SECOND ANNUAL FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION 2009

TEAM FITZMAURICE

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/X/X

BETWEEN:

MEDBERG CO.

CLAIMANT/INVESTOR

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA

RESPONDENT/STATE

MEMORIAL FOR THE CLAIMANT

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STATEMENT OF FACTS

A. THE INVESTMENT

1. On 5 February 2004, MEDBERG CO. (MEDBERG) applied for a patent in relation to an invention to treat obesity. On 15 March 2005, Patent No. AZ2005 was granted. MEDBERG concluded a licence agreement with BioLife Co., a Bergonian company, to utilise these products and treatment. After BioLife breached the terms of the licence agreement, which prohibited any exportation of these products, MEDBERG terminated the licence agreement. On 1 November 2007, the Bergonian IP Office issued a compulsory licence for Patent No. AZ2005 which was invoked by six Bergonian entities.

B. THE CLAIMANT

2. MEDBERG was established in Bergonia on 30 January 2004. MEDBERG's total capital (100%) is owned by MedX Holdings Ltd. MedScience Co. and Dr. Frankensid, who invented the technology covered by Patent No. AZ2005, each own 50% of MedX Holdings Ltd.

C. THE RESPONDENT

3. THE GOVERNMENT OF THE REPUBLIC OF BERGONIA (BERGONIA) issued the compulsory licence through the Bergonian Intellectual Property Office (IP Office). BERGONIA also has a quasi-judicial body, the Patent Review Board, to deal with intellectual property cases. This Board consists of Bergonian judges who are paid by the Bergonian IP Office.

D. INTERFERENCE

4. On 31 March 2007, MEDBERG terminated the licence agreement with BioLife because BioLife deliberately exported the products and treatments in violation of the agreement. As a consequence of BioLife's exportation of these products, the local MedX

subsidiaries, licence, production and sales of the treatments and products were undermined.

5. On 1 November 2007, the Bergonian IP Office issued a compulsory licence for Patent No. AZ2005 stating that the technology covered by the patent is needed to address important medical needs, especially obesity. However, the issuance of the compulsory licence has failed to alleviate substantially the obesity phenomenon in Bergonia. The compulsory licence itself lasts for 48 months, but Bergonian Law allows for further extension. BERGONIA has never issued compulsory licences for any other similar patented product.

6. The six Bergonian companies invoked this compulsory licence to produce these products for commercial purposes. The companies exported the treatments and products to third countries which actually have a pharmaceutical manufacturing capacity of their own. These exports constitute a significant part of the total exports of these companies.

7. As a consequence of the interference with MEDBERG's patent, MEDBERG can only sell limited quantities of its obesity treatments and products. Moreover, despite the fact that the units sold by the six firms is 155% of that sold previously by BioLife alone, the compensation offered by Bergonia was also lower and inadequate.

ARGUMENTS

Part One

THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE IN VIEW OF THE NATIONALITY OF THE PARTIES CONTROLLING MEDBERG

8. Article 41(1) **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (*ICSID Convention*) states that, "The Tribunal shall be the judge of its own competence."[1] This Article encapsulates the general principle that the Arbitral Tribunal has the authority to rule on its own competence. The power of an arbitral tribunal to rule on its own competence is an accepted principle of international adjudication[2] and is a common feature in instruments governing international judicial procedure.[3]

9. In particular, Article 41(2) *ICSID Convention* obliges the Tribunal to consider objections raised by a party that:

> "that dispute is not within the jurisdiction of the Centre [International Centre for Settlement of Investment Disputes], or for other reasons is not within the competence of the Tribunal."

The *ICSID Convention* distinguishes between the 'jurisdiction' of the Centre and the

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[1] Article 41(1) *ICSID Convention*; Schreuer (2001), 523.

[2] *Topco v Libya*, Para. 404.

[3] See, for example, Article 36(6) *Statute of the International Court of Justice***,** Article 21 *UNCITRAL Arbitration Rules* (1976), Article 16 *UNCITRAL Model Law on International Commercial Arbitration* (1985) and Article 6(2) *International Chamber of Commerce Rules of Arbitration* (1998).

'competence' of the Arbitral Tribunal.[4] In the context of Article 41(2) *ICSID Convention*, the word 'jurisdiction' is a reference to the requirements, set out in Article 25 *ICSID Convention***,** which must be satisfied to activate the power of the Arbitral Tribunal to be "the judge of its own competence." The term 'competence' refers to the narrower issues confronting a specific tribunal, such as its proper composition or *lis pendens*.[5]

10. In practice, the distinction under Article 41(2) *ICSID Convention* between the 'jurisdiction' of the Centre and the 'competence' of the Arbitral Tribunal is of little consequence. This is because ICSID tribunals must be satisfied that both the 'competence' and 'jurisdiction' requirements are fulfilled in establishing their power to hear the dispute. Indeed, Article 41(2) *ICSID Convention* speaks of an objection by a party that the dispute is not within the Centre's jurisdiction *or for other reasons* not within the Arbitral Tribunal's competence. Additionally, Article 41(2) **Rules of Procedure for Arbitration Proceedings** (*ICSID Arbitration Rules*) states that:

> "The Tribunal may … consider, … whether the dispute … before it is within the jurisdiction of the Centre and within its own competence."

Thus, when Article 41(1) *ICSID Convention* states that "The tribunal shall be the judge of its own competence", it is clear that the Tribunal must also judge whether the Centre has jurisdiction in the case before it.

11. In the present matter, the question before the Arbitral Tribunal is whether it has jurisdiction under Article 25(1) *ICSID Convention*, which specifically states that:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

In paragraph 14 of the Minutes of the First Session of the Arbitral Tribunal,

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[4] Schreuer (2001), 538.

[5] Delaume, 577; Dimsey, 87.

BERGONIA objected to the Tribunal's jurisdiction. BERGONIA contends that the Claimant, MEDBERG, is not a national of another Contracting State. In contrast, MEDBERG argues that this Tribunal has jurisdiction to hear this dispute because the jurisdictional requirements of nationality under Article 25 *ICSID Convention* are fulfilled in that: (A) this dispute is between a Contracting State and a national of another Contracting State, and (B) in the alternative, BERGONIA is obliged to treat MEDBERG as a national of another Contracting State. Further, (C) BERGONIA's obligations under Article 3(2) *Conveniencia Treaty* extend to the right to submit disputes to arbitration to activate the jurisdiction of the Tribunal.

A. THIS DISPUTE IS BETWEEN A CONTRACTING STATE AND A NATIONAL OF ANOTHER CONTRACTING STATE UNDER ARTICLE 25(1) *ICSID CONVENTION*

12. This dispute is between a Contracting State and a national of another Contracting State for the purposes of Article 25(1) *ICSID Convention* because (1) BERGONIA is a Contracting State; and (2) MEDBERG is a National of another Contracting State.

1. BERGONIA is a Contracting State

13. BERGONIA is a signatory to the *ICSID Convention*.[6] Under Article 25(4) *ICSID Convention*, the jurisdiction of this Tribunal extends to signatories to the extent that the Contracting State has consented to be bound by the *ICSID Convention*.[7] Thus, as a Contracting State, BERGONIA has the right under Article 25(4) *ICSID Convention* to limit the Tribunal's jurisdiction by notifying ICSID of the classes of dispute "it would or would not consider submitting to the jurisdiction of the Centre."[8] As BERGONIA has not made such notification, it has not limited the Tribunal's jurisdiction.

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[6] Uncontested Facts, Para. 3.

[7] Preamble, *ICSID Convention*; Article 25(4), *ICSID Convention.*

[8] Article 25(4), *ICSID Convention***.**

14. Instead, BERGONIA has unconditionally consented under Article 10(2) **Treaty between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia Concerning the Encouragement and Reciprocal Protection of Investments** (*Conveniencia Treaty*) to settle its disputes by submitting to the jurisdiction of ICSID. Specifically, Article 10(2) *Conveniencia Treaty* states:

> "If such a dispute cannot be settled within a period of three months from the date of receipt of request for settlement, the dispute shall be submitted at the request of the investor … to … (b) international arbitration under … the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)."[9]

2. MEDBERG is a National of another Contracting State

15. Article 25(2)(b) *ICSID Convention*, in its first arm, states that a "National of another Contracting State" includes:

> "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration."

In ascertaining whether "any juridical person" has the nationality of a Contracting State other than the State party to the dispute, arbitral tribunals consider the economic realities of ownership and control.[10] In particular, arbitral tribunals identify the predominant origin of capital ownership in order to ascertain the ultimate controller of a 'juridical person'.[11] Consequently, this Arbitral Tribunal must ascertain the predominant origin of MEDBERG's capital ownership in order to determine its nationality.[12]

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[9] Article 10(2), *Conveniencia Treaty***.**

[10] *Tokios Tokelès v Ukraine*, Paras. 252-253; Broches, 360-61; Dimsey, 68.

[11] *Aguas Del Tunari v Bolivia,* Para. 302.

[12] *Aguas Del Tunari v Bolivia*, Para. 302.

16. In the present matter, MEDBERG argues that it is a national of Conveniencia for the purposes of Article 25(2)(b) *ICSID Convention*. This is because MedX Holdings Ltd has 100% ownership and control[13] of MEDBERG, and MedX Holdings Ltd is incorporated in Conveniencia. Further, MEDBERG contends that its Conveniencian nationality is not affected by MedScience Co.'s and Dr Frankensid's ownership of MedX Holdings Ltd. This is because neither MedScience Co. nor Dr Frankensid has the ability to exercise exclusive control over MedX Holdings Ltd.[14] Therefore, MedX Holdings Ltd is the ultimate owner and controller of MEDBERG. As Conveniencia is a Contracting State to the *ICSID Convention*,[15] MEDBERG is a "National of another Contracting State" for the purposes of Article 25(1)(b) *ICSID Convention*.

B. IN THE ALTERNATIVE, BERGONIA IS OBLIGED TO TREAT MEDBERG AS A NATIONAL OF CONVENIENCIA

17. The second arm of Article 25(2)(b) *ICSID Convention* provides that "National of another Contracting State" means:

> "any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

18. It is an economic reality that investors often organise their investment operations under the local law of the host State. In theory, incorporation in the host State makes the investor a national of that State. However, this would exclude all investors that operate through local companies from the ambit of the *ICSID Convention* and as a result a large and important part of foreign investment would be outside the scope of the *ICSID Convention*. The second arm of Article 25(2)(b) *ICSID Convention* is designed to

[13] Uncontested Facts, Para. 2.

[14] Uncontested Facts, Para. 2; Response to Request No. 75.

[15] Uncontested Facts, Para. 3.

prevent such an eventuality by creating an exception to the strict nationality requirement in Article 25(2)(a) *ICSID Convention*. The Report of the Executive Directors, after referring to the provision in Article 25(2)(a) *ICSID Convention* on natural persons, offers the following comment:

> "Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control."[16]

Schreuer confirms that the drafting history of Article 25(2)(b) *ICSID Convention* clearly indicates that the second arm of this Article was designed for situations in which foreign investors had established a corporation under the host State's laws.[17]

19. MEDBERG argues that it is entitled to be treated as a national of Conveniencia under Article 25(2)(b) *ICSID Convention* because: (1) Article 3(1) *Conveniencia Treaty* obliges BERGONIA to consent to treat MEDBERG as a national of Conveniencia, and (2) MEDBERG is under the control of Conveniencian nationals.

1. Article 3(1) *Conveniencia Treaty* obliges BERGONIA to treat MEDBERG as a national of Conveniencia

20. According to Article 3(1) *Conveniencia Treaty*:

> "Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of ... investors of any third State."

Article 3(1) *Conveniencia Treaty* is a Most Favoured Nation (MFN) clause. Under this Article, BERGONIA is obliged to afford investments in Bergonia, which are owned or controlled by Conveniencian investors, treatment no less favourable than it accords to

[16] Schreuer (2001), 292.

[17] Schreuer (2001), 291.

investments of investors of any third state.

21. MEDBERG relies on the application of the MFN Clause in Article 3(1) *Conveniencia Treaty* in conjunction with Article VI(8) of the **Treaty between the Government of Tertia and the Government of Bergonia Concerning the Reciprocal Encouragement and Protection of Investment** (*Tertia Treaty*) to impose an obligation on BERGONIA to treat MEDBERG as a national of Conveniencia. In particular, the MFN clause of Article 3(1) *Conveniencia Treaty* obliges BERGONIA to treat MEDBERG as a National of Conveniencia because Article VI(8) *Tertia Treaty* requires BERGONIA to treat a company owned by Tertian investors but incorporated in BERGONIA:

> "as a national or company of such other Party [Tertia] in accordance with Article 25(2)(b) of the ICSID Convention."

22. This Article requires BERGONIA to treat Tertian investments of an investor incorporated in Bergonia as a national of another Contracting State for the purposes of Article 25(2)(b) *ICSID Convention*, despite the company's incorporation in Bergonia. Article VI(8) *Tertia Treaty* constitutes more favourable treatment than BERGONIA accords to investments of Conveniencian nationality under the *Conveniencia Treaty* because investments owned and controlled by Conveniencian investors, but incorporated in Bergonia, would not normally qualify as investors of another Contracting State. Hence, MEDBERG, in relying on Article VI(8) *Tertia Treaty* may be considered as a national of another Contracting State in order to activate Article 25(2)(b) *ICSID Convention*, provided it is under the control of Conveniencian nationals.

2. MEDBERG is under the control of Conveniencian nationals

23. The second arm of Article 25(2)(b) *ICSID Convention* refers to the agreement of the parties to treat a juridical person "as a national of another Contracting State" because of foreign control. This provision reveals a causal connection between 'control' and the 'agreement', suggesting that control is an objective requirement that cannot be replaced

by the agreement.[18] During the *ICSID Convention*'s drafting, the emphasis shifted from the purely objective criterion of control to a purely consensual element of agreement on nationality.[19] The objective requirement of control was deemed to evidence the existence of a consensual requirement of an agreement. In *LETCO v. Liberia,* in examining the requirements under the second arm of Article 25(2)(b) *ICSID Convention*, the tribunal stated:

> "unless circumstances clearly indicate otherwise, it must be presumed that where there exists foreign control, the agreement to treat the company in question as a foreign national is 'because' of this foreign control."[20]

24. The tribunal's statement in *LETCO v Liberia* reflects the wording of Article 25(2)(b) *ICSID Convention* which lists only 'foreign control' of the local company as the condition of an agreement to activate the second arm of Article 25(2)(b) *ICSID Convention*. Therefore, all that is required for the purposes of Article 25(2)(b) *ICSID Convention* is to ascertain the existence of the objective fact of foreign control over the local company, to achieve a valid consent to ICSID arbitration.

25. ICSID tribunals examine the actual existence of foreign control over the local company. In *Amco v Indonesia*, after considering the parties' agreement on nationality, the arbitral tribunal proceeded to examine the control over the local company. The tribunal examined the nationality of the immediate controller, Amco Asia, and concluded that the locally incorporated company was under the control of an investor from the United States. In coming to its conclusion, the tribunal refused to trace the chain of control beyond its first level. The tribunal stated:

> "The concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of

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[18] Schreuer (2001), 308.

[19] ICSID History I, 122, 124.

[20] Schreuer (2001), 310; Bishop, Crawford & Reisman, 366; *LETCO v Liberia* (1984), Para. 352.

> incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State party to the dispute, where said juridical persons are under foreign control. But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller".[21]

26. In the present case, if the Tribunal were to follow the reasoning of *Amco v Indonesia*, the question of foreign control is resolved with reference to MedX Holdings Ltd, a Conveniencian company. Alternatively, if the Tribunal were to trace the ultimate controller of MEDBERG the answer is still the same: MedX Holdings Ltd owns 100% of MEDBERG. MEDBERG's Conveniencian nationality is not affected by MedScience Co. and Dr Frankensid's ownership of MedX Holdings Ltd. While these entities own MedX Holdings Ltd, neither party has the ability to exercise control to the exclusion of the other party.[22]

C. BERGONIA'S OBLIGATIONS UNDER ARTICLE 3(2) *CONVENIENCIA TREATY* EXTEND TO THE RIGHT TO SUBMIT DISPUTES TO ARBITRATION

27. The principle that a MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates"[23] must be kept in mind when determining the scope of the protection afforded under the clause. In this context, Article 9.1 *International Law Commission's 1978 Draft Articles on Most Favoured Nation Clauses* states that a MFN clause confers "only those rights which fall within the limits of the subject-matter of the clause."[24] Therefore, when determining the scope of the clause the Tribunal must have regard to the category of subjects found in the

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[21] *Amco v Indonesia*, Para. 396; Mouawad & Karam, 273; Lew, 30.

[22] Response to Request No. 75.

[23] *Ambatielos*, Para. 106; Newcombe & Paradell, 204.

[24] Article 9.1, *International Law Commission Draft Articles on Most Favoured Nation Clauses*.

relevant Treaty. In the present matter, the category of subjects is stated in Article 3(2) *Conveniencia Treaty* which, in its relevant part, reads as follows:

> "in particular, though not exclusively, concerning management, maintenance, operation, enjoyment or disposal of their investments, to treatment less favourable than it accords to its own investors or to investors of any third State, whichever is more favourable to the investors."

28. Although Article 3(2) *Conveniencia Treaty* is broadly drafted, the inclusion of the phrase "not exclusively" in the Article demonstrates the intention of the Treaty parties not to confine the application of the clause solely to the protection of investors' activities listed in the Article.

29. A MFN clause relating to the substantive rights of investors also applies to the "administration of justice, in so far as it is concerned with the protection of these rights."[25] In particular, Gaillard argues that in circumstances where the MFN clause does not specifically include or exclude its application to jurisdictional issues:

> "The intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third country, including the right to the neutral and effective settlement of their investment disputes through arbitration rather than through the juridical organs of the host State itself."[26]

30. The tribunal in *Maffezini v Spain* was the first to consider the issue of whether a MFN clause applies to jurisdictional issues. The tribunal ruled that the clause in the *Argentina-Spain Bilateral Investment Treaty* applied to jurisdictional issues in order to afford the claimant more favourable dispute resolution provisions contained in the *Chile-Spain Bilateral Investment Treaty*. The tribunal stated:

> "The tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, ... if a third party treaty contains provisions for the

[25] *Ambatielos,* Para. 106; *Maffezini v Spain,* Para. 117; *Salini v Morocco*, Para. 118.

[26] Banifatemi, 273*;* Gaillard, 3.

> settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause."[27]

31. ICSID tribunals have confirmed the authority of *Maffezini* in subsequent cases[28] to apply a MFN Clause to jurisdictional issues. Further, the tribunal in the case of *RosInvest v Russian Federation* stated that:

> "It is difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him ... procedural options of obvious and great significance."[29]

The tribunal went on to say:

> "The tribunal sees no reason not to accept it [the application of the MFN Clause] in the context of procedural clauses such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to "only" procedural protection."[30]

The reasoning of the tribunal in *RosInvest v Russian Federation* was cited with approval and applied in the recent 2009 decision in the case of *Renta 4 S.V.SA v Russia*. In *Renta 4 S.V.SA v Russia*, the claimants sought to overcome the restriction on referring disputes to international arbitration contained in the Spain-Soviet Union Bilateral Investment Treaty. The claimants argued that the MFN clause contained in Article 5 of the bilateral investment treaty allowed them to submit the dispute to arbitration. The

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[27] *Maffezini v Spain*, Paras. 54-56.

[28] *Camuzzi v Argentine Republic,* Para. 57; *Gas Natural v Argentine Republic,* Para. 49; *Renta 4 S.V.SA v The Russian Federation,* Para. 97*; RosInvest v Russian Federation,* Paras. 130-132.

[29] *RosInvest v Russian Federation*, Para. 130.

[30] *RosInvest v Russian Federation,* Para. 132.

tribunal found in favour of the claimant and emphasised that there is no significant distinction between 'procedural' and 'substantive' investor protection.[31]

32. In the present matter, the *Conveniencia Treaty* is concerned with the "encouragement and contractual protection" of investments.[32] It would be incongruous to extend the operation of a MFN clause to investors' substantive rights, but fail to protect mechanisms designed to protect those substantive rights. Therefore, MEDBERG argues that the scope of Article 3(2) *Conveniencia Treaty* extends to the right to submit disputes to arbitration, thereby establishing the Tribunal's jurisdiction.

33. In addition, it is commonly accepted that a MFN clause should be enforced, as a matter of public policy, in order to promote mutually advantageous trade and investment relationships.[33] The purpose of the *Conveniencia Treaty* is:

> "to intensify economic co-operation between both countries and create favourable conditions to increase investments by investors of one of the Contracting States in the territory of the other Contracting State."[34]

34. Article 31(1) **Vienna Convention of the Law of Treaties** provides that a Treaty must be interpreted in light of its objects and purposes. Accordingly, the provisions of Article 3(1) *Conveniencia Treaty* should be interpreted to extend to the right of investors to submit disputes to arbitration.

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[31] *Renta 4 S.V.SA v The Russian Federation*, Para. 97

[32] Preamble, *Conveniencia Treaty*.

[33] Dolzer & Myers, 49.

[34] Preamble, *Conveniencia Treaty*.

Part Two

MEDBERG'S EXPLOITATION OF ITS INTELLECTUAL PROPERTY IN BERGONIA CONSTITUTES AN INVESTMENT FOR THE PURPOSE OF ARTICLE 25(1) *ICSID CONVENTION*

34. In addition to dealing with issues of investor nationality, Article 25(1) *ICSID Convention* requires, when addressing ICSID jurisdiction *ratione materiae* that:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment."

35. The definition of "investment" is central to the question of a tribunal's jurisdiction; however, the ICSID Convention does not define this key term. MEDBERG contends that (A) the term "investment" is defined by reference to Article 1(1)(d) *Conveniencia Treaty* to include intellectual property rights, including patents; and in the alternative, (B) MEDBERG's exploitation of Patent No. AZ2005 meets the *Salini* criteria for an investment under the *ICSID Convention*.

A. THE TERM INVESTMENT IS DEFINED BY REFERENCE TO ARTICLE 1(1)(d) *CONVENIENCIA TREATY* TO INCLUDE INTELLECTUAL PROPERTY RIGHTS, INCLUDING PATENTS

36. In the absence of an express definition in the *ICSID Convention*, the Tribunal should have regard to the Convention's object and purpose when considering whether Bergonian Patent No. AZ2005 is an "investment" within the scope of Article 25(1) *ICSID Convention*. The 'ordinary meaning' of "investment" is the commitment of money or other assets for the purpose of providing a return.[35]

37. In attempting to define the term "investment" a number of ICSID tribunals have applied each of the five benchmarks that were originally suggested by the tribunal in *Fedax v*

[35] *Malaysian Historical Salvors v Malaysia* (2009), Para 57.

Venezuela, and re-stated in *Salini v Morocco*, namely duration, regularity of profit and return, assumption of risk, substantial commitment of resources and significance for the host states' development.

38. MEDBERG argues that there is no basis for a strict application of the five *Salini* criteria in every case. The criteria are not fixed or mandatory as a matter of law, nor do they appear in the *ICSID Convention*.[36] The drafters of the *ICSID Convention* deliberately left the term "investment" undefined.[37] The *travaux préparatories* of the *ICSID Convention* reveal that despite several attempts to define "investment",[38] the drafters accepted a proposal to omit any definition of investment, on the ground that it would only create jurisdictional difficulties.[39] The term was intentionally left undefined in the final draft, with the expectation that the definition would be the subject of an agreement between the Contracting Parties.[40] Thus, the intended purpose of Article 25(1) *ICSID Convention* was not to define the circumstances in which recourse to the Centre would occur, but rather to delineate the outer limits of the Centre's jurisdiction, provided the host State's consent had been obtained.[41]

39. The *travaux préparatories* of the *ICSID Convention* do not ascertain the 'outer limits' of the Centre's jurisdiction, except to exclude commercial sales contracts from the jurisdiction of ICSID. In *Tradex v Albania*, the tribunal determined that ICSID's jurisdiction extended to a legal dispute concerning "immovable property and any other

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[36] *BiWater v Tanzania*, Para. 312.

[37] Report of the Executive Directors on ICSID Convention, Para. 27.

[38] ICSID History II-1, 34, 116.

[39] Schreuer (2001), 123; ICSID History II-2, 826.

[40] Schreuer (2001), 80-88.

[41] ICSID History II-1, 566.

property rights."[42] The tribunal's finding was made solely with reference to the parties' consent in the relevant bilateral investment treaty.[43]

40. Most recently, the annulment tribunal in *Malaysian Historical Salvors v Malaysia* considered the limit of the Centre's jurisdiction. When the matter was heard in the first instance, the Sole Arbitrator imposed 'outer limits' based strictly on the five *Salini* criteria. The annulment tribunal held that the Sole Arbitrator's definition of "investment" by reference to the *Salini* criteria was not supported on a reading of the *ICSID Convention*. In particular, the tribunal stated that,

> "Given that the Convention was not drafted with a strict, objective, definition of "investment", it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes."[44]

41. On reading the *travaux préparatories*, the annulment tribunal found that the use of the term "investment" was intended to exclude simple sales and like transient commercial transactions from the jurisdiction of the Centre. However, the intention of the drafters, as demonstrated by the *travaux préparatories*, does not lend support to judicial or arbitral construction of criteria or hallmarks of an "investment".[45] The tribunal concluded that the 'outer limit' of the Centre's jurisdiction is limited to legal disputes that are between a Contracting State and a national of another Contracting State. The inner content, framed by the term "investment", is defined by the terms of the consent of the parties to ICSID jurisdiction.

42. The finding of the annulment tribunal in *Malaysian Historical Salvors v Malaysia* is supported by the Report of the Executive Directors. In the debate over the draft of the

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[42] *Tradex v Albania*, Para. 100.

[43] *Tradex v Albania*, Para. 100.

[44] *Malaysian Historical Salvors v Malaysia* (2009), Para. 34.

[45] *Malaysian Historical Salvors v Malaysia* (2009), Para 69.

Report, Broches recalled that none of the suggested definitions of "investment" were acceptable. He proposed that the Report of the Executive Directors should state that it is neither necessary nor desirable to define "investment". Ultimately, the Report was adopted in the following terms;

> "Consent of the parties is the cornerstone of the jurisdiction of the Centre … No attempt was made to define the term "investment" given he essential requirement of consent by the parties."[46]

43. Given that the *ICSID Convention* does not contain a definition of "investment", MEDBERG contends that the term "investment" in the *ICSID Convention* should be given the meaning which the parties themselves have embraced for the purpose of consenting to ICSID arbitration. In the present matter, under Article 1(1)(d) *Conveniencia Treaty* the parties, Conveniencia and Bergonia, have agreed that "intellectual property rights, in particular ... patents" are investments for the purposes of protection of investments and consent to the resolution of investment disputes through arbitration. Therefore, in the present dispute Bergonian Patent No. AZ2005 is an "investment" for the purpose of Article 25(1) *ICSID Convention*.

B. MEDBERG'S EXPLOITATION OF PATENT NO. AZ2005 MEETS THE *SALINI* CRITERIA REQUIRED TO AMOUNT TO AN INVESTMENT FOR THE PURPOSE OF THE *ICSID CONVENTION*

44. If the Arbitral Tribunal were not to follow the award of the annulment tribunal in*Malaysian Historical Salvors v Malaysia*, the definition of "investment" would ultimately be decided by arbitral tribunals.[47] Most recently, in *Salini v Morocco*, the tribunal clarified the requirements of an "investment" that must be met in order to

[46] Report of the Executive Directors on ICSID Convention, Paras. 23, 25, 27.

[47] Schreuer (2001), 121-125; Reed, Paulsson, & Blackaby, 15; *CSOB v Slovak Republic*, Para. 68.

establish ICSID jurisdiction.[48] First, the claimant must establish that the transaction underlying the parties' dispute comes within the scope of consent to arbitrate.[49] Such consent is generally ascertained by reference to a contract, national investment law, or international investment treaties. Second, when the claimant has established that the parties have consented to arbitrate, the tribunal must make a decision as to the meaning of "investment" for the purpose of the *ICSID Convention*.[50]

45. In the present matter, the dispute arises out of MEDBERG's intellectual property rights under Bergonian Patent No. AZ2005. MEDBERG contends that (1) intellectual property rights are investments under the *Conveniencia Treaty*; and (2) the subject of the dispute is an "investment" within the meaning of the *ICSID Convention*.

1. Intellectual property rights are investments under the *Conveniencia Treaty*

46. The present dispute arises directly out of an "investment" as defined in the parties' consent to ICSID arbitration. Indeed, under Article 1(d) *Conveniencia Treaty*, the parties, Conveniencia and Bergonia, have agreed that "intellectual property rights, in particular ... patents" are investments for the purposes of consent to resolve investment disputes by arbitration.

2. Intellectual property is an "investment" within the meaning of the *ICSID Convention*

47. The first award to consider the meaning of "investment" within the context of Article 25(1) *ICSID Convention* was *Fedax NV v Venezuela*. The tribunal relied on Schreuer's commentaries of the *ICSID Convention* to determine the basic features of an investment

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[48] *Salini Construttori v Morocco,* Para. 52; *Malaysian Historical Salvors v Malaysia* (2007), Para. 55; Horn & Kroll, 290.

[49] *CSOB v Slovak Republic*, Para. 251; *Salini Construttori v Morocco,* Paras. 44, 52.

[50] *Salini Construttori v Morocco,* Para. 52.

within the scope of Article 25(1) *ICSID Convention.*[51] Schreuer points to five criteria that can be used as a guide in establishing whether a particular dispute is considered an 'investment dispute'. These criteria are not requirements, but characteristics that most investments will share.[52] *Fedax v Venezuela* adopted the position that the basic features of an investment involve:

> "a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment on behalf of the investor and the investment is of significance for the host states development."

The approach taken by the tribunal in *Fedax* has been consistently applied by ICSID tribunals.[53]

48. The dispute arising out of Bergonian Patent No. AZ2005 is a dispute arising out of an investment because (a) the investment is for a significant duration; (b) the investment involved regularity of profit and return; (c) the investment involved an assumption of risk by MEDBERG; (d) the investment is a substantial commitment of resources by MEDBERG; and (e) the investment was of major significance for Bergonia's development.

a. MEDBERG's investment is for a significant duration

49. The element of duration is a paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions.[54] Investment projects tend to have an extended duration. Thus, one-off sales or purchase of goods or

[51] *Fedax NV v Venezuela*, Para. 183; Schreuer (1996), 316.

[52] *Fedax NV v Venezuela*, Para. 183; Schreuer (1996), 316.

[53] *CSOB v Slovak Republic*, Para. 68; *Salini Construttori v Morocco*, Paras. 44, 52, 398; *Joy Mining v Egypt*, Para. 486; *Consortium RFCC v Kingdom of Morocco*, Para. 391.

[54] *Bayindir v Pakistan*, Para. 32.

short-term commercial credits would not normally be investments.[55] This criterion refers to the purpose of the *ICSID Convention*, namely, to encourage commitment of foreign capital to promote economic development. Thus, short-term operations will not be 'investments' for the purpose of the Convention because they are unpredictable, creating financial volatility, which is a detriment of economic development.

50. The duration aspect of the *Fedax* criteria was specifically considered by the tribunal in *Jan de Nul v Egypt*. The investment consisted of a dredging operation in the Suez Canal. The tribunal held that a 23 month period sufficed to satisfy the test of significant duration.[56] In *Bayindir v Pakistan*, the duration requirement was satisfied by arrangements over an eight-year period.[57] In *Malaysian Historical Salvors v Malaysia*, the requirement of duration was satisfied through a four-year arrangement. [58]

51. MEDBERG's participation in Bergonia began on 30 January 2004.[59] MEDBERG's commitment of resources and key personnel for five years represents a considerable investment in time and money which separates its activities from what can be described as an 'ordinary commercial transaction'.

b. MEDBERG's investment involved regularity of profit and return

52. Brownlie, in his opinion in *CME v Czech Republic* described an investment "as a form of expenditure or transfer of funds for the precise purpose of obtaining a return". Therefore, Brownlie suggests that the criteria of regularity of profit and return are

[55] *Joy Mining v Egypt*, Para. 62.

[56] *Jan de Nul & Anor v Egypt*, Paras 90-95.

[57] *Bayindir v Pakistan*, Para. 133.

[58] *Malaysian Historical Salvors v Malaysia* (2007), Para 9.

[59] Uncontested Facts, Para. 1.

indicative of any true investment.[60] MEDBERG derived a steady profit from Patent No. AZ2005 under the licensing agreement with BioLife.[61] Additionally, MEDBERG directly sells its obesity treatment in Bergonia.[62] MEDBERG argues that these facts demonstrate that it was generating a regular profit and return from its exploitation of Patent No. AZ2005.

c. MEDBERG's investment involved an assumption of risk

53. ICSID tribunals require an assumption of risk on behalf of the investor for the transaction to come within the realm of protected investments. The reason for this requirement can be seen in the purpose of the *ICSID Convention*. The risk of failure and loss associated with investment facilitated the need for international legal protection in order to entice investors to undertake investment transactions.

54. The tribunal in *Fedax v Venezuela* held that the credit risk associated with the purchase of bonds amounted to an assumption of risk.[63] Similarly, the tribunal in *Malaysian Historical Salvors v Malaysia* affirmed the decision in *Salini v Morocco* which found that the risks associated with the performance of a construction contract amounted to an assumption of risk.[64] The tribunal in coming to its determination cited a number of risks faced by the particular claimant. Notably, among others, these risks include: the contract prematurely ending, the modification of the contract for which the claimant would receive no additional compensation, the increasing cost of labour and any number of unforeseen incidents that would not give rise to a right of compensation.

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[60] *CME v Czech Republic* (Final Award), Separate Opinion of Ian Brownlie, Para. 34.

[61] Uncontested Facts, Para. 6.

[62] Response to Request No. 19.

[63] Bishop, Crawford & Reisman, 345.

[64] *Malaysian Historical Salvors v Malaysia* (2007), Para. 82.

55. In the present matter, MEDBERG carries all the risks of the development of its intellectual property. MEDBERG has invested time, money, equipment and key personnel with the aim of deriving a profit from licensing its patent, or possibly, in the future, from the production of health-related products. MEDBERG's assumption of risk is inherent in the development of its intellectual property under Patent No. AZ2005. The uncertain nature of research and development poses many risks for investors. MEDBERG was aware of these risks when it invested in the development of Patent No. AZ2005 with the hope of deriving a future profit.

d. MEDBERG's investment constitutes a substantial commitment of resources

56. In *Malaysian Historical Salvors v Malaysia*, the tribunal held that an investor's contribution be "in terms of know-how, equipment and personnel, and in financial terms". In particular, the tribunal listed intellectual property as an asset that contributes to the value of an investment.[65] In the present matter, MEDBERG has provided key personnel and know-how to develop the investment.[66]

e. MEDBERG's investment was of major significance for Bergonia's development

57. The criterion of the role of the investment on the host state's economy differs from the four previous elements in its perspective. Duration, risk, expectation of profit and commitment of resources are addressed from the investor's perspective. In contrast, in assessing this criterion the tribunal must look to the host state's motivation to accept and protect the transaction or operation. The importance of economic development was codified in the preamble to the *ICSID Convention* which refers to the need for international cooperation for economic development, and the role of private international investment.

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[65] *Malaysian Historical Salvors v Malaysia* (2007), Para. 4; *Bayindir v Pakistan*, Paras. 115-117.

[66] Uncontested facts, Para. 4

58. In *Bayindir v Pakistan*, the tribunal held that the 'contribution' requirement was satisfied by the investor's undertaking to construct a major highway in Pakistan. The investor made a significant contribution to the host country "in terms of know-how, equipment and personnel, and in financial terms."[67] Similarly, in *CSOB v Slovak Republic* the tribunal decided that CSOB's loan facility made available to the economic development process was a significant contribution to the development of the host state to amount to an investment within the meaning of the *ICSID Convention*.[68]

59. Similarly, the tribunal in *Malaysian Historical Salvors v Malaysia* commented that investments of relatively small sums of cash can amount to an 'investment'. The tribunal indicated that investments may have a non-monetary value. In making its finding, the tribunal listed human capital and intellectual property as assets that can amount to an investment.[69] The determining factor for the tribunal was that the investor had committed itself to making a contribution to the host state's economic development.[70]

60. In the present matter, MEDBERG's investment represented a significant contribution to the host state's development because it facilitated the development of health care in Bergonia. Initially, MEDBERG exploited its intellectual property rights in Bergonia through the licensing of its patent rights to BioLife and the production of a small quantity of an obesity drugs.[71] MEDBERG's investment was established to exploit a

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[67] *Malaysian Historical Salvors v Malaysia* (2007), Para. 4; *Bayindir v Pakistan*, Paras 115-117.

[68] *CSOB v Slovak Republic*, Paras. 356-357.

[69] *Malaysian Historical Salvors v Malaysia* (2007), Para. 131.

[70] *Malaysian Historical Salvors v Malaysia* (2007), Para. 131.

[71] Uncontested Facts, Para. 6; Response to Request No. 19.

market in Bergonia to service the host state's important medical needs.[72] Bergonia has affirmed the importance of MEDBERG's investment to its economic development through its actions in issuing a compulsory licence for Patent No. AZ2005.

CONCLUSION ON THE JURISDICTION OF THE TRIBUNAL TO HEAR THE DISPUTE

61. This Tribunal has jurisdiction to hear this dispute. The jurisdictional requirements under Article 25(1) *ICSID Convention* are satisfied. The dispute is between a Contracting State and a National of another Contracting State. Alternatively, BERGONIA is obliged to treat MEDBERG as a National of another contracting State. MEDBERG's exploitation of its intellectual property rights under Patent No. AZ2005 is an investment for the purposes of the *ICSID Convention*. BERGONIA's obligations under Article 3(2) *Conveniencia Treaty* extend to the right to submit disputes to arbitration.

[72] Response to Request No. 40.

Part Three

BERGONIA'S UNLAWFUL INTERFERENCE WITH MEDBERG'S INVESTMENT AMOUNTS TO AN EXPROPRIATION

62. Article 42(1) *ICSID Convention* stipulates that:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[73]

63. In the present matter, Article 9(5) *Convenienca Treaty* evidences the parties' agreement that:

> "The arbitral tribunal shall decide on the dispute in accordance with the provisions of this Treaty and the principles of international law."

64. The **Draft Articles on State Responsibility** (*Draft Articles*) are recognised as an authoritative statement of customary international law.[74] Article 2 *Draft Articles* provides that:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

65. BERGONIA has an international obligation under Article 4(2) *Conveniencia Treaty*, which provides that:

> "Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalised or subjected to any other measure

[73] Reed, Paulsson, & Blackaby, 46; *Maffezini v Spain*, Para. 76.

[74] *Corn Products v Mexico*, Para. 76; *LaGrand Case*, Para. 241.

> the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as 'expropriation') in the territory of the other Contracting State."

According to Article 4(2) *Conveniencia Treaty*, this obligation does not apply to expropriation:

> "in accordance with the applicable laws of the latter Contracting State for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation."

66. BERGONIA is liable for the measures of the Bergonian IP Office because: (A) the issuance of the compulsory licence by the Bergonian IP Office is attributable to BERGONIA under international law; (B) the issuance of the compulsory licence amounts to expropriation in breach of Article 4(2) *Conveniencia Treaty*; (C) BERGONIA's interference with MEDBERG's investment is not legally justified under the exception contained in Article 4(2) *Conveniencia Treaty*. Further, (D) the issuance of the compulsory licence is not legally justified because it is not in compliance with Article 31 (b) *TRIPS Agreement*.

A. THE ISSUANCE OF THE COMPULSORY LICENCE BY THE BERGONIAN IP OFFICE IS ATTRIBUTABLE TO BERGONIA UNDER INTERNATIONAL LAW

67. Article 4(1) *Draft Articles* provides that:

> "The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

Article 4(2) *Draft Articles* defines a state organ as any person or entity which has such status in accordance with the internal law of that state. However, where the internal law does not provide such classification, a state cannot avoid responsibility for the conduct of a body or department, which acts as one of its organs, by denying its status under its

own law.[75]

68. In assessing attribution, the principle of the 'unity of the State' regards acts of all state organs as acts of that State for the purpose of international responsibility.[76] The principle further elaborates that there is no category of organs specially designated for the commission of an internationally wrongful act, and virtually any state organ may be the author of such an act.[77] The responsibility may arise either as a legislative act[78] or as an administrative decision of the organ.[79]

69. BERGONIA is responsible for the issuance of the compulsory licence by the Bergonian IP Office because it is an organ of BERGONIA. The Bergonian IP Office is a governmental entity which has duties in relation to intellectual property in Bergonia, namely the granting of patent rights and the issuing of compulsory licences.[80] Moreover, the issuance of the compulsory license for Patent No. AZ2005 was an administrative decision taken by the Bergonian IP Office which is sufficient to impose responsibility on this organ.[81]

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[75] *Commentary to Draft Articles on State Responsibility*, Article 4, Para. 11.

[76] *Commentary to Draft Articles on State Responsibility*, Article 4, Para. 5; *Maffezini v Spain*, Paras. 78-79,82-83.

[77] *Commentary to Draft Articles on State Responsibility*, Article 4, Para. 5; *Salvador Commercial Company v Salvador*, 455, 477.

[78] *German Settlers*, 22.

[79] *German Interests*, 19.

[80] Uncontested Facts, Paras. 5, 8.

[81] Response to Request No. 29.

B. THE ISSUANCE OF THE COMPULSORY LICENCE BY BERGONIA CONSTITUTES AN EXPROPRIATION IN BREACH OF ARTICLE 4(2) *CONVENIENCIA TREATY*

70. BERGONIA is obliged under Article 4(2) *Conveniencia Treaty* to ensure that a foreign investment:

> "shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization … in the territory of the other Contracting State."

71. Expropriation is the taking or deprivation of the property of foreign investors by a host state.[82] Expropriation may occur even when the legal title remains with the owner, i.e. in cases involving 'indirect' expropriation,[83] which deprives the owner of the possibility of utilising the investment because of the adoption of certain measures by the host state.[84] In *Starett v Iran*, the tribunal found that an expropriation can occur to both tangible and intangible property because of unreasonable interference with the owner's rights.[85] Interference amounts to expropriation when the governmental measures have a permanent character, or interfere substantially with the investor's property rights and conflict with the investor's legitimate expectations.[86]

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[82] McLachlan, 290-298.

[83] *Amoco v Iran*, Para. 220; *Feldman v Mexico,* Paras. 366-367; *S D Myers v Canada*, Paras. 281,283*; TECMED v Mexico*, Para. 61; *Tippetts v Iran*, Para. 225; *Goets v Burundi*, Para. 119; Brunnee, Kindred, & Saunders, 693, Dolzer & Schreuer, 92; McLachlan, 290; Kunoy, 338; Newcombe & Paradell, 327.

[84] *CME v Czech Republic*, Para. 608; *Metalclad v Mexico*, Para. 103; Dolzer & Schreuer, 92.

[85] *Starett v Iran*, Paras. 51-52; *Mondev v US*, Para. 9.

[86] *LG&E v Argentine Republic Republic,* Para. 190; *Metalclad v Mexico,* Para. 103; Dolzer, 65-93.

72. In the present matter, BERGONIA issued compulsory licences for Patent No. AZ2005 which allowed six Bergonian companies to use the technology covered under the patent to produce certain health related products without MEDBERG's consent.[87] MEDBERG argues that this issuance amounts to an indirect expropriation of its investment because (1) the effect of BERGONIA's issuance of a compulsory licence is of a permanent character; (2) BERGONIA's measure substantially interferes with MEDBERG's intellectual property rights; and (3) BERGONIA's measure interferes with MEDBERG's legitimate expectations.

1. The effect of BERGONIA's issuance of a compulsory licence is of a permanent character

73. The length of time of the interference is a determining factor in assessing the character of a governmental measure.[88] The longer the duration of the interference, the more likely it will be viewed as an expropriatory measure.[89] Whether or not a measure of interference is seen as temporary or permanent will depend on the facts of the case. However, the relevant inquiry is the duration of the deprivation of rights or benefits, not the duration of the expropriatory acts themselves.[90]

74. Although there is no doctrine of binding precedent in international law, the decisions of previous tribunals on questions of principle are valuable and have been taken into account by subsequent tribunals.[91] Relevantly, in *Metalclad v Mexico,* the tribunal found that an act of interference which affected Metalclad's investment during three

[87] Uncontested Facts, Para. 8.

[88] Kunoy, 345; Weston, 170-173.

[89] *CME v Czech Republic,* Para. 609; *Goetz v Burundi,* Para 124*; Metalclad v Mexico,* Para. 107; *Middle East v Egypt,* Paras. 107-108.

[90] *Azurix v Argentine Republic Republic,* Para. 285.

[91] *Corn Products v Mexico,* Para. 77; *Metalclad v Mexico,* Para. 108.

years constituted an indirect expropriation.[92] Furthermore, in *Wena Hotels v Egypt*, the tribunal held that an act of interference, the effect of which lasted for more than a year, was sufficient to amount to permanent interference.[93]

75. In *Middle East v Egypt*, the tribunal decided that an act of a host state still amounts to an indirect expropriation even where, after the expropriatory measure ceases, the investor can be placed in a situation similar to where he was before the expropriation occurred. In that case, the Egyptian government temporarily withdrew an import licence from a Greek investor. Despite the possibility of regaining the import licence at a later stage, the tribunal found that an indirect expropriation had occurred because there was no good reason to continue the investment following the governmental interference.[94]

76. In the present case, BERGONIA has issued a compulsory licence with regard to Patent No. AZ2005 for a period of 48 months.[95] Additionally, Bergonian law allows the extension of the compulsory license.[96] Under the compulsory licence, the technology covered by the patent has already been exploited; significant amounts of products have been manufactured[97] and, as a result, the novelty of the patented technology no longer exists. Therefore, MEDBERG contends that the effect of BERGONIA's issuance of the compulsory licence is of a permanent character.

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[92] *Metalclad v Mexico*, Para. 107.

[93] *Wena Hotels v Egypt*, Para. 99.

[94] *Middle East v Egypt*, Para. 169.

[95] Response to Request No. 24.

[96] Response to Request No. 66.

[97] Response to Request No. 19.

2. BERGONIA's issuance of the compulsory licence substantially interferes with MEDBERG's intellectual property rights

77. Indirect expropriation occurs when control or the economic value of any property has been rendered "essentially useless."[98] A 'taking' amounting to an expropriation occurs if the interference affects, in significant part, the economic benefits derived from the investment, its use, and the investor's control of the investment.[99] BERGONIA substantially interferes with MEDBERG's investment because BERGONIA's granting of the compulsory licence (a) affects MEDBERG's property; and (b) constitutes substantial interference with the use and benefit of the investment.

a. BERGONIA's issuance of the compulsory licence affects MEDBERG's property

78. This dispute centres on MEDBERG's intellectual property rights under Bergonian Patent No. AZ2005. The patent has been validly granted to MEDBERG in accordance with the laws of Bergonia.[100] It is uncontested on the facts that the patent in question is MEDBERG's property.[101] In the present matter, BERGONIA's issuance of the compulsory licence restricts the use and benefit that MEDBERG derives from the exploitation of its patent to a level that is sufficient to amount to an expropriation.

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[98] *CME v Czech Republic*, Para. 604; *Feldman v Mexico*, Para. 100; *Foremost Tehran v Iran*, Page 280-282; *Metalclad v Mexico*, Para. 103; *Starett v Iran*, Para. 51; *Tippetts v Iran*, Para. 225.

[99] *CME v Czech Republic*, Para. 604; *Metalclad v Mexico*, Para. 103; *Starrett v Iran* Para. 51; *Tippetts v Iran*, 225; Dolzer & Schreuer, 92; Oppenheim, 917; Brownlie, 512-520.

[100] Uncontested Facts, Para. 5.

[101] Uncontested Facts, Para. 5.

b. BERGONIA's issuance of the compulsory licence constitutes substantial interference with the use and benefit of the investment

79. Interference with use and benefit alone is sufficient to establish the existence of expropriation.[102] Therefore, expropriation may take place even when the investor retains control of its investment.[103] In *Middle East v Egypt*, *Waste Management v Mexico* and *EnCana v Ecuador*, the investors were able to establish that expropriation had taken place despite the fact that they retained control over their investments.[104] In *Revere Copper v OPIC*, a mining lease was found to be expropriated because the investor's use and operation of its property was no longer effective, despite the investor maintaining control of its assets.[105]

80. In *Eureko B.V. v Poland*, the investor had acquired a minority share in a privatised insurance company. The investor had the right to acquire further shares to gain majority control of the company. The state withdrew the right to acquire additional shares. The tribunal found that the right to acquire further shares constituted 'assets', which were separately capable of expropriation.[106] It follows that, even where control over the investment remains unaffected, the taking of specific rights that are related to the investment may amount to an expropriation.[107]

81. Economic considerations are relevant in determining whether there has been indirect

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[102] Dolzer & Schreuer, 108.

[103] Dolzer & Schreuer, 108.

[104] *EnCana v Ecuador*, Paras. 172-183; *Middle East v Egypt*, Para. 107; *Waste Management v Mexico*, Paras. 141, 147.

[105] *Revere Copper v OPIC*, Paras. 291-292.

[106] *Eureko B.V. v Poland*, Paras. 239-241.

[107] Dolzer & Schreuer, 108.

expropriation.[108] Indirect expropriation exists if the measure constitutes a deprivation of the use and enjoyment of the rights related to the investment, such as income or benefits. [109] In *TECMED v Mexico*, the tribunal explained that an expropriation takes place where the act radically deprives the investor of the economic use and enjoyment of the investment.[110]

82. Similarly, in *Consortium RFCC v Morocco*, the tribunal stated that an indirect expropriation exists if the measures:

> "have the substantial effects of a certain intensity that reduce and/or eliminate the benefits legitimately expected from the exploitation of rights subject to the said measure to such an extent that they render the holding of these rights useless."[111]

83. Likewise, in *CME v Czech Republic* the tribunal found that the respondent had conducted an expropriation through its actions and omissions which caused the destruction of the investor's operations, leaving the investor as a company with assets but without a business. In that case, the commercial value of the investment was destroyed.[112]

84. Loss of benefit in a patent investment can be seen in the case of *Pharmon v Hoechst*, where the court specifically stated that:

> "Where … the competent authorities … grant a third party a compulsory license which allows him to carry out manufacturing and marketing operations which the patentee would normally have the right to prevent, the patentee cannot be deemed to have consented to the operation of that

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[108] Dolzer & Schreuer, 101.

[109] *TECMED v Mexico*, Para. 115; Jackson & Sanger, 123.

[110] *TECMED v Mexico*, Para. 115.

[111] *Consortium v Morocco*, Para. 69; Dolzer & Schreuer, 102.

[112] *CME v Czech Republic*, Para. 604.

> third party. Such a measure deprives the patent proprietor of his right to determine freely the conditions under which he markets his products."[113]

85. MEDBERG, as the owner of Patent No. AZ2005, enjoyed the exclusive right to prevent third parties, not having the owner's consent, from producing, using, marketing, or selling that product. Additionally, MEDBERG had the right to conclude private licencing contracts. In fact, MEDBERG exclusively derived the use and benefit for the patent through licencing fees from licencing agreements concluded with third parties.[114] Under the compulsory licence, third parties can use the technology protected by the patent without an agreement with MEDBERG. Since the issuance of the compulsory licence, BERGONIA has deprived MEDBERG of the commercial value of its investment. Therefore, even if MEDBERG still has control of the patent, BERGONIA has expropriated MEDBERG's investment.

3. BERGONIA's issuance of the compulsory licence interferes with MEDBERG's legitimate expectations

86. The legitimate expectations of an investor are a core factor in the assessment of whether the host state has expropriated the investment.[115] The doctrine of legitimate expectations has its roots in domestic public law principles and has developed into a crucial element in the context of foreign direct investment.[116]

87. The legitimate expectations of an investor are assessed from the investor's point of view at the time when the investment was made.[117] The relevant factors in making this

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[113] *Pharmon v Hoechst*, Para. 25.

[114] Uncontested Facts, Para. 6; Response to Request No. 32.

[115] Fietta, 375; Schill, 2, 11.

[116] *Saluka v Czech Republic*, Para. 304; *Waste Management v Mexico*, Para. 98.

[117] *TECMED v Mexico*, Para. 117.

determination are the activities carried out, the corporate purpose of the investment, and the terms and conditions that were initially applicable to the investment.[118] MEDBERG had a legitimate expectation that it would generate a long term profit from its intellectual property rights, free from expropriation or nationalisation.

88. MEDBERG was established in Bergonia on 30 January 2004 for the purpose of exploiting the rights granted under Patent No. AZ2005. The ongoing nature of MEDBERG's activities demonstrates a legitimate expectation of generating a profit and return through licencing agreements with third parties within Bergonia. Licencing agreements are typically conferred for a long period of time. The fact that MEDBERG intended to derive its revenue solely through licencing agreements demonstrates that its corporate purpose was to derive profits from its investment over a substantial period.[119]

89. Article 4 *Conveniencia Treaty* evidences the terms and conditions applicable at the commencement of the investment. Article 4 *Conveniencia Treaty* states that BERGONIA would not:

> "expropriate, nationalise or subject the investors of the other Contracting State to any other measure having the effect equivalent to expropriation or nationalisation."

Representations made by a host state create a legitimate expectation that investments will not be expropriated.[120] Therefore, MEDBERG had a legitimate expectation that its assets would neither be expropriated nor nationalised.

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[118] *TECMED v Mexico*, Para. 117; Paulsson & Douglas, 148-152.

[119] Uncontested Facts, Para. 6, Response to Request No. 32.

[120] *Metalclad v Mexico*, Para. 107.

C. BERGONIA'S INTERFERENCE WITH MEDBERG'S INVESTMENT WAS NOT LEGALLY JUSTIFIED UNDER THE EXCEPTION CONTAINED IN ARTICLE 4(2) *CONVENIENCIA TREATY*

90. Under Article 4(2) *Conveniencia Treaty*, an expropriation is permissible if it is done:

> "in accordance with the applicable laws of the latter Contracting State for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation."

91. International law requires that the host State satisfies all limbs to justify the taking of a foreign investor's property.[121] The tribunal in *Waguih v Egypt* stated that "the failure to meet one of the above standards is a failure overall."[122] Therefore, BERGONIA's interference will be justified only if all limbs of Article 4(2) *Conveniencia Treaty* are satisfied.

92. BERGONIA's interference with MEDBERG's investment was illegal because it was (1) not for a public benefit; (2) discriminatory, and (3) not followed by adequate and effective compensation.

1. BERGONIA's interference was not for a public benefit

93. BERGONIA's issuance of the compulsory licence fails to meet the requirement of 'public benefit' to be justified as a lawful expropriation. In *LG&E v Argentine Republic*, the tribunal held that, in arguing that an expropriatory measure is performed for public benefit, a state must be able to prove the existence of serious public disorders.[123] In that case, the gravity was proven through the high unemployment rate, a nearly collapsing health care system as prices of pharmaceuticals became

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[121] *Amoco v Iran*, Paras. 113, 115; *LETCO v Liberia* (1986), Para. 664; World Bank Guidelines on Expropriation; Article 3, *OECD Draft Convention on the Protection Foreign Property*.

[122] *Waguih v Egypt*, Para. 433.

[123] *LG&E v Argentine Republic Republic*, Para 28.

unaffordable, and a declaration of nationwide health emergency.

94. Obesity has been a long-standing issue in Bergonia, caused by the genetic make-up and the traditional diet of the population.[124] However, MEDBERG argues that obesity does not constitute a nationwide health emergency. It is an ordinary health problem that can be resolved by the adoption of appropriate educational measures and changes in diet.[125] Moreover, the tribunal in *EnCana v Ecuador* held that a governmental act which had the ultimate objective or effect of increasing the revenues of a limited number of entities will not satisfy the requirement of 'public benefit'.[126] Similarly, in the present matter, the issuance of the compulsory licence has the effect of increasing the revenues of the six Bergonian companies, which use the licence for commercial purposes.[127]

2. BERGONIA's interference was discriminatory

95. Under international law, discrimination is defined as treating differently persons in 'relatively' similar situations without an objective and reasonable justification.[128] In *SD Myers v Canada,* the tribunal found that the failure to accord 'national treatment' amounted to the imposition of discriminatory measures on non-nationals.[129] Similarly, in *Saluka v Czech Republic,*[130] the tribunal held that the government's refusal to deal in

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[124] Response to Request No. 40.

[125] World Health Organization*, Obesity and Overweight*.

[126] *EnCana v Ecuador,* Para. 52.

[127] Response to Request No. 34.

[128] *Fredin v Sweden*, Para. 60; *Goetz v Burundi*, Para. 121; *CMS v Argentine Republic,* Para. 293; *CME v Czech Republic,* Para. 612.

[129] *S D Myers v Government of Canada,* Para. 264.

[130] *Saluka v Czech Republic,* Paras. 408-416.

a constructive manner with the foreign investor, and instead accorded preferential treatment to the local company constituted discrimination.

96. BERGONIA's issuance of the compulsory licence of MEDBERG's Patent No. AZ2005 is a discriminatory measure because it results in differential treatment between Bergonian nationals and MEDBERG. There are various companies in Bergonia operating in the same business sector as MEDBERG.[131] MEDBERG's business sector involves the exploitation of a patent for the treatment of obesity. However, it is an uncontested fact that the Bergonian IP Office has not issued any compulsory licences with regard to any other patented technology similar to Patent No. AZ2005.[132] As such, BERGONIA has accorded preferential treatment to the Bergonian companies.

3. MEDBERG has not received prompt, adequate, and effective compensation

97. When an expropriation occurs, Article 4(2) *Conveniencia Treaty* provides that:

> "Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation has become publicly known."

This provision is a restatement of the principle of international law, *restitution in integrum*,[133] which obliges the host State to pay compensation that is equivalent to the value of the expropriated property measured at the 'fair market value' and includes future income.[134] The owner is thereby placed in the same position monetarily as he

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[131] Response to Request No. 84.

[132] Response to Request Nos. 63, 84.

[133] *Leesona v US*, Paras. 968-969.

[134] *INA v Iran*, p. 10; *Payne v. Iran*, p. 17-18; *SEDCO v National Iranian Oil Company*, p. 11-14; *US v 564.54 Acres of Land*, Para. 510-17; Vaughan, Para. 105; Reed, Paulsson, & Blackaby, 52.

would have occupied if his property had not been taken.[135] Expropriation, even for public benefit, must be followed by adequate compensation as stated by the tribunal in the case of *Santa Elena v Costa Rica*:

> "Expropriatory … measures – no matter how laudable and beneficial to society as a whole …: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."[136]

98. The compensation that has been offered to MEDBERG is inadequate and ineffective because it is lower than 'fair market value'. In the present matter, 'fair market value' can be assessed with reference to the value of the income that MEDBERG received under the licence agreement with BioLife. It is an uncontested fact that the royalty rate collected by the IP Office is lower than the rate that had been in effect under the terms of the licence agreement between MEDBERG and BioLife.[137]

D. BERGONIA'S ISSUANCE OF THE COMPULSORY LICENCE IS NOT LEGALLY JUSTIFED AS IT IS NOT IN COMPLIANCE WITH ARTICLE 31 *TRIPS AGREEMENT*

99. It is stated in the Minutes of the First Session of the Arbitral Tribunal that BERGONIA argues that, if the compulsory licence amounts to an expropriation, Article III.4 *Tertia Treaty* provides that the licence will not be unlawful because it complies with the *TRIPS Agreement*. MEDBERG (1) agrees with BERGONIA's contention that Article III.4 *Tertia Treaty* is relevant to a determination of whether BERGONIA's issuance of the compulsory licence amounts to an unjustified expropriation; and (2) argues that BERGONIA's issuance of the compulsory licence is not in compliance with Article 31 *TRIPS Agreement*.

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[135] *US v Reynolds*, Para. 16.

[136] *Santa Elena v Costa Rica*, Para. 72; OECD Expropriation, 2.

[137] Response to Request Nos. 25, 88.

1. Article III.4 *Tertia Treaty* is relevant to determine whether BERGONIA's issuance of the compulsory licence amounts to an unjustified expropriation

100. MEDBERG contends that Article III(4) *Tertia Treaty*, and in turn, the *TRIPS Agreement*, are relevant to a determination of whether BERGONIA's issuance of the compulsory licence amounts to expropriation.

101. As seen in paragraph 20 of this Memorial, Article 3(1) *Conveniencia Treaty* obliges BERGONIA to treat MEDBERG's investment no less favourably than the way in which it treats investments owned or controlled by investors of any third state. This MFN Clause allows MEDBERG to invoke the provisions of other treaties to which BERGONIA is a Contracting State, if such provisions are more favourable to MEDBERG. MEDBERG invokes Article III(4) *Tertia Treaty* because it affords investments greater protection than that which is provided under the *Conveniencia Treaty*. Under Article III(4) *Tertia Treaty*, compulsory licences relating to intellectual property rights are valid, provided they are consistent with the *TRIPS Agreement*.[138] In particular, Article 31 *TRIPS Agreement* affords MEDBERG greater protection than under the *Conveniencia Treaty*. This is because it holds BERGONIA to a higher standard if BERGONIA wants to justify its expropriatory measures.

2. BERGONIA's issuance of the compulsory licence is not in compliance with Article 31 *TRIPS Agreement*

102. The present dispute arises out of BERGONIA's issuance of a compulsory licence for Patent No. AZ2005.[139] The *TRIPS Agreement* specifically deals with the rights of a patent holder in Article 28.1(b), which states that a patent shall confer on its owner exclusive rights:

> "where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these

[138] Article III(4), *Tertia Treaty*.

[139] Uncontested Fact, Para. 8.

purposes at least the product obtained directly by that process."

Article 28.2 *TRIPS Agreement* further states that:

> "Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts."

However, the *TRIPS Agreement* also provides that these rights are not absolute. Indeed, under Article 31 *TRIPS Agreement*, a state may authorise the use of a patent without the patent holder's authorisation, provided that the authorisation is in accordance with the requirements set out in that Article.

103. MEDBERG argues that BERGONIA's issuance of the compulsory licence is *not* in accordance with Article 31 *TRIPS Agreement* because (a) the proposed users of the patent failed to make efforts to negotiate with MEDBERG in order to obtain authorisation; (b) the pre-requisite of negotiation was not waived by a situation of 'national emergency'; (c) the products manufactured with the use of the patented technology are not predominantly for the supply of Bergonia's domestic market; and (d) the decision to issue the compulsory licence for Bergonian Patent No. AZ2005 has not been subject to judicial review.

a. The proposed users of the patent failed to make efforts to negotiate with MEDBERG in order to obtain authorisation

104. Under Article 31(b) *TRIPS Agreement*, a Member State may grant a compulsory licence if the proposed user has made efforts to obtain authorisation from the patent holder on reasonable commercial terms and conditions, and such efforts have not been successful within a reasonable period of time

105. In the present case, there is insufficient evidence to suggest that MEDBERG refused to renegotiate the licence agreement with BioLife Co.[140] As of 1 January 2005, the five other Bergonian entities that invoked the compulsory licence have made no effort to

[140] Response to Request No. 39.

negotiate with MEDBERG at all, let alone on reasonable commercial terms.[141] As a result, without any negotiation between each of these entities and MEDBERG, BERGONIA's issuance of the compulsory licence is not compliant with Article 31(b) *TRIPS Agreement*.

b. The pre-requisite of negotiation was not waived by a situation of 'national emergency'

106. The second arm of Article 31(b) *TRIPS Agreement* provides that the proposed users do not have to negotiate with the patent holder in circumstance of 'national emergency', other circumstances of extreme urgency, or in the case of public non-commercial use.[142]

107. 'National emergency' is defined at international law as being a "situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community."[143] Further, 'national emergency' under the *TRIPS Agreement* may include public health crises, including diseases with severe consequences such as HIV/AIDS, tuberculosis, malaria and other epidemics.[144] In invoking situations of national emergency, a state must be able to prove that these situations are long-lasting.[145] In *LG&E v Argentina*, the tribunal found that there was a situation of national emergency due to a combination of a high unemployment rate, a nearly collapsing health care system, and a declaration by the government of a nationwide health

[141] Response to Request No. 28.

[142] Article 31(b), *TRIPS Agreement*.

[143] *Lawless v Ireland*, Para. 28.

[144] Article 5(c), *Doha Declaration on Text of the Declaration on the TRIPS Agreement and Public Health*.

[145] Correa, 316.

emergency.[146]

108. BERGONIA has argued that its issuance of the compulsory license is justified by important domestic medical needs, especially the treatment of obesity.[147] In contrast, MEDBERG contends that obesity does not constitute a national emergency or a real threat to Bergonia because obesity is not an acute public health problem which can only be cured with the use of products based on Patent No. AZ 2005. The World Health Organization has confirmed that obesity can be eradicated by achieving energy balance, limiting energy intake from saturated fats to unsaturated fats, increasing consumption of fruit and vegetables, limiting the intake of sugars; and increasing physical activity.[148]

109. Further, MEDBERG contends that the issuance of the compulsory licence is not justified under the 'public non-commercial use' exception. This is because the six companies which took advantage of the compulsory licence are using the technology for commercial purposes.[149]

c. Products manufactured with the use of the patented technology are not predominantly for the supply of BERGONIA's domestic market

110. Article 31(f) *TRIPS Agreement* provides that products manufactured under a compulsory licence must be predominantly destined for domestic markets. Since the issuance of the compulsory licence for Patent No. AZ2005, three of the six companies which are using this licence have exported significant portions of the products to other countries.[150]

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[146] *LG&E v Argentine Republic Republic*, Para 28.

[147] Uncontested Facts Para. 7; Response to Request No. 40.

[148] World Health Organization, Obesity and Overweight.

[149] Response to Request No. 34.

[150] Uncontested Facts, Para. 8; Response to Request No. 61.

111. The only exception to Article 31(f) *TRIPS Agreement* is found in Article 31(bis). The effect of Article 31(bis) *TRIPS Agreement* is that pharmaceutical products manufactured under a compulsory licence can only be exported to Least Developed Countries which are WTO members and to other WTO members who notified the Council for *TRIPS* of their intention to use the system as an importer prior to the import itself.[151] In the present dispute, the six companies have exported products manufactured under the compulsory licence to at least one *developing* country,[152] and all of the countries to which the products have been exported have the capacity to manufacture pharmaceutical products themselves.[153] While there is no universal definition of 'Developing Country,' it is clear that this is a category which is different from the category of '*Least* Developed Countries'.[154] Therefore, the products manufactured under the compulsory licence were not predominantly for domestic markets, and the exportation of such products is not justified under Article 31(bis) *TRIPS Agreement*.

d. The decision to issue a compulsory licence for Bergonian Patent No. AZ2005 has not been subject to judicial review

112. Article 31(i) *TRIPS Agreement* states that:

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

113. MEDBERG has repeatedly communicated its objections to the Bergonian IP Office

[151] WTO Decision, 784.

[152] Response to Request No. 62.

[153] Response to Request No. 70.

[154] WTO Least Developed Countries.

within the statutory time limits of such proceedings.[155] After the compulsory licence had been issued, MEDBERG appealed the decision to the Patent Review Board.

114. MEDBERG argues that the process of judicial review of compulsory licences in Bergonia is not compliant with Article 31(i) *TRIPS Agreement*. MEDBERG raised its objections before the Bergonia IP Office's Patent Review Board, on appeal from the IP Office's administrative decisions to issue the compulsory licence.[156] The Patent Review Board, the body created to settle IP disputes, is created within and paid by the Bergonian IP Office. The Patent Review Board is neither a higher authority nor distinct from the Bergonian IP Office.[157]

[155] Response to Request No. 46.

[156] Response to Request No. 37.

[157] Response to Request No. 29.

Part Four

BERGONIA'S ISSUANCE OF THE COMPULSORY LICENCE VIOLATES INTERNATIONAL LAW AND RELEVANT TREATY STANDARDS

115. Article 2(2) *Conveniencia Treaty* obliges BERGONIA to "accord investments by investors of the other Contracting State fair and equitable treatment." Additionally, Article 2(3) *Conveniencia Treaty* obliges BERGONIA to not:

> "in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State."

116. MEDBERG argues that BERGONIA's issuance of the compulsory licence amounts to (A) a failure to provide 'fair and equitable' treatment in breach of Article 2(2) *Conveniencia Treaty*; and (B) discriminatory interference with the use and enjoyment of MEDBERG's investment in breach of Article 2(3) *Conveniencia Treaty*.

A. BERGONIA'S ISSUANCE OF THE COMPULSORY LICENCE AMOUNTS TO A FAILURE TO PROVIDE 'FAIR AND EQUITABLE' TREATMENT IN BREACH OF ARTICLE 2(2) *CONVENIENCIA TREATY*

117. Granting foreign investors fair and equitable treatment is a well-recognised principle of private investment under international law.[158] Such treatment is regarded as a part of the minimum standard required by customary international law.[159] Tribunals, in elucidating the 'fair and equitable' standard, usually consider instances of arbitrariness and discrimination, failure to protect legitimate expectations and failure to provide a stable,

[158] Schreuer (2005), 357; Dolzer & Stevens, 374; OECD Fair and Equitable Standard, 2.

[159] *ADF v USA*, Para. 179; *AMT v Zaire*, Para. 6.10; Notes and Comments to Article 1 of the *OECD Draft Convention on the Protection of Foreign Property*, 9.

consistent, and predictable investment environment. No one factor is decisive and any of these factors can give rise to a claim for a breach of fair and equitable treatment.[160]

118. MEDBERG argues that BERGONIA failed to provide 'fair and equitable treatment' because: (1) it arbitrarily interfered with MEDBERG's investment; (2) it failed to protect MEDBERG's legitimate expectations; and (3) it failed to maintain a stable, predictable and consistent environment for MEDBERG's investment.

1. BERGONIA failed to provide 'fair and equitable treatment' because it arbitrarily interfered with MEDBERG's investment

119. When determining whether an investor's right to 'fair and equitable treatment' has been violated, arbitral tribunals consider arbitrary treatment.[161] The tribunal in *Waste Management v Mexico* stated that fair and equitable treatment is breached if:

> "the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[162]

120. This approach has been followed by subsequent tribunals.[163] The concepts of arbitrary treatment, and fair and equitable treatment, are interrelated because arbitrariness is closely connected with the idea of the rule of law, which is the foundation of the fair

[160] Schill, 51; Reed, Paulsson, & Blackaby, 48; Brower, 56.

[161] Weiler, 209.

[162] *Waste Management v Mexico*, Para. 98.

[163] *GAMI Investments v Mexico*, Para. 89; *Methanex v USA*, Para. 12; *Siemens v Argentina*, Para. 297; *Azurix v Argentine Republic Republic*, Para. 370; see Marshall, 8.

and equitable treatment standard.[164] The requirement to abide by the rule of law is seen as an obligation to afford due process of law to the foreign investor.[165] The obligation to afford due process is breached by the improper administration of civil and criminal justice affecting an alien, including denial of access to courts, inadequate procedures, undue delay and unjust decisions.[166]

121. In the present matter, BERGONIA has failed to afford due process of law to MEDBERG. This is because, after the issuance of the compulsory license for Patent No. AZ2005, MEDBERG filed an appeal to the Patent Review Board of Bergonia..[167] However, BERGONIA has not conducted any independent review of the IP Office's decision to issue the compulsory licence.[168]

2. BERGONIA failed to provide 'fair and equitable treatment' because it did not protect MEDBERG's legitimate expectations

122. A breach of legitimate expectations can also amount to a violation of fair and equitable treatment. In *TECMED v Mexico*, the tribunal established that actions that are contrary to an investor's expectations can be a violation of fair and equitable treatment.[169] The tribunal held that the notion of fair and equitable treatment allows a foreign investor to expect the host state to act consistently, without arbitrarily revoking any pre-existing decisions or permits that were relied upon by the investor to assume its commitments

[164] Schill, 41; OECD Fair and Equitable Standard, 28.

[165] McLachlan, Para. 7.86.

[166] *Azinian v Mexico*, Paras. 102-103; *Loewen v USA*, Para 129; Adede, 91; Brownlie, 506.

[167] Response to Request No. 29.

[168] Uncontested Facts, Para. 9.

[169] *TECMED v Mexico*, Para. 154.

and to plan its commercial and business activities.[170]

123. MEDBERG argues that the issuance of the compulsory licence is inconsistent with the legitimate expectation of the holder of exclusive patent rights. On 15 March 2005, MEDBERG was granted Patent No. AZ2005 with regard to technology that could be used to alleviate obesity.[171] With the knowledge of the function of the technology, the Bergonian IP Office granted MEDBERG an exclusive patent without any conditions.[172] MEDBERG has relied on the granted patent to run its business activities and investment in Bergonia. In fact, the protection of exclusivity over its technology by the patent has been the main reason for MEDBERG to conduct its business activity in Bergonia, as seen in its exclusive licensing agreement with BioLife.[173]

3. BERGONIA failed to provide 'fair and equitable treatment' because it did not maintain a stable, predictable and consistent environment for MEDBERG's investment

124. The *Metalclad v Mexico* tribunal identified the requirement to provide a predictable, stable legal and business framework as an element of fair and equitable treatment.[174] The tribunal ultimately found that a violation of Article 1105(1), NAFTA's provision on fair and equitable treatment, was based upon Mexico's failure to "ensure a …

[170] *AMT v Zaire*, Para. 6.13; *Wena v Egypt*, Para. 84; *TECMED v Mexico*, Para. 154; *Metalclad v Mexico*, Para. 89; Crawford & Lee, 192; Bishop, Crawford & Reisman, 1016.

[171] Uncontested Facts, Para. 5.

[172] Uncontested Facts, Para. 5.

[173] Uncontested Facts, Para. 6; Response to Request No. 32.

[174] *Metalclad v Mexico*, Para. 99; *Occidental v Equador*, Paras. 183, 186; *CMS v Argentina*, Paras. 275-278; Reed, Paulsson, & Blackaby, 28; Ortino, Liberti, Sheppard, & Warner, 133.

predictable framework for Metalclad's business planning and investment."[175]

125. BERGONIA has failed to provide a predictable framework by changing the investment environment. Indeed, although obesity is a long standing problem in Bergonia,[176] the uncontested facts do not disclose the existence of any compulsory licences with regard to obesity treatments at the time MEDBERG invested in Bergonia in 2005. Hence, the investment environment changed significantly when the compulsory licence was issued for Patent No. AZ2005.

B. BERGONIA'S ISSUANCE OF THE COMPULSORY LICENCE AMOUNTS TO DISCRIMINATORY INTERFERENCE WITH THE USE AND ENJOYMENT OF MEDBERG'S INVESTMENT IN BREACH OF ARTICLE 2(3) *CONVENIENCIA TREATY*

126. Article 2(3) *Conveniencia Treaty* imposes an obligation on BERGONIA not:

> "to impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory."

Discrimination under international law is defined as "treating differently, without an objective and reasonable justification, persons in 'relatively' similar situations."[177] In this case, BERGONIA's issuance of the compulsory licence of MEDBERG's Patent No. AZ2005 is a discriminatory measure because it results in differential treatment between Bergonian nationals and MEDBERG. As such, BERGONIA has accorded preferential treatment to the Bergonian companies.

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[175] *Metalclad v Mexico*, Para. 99; *CME v Czech Republic*, Para. 611.

[176] Response to Request No. 40.

[177] *Fredin v Sweden*, Para. 60; *Goetz v Burundi*, Para. 121; *CMS v Argentine Republic*, Para. 293; *CME v Czech Republic*, Para. 612.

CONCLUSION ON MERITS OF THE DISPUTE

127. BERGONIA has expropriated MEDBERG's investment in violation of international law. The effect of the issuance of the compulsory licence was of a permanent character; it substantially interfered with the use and benefit of MEDBERG's intellectual property rights and violated MEDBERG's legitimate expectations to derive a long term benefit from its investment. Furthermore, BERGONIA's expropriation is not justified under Article 4(2) *Conveniencia Treaty*. Additionally, BERGONIA failed to provide MEDBERG with 'fair and equitable treatment' and the issuance of the compulsory licence constituted a discriminatory measure.