

**INTERNATIONAL CENTER FOR SETTLEMENT OF
INTERNATIONAL DISPUTES
[ICSID]**

IN ARBITRATION BETWEEN

MEDBERG CO. [CLAIMANT]

V

**THE GOVERNMENT OF THE REPUBLIC OF BERGONIA
[RESPONDENT]
(ICSID CASE NO. ARB/X/X)**

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(E) STATEMENT OF FACTS

The applicable international treaties.

1. The Government of the Bergonia (hereinafter “the Respondent”) and the Government of Tertia entered into a Treaty concerning the reciprocal encouragement and protection of investment (hereinafter “the Bergonia-Tertia BIT”) on 1st January 2003.
2. The Democratic Commonwealth of Bergonia and The Sultanate of Conveniencia entered into a Treaty concerning the encouragement and reciprocal protection of investment (hereinafter “the Bergonia-Conveniencia BIT”) on 30 May 2003.
3. Amnesia, Bergonia and Conveniencia are ICSID Contracting States and all have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter “the ICSID Convention”). They are also members of the World Trade Organisation (hereinafter “WTO”) and parties to Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “the TRIPS Agreement”). Laputa is not an ICSID Contracting State nor a member of the WTO.
4. Bergonia and Conveniencia are parties to the Vienna Convention on the Law of Treaties (hereinafter “VCLT”).

The characteristics of a company's corporate structure

5. The MedBerg Co. (hereinafter “the Claimant”) was established in Begonia on 30 January 2004. The Claimant`s management board consist of Bergonian national and a tax adviser who works for MedX Holdings Ltd in Conveniencia.

6. MedBerg Co. is in 100 % controlled by MedX Holdings Ltd, established in Conveniencia. CC123 Holding Ltd was incorporated by Convenient CompaniesSARL on 1 January 2003.
7. On 1 December 2003, CC123 Holding Ltd name was changed to “MedX Holding Ltd” (hereinafter “MedX”). It was assigned, ultimately, to MedBerg by Dr. Frankensid and MedScience in exchange for shares in MedX. Since then there have been no changes in control. Furthermore, Dr. Frankensid would like to continue his employment in MedScience.
8. Dr Frankensid has dual nationality. He is Bergonian national by descent and birth. He was naturalized in Amnesia in 1991. Dr Frankensid’s habitual residence and place of employment has been in Laputa since 1998, but he also maintains a vacation home in Amnesia.
9. MedX Holdings Ltd. was established in Laputa .The majority of the shareholders in this company are Laputan. However, on certain trade issues, there have been tensions between Laputa and Bergonia, and Laputa has imposed sanctions on several occasions.
10. After acquiring MedX, Dr. Frankensid and MedScience had assigned their worldwide interests in the invention they were developing to MedX Holdings, and MedX had assigned those interests with respect to Bergonia to MedBerg.

The exclusive License Agreement

11. The Claimant is the owner of Bergonian Patent No. AZ2005 which is thought to be the most effective of obesity treatments available in Bergonia. Obesity is a medical problem in Bergonia due to the genetic make-up and the traditional diet of population of Bergonia; 34% of males and 38% of females in Bergonia are obese.
12. On 31 March 2005 Claimant licensed BioLife Co., a Bergonian company, to utilise Bergonian Patent No. AZ2005 under the terms and conditions of the License Agreement. The License Agreement was an exclusive one.
13. The treatment covered by the Patent No. AZ2005 cost was 9,950 Bergonian ECU (ca. US \$300) per annum. Furthermore, there were no generics available on the market.
14. The Claimant terminated the License Agreement on 31 March 2007 and had no immediate plans to license its intellectual property to a third-party in Bergonia.
15. BioLife complained that upon receiving notice of termination it had sought to renegotiate the terms of the License Agreement, but the Claimant ended these negotiations after only three days.
16. Bergonians obesity substantial problem became acute after the License Agreement with BioLife was terminated. The Bergonian Health Ministry has funded several information campaigns together and prepared a “Green Paper” on imposing an 18% tax on sugared beverages.
17. On 1 June 2007, the Bergonian Intellectual Property Office (IP Office) commenced proceedings for the issuance of a compulsory license with respect to Patent No. AZ2005, stating that the technology covered by this patent is needed to address important domestic medical needs.

18. On 1st November 2007 The Bergonian IP Office issued a compulsory license for Patent No. AZ2005 for a period of 48 months. The compulsory license does not regulate the issue of export of products based on Patent no. AZ2005 to other countries.
19. As of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license. Units sold by the six firms invoking the compulsory license is 155 % of that sold previously by BioLife alone. Total sales revenue for the six firms is higher than it was for BioLife under the License Agreement.
20. The Bergonian IP Office has collected royalties from the six Bergonian companies and has offered these royalty payments to Claimant, but as of the date on which these ICSID proceedings were initiated Claimant had refused to accept them.
21. Payments would have been made in the Bergonian official currency. There has been no problem with transferability of funds between these two currencies.

The Claimant's Court and Arbitration Proceedings

22. Following the Bergonian IP Office's administrative decision to issue the compulsory license, the Claimant filed an appeal with a Patent Review Board within the IP Office. The Patent Review Board found the issuance of the compulsory license in conformity with Bergonian law. The Patent Review Board is a quasi-judicial body, which draws upon existing Bergonian judges.
23. On November 2008, the ICSID Secretary General registered the dispute for arbitration.

(F) ARGUMENTS

A. JURISDICTION

I. Jurisdiction of the ICSID Tribunal

1. ICSID Arbitral Tribunal has not jurisdiction over the dispute between the Claimant and the Respondent according to Article 25 of the ICSID Convention.

1. Jurisdiction *Ratione Personae*

1) Nationality

2. The Tribunal has no jurisdiction in the view of the nationality of the Claimant.

a) The investor - MedBerg Co. - is the Claimant in the current dispute.

b) The Host State- The Republic of Bergonia, is the Respondent in the current dispute.

3. Respondent challenges that this Tribunal lack jurisdiction because a national of Conveniencia does not have control of the Claimant within the meaning of Article 25(2)(b) of the ICSID Convention, nor has Respondent consented to treat as a national of Conveniencia.

2) *Locus standi*

4. The ICSID Convention states that in the case of a juridical person, the requirement of Article 25 (2) (b) is that such a person must have the nationality of a Contracting State other than the host State on the date of consent to the jurisdiction of the Centre or that if it has the

nationality of the host State, the parties must have agreed that because of foreign control it should be treated as a national of another Contracting State.

a) Appropriate test

5. The disputes between a State and its own national fall outside the scope of an international convention intended to deal with foreign investment. As it is expressed, it is the nationality of the claimant that determines the jurisdiction *ratione personae* of the Tribunal.

6. The Convention is silent on the method of determination the notion of the corporate nationality. The purpose of Article 25(2)(b) is not to define corporate nationality but to:

Indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore the parties should be given the widest possible latitude to agree on the meaning of "nationality" and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion.¹

However, early ICSID awards, such as *Amco*, applied the requirements for nationality of the "place of incorporation" and the "place of its registered seat".²

Therefore, the BIT definition of "investor" is paramount in each particular case.³

¹ *Dolzer, Schreuer*, p. 277.

² see *Amco*.

³ The Germany model BIT determines the nationality of the company according to the actual management, or seat: "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit."

The article 1 point 3 of Treaty between Democratic Commonwealth of Bergonia and the Sultanat of Conveniencia concerning the encouragement and reciprocal protection of investment(hereafter referred to as Bergonia-Conveniencia BIT) states that

“the term investor means

a. in respect of Democratic Commonwealth of Bergonia

-any juridical person as well as any commercial or other company or association with or without legal personality **having its seat** in the territory of Democratic Commonwealth of Bergonia, irrespective of whether or not its activities are directed at profit

b. in respect of Sultanate of Conveniencia:

-any juridical person **having its seat** in the territory of the Sultanate of Conveniencia in accordance with its laws”

Under the terms of the Bergonia-Conveniencia BIT interpreted according to their ordinary meaning, in their context, and in light of the object and purpose of the Treaty, the Respondent finds that the invoked definition of investor refers simply and exclusively to the place of incorporation — or, to be more exact, to the place of its seat.

What is more, the ICSID jurisprudence indicates that the applicable test for the determination of corporate nationality under Article 25 is the traditional incorporation/effective seat test.

For instance, Delaume is very much in favour of using the place of incorporation or *siège social* as the main criterion.⁴

In the pending case Claimant, MedBerg Co, was established in Bergonia.⁵ What is more, the management board consists of a Bergonian national, who poses 50% of votes, and the meetings of the management board were held in Bergonia.⁶ Invoked facts leaves no doubt that MedBerg Co., consistently with the cited BIT, should be treated as a Bergonian national.

⁴ *Delaume: ICSID Arbitration and the Courts*, p.p. 793, 794.

⁵ Annex Uncontested Facts point 1.

⁶ see responses to Requests no. 75 and 43.

7. Respondent would like to emphasize, that it is not a crucial point what the Parties to this bilateral treaty might (or might not) conceivably have intended, but what they actually did, and the evidence for that is the terms of the treaty they concluded. It would be illogical to invoke some other test of determination the nationality than agreed in the BIT. It is unambiguous that both States expressed their free will in concluding the provisions of the BIT. Therefore the Respondent cannot agree to treat MedBerg. Co as a national of Conveniencia.

b) Test of control

8. The Claimant counters that MedBerg Co. should be treated as a national of Conveniencia because it is in 100% foreign controlled by MedX Holdings Ltd.-a national of Conveniencia. The Claimant refers to test of control and well know method of piercing the corporate veil. As stated above there is no reason to apply the test of control because the Claimant was lawfully incorporated in Bergonia and the definition of investor provided by the BIT is consistent with the Convention and supported by invoked facts.

9. Alternatively, the Convention requires that if the juridical person has the nationality of the host State, it must have been agreed between the parties that because of foreign control it has the nationality of a Contracting State other than the host State.

The second clause of Article 25 limits the use of the control test to the circumstances it describes. The Respondent submits that there was no agreement between the parties to treat the Claimant as a national of Conveniencia nor anything other than a national of its state of the seat.⁷

⁷ see response to Request no. 14.

Respondent follows the reasoning of well know authority in the subject, Professor Schreuer, who rightly asserts:

“The overwhelming weight of the authority ... points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b). The situation may be otherwise if the parties have entered into an agreement on the investor's nationality”.⁸

10. The seminal case, in this regard, is *Tokios Tokelés*.⁹ In that case the claimant was a business enterprise established under the laws of Lithuania. But nationals of the Ukraine owned 99 per cent of its shares.

Article 1(2)(b) of the Lithuania-Ukraine BIT defines the term "investor", with respect to Lithuania, as

"any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations".

The Respondent argued that the claimant was not a genuine entity of Lithuania because it was owned and controlled by Ukrainian nationals. However, the majority of the tribunal concluded that the claimant was an "investor" of Lithuania under the BIT and a "national of another Contracting State" under Article 25 of the ICSID Convention.

11. Due to the fact that the information about the ownership MedBerg.Co was available at any times at registry office in Bergonia¹⁰ both parties had knew the structure of the firm. If the Claimant would like to be treated as a national of Convencia it would enter into agreement with the Respondent to treat MedBerg Co. as a national of the other state. The Respondent

⁸ see *Dolzer, Schreuer*, p. 84.

⁹ *Tokios Tokelés*

¹⁰ see response to Request no. 59.

highlights that there was no awareness to agree that point at any time. However, the Claimant abuses its position and intents to go over the provisions of the BIT.

In *CMS*, the tribunal stated that

“[t]he reference that Article 25(2)(b) makes to foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State *is precisely meant to facilitate agreement between the parties....*”¹¹

Following the *Tokios Tokeles* ruling, the Tribunal outlined :

“This Tribunal, like the tribunal in *Autopista*, is obliged to respect the parties' agreement “unless it proves unreasonable.” Far from unreasonable, reference to the state of incorporation is the most common method of defining the nationality of business entities under modern BITs and traditional international law.”¹²

Furthermore, according to *Oppenheim's International Law*, “[i]t is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siège social* to be in the same state.” Thus, the Ukraine-Lithuania BIT uses the same well established method for determining corporate nationality as does customary international law.¹³

12. Thus, it is another arbitral judgment, which should be taken into consideration by this High Tribunal in adjudicating the case. In *Rompetrol Group NV*, in the Tribunal's view, the latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the Contracting Parties to the BIT

¹¹ *CMS Gas Transmission Company*, para.51.

¹² *Tokios Tokeles*, para. 63.

¹³ *Ibid*, para. 70.

themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their "nationals" for the purposes of enjoying the benefits the BIT is intended to confer.¹⁴

c) Lifting the corporate veil

13. At the same grounds that Respondent is opposed for applying the control test, he is opposed for lifting the corporate veil. Once more the Respondent emphasis that there was no agreement to treat the Claimant as a national of Conveniencia and there is no reference in the BIT to the test of control. What is more, the Tribunals are reluctant to pierce the corporate veil.

“ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person.”¹⁵

14. It is crucial to realize that the corporate structure of MedBerg Co. is more complex and the MedX Holdings Ltd. is a mere vehicle to control MedBerg Co. through other companies.

In the alternative, if this Highest Tribunal approves reasoning submitted by the Claimant, the Respondent requests for piercing the corporate veil up to the second corporate layer and to take a realistic look at the true controller thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State”¹⁶

If the Claimant will postulate not to pierce the second corporate layer after the one bearing the nationality of the host State, in identifying foreign control, the Respondent would like to

¹⁴ *Romp petrol Group*, para. 81.

¹⁵ *Dolzer, Schreuer*, p.p. 279–80.

¹⁶ *TSA Spectrum*, para. 153.

remind the reasoning of the Tribunals in *SOABI* and, most recently, *S.A.R.L.* , which did not hesitate to pierce the successive corporate layers in identifying foreign control and the nationality of those holding it.

15. In *Barcelona Traction*, the Court set forth the exceptions which justifies the necessity of lifting the corporate veil. In particular, the Court noted,

“[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to *prevent the misuse of the privileges of legal personality*, as in certain cases of *fraud or malfeasance*, to *protect third persons* such as a creditor or purchaser, or to *prevent the evasion of legal requirements or of obligations*.”¹⁷

Admitting that MedBerg Co. is solely controlled by MedX Holdings Ltd. would lead to evasion of legal requirements provided by ICSID Convention.

16. The position of the Claimant, who ascertains that MedBerg Co. is foreign controlled by MedX Holdings Ltd, undercuts that the Claimant misleads the interpretation of the second clause of the Article 25(2)(b) of the Convention, which allows the parties to agree to lift the corporate veil, but only “because of foreign control”. The *ratio legis* of this exception is the wording “because of foreign control”. Foreign control is thus the objective factor on which turns the applicability of this provision. It justifies the extension of the ambit of ICSID, but sets the objective limits of the exception at the same time.

As was stated in *Vacuum Salt*:

“[t]he reference in Article 25(2)(b) to “foreign control” necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist”.¹⁸

¹⁷ *Barcelona Traction*, para. 58.

¹⁸ *TSA Spectrum*, para 139

Therefore, the Respondent request the Highest Tribunal to lift the coporate veil and examine the structure of MedX Holdings Ltd. in context of the “foreign control”.

Control over a juridical person is not a simple phenomenon. The existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights, and management.¹⁹

According to information given in responses, CC123 Holding Ltd” was incorporated by Convenient Companies SARL on 1 January 2003. On 1 December 2003, its name was changed to “MedX Holding Ltd” and it was transferred to MedScience and Dr. Frankensid. Since then there have been no changes in control.²⁰ Following this information, the Respondent would like to take an approach to the nationality of the true controllers of MedX Holdings Ltd.

d) Rights of the shareholders in view of the nationality

17.In present case, both shareholders poses 50% of shares of MedX Holdings Ltd, what makes it clear that both have the same rights²¹. The problem arises when it comes to the nationality of shareholders, what is crucial to admit the protection under the ISCID Convention.

As to MedScience Co., a company incorporated in Laputa, it is clear that this entity cannot enjoy the protection of the ICSID Convention because this state is not an ICSID Contracting State.²² This fact excludes the right of this shareholder to pursue a claim under ICSID jurisdiction.

¹⁹ *Dolzer, Schreuer* , p. 54 quoting *Vacuum Salt*, parass 43–53.

²⁰ see response to Request no. 45.

²¹ see response to Request no. 18.

²² see annex 3 point 3 and response to Request no. 17.

18. The only person which could seek protection independent from the corporation is Dr Frankensid, a scientist employed by MedScience Co. and credited with a breakthrough leading to several patents including Bergonian Patent No.AZ2005²³.

Due to the Article 25(2) "National of another Contracting State" means:

any *natural person* who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.

In the pending dispute, that Dr Frankensid poses dual, Bergonian and Amnesian, nationality. Thus, the international law do not allow the individual to invoke the protection of both states, which the nationality natural person poses. As stated above, the Convention excludes from the protection the individuals who have the nationality of the Host Sate, even if they also hold the nationality of another state.

In *Champion Trading*, three of the claimants had dual US and Egyptian nationality. The tribunal was unimpressed by the argument that the Egyptian nationality was not effective.²⁴ It found that the ICSID Convention had a clear and specific rule to the effect that any person who also has the nationality of the host state is excluded from bringing a claim under the Convention.²⁵

The fact that Dr. Frankensid is Bergonian national by descent and birth²⁶ makes it crystal clear that he cannot pursue his own state, because this dispute becomes a domestic issue, which should be solved by Bergonian court.

²³ See annex 3 point 4.

²⁴ The claimants relied upon *Nottebohm* and upon a leading case before the Iran-US Claims Tribunal *Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality*.

²⁵ *Dolzer, Schreuer* quoting *Champion Trading*.

²⁶ see response to Request no.22.

Quoting Professor Lalive²⁷ who has described Article 25(2)(b) as constituting

“a relatively bold departure from the traditional principle of international law, according to which a state cannot be sued internationally by its own nationals”

the Respondent would like to decline the jurisdiction *ratione personae* of the Tribunal in the pending dispute and recall that in none of the presented possibilities the Claimant would have the *locus standi* under ICSID Tribunal.

e) Alternative- test of real and effective nationality.

18. On the other hand, if the High Tribunal treats Dr Frankensid as a national for Amnesia, the Respondent would like to invoke well establish concept of “real and effective nationality”.²⁸

According to piece of information give in requests, Dr Frankensid was naturalized in Amnesia in 1991 and his only relation with this state is that he poses there a vacation home. ²⁹The validity of a naturalization is, apart from those basic principles, to be determined according to the national law of the naturalizing State. It must be distinguished from the right of the

²⁷ *The Oxford Handbook of International Investment Law*, p. 889.

²⁸ The 1930 Hague Convention provides the following in Art 5: "Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is *habitually and principally resident*, or the nationality of the country with which in the circumstances he appears to be in fact the *most closely connected*"

²⁹ see response to Request no. 54.

naturalizing State to exercise diplomatic protection for the benefit of the naturalized individual, the preconditions of which are solely governed by international law.³⁰

Relying on the *Nottebohm* case, the International Court of Justice held that even though a state may decide on its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the state providing the protection and the national in need of protection.

19. Taking into account above considerations, it would be more relevant, to treat Dr Frankensid as a national of Laputa.

Nationality is a legal bond between a natural person and a State which, according to the court, is based on the 'social fact of attachment'.³¹ The Respondent finds that, in the presented facts, real and effective nationality is based on strong and factual ties between Dr Frankensid and Laputa. It is important to realize that Dr Frankensid was naturalized in 1991. The Respondent has no doubts that, at the present time, Dr Frankensid is more attached to Laputa. There are several factors that points out that this shareholder should be treated as a national of Laputa, i. e. his habitual residence and place of employment is Laputa³². However, we cannot admit the protection to a national whose state is not a party to the ICSID Convention.

The Most Favored Nation Provision

20. As mentioned above, the Respondent contends that this Tribunal lacks jurisdiction because a national of Conveniencia does not have the control of the Claimant within the meaning of Article 25(2) of the ICSID Convention, nor has Respondent consented to treat Claimant as a national of Conveniencia. The Claimant challenges that if such express consent

³⁰ *Encyclopedia of Public International Law*, quoting *Notebohm*, para. 11.

³¹ *Ibid*, para. 9.

³² see response to Request no. 54.

is required, then Article 3 of Bergonia-Conveniencia BIT (the MFN clause) permits to invoke Article VI. 8 of Bergonia-Conveniencia BIT.

Due to that request, The Respondent recalls that the Highest Tribunal should decide whether and if so in what circumstances, it is permissible for an investor to use the provision in the BIT applicable to its dispute as a means of establishing jurisdiction for an arbitral tribunal where jurisdiction could not otherwise be established.³³

a) The interpretation of the Most-Favoured-Nation Treatment clause.

21. Following the fact that the both, the Claimant and the Respondent, are parties to VCLT the rules of interpretation regulated therein will apply to the MFN clause as well.³⁴ Thus, the primary task is to identify the ordinary meaning of the clause in its context and in the light of the object and purpose of the treaty.³⁵ Due to the Article 31 of VCLT, a treaty:

“shall be interpreted in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose”

b) Invoking substantive rights under the Most-Favoured-Nation clause.

22. For the scope *ratio materiae*, it is crucial to distinguish between its applicability to substantive treaty guarantees and to matters of dispute settlement. This issue was developed in *Mafezini* whereas the Tribunal adopted the extensive interpretation of MFN clause.

³³ S.Fietta, p.1.

³⁴ see response to Request no. 108.

³⁵ *Dolzer, Schreuer*, p. 188.

However, the Tribunal pointed on importance that “a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand”³⁶

The Article IV paragraph 2 of the BIT between Argentina and Spain provides as follows:

“In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country”³⁷

By contrast, The Article 3 of the Bergonia-Conveniencia BIT (the MFN clause) provides as follows:

- 1) 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 its own investors or to investment of investors of any third state.
- 2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity, in particular, though not exclusively, concerning management, maintenance, operation, enjoyment or disposal of their investments, **to treatment less favourable** than it accords to its own investors or to investors of any third State, whichever is more favourable to the investors.

The Respondent observes that the MFN clause in the Article 3 of the Bergonia-Conveniencia BIT encompass different scope of *ratio materiae* than those in *Maffezini*. The reasoning of the Tribunal in *Maffezini* Case was based on the wording “in all matters”, what creates an open catalogue of issues that falls under MFN clause. In the absence of such a specification, the Claimant cannot invoke narrowly formulated MFN clause from the Bergonia- Conveniencia BIT, that should apply only to issues of substance but not to questions of dispute settlement.

23. In the Respondents view, the ordinary meaning of provision

³⁶ *Maffezini*, para. 63.

³⁷ *Maffezini*, para. 38.

“Neither Contacting State shall subject investments in its territory owned or controlled by investors of the other Contacting State **to treatment less favourable** than it accords to investments of its own investors or to investment of investors of any third state”

is that the investor's substantive rights in respect of the investments are to be treated no less favorably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural rights as well.³⁸

24. It is worth to note that the fourth paragraph of Article 3 of the Bergonia-Conveniencia BIT³⁹ contains an exception to MFN treatment relating to customs or economic union, a common market, free trade area. This may be considered as supporting the view that all other matters, including dispute settlement, fall under the MFN provision of the first paragraph of Article 3 (on the basis of the principle *expressio unius est exclusio alterius*). However, the fact that the fourth paragraph refers to “privileges” may be viewed as indicating that MFN treatment should be understood as relating to substantive protection. Hence, it can be argued with equal force that the second paragraph demonstrates that the first paragraph is solely concerned with provisions relating to substantive protection to the exclusion of the procedural provisions relating to dispute settlement.⁴⁰

25. What is more, an extensive interpretation of MFN clause in question would lead to violation of the public policy of Bergonia. As it was outlined by the Tribunal in *Maffezini* :

“ As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in

³⁸ *Telenor*, para. 92.

³⁹ see Article 3 (4) of the Begonia-Conveniencia BIT.

⁴⁰ *Plama* para. 191.

question, particularly , if the beneficiary is a private investor, as will often be the case. The scope of clause might thus be narrower than it appears at first sight”⁴¹

26.Submitted reasoning is confirmed by the case law. In *Salini*, the tribunal distinguished Maffezini on the grounds that the MFN clause in the Italy — Jordan BIT made no reference to “all matters governed by the agreement” and hence could not be given as broad an interpretation as the MFN clause considered in Maffezini.

27.Following, the Respondent highlights that wide interpretation of MFN in question would give rise to some concern with regard to the possible expansive effects of the extension of a Most-Favoured Nation clause to the investors' right to select different forums⁴².

This was the decision in *Maffezini*

“that the application of the most favoured nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements”⁴³.

The Respondent sympathizes with the Tribunal in *Plama*, which failed to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the “basket of treatment” and “self–adaptation of an MFN provision” in relation to dispute settlement provisions has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation — actually counterproductive to harmonization — cannot be the presumed intent of Contracting Parties. [...]⁴⁴

⁴¹ *Maffezini* para. 62.

⁴² *Sallini*, para. 114.

⁴³ *Maffezini*, para. 62.

⁴⁴ *Plama*, para. 219.

Furthermore, the Tribunal ruled that

[...] the principle with multiple exceptions as stated by the tribunal in the Maffezini case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute resolution 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.”⁴⁵

28. Moreover, the same line reasoning has been followed in *Telenor*⁴⁶, *Vladimir Berschader and Moïse Berschader*⁴⁷ and *Wintershall*⁴⁸

29. The Tribunal in *Telenor*, which “wholeheartedly endorsed the analysis and statement of principle furnished by the *Plama* Tribunal”⁴⁹, also established four compelling reasons why an MFN clause in a BIT providing for most favoured nation treatment of investment should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties.⁵⁰

Firstly, the requirement of Article 31 of VCLT to interpret the treaty in good faith and with ordinary meaning, what was explained above. Second, the effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty, and even then there would be questions as to whether the investor could select those elements of the wider dispute resolution that were apt for its purpose and discard those that were not. Third, the

⁴⁵ Ibid, para. 223.

⁴⁶ *Telenor*, at para. 90.

⁴⁷ *Vladimir Berschader and Moïse Berschader*, para. 181.

⁴⁸ *Wintershall*, para. 167.

⁴⁹ *Telenor*, para. 90.

⁵⁰ Ibid, para. 91.

wide interpretation also generates both uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new BIT entered into by the host State. Fourth, to invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish.⁵¹

30. In conclusion, the Claimant submitted nothing from which it might be established that the common intention of the contracting parties to the Bergonia- Conveniencia BIT was to extend the wording of MFN clause on dispute settlement issues.

c) Abuse of rights.

31. In addition, the line of extending interpretation of the scope of the MFN clause, referring to settlement of disputes, may be observed as abuse of rights on behalf of the Claimant. Considered as one of the "general principles of law recognized by civilized nations", the principle of abuse of rights, was for the first time formulated ,during the preparatory work on the Draft Statute of the Permanent Court of International Justice (PCIJ), at an inter-State level by the Committee of Jurists in 1920. Further, it is accepted that the rule in question is consistent within the meaning of Article 38(1) c of the Statute of the Permanent Court of International Justice. Moreover, Article 31(3) (c) of the VCLT states that while interpretation of a treaty there shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties. Following this provision the principle of the abuse of rights can be effectively applied to MFN clause⁵².

⁵¹ Ibid. paras. 91-97.

⁵² *Kalduński*, p. 38.

In inter-State relations the concept of abuse of rights may arise in three distinct legal situations.⁵³ However, the most relevant for the present dispute, occurs when a right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused(*détournement de pouvoir*)⁵⁴.

The Claimant should realize that the MFN clause refers only to the protection of substantive rights. However, extending the scope of this clause to procedural rights, the Claimant leads to different purpose, than the one originally mentioned by contracting parties. The Respondent outlines that this is another reason that the Highest Tribunal should denial the jurisdiction in the present dispute.

d) Denial of benefits.

32. Even if the Highest Tribunal would share the argumentation of the Claimant, the Respondent would like to remind that under Article I.2. of Bergonia-Tertia BIT, Bergonia may deny the advantages of Article VI.8.

According, to that Article I.2 of Bergonia- Tertia BIT, 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.**

33. As it was explained in the first part of the argumentation, the one of the shareholders in MedX Holdings Ltd., Med Science Co., is an entity established under the laws of Laputa and

⁵³ *Encyclopedia of Public International Law*

⁵⁴ *Ibid*, para 5.

the majority of the shareholders are Laputan. This company poses 50% of shares what makes it, equally as another shareholder Dr Frankensid, a controlling party.⁵⁵

The Respondent cannot agree to grant the benefits to a state with which does not maintain normal economic relations. On certain trade issues, there have been tensions between Laputa and Begonia⁵⁶. It would be against the common sense that Bergonia would create the preferential conditions to Laputa which has imposed several sanctions on Bergonia. Therefore, The Respondent denials to confer the benefit of Article VI.8.of Bergonia-Tertia BIT to MedX Holdings Ltd.

e) The cooling-off period.

34. As it is expressly stated in Article 10 Bergonia – Conveniencia BIT, prior to submitting a claim under the juridical body, the Claimant should seek an amicable settlement between the parties to the dispute. Only after three months from the date of receipt of request for settlement a dispute should be submitted to certain and competent body.⁵⁷ The purpose of this rule is to engage good-faith negotiations before initiating the arbitration.

35. The Claimant communicated its objections to Bergonian IP Office, however “the communications” may not be considered as an attempt to solve the dispute. The wording “to seek an amicable settlement” should be understood as an dialogue intended to resolve a problem and produce a certain course in contested issue.

⁵⁵ See responses to Requests no.17 and 18.

⁵⁶ See response to Request no. 36.

⁵⁷ See Article 10.1 and 2 of the Bergonia-Conveniencia BIT.

In *Enron*, the Tribunal considered that this requirement waiting period is very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.⁵⁸

The Respondent submits, that between 1 November 2007 and 1 November 2008, there was no information or attempt from the Claimant to resolve the dispute in amicable way, what excludes the possibility of submitting this dispute to ICDID Tribunal.

2. JURISDICTION RATIONE MATERIAE

1) THE LACK OF PROTECTED INVESTMENT

36. The Respondent does not contend that the Claimant's business operations conform with the definition of "investment" established in the Article 1 of the Bergonia – Convenencia BIT. However, the Respondent submits that the Claimant's exploitation of its intellectual property in Bergonia has not constituted an investment under applicable international law. Furthermore, the pending dispute does not arise out of the Claimant's activity and does not conform with the conditions established in Article 25(1) of the ICSID Convention.

37. According to coherent case law, the term "investment" in Article 25 of the ICSID Convention should be interpreted independently of the investment clause in the applicable BIT. The Tribunal in *Salini v Marocco* invoked that:

“ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre.”⁵⁹

⁵⁸ *Enron*, para. 88.

⁵⁹ *Salini*, para. 52:

The tribunals conform with the autonomous understanding of Article 25 and twofold assessment of the conception of investment. The influential approaches were represented by tribunals in *MHS* (“double-barrelled test”)⁶⁰ and *CSOB* (“double keyhole approach”).⁶¹

38. Article 25(1) of the ICSID Convention provides as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an *investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

The specific criteria have been utilized by ICSID tribunals to determine the scope of the “investment” in respect to Article 25 of the ICSID Convention. The Respondent submits that following regularly recognized conditions⁶² are not satisfied on the facts of recent case: significance for the host state's development, certain duration of the entrepreneur, the assumption of risk, dispute resulting directly out of investment. The requirements mentioned above, should not be examined in isolation because what matters is to assess the Claimant's operation globally.

a) The dispute does not arise out of investment

39. According to the literal understanding of the Article 25(1) of the ICSID Convention, the jurisdiction exists only over a legal dispute “arising directly out of an investment”. The Respondent submits that the Claimant's activity does not conform with invoked prerequisite. On 31 March 2005 Claimant licensed BioLife Co. to utilize Bergonian Patent No. AZ2005 under the terms of the License Agreement. Subsequently, the Claimant terminated the License

⁶⁰ *MHS*, para. 55.

⁶¹ *CSOB*, para. 251.

⁶² *Schreuer*, p. 140.

Agreement on 31 March 2007. Furthermore, after terminating the License Agreement, the Claimant had no immediate plans to license its intellectual property to a third-party in Bergonia. Afterwards, on 1st November 2007 The Bergonian IP Office issued a compulsory license for Patent No. AZ2005.

40. On the facts of recent case, it is unambiguous that the Claimant's business activity continued from 31 March 2005 to 31 March 2007. The essential feature is that the License Agreement was terminated voluntary by the Claimant. The licensing of the Patent No. AZ2005 was the Claimant's only economic initiative on the Bergonian market. The respondent submits that effective date of termination of the License Agreement should be interpreted as a termination of entire Claimant's entrepreneur. The Claimant contends the Bergonian IP Office proceedings, which commenced after 31 March 2007 and had no direct correlation with terminated License Agreement.

b) The purely commercial agreement

41. The respondent submits that the Claimant's operation should be classified as a purely commercial activity. The terms of the License Agreement with BioLife were entirely normal commercial terms. The Claimant did not participate in the higher risk than it is regularly involved in any commercial contract. Furthermore, the Claimant's assets consisted only of the intangible property, which creation were dependent on the law of the Respondent. It is characteristic for the intellectual property ownership that it does not produce any losses for the owner.

42. On the facts of recent case, the liberal approach in regards to agreements represented in *Fedax* should be discarded.⁶³ Invoked division is motivated by the fact that, Claimant's activity in *Fedax* was being used by the State to finance its budget under a law of public credit. In the pending case, the Bergonia state did not gain such benefits.

⁶³ *Fedax*, para. 42.

Respondent invokes the approach represented in *Joy Mining* case, along these lines:

International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law (...) Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?⁶⁴

According to Tribunal's opinion in *CSOB*

“an investment is frequently a rather complex operation, composed of various interrelated transactions”.⁶⁵

On the facts of recent case, the Claimants activity consisted only from one operation – contracting the single License Agreement with BioLife.

c) The lack of contribution to host State's development

43. The Respondent submits that the Claimant activity was limited to signing the License Agreement with BioLife. Invoked performance does not conform with the universally renowned requirement of substantial commitment and a significance for the host State's development.⁶⁶

Subsequently, the respondent invokes that the Claimant's business activity had not a fixed character. The termination of the License Agreement caused that every effect on the Bergonian economy had vanished. According to the *MHS*

⁶⁴ *Joy Mining*, para. 58.

⁶⁵ *CSOB*, para. 72.

⁶⁶ described as the basic features of an investment i. e. in *Fedax*, para. 43.

“Construction Contract must, by its nature, constitute a paramount significance to the economic development of the host State”.

Subsequently, the tribunal in the invoked case established that the salvage contract did constitute a sufficient contribution, as the “benefit was not lasting”.⁶⁷

44. In addition, the respondent submits that the scale of the Claimant's business activity excludes it from the notion of the protected investment within the meaning of Article 25(1) of the ICSID. To support this standpoint, the invokes the interpretation of the “investment” established in *Mitchell*, along these lines:

Such a concept, as long as it is not supplemented by the appropriate restrictions, does not equally include, under the ICSID Convention, and, as demonstrated, under the BIT, 'smaller' investments of shorter duration and with more limited benefit to the host State's economy.⁶⁸

d) The lack of certain duration

45. The Respondent submits that the 24 –month binding period of the License Agreement does not conform with the requirement of the certain duration. The condition of the certain duration were confirmed in affluent case law, for instance in *Fedax*⁶⁹, *Salini*⁷⁰. According to the history of the ICSID Convention, a time of five years was considered at one point of the ICSID Convention draft.⁷¹ However, the Tribunals represent slightly more flexible approach to the issue of project duration.

⁶⁷ *MHS*, paras. 122 and 144.

⁶⁸ *Mitchell*, para. 56.

⁶⁹ *Fedax*, para. 43.

⁷⁰ *Salini*, para. 52

⁷¹ *Dolzer, Schruer*, p. 68.

46. According to the award in the *LESI*, the minimum contract's duration of 50 months satisfied the condition of certain duration.⁷² Consequently, in *Bayindir* the Tribunal acknowledged that at least 4 year duration was sufficient.⁷³

The Tribunal in the *Jan de Nul* curtailed the certain duration prerequisite to the two year period.⁷⁴ However, in that specific period Jan de Nul commenced intensive and diverse activities. The investment consisted of a dredging operation in the Suez Canal. Therefore the contribution to development was evident. The circumstances of the recent case are dissimilar and that short certain duration period would inapplicable.

1. THE COMPULSORY LICENSE

1) Lack of expropriation

47. The Respondent submits that the compulsory license concerning Patent No. AZ2005 does not amount to expropriation and does not violate otherwise general international law or applicable treaties.

1) Lack of expropriation within the meaning of bilateral treaties.

48. The Respondent submits that the compulsory license does not amount to direct or indirect expropriation, nationalization or any other measure the effects of which would be tantamount to expropriation or nationalization. The Bergonian IP Office's actions could not be subject to obligations defined in Article 4(2) of Bergonia - Convenencia BIT.

⁷² *LESI*, para. H5.

⁷³ *Bayindir*, para. 133.

⁷⁴ *Jan de Nul*, paras. 93–96.

a) Diminutive duration of a measure

49. The duration of the compulsory license is insufficient to constitute expropriation. The Bergonian IP Office issued a compulsory license which is limited in time for 48 months.⁷⁵ Respondent emphasizes that Bergonia granted Patent No. AZ2005 in compliance with the TRIPS Agreement on 15 March 2005. Patent protection The TRIPS Agreement requires WTO Members to provide protection for a minimum term of 20 years from the filing date of a patent application for any invention including for a pharmaceutical product or process. The comparison of the duration of compulsory license and the duration of the patent result with the conclusion that the recent IP office action has merely ephemeral character.

50. The case law of investment tribunals support the Respondent's standpoint. The tribunal in *SD Myers* decided that measure which was in force for 18 months has limited effect and did not amount to an expropriation and, in addition, declared that:

“An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights”⁷⁶

51. Moreover, similar approach to the permanence of the expropriation were represented in *LG&E*, the tribunal held that:

“Thus, the effect of the Argentine State's actions has not been permanent on the value of the Claimants' shares', and Claimants' investment has not ceased to exist. Without a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment, the Tribunal concludes that these circumstances do not constitute expropriation.”⁷⁷

⁷⁵ see request Response no. 24.

⁷⁶ *S.D. Myers*, paras. 287 – 288.

⁷⁷ *LG&E*, para 200.

b) Lack of investment deprivation

52. Subsequently, the Tribunal in *LG&E* stated that interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished.⁷⁸ The related position were expressed in *Tecmed*. The Respondent submits that on the facts of recent case Claimant's business were not deprived of its profits by the issuance of the compulsory license.⁷⁹

The Claimant after the termination of License Agreement with BioLife, at the time of issuing the compulsory license, did not achieve any income from the patent No. AZ2005. In addition, Claimant had no immediate plans to license its intellectual property to a third-party in Bergonia.⁸⁰ Moreover, it cannot be said that Claimant lost control over their ownership in the patent, even though the value of the shares may have fluctuated during the operation of compulsory license. The Claimant even during the operation of compulsory license were able to sign independent License Agreements with the third-parties in Bergonia.

53. Furthermore, the IP Office actions does not influence the MedBerg company. The governmental operation did not accomplish the rations which were recognized in *Pope and Talbot* to allege expropriation such as day-to-day operations, work of the employees, management and shareholders activities etc.⁸¹

c) Executing police powers of State

54. Respondent submits that the police power of States were given to IP office by the domestic law and the TRIPS Agreement. The Bergonian State has sovereignty in regulating domestic pharmaceutical market.

⁷⁸ *LG&E*, para 191

⁷⁹ *Tecmed*, para 115.

⁸⁰ see response to Request no. 42.

⁸¹ *Pope and Talbot*, para. 100.

55. According to current ruling in *Saluka*, The Bergonian IP Office's actions could not be subject to obligations for expropriation defined in Article 4(2) of Bergonia - Convenencia BIT. The invoked tribunal ruled that:

“State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v. USA* said recently in its final award, “[i]t is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required”⁸²”

The analogous reasoning could be found in *Tecmed* as follows:

“The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable. Another undisputed issue is that within the framework or from the viewpoint of the domestic laws of the State, it is only in accordance with domestic laws and before the courts of the State that the determination of whether the exercise of such power is legitimate may take place. And such determination includes that of the limits which, if infringed, would give rise to the obligation to compensate an owner for the violation of its property rights.”⁸³

Moreover, The Iran-United States claims tribunal ruled in *Too v Greater Modesto Insurance Associates* that:

“A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.”⁸⁴

⁸² *Saluka*, para 262.

⁸³ *Tecmed*, para. 119.

⁸⁴ *Too v Greater Modesto Insurance Associates*, para. 26.

Similarly, the tribunal in *S.D. Myers* held that

“the general body of precedent usually does not treat regulatory action as amounting to expropriation.”⁸⁵

Correspondingly, in *Lauder* it was established that:

“Parties to the Treaty (Czech-Slovakia-US BIT's) are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State.”⁸⁶

56. The Respondent underlines that in the *Lauder* the provisions of Czech-Slovakia-US BIT in regards to expropriation were parallel to the article Article 4(2) of Bergonia - Convenencia BIT, i. e. as follows:

Article III(1) of the Czech-Slovakia-US BIT Treaty

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except for a public purpose; in accordance with due process of law; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with the general principles or treatment provided for in Article II(2)

Article 4(2) of Bergonia - Convenencia BIT

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 (hereinafter referred to as “expropriation”) in the territory of the other Contracting State except, 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.

⁸⁵ *S D Myers*, para. 281.

⁸⁶ *Lauder*, para. 198.

1) The obligation of treatment in accordance with international law.

a) Bergonia could not be liable on the sole basis of the specific measures implemented in the TRIPS Agreement.

57. Respondent is apprehensive, if the TRIPS Agreement could be the subject of the international law in the meaning of Article 8 (1) Bergonia – Convenencia BIT. As a general rule, the TRIPS Agreement could not be directly invoked by private entities, but only by political protection of Member States. The Respondent submits that dispute in regards to the TRIPS Agreement application should be adjudicated by The Dispute Settlement Body (DSB) of the World Trade Organization (WTO).

This approach is supported by Sornarajah:

“Intellectual property rights are created in domestic law, and apply within the system which creates it. In the sense the instrument properly requires that violations of these standards should be addressed through domestic law. It is only a failure to address them in that manner that would result in the violation of the international obligation.”⁸⁷

However, the Tribunal could share *Gaetan Verhoosel* standpoint:

“This is also true for the TRIPS Agreement, which requires certain guarantees of judicial protection and domestic remedies for foreign intellectual property right holders. When the parties to BITs have signed up to those disciplines, there is *a priori* no reason why such disciplines could not impart meaning to what is "fair and equitable" treatment of investors or treatment "in accordance with" or "no less favorable than" international law.”⁸⁸

58. The Respondent submits that when the TRIPS Agreement is considered by Tribunal as a “fair and equitable” treatment measure, the TRIPS Agreement could only be a guideline how

⁸⁷ *Sornarajah*, page 302

⁸⁸ *Gaetan Verhoosel*

to interpret the Bergonia obligations to foreign investors. However, Bergonia could not be liable on the sole basis of the specific measures implemented in the TRIPS Agreement.

b) The compulsory license satisfy requirements established in TRIPS Agreement.

59. The Respondent submits that the compulsory license with respect to Patent No. AZ2005 complies with the TRIPS Agreement. In addition, due to the compliance with the TRIPS Agreement, the Claimant could not allege unfair and inequitable treatment by Bergonia State. The TRIPS Agreement were established to promote effective and adequate protection of intellectual property rights. It would be unreasonable to imply that Bergonian State should operate differently than the States were obliged to under the TRIPS Agreement.

c) Compliance with the mechanism established in the Article 31 of the TRIPS Agreement.

60. Article 31 of the TRIPS Agreement (Other Use Without Authorization of the Right Holder) stipulates that

Where the law of a Member allows for other use⁸⁹ of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected

- (a) authorization of such use shall be considered on its individual merits;
- (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;
- (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only

⁸⁹ "Other use" refers to use other than that allowed under Article 30.

be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

- **Attempt to obtain a voluntary license**

61. According to the facts of recent case, BioLife had sought to renegotiate the terms of the License Agreement, but that Claimant ended these negotiations after only three days. Furthermore, the Claimant had no immediate plan to license its intellectual property to third-party in Bergonia.⁹⁰ Subsequently, BioLife invoked for the compulsory license with respect to Patent No. AZ2005. Furthermore, due to Claimant behavior, the Patent No. AZ2005 were not utilized in Bergonia from 31 March 2007 until 1st November 2007. Respondent submits

⁹⁰ see response to Response no. 42.

that the requirement of attempting to within a reasonable period of time to obtain authorization from the right holder on reasonable commercial terms were fulfilled.

- **The existence of national emergency or other circumstances of extreme urgency**

62. Although the proposed user has made efforts to obtain the license on reasonable commercial terms, the Respondent submits that it was avoidable effort to issue the compulsory license in conformity to the TRIPS Agreement. The Respondent were entitled to issue a compulsory license without authorization of the right holder due to the existence of extreme urgency. The Compulsory license was issued on the grounds of public health.

63. The technology covered by MedBerg's Patent No. AZ2005 is used to produce certain health-related products, which are important for Bergonia's domestic medical needs. 34% of males and 38% of females in Bergonia are obese.⁹¹ The Bergonian Health Ministry has funded several information campaigns on nutrition and exercise, and together with the Bergonian Exchequer has prepared a "Green Paper" on imposing an 18% tax on sugared beverages and beverages containing corn syrup.⁹² Furthermore, the technology covered by Patent No. AZ2005 is to recognized as the most effective and no generic version of the product were on the market.

Respondent emphasizes that in 1997 the WHO formally recognized obesity as a global epidemic and the existence of circumstances of extreme urgency is unambiguous.⁹³ According to the Declaration on the TRIPS Agreement and Public Health, Respondent determines that the obesity constitutes a public health crises:

"Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health

⁹¹ See response to Request no. 65.

⁹² See response to Request no. 85.

⁹³ *Caballero*

crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.”⁹⁴

64. In the light of the above, the Respondent points out that each of the Members can determine the meaning of “national emergency or other circumstances of extreme urgency” at its own discretion; “[t]his is a strong statement of Member sovereignty”⁹⁵. The Tribunal should take the above into account in considering whether the requirement of “public purpose” was met.

The Respondent submits that, the technology covered by Patent No. AZ2005 could be treated as an essential medicine in the circumstances of the recent case. According to the latest WHO definition, essential medicines are:

“those that satisfy the priority health care needs of the population. Essential medicines are selected with due regard to disease prevalence, evidence on efficacy and safety, and comparative cost-effectiveness. Essential medicines are intended to be available within the context of functioning health systems at all times, in adequate amounts, in the appropriate dosage forms, with assured quality, and at a price the individual and the community can afford. The implementation of the concept of essential medicines is intended to be flexible and adaptable to many different situations; exactly which medicines are regarded as essential remains a national responsibility”.⁹⁶

- **Appropriate procedures and authorities in the Bergonian State.**

65. The Respondent submits that the compulsory were considered on its individual merits. It is well-documented that certain population groups within Bergonia have a genetic pre-

⁹⁴ Article 5 (b) of the Doha Declaration.

⁹⁵ *Abbott, Cottier, Gurry*, p. 202.

⁹⁶ *WHO. The selection and use of essential medicines*, p. 54.

disposition toward obesity. Two studies were published supporting the efficacy of the patented products and treatments in treating this type of obesity.⁹⁷

66. Furthermore, Bergonian IP Office's Patent Board Review is the competent authority to review, upon motivated request, the continued existence of public health crises. The Patent Review Board is a quasi-judicial body, which draws upon existing Bergonian judges to sit in particular intellectual property cases and be paid for their services by the Bergonian IP Office.⁹⁸ The Respondent submits that implemented public sector governance policy conforms with the requirement of the independent review by a distinct higher authority.

- **The right holder was notified as soon as reasonably practicable.**

67. According to the facts of the recent case, the Claimant was notified properly. The Claimant communicated objection to the Bergonian IP office prior to and during the course of the compulsory proceedings.⁹⁹

- **The limited duration of non-exclusive compulsory license.**

68. According to the response to Request no. 24, the time limit for the compulsory amount to 48 months. Respondent submits that invoked time period is appropriate for the purpose of attempt to reduce the health crisis . In addition, according to the facts of recent case, the compulsory license has a non-exclusive character. Six Bergonian entities had invoked the compulsory license.

- **The supply of the domestic market of the Respondent.**

69. According to the Article 31(f) of the TRIPS Agreement, the compulsory license shall be authorized predominantly for the supply of the domestic market of the Member authorizing

⁹⁷ see response to Request no. 26.

⁹⁸ see response to Request no. 29.

⁹⁹ see response to Request no. 73.

such use. Respondent submits that the compulsory license were granted with the main purpose of supplying a national market. The compulsory license did not include any measures about allowance for export of products based on Patent No. AZ2005.¹⁰⁰ According to the facts of recent case, there occurred some issues of parallel import to the Countries which are the members of customs union and as a minimum one least-developed countries.¹⁰¹ The Respondent is the member to invoked customs union.

70. The Respondent submits that obligation of the predominant supply of the domestic market could not be invoked by the Claimant. The Article 3(4) of Bergonia - Convenencia BIT determine as follows:

Article 3: National Treatment and Most-Favoured-Nation Treatment of Investments Bergonia – Convenencia Bit

- (4) Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market, a free trade area as well as any other form of regional economic integration or by virtue of any agreements on avoidance of double taxation or other agreements regarding matters of taxation.

71. Futhermore, the Respondent submits that the compulsory license with respect to Patent No. AZ2005 complies with the obligation to the predominant supply of the domestic market. The institution of the Article 31 lies in the need to create large enough markets to achieve economies of scale for medicines produced under compulsory license. The Respondent submits that an understanding of the “domestic market” cover market within customs union.

72. Alternatively, the Respondent emphasizes that parallel importation is legal in terms of the TRIPS Agreement. Claimants exclusive patent right is exhausted throughout the trade bloc, under the principle of Customs union exhaustion. Bergonian States applies this principle of

¹⁰⁰ see response to Request no. 30.

¹⁰¹ see response to Request no. 62.

exhaustion of intellectual property rights within a territory of custom union. According to this principle, an intellectual property right is exhausted when a patented product is first put on the market.

The exclusive right of patent owner, conferred by Article 28 of the TRIPS Agreement, to import the patented product is limited by attached cross-reference. This cross-reference establish that the exclusive right to import is subject to Article 6 of the TRIPS Agreement, as follows:

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights

73. Under that Article, the issue of exhaustion of rights cannot be addressed by the Dispute Settlement Understanding, unless it is the basis for a discrimination claim. This mean that Bergonia can have the exhaustion regime they have chosen. According to the article published by World Health Organization:

“the Agreement does not impose any obligation on Member States on this point, which remains purely a national issue. A Member State is completely free to decide whether or not to apply the principle of the exhaustion of the patent owner's rights.”¹⁰²

Furthermore, the respondent submits that the circumstance of parallel import to the least-developed countries could be classified as the “exception to the exclusive rights” of the patent holder allowed by Article 30 of the TRIPS Agreement, as follows:

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

¹⁰² Velásquez, Boulet, p. 24.

According to Article 7 and Article 8.1. of the TRIPS Agreement, invoked exception is justified due to the principle to “protect public health and nutrition and to transfer and disseminate of technology.”

74. Finally, the Respondent emphasizes that the obligation for “*predominant*” supply of the domestic market concerning compulsory license issued on the foundation of Article 31 the TRIPS Agreement does not establish obligation to sale 100% of product on the domestic market.

- **The adequate remuneration in the circumstances of recent case.**

75. The Respondent submits that in the circumstances of recent case the Claimant were provided with adequate remuneration. The royalties are universal form of remuneration for the patent owners.¹⁰³ However, the TRIPS Council did not determine any royalty guidelines. Furthermore, the aim of issuing the compulsory license is to promote access to medicines. This aim will be often realized by setting the royalties rate at lower rate than the patent owners charges in a free market. Pharmaceutical budget allocations to address this price justification were investigated by independent authorities and revealed that marketing expenditures of new drugs have often doubled the amount that was allocated for required research and development.¹⁰⁴

¹⁰³ “in February 2000 that 5 percent was the average US royalty rate for pharmaceutical drugs, and Japan has used rates from 2 to 4 percent in the past for some purposes, while for pharmaceuticals Germany has used 2 to 10 percent. In the Canadian case, which according to the WHO is the most extensive use of compulsory licensing for pharmaceutical products, the government typically ordered royalties around 4 percent.” in: *James Love*.

¹⁰⁴ *Barton, Emanuel*, p.p. 2075-2082.

76. Moreover, the Respondent highlights that, the Bergonia gross domestic product (GDP) amount to US \$7,535 in 2006.¹⁰⁵ The Bergonia should be considered as developing country and the citizens do not have immense financial powers to expense overpriced medicines .

According to the response to Request no. 42, The Claimant believes the royalty rates that have been set by the Bergonian IP Office are inadequate. The percentage royalty rate was moderately lower than the rate that had been in effect under the terms of the License Agreement between MedBerg and BioLife.¹⁰⁶ The Respondent submits that there is market customary practice to set royalty rates lower for the non-exclusive license (the compulsory license agreement) than for exclusive license (previous License agreement with Biolife). In addition, the Claimant were not disallowed to contract independent License Agreement for the Patent No. AZ2005 on the free market terms.

77. Furthermore, the Respondent emphasizes that the Claimant had no immediate plans to license its intellectual property to a third-party in Bergonia. In the absence of compulsory license, the Claimant would gain no profits from the Patent No. AZ2005 on the Respondent's Territory. Furthermore, the units sold by the six firms invoking the compulsory license is 155 % of that sold previously by BioLife alone. Total sales revenue for the six firms (including BioLife) is higher than it was for BioLife under the License Agreement.¹⁰⁷ Although the royalty rates were lower the total amount of remuneration could be moderately higher than from the free market License Agreement.

78. To conclude, the Respondent submits that the Claimant were adequately remunerated in the convertible currency that was easily transferable out of Bergonia.¹⁰⁸ The Claimant's refusal to accept the collected royalties was unfounded.

¹⁰⁵ see response to Request no. 44.

¹⁰⁶ see response to Requests no. 24 and 88.

¹⁰⁷ See response to Request no. 19.

¹⁰⁸ See response to Request no. 86.

d) Alternatively, the lawful expropriation within provisions of Bergonia – Convenencia BIT and general international law.

79. Alternatively, if the Tribunal concerns that the compulsory license with respect to Patent No. AZ2005 could be classified as an expropriation, the Respondent submits that the compulsory license constitute a lawful expropriation within the meaning of applicable treaties.

The Respondent submits that it had the right to expropriate. Therefore, the Claimant's request to stop the utilization of the patented technology should be rejected due to the fact that the Respondent had the right to issue the compulsory license.

The right of the state to expropriate is undisputed. As it was observed in the doctrine:

“consistent with the notion of territorial sovereignty, the classical rules of international law have accepted the host state's right to expropriate alien property in principle. Indeed, state practice has considered the right to be so fundamental that even modern investment treaties (often entitled agreements “for the promotion and protection of foreign investment”) respect this position. Treaty law typically addresses only the conditions and consequences of an expropriation, leaving the right to expropriate as such unaffected.¹⁰⁹”

80. Sharing the above approach, the Claimant is entitled to compensation, but cannot make the Respondent revoke the compulsory license. The Claimant's view of the issue is unacceptable due to the fact that it leads to illogical and unjust consequences and, in fact, would contravene the very nature of the compulsory license.

¹⁰⁹ *Dolzer, Schreuer*, p. 89.

e) The requirements of lawful expropriation within provisions of Bergonia – Convenencia BIT.

81. The Article 4.2 of the Bergonia – Convenencia BIT determine conditions to establish the lawful expropriation, as follows:

Article 4

(2) Investments by investors of either Contracting State shall not directly or indirectly be expropriated, (...) except, 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. 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.

• **The existence of public benefit**

82. Compulsory license was issued on the grounds of public health, for a reason that the eruption of obesity occurred in the Bergonia.¹¹⁰ According to the Arbitrator Mahmassani in *LIAMCO*, the requirement of public purpose in regards to expropriation is flexible, it was acknowledged that:

“Motives are indifferent to international law, each state being free to judge for itself what it considers useful or necessary for the public good.”¹¹¹

Furthermore, in *James* the European Court of Human Rights declared that:

“The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be wide one, will respect the legislature's judgment as to what is “in the public interest” unless the judgement be manifestly without reasonable foundation.”¹¹²

¹¹⁰ See response to Request no. 65.

¹¹¹ *LIAMCO*

¹¹² *James*

83. The Respondent submits that issuance of the compulsory license with respect to Patent No. AZ2005 was reasonable. The problem of obesity in Bergonia was well documented and previous preventive actions conducted by the Respondent were ineffective. Moreover, the technology covered by patent was thought to be most efficient.¹¹³

The TRIPS Agreement allows to issue compulsory license and leaves the Members with a wide discretion of determining the conditions of the issuing – including the meaning of the term “public purpose”. Therefore, the “public purpose” regulated under the TRIPS Agreement is applied *a simile* to requirement of “public purpose” under the requirements of legal expropriation. In the alternative, should the aforementioned terms be separable, a situation when a lawful compulsory license amounts to an illegal expropriation could occur. Apparently, such interpretation would be interpretation *per non est* of the TRIPS Agreement and would be unacceptable

- **The issuance on a non-discriminatory basis and the review by due process of law.**

84. The Respondent submits that the compulsory license was issued on the non-discriminatory basis. It is unambiguous that the actions conducted by IP Office were aimed to improve the general health of the Bergonian society.

Furthermore, the Respondent submits that the principle of due process of law was not infringed during the issuance of compulsory license. The IP Office decision are reviewed by The Patent Review Board, which is a quasi-judicial body, which draws upon existing Bergonian judges.¹¹⁴ Moreover, the Claimant had opportunity to raise objections and exercised that right.¹¹⁵

¹¹³ see responses to Requests no. 85 and 26.

¹¹⁴ see request no. 29.

¹¹⁵ see request no. 73.

85. According to the due process of law standard expressed by Tribunals, the procedural safeguards have not been violated. In *Thunderbird*, the tribunal held that the standards of due process and procedural fairness applicable in administrative proceedings are lower than in a judicial process.¹¹⁶

Correspondingly, the Tribunal in *ADC* stated as follows:

“basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the action in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful.”¹¹⁷

Similarly, in the *Waste Management* it was determined as follows:

“a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”¹¹⁸

- **The existence of prompt, adequate and effective compensation.**

86. The compensation was arranged and offered to the Claimant. The refusal of the payment reception by the Claimant does not entitle to the statement that the Claimant has not been compensated for an expropriation. Furthermore, the Respondent submits that arranged compensation complies with the standard of promptness, adequateness and effectiveness.

- **Prompt compensation paid without delay.**

87. According to the facts of recent case, the compensation in the form of royalties payable yearly was prompt and paid without delay.¹¹⁹ The Respondent emphasizes that in the time of

¹¹⁶ *Thunderbird*, paras. 198 -200.

¹¹⁷ *ADC*, para. 432.

¹¹⁸ *Waste Management*, para. 98.

¹¹⁹ see response to Request no. 87.

issuance of compulsory license, the Patent No. AZ2005 were not utilized in Bergonia. Furthermore, the Claimant had no immediate plan to license its intellectual property to third-party in Bergonia.¹²⁰

Lump-sum compensation for compulsory license would be against modern intellectual property market practice.¹²¹ For instance, in the situation were the compulsory license have not been invoked there would be no utilization of the technology covered by the Patent No. AZ2005 and in summary no expropriation. Subsequently, the lump sum could be not proportional to the scale of the production on the basis of the compulsory license.

88. The Respondent submits that period stipulated in the terms and conditions of the compulsory license cannot be reasonably set forth as shorter. 12 months are required to estimate the amount of sale which affects the amount of royalties to be paid. The period should take into account such factors as: arrears, fluctuation of sale during the year, effects of advertisement and reputation of products and treatments, should it gain any, effect of the market competition with other similar products and treatments available in Bergonia (response to Request no. 114) etc. The period of 12 months is a minimum in which the impact of the aforesaid factors can be assessed.

– **Effectiveness of the payment .**

89. The Respondent invokes that the requirement of effective compensations is universally interpreted, that payments is to be made in a convertible currency.¹²² According to the facts of recent case, the compensation were expressed in convertible currency that was easily transferable out of Bergonia.¹²³

¹²⁰ see response to Request no. 42 .

¹²¹ *James Love*

¹²² *Dolzer, Shreuer*, p. 92.

¹²³ see response to Request no. 86.

– **Adequateness of the royalty rates.**

90. The Respondent submits that the royalty rates were adequate to the circumstances of the recent case. Although the percentage royalty rate was moderately lower than the rate that had been in effect under the terms of the License Agreement between MedBerg and BioLife, the units sold by the six firms invoking the compulsory license is 155 % of that sold previously by BioLife alone. Taking into consideration the scale of the sale, the remuneration for the Claimant could be moderately higher than from the free market License Agreement.¹²⁴

91. In addition, the Respondent submits that there is market customary practice to set royalty rates lower for the non-exclusive license (the compulsory license agreement) than for exclusive license (previous License agreement with Biolife). Moreover, the circumstances of the national health crisis and the governmental aim to decrease the treatment charge should be invoked.

To support this standpoint, the common interpretation of the compensation could be highlighted. The ECtHR simply requires that the level of compensation be should not be “manifestly without foundation”.¹²⁵ Moreover, the UNCTAD Resolution 88 (11) states that it is “for each state to fix its compensation”.¹²⁶

• **The Claimant is not entitled to “full compensation - inapplicability of *Factory at Chorzow***

92. Royalties payable to the Claimant under the terms and conditions of the compulsory license constitute a “compensation”. The Claimant is not entitled to “full compensation”. As

¹²⁴ See responses to Requests no. 88 and 19.

¹²⁵ *Lithgow and others* 373, see also 329.

¹²⁶ *Sornarajah*, p. 480.

regards an allegation that royalties payable to the Claimant do not constitute a compensation, the Respondent states that a standard of compensation is different in case of a lawful and unlawful expropriation. Professor Sornarajah observed that any opposite approach to that issue

„makes no difference to the standard of compensation whether the expropriation is lawful or unlawful. Such a view cannot rest on logical foundations, for every legal system must necessarily make a distinction between damages arising from lawful and unlawful acts. There must be a distinction between a wrong or injury which require compensation by way of remedy and a justifiable act which requires any person who has been adversely affected as a result is recompensated through the payment of money (...) if the law makes it lawful for a state to nationalize and makes certain types of taking unlawful, that law must also ensure that there is a distinction to be drawn in the awarding of damages.¹²⁷”

93. In the event that the Tribunal finds that the investment of the Claimant was expropriated, the Respondent submits that - as proven above – the expropriation was lawful. Therefore, any standard of compensation for illegal taking of property, e. g. presented in *Factory at Chorzow*¹²⁸, is not applicable to the legal takings.

94. Firstly, the Respondent argues that neither the provisions of the Bergonia-Conveniencia BIT, nor any the provisions of the Bergonia-Tertia BIT applied via the MFN clause, require the investor to be paid a “full” compensation. The Contracting States to the Bergonia-Conveniencia BIT regulated the payable compensation as “prompt, adequate and effective”. The ordinary meaning of the above-mentioned terms clearly shows that the parties to the Bergonia-Conveniencia BIT did not intend to require the investor to be paid a “full” compensation, nor the object and purpose of the Bergonia-Conveniencia BIT (as discussed in

¹²⁷Sornarajah, p.p. 438-439.

¹²⁸*Factory at Chorzow*, p. 47; see also: *S.D. Myers*, para. 311.; *Metalclad*, para. 122.; *CMS Gas Transmission Company*, para. 400.; *Pertobart Limited*, p. 77-78.; *Amoco*, paras. 191-194.; *Gabcikovo-Nagymaros*, para. 152; *LaGrand*, para. 125; *Avena*, paras. 119-121; *Arrest Warrant*, para. 76; *Wall in the Occupied Palestinian Territory*, para. 153.

para ...) give reason to construe the Article 4 of the Bergonia-Conveniencia BIT contrary to the ordinary meaning of the terms included therein.

95. The Respondent points out that standard of “appropriate compensation” is accepted in practice of American and European courts and tribunals, both in applying the provisions of international and internal law¹²⁹. As observed the European Court of Human Rights in *James*:

“Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake, and notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions. The Court further accepts the Commission's conclusion as to the standard of compensation: The taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 of the First Protocol. Article 1 does not guarantee a right to full compensation in all circumstances. Legitimate objectives of “public interest”, set as pursued in measures of economic reform or measured designed to achieve greater social justice, may call for less than reimbursement of full market value.¹³⁰”

In the light of the above, it is apparent that the Claimant is not entitled to “full compensation” and that an amount of compensation should be estimated taking into consideration the importance to the state of Bergonia. As discussed above, the patented technology is of the essence to the population of Bergonia.

- **The Claimant should have accepted the offered royalties.**

96. As it was proven above, the Claimant cannot efficiently request the Tribunal to make the Respondent revoke the compulsory license.

Although the Claimant is not a party to the Bergonia-Conveniencia BIT, it gained a benefit from the Bergonia-Conveniencia BIT. The Claimant is a third-party in relation to the

¹²⁹*Sornarajah*, p. 448-451.

¹³⁰*James*, para. 147.

Contracting States and provisions of VCLT concerning third States (i. e. Articles 34-38 of VCLT) should be applied *a simile* to the Claimant. As regard the requirement of consent of the third-party (Article 34 of VCLT), the Respondent states that the Claimant acted under the provisions of the Bergonia-Conveniencia BIT (e. g. response to Request no. 111) and – therefore – impliedly agreed upon rights and obligations stipulated therein.

According to the Article 26 of the VCLT:

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

97. Having considered the approach presented in preceding paragraph, the Respondent submits that the above rule should be applied *a simile* to the Claimant. In a process of interpretation of Article 26 of VCLT, an observations of the ICJ cannot be omitted. In *Nuclear Tests (Australia v France)*, the ICJ found that

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this CO-operation in many fields is becoming increasingly essential.¹³¹”

In *Gabcikovo-Nagymaros*, the ICJ stated that:

“the purpose of the Treaty, and the intentions of the Parties in concluding it, ... should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.¹³²”

Both parties to the instant dispute were obliged to act in a good faith. The *bona fide* principle is relevant to estimate legality of the Claimant's refusal of acceptance of royalties. The Claimant should act in a way that would reduce any possible detriment a Respondent could suffer from the Claimant's actions; as far as the issue in question is concerned – the Claimant

¹³¹*Nuclear Tests (Australia v France)*, para. 46.

¹³²*Gabcikovo-Nagymaros*, para. 79.

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should accept the offered royalties and thus – reduce an amount of interests that the Respondent would be obliged to pay if the royalty rates were found to be too low. The Claimant refused to accept the royalties and – by that action – violated the good faith principle.

Respectfully submitted,

Team Guerrero