

**SUBMITTED BY: VISSCHER**

**SUBMITTED TO: INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

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**CLAIMANT: MEDBERG CO., A BERGONIAN CORPORATION**

**v.**

**RESPONDENT: THE GOVERNMENT OF THE REPUBLIC OF BERGONIA**

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**DOCUMENT NAME: MEMORIAL FOR RESPONDENT**

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## INTRODUCTION

1. Respondent, the Bergonian Government, has challenged the jurisdiction of the tribunal under Article 25 of the ICSID Convention; therefore, the Tribunal has inquired whether the Tribunal has jurisdiction in view of the nationality of those parties controlling MedBerg. Addressed in Part A of this memorandum is the argument supporting the fact that Respondent has not agreed to arbitration with Claimant nor has the Bergonia Government agreed to treat MedBerg as a national of Conveniencia for purposes of Article 25(2)(b) of the ICSID Convention.
2. The Claimant argues that the exploitation of their intellectual property in Bergonia constitutes a protected ‘investment.’ As a result, the Tribunal has inquired whether the exploitation constitutes a protected ‘investment’ under applicable BITs and satisfies the general characteristics of an ‘investment.’ Addressed in Part B of this memorandum is the argument supporting that the exploitation of Claimant’s intellectual property does not constitute an ‘investment’ for purposes of this dispute.
3. Claimant’s argument that the issuance of the compulsory license amounts to expropriation fails because the Bergonian Government’s actions were TRIPS-compliant as required by Article 3(4) of the Bergonia-Tertia BIT. Additionally, the Bergonian Government is not subject to liability for expropriation when actions are taken for the “public benefit” pursuant to Article 4 of the Bergonia-Conveniencia BIT. Finally, the Bergonian Government’s actions can hardly be said to amount to expropriation because the issuance of the compulsory license was temporary, only minimally interfered with Claimant’s patent and was issued for the purpose of serving the “public benefit.”

## FACTS

4. Bergonia is an underdeveloped county with a miniscule US\$ 7,535 gross domestic product percapita.<sup>1</sup> But, Bergonia's problems extend beyond poverty, as more than one in three citizens is suffering from obesity.<sup>2</sup> In fact, many Bergonians are genetically pre-disposed to obesity.<sup>3</sup> Sadly, in the spring of 2007, what was already an obesity epidemic in Bergonia threatened to become far "more acute" when Claimant terminated its license agreement for patent AZ2005, an important pharmaceutical patent (to which there are no generics) used to combat obesity.<sup>4</sup> Patent AZ2005 had previously been licensed in Bergonia, but was no longer available as a result of Claimant's termination of a previous licensing agreement.<sup>5</sup>
5. As a result of the intensity of Bergonia's obesity epidemic, and acting on information obtained from two published scientific studies which demonstrate the efficacy of the patented products and treatments in treating the specific form of obesity affecting many Bergonians,<sup>6</sup> the Bergonian Government decided that the issuance of a compulsory license for patent AZ2005 would result in substantial "public benefit" to its population, in which more than one in three people are obese.<sup>7</sup> Based on assessments in the aforementioned scientific studies, the Bergonian Government limited the duration of the compulsory license to forty-eight (48) months.<sup>8</sup> And, as of January 1, 2009, some five (5) Bergonian companies had invoked the compulsory license.<sup>9</sup>
6. Claimant protested the Bergonian Government's decision to protect the health of its population by issuing the compulsory license. In response to Claimant's objections, the Bergonian Government's Justice Ministry explained to Claimant that the compulsory license was issued in "conformity with Bergonia's international obligations"<sup>10</sup>

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<sup>1</sup> Clarification 44.

<sup>2</sup> Clarification 65.

<sup>3</sup> Clarification 26

<sup>4</sup> Record at 20 ¶ 6.

<sup>5</sup> Annex 3- Uncontested Facts ¶ 6.

<sup>6</sup> Clarification 26.

<sup>7</sup> Clarification 65.

<sup>8</sup> Clarification 24.

<sup>9</sup> Record at 20 ¶ 8.

<sup>10</sup> Clarification 111.

7. While exports comprise a “significant” portion of the products produced using the compulsory license for three of the companies involved<sup>11</sup>, the underlying purpose of the compulsory license remains fulfilling an important medical need of the people of Bergonia. In all, the Bergonian Government has collected royalty payments from the companies receiving the compulsory license and offered these royalties to Claimant, who has refused them.<sup>12</sup>
8. The Claimant in this case is a national of Bergonia.<sup>13</sup> One of the Claimant’s main actors, Dr. Frankensid, is a national of both Bergonia and Amnesia.<sup>14</sup>
9. Additionally, Bergonia and Laputa do not have normal economic relations. There is tension between the two countries and Laputa has sanctioned Bergonia on several occasions.<sup>15</sup>

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<sup>11</sup> Clarification 61.

<sup>12</sup> Record at 20 ¶8.

<sup>13</sup> Annex 3 Uncontested Facts ¶ 2.

<sup>14</sup> Annex 3 Uncontested Facts ¶ 2.

<sup>15</sup> Clarification 36.

## SUMMARY OF ARGUMENT

10. Claimant should not be able to seek protection under the Bergonia-Conveniencia BIT because they are not a foreign investor and the BIT was not meant to protect a domestic Bergonian corporation against the Bergonian Government. In addition, even if the Claimant is allowed to obtain protection of the Bergonia-Conveniencia BIT, it should not be able to invoke the MFN clause within the BIT to access Article VI.8 of the Tertia-Bergonia BIT, because to do so would be to obtain the Bergonian Government's consent to arbitration solely through MFN treatment. Finally, Article VI.8 of the Tertia-Bergonia BIT is limited by Article I.2 of the same BIT, which allows Bergonia to deny Claimant advantages of the treaty "if nationals of any third country control" Claimant and the home country of the nationals "does not maintain normal economic relations." Claimant is controlled by Laputan nationals and Laputa "does not maintain normal economic relations" with Bergonia; therefore, the Bergonian Government may deny Claimant the protections of the Tertia-Bergonia BIT.
11. Furthermore, the Bergonian government's exploitation of Claimant's intellectual property does not constitute an 'investment.' As both parties to the dispute are national of Bergonia there is not applicable BIT or foreign investment. However, if a BIT was to be applied in this dispute it should be the Tertia-Bergonia BIT as a result of Claimant's invocation of its terms via the use of the MFN Clause in the Bergonia-Conveniencia BIT. The application of the Tertia-Bergonia BIT defines that there is no 'investment' in this instance. However, even if the Conveniencia-Bergonia BIT is applied, there still is no 'investment' under the objective characteristics of an 'investment' required for a finding of jurisdiction under Article 25 of the ICSID Convention.
12. Finally, Claimant's argument that the issuance of the compulsory license amounts to expropriation must fail because Article 3(4) of the Bergonia-Tertia BIT (which Claimant invokes) provides a clear exception to a finding of expropriation for compulsory licenses that are TRIPS-compliant. The Bergonian Government's actions in issuing the compulsory license were indeed TRIPS-compliant, particularly because TRIPS must be read in light of the Doha Declaration regarding public health, which provides that the Bergonian Government has a right to issue a compulsory license in order to protect its public interest. Similarly, should this Honorable Tribunal decide to use Article 4 of the

Bergonia-Conveniencia BIT as its standard for expropriation, there also can be no liability because the Bergonian government's issuance of the compulsory license is compliant with paragraph three's "public benefit" exception. Moreover, the issuance of the compulsory license was merely a temporary measure, had only a minimal impact on Claimant's patent, and was issued for the purpose of protecting Bergonia's public benefit.

## ARGUMENT

13. In order for the Claimant to prevail in this dispute it must first prove that the necessary requisites are met under Article 25 of the ICSID Convention for the Tribunal to exercise jurisdiction over the matter. Article 25 requires that Claimant establish 1) that the dispute is between a Contracting State and a national of another Contracting State; 2) that the parties consented in writing to submit the dispute to the Centre; and 3) the dispute arises out of an investment.<sup>16</sup> In addition, substantively, Claimant must prove that actions of Respondent, the Bergonian Government, were not 4) TRIPS compliant and 5) that the compulsory license constituted an expropriation. If Claimant fails to prove any one of these five items, Respondent must prevail.
14. Claimant's inability to establish items 1) and 2) is addressed in section A. In addition, Claimant's inability to demonstrate an investment is addressed in section B. Finally, section C. addresses Claimant's expropriation claims.

### **A) THE TRIBUNAL DOES NOT HAVE JURISDICTION IN VIEW OF THE NATIONALITY OF THOSE PARTIES CONTROLLING THE CLAIMANT**

15. The Tribunal should not grant jurisdiction to hear this dispute because Claimant is a Bergonian corporation<sup>17</sup> and the Bergonian Government has not agreed to treat it as anything but a national of Bergonia.
16. Article 25 of the ICSID Convention sets forth the necessary requisites to establish the Centre's jurisdiction.<sup>18</sup> The provision requires, in pertinent part, that disputes arise between "a Contracting State and a national of another Contracting State . . . ."<sup>19</sup> In addition, to consider a corporation as 'a national of another Contracting State', Article 25(2)(b) of the Convention provides two possible alternatives. First,
- any juridical person which 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; [or]

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<sup>16</sup> ICSID Convention, Regulations and Rules art. 25(1), 14 October 1966.

<sup>17</sup> Annex 3 Uncontested Facts ¶ 2.

<sup>18</sup> ICSID Convention, Regulations and Rules art. 25, 14 October 1966.

<sup>19</sup> ICSID Convention, Regulations and Rules art. 25(1), 14 October 1966.

17. Claimant is a Bergonian national<sup>20</sup> and Bergonia is a party to this dispute; therefore, Claimant did not have “the nationality of a Contracting State other than the State party to the dispute” and cannot satisfy the nationality requirement under the first part of 25(2)(b).
18. The second option under Article 25(2)(b) provides:  
any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
19. The Bergonian Government has not agreed 1) that Claimant is under foreign control; nor has the Bergonian Government agreed 2) that if it were under such foreign control, to treat Claimant “as a national of another Contracting State for the purposes of” ICSID jurisdiction based on foreign control; therefore, Claimant cannot satisfy the nationality requirement under the second option of Article 25(2)(b) either.
20. The Tribunal has summarized the claimant as arguing that  
Article 3 of the Bergonia-Conveniencia BIT (MFN clause) permits it to invoke Article VI.8. of the Bergonia-Tertia BIT.<sup>21</sup>
21. The Bergonian Government contends: 1) that Claimant does not have standing to invoke the Most-Favored-Nation (MFN) clause of the Bergonia-Conveniencia BIT; 2) that even if Claimant does have standing to invoke the MFN clause, international law precludes Claimant from incorporating Article VI.8 of the Tertia-Bergonia BIT, because to do so is to incorporate consent to arbitration via the MFN clause; and 3) that even if Claimant may incorporate such dispute settlement procedures, Article I.2 of the Tertia-Bergonia BIT allows Bergonia to deny Claimant the advantages of the Tertia-Bergonia BIT. These arguments are addressed respectively below.

**1) Claimant Does Not Have Standing to Invoke the Most-Favored-Nation (MFN) Clause of the Bergonia-Conveniencia BIT**

22. BITs deal “exclusively with foreign investment” and seek to protect investments by a national of one country in the territory of another;<sup>22</sup> therefore, as a national of Bergonia,

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<sup>20</sup> Annex 3 Uncontested Facts ¶ 2.

<sup>21</sup> Minutes of the First Session of the Arbitral Tribunal ¶ 14.

Claimant may not invoke a clause in a BIT against its own government. BIT's are meant to protect foreign investors against a foreign government, not a domestic investor against his own government.

23. Claimant seeks to argue that through the MFN clause in the Bergonia-Conveniencia BIT it may access the Tertia-Bergonia BIT. Before accessing the MFN clause, however, Claimant should demonstrate why it is a party protected under the Bergonia-Conveniencia BIT. The following diagram summarizes this point:

Claimant's Argument Diagram

Claimant's Nationality:	At the start	When it seeks to access MFN in Bergonia-Conveniencia BIT	When it accesses the Tertia-Bergonia BIT	After it accesses the Tertia-Bergonia BIT
	Bergonia	Bergonia	Bergonia	Conveniencia (for purposes of ICSID)
Stage:	1	2	3	4

24. Since Claimant is a Bergonian in a dispute against the Bergonian Government, Claimant's argument may not pass stage 1 of the chart above, because the BIT was not meant to protect a Bergonian Claimant against the Bergonian Government; therefore, Claimant may not invoke protections of the treaty.

25. Bergonia, Claimant's place of nationality, and Conveniencia are signatories to the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>23</sup> Approaching the text of the Bergonia-Conveniencia BIT as guided by the Vienna Convention clarifies that the treaty was not meant to provide protection to Claimant against its own government.

26. Article 31 of the Vienna Convention provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. . . . The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: .

<sup>22</sup> Jeswald W. Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain*, N. HORN, S. KRÖLL, *ARBITRATING FOREIGN INVESTMENT DISPUTES, PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS* 55 (Kluwer 2004).

<sup>23</sup> Clarification 108.

. . (c) any relevant rules of international law applicable in the relations between the parties.<sup>24</sup>

27. In addition, Article 32 of the Vienna Convention states that a treaty should be interpreted in a way that avoids rendering portions of a treaty “ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.”<sup>25</sup>

28. Looking to the preamble, text and annexes of the Bergonia-Conveniencia BIT it is clear that the BIT was only meant to provide protection to parties of Contracting State not party a dispute. For example, the object and purpose of the treaty is

to increase investments by investors of **one of the Contracting States** in the territory of **the other Contracting State**.<sup>26</sup>

Article 2 of the BIT also provides:

**Each Contracting State** shall as far as possible encourage investments by **investors of the other Contracting State** and create favourable conditions for such investments and shall admit such investments in accordance with its legislation.

Article 4 of the BIT provides:

Investors of **either Contracting State** shall enjoy most-favoured-nation treatment in the territory of the **other Contracting State** in respect of the matters provided for in this Article.

Article 6 provides that “**Each Contracting State** shall guarantee to **investors of the other Contracting State** . . . .”

Article 8 of the BIT states that:

**Each Contracting State** shall observe any other obligation it has assumed with regard to investments in its territory by **investors of the other Contracting State**.

Finally, Article 10, the dispute settlement provision, provides:

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<sup>24</sup> Vienna Convention on the Law of Treaties art. 31(1), (2), (3)(c), 27 January 1980.

<sup>25</sup> Vienna Convention on the Law of Treaties art. 32(a), (b), 27 January 1980.

<sup>26</sup> Annex1 – Treaty Between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia Concerning the Encouragement and Reciprocal Protection of Investments art. 11.

Disputes concerning investments between a **Contracting State and an investor of the other Contracting State** should as far as possible be settled amicably between the parties in dispute.

29. From the language provided, it should be clear that the object and purpose of the Bergonia-Conveniencia BIT was not meant to protect Claimants with the same nationality as the State a party to the dispute.
30. In addition, it would be inconsistent with Article 32 of the Vienna Convention to interpret the treaty in such a manner so that Claimant, a Bergonian corporation, could invoke protection of the BIT as it is “manifestly unreasonable or absurd” to believe that Conveniencia and Bergonia would negotiate with each other to come up with protections for their own nationals.
31. To preclude Claimant from protection of the Bergonia-Conveniencia BIT on this ground is also consistent with the goals of the BIT movement. The primary goal of BITs is:

Protection of investments made by [one country’s] nationals and companies in foreign countries. This basic goal is made clear in the first part of the title of virtually all BITs: ‘A Treaty to Protect . . .’<sup>27</sup>

32. Finally, commentators seem to agree that the definition of investment and investor are crucial to interpreting the scope of applicability of a treaty.<sup>28</sup> Examining the definition of a Bergonian Investor, Claimant clearly falls within the definition. A Bergonian Investor is:

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 Democratic Commonwealth of Bergonia, irrespective of whether or not its activities are directed at profit.

Claimant’s seat is incorporated in Bergonia and its seat is in Bergonia; therefore, Claimant is a national of Bergonia.<sup>29</sup>

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<sup>27</sup> Jeswald W. Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain*, N. HORN, S. KRÖLL, *ARBITRATING FOREIGN INVESTMENT DISPUTES, PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS* 58 (Kluwer 2004).

<sup>28</sup> *Id.*, 61; see also CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 29 (Oxford Univ. Press 2007).

<sup>29</sup> Annex 3 Uncontested Facts ¶ 2; Clarification 45.

33. Taken all the aforementioned factors into consideration, Claimant should be considered a Bergonian national at the time it seeks to invoke the MFN clause in the Bergonia-Conveniencia BIT in a dispute against the Bergonian Government; therefore, Claimant should not be able to avail itself of the protections of the Bergonia-Conveniencia BIT.

**2) Claimant May Not Invoke a MFN Clause to Incorporate Article VI.8 of the Tertia-Bergonia BIT, Because Doing So Would Be to Incorporate Consent to Arbitration Through MFN Treatment**

34. Claimant should not be allowed to invoke the MFN clause to access Article VI.8 of the Tertia-Bergonia BIT, because it is not just a dispute settlement provision, rather it is a treaty provision that consents to arbitration.

35. Article VI.8 of the Bergonia-Conveniencia BIT is contained in the Article of the Treaty addressing dispute settlement procedures. Dispute settlement procedures are considered to be procedural rights granted to a party, compared to substantive rights which are concerned with “how a state deals with foreign goods and persons when they enter its territory and thereafter.”<sup>30</sup> Generally, substantive rights may be addressed through MFN clauses so long as the proper requisites are met (i.e. compliance with *ejusdem generis*, etc.); however, extending procedural rights through MFN treatment has proven to be a very controversial matter.<sup>31</sup>

36. Two decisions that held that MFN treatment should extend to procedural rights were *Maffezini v. Spain*<sup>32</sup> and *Siemens A.G. v. The Argentine Republic*<sup>33</sup>. Disagreeing with the logic followed in the *Maffezini* and *Siemens* holding are the awards of *Salini Construttori S.P.A. and Italstrade S.P.A. v. The Hashemite Kingdom of Jordan*<sup>34</sup> and *Plama Consortium Limited v. The Republic of Bulgaria*.<sup>35</sup>

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<sup>30</sup> Pia Acconci, *Most-Favoured-Nation Treatment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 381 (Peter Muchlinski et al. eds., 2008).

<sup>31</sup> Pia Acconci, *Most-Favoured-Nation Treatment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 380-402 (Peter Muchlinski et al. eds., 2008); see also CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 254-57 (Oxford Univ. Press 2007).

<sup>32</sup> ICSID Case No. ARB/97/7 Decision on Objections to Jurisdiction, 25 January 2000, 40 I.L.M. 1129 (2001).

<sup>33</sup> ICSID Case No. ARB/02/8 Decision on Jurisdiction, 3 August 2004, 44 I.L.M. 138 (2005).

<sup>34</sup> ICSID Case No. ARB/02/13 Decision on Jurisdiction, 29 November 2004, 44 I.L.M. 573 (2005).

<sup>35</sup> ICSID Case No. ARB/03/24 Decision on Jurisdiction 8 February 2005, 44 I.L.M. 721 (2005).

37. In *Maffezini*, the Tribunal determined that a provision of the Chile-Spain BIT was applicable to an Argentinean investor by way of the MFN clause in the Argentine-Spain BIT.<sup>36</sup> The Argentine-Spain BIT provided that domestic courts had a period of eighteen months to address a dispute before it might be submitted to arbitration. The Chile-Spain BIT imposed no such condition. Therefore, the Claimant contended that Chilean investors were treated more favourably than Argentine investors in Spain.<sup>37</sup> Spain argued that under *ejusdem generis* that only substantive matters could be imported by way of a MFN clause, not procedural or jurisdictional matters.<sup>38</sup> The tribunal disagreed however and allowed the procedural right to be incorporated via the MFN treatment.<sup>39</sup>
38. In 2005, the *Siemens v. Argentine Republic* ICSID tribunal also agreed with the application of the MFN clause to dispute settlement provisions.<sup>40</sup> In *Siemens*, like *Maffezini*, the tribunal allowed the use of the MFN treatment to bypass a requirement that before a Claimant could turn to arbitration it must first pursue its objective for 18 months in domestic courts.<sup>41</sup>
39. The *Salini* Tribunal expressed concern over the extension of MFN clauses to procedural matters, stating that:

Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of “treaty shopping”.<sup>42</sup>

In *Maffezini*, the Tribunal examined the text of the applicable BIT and the MFN provisions therein, as well as the “legal policy adopted by Spain with regard to the treatment of its own investors abroad.”<sup>43</sup> The *Salini* court distinguished the factual situation present in its case as that in *Maffezini*. Unlike *Maffezini*, the BIT in *Salini* did not contain a provision extending MFN to procedural rights. *Salini* also looked to the common intention of the parties and

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<sup>36</sup> *Maffezini v. Spain*, ICSID Case No. Arb/97/7 Decision on Objections to Jurisdiction, 25 January 2000, 40 I.L.M. 1129 (2001).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1135-36.

<sup>39</sup> *Id.* at 1137-38.

<sup>40</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 Decision on Jurisdiction, 3 August 2004, 44 I.L.M. 138, 155 (2005).

<sup>41</sup> *Id.*

<sup>42</sup> *Salini Construttori S.P.A. and Italstrade S.P.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 Decision on Jurisdiction, 29 November 2004, 44 I.L.M. 573 (2005).

<sup>43</sup> *Maffezini v. Spain*, ICSID Case No. Arb/97/7 Decision on Objections to Jurisdiction, 25 January 2000, para. 64, 40 I.L.M. 1129 (2001).

found that there was nothing provided to establish that it was the common intention of the parties to extend the most-favored-nation clause to dispute settlement procedures.<sup>44</sup> In addition, there was no practice in the Contracting Parties of the applicable BIT that supported the extension of the MFN provision to procedural rights.

40. In *Plama*, the Tribunal also found against extending MFN clauses to procedural rights, specifically, procedural provisions that consented to arbitration. Going further than the *Salini* award, the *Plama* Tribunal stated of the facts leading to the *Maffezini* decision,

such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present.<sup>45</sup>

41. Different than *Maffezini* or *Siemens*, the Claimant in *Plama* was not just arguing that different procedures should be followed in carrying out an arbitration due to MFN treatment, rather the Claimant in *Plama* argued that the Respondent had consented to ICSID arbitration by way of the MFN clause located in the Bulgaria-Cyprus BIT which then incorporated a Bulgaria-Finland BIT dispute settlement procedure that consented to ICSID arbitration. Of the awards addressed, the *Plama* award, therefore, has the most similar circumstances to the case at hand.

42. In denying the application of the MFN clause to incorporate consent to arbitration, the *Plama* tribunal first examined the applicable MFN clause which is not much different than the clause contained in the Bergonia-Conveniencia BIT. The MFN clause in the Bulgaria-Cyprus BIT reads:

Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.

43. The Tribunal then relied on Article 7(2) of the UNCITRAL Model Law and found that if arbitration agreements are to be incorporated by reference, such incorporation must be “clear and unambiguous.”<sup>46</sup> Thus, the language of the MFN clause creates doubt whether

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<sup>44</sup> *Salini Construttori S.P.A. and Italstrade S.P.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 Decision on Jurisdiction, para. 118, 29 November 2004, 44 I.L.M. 573 (2005).

<sup>45</sup> *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24 Decision on Jurisdiction 8 February 2005, 44 I.L.M. 721 (2005).

<sup>46</sup> *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24 Decision on Jurisdiction 8 February 2005, para. 200, 44 I.L.M. 721 (2005).

the clause means to reference the dispute settlement procedures in the third-party BIT.<sup>47</sup>

The Tribunal also noted the lack of precedent as not surprising because:

When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of a MFN provision, unless the States have explicitly agreed thereto.<sup>48</sup>

The Tribunal added that this may be referred to as the separability principle and that “dispute resolution provisions constitute an agreement on their own . . . .”<sup>49</sup>

44. In the present case, the *Plama* decision is the most similar award offering any precedential value and the Bergonian Government requests that the Tribunal follow its holding and deny the application of MFN to procedural rights. In addition, however, given that there is such dichotomy between those in the investment arbitration community regarding the application of substantive and procedural rights through MFN clauses, the Bergonian Government would like to offer as an alternative a framework for analysis slightly different than those found in current awards, but which is reconcilable with all of the decisions cited above.
45. Current discussion blankets dispute settlement procedures into the category of procedural rights. The Bergonian Government requests the Tribunal to slightly alter this analysis and recognize that generally, dispute settlement provisions are made up of procedural elements as well as those elements which make up the consent to arbitration. For example, when a party consents to arbitration under Article 25 of the ICSID Convention, it consents to three things: 1) where the dispute will be arbitrated – at ICSID; 2) the subject matter of the arbitration – “any legal dispute arising directly out of an investment”<sup>50</sup>; 3) who may be considered a party to the arbitration – “a Contracting State and a national of another Contracting State”.<sup>51</sup> Any language that speaks directly to consenting to one of these three things, the arbitral forum, the parties, or the subject matter of the dispute, should be considered as an element of consent and not incorporable. However, other elements in the dispute settlement provision, such as those speaking to avenues that a Claimant must

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, ¶ 212.

<sup>49</sup> *Id.*

<sup>50</sup> ICSID Convention, Regulations and Rules Art. 25(1).

<sup>51</sup> *Id.*

pursue before bringing a claim to arbitration should be incorporable. In applying this framework, of course, other elements necessary to MFN treatment should also be recognized, such as *ejusdem generis* as well as that the party seeking MFN treatment, must stand in a similar relationship as the person receiving the more favorable treatment to the country giving the treatment.

46. If the Tribunal applied this framework and divided the language in the dispute settlement procedure between consent and procedure, it would reach the same outcome as all of the Tribunals did in *Maffezini*, *Siemens*, *Salini* and *Plama*.
47. First, looking at *Maffezini* through the lens of this framework, the treatment did not implicate one of the crucial elements of consent, but both the applicable BIT and the third-party BIT containing the more favorable treatment consented to ICSID arbitration, thus, placing the Claimant and the third-party in similar relationship to the Host State. Both the Claimant and the third-party investor receiving the more favourable treatment had access to arbitration, both clauses covered similar subject matter (i.e. *ejusdem generis* was satisfied), and both were validly considered parties to arbitration under ICSID. The question then only needs become whether the 18 month domestic court requirement was discriminatory against the Claimant, when another third-party investor did not have to undergo such procedure. Looking through this framework, it would not be difficult to come up with the same holding as the *Maffezini* Tribunal. The facts of the *Siemens* are so similar to *Maffezini* that the analysis is almost the same.
48. Unlike *Maffezini*, the material the *Salini* Claimant sought to incorporate through the MFN clause did implicate one of the three consent elements set forth in Article 25 of the ICSID Convention. In *Salini*, the Claimant was not party to an arbitration agreement that gave it access to ICSID; however, there the Claimant sought to invoke another MFN clause that contained consent to ICSID arbitration. Thus, analyzing *Salini* under the suggested framework would lead to the same outcome as determined by the *Salini* Tribunal.
49. Similarly, in analyzing *Plama* under the suggested framework the *Plama* Tribunal's decision may be reconciled. In *Plama*, under the original applicable arbitration provision, the Claimant did not have the right to arbitrate the subject matter of the dispute. Claimant sought to invoke the MFN clause to access an arbitration clause to arbitrate different subject matter than that originally agreed upon. As Claimant's attempt to incorporate

subject matter implicates one of the elements of Article 25 of the ICSID Convention, analysis under the suggested framework would lead to a similar decision as the *Plama* Tribunal and deny invocation of the MFN clause in this situation.

50. Finally, looking at the case at hand under the suggested framework, the Tribunal should deny Claimant the ability to invoke the MFN clause because the attempt to access Article VI.8 implicates one of the elements of consent – the parties. Article VI.8 implicates the parties to an arbitration because it explicitly consents to allowing domestic Bergonian companies (which would not be able to arbitrate claims against the Bergonian Government) as a Conveniencian company (which will be able to arbitrate claims). Thus, Claimant seeks to obtain through application of the MFN clause, consent of the Bergonian Government to arbitrate against Claimant. Denying Claimant the ability to invoke the MFN clause in this manner is then also consistent with the notion that parties seeking to invoke MFN treatment must be similarly situated to the Host State as those parties receiving the more favorable treatment. Unlike the party receiving more favorable treatment, Claimant does not have consent by the Bergonian Government to arbitration; therefore, in regards to ICSID arbitration, Claimant and Tertian investors are not in a similar situation to Bergonia.

### **3) Article I.2 of the Tertia-Bergonia BIT Allows Bergonia to Deny Claimant the Advantages of the Tertia-Bergonia BIT**

51. Even if the Tribunal finds that Article VI.8 of the Tertia-Bergonia BIT applies, jurisdiction should be denied based on the application of Article I.2 of the same BIT. The applicability of Article I.2 is discussed below in subsection i. and the application of Article I.2 is discussed in subsection ii.

#### **i. If Article VI.8 is Allowed to Be Incorporated Through the MFN Clause, Then Article I.2 Must be Incorporated As Well, As It Directly Limits the Application of Article VI.8**

52. The International Law Commission (ILC) has adopted *Draft Articles on most-favoured-nation clauses with commentaries* (ILC Draft Articles), which provide a useful framework

through which to interpret MFN clauses.<sup>52</sup> MFN treatment is accorded to a State in a MFN clause.<sup>53</sup> The ILC Draft Articles define MFN treatment:

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State or to persons or things in the same relationship with that third State.<sup>54</sup>

53. For example, the MFN clause present in the Bergonia-Conveniencia BIT provides:

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 investments of investors of any third State.

54. The implication of the above mentioned MFN clause then is that Claimant, in invoking Article VI.8 of the Tertia-Bergonia BIT, must receive **treatment** not less favorable than that extended to Tertian investor. Thus, it need be determined the treatment a Tertian investor would receive if it were acting in place of the Bergonian investor in this case.

55. If a Tertian investor were to invoke Article VI.8 the treatment he would receive would be limited by his compliance with Article I.2 which provides:

[The Bergonian Government] 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.<sup>55</sup>

Thus, if a Tertian investor was controlled by a company of a third country, and that company had “no substantial business activities in the territory of” Tertia or if Bergonia did “not maintain normal economic relations” with the third country, then Bergonia could deny the Tertian investor protections offered under the Tertian-Bergonia BIT.

56. If Claimant wishes to invoke the treatment afforded to a Tertian investor, then Claimant should be subject to the same limitation set forth in Article I.2. To clarify further, the

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<sup>52</sup> *Draft Articles on most-favoured-nation clauses with commentaries*, [1978] 2 Y.B. Int'l L. Comm'n 16, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (Part 2).

<sup>53</sup> *Id.* at 21, 25.

<sup>54</sup> *Id.* at 21.

<sup>55</sup> Tertia-Bergonia BIT Art. I.2.

Bergonian Government does not contend that by invoking a clause within the Tertia-Bergonia BIT that Claimant automatically is then subject to the entire treaty, however, other portions of the BIT that are so intertwined and directly impact the treatment Claimant receives under Article VI.8, such as Article I.2 should not be ignored. To ignore such provisions would lead to unjust cherry-picking of third-party treaties.

**ii. Applying Article I.2 Allows the Bergonian Government to Deny Claimant the Protections of Tertia-Bergonia BIT, Specifically, Those Protections Found in Article VI.8**

57. If Article VI.8 is found to be applicable, then Article I.2 must also be applicable and the Bergonian Government may deny Claimant the protections of Article VI.8 because Claimant is controlled by nationals of Laputa, a country with which Bergonia does not maintain normal economic relations.

58. Article I.2 of the Tertia-Bergonia BIT reads:

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. (emphasis added).

59. Read in connection with Article VI.8 then, these two provisions of the Tertia-Bergonia BIT may be read as saying that Bergonia will treat a domestic investor invoking Article VI.8 as a foreign investor, only if such investor is not a company controlled by nationals of a third country which Bergonia does not have normal economic relations. Thus, to make sure that Claimant is in compliance with Article I.2, it must be determined that no company from such a country with irregular economic relations with Bergonia controls such a company.

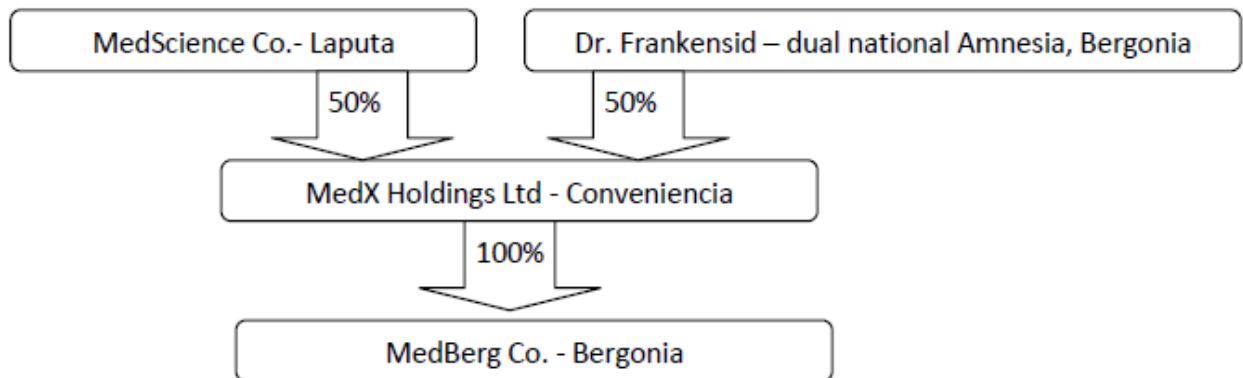
60. In some instances, Tribunals have hesitated to pierce the corporate veil and look further than needed up a corporate chain once jurisdiction has been established.<sup>56</sup> In such instances, however, provisions such as Article I.2 were not, which essentially implicates the entire ownership structure. To comply with the drafting states of the Tertia-Bergonia

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<sup>56</sup> See *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, 23 I.L.M. 351 (1984); see also *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18 (Decision on Jurisdiction, Apr. 29, 2004).

BIT's wishes the Tribunal needs to pierce the corporate veil and determine who actual controls the company in Conveniencia that in turn allegedly controls Claimant.<sup>57</sup>

61. Looking at the ownership structure (chart below) of Claimant it is clear that the owners of the Conveniencia company in question come from either Laputa or Amnesia and Bergonia.



62. Tribunals have determined that one company controls another company when it owns a majority of the shares and a majority of the voting rights.<sup>58</sup> Neither MedScience from Laputa or Dr. Frankensid a dual national from Bergonia and Amnesia owns a majority of either as they equally split the shares and the voting rights.<sup>59</sup> The analysis need not end here though, because two parties that would not be able to gain protection of the BIT individually, should not then be able to gain such protection together. Meaning, the Tribunal should consider both owners together (i.e. a majority of the shareholders and majority of the voting rights) and if neither one qualifies for protection of the BIT individually, they should not receive it together.

63. First, looking at MedScience a national of Laputa. Bergonia and Laputa do not have normal economic relations. There is tension between the two countries and Laputa has sanctioned Bergonia on several occasions.<sup>60</sup> Thus, under Article I.2 the Bergonian Government may deny protections of the Tertia-Bergonia BIT to MedScience Co.

64. Second, examining Dr. Frankensid a dual national of Bergonia and Amnesia.

<sup>57</sup> Tertia-Bergonia BIT Art. I.2.

<sup>58</sup> *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3 para. 264 (2005).

<sup>59</sup> Annex 3 Uncontested Facts ¶ 2; Clarification 18.

<sup>60</sup> Clarification 36.

Nationals of the host state are generally excluded from international protection even if they also hold the nationality of another state. The ICSID Convention, in Article 25(2)(a), explicitly excludes dual nationals if one of their nationalities is that of the host state.<sup>61</sup> In addition, the Bergonian Government reiterates the argument set forth in Part A, section 1, that a Bergonian citizen may not bring a dispute against the government of Bergonia as it is not afforded protection under the BIT.

65. Thus, control of the Conveniencia company is in the hands of one owner that is not granted protection under Article I.2 because he is from a country that does not maintain normal economic relations and another owner that is a citizen of a country party to the dispute that the protections of the BIT are not meant to extend to and, in addition, does not qualify under ICSID's jurisdiction.<sup>62</sup>
66. Alternatively, Article I.2 also provides that protections of the treaty may also be denied if the company from Conveniencia allegedly controlling Claimant "has no substantial business activities in the territory of Conveniencia."
67. As the company in Conveniencia is a mere conduit for MedScience and Dr. Frankensid's investment it has no **substantial** business activities in Conveniencia. MedX, a purported multinational company that has subsidiaries in multiple countries that license their products, only has a small office and two employees in Conveniencia.<sup>63</sup> Those two employees sit on Claimant's Board which almost always meets in Bergonia.<sup>64</sup> Finally, MedScience in Laputa, a publicly traded company, provides for all of the research and development costs and employs Dr. Frankensid, also located in Laputa.<sup>65</sup> Therefore, it is unclear what MedX does, but what they do not do is research, develop, or license the products to the end user.
68. For the aforementioned reasons, whether because MedX is controlled by a company from a country with poor economic relations with Bergonia and a Bergonian national, or because MedX does not have substantial business activities in Conveniencia, the Tribunal should deny jurisdiction to Claimant.

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<sup>61</sup> RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 48 (Oxford Univ. Press 2008).

<sup>62</sup> See ICSID Convention Art. 25(2)(b).

<sup>63</sup> Clarification 39, 75, 76.

<sup>64</sup> Clarification 43.

<sup>65</sup> Clarification 18, 54, 105.

**B) THE EXPLOITATION OF CLAIMANT’S INTELLECTUAL PROPERTY IS NOT A PROTECTED ‘INVESTMENT’ BECAUSE OF THE LACK OF AN APPLICABLE BIT; EVEN UNDER THE APPLICATION OF ANY BIT AN ‘INVESTMENT’ STILL DOES NOT EXIST, AND FURTHERMORE, THE OBJECTIVE CHARACTERISTICS OF AN ‘INVESTMENT’ ARE NOT SATISFIED.**

69. The Exploitation of the Claimant’s intellectual property does not constitute a protected ‘investment’ because there is no foreign party involved in this dispute. Both parties involved in this instance are nationals of Bergonia. Furthermore, even if the Claimant were able to prove that it was not a national of Bergonia and that it had made an ‘investment’ under the terms of an applicable BIT the exploitation of their intellectual property still would not constitute an ‘investment’ because it does not satisfy the general characteristics of an investment.

70. Generally, as it is not defined in the ICSID Convention, a BIT is consulted for the basic definition of what constitutes an investment.<sup>66</sup> However, since case law has determined there is an independent requirement for finding an ‘investment’ under Article 25 of the ICSID Convention, signatories to the Convention who have agreed to arbitration under its terms must not only have agreed what constitutes an ‘investment’ under their BIT, but also must satisfy the objective characteristics of an ‘investment’ as set forth in ICSID case law.<sup>67</sup>

71. Given the facts in this instance, we request that the Tribunal find that the exploitation of Claimant’s intellectual property does constitute an investment because there is no applicable BIT. Additionally, even if one of the BITs were applied, the exploitation does not satisfy their definition of what constitutes an ‘investment,’ and furthermore, does not satisfy any of the requirements necessary for a finding of jurisdiction under Article 25 of the ICSID Convention.

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<sup>66</sup> CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, AND BORZU SABAHI, INVESTOR-STATE ARBITRATION, OXFORD University Press (2008), 220.

<sup>67</sup> Farouk Yala, *The Notion of ‘Investment’ in ICSID Case Law: A Drifting Jurisdictional Requirement?: Some Unconventional Thoughts on Salini, SGS & Mihaly*, 22 J. Int’l Arb. 105 (2005).

**1) Both Parties to this Dispute Are Nationals of Bergonia, As a Result There is No Applicable BIT, and Therefore No Foreign ‘Investment’**

72. In their argument, Claimant asserts that the terms of the Bergonia-Conveniencia BIT should be applied to this conflict because Claimant is really a national of Conveniencia. However, as previously discussed above in Section A, neither this, nor any other BIT, should be applied as both parties to this dispute are nationals of Bergonia. As a result the Tribunal should determine that the Centre lacks appropriate jurisdiction over this dispute.

**2) In the Event that the Tertia-Bergonia BIT, or the Bergonia-Conveniencia BIT Were Applicable, Neither Would Define This Exploitation as an ‘Investment’**

73. However, even if it is found that the Claimant was a national of Conveniencia the exploitation of its intellectual property in Bergonia still does not constitute a protected ‘investment’ under the terms of the Bergonia-Conveniencia BIT. Additionally, the exploitation of Claimant’s intellectual property under the application of the Bergonia-Tertia BIT, through the use of the MFN Clause, still does not constitute an ‘investment.’ Furthermore, if any BIT is to be applied at all to this dispute to define ‘investment’, it should be the Tertia-Bergonia BIT because of Claimant’s reliance on the Tertia-Bergonia BIT to establish the other requisite elements for a finding of jurisdiction.

74. Claimant has attempted to avail itself of the nationality provision of the Tercia-Bergonia BIT by utilizing the MFN Clause found in Article 3 of the Bergonia-Conveniencia BIT. However, as discussed in more detail in Section A, an MFN clause cannot be used to invoke an isolated section of a BIT but ignore substantively related provisions.

75. Due to the linked nature of the *personae materiae* requirement of ‘nationality,’ and the *ratione materiae* requirement of ‘investment’<sup>68</sup> under Article 25 of the ICSID Convention, Claimant should not be able to utilize the MFN clause to invoke the definition of one but not the other. If the Claimant is to be allowed to incorporate a clause that creates jurisdiction under Article 25 of the ICSID Convention then they cannot ignore the accompanying subject matter granted by that party when it consented to arbitrate.<sup>69</sup> In

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<sup>68</sup> Convention of the Settlement of Investment Dispute Between States and Nationals of Other States, Art. 25(1).

<sup>69</sup> Christoph Schreuer, *THE ICSID CONVENTION: A COMMENTARY*, generally, (Cambridge University Press 2001).

this instance, the accompanying subject matter is the definition of ‘investment’ under the Tertia-Bergonia BIT.

76. As a result, if the Tribunal determines that the application of a BIT is appropriate in this dispute, it should apply the Tertia-Bergonia BIT over the Bergonia-Conveniencia BIT as a result of the Claimant’s reliance of portions of the Tertia-Bergonia BIT. As a result, it should be found that there is no ‘investment’ under the terms of the Tertia-Bergonia BIT, as its definition is too broad and patents were never contemplated to be protected. In the alternative, the application of the Bergonia-Conveniencia BIT still does not yield a protected ‘investment’ because the exploitation of the patent does not fall under its terms.

**i. Claimant’s Exploitation of Its Intellectual Property Does Not Constitute an ‘Investment’ Under the Tertia-Bergonia BIT because the Definition in the BIT is Too Broad and Patents Were Not Contemplated to Be Included as an ‘Investment’**

77. The exploitation of Claimant’s patent still does not constitute an ‘investment’ even if the Tertia-Bergonia BIT is applied because the definition of ‘investment’ is too broad in this BIT, and patents were never contemplated to be included in the BIT’s definition of ‘investment.’

78. Although the Tertia-Bergonia BIT specifically includes “intellectual property”<sup>70</sup> in its definition of ‘investment’ it never sets forth patents as being specifically included under a list which goes on to specifically include particular types of intellectual property.<sup>71</sup>

79. ICSID tribunals have been reluctant to base decisions as to the existence of an ‘investment’ when the sole basis is based on a very broad provision in the BIT.<sup>72</sup> For example, in the case of *Jan de Nul N.V. & Dredging Internation N.V. v. The Arab Republic of Egypt*<sup>73</sup>, the tribunal found that there was an ‘investment.’ However, they did determine the existence of that investment based on the very broad definition language in the applicable treaty, but by further inquiry into information following the broad definition.<sup>74</sup>

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<sup>70</sup> Treaty Between the Government of Tertia and the Government of Bergonia Concerning the Reciprocal Encouragement and Protection of Investment, Art. 1(a)(iv).

<sup>71</sup> Treaty Between the Government of Tertia and the Government of Bergonia Concerning the Reciprocal Encouragement and Protection of Investment, Art. 1(a)(iv).

<sup>72</sup> Cambell McLachlan, Laurence Shore, and Matthew Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION*, 172, ¶ 6.30, Oxford University Press (2007).

<sup>73</sup> *Jan de Nul N.V. & Dredging Internation N.V. v. The Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008.

<sup>74</sup> *Supra*, nt. 72.

Parties to a BIT have much discretion when it comes to what is included in the BIT and the provisions which are finally included are intended to reflect the specific conditions of consent to which the parties have agreed.<sup>75</sup>

80. In this instance relying solely on the fact that Tertia-Conveniencia BIT defines “intellectual property” under its definition of ‘investment’ to specifically include patents is far too broad and does not indicate that the parties’ intention was to include patents. This is particularly true considering that they went on to specifically define other types of “intellectual property” and omitted patents from that definition. As a result, it is not appropriate to find this dispute to be arising out of an ‘investment’ under the definition set forth in the Tertia-Bergonia BIT.

**ii. Even If The Exploitation of Claimant’s Intellectual Property Constitutes an ‘Investment’ Under the Terms of the Bergonia-Conveniencia BIT There Still is No Valid ‘Investment’ Because It is Not the Appropriate BIT and The General Characteristics of an ‘Investment’ Are Still Lacking.**

81. Even if there is an ‘investment’ under the terms of Conveniencia-Bergonia the exploitation of the Claimant’s intellectual property still does not constitute an ‘investment’ because this is not the appropriate BIT under which to define ‘investment’ for purposes of this dispute. Furthermore, even if the exploitation constitutes an ‘investment’ for purposes of the Bergonia-Conveniencia BIT it still does not satisfy the characteristics of an ‘investment’ under the applicable ICSID case law.

82. The language of the Bergonia-Conveniencia defines ‘investment’ as being inclusive of “intellectual property rights”, and goes on to specifically include patents as well as other types of intellectual property.<sup>76</sup>

83. However, as discussed in more detail above in Section B(2)(i) the applicable BIT in this dispute for the definition of ‘investment’ is the Tertia-Bergonia due to the Claimant’s invocation of the Tertia-Bergonia BIT via the MFN in the exploitation of the Bergonia-Conveniencia BIT.

84. Also, as discussed in more detail below in Section B(3), even if the exploitation of the Claimant’s intellectual property constitutes an ‘investment’ under the Bergonia-

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<sup>75</sup> Christoph Schreuer, *THE ICSID CONVENTION: A COMMENTARY*, 130, ¶ 102, (Cambridge University Press 2001).

<sup>76</sup> Treaty Between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia Concerning the Encouragement and Reciprocal Protection of Investments, Article 1(1)(d).

Conveniencia BIT it still fails to be properly classified as an ‘investment’ because it lacks the additional characteristics necessary for Article 25 jurisdiction under the ICSID Convention. In this instance, consent to the definition of an ‘investment’ in a treaty is “merely a factor to be given “great weight” in considering the determination of the existence of an ‘investment.’<sup>77</sup>

85. As a result, the Tribunal should find that even if the dispute in this instance constitutes an ‘investment’ under the terms of the Bergonia-Conveniencia BIT, that this is not the proper defining mechanism, and that regardless it still does not constitute an ‘investment’ under the objective Article 25 criteria.

### **3) The Exploitation of Claimant’s Intellectual Property Does Not Fall Within the Characteristics of an ‘Investment’ Under ICSID Case Law**

86. The exploitation of Claimant’s intellectual property in Bergonia also does not constitute an ‘investment’ because even in the case that the Tribunal determined that the exploitation of the intellectual property constituted an investment under either of the aforementioned BITs,, the exploitation still does not satisfy the indications of an ‘investment’ under ICSID case law.

87. In the *Fedax NV v. Republic of Venezuela*<sup>78</sup> the ICSID Tribunal adopted the criteria that were proposed by Professor Christoph Schreuer<sup>79</sup> in determining whether there was the existence of an ‘investment’ for purposes of Article 25 of the ICSID Convention. The *Fedax* Tribunal stated that:

The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and significance for the host State’s development.<sup>80</sup>

88. Furthermore, these characteristics must be looked at in their entirety, not simply

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<sup>77</sup> CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, AND BORZU SABAHI, INVESTOR-STATE ARBITRATION, 259, (Oxford University Press 2008), citing to *Alcoa Minerals of Jamaica, Inc. v. Gov’t of Jamaica*, ICSID Case No ARB/74/2, Decision on Jurisdiction and Competence, 6 July 1975.

<sup>78</sup> *Fedax NV v. Republic of Venezuela*, ICSID Case No ARB/96/3, Decision on Jurisdiction, 11 July 1997, 37 ILM 1378 (1997).

<sup>79</sup> Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press 2001).

<sup>80</sup> *Fedax*, ¶ 43.

individually, in order to find an ‘investment.’ In *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*<sup>81</sup> the Tribunal determined that the Center lacked jurisdiction over the dispute in question, and when looking for an ‘investment’ under the criteria set forth in *Fedax* determined that:

The requirement [is] . . . that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole. . . .<sup>82</sup>

89. As a result of this additional requirement, even if the Claimant is deemed to have an ‘investment’ under the term of either the Bergonia-Conveniencia BIT, or the Tertia-Bergonia BIT, there is still no protected ‘investment’ because the Claimant fails to satisfy the criteria for the finding of an ‘investment’ under the ICSID case law.

**i. There Was No ‘Investment’ Because There Was No Showing That the Use of Claimant’s Patent Was For a Substantial Duration**

90. The exploitation of the Claimant’s patent did not constitute an ‘investment’ because the period of time which the Bergonian government expropriate the Claimant’s patent was not a sufficient enough duration to establish an ‘investment.’

91. The expectation under Article 25 of the ICSID Convention is that the duration needs to indicate a long-term relationship between the parties in order to constitute an ‘investment.’<sup>83</sup> An ‘investment’ is perceived as needing to contribute to the host state’s development.<sup>84</sup> The substantial duration characteristic of an ‘investment’ is therefore thought to be required because commitments of an insubstantial duration are often unstable and can ultimately worsen the host state’s development.<sup>85</sup>

92. Again, there is no specific definition of what constitutes a sufficient duration. The First Draft of the ICSID Convention, sought to define an ‘investment’ of being for a period of “not less than five years.”<sup>86</sup> In the case of *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*<sup>87</sup> the Tribunal determined there was the existence of an investment.

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<sup>81</sup> *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004.

<sup>82</sup> *Id.*, ¶ 54.

<sup>83</sup> Christoph Schreuer, *THE ICSID CONVENTION: A COMMENTARY*, 140, ¶ 122, (Cambridge University Press 2001).

<sup>84</sup> CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, AND BORZU SABAHI, *INVESTOR-STATE ARBITRATION*, 266, (Oxford University Press 2008).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*, 256, citing First Draft of the ICSID Convention, (Oxford University Press 2008).

<sup>87</sup> *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, 23 July 2001, 42 ILM 606 (2003).

However, it stated that for a project to constitute an investment, it must “compl[y] with the minimal length of time upheld by doctrine, which is from 2 to 5 years.”<sup>88</sup>

93. In *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*<sup>89</sup> the Tribunal determined that there was no ‘investment’ for their contract dealing with mining material. One of the factors that the Tribunal considered was a payment of the contract early on did not indicate that the “duration of the commitment [was] particularly significant.”<sup>90</sup>
94. The Bergonian Government issued the compulsory license for the Claimant’s patent AZ2005 with a termination period of 48 months.<sup>91</sup> This does not fall within the two to five year period noted in *Salini*, or indicate that Bergonia was looking for a long-term relationship with the Claimant. They were simply seeking a quick, and temporary fix to a problem they were experiencing. Furthermore, the Bergonian government’s attempts to pay Medberg royalties prior to the completion of duration<sup>92</sup> indicate they do not consider this to be an ‘investment.’
95. As evidenced above, there is much variation regarding what constitutes a sufficient duration, and ultimately it seems to depend on the nature of the activity involved.<sup>93</sup> Given the nature of Patent AZ2005, and the uncertainty as to how quickly it would be effective,<sup>94</sup> a licensing of such a short duration is not a sufficient duration to establish an ‘investment.’

## **ii. There Was No ‘Investment’ Because There Was No Reasonable Indication that Claimant Would Receive Any Regular Profits or Returns**

96. The Claimant did not have any reasonable indication that they would receive any profits or returns from the use of patent AZ2005 in Bergonia. They did not make the purposeful transfer of capital into Bergonia specifically for the purpose of obtaining returns which is a strong indication of the existence of an ‘investment.’
97. The expectation of profit and returns is often held to be one of the most indicative characteristics of an investment and to show this there must be an “expenditure or transfer

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<sup>88</sup> *Id.*, ¶ 54.

<sup>89</sup> *Joy Mining*, *supra* nt. 81.

<sup>90</sup> *Id.*, ¶ 57.

<sup>91</sup> Clarification 24.

<sup>92</sup> Annex 3- Uncontested Facts, ¶ 8.

<sup>93</sup> CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, AND BORZU SABAHI, *INVESTOR-STATE ARBITRATION*, 267, (Oxford University Press 2008).

<sup>94</sup> Clarification 66.

of funds for the precise purpose of obtaining a return.”<sup>95</sup> Furthermore, there must be some indication that the returns will occur on a regular basis in order for this to be considered a characteristic of an ‘investment. One of the reasons the Tribunal failed to find an ‘investment’ in the *Joy Mining* case was because although there were returns from the project, they were delivered in one lump sum and not in regular returns.<sup>96</sup>

98. In this dispute there is no indication that Claimant purposefully made an expenditure directly into Bergonia for the purposes of obtaining returns. The Claimant had previously sought to license their product in Bergonia, but had specifically terminated that licensing agreement.<sup>97</sup> Furthermore, when offered return in the form of royalty payments, they specifically declined to accept them.<sup>98</sup> It would be counterintuitive for a company to make an investment specifically for the purposes of obtaining returns, and then decline to accept them. Further, even though the royalties were to be distributed on a yearly basis,<sup>99</sup> given the short forty-eight month duration of the compulsory license,<sup>100</sup> this is more like a lump-sum payment.

99. Given that Claimant was not currently seeking to license patent AZ2005 specifically in Bergonia there is no indication that they were seeking, or had any reason to believe that they would receive, regular profits and returns from Bergonia.

### **iii. There Was No ‘Investment’ Because The Use of the Patent Did Not Constitute a Risk For Either Party Involved**

100. The use of patent AZ2005 did not really constitute a risk for either the Claimant or the government of Bergonia. The Claimant still retained their patent over AZ2005, and the Bergonian government would be able to utilize another method if this patent did not solve their health issues.

101. There must be a showing that the parties to the dispute both participated in more of a risk than the simple threat of contractual breach, which is a risk that all parties to any contract

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<sup>95</sup> *CME Czech Republic, S.A. v. Czech Republic*, UNCITRAL Arbitration, Final Award, 13 March 2003, ¶ 34.

<sup>96</sup> *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶ 20.

<sup>97</sup> Annex 3- Uncontested Facts, ¶ 6.

<sup>98</sup> Annex 3- Uncontested Facts, ¶ 8.

<sup>99</sup> Clarification 87.

<sup>100</sup> Clarification 66.

must face.<sup>101</sup> Additionally, just because there is *any* risk in the project does not mean that the ‘investment’ itself constituted a risk.<sup>102</sup> In *Malaysian Historical Salvors Sdn v. Malaysia*<sup>103</sup> the Tribunal declined to find a salvage contract to be an ‘investment’ because:

The Claimant has not provided any convincing reasons why the risks assumed under the Contract were **anything other than normal commercial risks**. It is clear under ICSID practice and jurisprudence that an ordinary commercial contract cannot be considered as an “investment.” While the Claimant may have satisfied the risk characteristic or criterion in a quantitative sense (*i.e.*, that there was inherent risk assumed under the Contract), the quality of the assumed risk was not something which established ICSID practice and jurisprudence would recognize.<sup>104</sup>

102. In the current dispute the Claimant and Bergonia are only subject to the risks found in a normal sales contract: that the product will be defective, and that they will not get paid for the use of their product. Bergonia is unaware whether the product will be effective in solving their health issues.<sup>105</sup> Claimant is unaware whether they will receive adequate remuneration for the use of their patent.<sup>106</sup> However, these are risks entered into by almost all parties to *any* commercial contract, and therefore are not indicative of the existence of an ‘investment.’

#### **iv. There Was No ‘Investment’ Because Bergonia’s Use of the Patent Does Not Constitute a Substantial Contribution from the Claimant**

103. The use of patent AZ2005 by the Bergonian government does not constitute a substantial contribution from the Claimant. The contributions made by the Claimant were made prior to the commencement of the project, and therefore do not go towards a finding of an ‘investment.’

104. The financial magnitude of the project is often looked at to determine whether the Claimant made a substantial contribution.<sup>107</sup> In *Liberian Eastern Timber Corp. v. Republic*

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<sup>101</sup> Emmanuel Gaillard, *Chronique des sentences arbitrales*, 126 J.D.I. 273, 292 (1999).

<sup>102</sup> CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, AND BORZU SABAHI, *INVESTOR-STATE ARBITRATION*, 270, (Oxford University Press 2008).

<sup>103</sup> *Malaysian Historical Salvors Sdn v. Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction, 17 May 2007.

<sup>104</sup> *Id.*, ¶112 (**emphasis added**).

<sup>105</sup> Clarification 66.

<sup>106</sup> Clarification 88.

<sup>107</sup> CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, AND BORZU SABAHI, *INVESTOR-STATE ARBITRATION*, 271, (Oxford University Press 2008).

of Liberia<sup>108</sup> the Tribunal's finding of an 'investment' was largely based on the size of the expenditure made.<sup>109</sup>

105. However, it is also generally established that 'pre-investment' expenditures do not go towards the finding of an 'investment.'<sup>110</sup> In *Mihaly International Corp. v. Republic of Sri Lanka*<sup>111</sup> the Tribunal found that there was no 'investment' because it was not the intentions of the parties to include preparations for the project as an 'investment.'<sup>112</sup>

106. The substantial contributions made by the Claimant in regards to AZ2005 all occurred in the developmental stage, prior to any feasible contemplation of an 'investment' between Claimant and Bergonia. MedScience Co. and Dr. Frankensid had made a fifty percent (50%) contribution to the formation of patent AZ2005<sup>113</sup> prior to 5 February 2004.<sup>114</sup> All of the research and development costs of patent AZ2005 were borne by MedScience.<sup>115</sup> Furthermore, Medberg had terminated its attempt to license AZ2005 in Bergonia as of 31 March 2007<sup>116</sup> and the Bergonian Intellectual Property Office did not commence to obtain the compulsory license until 1 June 2007.<sup>117</sup> At the point in which Bergonia utilized Claimant's patent the only contribution that Claimant could really make was to license the patent.

107. As a result, there was not sufficient substantial contribution by the Claimant to consider that they had made a substantial contribution to Bergonia.

**v. There Was No 'Investment' Because Even Though the Use of the Patent is Significant for the Development of Bergonia There is No Indication That it Would Be Particularly Significant for Its Economic Development**

108. The use of patent AZ2005 had some significance for a health development in Bergonia. However there is no indication that the use of patent AZ2005 would be particularly

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<sup>108</sup> *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No ARB/83/2, Decision on Jurisdiction, 24 October 1984, 2 ICSID Rep. 346 (1994).

<sup>109</sup> *Id.*, 350.

<sup>110</sup> Noah Rubins, *The Notion of 'Investment' in International Investment Arbitration*, N. HORN, S. KRÖLL, ARBITRATING FOREIGN INVESTMENT DISPUTES, PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS, 300 (Kluwer 2004).

<sup>111</sup> *Mihaly International Corp. v. Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award, 15 March, 2002.

<sup>112</sup> *Id.*, ¶ 51.

<sup>113</sup> Annex 3- Uncontested Facts, ¶ 2.

<sup>114</sup> Annex 3- Uncontested Facts, ¶ 5.

<sup>115</sup> Clarification 105.

<sup>116</sup> Annex 3- Uncontested Facts, ¶ 6.

<sup>117</sup> Annex 3- Uncontested Facts, ¶ 7.

significant for Bergonia’s economic development. As the goal of the Centre is to promote economic, not health developments, the use of patent AZ2005 cannot be said to be of enough significance to be indicative of an ‘investment.’

109. The development of the host state is not necessarily a requisite characteristic of investments in general.<sup>118</sup> It is simply suggested that because economic development via the protection of investments is mentioned as one of the goals in the ICSID Convention’s Preamble that this element should be taken into consideration when determining the existence of an ‘investment.’<sup>119</sup> Therefore, states should only view projects which are crucial to their *economic* development as constituting ‘investments.’<sup>120</sup>

110. In *Malaysian Historical Salvors Sdn v. Malaysia* (MHS)<sup>121</sup> the Tribunal held that a salvage contract did not constitute an ‘investment’ because in the light of the objective of the ICSID convention that there be “some positive impact on development”<sup>122</sup> that “the term ‘investment’ should be interpreted as an activity which promotes some form of positive economic development for the host State.”<sup>123</sup>

111. Granted, the use patent AZ2005 will most likely be good for the general well-being of the citizens of Bergonia. However, there is no indication that Bergonia’s low per capita GDP<sup>124</sup> is caused by the obesity issues its population faces,<sup>125</sup> or that the elimination of this issue would make them more economically productive.

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<sup>118</sup> Christoph Schreurer, *THE ICSID CONVENTION: A COMMENTARY*, 140, ¶ 123, (Cambridge University Press 2001).

<sup>119</sup> Christoph Schreurer, *THE ICSID CONVENTION: A COMMENTARY*, 140, ¶ 123, (Cambridge University Press 2001).

<sup>120</sup> CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, AND BORZU SABAHI, *INVESTOR-STATE ARBITRATION*, 273, (Oxford University Press 2008).

<sup>121</sup> *Malaysian Historical Salvors Sdn v. Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction, 17 May 2007.

<sup>122</sup> Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ¶ 9.

<sup>123</sup> *Malaysian Historical Salvors Sdn v. Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction, 17 May 2007, ¶68.

<sup>124</sup> Clarification 44.

<sup>125</sup> Clarification 65.

**C) CLAIMANT’S CAUSE OF ACTION FOR EXPROPRIATION FAILS BECAUSE RESPONDENT IS TRIPS-COMPLIANT AND IS NOT LIABLE UNDER THE BERGONIA-CONVENIENCIA BIT**

**1) Respondent Complies with Article 3(4) of the Bergonia-Tertia BIT and TRIPS**

112. If this Honorable Tribunal elects to hear the merits of Claimant’s cause of action, it is because the Bergonia-Tertia BIT has been determined to be applicable.<sup>126</sup> Thus, Claimant cannot now be heard to argue that only the jurisdictional components of the Bergonia-Tertia BIT are applicable to this dispute, and that the other substantive provisions (such as Article 3(4), which provides that compulsory licenses are not expropriation when they are TRIPS-compliant) ought to be completely ignored. Claimant’s argument is fundamentally inequitable, that is, it is merely “cherry-picking.”

113. If Claimant wishes to invoke the treatment afforded to a Tertian investor, then Claimant should be subject to the same limitation set forth in Article 3(4). To clarify further, the Bergonian Government does not contend that by invoking a clause within the Bergonia-Tertia BIT that Claimant automatically is then subject to the entire treaty; however, other portions of the Bergonia-Tertia BIT that are inextricably intertwined and directly impact the treatment Claimant receives under the jurisdictional articles, such as Article 6(8) cannot not be ignored. To ignore such provisions would lead to unjust “cherry-picking” of third-party treaties.

114. Further, merely allowing Claimant to “cherry-pick” jurisdictional articles, while ignoring substantive the substantive articles relating to expropriation, does violence to the intent of procedural articles Claimant wishes to invoke. This is so because the procedural articles of the Bergonia-Tertia BIT were negotiated to specifically correspond to the substantive provisions of that treaty. Put differently, the Bergonian government’s consent to arbitration by means of the procedural mechanisms in the Bergonia-Tertia BIT (those invoked by Claimant) is limited to the applicable substantive aspects of the Bergonia-Tertia BIT. In the case at bar, the relevant substantive aspect of the Bergonia-Tertia BIT which is intertwined with the procedural articles invoked by Claimant is paragraph 4 of Article 3.

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<sup>126</sup> See section A (jurisdiction), *supra*.

115. Article III of the Bergonia-Tertia BIT, which is applicable here<sup>127</sup>, provides that “Investments shall not be expropriated . . .” However, paragraph 4 of this article carves out an important exception:

This Article does **not** apply to the **issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.**<sup>128</sup>

116. Therefore, because Bergonia’s actions with respect to the compulsory license at issue are TRIPS-Compliant, Bergonia cannot be found liable for expropriation.<sup>129</sup>

117. Article 31 of the TRIPS Agreement expressly allows for the “use of the subject matter of a patent without the authorization of the right holder” by a government.<sup>130</sup> Provided that certain provisions (discussed *infra*) are respected; Bergonia has, indeed, respected all of the TRIPS Agreement’s requirements, and is therefore entitled to issue compulsory licenses with respect to Claimant’s patent.

118. Of paramount importance to this Honorable Tribunal’s interpretation of Bergonia’s obligations under Article 31 of TRIPS is the Doha Declaration on the TRIPS Agreement and Public Health (hereinafter, “Doha Declaration”).<sup>131</sup> The Doha Declaration gives Bergonia the right to issue compulsory licenses to protect public health.<sup>132</sup> In fact, the Doha Declaration has made clear that “[e]ach member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.”<sup>133</sup> Likewise, the Doha Declaration has made clear that Bergonia has “the right to determine what constitutes a national emergency or other circumstance of extreme urgency” in order to justify the issuance of a compulsory license.<sup>134</sup> Thus, Article 31 must be interpreted in light of Bergonia’s rights declared under the Doha Declaration.<sup>135</sup>

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<sup>127</sup> See section A, *supra*.

<sup>128</sup> Bergonia-Tertia BIT Art. 3(4).

<sup>129</sup> Bergonia-Tertia BIT Art. 3(4).

<sup>130</sup> TRIPS Art. 31

<sup>131</sup> WT/MIN(01)/DEC/2 (Nov. 20 2001).

<sup>132</sup> WT/MIN(01)/DEC/2 (Nov. 20 2001).

<sup>133</sup> WT/MIN(01)/DEC/2 ¶ 5(b) (Nov. 20 2001).

<sup>134</sup> WT/MIN(01)/DEC/2 ¶ 5(b) (Nov. 20 2001).

<sup>135</sup> WT/MIN(01)/DEC/2 (Nov. 20 2001).

Therefore, any attempt by Claimant to assert that TRIPS limits the grounds for which a compulsory license may be granted must be soundly rejected.<sup>136</sup>

119. Bergonia satisfies all of the conditions for the issuance of a compulsory license pursuant to Article 31 of TRIPS. Pursuant to Article 31(b) of TRIPS, BioLife (the licensee) made a good faith effort to maintain a license to utilize Bergonian Patent No. AZ2005.<sup>137</sup> Indeed, it was Claimant who terminated the license agreement in March 2007.<sup>138</sup> The Bergonian government waited a “reasonable period of time,”<sup>139</sup> only resorting to the issuance of the compulsory license some eight (8) months later in November 2007.<sup>140</sup>

120. Additionally, by limiting the duration of the compulsory license to forty-eight (48) months<sup>141</sup>, the Bergonian government fully complied with Article 31(c), which provides that the duration of the authorization of the compulsory license should be “limited to the purpose for which it was authorized.”<sup>142</sup> In fact, nothing in TRIPS purports to ban the issuance of a compulsory license for the entire term of a patent, if required to fulfill the purpose of the grant.<sup>143</sup> Finally, the duration of the compulsory license is fully justified in order to provide the minimum period of time necessary to observe empirical results of the impact of the compulsory license.<sup>144</sup>

121. Likewise, the Bergonian government fulfilled its obligation under Article 31(d) of TRIPS by making the compulsory license “non-exclusive.” As of January 1, 2009, some five (5) Bergonian companies had invoked the license.<sup>145</sup>

122. Moreover, the Bergonian government is compliant with Article 31(f) which provides that a compulsory license should be given “**predominantly** for the supply of the domestic market.”<sup>146</sup> Although exports comprise a “significant” portion of the products produced

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<sup>136</sup> See C.M. Correa, *Intellectual Property Rights as an Investment: Options for Developing Countries*, Transnational Dispute Management, Vol. 6, No. 2, page 2 (Aug. 2009).

<sup>137</sup> Record at 20 ¶ 6.

<sup>138</sup> Record at 20 ¶ 6.

<sup>139</sup> TRIPS Art. 31(b)

<sup>140</sup> Record at 20 ¶ 6.

<sup>141</sup> Clarification 24.

<sup>142</sup> TRIPS Art. 31(c).

<sup>143</sup> TRIPS Art. 31(c); see also C.M. Correa, *Intellectual Property Rights as an Investment: Options for Developing Countries*, Transnational Dispute Management, Vol. 6, No. 2, page 13 (Aug. 2009).

<sup>144</sup> Clarification 66.

<sup>145</sup> Record at 20 ¶ 8.

<sup>146</sup> TRIPS Art. 31(f).

using the compulsory license for the three companies involved<sup>147</sup>, the underlying purpose of the compulsory license remains fulfilling an important medical need of the people of Bergonia. Thus, the predominant purpose of the compulsory license is to serve the needs of the domestic market. Additionally, at least of the import-destination countries is a developing country.<sup>148</sup> Therefore, Bergonia implores this Honorable Tribunal to consider the spirit of the Decision of the WTO General Council adopted on August 30, 2003, which waived the export requirement of TRIPS Article 31(f) “in the case of export of medicines to countries that are either completely without or that have insufficient manufacturing capacity.”<sup>149</sup> Although Claimant argues that the technical notice requirements of the 2003 Decision have not been met, the underlying purpose of the 2003 Decision would be served by applying it in this circumstance in order to provide for the public health of at least one developing country and to take advantage of economies of scale.<sup>150</sup>

123.Next, the Bergonian government has offered Claimant “adequate remuneration” under the circumstances of these facts and which has taken “into account the economic value of the authorization” pursuant to Article 31(h) of TRIPS.<sup>151</sup> Indeed, the Bergonian government has collected royalty payments from the companies receiving the compulsory license and offered these royalties to Claimant, who has refused them.<sup>152</sup> In fact, these royalty payments are only “moderately lower” than the royalty payments that Claimant negotiated on the open market, proving that Claimant has been offered “adequate remuneration.”<sup>153</sup>

124.Finally, Claimant was “given the possibility of reviewing,” by a judicial or other **“distinct higher authority”** the “legal validity” of the decisions relating to the granting of the compulsory license.<sup>154</sup> The Bergonian government’s Justice Ministry replied to Claimant’s December 1, 2007 letter by informing Claimant that the compulsory license

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<sup>147</sup> Clarification 61.

<sup>148</sup> Clarification 62.

<sup>149</sup> Implementation of paragraph 6 of the Doha Declaration on the TRIPS and public Health, WT/L/540 and Corr.1 (Sept. 2003) [hereinafter “2003 Decision”]; C.M. Correa, *Intellectual Property Rights as an Investment: Options for Developing Countries*, Transnational Dispute Management, Vol. 6, No. 2, page 13 (Aug. 2009).

<sup>150</sup> Implementation of paragraph 6 of the Doha Declaration on the TRIPS and public Health, WT/L/540 and Corr.1 (Sept. 2003) [hereinafter “2003 Decision”]; see also C.M. Correa, *Intellectual Property Rights as an Investment: Options for Developing Countries*, Transnational Dispute Management, Vol. 6, No. 2, page 13 (Aug. 2009).

<sup>151</sup> Record at 20 ¶8.

<sup>152</sup> Record at 20 ¶8.

<sup>153</sup> Clarification 88.

<sup>154</sup> TRIPS Article 31(i) and (g); see also C.M. Correa, *Intellectual Property Rights as an Investment: Options for Developing Countries*, Transnational Dispute Management, Vol. 6, No. 2, page 13 (Aug. 2009).

was issued in “conformity with Bergonia’s international obligations”<sup>155</sup> as required by TRIPS and under Bergonian law.

125. In light of all of this, the Bergonian government has met its obligations under TRIPS and is therefore not subject to liability for expropriation in accordance with Article 3(4) of the Bergonia-Tertia BIT.

## **2) Even if the Bergonia-Tertia BIT does not apply, Respondent Complies with the Bergonia-Conveniencia BIT**

### **i. The Public Benefit Exception of Article 4(2) of the Bergonia-Conveniencia BIT Is Applicable and Bars a Finding that the Bergonian Government Expropriated**

126. Article 4(2) of the Bergonia-Conveniencia BIT provides that:

Investments 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.<sup>156</sup>

127. This Honorable Tribunal should take note that the words “emergency,” “crisis,” “disaster,” etc. do not appear in the language of this exception. That is, invocation of the compulsory license is justified by merely showing a **“public benefit.”** Thus, by its plain language, this broad and important exception to Article 4(2)’s prohibition against expropriation is applicable to the case at bar. In short, Bergonia rightly determined, according to its “applicable laws” that that the public benefit would be served issuance of the compulsory license. Additionally, “adequate and effective compensation” was promptly offered to Claimants.

128. Bergonia, a country with a mere US\$ 7,535 gross domestic product per capita<sup>157</sup>, was unquestionably rational in deciding that the issuance of compulsory license would be likely to result in substantial “public benefit” to its population, in which more than one in three people are obese.<sup>158</sup>

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<sup>155</sup> Clarification 111.

<sup>156</sup> Bergonia-Conveniencia BIT Art. 4(2).

<sup>157</sup> Clarification 44.

<sup>158</sup> Clarification 65.

129. Indeed, the public interest (in terms of medical need) “became more acute” after claimant terminated the license agreement.<sup>159</sup> Similarly, it is well-settled that many Bergonians are genetically pre-disposed toward obesity.<sup>160</sup> Finally, the Bergonian government acted on information obtained from two published scientific studies which demonstrate the efficacy of the patented products and treatments in treating the specific form of obesity affecting many Bergonians.<sup>161</sup> Thus, there can be no doubt that the Bergonian government acted in the “public benefit” in issuing the compulsory license.

130. In addition to acting in the public interest, the Bergonian government fulfilled its obligation to provide “adequate and effective” compensation to Claimant. For the same reasons that the Bergonian government has met its obligation under Article 31(h) of TRIPS, discussed *supra*, the Bergonian government has met its obligations under the Article 4(2) exception.<sup>162</sup> Specifically, the Bergonian government has collected royalty payments from the companies receiving the compulsory license and offered these royalties to Claimant, who has refused them.<sup>163</sup> In fact, these royalty payments are only “moderately lower” than the royalty payments that Claimant negotiated on the open market, proving that Claimant has been offered “adequate remuneration.”<sup>164</sup>

**ii. Even if the Public Benefit Exception of Article 4(2) Is Inapplicable, There Is Still No Basis for Finding Liability for Expropriation Under Article 4 of the Bergonia-Conveniencia BIT**

131. Article 4(2) of the Bergonia-Conveniencia BIT provides:

Investments by investors of either Contract 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 . . . 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. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened

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<sup>159</sup> Clarification 26.

<sup>160</sup> Clarification 26.

<sup>161</sup> Clarification 26.

<sup>162</sup> Bergonia-Conveniencia BIT Art. 4(2)

<sup>163</sup> Record at 20 ¶8.

<sup>164</sup> Clarification 88.

expropriation has become publicly known.<sup>165</sup>

132. Setting aside that the “public benefit” exception precludes Claimant from proving expropriation under Article 4(2) of the Bergonia-Conveniencia BIT as a matter of law, Claimant also fails otherwise to prove expropriation.

**a. The Temporary Nature of the Compulsory License Does Not Support a Finding of Expropriation**

133. It is well settled that:

[g]enerally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment’s successful development depends on the realization of certain activities at specific moments that may not endure variations.<sup>166</sup>

134. *S.D. Myers v. Government of Canada* is instructive.<sup>167</sup> In *S.D. Myers*, the investment arbitrators concluded that the Canadian government’s eighteen (18) month closure of its border with the United States for the exportation of certain chemicals was merely “[a]n opportunity [that] was delayed,” but was not expropriation because the measure was temporary.<sup>168</sup> Thus, Claimant’s reliance on *Metalclad* is misplaced; in *Metalclad* the arbitral tribunal found that the regulation at issue was expropriatory in part because the “[d]ecree had the effect of barring forever the operation of the landfill.”<sup>169</sup> Similarly, Claimant’s reliance on *Tecmed v. United Mexican States* is equally misplaced. The Tribunal in *Tecmed* expressly conditioned a finding of expropriation in terms of permanent deprivation:

Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent,

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<sup>165</sup> Art. 4(2) Bergonia-Conveniencia BIT

<sup>166</sup> *LG&E Energy Corp., LG&E Capital Corp., & LGE&E Int’l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 ¶¶99-200 (Oct. 3, 2006); CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION (Oxford Univ. Press 2008) at p. 468.

<sup>167</sup> *S.D. Myers v. Gov’t of Canada* (UNCITRAL Partial Award, Nov. 12, 2000), 40 I.L.M. 1408 (2001).

<sup>168</sup> *Id.*, ¶¶283-84; *see also* Christopher F. Dugan, Don Wallace, Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* (Oxford Univ. Press 2008) at p. 468.

<sup>169</sup> *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award of Aug. 30, 2000) ¶ 109; *see also* Christopher F. Dugan, Don Wallace, Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* (Oxford Univ. Press 2008) at p. 468.

even where legal ownership of the assets in question is not affected, **and so long as the deprivation is not temporary.**<sup>170</sup>

135. Indeed, even where the government-caused deprivation is substantial, permanent deprivation is still required.<sup>171</sup>

136. In the case at bar, the compulsory license is, in fact, temporary, having a life of only forty-eight (48) months.<sup>172</sup> Further, as previously mentioned, the duration of the compulsory license is fully justified in order to provide the minimum period of time necessary to observe empirical results of the impact of the compulsory license.<sup>173</sup> Finally, Claimants point to nothing in the record, or elsewhere, that indicates that this specific forty-eight (48) month period is critical to the success of the patent.

**b. The Minimal Consequences to Claimant as a Result of the Issuance of the Compulsory License Does Not Support a Finding of Expropriation**

137. Claimant's assertion that loss of control to operate its business is tantamount to expropriation is fundamentally misplaced. As explained *infra*, the compulsory license is a temporary measure taken by the Bergonain government. That is, there can be no complete loss of control when the measure complained of is temporal in nature.<sup>174</sup>

138. Moreover, regardless of the degree of control that Claimant maintained over its patent, it has failed to prove that its entire investment value has been destroyed. Indeed, failure to demonstrate a total loss of its investment value is dispositive of Claimant's expropriation claim. Thus, Claimant cannot avoid the fact that:

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<sup>170</sup> Tecmed v. United Mexican States, ICSID Case No. ARB (AF)/00/2 (May 29, 2003) 43 LL.M. 133 (2004), ¶116; *see also* CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION (Oxford Univ. Press 2008) at p. 468.

<sup>171</sup> See, e.g., Generation Ukraine v. Ukraine, ICSID Case No. ARB/00/9 (Sep. 16, 2003) ¶¶20.32-21.33; *see also* CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION (Oxford Univ. Press 2008), 468.

<sup>172</sup> Clarification 24.

<sup>173</sup> Clarification 66.

<sup>174</sup> Tecmed v. United Mexican States, ICSID Case No. ARB (AF)/00/2 (May 29, 2003) 43 LL.M. 133 (2004), ¶116; *see also* CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION (Oxford Univ. Press 2008), 468.

[M]any tribunals have analyzed whether the government measures have effectively destroyed the entire value of the investment, regardless of the degree of retained control.<sup>175</sup>

139. After rejecting royalty offers that were nearly equivalent to the market value of its patented products, Claimant cannot now be heard to argue that it was deprived of its entire investment value.<sup>176</sup> Therefore, Claimant's cause of action for expropriation must fail as a matter of law.

**c. The Intent, Purpose and Character of the Bergonian Government's Act in Issuing the Compulsory License Does Not Support a Finding of Expropriation**

140. Finally, many Arbitral Tribunals have deferred to the purpose and goals set forth by sovereign governments with regard to whether regulatory actions amount to expropriation. For example, in *Siemens A.G. v. Argentine Republic*, the Tribunal explained:

The public purpose of the 2000 Emergency Law was to face the dire fiscal situation of the Government. This is a legitimate concern of Argentina and the Tribunal defers to Argentina in the determination of its public interest.<sup>177</sup>

141. In the case at bar, this Honorable Tribunal should also give significant weight to the purpose behind issuing the compulsory license. As previously discussed at length, Bergonian society was faced with an important medical, the gravity of which justified issuance of the compulsory license.<sup>178</sup>

142. Thus, in light of the fact that the issuance of the compulsory license was only temporary, the interference with Claimant's patent was minimal and that the Bergonian government acted out of public necessity Claimant's cause of action for expropriation must fail.

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<sup>175</sup> Christopher F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAHI, *INVESTOR-STATE ARBITRATION* (Oxford Univ. Press 2008), 458.

<sup>176</sup> Clarification 88.

<sup>177</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 ¶273 (Feb. 6, 2007).

<sup>178</sup> See Facts, *supra*.

## CONCLUSION

143. The Tribunal should deny jurisdiction to the Claimant because: 1) it is a Bergonian national, and therefore, may not obtain the protections of the Bergonia-Conveniencia BIT; 2) MFN clauses may not be invoked to obtain consent to arbitration; and 3) under Article I.2 the Bergonian Government may deny the protection of the Tertia-Bergonia BIT to Claimant.

144. The Tribunal should decline to find the existence of a foreign ‘investment’ because: 1) the lack of diversity of nationalities yields that there is no applicable BIT; 2) if there is an applicable BIT this dispute is not arising out of their definitions of ‘investment;’ and 3) the objective criteria of an ‘investment’ are lacking in this instance.

145. The Tribunal should reject Claimant’s cause of action for expropriation because: 1) the Bergonian Government is TRIPS-compliant and 2) the Bergonian Government complies with the Bergonian-Conveniencia BIT.

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Visscher

Respectfully Submitted this 21<sup>st</sup> day of September 2009