

Team: MO

Frankfurt International Arbitration Centre

Medberg Co. v. The Government of the Republic of Bergonia
Memorial for Respondent

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List of Authorities:

Dolzer and Stevens Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, Brill, Leiden, 1995

Kogan **Lawrence Kogan, *Forced Licensing of Drug Patents Reflects “IP Counterfeiting” Efforts on World Stage, Washington Legal Foundation, 2007***

Schreuer Christoph Schreuer, *The ICSID Convention: A Commentary*, 2001

UNCTAD Investor-State Dispute Settlement and Impact on Investment Rulemaking (2009)

World Trade Organization WTO Intellectual Property (TRIPS) §5 Art. 31 (p. iii)

... **A. The RESPONDENT did not act in a way that violated the guarantee of fair and equitable treatment.**

10. In determining what constitutes fair and equitable treatment, tribunals often look to the requirements of good governance, such as transparency, protection of the investor’s legitimate expectations, due process and procedural propriety, and good faith.”

11. In *Maffezini*, the Tribunal dealt with the issue of transparency in the context of a transfer of funds by a government official to a private bank account in Spain.⁷ Because such action did not comport with Spain’s commitment to ensuring investors fair and equitable treatment, the Respondent was found to have violated the guarantee of fair and equitable treatment.⁸ In our case, the application for and award of the compulsory license was done through the Bergonia Patent Office, in a manner that was transparent, and furthermore according to procedures that CLAIMANT should have been aware of at the time of investment. There has been no violation of this transparency requirement.

12. **While CLAIMANT may argue that issuing the compulsory license ran contrary to its investment backed expectations, these expectations must be measured against the CLAIMANT’S relative market expertise, and the specific characteristics of market itself.**⁹ In *Olguin*, the CLAIMANT was a Peruvian banker who invested in a bank in Ecuador.¹⁰ The Ecuadorian government took certain steps that ultimately forced the bank to go bankrupt, but **the actions were deemed an expropriation because they did not contravene the investor’s investment backed expectations.** This is because the industry itself was of such a kind that any investment carried a certain degree of risk of bankruptcy.¹¹

...Similarly in our case, the pharmaceutical industry operates with the possibility that a patented drug may be expropriated for the public good, with instances of

such expropriation recently coming from Thailand and Brazil.¹² In both cases the governments of each country expropriated anti-retroviral drugs in order to combat the spread of HIV/AIDS. Thus CLAIMANT'S investment backed expectations must objectively account for the possibility that a pharmaceutical patent could be expropriated for a country's public good.

¹¹ *Id.*

¹² See L Kogan, "Forced Licensing of Drug Patents Reflects 'IP Counterfeiting' Efforts on World Stage", Legal Backgrounder (June 22, 2007), available at <<http://www.itssd.org/Publications/ForcedLicensingofDrugPatentsReflectsIPCounterfeitingEffortsonWorldStage-WLF06-22-07kogan.pdf>>.

¹³ See *Tecmed S.A. v. Mexico*, Award, 29 May 2003, Oxford Reports on International Investment Claims.

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