



Foreign Direct Investment International Moot Competition

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2009 Clarification Requests plus Responses

115

[Determination of Royalties](#)

How did the Bergonian IP Office determine the royalties to be paid? What type of methodology did it use?

768

2009-08-15 04:03:02

Response No reply (late - see time stamp)

114

[Availability of Product](#)

Was the patented product available (through imports or otherwise) in Bergonia between the termination of the license agreement with Biolife and the issuance of the compulsory license?

780

2009-08-14 22:20:16

Response Yes

113

[Parallel Exports](#)

Were Medberg's concerns about BioLife's parallel exports ever confirmed? Was there a judicial or administrative pronouncement or decision on the matter?

780

2009-08-14 22:16:06

Response 2 Questions: 1. Parallel exports did occur. 2. No

112

[Agency Principles](#)

Under Bergonian law, could Claimant bind its 100% shareholder or viceversa? If not, is there any principle under Bergonian law public or private law (including tax laws) which considers a 100% controlled entity an alter ego of its sole shareholder?

780

2009-08-14 22:15:05

Response 2 Questions: No response.

111

[Attempts at Settlement](#)

Other than Medberg's objections before the IP Office, did the MED group of companies (through Medberg, MedX Holdings, MedScience or otherwise) ever file a Request for Settlement under Art. 10(2) of the Bergonia-Conveniencia BIT? If so, was it ever replied to by Respondent?

780

2009-08-14 22:08:51

Response 2 Questions: 1. On 1 December 2007, MedBerg wrote the Bergonian IP Office with copies to the Foreign, Economics and Justice Ministries referring to Art. 10(2) of the BIT. 2. Only the Justice Ministry replied to MedBerg's 1 December 2007 letter, stating that the compulsory license was issued in conformity with Bergonia's international obligations.

110

[Screening of Investments](#)

Does Bergonian law provide screening requirements or procedures for the admittance of a foreign investor?? If so, what are they?

768

2009-08-14 21:57:13

Response None specific to foreign investors save any found in its BITs. Separately, the Bergonian State Drug Administration approves all products that deal with medical treatments for humans

109

[product price](#)

What was the price of the product on the free market ? Was the drug very expensive (too expensive for average citizens) or the price was reasonable ?

Skadden



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783

2009-08-14 21:43:42

Response 2 Questions: 1. The treatment cost is 9,950 Bergonian ECU (ca. US \$300) per annum. 2. No response.

108

[V.C.](#)

Are Bergonia and Conveniencia parties to the Vienna Convention on the Law of Treaties?

783

2009-08-14 21:41:30

Response Yes

107

[MedBerg's incorporation](#)

Does Bergonian law provide any obligation (or facilitation) due to which foreign investors have to run their business under companies incorporated under Bergonian law?

783

2009-08-14 21:40:25

Response No

106

[MedBerg's behaviour](#)

Due to the fact that BioLife's licence was an exclusive one and when it terminated no other licence agreements were concluded or under negotiation, has there been any judicial or administrative process that declared MedBerg's activity anti-competitive?

783

2009-08-14 21:37:10

Response No

105

[product invention process](#)

Where the expenses connected to the research and development of the drug have been borne?

783

2009-08-14 21:21:08

Response R&D expenses were borne by MedScience

104

[Date of enter into force of Bergonian IP Law](#)

In what year did Bergonia's IP laws (which regulates compulsory licenses) enter into force?

768

2009-08-14 21:07:00

Response 1997

103

[MedX generics](#)

Of the MedX subsidiaries that license the production and sale of the patented product in the countries that import from the Bergonian compulsory license holders, do any of those MedX subsidiaries actually produce or sell the products covered by the license? If so, are any of these products, which are derived from the licenses of the MedX subsidiaries, sold as a generic version of the product? Did they acquire their license from MedBerg?

770

2009-08-14 20:08:04

Response 3 questions: 1. All the relevant subsidiaries produce and sell. 2. No generics are on the market. 3. No.

102

[MedScience](#)

What percentage of the shareholders of MedScience are both nationals of a country that is a signatory to ICSID and are not nationals of Bergonia?

770

2009-08-14 19:46:17

Response No data beyond that provided in response to Request No. 17 (1st Round of Requests) is available.

101

[international patents](#)

Is the drug patented in any country other than Bergonia? If so, are those patents owned by any company other than MedX or its subsidiaries?

770

2009-08-14 17:20:14

Response 2 Questions: 1. Yes. 2. No.

100

[trade union](#)

What percentage of countries in Bergonia's trade union are least developed countries as defined by the United Nations?

770

2009-08-14 16:10:47

Response None

93

[IP exchange](#)

If MedX exchanged shares in its company to Dr. Frankensid and MedScience in order to be assigned right to patent the drug, and if currently 100% of the ownership of MedX is owned by Dr. Frankensid and MedScience, what assets associated with MedX did the previous owners of MedX maintain immediately after the exchange?

770

2009-08-14 15:54:13

Response After transferring MedX Holdings Ltd to Dr. Frankensid and MedScience, Convenient Companies SARL maintained no assets associated with MedX (see responses to Requests 45and 74).

90

[Fabela 8](#)

Are there any information about the trade value of the patent from 31.3.2005 till 31.3.2007?

771

2009-08-14 15:29:18

Response No

89

[Fabela 7](#)

What is the income level of Conveniencia?

771

2009-08-14 15:29:01

Response 2008 per capita GDP in Conveniencia was US \$40,213 (IMF World Economic Outlook Database).

88

[Fabela 6](#)

How much was the offered royalty fee lower than the one found in License Agreement? (e.g. considerably, slightly)

771

2009-08-14 15:28:48

Response Moderately lower.

87

[Fabela 5](#)

What was the time period in which the royalty fee offered by the Bergonian IP Office and the companies invoking the compulsory license was payable? (e.g. monthly, yearly)

771

2009-08-14 15:28:28

Response Yearly

86

[Fabela 4](#)

Was the royalty fee offered by the Bergonian IP Office and the companies invoking the compulsory licenses expressed in convertible currency that was easily transferable out of Bergonia?

771

2009-08-14 15:28:12

Response It was expressed as a percentage of sales. Payments would have been made in the Bergonian official currency, the ECU, while under the License Agreement payments were made in the official currency of Conveniencia (Con\$). There has been no problem with transferability of funds between these two currencies.

85

[Fabela 3](#)

Had Bergonia conducted any measures in relation to obesity health problems in the past?

771

2009-08-14 15:27:55

Response The Bergonian Health Ministry has funded several information campaigns on nutrition and exercise, and together with the Bergonian Exchequer has prepared a "Green Paper" on imposing an 18% tax on sugared beverages and beverages containing corn syrup.

84

[Fabela 2](#)

Are there any companies in Bergonia operating in the same business sector as Claimant and have any measures similar to the ones conducted in case of Claimant's patent been conducted in relation to them?

771

2009-08-14 15:27:33

Response 2 Questions: 1. Yes. 2. No.

83

[Fabela 1](#)

Have any compulsory licenses been issued in the past by Bergonia in relation to the patents of undisputedly domestic companies?

771

2009-08-14 15:27:15

Response Yes

82

[Bustamante Question 8](#)

Do the proceedings before the Patent Review Board offer due process guarantees (any safeguards for the independence of judges, right to oral hearing, right to respond to any filings made by the other party)?

792

2009-08-14 14:08:06

Response No information on the specific items listed in the question above, but in general, yes. See also the response to 1st Clarifications, Request 29.

81

[Bustamante Question 7](#)

7. What are the primary ethnicities and religions in Bergonia and Conveniencia?

792

2009-08-14 14:07:44

Response No response.

80

[Bustamante Question 6](#)

6. Has Bergonia adopted the law specifying the notion of abuse of IP rights for the purposes of TRIPS and, if such is the case, what does the law establish as an abuse per se and what should depend on circumstances of each particular case and does Bergonian law provide for issuance of a compulsory license as remedy for abuse of rights?

792

2009-08-14 14:07:15

Response Bergonia has laws in place that implement all relevant TRIPS Agreement obligations, following reasonably closely the relevant text of the TRIPS Agreement.

79

[Bustamante Question 5](#)

5. Do the products manufactured by BioScience and/or other beneficiaries of the compulsory licenses issued in Bergonia differ in any way from similar products produced by MedBerg (or MedX subsidiaries in other countries)?

792

2009-08-14 14:06:50

Response No information available on this point.

78

[Bustamante Question 4](#)

4. In which currency werethe royalty payments offered to MedBerg (and is such currency freely convertible)?

792

2009-08-14 14:06:22

Response See response to Request 86. The Bergonian ECU, which is freely convertible

77

[Bustamante Question 3](#)

3. Does MedBerg carry out any other activities in Bergonia aside from limited sale of patented products (e.g. conducting further R&D, sale of other goods, consulting services)?

792

2009-08-14 14:05:55

Response See response to 1st Clarifications, Request 19.

76

Bustamante Question 2

2. Does MedX Holding carry out any activities in the territory of Conveniencia (rents office space, has employees etc.)?

792

2009-08-14 14:05:35

Response Yes, it rents a small office employing a lawyer and a tax adviser.

75

Bustamante Question 1

1. Nationals of which country dominate the MedBerg decision-making structure (General Director, Supervisory Board, etc.)?

792

2009-08-14 14:05:15

Response MedBerg would deny that its decision-making is dominated by nationals of any particular country. That being said, its management board consists of a Bergonian national and the lawyer and tax adviser who work for MedX in Conveniencia (see response to Request 76).

74

Jennings Question 5

How is it possible for Dr. Frankensid to have acquired shares in MedX Holding Ltd., on December 1, 2003, in exchange for the assignment of the intellectual property rights that led to the issuance of Bergonian Patent AZ2005 to MedBerg Co., when at the time of the acquisition of those shares MedBerg Co. did not exist yet (as it was constituted on January 30, 2004)? Does this mean that the intellectual property rights were at any time owned by MedX Holding Ltd.?

793

2009-08-14 13:14:46

Response When they acquired MedX Holdings Ltd, Dr. Frankensid and MedScience had assigned their worldwide interests in the invention they were developing to MedX Holdings, and MedX had assigned those interests with respect to Bergonia to MedBerg. MedBerg was established before the existence of Patent AZ2005.

73

Jennings Question 4

How do the breakthrough treatments and products treat obesity, i.e. what is the nature of the products and treatments - for instance, are they appetite suppressors/weightloss drugs, gastrointestinal surgery techniques, or both, or neither?

793

2009-08-14 13:13:52

Response Lipid absorption retardant combined with glycogen/lipid metabolism optimization.

72

Jennings Question 3

On what dates and how frequent were the "numerous occasions" that Claimant communicated its objections to the Bergonian IP office?

793

2009-08-14 13:13:11

Response Prior to and then formally, during the course of the compulsory license proceedings between 1 June and 1 November 2007.

71

Jennings Question 2

When did the Bergonian IP Office start collecting royalties from the six Bergonian companies? As of 1 Nov 2008 Claimant refused to accept the royalties, but the facts state that BioLife and the 5 other Bergonian companies only invoked the compulsory licence on 1 January 2009. There appears to be an inconsistency with the dates, i.e. if the 6 companies did not invoke the compulsory licence until 1 Jan 2009, how were royalties paid by them to the Bergonian IP office on 1 Nov 08 (the date ICSID proceedings were initiated)?

793

2009-08-14 13:12:38

Response Please note the problems says, "AS OF 1 January 2009, BioLife and five other Bergonian entities HAD invoked ...", i.e. sometime on OR before 1 January 2009.

70

Jennings Question 1

Do the countries which are importing the health products from BioLife and the other companies have pharmaceutical manufacturing capacity of their own? If so what are they?

793

2009-08-14 13:11:43

Response 2 Questions. 1. Yes 2. No further evidence has been established on the second point (see also other clarifications).

69

Drug Prices

What has been the impact fo the compulsory license on the licensed drug?

768

2009-08-14 03:07:56

Response Please see response to 1st Clarifications, Request 19.

68

[Substitutes for Patented Drug](#)

Are there any substitutes or any other drugs in Bergonia which combat obesity as effective as Patent No. AZ2005?

768

2009-08-14 03:05:37

Response As of yet, none have been proven as effective as Patent No. AZ2005 is thought to be.

67

[Fitzmaurice Question Seven](#)

Has the issuance of the compulsory license been successful in resolving the issue of obesity in Bergonia?

761

2009-08-13 02:53:54

Response Inconclusive. It is too early to tell; there is as yet insufficient data.

66

[Fitzmaurice Question Six](#)

On what grounds does the Bergonian IP Office justify issuing the compulsory licence for a period of 48 months?

761

2009-08-13 02:52:02

Response The Bergonian IP Office has contended that 48 months was a minimum period sufficient to determine the efficacy of Patent No. AZ2005 in reducing obesity among Bergonians and whether the impact of the compulsory license on the market for the product will enable sufficient numbers of Bergonians to use the product. Under Bergonian law, it is possible to extend the compulsory license. Claimant has strongly disagreed with this position and maintains the period is too long to meet any immediate needs and not needed to observe empirical results.

65

[Fitzmaurice Question Five](#)

What proportion of the Bergonian population is obese?

761

2009-08-13 02:50:52

Response 34% of males; 38% of females

64

[Fitzmaurice Question Four](#)

What was the sales volume of the products produced by Medberg prior to the compulsory licence?

761

2009-08-13 02:49:30

Response Please see response to 1st Clarifications, Request 19.

63

[Fitzmaurice Question Three](#)

Has the Bergonian IP Office issued compulsory licences with regard to any other patented technology similar to Patent AZ 2005?

761

2009-08-13 02:48:46

Response No

62

[Fitzmaurice Question Two](#)

Are less developed countries export destinations of the products produced under the compulsory licences?

761

2009-08-13 02:47:46

Response At least one developing country is among the countries of export destination

61

[Fitzmaurice Question One](#)

What proportion of the products produced under the compulsory licence are being exported to overseas markets?

761

2009-08-13 02:45:26

Response No specific data is available, but exports comprise a significant portion for the companies involved.

60

[Control - p. 2](#)

Who was responsible for the management of both Medberg and Medholdings?

749

2009-08-10 11:16:33

Response No further information available beyond what has already been provided (e.g. in response to Requests 76 and 75).

59

[Control](#)

Was Bergonia aware of the MedHoldings control over MedBerg?

749

2009-08-10 11:15:36

Response The ownership of MedBerg was available in the Bergonian corporate registry at all times.

58

[Patent](#)

How long does Patent AZ2005 last?

770

2009-08-05 22:56:39

Response The patent term is in accordance with TRIPS Agreement standards

56

[Export](#)

What percentage of drugs produced by the 6 companies are being exported?

740

2009-07-26 07:01:21

Response See response to Request 61.

55

[BIT](#)

Does Bergonia and Amnesia have any Bilateral treaty between them?

740

2009-07-10 10:28:44

Response No.

54

[Dr Frankensid](#)

Which of the two countries of the nationality is the place of Dr Frankensid's residence?

749

2009-07-06 13:26:09

Response Dr Frankensid's habitual residence and place of employment has been in Laputa since 1998, but he also maintains a vacation home in Amnesia.

11

[relationship between Medberg Co. and Bergonia](#)

Have Medberg Co. and Bergonia signed any sort of agreement or have engaged in direct negotiations?

768

2009-06-05 13:25:29

Response No except as referred to in response to Request 111.

10

[Patent](#)

Do the health-related products produced by Bergonian entities address the important medical needs which justified the issuance of the compulsory licensing?

768

2009-06-05 13:24:09

Response No response.

9

[Independent Review](#)

Is the decision by the IP office going to be reviews in the future by an independent and distinct authority?

768

2009-06-05 13:21:19

Response See other clarifications.

[Add A Request](#)

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