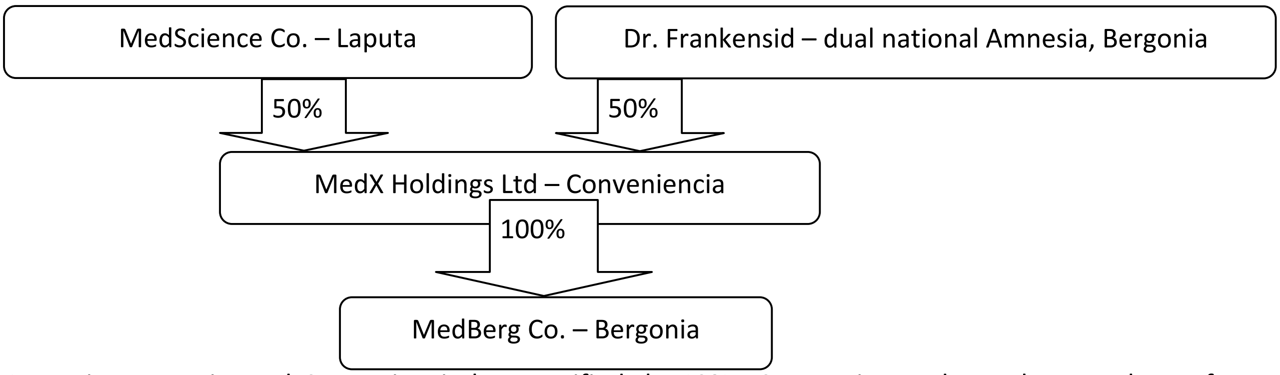
For Memorial Judges and Arbitrators ONLY

2009 FDI Moot Bench Brief

Note: The following observations are by no means exhaustive and are not intended to provide the best possible solution. They are offered only to provide some preliminary guidance.[1]

Brief Summary of Factual Background

Claimant, MedBerg Co., was established in Bergonia in2004. 100 per cent of its shares are owned by MedX, a Conveniencian company; MedScience, a Laputan company, and Dr. Frankensid, a scientist employed by MedScience Co. and credited with a breakthrough leading to several patents including Bergonian Patent No. AZ2005, each own 50 per cent of MedX.



Amnesia, Bergonia, and Conveniencia have ratified the ICSID Convention and are also Members of the World Trade Organisation (WTO) and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Laputa is not an ICSID Contracting State or a WTO Member.

Claimant was granted Bergonian Patent No. AZ2005 in relation to Dr. Frankensid's invention in early 2005, and soon thereafter licensed BioLife Co., a Bergonian company, to utilise it. Patent No. AZ2005 relates to products and treatments for obesity, which is a significant health issue in Bergonia. Claimant terminated the License Agreement -seemingly because of disagreement over exports - in accordance with the License Agreement's notice and termination provisions in early 2007. BioLife sought to renegotiate the terms of the License Agreement, but Claimant quickly rejected these efforts.

On 1 June 2007, the Bergonian Intellectual Property Office (IP Office) commenced compulsory license proceedings with respect to Patent No. AZ2005, stating that the technology covered by this patent is needed to address important domestic medical needs, and issued such a license in November 2007.

As of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license. Three of these companies have exported some of the products to other countries. The Bergonian IP Office has collected royalties from the six Bergonian companies and has offered these to Claimant, but Claimant not accepted them. Claimant's numerous objections to the Bergonian IP Office were not resolved to the Claimant's satisfaction.

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1 Markus Perkams and James Hosking offered the comments on Questions 2 and 3 to provide some thoughts based on their work on the recent TDM Special Issue. Christian Campbell offered the comments on Question 1.

{00006396;v2}

Note The full problem with the two relevant BITs and the first and second clarifications may be accessed using the hyperlinks.

Question 1: Whether the Tribunal has jurisdiction in view of the nationality of the Claimant

As a Bergonian entity, Claimant MedBerg does not *prima facia* have the nationality of an ICSID Contracting State *other than* the Respondent State. So, may the Tribunal have jurisdiction on the basis of the foreign control of MedBerg? See ICSID 25 (2) (b) final clause (underlined):

> "(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

1. Has Bergonia *agreed* because of foreign control to treat Medberg as a national of another Contracting State (Conveniencia) expressly (no facts support this) or by its conduct (e.g. concluding a BIT with Conveniencia) or does the Conveniencia-Bergonia BIT's MFN clause, Article II.1., allow reference to the Bergonia-Tertia BIT Art. VI.8, which expressly states such agreement?

> Bergonia-Tertia BIT Art. VI."8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."

There are numerous and varied views (and awards)[2] on the effect of MFN clauses found in BITs, i.e. whether – in the absence of express terms relating to their scope - they are limited to matters of "treatment" narrowly construed (e.g. FET, FPS), extend to admission of investments, dispute resolution, etc. It is common ground that tribunals must interpret each clause according to the rules of the VCLT. Conveniencia-Bergonia BIT, Article II.1:

> "1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable."

2. To what extent is the *ultimate* foreign control relevant, in particular

a. Dr. Frankensid's dual Amnesia/Bergonia nationality?

b. MedScience being a national of an ICSID non-Contracting State (Laputa)?

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[2] For a comprehensive up-to-date analysis, see, Chapter 5 in *Law and Practice of Investment Treaties: Standards of Treatment*, Andrew Newcombe, Lluís Paradell (Kluwer Law International 2009), especially §5.13 (pp. 216 *et seq*.).

Arguments can be made, and authority found, that ultimate control could be decisive, but generally (first part of ICSID 25 (2) (b)), awards have not looked beyond the place of incorporation or management to determine the nationality of a juridical person based on control. Since, however, in this context (second part of ICSID 25 (2) (b)), the Tribunal must consider control such general disregard of control is not possible. The use of foreign companies to bring what is essentially a domestic investor under international protection may well be contrary to the purposes of ICSID and BITs, i.e. promoting *foreign* investment (see e.g. *Vacuum Salts*, *Phoenix Action Ltd …*). Here, that concern might only be relevant with regard to Dr. Frankensid (which might also invite questions relating to effective nationality; see also *Soufraki v. UAE*).

Foreign investors' use of third State incorporation - *inter alia* – for the purpose of BIT (and DTT) shopping may be less problematic (e.g. *Aguas del Tunari v. Bolivia*) though it is still unsettled. It might be conceivable to extend the argument indicated in the preceding paragraph that the purposes of ICSID and BITs are *only* to promote foreign investment *among the Contracting States*.

3. If MedBerg relies on the MFN clause to reference Art. VI.8 of the Bergonia-Tertia BIT), may Bergonia invoke its Art. I. 2:

> "2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party <u>or</u> is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations."

a. Does MedX have "substantial" business activities in Conveniencia? The facts suggest that though it has only two employees and scant tangible assets, MedX manages a global licensing operation for the patented product.

b. Are the economic relations of Laputa with Bergonia "normal"? The facts hint that they may not be.

A creative Respondent might pursue this "denial of benefits" exception. Preliminarily, it raises the question of whether the more favourable provisions referenced through the MFN may be invoked in isolation or must be taken in the context of the entire Bergonia-Tertia BIT. This question could also arise with regard to the TRIPs expropriation carve out in Art. III of the Bergonia-Tertia BIT (see below). In the context of a competition like the FDI Moot with no opportunities for reply or rejoinder, the Claimant may perceive a tactical dilemma of whether and to what extent it should anticipate such arguments in its memorial. Might a desperate Claimant even counter that only the ("normal") economic relations between Bergonia and Conveniencia or those between Conveniencia and Laputa should be relevant rather than those of Bergonia and Laputa? This would seem difficult, but skilled advocates have swayed tribunals with arguments that did not seem convincing at first glance.

As a practical matter, one might ask why MedX did not bring a claim under the Conveniencia-Bergonia BIT and thereby avoid the foreign control and consequent issues. Arguably, the value of MedX's shareholding in MedBerg has also been diminished by the compulsory license, and meanwhile there are numerous awards supporting claims by shareholders, including minority shareholders. The effects of Respondent's prejudicial acts might be considered more remote (and raising different perspectives) with respect to MedX's shareholding, but a claim by MedX might have been a valid strategy for the MedScience Group. However, in the present problem, that is not an option: MedBerg has brought the claim, and teams should be wary of addressing a possible MedX claim.

Question 2: Is Claimant's exploitation of its intellectual property in Bergonia a protected investment under applicable international law?

Claimant's exploitation of its intellectual property in Bergonia (hereinafter: "Patent No. AZ 2005") needs to qualify as an "*investment*" under two separate provisions to be a protected investment for the purposes of this arbitration:

- Art. 25 of the ICSID Convention; and
- Art. 1 of the Bergonia-Conveniencia BIT.

The teams should realize that both concepts are different, but that, at least to a certain extent, the arguments can be built on each other.

Further, the teams should realize that both provisions have to be interpreted according to Art. 31 ff. of the Vienna Convention on the Law of Treaties ("Art. 31 VCLT") and that decisions of other tribunals are not *per se* binding precedents.

a.) Art. 25 of the ICSID Convention

Art. 25 does not define the term "investment". There is also no generally accepted definition of this term in law or economics. With regard to the ICSID Convention, it is assumed that the term is used broadly, but is not limitless. In recent years, arbitral tribunals have applied a canon of five criteria to find out whether an activity is protected or not. Two preliminary issues are noteworthy:

- the test is neither mandatory nor is a tribunal bound by the earlier decisions of other tribunals;
- all criteria need not be met in order to constitute an investment; rather, it is in the discretion of the tribunal to apply the criteria and to decide whether the test is met.

The criteria are:

- a certain duration;
- a certain regularity of profit and return;
- an assumption of risk;
- a substantial commitment; and
- a significance for the host state's development.

Again, the meaning of terms such as "*certain*" or "*substantial*" cannot be precisely defined and much depends on the quality of the arguments presented by the teams. Some preliminary comments are:

- the term of a patent is normally 20 years (see Art. 33 of the TRIPS and Request 58), which should be considered as long enough;

- Claimant had licensed the use of the patent for two years (31 March 2005 to 31 March 2007); this indicates that he gained at least some regular returns;

- In addition to the general (non-Bergonia specific) risk attendant with development and commercialization of a new pharmaceutical product, there is no exposure to a particular risk that would be higher than the "*normal*" risk; on the other hand, the "*normal*" risk that has materialized can suffice (see further next points);

- no extraordinary commitment has been undertaken; the application process alone however is expensive and has lasted for more than a year (5 February 2004 to 15 March 2005), but whether this suffices is unclear; further, one could think of whether the costs for the development of the protected invention (which can be assumed to have been enormous) could be regarded as a commitment; these costs however were not undertaken with regard to the protection in Bergonia, so it is questionable whether they could be taken into account here;

- a sensible question is whether the patent had any significance for the host state's development; from a legal point of view, one could refer to the preamble of the TRIPS: "*the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives*", but recognizes also "*the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base*"; in any case, attention should be paid as to whether the teams base their arguments on legal considerations or whether they also argue on a political, historical or social basis.[3]

b.) Art. 1 of the Bergonia-Conveniencia BIT

Contrary to the ICSID Convention and in-line with modern BITs the Bergonia-Conveniencia BIT contains a detailed definition of the term "investment".

Interpreted according to the "*ordinary meaning to be given to the terms of the treaty*" (Art. 31 VCLT) there are good arguments for a coverage of Patent AZ 2005:

- Art. 1 (1) d) expressly lists "*patents*" as protected investments;

- Art. 1 (1) states that investments are "*every kind of asset*".

If one places however more emphasis on the last half sentence of Art. 31 "*in their context and in the light of its object and purpose*" one could also argue that the ambit of the BIT is to protect foreign direct investment that requires some form of entrepreneurial activity. In this regard one could refer to

- the historical development of the modern system of investment protection that was not intended to cover every property right;

[3] Bergonia itself is not a least developed country.

- the second sub-paragraph of the preamble that expressly mentions "*the stimulation of business activities and transfer of capital and technology,*" that could be understood as indicating a requirement of active engagement.

Seen from this perspective, one could at least try to argue that a mere registration without some broader activity is insufficient to create a protected investment.[4]

Question 3: Does the compulsory license amount to expropriation or discrimination or otherwise violate general international law or applicable treaties?

A violation of the following material standards contained in the Bergonia-Conveniencia BIT could be discussed: Art. 4 sec. 2 (expropriation); Art. 2 sec. 2 (fair & equitable treatment), Art. 3 sec. 1 / 2 (national treatment); and potentially also other standards.

a.) Art. 4 sec. 2: Expropriation

Claimant is only entitled to a remedy if the compulsory license is an expropriation according to Art. 4 and if it was not in-line with the conditions set forth in Art. 4 sec 2 and 3 of the Bergonia-Conveniencia BIT.

The teams should discuss possible consequences of the application of Bergonia-Tertia BIT, problems related to the meaning of expropriation, the relationship between the Bergonia-Conveniencia BIT and the TRIPs agreement, and whether the expropriation was lawful.

All these topics are far from being settled and there is wide latitude for both parties to take varying positions. Accordingly, the focus should be more on the quality of the argument and less on compliance with the following notes, which represent only one possible approach (and structure to the answer).

(1) Consequences of Art. III sec. 4 of the Bergonia-Tertia BIT

Respondent will argue that if Claimant is entitled to rely on the broader nationality/consent provision in the Bergonia-Tertia BIT, then it must also be bound by the limitation in Art. III sec. 4 of that treaty that the expropriation article does not apply to the issuance of compulsory licenses in accordance with TRIPS. This issue may better be dealt with in the context of whether the most-favoured-nation ("MFN") provision in the Bergonia-Conveniencial BIT permits adoption of the Bergonia-Tertia BIT provisions to the threshold jurisdictional issues. However, it may also arise here and so we set out some points. Of course, this argument can only prevail if

- Art. III sec. 4 of the Bergonia-Tertia BIT is applicable and if
- its requirements are fulfilled, i.e. if the compulsory license has been granted in accordance with the TRIPS.

[4] In the context of Question 1 or otherwise, teams may end up discussing whether a patent right is a covered investment under the Bergonia-Tertia BIT. Even though the term "patent" is not explicitly included within the Article I definition of covered "investments", one could argue it is covered as an "invention".

There is plenty of scope for teams to argue both sides of the first issue. Many of the arguments will overlap with the Question 1 MFN debate, but for present purposes a key divide will be whether:[5]

- from Respondent's perspective, the MFN clause does not allow the Claimant to cherry-pick the provisions that are helpful for its case, but completely ignore the other provisions of the potentially relevant treaty, as otherwise the ratio of the individual treaties would be destroyed; as opposed to

- from Claimant's perspective, the wording of the MFN clause (Art. 3 sec. 1) precludes "*treatment less favourable than* [that accorded] *(...) to investments of investors of any third state*" but Claimant has relied on the MFN clause with regard to the term "*investor*" only, which is separate from the scope of the expropriation provision.

In any case, Art. III sec. 4 of the Bergonia-Tertia BIT applies only when the compulsory license was granted in accordance with the TRIPS. The requirements are contained in Art. 31 TRIPS, the potentially relevant parts of which reads as follows:

> *Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:*
>
> *(a) authorization of such use shall be considered on its individual merits;*
>
> *(b) such use may only be permitted if, prior to such use, the* ***proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use****. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;*
>
> *(c)* ***the scope and duration of such use shall be limited to the purpose for which it was authorized****, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;*
>
> *(d) such use shall be non-exclusive;*
>
> *(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;*

[5] Of course, there are many other arguments on the applicablity of the MFN provision for Question 1, some of which (e.g., the public health exception in Art. 3 sec. 3) might be addressed in response to Question 3.

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

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

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

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

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

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

Issues that could be discussed with regard to this provision are whether:

- the companies using the compulsory license made sufficient efforts under section (b) to negotiate a license or whether one of the exceptions to this requirement applies; it seems noteworthy that according to the clarifications provided to the teams only BioLife tried to negotiate and that the products are used for commercial use, so that the exception related to the negotiation-requirement related to "*public non-commercial use*" does not apply;

- with regard to the definition of "*the case of a national emergency or other circumstances of extreme urgency"* in this subsection in regard to the health problems in Bergonia, the "*Declaration on the TRIPS Agreement and Public Health*" adopted on 14 November 2001 should be discussed;

- the exports conducted by three of the licensees exceeds the level of exports allowed under subsection (f) ("*predominantly for the supply of the domestic market of the Member authorizing such use*");

- the royalty offered was "*adequate*" according to subsection h; it has to be noted that it was lower than the royalty agreed on with BioLife under the original license, but only "*moderately*" so;

- the decision of the Patent Review Board can be considered as a judicial review in the sense of subsection (i); this institution is a part of the patent office and its members are paid by it; on the other hand, it is a quasi-judicial body consisting of former judges.

(2) The meaning of the term expropriation

The teams must discuss whether the compulsory license is an expropriation according to Art. 4 sec. 2 of the Bergonia-Conveniencia BIT.

The provision comprises three kind of expropriations: direct, indirect and measures the effect of which is tantamount to expropriation. The following observations are based on the assumption that any possible differences between the two last mentioned forms are irrelevant for the purposes of the case study. Accordingly, both forms will be discussed under the label "*indirect expropriation*". However, if teams come up with meaningful arguments regarding a differentiation between both concepts, they are by no means incorrect or implausible.

(i) Is the compulsory licence a direct expropriation?

First one could discuss whether the compulsory license is a direct expropriation. Relevant arguments could be that:

- the compulsory license cuts a certain right out of the bundle of property rights constituting the patent and is therefore a direct (partial) expropriation;
- the patent as such remains with the owner and that a direct expropriation occurs only when there is a formalized taking of the complete right.

(ii) Is the compulsory taking an indirect expropriation?

There is no generally accepted definition of the term indirect expropriation. Again, much depends on the quality of the arguments. The teams should try to base their arguments on an interpretation of the term according to Art. 31 VCLT. In doing so, attention could be paid to the "*ordinary meaning*" of the term in international law and to the sources of international law listed in Art. 38 of the Statute of the International Court of Justice. Three approaches to the concept of indirect expropriation that have been identified in the recent case law are:

- the sole effects doctrine that analyzes only the impact on the property right; this could speak for an indirect expropriation, as Claimant has lost its most important right (the right to exclude others from the use of his invention) completely;
- the proportionality test that balances the impact of the measure against its objective; here, an interesting argument would be whether the royalty offered limits the impact and could so ensure that the measure is deemed to be proportional (i.e. not to be an expropriation);
- the police power exception; this approach carves out regulatory measures that have been taken in the public interest; while the public interest is obvious here, there might be some question about whether the compulsory license at issue here constitutes a regulatory measure of the sort contemplated.

One factor that might be relevant to all three tests (and which arises also in the fair and equitable treatment claim) is the investor's legitimate expectations, i.e. whether it should have expect that a compulsory license would or could be issued. Thus, teams might consider the fact that the IP laws were on the books and known to Claimant at the time of the investment, the documented and predictable increasing need for the produced drug, the fact that Claimant itself arguably contributed to the need for a compulsory license by terminating the license agreement, and the investor's expectation of a right to due process.

(3) Does the TRIPS influence the outcome?

Another issue that could become important in the expropriation analysis is the question of whether the compulsory licence was or was not TRIPS compliant and what is the legal consequence of this for the BIT claim.[6]

Attention should be paid to whether the teams are able to argue why the TRIPS should or should not be taken into account. As a starting point, the teams should discuss whether the TRIPS is an agreement within the meaning of Art. 31 sec. 2 VCLT that could be taken into account for the interpretation of Art. 4 sec. 2 of the Bergonia-Conveniencia BIT.

Provided the compulsory license is regarded as TRIPS compliant (otherwise TRIPS can only have a very limited role) arguments with regard to the TRIPS could be:

- TRIPS contains a carefully drafted compromise between the diverging interests of the WTO members and evidences a joint understanding that a TRIPS compliant compulsory license is regarded as a generally accepted regulatory measure that is not comparable to an expropriation under international law; since Art. 4 sec 2 of the Bergonia-Conveniencia BIT does not broaden the concept of expropriation under international law, it does not apply to the compulsory license at hand;
- The provisions of the TRIPS reflect only a minimum standard; WTO members are free to agree on stricter standards, as Bergonia and Conveniencia have done in Art. 4 sec. 2.

Of course, the question of TRIPS compliance also raises issues of what role Bergonia law should play in interpreting what constitutes compliance.

(4) Was the expropriation lawful?

In any case Claimant's claim is only valid if the expropriation was not lawful, i.e. if it was not compliant with the conditions set forth in Art. 4 sec. 2 and 3. These are:

- public benefit;
- non-discriminatory basis; and
- prompt adequate and effective compensation.
- Further, both the legality of the expropriation and the amount of compensation shall be subject to review by due process of law according to the respective national legal system (last sentence of Art. 4 sec. 3 of the Bergonia-Conveniencia BIT).

Issues that will have to be discussed in this regard are whether:

6 The argument will most probably form part of the above-mentioned discussion. It is dealt with here separately only to avoid confusion.

- the royalty offered complies with the compensation requirement; here it is noteworthy that the royalty was only "*moderately*" lower than the fee due under the license agreement; on the other hand, the fee under the license agreement did not cover exports, which were the reason for the termination of the license; another argument worth discussion is the relationship between the "*adequate*" compensation standard of TRIPS and the "*prompt adequate and effective*" language of the BIT; reference could be made to the discussions of the period after WW II in which the term "*adequate*" was seen as a compromise between the states denying an obligation to compensate and the states defending the traditional "*Hull rule*" for prompt adequate and effective compensation.

- the review before the Patent Review Board can be seen as a review by due process of law; the same considerations can apply as with regard to Art. 31 sec (i) of the TRIPS, i.e. decisive will be whether the board is sufficiently independent from the patent office.

b.) Art. 2 sec 2 (fair & equitable treatment)

The interpretation of the fair & equitable treatment standard is difficult, as its meaning is open to wide-ranging debate. Nevertheless, the teams should not jump straight to the existing "case law" and treat it as binding precedents, but should first try to give it some contours by interpreting the provision in accordance with Art. 31 VCLT and the traditional minimum standards of customary international law (which is <u>not</u> meant to say that fair & equitable treatment is identical to this standard).

With regard to the application of the standard to the facts, Art. 2 sec 2 of the Bergonia-Conveniencia BIT can be discussed in light of allegations of both substantive and procedural defects (this is not meant to say that both aspects have to be artificially separated; in fact, they influence each other).[7]

With regard to the material impact on the investment, more or less the same considerations can apply as with regard to Art. 4 sec. 2 (for example, whether the investor's legitimate expectations were disregarded). If the compulsory license is seen as a valid regulatory measure adopted in the public interest, it will be hard to argue that it violated the fair treatment obligation. If on the other hand it is regarded as an extraordinary interference with Claimant's rights or its legitimate expectations, it can also be seen as a breach of this obligation.

The procedural aspects concern both (1) the procedure of the issuing of the compulsory license and (2) the challenge to the license carried out before the Patent Review Board. The teams should argue whether

- the issuing was transparent enough and provided Claimant with a sufficient degree of participation;

- the review was independent enough not to constitute a denial of justice; in this regard, the same considerations will apply as with regard to Art. 31 (i) TRIPS and Art. 4 sec. 3 of the Bergonia-Conveniencia BIT.

c.) Art 3 (national treatment)

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7 Note also in passing that to the extent the Claimant is successful on an MFN argument, the exclusion for compulsory licenses in the Bergonia-Tertia BIT applies only with respect to "expropriation".

The discussion of national treatment is difficult, as this is highly fact-specific and the case study offers only that compulsory licenses for other inventions have been granted that affected patent-holders who were Bergonian nationals (Request 83).

If the teams address this provision, the following issues could be discussed:

- is a comparable treatment a necessary element for a violation of the national treatment provision or does it suffice that the treatment was due to the foreign nationality of the investor?

- If less favourable treatment can be shown, can it be justified by the public purpose of the measure?

d.) Other standards

The teams could also discuss violations of other provisions of the Bergonia-Conveniencia BIT.

For example, the prohibition on arbitrary or discriminatory measures provided for in Art. 2 sec. 3 or the requirement of full protection and security in Art. 4 sec. 1 could be addressed. It is nevertheless questionable whether these provisions would add anything new: the first provision deals with the same considerations as the obligation to fair & equitable treatment and to national treatment. The second provision is more related to physical protection than to procedural treatment.

Finally, one could also discuss whether the grant of a compulsory license is a breach of the umbrella clause contained in Art. 8 sec. 2 of the Bergonia-Conveniencia BIT. In this regard, it would have to be discussed whether the grant of a patent is "*an obligation (...) assumed with regard to investments*" and whether the issuing of a compulsory license based on a law that was already in place when the patent was granted (the law is from 1997, the patent was granted on 15 March 2005) is a breach of such an "*obligation*". Separately, if the compulsory license was not TRIPS compliant, then (arguably) Claimant might be able to use the umbrella clause to assert an additional claim for breach of the BIT, raising interesting questions of whether this undermines the enforcement regime provided within TRIPS itself.