HACKWORTH

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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in the proceedings between

MEDBERG CO.
(CLAIMANT)

V.

THE
DEMOCRATIC COMMONWEALTH OF BERGONIA
(RESPONDENT)

ICSID Case No. ARB/X/X

MEMORANDUM FOR CLAIMANT

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List of Abbreviations

Art.	Article
ECT	Energy Charter Treaty
i.e.	that is (*lat.: id est*)
ibid.	*ibidem*
ICSID	International Centre for the Settlement of Investment Disputes
JWIT	Journal of World Investment & Trade
MFN	Most Favoured Nation
No.	Number
p.	page
para.	Paragraph
paras.	Paragraphs
§	Paragraph
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
SchiedsVZ	Zeitschrift für Schiedsverfahren
v	versus
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
YJIL	Yale Journal of International Law

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Tribunal: Berthold Goldmann (President)
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Karl-Heinz Böckstiegel
Sir Franklin Berman

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(hereinafter cited as: *Bergonia-Conveniencia BIT* or the *BIT*)

Treaty between the Government of Tertia and Government of Bergonia concerning the Reciprocal Encouragement and Protection of Investments of 1 January 2003
(hereinafter cited as: *Bergonia-Tertia BIT*)

Statement of Facts

1. Claimant MedBerg Co. is a registered company 100% controlled by the Conveniencian company MedX. Claimant's seat and principal place of business is the State of Bergonia where it has been doing business since 30 January 2004. This information has been available in the Bergonian corporate registry ever since MedBerg's incorporation.

2. On February 5, 2004, Claimant applied for a patent in Bergonia relating to an invention of Dr. Frankensid, an employee of MedX's shareholder MedScience Co.

3. On March 15, 2005 Claimant obtained Patent No. AZ2005 containing technology to generate a health-related product which can be applied in the treatment of obesity. Shortly after that, Claimant licensed a local Bergonian company, BioLife Co., to utilise Patent No. AZ2005 on the basis of a Licence Agreement.

4. When the Licence Agreement expired on March 31, 2007, Claimant and BioLife Co. attempted to renegotiate the terms and conditions of the Licence Agreement.

5. After the failure of these negotiations, Respondent, the Bergonian State initiated proceedings for the issuance of a compulsory licence through its Intellectual Property Office (IP Office) with respect to Claimant's Patent AZ2005. No attempts to obtain authorisation for this from Claimant were undertaken by the Bergonian state.

6. Respondent issued the compulsory licence on June 1, 2007 for a duration of 48 months, i.e. four years and as of January 1, 2009, six companies have invoked the compulsory licence, producing, marketing and selling the product both on domestic as well as on foreign markets. The patented treatment is *inter alia* exported to third countries that are members of a customs union with Bergonia. These exports undermine the production and sales of the patented treatment of local MedX subsidiaries in these countries.

7. Respondent has offered royalties to Claimant who however has had to refuse these royalties, which are lower than the original market value of the patented technology.

8. Claimant has complained to the Bergonian IP Office on various occasions. In particular, Claimant has filed an appeal with the Patent Review Board of the Bergonian IP Office, whose panel members are specialised in intellectual property cases and are paid by the IP Office. No independent review of the IP Office's decision has been conducted.

9. Since no resolution of the dispute was in sight, Claimant, after properly serving notice for arbitration, filed a Request for Arbitration with the International Centre for Settlement of Investment Disputes in accordance with Article 10 (2) (b) of the Bergonia – Conveniencia BIT, therewith accepting Respondent's offer, i.e. its consent to arbitration as laid down in Article 10 (2) last sentence, Bergonia – Conveniencia BIT.

Summary of Argument

10. This Tribunal has jurisdiction *ratione personae* over the present dispute since Claimant is controlled 100% by a national of Conveniencia, a party to the Bergonia – Conveniencia BIT. Investments that are controlled by one of the contracting parties are explicitly protected under Article 3 (1) of the Bergonia – Coveniencia BIT.

11. No express consent is required to treat Claimant as a national of Conveniencia. Even if this were the case, the most favoured nation clause in the Bergonia – Conveniencia BIT allows Claimant to invoke Article VI (8) of the Bergonia – Tertia BIT which provides for such consent.

12. Furthermore, Claimant has a protected investment under Art. 1 (1) Bergonia-Conveniencia BIT for the purpose of jurisdiction *ratione materiae*. An extension of the scope of application of the MFN clause is not possible since the invocation of MFN clauses is only possible for the investor. However, even if the scope of application will be extended, Claimant has protected investment under the conditions of the Bergonia-Tertia BIT.

13. Moreover, the denial of benefit clause is not applicable since it is not made for constellations as in the present case. Even if attempted to apply the denial of benefits clause, none of its conditions is complied with and the clause is, therefore, not of relevance. Furthermore, such a denial would have to be validly expressed and exercised which has not been the case here. In any case, denial of benefit clauses are not subject to the jurisdiction of a Tribunal.

14. Moreover, Claimant's investment is a protected investment for the purpose of jurisdiction *ratione materiae* of Art. 25 (1) ICSID-Convention. It does comply with all the relevant criteria developed by ICSID jurisprudence.

15. On the merits, Claimant submits that the compulsory license amounts to an expropriation under Article 4 (2) of the Bergonia – Conveniencia BIT. The compulsory

licence is a measure tantamount to expropriation and has is not justified due to public interest, nor has it been issued on a non-discriminatory basis nor has there been a compensation payment in accordance with the standards recognised under international law.

16. The compulsory license further violates the standard of fair and equitable treatment as set down in Article 2 (2) of the BIT. In addition, the issuance of the compulsory license amounts to an arbitrary and discriminatory measure as set out in Article 2 (3) of the BIT.

17. Overall, Claimant thus holds that this Tribunal has jurisdiction over the dispute and that Respondent is liable for expropriation as well as breach of fair and equitable treatment and for undertaking arbitrary and discriminatory measures. Claimant thus respectfully requests this Tribunal to issue an Award ordering to continue with the remedies phase.

Argument

A. Introduction

18. In 2005 Claimant started its investment in Bergonia in good faith and fully in accordance with the law. With its investment Claimant provided the people of Bergonia with important medical supplies and in this way decisively contributed to the public health and economy of Bergonia.

19. However, without providing any reason, acting through its IP Office, the State of Bergonia deterred Claimant from benefitting from its investment by arbitrary conducts and by doing so breached its international obligations. Claimant lost its investment and did not receive adequate compensation.

20. For these reasons, Claimant seeks protection under the Bergonia – Conveniencia BIT and asks this honourable Tribunal to declare and adjudge for compensation in regard of the damages which were caused by the illegal conducts of the State of Bergonia.

21. In the following sections, Claimant will demonstrate that the Tribunal has jurisdiction over the present case, that is: Claimant is a protected investor with a protected investment. Furthermore, it will be shown that Respondent breached its obligation under the Bergonia-Conveniencia BIT due to measures tantamount to expropriation and violations of fair and equitable treatment and is, thus, liable to pay compensation.

B. The Jurisdiction of the Tribunal

I. The Jurisdiction *ratione personae* under the Bergonia – Coveniencia BIT

1. The Tribunal has Jurisdiction under Art. 1 (3) (b) in Connection with Art. 3 (1) Bergonia – Conveniencia BIT because Claimant's 100% owner MedX Holding Ltd[1] is Seated in Conveniencia

As can be seen, Art. 3 (1) explicitly provides for the protection of "*investments (…) owned or <u>controlled</u> by investors of the other Contracting State*" into the BIT (*emphasis added*). This means that the parties clearly intended to protect investments of foreign controllers. Any alternative interpretation of this Article would render it meaningless.

22. Claimant fulfils the requirements *ratione personae* of the Bergonia – Conveniencia BIT. As far as Respondent challenges that nationality cannot be established by the criterion of "control", this argument has to be rejected.

23. According to Art. 1 (3)(b) of the Bergonia – Conveniencia BIT the criterion "seat" is required to determine the nationality of a juridical person. However, this does not mean that the parties of the BIT intended to restrict the criteria only to the notion of "seat". To interpret a certain term, one cannot only stick to the wording of a single Article, but in accordance with Art. 31 (1) of the Vienna Convention on the Law of Treaties (VCLT) has to take into consideration the object and purpose of the treaty as well as the intention of the parties.

Such a restricted interpretation militates against the obvious intention of the parties to the BIT. Therefore, according to Art. 1 (3)(b) in connection with Art. 3 (1) of the Bergonia – Conveniencia BIT the notion of "nationality" also includes the criterion of "control".

[1] *MedX Holding Ltd.* hereinafter cited as: MedX.

2. The Tribunal may Exercise Jurisdiction Based on the MFN Clause in Art. 3 (1) Bergonia – Conveniencia BIT in Connection with the Bergonia – Tertia BIT

24. In the alternative, the Tribunal may refer to Art. 3 (1) Bergonia – Conveniencia BIT (MFN clause) which permits Claimant to invoke Art. VI (8) Bergonia – Tertia BIT through Art. VI (8) Bergonia – Tertia BIT.

25. The parties may consent to treat a corporation as a national of another contracting party because of foreign control in accordance with Art. 25 (2)(b) ICSID – Convention. Art. 3 (1) Bergonia – Conveniencia BIT provides Claimant with MFN privileges. Consequently, this clause can be invoked into the BIT.

26. As far as Respondent denies such invocation, this argument has to be rejected. As will be shown in the following, this is firstly due to reasons of the object and purpose, secondly due to the systematic interpretation and the wording of the clause, and finally in regard of jurisprudence.

a. The Object and Purpose of the MFN Clause Permit Claimant to Invoke Art. VI (8) Bergonia – Tertia BIT

27. The purpose of MFN clauses in treaties is to ensure that the contracting parties treat investors of the other contracting party in a manner not less favourable than investors of a third country.[2] Thus, Claimant should not be less favoured than a company which is controlled by a Tertian national.

28. However, Respondent challenges the very simple purpose of this clause, which is meant to guarantee uniformity and equality of the treatment granted by a host state. [3] Thus the MFN clause is intended to serve as a benchmark for rights and privileges granted by the host state to other investors.[4]

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[2] *Dolzer/Schreuer*, p. 186.

[3] *Acconci* in *Muchlinski/Ortino/Schreuer*, p. 365.

[4] *Ibid.*, p. 364.

29. Accepting an alternative argument would lead to an inconsistent result. A company which is based in Bergonia and controlled by a national from Tertia, and therefore is in the same objective situation as Claimant, receives a better treatment than a company which is also based in Bergonia but is controlled by nationals of Conveniencia, such as Claimant. Consequently, Tertian investors in Bergonia, as a result of the Bergonia – Tertia BIT, would receive a more favourable treatment than do Conveniencian investors in Bergonia under the Bergonia – Conveniencia BIT. However, regarding the object and purpose of the MFN clause in accordance with Art. 31 (1) VCLT, it is the function of a MFN clause to avoid such discrimination.[5] In this regard, such a result would give rise to a clear discrimination and destroy the very purpose of the MFN clause.

b. The Systematic Interpretation and the Wording of Art. 3 (1) Bergonia – Conveniencia BIT Permits Claimant to Invoke Art. VI 8 Bergonia – Tertia BIT

30. Art. 3 of the Bergonia – Conveniencia BIT expressly excludes the transfer of MFN protection from other treaties with regard to the fields mentioned in paragraphs (3), (4), (5) and (6) of Article 3 of the BIT. While it can be argued that the multilateral commitments mentioned in para. 4 are of quite different character and are obvious exceptions to MFN treatment in order to avoid that the states concluding the BIT receive the benefits of such multilateral arrangements without joining them, the exceptions in para. 3 considering some justifications to unequal treatment, para. 5 regarding taxation, and para. 6 regarding real estate do not contain such an obvious background.[6]

31. This shows that the states expressly considered which issues would not be covered by the MFN clause. If the contracting states had wanted to exclude provisions *ratione personae* from MFN protection, they would have included such an exclusion in a further paragraph. Therefore, it cannot be presumed that the parties simply "forgot" this issue when drafting Art. 3. Indeed, according to the principle of *expressio unius est exclusio*

[5] *Ibid.*, p. 364, 365.

[6] *Suez v Argentina*, Decision on Jurisdiction, 2006, para. 56.

alterius, the fact that an exclusion is missing indicates that the parties indeed intended to include provisions *ratione personae* into the scope of the MFN protection.[7]

32. Furthermore, the expression "treatment" is not confined to substantive provisions but is construed generally.[8] Art. 3 (2) of the Bergonia – Conveniencia BIT explicitly refers to "treatment" of "investors".

33. "Treatment", in the context of investments, embraces all kinds of conduct of the host state that affects an investor's investment such as the imposition of restrictions or the state's extension of benefits to an investment and/or an investor.[9] It has also been found that the state's consent protects indirect investments which are controlled from nationals of the other contracting party. The consent of who is defined as investor in the BIT does not directly affect the "investment", but rather the procedural rights of the "investor" for whom paragraph (2) of Art. 3 provides a separate protective rule.[10]

34. A restrictive interpretation of the MFN clause is inappropriate if there is no indication made to follow such an interpretation. In line with this, Claimant refers to the tribunal's argumentation in *Suez v Argentina*. Here, the tribunal found no rule indicating a strict interpretation of the MFN clause and, accordingly, the tribunal noted that it will then not interpret the provision differently.[11]

35. As a matter of textual interpretation, an MFN clause like Art. 3 (1) Bergonia – Conveniencia BIT, which is very similar to that applied in RosInvest, is "*usually worded*

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[7] *RosInvest v Russia*, Award on Jurisdiction, 2007, para. 135.

[8] *Siemens v Argentina*, Decision on Jurisdiction, 2004, para. 85; *RosInvest v Russia*, Award on Jurisdiction, 2007, paras. 128-132; *Maffezini v Spain*, Decision on Jurisdiction, 2000, paras. 45, 50; *Schill*, in JWIT, p. 203.

[9] *Suez v Argentina*, Decision on Jurisdiction, 2006, para. 55; *Schill*, JWIT, p. 204.

[10] *RosInvest v Russia*, Award on Jurisdiction, 2007, para. 128.

[11] *Suez v Argentina*, Decision on Jurisdiction, 2006, para. 59.

broadly enough in order not to be restricted to more favourable substantive treatment."[12]

36. A restrictive approach to the interpretation of this MFN clause would disregard both the ordinary meaning of the clause as well as the treaty practice of states in which limitations of MFN clauses are expressly mentioned.[13]

c. According to International Investment Cases, Jurisdictional Provisions can be Invoked through an MFN Clause

37. The jurisdictional effect of MFN clauses has been accorded by many previous tribunals, inter alia *Maffezini v Spain, RosInvest v Russia, Siemens v Argentina, Suez v Argentina, Gas Natural v Argentina* and *National Grid v Argentina*.[14] In support of Claimant's arguments, the majority of investment tribunals have expanded the scope of MFN clauses to jurisdictional provisions.

38. The tribunal in *RosInvest v Russia* noted that if the effect of MFN clauses is to extend the protection offered by an investment treaty the tribunal sees no problem "*not to accept it in the context of procedural clauses*" .[15] Furthermore, the tribunal found that it could even more be argued that MFN clauses shall apply only to procedural protection.[16]

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[12] *Schill*, JWIT, pp. 203, 205.

[13] *Gas Natural v Argentin*a, Decision on Jurisdiction, 2005, para. 30; *RosInvest v Russia*, Award on Jurisdiction, 2007, para. 135.

[14] *Maffezini v Spain*, Decision on Jurisdiction, 2000, paras. 38-64; *RosInvest v Russia*, Award on Jurisdiction, 2007, paras.124-139; *Siemens v Argentina*, Decision on Jurisdiction, 2004, paras. 79-110; *Suez v Argentina*, Decision on Jurisdiction, 2006, paras. 52-66; *Gas Natural v Argentin*a, Decision on Jurisdiction, 2005, paras. 24-31; *National Grid v Argentina*, Decision on Jurisdiction, 2006, paras. 53-94.

[15] *RosInvest v Russia*, Award on Jurisdiction, 2007, paras. 131-132.

[16] *RosInvest v Russia*, Award on Jurisdiction, 2007, paras. 131-132.

39. The tribunal thus accepted that MFN clauses could, in connection with the broader consent to jurisdiction in third country BITs, establish the jurisdiction of an investment tribunal. Instead of interpreting the operation of MFN clauses restrictively, the tribunal considered that it could have recourse to every potential basis of jurisdiction.

40. In *Maffezini v Spain* the tribunal extended the scope of the MFN clause to jurisdictional provisions, although the clause lacked any express reference to such extension. The tribunal noted:

> *"(…) if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle."*[17]

41. Moreover, the decision by the Commission of Arbitration in the *Ambatielos Case* confirmed that jurisdictional provisions could be incorporated by an MFN clause even though the clause referred to "*matters relating to commerce and navigation*" because the protection of traders' rights is necessarily included in such "matters".[18]

42. Thus, textual and teleological methods of treaty interpretation confirm that MFN clauses extend the protection to both substantive and procedural rights.

d. Conclusion

43. The MFN clause in Art. 3 Bergonia – Conveniencia BIT broaden the jurisdiction of tribunals in full conformity with case law as well as the structure of international law and recognised rules of interpretation.

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[17] *Maffezini v Spain*, Decision on Jurisdiction, 2000, para. 56.

[18] *Ambatielos case*, Merits: Obligation to arbitrate, 1953, p. 15.

44. The contrary result would allow states to block a tribunal's jurisdiction and would thereby enable them to breach treaty obligations without punishment.

45. This Tribunal is respectfully requested to consider the object and purpose of the MFN clause which is meant to implement full equal treatment and competition between foreign investors independent of their national origin. It is asked to take into account the core objective of non-discrimination as is endorsed by Art. 3 of the BIT and prevent Bergonia from granting preferential treatment to some foreign investors while not extending it to those from Conveniencia.

46. The application of the MFN clause, furthermore, multilateralises the jurisdiction of investment tribunals and enables a harmonization of compliance procedures for investment treaty obligations.[19]

47. For all these reasons, Claimant is permitted to invoke Art. VI (8) Bergonia – Tertia BIT in accordance with Art. 3 Bergonia – Conveniencia BIT in order to establish jurisdiction.

3. Claimant is Controlled by a National of Conveniencia in the Meaning of Art. 25 (2)(b) ICSID Convention

48. Claimant fully complies with the conditions in Art. VI (8) Bergonia – Tertia BIT as well as with Art. 25 (2)(b) ICSID Convention.

49. In accordance with these provisions, Claimant is controlled by a national of Conveniencia, namely MedX. According to the second clause of Art. 25 (2)(b) of the ICSID Convention the existence of an agreement to treat the investor as a foreign investor because of foreign control and the existence of foreign control are required. As demonstrated above, the consent to treat the investor as a foreign investor stipulated in Art. VI (8) Bergonia Tertia BIT can be invoked through Art. 3 (1) Bergonia – Conveniencia BIT.

[19] *Maffezini v Spain*, Decision on Jurisdiction, 2000, para. 62.

a. According to the Ordinary Meaning of 'Control' Claimant is under the Foreign Control of a Conveniencian national (MedX)

50. The ICSID Convention does not define the notion of "foreign control" as used in Art. 25 (2)(b). Therefore, it is up to the parties to specify this term and "*an Arbitral Tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purpose of the convention*".[20] However, Art. 25 (2)(b) ICSID Convention does not refer to effective control.[21]

51. Hence, unless the parties did not further substantiate the notion of control, such restrictions in sense of "ultimate" or "effective" control are not to be considered. Therefore, a controller might be said to exercise foreign control in the meaning of the Convention, despite the fact that another controller exercises an even higher degree of control.[22]

52. Thus, the fact that MedX controls Claimant with 100% of the shares is sufficient to satisfy the condition of foreign control in the meaning of Art. 25 (2)(b) ICSID Convention and Art. VI (8) Bergonia – Tertia BIT.

b. Claimant's Position is furthermore in Conformity with ICSID Jurisprudence

53. In *Amco v Indonesia*, the respondent contended that the true controller of the local company was not a US company but rather a Dutch citizen who controlled the US company. There, the tribunal refused to go even beyond the first level of control stating that "*such a reasoning is, in law, not in accord with the Convention*".[23] Thus, the tribunal confirmed that the nationality of the controller cannot be based on a further

[20] *Autopista v Venezuela*, Decision on Jurisdiction, 2001, para 83.

[21] *Amerasinghe*, International Arbitration in the 21st Century, pp. 236-240; *Autopista v Venezuela*, Decision on Jurisdiction, 2001, para. 110.

[22] *Amerasinghe*, International Arbitration in the 21st Century, p. 240; *Schreuer*, para. 865.

[23] *Amco v Indonesia*, Decision on Jurisdiction, 1983, para. 14 (iii).

controlling test, since piercing the second corporate veil is not in conformity with Art. 25 (2)(b).[24]

54. In *Autopista v Venezuela*, the immediate controller of the Claimant was a US company which was controlled by a Mexican company. Venezuela argued that Claimant was not, in fact, controlled by nationals of the United States, a contracting state, but by nationals of Mexico, which is not a contracting state. The tribunal rejected the idea that Art. 25 (2)(b) of the Convention requires "effective" control and accordingly stated that Art. 25 (2)(b) *"does not specify the nature, direct, indirect, ultimate or effective, of the foreign control"*.[25] The tribunal held that the claimant was controlled by a national of another contracting state by virtue of its shares being held by a US company, despite the latter was in turn owned by a national of a non-contracting state. [26]

55. In *Aguas del Tunari v Bolivia*, the tribunal followed the same approach. The local company was controlled by Dutch companies, which were controlled by US nationals.[27] The tribunal noted that the ordinary meaning of control can "*encompass both actual exercise of powers or direction and the rights arising from ownership of shares*".[28] Thus, it rejected Bolivia's argument and referred to the legal meaning of control which was the power of control and not the actual exercise of control.[29] The Tribunal mentioned that it is almost impossible to discern precisely at what stage mere formal control through ownership might turn into actual or effective control. It thought any such test would be impracticable and would effectuate uncertainty in the field of investment law.[30] It finally stressed that an entity may be said to control another entity if it possesses the legal capacity to control.[31]

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[24] *Ibid*.

[25] *Autopista v Venezuela*, Decision on Jurisdiction, 2001, para. 110.

[26] *Ibid*., paras. 117-121, 133/4.

[27] *Aguas del Tunari v Bolivia*, Decision on Jurisdiction, 2005, at para.. 264.

[28] *Ibid*., para 227.

[29] *Ibid*., para 232.

[30] *Ibid*., paras. 247, 247.

c. Conclusion

56. For the aforementioned reasons, Claimant requests this Tribunal to find, in accordance with the Tribunals previous holdings in *Aguas del Tunari v Argentina*, that Claimant may invoke Art. VI (8) of the Bergonia – Tertia BIT through the MFN clause Art. 3 Bergonia – Conveniencia BIT in order to establish jurisdiction in accordance with the second clause of Art. 25. (2)(b) ICSID Convention. As stipulated by the parties in the joint statement of facts, Claimant is 100% owned and, therefore, controlled by a national of Conveniencia. MedX is a national of Conveniencia. Therefore, Claimant respectfully requests that this Tribunal find that Claimant fulfilled the conditions *ratione personae* of the BIT as well as Art. 25 (2)(b) ICSID-Convention in order to qualify as a foreign investor, thereby giving the Tribunal jurisdiction *ratione personae.*

II. The Jurisdiction *ratione materiae*

57. The Tribunal enjoys jurisdiction *ratione materiae* for the purpose of the BIT as well as under the ICSID Convention.

1. The Tribunal has Jurisdiction *ratione materiae* under the Bergonia-Conveniencia BIT since Claimant's Investment Is Protected Under Art. 1(1) of the Bergonia-Conveniencia BIT

58. Claimant's patent is a protected investment for the purpose of jurisdiction *ratione materiae* under the Bergonia-Conveniencia BIT.

59. Art. 1 (1) of the Bergonia-Conveniencia BIT stipulates that for the purposes of this treaty the term investment comprises *inter alia* "*intellectual property, in particular copyrights, patents, utility-model patents (…)*".

[31] *Ibid*., 264.

60. Under the plain meaning of the wording of Art. 1 (1) of the Bergonia-Conveniencia BIT, patents such as the Bergonian patent No. AZ2005 are explicitly included in the scope of protection of the aforementioned treaty.

61. Therefore, Claimant has a protected investment for the purpose of the Bergonia-Conveniencia BIT. The Tribunal, accordingly, has jurisdiction *ratione materiae* under the BIT.

2. Respondent Cannot Extend the Scope of Application of the MFN Clause

62. Insofar as it is argued that for reason of the application of the MFN clause the whole jurisdiction standard of the Bergonia-Tertia BIT applies, this argument has to be rejected.

63. The MFN clause found in Art. 3 (1) of the Bergonia-Conveniencia BIT allows the investor to rely on Art. VI (8) of the Bergonia-Tertia BIT. The scope of application of the MFN clause cannot be extended. Pursuant to an MFN clause, the host state has a duty to ensure fair and equal conditions in its territory for all investors subject to MFN treatment.[32] The most favoured nation standard is an instrument for *investors* to enforce certain rights against the host state in cases of the host state's unequal treatment to investors.[33] In particular it is not one which can be invoked by the host state. Rather, the MFN clause is invoked by the investor and the MFN standards and privileges must be *ensured* by the host state.

64. This view finds strong support in the decision of *Siemens v Argentina*. In that case the tribunal noted that the MFN standard is only favourable to the investor. The object and purpose of an MFN clause is that the investor should benefit from the advantages of third treaties that host states conclude with third states. The tribunal found that it need

[32] *Dolzer/Schreuer*, p. 186; *Happ*, SchiedsVZ, p. 21, 23.

[33] *Acconci* in Muchliniski/Ortino/Schreuer (ed.), p. 364.

not weigh the advantages and disadvantages of a certain treaty.[34] Instead, the investor may cherry pick the advantages of one treaty and rely on them for its own purposes.[35] Hence, the investor does not have to choose rather between the scopes of protection of one or the other treaty but can combine the advantages of both treaties.[36]

65. However, regarding the object and purpose pursuant to Art. 31 of the VCLT, BIT standards are not meant to protect the host state, but confer certain rights upon the investor to claim against the host state.[37] Therefore, this Tribunal should find that, consistent with prior practice of international tribunals and accepted methods of treaty interpretation, Respondent cannot use the MFN clause found in Art. 3 (1) to apply the jurisdiction standard of the Bergonia-Tertia BIT.

66. Hence, the standard *ratione materiae* as well as a possible denial of benefit clause of the aforementioned treaty are not applicable and thus of no relevance.

3. The Jurisdiction *ratione materiae* under the Bergonia-Tertia BIT

67. Even if the Tribunal came to the conclusion that the other provisions concerning the application *ratione materiae* apply by virtue of the MFN clause, this honourable Tribunal should still exercise jurisdiction over this matter because Claimant fulfils the conditions of the Bergonia-Tertia BIT regarding the jurisdiction *ratione materiae*.

68. Pursuant to the wording of Art. 1 (1) (a) (iv), the Bergonia-Tertia BIT protects "*intellectual and industrial property*" which is within the scope of protection of the BIT. Moreover, Claimant wants to make special reference to the phrase: "*rights relating to* […] *inventions in all fields of human endeavor*" which certainly includes a patent in the field of pharmacy. Claimant's investment does not only constitute intellectual property

[34] *Siemens v Argentina*, Decision on Jurisdiction, 2004, para. 120.

[35] *Ibid*, paras. 119, 120.

[36] *Ibid*, para. 120.

[37] *Muchlinski* in Muchliniski/Ortino/Schreuer (ed.), p. 6.

but, furthermore the patent relates to certain health related products which have to be regarded as inventions in all fields of human endeavour. Hence, Claimant's patent is within the coverage of the standard *ratione materiae*.

69. Therefore, the Claimant even satisfies the conditions of the Bergonia-Tertia BIT regarding jurisdiction *ratione materiae*, *i.e.* the existence of an investment.

4. Respondent Cannot Deny Benefits to Claimant

70. As far as Respondent contends that for reason of the application of the MFN clause, it can deny the benefits of the Bergonia-Tertia BIT, this argument has to be rejected for the following reasons. Firstly, the denial of benefit is not subject to the jurisdictional stage. Secondly, the conditions set out by the clause neither do fit to the case at hand nor are those conditions, logically speaking, not complied with. Moreover, the right to deny benefits was not validly exercised and does merely have prospective effect.

a. The Denial of Benefits is Not Subject to the Jurisdictional Stage

71. Respondent tries to invoke Art. 1 (2) of the Bergonia-Tertia BIT to deny the advantages of that treaty to Claimant. However, Claimant wants to emphasize that in order to find out whether the Tribunal has jurisdiction over the present case, it has to examine whether jurisdiction *ratione personae* and *ratione materiae* under both the BIT and the ICSID Convention are satisfied.

72. Consequently, it is not possible for the Tribunal to invent a different standard to examine whether jurisdiction is given or not. This means, it is not within its competence to elevate the denial of benefit to further a standard of jurisdictional examination.

73. As has been explained above Claimant can choose more favourable conditions of a certain treaty if they are subject to MFN treatment.[38] This is unambiguously the case here (see above) since Claimant validly imports Art. VI (8) of the Bergonia-Tertia BIT. There is no connection whatsoever pointing to the understanding that Art. 1 (2) of the Bergonia-Tertia BIT should come into play due to the importation of Art. VI (8).

74. Thus, there is no space for Respondent to rely on a denial of benefit since this has certainly not been invoked by Claimant and, first and foremost, the extension of an MFN clause in favour of the host state is invalid.

75. Furthermore, this finds support in the decision of *Plama v Bulgaria* where the tribunal examined the denial of Bulgaria in its Decision on Jurisdiction, however, noting that "the tribunal addresses this part of the parties' submissions on the assumption that the Tribunal has jurisdiction".[39] Put differently, a denial of benefit clause is not subject to the jurisdiction of the Tribunal. Therefore, Respondent's reliance may at the earliest have an effect at the merits stage.

76. Respondent cannot invoke Art. 1 (2) of the Bergonia-Tertia BIT since it has not been incorporated simply due to the reliance on Art. VI (8). Moreover, the denial of benefit is subject to the merits stage.

b. The Conditions for Denial of Benefits are not Complied With

77. However, even if the Tribunal concluded that the denial forms part of the jurisdictional stage, Art. 1 (2) of the Bergonia-Tertia BIT does not fit and the relevant conditions are not fulfilled.

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[38] *Acconci* in Muchliniski/Ortino/Schreuer (ed.), p. 366; *Newmark/Poulton*, SchiedsVZ, p. 30, 30.

[39] *Plama v Bulgaria*, Decision on Jurisdiction, 2005, para. 152.

1) Art. 1 (2) of the Bergonia – Tertia BIT is Not Applicable to the Case at Hand

78. According to the findings of the *Generation Ukraine* tribunal, which dealt with an identical clause, Art. 1 (2) Bergonia – Tertia BIT applies in situations where the controlling company is simultaneously also the Claimant.[40] However, in the case at hand Claimant is a company established in the host state. In contrast to that, Claimant in the *Generation Ukraine* decision was the company behind the company in the host state. Therefore, the tribunal in *Generation Ukraine* correctly noted that the Claimant has to have substantial businesses in the USA.[41]

79. However, in the case at hand that does not fit. One would have to prove that MedBerg as the claiming company, has substantial business in Bergonia. This does not make sense because it would be against the object and purpose of the clause if the examination whether Claimant has an investment and has a substantial businesses activity at the same time, will coincide with each other.

80. Furthermore, in *Generation Ukraine v Ukraine* the tribunal held the view that third country control was a condition pervading the following prerequisites of that Article.[42] For this case that means Claimant would additionally have to be controlled by third state nationals. But again this would be nonsensical since Claimant is controlled by MedX, a company from Conveniencia and, hence, in the country which is a party to the relevant BIT and not a third state.

81. Consequently, for the reason of the exact wording which does not leave space for wide interpretation, this infers that Art. 1 (2) Bergonia – Tertia BIT is not applicable in such situations.

[40] *Generation Ukraine v Ukraine*, Award, 2003, para. 15.7.

[41] *Ibid*, para. 15.7.

[42] *Generation Ukraine v Ukraine*, Award, 2003, para. 15.6.

2) The Conditions of Art. 1 (2) Bergonia – Tertia BIT

82. However, even if the Tribunal concludes that Art. 1 (2) is applicable, Claimant submits that the required conditions are not fulfilled. Due to the fact that the clause does not fit to the present situation it remains unclear what the exact constellation of condition of Art. 1 (2) is.

83. As mentioned above the first conditions ("third country control") pervades the following prerequisites of that Article.[43] However, it is unclear which company needs, firstly, to be controlled by third state nationals and, in addition, has to have substantial business.

3) The Burden of Proof lies with Respondent

84. However, first of all Claimant notes that the burden of proof to show that third national control and substantial businesses are not present by the relevant company in question, lies with Respondent and not with Claimant.

85. According to the abovementioned decision of *Generation Ukraine v Ukraine* the tribunal stated that the denial of benefit clause is not a procedural obstacle for the Claimant and that the burden of proof falls upon the party invoking the right to deny.[44] Moreover, it is generally recognized that the burden of proof shifts to the party relying upon a certain right.[45] Additionally, this party has to bring proof to the satisfaction of the tribunal.

86. Accordingly, Respondent has to bring convincing and stringent evidence about third national control and the substantial business activities. However, Respondent cannot furnish these evidences though but can rest its argumentation merely on assumptions.

[43] *Generation Ukraine v Ukraine*, Award, 2003, para. 15.6.

[44] *Generation Ukraine v Ukraine*, Award, 2003, para. 15.7.

[45] *Soufraki v Arab Emirates*, Award, 2004, para. 58.

aa. No Control by Nationals of a Third Country

87. Claimant is controlled by MedX. However, one has to admit that this is clearly no third national control since MedX is a company from Conveniencia. Conveniencia is party to the relevant BIT between Bergonia and Conveniencia. It is the object and purpose of BITs that companies from one BIT party shall not be excluded from the scope of protection in the territory of the other BIT party.

88. Moreover, ultimate control is not applicable and hence this argument has to be rejected as has been explained above.

bb. MedBerg has Substantial Business Activities in Bergonia

89. As far as Respondent relies on the interpretation that Claimant does not have substantial business, this argument has to be rejected.

90. Claimant's business is the conduct of the investment. This contains the application and registration of the patent, furthermore, the negotiations which MedScience the company taking advantage of the invention due to the License Agreement. That is clearly a substantial business activity.

cc. MedX has Substantial Business Activities in Conveniencia

91. Even if a denial was expressed regarding an alleged lack of substantial business concerning MedX in Conveniencia the Respondent's objection would fail.

92. Claimant is fully controlled by MedX, a company duly established under the laws of Conveniencia. It is the company which operates from Conveniencia that controls the investment which suffices as a substantial business activity.

93. For the aforementioned arguments, the Tribunal shall reject the applicability of Art. 1 (2) since it has not been designed for such situations. Furthermore, if one tries to apply the conditions, this leads to an exceeding misinterpretation of the clause where each scenario for itself does not make sense and does not fit.

c. No Valid Exercise of the Right to Deny

94. Even if the Tribunal concluded that the denial of benefit clause was applicable and, furthermore, concluded that it does fit to such situations, Claimant, moreover, asserts that Respondent cannot validly exercise the right to deny or, in the alternative, the denial raised in the Written and Oral Procedures only has prospective effect.

1) Need for an Explicit Exercise of the Right to Deny

95. In this connection Claimant relies on the case of *Plama v Bulgaria* where the tribunal also dealt with a denial of benefits clause. Bulgaria raised the denial in a special letter to the ICSID Secretary-General after the claim was filed with ICSID.[46] Compared to the case at hand, Respondent primarily raised the denial of benefits in the First Oral Procedure.

96. The tribunal in the aforementioned decision found that conferring a right on someone is different from its exercise.[47] According to the findings of the tribunal, the denial of benefit clause is similar to a provision in treaty granting the opportunity to go before an arbitral tribunal. This right has to be exercised prior to the settlement of the dispute itself before that certain forum provided in the provision. The tribunal stated that the rights entitling the parties always have to be exercised because they may never do so. Furthermore, for the exercise to be valid it has to be associated with publicity due to the serious consequences for the investor which cannot be foreseen.[48] Put differently, the right to deny is not evidently by its mere existence. States have to exercise that right properly in line with a notification to the investor because otherwise the right to deny cannot produce its effect.[49]

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[46] *Plama v Bulgaria*, Award, 2005, para. 144.

[47] *Ibid*, para. 155.

[48] *Ibid*, para. 157.

[49] *Ibid*, para. 161.

97. In addition, the ordinary meaning of the clause points strongly to the understanding, that the right must be exercised because the denial is (only) *reserved* to the states. That is to say, it has to be invoked before it can have any effect.

98. In the case at hand, Respondent never exercised the right to deny. Respondent relied upon that right prior to this Memorial. In contrast to the *Plama* case Respondent did not serve notice to Claimant about the denial. There is a vast difference between the official letter of Bulgaria to the ICSID Secretary-General compared to the reliance upon the denial by Respondent for the first time in the Oral Hearings.

99. Thus, Respondent did not validly exercise the right to deny and, accordingly, the denial has to be disregarded by the Tribunal.

2) Right to Deny has Merely Prospective Effect

100. Even if the Tribunal concludes that the right to deny must not properly be exercised, Claimant states that the denial only entails prospective effect. Hence, it cannot have retrospective effect on the claims brought before this Tribunal since the right to deny has been invoked after the claim was filed with ICSID. Consequently, it cannot hinder the Tribunal from examining whether Respondent has expropriated Claimant.

101. If an investor already made an investment, it is hence vulnerable to the actions of the state due to the existence of a "hostage factor".[50] If one considers that the state may exercise its denial with retrospective effect, this will subvert the legitimate expectations of the investor. In order to plan its investment the investor must have sufficient information regarding the circumcision of its legal positions.

102. According to Art. 31 (2) VCLT the preamble of a BIT can be taken into consideration in interpreting a treaty. The preamble of the Bergonia-Tertia BIT prescribes that the agreement should "maintain a stable framework for investment". From this follows that

[50] *Ibid,* para. 161.

retrospective effect of the denial of benefits clause subverts the intention of the BIT and militates against it due to the possibility of circumventing the intended "stable framework".

103. Therefore, the tribunal in *Plama v Bulgaria* concluded that the denial does not have retrospective effect; otherwise the consequences will be serious for the investor.[51]

104. Thus, the right to deny benefits does only have prospective effect and, therefore, may not deprive the Tribunal from examining the claim brought before it in connection with the investment at hand.

105. Hence, the Tribunal has jurisdiction *ratione materiae* under both the Bergonia-Conveniencia BIT and the Bergonia-Tertia BIT. Respondent cannot deny benefits to Claimant since the several required conditions are not fulfilled.

5. The Jurisdiction *ratione materiae* under the ICSID Convention

106. Claimant submits that it has made a protected Investment for the purpose of Art. 25 (1) ICISD Convention.

a. Claimant's Patent Constitutes an Investment under Art. 25 (1) of the ICSID Convention

107. Art. 25 (1) does not give a definition of the notion of investment since no attempt was made by the Drafter of the ICSID Convention.[52] It is well recognised in ICSID jurisprudence that the scope of application of investment is left to the consent of the

[51] *Ibid*, para. 162.

[52] *Dolzer/Schreuer*, p. 61; *McLachlan/Shore/Weiniger*, para. 6.04.

parties.[53] Accordingly, it was intended to leave a wide discretion to the members of the ICSID Convention to determine the types of arbitrable disputes.[54]

108. Following this perspective an investment which is so clearly within the scope of protection of the BIT in question, must be regarded as constituting also an investment for the purpose of the ICSID Convention.

109. However, certain tribunals and authors found that there are some criteria which are today generally referred to as *Salini test* and comprise a *substantial commitment*, *certain duration of the project*, a *commercial risk* and an *economic development*.[55] Of these criteria, the *economic development* criterion is only the criterion which has a basis in the preamble of the ICSID Convention due to the reference the Convention's purpose of the "need for international co-operation for economic development".[56] Furthermore, some cases examine whether the investments in question include a *regularity of profit and return* in connection with *commercial risk* taken by the investor before due to the establishment of its business.[57]

110. Reference has to be made to the fact that it is highly disputed to what extent all these criteria have to be fulfilled.[58] It is more likely that those criteria merely reflect certain features that are typical to most of the investments in question.[59] Consequently, they just give a guideline of what is generally comprised by an investment.

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[53] *ICISD Reports*, Vol. 1, para. 27.

[54] *Fedax v Venezuela*, Decision on Jurisdiction, 1997, paras. 21- 29; *Dolzer/Schreuer*, p. 66.

[55] *Bayindir v Pakistan*, Decision on Jurisdiction, 2005, para. 130; *Salini v Morocco*, 2001, para. 52; *Dolzer/Schreuer*, p. 68; *Reed/Paulsson/Blackaby*, p. 15.

[56] *Schreuer*, A Commentary, para. 153.

[57] *Dolzer/Schreuer*, p. 68; *Joy Mining v Egypt*; Award on Jurisdiction, 2004, para. 53.

[58] *Schlemmer* in *Muchlinski/Ortino/Schreuer*, p. 66; *Dolzer/Schreuer*, p. 69.

[59] *Schreuer*, A Commentary, para. 153.

1) Substantial Commitment

111. Claimant's investment does form a substantial commitment.

112. Substantial commitment means any significant financial resource or transfer of know-how, equipment and personnel.[60]

113. Claimant is the owner of Bergonian Patent No. AZ2005 since 15 March 2005 and 15 days after the patent was granted Claimant licensed the Bergonian Company BioLife to utilise this patent.

114. Claimant submits that the License Agreement with BioLife is at least a transfer of know-how due to the possibility for BioLife to profit from the patent. Furthermore, the negotiations prior the Agreement must be conducted by Claimant and accordingly this entails a significant transfer of personnel as well. Otherwise there is no possibility to ever conclude a License Agreement. Moreover, the registration of a patent as such presupposes that financial resources are devoted.

115. Thus, Claimant's patent constitutes a substantial commitment.

2) Certain Duration of the Project

116. Recent ICSID tribunals and scholars stated that the threshold regarding the duration of the project should not be "excessively rigorous".[61] In this context, reference can be made to the decision of *Jan de Nul Dredging International v Egypt* where the tribunal found that a period of two years suffices.[62]

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[60] *Bayindir v Pakistan*, Decision on Jurisdiction, 2005, para. 131; *Dolzer/Schreuer*, p. 68; *McLachlan/ Shore/Weiniger*, para. 6.08.

[61] *LESI Dipenta v Algeria*, Award, 2005, para. 52.

[62] *Jan de Nul v Egypt*, Decision on Jurisdiction, 2006, paras. 93 -96.

117. Considering the circumstances in the present case it is beyond doubt that from the time of the granted patent to the termination of the License Agreement the project took over two years, which is from March 2005 until March 2007. Additionally, Claimant notes that the patent was meant to be made available to other licensees. This was only prevented by the expropriatory conduct of Respondent. Thus, there was actually no chance for Claimant to conduct its investment beyond and anyhow Claimant's investment satisfies the two years period.

3) Commercial Risk

118. Claimant also bore a commercial risk. The establishment of new business in a foreign country and in this connection the application, registration and licensing of a patent naturally entails commercial risks. The application for patent always includes the risk of failing or the decline of the whole project.

119. Claimant's business in connection with the patent also bore a commercial risk.

4) Regularity of Profit and Return

120. Moreover, Claimant clearly has a regularity of project income due to the claims to license fee in connection with the License Agreement with BioLife.

5) Economic Development

121. Claimant's business does contribute to the economic development. The establishment of company and the application for patent are merely two elements of the economic effect of the patent on Respondent's development. The greatest effect must be seen in the positive contribution of the patent and its licensing to the health protection of the society of the Respondent which has clear implications for the whole of Respondent's development. Additionally, there are important side effects due to the licensing of BioLife, which accordingly, is entitled to produce products which are sold in Bergonia.

122. The economic activities of Claimant, therefore, have an important impact on the development of Respondent's economy.

123. Thus, Claimant's businesses in conjunction with the patent do constitute an investment for the purpose of Art. 25 (1) of the ICSID Convention. The Tribunal has jurisdiction *ratione materiae*.

III. Conclusion

124. For the abovementioned reasons Claimant is a valid investor with a protected investment under both the BIT as well as the ICSID Convention. Therefore, this Tribunal has jurisdiction *ratione personae* and *ratione materiae* and may, accordingly, proceed with the examination on the Merits of the case.

C. Merits

I. Introduction

125. On the merits, Claimant submits that the issuance of the compulsory licence amounted to an indirect expropriation. Respondent's measures also led to a violation of several Treaty standards such as fair and equitable treatment and full protection and security. Furthermore, Claimant contends that Respondent's measures amounted to arbitrary and discriminatory measures as laid down in Article 2 (2) Bergonia – Conveniencia BIT.

II. Expropriation

126. No direct taking of Claimant's property has been exercised on Respondent's behalf. However, this is hardly surprising since a direct taking of Claimant's intellectual property would in fact be hard to imagine. Claimant upholds that Respondent's issuance of a compulsory licence regarding Patent No. AZ2005 amounted to an unlawful indirect expropriation as stipulated in Article 4 (2) Bergonia – Conveniencia BIT. Article 4 (2) Bergonia – Conveniencia BIT sets out the prerequisites which have to be met to invoke such an indirect expropriation. This provision requires that the state measures are tantamount to an expropriation and are undertaken in the territory of the other

Contracting State. In the following, Claimant will prove that these requirements are met and that thus, an indirect expropriation of Claimant's patent took place.

1. Measure Tantamount to Expropriation

127. By its very nature, it is hard to precisely define what kind of measures constitute measures tantamount to expropriation, since this subtle process will by definition be fact specific.[63] However, certain common criteria have emerged in case law as well as in the literature which speak in favour of Claimant's case. These criteria look primarily at the severity of the impact as well as the degree of interference and the nature and context of the state measure at stake.[64] Furthermore, arbitral tribunals have found that one has to examine the consequences rather than take a formal approach when considering such measures. In other words, the crucial point is the outcome resulting from the state measure rather than the kind of measure adopted in the first place.[65]

128. In the present case, Respondent has issued a compulsory licence regarding Patent No. AZ2005 which has to this day undisputedly been owned by Claimant. Ownership signifies permanent and full freedom to exercise sovereignty over the property and enjoy the benefits resulting from the property.[66] With regard to the case at hand, ownership of the patent entitles the owner to exclusively make use of that patent and exploit it, while at the same time legally barring third parties from interfering.[67] As its owner, Claimant could for example freely dispose of using or licensing the patent to a company of their choice and reap the benefits. At the same time, Claimant was free to choose *not* to licence the patent to anybody should it wish to do so. The decision how to operate business with Patent No. AZ2005 was entirely in Claimant's hand.

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[63] Cf. *Newcombe/Paradell*, chpt. 7 at para. 7.7; *Reed/Bray*, at 14 and 25.

[64] Cf. e.g. *Jan Paulsson/Zachary Douglas*, at 145 *et seq.*

[65] Cf. *Newcombe*, 20 ICSID Review – FILJ 1, at 8, 9.

[66] Cf. *Gibson*, TDM Vol. 6, issue 2 (2009), at 9.

[67] Cf. also *Gibson*, TDM Vol. 6, issue 2 (2009), at 9; *Grantham*, 14 Berkeley Journal of Int'l L. 173, 180 (1996).

129. By issuing the compulsory licence through its Intellectual Property Office, Respondent has deprived Claimant of this choice, making it impossible for Claimant to do business with the patent according to its own marketing and business strategy. Claimant's exclusive right to produce, market, sell, or licence the patent – the quintessence of intellectual property[68] -- has been tampered with and led to a significant invalidation of Patent No. AZ2005. This goes beyond a mere governmental regulation; instead the compulsory licence it hits the core of Claimant's exclusive right making use of the patent's intellectual value, depriving Claimant in every way of the possibility to dispose of his property.

130. Hence, this is not simply an ephemeral measure. The economic impact is thus such that Claimant is substantially deprived of the economic use of the patent and cannot enjoy the benefits resulting from the ownership of the patent. Even if Claimant were to licence the patent at this point, the economic benefit would be substantially reduced since the compulsory licence has already been invoked by six different companies, thus reducing the market value of the patent significantly.

131. Furthermore, Claimant could legitimately have expected to make free use of its own patent and licence or not licence it to whoever it wished without interference from a third party, here the Bergonian state. These expectations were not met and led to a significant invalidation of Patent No. AZ 2005.

2. In the Territory

132. The issuance of the contemporary licence was carried out by the Bergonian Intellectual Property Office and has uncontestedly been undertaken in the territory of Bergonia, thus in the territory of another Contracting State.

[68] *Gibson*, TDM Vol. 6, issue 2 (2009), at 9.

3. Conclusion

133. As has been demonstrated, Claimant has lost its exclusive right and legal protection of its intellection property and is thus unable to exercise factual control over its intellectual property. The issuance of the compulsory licence amounts to a measure tantamount to expropriation under Article 4 (2) Bergonia – Conveniencia BIT conducted in Bergonia, namely the territory of another Contracting State.

III. No Justification

134. Not every expropriation as such can be regarded as unlawful under the Bergonia – Conveniencia BIT. According to Article 4 (2) of the BIT an expropriation may be justified if it was undertaken in accordance with the applicable laws of the Contracting State for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation. However, Claimant will show that Respondent has not complied with a single of these requirements and thus, its measures cannot be justified as lawful expropriation under any circumstances.

1. The Compulsory Licence did not Serve the Public Benefit

135. The compulsory licence for Patent No. AZ2005 did not serve an urgent public benefit. While the product at stake is to assist in the treatment of obesity, it is by no means the only measure that can be taken in fighting the illness. Furthermore, not even half the population of Bergonia is suffering from obesity. In addition, in view of the fact that three companies are also exporting the product abroad, it is evident that the generated product is not market specific and that there is no urgent need of such products on the domestic Bergonian market. Claimant is not aware of any health epidemic in Bergonia threatening Bergonia's national security that could justify an overriding public health concern. Claimant contends that Respondent has failed to show that such overwhelming public interest is given in the present case.

136. Quite on the contrary, Claimant submits that Respondent's behaviour has taken away Claimant's competitive edge on the Bergonian market, ruined its market leverage and thus destroyed any prospects of marketing or licencing its products on the Bergonian

market ever again. Thus in the long run any incentive to develop breakthrough products and make them accessible in Bergonia has vanished. Such behaviour can in no way be regarded as acting on behalf of the public benefit.

137. In addition, Claimant concedes that while anti-competitive conduct might in certain circumstances constitute a justification on grounds of public interest, no such anti-competitive practice was ever detected regarding Claimant's business operations. Therefore, Respondent cannot even rely on the prevention of anti-competitive behaviour to justify the issuance of the compulsory licence. Accordingly, the issuance of the compulsory licence cannot have been issued for the public benefit and Respondent's actions are not justifiable under Article 4 (2) Bergonia – Conveniencia BIT.

2. The Compulsory Licence was not Issued on a Non-Discriminatory Basis

138. Moreover, the issuance of the compulsory licence was discriminatory. Although there are a number of companies working in the same business sector as Claimant, none of these businesses have been troubled with compulsory licences regarding any patents that they owned. Uniquely, Claimant's patent was singled out and proceedings for the issuance of a compulsory licence were commenced which eventually resulted in a compulsory licence issued on November 1, 2007 by Respondent's IP Office.

3. No Compensation has been paid

139. Lastly, Claimant would like to point out that at no point in time compensation was paid which is a necessary requirement for a lawful expropriation. Furthermore, this compensation would have needed to be paid promptly, adequately and effectively to meet the standards of the internationally recognised so-called *Hull formula*.[69] However, there has neither been a timely payment which would have fulfilled the criterion of prompt payment nor have the royalties offered been adequate in any way. Adequacy of payment would be given if the royalties were reflective of the actual value of Claimant's

[69] *Griebel*, at 77.

intellectual property, i.e. the market value that could be reasonably expected by Claimant. This has not been the case here. It can be assumed that the previous Licence Agreement between Claimant and BioLife reflects the average market value of Claimant's intellectual property. However, the royalties offered by Respondent were lower than the royalties offered in the Licence Agreement.[70] They can thus not be regarded as adequate.

4. Conclusion

140. Claimant therefore submits that the issuance of the compulsory licence constituted an unlawful expropriation under Article 4 (2) of the Bergonia – Conveniencia BIT, which cannot be justified under this provision.

IV. Breach of the Standard of Fair and Equitable Treatment

141. In addition, by issuing the compulsory licence, Respondent has violated the standard of fair and equitable treatment under Article 2 (2) Bergonia – Conveniencia BIT. In arbitral jurisprudence, this standard has been declared to grant protection to investors by ensuring stability and predictability of the host state regime and any measures it might take.[71] Tribunals have also pointed out that whether the standard of fair and equitable treatment was violated was fact specific and needs to be "*considered in the light in the light of the circumstances of each case*"[72]. A decisive criterion in determining whether the standard had been breached was the question of whether legitimate expectations of the investor had been frustrated by the host state measures in question.[73]

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[70] Cf. clarification 88.

[71] Cf. *CMS v. Argentina*, Award, 2005, at para. 262, 263; see also *Enron v. Argentina*, Award, 2007, at paras. 260-268.

[72] *Noble Ventures v Romania,* Award, 2005, at para. 182; also cf. *Schreuer*, JWIT 6 (2005), 357 *et seq*.

[73] *Enron v. Argentina,* Award, 2007, at paras. 260-268.

142. Applied to the case at hand, Claimant would like to emphasise that Respondent has destroyed Claimant's prospects of exploiting its exclusive right to market, sell, and licence its patent. Although Claimant concedes that no investor can expect the circumstances prevailing at the time it made an investment remain completely unchanged, issuing a compulsory licence is in no respect within the boundaries of what any investor could have reasonably expected. As has been shown above, Respondent's measures amount to an unlawful expropriation that are not to be justified. Instead Respondent completely dumped Claimant's legitimate expectations that its exclusive right to exploitation would be protected under Respondent's legal order.

143. At the very least, Claimant should have been granted the minimum standard under international law. In this context, Claimant would like to direct the Tribunal to Article 31 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which sets out the conditions under which a patent may be used without the authorisation of the right holder, here Claimant. Claimant submits that no effort at all has been made by the Bergonian state to obtain authorisation from Claimant to issue a licence on Claimant's intellectual property. While Claimant concedes that short and unsuccessful negotiations with regard to a licence agreement with a BioLife had taken place in 2007, it is a fact that BioLife is a private Bergonian company that has no connections to Respondent. These negotiations with a private business company can thus not be attributed to the Bergonian state. Hence, no efforts have been made to obtain authorisation from Claimant.

144. If the Tribunal were to conclude that the offering of the collected royalties was an implicit attempt to obtain authorisation, Claimant has to rebut this argument since it was it no way based on reasonable commercial terms and conditions as required by Article 31 (b) TRIPS.

145. Claimant further upholds that no case of national emergency or other signs of extreme urgency are given, as has already been explained above, so that Respondent cannot rely on a waiver of its obligation to obtain prior authorisation on grounds of national emergency or extreme urgency.

146. In addition, Claimant strongly opposes Respondent's apparent perception that the licence is predominantly used for the domestic market as is required by Article 31 (f) TRIPS. Several Bergonian entities have invoked the compulsory licence, making profit from Claimant's intellectual property and selling the product on domestic as well as foreign markets. This leads Claimant to the inevitable conclusion that no urgent domestic demand exists and that it was invoked as a mere pretext to issue the compulsory licence stimulate the Bergonian economy.

147. Lastly, Claimant points out that as its right holder it should have been paid adequate remuneration according to Article 31 (h) TRIPS. Considering the circumstances of the case, the fact that no compensation has been paid and that the royalties offered were lower than the reasonably to be expected market value, Claimant submits that no such remuneration has been paid.

148. For the arguments already elaborated on above, Respondent has therefore not accorded fair and equitable treatment to Claimant, as it should have done under Article 2 (2) of the Bergonia – Conveniencia BIT.

V. The Compulsory Licence Constitutes an Arbitrary and Discriminatory Measure

149. For the reasons already elaborated on above, Claimant submits that Respondent's measure also constitute an arbitrary and discriminatory measure under Article 2 (3) of the Bergonia – Conveniencia BIT.

D. Claimant's Requests for Relief

150. Claimant respectfully requests an Award finding that

a. this Tribunal has jurisdiction over the dispute, in particular regarding the nationality of any party controlling Claimant's investment;

b. Claimant's exploitation of its intellectual property in Bergonia constituted a lawful investment under applicable international law;

c. the issuance of the compulsory licence amounted to an unlawful expropriation and is thus in breach of Article 4 (2) of the Bergonia – Conveniencia BIT;

d. the compulsory licence breached the standard of fair and equitable treatment as stipulated in Article 2(2) Bergonia – Conveniencia BIT;

e. the compulsory licence constituted an arbitrary and discriminatory measure under Article 2 (2) Bergonia – Conveniencia BIT; and

f. these proceedings are to be continued on remedies.