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BEFORE THE FRANKFURT INTERNATIONAL ARBITRATION CENTRE

(ICSID Case No. ARB/X/X)

MEDBERG CO.

Claimant

v.

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA

Respondent

**FOREIGN DIRECT INVESTMENT INTERNATIONAL
MOOT COMPETITION (FDI MOOT)**

2009

Frankfurt, Germany

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- TSA Spectrum de Argentina S.A. v. Argentine Republic ICSID Case No ARB/05/5; IIC 358 (2008)
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- *CSOB v Slovak Republic* , Decision on Jurisdiction, 24 May 1999, 14 ICSID Rev-FILJ (1999).
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Applicable Conventions and Treaties

- The International Convention on Settlement of Investment Disputes.(ICSID)
- The Trade-Related Intellectual Property Rights.(TRIPS)
- The Vienna Convention on Law of Treaties.

Statement of Facts

Background of Claimant

- Claimant MedBerg Co. was established in Bergonia on 30th September 2004.
- Medscience Co. is accompany based in state of Laputa. MedScience is publicly traded, but it can be assumed that the majority of its shareholders are Laputan.
- Dr. Frankensid, who is dual national of Amnesia and Bergonia but habitually resides in Laputa since 1998, is a scientist employed by MedScience Co. and credited with a breakthrough leading to several patents including Bergonian Patent No. AZ2005. Dr. Frankensid is a Bergonian national by descent and birth. He was naturalized in Amnesia in 1991.
- 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.
- MedScience Co. and Dr. Frankensid acquired 50% each shares respectively in a company MedxHoldings ltd. on December 1, 2003 and had assigned their worldwide interests in the invention they were developing to MedX Holdings and MedX holdings assigned their interests with respect to Bergonia to Medberg. Medberg was established before the existence of Patent AZ2005.
- Claimant Medberg Co. applied for patent in relation to Dr. Frankensid's invention on 5 February 2004, and was granted Berginian Patent No. AZ2005 on 15 March 2005. Claimant is the Owner of Bergonian Patent No. Az2005.
- Claimant is represented by Broches & Partners in this present claim before the tribunal.

Background of Respondent

- Respondent is the Democratic Commonwealth of Bergonia.
- The income level of Bergonia was US \$7,535 GDP 2006.
- Respondent is having Bilateral Treaties with the Sultanate of Conveniencia which they have ratified on 6th October 2003 and the Government of Tertia which they have ratified on 15th March 2003.

- Respondent is represented by Shihata e Associati in this present claim before the tribunal.

Genesis of Dispute

- Claimant licensed BioLife Co., a Bergonian company, to utilise Bergonian Patent No. AZ2005 on 31 March 2005 (the License Agreement). The license agreement between BioLife and Claimant was an exclusive license. The Claimant terminated the License Agreement in accordance with the License Agreement's notice and termination provisions on 31 March 2007. BioLife complained that upon receiving notice of termination it had sought to renegotiate the terms of the License Agreement, but that Claimant ended these negotiations after only three days. MedBerg Co. does not admit that it refused any effort to renegotiate the License Agreement. MedBerg's revenues decreased after termination of the License Agreement. Medberg's choice to terminate was driven in large part by concerns of parallel exports of the patented treatments and products by BioLife into third-countries other than Bergonia, in a manner that Medberg believed was inconsistent with the terms of the License Agreement. These third-countries are members of a customs union with Bergonia. After terminating the License Agreement with BioLife Co., the Claimant had no immediate plans to license its intellectual property to a third-party in Bergonia.
- 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. 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. In particular, the patent covers a breakthrough treatment (and related products) that certain] medical experts believe is useful for treatment of obesity, which has been a serious problem among a large population group in Bergonia. Given the genetic make-up and traditional diet of this population, obesity has been a significant and long-standing issue, causing numerous other associated medical problems.
- The Bergonian IP Office issued a compulsory license for Patent No. AZ2005 on 1 November 2007. As of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license. These companies are using the technology covered by

Patent No. AZ2005 to produce certain health-related products. Three of these companies have exported some of the products to other countries. None of the companies that invoked the license entered into negotiations with claimant about a license agreement before the compulsory license.

- On numerous occasions, Claimant communicated its objections to the Bergonian IP Office, but these objections were not resolved to the Claimant's satisfaction. Despite Claimant's objections, there has been no independent review of the IP Office's decision to issue the compulsory license. Following the 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 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.
- On 1 November 2008, the ICSID Secretary General registered the dispute for arbitration.
- Claimant contends that Respondent's issuance of a compulsory license with respect to Claimant's intellectual property (Bergonian Patent No. AZ2005) violates its rights in accordance with general international law and applicable treaties, in particular Article 4 of the Bergonia Conveniencia BIT.
- Respondent contends that this Tribunal lacks jurisdiction because a national of Conveniencia does not have control of the Claimant within the meaning of ICSID Convention Article 25(2)(b), nor has Respondent consented to treat Claimant as a national of Conveniencia.

Agreed Points

- It was agreed that the proceedings herein shall be comprised of both written and oral procedures. It was agreed that ICSID Arbitration Rule 21 shall govern with respect to pre-hearing conferences.
- It was agreed that, pursuant to Article 44 of the ICSID Convention, the proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since 10 April 2006.
- The parties agreed that, in accordance with Article 61 of the ICSID Convention and Rule 14 of the ICSID Administrative and Financial Rules, the parties would defray the

expenses of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to costs. It was recalled that the Centre had requested in Case No. ARB/x/x each party to pay an amount of US\$25,000 to defray the costs of the proceeding during its first three to six months. The Claimant made the payment requested on 15 March 2008 and the Respondent on 17 March 2008.

- Bergonia, and Conveniencia are ICSID Contracting States and all have ratified the Convention. They are also Members of the World Trade Organisation (WTO) and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). They are also parties to Vienna Convention on laws of treaties.
- Laputa is not an ICSID Contracting State nor a Member of the WTO.

ARGUEMENTS

1. Whether the Tribunal has jurisdiction in view of the nationality of those parties controlling the Claimant?

The main purpose of ICSID is to facilitate the investment disputes between Government and foreign investors.¹ It is settled principle of the ICSID Convention that one party must be a 'contracting state' and other party must be a foreign 'national of another contracting state' for the purposes of settlement of investment dispute.² In the present claim the tribunal lacks jurisdiction as there does not exist any foreign control on Claimant by nationals of Conveniencia. In the present claim before the tribunal it is submitted that in view of the nationality of the claimant and the nationality of the parties controlling the claimant the essential requirements of Art25(2)(b) are not met and thereby the tribunal does not have jurisdiction to try the present claim.

I.1 Whether the requirements provided under Article 25(2)(b) of ICSID Convention are fulfilled?

It is settled law that to fulfil the requirements of Article 25 of ICSID Convention certain essentials are needed to be inherently present. The first is jurisdiction of Ratione Personae and the second is the foreign control under this article. Both these requirements are not met by the Claimant and thus this tribunal lacks jurisdiction to try this present claim.

I.1.1 Whether the jurisdiction of Ratione Personae is present in the present dispute?

The personal jurisdiction of ICSID is limited to disputes between a contracting state and a national of another contracting state.³ A Contracting State or any constituent subdivision or agency of a Contracting State designated to the Centre by that State shall stand on one side. On the other side, there must be an investor being the national of another Contracting State. The investor party to the dispute can be either a natural or a juridical person. If such a juridical person is involved in the dispute and the parties have agreed that because of foreign control that juridical person shall be treated as a national of another Contracting State for the purposes of the

¹ Carolyn B. Lamm, *Jurisdiction of The International Centre for Settlement of Investment Disputes*, ICSID Review, Foreign Investment Law Journal, Vol.6, Number 2, Fall 1991 at 463.

² Article 1(2), The International Centre for Settlement of Investment Disputes.

³ Art 25(1), International Convention on Settlement of Investment Disputes.

Convention, the jurisdictional requirements are also met.⁴ In the present claim Respondent never treated Claimant to be national of Conveniencia nor a national of Conveniencia have control of the Claimant⁵ within the meaning of ICSID Convention.⁶ It is submitted before the tribunal that even mere proof of nationality cannot itself prove the existence of foreign control.⁷ It is again contended that if one considers as a foreign national, each company controlled by a foreign corporation a government permit, then why have Article 25(2)(b) at all?⁸ It is settled principle that consent to international arbitration between a state and a juridical person should not be open to doubt and that a liberal interpretation of Article 25(2)(b) would hardly contribute to a wider acceptance of ICSID arbitration by states and to the protection of foreign investor, therefore, it is up to the foreign investor to take all necessary precautions whenever the creation of local legal person whether wholly or partly owned, is suggested or decided upon.⁹ In support of this view, the Tribunal should rely on *Vacuum Salt Products Ltd. v. Republic of Ghana*,¹⁰ which involved a claim under the BIT between Ghana and Greece. *Vacuum Salt* was incorporated in Ghana but claimed it was controlled by Greek citizens and therefore a ‘national’ of Greece in accordance with the definition of that term in the BIT. In this case Ghana objected to the jurisdiction on the ground that Vacuum Salt was a Ghanaian company. They never agreed to treat Vacuum Salt as a national of another contracting state’. However, the Tribunal concluded that such a provision in a BIT only raises ‘a rebuttable presumption of foreign control and cannot provide ICSID jurisdiction unless the conditions of Article 25(2)(b) are satisfied. The parties’ agreement to treat claimant as a foreign national because of foreign control does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to ‘foreign control’ necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so. The *Vacuum Salt* Tribunal then concluded that the claimant was in fact controlled by Ghanaian citizens and dismissed the claim for lack of jurisdiction. In the present claim it is humbly contended that the Claimant does not adhere to jurisdiction of Rationae Personae which is required by Article 25(2)(b) of ICSID convention and hence the present arbitration claim cannot be tried for lack of jurisdiction.

⁴ Article 25(2)(b), International Convention on Settlement of Investment Disputes.

⁵ Para 2, Point 14, page 5 of the Problem.

⁶ Art 25(2)(b), International Convention on Settlement of Investment Disputes.

⁷ *Holiday Inns v. Morocco* case ARB/72/1.

⁸ M. Sornarajah, *The Settlement of Foreign Investment Disputes* at 210, 2000.

⁹ Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)-Some Legal Problems*, ICSID reports 645; W. Michael Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, ICLQ, Vol. 35, April 1986 at 817.

¹⁰ *Vacuum Salt Products Ltd. v. Republic of Ghana*, (ICSID Case No. ARB/92/1), June 11, 1992.

I.2 Whether the foreign control as defined in Art 25(2)(b) is exist in the present dispute?

Foreign control is an objective requirement which must be examined independently of the foreign control. Foreign control mentioned in Art 25(2)(b) refers to situation when a foreign national has control or influence on the national of another contracting state. What activities or facts can serve as the basis of such foreign control? There are many examples like capital or share ownership, different voting rights attached to different shares, decision-making procedures and exercise of management or know how but practically the scene is usually much more complex. It is submitted before the tribunal that no foreign control exist on the Claimant. Claimant is a national of Respondent state but is not under the control of national of Conveniencia. In the present case to know the existence of foreign control it is necessary to have on look on the concept of corporate veil.

I.2.1 Whether the Corporate veil needs to be lifted in the present claim?

In the present case it is submitted that the Claimant does not possess any foreign control. Claimant was incorporated in Respondent's state and it is settled law that the place of incorporation and its seat itself proves the nationality of juridical person.¹¹ And under this tribunal a national cannot bring action against its own state without having foreign control. In *TSA Spectrum de Argentina S.A. v. Argentine Republic*¹², a tribunal constituted pursuant to the Rules of the International Centre for the Settlement Investment of Disputes dismissed on jurisdictional grounds the claim by TSA, a wholly-owned subsidiary of a Dutch company, that Argentina breached its obligations under the Bilateral Investment Treaty between the Netherlands and Argentina, when it terminated a concession contract between TSA and a government agency. It is submitted that in that case the Tribunal rejected Argentina's request for dismissal based on a forum selection clause in the concession contract while observing that it did not have jurisdiction under Article 25(1) of the ICSID Convention because, despite the fact that the claimant was a Dutch national, TSA was ultimately controlled by an Argentine citizen. The second issue considered by the Tribunal was more controversial. Article 25(1) of the ICSID Convention provides that ICSID has jurisdiction over disputes between a Contracting State and a national of another Contracting State. In the case of corporations (juridical persons), the first clause of Article 25(2)(b) defines a national of another Contracting State as a juridical person with the

¹¹ Amco Asia Corporation and others v. Indonesia Case No. ARB/81/1.

¹² TSA Spectrum de Argentina S.A. v. Argentine Republic ICSID Case No ARB/05/5; IIC 358 (2008)

nationality of the State other than the State party to the dispute. In such circumstances, tribunals have generally upheld jurisdiction even where the corporation of the other state is owned or controlled by nationals of the state party to the dispute. Thus, in *Tokios Tokelés v. Ukraine* and *Rompetrol Group N.V. v. Romania*,¹³ the Tribunal held that a Lithuanian corporation was a Lithuanian national even though it was controlled by Ukrainian citizens. Refusing to “pierce the corporate veil,” the Tribunal found that it had jurisdiction to consider the corporation’s claim against Ukraine under the first clause of Article 25. But TSA presented a different problem, because it was incorporated in Argentina, not in the Netherlands. Therefore, the Tribunal had to determine jurisdiction based on Article 25(2)(b). In analyzing the second clause of Article 25(2), the Tribunal concluded that “the existence and materiality of foreign control have to be objectively proven” by the complaining party even if the parties have agreed that a juridical person should be treated as a national of another contracting State. That is, TSA had the burden of proving that the Dutch corporation itself was under “foreign control.” The Tribunal acknowledged that *Tokios* and *Rompetrol*¹⁴ had adopted the ‘strict nationalist’ interpretation of nationality in the interpretation of Article 25(1) without piercing the corporate veil. However, those cases involved the first clause of Article 25, which requires that the judicial person hold the nationality of the foreign state. The situation in TSA case is different, according to the Tribunal, where the second clause is implicated, because the judicial person has the nationality of the contracting state party to the dispute. In these circumstances, the Tribunal argued that the text of Article 25(2)(b) itself allows the ‘lifting’ of the corporate veil and requires the Tribunal to pursue “its objective identification of foreign control up to its real source.” In support of this view, the Tribunal relied on *Vacuum Salt Products Ltd. v. Republic of Ghana*¹⁵ which too refused the presence of foreign control. In the present claim before the tribunal it can be clearly ascertained that the lifting of corporate veil is not necessary since the patent has been registered and licensed by Medberg, a company based in Bergonia itself. Since the control has been exercised fully by the company itself so the lifting of corporate veil is not necessary. So in the light of these authorities it is humbly submitted before the tribunal that it should not unnecessarily lift the corporate veil to bring the matter under jurisdiction.

¹³ *Tokios Tokelés v. Ukraine and Rompetrol Group N.V. v. Romania*, ICSID Case No ARB/02/18; IIC 258 (2004).

¹⁴ *Ibid.* supra note 13.

¹⁵ *Ibid.* Supra note 10.

I.2.2 Assuming Arguendo if the Corporate veil needs to be lifted then also the present dispute does not fall under jurisdiction of centre due to control of non-contracting state of ICSID?

If the text of Article 25(2)(b) itself allows the ‘lifting’ of the corporate veil then it is required by the Tribunal to pursue “its objective identification of foreign control up to its real source. It is humbly submitted before the tribunal that assuming arguendo the corporate veil is lifted than also the jurisdiction requirements of this tribunal are not met. Since as pleaded by Claimant the real owner is state Laputa and it is humbly submitted before the tribunal that Laputa is not an ICSID member¹⁶ and cannot avail the jurisdiction of this tribunal. And it is settled law that while agreement on foreign nationality may be inferred from the consent agreement but the same is not possible with regard to foreign control. In many earlier cases the presence of agreement on foreign control was presumed but in the present case it was in very beginning argued by the respondent that it did not agree to that a national of Conveniencia controls the Claimant nor it has refused to treat Claimant as national of Conveniencia. Claimant is national of Respondent state since it has been incorporated in Respondent state but it does not possess foreign control and even assuming it has, still then this tribunal does not possess jurisdiction to try this present claim because Laputa is not an ICSID contracting state.

¹⁶ Point No. 1, pg no. 20 of the Problem.

2. Whether Claimant's exploitation of its intellectual property in Bergonia constituted an investment under applicable international law?

The autonomous understanding of Article 25 has, in cases based on BITs, led to the practice of a dual examination of the notion of investment, sometimes called the 'double keyhole approach'. The tribunal in *CSOB v Slovakia*¹⁷ said in this respect: A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.¹⁸

2.1 Whether ICSID requirements of investments are fulfilled?

For ascertaining the definition of Investment the requirements of ICSID Convention are also to be complied with. In *Malaysian Historical Salvors*,¹⁹ the tribunal called this approach a 'double-barrelled test': Under the double-barrelled test, a finding that the Contract satisfied the definition of 'investment' under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the objective criterion of an 'investment' within the meaning of Article 25.²⁰ The decisive criterion for the existence of a foreign investment is the nationality of the investor. An investment is a foreign investment if it is owned or controlled by a foreign investor. From this it appears that the ICSID arbitration mechanism is meant for international investment disputes, that is to say, for disputes between States and foreign investors. It is because of their *international* character, and with a view to stimulating private international investment, that these disputes may be settled, if the parties so desire, by an international judicial body. The ICSID mechanism is not meant for investment disputes between States and their own nationals. It appears, therefore, that because of its specific object and purpose - namely, the protection of international investments, the ICSID Convention imposes strict obligations and limitations on both the Contracting States and the investors who are nationals of other Contracting States. It prohibits the use of diplomatic protection and excludes

¹⁷ *CSOB v Slovak Republic*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Rev-FILJ (1999).

¹⁸ *Salini Costruttori v Morocco*, Decision on Jurisdiction, 23 July 2003, 42 ILM 609 (2003), paras 44, 52.

¹⁹ *Malaysian Historical Salvors v Malaysia*, Award on Jurisdiction, 17 May 2007.

²⁰ *Ibid* at para 55.

the jurisdiction of domestic courts, for which it substitutes the recourse to its own, specific international arbitration mechanism.²¹ It follows that ICSID arbitral tribunals have to be particularly cautious when they determine their jurisdiction. An unwarranted extension of the ICSID arbitral jurisdiction would entail an unwarranted encroachment on both the availability of diplomatic protection and the jurisdiction of domestic courts. The silence of the Convention on the criterion of corporate nationality does not leave the matter to the discretion of the Parties. According to Article 31 of the Vienna Convention,²² which the International Court of Justice has repeatedly described as the expression of customary international law, “a treaty shall be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose”. It is indisputable, and indeed undisputed, that the object and purpose of the ICSID Convention and, by the same token, of the procedures therein provided for are not the settlement of investment disputes between a State and its own nationals. It is only the international investment that the Convention governs, that is to say, an investment implying a *transborder flux of capital*. This appears from the Convention itself, in particular from its Preamble which refers to “the role of private international investment” and, of course, from its Article 25. The basic idea of the Convention, as expressed in its title, is to provide for dispute settlement between States and foreign investors. Disputes between a State and its own nationals are settled by that State's domestic courts. The Convention is designed to facilitate the settlement of investment disputes between States and nationals of other States. It is not meant for disputes between States and their own nationals. The latter type of dispute is to be settled by domestic procedures, notably before domestic courts.²³

In the present case Claimant is a national of Respondent State and it is already proved that it does not possess foreign control, thus making it clear that there cannot be the redressal of grievances arising out of an Investment by its own national in this tribunal. The remedy is thus local and lies in domestic courts. An investment as desired under the ICSID Convention is that it should be made by the nationals of another contracting state or maximum by one's own national provided they have foreign control.²⁴ But since in the present dispute there exist no foreign control on Claimant so the intellectual property right of Claimant is not an investment under this Convention.

²¹ Article 27, ICSID Convention.

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

²³ *Amco Asia Corp. and Others v. Republic of Indonesia*, Decision on Jurisdiction, Case No. ARB/81/1 (Sept. 25, 1983), 1 ICSID Reports 389, 396.

²⁴ Article 1(2) and Article 25(2)(b), ICSID Convention.

2.2 Whether the provisions regarding investment in BIT are applicable on Respondent?

It is humbly submitted that the provisions regarding investment in BIT ²⁵are not applicable on Respondent in the present dispute since the Claimant has failed to fulfil the requirements of ICSID Convention. As with corporate nationality, the parties have broad discretion to decide the kinds of investment they wish to bring to ICSID.²⁶ Parties have a large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention.²⁷ Assuming arguendo if the BIT provisions are applicable then inference can be drawn to BIT with Tertia which Claimant invoked earlier which expressly excludes compulsory licenses from being treated as an expropriation.²⁸ But such an assumption can only be made if the Claimant fulfils the requirement of investment of Art 25 of ICSID. In the present claim it is submitted that since the Claimant's investment does not fall in the four corners of Art 25 of ICSID so the intellectual property right of Claimant is not an investment for the purposes of this dispute.

3. Whether the compulsory license amounts to expropriation or discrimination, or otherwise violates general international law or applicable treaties?

²⁵ Art 1 of Bergonia-Coveniencia Bilateral Treaty.

²⁶ Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 158, para.124.

²⁷ *Fedax N.V. v. Republic of Venezuela*, Decision on Jurisdiction, Case No. ARB/96/3 (July 11, 1997), 37 I.L.M. 1378 (1998), at para. 22 (quoting Carolyn B. Lamm and Abby Cohen Smutny, "The Implementation of ICSID Arbitration Agreements," 11 ICSID Review-FILJ 64, 80 (1996)) ("*Fedax*").

²⁸ Art III.4 of Bergonia-Tertia BIT.

An often repeated and time-tested saying is ‘Necessity is the mother of invention’ and it is in this spirit that many a time, past actions are required to be redesigned in order to suit the needs of the present and to shape the future. The philosophy underlying compulsory licenses seems to strike at the same cord. Compulsory licenses are granted in order to attain various public-policy objectives such as to address emergencies and public-health needs. In patent law one mode of limiting or restricting the patent holder from right to use his work is issuance of compulsory license. Compulsory license is an action of a government forcing an exclusive holder of a right to grant the use of that right to others upon the terms decided by the government. Thus, a compulsory license is an act of diluting an earlier grant, whereby an exclusive right was conferred upon the right holder. Also known as a non-voluntary licenses, compulsory licenses are a judicial or governmental annulment of patent rights, depriving a patentee of a monopoly or an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state.²⁹ In the present claim before the tribunal, the respondent by issuing compulsory license unnecessarily on patent AZ2005 has not expropriated, discriminated and violated the general principles of international laws.

3.1 Whether the issuance of compulsory license by Respondent is in conformity with applicable international law?

Compulsory licenses provisions are majorly envisaged in Article 31.³⁰ In the present claim before the tribunal the applicable provisions of International law that are binding upon parties is that of TRIPS³¹, which regulate conditions and grounds of issuance of compulsory licenses. It is submitted before the tribunal that Respondent has not violated any applicable provision of International law in the present arbitration claim before the tribunal. It is argued that Article 31 makes a very flexible provision for compulsory licenses. It states that in event of urgency the patent holder can only be informed about the issuance of compulsory licenses and no consent is needed in such situations.³² But nevertheless in the present claim every step of issuance of compulsory license was done with a proper procedure by keeping Claimant equally on same platform in getting legal recourse and was not at all done unanimously.

²⁹ Michelle M Nerozzi, “The Battle Over Life-Saving Pharmaceuticals: Are Developing Countries Being ‘TRIPed’ by Developed Countries?”, *Vilanova Review*, Vol 47, No.605, p.612, 2002.

³⁰ Article 31, Trade Related Intellectual Property Rights.

³¹ Agreement on Trade Related Intellectual Property Rights, WTO.

³² Article 31(b), Trade Related Intellectual Property Rights.

3.1.1 Whether Respondent's action is in consonance with Article 40(2) of TRIPS?

It is humbly submitted before the tribunal that the Respondent state has its own Intellectual Property laws that came into force in 1997.³³ It will not be appropriate for the Claimant to take a plea that Bergonian Intellectual Rights are inconsistent with TRIPS provision. Some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. But the provisions of TRIPS agreement *prima facie* makes it clear that nothing in the TRIPS Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.³⁴ A member may adopt appropriate measures to prevent or control such practices.³⁵ It means in the present claim firstly the Respondent's step to grant compulsory license is valid and legal and is not violative of TRIPS agreement.

3.1.2 Whether Respondent's action is in consonance with Art 26 of ICSID Convention read with Art 31(i) of TRIPS?

It is humbly submitted before the tribunal that Article 26 of ICSID convention and Article 31(i) of TRIPS agreement should be read together in order to ascertain the legality of action taken up by the Respondent. It is argued by the Claimant that there was no independent review from the Bergonian Intellectual Property Office.³⁶ In order to provide an opportunity to the right holder to prevent abuse of his right by grant of compulsory license, the TRIPS Agreement obliges the member countries to a judicial review to test the legal validity of any decision relating to the authorization.³⁷ But the same provision requires that the reviewing authority must be a distinct and higher one. Thus it is ensured that the right holder gets an opportunity afresh and that too before a forum which annul/reverse/vary the decision of the original granting authority and thus *de facto* preserving the rights of the holder of the IPR. But in the present claim may be the Claimant has applied to a quasi-judicial body i.e the Patent review board which itself is constituted within IP office which is an administrative body and thus is not distinct and a higher

³³ Clarification No. 104.

³⁴ Article 40(2), Trade Related Intellectual Property Rights.

³⁵ *Ibid.*

³⁶ Point 9 page 20 of the Problem

³⁷ Article 31(i), Trade Related Intellectual Property Rights.

judicial authority.³⁸ The Patent Review Board found the issuance of the compulsory license in conformity with Bergonian law.³⁹ The Claimant should have approached the judicial Courts of Bergonia which are proper judicial organ the state. But instead Claimant did not avail the remaining higher appellate remedies after getting review from the Patent Review Board and thus did not exhaust the local remedies as are deemed to be done necessarily by the ICSID Convention.⁴⁰ Moreover it is argued earlier that no domestic law provision of a member country in relation to licensing practices will not constitute abuse of Intellectual properties and thus don not violate provision of TRIPS.

3.1.3 Whether the Respondent's action adheres to Article 31(h) of TRIPS Agreement?

Article 31(h)⁴¹ states that the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization. It is humbly submitted before the tribunal that the Claimant argued that royalty paid by the IP office are inadequate.⁴² Firstly it is pleaded that the fixation of rate of royalty is not a straight-jacket formula. It varies in laws from country to country. There is not a fixed criterion for remuneration but governments have considerable discretion to define the level and kind of remuneration that the patent owner should receive. But in the present case it is not worthy of discussing the rate of royalties as there is right⁴³ of the Respondent to limit the remedy against such use to payment of remuneration in accordance with Article 31⁴⁴ in event of use for public purpose. Article 31 of the TRIPS⁴⁵, states that 'the agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.'⁴⁶ So how much royalty is to be paid and at what rate is clear discretion of members. But this discretion is not discriminatory in nature. Sometimes the low rate of remuneration is paid because of public health and other medicinal purposes or sometimes due to anti-competitive practices and so in these cases the amount of remuneration is set keeping in mind all these factors. Sometimes the remuneration is zero. Further the plea of Claimant of

³⁸ Clarification No. 29

³⁹ Clarification No. 37.

⁴⁰ Article 26, ICSID Convention.

⁴¹ Article 31(h), Trade Related Intellectual Property Rights.

⁴² Clarification NO. 42.

⁴³ Article 44(2), Trade Related Intellectual Property Rights.

⁴⁴ Paragraph 4 Art 31, Trade Related Intellectual Property Rights.

⁴⁵ Ibid.

⁴⁶ World Trade Organization, Trade-Related Aspects of Intellectual Property Rights, Geneva, 1994.

inadequate compensation is very much no-technical regarding the jurisdiction of this court. Again it is submitted that Art 26 of ICSID Convention and Article 31(j) of TRIPS agreement should be read together. Art 31(j)⁴⁷ states that 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. But in the present case no review as to remuneration was made to the appellate body. Only review in relation to compulsory license was made to the Patent Review Board but not of remuneration.⁴⁸ No where it is mentioned that Claimant took plea of appeal of inadequate remuneration to higher and distinct authority. Thus in light of these arguments it is humbly submitted that Respondent' action is not contrary to applicable international law.

3.2 Whether issuance of compulsory license by Respondent is justified in the present case?

In the present claim the issuance of compulsory license is very much justified. The reason for its justification is the public health of people of Respondent's state. Already average of 34 % males and 38% females of Respondent's state are affected by the disease of obesity⁴⁹ and it has become a matter of urgency that needs to be addressed. In past before the issuance of compulsory license, the Respondent's health ministry has funded several information campaigns on nutrition and exercise, and together with the Respondent Exchequer has prepared a 'Green Paper' on imposing an 18% tax on sugar beverages and beverages containing corn syrup.⁵⁰ But no method was proving to be beneficial to curb the problem of obesity. The only medical treatment was that of Claimant's product which contain Lipid absorption retardant combined with glycogen/lipid metabolism optimization and it has the capacity to treat the problem of obesity. It is submitted that in the present dispute the issuance of compulsory license is not at all expropriation rather it is justified on public health grounds and is also in very much in conformity with Doha Declaration on TRIPs and public health.

3.2.1 Whether there was any expropriation resulting out of compulsory license in the present claim?

⁴⁷ Article 31(j), Trade Related Intellectual Property Rights.

⁴⁸ Clarification No. 37

⁴⁹ Clarification No. 65

⁵⁰ Clarification No. 85

In the present dispute before the tribunal it is submitted that issuance of compulsory license did not amount to expropriation but instead is a regulatory step taken by the Respondent to address public health. As Weston⁵¹ notes that the essence of the law of state responsibility is to find an accommodation between the interest of states in achieving economic freedom and well-being and the interest of the foreign investor in being assured a minimum level of security and cooperation. The level of investment protection in international law for foreign investment should be based on a policy of promoting investment flows that are welfare maximizing for both host states and foreign investors. Legitimate reliance is a necessary element in maintaining “a continuous and increased international flow of capital, which is crucial for the development and stabilization of the international economy in general, and the economy of developing countries in particular.”⁵² States regulate property to protect the public interest by ensuring that property is used in a manner that maximizes social welfare. In consequential expropriations, while there exists, to borrow terms from criminal law, an *actus reus* and a *corpus delicti*, there may not exist a *mens rea*, an intent to expropriate. The absence of this intent within at least some echelon of the host state's government distinguishes consequential expropriations from garden-variety indirect expropriations and also from most, though not all, creeping expropriations—for consequential expropriation can be accomplished in the same manner as creeping expropriations. Lawful regulation is not an expropriation. International law’, in the words of a recent ICSID award, ‘permits a state to expropriate foreign-owned property within its territory for a public purpose and against the payment of adequate and effective compensation’.⁵³ This so-called ‘compensation rule’, which permits expropriation conditional on the payment of ‘prompt, adequate, and effective’ compensation,⁵⁴ has been widely, if not always unanimously, embraced by jurists and scholars throughout the twentieth century.⁵⁵ Further the Customary international law on this issue is unclear and BITs and other international instruments typically rely on international law to

⁵¹ B.H. Weston, “The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth” (1981) 75 A.J.I.L. 437.at 475.

⁵² R. Dolzer, “New Foundations of the Law of Expropriation of Alien Property” (1981) 75 A.J.I.L. 553. At 580.

⁵³ *Compañía del Desarrollo de Santa Elena, S.A. v Costa Rica*, ICSID Case No. ARB/96/1, Award of Feb. 17, 2000, (2000) 39 ILM 1317, 1329; *accord Sedco, Inc. v Nat'l Ir. Oil Co.*, (1986) 10 Iran-US CTR 180, 25 ILM 629, 647–8 (Brower, J., concurring) (‘A taking is unlawful under customary international law when it occurs in a discriminatory context, is not for a public purpose, or constitutes a breach of a specific obligation undertaken by the nationalizing State in relation to the property in question, e.g., violates the terms of an agreement between that State and an alien.’). The legitimacy of the public purpose invoked to justify expropriation does not ‘alter the legal character of the taking for which adequate compensation must be paid’. *Santa Elena*, 39 ILM at 1329.

⁵⁴ Ian Brownlie, *Principles of Public International Law* 70 (5th ed. 1998) at 535–8

⁵⁵ Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, in IV *The Valuation of Nationalized Property in International Law* 31, 42 (Richard B. Lillich ed., 1987); Christie, *supra* n. 19, at 307.

determine what amounts to an expropriation. BITs almost invariably include provisions codifying a *lex specialis* to handle claims of expropriation.⁵⁶ BITs and comparable multilateral investment treaties, which have become the preeminent mechanisms for preventing expropriations, compensating its victims, and thereby preserving the ‘favourable conditions’ for mutually beneficial reciprocal foreign investment, must respond to these changes in a manner consistent with the longstanding principles of customary international law.⁵⁷ In the present dispute too, Respondent submits that it has neither recognised compulsory licenses as an expropriation in general practice nor in its Bilateral Treaty⁵⁸ with the states. Assuming *arguendo* if there is any such expropriation to be agreed by the Respondent than the tribunal should rely on BIT between Sultanate of Conveniencia and the Democratic Commonwealth of Bergonia(Respondent). It states that there can be a direct or indirect expropriation of property for the public benefit.⁵⁹ Thus it is submitted that issuance of compulsory license by the Respondent did not amount to expropriation of the property of Claimant rather is justifies in the present case.

3.2.2 Whether grant of compulsory license is in conformity with Doha declaration on TRIPS and public health?

The Doha Declaration on the TRIPS agreement and public health was adopted⁶⁰ to address the issues related to public health and enshrines the role of WTO members and also to use the flexibilities in the TRIPS provision. The declaration reaffirms members’ commitment to the TRIPS, but it also emphasis that TRIPS must be a part of the international solutions for addressing public health problems.⁶¹ The Declaration reaffirms that each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.⁶² Further it provides that each member has the right to determine what constitutes a national emergency or other extreme urgency as a matter being understood as concerning public health crises.⁶³ Further to address the bar on exporting outside domestic market in provision of TRIPS,⁶⁴ the present declaration recognize that WTO members with insufficient or no

⁵⁶ *S.D. Myers Inc. v Canada*, Award of Nov. 12, 2000, (2001) 40 ILM 1408.

⁵⁷ *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL Final Award of Mar. 14, 2003.

⁵⁸ Article III(4), Bilateral Treaty between the Democratic Commonwealth of Bergonia and the Government of Tertia, page no. 16 of Problem.

⁵⁹ Article 4(2), Bilateral Treaty between The Sultanate of Conveniencia and the Democratic Commonwealth of Bergonia, page no. 9 of Problem.

⁶⁰ Declaration on the TRIPS Agreement And Public Health, 4th session, 9-14th November 2001, Doha.

⁶¹ Art 2, Declaration on the TRIPS Agreement And Public Health, 4th session, 9-14th November 2001, Doha.

⁶² Art 5(b), Declaration on the TRIPS Agreement And Public Health, 4th session, 9-14th November 2001, Doha.

⁶³ Art 5(c), Declaration on the TRIPS Agreement And Public Health, 4th session, 9-14th November 2001, Doha.

⁶⁴ Art 31(f), The Trade Related Intellectual Property Rights.

manufacturing capacities in the pharmaceuticals sector could face difficulties in making effective use of compulsory licenses under the TRIPS agreement and instructs the Council for TRIPS to find an expeditious solution to this problem.⁶⁵ In the present claim before the tribunal the Respondent fully complies with the objectives set forth by the Doha declaration. Firstly the problem of obesity concerning huge masses of Respondent's state was a matter of urgency and the TRIPS agreement needed to be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and in particular, to promote access to medicines for all. Already average of 35% of people of Respondent's state are affected of the disease of obesity and it has become a matter of urgency that needs to be addressed. Thus the issuance of compulsory license by the Respondent state falls within four corners of the Doha declaration and is not violative of its provision and is justified in the present case.

Conclusion

It is humbly prayed that in the light of issues raised, arguments advanced and authorities cited, the tribunal should declare that:

- a) The Tribunal does not have jurisdiction in view of the nationality of those parties controlling the Claimant.

- b) Claimant's exploitation of its intellectual property in Bergonia did not constitute an investment under applicable international law; and

⁶⁵ Art 6, Declaration on the TRIPS Agreement And Public Health, 4th session 9-14th November 2001, Doha.

- c) the compulsory license does not in any way amounts to expropriation or discrimination, or otherwise violates general international law or applicable treaties.

Representing Respondent

Shihata e

Associati