BUSTAMANTE

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

MEDBERG CO.

CLAIMANT

v.

GOVERNMENT OF THE REPUBLIC OF BERGONIA

RESPONDENT

MEMORIAL FOR CLAIMANT

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LIST OF ABBREVIATIONS

In addition to short-form references to sources and authorities defined in the Index of Authorities and List of Sources below the following abbreviations are used in this memorial:

Abbreviation	Definition
BC BIT	Treaty between Bergonia and Conveniencia Concerning the Encouragement and Reciprocal Protection of Investments, signed on 30th May 2003.
Bergonia	Democratic Commonwealth of Bergonia
BioLife	BioLife Co.
BIT	Bilateral Investment Treaty
BT BIT	Treaty between Tertia and Bergonia Concerning the Reciprocal Encouragement and Protection of Investment signed on 1st January 2003
Conveniencia	Sultanate of Conveniencia
GDP	Gross Domestic Product
ICSID	International Center for Settlement of Investment Disputes
MFN	Most Favored Nation
MedBerg	MedBerg Co.
MedScience	MedScience Co.
MedX	MedX Holding Ltd.
P.	Annex 3 "Uncontested Facts" to the Foreign Direct Investment Moot Competition Problem 2009
p.	Page
Patent	Bergonian patent No. AZ2005
RtQ	Response(s) to questions of the teams from the organizers of the competition as available on www.fdimoot.org
WTO	World Trade Organization
USD	United States Dollar
¶ (¶¶)	paragraph(s)

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STATEMENT OF FACTS

Parties to the dispute

1. The Claimant, MedBerg Co. was registered in Bergonia on 30 January 2004 and is owned by MedX Holding Ltd, a Conveniencian company. Its' board consists of three members, two of whom are employees of MedX (RtQ 75). MedBerg has its administrative seat in Bergonia (RtQ 35). MedBerg's sole shareholder MedX in turn has two shareholders with equal 50% shares in its capital and equal voting rights (RtQ 18): MedScience Co, a publicly traded Laputan corporation (RtQ 17), and Dr. Frankensid, a dual national of Amnesia and Bergonia. MedX has an office in Conveniencia and employs several persons there (RtQ 76) and holds shares in a number of companies beside MedBerg (RtQ 39). MedX has its administrative seat in Conveniencia.
2. The Respondent, Bergonia is a State party to the ICSID Convention, WTO and TRIPS (P. ¶3). In 2006 GDP per capita in Bergonia amounted to USD 7,535 (RtQ 44).

MedBerg's investment in Bergonia

3. Dr. Frankensid has invented a new method of treatment of obesity (P. ¶4, RtQ 40). He has assigned his rights to patent this invention to MedX (RtQ 23), which in turn assigned those rights with respect to Bergonia to MedBerg (RtQ 74).
4. MedBerg has received Bergonian patent AZ2005 covering the treatment invented by Dr. Frankensid in 2005 (P. ¶5) and had for two years licensed it to a local company BioLife Co (P. ¶6).
5. After the license agreement with BioLife was terminated on the basis of breach by BioLife (P. ¶6), MedBerg continued to supply the patented treatment to Bergonian market (RtQs 19 and 114).

Illegal expropriation of the MedBerg's investment by Bergonia

6. In June 2007, Bergonian IP office started proceedings for the issuance of a compulsory license with respect to the Patent allowing third parties to produce patented treatment without MedBerg's consent. Within 5 months it had decided to issue the license (P. ¶¶7-8) despite protests of MedBerg (P. ¶9).
7. The terms of the licenses do not limit the quantity of the products that may be produced under them (P. ¶8), do not prohibit export (RtQ 30) and provided for payment of royalties based on sales (RtQ 86) on an annual basis (RtQ 87). The royalty rate is lower than that previously paid by BioLife (RtQ 25). The compulsory license has been granted

for an original period of 48 months (RtQ 24), but it may be extended at Bergonia's discretion (RtQ 66).

8. Bergonia has sought to justify its conduct with reference to the problem with obesity existing in Bergonia (RtQ 40), where more than 30% of population suffers from obesity (RtQ 65). To date, aside from depriving MedBerg of its patent rights the only other two steps that Bergonia has taken to address this problem have been funding of an information campaigns on nutrition and exercise, and consideration of the possibility to impose additional tax on sugar beverages (RtQ 85). Nor had Bergonia attempted to issue a compulsory licenses with respect to any other anti-obesity patented methods (RtQ 63).

9. At no time has Bergonia notified the TRIPS Council that it is issuing a compulsory license covering export to countries that have no means to produce the treatment in question on their own (RtQ 20).

10. MedBerg has unsuccessfully tried to challenge the decision of Bergonian IP office before a Patent Review Board, a "quasi-judicial body" comprising of Bergonian judges selected to this Board and paid for their services by the Bergonian IP office (RtQ 29). Bergonia has agreed to stipulate that the review by the Patent Review Board has not constituted an "independent review" (P. ¶9).

11. To date 6 Bergonian companies, including BioLife, have invoked Bergonian compulsory license (P. ¶8). The volume of their sales is 155% of the former sales of BioLife under the license agreement with MedBerg (RtQ 19).

12. Three of the companies that have invoked the license are actively engaged in export of the patented treatment to other states (P. ¶8), with exported products constituting significant portion of their total output (RtQ 61). The products are being exported mostly to developed countries, with only one export destination being a developing country (RtQ 62). None of these destinations is a country lacking means of its own to produce the patented treatment (RtQ 70).

Submission of the dispute to arbitration

13. On 1 December 2007 MedBerg sent a request for settlement of the dispute between itself and Bergonia to Bergonia's Foreign, Justice and Economics ministries and the IP Office. MedBerg received a reply from the Ministry of Justice stating that Bergonia considered its actions lawful.

14. On 1 November 2008 the Secretary-General of ICSID registered MedBerg's request for arbitration.

Legal framework of the dispute

15. Amnesia, Bergonia and Conveniencia have ratified the ICSID Convention and they are members of World Trade Organization and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (P. ¶3). Both Bergonia and Conveniencia are parties to the Vienna Convention on the Law of Treaties (RtQ 108). Bergonia and Conveniencia have signed and properly ratified the BC BIT. Bergonia and Tertia have properly signed and ratified the BT BIT.

ARGUMENTS

I. BERGONIA'S JURISDICTIONAL OBJECTIONS ARE WITHOUT MERIT

16. MedBerg submits that this tribunal has jurisdiction both *ratione personae* and *ratione materiae*. In responding to Respondent's jurisdictional objections MedBerg will proceed in the following manner. First, MedBerg will prove that it is a Bergonian company, which Bergonia consented to treat as foreign national, because of foreign control. Second, MedBerg will show that the present dispute arises directly out of its investments in Bergonia, which fall within the definition of investment provided by both BC BIT and ICSID Convention. Finally, MedBerg will address compliance with the prior negotiations requirement established by BC BIT.

1. THIS TRIBUNAL HAS JURISDICTION RATIONE PERSONAE, SINCE BERGONIA CONSENTED TO TREAT MEDBERG AS A FOREIGN NATIONAL

17. For this Tribunal to have jurisdiction *ratione personae* it should be established that the dispute is between a State party to the ICSID Convention and a company of such State, which such State consented to treat as foreign national because of foreign control.[1] In the present case there is no dispute that Bergonia is a party to ICSID Convention (P.¶3).

18. Below, MedBerg will demonstrate that (A) Bergonia has consented to treat MedBerg as a foreign-controlled company and that (B) MedBerg meets the requirement of being under "foreign control" as established by the ICSID Convention. Finally, MedBerg will show that Bergonia may not avoid jurisdiction by claiming the right to "deny" treatment to MedBerg.

A. MedBerg may rely on Bergonia's general consent to treat Bergonian companies as foreign nationals expressed in BT BIT

19. Bergonia properly consented to treat Bergonian companies owned by foreign nationals as foreign nationals in a general manner in BT BIT.[2] Such consent was given expressly,[3] for Article VI(8) of BT BIT refers specifically to Article 25(2)(b) of ICSID Convention.

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[1] ICSID Convention, Article 25(2)(b).

[2] AFRICOM, at ¶¶85-86; Aguas Del Tunar at ¶217; Ioan Micula at ¶¶107-116; SCHREUER, at p. 300, ¶773; DOUGLAS, at p. 319 ¶593; DOLZER/SCHREUER, at p. 53.

[3] Holiday Inns, at ¶31.

20. MedBerg will proceed to show that (i) it may rely on such consent by virtue of MFN clause of BC BIT and (ii) it falls within the category of Bergonian companies Bergonia agreed to treat as foreign nationals in BT BIT.

(i) MFN clause of BC BIT entitles MedBerg to rely on the general consent given by Bergonia in BT BIT

21. MedX Holding owns 100% shares in MedBerg (P. ¶2), therefore MedBerg is an investment of Conveniencian investor.[4] Hence it should be treated in all aspects as favorably as Bergonian companies owned by Tertian investors including separate standing in ICSID arbitration. Under BC BIT

> "Neither Contracting State shall subject investments in its territory owned … by investors of the other Contracting State to treatment less favorable than it accords … to investments of investors of any third State ".[5]

22. MedBerg will demonstrate first that under applicable rules of treaty interpretation this provision extends to consent to ICSID arbitration with foreign-controlled domestic companies contained in the BC BIT and then that this conclusion is supported by the current practice of investment arbitration tribunals.

(a) Interpretation of Article 3(1) under the rules of VCLT

23. According to Article 31 of VCLT, this provision should be interpreted in good faith with words being given their ordinary meaning in the light of their context as well as the object and purpose of the treaty.[6] This rule reflects customary law[7] and is applicable within framework of investor-state arbitration.[8]

24. The ordinary meaning of the word "treatment" is "the act, practice or manner of handling or dealing with"[9]. The term is very broad in scope and it is difficult to doubt that issue of a compulsory license with respect to an investment would be part of

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[4] <u>BC BIT</u>, Article 1; <u>Azurix (Annulment)</u>, at ¶84

[5] <u>BC BIT</u>, Article 3(1).

[6] <u>Vienna Convention on the Law of Treaties</u>. Art. 31.

[7] See e.g. <u>Libya v. Chad</u>, pp. 6, 21-2; <u>Botswana v. Namibia</u> ICJ Reports, pp. 1045, 1059-60; SHAW, 418.

[8] e.g., Wintershall, at ¶77.

[9] COLLINS DICTIONARY

treatment of the investment by the state. The opportunity to challenge such a compulsory license both before domestic courts and in international fora forms an integral part of such "treatment". Thus, access to ICSID arbitration is part of the "treatment" of investments and the advantages accessible through the MFN clause.

25. Turning to context of BC BIT, Article 3 in paragraphs 3,4 and 6, lists a number of rights and areas to which the MFN does not apply, however such list does not include dispute resolution. This omission confirms that the parties did not intend to exclude more favorable dispute resolution provisions.[10]

26. The object of BC BIT is set forth in its Preamble and is to create favorable conditions to increase investment. Access to independent international dispute settlement mechanism, such as ICSID is one of such conditions, which was recognized by the drafters of ICSID Convention, Executive Directors of World Bank[11] and confirmed by a number of previous tribunals.[12] Hence, extension of the number of persons having access to such mechanism, unless such extension is expressly restricted by the BIT, further the object of creating more favorable conditions to investment.

27. Such conclusion is further reinforced by the circumstances of conclusion of BC BIT, which are also relevant for the purposes of treaty interpretation.[13] Even though the BIT was signed in 2003, years after decisions in Maffezini and other cases, where tribunals found that MFN clauses extended to dispute resolution provisions, Bergonia and Conveniencia chose not to exclude those provisions from the reach of MFN clause of their BIT. Such inaction is telling[14] because many other States unwilling to provide MFN treatment with respect to dispute settlement have included specific provisions to this effect in their subsequent treaties.[15]

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[10] RosInvestCo, at ¶¶ 99, 136; Plama (Jurisdiction), at ¶191.

[11] Report of the Executive Directors on the ICSID Convention, at ¶ ¶ 8-13.

[12] Maffezini, at ¶ 54.

[13] VCLT, Article 32.

[14] Cf. Plama (Jurisdiction), at ¶195,

[15] US Model BIT, NAFTA Interpretive Note

(b) The current practice of investment tribunals supports extension of BC BIT MFN clause to dispute resolution provisions of BT BIT

28. While the tribunals set up under ICSID Convention are not bound to follow decisions of previous tribunals MedBerg submits that under the general principles of law and the requirements of judicial propriety tribunals shall not depart from a conclusion made by a previous tribunal in a similar case unless there are compelling reasons for doing so.[16]
29. While there could be found cases both accepting extension of MFN clause to dispute resolution provisions[17] and denying it, below MedBerg will demonstrate that the present case may by distinguished from the cases denying application of MFN clause to dispute resolution provisions.
30. Turning to cases where application of MFN to dispute resolution clauses was denied. Firstly, in Salini the tribunal ruled that where a treaty contains an express exclusion from jurisdiction of international arbitral tribunal it must be assumed that the parties' intention was not that such exclusion would be removed by operation of MFN clause.[18] In Plama the tribunal based its conclusions on two factors: (i) Bulgaria has expressly refused to include the right of investors to submit claims to ICSID proposed by Cyprus during renegotiation of the relevant BIT demonstrating that neither party intended MFN clause to apply to dispute settlement;[19] (ii) there was evidence that UNCITRAL arbitration was a method of dispute resolution specifically chosen by the parties, hence the tribunal concluded they could not have intended for it to be replaced by operation of the MFN clause.[20] Similarly, in Telenor the tribunal relied on the common intention of the parties to restrict the scope of jurisdiction of arbitration tribunal to disputes concerning expropriation and concluded that such intention also extended to MFN not applying to dispute resolution provisions in other treaties.[21]

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[16] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Sebia), Preliminary Objections, Judgment of 18 November 2008, unpublished, available at www.icj-cij.org, ¶54; Kaufmann-Kohler, at 144-145.

[17] Maffezini, at ¶ 56; Gas Natural, at ¶ 29; National Grid, at ¶ 46 et seq.; Siemens, at ¶ 103; Suez, at ¶¶ 60-66.

[18] Salini v. Jordan, at ¶ 118,

[19] Plama (Jurisdiction), at ¶195,

[20] Id. at ¶ 209,

[21] Telenor, ¶¶ 95-96; See also Berschader, at ¶204 and ¶208.

31. In similar vein, the tribunal in Maffezini observed that the MFN clause may not overcome certain policy choices made by the parties to the BIT (such as requirement to exhaust local remedies or fork-in-the-road provision).[22] This reasoning corresponds with the conclusions of the tribunals in Salini, Plama and Telenor, which held that indication of the express intent of the parties to exclude certain disputes from the scope of their consent to arbitration may not be overcame by MFN clause
32. However, in the present case there is no evidence that Bergonia or Conveniencia sought to restrict access to international arbitration to foreign-owned Bergonian companies. Thus application to MFN clause of BC BIT to allow such access would not be contrary to the policy choice made by the parties and should thus be permitted.
33. Several tribunals in their dictum have indicated that the intention of the parties to extend MFN treatment should be expressly stated in the BIT,[23] however there is no authority for such a restrictive interpretation[24]. In interpreting the provisions of an international treaty the tribunal is required to look only at the intention of the parties as reflected in the text of the treaty.[25] Hence in the absence of any express or implied provision reflecting intention of the parties to restrict the scope of MFN clause, no such intention may be assumed by the tribunal *proprio motu*.
34. On this basis MedBerg submits that both the plain meaning of BC BIT and the current practice of tribunals established under ICSID Convention supports extension of Bergonia's consent to treat foreign-controlled companies as foreign nationals to Conveniencian investments, such as MedBerg.

(ii) MedBerg meets the requirements of Article VI(8) of BT BIT

35. According to Article VI(8) of BT BIT, read in conjunction with BC BIT, Bergonia agreed to treat as foreign nationals companies, which at the time the dispute arose constituted investments of Conveniencian investors. Investor is defined by BT BIT as a company incorporated under the laws of Conveniencia and investment is defined as an asset owned by an investor.

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[22] Maffezini, at ¶56.

[23] e.g. Telenor, at ¶96.

[24] Renta 4, at ¶100,

[25] VCLT, Article 31.

36. At the time the dispute arose MedX was a Conveniencian company as it was legally constituted under the laws of Conveniencia (P. ¶2). MedBerg is an investment of MedX, because it was at the time the dispute arose 100% owned by MedX (P. ¶ 2). Hence MedBerg falls within the scope of Bergonia's consent.

B. MedBerg is a company under foreign control for the purposes of ICSID Convention

37. MedBerg acknowledges that Article 25(2)(b) sets the outer limits of jurisdiction of tribunals constituted under the ICSID Convention by requiring that the claimant be a company under foreign control.[26] However this requirement is flexible and requires showing of only immediate ownership and control by a foreign national over the claimant company. Exceptional circumstances in which the tribunal is required to look behind the immediate controller and owner of the claimant company are not present in this case.

(i) MedX's ownership of the whole stock in MedBerg is sufficient to establish that it is under control of Conveniencian investor

38. In interpreting requirements of Article 25(2)(b) particular attention should be given to the object and purpose of the Convention, namely establishment of a flexible mechanism of dispute settlement.[27] This purpose dictates that the choice made by the State parties in defining which companies they agree to treat as foreign nationals should be given high degree of deference.[28] Indeed, previous tribunals held that if a state consented to treat certain national companies as foreign nationals, such consent raises a presumption that such companies are under foreign control.[29] While this presumption may be rebutted in certain cases, in requires a clear showing of unreasonableness of criteria used to identify foreign control.
39. In the present case, Bergonia, essentially, consented to treat Bergonian companies owned by foreign investors as those under foreign control (BT BIT Article VI.8). Criterion of ownership is reasonable to define existence of foreign control and it was recognized as such during the drafting of ICSID Convention, by subsequent practice

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[26] Report of the Executive Directors on the ICSID, at ¶25; BROCHES, at 360.

[27] BROCHES, Id.

[28] Aguas Del Tunari, at ¶280; Autopista (Jurisdiction) at ¶114; BROCHES, at 360; SCHREUER, at 286; ¶481.

[29] Vacuum Salt Products at ¶37; AMERASIGHE, at 264-266.

of ICSID tribunals[30] and in commentaries of influential scholars of international investment law. In particular, Aaron Broches, one of the principal drafters of ICSID Convention, wrote that the last part of Article 25(2)(b) was

> "specifically designed to cover the case of companies incorporated in the host State but owned by foreigners" (emphasis added).[31]

40. Consistent jurisprudence of tribunals formed under ICSID demonstrates that in determining existence of foreign control they looked at nationality of shareholders of the company.[32] In fact, in AMCO v. Indonesia, the tribunal expressly stated that the only relevant factor is the nationality of immediate shareholder and conversely the nationality of its shareholders is irrelevant.[33] Similar conclusion was reached by the tribunal in Autopista v. Venezuela, which moreover stated that if a State agreed to treat as foreign-controlled a company, whose shareholders are foreign nationals, the other factors such as nationality of indirect shareholders and management are irrelevant.[34]

(ii) MedX is a genuine Conveniencian company, hence the nationality of its shareholders is irrelevant

41. In exceptional cases tribunals may be required to look behind the nationality of direct shareholder of the company with host States' nationality to determine whether a company is under foreign control. This may be allowed in two cases: (1) direct shareholder being a mere "shell" company, which is in turn controlled by qualifying foreign nationals and (2) direct shareholder being used in bad faith solely to "engineer" ICSID jurisdiction.
42. There are six publicly available cases where previous tribunals looked behind the nationality of direct shareholder.[35] In all of those cases, this was done on the evidence that the direct shareholders had no separate decision-making power.

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[30] Autopista, at ¶64.

[31] BROCHES, at 360.

[32] SOABI at ¶29.

[33] AMCO (Jurisdiction), at ¶15.

[34] Autopista, at ¶65.

[35] Aguas Del Tunari; AFRICOM; Banro American; Cable Television; SOABI; TSA Spectrum.

43. It must be stressed that in four of those cases (AFRICOM, SOABI, Cable Television, Aguas Del Tunari) the tribunals relied on choice made by the host states to treat as foreign-controlled national companies that were indirectly controlled by foreign nationals.[36] MedBerg submits that attribution of nationality of indirect controller to a national company is a reasonable criterion falling within the ambit of ICSID Convention. However, in the present case such choice was not made by Bergonia hence those cases are non-opposable to MedBerg.
44. In SOABI the tribunal looked behind the immediate Panamian shareholder of Senegalese company in order to establish that the Senegalese company was controlled by nationals of Belgium, an ICSID Convention contracting state. In doing so, the tribunal relied on two grounds: (i) desire of the ICSID contracting states to extend the arbitral jurisdiction, which was incompatible with the nationality of direct shareholder being decisive in declining jurisdiction[37] and (ii) Belgian investors investing through a Panamian intermediary company retained the same degree of control as they would have had if there were the immediate shareholders.[38]
45. In TSA v. Argentina, the tribunal was dealing with an Argentinian company, which was owned by a Dutch shell company, which in turn was at all times majority owned by an Argentinian national, which retained control of all operations.[39] Similarly, in Banro American, the tribunal disregarded US nationality of the parent of a Congolese company, because it was a 100% subsidiary of Canadian company and the Canadian company had repeatedly made statements underscoring its total control over American subsidiary.[40]
46. MedBerg submits that this case most closely resembles that considered by the tribunal in Aguas Del Tunari v. Bolivia, where Bolivian company was indirectly controlled by a Dutch corporation that in turn had two 50% shareholders (US and Italian). The tribunal concluded that the local company had Dutch nationality of its indirect parent, because the latter was an important JV company, in which neither of shareholders

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[36] AFRICOM, at ¶99; Aguas Del Tunari, at ¶319;

[37] See also SCHREUER, at 321 ¶844.

[38] SOABI, at ¶¶35-37.

[39] TSA Spectrum, at ¶161.

[40] Banro American, at ¶8.

exercised control.[41] On this basis the tribunal decided that it is not required to look behind the Dutch holding company.

47. Like in Aguas Del Tunari, MedX is a joint venture company, which has its own office and employees (RtQ 76) and holds shares in subsidiaries throughout the world (RtQ. 103). On similar facts, tribunal in LLC Amto v. Ukraine concluded that a Latvian claimant company was not a mere corporation of convenience, but rather conducted substantial business activities in Latvia.[42]
48. Turning to the question of control, neither of MedX shareholders could be held to control it, since both of them have 50% shares (P. ¶2) and votes (RtQ 18) in MedX. Though the parties agreed to stipulate that "Dr. Frankensid would like to continue in the employment of MedScience" (RtQ 18), such psychological motivation does not rise to the required level of legal restriction on the exercise of shareholders' rights, which would have allowed to conclude that MedScience is the real controller of MedX.[43]
49. There are no policy reasons to take into account the nationality of MedX shareholders. There is an argument that nationals of States that are not parties to ICSID Convention should not be allowed to bring claims before ICSID tribunals, because their national States would not be precluded from exercising diplomatic protection.[44] However, in the present case Laputa would not be able to exercise diplomatic protection, because under general international law States of nationality of indirect shareholders have no jus standi to bring claims of their behalf.[45]
50. Furthermore, as demonstrated by overwhelming practice of tribunals constituted under ICSID, there is no contradiction to the object and purpose of ICSID if a foreign company wholly owned by a national of the host state brings a claim against such State.[46] Hence it is submitted that even though Dr. Frankensid has Bergonian

[41] Aguas Del Tunari, at ¶321.

[42] LLC Amto, at ¶69

[43] Aguas Del Tunari, at ¶264.

[44] e.g., Tokios Tokeles (Jurisdiction), at ¶59.

[45] Ahmadou Sadio Diallo, at ¶¶ 89-92; Barcelona Traction, p. 36 ¶46.

[46] Rompetrol, at ¶85; Tokios Tokeles, at ¶52; SINCLAIR, at 106.

nationality his shareholding in MedX does not jeopardize MedBerg's standing before this tribunal.

51. MedBerg does not dispute that a tribunal may pierce the corporate veil and look behind the nationality of a company, where it is used to abuse ICSID process. However, the applicable test established in Tokios Tokeles is high and requires showing that the company in question was created specifically and exclusively for the purpose of obtaining ICSID jurisdiction.[47] In the present case, MedX was created not only before the dispute arose, but also before MedBerg was incorporated (RtQ 74). In addition, MedX has substantial assets outside of Bergonia (RtQ 103). Hence there is no evidence that MedX was created in bad faith that would justify disregarding its Conveniencian nationality.

C. Bergonia purported exercise of its right to "deny" treatment to MedBerg does not affect the jurisdiction of this Tribunal

52. Under Article I.2 of BT BIT each party reserved the right to deny the benefits of BIT to a company of such party, which is controlled by a company of another party subject to certain conditions.
53. In the present case Bergonia invoked this right for the first time in its response to MedBerg's Request for Arbitration. Even assuming the other conditions of Article I.2 are satisfied MedBerg submits that this provision may not be interpreted as allowing Bergonia to walk out of the arbitration after a valid arbitration agreement has been formed.
54. Firstly, the denial is not automatic and is not expressed in the BC BIT itself, which follows from the ordinary meaning of the words used in Article I.2. When a right is reserved it means that it may be exercised at a future time.[48] This is in fact confirmed by Bergonia's own actions, i.e. .its' statement that it "may deny" the benefits of BT BIT.
55. Secondly, the right to denial of benefits applies only prospectively to possible future rights of investor. There is nothing in the text of Article I.2 of BT BIT that supports restrospective application. In this case the object of BT BIT "to maintain stable framework for investment" is particularly relevant, for such framework cannot be

[47] Tokios Tokeles ¶56.

[48] Plama, at ¶ 153

maintained if a State has a right to ex post facto deny to investor the rights which he already exercised and on which he already relied. [49] In this regard, MedBerg's position is further reinforced by the decision of the arbitral tribunal in Plama, that held with respect to similar language in Energy Charter Treaty that the denial of rights under such language applies only prospectively.[50]

56. Thirdly, once a valid arbitration agreement has been formed it may not be terminated unilaterally. In the present case, the agreement was formed by an offer by Bergonia contained in BC BIT and an acceptance by MedBerg in the form of submission of request for arbitration. Bergonia may not unilaterally withdraw its consent for arbitration as by signing the BIT it has entered into a binding obligation, unilateral withdrawal from which would contradict the principle of good faith[51].
57. Finally, even assuming Bergonia might have validly exercised the right of denial under Article I.2 after filing of the Request for Arbitration, the conditions for the exercise of this right are not met in the present case, since MedBerg is controlled by a Conveniencian corporation, MedX Holding.

2. MedBerg's exploitation of its intellectual property in Bergonia constitutes an investment

58. MedBerg submits that this Tribunal has jurisdiction ratione materiae in the present case, because MedBerg's exclusive right to exploit the invention covered by the Bergonian Patent and license it constitute investment in Bergonia. Such right falls within the definition of investment provided by the BC BIT and the dispute between MedBerg and Bergonia regarding Bergonia's actions with respect to such right is within the "outer limits" of the scope of investment disputes provided by Article 25 of ICSID.
59. Below Medberg would demonstrate that (1) its investments fall within the definition of BIT; (2) the "Salini hallmarks" do not properly define the "outer limits" of investment disputes covered by ICSID and (3) finally, even if this Tribunal finds that Salini test of investment continues to apply Medberg's investment meets this test.

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[49] Id., at ¶ 157

[50] Id.

[51] ICSID Convention, Article ___; Nicaragua, at ¶¶ 59-61; Nuclear Tests, at ¶¶ 43-49.

A. Exclusive patent rights of MedBerg fall within the definition of investment of BC BIT

60. The BC BIT is one of the cornerstones of the jurisdiction of this Tribunal for it defines the scope of consent given by the parties to the case to the jurisdiction of the Tribunal.[52] In interpreting its provisions the Tribunal should be guided by rules of the VCLT (since these provisions express customary international law),[53] which requires looking first at the ordinary meaning of the provisions of a treaty in light of the treaty's object and purpose.[54]
61. BC BIT explicitly includes patents within the definition of investment.[55] Moreover, its formulated as a 'broad' definition,[56] which is evidenced by the fact that it begins with reference to "any kind of assets" and than provides a non-exhaustive list of examples of such assets.
62. Hence Medberg submits that the patent constitutes an investment under BC BIT which expressed the consent of Bergonia to the jurisdiction of this tribunal.

B. Patent falls within the 'outer limits' of the jurisdiction of tribunals constituted under ICSID Convention

63. ICSID Convention establishes certain conditions of the Centre's jurisdiction including that a dispute submitted to it must be a "dispute arising directly out of an investment"[57]. Medberg would submit three arguments. (i) This provision was deliberately included by the parties to ICSID Convention to give contracting states maximum latitude in defining what disputes may be submitted to the Centre and thus the definition of the BIT, such as BC BIT is controlling in most cases, while IP rights including patents were at all times contemplated by the drafters as one form of investment. (ii) present dispute does not fall within the narrow exceptions to the ICSID jurisdiction established by Article 25 of ICSID Convention and finally even

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[52] e.g., Malaysian Historical Salvors, ¶ 58, CSOB, ¶ 37, Jan de Nul, ¶ 73, UNCTAD Dispute settlement, at 15.

[53] Libya v. Chad, at 21-22, ¶ 41; Botswana v. Namibia, p. 1059, ¶ 18, Oil Platforms, p. 8 12,¶. 23).

[54] VCLT, Article 31; Société Générale, ¶ 31

[55] BC BIT, Article 1(1)(d)

[56] MUCHLINSKI, at 56

[57] ICSID Convention, Article 25(1)

assuming the so-called "Salini hallmarks" are applicable MedBerg's investments subject of the present dispute meet them.

(i) ICSID Convention allows BITs to define scope of 'investment disputes' covered by the Centre's jurisdiction

64. The ICSID Convention does not contain definition of the term investment. Hence, in accordance with the requirement of VCLT the Tribunal shall first look at the object and purpose of ICSID and the principle of good faith. Given the existence of certain ambiguity regarding the broadness of this term and to confirm its meaning the Tribunal should also consider the travaux preparatoirs of ICSID.[58]

65. The object and purpose of the ICSID convention support broad definition. The main purpose of ICSID is providing to the state parties an effective mechanism of settlement of investment disputes, what would stimulate the flow of private investment[59]. Statement of drafters of ICSID Convention confirms their intention to encourage the state parties to use this mechanism.[60] The concrete definition of investment would restrict the ICSID jurisdiction[61]. The broad definition creates flexible notion which allows progress of arbitration and possibility to create concrete definition in multilateral treaties, and "does not leave the only exit option as renegotiation of the Convention".[62] Effectiveness is not achieved where the states are unable to define the scope of disputes they refer to arbitration.

66. Furthermore, as ICJ held in a recent dispute where the treaty expected by the parties to be in operation for considerable undefined period uses general undefined term (like investment in this case) the general presumption is that parties recognize the possibility of evolution of this term[63].

67. MedBerg submits that in tracing evolution of the meaning of the term investment the tribunal should look at the evolution of definitions of investment in BITs. The majority of BITs contain "asset-based" definition, which includes open-ended, broad

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[58] VCLT, Article 32; Malaysian Historical Salvors, ¶ 57

[59] Malaysian Historical Salvors, Id.

[60] History of the ICSID Convention, Volume I, p. 16

[61] DAVID A. LOPINA, at 114;

[62] DEVASHISH KRISHAN, 9

[63] Costa Rica v. Nicaragua, at ¶66.

model .It usually includes “every kind of investment”, or “any kind of asset” and a non-exhaustive list of different specific categories, which almost always expressly lists intellectual property[64] as it is in BC BIT. Intellectual property is included in UK, US, Germany,France, Netherlands model BITs.

68. Furthermore, *travaux preparatoires* of ICSID Convention indicate that the term investment was deliberately left undefined to extend the scope of jurisdiction. Original draft of ICSID Convention contained a definition of investment requiring 5 years duration and monetary limit of one hundred thousand United States dollars as the condition for jurisdiction[65]. During the final drafting stage the majority of the Legal Committee, which substantially revised the jurisdictional section of the Convention, rejected not only the monetary limit, time period, but also the definition of investment itself. Mr. Broches, the General Counsel of Bank and the Chairman of the Legal Committee, explained that it was inexpedient to strictly define the kinds of disputes [66]
69. Hence, MedBerg submits that in principle, the tribunal in determining its jurisdiction ratione materiae should defer to the definition of investment provided in the BC BIT. The facts of the present case are not such as to place the dispute outside of the ‘outer limits’ of ICSID jurisdiction, that the drafters indeed contemplated.

(ii) Medberg’s case does not fall within the narrow exceptions from the subject-matter jurisdiction of the Centre

70. The outer limits of ICSID jurisdiction are obscure and MedBerg submits could be determined on the basis of the *travaux preparatoirs* of the ICSID Convention. The drafters of the Convention when they decided that the subject matter of disputes falling within the jurisdiction of ICSID should be limited had in mind primarily exclusion of transactions in the ordinary course of business, such as straightforward sales agreements or loans arising from commercial operations.[67] In practice even such exceptions have been interpreted narrowly. While simple contracts envisaging supply of equipment on ordinary commercial terms were not considered investments,[68] the

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[64] MCLACHLAN, at 172

[65] History of the ICSID Convention, Volume I, p. 116

[66] Id., Volume II-1, p. 54

[67] SCHREUER, p.139 ¶ 120; Fedax ¶ 42

[68] Joy Mining ¶ 58

tribunals have already acknowledged that in certain cases even supply contracts may constitute investments.[69]

71. In the present case, MedBerg's investment comprises of the patent rights it has acquired and subsequently used and licensed in Bergonia. The fact that the right to application to patent was originally acquired by MedBerg from its parent company MedX does not affect this conclusion for the transfer was completed long before the dispute arose. Previous tribunals have recognized that investment may be transferred from one investor to the other without depriving it of its nature.[70] Moreover, MedBerg has obviously contributed to the development of this investment by undertaking the patenting process and subsequent use and licensing of the invention covered by patent.
72. MedBerg acknowledges that in several instances tribunals held that in order to be considered investment, the operation should meet certain criteria commonly known as Salini hallmarks or Salini test. MedBerg would submit three arguments in this respect.
73. Firstly, several recent decisions of ICSID tribunals found that the Salini test has no foundation in the text of ICSID Convention,[71] with the Annulment Committee in Malaysian Historical Salvors holding that the previous tribunal exceeded its jurisdiction by denying existence of investment on the basis of the Salini test.[72] Hence, MedBerg submits the Salini test does not properly define the jurisdiction ratione materiae of this tribunal.
74. Secondly, in all the cases where the Salini test was applied, save in the annulled Malaysian Historical Salvors decision and the Joy Mining award where the claims concerned ordinary sales contract, the tribunals decided that they have jurisdiction[73] thus their holdings with respect to the Salini test constitute no more than obiter dicta. Hence, MedBerg submits that the correct approach to the Salini test is that it expresses a method of determining whether certain operation constitutes investment which may

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[69] Pantechniki

[70] Société Générale, ¶¶ 26-48

[71] Biwater Gauff ¶¶. 310, 312-318; Pantechniki ¶ 39

[72] Malaysian Historical Salvors, ¶ 80

[73] Jan De Nul, at ¶91; Bayindir (Jurisdiction), at ¶130; LESI, at ¶13; Salini v. Morocco (Jurisdiction) ¶ 37–58; Helnan ¶ 77; Saipem ¶ 98–100.

be convenient in certain cases, but in no way does it lay down any hard conditions of ICSID jurisdiction.[74]

(iii) Even assuming Salini test continues to apply it is satisfied in the present case

75. In Salini v. Morocco, tribunal listed 4 features of a "typical" investment. They are: (a) contribution; (b) assumption of risk; (c) duration; (d) contribution to host state's development.[75] In subsequent practice tribunals found that not all of those features, most notably contribution to host's state development[76] and duration[77] need necessarily be present for an operation to be considered investment. All these criteria are interdependent and should be regarded totally[78]. Moreover these elements are closely connected with circumstances of each case[79].

(a)Contribution of assets by MedBerg

76. Previous tribunals held that contribution needs not be substantial to satisfy this criteria, which clearly follows from the travaux preparatoirs of ICSID Convention, because materiality criteria was expressly rejected by the drafters. Moreover contribution may be made both through transfer of assets and otherwise.[80] IP rights (e.g. know how) may constitute such contribution.[81]

77. Considerable expenses were obviously incurred by MED group of companies for the purpose of developing the invention covered by MedBerg's patent (RtQ 105). Subsequently, the invention and the rights to obtain Bergonian patent were assigned to MedBerg (RtQ 74) which constitutes a further contribution. MedBerg borne the expense related to the acquisition of Bergonian patent (P. ¶4). MedBerg submits that all those factors taken together represent contribution made by MedBerg and satisfy the first prong of Salini test.

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[74] SCHREUER, 140 ¶ 122; see also, Pantechniki, at ¶36; MUCHLINSKI, 67

[75] Salini v. Morocco (Jurisdiction) ¶ 37–58.

[76] LESI, at ¶ 72; Bayandir (Jurisdiction) ¶ 137.

[77] Phoenix Action ¶ 125; Saipem, ¶ 102.

[78] LESI, ¶ 13; Bayindir (Jurisdiction), ¶ 130, Jan de Nul ¶ 91

[79] Joy Mining, ¶ 53

[80] Mitchell, ¶ 27.

[81] Bayindir (Jurisdiction) ¶ 131.

(b) Assumption of risk

78. Some tribunals held that the investor should assume certain degree of risk for their operations to be treated as investments, that is that there should be uncertainty regarding the profitability of investor's operations. However, the applicable threshold is not high and obviously does not require that the operation be speculative. Moreover if an investment develops into a profitable operation with relatively insignificant risks it does not cease to be an investment. [82]

79. In the present case MedBerg's investment is connected with ordinary risks of investing into intellectual property and operating in pharmaceuticals market, including development of more effective treatment by competitors, risks of claims from consumer related to alleged side effects of treatment and restrictive regulation of national governments. On this basis MedBerg submits that the second prong is also satisfied.

(c) Duration of investment

80. The previous practice has not produced any watershed line for determining whether the duration of investment requirement is satisfied. However, in a number of previous cases tribunals have held that a 2 years period is sufficient to satisfy this prong of Salini test.[83]

81. Medberg received the patent on 15 March 2005 (P. ¶5) and still maintains it, hence at the time MedBerg's request for arbitration was registered on 1 December 2008, it has maintained its investment in Bergonia for more than 3 years. Thus, the requirement of duration is satisfied.

(d) Contribution to the development of Bergonia

82. It has been held that in order to meet the Salini test contribution to the development of the state need not be significant,[84] nor should be exclusively in economic sphere.[85]

83. In the present case, the technology covered by MedBerg's patent is designed to combat obesity, which is a serious concern of Bergonian population. In fact, Bergonia considers this treatment as "needed to address important domestic medical needs".

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[82] DOLZER/SCHREUER, at 68

[83] Jan de Nul ¶ 93; Salini v. Morocco, at ¶54.

[84] Mitchell, ¶ 33

[85] Malaysian Historical Salvors, ¶ 80(b)

While MedBerg disputes the validity of actions taken by Bergonia on the basis of this pronouncement, MedBerg would submit that Bergonia is estopped from denying that the treatment covered by MedBerg's patent is an important contribution to Bergonia's development.

84. Taking into account these factors Medberg submits that its investment meets all the prongs of Salini test and even should such test be found applicable, this Tribunal has jurisdiction ratione materiae over this case.

3. MEDBERG COMPLIED WITH PROCEDURAL REQUIREMENTS OF BC BIT

85. Under Article 10(2) of BC BIT the dispute may be submitted to ICSID arbitration if it cannot be settled within 3 months from the date of receipt of request for settlement. In numerous previous cases tribunals held that similar requirements do not constitute precondition to this tribunal's jurisdiction.[86] Even assuming this requirement constitutes precondition to the jurisdiction of this tribunal,[87] it has been satisfied in this case.

86. On 1 December 2007 MedBerg submitted request for settlement of the dispute with specific reference to Article 10(2) of BC BIT to all involved Bergonian agencies, including Foreign, Economic and Justice ministries and to Bergonian IP office, and has received reply from the Ministry of Justice to the effect that Bergonia considers its actions lawful (RtQ 111). Hence MedBerg could have submitted request for arbitration since 2 March 2008. Though the agreed facts do not indicate when the request for arbitration was submitted to ICSID, it was registered on 1 December 2008 (P ¶9). Given that ICSID Secretary-General should register the request "as soon as possible",[88] MedBerg submits that the request for arbitration was obviously submitted after 2 March 2008.

II. BERGONIA HAS ILLEGALLY EXPROPRIATED MEBERG's INVESTMENT

87. Bergonia's decision to issue compulsory licenses with respect to MedBerg's patent to 6 companies (without limitation as to quantity of the products to be produced) effectively deprived MedBerg of its exclusive rights conferred by the Patent. MedBerg submits that those actions constitute illegal expropriation in breach of Bergonia's

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[86] Ethyl at ¶¶76-88; Wena (Jurisdiction), at 87; Lauder, at ¶187; Bayandir (Jurisdiction), at ¶¶ 88-103; SGS, at ¶184.

[87] Enron, at ¶88; Wintershall, at ¶¶156-157.

[88] ICSID Arbitration Rules, Rule 6(1).

obligations under BC BIT. Shall the Respondent argue that the compulsory license was issued under the TRIPS Agreement and that MedBerg's claim is precluded by Article III (4) of BT BIT, MedBerg would submit that in the present case the compulsory licenses were not issued in accordance with the TRIPS, hence Bergonia's reliance on that provision is unsubstantiated.

1. BERGONIA's GRANT OF COMPULSORY LICENSES AMOUNTS TO ILLEGAL EXPROPRIATION

88. BC BIT prohibits both direct and indirect expropriation with the latter being a measure having the effect of expropriation, unless such measure is taken (i) for the public benefit; (ii) on a non-discriminatory basis; and (iii) against prompt, adequate and effective compensation. In addition, under provisions of customary international law and BT BIT, being imported to BC BIT by virtue of MFN clause, the investor should be accorded right of review of expropriatory decision by an appropriate judicial or administrative authority. MedBerg submits that (A) the issuance of compulsory licenses by Bergonia constitutes indirect expropriation and (B) such expropriation was not in accordance with the requirements of BC BIT.

A. Issuance of compulsory licenses by Bergonia effectively deprived MedBerg of its exclusive patent rights

89. The notion of expropriation covers not only the formal transfer of private property to the State but also indirect expropriation defined as "any unreasonable interference with the use, enjoyment or disposal of property so as to justify the interference that the owner thereof will not be able to use, enjoy or dispose of the property within reasonable period of time after the inception of such interference".[89] Though BC BIT does not define the notion of measures having effect "tantamount to expropriation". MedBerg submits that the above definition reflects, as accepted by numerous previous tribunals,[90] the ordinary meaning of the above notion and arguably the customary international law standard.[91]

90. For the State action to be considered indirect expropriation the deprivation of the property right is unnecessary, but rather it has to be shown that the rights of the owner

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[89] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 10(5)

[90] CMS Gas, ¶ 262; Metalclad, ¶ 103; Tippetts, at 225; CME, at ¶ 688; Tokios Tokeles, ¶ 92

[91] ALVAREZ & PARK, 378

were limited to such extent that their use or enjoyment was substantially hindered. Nor is it necessary for such measures to be permanent or that the property rights in question be transferred to the state.

91. In determining whether the actions of the State have effect tantamount to expropriation previous tribunals have looked as such factors as degree to which the investor may continue to make use of its right and to what extent its freedom to make use of it is limited.

92. In *Metaclad*, Mexico issued an environmental decree which prohibited operation of a landfill owned by foreign investor, and even though the said investor retained possession of the real estate in question it was not able to make use of it, which led tribunal to conclude that Mexico's actions amounted to expropriation.[92] Again, in frequently cited *Starrett Housing*, Iran-US Claims Tribunal stated that the state may indirectly expropriate private property by interfering with the property rights to the extent of rendering these rights useless.[93]

93. When state guarantees exclusivity in certain market and than withdraws such exclusivity, such action may be treated as expropriation. Thus in *Benvenutti & Bonfant* Congolese government guaranteed to Italian investor which was planning to set up a company for the production of bottled water, that it would prohibit import of bottled water. Failure to restrict such import was held by tribunal to constitute expropriation.[94] Similarly, in *LETCO* tribunal held that Liberia effectively expropriated French investment (exclusive concessionary rights), because the area of the concession was significantly limited by Liberia.[95]

94. MedBerg submits that it is those cases, where the exclusive right was conferred upon investor by the State, that shall guide the tribunal in this case. On the other hand, cases such as *Feldman* are inapplicable in the present case, because in those cases tribunals found that the claimants did not have any "vested right" granted by the State as the basis for rejecting expropriation claims.[96] In the present case, MedBerg received an

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[92] Metalclad, ¶ 111

[93] Starrett Housing, at 154

[94] Benvenutti & Bonfant, at 371 ¶ 4.32 and ¶ 4.37.

[95] LETCO (Merits), at 337-338.

[96] Feldman, at¶ 152.

exclusive right to the invention by passing a special procedure of obtaining the Patent, hence it was entitled to rely on it an exclusive concession and explicit undertaking by the Respondent[97] and therefore interference with it amounts to expropriation.

95. Compulsory licensing has hitherto never been subject of the final decision of investment treaty tribunal. To the knowledge of MedBerg the only available municipal decision, the judgment of German Court of Braunschweig in *Officina Meccanica Corlese v. Burgsmueller*, treated compulsory licensing as expropriation.[98] Further support to this position is rendered by the scholars of international investment law, who opine that issuance of compulsory license amounts to measure that has effect tantamount to expropriation.[99]

96. In the present case even though MedBerg retains its patent rights they are rendered effectively useless. There are six local companies that operate in the market under compulsory licenses (P ¶8). With no quantum restrictions they sell in Bergonia 155% of the volume that was sold before compulsory licenses were issued (RtQ 19). Thus the market is effectively covered by their output, which is demonstrated by both the fact that MedBerg is able to sell only very limited amount of products (RtQ 19) and that the compulsory licensees are forced to export significant parts of their output to other countries (P.¶8, RtQ 113, RtQ 61).

97. In addition, the decision of Bergonian IP office to issue compulsory licenses to MedBerg's Patent to any willing party (P. ¶8) effectively deprived MedBerg of the right not to issue any licenses and pursue independent production. In fact, according to the facts of the case MedX subsidiaries all over the world, but Bergonia, are actively engaged inhouse production of the treatment (RtQs 101 and 103).

98. Even temporary interference may have the effect of depriving investor of its investment.[100] Especially in the present economic conditions even temporary removal or severe restriction of profit-generating activity may result in effective closure of business. Tribunals in many previous cases recognized that temporary measures amounted to indirect expropriation. In *Wena Hotels* seizure of the hotel operations for

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[97] GIBSON, at 25-6

[98] Officina Meccanica Corlese, 428 at 429

[99] e.g. SORNARAJAH, at 302; BIRD & CAHOY, at 9.

[100] S.D. Myers (Partial Award), ¶ 59, cited in MCLACHLAN, SHORE & WEINIGER, 299.

1 year was considered expropriatory.[101] Similarly, in *Middle East Cement*, temporary suspension of import license for 4 months was treated as expropriation.[102]

99. In MedBerg's case compulsory licenses were issued for 4 years (RtQ 24) and would thus last from 1 November 2007 to 1 November 2011 (P. ¶8). Hnece the period in question substantially exceeds those that were found in practice to have expropriatory effect. Besides, in assessing the effect of Bergonia's actions on MedBerg the tribunal should consider the specific features of pharmaceutical market, which is affected by constant appearance of new medicine and companies who find ways to work around the patent, i.e. produce medicine with similar effects but not covered by the original inventor's patent. In this case, MedBerg may very well find itself in a situation where after the compulsory license expires it would have no market at all for its products because they would be ousted by newer medicine or generics. Hence MedBerg submits that the issuance of compulsory licenses in this case even though temporarily limiting its rights, nonetheless has effect of expropriation.

100. Indirect expropriation encompasses actions of the State that do not result in transfer of property to State or any other benefit to it.[103] The language of BC BIT requires the tribunal to look not at the benefit of the state, but at the effect state actions have on investor. Thus, if the substantial interference with investor's benefits nobody or benefits third parties it should still be treated as indirect expropriation. In a number of Mexican landfill cases, tribunals concluded that revocation or certain permits or failure to grant them, which resulted in inability of foreign investors to make use of landfills owned by them, but did not transfer title to such landfills to Mexico constituted expropriation.[104] In *CME* the tribunal concluded that certain actions of Czech Republic which resulted in private individuals, but not Czech Republic, obtaining control of CME's investment in Czech TV company constituted expropriation.[105]

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[101] Wena (Merits), ¶ 82

[102] ME Cement, ¶ 107.

[103] Metalclad, ¶103.

[104] e.g., Id., ¶ 111.

[105] CME (Partial Award) ¶ 602

101. Hence, even though in the present case compulsory licenses were issued by Bergonia to private Bergonian companies (P. ¶8), those actions constitute measure that has effect tantamount to expropriation.

B. Bergonia's actions are incompatible with criteria of legitimate expropriation

102. MedBerg submits that Bergonia's measures consisting of issue of compulsory licenses with respect to MedBerg's Patent (i) did not pursue legitimate public purpose and (ii) were not coupled with adequate and effective compensation. In addition, (iii) MedBerg was not accorded the right to have the decision of Bergonian IP office reviewed by appropriate judicial or administrative authority.

(i) Issuance of compulsory license did not pursue legitimate public purposes

103. MedBerg recognizes that the State is the primary judge of what measures are required to be taken and that, in principle, the tribunals should defer to the policy choice made by the State.[106] Such discretion however broad has objective limits, compliance with which may be tested by international investment tribunals.[107] In the present case MedBerg submits the actions of Bergonia did not pursue valid public purpose and were arbitrary, because there was (a) no serious public health concern justifying issuance of compulsory license (b) no evidence that issuance of such licenses was the only measure available and finally and most importantly (c) showing that issuance of such license would achieve the purpose of reducing the number of Bergonians suffering from obesity.

104. Protection of public health and provision of access to medicines to those with insufficient resources may be a legitimate reason to limit exclusive patent rights.[108] However, MedBerg submits that in interpreting which measures may be justified and in which cases, the tribunal shall be guided by the WTO Doha Declaration, which provides that issuance of compulsory licenses may be justified to combat most serious diseases such as HIV, tuberculosis, malaria and other epidemics. In ¶ 5 the Doha Declaration states "We recognize the gravity of the public health problems afflicting many developing and least developed countries, *especially those resulting from HIV/AIDS,*

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[106] Amoco, at 233

[107] WHITE, at 19

[108] Doha Declaration

tuberculosis, malaria and other epidemics" (emphasis added).[109] Under article 31 of the Vienna Convention, "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."[110]. As Professor Dolzer stated, the preamble of a treaty is a source for finding the object of the treaty.[111] The Declaration specifies in the introductory paragraph the issue to which it serves as a response, i.e. the epidemics in developing and least developed countries and inability of the poor people there to gain access to medicines.[112] By specifying epidemics in developing and least developed countries as the problem, which it is directed against, the Declaration does not allow to interpret itself to include all medical challenges existing nowadays.

105. MedBerg submits that obesity certainly does not reach the degree of danger to public health required under Doha Declaration to justify issuance of compulsory license. In fact, Bergonia's decision could be compared to that of Egypt which issued compulsory license for VIAGRA, citing importance of providing access to this drug to poor. This measure was widely criticized as not pursuing valid public purpose and even Egypt itself recognized that the issuance of such license was incompatible with TRIPS.[113] Other compulsory licenses hitherto issued by states pursued only serious mass diseases such AIDS or tuberculosis.[114]

106. MedBerg submits that the compulsory license was an arbitrary measure, which, in its turn, cannot pursuit valid public purpose. As Professor White put it "expropriations which are not for a public purpose, i.e. because they are discriminatory or arbitrary, are unlawful in international law."[115] Under Black's Law Dictionary's definition cited in

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[109] Id.

[110] VCLT, Article 31

[111] DOLZER, at 74

[112] NEWFARMER, at 15

[113] CASTELLANO, at 289; BIRD & CAHOY, at 26.

[114] CARLOS CORREA, at 3

[115] WHITE, at 19

Lauder,[116] arbitrary means "depending on individual discretion; (...) founded on prejudice or preference rather than on reason or fact".

107. In considering this argument the following facts should be taken into account. At the time the decision to issue compulsory licenses was taken MedBerg was supplying the patented products to Bergonian market in sufficient quantities (RtQ 114). The annual cost of treatment was USD 300 (RtQ 109) and thus less than 0,5% of the Bergonian 2006 GDP per capita (RtQ 44). The treatment medicine was available in Bergonia within the period between the termination of the license agreement with BioLife and the issuance of compulsory license (RtQ 114).

108. Hence the only pertinent factor that has indeed changed at the time compulsory licenses were issued was that BioLife's license agreement was terminated (P. ¶6) due to its breach by BioLife (RtQ 39, RtQ 113) and MedBerg was not considering issuing further licenses to Bergonian national companies (RtQ). Hence, the sole purpose of the measures for to benefit the national Bergonian companies at the expense of Conveniencian investor. Thus, the decision to issue compulsory licenses was arbitrary.

(ii) Compulsory license was not accompanied with due compensation

109. Article 4 (2) of the BC BIT requires that the "*compensation shall be equivalent to the value of the expropriated investment*" and that such compensation should be prompt. Claimant submits that the royalty offered by Bergonia to the Claimant of the compulsory license is not enough to cover the value of the expropriated patent, nor was the compensation promptly paid.

110. The Respondent has offered MedBerg the compensation in an amount of the royalty collected from all the companies that had invoked compulsory license (P. ¶8). The percentage royalty rate was lower than the rate that had been in effect under the terms of the License Agreement between MedBerg and BioLife (RtQs 25 and 88). In addition, issuance of compulsory licenses deprived MedBerg of ability to engage in independent production of the treatment which would have resulted in MedBerg receiving the whole added value of the treatment (as compared to royalties)..

111. In addition, though the compulsory licenses were issued for 4 years (RtQ 24) the royalties are supposed to be paid to MedBerg annually (RtQ 87). Hence by the time oral pleadings would be made in this case (October 2009), 23 months after the compulsory licenses were issued, MedBerg is being offered to receive only ¼ of the total

[116] Lauder (Final Award), ¶ 221

compensation calculated on the basis of inadequate royalty rate (the licenses being issued in November 2007). MedBerg submits that such timeframe does not satisfy the standard of prompt compensation

112. On this basis MedBerg submits that compensation offered by Bergonia was neither adequate nor prompt.

(iii) MedBerg was not allowed to have decision to issue compulsory licenses reviewed by independent tribunal

113. Claimant submits that, *firstly*, notwithstanding Article 4 (3) of BC BIT, the standard of review should be determined in accordance with international law and, *secondly*, the Respondent failed to provide the Claimant with independent review in accordance with international law.

114. Under Article 4 (3) of BC BIT, the legality of any expropriation committed by any of the Parties and the amount of compensation shall be subject to review

> "*by (sic) due process of law according to the respective national legal system". A the same time*" .

115. However, Article 4(4) of BC BIT accords to Conveniencian investors MFN treatment regarding any matter concerning expropriation. The simple goal of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favorable as they treat third parties.[117] Although there are disputes regarding application of procedural provisions of the BITs with third States, there is a firm consensus regarding the opportunity to invoke a substantial right under MFN, which is proven by totally consistent arbitral practice.[118]

116. Thus MedBerg may rely on Article III (2) of the BT BIT provides for "*a right of prompt review by the appropriate judicial or administrative authorities*" without adding the limiting clause regarding national legal system. When there is no limitation as to the law applicable to the due process guarantee, the tribunals test the process offered in particular cases in accordance with both applicable national and international law.[119] It is therefore the BT BIT's provision that is more favorable to the Claimant.

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[117] DOLZER/SCHREUER at 186.

[118] Pope & Talbot, ¶ 117; ADF Group, ¶¶ 193-198; MTD Equity, ¶¶ 103-104.

[119] AMCO (Resubmitted Case: Award), ¶ 122-136.

117. Due process obligation, or obligation not to deny justice, arises from customary international law.[120]Due process requirement provides for, as a separate guarantee, independent review of a decision of administrative organ. In *ADC v. Hungary*, the tribunal stated that

> "some basic legal mechanisms, such as … a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful".[121]

118. In order to establish the standard of independence of a reviewing tribunal within the due process guarantee, which cannot be found in the investment arbitration cases, MedBerg refers the Tribunal to the jurisprudence of the ECHR, which is widely relied upon by the investment tribunals.[122] Most importantly, the ECHR jurisprudence was cited to clarify the issue of due process. In *Amco II*, the tribunal paid attention to the cases of the ECtHR cited by Indonesia with regard to the compensation for the breach of due process[123], while in *Mondev* the tribunal availed of the ECHR practice for the guidance regarding state immunity and the right to fair trial.[124]

119. In *Incal v. Turkey*, where the applicant was tried by the National Security Court composed of three judges, one of whom was the member of Military Legal Service, the ECtHR stated that the military judges' affiliation with the army and, in particular, the fact that decisions concerning their appointment were to a great extent taken by the administrative authorities gives rise to a "justified fear" that the National Security Court would be unduly influenced by extraneous considerations.[125].

120. In the present case, the decision to issue compulsory licenses was issued by IP office, and reviewed by Patent Review Board, a body comprising of Bergonian judges selected

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[120] Rumeli/Telsim, ¶ 651

[121] ADC, ¶ 435; See also Thunderbird, ¶ 201.

[122] UNCTAD, Selected Recent Developments in IIA Arbitration and Human Rights, at 4

[123] AMCO (Resubmitted Case: Award) at 601, ¶ 128

[124] Mondev, ¶144.

[125] Incal v. Turkey, ¶ 68; see also, Osman v. Turkey; Çıraklar v. Turkey, ¶ 39; Seher Karatas v. Turkey; Ocalan v. Turkey

and paid by the IP office. MedBerg submits that the dependence of the Patent Review Body on Bergonian IP office is so obvious that Bergonia agreed to stipulate that

> "*there has been no independent review* *of the IP's office decision to issue the compulsory license*" (P. ¶9)

121. MedBerg submits that the members of Patent Review Board being selected by the very administrative organ, whose decision they were supposed to review, and being on the payroll of the same body, it had every reasons to justifiably doubt their independence and impartiality. MedBerg submits that it was no accorded the right to have the expropriatory decision reviewed by an independent tribunal

2. THE EXPROPRIATORY COMPULSORY LICENSES ISSUED BY BERGONIA ARE IN BREACH OF THE TRIPS AGREEMENT.

122. MedBerg submits that Bergonia may not rely upon the TRIPS as a conventional cover for issuance of compulsory licenses in pursuance of public health, since the license in the case at hand is and has been in breach of the TRIPS. Thus, the Respondent may not rely on the TRIPS exception clause provided by Article III (4) of the BT BIT.

123. Respondent should have complied with Article 31 of the TRIPS Agreement setting forth the requirements for the use of patent rights without authorization of the patent holder, i.e. compulsory license.[126] Under ¶ 4 of the Doha Declaration, the TRIPS should be interpreted in a way supportive to the promotion of public health.[127] This corresponds to the provision of Article 31 of the VCLT that "any subsequent agreement between the parties regarding the interpretation of the treaty" shall be taken into account together with the context of the treaty in the process of interpretation thereof. As the ICJ stated in the *Competence for the Admission* advisory opinion, "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur."[128] The TRIPS cannot accordingly be interpreted in a way as to establish the right of States to issue health-oriented compulsory licenses that are independent from the requirements for such licenses set forth in the TRIPS.

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[126] GIBSON, at 5

[127] Doha Declaration

[128] Competence for Admission, at 8

124. Therefore, the right of States members of the WTO to issue health-oriented compulsory licenses emerged in the course of interpretation of the TRIPS Agreement in the light of Doha Declaration is still subject to the provisions of the TRIPS Agreement, specifically Article 31 thereof.

125. The license issued in this case failed to comply with the following requirements of Article 31 of the TRIPS Agreement: (i) exhaustion of ordinary measures under Article 31 (b) (e.g. negotiations with patent holder and maintenance of the existing license agreement), (ii) the scope and duration limited to the purpose of the license under Article 31(c), (iii) the use predominantly for the domestic market under Article 31 (f).

126. Furthermore, the Claimant refers to the previous sections regarding inadequate compensation and absence of independent review to prove violation of Article 31 (h) (adequate remuneration in light of economic value of the property) and Article 31 (i) and (j) (independent review of the decision and adequacy of remuneration) of the TRIPS.

(i) Ordinary measures were not exhausted in violation of Article 31 (b)

127. Article 31 (b) of the TRIPS provides the following with regard to the compulsory license:

> "Such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time…."

128. The termination of the license agreement with BioLife was driven by the parallel exports by BioLife to the third countries member of a customs union with the Respondent State. (RtQ 39). The parallel exports did occur (RtQ 113). The only thing that BioLife should have done is to terminate parallel exports to the third countries. By terminating the license agreement, the Claimant has incurred losses (RtQ 39); it is reasonable to presume that the Claimant would not terminate the agreement provided that BioLife discontinued the parallel exports .Furthermore, there is no indication in the facts that any of the domestic producers other than BioLife, approached the Claimant with the request to conclude a license agreement. Hence, none of them actually tried to obtain licenses from MedBerg on reasonable commercial terms.

129. Respondent may not justify the breach of the said condition by either the urgency or the public non-commercial use, as provided in Article 31 (b). First, the patented drug was available after the termination of the license agreement (RtQ 114). Second, the compulsory license was used for commercial needs (RtQ 34).

130. Therefore the condition of Article 31 (b) of the TRIPS was not complied with.

(ii) The scope and duration of the compulsory license are not limited to the purpose in violation of Article 31 (c)

131. Article 31 (c) of the TRIPS provides:

> "The scope and duration of such use shall be limited to the purpose for which it was authorized, ….".

132. In the present case Bergonia justified issuance of compulsory licenses by reference to the need to combat domestic obesity (RtQ 40). However, it did not even try to restrict the use under the compulsory license at all let alone to the purpose for which it was authorized. Even though the purpose was allegedly to address domestic needs the licenses did not prohibit export (RtQ 30) and in fact substantial amounts were exported (RtQ61). Even though the statistics regarding the number of obese residents of Bergonia was obviously available (RtQ 65), the compulsory licenses contained no quantum limitations (P. ¶8).

133. MedBerg submits that in breach of Article 31(c) Bergonia failed to restrict the scope of compulsory licenses to their purpose.

(iii) The license is not issued "predominantly for the supply of the domestic market" in violation of Article 31(f)

134. Article 31 (f) of the TRIPS provides

> "Any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use".

135. Insofar as compulsory license may only be an exceptional measure, the licensee that has invoked the said license may export only "eventual (that is, unexpected) or unavoidable (when production cost require a larger scale) surpluses".[129]

[129] PIRES DE CARVALHO, at 242.

136. Exports comprise a significant portion for the licensees (RtQ 61). The word "significant" means "of a noticeably or measurably large amount".[130] Significant portion of production of the licensees being exported is manifestly incompatible with the Article 31 (f) of the TRIPS interpreted by the commentators. Therefore, the condition laid down in Article 31 (f) of the TRIPS was not complied with.

137. Thought the Doha Declaration read in conjunction with the WTO General Council Decision of 1 September 2003 allows export to countries with no means to produce exported medicine, it requires that notification be given to TRIPS Council of the compulsory licenses issued for such purpose.[131] In the present cases no notification was given to TRIPS Council (RtQ 20), hence Bergonia may not rely on this exception. In any event Bergonian companies benefiting from the compulsory license have not exported the treatment to any country with no means to produce the treatment (RtQ 70).

138. On this basis MedBerg submits that compulsory licenses were issued by Bergonia in breach of TRIPS and thus Bergonia may not rely on Article IV(3) of BT BIT to justify its actions.

Respectfully submitted
Counsel for MedBerg Co.

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[130] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY

[131] Decision of the General Council.