

**SECOND ANNUAL FOREIGN
DIRECT INVESTMENT
INTERNATIONAL MOOT
COMPETITION 2009**

TEAM FITZMAURICE

**INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT
DISPUTES**

ICSID CASE NO. ARB/X/X

BETWEEN:

MEDBERG CO.

THE GOVERNMENT OF THE

REPUBLIC OF BERGONIA

CLAIMANT/INVESTOR

RESPONDENT/STATE

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF FACTS

A. THE INVESTMENT

1. On 5 February 2004, MEDBERG CO. (MEDBERG) applied for a patent in relation to an invention to treat obesity. On 15 March 2005, Patent No. AZ2005 was granted. MEDBERG concluded a licence agreement with BioLife Co., a Bergonian company, to utilise these products and treatment. After BioLife breached the terms of the licence agreement, which prohibited any exportation of these products, MEDBERG terminated the licence agreement. On 1 November 2007, the Bergonian IP Office issued a compulsory licence for Patent No. AZ2005 which was invoked by six Bergonian entities.

B. THE CLAIMANT

2. MEDBERG was established in Bergonia on 30 January 2004. MEDBERG's total capital (100%) is owned by MedX Holdings Ltd. MedScience Co. and Dr. Frankensid, who invented the technology covered by Patent No. AZ2005, each own 50% of MedX Holdings Ltd.

C. THE RESPONDENT

3. THE GOVERNMENT OF THE REPUBLIC OF BERGONIA (BERGONIA) issued the compulsory licence through the Bergonian Intellectual Property Office (Bergonian IP Office). BERGONIA also has a quasi-judicial body, the Patent Review Board, to deal with intellectual property cases. This Board consists of Bergonian judges who are paid by the Bergonian IP Office.

D. GOVERNMENTAL ACTION

4. A large part of the population of Bergonia suffers from obesity. The Bergonian Health Ministry has funded several information campaigns on nutrition and exercise. Nevertheless, these actions did not resolve the problem. MEDBERG's Patent No. AZ2005 covers a breakthrough treatment that medical experts believe is useful in the treatment of

the problem. No other substitute drugs in Bergonia have been proven as effective as Patent No. AZ2005. However, on 31 March 2007, MEDBERG terminated the licence agreement with BioLife. Furthermore, after the termination, MEDBERG had no immediate plans to license its intellectual property to a third party in Bergonia. As a consequence the medical needs for the obesity treatment in Bergonia became more acute.

5. On 1 November 2007, the Bergonian IP Office issued a compulsory licence for Patent No. AZ2005 to facilitate the treatment of obesity in Bergonia. Following the issuance of the compulsory licence, MEDBERG appealed to the Patent Review Board in order to review the validity of the decision. The Board found that the issuance of the compulsory licence was in conformity with Bergonian law, which is compatible with the *TRIPS Agreement*. Furthermore, the proceedings before the Patent Review Board satisfied due process guarantees.
6. Six Bergonian companies invoked this compulsory licence to produce the products and to meet the medical needs. In fact, they paid royalties for the use of the licence to the Bergonian IP Office. Although the Bergonian IP Office has offered these royalty payments to MEDBERG, MEDBERG refused to accept them.

PART ONE:

THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE IN VIEW OF MEDBERG'S NATIONALITY

7. Article 41(1) **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (*ICSID Convention*) states that, “The Tribunal shall be the judge of its own competence.”¹ Article 41 *ICSID Convention* encapsulates the general principle that the Arbitral Tribunal has the authority to rule on its own competence. The power of an arbitral tribunal to rule on its own competence is an accepted principle of international adjudication² and is a common feature in instruments governing international judicial procedure.³
8. In particular, Article 41(2) *ICSID Convention* obliges the Tribunal to consider objections raised by a party that:

“that dispute is not within the jurisdiction of the Centre [International Centre for Settlement of Investment Disputes], or for other reasons is not within the competence of the Tribunal.”

The *ICSID Convention* distinguishes between the ‘jurisdiction’ of the Centre and the ‘competence’ of the Arbitral Tribunal.⁴ In the context of Article 41(2) *ICSID Convention*,

¹ Article 41(1) *ICSID Convention*; Schreuer (2001), 523.

² *Topco v Libya*, Para. 404.

³ See, for example, Article 36(6) *Statute of the International Court of Justice*, Article 21 *UNCITRAL Arbitration Rules* (1976), Article 16 *UNCITRAL Model Law on International Commercial Arbitration* (1985) and Article 6(2) *International Chamber of Commerce Rules of Arbitration* (1998).

⁴ Schreuer (2001), 538.

the word ‘jurisdiction’ is a reference to the requirements, set out in Article 25 *ICSID Convention*, which must be satisfied to activate the power of the Arbitral Tribunal to be “the judge of its own competence.” The term ‘competence’ refers to the narrower issues confronting a specific tribunal, such as its proper composition or *lis pendens*.⁵

9. In practice, the distinction under Article 41(2) *ICSID Convention* between the ‘jurisdiction’ of the Centre and the ‘competence’ of the Arbitral Tribunal is of little consequence. This is because ICSID tribunals must be satisfied that both the ‘competence’ and ‘jurisdiction’ requirements are fulfilled in establishing their power to hear the dispute. Indeed, Article 41(2) *ICSID Convention* speaks of an objection by a party that the dispute is not within the Centre’s jurisdiction *or for other reasons* not within the Arbitral Tribunal’s competence. Additionally, Article 41(2) **Rules of Procedure for Arbitration Proceedings** (*ICSID Arbitration Rules*) states that:

“The Tribunal may ... consider ... whether the dispute ... before it is within the jurisdiction of the Centre and within its own competence.”

Thus, when Article 41(1) *ICSID Convention* states that, “The tribunal shall be the judge of its own competence”, it is clear that the Tribunal must also judge whether the Centre has jurisdiction in the case before it.

10. In the present matter, the question before the Arbitral Tribunal is whether it has jurisdiction under Article 25(1) *ICSID Convention*, which specifically states that:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

Paragraph 14 of the Minutes of the First Session of the Arbitral Tribunal reports MEDBERG’s argument that this Tribunal has jurisdiction to hear this dispute because MEDBERG meets the nationality requirement under Article 25 *ICSID Convention*. In contrast, BERGONIA contends that this Arbitral Tribunal’s jurisdiction is precluded under

⁵ Delaume, 577; Dimsey, 87.

Article 25 *ICSID Convention* because: (A) this dispute is *not* between a Contracting State and a national of another Contracting State under Article 25(1) *ICSID Convention*; and (B) BERGONIA is not obliged to treat MEDBERG as a national of another Contracting State under Article 25(2)(b) *ICSID Convention*.

A. THIS DISPUTE IS NOT BETWEEN A CONTRACTING STATE AND A NATIONAL OF ANOTHER CONTRACTING STATE UNDER ARTICLE 25(1) *ICSID CONVENTION*

11. Article 25(1) *ICSID Convention* states that:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State.”

12. The fundamental purpose of the *ICSID Convention*, as expressed in the Convention’s title, is to provide for dispute settlement between States and foreign investors.⁶ A draft proposal to grant access to a Contracting State’s own nationals to ICSID was specifically rejected because it was inconsistent with the *ICSID Convention*’s purpose.⁷ It was envisaged that disputes between a State and its own nationals would be settled in the State’s domestic courts.

13. In the present matter, BERGONIA concedes that it is a Contracting State to the *ICSID Convention*.⁸ However, BERGONIA contends that this Tribunal does not have jurisdiction to hear this dispute because MEDBERG is not a national of *another* Contracting State. According to Article 25(2)(b) *ICSID Convention*, a “National of another Contracting State” includes:

“any juridical person which had the nationality of a Contracting State other

⁶ Schreuer (2001), 159.

⁷ Delaume (1983), 793-4; Delaume (1984), 62; *ICSID History II-2*, 837, 871; Schreuer (2001), 279.

⁸ Uncontested Facts, Para. 3.

- than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration.”
14. ICSID tribunals have uniformly adopted the test of ‘incorporation’ or ‘seat’ rather than ‘control’ when determining the nationality of a juridical person.⁹ In *Amco v Indonesia*, the tribunal applied both the test of place of incorporation and that of seat,¹⁰ while the tribunal in *Tokios Tokelés v Ukraine* followed the “predominant approach in international law”¹¹ when it found that a company’s corporate nationality is attributed to the State where the corporation has been incorporated.¹²
15. Consistent with this jurisprudence, Delaume points out that, for the purposes of the *ICSID Convention*, the nationality of a corporation is determined on the basis of seat or place of incorporation.¹³ In this context, Schreuer argues that the second clause of Article 25(2)(b) *ICSID Convention*, which provides that a juridical person may be treated as a national of another Contracting State because of ‘foreign control’, implies that the test for nationality under the first arm is *not* based on control. Therefore, BERGONIA contends that the Tribunal must determine MEDBERG’s nationality in accordance with the laws of the place of incorporation or the location of the company’s head office. MEDBERG was incorporated in Bergonia.¹⁴ Hence, MEDBERG is a national of Bergonia, the State party to this dispute, and as such is not a national of *another* Contracting State within the meaning of Article 25(1) *ICSID Convention*.

⁹ Schreuer (2001), 279.

¹⁰ *Amco v Indonesia*, Para. 14(iii).

¹¹ *Barcelona Traction*, Para. 70; Oppenheim, 859-860.

¹² *Tokios Tokelés v Ukraine*, Para. 70.

¹³ Delaume (1983), 793-794; Delaume (1984), 62.

¹⁴ Uncontested Facts, Para. 1.

B. BERGONIA IS NOT OBLIGED TO TREAT MEDBERG AS A NATIONAL OF ANOTHER CONTRACTING STATE UNDER ARTICLE 25(2)(B) ICSID CONVENTION

16. Article 25(2)(b) *ICSID Convention* states that “National of another Contracting State” means:

“any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

17. There is no agreement under the *Conveniencia Treaty* to treat MEDBERG as a national of another Contracting State because of foreign control. However, Article 3(1) *Conveniencia Treaty* states:

“Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of ... investors of any third State.”

Article 3(1) *Conveniencia Treaty* is a Most Favoured Nation (MFN) clause which enables investors to avail themselves of more favourable Treaty provisions contained in a Bilateral Investment Treaty between *Conveniencia* and a third State.

18. BERGONIA contends that MEDBERG cannot rely on this MFN clause under Article 3(1) *Conveniencia Treaty* to invoke any provision under the *Tertia Treaty* to establish jurisdiction for the purposes of Article 25(2)(b) *ICSID Convention* because: (a) MEDBERG is neither owned nor controlled by investors of the other Contracting State to the *Conveniencia Treaty*; in the alternative (b) Article 3(1) *Conveniencia Treaty* does not apply to dispute resolution provisions; and in the further alternative, (c) BERGONIA can refuse to treat MEDBERG as a national of another Contracting State under Article I.2 *Tertia Treaty*.

a. MEDBERG is neither owned nor controlled by investors of the other Contracting State to the *Conveniencia Treaty*

19. MEDBERG is neither owned nor controlled by *Conveniencian* investors. Rather, BERGONIA argues that MEDBERG is owned and controlled by Dr Frankensid and

MedScience Co, respectively nationals of Laputa and Amnesia.

20. The tribunal in *AdT v Bolivia* considered the phrase ‘controlled’ to determine the scope of a MFN clause. On the issue of the term ‘controlled’, the Dissenting Declaration found, as a matter of grammar, that for jurisdiction to exist, the claimant has to prove that it received the effect of the controlling actions by the controlling company.¹⁵
21. The reasoning in *AdT v Bolivia* is supported by the award of the tribunal in *Banro American Resources v Congo*. The tribunal cast doubt on the proposition that majority share ownership was sufficient to establish control when it held that an investor with a minority share ownership was found to control a company.¹⁶ Likewise, in *Amco v Indonesia*, the tribunal had to determine the controlling national of a company incorporated in the host state. The tribunal admitted that one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, or fourth degree.¹⁷
22. Further, Schreuer argues that for the purposes of control, it is not necessary for one party to have exclusive control over the company in question.¹⁸ As such the combined influence of shareholders of a company can be described as controlling.¹⁹
23. BERGONIA contends that the test for control is one that examines the actions of the investors and their ability to influence the subsidiary rather than a situation where

¹⁵ *AdT v Bolivia*, Para. 26.

¹⁶ *Banro American Resources v Congo*, Paras. 562-563.

¹⁷ Bishop, Crawford & Reisman, 354.

¹⁸ Schreuer (2001), 314.

¹⁹ Schreuer (2001), 314.

ownership equals control. Applying the principle in *Amco v Indonesia*, it is clear that MedScience Co., a company incorporated in Laputa, and Dr Frankensid, an individual who holds dual nationality of Amnesia and Bergonia, are the ultimate controllers of MEDBERG.²⁰ As stated by Schreuer, combined control of those two companies, although none is exercising exclusive control, can still be described as controlling. In the present matter, neither Laputa nor Amnesia are Contracting States to the *Conveniencia Treaty*. As MEDBERG is not owned or controlled by investors of Conveniencian nationality, MEDBERG is not entitled to the MFN treatment under Article 3(1) *Conveniencia Treaty*.

b. Article 3(1) *Conveniencia Treaty* does not apply to dispute resolution provisions

24. Without prejudice to the above arguments, BERGONIA argues that even if MEDBERG is controlled by a Conveniencian national, the MFN clause does not apply to dispute resolution provisions. As provisions in a treaty, Article 3 *Conveniencia Treaty* must be interpreted to give effect to the intention of the Contracting Parties.²¹ Article 31 *Vienna Convention on the Law of Treaties* states that a treaty must be interpreted:

“in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²²

25. In *Telenor v Hungary*, the tribunal refused to apply a MFN clause to a dispute resolution provision, stating that this would be contrary to the Contracting State’s intention to allow an investor to subvert conditions of dispute resolution in a Bilateral Investment Treaty by invoking a MFN clause.²³ It would be inconsistent with the purposes of a Bilateral Investment Treaty to allow the investor to use the MFN clause to “treaty shop” in order to obtain its most favourable dispute resolution mechanism, while ignoring the actual terms of

²⁰ Uncontested Facts, Para. 2.

²¹ McLachlan, 25.

²² Article 31 *Vienna Convention on the Law of Treaties*.

²³ *Telenor v Hungary*, Para. 100.

what was agreed between the two Contracting States.²⁴

26. Further, the tribunal in *Berschader v Russia* stated:

“There is a fundamental difference as to how an MFN clause is generally understood to operate in relation to the material benefits afforded by a BIT, on the one hand, and in relation to dispute resolution clauses, on the other hand the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.”²⁵

27. The principle that a MFN clause can only attract matters belonging to the same category of subject as that to which the clause itself relates²⁶ must be kept in mind when determining the scope of protection afforded under the clause. In this context, Article 9.1 *International Law Commission’s 1978 Draft Articles on Most Favoured Nation Clauses* states that a MFN confers “only those rights which fall within the limits of the subject matter of the clause.”²⁷ The modern approach adopted by ICSID tribunals in determining whether or not a MFN clause can be used to establish jurisdiction has been to limit the expansion of the clause to a “legitimate extension of rights and benefits”.²⁸ Therefore, MFN clauses can only be read broadly when the text of the clause shows that such a reading was *the clear and unambiguous* intention of the Contracting Parties.

28. The tribunal in *Maffezini v Spain* considered the issue of extending a MFN to a dispute resolution provision. In that case the tribunal adopted an expansive interpretation of the

²⁴ *Telenor v Hungary*, Para. 93.

²⁵ *Berschader v Russia*, Paras. 179, 181.

²⁶ *Ambatielos*, Para. 106; Newcombe & Paradell, 204.

²⁷ Article 9.1, *International Law Commission Draft Article on Most Favoured Nation Clauses*.

²⁸ *Salini v Jordan*, Para. 114; *Plama v Bulgaria*, Para. 220; *Wintershall v Argentina*, Para 172.

clause but such interpretation was tempered by important exceptions, namely, limitations arising from public policy considerations.²⁹ Most relevantly, the tribunal noted that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the MFN clause, on the one hand, and the disruptive treaty shopping that would distort the policy objectives of the underlying treaty provision, on the other.³⁰ This concept of legitimate extension was also dealt with by the tribunal in *Plama v Bulgaria*. The tribunal stated:

“an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”³¹

29. The tribunal in *Plama v Bulgaria* found that the MFN clause cannot be used to imply a parties’ consent to ICSID³² and noted that a wide interpretation of a MFN would amount to treaty shopping by the investor. It is a principle of general international law that international courts and arbitral tribunals can only exercise jurisdiction over a State with consent of that State.³³ The current trend of ICSID decisions do not regard the operation of a MFN clause, without reference to dispute resolution, as sufficient consent to bind a host State to international arbitration.³⁴

²⁹ *Maffezini v Spain* (Jurisdiction), Paras. 56, 62-63; *Wintershall v Argentina*, Para. 181.

³⁰ *Maffezini v Spain* (Jurisdiction), Para. 63.

³¹ *Plama v Bulgaria*, Para. 223.

³² *Plama v Bulgaria*, Para. 184.

³³ *Wintershall v Argentina*, Para. 179.

³⁴ *Salini v Jordan*, Para. 117; *Plama v Bulgaria*, Paras. 183-184, 189; *Wintershall v Argentina*, Para. 172.

30. The tribunal in *Telenor v Hungary* stated that it:

“wholeheartedly endorses the analysis and statement of principle furnished by the Plama tribunal.”³⁵

The tribunal further noted that the decision in *Maffezini v Spain* had been the subject of “vigorous criticism”.³⁶ Similarly, in *Salini v Jordan*, the tribunal concluded that a MFN clause did not include any provision extending its scope of application to dispute settlement as it did not envisage “all rights” or “all matters” covered by the treaty.³⁷ Using a MFN clause in such a way would mean that any dispute resolution mechanisms agreed on in a bilateral investment treaty would be open to future replacement by other agreements, and would therefore lead to uncertainty and instability.³⁸

31. In the present matter, Article 3(2) *Conveniencia Treaty* extends to “management, maintenance, operation, enjoyment or disposal” of investments.³⁹ The clause describes *substantive* rights, making *no* mention of *procedural* rights. Relevantly, in *Telenor v Hungary* the tribunal stated:

“In the absence of language or context to suggest contrary, the ordinary meaning of “investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State” is that the investor’s *substantive* right in respect of the investments are to be treated no less favourably than under a BIT ... there is no warrant for construing the above phrase as importing *procedural* rights as well.”⁴⁰

³⁵ *Telenor v Hungary*, Para. 90.

³⁶ *Telenor v Hungary*, Para. 89.

³⁷ *Plama v Bulgaria*, Paras. 118-119.

³⁸ *Telenor v Hungary*, Para. 94.

³⁹ Article 3(2) *Conveniencia Treaty*.

⁴⁰ *Telenor v Hungary*, Para. 92.

The tribunal stated that in interpreting such a clause:

“what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties.”⁴¹

32. BERGONIA argues that in the present matter, Article 3 *Conveniencia Treaty* does not evidence any intention on behalf of BERGONIA to consent to extend the operation of the MFN clause to dispute resolution provisions in third party treaties. Therefore, MEDBERG cannot rely on the operation of Article 3 *Conveniencia Treaty* to circumvent the requirements of Article 25 *ICSID Convention* and bind BERGONIA to an ICSID arbitration to which it has not consented.

c. BERGONIA can refuse to treat MEDBERG as a national of another Contracting State under Article I.2 *Tertia Treaty*

33. Article I.2 *Tertia Treaty* states:

“Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations”.⁴²

34. Article I.2 *Tertia Treaty* gives BERGONIA the right to deny the advantages of the *Tertia Treaty* to: a company which is controlled by nationals of any third country, not a party to the *Tertia Treaty*; and a company that has no substantial business activities in the territory of the other Party; or a company of the other party that is controlled by nationals of a third country with which BERGONIA does not maintain normal economic relations.

35. BERGONIA contends that even if MEDBERG can invoke the *Tertia Treaty* provisions by

⁴¹ *Telenor v Hungary*, Para. 95.

⁴² Article I.2 *Tertia Treaty*.

virtue of the MFN clause to establish this Tribunal's jurisdiction, BERGONIA can deny MEDBERG's Conveniencian nationality which is granted by Article VI.8 *Tertia Treaty* because MEDBERG has no substantial business activities in Conveniencia.

36. MEDBERG is incorporated in Bergonia.⁴³ MEDBERG has only one asset which is Bergonian Patent No. AZ2005.⁴⁴ MEDBERG's commercial activities were limited to licensing Bergonian Patent No. AZ2005 to Biolife, a Bergonian company,⁴⁵ and selling directly very limited quantities of its obesity treatment and products in Bergonia.⁴⁶ There is no evidence which suggests that MEDBERG has engaged in any business activity within the territory of Conveniencia. Therefore, BERGONIA can deny MEDBERG the benefits of the *Tertia Treaty*, including the consent to treat it as a national of Conveniencia.

⁴³ Uncontested Fact, Para. 1.

⁴⁴ Uncontested Facts, Para. 5.

⁴⁵ Uncontested Facts, Para. 6.

⁴⁶ Response to Request, No. 19.

PART TWO:

**MEDBERG’S EXPLOITATION OF ITS INTELLECTUAL PROPERTY
IN BERGONIA DOES NOT CONSTITUTE AN INVESTMENT FOR
THE PURPOSE OF JURISDICTION UNDER ARTICLE 25(1) *ICSID*
*CONVENTION***

37. In addition to dealing with issues of investor nationality, Article 25(1) *ICSID Convention* requires, when addressing ICSID jurisdiction *ratione materiae* that:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.”

38. Although the definition of ‘investment’ is central to the question of a tribunal’s jurisdiction, the *ICSID Convention* does not define this key term.⁴⁷ The absence of any clarification in the *ICSID Convention* means that, within a wide area of discretion, the parameters of what constitutes an investment are determined by the parties’ consent and ultimately by tribunals.⁴⁸ The understanding of Article 25 *ICSID Convention* has, in cases based on bilateral investment treaties, led to the practice of a dual examination of the notion of investment, sometimes called the ‘double keyhole approach’. The tribunal in *CSOB v Slovak Republic*⁴⁹ said in this respect:

“A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent

⁴⁷ Report of the Executive Directors on ICSID Convention, 28; Schreuer (2001), 121-134.

⁴⁸ Schreuer (2001), 121-125.

⁴⁹ *CSOB v Slovak Republic*, Para. 251.

definitions contained in Article 1 of the BIT.”⁵⁰

39. In the present matter, while intellectual property is considered an investment under Article 1 *Conveniencia Treaty*, BERGONIA contends that (A) the term ‘investment’ is not defined solely with reference to Article 1 *Conveniencia Treaty* and (B) the Tribunal does not have jurisdiction because Bergonian Patent No. AZ2005 is a not an ‘investment’ for the purposes of the *ICSID Convention*.

A. THE TERM ‘INVESTMENT’ IS NOT DEFINED SOLELY WITH REFERENCE TO ARTICLE 1 *CONVENIENCIA TREATY*

40. Although a bilateral investment treaty might include various matters to qualify as an ‘investment’ for the purpose of jurisdiction, the *ICSID Convention* establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated.⁵¹ It means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.⁵² In *Joy Mining v Egypt* the tribunal stated that:

“Parties to a dispute cannot by contract or treaty define as investment for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.”⁵³

41. The first award to consider the meaning of ‘investment’ within the context of Article 25(1) *ICSID Convention* was *Fedax v Venezuela*. The tribunal relied on Schreuer’s commentaries

⁵⁰ *CSOB v Slovak Republic*, Para. 68; *Salini v Morocco*, Paras. 44, 52.

⁵¹ *CSOB v Slovak Republic*, Para. 68; see also *Salini v Morocco*, Paras. 44, 52; *Joy Mining v Egypt*, Para. 40.

⁵² *Joy Mining v Egypt*, Para. 49.

⁵³ *Joy Mining v Egypt*, Para. 50.

of the *ICSID Convention* to determine the basic features of an investment within the scope of Article 25(1) *ICSID Convention*.⁵⁴ Schreuer points to five objective criteria, separate from the parties' consent to arbitrate, that can be used as a guide in establishing whether a particular dispute can be considered as an 'investment dispute'. The approach taken by the tribunal in *Fedax* has been consistently applied by ICSID tribunals.⁵⁵

42. Similarly, the tribunal in *Salini v Morocco* reiterated that the 'investment' requirement under the *ICSID Convention* is an objective condition that cannot be diluted by the consent of the parties. The tribunal held that:

“The doctrine generally [emphasis added] considers that investment infers: contributions, a certain duration ... and participation in the risks of the transaction ... In reading the Convention's Preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”⁵⁶

43. The language used in *L.E.S.I.-DIPENTA* supports a strict objective approach to the definition of 'investment'. The ICSID tribunal held that from a number of decisions [citing amongst others, *CSOB*, *SGS v Pakistan and SGS v The Philippines*] some objective criteria emerge, sufficient to guarantee a degree of certainty. Therefore, in order to be considered an 'investment' for the purpose of Article 25 it should fulfil the requirements set out in *Fedax v Venezuela*.
44. In the present matter, it is true that Article 1(1)(d) *Conveniencia Treaty* includes patents as an investment. However, applying the rationale in the decisions of various ICSID tribunals, MEDBERG's Patent No. AZ2005 must fulfil the requirements set out in *Fedax v Venezuela* to qualify as an investment for the purpose of jurisdiction.

⁵⁴ *Fedax v Venezuela*, Paras. 22-25; Schreuer (1996), 355-360.

⁵⁵ *CSOB v Slovak Republic*, Para. 68; *Salini v Morocco*, Paras. 44, 52; *Consortium v Morocco* (Jurisdiction), Para. 60.

⁵⁶ *Salini v Morocco*, Para. 52.

B. THE TRIBUNAL DOES NOT HAVE JURISDICTION BECAUSE BERGONIAN PATENT NO. AZ2005 IS A NOT AN ‘INVESTMENT’ FOR THE PURPOSES OF THE *ICSID CONVENTION*

45. ICSID tribunals consistently apply the objective formula adopted by *Fedax v Venezuela* to determine the meaning of ‘investment’ within the context of Article 25(1) *ICSID Convention*.⁵⁷ The tribunal points to five criteria that can be used as a guide in establishing whether a particular dispute is considered an ‘investment dispute’.⁵⁸ *Fedax v Venezuela* adopted the position that the basic features of an investment involve:

“a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment on behalf of the investor and the investment is of significance for the host states development.”

46. The dispute arising out of Bergonian Patent No. AZ2005 is not a dispute arising out of an ‘investment’ because (1) the investment is not for a significant duration; (2) the investment does not involve regularity of profit and return; (3) the investment does not involve an assumption of risk by MEDBERG; and (4) MEDBERG’s exploitation of its intellectual property rights does not significantly contribute to Bergonia’s development.

1. The investment is not for a significant duration

47. The element of duration is a paramount factor which distinguishes investments within the scope of the *ICSID Convention* and ordinary commercial transactions.⁵⁹ Investment projects tend to have an extended duration. Thus, one-off sales or purchase of goods or short-term commercial credits would not normally be investments.⁶⁰ This criterion refers to the purpose of the *ICSID Convention*, namely, to encourage commitment of foreign capital

⁵⁷ *CSOB v Slovak Republic*, Para. 68; *Salini v Morocco*, Paras. 44, 52.

⁵⁸ *Fedax v Venezuela*, Paras. 23-25.

⁵⁹ *Bayindir v Pakistan*, Para. 32.

⁶⁰ *Joy Mining v Egypt*, Para. 62.

to promote economic development. Thus, short-term operations will not be ‘investments’ for the purpose of the Convention because they are unpredictable, creating financial volatility, which is a detriment of economic development.

48. The duration aspect of the *Fedax* criteria was specifically considered by the tribunal in *Bayindir v Pakistan*, where the tribunal held that the duration requirement was satisfied by arrangements over an eight-year period.⁶¹ In *Malaysian Historical Salvors v Malaysia*, the requirement of duration was satisfied through a four-year arrangement.⁶²
49. In the instant matter, MEDBERG exploited Patent No. AZ2005 under a licensing agreement with BioLife for only 2 years, from 31 March 2005 to 31 March 2007.⁶³ Further, MEDBERG was unwilling to exploit its intellectual property rights further as it refused to renegotiate the terms of the licence agreement with BioLife.⁶⁴ On this basis, BERGONIA argues that the exploitation was for an insufficient duration.

2. The investment did not involve regularity of profit and return

50. Brownlie, in his opinion in *CME v Czech Republic* described an investment “as a form of expenditure or transfer of funds for the precise purpose of obtaining a return”. Therefore, Brownlie suggests that the criteria of a regularity of profit and return are an indispensable aspect of any true investment.⁶⁵
51. MEDBERG has not received a profit or return from its intellectual property since early

⁶¹ *Bayindir v Pakistan*, Para. 133.

⁶² *Malaysian Historical Salvors v Malaysia* (2007), Para. 9.

⁶³ Uncontested Facts, Para. 6.

⁶⁴ Uncontested Facts, Para. 6.

⁶⁵ *CME v Czech Republic* (Final Award), Separate Opinion of Ian Brownlie, Para. 34.

2007.⁶⁶ MEDBERG's use of Bergonian Patent No. AZ2005 cannot be described as an 'investment' because MEDBERG is not using it for the purpose of deriving income, but rather MEDBERG insist on using its intellectual property rights to stifle the development of healthcare in Bergonia.

3. The investment does not involve an assumption of risk by MEDBERG

52. This third criterion arises in part due to the extended duration of the project and the expectation of profit. ICSID tribunals require an assumption of risk on behalf of the investor for the transaction to fall within the realm of protected investments. The reason for this requirement can be seen in the purpose of the *ICSID Convention*. The risk of failure and loss associated with investment facilitated the need for international legal protection in order to entice investors to undertake investment transactions.
53. The tribunal in *Fedax v Venezuela* held that the credit risk associated with the purchase of bonds amounted to an assumption of risk.⁶⁷ Similarly, the tribunal in *Malaysian Historical Salvors v Malaysia* affirmed the decision in *Salini v Morocco* which found that the risks associated with the performance of a construction contract amounted to an assumption of risk.⁶⁸ The tribunal in coming to its determination cited a number of risks faced by the particular claimant. Notably, among others, these risks include: the contract prematurely ending, the modification of the contract for which the claimant would receive no additional compensation, the increasing cost of labour and any number of unforeseen incidents that would not give rise to a right of compensation.
54. In *Joy Mining v Egypt*, the tribunal examined the element of risk from the *Fedax* elements. The claim was brought in relation to performance guarantees under a contract. The underlying contract related to the supply of mining equipment. In adopting the *Fedax*

⁶⁶ Uncontested Facts, Para. 6.

⁶⁷ Bishop, Crawford & Reisman, 345.

⁶⁸ *Malaysian Historical Salvors v Malaysia* (2007), Para. 82.

criteria, the tribunal stated that it must look at the transaction in its broader context:

“a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole.”⁶⁹

The tribunal considered the contract as a whole and listed with some particularity the specific obligations the claimant had undertaken to perform. However, the tribunal concluded that the contract amounted to no more than a sales contract on “normal commercial terms”⁷⁰ and this had to be distinguished from investment activity. On the basis of this examination, the tribunal concluded that no investment had been made and thus denied jurisdiction.

55. In the present matter, MEDBERG’s exploitation of its intellectual property rights amounts to no more than a contract on normal commercial terms. Under the licence agreement with BioLife, MEDBERG agreed to allow the use of the technology covered under Patent No. AZ2005 for a fee. MEDBERG assumes no risk under the licence agreement as BioLife was solely responsible for the production and sale of the health related products.

4. MEDBERG’s exploitation of its intellectual property rights does not significantly contribute to BERGONIA’s development

56. The criterion of the role of the investment on the host state’s economy differs from the previous elements in its perspective. Duration, risk, expectation of profit and commitment of resources are addressed from the investor’s perspective. In assessing this criterion the tribunal must look to the host state’s motivation to accept and protect the transaction or operation. The importance of economic development was codified in the preamble of the *ICSID Convention*.

57. In *Bayindir v Pakistan*, the tribunal held that the requirement of ‘contribution’ was satisfied

⁶⁹ *Joy Mining v Egypt*, Para. 500.

⁷⁰ *Joy Mining v Egypt*, Para. 501.

by an undertaking to construct a major highway in Pakistan as the investor made a significant contribution to the host country “in terms of know-how, equipment and personnel, and in financial terms”⁷¹ Similarly, in *CSOB v Slovak Republic* the tribunal decided that CSOB’s loan facility made available to the economic development process was a significant contribution to the development of the host state to amount to an investment within the meaning of the *ICSID Convention*.⁷² The tribunal in *Malaysian Historical Salvors v Malaysia* held that the determining factor for the tribunal was that the investor had committed itself to making a contribution to the host state’s economic development.⁷³

58. In the instant matter, MEDBERG merely licensed Bergonian Patent No. AZ2005 to BioLife for 2 years. Once the licence with BioLife came to an end, MEDBERG refused to renegotiate the licence and therefore refused to contribute at all to the economic development of Bergonia. MEDBERG’s refusal to supply the Bergonian market or to allow another to satisfy the demand for this important product cannot be construed as contributing to the economic development of Bergonia. As of March 2007, no Bergonian citizens were receiving a benefit from the technology covered by Bergonian Patent No. AZ2005.

CONCLUSION ON JURISDICTION OF THE TRIBUNAL TO HEAR THE DISPUTE

59. This Tribunal has no jurisdiction to hear this dispute. The jurisdictional requirements under Article 25(1) *ICSID Convention* are not satisfied. The dispute is not between a Contracting State and a National of another Contracting State. Alternatively, BERGONIA is not obliged to treat MEDBERG as a National of another contracting State. MEDBERG’s exploitation of

⁷¹ *Malaysian Historical Salvors v Malaysia* (2007), Para. 4; *Bayindir v Pakistan*, Paras. 115-117.

⁷² *CSOB v Slovak Republic*, Paras. 356-357.

⁷³ *Malaysian Historical Salvors v Malaysia* (2007), Para. 131.

its intellectual property rights under Patent No. AZ2005 is not an investment for the purpose of jurisdiction under the *ICSID Convention*.

PART THREE:

BERGONIA DID NOT EXPROPRIATE MEDBERG'S INTELLECTUAL PROPERTY RIGHTS

60. BERGONIA contends that (A) the issuance of the compulsory licence does not amount to an expropriation. In the event MEDBERG invokes substantive protection under the *Tertia Treaty* (B) Article III.4 *Tertia Treaty* expressly excludes the issuance of a compulsory licence granted in relation to intellectual property rights from being treated as an expropriation; in the alternative, (C) BERGONIA's issuance of the compulsory licence is legally justified under Article 4(2) *Conveniencia Treaty*.

A. THE ISSUANCE OF THE COMPULSORY LICENCE DOES NOT AMOUNT TO AN EXPROPRIATION

61. MEDBERG argues that the issuance of the compulsory licence of Patent No. AZ2005 violates Article 4(2) *Conveniencia Treaty*,⁷⁴ which states that:

“Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization.”

62. Expropriation may either be direct or indirect. Direct expropriation occurs when a state takes concrete action, resulting in an investor's loss of control of its property,⁷⁵ and transfer of its property's legal title to the government or a third party.⁷⁶ In the present case,

⁷⁴ Minutes of the First Session of the Arbitral Tribunal, (ICSID Case No. ARB/X/X), 16 February 2009, Para. 14.

⁷⁵ *Santa Elena v Costa Rica*, Para. 76.

⁷⁶ *Starett v Iran*, 154; Christie, Para. 309 ; Newcombe (2005), 8.

MEDBERG has not lost its title over Bergonian Patent No. AZ2005. As the property's legal title has not been transferred to the government or a third party, MEDBERG cannot claim that the compulsory licence constitutes direct expropriation.

63. An indirect expropriation occurs when a government takes measures tantamount to an expropriation with respect to tangible or intangible property without affecting the investor's legal title to the property.⁷⁷ In the present case, BERGONIA contends that the issuance of the compulsory licence does not amount to an indirect expropriation. In order to substantiate a claim that an indirect expropriation has occurred, MEDBERG must establish that the alleged interference was so restrictive that the property was 'taken',⁷⁸ thereby resulting in an expropriation. An indirect expropriation has taken place when the governmental measure constitutes a substantial interference with the investor's property rights;⁷⁹ the investor's legitimate expectations;⁸⁰ and the measure is of a permanent character.⁸¹
64. BERGONIA contends that there can be no finding of expropriation because: 1) the alleged measure does not amount to a substantial interference; 2) the alleged measure does not interfere with MEDBERG's legitimate expectations; and 3) the compulsory licence is not a measure of a permanent character.

1. The alleged measure does not amount to substantial interference

65. Governmental interference amounts to expropriation when the alleged measure has

⁷⁷ *TECMED v Mexico*, Para. 96.

⁷⁸ *Gami v Mexico*, Para. 125; *Pope & Talbot v Canada*, Para. 102.

⁷⁹ *Metalclad v Mexico*, Para. 103.

⁸⁰ *Metalclad v Mexico*, Para. 103.

⁸¹ *LG&E v Argentine Republic*, Para. 35; *Metalclad v Mexico*, Para. 103; Dolzer, 65-93.

substantially interfered with the investor's control, use and benefits⁸² of its investment rendering the investment totally useless.⁸³ BERGONIA argues that the alleged measure does not constitute substantial interference as MEDBERG still has the (a) use and benefit and (b) control of its investment.

a. MEDBERG has the use and benefit of its investment

66. Not all deprivations of property are expropriatory.⁸⁴ Economic considerations are relevant in determining whether there has been indirect expropriation.⁸⁵ The tribunal in *TECMED v Mexico* explicitly drew on the concept of proportionality developed by the *European Court of Human Rights*⁸⁶ which decided that a deprivation of the use and benefit of an investment constitutes expropriation when the income or benefits completely cease to exist.⁸⁷ This view was affirmed in *Consortium v Morocco* where the tribunal stated that an indirect expropriation exists if the measures:

“have the substantial effects of a certain intensity that reduce and/or eliminate the benefits legitimately expected from the exploitation of rights subject to the said measure to such an extent that they render the holding of these rights useless.”⁸⁸

Therefore, expropriation will not occur if the investor retains its rights and the situation is

⁸² *Santa Elena v Costa Rica*, Para. 77.

⁸³ *Starrett v Iran*, 115.

⁸⁴ Newcombe (2005), 2.

⁸⁵ Dolzer & Schreuer, 101.

⁸⁶ *Matos v Portugal*, 19; Crawford & Lee, 177; Newcombe (2005), 14.

⁸⁷ *Sempra v Argentine Republic*, Paras. 283-285; *Starrett v Iran*, 154; *TECMED v Mexico*, Para. 115.

⁸⁸ *Consortium v Morocco*, Para. 69; Dolzer & Schreuer, 102.

reversible.⁸⁹

67. In *Waste Management v Mexico* and in *Pope & Talbot*, the tribunals found that a mere loss of benefits or expectations does not constitute an expropriation when an investment continues to operate.⁹⁰ Therefore, unless the measure has destroyed or neutralised the investment or its “reasonably-to-be-expected economic benefit”, there can be no finding of indirect expropriation.⁹¹ Simply, not all government actions that make certain activities of investors less profitable will necessarily amount to an expropriation.⁹²
68. In the present case, the fact that BERGONIA’s issuance of the compulsory licence *might* have affected MEDBERG’s use and benefit of its intellectual property, the measure is not sufficient to establish that an expropriation has occurred. Indeed, there has been no deprivation of use and benefit which cause the termination of MEDBERG’s income. In fact, after the issuance of the compulsory licence, MEDBERG continues to sell directly its obesity treatment and products in BERGONIA,⁹³ in addition to being offered royalty payments from the six firms which are using the patent under the compulsory licence.⁹⁴ Therefore, in the absence of a complete deprivation of benefits, the issuance of the compulsory licence does not constitute a substantial interference with MEDBERG’s use and benefit of its intellectual property to amount to an expropriation.

⁸⁹ *Handyside v United Kingdom*, Para. 29; *Poiss v Austria*, Paras. 62,64.

⁹⁰ *Biloune v Ghana*, 4; *LG&E v Argentine Republic*, Para. 35; *Pope & Talbot v Canada*, Paras. 99-101; *TECMED v Mexico*, Para. 117; *Waste Management v Mexico*, Para. 159.

⁹¹ *Metalclad v Mexico*, Para. 103; Fietta, 383.

⁹² *TECMED v Mexico*, Para. 115; Lin, 157; Newcombe (2005), 2.

⁹³ Response to Request, No. 19.

⁹⁴ Uncontested facts, Para. 8.

b. MEDBERG has control of its investment

69. In *PSEG Global v Turkey*, the tribunal found that extreme forms of interference with an investor's control would constitute an expropriation.⁹⁵ The tribunal in *Sempra v Argentine Republic* affirmed that, in order for a claim of indirect expropriation to be successful, it would be required that the investor is no longer in control of its business operation.⁹⁶ The tribunal further stipulated that an investor must be deprived of control or management of day-to-day operations of the company.⁹⁷
70. In establishing whether the issuance of the compulsory licence amounts to an indirect expropriation, the Arbitral Tribunal must assess whether MEDBERG's control over Bergonian Patent No. AZ2005 has been extremely diminished. A patent itself entitles the patent holder with the rights of control to produce, use or offer for sale its patented invention.⁹⁸ However, the legal power under a patent right is not absolute. There are certain exceptions where third parties are allowed to undertake acts without the authorisation of the patent holder.⁹⁹ MEDBERG has not lost the rights it possessed before the compulsory licence. MEDBERG retains control of the management of the day-to-day operations of the investment; it is able to sell its obesity products¹⁰⁰ and, it continues to possess the right to conclude any further licence agreements with third parties.¹⁰¹

⁹⁵ *PSEG Global v Turkey*, Paras. 278-279; *Sempra v Argentine Republic*, Para. 274.

⁹⁶ *Sempra v Argentine Republic*, Paras. 283-285.

⁹⁷ *Sempra v Argentine Republic*, Para. 274.

⁹⁸ Di Massa & Hoffman, 54.

⁹⁹ Correa (2004), 346.

¹⁰⁰ Response to Request, No. 19.

¹⁰¹ Response to Request, No. 31.

Therefore, the requirement of extreme deprivation of control to substantiate interference constituting an indirect expropriation has not been fulfilled.

2. The issuance of the compulsory licence does not interfere with MEDBERG's legitimate expectations

71. The legitimate expectation of an investor is a core factor in the assessment of whether the host state has expropriated the investment.¹⁰² The scope of a Bilateral Investment Treaty's protection of a foreign investor's legitimate expectation cannot exclusively be determined by the investor's subjective motivations and considerations. Their expectations must be legitimate and reasonable in the circumstances.¹⁰³ To that end, an investor's legitimate expectation can only be assessed by taking into consideration the host state's legitimate right to regulate domestic matters within its own borders¹⁰⁴ and the public interest of that state.¹⁰⁵
72. Patent rights are not absolute and therefore a patent holder cannot have a legitimate expectation that its rights will *never* be expropriated. The government of the territory issuing the patent has the right to restrict the patent holder's control over its rights,¹⁰⁶ and this includes the right to issue compulsory licences in order to protect public health.¹⁰⁷ This indicates that from its initial registration, MEDBERG never had an absolute control over its

¹⁰² Fietta, 375; Schill, 2,11.

¹⁰³ *Saluka v Czech Republic*, Para. 304.

¹⁰⁴ *Gami v Mexico*, Para. 93; *International Thunderbird Gaming v Mexico*, Para. 194; *S D Myers v Canada*, Paras. 261, 263; *Waste Management v Mexico*, Para. 94.

¹⁰⁵ *Saluka v Czech Republic*, Para. 305.

¹⁰⁶ Article 31 *TRIPS Agreement*; Gibson, 8.

¹⁰⁷ Newcombe (1999), 74.

patent. Further, in the present case, obesity is a serious medical problem in Bergonia, caused by the nation's genetic make-up.¹⁰⁸ In light of these circumstances, BERGONIA contends that MEDBERG could not have had a legitimate expectation that BERGONIA would not issue a compulsory licence for the unique obesity treatment covered by Patent No. AZ2005. Accordingly, the issuance of the compulsory licence is not a violation of MEDBERG's legitimate expectation.

73. Further, both an investor and the host state possess certain obligations. The host state has to maintain a stable legal and business environment which is an essential element of fair and equitable treatment¹⁰⁹ that does not affect the basic expectations that were taken into account by the foreign investor when making the investment.¹¹⁰ The tribunal in *Tecmed v Mexico* requires:

“the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”¹¹¹

The obligation to act consistently means that the state should not arbitrarily revoke any pre-existing decisions or permits which were relied upon by an investor to assume its

¹⁰⁸ Response to Request, No. 40.

¹⁰⁹ *CME v Czech Republic* (Partial Award), Para. 611; *CMS v Argentine Republic*, Para. 274; *Enron v Argentine Republic*, Para. 183; *LG&E v Argentine Republic*, Para. 124; *PSEG Global v Turkey*, Para. 253; *Saluka v Czech Republic*, Para. 303; Tackaberry & Marriott, 722.

¹¹⁰ *TECMED v Mexico*, Paras. 105-106.

¹¹¹ *PSEG Global v Turkey*, Para. 223; *TECMED v Mexico*, Para.154.

commitments as well as to plan its commercial and business activities.¹¹² On the other hand, an investor is responsible for meeting the requirements of the host State's law.¹¹³ Indeed, investors cannot reasonably expect that the circumstances prevalent at the time of making the investment will remain unchanged.¹¹⁴ Investors also cannot make a subsequent complaint if the investment fails merely because of laws or practices that were in place at the time of the investment, and which were, or ought to have been, known to it before making the investment.¹¹⁵

74. A distinction can be drawn from the case of *Metalclad v Mexico*, where the investor was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill.¹¹⁶ In this present case, BERGONIA did not mislead MEDBERG into believing that the compulsory licence would never be granted.
75. To the contrary, BERGONIA argues that MEDBERG ought to have known that BERGONIA is a member of the World Trade Organization (WTO) and bound by the provisions under the **Agreement on Trade-Related Aspects of Intellectual Property Rights** (*TRIPS Agreement*).¹¹⁷ Under Article 31 *TRIPS Agreement* BERGONIA is able to issue compulsory licences in order to “meet important domestic medical needs”. MEDBERG, as an international business, ought to have been aware of the operation of Article 31 *TRIPS Agreement*. Therefore, MEDBERG's legitimate expectation of economic benefit would have been informed by the fact that its benefits could be limited in order to

¹¹² *TECMED v Mexico*, Para. 154.

¹¹³ *Maffezini v Spain* (Award), Para. 70.

¹¹⁴ *PSEG Global v Turkey*, Para. 255; *Saluka v Czech Republic*, Para. 305.

¹¹⁵ *Gami v Mexico*, Para. 91; *MTD v Chile*, Para. 205.

¹¹⁶ *Metalclad v Mexico*, Para. 85.

¹¹⁷ Uncontested Facts, Para. 3.

meet the important medical needs of BERGONIA. Thus, MEDBERG's complaint of interference with its legitimate expectations is unfounded.

3. The compulsory licence is not of a permanent character

76. In assessing the existence of substantial interference towards an investor's use and benefit of its investment, duration of a governmental measure also plays a significant role.¹¹⁸ The *Iran-United States Claims Tribunal* stated that to constitute an expropriation, the duration must not be "merely ephemeral".¹¹⁹ The notion of 'ephemeral' is clarified by the *European Court of Justice* decision that a regulation, affecting an investor's property, which lasted for three years, does not constitute an expropriation.¹²⁰ This was affirmed in *CMS v Argentine Republic* where the tribunal stressed that delays after more than five years might become permanent.¹²¹
77. In the present case, BERGONIA's issuance of the compulsory license is for a temporary period of 48 months.¹²² Therefore, this measure is 'ephemeral' and, at law, an ephemeral dispossession of a foreign investment cannot be characterised as an indirect expropriation.

B. ARTICLE III.4 *TERTIA TREATY* EXPRESSLY EXCLUDES THE ISSUANCE OF A COMPULSORY LICENCE GRANTED IN RELATION TO INTELLECTUAL PROPERTY RIGHTS FROM BEING TREATED AS AN EXPROPRIATION

78. In the event MEDBERG invokes the substantive protection under the *Tertia Treaty*, BERGONIA contends that (1) Article III.4 *Tertia Treaty* excludes the TRIPS-compliant

¹¹⁸ Wagner, 465-538.

¹¹⁹ Weiner, 161.

¹²⁰ OECD Expropriation, 14.

¹²¹ *CMS v Argentine Republic*, Para. 107.

¹²² Response to Request, No. 24.

compulsory licence from being treated as an expropriation, and (2) BERGONIA's issuance of the compulsory licence is in accordance with the *TRIPS Agreement*.

1. Article III.4 *Tertia Treaty* excludes the *TRIPS*-compliant compulsory licence from being treated as an expropriation

79. Article III.4 *Tertia Treaty* states that:

“This Article [protection from expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement ... to the extent that such issuance ... is consistent with the TRIPS Agreement.”

The possibility of challenging compulsory licences has been anticipated by some agreements, namely the Comprehensive Economic Cooperation Agreement between The Republic Of India And The Republic Of Singapore,¹²³ United States-Singapore Free Trade Agreement,¹²⁴ and the Comprehensive Economic Cooperation Agreement Between The Republic Of India And The Republic Of Singapore.¹²⁵ These agreements exclude the issuance of TRIPS-compatible compulsory licence from protection against expropriation to avoid any challenge to the issuance of a compulsory licence.

80. Similarly, if MEDBERG were to invoke substantive protection under the *Tertia Treaty* through the MFN Clause, Article III.4 *Tertia Treaty* excludes MEDBERG's right to dispute the issuance of a compulsory licence as it is in compatible with the *TRIPS Agreement*.

¹²³ Article 6.5, *Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore*.

¹²⁴ Article 15.6, *US-Singapore Free Trade Agreement*.

¹²⁵ Article 6.5, *Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore*.

2. BERGONIA's issuance of the compulsory licence is in accordance with the *TRIPS Agreement*

81. According to the Bergonian Justice Ministry, the compulsory licence was issued in accordance with Bergonia's international obligations.¹²⁶ Additionally, the issuance of the compulsory licence is also in compliance with Bergonian law which implements all relevant *TRIPS Agreement* obligations.¹²⁷
82. Under the *TRIPS Agreement*, a patent is subject to a number of exceptions, including the issuance of a compulsory licence, in which a government allows someone else to produce the patented product or process without the consent of the patent owner.¹²⁸ The *TRIPS Agreement* balances patent protection with access to pharmaceutical products in the context of WTO members facing public health emergencies. Other bases for issuing a compulsory licence include technology transfers and preventing restraints of trade by patent owners.¹²⁹
83. Article 31 *TRIPS Agreement* requires several prerequisites for the lawful issuance of a compulsory licence. At issue in this present case are five provisions under Article 31 *TRIPS Agreement* in which BERGONIA argues that: a) the compulsory licence was issued in the case of a national emergency; b) the compulsory licence was issued for a limited duration; c) the exports by the Bergonian companies are permissible under the *TRIPS Agreement*; d) MEDBERG has received adequate remuneration; e) the issuance of the compulsory licence is subject to judicial review.

¹²⁶ Response to Request, No. 111.

¹²⁷ Response to Request, No. 80.

¹²⁸ Article 31 *TRIPS Agreement*.

¹²⁹ Gathii, Para. 304.

a. The compulsory licence was issued in the case of a national emergency

84. Article 31(b) *TRIPS Agreement* stipulates that the requirement to initiate a negotiation may be waived in the case of national emergency or other circumstances of extreme urgency.¹³⁰ Neither the *TRIPS Agreement* nor the **Doha Declaration on the TRIPS Agreement and Public Health** (*Doha Declaration*) specifies what constitutes a ‘national emergency’ or other circumstance of extreme urgency. ‘Emergency’ itself could suggest the need for an accelerated response where there is no time for negotiations with the patent holder.¹³¹ Further, Article 5(c) *Doha Declaration* vests the right for member states to determine what constitutes national emergency or other circumstances of extreme urgency by stating that:

“Each member has the right to determine what constitutes national emergency or other circumstances of extreme urgency.”

Nothing in the *TRIPS Agreement* or the *Doha Declaration* suggests that a member state must seek permission from the WTO or any other authority to determine whether a national emergency exist. This is also in accordance with the concept of sovereignty where the state has legal authority over its internal and external affairs.¹³² In light of the lack of definition, every member state has the authority to determine what constitutes a national emergency. This is the accepted practice for *TRIPS* requirements that are undefined.¹³³ In addition, while the *Doha Declaration* does not specify national emergency, it does determine that public health crises can constitute a national emergency.¹³⁴

85. The serious problem of obesity in Bergonia can be regarded as a situation of emergency

¹³⁰ Article 31(b) *TRIPS Agreement*; Carvalho, 237.

¹³¹ Ho, 22.

¹³² Keohane, Para. 312.

¹³³ Correa (2007), Paras. 271-272; Ho, 22.

¹³⁴ Gathii, Para. 307.

which justifies the waiver of prior negotiation according to Article 31(b) *TRIPS Agreement*. BERGONIA argued that the compulsory licence was issued because the technology covered by the patent is crucial for the treatment of obesity which has been a serious problem among a large population group in Bergonia.¹³⁵ It must be taken into account that the obesity problem in Bergonia is not the kind of obesity which can be resolved simply by traditional methods. The population in Bergonia have a genetic pre-disposition toward obesity.¹³⁶ BERGONIA has conducted other measures to combat the problem by funding campaigns on nutrition and exercise and imposing 18% tax on sugared beverages and beverages containing corn syrup.¹³⁷ The fact that the medical needs became more acute when the licence agreement between MEDBERG and BioLife was terminated evidences the gravity of the problem.¹³⁸ This shows that the lack of such products in Bergonia has led to a situation of public health crises which justify the issuance of the compulsory licence.

b. The compulsory licence was issued for a limited duration

86. The compulsory licence of Bergonian Patent No. AZ2005 is issued for a limited duration in conformity with Article 31(c) *TRIPS Agreement*. The duration of a compulsory licence must be proportional to the purposes for which it is granted.¹³⁹ The duration should be long enough to provide an adequate incentive for production.¹⁴⁰ For instance, Canadian Law allows the issuance of a compulsory licence for a period of 4 years from the day the licence

¹³⁵ Response to Request, No. 40.

¹³⁶ Response to Request, No. 26.

¹³⁷ Response to Request, No. 85.

¹³⁸ Response to Request, No. 26.

¹³⁹ Gervais, 165-166.

¹⁴⁰ Resource Book on *TRIPS*, 473.

is granted.¹⁴¹

87. In the present case, the compulsory licence was issued for the duration of 48 months.¹⁴² BERGONIA contends that this length of time is not unreasonable because it is a minimum period sufficient to determine the efficiency of the treatments and products in reducing obesity and to ascertain the impact of the compulsory licence on the Bergonian market.¹⁴³

c. The exports by the Bergonian companies are permissible under the *TRIPS Agreement*

88. Article 31(f) *TRIPS Agreement* regulates that:

“any such use shall be authorized predominantly for the supply of the domestic market of the MEMBER authorizing such use.”¹⁴⁴

However, exportations are permitted.¹⁴⁵ Article 31bis *TRIPS Agreement* states that:

“the obligation of that Member under Article 31(f) shall not apply to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory licence in that Member to be exported to the markets of those other developing or least developed country parties ... that share the health problem in question.”¹⁴⁶

89. In the present case, at least one of the export destinations is a developing country.¹⁴⁷ There

¹⁴¹ *Bill C-9, An Act to Amend the Patent Act and the Food and Drugs Act*, Section. 21.09.

¹⁴² Response to Request, No. 24.

¹⁴³ Response to Request, No. 66.

¹⁴⁴ Article 31(f) *TRIPS Agreement*.

¹⁴⁵ Gervais, 166; Resource Book on *TRIPS*, 474.

¹⁴⁶ Article 31 bis(3) *TRIPS Agreement*.

¹⁴⁷ Response to Request, No. 62.

is no further elaboration on the facts whether the rest of the export destinations are least developed or developed countries. Therefore, MEDBERG cannot raise an argument that the exports conducted by the Bergonian companies has violated Article 31bis *TRIPS Agreement*.

90. Furthermore, the *Doha Declaration* encourages the export to countries that are unable to manufacture the pharmaceuticals.¹⁴⁸ Paragraph 6 of the *Doha Declaration* states that:

“We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.”

The appendix to the annex to the *TRIPS Agreement* provides an interpretation for other eligible importing Members which have insufficient or no manufacturing capacities for the products. It states:

“where the Member has some manufacturing capacity in this sector, it has examined this capacity and found that, excluding any capacity owned or controlled by the patent owner, it is currently insufficient for the purposes of meeting its needs.”

91. In the present case, the fact that the export destinations have their own pharmaceutical manufacturing capacity does not suggest that they have the necessary technology to produce the treatments and products covered by Bergonian Patent No. AZ2005. This inference is supported by the fact that there is no other products and treatment which have been proven to be as effective as Bergonian Patent No. AZ2005.¹⁴⁹

d. MEDBERG has received adequate remuneration

92. According to the commentary to the *TRIPS Agreement*, Article 31(h) *TRIPS Agreement*

¹⁴⁸ Para. 6 *Doha Declaration*.

¹⁴⁹ Response to Request, No. 68.

justifies the payment of a minimal royalty for every issuance of a compulsory licence by a developing country in order to address public health crisis.¹⁵⁰ The granting authorities are not required to base the royalty payable to the patent holder on lost profits or royalties, but rather on reasonable royalty.¹⁵¹ In other words, the proper measure is “what the owner has lost, not what the taker has gained.”¹⁵²

93. BERGONIA does not challenge MEDBERG’s right, as the patent owner, to receive adequate payment. In fact, the Bergonian IP Office has collected royalties from the companies using the compulsory licence and offered these payments to MEDBERG as compensation. MEDBERG refused to accept this offer.¹⁵³
94. The royalties are offered at a rate that is less than MEDBERG received under the licence agreement with BioLife.¹⁵⁴ BERGONIA is an emerging and developing country.¹⁵⁵ As a developing country, BERGONIA, issued the compulsory licence of Bergonian Patent No. AZ2005 to address a serious medical problem. Hence, the minimal royalty qualifies as adequate remuneration.

e. The issuance of the compulsory licence is subject to judicial review

95. Article 31(j) *TRIPS Agreement* requires a review of the issuance of a compulsory licence by a person or body that is not being controlled by the granting authorities and there is an

¹⁵⁰ Resource Book on *TRIPS*, 476-477.

¹⁵¹ *Leesona v US*, Para. 958; Resource Book on *TRIPS*, 476-477.

¹⁵² *Leesona v US*, Para. 969.

¹⁵³ Uncontested Facts, Para. 8.

¹⁵⁴ Response to Request, No. 19.

¹⁵⁵ Response to Request, No. 44; World Economic and Financial Surveys.

adequate separation of personnel and function among the two bodies.¹⁵⁶

96. In the present matter, after MEDBERG filed an appeal from the issuance of the compulsory licence, the Patent Review Board decided that this measure was in conformity with Bergonian Law.¹⁵⁷ The Board is a body that is different from the Bergonian IP Office and consists of Bergonian judges.¹⁵⁸ As a quasi-judicial body, this Board plays a different role to the Bergonian IP Office. It provides due process guarantees¹⁵⁹ to adjudge particular intellectual property cases in the country.¹⁶⁰ Therefore, the requirement of judicial review is fulfilled.

C. IN THE ALTERNATIVE, BERGONIA’S ISSUANCE OF THE COMPULSORY LICENCE IS LEGALLY JUSTIFIED UNDER ARTICLE 4(2) *CONVENIENCIA TREATY*

97. The right to expropriate the property of foreign nationals for a public benefit is a sovereign right of states. The inclusion of an anti-expropriation clause within a Bilateral Investment Treaty is not meant to limit this inherent right.¹⁶¹ Article 4(2) *Conveniencia Treaty* states that expropriation is permissible if it is done:

“in accordance with the applicable laws of the latter Contracting State for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation.”

98. Without prejudice to the above arguments, BERGONIA argues that the issuance of the

¹⁵⁶ Resource Book on *TRIPS*, 478.

¹⁵⁷ Response to Request, No. 37.

¹⁵⁸ Response to Request, No. 29.

¹⁵⁹ Response to Request, No. 82.

¹⁶⁰ Response to Request, No. 29.

¹⁶¹ Schreiber, 454.

compulsory licence is justified under Article 4(2) *Conveniencia Treaty* because: (1) BERGONIA's measure is for the public benefit; (2) BERGONIA's measure is not discriminatory; and (3) MEDBERG was offered prompt, adequate, and effective compensation.

1. BERGONIA's measure is for the public benefit

99. The character of the government's measure must be assessed in light of the public interest at stake.¹⁶² A non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects a foreign investor or its investment, does not constitute an expropriation.¹⁶³ However, if the Tribunal considers that the interference did amount to an expropriation, BERGONIA argues that the expropriation is justified since it was carried out for the public benefit.
100. In *LG&E v Argentine Republic*, the tribunal found that a state must prove the existence of serious public disorders in order for the expropriation to be for the public benefit.¹⁶⁴ The authority to make an initial assessment of the existence of a public purpose lies with national authorities.¹⁶⁵ Expropriation can be justified if such transfer is for the public benefit, even if it involves a compulsory transfer of property from one individual to another.¹⁶⁶ Measures taken in the public benefit concern not only the protection of the public but also extend to any actions that governments deem necessary to achieve public policy objectives, including in the area of health.¹⁶⁷ In fact, under the *Doha Declaration*,

¹⁶² Newcombe (2005), 15.

¹⁶³ *Methanex v US*, Para. 7.

¹⁶⁴ *LG&E v Argentine Republic*, Para. 28.

¹⁶⁵ *James v United Kingdom*, Para. 32.

¹⁶⁶ *James v United Kingdom*, Para. 32.

¹⁶⁷ Correa (2004), 349.

States are encouraged to promote access to medicines for all,¹⁶⁸ including the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.¹⁶⁹

101. In the present case, BERGONIA issued the compulsory licence because the patent is needed for important domestic medical needs.¹⁷⁰ In particular, the patent covers a breakthrough treatment and related products for obesity which has been a serious long-standing problem in Bergonia.¹⁷¹ ‘Obesity’ itself is defined as abnormal or excessive fat accumulation that may impair health and it leads to other serious health consequences like cardiovascular disease, the world’s number one cause of death, diabetes which rapidly becomes a global epidemic, musculoskeletal disorders, cancers, and hypertension.¹⁷²
102. In *Waguih v Egypt*, the tribunal found that the fact that a pipeline could have been built elsewhere, did not demonstrate that the expropriation was not for a public benefit.¹⁷³ In the present case, even if the Tribunal is persuaded that obesity can be resolved without using the products and treatments covered by Bergonian Patent No. AZ2005, it does not mean that the issuance of the compulsory licence is not for the purpose of public benefit.
103. The issuance of the compulsory licence can be distinguished from a measure taken by the government to achieve economic purposes.¹⁷⁴ For example, in *S D Myers v Canada*, the

¹⁶⁸ Para. 4 *Doha Declaration*.

¹⁶⁹ Para. 5(b) *Doha Declaration*.

¹⁷⁰ Uncontested Facts, Para. 7.

¹⁷¹ Response to Request, No. 40.

¹⁷² World Health Organization, *Obesity and Overweight*.

¹⁷³ *Waguih v Egypt*, Para. 430.

¹⁷⁴ Newcombe (2005), 22.

tribunal found that there was no expropriation because the host state did not benefit from the measure, and there was no transfer of property or benefit from the investor to the host state.¹⁷⁵

104. In the present matter, population groups within Bergonia have a genetic pre-disposition toward obesity and traditional treatments are no longer effective to treat obesity.¹⁷⁶ Despite the gravity of the problem, MEDBERG had no plans to license its intellectual property to a third party in Bergonia after the licence agreement between MEDBERG and BioLife was terminated.¹⁷⁷

105. Furthermore, there is nothing to indicate that BERGONIA has gained any economic benefit from the issuance of the compulsory licence. In fact, MEDBERG has benefited from the exploitation of the patent by the six Bergonian companies because it has received royalty payments.¹⁷⁸ Therefore, since the compulsory licence was issued by BERGONIA for the public benefit in the area of public health and BERGONIA did not benefit from it economically, the issuance of the compulsory licence is justifiable and in accordance with Article 4(2) *Conveniencia Treaty* regarding the requirement of public benefit.¹⁷⁹

2. BERGONIA's measure is not discriminatory

106. BERGONIA contends that its treatment of MEDBERG was not discriminatory. Discrimination is treating differently, without an objective and reasonable justification,

¹⁷⁵ *Lauder v Czech Republic*, Para. 203; *S D Myers v Canada*, 59.

¹⁷⁶ Response to Request, No. 26, 40.

¹⁷⁷ Response to Request, No. 42.

¹⁷⁸ Uncontested Facts, Para. 8.

¹⁷⁹ Lin, Para. 158.

persons in ‘relatively’ similar situations.¹⁸⁰ As each patent covers a unique process or product, the issuance of a compulsory licence over a certain patent cannot be discriminatory.¹⁸¹

107. In the present case, Patent No. AZ2005 covers unique products and treatments to combat obesity and no other products or treatments have been proven to be as effective as Patent No. AZ2005.¹⁸² Furthermore, the compulsory licence, in the present case, is the legitimate exercise of the State’s police power.¹⁸³ If the compulsory licence is issued in the development of the legitimate exercise of the State’s regulatory power, there is no indication that the measure is discriminatory.¹⁸⁴ Therefore, in issuing the compulsory licence, BERGONIA has satisfied the non-discrimination requirement.

3. MEDBERG was offered prompt, adequate, and effective compensation

108. Article 4(2) *Conveniencia Treaty* provides that when a compulsory licence is issued:

“Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation has become publicly known.”

109. As a developing country which issued the compulsory licence to address the serious health problem of obesity, BERGONIA is allowed to pay a minimal royalty.¹⁸⁵ The fact that the

¹⁸⁰ *CME v Czech Republic* (Final Award), Para. 612; *CMS v Argentine Republic*, Para. 293; *Fredin v Sweden*, Para. 60; *Goetz v Burundi*, 457, Para. 121.

¹⁸¹ Correa (2004), 350.

¹⁸² Response to Request, No. 68.

¹⁸³ Part Three, B(2)(d) BERGONIA’s memorial.

¹⁸⁴ Correa (2004), 348-349.

¹⁸⁵ Resource Book on *TRIPS*, 476-477.

compensation offered was moderately lower than the royalties paid by BioLife¹⁸⁶ does not mean that BERGONIA has violated this point of justification under Article 4(2) *Conveniencia Treaty*.

¹⁸⁶ Response to Request, No. 88.

PART FOUR:

BERGONIA HAS AFFORDED MEDBERG FAIR AND EQUITABLE TREATMENT

110. Article 2(2) *Conveniencia Treaty* guarantees fair and equitable treatment of investors by stating:

“Each Contracting State shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under the Treaty.”

111. In the present case, BERGONIA contends that its issuance of the compulsory licence is not in breach of Article 2(2) *Conveniencia Treaty* because BERGONIA continues to afford fair and equitable treatment to MEDBERG.

112. Fair and equitable treatment requires states to provide a reasonably stable investment environment, consistent with investor expectations.¹⁸⁷ Arbitral tribunals¹⁸⁸ and various international instruments¹⁸⁹ assess fair and equitable treatment in the light of the minimum standard required by customary international law.

113. Although there is no doctrine of precedent in international arbitration law, arbitral tribunals generally seek to act consistently with each other.¹⁹⁰ In interpreting the fair and equitable

¹⁸⁷ Moses, 230.

¹⁸⁸ *AAPL v Sri Lanka*, 580-655; *ADF v US*, Para. 179; *AMT v Zaire*, Para. 6.10; *Eastern v Estonia*, Para. 367; Dolzer & Stevens, 59.

¹⁸⁹ Article 1105 (1), Binding Interpretation on NAFTA; Notes and Comments to Article 1, OECD *Draft Convention on the Protection of Foreign Property*; OECD Investment Law, 84.

¹⁹⁰ Marshall, 9.

treatment, certain principles are emerging from the growing body of arbitral awards. In assessing a breach of fair and equitable treatment by a host state, tribunals analysed the protection of investors' legitimate expectations and due process of law in regards of governments' disputed decision.¹⁹¹

114. In *AMT v Zaire*,¹⁹² the tribunal found that a host state has an obligation of vigilance in providing a fair and equitable treatment to investors. The obligation requires the state to take necessary measures to enable the investor to enjoy its investment.¹⁹³ However, in *Saluka v Czech Republic*, the tribunal found that the determination of a breach of fair and equitable treatment requires a weighing of the investor's legitimate and reasonable expectations, on the one hand, and the State's legitimate regulatory interests, on the other.¹⁹⁴

115. As elaborated in Part Three, Subsection A(2) of this Memorial, BERGONIA has not interfered with MEDBERG's legitimate expectation by the issuance of the compulsory licence of Patent No. AZ2005. This is because BERGONIA issued the licence as a legitimate regulatory measure in the case of a national emergency.

116. In disputes before arbitral tribunals, the issue of fair and equitable treatment in relation to due process of law deals with denial of justice. The notion of denial of justice is defined as improper administration of civil and criminal justice towards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.¹⁹⁵ In *Azinian v Mexico*,¹⁹⁶ the

¹⁹¹ McLachlan, 234.

¹⁹² *AMT v Zaire*, 1531.

¹⁹³ *AMT v Zaire*, 1548; *Wena Hotels v Egypt*, Para. 84.

¹⁹⁴ *Saluka v Czech Republic*, Para. 306.

¹⁹⁵ Brownlie, 506; OECD Fair and Equitable Standard, 28.

¹⁹⁶ *Azinian v Mexico*, Para. 102.

tribunal opined that:

“A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.”

117. In the present case, BERGONIA has not denied MEDBERG justice. MEDBERG had not been denied at any point of time the access to courts or adequate procedures to oppose the administrative decision of the compulsory licence.¹⁹⁷ The Patent Review Board, which provides due process guarantee,¹⁹⁸ found that the issuance of the compulsory licence was in accordance with Bergonian Law which implements the *TRIPS Agreement*.¹⁹⁹ The Review Board’s finding is supported by the statement of the Ministry of Justice that the issuance of the compulsory licence was in conformity with Bergonia’s obligation under international law.²⁰⁰ Consequently, MEDBERG has neither been treated unfairly nor inequitably in regards of due process of law in BERGONIA.

118. However, some principles emerging from arbitral awards concerned with the treatment of investors in administrative decision-making includes the principle that a state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.²⁰¹ It is the existence of bad faith which likely leads to a finding that the standard has been

¹⁹⁷ Uncontested Facts, Para. 7.

¹⁹⁸ Response to Request, No. 82.

¹⁹⁹ Response to Request, No. 37.

²⁰⁰ Response to Request, No. 111.

²⁰¹ *ADF v US*, Para. 180; *Azurix v Argentine Republic*, Paras. 368-369; *CMS v Argentine Republic*, Para. 280; *Enron v Argentine Republic*, Para. 263; *Eureko B.V. v Poland*, Para. 234; *LG&E v Argentine Republic*, Para. 129; *Mondev v US*, Para. 116; *Occidental v Ecuador*, Para. 186; *Siemens v Argentine Republic*, Para. 297; *Tecmed v Mexico*, Para. 153.

breached.²⁰² Moreover, the act must show a wilful neglect of duty far below international standards.²⁰³

119. For instance, if a State uses its powers for a purpose other than for which they were intended, this may be found to be a breach of the standard.²⁰⁴ In *Tecmed v Mexico* the tribunal found that the Mexican environmental agency's refusal to renew the investor's permit for a hazardous waste landfill was in response to political problems arising from public opposition to the landfill, rather than a contravention of environmental regulations by the investor.²⁰⁵

120. In this present case, BERGONIA did not act in bad faith through the issuance of the compulsory licence. Instead of issuing the compulsory licence in bad faith, the compulsory licence was issued in order to address important domestic medical needs.²⁰⁶ Proof of a good faith effort by the State to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal and regulatory requirements.²⁰⁷ Therefore, the issuance of the compulsory licence did not breach the standard of fair and equitable treatment as governed by the *Conveniencia Treaty*.

CONCLUSION ON THE MERITS OF THE DISPUTE

121. BERGONIA's governmental action was carried out in accordance with international law

²⁰² *PSEG Global v Turkey*, Para. 232; Marshall, 13.

²⁰³ *Eastern v Estonia*, Para. 367.

²⁰⁴ Marshall, 14.

²⁰⁵ *Tecmed v Mexico*, Paras. 164-166.

²⁰⁶ Uncontested Facts, Para. 7.

²⁰⁷ *Gami v Mexico*, Para. 97.

and does not amount to an act of expropriation. The issuance of the compulsory licence does not constitute a substantial interference with the control, use and benefit of MEDBERG's investment. The compulsory licence does not interfere with MEDBERG's legitimate expectations because the measure was a lawful regulatory intervention. Furthermore, the measure is justified under Article 4(2) *Conveniencia Treaty* and *TRIPS Agreement*. Additionally, BERGONIA affords MEDBERG 'fair and equitable treatment'.