International Center for Settlement of International Disputes

[ICSID]

IN ARBITRATION BETWEEN

Medberg co. [Claimant]

V

The Government of The Republic of Bergonia [Respondent]

(ICSID Case No. ARB/X/X)

MEMORANDUM FOR CLAIMANT

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© List of Authorities

"Encyclopedia of Public International Law"
t. 7, Amsterdam 1984, keyword: abuse of rights
ed.. Kiss, A. C.
(hereinafter referred to as *Encyclopedia of Public International Law)*

Frederic M. Abbott, Thomas Cottier, Francis Gurry
„International Intellectual Property in an Integrated World Economy"
Aspen Publishers, 2007
(hereinafter referred to as *Abbott, Cottier and Gurry)*

Georges R. Delaume
„ICSID and the Transnational Financial Community"
ICSID Review – Foreign Investment Law Journal, Vol. 1, 1986, 237-256
(hereinafter referred to as *Delaume)*

Georges R. Delaume
" ICSID Arbitration: Practical Considerations"
Journal of International Arbitration, vol. 1 (1984) [Annex W33, at 112]
(hereinafter referred to as *Delaume:Practical Considerations)*

Rudolph Dolzer, Christoph Schreuer,
„Principles of International Investment Law"
Oxford University Press, 2008
(hereinafter referred to as *Dolzer, Schreuer)*

E. Gaillard
„International Arbitration Law: Establishing Jurisdiction Through a Most-Favored-Nation Clause"
NYLJ, 2 June 2005
(hereinafter referred to as *Gaillard)*

Ian Laird
"A Community of Destiny – The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims"
Todd Weiler, ed. „International Investment Law and Arbitration: Leading Cases for the ICSID, NAFTA, Bilateral treaties and Customary International Law"
Juris Publishing 2009
(hereinafter referred to as *Laird)*

Carolyn Lamm and Abby Cohen Smutny
„The implementation of ICSID Arbitration Agreements"
ICSID Review - Foreign Investment Law Journal, Vol. 11, 1996, 64
(hereinafter referred to as *Lamm and Smutny*)

Campbell McLachan, Laurence Shore, Matthew Weiniger,
„International Investment Arbitration. Substantive Principles"
Oxford University Press, 2007
(hereinafter referred to as *McLachan, Shore and Weniger)*

Christoph Schreuer
The ICSID Convention: A Commentary (2001),
Cambridge University Press, 2001
(hereinafter referred to as *Schreuer*)

Christoph Schreurer
„Calvo's Grandchildren: The Return Of Local Remedies In Investment Arbitration"
The Law and Practice of International Courts and Tribunals 1, 2005
(hereinafter referred to as *Schreuer: Calvo's Grandchildren*)

Ibrahim F.I. Shihata
„Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA"
ICSID Review – Foreign Investment Law Journal, Vol. 1, 1986, 1
(hereinafter referred to as *Shihata*)

M. Sornarajah
"The International Law on Foreign Investment"
Cambridge University Press, 2004
(hereinafter referred to as *Sornarajah*)

(d) List of Legal Sources

Arbitral Tribunals (alphabetical listing by Claimant)

ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16)
Award of 2 October 2006

(hereinafter referred to as *ADC*)

Aquas del Tunari vel Bolivia (ICSID Case No. ARB/02/3)
Decision on Jurisdiction of 21 October 2005
(hereinafter referred to as *AdT*)

Banro American Resources Inc and Société Aurifère du Kivu et du Maniema SARL v Congo, the Democratic Republic of the (ICSID Case No ARB/98/7)
Final award on jurisdiction (excerpts),
IIC 26 (2000)
(hereinafter referred to as *Banro*)

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29)
Decision on Jurisdiction of 14 November 2005
(hereinafter referred to as *Bayindir*)

Vladimir Berschader and Moïse Berschader v. The Russian Federation, (SCC Case No. 080/2004)
Award of 21 April 2006
(hereinafter referred to as *Vladimir Berschader and Moïse Berschader*)

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22)
Award of 24 July 2008
(hereinafter referred to as *Biwater*)

Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic, ICSID Case No. ARB/97/4
(Czech Republic/Slovak Republic BIT), Jurisdiction, 5 ICSID Rep 330
(hereinafter referred to as *CSOB*)

CMS Gas Transmission Company v The Argentine Republic, (ICSID Case No. ARB/01/8)
Award of 12 May 2005
44 I.L.M. 1205 (2005)
(hereinafter referred to as *CMS Gas Transmission Company*)

Eureko BV v Poland,
Partial Award of 19 August 2005
12 ICSID Reports 335
(hereinafter referred to as *Eureko*)

Ethyl Corp v Government of Canada
Decision on Jurisdiction of 24 June 1998
38 I.L.M. 708 (1999)
(hereinafter referred to as *Ethyl*)

Fedax N.V. v Republic of Venezuela (ICSID Case No. ARB/96/3)
Decision on Jurisdiction of 11 July 1997
5 ICSID Rep. 183
(hereinafter referred to as *Fedax*)

Gas Natural SDG SA v Argentina (ICSID Case No ARB/03/10)
Decision of the Tribunal on Preliminary Questions on Jurisdiction of 17 June 2005
IIC 115 (2005) (31)
(hereinafter referred to as *Gas Natural*)

Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (ICSID Case no. ARB/04/13)

Jurisdiction of 16 June 2006
(hereinafter referred to as *Jan de Nul*)

Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic
Award of 12 April 1977
20 I.L.M. I (1981)
(hereinafter referred to as *LIAMCO*)

Lauder v Czech Republic
Final Award of 3 September 2001
9 ICSID Reports 62
(hereinafter referred to as *Lauder*)

Emilio Agustin Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7)
Decision on Objections to Jurisdiction of 25 January 2000
(hereinafter referred to as *Mafezzini*)

Metalclad Corporation v Mexico (ICSID Case No. ARB(AF)/97/1)
Award of 30 August 2000
(hereinafter referred to as *Metalclad)*

Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt (ICSID Case No. ARB/99/6)
Award of 12 April 2002
7 ICSID Reports 173
(hereinafter referred to as *Middle East Cement Shipping*)

MTD Equity Sdn Bhd and MTD Chile SA v Chile (ICSID Case No. ARB/01/7)

Award of 25 May 2004
(hereinafter referred to as *MTD)*

National Grid plc v The Argentine Republic
Decision on Jurisdiction of 20 June 2006
(hereinafter referred to as *National Grid*)

Petrobart Limited v The Kyrgyz Republic (SCC Case no. 126/2003)
Award of 26 March 2005
(hereinafter referred to as *Petrobart Limited*)

Plama v. Bulgaria, (ICSID Case No. ARB/03/24)
Decision on Jurisdiction of 8 February. 2005
(hereinafter referred to as *Plama*)

Pope and Talbot Inc v Government of Canada
Interim Award of 26 June 2000
7 ICSID Reports 43
(hereinafter referred to as *Pope and Talbot*)

Phillips Petroleum Co. Iran v Islamic Republic of Iran
Award no. 425-39-2 of 29 June 1989
21 Iran – U.S. Cl. Trib. Rep. 79
(hereinafter referred to as *Phillips Petroleum Co.*)

Phoenix Action, Ltd. v. Czech Republic, (ICSID Case No. ARB/06/5)
Decision on Provisional Measures of 6 April 2007
(hereinafter referred to as *Phoenix*)

Renta 4 SVSA and others v Russian Federation, (SCC Case No 24/2007)
Award on Preliminary Objections of 20 March 2009.
IIC 369 (2009)
(hereinafter referred to as *Renta 4 SVSA and others*)

RosInvest Co UK Ltd v Russian Federation (SCC Case No V079/2005);
Jurisdiction award of October 2007
IIC 315 (2007)
(hereinafter referred to as *RosInvest*)

Saluka Investments BV v Czech Republic
Partial Award of 17 March 2006
(hereinafter referred to as *Saluka*)

S.D. Myers, Inc v Canada
Award of 13 November 2000
(hereinafter referred to as *S.D. Myers*)

Siemens AG v Argentina (ICSID Case No. ARB/02/8)
Decision on Jurisdiction of 3 August 2004
(hereinafter referred to as *Siemens*)

Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt
Award of 20 May 1992
ICSID Review - Foreign Investment Law Journal, 1993 at. 328 et seq.
(hereinafter referred to as *SPP*)

TSA Spectrum de Argentina SA v Argentina (ICSID Case No ARB/05/5)

Award of 19 December 2008
IIC 358 (2008)
(hereinafter referred to as *Spectrum*)

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Intergrales del Agua S.A. v Argentina
Decision on Jurisdiction of 16 May 2006
(hereinafter referred to as *Suez*)

Telenor Mobile Communications A.S. v. The Republic of Hungary, (ICSID Case No. ARB/04/15)
Award of 13 September. 2006,
hereinafter referred to as *Telenor*)

Tokio Tokeles v Ukraine *(*ICSID Case No. ARB/02/18)
Decision on Jurisdiction of 29 April 2004
(hereinafter referred to as *Tokio Tokeles*)

Wena Hotels Ltd v Egypt (ICSID Case No ARB/98/4)
Decision on Jurisdiction of 29 June 1999
IIC 272 (1999)
(hereinafter referred to as *Wena Hotels*)

Wintershall Aktiengesellschaft v. Argentine Republic, (ICSID Case No. ARB/04/14)
Award of 8 December 2008
(hereinafter referred to as *Wintershall*)

Iran-United States Claims Tribunal

Amoco International Finance Corporation v. Iran

Award no. 310-56-3 of 14 July 1987
15 Iran-U.S. Cl. Trib. Rep. 189
(hereinafter referred to as *Amoco*)

Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA
Award No. 141-7-2,
6 Iran-U.S. Cl. Trib. Rep.
(hereinafter referred to as *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*)

International Court of Justice

The Ambatielos Case (Greece v United Kingdom)
Award of 6 March 1956
UNRIAA, 1963, vol XII
(hereinafter referred to as *Ambatielos*)

Barcelona Traction Light and Power Company Limited (Belgium v Spain)
1970 ICJ 3
(hereinafter referred to as *Barcelona Traction*)

Case concerning East Timor, (Portugal v Australia)
Judgment of 30 June 1995
1995 ICJ Reports 89,90.
(hereinafter referred to as *East Timor*)

Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)
Judgment of 20 July 1989
I.C.J. Reports 1989

(hereinafter referred to as *ELSI*)

Gabcikovo-Nagymaros Project (Hungary v Slovakia)
Judgment of 27 September 1997
I.C.J. Reports 1997
(hereinafter referred to as *Gabcikovo-Nagymaros*)

LaGrand (Germany v. United States of America)
Judgment of 27 June 2001
I.C.J. Reports 2001
(hereinafter referred to as *LaGrand*)

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
Advisory Opinion of 9 July 2004
I.C.J. Reports 2004
(hereinafter referred to as *Wall in the Occupied Palestinian Territory)*

Permanent Court of International Justice

Certain German Interests in Polish Upper Silesia (Germany v. Poland)
Judgment of 25 May 1926
PCIJ Series A, No. 7
(hereinafter referred to as *Certain German Interests in Polish Upper Silesia*)

Factory at Chorzow (Germany v. Poland)
Judgment of 13 September 1928
PCIJ Series A, No. 13
(hereinafter referred to as *Factory at Chorzow*)

Exchange of Greek and Turkish Populations
Advisory Opinion of 21 February 1925
PCIJ Series B, no. 10
(hereinafter referred to as *Exchange of Greek and Turkish Populations*)

The Mavrommatis Palestine Concessions (Greece v United Kingdom)
Judgment of 30 August 1924
[1924] PCIJ (ser A) No 2
(hereinafter referred to as *Mavrommatis*)

Phosphates in Morocco (Italy v France)
Judgment of 14 June 1938
P.C.I.J., Series A/B No. 74
(hereinafter referred to as *Phosphates in Morocco*)

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory
Advisory Opinion of 4 February 1932
P.C.I.J., Series A/B, No. 44
(hereinafter referred to as *Treatment of Polish Nationals*)

Miscellaneous
Dissenting opinion of Prosper Weil submitted to *Tokios Tokeles*
29 April 2004
(hereinafter referred to as *Dissenting opinion in Tokios Tokeles)*

The Draft Convention on the International Responsibility of States for Injuries to Aliens

the Harvard Draft no. 12 of 18 February 1961.
*(*hereinafter cited as The Draft Convention on the International Responsibility of States for Injuries to Aliens)

International Law Commission`s The Draft Articles on Responsibility of States for Internationally Wrongful Acts
Yearbook of 104 the International Law Commission, 2001, vol. II (PartTwo) (2001)
(hereinafter referred to as DASR)

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between State and Nationals of Other States
Doc. ICSID/2, 1 ICSID Reports, 1993, 23
(hereinafter cited as *Report)*

International Covenant on Civil and Political Rights
G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171
(hereinafter referred to as: *International Covenant on Civil and Political Rights*)

Vienna Convention on the Law of Treaties
23 May, 1969
1155 U.N.T.S. 331, 8 I.L.M. 679 (1969)
(hereinafter referred to as VCLT)

(e) Statement of Facts

The applicable international treaties.

1. The Government of the Bergonia (hereinafter referred as to "the Respondent") and the Government of Tertia entered into a Treaty concerning the reciprocal encouragement and protection of investment (hereinafter referred as to "the Bergonia-Tertia BIT") on 1st January 2003.

2. The Democratic Commowealth of Bergonia and The Sultanate of Conveniencia entered into a Treaty concerning the encouragement and reciprocal protection of investment (hereinafter referred as to "the Bergonia-Conveniencia BIT") on 30 May 2003.

3. Amnesia, Bergonia and Conveniencia are ICSID Contracting States and all have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as "the ICSID Convention"). They are also members of the World Trade Organisation (hereinafter referred as to "WTO") and parties to Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as "the TRIPS Agreement"). Laputa is not an ICSID Contracting State nor a member of the WTO.

4. Bergonia and Conveniencia are parties to the Vienna Convention on the Law of Treaties (hereinafter referred to as "VCLT").

The characteristics of a company's corporate structure

5. The MedBerg Co. (hereinafter referred as to "the Claimant") was established in Begonia on 30 January 2004. The Claimant`s management board consist of Bergonian national and a tax adviser who works for MedX Holdings Ltd in Conveniencia.

6. The ownership of MedBerg Co. is available at any times at registry office in Bergonia.

7. MedBerg Co. is in 100 % controlled by MedX Holdings Ltd, established in Conveniencia. CC123 Holding Ltd was incorporated by Convenient Companies SARL on 1 January 2003.

8. On 1 December 2003, CC123 Holding Ltd name was changed to "MedX Holding Ltd" (hereinafter referred as to "MedX"). It was assigned, ultimately, to MedBerg by Dr. Frankensid and MedScience in exchange for shares in MedX. Since then there have been no changes in control. Furthermore, Dr. Frankensid would like to continue his employment in MedScience.

9. Dr. Frankensid is the scientist employed by MedScience Co. and credited with a breakthrough inventions leading to several patents including Bergonian Patent No. AZ2005.

10. Dr Frankensid has dual nationality. He is Bergonian national by descent and birth. He was naturalized in Amnesia in 1991. Dr Frankensid's habitual residence and place of employment has been in Laputa since 1998, but he also maintains a vacation home in Amnesia.

11. After transferring MedX Holdings Ltd to Dr. Frankensid and MedScience, Convenient Companies SARL maintained no assets associated with MedX.

12. After acquiring MedX, Dr. Frankensid and MedScience had assigned their worldwide interests in the invention they were developing to MedX Holdings, and MedX had assigned those interests with respect to Bergonia to MedBerg. As stated above, MedBerg was established before the granting of Patent AZ2005.

The exclusive License Agreement

13. Claimant applied for a patent in relation to Dr. Frankensid's invention on 5 February and was granted Bergonian Patent No. AZ2005 in compliance with the TRIPS Agreement on 15 March 2005. The Claimant is the owner of Bergonian Patent No. AZ2005 which is thought to be the most effective of obesity treatments available in Bergonia. Obesity is a serious medical problem in Berognia due to the genetic make-up and the traditional diet of population of Bergonia; 34% of males and 38% of females in Bergonia are obese.

14. On 31 March 2005 Claimant licensed BioLife Co., a Bergonian company, to utilise Bergonian Patent No. AZ2005 under the terms and conditions of the License Agreement. The License Agreement was an exclusive one.

15. The Claimant terminated the License Agreement in accordance with its notice and termination provisions on 31 March 2007. Furthermore, after terminating the License Agreement with BioLife Co., the Claimant had no immediate plans to license its intellectual property to a third-party in Bergonia.

16. BioLife complained that upon receiving notice of termination it had sought to renegotiate the terms of the License Agreement.

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

18. On 1st November 2007 The Bergonian IP Office issued a compulsory license for Patent No. AZ2005 for a period of 48 months. The compulsory license does not regulate the issue of export of products based on Patent no. AZ2005 to other countries.

19. As of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license. These companies are using the technology covered by Patent No. AZ2005 to produce certain health-related products. Three of these companies export the treatments and products manufactured using the patented technology to other countries; the export comprise a significant portion for the companies involved. All of the companies use the patented technology for commercial purposes.

20. The Bergonian IP Office has collected royalties from the six Bergonian companies and has offered these royalty payments to Claimant, but as of the date on which these ICSID proceedings were initiated Claimant had refused to accept them because the proposed amount was insufficient and did not cover the incurred loss. The amount of royalties is based on sale of the treatment and products, but the percentage rate of royalties is moderately lower than it used to be under the terms of the License Agreement. The royalties were to be paid yearly**.**

The Claimant's Court and Arbitration Proceedings

21. Following the Bergonian IP Office's administrative decision to issue the compulsory license, the Claimant filed an appeal with a Patent Review Board within the IP Office. The Patent Review Board found the issuance of the compulsory license in conformity with Bergonian law. The Patent Review Board is a quasi-judicial body, which draws upon existing Bergonian judges to sit in particular intellectual property cases and be paid for their services by the Bergonian IP Office.

22. On 1 December 2007, the Claimant wrote the Bergonian IP Office with copies to the Foreign, Economics and Justice Ministries referring to Article 10 (2) of the Bergonia-Conveniencia BIT. Only the Justice Ministry replied to the Claimant`s letter, stating that

the compulsory license was issued in conformity with international obligations of Bergonia.

23. On November 2008, the ICSID Secretary General registered the dispute for arbitration.

(f) Arguments:

JURISDICTION

JURISDICTION OF THE ICSID TRIBUNAL

1. ICSID Arbitral Tribunal has jurisdiction over the dispute between the Claimant and the Respondent according to Article 25. of the ICSID Convention

1. Jurisdiction Ratione Personae

1) Nationality

2. The Tribunal has jurisdiction in the view of the nationality of those parties controlling the Claimant.

(1)The Host State -The Republic of Bergonia, is the Respondent in the current dispute.

3. Respondent, The Republic of Bergonia is a Contracting State of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

2) The Investor – MedBerg Co., is the Claimant in the current dispute

(1) The Most Favored Nation Provision

4. Respondent challenges that this Tribunal lacks jurisdiction because a national of Conveniencia does not have control of the Claimant within the meaning of Article 25(2)(b) of theICSID Convention , nor has Respondent consented to treat Claimant as a national of Conveniencia.

Claimant would like to highlight that if such express consent is required, then Article 3 of the Bergonia-Conveniencia BIT (MFN clause) permits it to invoke Article VI. 8. of the Bergonia-Tertia BIT.

a) The structure of the Most-Favoured-Nation treatment clause

4. Remarkably, the apparently neutral, unconditional, reciprocal, and indeterminate, structure of the Most-Favoured-Nation treatment characterized by Article 3 of the Bergonia-Conveniencia BIT (MFN clause) provides as follows:

> Neither Contracting State shall subject investors of the other Contracting State, as regards their activity, in particular, though not exclusively, concerning management, maintenance, operation, enjoyment or disposal of their investments, to treatment less favourable than it accords to its own investors or to investors of any third State, whichever is more favourable to the investors.

b) The favorable substance of the provision invoked by the Claimant

5. According to the foreign investment law, the aim of investor's application of the MFN is to attract more favorable treatment; the treatment sought must, in fact, be more favorable.[1] It is essential to evaluate whether "the practical effect of the measure is to create a disproportionate

[1] *McLachan, Shore and Weniger*, at §7.193, 293

benefit" for a third party over the protected investor.[2]

Thereof, Article 1.3 (b) in the basic treaty, Bergonia-Conveniencia BIT legislates the term "investor" as follows:

> „in respect of the Sultanate of Conveniencia:
> – any juridical person having its seat in the territory of the Sultanate of Conveniencia in accordance with its laws;"

Whereas invoked provision from Article VI. 8. of the Bergonia-Tertia BIT describes investor in the subsequent formula:

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

Claimant would like to emphasize that, on the facts of recent case, settling the dispute before ICSID Arbitration is clearly and objectively favorable. Prior to the final evaluation, it should be underlined, that Claimant had taken an opportunity of seeking for dispute solution directly in Bergonia, for instance filed an appeal with a Patent Review Board and sent complaints to Foreign, Economics and Justice Ministries.[3]

6. Article VI. 8. of the Bergonia-Tertia BIT could apply, as the provision is more favourable than those contained in the Article 1.3(b) in the basic treaty, Bergonia-Conveniencia BIT. Comparable position, which favors access to international arbitration were represented in CMS v Argentina

[2] *S.D. Myers*, p. 102.

[3] see: response to Request no. 111

case.[4] Furthermore, this point of study was assumed by professor Scheurer:

> From the investor's perspective the enforced attempt to seek justice domestically will usually be no more than a costly ritual that serves no purpose except to delay arbitration.[5]

c) The less favorable substance of the provision summoned by the Respondent

7. Respondent counters that the Article 3 of the Bergonia-Conveniencia BIT may not be invoked in this way and that in any case according to Article I. 2. of the Bergonia-Tertia BIT, Respondent may deny Claimant the benefits of Article VI. 8. Respondent would like to revoke entitlement, which presents as follows:

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

Claimant submits that Article I. 2. of the Bergonia-Tertia BIT does not provide beneficial effect from the investor's perspective. Accordingly, in scope of the characteristic features of MFN clause such provision is inapplicable to the international investment dispute among Convenencia national and Bergonia state.

The requirement of the favorable substance was represented in the recent case law. The most representative is *Siemens* , were the application of the MFN clause, which was of general nature, has been related only to the benefits.[6] Furthemore, the Tribunal decided:

> „As regards the issue of whether the claim of a benefit under an MFN clause triggers application of the whole treaty, it depends on the terms of the clause, but only to the

[4] *Gas Natural*, para. 31

[5] *Schreurer, Calvo's Grandchildren,* p.p. 4-5.

[6] *Siemens*, para. 120.

> extent that it is advantageous to the beneficiary of the clause. The MFN clause would be of limited use otherwise."[7]

8. Therefore, homogeneous attitude to the requirement of the favorable substance in regards to the the general nature of the MFN clause, were expressed in *MTD*.[8] According to the discussed ruling, the fair and equitable treatment standard could be successfully invoked to the recent dispute. Although, the standard of fair and equitable treatment is included in the basic treaty - i. e. the Bergonia-Conveniencia BIT - it is established in the Article II of the Bergonia-Tertia BIT. The lawfulness of discussed entitlement were affirmed in the *Bayindir*.[9] The Claimant emphasizes that it would be unfair and inequitable to invoke disadvantageous provisions through the MFN clause.

Moreover, in regards to the international law, Respondent could not invoke the less favorable stipulation through MFN clause. Considered operation would constitute the *abus de droit* ("abuse of right"), for the reason that it would undermine the fundamental aim of the MFN clause and interfere with its purpose.[10]

d) The scope of the Most-Favoured-Nation treatment clause

- **The coverage of the dispute settlement**

9. Initially, Claimant would like to emphasize that the evaluated MFN clause is addressed directly to the investor. The incorporated expression "though not exclusively" concerning investor activity communicate, that there is open catalogue of discussed activities and that the MFN clause should be interpreted broadly. It is clearly indicated that Article 3 of the Bergonia-Conveniencia BIT has no reservation which seems to be intentionally. Professors R. Dolzer and C. Schreuer stated:

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[7] *Siemens*, para. 108 .

[8] *MTD,* para. 104.

[9] *Bayindir*, paras. 230–231.

[10] *Encyclopedia of Public International Law*, p. 1.

> In the absence of such indication, there is no convincing reason for distinguishing between substantive standards and dispute settlement. As a matter of treaty interpretation, it is difficult to understand why a broadly formulated MFN clause that refers to 'treatment' should apply only to issues of substantive, but not to questions of dispute settlement[11]

10. Submitted interpretation is generously supported by case law. The Tribunal in *Siemens*, concluded that the term "treatment" and the phrase "activities related to the investments" are sufficiently wide to include settlement of disputes.[12] The interpretation straightforwardly followed the significant ruling from *Maffezini* .[13]

12. Furthermore, as well in the most recent cases in the Arbitration Institute of the Stockholm Chamber of Commerce, in *RosInvest* the Tribunal decided that MFN clauses can be extended to arbitration.[14] It was reaffirmed in the *Renta 4 SVSA and others*, where it was underlined, that there is no textual basis or legal rule to say that "treatment" does not encompass the host state's acceptance of international arbitration.[15]

The standpoint, which classifies both substantive treatment and access to arbitration under the same general subject-matter of investor protection is is broadly supported by doctrine, for instance by E. Gaillard.

> „when the clause is broadly phrased and the contracting parties to the treaty have neither expressly excluded dispute resolution mechanisms nor clarified their intention of including such mechanisms in the protection that is accorded to the beneficiaries of the clause. In those situations, the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a

[11] *Dolzer, Schreuer*. p. 257.

[12] *Siemens*, para. 103.

[13] *Maffezini*, para. 60.

[14] *RosInvest* ,para. 75

[15] *Renta 4 SVSA and others*, para. 86.

> third country, including the right to neutral and effective settlement of their investment disputes through arbitration rather than through the judicial organs oh the host state itself."[16]

13. Therefore, the Claimant submits, that the legal circumstances from the pending case fulfills the requirements established by *ejusdem generis* principle in *Maffezini* case, and other subsequent cases.[17] In conclusion, the Claimant would like to underline, that radical *Plama* reasoning is unapplicable on the facts of recent case.[18] In view of this broad consensus on the interpretative methodology to be applied to questions regarding the jurisdiction of international dispute settlement bodies, the principle basis of the decisions in *Plama*[19], *Telenor*[20], *Vladimir Berschader and Moïse Berschader*,[21] and *Wintershall*[22] is, with respect, wrong and cannot be followed. Principles for MFN clause clarification established in *Maffezini* case comply with principles of treaty interpretation.

- **The coverage of the administration of justice**

14. Alternatively, the substance of the invoked Article VI. 8. of the Bergonia-Tertia BIT could be classified to administration of justice array. This interpretation follows *Ambatielos* case, which had specifically acknowledged that a Most-Favoured-Nation treatment clause could cover the administration of justice.[23]

3) Corporate nationality

15. According to the invoked provision from Article VI. 8. of the Bergonia-Tertia BIT, MedBerg

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[16] *Gaillard*, p 3.

[17] *Maffezini*, para. 46.

[18] *Plama* , para. 223.

[19] *Plama*, para. 223.

[20] *Telenor,* para. 90.

[21] *Vladimir Berschader and Moïse Berschader*, para. 181.

[22] *Wintershall,* para. 167.

[23] *Ambatielos*, para 53.

Co. should be treated as a national of Convenencia, since it was an investment of assets owned by the national of Convenencia (in particular, MedX Holdings Ltd.). Claimant submits, that MedBerg is controlled by MedX. Actually, with regards to the reference in the Art 25(2) b, MedBerg is foreign controlled, and such control is exercised by the national of Convenencia.

16. In the pending case, the Article I.1.(a) of the Tertia – Bergonia BIT acts to clear and unambiguous expansion of the Convention's jurisdiction — allowing a juridical person to be regarded as the national of another Contracting state, because of the ownership or control.[24] This legal situation is comparable to the circumstances from *Wena Hotels* [25] Therefore, the Tribunal agreed with Wena's interpretation and confirmed the jurisdiction.

4) Test of control

17. The Claimant submits that, as regards the corporate nationality of MedBerg, the formal State of incorporation test is inadmissible. The nationality of the shareholders will further be relevant in the event that they claim direct injury to their rights - as opposed to injury to the corporation.[26] On the facts of recent case, MedX is the factual owner and universal executive of the Intellectual Property rights, which were the subject of Bergonian Patent No. AZ2005. The incorrectness of the compulsory license compulsory for Patent No. AZ2005 and parallel export incidents made direct damages to the MedX.[27]

18. Moreover, Claimant in order to “shelter” the discussed approach invokes the basic Bergonia-Convenencia BIT, where the ”investment” term is defined as every kind of assets, in particular shares of companies and intellectual property rights.

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[24] .*Delaume: Practical Considerations, p.* 112

[25] Wena Hotels, para. 39

[26] McLachlan et al., at para 162

[27] See requests no. 74 and 113

Universally recognized as an authority on the subject, Professor Schreuer appealed that, *"the better approach would appear to be a realistic look at the true controller".*[28] Furthermore, in the Separate Opinion in *Barcelona Traction* case, Judge Jessup stated that in the evaluation of corporate nationality: '*We must look at the economic reality of the relevant transactions*' and identify '*the overwhelmingly dominant feature'.*[29] *Claimant submits that, o*n the facts of present case a dominant feature in the affairs of MedBerg Co is not the fact of incorporation in Bergonia, but the *controlling* influence of exceeding international financial interests manifested by MedX. Furthermore, it should be highlighted, that an employee of MedX is subsequently a member of MedBerg`s management – he posses ½ of votes. [30]

19. Flexible approach to the corporate nationality, were represented in the *Spectrum*. The Tribunal deduced that:

> "The second clause of Article 25(2)(b) introduces a significant exception to one of the major premises of the Convention (which also reflects a general principle of international law), i.e. that it deals exclusively with disputes between parties of diverse nationalities, to the exclusion of those between a State and its own national investors. The ratio legis of this exception is the wording "because of foreign control". Foreign control is thus the objective factor on which turns the applicability of this provision. It justifies the extension of the ambit of ICSID"[31]

Claimant give emphasis to the fact that MedX is not only a sole shareholder of MedBerg, but controlling authority as well. MedX as shareholding in a company is a form of investment, which should enjoy a protection. This attitude can be summon from a Banro v Congo award:
"This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decision on a realistic

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[28] *Schreuer*, p. 318 [para. 563].

[29] See: *Barcelona Traction*

[30] See request no. 75

[31] *Spectrum*, para 139

assessment of the situation before them"[32]

20. There was corresponding situation in the *Siemens*. According to that case, 'shares, rights of participation in companies and other types of participation', 'claims to money that has been used to create economic value or claims to any performance under a contract having an economic value', 'intellectual property rights', and 'business concessions conferred by public law' could be classified as a protected investment.[33]

(1) The Host State's awareness of the foreign control

21. The Claimant submits that, Bergonia had knowledge of the foreign control. The ownership of MedBerg Co. was established and the information about it is available at any times at registry office in Bergonia.[34] The State's awareness of the foreign control could be implied. It was established in *Amco*, the express notice of State's knowledge is not considered necessary.

(2) Alternative -the lifting of the corporate veil.

22. Alternatively, in the event that the Tribunal does not apply the ctest of control, the Claimant requests for piercing the corporate veil. The Claimant emphasizes that MedBerg Co. is a national of Convenencia, due to the origin of the capital. MedBerg Co. was only a mere vehicle company to make an investment in Bergonia and established in the Convenencia while MedX is the sole parent company of MedBerg Co.

As regards the issue of piercing the corporate veil of the Claimant, a dissenting opinion of Prosper Weil, submitted to Award in *Tokios Tokeles*, must be discussed. As far as the nationality of the investor is conserned, the award in *Tokios Tokeles* was based on approach of ICJ presented

[32] *Banro,* para 11

[33] *Siemens,* para. 150

[34] See request no. 59

in *Barcelona Tracion* – i. e. that the nationality of the company depends on the place of its incorporation and that the corporate veil should not be pierced unless one of four exceptions to that rule should occur.

23. The judgment in *Barcelona Traction* was given in 1970s. It is undisputed that the international law concerning investments, procetion of investor (especially – shareholders) changed since that time. With all due respect to authority of ICJ and judges who handed down *Barcelona Tracion* ruling – it "no longer reflects the current state of international law"[35]. Due to that fact that the *Tokios Tokeles* Tribunal decision "rests on the assumption that the origin of the capital is not relevant and even less decisive"[36], it should not be followed as regards the issue of nationality of the investor.

Article 25.2.(b) of the ICSID Convention stipulates that:

> " (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."

24. Having considered the fact that there is no particular agreement of the parties to the ICSID Convention on interpretation of the Convention, the terms used in Article 25 of the ICSID Convention should be construed in accordance with general rules of interpretation of International treaties of VCLT. As it was said by Ch. Schreuer:

> "The basic idea of the Convention, as expressed in its title, is to provide for dispute settlement between States and foreign investors (...) Disputes between a State and its own nationals are settled by that State's domestic courts(...) The Convention is

[35] *Laird*, p. 77

[36] *Dissenting opinion in Tokios Tokeles*, para. 6

> designed to facilitate the settlement of investment disputes between States and nationals of other States. It is not meant for disputes between States and their own nationals. The latter type of dispute is to be settled by domestic procedures, notably before domestic courts."[37]

Therefore, the ICSID tribunals should interpret the ICSD Convenion in accordance with its object and purpose – e. g. in a way which does not allow nationals of the state to evade jurisdiction of the domestic courts by referring to the international arbitrage. Subsequently, the ICSID Convention should be interpreted in a way which allows foreign investors to have the disputes settled by arbitration tribunals.

25. In the instant case, the factual situation seems to be reverse to the one in *Tokios Tokeles*. In *Tokios Tokeles*, the Respondent State raised an objection to tribunal`s jurisdiction contenting that the claimant was not a foreign investor due to the fact that Tokios Tokeles was undisputedly controlled and owned by Ukrainians. In the present case, the Respondent contends that the jurisdicion is precluded because the Claimant is incorporated in the Respondent state, even though it is controlled and owned by foreign entity.

Nonetheless, the principle remains the same:

> "When it comes to ascertaining the international character of an investment, the origin of the capital is relevant, and even decisive (…) What is decisive in our case is the simple, straightforward, objective fact that the dispute before this ICSID Tribunal is not between the Ukrainian State and a foreign investor but between the Ukrainian State and an Ukrainian investor – and to such a relationship and to such a dispute the ICSID Convention was not meant to apply and does not apply."[38]

For the above reason, the Tribunal should reject the Respondent`s objection to jurisdiction based on the nationality of the Claimant and focus on the fact that the only shareholder of the Claimant

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[37] *Dissenting opinion in Tokios Tokeles*, para. 19 quoting *Schreuer*, p. 158, para. 165, and p. 290, para. 496.

[38] *Dissenting opinion in Tokios Tokeles*, paras. 20-21

– MedX, is incorporated in Conveniencia and conducts a business in that country.

26. According to the pieces of information given in responses to Requests (e. g. 39 and 103), it is MedX which is a parent company and owns subsidiaries in many countries. Furthermore, MedX is not a mere shell company. It is an active company with the employee and the office, it has also valuable assets such as intellectual property . In conclusion, MedX Holdings Ltd, fulfills the nationality condition as it was required in Aquas del Tunari vel Bolivia.[39]

It should be underlined that the size of the investor is not a crucial issue. This interpretation were provided in Saluka v Czech Republic, where it was emphasized that "it is not open to the Tribunal to add other requirements".[40]

(3) Therefore, the Tribunal should consider the situation of MedX in determining its jurisdiction as regards the nationality of the Claimant.

27. Moreover, Claimant would like to remind generous case law, where the Tribunals refused to lift the veil beyond the first layer or rung of the corporate ladder (bearing the nationality of the host State). This approach was represented, for instance, in *AMCO and others v. Republic of Indonesia, Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* and *Aguas del Tunari v. Republic of Bolivia*.

2. Jurisdiction Ratione Materiae

1) Applicability of VCLT provisions

28. Due to the fact that both Conveniencia and Bergonia are parties to VCLT (response to

[39] *AdT,* paras 206-323

[40] *Saluka,* para. 241

Request no. 108), there can be no doubt that the rules of interpretation of international agreements set forth therein are applicable in the pending case. For that reason, the Claimant shall not discuss whether or not rules of interpretation stipulated in Article 31 of VCLT are a part of customary international law, and – consequently – are binding upon the parties to the Bergonia-Conveniencia BIT as a part of customary international law.

2) Waiting Period

(1) The waiting period stipulated in Article 10 of the Bergonia-Conveniencia BIT does not preclude the Tribunal from having jurisdiction in the instant dispute.

29. Article 10 (Settlement of Disputes between an Investor and a Contracting State) of the Bergonia-Conveniencia BIT regulates that

> (1) Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.
> (2) If such a dispute cannot be settled within a period of three months from the date of receipt of request for settlement, the dispute shall be submitted at the request of the investor alternatively or consecutively to: (a) the competent court of the Contracting State in whose territory the investment has been made; (b) international arbitration under either: – the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), or – the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL), or – the rules of arbitration of the International Chamber of Commerce (ICC), or – any other form of dispute settlement agreed upon by the parties to the dispute. Each Contracting State herewith declares its acceptance of such international arbitral procedures.

(2)Meeting the requirement of waiting period is a procedural, not a jurisdictional matter.

30. The Claimant points out that fulfillment of the Article 10 (1 and 2) of the Bergonia-Conveniencia BIT is not a *sine qua non* condition of the Tribunal's jurisdiction. Numerous decisions of investment tribunals stress that “non-fulfillment of this requirement is not 'fatal to

the case of the claimant".[41] To support the aforesaid argument, the Claimant submits quotations from various investment cases including, but not limited to ICSID cases.

It was observed by *Lauder* Tribunal that:

> "requirement of a six-month waiting period of Article VI(3)(a) of the Treaty is not a jurisdictional provision, i. e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant (…) the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration."[42]

The *Bayindir* Tribunal, sharing the above-mentioned approach, found that:

> notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan's position, the non-fulfillment of this requirement is not "fatal to the case of the claimant" (Tr. J., 222:34). As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage[43]

In *Ethyl,* the issue of waiting period was considered in connection with interpratation rules set forth in Article 31 of the VCLT. The Tribunal rejected Respondent`s objections to jurisdiction and stated that

> "Clearly, a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA."[44]

Therefore, the alleged non-compliance with the waiting period set forth in Article 9 (1 and 2) of the Bergonia-Conveniencia BIT does not preclude the Tribunal from having jurisdiction in the pending case.

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41 *McLachan, Shore and Weniger,* p. 51 quoting *Bayindir,* para. 100.

42 *Lauder*, para. 187.

43 *Bayindir*, para. 100.

44 *Ethyl,* para. 85.

(3) In the event that the Tribunal finds that meeting the requirement of Article 10 of the Bergonia-Conveniencia BIT is a juridsictional matter, the Claimant met the aforesaid requirement.

31. Alternatively, if the Tribunal finds that non-compliance with the waiting period requirement stipulated in Article 10 (1 and 2) of the Bergonia-Conveniencia BIT precludes the Tribunal from having jurisdiction in the instant case, the Claimant argues that it filed a request for settlement in compliance with Article 10 (2) of the Bergonia-Conveniencia BIT. Response to Request no. 111 is crystal clear:

> "On 1 December 2007, MedBerg wrote the Bergonian IP Office with copies to the Foreign, Economics and Justice Ministries referring to Art. 10(2) of the BIT. Only the Justice Ministry replied to MedBerg's 1 December 2007 letter, stating that the compulsory license was issued in conformity with Bergonia's international obligations."

The Justice Ministry's response as well as silence of the other ministries should be assessed as refusal to enter negotiations. The Claimant made an attempt to induce the Respondent to take up negotiation, however, the attempt was unsuccessful. Nonetheless, the Claimant satisfied the rule set forth in Article 10 (1 and 2) of the Bergonia-Conveniencia BIT.

3) Scope of the dispute

32. Without doubt pending case between the Claimant and the Respondent fall within the scope of the dispute definition defined by the ICJ as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties"[45].

(1) The pending dispute is of a legal nature within the meaning given to that term in decision of court and tribunals.

33. Executive Directors on the ICSID in its *Report* stated that:

[45] *East Timor*, para.22, see also: *Mavrommatis,* p. 11.

> "the dispute must concern the existence or scope of a legal rights or obligations, or the nature or extent of the reparation to be made for breach of a legal obligation"[46].

The question of legal nature of the dispute should not raise any doubts. The dispute is legal when it concerned legal rights and obligations under the agreement between the parties[47]. As it was also confirmed in *Suez* that the dispute is legal when the case is based on legal rights and the case is presented in legal terms.

4) Consent

34. Article 25(1) of the ICSID Convention requires the consent of both contracting states in order to initiate arbitration. Specifically, Article 25(1) states:

> "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."

Bergonia's advance consent to arbitration was given through Bilateral Investement Treaty, precisely in the Article 10.2 of the Bergonia-Conveniencia BIT, where it was contracted, that the dispute could be submitted at the request of the investor to international arbitration, for instance under the ICSID Convention.

5) The jurisdictional condition of "foreign investment" is met in the instant case.

35. Although a definition of "investment" in international investment law is crucial in investment

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[46] *Report* , para. 26.
[47] *Schreuer*, p. 106

disputes, proposed definitions tend to dissent on many issues[48]. For the sake of brevity, the Claimant submits the definition proposed by M. Sornarajah:

> "Foreign investment involves the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under total or partial control of the owner of the assets.[49]"

36. In order to establish that the Tribunal`s jurisdiction extends to the present dispute, the following criteria need to be met:

(1) the patent no. AZ2005 constitutes an investment within the meaning of the ICSID Convention;

(2) the patent no. AZ2005 constitutes an investment within the meaning of the Bergonia-Conveniencia BIT.

(1) Investment is broadly defined in the Bergonia-Conveniencia BIT.

37. Article 1 (1d) of the Bergonia-Conveniencia BIT stipulates that

> „the term "investments" comprises every kind of asset invested in accordance with the laws and regulations of a Contracting State and shall include in particular, though not exclusively: (...)
> (d) intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trademarks, trade-names, trade and business secrets, technical processes, know-how, and good will;(...).

In the light of literal meaning of Article 1 (1d) of the Bergonia-Conveniencia BIT, it is obvious that patents are inclusive of the scope of the term "investment". The will of the parties to the contract is important in the process of interpretation of the term, as it is discussed below.

(2)The investment was intentionally undefined in the ICSID Convention.

38. As far as the definition of investment is concerned, it is to be stressed that the ICSID Convention does not comprise this definition. During the negotiations of the ICSID Convention,

[48] *Sornarajah*, p. 7-18, especially footnotes 10, 11 and 19.

there were attempts to define "investment", but all of them failed[50]. The Claimant submits commonly quoted excerpt from *Report:*

> "No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Center (Article 25 (4))."[51]

The Claimant submits that the process of interpretation of terms inclusive of the international treaties needs to apply principles stipulated in the Articles 31 and 32 of the VLCT. Thus, the ordinary meaning of the term "investment" has to be taken into consideration – on understanding that object and purpose of the treaty are also pondered.

39. The doctrine and decisions of other investment tribunals are essential source of remarks on the way the term "investment" should be construed. To mention only a few of them, the Claimant cites excerpt from *Fedax:*

> „it is within the sole discretion of each Contractin State o determine the type of investment disputes that it considers arbitrable in the context of ICSID, or that the parties 'thus have a large measure of discretion to determine fot themselves whether their transaction constitutes an investment for the purposes of the Convention"'[52]

As it was observed by *Biwater* Tribunal:

> "criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of "investment" were made, but ultimately did not succeed. In the end, the term was left intentionally

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[49] *Sornarajah*, p. 7.

[50] *Fedax*, para. 21.

[51] *Report*, para. 26.

[52] *Fedax*, para. 22. The *Fedax* Tribunal cited *Lamm and Smutny*, p. 80 and *Delaume*, p.p. 239-240; *Shihata*, p. 4.

undefined."[53]

40. Therefore, the Tribunal is not bound whatsoever by criteria given in the doctrine or decisions of other tribunals. Every investment is made in particular, unique circumstances. For this reason, the Tribunal is free to assume criteria that would be suitable to the pending dispute, having considered e. g. the income level of the Respondent, Repondent`s membership in customs union etc.

(3)The term "investment" should be construed in accordance with its meaning stipulated in majority of BITs across the world.

41. If the Tribunal finds otherwise, the Claimant points out that while construing the term "investment", the practice of states have to be taken into consideration. Most of the modern BITs define investment as "every kind of assets" and itemize the assets which are inclusive of therein. On the facts of the recent case, the Claimant stresses that the way of constructing the scope of the term "investment" is similar to the one which is established in the majority of the modern BITs.

As is was noticed by the arbitrators in the *Biwater*:

> "If very substantial numbers of BITs across the world express the definition of "investment" more broadly than the Salini Test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly."[54]

The *Biwater* Tribunal's observation was noteworthy – it took into account the lack of uniformity of international investment tribunals and followed the commonly established practice of states in order to interpret the ISCID Convention "in the light of its object and purpose"[55] The fact that a common practice is of importance in the international law seems to apparent. *Usus,* aside from *opinio iuris* is a necessary element of a rule of customary international law. For that reason, the

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[53] *Biwater*, para. 312.

[54] *Biwater*, para. 314.

[55] VCLT, Article 31 (1).

practice of states should not be ignored.

42. In the alternative – i. e. if the Tribunal finds that practice of states is irrelevant to the matter of interpretation of "investment", the Claimant points out that by assuming this reasoning, the Tribunal would reject the importance of Tribunal's decisions in other cases. Thus, the Tribunal should construe every term and clause included in the international treaties and every provision of the BITs on its own. It goes without saying that such approach is contrary to well-established practice of international courts and tribunals.

(4)The term "investment" should be construed in accordance with the intention of the parties to the Begronia-Conveniencia BIT, in the light the object and purpose of the BIT. Descetion of the parties to the BIT to define the term "investment".

43. The Tribunal in *Tokio Tokeles* stated that

> „the parties have broad discretion to decide the "kinds of investment they wish to bring to ICSID." Indeed, "[p]recisely because the Convention does not define 'investment', it does not purport to define the requirements that an investment should meet to qualify for ICSID jurisdiction." Parties have a "large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention."[56]

The Tribunal should follow the established practice of states and consider patents and compulsory licenses as an investment.

(5)Even if the practice of states or the intention of the parties to the BIT is not a decisive factor as regards the interpretation of the term "investment", the Claimant`s investment meets the conditions of the Salini test.

44. Alternatively, should the Tribunal base its decision one the prerequisites referred to as the

[56] *Tokio Tokeles*, para. 73.

Salini test, the Claimant states that all of the criteria included therein are met.

a) Duration

45. The element of duration is crucial in determining whether there is an investment due to the fact that it distinguishes investments from ordinary commercial transaction[57]. The requirement of certain duration is not commonly discussed in decisions of investment tribunals. Nevertheless, there are cases which give noteworthy remarks on the duration aspect.

According to an opinion given by the Tribunal in *Fedax*

> „the duration of the investment in this case meets the requirement of the Law as to contracts needing to extend beyond the fiscal year in which they are made"[58]

In *Jan de Nul*, having considered the fact that the investment lasted for not less than 23 months, the Tribunal decided that it

> „agrees with the Claimants that the duration of the operation was sufficient for it to qualify as an investment within the meaning of Article 25 of the ICSID Convention, even starting from the execution of the Contract on 29 July 1992."[59]

In the pending case, the investment lasted for at least the time when License Agreement was in force, i. e. 24 months. It has to mentioned that whichever of the aforesaid standards would be found sufficient, in the pending case both of them are met.

b) Regularity of profit and return

46. The Claimant licensed BioLife Co. to utilize the patent for a period of 2 years. In exchange for the use of the patented technology, the Claimant was paid royalties based on sale of products the patented products. Therefore, it can be presumed that royalties due to the Claimant were

[57] *Bayindir,* para. 132.

[58] *Fedax*, para. 43.

[59] *Jan de Nul,* para. 95.

calculated periodically – e .g. at the end of each month or quarter. In the light of the above, a conclusion that profits were regular can be made.

c) Assumption of risk

47. Every commercial activity is encumbered by some risk of failure or loss. The Claimant applied for a patent on the 5 February 2004, and was granted Bergonian Patent No. AZ2005 on 15 March 2005. The license agreement was signed on the 31 March 2005 r. The Claimant paid for the patent and was not able to predict whether the invested money shall produce any profits.

48. Moreover, Bergonia is a member of customs union. Under such circumstances, it can be concluded that the Claimant and its shareholder – MedX were aware of the possibility of competitions with privileged entities, e. g. other companies which manufacture would be exempted from a duty.

d) Substantial commitment and significance for the host State's development

49. The granting of the patent is basically payable, therefore it can be presumed that the Claimant made contribution of money and – consequently - IP rights. It is uncontested that patented technology is "needed to address important domestic medical needs". The products manufactured using the technology covered by the Patent nr AZ2005 is to be the most effective from all available treatments (response to Request no. 68), approximately one-third of population of Bergonia suffers from obesity (34% of males, 38% of females - response to Request no. 65).

6) Should it be of the essence to establish that the Tribunal`s jurisdiction extends to the investments made in good faith, the Claimant submits that it acted in good faith as regards its activity connected with granting and utilization of the patent no. AZ 2005.

50. Provided that the Tribunal finds that an essential condition of "investment" is a good faith of the investor, relating to a prospective allegation of bad faith of the Claimant, the Claimant

stresses that it is a general principle of law recognized by civilized nations that the good faith is presumed, but the presumption can be rebutted. Moreover, the Respondent cannot prove the bad faith of the investor, as no examples of activities that would be considered as *mala fide* actions can be given. Quoting the Tribunal's decision in *Phoenix:*

> „investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system."[60]

It is unquestionable that a crime or an abuse of right are not worthy of being granted a protection of law. Nonetheless, there is a substantial difference between termination of negotiations and the actions enlisted in the cited excerpt. While the latter is an illegal behavior, the former is a legal, everyday business activity. The Claimant cannot be held responsible for the fact that the negotiations were not successful. In the instant case, no examples of actions or omissions ever comparable to those itemized in excerpt from *Phoenix* can be given.

7) A dispute in the pending case arises directly out of the investment within the meaning of the Article 25 of the ICSID Convention.

51. According to Article 25 of the ICSID Convention, only a dispute which arises "directly out of the investment" is arbitrable by the Centre . As it was proven above, in the pending case the investment was made. For that reason, it needs to be shown that above-mentioned requirement is met.

(1)The fact that the investment came to an end does not bar the Tribunal jurisdiction.

52. Prima facie. the investment lasted for the time when the Patent no. AZ 2005 was utilized by the Bio Life Co. under the License Agreement. Therefore, the issuance of compulsory license would not be connected with the investment which would induce the unfulfillment of the

[60] *Phoenix*, para. 100.

requirement stipulated in Article 25 of the ICSID Convention. The latter would force the Tribunal to deny the jurisdiction.

53. Nevertheless, the approach set out above is unacceptable cause it is based on "narrow focusing on the particular economic activity giving rise to the dispute"[61]. The Claimant submits that the Tribunal should look at the aforementioned facts in a broader meaning. There is a strong tendency to look "at the entire concept of what constitute an investment"[62]. Such approach was adopted by the Tribunal in *CSOB*[63] and, more recently by *Eureko Tribunal* which concluded that it:

> "finds that those rights [i. e. - corporate governance rights], critical as they were to the conclusion of the SPA and hence to making of Eureko`s very large investment, do so qualify"[64]

Although *Eureko* was not an ICSID case, the reasoning of the *Eureko* Tribunal would apply *per analogiam* to the discussed issue regulated in Article 25 of the ICSID Convention[65].

54. The issue of the investment which came to an end was a focus of litigation in *Jan de Nul*. In that case, the arbitration proceeding were commenced long after the investment had come to an end. The respondent state raised the objection to Tribunal`s jurisdiction by contending that the investment no longer existed at the time when the arbitration proceeding were commenced. The objection was rejected due to the fact that such approach would contravene "the entire logic of investment protection treaties.[66] The *Jan de Nul* Tribunal cited excerpt from Schreuer`s report submitted by the claimant

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61 *McLachan, Shore and Weniger,* p. 167.

62 *McLachan, Shore and Weniger,* p. 167.

63 *CSOB*, paras. 350-357.

64 *Eureko*, para. 144.

65 *McLachan, Shore and Weniger*, p. 167.

66 *McLachan, Shore and Weniger,* p. 177.

> "The duty to provide redress for a violation of rights persists even if the rights as such have come to an end. Otherwise an expropriating State might argue that it owes no compensation since the investment no longer belongs to the previous owner"[67]

The above-mentioned arguments give reason to looking at the complexity of entire activity of the Claimant and the Respondent since the granting of the Patent no. AZ2005.

B. MERITS

EXPROPRIATION

1. The term expropriation is defined in the doctrine of law and in decision of investment tribunals.

55. The very nature of expropriation seems to be clear: "it is a governmental taking of property for which compensation is required."[68] However, parties to investment treaties are reluctant to define expropriation. Instead, the clauses concerning expropriation itemize the conditions of an lawful expropriation (discussed below at para. …). For the purposes of this memorial, the above definition and the hereafter excepts from decisions of tribunals are sufficient.

According to the definition of expropriation formulated in *Metalclad*

> „Expropriation under NAFTA includes (...) 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 or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

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[67] *Jan de Nul*, paras. 134-136.

[68] *McLachan, Shore and Weniger,* p. 266.

2. Both corporal and incorporal rights of the investor are protected against expropriation under Article 4 of the Bergonia-Conveniencia BIT.

56. Even though the protection of investment was initially restricted to physical property[69], it is presently unquestionable that the protection of investment against expropriation covers the contractual rights and other incorporeal rights[70] To put it in even more emphatic words:

> "There is a long judicial practice that recognizes that expropriation is not limited to tangible property."[71]

In the landmark case *Certain German Interests in Polish Upper Silesia,* PCIJ observed that:

> „it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzów factory and were, so to speak, concentrated in that factory, the prohibition contained in the last sentence of Article 6 of the Geneva Convention applies in all respects to them."[72]

In the light of the above, there can be no doubt that incorporeal rights can be expropriated and for that reason – they are protected as well as corporeal rights.

3. The Respondent deprived the Claimant of use and benefits of the investment.

57. The Draft Convention on the International Responsibility of States for Injuries to Aliens defines a "taking of property" to include

> „not only an outright taking of property but also any such unreasonable interference

[69] *Sornarajah*, p.10.

[70] *LIAMCO*, para. 62; *Phillips Petroleum,* para. 106; *SPP*, para. 164; *Tokio Tokeles*, para. 92; *Siemens*, para. 267.

[71] *Siemens*, para. 267.

[72] *Certain German Interests in Polish Upper Silesia*, p. 44.

> 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."[73]

As regard the issue in question, the Claimant submits that the Iran-U.S. Claims Tribunal found that

> „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."[74]

4. The exclusive character of the patent no. AZ2005 was terminated due to issuance of the compulsory license.

58. As far as the control of the investment is concerned, the Claimant stresses that conditions set forth in *Pope and Talbot*[75] need to be transposed to the nature of the instant investment – an intellectual property rights. As it is briefly defined in the doctrine, the very idea of patent consists of exclusive utilization of a protected invention:

> „the holder of a patent may prevent others from making, using, offering for sale, selling or importing the invention during the patent term."[76]

According to Article 28 (1a) of the TRIPS Agreement

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

59. As a result of Respondent's actions (attributability – see paragraph ….. of the Memorial), the

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[73] Article 10, paragraph 3 (a); see also *Pope and Talbot,* para. 100.

[74] *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, paras. 219, 225.

[75] *Pope and Talbot*, para. 102

[76] *Abbott, Cottier and Gurry,* p. 7.

use of technology covered by the patent was no longer an exclusive right. Therefore, the vital feature of the patent was terminated. As the Tribunal said in *Middle East Cement Shipping*

> „measures taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of this respective rights being the investment (...) is deprived of parts of value of his investment (...) and Respondent is liable to pay compensation." [77]

The above approach was shared by *Lauder* Tribunal which described indirect expropriation as a taking that

> "does not involve an overt taking but effectively neutralizes the enjoyment of property"[78]

5. The criteria of a lawful expropriation are included in the Bergonia-Conveniencia BIT as well as in the customary international law.

60. The criteria of lawful expropriation are virtually uncontested, although a precise definition of each of them may vary. Expropriation shall be lawful provided that:

(3) it is in the public interest,

(4) it is non-discriminatory,

(5) it is carried out under due process of law,

(6) it is accompanied by the payment of compensation.[79]

61. The aforementioned conditions are said to be a part of customary international law[80,] which was reflected in the Article 4 of the Bergonia-Conveniencia BIT:

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[77] *Middle East Cement Shipping ,* Award, para. 107

[78] *Lauder*, para. 54

[79] NAFTA, Article 1110(1); ECT, Article 13(1); ASEAN, Article VI; e.g. Brazil-Netherlands BIT 1998, Article 6; France – Mexico BIT 1998, Article 5 (1).

[80] *Dolzer, Schreuer,* p. 91.

> „Investments by investor 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 of the latter Contracting State:
> *8)* for the public benefit;
> 2) on a non-discriminatory basis;
> 3) against prompt, adequate and effective compensation. (…) paid without delay(...);
> 4) the legality of any such expropriation and the amount of compensation shall be subject to review by due process of law according to the respective national legal system."

While meeting the conditions (1) and (2) is not contested, the Claimant states that the conditions (3) and (4) were not met, thus the expropriation is unlawful.

1) The Respondent violated its obligation under Article 4 of the Bergonia-Conveniencia BIT by not paying compensation to the Claimant.

62. In the pending case, the quantity of royalties collected by the Bergonian IP Office depends upon the sale of goods produced using the technology in question (as it is clearly stated in response to Request no. 13). Moreover, the royalty rate was "moderately lower" than it was while the License Agreement was in force (response to Request no. 25 and response to Request no. 88).

2) The royalties in the pending case are not even comparable to compensation within the meaning of the Article 4 of the Bergonia-Conveniencia BIT and the customary international law.

63. The Claimant argues that royalties based on sales cannot be perceived as compensation. The very idea of compensation is redress a loss that has been suffered. As regards the judicial approach to compensation, the famous passage from *Factory at Chorzow* must be quoted:

> "The essential principle contained in the actual notion of an illegal act a principle which seems to be established by international practice and in particular by the

> decisions of arbitral tribunals is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for act contrary to international law."[81]

64. In the instant case, the issuing of compulsory license induced a decrease of the Claimant's revenues (response to Request no. 39). Therefore, an amount of compensation should be based on difference between the Claimant's revenues prior to issuing the compulsory license and those after that moment. A possible impact of economic situation in Bergonia, fluctuations of inflation rate and other factors may be of the essence to calculate the amount of compensation. Nonetheless, percentage royalty rate is not equivalent to compensation.

3) The Respondent violated its obligation under Article 4 of the Bergonia-Conveniencia BIT by not paying the "prompt" compensation to the Claimant.

65. In the event that the Tribunal finds that royalties collected by the Bergonian IP Office could be recognized as compensation, the Claimant states that the royalties were offered to the Claimant too late after the compulsory patent was granted to meet the requirement of the "prompt compensation". The Bergonian IP Office commenced the procedure of issuance of the compulsory license for patent no. AZ2005 on the 1 June 2007 and the compulsory license was issued on 1 November 2007. After that day, the patent no. AZ2005 was no longer an exclusive right.

On the facts of recent case it is not clear when precisely the royalties were offered to the Claimant. As it is stated in response to Request no. 71, the royalties were collected "sometime on or before 1 January 2009."

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[81] *Factory at Chorzow*, p. 47.

66. Having considered the fact that royalties are based on percentage of sales of the products manufactured using the patented technology, the royalties could not have been paid shortly after 1 November 2007. In the light of response to Request no. 87, which states that royalties offered to the Claimant were to be paid yearly, it is apparent that compensation was not prompt and paid without delay.

4) The Respondent violated its obligation under Article 4 of the Bergonia-Conveniencia BIT by not guaranteeing the Claimant due process of law.

67. Although there is no point in trying to explain the scope of the term "due process of law" in the present memorial, some aspects of this principle are evident. The following is relevant in the instant case - the decision-maker must be impartial[82] The Tribunal in *ADC* stated that

> „basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the action in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful"[83]

According to the pieces of information given in response to Request no. 29, the Bergonian IP Office's Patent Review Board

> „is a quasi-judicial body, which draws upon existing Bergonian judges to sit in particular intellectual property case and be paid for their services by the Bergonian IP Office."

68. The facts are more than clear – in the proceeding before the Bergonian IP Office's Patent Review Board, the party to the dispute is at the same time the employer of the adjudicating body. Such adjudicator cannot be assessed as independent which constitutes a breach of the "due process of law" requirement.

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[82] e. g. *International Covenant on Civil and Political Rights*, Article 14 (1)

[83] *ADC*, para. 432.

6. The Respondent violated its international obligations under the TRIPS Agreement. Conformity of the acts of Respondent with the internal law in irrelevant to establish that those acts violated the international obligations of the Respondent.

69. If the Tribunal finds that the Claimant may not refer only to some provisions contained in the other BITs and/or that both parties to the dispute may invoke the Bergonia-Tertia BIT using the MFN clause and the Respondent refers to Article III.4 of the Bergonia-Tertia BIT, the Claimant states that the compulsory patent was not granted in accordance with the TRIPS Agreement.

The Patent no. AZ2005 is an intellectual property right granted to the Claimant in accordance and under the internal Bergonian law. Nonetheless, Bergonia is a party to the TRIPS Agreement. Therefore, the IP rights governed by local Bergonian statute are protected through international agreement. As it is stressed in the doctrine:

> „as a result of this internationalization, any state interference with intellectual property thereafter becomes a breach of treaty which amounts to an expropriation and has to be compensated"[84]

70. The Respondent invokes the MFN clause contained in Article 3 (2) of the Bergonia-Conveniencia BIT which stipulates that

> "Neither Contracting State shall subject investors of the other Contracting State, as regards their activity, in particular, though not exclusively, concerning management, maintenance, operation, enjoyment or disposal of their investments, to treatment less favourable than it accords to its own investors or to investors of any third State, whichever is more favourable to the investors."

The Respondent contends that provisions protecting the expropriated investments i. e. Article

[84] *Sornarajah*, p. 12

III.1-3 of the Bergonia-Tertia BIT are not applicable by virtue of exception set forth in Article III.4 of the Bergonia-Tertia BIT which stipulates that

> „this Article [i. e. - concerning expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement."

1) The rules of interpretation stipulated in the VCLT are applicable to construing the meaning of the Article 3 (2) of the Bergonia-Conveniencia BIT (i. e. the MFN clause).

71. The Claimant point out that the MFN clause cannot be invoked by the host state to evade from its international obligation. The MFN clause should be interpreted in accordance with rules of interpretation set forth in VCLT. Neither the ICSID Convention nor the BITs establish different rules of interpretation for different clauses. For that reason, the Article 31 of VCLT is applicable.[85]

The MFN clause 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 light of its object and purpose"[86]

2) The intention of the parties to the Bergonia-Conveniencia BIT is vital to the interpretation of the Article 3 (2) of the Bergonia-Conveniencia BIT (i. e. the MFN clause).

72. As it was observed by the *National Grid* Tribunal[87], the key to correct interpretation of

[85] *National Grid*, para. 80

[86] VCLT, Article 31.

[87] *National Grid*, para. 80.

intention of the parties to the BIT is the text of the international agreement which reflects "the more recent common intention of the parties"[88] As regards the entity which may benefit from referring to MFN clause, the ordinary meaning of the Bergonia-Conveniencia BIT is crystal clear – only the investors, not the host states are protected by MFN clause.

3) The interpretation of the Article 3 (2) of the Bergonia-Conveniencia BIT (i. e. the MFN clause) should be compliant with both ordinary meaning of the terms used therein and the object and purpose of the treaty.

73. Moreover, even if the would be a reason to depart from ordinary meaning of the Article 3 (2) of the Bergonia-Conveniencia BIT, such interpretation would be inconsistent with the object and purpose of the treaty. Firstly, the Claimant submits that the very name of the treaty ("A treaty (…) concerning the encouragement reciprocal protection of investments") indicates that the BIT is to protect the investments, not the host states. Secondly, the parties intention of entering into agreement was reflected in the preamble of the Bergonia-Conveniencia BIT which expressly shows that Contracting States desired

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

There can be no doubt that Respondent`s objection would contravene the object and purpose of the Bergonia-Conveniencia BIT.

4) The Respondent violated its obligation under Article 31 (f) of the TRIPS Agreement by issuance of the compulsory license non-compliant with the aforesaid provision.

74. Article 31 (f) of the TRIPS Agreement provides that

[88] *National Grid*, para. 80 quoting *Brownie*, p. 602.

> „compulsory licenses shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use."

Firstly, according to the facts given in the response to Request no. 30, the compulsory license does not cover the matter of exporting products based on Patent no. AZ2005 to other countries. Having considered the provision of Article 31 (f) of the TRIPS Agreement, it is obvious that The Respondent was obliged to issue a compulsory license in compliance with the requirements set forth in the TRIPS Agreement. The license should forbid the licensee to export of more that 50% of products based on the patent to other countries. The lack of regulation constitutes a breach of the Article 31 (f) of the TRIPS Agreement.

75. Secondly, due to the fact that the IP Office collected royalties from the six companies, it can be reasonably presumed that the Office was aware of the fact of exporting of goods. Moreover, it is even more probable that the Respondent was aware of the export cause its amount "comprise[d] a significant portion for the companies involved" (response to request no. 61). The Respondent cannot defend itself by submitting that although the compulsory license did not regulate the matters of export, the Claimant is not entitled to compensation because the Respondent did not act negligently.

5) The Respondent violated its obligation under Article 31 (i) of the TRIPS Agreement by issuance of the compulsory license non-compliant with the aforesaid provision.

76. According to the Article 31 (i) of the TRIPS Agreement

> „the legal validity of any decision relating to the authorization of such use [i .e. use without the authorization of the Right Holder] shall be subject to judicial review or other independent review by a distinct higher authority in that Member."

As it was proven above, the Bergonian IP Office's Patent Review Board's review is not an independent one which violates Article 31 (i) of the TRIPS Agreement.

6) Article III.4 of the Tergia-Bergonia BIT in not applicable in the instant case.

77. For the aforementioned reasons, granting of the compulsory patent needs to be assessed as a violation of the TRIPS Agreement. Therefore, the exception set out in Article III.4 of the Tertia-Bergonia BIT that is invoked to by the Respondent is not applicable in the instant case and the requirements concerning expropriation regulated by Article 4 of the Bergonia-Conveniencia BIT are applicable.

BERGONIAN INTERNAL LAW IS INCONSISTENT WITH ARTICLE 31 (I) OF THE TRIPS AGREEMENT.

78. Having considered the fact that to compulsory license is compliant with the internal law of the Claimant (response to Request no. 37 and response to Request no. 58), the Claimant argues that Bergonian implementation of Article 31 (i) of the TRIPS Agreement is non-compliant with an international obligation of the Respondent. Therefore, it constitutes an internationally wrongful act within the meaning of the customary international law reflected in DASR.

79. For the purposes of the present memorial, reference to DASR shall be interpreted as a reference to the rules of customary international law reflected therein.

1. The term "international wrongful act" is defined in customary international law and as a part of it is applicable in the present case.

80. Article 3 of DASR sets forth that:

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

The aforesaid essential conditions of state responsibility have a long judicial tradition.[89]

[89] *Phosphates in Morocco,* p. 28.

2. The Bergonian IP Office`s actions and omissions are imputable to the Respondent both acting in its capacity and *ultra vires*.

81. As far as the requirement of attribution is concerned, the Claimant points out that the conduct of an organ of the Respondent which enacted the regulations implementing Article 31 (i) of the TRIPS Agreement shall be considered as an act of Respondent due to the provision of Article 4 of DASR which stipulates that

> „for the purposes of the present articles, conduct of any state organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question."

82. Moreover, the Respondent is responsible for actions and omissions of the organ in the event that the organ acted *ultra vires* because of the provision of Article 10 of DASR which stipulates that

> „the conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity."

3. The Respondent was obliged to ensure the fulfillment of its international obligations, regardless of provisions of its internal law.

83. As regards the international obligation of the Respondent, the Claimant argues that the Sultanate of Conveniencia is a member of World Trade Organization and is a signatory of the TRIPS Agreement. The Respondent

> *"*is bound to make in its legislation such modification as may be necessary to ensure the fulfillment of the obligations undertaken"[90].

[90] *Exchange of Greek and Turkish Populations,* p. 21.

Inconsistency of Repondent`s legislation with the TRIPS Agreement is a breach of an international obligation. The Respondent cannot decline its responsibility by pleading that issuing of compulsory license was consistent with the internal law.[91]

84. For the aforesaid reasons, the act of the organ of the Respondent is to be considered as act of Respondent and is to be considered as a breach of the international obligation and causes the international responsibility of the Respondent state in accordance with Article 1 of DASR. Therefore, the Claimant should be awarded compensation in an amount to be defined in the stage on remedies.

THE CLAIMANT SHOULD BE GIVEN PROTECTION UNDER GENERAL INTERNATIONAL LAW.

85. The Bergonia-Conveniencia BIT provisions create particular international law which is applicable *inter partes*. In the event that the particular international law would not be applicable, the remedies should the adjudicated according to the rules of the general international law.

86. Furthermore, provided that the particular international law is applicable, then the general international law applicable in the event that an issue in question is not regulated in the particular international law. Due to the fact that the Bergonia-Conveniencia BIT remains silent on the issue of compensation for violation of international obligations of the Contracting States, the rules of general international law should be applies.

1. The Tribunal is capable of applying the rules general international law to the pending case under the Article 9 (5) of the Bergonia-Conveniencia BIT.

87. If the Respondent alleges the lack of Tribunal's jurisdiction in giving a ruling based of general

[91] *Treatment of Polish Nationals* , p. 4.; *ELSI*, para. 73.

international law, the Claimant argues that invoked rules of general international law are inclusive of "the principles of international law" as it was agreed upon in Article 9 (5) of Bergonia-Conveniencia BIT which provides that

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

2. The Claimant should be given protection in compliance with the standard of *Factory at Chorzow* case.

88. Alternatively, should the Tribunal not accept the aforesaid arguments, the Claimant argues that it ought to be given protection in accordance with the rules of general international law.

The Tribunal should follow the reasoning of PCIJ presented in the landmark case *Factory at Chorzow*. In that judgment, PCIJ presented an approach to standard of compensation for an act contrary to international law that was – and still is - repeatedly referred to by various courts and tribunals, only to mention a few: *S.D. Myers* Tribunal[92], *Metalclad* Tribunal[93], *CMS Gas Transmission Company* Tribunal[94], Arbitration Institute of the Stockholm Chamber of Commerce in *Pertobart Limited*[95], Iran – U. S. Claims Tribunal in *Amoco*[96] and – last but not least – the International Court of Justice[97]. The International Law Commission in Article 31 (1) of DASR shared the above approach and thus regulated that

> "The responsible State is under an obligation to make full reparation for the injury

[92] *S.D. Myers*, para. 311.

[93] *Metalclad*, para. 122.

[94] *CMS Gas Transmission Company*, para. 400.

[95] *Pertobart Limited*, p. 77-78.

[96] *Amoco*, paras. 191-194.

[97] *Gabcikovo-Nagymaros*, para. 152; *LaGrand*, para. 125; *Averna*, paras. 119-121; *Wall in the Occupied Palestinian Territory*, para. 153.

caused by the internationally wrongful act."

89. In judgment of 13 September 1928, PCIJ considered the submissions of Germany aimaed at obtaining reparation and observed that

> "Three fundamental questions arise:
> (1) The existence of the obligation to make reparation.
> (2) The existence of the damage which must serve as a basis for the calculation of the amount of the indemnity
> (3) The extent of this damage."[98]

On the facts of recent case, the Claimant states that the issue of point (2) is an issue of fact (discussed above), the issue of point (3) is to be decided in the next stage of proceedings. As regards issue of point (1), the Claimant cites the passage from *Factory at Chorzow:*

> "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[99]

90. In the light of the above, should the Tribunal not accept any of the submitted arguments based on provisions of the investment law applicable in the pending case, the Claimant points out that the proven violations of Respondent's obligations ought to be redressed under principles of general international law.

Submissions

For all of the above-mentioned reasons, the Claimant respectfully asks this High Tribunal to adjudge and declare that:

(2) the Tribunal has jurisdiction over the instant dispute in view of the nationality of those parties controlling the Claimant;

(3) Claimant's exploitation of its intellectual property in Bergonia constituted an investment;

(4) the Respondent violated its international obligations

(a) under Article 4 of the Bergonia-Conveniencia BIT;

[98] *Factory at Chorzow*, p. 29.

[99] *Factory at Chorzow*, p. 29.

(b) under Article 31 in connection with Artcile 1 (1) of the TRIPS Agreement;

(5) the arbitration shall proceed to the stage on remedies.

RESPECTFULLY SUBMITTED ON 7 SEPTEMBER 2009

BY TEAM GUERRERO
ON BEHALF OF THE CLAIMANT