FABELA

Memorandum for Claimant

MEDBERG CO.

CLAIMANT

v.

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA

RESPONDENT

II Annual Foreign Direct Investment International Moot Competition

International Center for Settlement of Investment Disputes

ICSID Case No. ARB/X/X

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LIST OF ABBREVIATIONS

Art./Arts.	Article/Articles
BIT	Bilateral Investment Treaty
Bergonia–Conveniencia BIT	Treaty between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia concerning the Encouragement and Reciprocal Protection of Investments
Bergonia–Tertia BIT	Treaty between the Government of Tertia and the Government of Bergonia concerning the Reciprocal Encouragement and Protection of Investment
Claimant	MedBerg Co.
Co.	Company
Corp.	Corporation
e.g.	Exempli gratia (for example)
ed.	Edition
Ed./Eds	Editor/Editors
emph. add.	Emphasis added
et seq.	Et sequentes (and following)
etc.	Et cetera (and so on)
FDI	Foreign Direct Investment

ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
i.e.	Id est (that means)
ILC	International Law Commission
Inc.	Incorporated
inter alia	Among other things
LCIA	London Court of International Arbitration
Ltd.	Limited
Memo	Memorandum
Minutes	Minutes of the First Session of the Arbitral Tribunal
NAFTA	North American Free Trade Agreement
No./Nos.	Number/s
OECD	Organisation for Economic Co-operation and Development
p./pp.	Page/pages
Prof.	Professor
Respondent	The Government of the Republic of Bergonia

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
Uncontested facts	Annex 3 of the Minutes of the First Session of the Arbitral Tribunal
UNCTAD	United Nations Conference on Trade and Development
Vol.	Volume
v.	Versus
&	And
¶	Paragraph
%	Percent

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STATEMENT OF FACTS

1.	1997	Bergonian IP laws, modeled in accordance with TRIPS, came into force.
2.	01/01/2003	CC123 Holding Ltd incorporated by Convenient Companies SARL.
3.	01/12/2003	CC123 Holding Ltd changed its name to MedX Holding Ltd and it was transferred to MedScience and Dr. Frankensid.
4.	30/01/2004	Claimant, MedBerg Co, established in Bergonia.
5.	05/02/2004	Claimant applied for a patent in relation to Dr. Frankensid's invention.
6.	15/03/2005	Bergonian Patent No. AZ2005 granted to Claimant.
7.	31/03/2005	Claimant licensed BioLife Co. to utilize Patent No. AZ2005.
8.	31/03/2007	License Agreement with BioLife terminated by Claimant in accordance with notice and termination provisions contained therein.
9.	01/06/2007	Bergonian IP Office commenced proceedings for the issuance of a compulsory license, stating that this action would address important domestic medical needs.
10.	01/06/2007-01/11/2007	Claimant on numerous occasions communicated its objections about the compulsory license to the Bergonian IP Office. No objections were resolved to the Claimant's satisfaction.
11.	01/11/2007	Bergonian IP Office issued a compulsory license for Patent No. AZ2005.
12.	01/11/2007-01/01/2009	BioLife and five other companies invoked the compulsory license.
13.	01/12/2007	Claimant wrote to the Bergonian IP Office with copies to the Foreign, Economics and Justice Ministries referring to Art. 10(2) of the Bergonia - Conveniencia BIT.
14.	01/11/2008	ICSID Secretary General registered the dispute for arbitration.
15.	16/02/2009	The Tribunal held its First session.

PART ONE: THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE

18. The present arbitral proceedings were instituted before the International Centre for Settlement of Investment Disputes (hereinafter the Centre or ICSID) on 1 November 2008 when the Secretary General of the Centre registered the dispute for arbitration. The Parties agree that the arbitral tribunal in the present dispute (hereinafter the Tribunal) was properly constituted in accordance with Art. 37(2)(b) of the Convention on Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the Convention or ICSID Convention).

19. The jurisdiction of the Centre and of the Tribunal over the current dispute is established under Art. 25(1) of the Convention since all conditions set out therein are fulfilled: the dispute is a legal dispute **(I)**, it arises directly out of an investment **(II)**, the Parties to the dispute are a Contracting State and a national of another Contracting State **(III)** and the Parties have expressed their written consent to submit the present dispute to the Centre **(IV)**. Respondent, however, wrongly contends that the Tribunal lacks jurisdiction in the current dispute because the conditions enumerated under nos. II and III above have not been met.[1] Claimant submits that the Tribunal should exercise its authority to decide upon its own jurisdiction pursuant to Art. 41(1) of the Convention and find that it is competent to decide the present dispute since all jurisdictional requirements are met.

I The dispute is a legal dispute

20. It is undisputed between the Parties that the present dispute is *a legal dispute*. It clearly involves conflicts of rights and not mere conflicts of interests between the Parties.[2] Claimant's rights which were impaired by Respondent and the appropriate legal remedies sought by Claimant are based on the relevant provisions of the Treaty signed and in effect between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia concerning the Encouragement and Reciprocal Protection of Investments (hereinafter Bergonia – Conveniencia BIT). This treaty has been violated by Respondent and Claimant seeks

[1] Minutes, para. 14.

[2] Report, para. 26; Drafting History, pp. 54, 203.

appropriate legal remedies under it.[3] Therefore, the first jurisdictional requirement under Art. 25(1) of the ICSID Convention has clearly been met.

II The dispute arises directly out of an investment

21. This dispute arises out of Bergonian Patent No. AZ2005 that Claimant owns in Bergonia (hereinafter the Patent).[4] Contrary to Respondent's contention that a patent as such does not constitute an investment,[5] it is Claimant's submission that the Patent, which is the subject of the present dispute, clearly falls under both the objective definition of investment under Art. 25(1) of the ICSID Convention **(1)** and the subjective definition of investment under Art. 1(1) of the Bergonia – Conveniencia BIT **(2)**, thus satisfying the so-called "two-fold" or "double-barrelled test".[6]

1. The subject of the dispute is an investment under Article 25(1) ICSID Convention

22. Admittedly the Convention does not contain a definition of investment. For this reason, Claimant submits that the Tribunal should follow the established ICSID's case law in deciding whether the subject of the present dispute falls under the objective notion of investment under the Convention. In particular, the Tribunal should examine this issue in the light of five features that a transaction should fulfill in order to objectively qualify as an investment, which have been cited by ICSID tribunals: **a)** long-term duration, **b)** regularity of profit and return, **c)** assumption of risk by the investor, **d)** substantial commitment by the investor, **e)** significance for the development of the host State[7]. Claimant submits that, by examining the Patent which is the subject of the present dispute in light of these five features, the Tribunal should find that it undoubtedly falls under the objective notion of investment. In addition to looking into the established case law, the Tribunal should also bear in mind that the drafting

[3] Schreuer1, p. 105.

[4] Uncontested facts, para. 5.

[5] Minutes, p. 5.

[6] *Ceskoslovenska Obchodni Banka v. Slovakia*, para. 68; *Salini v. Moroco*, paras. 44, 52; *Joy Mining v. Egypt*, paras. 49-50; *Malaysian Historical Salvors v. Malaysia*, para. 55.

[7] *Fedax v. Venezuela*, para. 43; *Joy Mining v. Egypt*, para. 53; *Salini v. Morocco*, para. 52; Schreuer1, p. 140.

history of Art. 25 of the Convention supports Claimant's position that patents are to be regarded as falling under the objective definition of investment.[8] Moreover, patents are explicitly mentioned in legal literature as assets that are always regarded as investment within the meaning of Art. 25 of the Convention.[9]

a) Claimant's investment is of long-term duration

23. A transaction needs to be of long-term duration in order to be considered as an investment under Art. 25 of the Convention. Although the fulfillment of this criterion depends on factual circumstances of each particular case, it has been stated in both theory[10] and practice[11] that the minimum amount of time a transaction should last in order to objectively qualify as an investment is from 2 to 5 years. In addition, transactions that break down at an early stage and that for this reason last less than this minimal period of time can also be considered as investment provided that it was expected at their inception that they would produce a long term relationship.[12]

24. The condition of long-term duration is clearly satisfied in the case at hand. Firstly, more than 3 and a half years have elapsed from the moment that Claimant obtained the Patent (15 March 2005)[13] until the moment of registration of the dispute for arbitration (1 November 2008)[14], which *prima facie* makes it clear that Claimant's investment satisfies the named criterion. Secondly, Claimant applied for a patent with the view of conducting long-lasting business in Bergonia. Namely, both Bergonia and Conveniencia are Member States of the World Trade Organization (hereinafter WTO) and also parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS).[15] As such, Bergonia is under obligation to grant protection to patents for a term of 20 years from the filing date, in accordance with Art.

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[8] Amerasinghe1, pp. 177-178.

[9] Szasz, pp. 14-15.

[10] Schreuer1 p. 140.

[11] *Salini v. Morocco*, para. 54.

[12] Schreuer1 p. 140.

[13] Uncontested facts, para. 5.

[14] Uncontested facts, para. 7.

[15] Uncontested facts, para. 3.

33 of TRIPS.[16] The fact that Claimant's investment was to last at least 20 years further demonstrates that the requirement of long-term duration is fulfilled. In addition, Claimant's expectations of longevity of its business in Bergonia are supported by the fact that products based on the Patent found an excellent and rapidly growing market in Bergonia due to the fact that they are useful for treatment of obesity, which has been a significant, long-standing and ever more acute problem among a large population group in Bergonia, causing numerous other associated medical problems.[17]

25. Having all this in mind, the Tribunal should find that the investment had been of adequate duration (3 and a half years) at the time of registration of the present dispute and that its duration was intended to last for at least 20 years, thus by far meeting the minimum length of time mentioned above.

b) Claimant's investment shows regularity of profit and return

26. Investments normally display a certain regularity of profit and return and even where no profits are eventually realized, the expectation of return is a typical aspect of an investment.[18]The facts of the case show that Claimant's investment satisfies this criterion.

27. In order to exploit its Patent and gain profit, Claimant concluded a License Agreement with BioLife Co, under the terms of which it licensed BioLife Co to utilise Bergonian Patent AZ2005 in exchange for royalty payments based on sales. Although the specific details of the License Agreement are not disclosed in the Record, the facts of the case clearly indicate that Claimant collected the royalty payments on a regular, yearly[19] basis and that it was making a significant profit thereof.[20] In addition, Claimant could have expected constant rise in the sales of the products based on the Patent and thus greater royalties income. As mentioned above, these products were used for treatment of a significant and long-standing problem of obesity in Bergonia, a problem that has become even more acute recently thus generating greater demand for the products based on the Patent, which is reflected in a significant 55% rise of

[16] Clarifications, response to request No. 58.

[17] Clarifications, response to request No. 26.

[18] Rubins, p. 297.

[19] Clarifications, response to request No. 87

[20] Clarifications, response to requests Nos. 65 and 109.

the number of the sold products, and a correspondent increase of income for the companies selling these products.[21]

28. Therefore, it is obvious that the investment not only showed regularity of profit and return but was also made with expectation of their constant rise, thus clearly fulfilling this criterion.

c) Claimant assumed risk when making its investment

29. As has been stated in doctrine:

> "transactions where the risk is primarily or entirely placed on the Host State (…) would tend to fall out of realm of protected investment."[22]

30. In the present case the entire risk was on Claimant. When making its investment, Claimant clearly accepted typical risks for this kind of investment, which can be divided into two groups: business risks and political risks. Business risks include in particular the possibility that Claimant would not be able to license its Patent or exploit it in other possible ways, that companies to whom it would grant the license would not act in accordance with it, the uncertainty regarding the amount of sales of the products based on the Patent because of the fluctuating market, that the royalty fee might have to be changed over time reflecting market changes, and of course the risk that other persons might develop new or improve existing patents addressing the same medical need thus taking business away from Claimant. Furthermore, Claimant accepted the political risks such as State intervention, which eventually materialized when Respondent expropriated the investment leaving Claimant without the possibility of exploiting it. In addition to that, Claimant accepted the risk of unstable political climate, i.e. of unexpected changes of the legislation which could jeopardize the whole investment.

31. Since the entire risk of the transaction at hand was placed upon Claimant and since Bergonia only collected benefits from it, it is obvious that this criterion is fulfilled.

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[21] Clarifications, response to request No. 19.

[22] Rubins, p. 298.

d) Claimant's commitment was substantial

32. There is no prescribed minimum value that a transaction needs to have in order to be regarded as "substantial" and to qualify as an investment under Art. 25 of the Convention.[23] It depends primarily on the position of the parties and on the significance of the transaction for the investor and the host State in every particular case.[24]

33. The facts of the case clearly show that Claimant's commitment was substantial. Firstly, in order to register the Patent, Claimant had to comply with all formalities of the registration process and to pay the relevant fees and related costs, which are usually considerable due to potentially long registration procedure. Secondly, in accordance with TRIPS, duration of patents is 20 years, which shows that Claimant showed obvious intent to substantially commit for a period of time no shorter than that. That implies future presence on the market for a minimum of 20 years, obligation to pay for maintenance of the patent registration and to develop Claimant as a functioning company. Finally, the mere commencement of the ICSID procedure with the view of protecting its investment shows how serious Claimant committed itself and how important its investment was.

34. Therefore, it is obvious that Claimant's commitment was substantial since it had invested time and money in its Patent and did not hesitate to protect it when the necessity occurred. Hence, this criterion is also fulfilled.

e) Claimant's investment contributed to the development of Bergonia

35. The Bergonian Patent No. AZ2005 clearly contributed to the development of Bergonia. The technology covered by this Patent represents a breakthrough treatment (and related products) that is useful in fighting obesity, which has been a serious problem among a large population group in Bergonia. This "significant and long-standing issue" caused by the genetic make-up and traditional diet of Bergonian population had been causing numerous medical problems. In addition, there are no substitutes or any other drugs in Bergonia which combat obesity as

[23] Analysis, pp. 34, 257-258, 260, 497-499; *Mihaly v. Sri Lanka*, para. 51.

[24] Rubins, p. 298.

effectively as the Patent.[25] The investment's contribution to the development of Bergonia is therefore obvious since it met important domestic medical needs.[26]

36. In conclusion, Claimant states that the Tribunal should accept its jurisdiction since it has proven beyond any doubt that its asset in Bergonia clearly fulfills all the above-named features to be considered as an investment within the meaning of Art. 25(1) of the ICSID Convention.

2. The subject of the dispute is an investment under Art. 1(1) Bergonia – Conveniencia BIT

37. Claimant's asset in Bergonia should also be considered as investment under Art. 1(1) of the Bergonia – Conveniencia BIT. The Bergonia – Conveniencia BIT specifically includes patents in the definition of investment and as such makes them eligible for protection under the BIT. This Article contains a broad definition of the term investment, which comprises "every kind of asset" and explicitly includes patents as a form of intellectual property.

38. Furthermore, patents are considered as investment under the Treaty between the Government of Tertia and the Government of Bergonia concerning the reciprocal Encouragement and Protection of Investment (hereinafter Bergonia - Tertia BIT) that can be invoked under the most favorable nation clause (hereinafter MFN clause) contained in Art. 3 of the Bergonia – Conveniencia BIT (see paras. 53-61 below). Art. I(1)(a) of the Bergonia – Tertia BIT broadly defines "investment" as:

> "… every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party"

39. and includes in particular:

> "*intellectual* and *industrial property* which includes, inter alia, rights relating to … *inventions* in all fields of human endeavor" (emph. add.).

[25] Clarifications, response to request No. 68.

[26] Clarifications, response to request No. 26.

40. Patents clearly fall under this definition since it is undisputed that they are intellectual property rights;[27] furthermore, patents are also considered as industrial property;[28] finally, patents as such give an exclusive right of use of the invention.[29]

41. Since Claimant's asset without a doubt satisfies both the objective definition of investment under the ICSID Convention and the subjective definition under Bergonia – Conveniencia BIT, the second requirement for the jurisdiction of this Tribunal has clearly been met.

III The parties to the dispute are a Contracting State and a national of another Contracting State

42. The jurisdiction of the Tribunal extends to legal disputes between a Contracting State (or its constituent subdivisions or agencies) and a national of another Contracting State.[30] However, Art. 25(2)(b) of the Convention also grants protection to entities that have nationality of the Contracting State party to the dispute where:

> "because of foreign control, the parties have agreed [it] should be treated as a national of another Contracting State for the purposes of this Convention".

43. Thus, a company may bring investment claims against the State in which it is incorporated and has its seat provided that two requirements are met: 1) that the company must be foreign owned, and 2) there must be an agreement to treat such company as a national of another Contracting State.

44. In the case at hand the *ratione personae* condition for establishment of the Tribunal's jurisdiction is satisfied since Bergonia, the Respondent, is an ICSID Contracting State and since all the conditions set out in Art. 25(2)(b) of the Convention are fulfilled in order to treat Claimant as a national of Conveniencia, which is also an ICSID Contracting State that has ratified the Convention.[31] Contrary to this, Respondent claims that the conditions prescribed

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[27] Torremans, p. 4.

[28] *Ibid*, p. 5.

[29] *Ibid*, p. 13.

[30] ICSID Convention Art. 25(1).

[31] Uncontested facts, para. 3.

in the said Article are not met and that consequently the Tribunal lacks jurisdiction over this dispute.[32] This Respondent's submission should be rejected by the Tribunal, and the jurisdiction should be upheld, since Claimant is under relevant foreign control **(1)** and since Respondent agreed to treat Claimant as a Conveniencian investor **(2)**.

1) Claimant is under relevant foreign control

45. The first requirement that has to be met in order for a company to bring investment claims against the State in which it is incorporated and has its seat is the existence of foreign control. In addition, such control must be exercised by a national of another Contracting State. In the present case these conditions are clearly met since Claimant is 100% owned by MedX Holdings Ltd, a company incorporated in Conveniencia, which is an ICSID Contracting State and has ratified the Convention.[33] It stands to reason, as precisely put in *Vacuum Salt v. Ghana* case that "100 percent foreign ownership almost certainly would result in foreign control"[34] and there are no facts in the present case (such as voting rights, management agreements and similar) that would indicate that Claimant is not controlled by MedX Holdings Ltd.

46. However, the Respondent argues that Claimant is not under relevant foreign control since it is indirectly controlled by a national of a non-Contracting State and by a national of the home State of the investment. Admittedly, MedX Holdings Ltd, the direct holder of Claimant, is itself 50% owned by MedSciences Co, which is a company incorporated in Laputa, a country that is not an ICSID Member State and 50% by Dr. Frankensid, a dual national of Amnesia and Bergonia, which are both ICSID Member States that have ratified the Convention, with the latter being the home State to the investment at hand.[35] Contrary to this, it is Claimant's submission that in cases such as the one at hand a direct control by a national of another Contracting State is sufficient. ICSID case law clearly shows that there is no need to look beyond the first layer of control.

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[32] Minutes, para. 14.

[33] Uncontested facts, para. 2.

[34] *Vacuum Salt v. Ghana*, para. 43; *Aguas del Tunari v. Bolivia*, para. 245.

[35] Uncontested facts paras. 2-3.

47. In interpreting Art. 25(2)(b) of the Convention, the tribunal in *Amco v. Indonesia* case unequivocally found that the requirement of control is restricted to immediate control exercised by the parent company of the local company by stating that:

> "[the reasoning that] one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself (…) is, in law, not in accord with the Convention."[36]

48. Not only would it be quite difficult and time-consuming for any tribunal to take care of control at the second, and possibly third, fourth or xth degree but this approach might threaten the efficient working of the ICSID arbitration system.[37] Moreover, determining this kind of control is practically impossible if a company is listed on a stock exchange since it can have thousands of shareholders and since shares are nowadays often held indirectly, i.e. through a chain of intermediaries. Convention already brought an exception to the classical concept of nationality of juridical persons, by allowing foreign controlled local companies to be treated as foreign companies, but no further exceptions are provided when it comes to the nationality of the foreign controller. For these reasons, the approach adopted in the *Amco* case has consequently been adopted in other cases such as *Klockner v. Cameroon*, *Letco v. Liberia*, *Cable TV v. St Kitts and Nevis* and *Aucoven v. Venezuela*, where tribunals defined the term "foreign control" only by reference to direct shareholding and did not take into account any additional criteria.[38]

49. Respondent might argue that in the past some tribunals decided to look beyond the first layer of control in search of the ultimate holder and that the Tribunal in the present case should do the same. To the best of Claimant's knowledge, there is only one ICSID case, *Soabi v. Senegal*, where the tribunal decided to look beyond the first layer of control and search for the ultimate controller. However, Claimant submits that this case is not relevant for the Tribunal's consideration, since the circumstances thereof clearly required determining indirect control over juridical persons. In the cited case, the local company was controlled by a mere company of convenience incorporated in a non-Contracting State, which in turn was controlled by nationals of a Contracting State. The tribunal went beyond direct control, by referring to the purpose of Art. 25(2)(b) of the Convention, because it was the only way to uphold

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[36] *Amco v. Indonesia*, para. 12 (iii).

[37] McLachlan/Shore/Weiniger, p. 151.

[38] *Klockner v. Cameroon,* p. 76; *Letco v. Liberia*, para. 3(a); *Cable TV v. St. Kitts and Nevis*, para. 5.13; *Aucoven v. Venezuela*, para. 121.

jurisdiction.[39] Only in identical situations such approach could be justifiable – just as a host State might wish to require local incorporation of foreign investors, investors may for their own reasons wish to channel their investments through intermediary companies, exercising the same control over the company incorporated in the host State as they could have exercised as its direct shareholders, and for that reason the direct shareholding by the intermediary company could be disregarded.[40] Since the Record clearly shows that MedX Holdings Ltd was not merely a company of convenience, but a company that effectively controlled Claimant[41], even *Soabi v. Senegal* case shows that there is no grounds to search beyond the direct level of control.

50. In addition, the ownership of Claimant was made public in the Bergonian corporate registry at all times,[42] and Respondent cannot claim that it was not aware that a Conveniencian company is the owner of Claimant.

51. Therefore, in light of this evidence Claimant submits that the first condition in order to be treated as a national of Conveniencia is fulfilled.

2) Respondent agreed to treat Claimant as a Conveniencian investor

52. The second requirement that has to be met in order for a company to bring investment claims against the State in which it is incorporated and has its seat is that there is an agreement between the parties to treat such company as a national of another Contracting State for the purposes of the Convention. Respondent contends that it has never consented to treat Claimant as a national of Conveniencia.[43] Admittedly such consent is not given in Bergonia – Conveniencia BIT. However Claimant submits that such consent is given, not directly, but through an MFN clause which is incorporated in this BIT. Therefore, it is Claimant's submission that the MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT extends to dispute resolution matters **(a)** and that Art. VI(8) of Bergonia - Tertia BIT should be applied in the present case as more favorable **(b)**.

[39] *Soabi v. Senegal*, paras. 35-38.

[40] *Ibid*, para. 37.

[41] Clarifications, response to request Nos. 74, 75, 76.

[42] Clarifications, response to request No. 59.

[43] Minutes, para. 14.

a) MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT extends to dispute resolution matters

53. In cases where there is an MFN clause in a bilateral investment treaty (the "basic treaty"), all favors that one Contracting State to the basic treaty gives to nationals of a third country by concluding a treaty with the third country (the "third – party treaty") are automatically extended to the nationals of the counterparty from the basic treaty.

54. The MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT clearly states:

> "Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to *treatment* less favorable than it accords to investment of its own investors or to investments of any third State." (emph. add.)

55. Respondent might argue that MFN clauses do not extend to dispute resolution matters and that consequently Art. VI(8) of Bergonia - Tertia BIT cannot be applied in the present case even though it is more favorable to Claimant. This line of argumentation should be rejected by the Tribunal and it is Claimant's submission that the MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT extends without any doubt to dispute resolution matters and clearly leads to application of Art. VI(8) of the Bergonia – Conveniencia BIT.

56. From an investor's point of view, standards and guarantees proclaimed in a BIT are of little practical value unless they are followed by an efficient and impartial way of redressing their nonobservance. Hence, dispute resolution mechanism contained in a BIT stands on an equal footing with substantial standards of treatment and guarantees granted to a foreign investor. It is neither possible nor desirable to separate treaty rights from treaty remedies and then to apply the MFN principle only to the rights and not to the remedies.[44] Because access to international arbitration is perhaps the most important safeguard afforded to investors under BITs, it would be something of a paradox to exclude this particular safeguard from the scope of the MFN clause.[45] It would be unreasonable to make a distinction between the protection of access to an independent tribunal from the substantive rights that the tribunal is supposed to protect. For this reason, pursuant to an MFN clause foreign investors are allowed to rely on

[44] Vesel, p. 20.

[45] Gaillard, p. 163.

most favorable dispute settlement provisions contained in third-party BITs, just as they may rely on most favorable standards of treatment or guarantees contained in these treaties. This view has also been confirmed in numerous cases.[46]

57. Respondent might further argue that the wording of the MFN clause contained in Art. 3 of the Bergonia - Conveniencia BIT excludes dispute resolution matters from its scope. Admittedly, paras. 2 and 3 of Art. 3 of the Bergonia – Conveniencia BIT may seem disadvantageous to Claimant at first sight since they define the scope of the MFN clause by listing treatments which will be considered as less favorable and not mentioning dispute resolution treatment. However, this argumentation is clearly wrong and should be rejected by the Tribunal for the following reasons. Firstly, the Tribunal should note that the MFN clause contained in Art. 3(1) of the named BIT is broadly phrased (it refers generally to "treatment") and is *prima faciae* capable of embracing treatment in dispute resolution within its scope. Secondly, even the list of treatments which is contained in paras. 2 and 3 of this Article is not exhaustive (these provisions use the wording "in particular, but not exclusively" when listing the kinds of treatment covered by the MFN clause) and hence allow the Tribunal to include treatment in dispute resolution into its scope. Finally, the Contracting States to the Bergonia - Conveniencia BIT have neither expressly excluded nor included dispute resolution matters in the protection that is accorded to the beneficiaries of the clause. In these situations, the intention of the contracting parties can be derived from the object and the purpose of the BIT. The title and the preamble of the Bergonia – Conveniencia BIT shows that it is a treaty designed "to intensify" mutual investments and "to create favorable [investment] conditions". For this reason, the MFN clause contained in this BIT should be construed in a way that promotes investment protection by allowing more favorable dispute settlement procedures to be imported into it.[47] As stated in *Siemens v Argentina* case, a good faith interpretation of a BIT should bring to conclusion that an MFN clause encompasses all maters covered by the treaty except those expressly excluded.[48]

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[46] *Ambatielos case; Maffezini v. Spain*; *Siemens v. Argentina*; *Gas Natural v. Argentina*; *National Grid v. Argentina*; *RosInvest v. Russia*.

[47] Gaillard, p. 3.

[48] *Siemens v. Argentina*, para. 60.

b) Art. VI(8) of Bergonia – Tertia BIT should be applied in the present case as more favorable

58. Respondent cannot deny that there is a more favorable treatment given to investors of a third State, Tertia. Bergonia – Tertia BIT in its Art. VI(8) states that any company legally constituted under applicable law of one Party shall be treated as a company of the other Party if, immediately before the occurrence of events giving rise to the dispute, it was an investment of nationals or companies of the other Party. The more favorable treatment is represented in the fact that all investments of Tertian nationals in Bergonia effectuated by means of locally incorporated companies are automatically treated as foreign, Tertian, investors and thus under the protective umbrella of ICSID arbitration. Conveniencian investors are deprived of this possibility; hence, it is obvious that Tertian nationals enjoy a more favorable treatment in dispute resolution than the nationals of Bergonia. Therefore, Claimant submits that the presence of the MFN clause in Art. 3(1) Bergonia – Conveniencia BIT gives it the right to invoke Art. VI(8) Bergonia - Tertia BIT since it is more favorable to Claimant.

59. However, Respondent might refer to the *Tecmed v. Mexico* case and claim that Art. VI(8) of Bergonia - Tertia BIT may not be invoked because it is "specifically negotiated" by the Contracting States, and support the argument that this clause was specifically negotiated by referring to Art. I(2) of the BIT, which declares that advantages given in this BIT will be denied if nationals of any third country control company of a Contracting Party. However, the *Tecmed v. Mexico* case should be distinguished by the Tribunal and its application should be rejected since that case dealt

> "more [with] time dimension of application of (…) substantive provisions rather than matters of procedure or jurisdiction."[49]

60. This is not the case in the present dispute since the MFN clause is invoked in order to lead to more preferential dispute settlement mechanism and not to retroactive application of a BIT.

61. Respondent might further claim that Art. VI(8) of Bergonia - Tertia BIT can be invoked only in conjunction with Art. I(2) of the same BIT, which would then deny Claimant the benefits established by this BIT, since Claimant and MedX Holdings Ltd are companies controlled by nationals of a third country. However, it is Claimant's submission that the MFN clause relates only to more favorable treatment and that the application of all disadvantageous provisions

[49] *Tecmed v. Mexico*, para. 69.

from the third – party BIT should be rejected (see also paras. 100-101). This conclusion is supported by the very purpose of the MFN clauses and by the existing ICSID case law.[50]

62. Having fulfilled the condition of consent along with the existence of foreign control, there are no obstacles for granting Claimant's request to be treated as a national of Conveniencia for the purposes of this dispute. Therefore, the third requirement for establishing the jurisdiction of this Tribunal is clearly fulfilled.

IV The Parties have expressed their written consent to submit the present dispute to the Centre

63. Both Claimant and Respondent have consented in writing to submit the present dispute to the Centre. Having entered into and by ratifying the Bergonia – Conveniencia BIT, Respondent effectively gave advance consent to have all investment disputes with Conveniencian nationals resolved before the Centre. The relevant Art. 10(2) of this BIT states that if the parties to a dispute fail to reach amicable settlement, the investor has the choice to submit the dispute to international arbitration under the ICSID Convention. In addition:

> "each Contracting State herewith declares its acceptance of such international arbitration procedures".

64. Claimant, which is to be treated as a Conveniencian investor in the current proceedings (see paras. 52-62 above) accepted this standing offer by sending the Request for Arbitration.[51] Hence, the so-called requirement of "dual consent" has been met,[52] thus meeting the fourth condition for establishing the jurisdiction of the Tribunal.

65. In addition the requirement of amicable settlement contained in paras. 1 and 2 of Art. 10 of the Bergonia – Conveniencia BIT has also been fulfilled by the Claimant. Namely, Claimant sent the request for amicable settlement on 1 December 2007 when it sent letters to the Bergonian IP Office, the Foreign, Economics and Justice Ministries referring to Art. 10(2) of the Bergonia – Conveniencia BIT.[53] Even though the exact moment when Claimant submitted

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[50] *Siemens v. Argentina*, para. 120.

[51] *AAPL v. Sri Lanka*, para. 2; *Olguin v. Paraguay*, para. 26; *Tradex v. Albania* p. 187; UNCTAD Dispute Settlement, p. 20; Schreuer1 p. 218; Spiermann p. 180; Cremades, pp. 11-12.

[52] ICSID Convention Preamble; *AMT v.. Zaire*, para. 5.23.

[53] Clarifications, response to request No. 111.

its Request for Arbitration is not disclosed in the Record it can be presumed that it did not happen too long before the ICSID Secretary General registered the dispute on 1 November 2008. Therefore, the period of 3 months in which there was to be an attempt to settle the dispute amicably was clearly respected by Claimant.

PART TWO: RESPONDENT HAS BREACHED CLAIMANT'S RIGHTS RELATED TO ITS INVESTMENT

66. In 2005 Claimant obtained Bergonian Patent No. AZ2005. In 2007 Bergonian Intellectual Property Office issued a compulsory license which effectively deprived Claimant of the rights of use and benefit of its investment. Having in mind that the Parties have not agreed on the applicable law in the present case, the Tribunal should reach its decision by relying on the applicable rules of international law and domestic law of Conveniencia to the extent that it is in compliance with international law.[54] In accordance with these rules, the Tribunal should find that: acts of Bergonian IP Office are to be attributed to Respondent **(I)**; by issuing a compulsory license, Respondent expropriated Claimant's investment **(II)**; all of Bergonian actions constitute a violation of applicable standards of treatment of Claimant's investment **(III)**.

I ACTS OF BERGONIAN INTELLECTUAL PROPERTY OFFICE ARE TO BE ATTRIBUTED TO RESPONDENT

67. Claimant submits that actions of Bergonian IP Office which affected its investment are attributable to Respondent, the State of Bergonia. As can be derived from its full name ("Bergonian Intellectual Property Office") and the functions that it performs in executing administrative duties regarding intellectual property in Bergonia, there should be no doubt that Bergonian IP Office is both organizationally and functionally an organ of Respondent. Therefore, Bergonian IP Office clearly meets the requirements of both the formal and functional tests[55] established by jurisprudence in order to examine whether the acts of an

[54] ICSID Convention Art. 42(1); Redfern/Hunter/Blackaby/Partasides, paras. 11.19-11.22.

[55] *Maffezini v. Spain,* paras. 71-82. Also, Brownlie, p. 32 et seq.

entity can be attributed to the State. It is also in conformity with the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which are deemed to be the most important expression of customary international law in this area.[56] Consequently, acts of Bergonian IP Office should be attributed to Respondent. This is even undisputed by the Parties as the attribution of Bergonian IP Office's acts to the State of Bergonia has not been contested by Respondent.

II COMPULSORY LICENSE ISSUED BY RESPONDENT AMOUNTS TO EXPROPRIATION

68. Actions of Respondent regarding the Patent are unlawful under the Bergonia - Conveniencia BIT and Claimant is entitled to compensation. Claimant submits that Bergonian compulsory license interferes with Claimant's property in such a manner that it constitutes indirect expropriation (**1**) without fulfilling the necessary conditions for lawful expropriation (**2**). In addition, Art. III(4) of Bergonia - Tertia BIT does not affect the competence of this Tribunal to decide upon the existence of expropriation (**3**).

1. Bergonian compulsory license interferes with Claimant's property in such a manner that it constitutes indirect expropriation

69. According to Art. 4(2) of the Bergonia - Conveniencia BIT, investments by Bergonian and Conveniencian investors shall not be expropriated either directly or indirectly in the territory of the other State except upon fulfillment of very clear and strict conditions. Admittedly, there has been no direct expropriation in the present case, bearing in mind that Claimant still has the notional ownership over the Patent. However, Respondent's issuing of compulsory license is a measure that effectively represents indirect expropriation of Claimant's investment.

70. Under customary international law, all measures which have similar effects to expropriation are regarded as expropriation itself.[57] Every act which erodes rights associated with

[56] Draft Articles, Art. 4.(1); Shaw, pp. 694-695.

[57] UNCTAD Taking of Property, p. 20; World Bank Guidelines, IV(1); *Starret Housing Corp v. Iran,* p. 233.

ownership, and "*in particular*" leads to "*the loss of management, use or control, or a significant depreciation in the value, of assets*" is regarded as an act of expropriation.[58] The same view is taken in Art. 4(2) of the Bergonia - Conveniencia BIT, which says that any measure having the effects tantamount to expropriation or nationalization is equated to expropriation. The tangible or intangible nature of the expropriated asset plays no role in finding the existence of expropriation.[59] As will be shown in more detail below, Respondent's actions deeply interfered with the Claimant's *right to use* its investment by depriving it of the *control* over its licensing **(a)**, thus significantly *diminishing the value* of the investment **(b).** Moreover, Respondent's actions do not fall under the ambit of legitimate and allowed state regulatory action **(c).** Therefore, it is Claimant's submission that Respondent has effectively indirectly expropriated its investment.

a) Respondent's actions deeply interfered with the Claimant's *right to use* its investment by depriving it of the *control* over its licensing

71. As it is well known, a patent gives its owner the right to exclusively economically use the invention protected by it and to determine if and how it will license the others to use it.[60] Alongside the use of the invention in production, such licensing is practically the main source of profit for the patent owner. This is confirmed in practice by the facts of the case at hand. Merely two weeks after obtaining the Patent, Claimant licensed BioLife Co. to use the Patent against an appropriate licensing fee by virtue of the License Agreement.[61]

72. Subsequent Bergonian decision to issue a compulsory license in relation to the Patent clearly represents the taking of the exclusive right of Claimant to license its Patent in future and thus amounts to expropriation. As has been stated in the *Amoco* case:

> "[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of commercial transaction …".[62]

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[58] UNCTAD Taking of property, p. 4.

[59] *Wena Hotels v. Egypt*, para. 98.

[60] Dratler, pp. 1-8.

[61] Uncontested facts, paras. 5-6.

[62] *Amoco International Finance Corp. v. Iran*, para. 108.

73. There is no doubt that the right to license can be an object of commercial transaction, as is obvious from the facts of the case: such commercial transaction had actually taken place between Claimant and BioLife by conclusion of the License Agreement. Due to the fact that license was exclusive,[63] Claimant no more had a right to license other entities as long as the License Agreement lasted.

74. The fact that Claimant, after the issuing of the compulsory license, still has a nominal right to issue licenses, as could possibly be argued by the Respondent, is not relevant for determining whether indirect expropriation occurred. As has been pointed out in literature[64] and case law,[65] the fact that the legal title of property holder is not affected does not preclude the existence of indirect expropriation. Thus, the fact that Claimant nominally still has every legal title to continue issuing licenses does not counter the fact that the real value of such right, the value of exclusivity, no longer exists.

b) Respondent's actions significantly *diminished the value* of Claimant's investment

75. The exclusivity of a patent is a key element of its market value. The fact that the license to use the Patent became publicly available without the obligation to obtain Claimant's approval in any manner and for an inadequate royalty that was lower than the one that had been in effect under the terms of the License Agreement[66] significantly diminished the value of the Patent. Since licensees were able to use the Patent under the compulsory license for a reduced fee, they no more had an interest in entering into a license agreement with Claimant and paying the market value license fee to it. This conclusion is supported by the facts of the case as BioLife and five other Bergonian entities invoked the compulsory license[67] and did not attempt to sign a license agreement with Claimant. Hence, the measures adopted by the Respondent clearly resulted in significant depreciation of the Claimant's asset. Moreover, Claimant's loss was even greater since the products based on the Patent found a strong and

[63] Clarifications, response to request No. 32.

[64] UNCTAD Taking of Property, pp. 18-19.

[65] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, p. 225.

[66] Clarifications, response to request No. 88.

[67] Uncontested facts, para. 8.

increasing market (the need for the product becoming more acute) in Bergonia,[68] so it is safe to assume that the Patent itself would have gained considerably in market value. Significant depreciation of the market value of the Patent is a clear evidence of indirect expropriation. The case law firmly supports the conclusion that destruction of the commercial value of an investment amounts to expropriation.[69]

c) Respondent's actions do not fall under the ambit of state regulatory action

76. Respondent might argue that issuing of compulsory licenses falls within the ambit of legitimate and allowed state regulatory action. Claimant submits that it would be wrong to *a priori* exclude regulatory actions from the scope of possible forms of expropriation. As has been correctly observed, that would leave a "gaping loophole" in investor protection against expropriation.[70] Still, if the Tribunal would like to determine specific differences between regulation and expropriation, despite the fact that this issue is highly contentious[71], Claimant submits that pertinent guidelines can be found in case law. The differences between these two have been summarized by professor Schwarz in *S.D Myers* case and since then cited in literature.[72] Specifically, expropriations tend to be severe deprivations of ownership rights while regulations tend to amount to much less interference; expropriations tend to deprive the owner and enrich a public authority or a third party to whom the property is given while regulatory action tends to prevent an owner from using property in a way that unjustly enriches the owner (this is similarly supported in case law[73]); finally, expropriations without compensation tend to frustrate owner's reasonable expectations in law and fairness while regulation is something that owners ought reasonably to expect.[74]

77. As has been explained above in paras. 69-74. Bergonian actions severely deprived Claimant of its property rights over the Patent. Secondly, as explained in paras. 81-84 third parties

[68] Clarifications, response to request No. 26.

[69] *CME v. The Czech Republic*, para. 591.

[70] *Pope & Talbot v. Canada2*, para. 99.

[71] Reinisch, p. 432.

[72] McLachlan/Shore/Weiniger, p. 307.

[73] *CME v. The Czech Republic*, para. 603.

[74] *S.D Myers v. Canada Separate Opinion,* para. 211-213.

(BioLife and five other companies) have been enriched as they have used the compulsory license for commercial purposes. At the same time, nothing in the Record shows that Claimant had in any manner unjustly used its Patent to enrich itself. Finally, as explained in paras. 121-122,137 Claimant could not have reasonably expected Bergonian measure which came as an unfair surprise. All of this indicates that Bergonian actions cannot be deemed as regulation but only as expropriation.

2. Bergonia failed to fulfill necessary conditions for lawful expropriation

78. Admittedly, States have the right to expropriate and even indirect expropriation can be lawful provided that the necessary conditions set out in applicable BITs and international law in general are fulfilled.[75] In the case at hand, the criteria for assessing lawfulness of an indirect expropriation should be found in the applicable Bergonia – Conveniencia BIT and in international law, and they are the following:[76] **(a)** taking must serve a public purpose; **(b)** there should be no discrimination; **(c)** adequate compensation must be paid; and **(d)** due process must be observed. It must be emphasized that all of these conditions must be fulfilled cumulatively in order for an expropriation to be lawful. Claimant submits that Respondent's actions do not fulfill any of these requirements and hence amount to unlawful expropriation.

a) Taking did not serve a public purpose

79. According to Art. 4 of the Bergonia - Conveniencia BIT, expropriation is only allowed if it is needed for the public benefit. Claimant does not contest that products based on the Patent have significant impact on regulating domestic medical needs (see para. 35). However the issuing of compulsory license was not needed for improvement of the public benefit or has it in any way done so.

80. Public benefit regarding the medical needs addressed by the Patent could have been improved by a host of possible measures. For example, Respondent could have negotiated with

[75] Reinisch2, p. 176.

[76] UNCTAD Taking of property, pp. 12-13.

Claimant the lowering of royalty fees for an appropriate remuneration, thus achieving the lower price of the products and their better availability. Similar negotiating between States and patent holders has been done in comparative practice.[77] Furthermore, Respondent could have subsidized BioLife's manufacture of products based on the Patent or the parts of population most affected by the illness in question. Finally, Respondent could have conducted more efficient measures in order to change the traditional diet of parts of population, which is an equally important cause of medical problems, as explained in more detail in para. 114. Respondent limited its concrete measures to change the traditional diet to mere informing of the public.[78] Potentially much more efficient measures, such as tax increases, are still in preparatory phase waiting for implementation.[79]

81. In sharp contrast to the proclaimed goal of improvement of public benefit, all the relevant facts indicate that the only effect of Respondent's measure was commercial gain for the companies invoking the compulsory license. Respondent's behavior is even more unacceptable bearing in mind the record of harmful parallel exports conducted by Bergonian companies such as BioLife[80] and the fact that this justified Claimant's wish to determine itself whether and how it would license its Patent in Bergonia.

82. Firstly, the royalty under the compulsory license was lower than the one agreed on the arms' length basis and stipulated in the License Agreement.[81] This reduced license fee brought only windfall profit to the companies involved and loss to Claimant as there is no indication that there has been any lowering of the prices of the products based on the Patent or their increased quality.

83. Secondly, some of the involved companies exported the products produced under the compulsory license,[82] which clearly indicates that one of the motives of the Bergonian measure was to boost its balance of trade and not to address "important *domestic* medical needs" (emph. add.). This is further supported by the fact that at least some of these exports

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[77] Aidsmap; IPS.

[78] Clarifications, response to request No. 85.

[79] Ibid.

[80] Clarifications, response to request No. 113.

[81] Clarifications, response to request No. 88.

[82] Uncontested facts, para. 8.

took place into countries which are not least developed[83] and *all* of the exports were to countries which have their own production capabilities.[84]

84. Thirdly, the number of units of products sold by the six firms invoking the compulsory license is 155% of that sold previously by BioLife alone.[85] Bearing in mind that the products are now sold by seven entities in Bergonia (including Claimant[86]) instead of just one, the fact that the sale increased by mere 55% indicates that the measure failed to increase the availability of the products anywhere near the range that could be reasonably expected from a measure aimed at advancing public benefit. Furthermore, the 55% increase in sales of the products cannot be clearly linked to the issuance of compulsory license. As can be seen from the facts of the case, the medical need for the products became more acute after the cancellation of the License Agreement.[87] Hence, the increase of sales should be attributed to this increased need, and not to the alleged public benefits of the compulsory license. It should be also noted that the patented product remained available in the Bergonian market after the cancellation of the License Agreement[88] which means that Respondent cannot state non-availability of the product as a reason supporting the compulsory license. Consequently, the same increase could have been achieved if Claimant had continued to be the exclusive owner of the Patent.

85. In conclusion, it is obvious that there has been no valid public benefit that has been achieved by issuing of the compulsory license.

b) Taking was conducted in a discriminatory manner

86. As can be seen from the Record, Claimant is not the only company in Bergonia operating in the same health business sector.[89] Furthermore, as can be inferred, there are other medical products and patented technology covering the same problem area as the Patent.[90] However,

[83] Clarifications, response to request No. 62.

[84] Clarifications, response to request No. 70.

[85] Clarifications, response to request No. 19.

[86] ibid.

[87] Clarifications, response to request No. 26.

[88] Clarifications, response to request No. 114.

[89] Clarifications, response to request No. 84.

[90] Clarifications, response to request Nos. 68. and 63.

Respondent did not issue compulsory license or conduct any similar measure in relation to other companies, products and technology.[91] Such behavior indicates the discriminatory attitude taken toward the Claimant, thus making the expropriation illegal. It can be argued by the Respondent that other products were not as efficient as the ones made under the Patent.[92] However, if Respondent had had an actual will to combat allegedly urgent medical needs, it should have conducted the same measures towards all products that could possibly help ease these medical needs.

87. Should the Tribunal fail to find evidence of discrimination towards Claimant, this would still not be an obstacle in finding the existence of illegal expropriation. Even if there was no discrimination, all of the conditions must be fulfilled cumulatively in order for the expropriation to be lawful, which is not the case here.

c) There was no adequate compensation

88. As set out in Art. 4 of the Bergonia - Conveniencia BIT, the compensation for expropriation needs to be prompt, adequate and effective (which corresponds to the so-called Hull formula, expressing minimum customary international law standard[93]). In the case at hand, no compensation was actually paid and the amount offered by the Bergonian IP cannot be considered as equal, prompt, adequate or effective compensation.

89. For the purpose of determining whether the royalty payments offered by the Bergonian IP Office could be considered as adequate compensation, Claimant submits that the Tribunal should take into account Art. III(1) of the Bergonia - Tertia BIT which is invoked under the MFN clause contained in Art. 3(2) of the Bergonia - Conveniencia BIT. Pursuant to the said Article, the amount of adequate compensation equals the fair market value of the expropriated investment before the expropriation measure was taken.

90. Considering the facts of the case at hand, Bergonia effectively expropriated Claimant's right to license the Patent and thus gain royalty fees. Claimants submits that if the Tribunal has the right to determine the actual compensation that is adequate then such same compensation had

[91] Clarifications, response to request Nos. 63. and 84.

[92] Clarifications, response to request No. 68.

[93] Reinisch2, p. 194.

to be offered by the Respondent in order to be determined as adequate. Despite the fact that, to the best of Claimant's knowledge, the issue of patent royalty fees has not been explicitly dealt with in available investment arbitration case law, there are still methods of determining the compensation known in case law which can be applicable in the case at hand. Namely, as has been stated in *Santa Elena* case, fair market value of the property would be what a willing buyer would pay to a willing seller.[94] Similarly, a "comparable transaction" method was used to review contemporaneous values of the taken assets in the cases *CMS v Argentina* and *CME v. The Czech Republic*.[95] Such contemporaneous values, especially seen from the dealings between willing buyers and willing sellers when available, will almost always be persuasive.[96]

91. Claimant submits that in the case at hand such contemporaneous, fair market value was reflected in the terms of the License Agreement regarding the royalty fee. This License Agreement had been concluded before the Bergonian expropriation was performed or even announced and, from all the available facts, it can be reasonably assumed that it was concluded on commercial basis. With this in mind, it can be safely assumed that Respondent had before it the adequate value it could compensate to Respondent. Claimant submits that Respondent could either offer a lump sum for the duration of the compulsory license, by multiplying the royalty fee and the duration of the compulsory license (48 months)[97] or offer the same royalty fee in regular installments (possibly with Claimants acceptance of such a manner of payment). However, Respondent failed to do either of this. It is obvious from the facts that all that the Bergonian IP office offered to Claimant was the payment of an inadequate fee for the duration of the compulsory license– four years, which in itself has been already objected as unnecessarily long period of time.[98] Consequently, Claimant was justified in not accepting this fee since it did not represent adequate compensation to which it was entitled.

92. However, it could be argued by the Respondent that the situation is somehow different because the amount of royalty fee under the compulsory license was to be paid by six entities instead of one and that the absolute amount received therefore could be equal or even higher than the sum provided for by the License Agreement. However, such potential allegations

[94] *Santa Elena v. Costa Rica*, para. 73.

[95] McLachlan/Shore/Weiniger, p. 322.

[96] Ibid.

[97] Clarifications, response to request No. 24.

[98] Clarifications, response to request No. 66.

should be dismissed by the Tribunal. Firstly, there is no clear information as to the amount of the offered royalty fee and whether or not even sixfold such fee would add up to the amount of the royalty fee from the License Agreement. Secondly, every license agreement is a commercial transaction for itself and the appropriate fee is calculated on a case-by-case basis. Judging from the facts of the case, such appropriate fee is found in the License Agreement and the fact that inappropriate fee was offered six times still does not affect the conclusion that it was unsatisfactory for the Claimant and that Claimant was justified in rejecting it.

93. In conclusion, since Bergonia failed to offer adequate compensation, it failed to meet the standard of compensation prescribed by the Bergonia – Conveniencia BIT and general international law, thus making unlawful expropriation.

d) Due process was not observed

94. Art. 4 of the Bergonia - Conveniencia BIT demands that the expropriation is performed in accordance with the applicable laws, which is a formulation that fits the requirement widely known as due process in international investment law and international law in general. Due process is typically recognized as a necessary condition for lawful expropriation in the doctrine[99] and case law.[100] Moreover, this requirement can also be found in Art. III(1) of the Bergonia - Tertia BIT, which can be invoked under the MFN clause contained in Art. 3(2) Bergonia - Conveniencia BIT.

95. As it is clear from the Record, Claimant was not granted due process in regard to the taking of its property. Claimant communicated its objections to the Bergonian IP office without any success on numerous occasions and there has been no independent review of the IP Office's decision to issue the compulsory license.[101] This represents a violation of the applicable laws of Bergonia. Namely, as a WTO Member State, [102] Bergonia has to enact laws which conform to the conditions of the TRIPS. For this reason, whether due process was granted to Claimant

[99] UNCTAD Taking of Property, p. 12.; Reinisch2, p. 191.

[100] *Methanex v. United States of America*, Part IV, Chapter D, para. 7.

[101] Uncontested facts, para. 9.

[102] Clarifications, response to request No. 21.

or not should be judged by the fact of whether Bergonian actions were in accordance with the TRIPS or not.

96. Art. 31 of the TRIPS, which regulates compulsory licenses, states that the legal validity of any decision relating to the compulsory license shall be subject to judicial review or other independent review by a distinct higher authority in the Member Country.[103] Respondent might argue that the review performed by the Bergonian IP Office Patent Review Board fulfilled the conditions of Art. 31 of TRIPS. However, Patent Review Board does not qualify as either judicial, independent or distinct authority. As can be seen from the facts, Patent Review Board is a part of Bergonian IP Office[104] and as such is not distinct or higher authority. Board itself is *quasi*-judicial in character,[105] thus obviously failing to fulfill the condition of a judicial body. Finally, the members of the Patent Review Board are paid by the Bergonian IP Office for their duty[106], making it highly doubtful that they are indeed independent in their review.

97. Bearing all this in mind, the Tribunal should find that Bergonia obviously failed to fulfill this condition for lawful expropriation.

3. Article III.4 of Bergonia - Tertia BIT does not affect the competence of this Tribunal in deciding upon the existence of expropriation

98. Respondent has argued that to the extent that Claimant invokes the terms of the Bergonia - Tertia BIT (see paras. 52-62 above) on the basis of the MFN clause contained in the Bergonia - Conveniencia BIT, Art. III(4) of the Bergonia - Tertia BIT must also apply.[107] Respondent further argues that the provision contained in this Article expressly excludes compulsory licenses from being treated as expropriation. Contrary to this, Claimant submits that the Tribunal cannot apply Art. III(4) of Bergonia - Tertia BIT since the MFN clause does not relate to lower standard of rights **(a)**. Even if the Tribunal finds otherwise, the conditions for

[103] TRIPS Article 31 (i).

[104] Clarifications, response to request No. 29.

[105] Ibid.

[106] Ibid.

[107] Minutes, para. 14.

applying Art. III(4) of Bergonia - Tertia BIT have not been met since Bergonia violated the applicable international law regarding compulsory licenses **(b)**.

a) The Tribunal cannot apply Article III(4) of Bergonia - Tertia BIT since the MFN clause does not relate to lower standard of rights

99. Respondent's submission that the MFN clause from Art. 3(1) of the Bergonia - Conveniencia BIT leads to the application of Art. III(4) of Bergonia - Tertia BIT is erroneous and should be rejected by the Tribunal since such interpretation is in contravention with the very purpose of the said MFN clause.

100. As has been stated in doctrine, the purpose of MFN clauses is to extend *favors* given to third States (or their nationals) to the contracting parties of the basic treaty (or their nationals).[108] Thus, the MFN clause contained in Art. 3(1) of the Bergonia - Conveniencia BIT, which the basic treaty in the present case, represents consent of Bergonia to extend to Conveniencian investors all benefits that it grants to investors from third States. The main and exclusive aim of this MFN clause is to improve the position of Bergonian and Conveniencian investors *vis-à-vis* the host State and not to grant any favors to the host State. Thus, its application cannot be invoked by Bergonia.

101. Moreover, there is no case law to support the position that an MFN clause can be used to import provisions in the basic treaty that are less favorable to investors covered by the basic treaty. For this reason, the provisions of the Bergonia - Tertia BIT that are clearly more favorable for the Claimant, as the ones invoked in paras. 52-62 above, should be applied by the Tribunal on the basis of the wording and purpose of the MFN clause found in Bergonia - Conveniencia BIT. On the other hand, the application of the provisions found in Art. III(4) of the Bergonia - Tertia BIT should be rejected by the Tribunal since they are clearly less favorable to the Claimant when compared to the provisions of the basic Bergonia - Conveniencia BIT. Namely, the application of those provisions would exclude a whole class of governmental actions regarding investments – compulsory licenses – from the scope of expropriation, thus disallowing the affected parties benefits of the truly and often the only independent and impartial review system under the circumstances.

[108] Ziegler, p. 65.

b) The conditions for applying Article III(4) of Bergonia - Tertia BIT have not been met since Bergonia violated the applicable international law regarding compulsory licenses

102. Even if the Tribunal disregards the argumentation contained in paras. 99-101 above and decides to accept Respondent's reasoning regarding the application of Art. III(4) of the Bergonia - Tertia BIT, it should still have to reach the conclusion that this provision is inapplicable in the present case.

103. Namely, Art. III(4) of Bergonia - Tertia BIT states that:

> "[T]his Article [dealing with expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights *in accordance with the TRIPS Agreement"* (emph. add.).

104. This exemption clause cannot be applied by the Tribunal since the issuance of compulsory licenses by Respondent was not in accordance with the TRIPS. The conditions which had to be met by Respondent are found in Art. 31 of the TRIPS, and Bergonia violated in particular provisions of Art. 31 (b), (f), (h), (i) and (j).

105. Firstly, Art. 31(b) of TRIPS states, in relation to other unauthorized use (which is a term describing compulsory license), that:

> "…[s]uch use may only be permitted if, prior to such use, the proposed user has *made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time*. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public noncommercial use.[…]."(emph. add.).

106. Bergonia violated the terms of Art. 31(b) of TRIPS due to the fact that there was no proposed user which made efforts to obtain the license on reasonable commercial terms and conditions. In particular, there is no evidence in the Record that BioLife was the proposed user. Furthermore, the fact that BioLife tried to renew the license with Claimant cannot be described as the effort under Art. 31(b) as it was not made in conjunction with the issuing of the compulsory license. Namely, BioLife's efforts to obtain a new license were made 7 months before the issuing of the compulsory licenses, and 2 months before the process for the issuing of compulsory license even begun. It can be safely assumed that these were only business negotiations between partners (Claimant and BioLife) who had an existing business relationship between them and without any connection to Bergonian government or its efforts

to remedy the alleged medical needs. The further breaching of the TRIPS rules is evidenced by the fact that five more Bergonian enterprises invoked the compulsory license[109] while none of them before it even tried to negotiate the license with the Claimant,[110] as required by TRIPS Art. 31(b).

107. It is not disputed by the Claimant that requirement of prior negotiation can be waived in cases of national emergency, extreme urgency or public non-commercial use. However, Bergonian government has not clarified whether any of the "important domestic medical needs" fit within the category of national emergency or extreme urgency which is a necessary condition. As explained above (see paras. 81-84), Bergonian compulsory license does not fit within the category of public non-commercial use, since the compulsory license has been invoked by various private enterprises for, as is explicitly stated in the Record, commercial purposes.[111] Furthermore, three of these companies exported products made under the license, clearly indicating the commercial nature of their production.

108. Secondly, Art. 31(f) TRIPS requires that the products manufactured under the compulsory license are used to predominantly supply the domestic market, and due to the export of the products it is unclear whether this criterion is fulfilled. The existence of exports further diminishes the alleged non-commercial use, as explained in para. 83, Furthermore, no notification of exports was made to the TRIPS Council[112], indicating that there were no allowed exports to the least developed countries, as is at least partially confirmed by the Record.[113]

109. Thirdly, pursuant to Art. 31(h) TRIPS:

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

110. Such adequate remuneration, and especially the real economic (market) value of the authorization were neither paid nor offered as elaborated in more detail in paras. 88-92 above.

111. Finally, Art. 31(i) and (j) TRIPS require the existence of judicial or other independent review of the decision to issue a compulsory license and in respect to remuneration, respectively. As

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[109] Uncontested facts, para. 8.

[110] Clarifications, response to request No. 28.

[111] Clarifications, response to request No. 54.

[112] Clarifications, response to request No. 20.

[113] Clarifications, response to request No. 62.

has been explained in paras. 95-96 above, Bergonia provided neither judicial nor any other independent review of Bergonian IP Office's decisions regarding compulsory license and royalty fees.

112. In addition, Bergonia did not act in good faith when it invoked the compulsory license.

113. The whole system of compulsory licensing is meant to counter the large scale epidemics and wide ranging health problems, mainly in poor countries. There have been attempts to issue compulsory licenses for medications aimed at treating diseases which are mainly caused by certain lifestyle, and not by acute epidemics or similar causes. Such situation existed when Thailand issued compulsory licenses for Plavix, a medication for blood thinning, used for treating heart disease. Since heart disease can be prevented by other means, Thailand's requirement of compulsory licenses was fiercely criticized as contrary to the very spirit of the whole licensing system and illegitimately aimed at improving the standard of its population.[114]

114. Similarly, in the case at hand, despite the fact that there is a genetic predisposition to obesity in parts of Bergonian population, this still does not mean that the threshold for using compulsory licenses was reached. As has been noted in the facts of the case, equally important factor for obesity is traditional diet.[115] Thus, the problem of obesity can be treated by changing the diet and lifestyle of the population, without reaching for infringement of intellectual property rights. The measures taken by the Respondent (as explained in detail in para. 80) do not even nearly deplete the possibilities Respondent had to change the harmful lifestyle of parts of the population. Claimant submits that compulsory licenses should remain the last resort reserved for actual emergencies. Such reasoning has been supported by, for example, the European Commission in the case of Thailand's decision to retain compulsory licenses for anti-cancer drugs.[116] Admittedly, the opinions of the European Commission on the subject are not a part of the applicable law in the case at hand, but they should provide a useful guidance, bearing in mind that EC is an influential member of the WTO. Consequently, as there is a lack of actual emergency, Respondent's use of the compulsory licenses cannot be justified in any manner.

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[114] Ho, p. 4.

[115] Clarifications, response to request No. 40.

[116] Third World Network.

III BERGONIAN ACTIONS VIOLATED APPLICABLE STANDARDS OF TREATMENT OF CLAIMANT'S INVESTMENT

115. Through the actions of Bergonian IP Office Respondent failed to provide Claimant the treatment which was guaranteed to it under the Bergonia - Conveniencia BIT and customary international law. In particular, Respondent failed to provide fair and equitable treatment **(1.)** and full and constant protection and security **(2.)** Moreover, Respondent unlawfully interfered in Claimant's investment by undertaking unreasonable and arbitrary measures impairing Claimant's investment **(3.)**.

1. Respondent failed to provide fair and equitable treatment to Claimant

116. Art. 2(2) of the Bergonia - Conveniencia BIT provides that:

> "[E]ach Contracting State shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment […]"

117. The Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), to which both Bergonia and Conveniencia are parties[117], gives primacy to the text of the treaty as evidence of the intention of the state parties.[118] According to a dictionary definition, a treatment is presumed to be "fair" or "equitable" when it is free from bias, fraud, or injustice, i.e. when it is characterized by equity or fairness.[119] This basic definition was further confirmed in relevant case law.[120] However, due to the abstract nature of the fair and equitable treatment standard there have been several interpretations thereof in scholarly writings, judicial decisions, and government statements. The two main interpretations are that, on one hand, it is: **a)** an autonomous self-contained concept different from the customary international law minimum standard and, on the other hand, that it is **b)** a standard of

[117] Clarifications, response to request No. 108.

[118] Vienna Convention, Art. 31.(1).

[119] Oxford Dictionary.

[120] *MTD v. Chile,* para. 113.

treatment which should be equated with the customary international law minimum standard.[121]

118. The application of either of these two interpretations, leads to the conclusion that Respondent breached its obligations under Art. 2(2) of Bergonia - Conveniencia BIT.

a) Respondent's actions are not in accord with the fair and equitable treatment defined as an autonomous self-contained concept

119. According to the first interpretation, the fair and equitable treatment standard should be interpreted in the light of its "additive character" under which the fairness and equity elements are distinct from the customary international law minimum standard.[122] Accordingly, it is generally misleading to equate the fair and equitable with the minimum standard due to the fact that

> "[t]he terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard."[123]

120. What is important for the case at hand is that this standard requires host States to seriously take into account all basic expectations by the investors which they had when making the investment. This trend of inclusion of investor's legitimate expectations as one of the main components of fair and equitable treatment is recognized both in jurisprudence[124] and by numerous decisions of arbitral tribunals.[125]

> "[T]he concept of legitimate expectations appears to be moving from its more narrow application, in detrimental reliance cases involving a specific promise by State officials not honored with damages resulting, to an application regarding the *entirety of the regulatory experience*, where transparency, predictability, the rule of

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[121] Schreuer2, pp. 9,17; OECD F&E, p. 2; UNCTAD F&E, pp. 10,34; Sornarajah, p. 332-333.

[122] *Pope and Talbot v. Canada,* para. 105-118; *PSEG v. Turkey,* para. 239; *MTD v. Chile,* paras. 110-112; *Saluka v. Czech Republic*, p. 309; Dumberry, p. 455; Dolzer/Stevens, p. 60; Muchlinski, p. 626; Laviec, p. 94; Vasciannie, pp. 139-144.

[123] Mann, p. 244.

[124] Yannaca-Small, p. 122.

[125] *Tecmed v. Mexico*, para. 154; *Occidental v. Ecuador*, para. 186; *CMS v. Argentina*, para. 274; *Saluka v. Czech Republic*, para. 302.

law and non-discrimination are the promise that induces *reasonable reliance*."[126] (emph. add.)

121. The actions of Bergonia deprived Claimant of its legitimate and reasonable expectations. Investor's decision to make an investment is based on the assessment of the legal framework and overall business climate in the host State at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.[127] There were no indications in the moment when Claimant started its business operations in Bergonia and acquired the Patent that Respondent would issue compulsory license or deprive Claimant of its Patent rights in any other manner. Thus, Claimant could have reasonably expected that it would be in a position to enjoy ownership of its Patent and license it without any obstacles from Respondent. These legitimate expectations were failed. Claimant's investment was subject to undue compulsory license and made available to all interested parties, depriving Claimant of its legitimate expectation that it would freely decide whether, when and under which conditions it would license its Patent. In addition, the offered royalty rates were considerably lower than what could have been accepted, depriving Claimant of its reasonable expectations of profit from its Patent.

122. Respondent might argue that general conditions regarding compulsory licenses ought to have been known to Claimant because they were contained in the TRIPS Agreement. However, as Bergonia did not use the provisions of the TRIPS Agreement before, despite the fact that health situation that allegedly warranted the use of compulsory licenses had existed for generations in Bergonia, it can be safely assumed that Claimant had a legitimate expectation that its investment would be secure. Furthermore, even if Claimant could have taken into account the conditions found in TRIPS, it surely could not have expected Respondent to contravene them, as explained in paras. 104-114. Respondent's contention that the health problem became more acute after the cancellation of the License Agreement,[128] suggesting that this could somehow be connected to Claimant and alter its expectations can hardly be accepted, as the health problem is caused by a genetic pre-condition deeply rooted within the Bergonian population and not by a subsequent and unpredictable effect of external factors. The problem certainly did not become more acute because there was total lack of the product

[126] Grierson-Weiler/Laird, p. 282.

[127] *Saluka v. Czech Republic*, para. 301.

[128] Clarifications, response to request No. 26.

based on the Patent, as the product remained available in Bergonia after the termination of the License Agreement.[129]

123. Furthermore, the decision making process in regard to compulsory license was also not transparent and Claimant, which was the most directly affected by the measures taken, had no possibility whatsoever to influence the decision of the Bergonian authorities. Additionally, there was a considerable lack of due process in regard to review of the decisions.

124. Bearing all this in mind it is clear that Claimant's legitimate expectations were not met. Thus, the Tribunal should have no obstacles in finding that by failing Claimant's legitimate expectations Bergonia committed a breach of fair and equitable standard.

b) Respondent's actions are not in accordance with the fair and equitable treatment defined as minimum standard of treatment in international law

125. The second interpretation of the fair and equitable treatment standard is that it is sometimes regarded as being equal to the minimum standard of treatment in international law.[130] It is generally accepted under customary international law that foreign investors are entitled to a certain level of treatment, and that any treatment which falls short of this level, gives rise to responsibility on the part of the State.[131] In particular, the international minimum standard encompasses the following obligations a host State has towards foreign investors: **1)** obligation of vigilance and protection, **2)** due process, including non-denial of justice and lack of arbitrariness, **3)** transparency, and **4)** good faith.[132] It is Claimant's submission that none of the following obligations were met by the Respondent in the present case.

1) Respondent did not exercise its obligation of vigilance and protection of Claimant's investment

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[129] Clarifications, response to request No. 114.

[130] *AAPL v. Sri Lanka*, Judge Asante's dissenting opinion, paras. 634-639; *AMT v. Zaire*, para. 6.10; *Genin v. Estonia*, para. 367; Leben, pp. 7-28; Sacerdoti, p. 341; Juillard, pp. 132 -134; NAFTA Interpretation, paras. B.1, B.2, B.3; OECD F&E, p. 9; Commentary OECD Draft Convention 1967, p. 9.

[131] OECD F&E, p. 8; UNCTAD F&E, p. 12.

[132] OECD F&E, p. 26.

126. The State has an obligation of vigilance, i.e. an obligation to exercise due diligence in protecting foreign investments.[133] Such general obligation is supplemented in this particular case by the provision of Art. 2(2) of the Bergonia - Conveniencia BIT which provides that:

> "[E]ach contracting State shall in its territory in any case accord investments by investors of the other Contracting State […] full protection under the Treaty."

127. As is explained in more detail in paras. 133-138. Respondent failed in its obligation to provide full security and thus violated fair and equitable treatment.

2) Respondent failed to provide Claimant due process and has acted in an arbitrary manner

128. Prohibition of denial of justice has always been considered a principle element of customary international law.[134] Furthermore, it constitutes one of fundamental human rights, embodied in various international conventions, such as Art. 6 ECHR. As has been outlined in paras. 94-97 above Respondent failed to provide Claimant with due process of law thus also violating fair and equitable treatment.

3) Respondent failed to provide transparency

129. Transparency plays an important role in enhancing and promoting legal security and it is thus crucial for achieving objectives and purposes of international investment treaties.[135] As been observed in case law:

> "[T]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and *totally transparent in its relations with the foreign investor*, so that it may know beforehand any and all rules and regulations that will govern its investments, as *well as the goals of the relevant policies and administrative practices* or directives, to be able to plan its investment and comply with such regulations."[136] (emph. add.).

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[133] Ibid.

[134] Kinnaer/Bjorklund/Hannaford, pp. 1105-42.

[135] Yannaca-Small, p. 123.

[136] *Metalclad v. Mexico*, para. 154.

130. From the facts of the case it can be seen that Respondent, at least allegedly, tried to obtain a public health goal and that issuing a compulsory license can be seen as a part of its relevant policy and practice. However, such goals, as has already been explained in para. 122, were not known to Claimant and were not disclosed at any point in the past. Such behavior on Respondent's side is clearly not transparent and as such it violates the fair and equitable treatment.

4) Respondent failed to act in good faith

131. According to Art. 26 of the Vienna Convention and as has also been stated in the doctrine and case law, the good faith principle is the basic guiding principle in performance of a treaty by the State.[137] Therefore, all the actions Bergonia took must be assessed from the viewpoint of this principle. Namely, Bergonia did not transparently announce its intentions, did not conduct transparent procedure when issuing compulsory licenses in relation to Claimant's investment, did not follow its international obligations in regard to Claimant's intellectual property and thus indirectly expropriated Claimant's investment without meeting necessary requirements for lawful expropriation. When all these facts are taken together, it is clear that Bergonia did not act in good faith, despite having ample opportunities to do so.

132. Having all this in mind, regardless of the approach the Tribunal takes, it is Claimant's submission that Respondent has failed to treat the Claimant's investment in a fair and equitable manner.

2. Bergonia did not provide full protection of Conveniencian investment

133. Art. 2(2) of the Bergonia - Conveniencia BIT states that:

> "[E]ach Contracting State shall in its territory in any case accord investments by investors of the other Contracting State […] full protection under the Treaty.[…]"

134. It is Claimant's submission that Respondent failed to meet its obligations under this standard.

[137] *Canfor Corporation v. USA*, paras. 182,323; Yannaca- Small, p. 122.

135. Some tribunals have equated the standard of full and constant protection and security with the fair and equitable treatment.[138] Having in mind that Respondent failed to treat Claimant's investment in a fair and equitable manner, as will be shown below, the Tribunal could also automatically find that there has been a breach of the full protection and security standard. Should the Tribunal decide to regard these two standards as two separate obligations, it is Claimant's assertion that there has nevertheless been a breach of the full and constant protection and security standard.

136. Unlike other standards of treatment, the full and constant protection and security standard imposes certain positive obligations on the part of the host State to protect investments in its territory. The host State is required to act with due diligence and exercise reasonable care to protect investments.[139] The full security and protection clause is meant to cover not only the situations of violation of physical integrity of an investment by use of force,[140] but also situations in which an investor or its property are subject to harassment without actually being physically harmed or seized.[141] The concept has expanded from mere physical protection into more abstract kind of security,[142] and has at times been invoked to sanction regulatory actions or other behavior that have violated original legal framework under which the investment has been conducted.[143] As has been expressly stated in *CME v. Czech Republic*, a State is under obligation to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the investment withdrawn or devalued.[144] Respondent might argue that Bergonia did not agree or approve any special protection to Claimant, however Claimant submits that Respondent nevertheless agreed and approved a certain level of security and protection by ratifying the Bergonia -Conveniencia BIT, Bergonia - Tertia BIT and the TRIPS Agreement. Claimant considers that interpreting agreed and approved protection as a case-by-case protection would create an unacceptable "escape route" for host State to claim that it did not agree to protect the foreign investor and its investment.

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[138] *Wena Hotels v. Egypt*, paras. 84-95; *Occidental v. Ecuador*, para. 187; *PSEG v. Turkey*, para. 258.

[139] Redfern/Hunter/Blackaby/Partasides, paras. 11-28; *AMT v. Zaire*, para. 6.08.

[140] *Saluka v. Czech Republic*, para. 484.

[141] *Vivendi v. Argentina,* para. 7.4.17.

[142] Cordero Moss, p. 131.

[143] Cordero Moss, pp. 131-132; *Siemens v. Argentina*, para. 303.

[144] *CME v. Czech Republic*, para. 613.

137. The original legal framework for Claimant was substantially different from the one existing after the issuing of the compulsory licenses. Claimant was facing a framework where compulsory licenses had not been issued before, where no information existing that they would be issued and where no official policy or directive regarding health problems existed. In addition, it could have been expected that TRIPS rules would be observed if compulsory licenses were to be issued. Eventually, Respondent announced and implemented the issuing of a compulsory license to a suddenly announced domestic medical need and in contravention to TRIPS rules. Such actions altered the legal framework for Claimant in an unfavorable manner, putting Bergonian actions in contravention with its obligation.

138. Consequently, the Tribunal should find that Bergonian actions violated the obligation of full protection.

3. Bergonian actions were unreasonable and arbitrary

139. Some of the most important restrictions imposed by the international law to the ability of a State to take actions towards foreign investors and their investments are, *inter alia,* principle of nondiscrimination and non-arbitrariness.[145] Art. 2(3) of the Bergonia - Conveniencia BIT clearly follows this approach and prohibits Respondent from impairing Claimant's investment by unreasonable, arbitrary or discriminatory measures. It is Claimant's submission that Respondent has obviously breached this obligation.

140. As has been shown above, Respondent's actions deprived Claimant of normal enjoyment of its investment. Respondent could argue that these actions were legitimate and reasonable. However, as can be seen from the para. 79-85, Respondent did not have a legitimate public purpose goal that can be acceptable as a legitimate reason, thus making its action illegitimate and unreasonable. Furthermore, the arbitrariness of Respondent's actions is further enhanced by the lack of due process available to Claimant, as can be seen from paras. 94-97.

141. Respondent might argue that for arbitrariness to exist there must be a proven bad faith on the side of the State. However, as it is stated in the case law, it is not necessary to establish the existence of actual bad faith.[146] Furthermore, even if Respondent perceived that it had a

[145] Bishop/Crawford/Reisman, Ch.8. II and III.

[146] *Loewen v. USA*, para. 132.

legitimate goal, despite this not being the case, it still had to act with caution. Namely, as can be deducted from case law, despite what can be perceived as a legitimate goal, the authority must be aware whether or not it is acting within its legal authority.[147] Such legal authority in the case at hand would be observed if Respondent acted in conformity with legal requirements in regards to compulsory licensing and/or expropriation, which it failed to do.

142. Since there is no legitimate background, coupled with the lack of legal authority, Respondents actions must be deemed as unreasonable and arbitrary. Consequently, Bergonia failed to comply with Art. 2(3) of the Bergonia - Conveniencia BIT.

REQUEST FOR RELIEF

In light of the above submissions, the Counsel for Claimant respectfully requests the Tribunal to find that:

- The Tribunal has jurisdiction to rule in the present case;
- The acts of Bergonian IP Office which had deprived Claimant of the use and benefit of its investment are to be attributed to the Respondent;
- Compulsory license issued by Respondent amounts to expropriation;
- Respondent's actions violated applicable standards of treatment of Claimant's investment;
- Respondent should pay prompt, adequate and effective compensation for expropriation and damages for other treaty breaches;
- Respondent should cover all costs of the arbitration, including all costs incurred by Claimant.

For Claimant, MedBerg Co.
Signed

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7 September 2009

[147] Grierson-Weiler/Laird, p. 287.