

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

**MedBerg Co.**  
**v.**  
**The Government of the Republic of Bergonia**

ICSID Case No. ARB/X/X

MEMORANDUM FOR CLAIMANT

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## DEFINITIONS AND ABBREVIATIONS

<b>Abbreviation</b>	<b>Full denomination</b>
#	Number
¶(¶)	Paragraph(s)
<i>Annex 1</i>	Annex of the case – Bergonia-Conveniencia BIT
<i>Annex 2</i>	Annex of the case – Bergonia-Tertia BIT
<i>Annex 3</i>	Annex of the case – Uncontested facts
<i>Art.(s.)</i>	Article(s)
<i>BIT( 's)</i>	Bilateral Investment Treaty(s)
<i>Clarifications</i>	First and second round of clarifications
<i>FET</i>	Fair and Equitable Treatment
<i>i.e</i>	<i>Id est</i> (that is)
<i>ICJ</i>	International Court of Justice
<i>ICSID</i>	International Center for Settlement of Investment Disputes
<i>ILC</i>	International Law Commission
<i>IP Office</i>	Bergonian Intellectual Property Office
<i>MFN</i>	Most-Favoured Nation
<i>MFNC</i>	Most-Favoured Nation Clause
<i>Minutes</i>	Minutes of the first session of the Tribunal
<i>NAFTA</i>	North America Free Trade Agreement
<i>UNCITRAL</i>	United Nations Commission on International Trade Law
<i>VCLT</i>	Vienna Convention on the Law of Treaties
<i>WHO</i>	World Health Organization
<i>WTO</i>	World Trade Organization

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## STATEMENT OF FACTS

1. On May 31<sup>st</sup>, 2003, the State of Bergonia entered into a BIT with the State of Conveniencia,<sup>1</sup> concerning the reciprocal encouragement and protection of investments. Both Bergonia and Conveniencia are parties to the ICSID Convention.
2. Claimant, MedBerg Co., is the Bergonian local subsidiary of MedX Holdings Ltd.,<sup>2</sup> a national of Conveniencia. Claimant was incorporated in January, 2004, and is wholly owned and controlled by its Conveniencian shareholder.
3. On March 15<sup>th</sup>, 2005, Claimant was granted Bergonian Patent AZ2005 by the IP Office. This patent covers a breakthrough treatment and related products for the treatment of obesity<sup>3</sup> through a lipid absorption retardant combined with glycogen/lipid metabolism optimization.<sup>4</sup>
4. On March 31<sup>st</sup>, 2005, MedBerg Co. licensed some of its rights under that patent to BioLife Co., a Bergonian company, under agreed terms of contract. In March 2007, after two years in force, MedBerg Co., driven in large part by its finding of parallel exports of the patented treatment and products,<sup>5</sup> decided to terminate the license agreement, which it did in accordance with its notice and termination provisions.
5. On November 1<sup>st</sup>, 2007, the State of Bergonia, through the IP Office, issued a compulsory license with respect to Patent AZ2005,<sup>6</sup> alleging that the technology covered by the latter was required to address certain domestic medical needs.<sup>7</sup> This was done in spite of the patented product being available in the territory of Bergonia through imports.<sup>8</sup>
6. In December 2007, Claimant communicated its objection to the issuance of such compulsory license to the IP Office, with copies to the Foreign, Economics and Justice Ministries, seeking to settle the difference amicably, in the terms of Art. 10 (2) of the

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<sup>1</sup> *Annex 1*

<sup>2</sup> *Annex 3, ¶2.*

<sup>3</sup> *Clarifications #40.*

<sup>4</sup> *Clarifications #73.*

<sup>5</sup> *Clarifications #39, #113.*

<sup>6</sup> *Annex 3, ¶8.*

<sup>7</sup> *Annex 3, ¶7.*

<sup>8</sup> *Clarifications #114.*

Bergonia Conveniencia. Only the Justice Ministry replied, stating that the compulsory license had been issued in conformity with Bergonia's international obligations.<sup>9</sup>

7. As the compulsory license breached Claimant's treaty rights under the Bergonia-Conveniencia BIT, Claimant filed a request for arbitration before the ICSID Secretary General on November 1<sup>st</sup>, 2008.<sup>10</sup>
8. As of January 2009, BioLife Co. and five other Bergonian companies have invoked the compulsory license issued by Respondent.<sup>11</sup> Three of them have begun to export the products manufactured with the technology covered by the patent to third countries. Prior to the issuance of the compulsory license, none of these companies had attempted to negotiate a voluntary license with Claimant, regarding the patented products and methods. To date, they have been profiting from the trading of said products. Respondent has only offered Claimant certain royalties at a rate unacceptable to the latter, since it was lower than that agreed with BioLife Co.<sup>12</sup> Claimant has not consented to the licensing or the low royalties proposed by Respondent.

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<sup>9</sup> *Clarifications* #111.

<sup>10</sup> *Annex 3*, ¶10.

<sup>11</sup> *Annex 3*, ¶8.

<sup>12</sup> *Clarifications* #25,88.

## SUMMARY ARGUMENT

9. **JURISDICTION**. This dispute meets the requirements of both Art. 25 of the ICSID Convention and of the Bergonia-Conveniencia BIT. On the one hand, Claimant has complied with the three-month waiting period provided for in the BIT for amicable settlement, and, in any case, being a procedural issue, failure to succeed in negotiating a settlement does not bar jurisdiction. On the other hand, patents are protected investments under the Bergonia-Conveniencia BIT and the ICSID Convention. Respondent's objections to jurisdiction based on nationality are meritless. Firstly, the State of Bergonia has implicitly agreed to treat Claimant as a Conveniencia investor in the terms of Art. 25(2)(b) of the ICSID Convention. Secondly, even if an express agreement was required, MedBerg Co, being a protected investment under the Bergonia-Conveniencia BIT, would be entitled to invoke the more favourable express agreement clause of the Tertia-Bergonia BIT. Thirdly, Respondent has no right to invoke third-party provisions to deny the protection conferred to Claimant under the Bergonia-Conveniencia BIT. Ultimately, Claimant offers to bring MedX Holdings Ltd., the parent company, as a party to the present proceedings.
10. **MERITS OF THE CLAIM**. Respondent, through the acts and omissions of its IP Office, has breached several provisions of the Bergonia-Conveniencia BIT, resulting in the destruction of Claimant's investment. Firstly, Respondent has expropriated Claimant's property without compensation. Secondly, Respondent has failed to accord fair and equitable treatment to Claimant through its arbitrary, non-transparent and discriminatory conduct. Moreover, it has failed to provide Claimant with due process of law. Thirdly, Respondent has failed to provide Claimant's investment with full protection. Finally, Respondent cannot elude its obligations under the BIT by resorting to the TRIPS Agreement, since it chose to provide a broader scope of protection over intellectual property through the BIT.

## ARGUMENT

### PART ONE: JURISDICTION

#### **I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE**

11. The Tribunal has jurisdiction over this dispute. The requirements for ICSID jurisdiction are set forth in Art. 25 of the ICSID Convention, which provides as follows:

(1)The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2)“National of another Contracting State” means:

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

12. The requirements for ICSID jurisdiction may be summarized as follows: **(A)** the dispute in question must be of a legal nature; **(B)** the dispute must arise directly out of an investment; **(C)** one party must be a Contracting State to the ICSID Convention; **(D)** the opposing party must be a private party that is a national or company of another Contracting State; and **(E)** the parties must have consented to ICSID jurisdiction. Each requirement is met here.

13. Together with the ICSID requirements a claimant must also fulfil the requirements set forth in the relevant BIT, in this case the Bergonia-Conveniencia BIT.

#### **A. The present dispute is of a legal nature**

14. In order to qualify as a “legal dispute,” the dispute must concern:

The existence or scope of a legal right or obligation, or the extent of the reparation to be made for breach of a legal obligation . . . [W]hile conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not.<sup>13</sup>

15. The issues in dispute in this case involve whether Respondent violated its obligations under the applicable BIT, including whether the conduct of the State and its failure to protect the investments concerned are tantamount to a violation of the BIT and international law. Thus, this is, by all accounts, a legal dispute.

**B. This dispute arises directly out of MedBerg Co.'s investment in Bergonia**

16. The present claim satisfies the subject-matter requirement of the ICSID Convention, as:

- 1) Bergonia's acts have violated its obligations towards Claimant under the Bergonia-Conveniencia BIT, affecting, in particular, Patent AZ2005; and
- 2) Patent AZ2005 is a protected investment under the Bergonia-Conveniencia BIT and the ICSID Convention.

**1. Bergonia's acts have violated its obligations towards Claimant under the Bergonia-Conveniencia BIT, affecting in particular Patent AZ2005**

17. Even though the legal nature of this dispute has never been contested by Respondent, it should be remembered that the present case concerns Respondent's violations of legal rights conferred to Claimant,<sup>14</sup> particularly those contained in the Bergonia-Conveniencia BIT.

**2. Patent AZ2005 is a protected investment**

18. Many ICSID Tribunals have consistently asserted that, for purposes of ICSID Convention Art. 25(1), investments have to meet the requirements of both the BIT and the ICSID Convention. In the present case, Patent AZ2005 constitutes a protected investment: **(a)** under the Bergonia-Conveniencia BIT; and **(b)** under ICSID Convention Art. 25 (1).

**a. Under the Bergonia-Conveniencia BIT**

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<sup>13</sup> *Executive report.*

<sup>14</sup> *Amerasinghe I*, p.640.

19. In order to avoid jurisdictional barriers, the ICSID Convention does not offer a definition of the term “investment”.<sup>15</sup> Instead, it leaves the parties the freedom to characterize it as they agree under the relevant instruments. Therefore, the provisions set forth in a BIT regarding the definition of investment govern the jurisdiction of ICSID.<sup>16</sup>

20. In the present case, Art. 1(d) of the Bergonia-Conveniencia BIT defines “investments” as “intellectual property rights, in particular...patents...”<sup>17</sup>

21. According to the principles of treaty interpretation,<sup>18</sup> this provision leads to the conclusion that Respondent’s assertion that patents are not protected investments<sup>19</sup> is groundless.

22. On the other hand, if Respondent had pursued to exclude patents from the protective scope of the BIT, it should have negotiated an express provision to that effect.<sup>20</sup>

#### **b. Under Art. 25(1) of the ICSID Convention**

23. Commenting on the history of the ICSID Convention, A. Broches has stated that:

[D]uring the negotiations several definitions of investment were considered and rejected. It was felt in the end that a definition could be dispensed with –given the essential requirement of consent by the parties-.This indicates that the requirement that the dispute must have arisen out of an investment may be merged into the requirement of consent to jurisdiction.<sup>21</sup>

24. As cited, no definition of investment is provided by the ICSID Convention.<sup>22</sup> Although ICSID awards do not set a precedent, ICSID tribunals frequently consider that investment entails: a commitment, certain duration, and a participation in the risks of the

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<sup>15</sup> *ICSID Commentary*, p.121.

<sup>16</sup> *Fedax*, ¶31.

<sup>17</sup> *Bergonia-Conveniencia BIT*, Art. 1(d).

<sup>18</sup> *VCLT*, Art. 31.

<sup>19</sup> *Minutes*, p.5, ¶14.

<sup>20</sup> *Rompetrol*, ¶62.

<sup>21</sup> *Broches*, ¶268.

<sup>22</sup> *Salini v. Morocco*, ¶51.

transaction.<sup>23</sup> In reading the ICSID Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional element.<sup>24</sup>

25. It must be remembered that the absence of one element or another is not fatal, and that the elements themselves are often intertwined in any particular investment and need to be analyzed together.<sup>25</sup>

26. MedBerg Co., as its local subsidiary,<sup>26</sup> is the instrumentality through which MedX Holdings carries out,<sup>27</sup> *inter alia*, its patent as an investment in Bergonian territory. The contribution of the patent to the economic development<sup>28</sup> of Bergonia cannot seriously be questioned as the patenting of the breakthrough treatment represents a technological advance in health<sup>29</sup> for the Bergonian Government and its population, for which Claimant has provided, also, all necessary equipment and has funded salaries and local infrastructure for its operations. This accounts, also, for the commitment requirement regarding qualification as an investment, and is in line with the preamble to the Bergonia-Conveniencia BIT which states that:

The encouragement and contractual protection of such investments are apt to increase...the stimulation of business initiatives and transfer of technology between the two countries.<sup>30</sup>

27. As to the duration requirement, it has been stated that the minimal length of time required for a project to qualify as an investment is between two and five years.<sup>31</sup> In the instant

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<sup>23</sup> *Id.* ¶52.

<sup>24</sup> *Id.* ¶53.

<sup>25</sup> *Waibel*, p.6.

<sup>26</sup> *Annex 3*, ¶2.

<sup>27</sup> *Amco*, ¶64.

<sup>28</sup> *Salini v Morocco*, ¶52.

<sup>29</sup> *Clarifications #40*.

<sup>30</sup> *Bergonia-Conveniencia BIT, Preamble*.

<sup>31</sup> *Salini v Morocco*, ¶54.

case, MedBerg Co. was granted Patent AZ2005 on 15 March 2005,<sup>32</sup> and this requirement is thus also complied with.

28. Finally, regarding the risks incurred by MedBerg Co. these flow from the very nature of the investment at issue. Namely, risks consisting of the potential increase in the cost of labour in case of modification of the Bergonian law,<sup>33</sup> the fixing of prices of the products covered by Patent AZ2005 and, any other unforeseeable incident that could jeopardize MedBerg Co.'s key business strategies. In this respect, it does not matter that these risks were freely taken.<sup>34</sup>

29. For all these reasons, the subject-matter requirement of article 25(1) must be deemed complied with.

**C. Bergonia is a Contracting State Party and, just as Claimant, it has duly consented to ICSID jurisdiction**

30. It is an uncontested fact that Bergonia is a Contracting Party to the ICSID Convention.<sup>35</sup>

31. Moreover, as to the requirement of consent,<sup>36</sup> Claimant satisfies the “double review requirement”, since: (1) Respondent has rendered its irrevocable consent to ICSID arbitration in Art. 10(2)(b) of the Bergonia-Conveniencia BIT; and (2) Claimant has complied with the three-month waiting period set out in Art. 10(2) of the Bergonia-Conveniencia BIT.

**1. Respondent has rendered its irrevocable consent to ICSID arbitration in Art. 10(2)(b) of the Bergonia-Conveniencia BIT**

32. The ICSID Convention does not specify how consent is to be given: it merely indicates that it shall be “*in writing*”. It has been widely accepted by several ICSID Tribunals that

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<sup>32</sup> Annex 3, ¶5.

<sup>33</sup> *Salini v Morocco*, ¶55.

<sup>34</sup> *Salini v Morocco*, ¶3.

<sup>35</sup> Annex 3, ¶3.

<sup>36</sup> *ICSID Convention*, Art.25(2)(b).

consent by a State may come from a BIT.<sup>37</sup> In the instant case, Bergonia's consent to ICSID arbitration over "*disputes concerning investments*" arises from Art. 10 of the Bergonia-Conveniencia BIT. On its part, consent was granted by Claimant through the institution of these proceedings<sup>38</sup> on November 1st, 2008.<sup>39</sup>

**2. Claimant has complied with the three-month waiting period set out in Art. 10(2) of the Bergonia-Conveniencia BIT**

33. It is an uncontested fact in these proceedings that in December 2007, MedBerg Co. sought to negotiate the dispute resulting from the issuance of the compulsory license by means of a written communication sent to the Bergonian IP Office with copies to the Foreign, Economics and Justice Ministries referring to Art. 10(2) of the Bergonia-Conveniencia BIT.<sup>40</sup> However, the only response it obtained came from the Justice Ministry, which alleged that the compulsory license had been issued in conformity with Bergonia's international obligations.<sup>41</sup> This impeded any possibility of a negotiated settlement of the dispute. Still, Claimant waited a full 11 months before filing its request for ICSID arbitration –December 2007 through November 2008–.<sup>42</sup>

34. For the abovementioned reasons, this Tribunal should consider that the three-month waiting period set forth in Art. 10(2) of the Bergonia-Conveniencia BIT, has been duly complied with. An analogous situation was commented by Professor Schreuer, who noticed that access to ICSID arbitration was permitted in a similar case:

In *AAPL*, the Tribunal noted that the claim remained outstanding without a reply for more than the three months' waiting period provided for in the Bilateral Investment Treaty to reach an amicable settlement.<sup>43</sup>

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<sup>37</sup> See *AAPL*, ¶2; *AMT*, ¶3; *Lanco*, ¶8.

<sup>38</sup> See *AAPL*, ¶4; *AMT*, ¶¶1-3; *SGS*, ¶¶30-31; *Generation Ukraine*, ¶12; *Tokios Tokeles*, ¶¶94-100; *Impregilo*, ¶108.

<sup>39</sup> *Annex 3*, ¶10.

<sup>40</sup> *Clarifications* #111.

<sup>41</sup> *Id.*

<sup>42</sup> *Annex 3*, ¶¶ 6,7.

<sup>43</sup> *ICSID Commentary*, p.102

**a. In addition, being a procedural issue, amicable settlement provisions do not bar jurisdiction**

35. Even if this tribunal reached the conclusion that the three-month waiting period has not been complied with, it would still have jurisdiction over the present dispute since, as several ICSID Tribunals have decided that amicable settlement provisions do not bar jurisdiction.<sup>44</sup> Scholarly writings also support this position.<sup>45</sup>

**D. Claimant qualifies as an investment and investor under the applicable instruments and, thus, it has standing to bring forth this claim**

36. Claimant has standing in the present dispute, since: (1) MedBerg Co. has a dual character in these proceedings: a) it is a protected investor under the ICSID Convention and the Bergonia-Conveniencia BIT; and b) it is a protected investment under the Bergonia-Conveniencia BIT; (2) the ICSID Convention has been designed to protect foreign investors and their investments; (3) if indirect claims are allowed in the context of the ICSID Convention, a direct claim submitted by the very aggrieved person must be accepted; (4) neither the Bergonia-Conveniencia BIT nor the ICSID Convention prohibit the possibility of bringing actions for direct claims; and (5) Claimant's right to bring an action in arbitration cannot be disregarded because of non-compliance with a mere procedural requirement

**1. MedBerg Co. has a dual character in these proceedings**

37. MedBerg Co. has a dual character in these proceedings<sup>46</sup> because: a) it is a protected investor under the ICSID Convention and the Bergonia-Conveniencia BIT; and b) it is a protected investment under the Bergonia-Conveniencia BIT.

**a. Claimant is a protected investor under both the ICSID Convention and the Bergonia-Conveniencia BIT**

38. MedBerg Co. is a corporation established in Bergonia, which is fully owned and controlled by MedX Holdings Ltd.,<sup>47</sup> a national of Conveniencia. The State of Bergonia is

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<sup>44</sup> *Lauder*, ¶¶187-191; *SGS*, ¶184; *Wena Hotels*, p.891; *CMS*, ¶122.

<sup>45</sup> *Schreuer II*, p.238.

<sup>46</sup> *Annex 3*, ¶1.

aware of this fact.<sup>48</sup> Therefore, MedBerg Co. qualifies as a national of Conveniencia under the terms of Art. 25(2)(b) of such Convention.<sup>49</sup>

**b. In addition, Claimant is a protected investment under the Bergonia-Conveniencia BIT**

39. According to Art. 1(b) of the Bergonia-Conveniencia BIT, the term “investments” comprises “shares of companies and other kinds of interest in companies.”<sup>50</sup> MedX Holdings Ltd. holds 100% of the equity capital of MedBerg Co. As a consequence, MedBerg Co. is an investment of a foreign investor, and, therefore, it is protected by the Bergonia-Conveniencia BIT. This interpretation is fully consistent with the rules on treaty interpretation laid down in the 1969 VCLT.<sup>51</sup>

**2. The ICSID Convention has been designed to protect foreign investors and their investments**

40. The ICSID regime has been primarily conceived to stimulate both economic development and private international investments. As explained by Professor Schreuer:

The Convention's primary aim is the promotion of economic development. Economic development depends in large measure on private international investment. The Convention is designed to facilitate private international investment through the creation of a favourable investment climate.<sup>52</sup>

41. Bearing this in mind, and being MedBerg Co. the exclusive holder of Patent AZ2005, it must be concluded that it has “*ius standi*” in the present dispute, since it has been directly affected by the compulsory license issued by the Bergonian IP Office. Because of this and

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<sup>47</sup> Annex 3, ¶2.

<sup>48</sup> Clarifications #59, 111.

<sup>49</sup> See ¶45 *et seq* below.

<sup>50</sup> Bergonia-Conveniencia BIT, Art.1.

<sup>51</sup> VCLT, Art.31.

<sup>52</sup> ICSID Commentary, p.4.

by virtue of the provisions set forth in both the Bergonia-Conveniencia BIT<sup>53</sup> and the principles of the ICSID Convention, MedBerg Co. has “*locus standi*” to bring this claim directly before this Tribunal.

**3. If indirect claims are allowed in the context of the ICSID Convention, a direct claim submitted by the very aggrieved person must be accepted**

42. Art. 10(2) of the Bergonia-Conveniencia BIT specifically allows investors to bring actions in relation to their investments.

43. The claims that may be asserted under a BIT may be either direct or indirect. Several Tribunals in the context of the ICSID regime have admitted indirect claims.<sup>54</sup>

44. Given that consistent trend in current arbitral ICSID practice admits indirect claims, there is no solid reason to reject the present claim, submitted by the very corporation which has suffered injuries resulting from acts committed by the State of Bergonia, who has expressly assumed the international obligation to protect foreign investors and their investments.<sup>55</sup>

**4. Neither the Bergonia-Conveniencia BIT nor the ICSID Convention prohibit the possibility of bringing actions for direct claims**

45. Nowhere in the Bergonia-Conveniencia BIT have the Contracting Parties either expressly or implicitly prohibited the possibility of bringing direct claims before ICSID Tribunals. What is more, if Respondent had pursued to exclude claims of this nature from the protective scope of the BIT, it should have sought an express “higher threshold” to that effect.<sup>56</sup>

**II. RESPONDENT HAS AGREED TO TREAT CLAIMANT AS A FOREIGN INVESTOR, IN THE TERMS OF ART. 25(2)(B) OF THE ICSID CONVENTION**

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<sup>53</sup> Bergonia-Conveniencia BIT, Preamble.

<sup>54</sup> See *Suez*, ¶¶41-50; *Enron*, ¶¶21-44; *CMS*, ¶788.

<sup>55</sup> Bergonia-Conveniencia BIT, Preamble.

<sup>56</sup> *Rompetrol*, ¶62.

46. Respondent contends that this Tribunal lacks jurisdiction because a national of Conveniencia does not have control of Claimant within the meaning of Art. 25(2)(b) of the ICSID Convention.<sup>57</sup> It also asserts that it has not consented to treat Claimant as a national of Conveniencia.<sup>58</sup> These contentions should be dismissed because: **(A)** Respondent has implicitly agreed to treat Claimant as a foreign investor; and **(B)** the MFNC contained in the Bergonia-Conveniencia BIT allows Claimant to rely on Art. VI(8) of the Bergonia-Tertia BIT.

**A. RESPONDENT HAS IMPLICITLY AGREED TO TREAT CLAIMANT AS A FOREIGN INVESTOR**

47. Respondent has advanced the view that it has not consented to treat Claimant as a foreign investor.<sup>59</sup> However, this assertion should be overruled since: **(1)** an express agreement on foreign control is not required by Art. 25(2)(b) of the ICSID Convention; and **(2)** Respondent is aware of the fact that MedX Holdings Ltd., a national of Conveniencia, exercises control over Claimant.

**1. An express agreement on foreign control is not required by Art. 25(2)(b) of the ICSID Convention**

48. The text of Art. 25(2)(b) reads as follows:

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

49. According to the VCLT:

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<sup>57</sup> *Minutes*, p.5.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>60</sup>

50. In light of this rule and given that the wording of the Art. 25(2)(b) does not require an agreement in writing –as Art. 25(1) does–, it should be construed that such agreement can be implied.<sup>61</sup>

51. This construction is consistent with past decisions reached by ICSID Tribunals. For instance, in the *Amco* case the arbitrators were of the opinion that:

Nothing in the Convention, and in particular in Art. 25, provides for a formal requisite of an express clause stating that the parties have decided to treat a company having legally the nationality of the Contracting State, which is a party to the dispute, as a foreign company of another contracting State, because of the control to which it is submitted.<sup>62</sup>

52. Commenting on the decision reached in such arbitration, Professor Amerasinghe observes that the tribunal “was correct in not requiring a formal and ritual agreement on the matter”,<sup>63</sup> but thought “that it was sufficient that the respondent knew of the foreign control”.<sup>64</sup> According to this line of thought:

The requirement of foreign control under Art. 25(2)(b) is satisfied by the very fact that such foreign control exists.<sup>65</sup>

53. The view expressed in such decision has also been supported by other scholars, such as Professor Schreuer, who has stated that:

An agreement on the investor’s nationality need not be made in the form of an express stipulation.<sup>66</sup>

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<sup>60</sup> *VCLT*, Art.31.

<sup>61</sup> *ICSID Commentary*, ¶508.

<sup>62</sup> *Amco*, ¶14.

<sup>63</sup> *Amerasinghe II*, p.234.

<sup>64</sup> *Id.*, p.225.

<sup>65</sup> *Id.*, p.233.

And that:

The Convention does not require any specific form for an agreement to treat a juridical person that has the host State's nationality as a national of another Contracting State because of foreign control.<sup>67</sup>

54. On the other hand, as Professor Schreuer indicates, the drafting history of the Convention clearly shows that:

The second clause of Art. 25(2)(b) was designed for situations in which the foreign investor had established a corporation under the host State's law.<sup>68</sup>

55. Professor Schreuer also points out that the history of Art. 25(2)(b):

Would suggest that the existence of foreign control is a necessary element, which must exist independently of the terms of any agreement.<sup>69</sup>

## **2. Respondent was fully aware of the foreign control exercised over Claimant**

56. It is an uncontested fact in these proceedings that MedBerg Co. is a subsidiary company fully owned and controlled by MedX Holdings Ltd.,<sup>70</sup> a national of Conveniencia. In view of these facts, Respondent's assertion that a national of Conveniencia does not have control over MedBerg Co. is groundless, since Bergonia has been aware of MedBerg Co.'s ownership at all times, through the information available at the Bergonian Corporate Registry.<sup>71</sup>

57. Furthermore, the Justice Ministry of Bergonia, when addressing Claimant's request for an amicable settlement, at no time challenged MedBerg Co.'s capability of invoking the provisions of the Bergonia-Conveniencia BIT. This demonstrates that Respondent was fully aware that it was dealing with a foreign investor.

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<sup>66</sup> *ICSID Commentary*, ¶476.

<sup>67</sup> *Id.*, ¶504.

<sup>68</sup> *Id.*, ¶500.

<sup>69</sup> *Id.* ¶539.

<sup>70</sup> *Annex 3*, ¶2.

<sup>71</sup> *Clarifications #59*.

58. Bearing this in mind, it can be concluded that, by not contesting MedBerg Co.'s capability to invoke the Bergonia-Conveniencia BIT,<sup>72</sup> the State of Bergonia –through one of its organs– has implicitly consented to Claimant's standing as a national of Conveniencia.<sup>73</sup>

59. This interpretation of the ICSID Convention is fully verified by previous decisions of ICSID Tribunals and by the opinion of numerous scholars. For instance, in the LETCO arbitration, the claimant had the nationality of the Host State, Liberia, but it was controlled by a national of France, a party to the ICSID Convention. Not only was the Host State aware of this fact, but it had also dealt with and treated the claimant for all practical purposes as being controlled by foreign nationals belonging to other Contracting States. Therefore, the Tribunal concluded that Respondent had recognized the element of foreign control.<sup>74</sup> The arbitrators stated that:

The actions of the parties indicate that, even if there was no express agreement, there was at least an implied agreement.<sup>75</sup>

60. In this sense, Professor Schreuer has said that:

All that is required for purposes of Art. 25(2)(b) is the objective fact of foreign control over the local company, the host State's awareness of this objective fact and an otherwise valid consent to ICSID's jurisdiction. The host State's agreement to treat the local company as a national of another Contracting State and the causal nexus expressed in the word "because" [when it reads "because of foreign control"] may then be construed from these elements.<sup>76</sup>

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<sup>72</sup> *Clarifications* #111.

<sup>73</sup> *Shaw*, p.439.

<sup>74</sup> *Amerasinghe II*, p.234.

<sup>75</sup> *LETCO*, p.8; *AMCO*, ¶14.

<sup>76</sup> *ICSID Commentary*, ¶544.

**B. ALTERNATIVELY, THE MFNC CONTAINED IN THE BERGONIA-CONVENIENCIA BIT ALLOWS CLAIMANT TO RELY ON ART. VI(8) OF THE TERTIA-BERGONIA BIT**

61. Even if the aforementioned proposition was dismissed by the Tribunal—which we contend it should not—, Claimant hereby invokes in the alternative the Most-Favored-Nation Clause of the BIT.

62. However, Respondent argues that the MFNC set forth in the Bergonia-Conveniencia BIT cannot be invoked to import the abovereferred dispute settlement clause. This argument is wrong and should be dismissed on the following grounds: (1) the language of the MFNC in Art. 3(1) of the Bergonia-Conveniencia BIT includes dispute settlement provisions; (2) the clause providing for an express agreement on foreign control set forth in Art. VI(8) of the Tertia-Bergonia BIT constitutes the more favourable treatment to which Claimant is entitled; (3) procedural provisions of BIT’s are an essential part of the protection afforded to investor’s rights by such treaties; and (4) the “denial of benefits” clause contained in Art. I(2) of the Tertia-Bergonia is not applicable to the present case.

**1. The language of the MFNC in Art. 3(1) of the Bergonia-Conveniencia BIT subsumes dispute settlement provisions**

63. Art. 3(1) of the Bergonia-Conveniencia BIT reads as follows:

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 its own investors or to investments of investors of any third State.

64. The scope of this provision is extremely broad, since it actually establishes no limits to the MFN treatment, and thus, it shall be extended to all of the matters regulated by the BIT. Needless to say, such a broad scope clearly includes the dispute-settlement provision of the BIT.

65. Two terms in this provision are of particular importance to reach the aforementioned conclusion. These are the terms “investments” and “treatment”.

66. As for the word “investment”, the Bergonia-Conveniencia BIT defines it as comprising “shares of companies” and “intellectual property rights”, particularly “patents”.<sup>77</sup> Therefore, it is clear that the concept of “investment” under the abovementioned BIT does comprise Patent AZ2005 as well as MedBerg Co. itself. Furthermore, both of them are investments owned and controlled by MedX Holdings Ltd., an “investor of the other Contracting State.”

67. On the other hand, the word “treatment” is not defined in the Bergonia-Conveniencia BIT. However, resort to the ordinary meaning of such term<sup>78</sup> in the field of investment arbitration suggests that it can encompass both the rights and privileges granted, as well as the obligations and burdens imposed, by a Contracting State on investments belonging to investors covered by the Treaty.<sup>79</sup> It is beyond doubt that access to ICSID arbitration is among those rights and privileges granted by Bergonia to Conveniencian investors. Denying such access to Claimant would entail a discriminative act, which is forbidden precisely by operation of the MFNC incorporated into the treaty by the free will of its parties. In effect, the purpose of such clauses is to insure the beneficiary (i.e., MedBerg Co.) against discrimination,<sup>80</sup> which may take place in connection with both material and procedural treatment.

68. This interpretation does not contradict the “*ejusdem generis*” principle, which prescribes that the MFNC:

Can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty.<sup>81</sup>

69. As the *Maffezini* Tribunal observed:

If a third-party treaty contains provisions for the 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

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<sup>77</sup> *Bergonia-Conveniencia BIT*, Art.1.

<sup>78</sup> *VCLT*, Art.31.

<sup>79</sup> *Suez*, ¶55.

<sup>80</sup> *Yearbook of the ILC*, p.12.

<sup>81</sup> *Maffezini*, ¶41.

the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle.<sup>82</sup>

70. In the instant case, the basic Treaty is the Bergonia-Conveniencia BIT. The subject matter to which the clause applies is established by such Treaty,<sup>83</sup> which, in turn, expressly provides for arbitration under the ICSID Convention. Consequently, the word “treatment” in this BIT must be understood to refer to both material and jurisdictional aspects of the treatment granted to investors.

71. This reasoning is in line with the latest formulations made by several ICSID Tribunals. For instance, in the Maffezini case the Tribunal expressed the view that, although the Argentina-Spain BIT did not provide expressly that dispute settlement was covered by the MFNC (it only referred to “all matters subject to this Agreement”), there were good reasons to conclude that:

Today dispute settlement arrangements are inextricably related to the protection of foreign investors.<sup>84</sup>

72. In the Siemens case, the Tribunal considered that the term “treatment” was sufficiently wide to include dispute settlement mechanisms. It stated that:

Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.<sup>85</sup>

73. Other international tribunals have also supported this view. For instance, the question of whether the provisions on dispute settlement contained in a third-party treaty could be regarded as the subject matter covered by the clause was considered by the Commission of Arbitration in the *Ambatielos* case. This Tribunal stated that the MFNC could only attract “matters belonging to the same category of subject as that to which the clause itself relates.” As far as the scope of the rule is concerned, it established that:

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<sup>82</sup> *Maffezini*, ¶56.

<sup>83</sup> *Id.*, ¶44.

<sup>84</sup> *Id.*, ¶54.

<sup>85</sup> *Siemens*, ¶103.

Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation.<sup>86</sup>

74. Therefore, it found that the clause could be extended to questions concerning the administration of justice, since it was compatible with the *ejusdem generis* principle.

75. On the other hand, from the point of view of the promotion and protection of investments, it is obvious that dispute settlement is an integral part of the investment protection regime that Bergonia and Conveniencia have envisaged to attract foreign investment.<sup>87</sup> In effect, the Preamble of the Bergonia-Conveniencia BIT expresses as one of its objects and purposes that:

The encouragement and contractual protection of such investments are apt to increase the prosperity of both nations through their positive effects, such as the stimulation of business initiatives and transfer of capital and technology between the two countries.

76. Respondent contends that the MFNC in question cannot be invoked in such a way. However, this allegation is not in accordance with the diaphanous text of the BIT, as it was demonstrated before. What is more, the parties to this treaty made it very clear which exceptions there may be to the application of the MFNC. Those exceptions are contained in Art. III, paragraph 3, of said BIT, where there is a definite enumeration of the matters which the contracting States specifically excluded from the scope of the clause. Dispute settlement is not listed among them. For all these reasons, and since the treaty text is presumed to be the authentic expression of the parties' intentions,<sup>88</sup> Respondent's contention must be rejected.

**2. The clause providing for an express agreement on foreign control set forth in Art. VI(8) of the Tertia-Bergonia BIT constitutes the more favourable treatment to which Claimant is entitled**

77. Art. VI (8) of the Tertia-Bergonia BIT reads as follows:

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<sup>86</sup> *Ambatielos*, p.107.

<sup>87</sup> *Suez*, ¶57.

<sup>88</sup> *Suez*, ¶54.

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

78. Through this provision, the States of Bergonia and Tertia entered into a special agreement whereby they obliged themselves to treat certain companies, under given circumstances, as nationals of the other State, pursuant to Art. 25(2)(b) of the ICSID Convention. By virtue of this Art., the State of Bergonia considers as Tertian nationals any companies which, having been incorporated under its own legislation, are investments of Tertian nationals. This privilege is granted for the purposes of arbitration under the ICSID regime.
79. This agreement means that Tertian investors in Bergonia enjoy a more favourable treatment than Conveniencian investors in Bergonia. To be more precise, while a Tertian company which has been incorporated in Bergonia is able to resort to ICSID arbitration, a Conveniencian company which has been incorporated in Bergonia is not. It is this situation of disadvantage which triggers the operation of the MFNC contained in the Bergonia-Conveniencia BIT, and allows Claimant to demand the more favourable treatment granted to Tertian companies. What is more, if an express agreement was required by Art. 25(2)(b) of the ICSID Convention, it is the absence of such an agreement which would justify the invocation of the clause contained in the Art. VI(8) of the Tertia-Bergonia BIT: it would be the more favourable treatment to which Claimant is entitled.
80. For these reasons, the State of Bergonia cannot deny Claimant the more favourable treatment provided for in Art. VI(8) of the Tertia-Bergonia BIT. Such behaviour is not compatible with the MFN obligation undertaken by Bergonia when entering into the Bergonia-Conveniencia BIT. In effect:

To provide MFN treatment under investment agreements is generally understood to mean that an investor from a party to an agreement, or its investment, would be treated by the other party ‘no less favourably’ with respect to a given subject-matter than an investor from any third country, or its investment.<sup>89</sup>

81. Furthermore:

A MFN obligation exists only when a treaty clause creates it. In the absence of a treaty obligation (...), nations retain the possibility of discriminating between foreign nations in their economic affairs.<sup>90</sup>

82. Consequently, Respondent’s contention must be rejected.

**3. The denial of benefits clause contained in Art. I(2) of the Tertia-Bergonia is not applicable to the present case**

83. Respondent’s assertion that the “denial of benefits” clause would prevent Claimant from importing the provision in Art. VI(8) of the Tertia-Bergonia BIT is groundless and should be dismissed for the following reasons: **(a)** the operation of an MFNC does not attract the whole treaty but only the more favourable treatment; and **(b)** Respondent cannot invoke a third-party treaty provision to deny Claimant the benefits of the basic treaty.

**a. The operation of an MFNC does not attract the whole treaty but only the more favourable treatment**

84. The main purpose of most MFNC is to help establish equality of competitive opportunities between foreign investors from different countries and to avoid economic distortions that would occur through more selective country-by-country liberalization.<sup>91</sup>

85. Following this reasoning, being the present MFNC a protective standard, it would be against its nature to attract provisions other than those containing more-favourable treatment.<sup>92</sup>

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<sup>89</sup> *OECD II*, p.2.

<sup>90</sup> *Id.*

<sup>91</sup> *Faya Rodriguez*, p.91.

**b. Respondent cannot invoke a third-party treaty provision to deny Claimant the benefits of the basic treaty**

86. Under the International Investment Law regime, MFN provisions are not intended to provide protection to the Contracting States but to their nationals and their investments.<sup>93</sup>

87. In this sense, the State of Bergonia has not acquired the right but the obligation to accord Claimant treatment no less favourable than that accorded to nationals of third States.

88. Following this reasoning, even when Claimant's right to import a provision contained in the Tertia-Bergonia BIT is in accordance with the wording<sup>94</sup> of Art. 3(1) of the Bergonia-Conveniencia BIT, because of the *res inter alios acta* principle,<sup>95</sup> Respondent has no right to invoke provisions of a third-party treaty to preclude Claimant from asserting its rights under the basic treaty.<sup>96</sup>

**III. THE TRIBUNAL SHOULD NOT LOOK BEYOND THE CONTROLLING CORPORATION, MEDX HOLDINGS LTD.**

89. Respondent's contention that a national of Conveniencia does not have control over Claimant should be dismissed since, for the purposes of this arbitration: **(A)** search for foreign control is precluded beyond immediate control; and **(B)** the requirements for piercing the corporate veil have not been met.

**A. Search for foreign control is precluded beyond immediate control**

90. As stated before, the wording of Art. 25(2)(b) of the ICSID Convention is clear when it refers to foreign control as the objective element upon which the parties are entitled to reach the agreement.<sup>97</sup> Said article does not refer to "effective" control, but to control only. Therefore, in determining whether there is a foreign controlling element, and what

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<sup>92</sup> *Id.*, p.100.

<sup>93</sup> *OECD I*, p.2.

<sup>94</sup> *VCLT*, Art.31.

<sup>95</sup> *Suez*, ¶58.

<sup>96</sup> i.e., *Bergonia-Conveniencia BIT*.

<sup>97</sup> *Vacuum Salt*, ¶30.

its nationality is, no search for foreign control is permissible beyond the first step under the Convention.<sup>98</sup>

91. Regarding Respondent's assertion that a national of Conveniencia does not have control of MedBerg Co.,<sup>99</sup> the Tribunal in the *Rompetrol* case found that:

There is nothing in the *Nottebohm* judgment that would serve to establish a general rule of 'real and effective nationality' for the purpose of determining the status of corporations under international law.<sup>100</sup>

92. Thus, there is simply no room for an argument that a supposed rule of "real and effective nationality" should override either the permissive terms of Art. 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT.

93. Similarly, the Tribunal in the *Amco* case reached the conclusion that:

Whereas Art. 25(2)(b) of the ICSID convention envisages an exception to the classical concept of place of incorporation 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, there is no exception to the classical concept provided for to the nationality of the foreign controller.<sup>101</sup>

94. Moreover, the overwhelming weight of authorities points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b).<sup>102</sup>

95. Finally, in accordance with the "*in favorem jurisdictionis*" principle, the *SOABI* Tribunal ruled that:

For purposes of Art. 25(2)(b) of the ICSID Convention, the Tribunal was entitled to go beyond immediate control just to find that Flexa, national of a

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<sup>98</sup> *Amerasinghe II*, p.225

<sup>99</sup> *Minutes*, p.5.

<sup>100</sup> *Rompetrol*, ¶88.

<sup>101</sup> *Amco*, ¶7.

<sup>102</sup> *Tokios Tokelès*, ¶40.

non-contracting party to the ICSID Convention, was in fact controlled by nationals of Belgium, a Contracting State.<sup>103</sup>

96. In other words, under Art. 25(2)(b) a tribunal can only go beyond immediate control to prove that it has jurisdiction over the dispute. This assertion has been confirmed by Professor Schreuer, who wrote:

For purposes of finding that the corporate investor has the host state's nationality, the criterion of control cannot be applied.<sup>104</sup>

97. For all these reasons, this Tribunal should not look beyond MedBerg Co. Co's immediate controller.

### **B. The requirements for piercing the corporate veil have not been met**

98. As previously stated, for purposes of finding that the corporate investor has the host State's nationality, the criterion of control cannot be applied.<sup>105</sup>

99. Professor Amerasinghe has supported the view that a tribunal constituted under the ICSID regime is not compelled to investigate whether this is the genuine or effective nationality of the juridical person.<sup>106</sup>

100. In this sense, Professor Schreuer notes that:

A systematic interpretation of Art. 25(2)(b) would militate against the use of the control test for a corporation's nationality.<sup>107</sup>

101. Furthermore, the view taken by Professor Prosper Weil in *Tokios Tokeles* that the economic reality should prevail over formal legal structure when it comes to the interpretation of both the ICSID Convention and the BIT has not been widely approved in the academic and professional arenas, or generally accepted by subsequent tribunals. The Tribunal would in any case have great difficulty in an approach that was tantamount to

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<sup>103</sup> *SOABI*, ¶¶35,36,37,38.

<sup>104</sup> *ICSID Commentary*, ¶500.

<sup>105</sup> *Id.*

<sup>106</sup> *Amerasinghe I*, p.661.

<sup>107</sup> *ICSID Commentary*, p.278.

setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion. Such an approach could not be reconciled with Art. 31 of the VCLT, according to which the primary element of interpretation is “the ordinary meaning to be given to the terms of the treaty.”<sup>108</sup>

102. Clearly, there is no reason to search further than is necessary in a given case, and it is appropriate that the search end when the proper foreign control has been established.<sup>109</sup>

103. In this sense, Judge Kéba Mbaye, in his dissenting opinion in *SOABI* found that:

Whereas Art. 25 (2) (b) of the ICSID Convention sets forth an exception to the place of incorporation principle applied to define the nationality of corporations, there was under the ICSID regime no exception to the classical concept provided for when it comes to the nationality of the foreign controller, hence the Tribunal was not be entitled to go beyond the place of incorporation of the foreign controller company.<sup>110</sup>

104. In any case, for this Tribunal to pierce MedBerg Co.’s corporate veil certain requirements would have to be met. In this sense, in the *Barcelona Traction* case the ICJ established that:

The corporate veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.<sup>111</sup>

105. Moreover, for this Tribunal could invoke the equitable doctrine of veil-piercing, disregarding MedX Science’s place of incorporation and looking instead to its shareholders for the purposes of defining its nationality, evidence that it used its formal

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<sup>108</sup> *Rompetrol*, ¶85.

<sup>109</sup> *Amerasinghe II*, p.236.

<sup>110</sup> *SOABI*, ¶¶12,13.

<sup>111</sup> *Barcelona Traction*, ¶56.

legal nationality for an improper purpose<sup>112</sup> such as those described above would be required, which is not present.

106. In the present case, Respondent has not made a *prima facie* case, much less demonstrated, that Claimant has engaged in any of the types of conducts described in *Barcelona Traction* that might support a piercing of MedBerg Co.'s corporate veil.

107. MedX Holdings Ltd. manifestly did not create MedBerg Co. to gain access to ICSID arbitration, as the enterprise was founded more than four years before the filing of arbitration request.<sup>113</sup>

108. For all these reasons, the tribunal should refrain from piercing MedX Holding's corporate veil.

#### **IV. ULTIMATELY, CLAIMANT OFFERS TO BRING MEDX HOLDINGS LTD., THE PARENT COMPANY, AS A PARTY TO THESE PROCEEDINGS**

109. Even if the tribunal was not convinced by the abovestated propositions, it would still have jurisdiction over the present dispute since **(A)** Claimant's right to bring an action in arbitration cannot be disregarded because of non-compliance with a mere procedural requirement; and **(B)** the purpose of the ICSID Convention is to guarantee the principle "*in favorem jurisdictionis*".

##### **A. Claimant's right to bring an action in arbitration cannot be disregarded because of non-compliance with a mere procedural requirement**

110. Simply put, the question of a need for an agreement on nationality for local subsidiaries should also be seen from another perspective.

111. In this sense, Professor Schreuer has stated that:

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<sup>112</sup> *Alexandrov*, p.39.

<sup>113</sup> *Annex 3*, ¶1.

ICSID tribunals have developed a practice of looking beyond the investors' subsidiaries and of granting party status to parent companies even if the latter are not named in the consent agreement number of cases the controlling foreign owners were given standing despite the fact that they were not the formal parties to the ICSID arbitration.<sup>114</sup>

112. This practice would reduce the significance of an agreement to treat the local subsidiary as a foreign national. If MedX Holdings Ltd. were given direct access, ICSID's jurisdiction would no longer depend on the existence of an agreement to treat the subsidiary as a foreign national.<sup>115</sup>

**B. The purpose of the ICSID Convention is to guarantee the principle “*in favorem jurisdictionis*”**

113. Under the ICSID regime, arbitral tribunals are judges of its own competence.<sup>116</sup> In their assessment of the relevant circumstances of a given case, great importance must be paid to the preambular language of the BIT upon which the parties base their claim.<sup>117</sup>

114. On the one hand, the Bergonia-Conveniencia BIT stresses the need to:

...intensify economic co-operation between both countries and create favourable conditions to increase investments....<sup>118</sup>

And:

Recognizing that the encouragement and contractual protection of such investments are apt to increase the prosperity of both nations through their positive effects, such as the stimulation of business initiatives and transfer of capital and technology.<sup>119</sup>

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<sup>114</sup> *ICSID Commentary*, ¶520.

<sup>115</sup> *Id.*

<sup>116</sup> *ICSID Convention*, Art.41.

<sup>117</sup> *Tokios Tokelés*, ¶31.

<sup>118</sup> *Bergonia-Conveniencia BIT*, Preamble.

<sup>119</sup> *Id.*

115. This is undoubtedly indicative of the Bergonia-Conveniencia BIT's broad scope of investment protection.<sup>120</sup>

116. On the other hand, as explained by Professor Schreuer, the Convention's primary aim is the promotion of economic development. Economic development depends in large measure on private international investment. The Convention is designed to facilitate private international investment through the creation of a favourable investment climate.<sup>121</sup>

117. Bearing this in mind, when judging whether it has jurisdiction over the present case,<sup>122</sup> this Tribunal cannot overlook that the Bergonia-Conveniencia BIT and the ICSID Convention:

Shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>123</sup>

118. Therefore, in light of these principles, this tribunal should endorse the intention of the parties enshrined in the Bergonia-Conveniencia BIT<sup>124</sup> by allowing MedX Holding Ltd. to become a party in these proceedings.

## **CONCLUSION ON JURISDICTION**

119. For the foregoing reasons, the requirements of jurisdiction under Art. 25 of the ICSID Convention have been met. Accordingly, the Tribunal has jurisdiction to hear this case.

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<sup>120</sup> *SGS*, ¶116.

<sup>121</sup> *ICSID Commentary*, p.4.

<sup>122</sup> *ICSID Convention*, art.41.

<sup>123</sup> *VCLT*, Art.31.

<sup>124</sup> *Bergonia-Conveniencia BIT*, Preamble.

## **PART TWO: MERITS OF THE CLAIM**

120. Bergonia's various breaches of its obligations under the BIT, international law, its internal law and its failure to protect Claimant's investment from illegal, arbitrary, unfair, inequitable, and confiscatory acts by its agencies constitute a violation of the BIT, international law, and an expropriation of Claimant's investment without the payment of prompt, adequate and effective compensation.

### **I. THE ACTS OF THE IP OFFICE ARE ATTRIBUTABLE TO THE STATE OF BERGONIA**

121. Bergonia, through the acts and omissions carried out by its IP Office, has disregarded the obligations derived from the Bergonia- Conveniencia BIT. The IP Office is an administrative organ of the State. As such, its actions are attributable to the State of Bergonia under International Law.<sup>125</sup> Therefore, Respondent is to be held responsible for the IP Office's conduct.

122. It is well established in International Law that the conduct of *any* organ of the State— which has that *status* in accordance with its internal law— shall be considered an act of that State under International Law, irrespective of its functions and of the position it holds in the State's organization.<sup>126</sup>

123. Even though the rules drafted by the ILC are not *per se* mandatory for States, they are reflective of customary International Law. As for Art. 4 of the ILC Draft Articles on State Responsibility, the ICJ has confirmed the rule in categorical terms, by stating that:

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<sup>125</sup> *Articles on State Responsibility*, Art.4.

<sup>126</sup> *Id.* See also *Claims of Italian Nationals* (UNRIAA, vol. XV (Sales No. 66.V.3), ¶399, (*Chiessa claim*), 401 (*Sessarego claim*), 404 (*Sanguinetti claim*), 407 (*Vercelli claim*), 408 (*Queirolo claim*), 409 (*Roggero claim*), and 411 (*Miglia claim*)); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

According to a well-established rule of International Law, the conduct of any organ of a state must be regarded as an act of that State. This rule...is of a customary character.<sup>127</sup>

## **II. RESPONDENT HAS UNLAWFULLY EXPROPRIATED CLAIMANT'S PROPERTY**

124. Respondent's issuance of the compulsory license in question: **(A)** is an unlawful expropriation under the BIT; **(B)** constitutes a substantial interference with Claimant's overall business activities; **(C)** amounts to an interference that has exceeded a reasonable period of time; and **(D)** does not comply with the requirements set out in the Bergonia-Conveniencia BIT for an expropriation to be otherwise legal.

### **A. Respondent's issuance of the compulsory license constitutes an expropriation under the BIT**

125. Protection against unlawful expropriation is provided by International Law,<sup>128</sup> and, more specifically, by the Bergonia-Conveniencia BIT. The latter sets forth that:

Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as "expropriation") in the territory of the other Contracting State except, 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.<sup>129</sup>

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<sup>127</sup> *Difference*, ¶62.

<sup>128</sup> *Paris Convention* Art.1, *TRIPS* Art.1.

<sup>129</sup> *Bergonia-Conveniencia* BIT, Art.4(2).

126. Respondent has blatantly breached this provision since it has taken measures which have an effect that is similar to expropriation, “although they do not *de jure* constitute an act of expropriation.”<sup>130</sup>

127. Indeed, it has long been accepted in International Law that an expropriation may occur in the absence of an expropriatory decree or the actual seizure or taking possession of property. Professor Christie analyzed the decisions in the *German Interest in Polish Upper Silesia*<sup>131</sup> and the *Norwegian Shipowners*,<sup>132</sup> cases and concluded that a State may expropriate property when it interferes with it, even though the State expressly disclaims any such intention.

128. More importantly, both cases illustrate that even though a State may not purport to interfere with rights to property, it may, through its actions, render those rights so useless that it will be deemed to have expropriated them.<sup>133</sup>

129. Similarly, the 1961 Harvard Draft expressed that a taking of property included any:

Unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.<sup>134</sup>

130. More recently, Professor Reisman has written:

A wide variety of measures—including taxation, regulation, denial of due process, delay and non-performance, and other forms of governmental malfeasance, misfeasance, and nonfeasance—may be deemed expropriatory if those measures significantly reduce an investor’s property rights or render them practically useless.<sup>135</sup>

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<sup>130</sup> *Stevens*, 99. See also *Occidental* ¶85; *Myers* ¶285, *Tecmed* ¶114.

<sup>131</sup> *Upper Silesia*, p.1.

<sup>132</sup> *Norwegian*, p.309.

<sup>133</sup> *Christie*, p.311.

<sup>134</sup> *Harvard Draft*, p.62.

<sup>135</sup> *Reisman & Sloane*, p.115.

131. Decisions of various international tribunals support this position. For instance, the Iran-US Claims Tribunal has consistently recognized the principle of indirect expropriation:

... Interference by the Government with the alien's enjoyment of the incidents of ownership – such as the use or control of the property, or the income and economic benefits derived therefrom – constitutes a compensable taking.<sup>136</sup>

132. In the *CME* case, the Tribunal stated that:

*De facto* expropriations or indirect expropriations, *i.e.* measures that do not involve an overt taking but that effectively neutralized the benefit of the property of the foreign owner, are subject to expropriation claims.<sup>137</sup>

133. Furthermore, it makes no difference whether the deprivation was caused by actions or inactions. In this sense, the Tribunal in *Santa Elena* reached the conclusion that:

There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the State has been to deprive the owner of title, possession or access to the benefit and economic use of his property. A deprivation or taking of property may occur under international law through interference by a State in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.<sup>138</sup>

134. In the present case, Respondent's issuance of a compulsory license with respect to Patent AZ2005 clearly constitutes a measure tantamount to expropriation, as it deprived Claimant of:

[T]he use and the benefit of its investment even though it [...] retains nominal ownership of the respective rights.<sup>139</sup>

135. In effect, although the title to the patent formally remains in the hands of MedBerg Co., the interference with its property has been so far-reaching that it made Claimant lose the

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<sup>136</sup> *Brower*, ¶¶ 639, 643 . See also *Tippetts*, p.256.

<sup>137</sup> *CME* ¶¶ 604-605.

<sup>138</sup> *Santa Elena*, ¶77.

<sup>139</sup> *Middle East*, ¶107.

exclusive right it enjoyed over it, thus rendering the property useless. This is what an indirect expropriation consists of.<sup>140</sup>

**B. The issuance of the Compulsory License constitutes a substantial interference on Claimant's overall business activities**

136. International tribunals have stated that, to reach a finding of indirect expropriation, the interference with property must be substantial<sup>141</sup> and more than ephemeral.<sup>142</sup>

137. While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support the conclusion that the property has been "taken" from the owner.<sup>143</sup>

138. Moreover, interference by the State in the use of a property or with the enjoyment of its benefits may also be considered as a deprivation or taking of property under international law, even if the title of property is not affected.<sup>144</sup>

139. A patent entitles its owner with the legal means to prevent others from making, using, or selling the new invention for a period of time,<sup>145</sup> granting the owner exclusivity thereon. If this right is ignored, the patent holder is left with nothing but a vacuous property that makes formal distinctions of ownership irrelevant.<sup>146</sup>

140. In this sense, the *Metalclad* Tribunal<sup>147</sup> found that expropriation includes also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use of reasonably-to-be expected economic benefit of property.

141. Therefore, the issuance of a compulsory license in the present case has considerably interfered with Claimant's investment, without reasonable justification, as will be

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<sup>140</sup> *Christie*, p.311; *Starrett* ¶103, *Metalclad* ¶103.

<sup>141</sup> *OECD I*, p.10-14; *LG&E* ¶191; *Pope* ¶102; *Santa Elena* ¶76.

<sup>142</sup> *Wena* ¶99, *OECD I*, p.10-14, *Tippets* p.256; *Pope*, p.103.

<sup>143</sup> *Pope*, p.103.

<sup>144</sup> *Tippets* p.225.

<sup>145</sup> *TRIPS*, Art.28(1)(b).

<sup>146</sup> *Waste Management*, p.143.

<sup>147</sup> *Metalclad*, p.103.

explained in depth *infra*, and to such an extent that it has become useless, thus destroying all commercial value of the investment.

**C. The issuance of the compulsory license constitutes an interference that has exceeded a reasonable period of time**

142. In order to consider that an indirect expropriation has taken place, international tribunals have required that the interference carried out by the State exceeds a reasonable period of time. In this sense, the *Tippetts* Tribunal stated that:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, [...] a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.<sup>148</sup>

143. Moreover, the *Santa Elena* case also provides a cogent explanation of how a State can wrongly expropriate property through regulatory action:

A decree which heralds a process of administrative and judicial consideration of the issue, in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.<sup>149</sup>

144. A patent entails, by nature, a **temporary** right, which has a duration of twenty years.<sup>150</sup> As stated before, the issuance of a compulsory license by Respondent has deprived Claimant of the possibility of exercising the aforementioned right in an exclusive manner for a critical period of four years minimum.<sup>151</sup> In other words, the expropriatory measure has been authorized for a period of time which amounts to 20% of the total duration of such property.

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<sup>148</sup> *Tippetts*, p.225.

<sup>149</sup> *Santa Elena*, ¶76.

<sup>150</sup> *TRIPS*, Art.33; *Clarifications* #58.

<sup>151</sup> *Clarifications* #66.

145. For instance, in the *Wena Hotels* case,<sup>152</sup> the Tribunal found that an interference of a period of less than one year constituted more than ephemeral interference and exceeded a reasonable period of time. In the light of these considerations, the interference which Claimant suffered over its property must be considered "more than ephemeral".

**D. Respondent has failed to comply with the requirements set out in the Bergonia-Conveniencia BIT for an expropriation to be otherwise legal**

146. Claimant submits that Respondent has failed to comply with the cumulative legal requirements for an expropriation to be legal, as: (1) Respondent's measure manifestly lacks pursuit of public benefit, and (2) Respondent's purported offer of payment of the so-called "collected royalties" does not amount to the full compensation requirement envisaged in the BIT.

**1. Respondent's measure manifestly lacks public benefit purposes**

147. Under the Bergonia-Conveniencia BIT, an expropriation is legal if it is based on public purpose and against prompt, adequate and effective compensation.<sup>153</sup> In order to justify the public purpose of the measures taken, Bergonia argues that its population suffers from "important medical needs", which are allegedly covered by Patent AZ2005. In the first place, it must highlighted that, since there is no record that Patent AZ2005 is actually the solution to the needs Respondent wishes to address, its contentions boil down to mere unsubstantial allegations.<sup>154</sup>

148. In this regard, the ADC Tribunal stated that:

A treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.<sup>155</sup>

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<sup>152</sup> *Wena*, ¶99.

<sup>153</sup> *Schreuer I*, p.4.

<sup>154</sup> *Clarifications* #66,67.

<sup>155</sup> *ADC*, ¶432.

149. In the present case, it is an uncontested fact that, before the issuance of the compulsory license, Claimant terminated a license agreement with BioLife Co. Under such agreement, all products and treatments were intended for sale in the Bergonian **domestic market only**.<sup>156</sup> Nevertheless, Claimant confirmed that the licensee was performing parallel exports.<sup>157</sup> On these grounds, said agreement was terminated two months before the issuance of the compulsory license.

150. It should be noticed that, during this two-month period, the patented products and treatments **were** available in Bergonia. Nevertheless, Respondent proceeded with the expropriatory measure.<sup>158</sup>

151. For all the reasons stated *ut supra*, the measures taken by Respondent manifestly failed to pursue any public benefit, and thus amount to an unlawful expropriation.

**2. Respondent’s purported offer of payment of the so-called “collected royalties” does not comply with the full compensation requirement**

152. The distinction between lawful and unlawful expropriation in International Law<sup>159</sup> is based on the idea that wrongful acts are condemnable and, for preventive reasons, should entail consequences opposite to lawful acts, even if both produce detrimental effects. Therefore, in the case of an unlawful expropriation like the present, the expropriating State has to provide full reparation<sup>160</sup> within the meaning of Art. 31 of the ILC Draft Articles on State Responsibility. This includes financially assessable damage, loss of profits under Art. 36 of the referred Draft Articles, and interests,<sup>161</sup> if appropriate.

153. In this sense, the *Rumeli Telekom* Tribunal stated that:

In assessing compensation for internationally wrongful acts [...], the Tribunal considers that it should apply the principle of the *Factory at Chorzow* case, according to which any award should as far as possible wipe out all the

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<sup>156</sup> *Clarifications* #27.

<sup>157</sup> *Clarifications* #113.

<sup>158</sup> *Clarifications* #114.

<sup>159</sup> *Chorzów*, p.47.

<sup>160</sup> See *BP vs. Libya, Texaco v. Libya, LiAmco v. Libya*.

<sup>161</sup> *Higgins*, p.314-320, *Wittich*.

consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed.<sup>162</sup>

154. Compensation should be determined by the parameters set forth in the BIT as *lex specialis* rules in compensation, or, in the absence of such a provision, by the rules of Customary International Law.<sup>163</sup> The only *lex specialis* rule regarding compensation found in the BIT rests in Art. 4(2), which sets out the conditions that Respondent must comply with in order to lawfully expropriate the investment held by Claimant in Bergonia.

155. Claimant has already established beyond cavil that Begonia's expropriation of Claimant's investments was unlawful. The BIT is silent as to the standard of compensation for an unlawful expropriation. In these circumstances, customary international law fills the *lacunae* and provides the governing rules of compensation. This was precisely the Tribunal's holding in the recent award in *ADC*:

In the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. ... Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.<sup>164</sup>

156. It is a well-established principle of customary international law that a claimant whose investment has been subject to an unlawful expropriation is entitled to be compensated by

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<sup>162</sup> *Rumeli Telekom*, ¶¶792.

<sup>163</sup> *Amoco* ¶112.

<sup>164</sup> *ADC* ¶¶ 481, 483.

means of: i) restitution in kind or its monetary equivalent; ii) compensation for any additional loss not covered by the previous one.<sup>165</sup>

157. Thus, restitution (plus compensation for additional losses sustained if restitution alone is insufficient) is the preferred remedy when available. The *Chorzów Factory* standard continues to be cited and followed in contemporary cases.<sup>166</sup>

158. According to the Tribunal in CMS:

Restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation.<sup>167</sup>

159. Therefore, Respondent should base the compensation granted to Claimant on the higher value on the date of expropriation plus interest, or, otherwise, base it on the value on any later date up to the date of the award (in either case accompanied by further compensation for any additional loss not covered by the restitutionary monetary equivalent).<sup>168</sup>

160. Hence, the royalties offered by Respondent<sup>169</sup> to MedBerg Co. neither comply with the prompt,<sup>170</sup> adequate<sup>171</sup> and effective requirement, nor are they equivalent to the value of the expropriated investment immediately before the date on which the actual expropriation became publicly known,<sup>172</sup> as set forth in the BIT.<sup>173</sup>

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<sup>165</sup> *Chorzów*, p.47.

<sup>166</sup> *Rumeli Telekom*, ¶792.

<sup>167</sup> *CMS* ¶400. See also *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, I.C.J., ¶153*.

<sup>168</sup> See *ADC* ¶¶495-499; *Siemens* ¶351-352.

<sup>169</sup> *Annex 3, ¶8, Clarifications #25*.

<sup>170</sup> *World Bank Guidelines*, p.7.

<sup>171</sup> *World Bank Guidelines*, p.6.

<sup>172</sup> *Schreuer I*, p.4.

<sup>173</sup> *Bergonia-Conveniencia BIT*.

161. In other words, said royalties: i) were not set in accordance with the real value of patent AZ2005; and ii) did not comply with the requirement of being “prompt”, since they consisted in the offer of yearly instalments.<sup>174</sup>

162. For all the reasons stated above, Bergonia has unlawfully expropriated Claimant’s property breaching its international obligations under Bergonia-Conveniencia BIT, and is bound to accord Claimant full restitution. Alternatively, even if the Tribunal were to conclude that the expropriation of Claimant’s investments was lawful, MedBerg Co. would remain entitled to “prompt, adequate and effective” compensation in accordance with Art. 4(2) of the BIT.

### **III. RESPONDENT HAS BREACHED ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT TO CLAIMANT**

163. Art. 2(2) of the Bergonia-Conveniencia BIT guarantees Claimant a fair and equitable treatment, when stating that:

Each Contracting State shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment....

164. As a matter of textual interpretation, this standard of treatment is understood and applied independently and autonomously<sup>175</sup> from the minimum standard of treatment in customary international law as it is inherently implausible that a treaty would use an expression such as “fair and equitable treatment” to denote a well known concept like the “minimum standard of treatment in customary international law”. If the parties to a treaty want to refer to customary international law, it must be presumed that they “will refer to it as such rather than using a different expression.”<sup>176</sup>

165. The BIT protection is broader than the customary one, as it imposes obligations beyond those comprised by the latter.<sup>177</sup> Nevertheless, even if we assumed that the FET provision

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<sup>174</sup> *Clarifications #87.*

<sup>175</sup> *Mann*, p.241-244.

<sup>176</sup> *Schreuer FET*, p.9,10.

<sup>177</sup> *CME*, ¶156.

of the BIT encompasses not more than the customary international law concept, Bergonia would have also breached such standard.

166. In this sense, the Tribunal in *Waste Management* described this standard as follows:

[F]air and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant 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 ... In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the Claimant.<sup>178</sup>

167. The current content of this standard comprises various elements such as: **(A)** transparency, Stability, consistency and predictability of the legal and business framework provided to the investor; **(B)** the investor's legitimate expectations; **(C)** due process of law, and **(D)** arbitrariness and discrimination.<sup>179</sup>

168. Through its actions and omissions, Respondent has completely disregarded every one of these factors resulting in a complete breach of the FET standard.

**A. Respondent has failed to provide Claimant with a transparent, stable, consistent and predictable legal and business framework**

169. Despite the fact that this party finds logic in the affirmation that no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged,<sup>180</sup> the stability of the legal and business framework is an essential element of fair and equitable treatment.<sup>181</sup>

170. Regarding transparency, Tribunals have understood it as to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully

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<sup>178</sup> *Waste Management*, ¶98.

<sup>179</sup> *McLachlan et al.*, p.119.

<sup>180</sup> *Saluka*, ¶305.

<sup>181</sup> *LG&E*, ¶124.

operating investments made, or intended to be made should be capable of being readily known to all affected investors, without room for doubt or uncertainty.<sup>182</sup>

171. Claimant's reliance on Bergonia's legal framework appears to be reasonable, particularly since it is incorrect for a government administration to avoid making clear what it wants from the investor hiding behind ambiguity or contradiction.<sup>183</sup>

172. It is worth noting that only twenty-seven months had elapsed from the granting of Patent AZ2005 to the date in which the compulsory license was issued.

173. In this context, as of the granting of Patent AZ2005,<sup>184</sup> at a time in which Respondent was already dealing the obesity problem,<sup>185</sup> Claimant had built reasonable legitimate expectations for the future development of its business in the territory of Bergonia.

174. In addition to this, the Tribunal should pay special attention to the fact that the period of time between the termination of the license agreement<sup>186</sup> between Claimant and "BioLife Co." and the issuance of the compulsory license,<sup>187</sup> was of two months only. Respondent groundlessly contends that, during this period, its "urgent medical needs became more acute."<sup>188</sup>

175. Therefore two questions arise: i) is it possible that a disease such as obesity can become more acute in a 60-day period of time?, and ii) if such were the case, how could it allow the instrumentation of a mechanism such as compulsory licensing which is conceived to overcome rapidly spreading pandemics such as HIV/AIDS, malaria or tuberculosis?

176. In addition, as lack of transparency and candour in an administrative process amounts to a violation of FET,<sup>189</sup> the intervention of the Patent Review Board must be unequivocally considered as such. Such intervention does not imply a revision of the IP Office's

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<sup>182</sup> *Metalclad*, ¶76.

<sup>183</sup> *Wälde*, p.373-387.

<sup>184</sup> *Annex 3*, ¶3.

<sup>185</sup> *Clarifications #40*.

<sup>186</sup> *Annex 3*, ¶6.

<sup>187</sup> *Annex 3*, ¶7.

<sup>188</sup> *Clarifications #26*.

<sup>189</sup> *Waste Management*, ¶98.

decision since the members of the former organ are paid for their services by the latter,<sup>190</sup> thus resulting on manifest lack of transparency in the administrative process provided for Claimant's objections. Indeed, the manifest conflict of interests of the members of the Patent Review Board, and the latter's non-independent structure and functioning, which fails to provide judicial review,<sup>191</sup> makes the lack of transparency patent.

177. Finally, consistency of the legal framework can be breached by an arbitrary behaviour on behalf of the State i.e. by revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.<sup>192</sup>

178. Following this reasoning, Respondent conducted itself inconsistently when issuing the compulsory license over Patent AZ2005, which had been granted only two years earlier<sup>193</sup>, at a time in which the alleged medical needs already existed. This ill-grounded measure by the bergonian IP Office has also destroyed Medberg Co.'s vital role in both the Bergonian and foreign markets.

179. From this standpoint, it clearly follows that the measure issued by Respondent could not have been anticipated in any way by Claimant since none of the reasons that could have allowed the State to carry out such a measure had taken place.

**B. Respondent has disregarded and violated Claimant's legitimate expectations and good faith**

180. It is widely accepted that the most important function of the FET standard is the protection of the investor's legitimate expectations through the creation of a transparent and stable legal framework.<sup>194</sup>

181. The State of Bergonia has the obligation to provide to international investments with a treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.<sup>195</sup>

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<sup>190</sup> *Clarifications #29.*

<sup>191</sup> *Íd.*

<sup>192</sup> *Tecmed*, ¶154.

<sup>193</sup> *Annex 3*, ¶7.

<sup>194</sup> *Schreuer FET*, p. 17.

182. As stated before, in view of those expectations, Claimant decided to carry out its business in the territory of Bergonia, believing that its fundamental rights of property were protected.

183. Even more, as Bergonia must be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investor's legitimate and reasonable expectations,<sup>196</sup> consequently, its decision to unlawfully issue a compulsory license over Claimant's property and the further absence of adequate compensation according to its legal obligations constitutes a direct attack to Claimant's expectations derived from the granting of the patent two years before.

184. Claimant had also the right to receive the benefits of its investment, to decide as any other intellectual property owner, to whom it would grant access to its proprietary material, and also in which terms –economic and otherwise- they would, if agreed, be licensed.

185. Thus, Claimant's expectations were also frustrated, because of Bergonia's actions in violation of FET.

**C. Respondent did not provide due process of law in the revision of its IP Office's decision**

186. The Tribunal in *ADC* found that:

Due process of law in expropriatory contexts must contain certain legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, [which] are expected to be readily available and accessible to the investor to make such legal procedure meaningful. (...) If no legal procedure of such nature exists at all, the argument that “the actions are taken under due process of law” rings hollow.<sup>197</sup>

187. In the present case, it must be remembered that, although the compulsory license was represented by Respondent as allegedly in compliance with Begonia's internal legislation,

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<sup>195</sup> *Tecmed*, ¶154.

<sup>196</sup> *Saluka*, ¶301.

<sup>197</sup> *ADC*, ¶435.

such legislation has never been assessed to determine its conformity with TRIPS, and, moreover, its implementation has been doubted to be compliant with TRIPS.<sup>198</sup>

188. Furthermore, the Patent Review Board, as the sole reviewer of the IP Office's decision, remained silent regarding the royalties offered as compensation. Therefore, such incomplete review also failed to provide due process of law regarding compensation.

189. In addition, this Tribunal must bear in mind the very relevant fact that the Patent Review Board is an organ within the IP Office, whose members are paid for their services by the latter.<sup>199</sup> Consequently, its review shall not by any means, be considered independent from the one taken by the IP Office, thus resulting on a breach of due process of law regarding Claimant's objections.

**D. Respondent has failed to protect Claimant against arbitrariness and discrimination**

190. Arbitrariness has been described as a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.<sup>200</sup> As a consequence, being that the IP Office administrative decision and its posterior review lacked due process of law, it follows that the State has incurred on arbitrary behaviour.

191. Following the wording of the Tribunal in *Link Trading*, it was said that:

Abuse arises where it is demonstrated that the State has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the State in regard to the investment.<sup>201</sup>

192. In the present case, Respondent has simply resorted to an abstract concept such as "important medical needs" in order to justify the issuance of the compulsory license, without offering further evidence to justify its actions. Moreover, since it has not made

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<sup>198</sup> *Clarifications* #21.

<sup>199</sup> *Clarifications* #29.

<sup>200</sup> *ELSI*, ¶176.

<sup>201</sup> *Link*, ¶64.

any attempt of negotiations for the granting of a voluntary license, and directly proceeded with the expropriatory measure, the arbitrariness of the measure is left in plain sight.

193. Consequently, taking into account that any measure that might involve arbitrariness is in itself contrary to a fair and equitable treatment,<sup>202</sup> the protection against arbitrariness as an element of FET has been breached.

194. In addition, it should be noted that the beneficiaries of the compulsory license issued by Respondent are six Bergonian companies, among them BioLife Co., who had previously entered into a license agreement with Claimant over Patent AZ2005, and who had provided grounds for the lawful termination of the license by Claimant on account of confirmed parallel exports inconsistent with the terms of such agreement.

195. Moreover, Respondent alleged that the compulsory license was issued to address domestic medical needs,<sup>203</sup> however three of the abovementioned companies, including BioLife Co. -who was suspected of anticompetitive behaviour-, are Bergonian nationals profiting from the exportation of such technology.<sup>204</sup> Said actions amount to spreading the effect of the expropriatory measure beyond Bergonia's borders, thus affecting Claimant's business not only within Bergonia but also in foreign markets, where affiliates to the Claimant commercialized the same products and treatments. The beneficiaries of this compulsory license engage in those other markets in direct competition with Claimant, damaging its possibility to, even, capitalize its exclusivity rights abroad.

196. The present differentiation between nationals and aliens entails disregard of an exclusive right of property internationally recognized to the sole benefit of the patent right holder.

197. Therefore, the measure taken by Respondent is not only expropriatory and arbitrary, but also evinces the differential and unfair treatment towards the investor for the benefit of

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<sup>202</sup> *CMS*, ¶290.

<sup>203</sup> *Annex 3*, ¶7.

<sup>204</sup> *Annex 3*, ¶8.

nationals of the Host State, which have been enabled to profit from the export of the technology covered by the patent, without any attempt at a rational justification.<sup>205</sup>

#### **IV. RESPONDENT HAS FAILED TO ACCORD CLAIMANT FULL PROTECTION**

198. Article 2(2) of the Bergonia-Conveniencia BIT states that “investments shall at all times... enjoy full protection and security... .” It is clear from the very wording of this clause that the parties have intended to differentiate the concept of full protection from that of physical security which is later on introduced in Art. 4(1) of the same treaty.

199. Said provision imposes an obligation of vigilance under which the State must take all measures necessary to ensure the full enjoyment of protection and security of the foreign investment.<sup>206</sup>

200. Through its actions, Respondent has violated the full protection clause set out in the Bergonia-Conveniencia BIT, which is a broad scope of protection that includes legal protection to the investment.

201. The Tribunal in the *Azurix* case stated that:

Full protection and security is understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view(...) when the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security.<sup>207</sup>

202. Sharing the Tribunal’s logic in *Siemens* it is only but reasonable to support that, as a general matter, and based on the definition of investment, which includes tangible and intangible assets, the obligation to provide full protection and security is wider than

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<sup>205</sup> Cf. *Saluka*, ¶460.

<sup>206</sup> *CME*, ¶353.

<sup>207</sup> *Azurix*, ¶408.

“physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.<sup>208</sup>

203. The expropriatory measure was issued over Claimant’s intellectual property and the provision, as contained in the BIT, goes beyond mere physical protection and extends to the investor's legal protection.

204. Claimant was deprived of such legal protection since: i) Respondent unlawfully interfered with its exclusivity right over Patent AZ2005 and, as a consequence, substantially harmed the value of its investment; ii) permits were granted to three Bergonian companies for the export of the patented products and treatments, to countries in which affiliates to the Claimant commercialized the same products and treatments, thus damaging Claimant’s possibility to at least capitalize its exclusivity rights abroad; iii) or even by the mere fact that the compulsory license was issued on arbitrary basis without reasonable justification, and without an independent review of the decision.

205. It is for all the reasons stated above that Claimant contends that Respondent did not provide it full protection, thus failing to comply with Art. 2(2) of the applicable BIT.

## **V. RESPONDENT CANNOT RELY ON TRIPS TO ELUDE ITS INTERNATIONAL OBLIGATIONS UNDER THE BERGONIA-CONVENIENCIA BIT**

### **A. As *lex specialis*, the Bergonia- Conveniencia BIT is the law applicable to the dispute**

206. Being that the ICSID process is entirely self- contained<sup>209</sup> meaning it provides a group of rules and principles concerned with a particular subject matter and institutions to administer such relevant rules, such self contained regime is to be applicable as *lex specialis*.<sup>210</sup>

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<sup>208</sup> *Siemens*, ¶303.

<sup>209</sup> *Reed*, p.8.

<sup>210</sup> *ILC Fragmentation*, p.4.

207. Since the present is a claim which arises directly out of an investment and that there is a binding BIT which Bergonia signed along with Conveniencia, such Treaty is to be understood and applied as *lex specialis*, displacing other international obligations, even if they appear to be applicable, which they are not.

208. Since Claimant's case is based on the standards of protection, as well as the concept of expropriation and scope of compensation set forth in the BIT, this Tribunal must primarily apply the BIT as the applicable rule of international law.<sup>211</sup>

209. The Tribunal in *LG&E* stated that:

Obviating application of international law, specifically of the ICSID Convention and the Bilateral Treaty, would entail ignoring the fact that "international treaties move away from the principle according to which foreign investment is subject to the law and jurisdiction of the host state and seek international solution of conflicts."<sup>212</sup>

210. In the same direction, the Tribunal in *National Grid* established that:

Indeed, the pre-eminence of the Treaty as *lex specialis* governing the scope of protection owed to the investor is the main purpose for concluding a bilateral treaty aimed at protecting foreign investments.<sup>213</sup>

211. BIT's aim at the promotion and protection of investments, whereby States give a reciprocal promise of treating the investors of the other State in a certain manner. In this sense, they must be viewed as subsequent commitments to improve the minimum standards set on TRIPS, being that Art. 1 of the latter Treaty allows the State to provide a broader protection.

212. If Respondent had intended to exclude compulsory licenses from the scope of protection set forth in the BIT, it should have followed the same route it chose when entering into a BIT with Tertia, which was signed six months before the Bergonia-Conveniencia BIT.<sup>214</sup>

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<sup>211</sup> *Saipem*, ¶99.

<sup>212</sup> *LG&E*, ¶93.

<sup>213</sup> *National Grid*, ¶86.

213. In any event, Claimant has not consented to the application of the TRIPS regime to the present dispute.

**B. In any event, Respondent has disregarded its international obligations derived from the TRIPS Agreement, by failing to comply with the requirement of Art. 31 of such Agreement**

214. Despite what has been stated above regarding the provisions on the BIT as *lex specialis*, even analyzing the requirements set in Art. 31 of the TRIPS Agreement which establish a *mínimum* of protection in the case of compulsory licensing, we confirm that Respondent has also failed to comply with such requirements.

215. Regarding compulsory licensing, the WTO, in a joint study with WHO, considered that:

The limited exceptions that Governments are allowed to make must not "unreasonably" conflict with the "normal" exploitation of the patent and must not unreasonably prejudice the legitimate interests of the patent owner... Compulsory licensing or government use of a patent without the authorization of the right holder can only be done under a number of conditions aimed at protecting the legitimate interests of the patent holder.<sup>215</sup>

216. In the same document it was stated that:

A key function of the patent system is to provide incentives for research and development into new inventions, by giving inventors exclusive rights over their inventions for a limited period of time.<sup>216</sup>

217. We shall start by restating that none of the companies which have invoked the license made an attempt to obtain a voluntary license, under reasonable commercial terms, in accordance with Art. 31 (b). This requirement cannot be waived by Respondent's groundless allegations of "important medical needs". In fact, when commencing proceedings for the issuance of the compulsory license, the IP Office referred to such exact concept, which by no means can be understood as an equivalent of "urgent".

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<sup>214</sup> *Bergonia- Tertia BIT*, Art.3(4).

<sup>215</sup> *WTO and Public Health*, p.44.

<sup>216</sup> *Id.*

218. Furthermore, Respondent refused to provide an independent review of the IP Office's decision. This requirement, which is directly linked to due process of law, is embodied in TRIPS Articles 31 (i) and (j). The former refers to the possibility of questioning the legal validity of the issuance of the compulsory licence itself; the latter gives the right holder the prerogative to question the remuneration provided in respect of such use. The record shows that, in spite of Claimant's persistent objections, no such review was provided.

219. Finally, Art. 31(f) establishes that the use of the compulsory license shall be authorized, predominantly, for the supply of the domestic market. As stated above, this provision has also been disregarded since three Bergonian companies are exporting the patented products.<sup>217</sup>

220. Finally, it is worth noting that none of the situations in which this last requirement can be waived, as established in the Doha Declaration, are present in this claim.

221. To conclude, in the absence of compliance with any of these provisions, the granting of a compulsory license must be considered abusive under WTO standards.

**a. In the further alternative, compliance with the TRIPS Agreement cannot preclude Bergonia's international responsibility or its unlawful acts**

222. The Tribunal in *Santa Elena* stated that:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of compensation to be paid for the taking. That is, the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.<sup>218</sup>

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<sup>217</sup> Annex 3, ¶8, clarifications #61.

<sup>218</sup> *Santa Elena*, ¶71.

223. For all the reasons mentioned above, Claimant emphatically maintains that Respondent has failed to comply with the provisions agreed by the parties in the Bergonia-Conveniencia BIT as applicable law to the present claim. Alternatively, Respondent has also failed to comply with the *mínimum* protection set forth in the TRIPS Agreement for the protection of Intellectual Property Rights.

#### **CONCLUSION ON THE MERITS OF THE CLAIM**

224. For the foregoing reasons, Respondent's wrongful acts have breached its numerous international obligations towards Claimant, including expropriation without compensation, fair and equitable treatment and full protection.

**PART THREE: RELIEF REQUESTED**

225. For the reasons abovementioned, and reserving the right to further develop and expand its submissions in view of Respondent's subsequent written and oral submissions, Claimant respectfully requests this Tribunal an award in its favour:

(1) Declaring that it has jurisdiction over the present dispute.

(2) Declaring that Respondent has violated its obligations under the Bergonia-Conveniencia BIT, Articles 2(2), 4(1) and 4(2).

(3) Ordering that this arbitration should proceed forthwith to the "quantification of damages" phase.

RESPECTFULLY SUBMITTED ON SEPTEMBER 7, 2009 BY

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Team Fleischhauer

on behalf of Claimant

MEDBERG CO.