IN THE ARBITRATION UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

Frankfurt International Arbitration Center, Börsenplatz 4, 60313 Frankfurt Am Main, Germany

MEDBERG CO.,

Claimant

v.

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA

Respondent

ICSID Case No. ARB/X/X

MEMORIAL FOR CLAIMANT

Respectfully submitted,
The claimant, Medberg Co.,
By its attorneys,
Team Cordova

7 September 2009

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STATEMENT OF FACTS

1. The Democratic Commonwealth of Bergonia ("Respondent") and the Sultanate of Conveniencia are both Contracting States to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), Members of the World Trade Organization (WTO), and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[1]

2. The Respondent and Conveniencia entered into a bilateral investment treaty Concerning the Encouragement and Reciprocal Protection of Investments (CB BIT) on 30 May 2003.[2] Also relevant to this dispute is the BIT between the Government of Tertia and the Respondent (BT BIT), which entered into force On 1 January 2003.[3]

3. MedBerg Co. (Claimant) was duly incorporated in Bergonia on 30 January 2004.[4] Claimant's administrative seat is also located in Bergonia.[5] Claimant is a wholly-owned subsidiary of MedX Holdings Ltd. (MedX).[6]

4. MedX was originally owned by Conveniencian Companies SARL (CCS) and duly incorporated in Conveniencia on 1 January 2003 under the name "CC123 Holding Ltd."[7] On 1 December 2003, CCS transferred ownership of CC123 Holding to MedScience Co.

[1] Minutes of the First Session of the Arbitral Tribunal [Record], Annex 3 Uncontested Facts, para. 3.

[2] *Id.* at Annex 1, art. 12, para. 4.

[3] *Id*. at Annex 2.

[4] Record at Annex 3, para. 1.

[5] *First Clarification*, Request 11.

[6] *Id.* at para 2.

[7] *First Clarification*, Request 2.

and Dr. Frankensid.[8] The company was renamed MedX Holdings Ltd. There have been no other changes in ownership.[9]

5. MedScience Co. is a company incorporated and operating under the laws of Laputa and has a 50 percent stake in MedX. Dr. Frankensid is an employee of MedScience and a dual national of Bergonia and Amnesia. He is credited with a breakthrough that has led to several patents and he also has a 50 percent stake in MedX. Dr. Frankensid and MedScience have equal voting rights and have agreed to solve any deadlocks through negotiation. MedScience and Dr. Frankensid received their MedX shares in exchange for transferring their ownership and assignment rights for patent applications based on the technology to MedX.

6. Claimant is the owner of Bergonian Patent No. AZ2005, which Bergonia granted to Claimant on 15 March 2005.

7. Patent AZ2005 covers technology that is used to produce certain health-related products.[10] In particular, the patent covers a treatment and related products that combine a lipid absorption retardant with glycogen/lipid metabolism optimization.[11] Medical experts believe the technology is useful for treatment of obesity, but its efficacy in reducing obesity among Bergonians has not yet been determined.[12]

8. Thirty-four percent of Bergonia's males and thirty-eight percent of its females are obese due to the genetic makeup and diet of this population, conditions that have evolved over generations of life in Bergonia.[13] Obesity among Bergonians has been a long-standing issue.[14]

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[8] *Id.*

[9] *Id.*

[10] Record, Annex 3, Uncontested Facts, para.7.

[11] *Second Clarifications*, Request 73.

[12] *Second Clarifications*, Request 40, 66.

[13] *First Clarifications*, Request 65, 40.

9. Claimant licensed BioLife Co., a Bergonian company, to utilize Bergonian Patent No. AZ2005 on 31 March 2005 (the License Agreement).[15] Claimant terminated the License Agreement in accordance with the Agreement's notice and termination provisions on 31 March 2007.[16] There have been no judicial or administrative processes declaring the termination of the first License Agreement or MedBerg's hesitation to enter into any subsequent license agreement as anticompetitive.[17]

10. On 1 June 2007, only two months after MedBerg terminated the License Agreement with BioLife, the Bergonian Intellectual Property Office (IP Office) commenced proceedings for the issuance of a compulsory license with respect to Patent No. AZ2005. The Respondent contends that obesity-related medical needs somehow became more acute during this brief period.[18] MedBerg was then notified of the proceedings.[19] The Bergonian IP Office issued a 48-month compulsory license for Patent No. AZ2005 on 1 November 2007.[20]

11. Products produced under Patent No. AZ2005 were available on the Bergonian market during the period after termination of the License Agreement with BioLife and before the issuance of the compulsory license.[21]

12. In 2006, the gross domestic product (GDP) for Bergonians per capita was $7,535 USD.[22] Prior to the issuance of the compulsory license, the annual treatment cost in the free

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[14] *First Clarifications*, Request 40.

[15] Record, Annex 3 Uncontested facts, para 6.

[16] *Id.*

[17] *Second Clarifications*, Request 106.

[18] *First Clarifications*, Request 26.

[19] Record, Annex 3 Uncontested facts, para 7.

[20] Record, Annex 3 Uncontested facts, para 8.

[21] *Second Clarifications*, Request 114.

market for Claimant's product was $300 USD, or less than four percent of the per capita GDP of Bergonian citizens. [23]

13. As of 1 January 2009, BioLife and five other Bergonian entities have exploited the State-granted compulsory license from Claimant's lawfully obtained patent.[24] These companies are using the technology covered by Patent No. AZ2005 to produce health-related products virtually identical to the Claimant's and have produced and sold these products solely for commercial purposes.[25] Three of these companies have exported a significant portion of their production to other countries.[26]

14. The Bergonian IP Office has collected royalties from the six Bergonian companies.[27] The percentage royalty rate Respondent offered to Claimant was substantially lower than the rate that had been in effect under the terms of the License Agreement between MedBerg and BioLife.[28]

15. The Claimant repeatedly communicated its objections to the Bergonian IP Office within the statutory time limits for doing so on numerous occasions.[29] However, Respondent has not offered a satisfactory resolution to this dispute insofar.[30] Despite Claimant's objections, there has been no independent review of the IP Office's decision to issue the compulsory license.[31]

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[22] *First Clarifications*, Request 44.

[23] *Second Clarifications*, Request 109.

[24] Record, Annex 3 Uncontested facts, para 8.

[25] Record, Annex 3 Uncontested facts, para. 8; *First Clarifications*, Request 34.

[26] *First Clarifications*, Request 39; Second Clarifications, Request 61.

[27] *First Clarifications*, Request 39.

[28] *First Clarifications*, Request 25; *Second Clarifications*, Request 88.

[29] *First Clarifications*, Request 46.

[30] Record, Annex 3, Uncontested facts, para. 9.

[31] *Id.*

16. The ICSID Secretary General registered this dispute for arbitration on 1 November 2008.[32] The Parties have stipulated that the only issues to be addressed at this time are: 1) whether the Tribunal has jurisdiction in view of the nationality of those parties controlling the claimant; 2) whether Claimant's utilization of its intellectual property in Bergonia is an investment; and 3) whether the compulsory license is expropriation and discrimination, or otherwise violates international law or any applicable treaties.[33]

[32] Id. para. 10.

[33] *Id.* para. 14.

ARGUMENT

I. JURISDICTION

A. Ratione Personae – The Tribunal Has Jurisdiction To Hear This Dispute Because the Parties Agreed to Treat Claimant as a National of Another Contracting State Due to Foreign Control.

17. Nationals of a contracting state generally do not have standing under the ICSID Convention to submit a dispute against the contracting state.[34] The second part of Article 25(2)(b) of the Convention, however, confers ICSID jurisdiction over:

> ". . . 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."

18. Accordingly, the Claimant meets the Article 25(2)(b) factors because **(1)** Claimant is a juridical person with nationality of the Host State; **(2)** an agreement exists; **(3)** and foreign control objectively exists. Additionally, **(4)** the nationality of the foreign control satisfies jurisdiction because a company of a Contracting State different from the Respondent exercises foreign control over the Claimant.

1. Claimant is a Juridical Person and National of Bergonia

19. The Claimant is a juridical person under the ICSID Convention. The term "juridical person" is not defined in the ICSID Convention.[35] Based on drafting history and commentary, it is established that entities bringing disputes under the ICSID Convention must have legal personality under a legal system.[36] In this case, the facts state that Claimant is recognized as a duly-established company operating under the national laws

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[34] *See* ICSID Convention, art. 25.

[35] *See generally* ICSID Convention.

[36] Christoph Schreuer, The ICSID Convention: A Commentary, paras 457-59 (2001) [hereinafter ICSID Commentary].

of Bergonia.[37] Claimant is therefore considered a juridical person for purposes of the ICSID Convention.

20. Claimant is a Bergonian national under the Host State's law and under the C-B BIT. Corporate nationality is also not defined in the Convention but international law recognizes the state of incorporation or where the seat of the corporation is located as the two main criteria for determining corporate nationality.[38] Additionally, under the CB BIT, a Bergonian national is defined as a juridical person having its seat in Bergonia.[39] The undisputed facts show Claimant has both its registered incorporation and seat in Bergonia.[40]

21. Claimant is therefore eligible to invoke Article 25(2)(b) in this dispute because Claimant is a juridical person with the nationality of the Host State.

2. Respondent Has Expressly Agreed to Treat Claimant as Conveniencian National

22. This tribunal has jurisdiction under ICSID Convention Article 25(2)(b) because: **(a)** Article VI(8) of the BT BIT constitutes a valid 25(2)(b) agreement under the ICSID Convention; and **(b)** the CB BIT's Most-Favoured Nation (MFN) clause incorporates this agreement.

a. BT BIT Art. VI(8) Is a Recognized Agreement by Respondent Under the Convention

[37] Statement of Facts, para. 3.

[38] Engela C. Schlemmer, "Investment, Investor, Shareholders," in The Oxford Handbook of International Investment Law [hereinafter The Oxford Handbook], 76 (2008).

[39] CB BIT, art. 1(3)(a).

[40] Statement of Facts , para. 3.

23. The ICSID Convention does not prescribe, nor require, any specific manifestation or form of an agreement to treat a domestic juridical person as a foreign-controlled national of another Contracting State.[41] Tribunals have found agreements on foreign control in consent agreements, investment contracts, the nature of host state treatment of juridical persons, or in BIT provisions.[42] In Article VI(8) of the BT BIT, Respondent agreed to treat entities that were also foreign investments as defined by the BT BIT, like the Claimant, as nationals of the foreigners' state for 25(2)(b) purposes.

24. BITs providing for ICSID arbitration and other national legislature may contain a host state's expressed offer to treat local companies as foreign nationals and investors of other contracting states for the purposes of ICSID arbitration and, specifically for providing jurisdiction under Article 25(2)(b). The vast majority of ICSID arbitrations are initiated by parties' consent through BIT provisions.[43] Tribunals and commentators alike have acknowledged that most BITs offer unequivocal consent to arbitration through language like "this dispute shall be submitted," and that these clauses are merely offers until an investor submits a dispute to ICSID.[44] In submitting the dispute, the investor accepts the host state's offer of consent and BIT provisions are then incorporated as part of the agreement to arbitrate the dispute.[45] It follows that provisions, such as 25(2)(b) agreements, contained in a BIT that expresses the host state's unequivocal offer to ICSID arbitration, become part of the arbitration agreement between a host state and investor

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[41] *See* ICSID Convention; Schreuer, *supra* note 36, at para. 504.

[42] *See* Schreuer, *supra* note 36, at paras 511, 525-27 discussing *Holiday Inns v. Morocco* and *Amco Asia Corp. v. The Republic of Indonesia*; *Cable TV v. St. Kitts and Nevis*, Award, 13 Jan. 1997, ICISD Review: Foreign Investment Law Journal, 328, 367/8 (1998); *Wana Hotels Ltd. v. Arab Rep. of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, paras. 40-44 (29 June 1999).

[43] Christoph Schreur, "Consent to Arbitration" in The Oxford Handbook, 837 n.25.

[44] *Id.* at 836; *see also El Paso Energy Int'l Co. v. The Argentine Rep.*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, para. 35 (27 April 2006).

[45] *See supra* note 44 and accompanying text.

when the investor submits the dispute.[46] In this case, both the CB BIT and BT BIT contain language offering unequivocal consent to investors.[47] Claimant submitted the dispute thereby accepting Respondent's offer to arbitrate and incorporating the CB BIT provisions. The MFN clause in the CB BIT naturally operates to include the more favorable Article VI(8) of the BT BIT as a provision in the CB BIT and, thus, part of the agreement to arbitrate between the parties.

25. Although ICSID Model Clause 7 suggests that consent agreements between parties specifically addressing the foreign-control treatment of local companies are preferable to avoid any doubt, drafting realities have proven time and time again that actual agreements are not always so explicit and the absence of explicit reference to foreign control is not dispositive of an absence of agreement or lack of jurisdiction.[48] Past ICSID Tribunals recognized such imperfections and took a flexible approach in construing Art. 25(2)(b) agreements regarding national treatment.[49] Some tribunals found implied agreements sufficient while others held that parties must clearly express foreign treatment for Art. 25(2)(b) purposes.[50]

26. While specific language between parties would leave little doubt to the presence of an agreement for 25(2)(b) purposes, a flexible approach toward form is most consistent with

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[46] ICSID Commentary, *supra* note 36 at para. 536; Anthony C. Sinclair, "The Foreign Nationality Requirements in ICSID Arbitration," in ICSID: taking stock after 40 years, 132 (2007).

[47] CB BIT, art. 10(2); BT BIT Art. VI(3).

[48] *See Vacuum Salt Products Ltd. v. Government of the Rep. of Ghana*, ICSID Case No. ARB/92/1, Award, para. 31 (16 Feb.1994).

[49] *See infra* note 50 and accompanying text.

[50] *Compare generally Amco Asia Corp. v. Indonesia*, ICSID ARB/81/1, Decision on Jurisdiction, para. 14(ii) (25 Sept. 1983), *Klockner v. Cameroon*, ICSID ARB/81/2, Decision on Jurisdiction, (21 Oct. 1983), *and Liberian Eastern Timber Corp.* (LETCO) *v. Liberia*, ICSID ARB/83/2, Award, (31 March 1986) *with Holiday Inns et al v. Morocco*, *and Vacuum Salts v. Ghana*.

both the plain language of the Convention and with the purpose of ICSID, which is to facilitate the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.[51] In this case, the tribunal does not need to find an implied agreement to treat the Claimant as a foreign national because Respondent has clearly expressed such treatment in Article VI of the BT BIT and Respondent has drafted MFN language in the CB BIT to incorporate this agreement.[52]

b. BT BIT Art. VI(8) is Incorporated Into the CB BIT Through Most-Favoured Nation Treatment

26. Respondent's 25(2)(b) treatment of locally-incorporated companies in Article VI(8) of the BT BIT applies to Claimant for several reasons: **(i)** Claimant may invoke the CB BIT's MFN clause because Article VI(8) provides a more favorable substantive right to third party investors;[53] **(ii)** the MFN clause satisfies ejusdem generis; **(iii)** in accordance with the CB BIT MFN clause, established treaty law, treaty interpretation, and prior ICSID jurisprudence, the Claimant has a right to benefit from the more favourable terms of Article VI (8); **(iv)** Respondent cannot deny Claimant this benefit because Respondent has not asserted this denial in a timely manner; and **(v)** even if Respondent was able to deny Claimant the benefits of Article VI(8), doing so would be discriminatory and undermine the core foundation of MFN principles.

i. Claimant May Invoke the CB BIT's MFN Clause

27. In the context of investment law, MFN treatment means that a host state agrees to not treat an investor, or its investment, more favourably with respect to a given subject matter than an investor, or its investment, from a third country.[54]

[51] ICSID Convention, art. 1(2).

[52] BT BIT, art. VI, para. 8.

[53] *See* CB BIT, art. 3(1)-(2); *see infra* part I(A)(ii).

[54] OECD Directorate for Financial and Enterprise Affairs, Most-Favoured Nation Treatment In International Investment Law, 2. Working Papers On International Investment No. 2004/2, Sept.

28. The CB BIT's MFN clause states in part that "[n]either Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State."[55]

29. The CB BIT defines investments to include shares of companies and other kinds of interest in companies.[56] The Claimant is an investment under the CB BIT because it consists of shares wholly-owned and controlled by its parent company, MedX.[57] Under the CB BIT definitions, MedX is an investor of the contracting state of Conveniencia.[58] Respondent is therefore bound by its treaty obligations with Conveniencia to treat the Claimant, an investment controlled by a Conveniencian national, no less favourably than the Respondent would treat an investment from another country and must afford the same treatment to the Claimant's intellectual property rights as Respondent would to any other third-party investor.

ii. The MFN Clause Satisfies Ejusdem Generis

30. The CB BIT MFN clause satisfies the principle of ejusdem generis because the basic treaty and the treaty with the more favourable term both address the same subject matter.[59] Both BITs were entered into by the states to promote favourable investment

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2004, *available at* http://www.oecd.org/dataoecd/21/37/33773085.pdf [hereinafter OECD MFN Report].

[55] CB BIT art. 3(1).

[56] *Id.* at art. 1(1)(b).

[57] *Id.* *See also* Statement of Facts, para. 3; *infra* parts iii, iv (describing MedX's foreign control over Claimant).

[58] CB BIT art. 1(3)(b).

[59] *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, para. 56 (25 Jan. 2000); OECD MFN Report, at 9; *see also* Dana H.

conditions and both contain offers to investors for ICSID arbitration of investment disputes.[60] Both BITs contemplate shares of companies as investments and extend treaty protections to them.[61] The MFN clause applies to the treatment of investments and does not exclude dispute resolution. The MFN clause therefore applies to the same subject matter as Article VI (8) is concerned with.

iii. The MFN Clause Attaches to Dispute Resolution Provisions

31. The language of the MFN clause and intent of the parties show that the Claimant is entitled to the more favourble terms relating to dispute resolution in Article VI (8) because the MFN clause incorporates such treatment.

32. In the seminal case of *Maffezini v. Spain*, the Tribunal held that an MFN clause that referred to "all matters subject to the agreement," applied to a dispute resolution clause in another BIT which allowed the investor to enter international arbitration after six months instead of bringing a claim to domestic courts first and then waiting for eighteen months before entering international arbitration.[62] The Tribunal stated that dispute settlement arrangements are "inextricably related to the protection of foreign investors" and that more favourable dispute settlement terms should be extended to beneficiaries of MFN clauses because international arbitration is essential to the protection of investors' rights as intended by investment treaties.[63] The *Maffezini* Tribunal also held that beneficiaries should not use MFN clauses to override public policy considerations that contracting parties envisaged, such as using MFN treatment to extend arbitration to disputes the parties did not intend arbitrate.

Freyer & David Herlihy, *Most Favored Nation Treatment and Dispute Settlement In Investment Arbitration: Just How "Favored" is "Most-Favored*, 20 ICSID Review 58, 66 (2005).

[60] *See* CB BIT preamble; BT BIT preamble; CB BIT art. 10(2); BT BIT art. VI(3);

[61] CB BIT, art. 1(1)(b); BT BIT, art. I(a)(i).

[62] *See Maffezini* at paras. 38-64.

[63] *Id.* at 52-56.

33. ICSID jurisprudence overwhelmingly agrees with the basic principle laid out in *Maffezini* that dispute resolution concerns access to arbitration and this is the heart of substantive investor rights. *Siemens v. Argentina* and *Gas Natural v. Argentina* both addressed broad MFN language and dispute resolution waiting periods similar to *Maffezini*.[64] The Tribunals in both of those cases concurred that investment treaties have distinctive dispute settlement mechanisms and that access to these mechanisms is part of the protection offered under the treaty.[65] The *Siemens* Tribunal in particular stated,

> "Dispute resolutions are part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause."[66]

Similarly, Tribunals in *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic* and *National Grid v. Argentine Republic,* both decided that MFN treatment includes dispute resolution mechanisms when treatment is undefined in the BIT.[67] Even the Tribunal in *Plama Consortium Ltd. v. Republic. of Bulgaria*, a case often present as setting the opposite spectrum of MFN jurisprudence *vis a vis Maffezini*, acknowledged *Maffezini's* basic reasoning that dispute resolution and arbitration clauses are a necessary to the protection of investors.[68]

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[64] *See Siemens AG v. Argentina,* ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004); *Gas Natural SDG SA v. Argentina,* ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 June 2005).

[65] *Siemens*, para 102; *Gas Natural*, para. 31.

[66] *Siemens*, para. 102-03.

[67] *See Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Rep.*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, paras. 55-59 (3 Aug. 2006); *Nat'l Grid pic v. Argentine Rep.,* UNCITRAL, Decision on Jurisdiction, paras. 92-93 (20 June 2006).

[68] *See Plama Consortium Ltd. v. Rep. of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para 193 (8 Feb. 2005).

34. The *Plama* Tribunal reached a contrary result from *Maffezini*, stating the Vienna Convention Law on Treaties (VCLT) offered no guidance to interpretation of the MFN clause in question, and by finding the object and purpose of the relevant BITs, as well as the Report of the Executive Directors on the ICSID Convention of 1965, to be "legally insufficient."[69] The *Plama* Tribunal found the MFN clause in question did not attach dispute resolution terms of another BIT.[70] The MFN clause in *Plama* listed specific exceptions to MFN treatment regarding economic communities, union relationships and free trade areas.[71] The inclusion of specific exceptions to MFN treatment would normally support the view that all other matters (including dispute resolution) were intended to be included in the MFN clause under the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).[72] The Tribunal, however, inferred that the word "privileges" in the exceptions paragraph of the clause meant the entire MFN clause attached to only substantive protection and that this paragraph listing exceptions somehow modified the first paragraph of the clause to exclude dispute resolutions.[73] The Tribunal offered no evidence and relied on conditionally flimsy language in reaching this decision.[74]

35. Notable in *Plama*, is the fact that the Claimant attempted to exceed the scope of the basic BIT dispute resolution provision. The Claimant attempted to use the MFN clause to extend arbitral jurisdiction over a much broader line of disputes not contemplated in the basic treaty.[75] The Tribunal, following *Maffezini's* warning of overriding public policy considerations, stated MFN clauses could not operate to replace one dispute resolution

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[69] *Id.*

[70] *Id.*

[71] *Id*. para. 191.

[72] *Id*.

[73] *Id.* para 187-191.

[74] *Id.* para. 191.

[75] *Id.* para. 208.

mechanism with a completely different one.[76] Similarly, in *Telenor v. Hungary*, the Tribunal held the Claimant in that case could not invoke an MFN clause to replace a narrow dispute clause in a BIT that provided for arbitration only for expropriation cases.[77]

36. The case of *RosInvestor v. Russia* came two years after *Plama* and reached the opposite conclusion of the *Plama* Tribunal with regard to an MFN clause with similar language.[78] In *RosInvestor*, the MFN clause also specifically listed exclusions that do not attach but did not include dispute resolutions within these exclusions for MFN treatment.[79] The MFN clause also mentioned "privileges" in its exception for treatment regarding economic communities, union relationships, and free trade areas.[80] Unlike the *Plama* tribunal, the *RosInvestor* Tribunal found the *expressio unius est exclusio alterius* principle in tact and unaffected by the addition of the word "privileges" to a single exception in a different paragraph in the BIT because the inclusion of exceptions showed the two States considered the question of which issues should not benefit from MFN protection.[81] Unlike the *Plama* Tribunal, the *RosInvestor* Tribunal wisely avoided making the large inference that mentioning the word "privileges" in a subsequent paragraph somehow excludes dispute resolutions from MFN treatment. Instead, the *RosInvestor* Tribunal found that in lieu of careful drafting and limiting language, "it can certainly not be presumed that the Parties 'forgot' arbitration when drafting."[82]

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[76] *Id.* para. 209.

[77] *Telenor Mobile Comm. A.S. v. Rep. of Hungary,* ICSID Case No. ARB/04/15, Award, para. 91-97 (13 Sept. 2006).

[78] *RosInvest Co. UK Ltd v. Russian Federation,* SCC Arbitration Institute Case No. 080/2004, Award on Jurisdiction of October 2007, para 136, *available at http://ita.law.uvic.ca/documents/RosInvestjurisdiction_decision_2007_10_000.pdf*

[79] *Id.* para 23.

[80] *Id.*

[81] *Id.* para. 135.

[82] *Id.*

37. The different outcomes between the "*Plama* line of cases" and "*Maffezini* cases" result from the individual facts of the dispute, specifically, the language of the BITs, the MFN clauses, the weight given to the object and purpose of the treaty, and the purposes for which the claimants attempted to use the MFN clause. Dispute resolution is not *de jure* disharmonious with MFN treatment, but rather turns on the treaty language and intent as ascertained under applicable laws of treaty interpretation.

38. Unlike the claimants in *Plama* and its progeny, the Claimant in this case is not seeking to use the MFN clause to replace one dispute resolution mechanism with another, but rather to supplement the mechanism provided for in the basic treaty with a more favourable term that the Respondent offers other investments.

39. Relevant international law and treaty interpretation must be given the weight it deserves in assessing the scope and applicability of MFN clauses. The Vienna Convention on the Law of Treaties (VCLT) requires a treaty to 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."[83]

40. Paragraph one of the CB BIT MFN clause broadly references "less favourable treatment." The parties list illustrative examples of such treatment in paragraph three, qualifying the list with "the following shall, *in particular* be deemed treatment less favourble" (emphasis added). In paragraph four, the contracting parties list specific and exclusive exceptions to MFN treatment and did not include dispute resolutions.

41. Under the VCLT, ordinary meaning given to "treatment" in Article 3 of the CB BIT must necessarily include dispute resolution. The Contracting States of Conveniencia and Bergonia specifically chose not to limit the definition of treatment in the CB BIT MFN

[83] The Vienna Convention on the Law of Treaties (VCLT), art. 31.

clause.[84] The parties instead specifically listed select situations that the parties explicitly wanted to ensure were covered.[85] Further, under the principle of *expressio unius est exclusio alterius*, and following past ICSID jurisprudence, dispute resolution is included in the CB BIT MFN clause because the parties purposefully chose to not include dispute resolutions in the exceptions to MFN treatment. The *Plama* reasoning that concludes "privileges" in an exceptions paragraph means the MFN clause only relates to substantive rights and not dispute resolution is fundamentally flawed and should not be followed by this Honorable Tribunal.

42. The second part of VCLT Article 31 requires the ordinary meaning of treatment to be determined in light of the context and purpose of the BIT. The preamble of the CB BIT states in part that the BIT's objectives are to create favourable conditions to increase investments and that the parties recognize the encouragement and contractual protection of such investments are apt to increase the prosperity of both nations.[86] The ordinary meaning of "treatment," read in this context, allows the Claimant to benefit from more favourable dispute resolution terms by way of the MFN clause because doing so abides by the context and purpose of the BIT.

iv. Respondent May Not Invoke the Denial of Benefits Clause

43. Respondent may not deny the Claimant the advantages of Article VI (8) because **(1)** Respondent did not timely exercise its right to deny benefits and **(2)** the Respondent offers more favorable treatment to Tertia in the BT BIT that should apply to the Claimant.

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[84] CB BIT, art. 3(3). "The following shall, in particular, be deemed 'treatment less favourable'…." *Id.* This is non-exclusive plain language. Respondent could have easily made an exhaustive list but chose not to.

[85] *Id.*

[86] CB BIT, preamble.

iv.(1) Respondent Did Not Exercise Its Right to Deny Benefits

44. Article I(2) states "each party reserves the right to deny any company the advantages of this treaty if nationals of any third party control such company…."[87] While there are few decisions that have addressed the application of these clauses in BITs, the *Plama* Tribunal is widely cited as offering an influential decision on the matter.[88] The *Plama* Tribunal correctly interpreted language similar to the denial clause in this case and noted that the existence of a right is different from the exercise of that right.[89] As such, the right to deny treaty advantages is not automatic, but must be asserted by the Respondent.

45. The *Plama* Tribunal further held that an asserted denial of treaty benefits must exercised to prospective investors or investments, and not after the investment is made, a dispute arises, and the investor requests arbitration.[90] The Tribunal reasoned that as a policy measure, putative investors are entitled to notice of such a detrimental denial of treaty rights.[91]

46. This Tribunal should not rule that States have an unconditional right to deny treaty benefits to Investors at any time and for any reason. Encouraging such practice would grant states powers beyond what the treaty language provides, shake investor confidence, and undermine the very purpose the BITs in this case, which is to protect and promote investments.

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[87] BT BIT art. I(2).

[88] *See Plama*, para. 15-65; Rudolf Dolzer and Christoph Schreur, <u>Principles of International Investment Law</u>, (2008); OECD, <u>International Investment Law: Understanding Concepts and tracking innovations</u>, 30-33, (2008).

[89] *Plama*, para. 155.

[90] I*d.* para 159.

[91] *Id*. para 161-62.

iv.(2) Article I(2) Treats Third-Parties More Favourably and These Terms Should Apply to Claimant.

47. Article I(2)provides that the Respondent may deny the Claimant treaty advantages simply because it is controlled by nationals of another third country.[92] However, Tertian companies, defined under the BT BIT as "a company of the other Party," are not denied the treaty protections so easily.[93] In order to use this clause, the Respondent must also establish that Tertian companies have substantial business activities in Bergonia, or be controlled by a country that does not maintain normal economic relations with Bergonia.[94] These additional conditions for Tertian companies amount to a more favourble terms to Terian investors and investments and must apply to the Claimant through the CB BIT's MFN clause for the same reasons as set forth in Part 2(b).

48. Should the Tribunal find these more favourable terms are attached through the MFN clause, the Respondent would not be able to deny Claimant the advantages of the BT BIT because the Claimant does not meet the additional criteria for Respondent to exercise its right. As discussed below in Part 4, Claimant has substantial business activities in Bergonia and is controlled by nationals of Conveniencia, a country with normal economic relations with Bergonia. Claimant does not meet the description of a company which may be denied benefits under Article I(2) and may benefit from Article VI(8) of the BT BIT.

v. Respondent's Selective Application of Its 25(b)(2) Agreement Is Discriminatory

49. Respondent's application of agreement in Article VI(8) of the BT BIT solely to Tertian companies is a discriminatory practice, which the MFN clause was created to address. Article IV(8) offers an expressed agreement to treat all Bergonian-incorporated

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[92] BT BIT, art. I(2).

[93] *Id.*

[94] *Id.*

companies that are investments of nationals or companies of Tertia, as Tertian nationals for 25(2)(b) purposes.[95] By offering this blanket consent agreement to all domestically-incorporated Tertian investments, Bergonia creates and perpetuates a more favorable investment environment for Tertian investments in Bergonia. Meanwhile, similar Bergonian-incorporated juridical persons that are Conveniencian investments are deprived of the same degree of security and investment protection merely because they are of a different nationality. MFN clauses and BITs are intended to promote investment neutrality and ensure host states do not discriminate amongst investments and investors based on nationality.[96] The Tribunal should enforce both the MFN and BITs in this case according to their plain language and find that there is Respondent made a 25(2)(b) agreement and this agreement applies to the Claimant.

3. Foreign Control is Objectively Present

50. This Tribunal has jurisdiction over this dispute because the Respondent's agreement, which treats the Claimant as a foreign national, was made because of foreign control and a foreign entity of a Contracting State exercises control over the Claimant.

51. The Convention does not define "control" nor state anywhere that effective control must objectively exist independent of any agreement between parties.[97] Some commentators and tribunals have inferred the language of Article 25(2)(b) to require the objective presence of foreign control.[98]

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[95] BT BIT, art. VI(8).

[96] Kenneth J. Vandevelde, *The BIT Program: A Fifteen-year Appraisal, The Development and Expansion of Bilateral Investment Treaties*, American Society of International Law and Proceedings, 512 (1992).

[97] *See* ICSID Convention.

[98] *See* ICSID Commentary, para 538; Richard Happ, "The Foreign Nationality Requirement and the Exhaustion of Local Remedies in Recent ICSID Jurisprudence," 108-9 in ICSID: Taking

52. It is widely recognized that Control is primarily exercised through majority shareholding.[99] A Conveniencian company, MedX, owns 100 percent of the Claimant's shares. This objective element of control satisfies a control analysis in addition to the Respondent's agreement to treat investments as foreign nationals for 25(2)(b) purposes.

4. Foreign Control Lies in the Conveniencian National, MedX Holdings

a. MedX Controls the Claimant

53. Contrary to Respondent's contention, MedX controls the Claimant. The Claimant holds 100 percent of the shares of the Claimant and is the majority shareholder. Although MedScience and Dr. Frankensid each own equal 50 percent shares of MedX, MedX has the most control over the claimant on a direct and daily basis.

54. Foreign control was purposefully not defined in the ICSID Convention and left up to parties to determine for themselves when a company could be treated as a national of another state.[100] Respondent's agreement states that companies considered "investments of the other party" are to be considered nationals of the other party in accordance with Article 25(2)(b).[101] Investment is defined in the BITs to include shares in a company.[102]

Stock After 40 Years, Rainer Hofmann & Christian J. Tams eds. (2007); *TSA Spectrum De Argentina S.A. v. Agentine Rep.*, ICSID Case No. ARB/05/5, Award, para. 140 (19 December 2008).

[99] Happ, *supra* note 98 at 109; *Aguas del Tunari SA v. Bolivia* (*AdT*), ICSID CASE No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, para. 246 (21 Oct. 2005); *see also Autopista Concesionada de Venezuela CA (Aucoven) v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, para 120-121 (27 September 2001); *Vacuum Salt* at para. 43.

[100] *Aucoven*, para 281-86, quoting ICSID Commentary, para 481.

[101] BT BIT, art. VI(8).

[102] CB BIT, art. 1(1)(b); BT BIT, art. I(1)(ii).

Looking at shares to determine where control lies in a company is reasonable and has been followed by numerous tribunals when faced with similar scenarios.

55. The Tribunal in *Aguas del Tunari SA v. Bolivia* (*AdT*), succinctly stated the matter when it said,

> "An entity that owns 100 percent of the shares of another entity necessarily possesses the power to control the second entity."[103]

Tribunals are free to look at other factors to analyze where control lies, however majority shareholding, indeed 100 percent ownership, has consistently been influential in finding where control lies. Even in cases like *TSA* and *Banro v. Congo*, where the Tribunals disregarded the legal form of a corporation to reject jurisdiction, they did so because the ultimate majority shareholder of the intermediate company were a national of the host state or of a non-contracting state respectfully.[104] Unlike those cases, in this dispute there is no majority shareholder of MedX.

56. Beyond MedX, there is no majority owner. MedScience and Dr. Frankensid have equal ownership in the joint venture and neither party can be said with certainty to have more power over the other. Certainly, Dr. Frankensid enjoys his employment with MedScience and this could be construed to mean MedScience possesses leverage over it's equity partner and is the "true" or "real" controller behind the Claimant, however reaching this conclusion would amount to little more than rank speculation over the relationship between the two parties. Dr. Frankensid could work at MedScience for several years or he could leave tomorrow with his half of the MedX shares. It would be equally erroneous to say both Dr. Frankensid and MedScience control MedX and indirectly, the Claimant. Both parties possess equal shares and in the event of deadlocks

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[103] *AdT*, para. 245.

[104] *See TSA*, para 159; *Banro American Resources Inc and Société Aurifère du Kivu et du Maniema SARL v. the Democratic Rep of the Congo*, ICSID Case No ARB/98/7, Final award on Jurisdiction (1 Sept. 2000).

between MedScience and Dr. Frankensid, neither can be said to control MedX. Yet MedX can continue to operate and run its subsidiaries via its Conveniecian office and staff.

57. This Tribunal should avoid engaging in mere speculation over a true or effective controller which the drafters of the Convention purposefully avoided defining. Rather, a bright-line look at ownership based on fact yields a workable decision that MedX controls the Claimant through its 100 percent stake.

b. The Tribunal Should Not Pierce the Corporate Veil Because There Is No Evidence of Wrongdoing

58. The Tribunal should further find that MedX controls the Claimant because there is no basis for piercing the corporate veil and looking past the Claimant's immediate parent company.

59. The International Court of Justice in *Barcelona Traction* recognized that piercing the corporate veil is an exceptional act and done so,

> "To prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."[105]

None of these factors are present in this case. There is no evidence that Claimant or its controlling shareholders ever misrepresented the corporation, its investments, or ever engaged in fraudulent activity. Unlike the Claimant in *Phoenix Action v. Czech Republic* that rearranged corporate assets after a dispute to gain arbitration access, in this case, the Claimant and its controlling parent company, MedX, were established well before any dispute arose.[106] In fact, at all times relevant to Claimant's investment and to this

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[105] *Barcelona Traction Light and Power Co. Ltd. (Belgium v. Spain),* para. 56, ICJ Reports 3 (1970).

[106] *See Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No ARB/06/5, Award, para. 140-44 (15 April 2009).

dispute, the Respondent was aware of the Claimant's corporate structure and encouraged it through the granting of Claimant's patent.

60. Contrary to Respondent's belief, the Claimant is not controlled by a shell company and MedX, was not established solely to gain access to ICSID arbitration and subvert the Convention. As the *AdT* Tribunal observed, holding companies "owning substantial assets are both a common and legal device for corporate organization" with the same legal obligations of corporations.[107] MedX maintains an office and employees in Conveniencia.[108] MedX also maintains several subsidiaries, similar to the Claimant, in other countries which produce and sell products derived from patents applied for domestically. The patent rights, which legally and officially belong to MedX, and the numerous subsidiaries, are certainly substantial assets.

61. Even if the Tribunal agrees with the Respondent that MedX is a so-called "shell company," The ICSID Convention's drafters chose deliberately not to import any rule that would deny jurisdiction to a juridical person resembling a "corporate shell" and not having any substantial business activities in the Contracting State in which it is incorporated.[109]

62. In *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan,* the Tribunal recognized the legitimacy of structured corporate vehicles for investment and upheld its jurisdiction, despite the respondent's claim that the claimant's corporate veil should be pierced, noting that "nowhere in the ICSID Convention is there a basis for piercing the corporate veil of a designated claimant."[110] Further, the ad hoc committee of *Soufraki v. The United Arab Emirates* in its opinion essentially encouraged individuals to

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[107] *AdT*, para 245.

[108] *Second Clarifications*, 76

[109] Sinclair, *supra* note 46 at 129.

[110] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 186 (21 July 2008).

structure their investments through corporations and holding companies in order to avoid arbitral jurisdictional failings and to better protect sensitive transnational investments.[111]

63. While some tribunals in the past have been quick to ignore the legal formalities of corporate entities, the *Aucoven* Tribunal wisely observed that "this formality is the fundamental building block of the global economy.[112]" Unwarranted and unsubstantiated disregard for the corporate form is chilling to investors, and all commercial activity, and creates further uncertainty in this difficult global economy.

<u>c. The Tribunal Has Jurisdiction in View of the Nationality of the Party Controlling Claimant</u>

64. This Tribunal has jurisdiction over this dispute because it is between the Respondent Host State and a national of the Contracting State of Conveniencia. This dispute arises out of a patent license investment which is wholly-owned by the Claimant. This dispute is not a backdoor attempt for nationals of a non-contracting state and the Host state to subvert domestic courts in favor of ICSID arbitration because Dr. Frankensid and MedScience do not own the investment, with which the merit of this dispute is concerned. Rather the Claimant, as the entity that was assigned the rights and applied for the patent, is the owner. Based on the language of the Convention, relevant BITs, and application of international legal principles, the Claimant is controlled by MedX, a foreign investor and national of Conveniencia. Pursuant to Respondent's Article 25(b)(2) agreement and the CB BIT's MFN clause, Claimant should be considered a national of Conveniencia and the Tribunal should uphold the agreement to treat claimant as a national of another Contracting State due to foreign control.

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[111] *In the Matter of an Arbitration between Hussein Nuaman Soufraki and The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, para. 83 (July 7, 2004).

[112] *Aucoven*, para. 67.

B. Ratione Materie – Claimant's Utilization Of Its Intellectual Property In Bergonia Is An Investment

1. The Patent and Utilization Thereof Is an Investment Under the ICSID Convention

65. The patent is a valid and protected investment for the following reasons: **(a)** the designation of the patent as an investment is valid under the ICSID Convention; and **(b)** the CB BIT states that a patent is an investment.

66. International law and applicable treaties offer protection from expropriation to activities and rights qualifying as "investments" under the terms and definitions of those laws and treaties. The applicable bodies of law for the purposes of determining whether there has been an investment in the present case are **(a)** the ICSID Convention and **(b)** the CB BIT. Claimant's utilization of its patent must constitute an investment in order to receive protection from Bergonia's expropriation.

67. Some ICSID tribunals have examined the definition of investment contained in the consent to arbitration on its own, while others have considered separately the definition of investment for purposes of consent and for purposes of ICSID jurisdiction.[113] Claimant's utilization of its patent survives both analysis: the utilization qualifies as an investment within the scope of the ICSID Convention and the CB BIT constitutes the parties consent to arbitration and specifically includes patents in its definition of protected investments.

a. The Parties Have Consented to a Definition of Investment That Is Within the Scope of the ICSID Convention

68. The parties' designation of a patent as an investment is valid under the ICSID Convention. ICSID arbitration is only proper where the legal dispute arises directly out

[113] Christopher Dugan Et Al., Investor State Arbitration 281, n.182 (2008).

of an "investment."[114] The Convention did not explicitly define "investment," but left the particular determination to the discretion and consent of the parties, so long as such a determination remains within the scope of the Convention.[115] It can be expressed by means of contracts, national legislation or bilateral investment treaties, among other features.[116] Any definition of "investment" agreed upon by the parties must remain congruent with the nature and purpose of the Convention, which is to protect and promote international investment.

69. In the present case, the parties are signatories to a bilateral investment treaty concerning the encouragement and reciprocal protection of investments that includes patents in the definition of "investment."[117] A patent is an intellectual property right of which the purpose is to protect investments in inventions, and so, fits perfectly within the scope of the Convention.

<u>b. Claimant's Utilization of Its Patent Meets the Criteria of an Investment Within The Meaning of Article 25(1) of the ICSID Convention</u>

70. Should the language of the BIT be deemed insufficient to show that a patent is an investment, or the BIT be proven inapplicable to the case at hand, the tribunal can look to five criteria that can be used as a guide in establishing whether this dispute qualifies as an investment dispute within the meaning of the ICSID Convention.[118]

71. These criteria are known as the "Schreuer characteristics," which are seen as factors that investments commonly share.[119] These factors are **(i)** a certain duration; **(ii)** generation of regular profits and concerns; **(iii)** participation of both parties in risk; **(iv)** substantial

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[114] ICSID Convention, art. 25(1).

[115] Report of Executive Directors on ICSID Convention, 28 1 ICSID Reports.

[116] *Joy Mining Machinery Ltd v. The Arab Rep. of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, para. 42 (6 Aug. 2004).

[117] CB BIT art.1(1)(d).

[118] Dugan, *supra* note 113 at 260.

[119] *Id.* at 265.

commitment of capital; and **(v)** contribution to the economic development of the host state.[120] It is important to be clear that neither the presence of all of these factors, nor the absence of any of them automatically qualifies or disqualifies something as an investment.[121]

i. Claimant's Patent is for a Certain Duration

72. This patent, like all patents, is for a certain duration. The minimum term of a patent under the TRIPs Agreement, Article 33 is 20 years from the filing of the application.[122] There is no evidence to suggest that the duration of patent AZ2005 is any less. 20 years is a certain and substantial amount of time. Additionally, the fight against obesity is a long-term battle and will not be won in a matter of days or months, no matter how effective the products of this patented technology are at fighting it, so the need for the technology covered by this patent will exist well into the future.

ii. Claimant's Patent Generated Regular Profits and Returns

73. This patent allows for the generation of regular profits and returns, which Claimant was receiving by virtue of its license agreement with BioLife. The patent was licensed to BioLife for a two-year term, during which time MedBerg received royalties from BioLife in exchange for BioLife's utilization of the patent. The fact that the patent was licensed out for only two years does not indicate that Claimant did not intend to use its patent beyond that time. Rather, the existence of this relatively short contract shows that Claimant expected its profits and returns to increase over that period and left room for Claimant to renegotiate a more favorable contract. Without regard to any particular patent, patents in general allow for the generation of regular profits and returns. The holder of a patent may prevent others from making, using, offering for sale, selling or

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[120] *Id.* at 260.

[121] *Id.* at 265.

[122] Frederick M. Abbott Et Al., International Intellectual Property in an Integrated World Economy 7 (Aspen Publishers 2007).

importing the invention during the patent term.[123] The patent holder's exclusive hold on t he patent allows him to enter into profitable license agreements that he otherwise would not be able to negotiate. Without the protection of a patent, any party would be able to utilize the invention as he pleased without remuneration to the inventor.

iii. Claimant Undertook Associated Risk in the Patent

74. Both Claimant and Respondent have participated in risk associated with the grant of the patent. In order to secure a patent, the inventor must disclose the invention in the patent application in a way that enables others to make the invention without undue experimentation.[124] This disclosure is an obvious risk to claimant because it makes known the company's most valuable secret and gives other parties access to information that may enable them to recreate the invention and sell it illegally in the country where the patent is held or to patent it or legally in a country where the inventor has not yet obtained a patent. This risk was clearly realized when BioLife began to export the patented treatments and products to third-countries and when Bergonia issued a compulsory license for the same. Respondent took a risk that the product of this technology would become unaffordable to its people when it issued the patent for technology for which there was an "important domestic medical need" because compulsory licenses are not issuable in non-emergency situations. When Bergonia issued the patent granting the inventor exclusive rights to the technology, it eliminated any competition to the inventor that may have existed and granted a monopoly to the inventor. This allowed the inventor to charge a high price for licensing. It also took away the government's ability to utilize the technology on its own terms in non-emergency situations, like the one the country is currently facing with obesity.

iv. Claimant Committed Substantial Capital

75. Claimant committed substantial capital to obtaining the patent. Dr. Frankensid and MedScience were the original holders of the patent. They transferred it to MedBerg in

[123] *Id.*

[124] *Id.*

exchange for shares in MedX. Stock in a company is considered to be capital of that company.[125] MedX, acting as MedBerg by virtue of its 100% owner of MedBerg, committed valuable shares of itself in exchange for ownership of the patent.

v. Patent Contributed to the Economic Development of the Host State

76. Claimant has contributed to the economic development of the host state through use of its patent. Through licensure of the patent, MedBerg has addressed a "important medical need" in Bergonia. Technology that is important to domestic medical needs contributes to the economic development of the state by improving the quality of healthcare in that country, thereby making it a more desirable place to receive medical care, which has a direct effect on the quality of life in that country. Bergonia's ability to address domestic medical needs provides a much-needed boost to the country's global status. The patent also contributes to the economic development of Bergonia in that it provides jobs to employees of the licensee and adds to the value of the country's healthcare technology industry. Additionally, if the drug is successful in fighting obesity in Bergonia, which studies indicate that it is[126], healthcare costs for the state will decrease, having a positive effect on the country's economy.

77. > "The types of projects that have failed the *Salini* test have generally been short-term projects that do not leave a clear, lasting contribution to the host economy."[127]

These are things like sales and government salvage contracts.[128] MedBerg's investment is for the long term and will have a clear and lasting effect on the host economy over the course of its life by decreasing the burden on the State's healthcare system caused by an obese population group.

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[125] Black's Law Dictionary (8th ed. 2004), stock, Definition #4.

[126] *First Clarifications*, Request 40.

[127] Dugan, *supra* note 113 at 260.

[128] *Id.* at 264.

78. When considering the scope of Claimant's activities in Bergonia, the existence of the patent and use thereof, the Tribunal should find that this patent is a valid investment under the ICSID Convention. Claimant has licensed its patent in Bergonia, has allowed the product of the technology covered by its patent to service the health needs of the Bergonian public, has received profit and return from the utilization of the patent and has assumed a risk in releasing its proprietary secrets to the Bergonian government. This dispute arises directly out of Claimant's inability to capitalize upon its investment due to interference by the Bergonian government and is therefore a proper dispute for ICSID arbitration.

2. The Patent and Utilization Thereof is an Investment Under the CB BIT

79. The tribunal should defer to the language of the BIT for guidance as to the definition of investment. Arbitral tribunals in past cases have relied on the language of the BIT for this purpose. The CB BIT includes patents in its definition of "investment."[129]

> "Undercustomary international law, treaty interpretation must be based on (i) the text, (ii) context, object and purpose, and (iii) good faith. Where these methods do not result in a conclusive interpretation, supplementary bases of interpretation may be used."[130]

Under all sources of interpretation, Claimants' patent and utilization thereof is an investment.

<u>a. Textual Interpretation of the CB BIT</u>

80. In *Middle East Cement*, an expropriated ship that was allegedly owned by claimant's parent company and leased to claimant was deemed an investment, primarily because the

[129] CB BIT art. (1)(1)(d).

[130] James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPs and Public Health Under the Vienna Convention on the Law of Treaties*, 15 Harv. J.L. & Tech. 291, 292 (2001-2002).

applicable Greece-Egypt BIT included leased property in its definition.[131] In the present case, the CB BIT specifically includes "intellectual property rights," and "patents" in particular, as assets comprising an investment.[132]

b. Context, Object and Purpose of the CB BIT

81. A secondary method of interpretation would be to consider the investment in light of the underlying concept of investment in the Treaty. Bergonia and Conveniencia entered into the CB BIT in an effort to create favourable investment conditions between the two States.[133] The Treaty was born out of the understanding that:

> "Encouragement and contractual protection of investments are apt to increase the prosperity of both nations through their positive effects, such as stimulation of business initiatives and transfer of capital and technology between the two countries."[134]

82. The purpose of the treaty is to protect investments made by investors of one State in the territory of the other and a patent is a contractual representation of that obligation, creating a favorable condition for the investor. Therefore, the treaty must be interpreted as treating a patent as an investment.

83. In *Nagel v. Czech Republic*, the Tribunal concluded that the there was an underlying concept of investment in the BIT thereby making financial value an indispensible element of investments under that Treaty. In that case, an investor had entered into a co-operation agreement with a state-owned enterprise to obtain a broadcasting license[135] and the government later sold that license to another party.[136]

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131 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Rep. of Egypt,* ICSID Case No. ARB/99/6, Award (12 April 2002).

132 CB BIT art. I, 1(d).

133 CB BIT, Introduction, para. 2.

134 CB BIT, Introduction, para. 3.

135 *Nagel v. Czech Rep., SCC Case 49/2002,* Award of Sept. 9, 2003, reprinted in 1 Stockholm Arb. Rep. 141 (2004).

84. Countries worldwide recognize that intellectual property is an asset that has commercial value.[137] In the present case, financial value is an underlying concept of investment in both the Bergonia-Conveniencia BIT and the Tertia-Bergonia BIT. Article 1(1) of the BT BIT uses some of the following terms in its definition of "investment:" asset, property, shares, interests, claims and titles to money, economic value, and licenses. Article 1(1) of the CB BIT lists these terms: rights in rem, mortgages, liens, shares, interest, claims to money or performance, economic value, concessions, licenses. Each of these terms bears a relationship to financial value.

85. Claimant's patent carried with it significant financial value prior to Bergonia's interference with Claimant's intellectual property rights. The financial value of the patent and the utilization thereof has been demonstrated both by Claimant's ability to license out use of the patent for a fee and by Bergonia's offer to pay royalties to Claimant after issuing the compulsory license. Further proof of such value can be gleaned from Frankensid and MedScience's trading of ownership of the patent for shares in MedX having discernable financial value. The notion of financial value of patents in general is further supported by the Doha Agreement's calling for prompt compensation for an expropriation.

c. Good Faith Interpretation of the CB BIT

86. A good faith interpretation of the treaty also necessitates the contention that a patent is an investment. Article 31(1) of the Vienna Convention on the Law of Treaties mandates that:

> "A treaty shall be interpreted in good faith in accordance with the meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[138]

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[136] *Id.*

[137] Nabila Ansari, *International Patent Rights in a Post-Doha World*, 11 Currents Int'l Trade L.J. 57, 59 (2002).

[138] VCLT art. 31(1).

87. This means that the parties are barred from making intended and literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party.[139] Article I, 1(d) of the BIT expresses clearly the parties' intent to treat patents as such. To define a patent as anything other than an investment for the purposes of this Treaty would go against the language and purpose of the Agreement, which is to protect investments. The State of Bergonia, the party that negotiated the treaty and agreed to its language, could have sought to include in the Treaty a more precise definition or limited interpretation of "investment" to avoid the kind of dispute presented in this case. The State either neglected to do this or could not get the other side to agree to such a limitation. In either case, the language of the Treaty must be taken at face value, and so, the patent must be an investment. The modern trend in Model BITs and free trade agreements is to treat intellectual property rights as investments.[140] The 2000 U.S. Panama BIT[141] and the 2005 Economic Partnership Agreement between Japan and Malaysia[142] specifically regard patents as investments.

<u>CONCLUSION ON JURISDICTION</u>

88. This Tribunal has jurisdiction over this dispute because it is between the Host State and the Claimant, which Respondent has agreed under ICSID Convention Article 25(b)(2) to treat as a foreign national investor of another Contracting State. The Claimants patent constitutes an investment under both the ICSID Convention and the relevant BITs and therefore, falls under the protections of these laws.

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[139] D'Amato, Anthony, "Good Faith" in Encyclopedia of Public International Law 599 (1992).

[140] U.S. Model BIT (2004).

[141] U.S. Panama BIT (2000).

[142] Economic Partnership Agreement between Japan and Malaysia (2005).

II. MERITS OF THE DISPUTE

A. Respondent's Issuance Of A Compulsory License Over Claimant's Investment Constitutes Expropriation And Discrimination, And Is A Violation Of International Law And Applicable Treaties

89. Bergonia has violated both general international law and the treaties applicable to this dispute. Respondent's issuance of a compulsory license is **(1)** exportation under TRIPs and **(2)** expropriation under the CB BIT. Such action also constitutes **(3)** a discrimination against the Claimant because it violates the standard of general international law known as "Fair and Equitable Treatment."

1. Respondent's Issuance of a Compulsory License is Expropriation

90. TRIPs applies to the present case through Article 4(2) of the CB BIT, which states that:

> "Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except, in accordance with the applicable laws of the latter Contracting State…"[143]

91. The applicable law in both Conveniencia and Bergonia is TRIPs because both States are members of the WTO and are thereby parties to TRIPs. The Agreement directly applies to patent disputes through Article 28, which is labeled "Rights Conferred."[144] This Article indicates that:

> "A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product."[145]

[143] CB BIT, art. 4(2).

[144] TRIPs, art. 28.

[145] TRIPs, art. 28.

The term “these purposes” refers back to the commercial exploitation mentioned in Article 27.

92. Claimant maintains that the expropriation was not carried out for a public purpose as evidenced by the fact that the users of the compulsory license have been selling their production commercially.[146]

93. Article 31 of TRIPs sets out certain provisions that a WTO Member must respect before using the subject matter of a patent without the authorization of the right holder. The provisions remain applicable even where the use is by the government or third parties authorized by the government. However, authorization of such use shall be considered on its individual merits.[147] Bergonia has failed to respect the provisions set forth in Article 31 by authorizing third parties to use MedBerg’s patented technology to produce a certain therapy and related medical products without authorization from MedBerg.

<u>a. Respondent’s Issuance of the Compulsory License is an Expropriation and Violation Under TRIPs</u>

94. The requirements for proper issuance of a compulsory license under TRIPs mandate that: **(i)** the product of the license must be used predominantly for supply of the domestic market; **(ii)** the issuer has made attempts to obtain a license; **(iii)** the right holder be compensated adequately and have access to judicial or independent review of the amount; **(iv)** issuance of a compulsory license must be a necessity; and **(v)** there be access to judicial or independent review of the legal validity of the authority to issue the license. Respondent has not comported with any of the above-mentioned requirements and **(vi)** is in violation of its WTO member obligations.

[146] *First Clarifications*, Request 34.

[147] TRIPs, art. 31(a).

i. Respondent Engaged in Excessive Exportation of Claimant's Patent

95. Producer countries are barred from exporting more than a small amount of any generic pharmaceutical they make under a compulsory license.[148] Article 31(f) calls for use of the product of a compulsory licensing to be authorized predominantly for the supply of the domestic market of the Member authorizing such use.[149] The noncompliance of this provision is evidenced by the fact that Bergonia has allowed third party licensees to export a significant portion of their productions made using Claimant's technology.[150]

ii. Respondent Made No Attempts to Obtain a License Through Negotiation

96. Adequate attempts means that attempts to obtain a license under reasonable commercial terms must have failed over a reasonable period of time.[151] Such negotiation also serves as notice to the right holder that a compulsory license may be issued. The State of Bergonia did not make any attempt to obtain a license from MedBerg, thereby failing in its duty to notify Claimant of the coming compulsory license. It is not necessary to discuss what are reasonably commercial terms or what is a reasonable period of time in the absence of any negotiation.

> "This requirement [of negotiation] 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."[152]

97. Bergonia has not announced a national emergency relating to the health of its population, nor has the State described the health situation as one of extreme urgency. Bergonia has

[148] Ansari, *supra* note 138 at 65.

[149] TRIPs, art. 31(f).

[150] *Second Clarifications*, Request 61.

[151] TRIPs, art. 31(b).

[152] TRIPs, art. 31(b).

merely stated that the technology is "important to domestic health needs," a status which does not rise to the elevated level required by Article 31.

iii. Respondent Has Not Offered Adequate Remuneration to Claimant

98. The State must pay adequate remuneration to the right holder in the event that the State issues a compulsory license.

> "The right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization."[153]

99. The royalty payments offered to claimant by the Bergonian IP Office are insufficient because they undervalue the economic value of the authorization. The CB BIT requires that compensation be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation has become publicly known.[154] The percentage royalty rate offered is lower than the rate that had been in effect under the terms of the License Agreement between MedBerg and BioLife. The minimum market value for a license to exploit this technology should be at least the value of that Agreement. This is evidenced by the fact that BioLife, who was in violation of the first license agreement, was attempting to renegotiate the contract with MedBerg.

100. In addition,

> "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."[155]

101. Claimant rejection of the State's offer of royalties was a clear showing that it was inadequate. To this date, over two years after Bergonia issued the compulsory license, Bergonia has made no effort to show by a higher authority that the offer provided sufficient remuneration.

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[153] TRIPs, art. 31(h).

[154] CB BIT, art. 4(2).

[155] TRIPs, art. 31(j).

iv. Respondent Engaged in Unnecessary Expropriation

102. Under Articles 30 and 31, issuance of a compulsory license is also improper unless doing so is a necessity. Article 30, "Exceptions to Rights Conferred," states that,

> "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."[156]

103. The limited exception is defined as "necessity" in Article 31.[157] "Importance" does not meet the standard set forth in this provision. "Important to domestic health needs" is an overly broad expansion of and unreasonably conflicts with "normal exploitation of a patent." Bergonia is undoubtedly familiar with TRIPs, and therefore its use of the word "important" as opposed to the word "necessary" should be construed against the State. It must be assumed that the State did not consider the technology to rise to the level of necessity and therefore the issuance of the compulsory license was inappropriate and constitutes an expropriation.

104. MedBerg would not have been trying to produce the technology if it was not going to be important to health needs. It is just this "importance" that makes the technology and its products a profitable endeavor, which is the core reason that almost any investor would have for making such an investment. MedBerg should not be punished for successfully developing its technology. The very reason that patent law exists is to protect inventions and subsequent success from this kind of exploitation.

105. Moreover, MedBerg's use of discretion in limiting the use of the patent is a protected right under TRIPs, which says that patent owners have the right to assign, or

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[156] TRIPs, art. 30.

[157] TRIPs, art. 31.

transfer by succession, the patent and to *conclude licensing contracts.*[158] This Article gives MedBerg a treaty right to conclude the licensing contract it had with BioLife.

v. Respondent Offered No Judicial or Independent Review in Violation of TRIPs

106. Finally, Article 31 calls for review of decisions by which,

> "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."[159]

107. Following the IP Office's administrative decision to issue the compulsory license, claimant filed an appeal with a Patent Review Board within the IP Office. The Patent Review Board is a quasi-judicial body, which draws upon existing Bergonian judges to sit in particular intellectual property cases and be paid for their services by the Bergonian IP Office. As such, it cannot be considered to be "judicial" or "independent." Its independence is undermined by the fact that the IP Office pays the judges directly. In any case, even if the Board were considered to be of a judicial nature and/or independent, the Board is effectively absent because MedBerg has been waiting for review for over two years, which is an unreasonable period of time when the issue to be reviewed is the lifeblood of the appellee's business and investment.

vi. Respondent's Actions Violate Its WTO Obligations

108. The expropriation does not comport with the Doha Declaration on the TRIPs Agreement and Public Health (Doha). Doha supports a State's ability to protect its own public health and to promote access to medicine for all. As the users of the compulsory license are selling the treatment and related products outside the country and are selling them commercially, the State cannot be said to be working in the interest of its own domestic

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[158] TRIPs, art. 28.

[159] TRIPs, art. 31(i).

health needs, nor can it be said to be working to promote access to medicine for all, since selling the treatment commercially would lead to higher prices for consumers.

109. The WTO Appellate Body has made it clear that subsequent agreements between parties to a WTO treaty should be given the same legal status as the WTO treaty.[160] Doha is such a subsequent agreement under Article 31, section 3(a) of the Vienna Convention on the Law of Treaties regarding the interpretation of the TRIPs Agreement.[161] As a member of the WTO, Bergonia is bound to respect the Doha Declaration.

110. Doha asserts that the TRIPs Agreement does not and should not prevent members from taking measures to protect public health,[162] but it also mandates that each member nation should determine for itself the grounds upon which compulsory licenses may be granted.[163] This language underscores the notion that even measures to protect public health must be taken within some analytical and reviewable framework.

111. While Doha states that the TRIPs Agreement should be implemented to support "WTO Members' right to protect public health and, in particular, to promote access to medicines for all," it should not be interpreted as permission to issue compulsory licenses at will.[164] Any compulsory licensing must comply with the provisions set forth in Article 31 of the TRIPs Agreement, as TRIPs and Doha should be read harmoniously together.

112. Doha calls for the protection of public health but is silent on a definition of protection or on a threshold level of importance that must be met in order to warrant protection. The State of Bergonia has not claimed that the issuance of the compulsory license for MedBerg's obesity treatment was issued in an effort to protect the public health. The

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[160] WTO Appellate Body Report at 24.

[161] Gathii at 299.

[162] WTO, Ministerial Declaration of 14 November 2001, P 5(b).

[163] *Id.*

[164] Doha Declaration.

State merely claimed that the drug was "important to domestic health needs" and the facts state that the treatment and related products are believed to be "useful" for the treatment of obesity.[165] While Doha stands for the right of a State to define its own grounds upon which compulsory licenses may be granted, the State of Bergonia has not defined these grounds as "importance" to domestic health needs or mere "usefulness" in treating a disease. In fact, under the BT BIT, any expropriation, even for a public purpose, must comport with the general principles of treatment required by international law, which in this case would be the provisions set forth in TRIPs.[166] The requirement under TRIPs is "necessity," so Bergonia has not met the standard and its issuance of the compulsory license amounts to an expropriation.

113. Other states that have issued compulsory licenses for health related products have done so only in situations of national emergency or other cases of extreme urgency. For example, in 2007, Brazil issued a compulsory license for an HIV/AIDS medication[167] and Thailand issued compulsory licenses for two HIV/AIDS medications and a heart disease medication.[168] Despite the plain urgency of the emergencies being remedied, Brazil's actions were controversial because, as an upper-middle income country that has been able to control the spread of the HIV/AIDS epidemic within its borders, there is doubt as to the actual necessity of such measures.[169] Thailand has also been criticized for its compulsory licensing of heart disease medication because that was the first time the provision has been used to produce a chronic disease medication.[170] The language of

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[165] *First Clarifications*, Request 40.

[166] BT BIT, art. III(1), referencing art. II(2)(a).

[167] Vera Zolotaryova, *Are We There Yet? Taking "TRIPs" to Brazil and Expanding Access to HIV/AIDS Medication*, 33 Brooklyn J. Int'l L. 1099 (2008). at 6.

[168] Zolotaryova at 11.

[169] Zolotaryova at 10.

[170] Zolotaryova at 12.

TRIPs and Doha suggest that the compulsory licensing provision should be used only in cases of infectious epidemics, which obesity is not. [171],

b. Bergonia's Issuance of the Compulsory License Over Claimant's Property Is An Expropriation or an Action Tantamount Thereto Under the CB BIT

114. As discussed above, the text of the applicable BIT defines a patent as an investment. Since the patent is an investment, Claimant's dispute is covered by the BIT and its patent is protected against expropriation from the host state, except under limited circumstances.

> "The starting point in determining whether a particular investment or property right is protected from expropriation is the text of the governing treaty, but where the treaty is silent, a tribunal will have to decide whether the property or property right at issue is within the evolving customary definition of protected property."[172]

115. The text of the CB BIT specifically states that patents are protected from expropriation except in special circumstances. As the treaty is not silent on the matter, a discussion of the evolving customary definition of protected property is unnecessary.

116. The CB BIT requires that:

> "Any valid expropriation or action tantamount thereto must take place in accordance with the laws of the host state for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation."[173]

Bergonia's actions have a negative impact on the public, were taken on a discriminatory basis and were not supported by prompt, adequate or effective compensation.

[171] Brent Savoie, *Thailand's Test: Compulsory Licensing in an Era of Epidemiological Transition*, 48 VA. J. INT'L L. 211, 238-39 (2007).

[172] Dugan, *supra* note 113 at 439.

[173] CB BIT art.4(2).

117. It is uncontested that Bergonia issued the compulsory license in an effort to increase production of the anti-obesity treatment for wider and cheaper distribution to the public. However, a similar result could likely have been reached through negotiation of a non-expropriatory licensing agreement with MedBerg, had Bergonia been willing to enter into such negotiation. Issuance of the compulsory license ultimately has a negative effect on the public because it discourages investors from investing in the state.

118. Bergonia's actions also violated the provision for prompt, adequate and effective compensation.[174] This term calls for the presence of all three factors and Bergonia has failed to offer such. Bergonia has offered Claimant a percentage royalty rate that is lower than the rate that had been in effect under the terms of the License Agreement between MedBerg and BioLife[175] and has therefore collected royalties from the compulsory licensees without regard for their adequacy. This rate is inadequate in light of Bergonia's claim that the need and demand for the licensure of MedBerg's technology has become more acute since the termination of that Agreement.[176] If the need and demand for products produced under the patent have increased, surely the value of the patent right itself has also increased.

2. Bergonia's Issuance of the Compulsory License Over Claimant's Property Amounts to a Discrimination and Violates International Law

119. Bergonia acted in a discriminatory manner when it issued a compulsory license in violation of the customary international law standards of fair and equitable treatment and full protection and security. This action also constitutes a violation of the CB BIT because, per Article 2(2) and (3), Article 4(1) and Article 8(1), the parties to the BIT are obligated to adhere to these standards. Article 2(2) mandates that each contracting state

[174] CB BIT art.4(2).

[175] *First Clarifications*, Request 25.

[176] *First Clarifications*, Request 26.

shall afford fair and equitable treatment as well as full protection under the Treaty. Article 8 mandates application of the most favorable national or international laws to investments covered by the treaty. Fair and equitable treatment and full protection and security are standards of international law that are currently most favorable to Claimant because they set a higher and more definitive standard of treatment than is required under the BIT.

a. Fair and Equitable Treatment

120. Though there is no general agreement as to the definition of "Fair and Equitable Treatment," the concept embodies the principle of non-discrimination and proportionality in the treatment of foreign investors.[177]

121. The concept of fair and equitable treatment flows from the well established general principle of international law that a State is bound to respect and protect the property of nationals of other states.[178]

> "The standard requires that – subject to essential security interests – protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law."[179]

Therefore, even if Bergonia was acting in accordance with its own national laws regarding compulsory licensing, whatever those laws may be, if those laws do not conform to the minimum standards of international law, that being fair and equitable treatment, such action is still considered to be violation of international law.

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[177] *See* OECD Directorate for Financial and Enterprise Affairs Working Papers on International Investment at.25; Peter Muchlinski, Multinational Enterprises and the Law 625 (Wiley-Blackwell 1995).

[178] OECD Draft Convention on the Protection of Foreign Property, Comments to art. 1.

[179] Draft Convention on the Protection of Foreign at 13-15.

122. Arbitral tribunals have identified some elements that, alone or in combination, have been seen as being within the umbrella of the "fair and equitable treatment" standard.[180] The two most commonly addressed elements are due diligence and due process.[181]

123. Due diligence is well grounded in international customary law.[182] The Tribunal in American Manufacturing & Trading (AMT), INC. v. Republic of Zaire interpreted due diligence to mean that the host state,

> "Shall take all measures necessary to ensure the full enjoyment of protection and security of the investor's investment and should not be permitted to invoke its own legislation to detract from any such obligation."[183]

124. In the present case, Respondent has issued a compulsory license under its own law. This compulsory licensing eliminates the protection and security of Claimant's investment and leaves Claimant's interest with little if any value.

125. The principle of due process is a

> "Standard of justice of such general acceptance by all civilised countries as to form a part of the international law of the world."[184]

The concept is most often approached, with respect to fair and equitable treatment, in the intermediate sense,[185] meaning in connection with the improper administration of civil

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[180] OECD Directorate for Financial and Enterprise Affairs Working Papers on International Investment at 40.

[181] *Id.*

[182] *Id.*

[183] *American Manufacturing & Trading (AMT), Inc. v. Rep. of Zaire,* ICSID Case No. ARB/93/1, Award (21 Feb. 1997).

[184] Root, *The Basis for Protection to Citizens Residing Abroad*, 4 PROC. AM. SOC.INT.L.16 (1910).

[185] OECD Directorate for Financial and Enterprise Affairs Working Papers on International Investment at 21.

and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.[186] The concept of arbitrariness is also closely related to a discussion of due process in that it is "willful disregard of due process of law, which at a minimum surprises a sense of judicial propriety."[187] Bergonia acted arbitrarily and in disregard of due process when it issued a compulsory license over Claimant's property without notice. Had Claimant been made aware of the State's plans, it would have had the opportunity to file for patents in the countries to which Bergonia was planning on exporting the product of Claimant's technology, minimizing Claimant's financial losses outside of Bergonia. Claimant could also have filed an appeal and tried to obtain an injunction against such action by the State. The thought that an investor could be deprived of his entire investment without any say in the matter, having done nothing to bring about such action except for having created a desirable product and having complied with intellectual property requirements, shocks judicial propriety and flies in the face of the basic protections that an investor should be able to expect from the host state.

b. Compulsory Licensing Discourages International Foreign Direct Investment

126. In a globalized market, inventors are rarely bound by national borders. Many countries share similar problems and have similar needs. A country with a reputation for using compulsory licensing will almost certainly be passed over by investors in favor of a country without such a reputation, thereby having a decisively negative impact on the economy of that State. This behavior will also ensure that that country falls to, or remains at, the bottom of the socio-economic ladder by discouraging the creation and the advancement of what could be lucrative income and job-producing industries.

127. States should primarily be concerned with the encouragement of investment necessary to produce and utilize inventions. Compulsory licensing works against this objective because of high research and development costs, the shortened lifecycle of products, and

[186] Brownlie at 506.

[187] *Asylum Judgment*, 284, ICJ Reports 1950.

the globalization of the economy.[188] Compulsory licensing can destroy profitability. Lack of profitability discourages investors from producing new technologies. Investors are not going to be inclined to spend their money producing things that may be of little value in the market after just a short period of time. The desire will be even more reduced if there is a threat that a compulsory license will shorten that period even further.

128. Use of compulsory licensing discourages foreign investment and deters companies from introducing new technologies out of fear that the technology will be expropriated for unauthorized use. Almost all traded goods rely on intellectual property protection, and thus the fair and economic conduct of international trade is dependent on secure intellectual property rights.[189]

CONCLUSION ON MERITS OF THE DISPUTE AND REQUEST FOR RELIEF

129. Claimant deserves to be compensated for Respondent's unlawful expropriation of Claimant's investment. Bergonia's issuance of the compulsory license amounts to an expropriation in violation of the terms of the CB BIT and in violation of the TRIPs Agreement.

130. Even if Respondent has not directly or indirectly expropriated Claimant's investment, Respondent has discriminated against Claimant and has not afforded it the fair and equitable treatment called for under international law. Consequently, this Tribunal should find in favour of Claimant and award damages accordingly for loss of expected returns on Claimant's investment, and lost value on its patent, to be determined at a later hearing at the Tribunal's discretion.

[188] Ansari, *supra* note 139 at 59.

[189] *Id.* at 57.