

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES

in the proceedings between

MEDBERG CO.
(CLAIMANT)

v.

THE
DEMOCRATIC COMMONWEALTH OF BERGONIA
(RESPONDENT)

ICSID Case No. ARB/X/X

COUNTER-MEMORIAL FOR RESPONDENT

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List of Abbreviations

Art.	Article
ECT	Energy Charter Treaty
<i>i.e.</i>	<i>id est</i>
<i>ibid.</i>	<i>ibidem</i>
ICSID	International Centre for the Settlement of Investment Disputes
JIA	Journal of International Arbitration
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
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
v	versus
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
YJIL	Yale Journal of International Law

List of Authorities

1. Documents:

ICSID *History of the ICSID Convention*,
Vol. 1, 1970
(hereinafter cited as: *History of the ICSID Convention*)

Rayfuse, Rosemary *ICSID Reports*,
1st Edition, 1993, Cambridge University Press
(hereinafter cited as: *ICSID Reports*)

Doha Declaration on the TRIPS Agreement and Public Health,
WT/MIN(01)/DEC/W/2, November 14, 2001, available at:
<http://www.who.int/medicines/areas/policy/tripshealth.pdf>
(hereinafter cited as: *Doha Declaration*)

2. Books:

Cheng, Bin *General Principles of Law as Applied by International Courts
and Tribunals*,
1st Edition, 1953, Stevens & Sons
(hereinafter cited as: Cheng, *General Principles*)

Coop, Graham/
Ribeiro, Clarisse *Investment Protection and the Energy Charter Treaty*,
1st Edition, 2008, JurisNet, LLC
(hereinafter cited as: Ribeiro/Coop)

Dolzer, Rudolf/
Stevens, Margrete *Bilateral Investment Treaties*,
1st Edition, 1995, Kluwer Law International
(hereinafter cited as: Dolzer/Stevens)

- Griebel, Jörn *Internationales Investitionsrecht*
1st Edition, 2008, C. H. Beck
(hereinafter cited as: Griebel)
- Hirsch, Moshe *The arbitration mechanism of the International Centre for the Settlement of Investment Disputes*
1st Edition, 1993, Dordrecht Nijhoff
(hereinafter cited as: Hirsch)
- MacLachlan, Campbell/
Shore, Laurence/
Weiniger, Matthew *International Investment Arbitration,*
1st Edition, 2007, Oxford University Press
(hereinafter cited as: MacLachlan/Shore/Weiniger)
- Muchlinski, Peter/
Ortino, Federico/
Schreuer, Christoph (eds.) *The Oxford Handbook – International Investment Law,*
1st Edition, 2008, Oxford University Press
(hereinafter cited as: Muchlinski/Ortino/Schreuer)
- Reed, Lucy/
Paulsson, Jan/
Blackaby, Nigel *Guide to ICSID Arbitration,*
1st Edition, 2004, Kluwer Law International
(hereinafter cited as: Reed/Paulsson/Blackaby)
- Schreuer, Christoph/
Dolzer, Rudolf *Principles of International Investment Law,*
1st Edition, 2008, Oxford University Press
(hereinafter cited as: Dolzer/Schreuer)
- Sornarajah,
Muthucumaraswamy *The International Law on Foreign Investment,*
2nd Edition, 2004, Cambridge University Press
(hereinafter cited as: Sornarajah)

UNCTAD International
Centre for Trade and
Sustainable Development
(ICTSD)

Resource Book on TRIPS and Development
1st Edition, 2005, Cambridge University Press
(hereinafter cited as: UNCTAD-ICTSD)

3. Commentaries:

Schreuer, Christoph

The ICSID Convention – A Commentary,
2nd Edition, 2009, Cambridge University Press
(hereinafter cited as: Schreuer, *A Commentary*)

4. Articles:

Amerasinghe, Felix

The Interpretation of Article 25 (2)(b) of the ICSID Convention
in: Lillich/Brower (ed.), *International arbitration in the 21st
century: towards “judicialization” and “uniformity”?*, 1994, p.
223
(hereinafter cited as: Amerasinghe, *International Arbitration in
the 21st century*)

Bernieri, Rosa Castro

*Compulsory Licensing and Public Health: TRIPS-plus
Standards in Investment Agreements*,
in: 6 TDM 2 (2009), available at [www.transnational-dispute-
management.com](http://www.transnational-dispute-management.com)
(hereinafter cited as: Bernieri)

Broches, Aron

*Denying ICSID Jurisdiction. The ICSID Award in Vacuum Salt
Products Limited*
in: JIA, 1996, Vol. 13, No. 3, p. 21
(hereinafter cited as: Broches, JIA)

- Burgstaller, Markus *Nationality of Corporate Investors and International Claims against the Investor's Own State*
in: JWIT, 2006, Vol. 6, No. 2, p. 857
(hereinafter cited as: Burgstaller, JWIT)
- Chuckwumerije, Okezie *Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations*
in: JWIT, 2007, Vol. 8, No. 5, p. 597
(hereinafter cited as: Chuckwumerije, JWIT)
- Delaume, Georges R. *ICSID Arbitration in Practice*
in: International Tax and Business Lawyer, 1984, Vol. 2, p. 58
(hereinafter cited as: Delaume, ICSID Arbitration in practice)
- Delaume, Georges R. *How to draft an ICSID Arbitration clause*
in: ICSID Review, FILJ, 1992, Vol. 7, No. 1, p. 168
(hereinafter cited as: Delaume, ICSID Review, FILJ)
- D'Allaires, Dominique *The Nationality Rules under the Energy Charter Treaty: Practical Considerations*
in: JWIT, 2009, Vol. 10, No. 1, p. 39
(hereinafter cited as: D'Allaires, JWIT)
- Gibson, Christoper S. *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation,*
in: 6 TDM 2 (2009), available at: www.transnational-dispute-management.com
(hereinafter cited as: Gibson)

- Paulsson, Jan/
Douglas, Zachary *Indirect Expropriation in Investment Treaty Arbitrations*,
in: Norbert Horn (ed.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, p. 145
(hereinafter cited as: Paulsson/Douglas)
- Schill, Stephan *“Fair and Equitable Treatment” as an Embodiment of the Rule of Law*,
in: Rainer Hofmann/Christian Tams (eds.), *The International Convention for the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years*, p. 31
(hereinafter cited as: Schill)
- Schill, Stephan *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroads*,
in: JWIT, 2009, Vol. 10, No. 2, p. 189
(hereinafter cited as: Schill, JWIT)
- Schreuer, Christoph *Access to ICSID Disputes Settlement for Locally Incorporated Companies*
in: *International Economic Law with a Human Face*, 1998
Friedleweiss, Deuters & de Waart, p. 497
(hereinafter cited as: Schreuer, *Access to ICSID Disputes Settlement for Locally Incorporated Companies*)
- Sinclair, Anthony C. *The Substance of Nationality Requirements in Investment Treaty Arbitration*,
in: *ICSID Review, FILJ*, 2005, Vol. 20, No. 2, p. 357
(hereinafter cited as: Sinclair, *ICSID Review, FILJ*)

Vesel, Scott

Clearing a path through a tangled jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties,
in: YJIL, 2007, 32, p.125
(hereinafter cited as: Vesel, YJIL)

5. Jurisprudence

5.1 ICSID – International Centre for Settlement of Investment Disputes

*Aguas del Tunari v
Argentina*

Aguas del Tunari, S.A. v Republic of Bolivia
Decision on Respondent's Objections to Jurisdiction,
October 2005

ICSID Case No. ARB/02/3

Tribunal: David D. Caron (President)
José Luis Alberro-Semerena
Henri C. Alvarez

(http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf)

AES Corp. v Argentina

AES Corporation v Argentina

Decision on jurisdiction, April 2005

ICSID Case No. ARB/02/17

Tribunal: Pierre-Marie Dupuy (President)
Karl-Heinz Böckstiegel
Domingo Bello Janeiro

(http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_002.pdf)

Bayindir v Pakistan

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic
Republic of Pakistan

Decision on Jurisdiction, November 2005

ICSID Case No. ARB/03/29

Tribunal: Gabrielle Kaufmann-Kohler (President)
Franklin Berman
Karl-Heinz Böckstiegel

(<http://ita.law.uvic.ca/documents/Bayindr-jurisdiction.pdf>)

BP et al. v Argentina

BP America Production Co. and Others v Argentine Republic

Decision on Preliminary Objections, July 2006

ICSID Case No. ARB/04/8

Tribunal: Lucius Caflisch (President)
Brigitte Stern
Albert Jan van den Berg

(<http://ita.law.uvic.ca/documents/PanAmericanBPJurisdiction-eng.pdf>)

CableTV v St. Kitts a. Nevis

Cable TV v St. Kitts and Nevis

Award, January 1997

ICSID Case No. ARB/95/2

13 ICSID Review - Foreign Investment Law Journal 328, 367/8
(1998).

Fedax v Venezuela

Fedax NV v Republic of Venezuela

Decision on Jurisdiction, July 1997

ICSID Case No. ARB/96/3

Tribunal: Francisco Orrego Vicuña (President)
Meir Heth
Roberts B. Owen

(<http://ita.law.uvic.ca/documents/Fedax-1997-Last.pdf>)

*Generation Ukraine v
Ukraine*

Generation Ukraine, Inc v Ukraine

Award, September 2003

ICSID Case No. ARB/00/9

Tribunal: Jan Paulsson (President)

Eugen Salpius

Jürgen Voss

(http://ita.law.uvic.ca/documents/GenerationUkraine_000.pdf)

Joy Mining v Egypt

Joy Mining Machinery Ltd v Egypt

Award on jurisdiction, July 2004

ICSID Case No. ARB/03/11

Tribunal: Francisco Orrego Vicuña (President)

William Laurence Craig

CG Weeramantry

(http://ita.law.uvic.ca/documents/JoyMining_Egypt.pdf)

LESI Dipenta v Algeria

L.E.S.I. S.p.A. et ASTALDI S.p.A. v Algeria

Decision on Jurisdiction, July 2006

ICSID Case No. ARB/05/3

Tribunal: Pierre Tercier (Président)

André Faurès

Emmanuel Gaillard

(<http://ita.law.uvic.ca/documents/LESIAAlgeria.pdf>)

Maffezini v Spain

Emilio Agustín Maffezini v Spain

Award on Jurisdiction, January 2000

ICSID Case No. ARB/97/7

Tribunal: Francisco Orrego Vicuña (President);

Thomas Buergenthal

Maurice Wolf

(http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf)

Mihaly v Sri Lanka

Mihaly International Corporation v Sri Lanka

Final Award, March 2002

ICSID Case No. ARB/00/2

Tribunal: Sompong Sucharitkul (President)

David Suratgar

Andrew J Rogers

(<http://ita.law.uvic.ca/documents/mihaly-award.pdf>)

Plama v Bulgaria

Plama Consortium Limited v Bulgaria

Decision on Jurisdiction, February 2005

ICSID Case No. ARB/03/24

Tribunal: Carl F Salans (President)

Albert Jan van den Berg

V.V. Veeder

(<http://ita.law.uvic.ca/documents/plamavbulgaria.pdf>)

Salini v Jordan

Salini Costruttori SpA and Italstrade SpA v Jordan

Decision on Jurisdiction, November 2004

ICSID Case No. ARB/02/13

Tribunal: Gilbert Guillaume (President)

Bernardo Cremades

Ian Sinclair

(http://ita.law.uvic.ca/documents/salini-decision_000.pdf)

Salini v Morocco

Salini Construtorri S.p.A. and Italstrade S.p.A. v Morocco

Decision on Jurisdiction, July 2001

ICSID Case No. ARB/00/4

Tribunal: Robert Brina (President)

Bernardo Cremades

Ibrahim Fadlallah

(<http://ita.law.uvic.ca/documents/Salini-English.pdf>)

S.A.R.L. v Congo

African Holding Company of America Inc (AHL) and the
African Society of Construction in Congo (SARL) v Congo
Decision on Jurisdiction and Admissibility, July 2008

ICSID Case No. ARB/05/21,

Tribunal: Francisco Orrego Vicuña, (President)

O.L.O. de Witt Wijnen

Dominique Grisay

(<http://ita.law.uvic.ca/documents/AfricanHoldingCompanyAward.pdf>)

SOABI v Senegal

Societe Quest Africaine des Betons Industriels v Senegal

Decision on jurisdiction, August 1984

ICSID Case No. ARB/82/1

Tribunal: Aron Broches (President)

Kéba Mbaye

Baron Jean van Houtte

(ICSID Reports, Vol. 2, p. 165)

Telenor v Hungary

Telenor Mobile Communications v Hungary

Award, September 2006

ICSID Case No. ARB/04/15

Tribunal: Roy Goode (President)

Nicholas W Allard

Arthur L Marriott

(http://ita.law.uvic.ca/documents/Telenorv.HungaryAward_001.pdf)

Tokios Tokelès v Ukraine

Tokios Tokelès v Ukraine

Dissenting opinion by Prosper Weil, April 2004

ICSID Case No. ARB/02/18

Tribunal: Prosper Weil (President)

Piero Bernardini

Daniel M. Price

(http://ita.law.uvic.ca/documents/tokios-dissenting_opinion_000.pdf)

TSA v Argentina

TSA Spectrum de Argentina SA v Argentina

Award, December 2008

ICSID Case No ARB/05/5

Tribunal: Judge Hans Danelius (President)

Georges Abi-Saab

Grant D Aldonas

(<http://ita.law.uvic.ca/documents/TSAAwardEng.pdf>)

Vacuum Salt v Ghana

Vacuum Salt Products Ltd. v Republic of Ghana

Award, February, 1994

ICSID Case No. ARB/92/1

Tribunal: Robert Jennings (President)

Charles N. Brower

Kamal Hossain

(ICSID Reports, Vol. 4, p. 323)

Waste Management v

Mexico

Waste Management, Inc. v United Mexican States

Award, April 2004

ICSID Case No. ARB(AF)/00/3

Tribunal: James Crawford (President)

Benjamin R. Civiletti

Eduardo Magallón Gómez

(http://ita.law.uvic.ca/documents/laudo_ingles.pdf)

Wintershall v Argentina Wintershall Aktiengesellschaft v Argentina
Award, December 2008
ICSID Case No. ARB/04/14
Tribunal: Fali S Nariman (President)
 Santiago Torres Bernárdez
 Piero Bernardini
(<http://ita.law.uvic.ca/documents/Wintershall.pdf>)

5.2 PCA – Permanent Court of Arbitration

Saluka v Czech Republic Saluka Investments BV v Czech Republic
Partial Award, March 2006
Tribunal: Sir Arthur Watts (President)
 Yves Fortier
 Peter Behrens
(<http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>)

5.3 SCC - Arbitration Institute of the Stockholm Chamber of Commerce

Berschader v Russia Berschader and Berschader v Russian Federation
Award and Correction, April 2006
SCC Case No. 080/2004
Tribunal: Bengt Sjövall (President)
 Sergei Lebedev
 Todd Grierson-Weiler
(<http://ita.law.uvic.ca/documents/BerschaderFinalAward.pdf>)

RosInvest v Russia

RosInvest Co UK Ltd v Russian Federation

Jurisdiction award, October 2007

SCC Case No. V079/2005

Tribunal: Karl-Heinz Böckstiegel (President)

The Rt Hon The Lord Steyn

Franklin Berman

(http://ita.law.uvic.ca/documents/RosInvestjurisdiction_decision_2007_10_000.pdf)

List of Legal Sources

1. Conventions and Multilateral Agreements

International Centre for Settlement of Investment Disputes Convention (Washington Convention) of 14 October 1966,

http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

(hereinafter cited as: *ICSID-Convention*)

Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Agreement Establishing the WTO,

http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

(hereinafter cited as: DSU)

Vienna Convention in the Law of Treaties of 23 May 1969,

1155 UNTS p. 331

(hereinafter cited as: *VCLT*)

2. Bilateral Investment Treaties

Acuerdo para la Promocion y la Proteccion reciproca de inversiones entre El Reino de España y La Republica Argentina of 3 October 1991

(hereinafter cited as: *Argentina-Spain BIT*)

Treaty between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia concerning Encouragement and Reciprocal Protection of Investments of 30 May 2003

(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*)

Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investments of 4 March 1996
(hereinafter cited as: *US-Ukraine BIT*)

Treaty between the United States of America and the Republic of Cameroon concerning the Reciprocal Encouragement and Protection of Investment of 27 November 1984
(hereinafter cited as: *US-Cameroon BIT*)

Treaty with the Czech and Slovak federal Republic concerning the Reciprocal Encouragement and Protection of Investment of 19 December 1992
(hereinafter cited as: *US-Czech Republic BIT*)

Statement of Facts

1. Respondent is the Democratic Commonwealth of Bergonia, a threshold country with a gross domestic product per capita of US \$7,535. As such, on 15 March 2005 it granted Bergonian Patent No. AZ2005 to MedBerg Co. (in the following referred to as MedBerg), a company established under the laws of Bergonia in 2004. MedBerg Co. is the Claimant in these proceedings.
2. In March 2005, Claimant concluded a Licence Agreement with another Bergonian company, BioLife Co. (in the following referred to as BioLife) which it terminated shortly after in March 2007. Upon notice of termination, BioLife attempted to enter into serious negotiations with MedBerg with the goal to conclude a follow-up licence agreement. However, MedBerg broke off all negotiations after only three days; no indications for a possible resumption of negotiations were given.
3. Since the product created by use of the patent was taken off the Bergonian market for an indetermined period of time without so much as a hint whether it would be circulated again any time soon, the Bergonian Intellectual Property Office (IP Office) after careful consideration had to commence proceedings for the issuance of a compulsory licence with respect to Patent No. AZ2005 in June 2007. This was due to the fact that Patent No. AZ2005 contained a key technology to meet overriding medical needs of the Bergonian population.
4. The IP Office issued the licence for Patent No. AZ2005 on 1 November 2007, limiting it in scope and duration. It also began collecting royalties from all companies that invoked the licence. As of 1 January 2009, six companies have done so, supplying the Bergonian population with an important product in the treatment of obesity.
5. Respondent has offered the royalties collected to MedBerg, which however, refused to accept them.
6. Claimant has complained to the IP Office on several occasions and the Patent Review Board of the IP Office which is specialised in intellectual property cases has dealt with

these complaints. Notwithstanding MedBerg's complaints Claimant has never filed for an independent review before any other institution such as national courts.

Summary of Argument

7. In Respondent's first submission it respectfully asks this honourable Tribunal to dismiss the present dispute for lack of jurisdiction. Claimant neither fulfils the requirements under the Bergonia – Conveniencia BIT *ratione personae* nor *ratione materiae*.
8. Claimant is first and foremost a company incorporated in Bergonia and thus a Bergonian company barred from invoking Art. 3 of the Bergonia – Conveniencia BIT in order to make use of the provisions on *ratione materiae* of a third BIT (the Bergonia – Tertia BIT).
9. In the alternative, Claimant's application of Art. 3 (1) and (2) of the Bergonia – Conveniencia BIT must be denied according to Art. 3 (3) of the BIT.
10. Even if the MFN clause applied, Claimant would not enjoy protection with regard to the provisions governing *ratione personae* of the Bergonia – Tertia BIT in connection with Art. 25 (2)(b) of the ICSID Convention since at no point has Respondent given its consent to treat Claimant as a foreign national nor is Claimant controlled by nationals of Conveniencia.
11. Furthermore, Respondent denies the benefits of the Bergonia – Conveniencia BIT to Claimant. The denial of benefits clause is applicable since it is incorporated due to the invocation of the MFN clause by Claimant. The conditions of the denial of benefits clause are fulfilled since Claimant is controlled by nationals of a third country and does not have substantial business activities in Bergonia. The corporate structure of Claimant and the structure of their investment are not envisaged to be protected under the BIT.
12. Moreover, Claimant's investment does not constitute an investment for the purpose of Art. 25 (1) ICSID Convention. It does not comply with the relevant criteria developed by ICSID jurisprudence and cannot be regarded as protected by the ICSID Convention.

13. Respondent further submits that this case is without merit. Respondent contends that the BIT regime is not the applicable law governing the present dispute. The applicable law with regard to intellectual property in the present case is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Therefore, the appropriate forum for this dispute is the WTO Dispute Settlement Body.
14. Respondent further upholds that all of its actions regarding the compulsory licence were in accordance with the provisions of the TRIPS Agreement.
15. If but for all that the Tribunal came to conclude that the BIT was applicable, Respondent contests that any BIT provisions have been breached. In particular, the compulsory licence did not amount to a measure tantamount to expropriation. Even if the Tribunal found that an indirect expropriation has occurred, Respondent maintains that this expropriation would be lawful as it served a public benefit, was non-discriminatory and an adequate, prompt and effective compensation was offered.
16. Again, if the Tribunal found the BIT to be applicable, Respondent submits that at all times it observed the standard of fair and equitable treatment as set out in Art. 2 (2) Bergonia – Conveniencia BIT. In addition, none of its conduct amounted to an arbitrary or discriminatory measure.
17. Respondent denies all of Claimant's allegations in their entirety. In consequence, Respondent requests this honourable Tribunal to declare that it lacks jurisdiction over the dispute and that all of Claimant's allegations are without merit and hence to be dismissed.

Statement of Law

A. Introduction

18. In the following it will be demonstrated that the Tribunal lacks jurisdiction over the present claim by MedBerg – a Bergonian company – against the state of Bergonia. In particular, Respondent will show that Claimant MedBerg is not a protected investor with a protected investment and therefore cannot rely on the provisions of the Bergonia – Conveniencia BIT – a Treaty protecting foreign investments. Claimant cannot for the purpose of establishing the required jurisdiction based on the most-favoured nation clause within the Bergonia – Conveniencia BIT rely on the Bergonia – Tertia BIT. Even if this should be possible Respondent would in that case be able to deny the benefits of the Bergonia – Tertia BIT to the Claimant. In the alternative, should this Tribunal find that it has jurisdiction after all, Respondent will demonstrate that it did not infringe obligations under the BIT and general obligations under international law and, thus, is not liable to pay compensation.

B. Tribunal lacks Jurisdiction

19. The Tribunal lacks jurisdiction *ratione personae* (I.) as well as *ratione materiae* (II.).

I. The Tribunal lacks Jurisdiction *ratione personae* under the Bergonia – Conveniencia BIT since Claimant is a Bergonian Company

20. Claimant, MedBerg Co., does not fulfil the relevant criteria *ratione personae*. Claimant is neither protected under the Bergonia – Conveniencia BIT and Bergonia – Tertia BIT nor under Art. 25 of the ICSID Convention.

1. Art. 1 (3) (b) of the Bergonia – Conveniencia BIT is not met

21. The Tribunal lacks jurisdiction *ratione personae* since the requirement of Art. 1 (3) (b) of the Bergonia – Conveniencia BIT is not complied with. According to this provision Claimant, in order to be a national of Conveniencia, must have its seat in that state. However, Claimant is established in Bergonia and also has its seat there.

22. As this reference to the ‘seat’ is the only criterion in the Bergonia – Conveniencia BIT on which the nationality of a company can be based, no other criterion comes into play. The Tribunal is not free to read additional requirements into the BIT which the parties could themselves have added but which they omitted to add.¹
23. Therefore, the fact that the parties deliberately did not add the criterion of foreign control to determine the nationality of a juridical person reflects their true intention.
24. Hence, Claimant is not a national of Conveniencia since it does not fulfil the requirements of Art. 1 (3) (b) of the Bergonia – Conveniencia BIT. Therefore the Tribunal lacks jurisdiction *ratione personae*.

2. Claimant cannot invoke Art. 3 of the Bergonia – Conveniencia BIT (MFN Clause) in order to rely on the Provisions *ratione personae* of the Bergonia – Tertia BIT

25. As far as Claimant relies on the most favoured nation treatment clause (MFN clause) in Art. 3 of the Bergonia – Conveniencia Treaty in order to invoke Art. VI (8) of the Bergonia – Tertia BIT, this argument has to be rejected. This is firstly for reasons of legal logic, secondly due to the systematic interpretation and the wording of the clause, and finally in due consideration of jurisprudence.

a. The Invocation of the MFN Clause regarding Provisions *ratione personae* militates against the legal Logic of the BIT

26. The purpose of MFN clauses in treaties is to ensure that the relevant parties treat investors of the other contracting party not less favourable than investors of a third party.²

¹ *Saluka v Czech Republic*, Partial Award, 2006, paras. 240-241; *AES Corp. v Argentina*, Decision on Jurisdiction, 2005, paras. 75-80.

² Dolzer/Schreuer, *Principles of International Investment Law*, p. 186.

27. Claimant misconceives the fact that the MFN clause is not applicable at this stage of the proceeding as long as the conditions *ratione personae* of the Bergonia – Conveniencia BIT are not fulfilled. In other words, the very first condition of Art. 3 of the Bergonia – Conveniencia BIT is that the investor must be a foreign investor under the pertinent BIT. The Claimant can rely on the provisions providing for substantive rights only if the BIT is applicable. If this condition is not fulfilled this Article is not applicable at all. This is a matter of a logical understanding of the system of the BIT rather than a question of scope of the MFN clause. Accordingly, unless the requirements of *ratione personae* and *ratione materiae* are not complied with, the ‘door’ to the substantive protection of the applicable BIT is not opened.³ Art. 3 of the BIT is part of the merit stage and therefore not applicable at this instant. This is also indicated regarding the context, since the MFN clause is set forth after the provision concerning *ratione personae* and amongst the treaty’s provisions relating to substantive investment protection.
28. Hence, by applying the MFN clause before the stage of *ratione personae* is passed, Claimant violates the system of the BIT as well as the intention of the parties of the BIT.
29. Thus, Claimant must first fulfil the requirements of Art. 1 (3) (b) Bergonia – Conveniencia BIT. As stated above Claimant has not complied with those requirements. Claimant is not an investor in the meaning of the BIT and therefore Art. 3 of the BIT is not applicable.
- b. The invocation of *ratione personae* provisions through Art. 3 Bergonia – Conveniencia BIT is not in Accordance with the Wording and the Systematic Interpretation of the MFN Clause**
30. Not only the legal logic but also the wording as well as the systematic interpretation of Art. 3 militates against an application of the MFN clause in order to import an external *ratione personae* provision.

³ Dolzer/Stevens, *Bilateral Investment Treaties*, p. 66.

31. The relevant MFN provision set forth in Art. 3 of the Bergonia – Conveniencia BIT reads as follows:

“(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.”

32. Firstly, the wording of the MFN clause in the Bergonia – Conveniencia BIT is not as broadly stipulated as other MFN clauses are. Art. 3 of the BIT is confined to ‘treatment’ of ‘investors’ (or ‘investments’) whereas the expression “[i]n all matters subject to this Agreement, this treatment shall not be less favourable ...”⁴ as also appearing in MFN provisions in a number of other BITs (but not the Bergonia – Conveniencia BIT) may leave room for a wider interpretation. The tribunal in *Maffezini v Spain* explicitly emphasised this distinction:

*“60. The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of “all matters subject to this Agreement” in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that “this treatment” shall be subject to the clause, **which is of course a narrower formulation.**”⁵ (emphasis added).*

33. This honourable Tribunal should consider this distinction of two different MFN formulations which result in two different interpretations, one having a quite broad scope of application, the other – such as in the case of Art. 3 Bergonia – Conveniencia BIT – being narrower.

34. Secondly, ‘treatment’ in the meaning of Art. 3 is related to substantive protection.⁶ The definition of nationality in Art. 1 (3) (b) is not a ‘treatment’. When states drafting a BIT and stipulating a provision to define the term nationality, such a definition which is based on consent of the parties can hardly be considered as a ‘treatment’.

⁴ Art. IV (2) of the Argentina-Spain BIT; Art. 3 (2) of the UK – Argentina BIT.

⁵ *Maffezini v Spain*, Decision on Jurisdiction, 2000, para. 60; *Salini v Jordan*, Decision on Jurisdiction, 2004, para. 116.

⁶ *Plama v Bulgaria*, Decision on Jurisdiction, 2005, para. 209.

35. Furthermore, the fact that Art. 3 (4) refers to ‘privileges’ (“(4) *Such treatment shall not relate to **privileges** which either Contracting State accords to investors of third States on account of its membership of ...*” (emphasis added)) is a strong indication that the MFN ‘treatment’ is to be understood as relating to substantive provisions.⁷
36. Thirdly, an MFN provision in a basic treaty does not incorporate by reference jurisdictional provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the contracting parties intended to incorporate them.⁸ Here, had the parties wanted to broaden the scope of the MFN clause with regard to *ratione personae* provisions, they could have done so, simply as they did for example in Art. 4 (4) and Art. 5 (1) of the Bergonia – Conveniencia BIT.
37. As can be seen, Art. 4 (4) and Art. 5 (1) Bergonia – Conveniencia BIT expressly provide for the transfer of MFN protection from other treaties with regard to the specific fields mentioned in their paragraph (4) and (1). The fact that this was not done within Art. 1 is a further confirmation that the MFN clause in Art. 3 was not intended to be applicable to provisions *ratione personae*.
38. Therefore, if the MFN clause was meant to cover other provisions beyond substantive protection, it needed to have been stipulated clearly and undoubtedly.⁹ Such clear expression of extension of the MFN clause to *ratione personae* provisions is absent from the Bergonia – Conveniencia BIT. Therefore, Claimant cannot import more favourable *ratione personae* jurisdiction standards into the BIT. Hence, this honourable Tribunal is requested to find that provisions *ratione personae* are not covered by the pertinent MFN clause.

⁷ *Plama v Bulgaria*, Decision on Jurisdiction, 2005, para. 191.

⁸ *Ibid.*, para. 223.

⁹ *Telenor v Hungary*, Award, 2006, para. 96; *Plama v Bulgaria*, Decision on Jurisdiction, 2005, paras. 204-209; *Wintershall v Argentina*, Award, 2008, para. 167; *Berschader v Russia*, SCC Case, Award and Correction, 2006, para. 181.

c. There is no Precedent or legal Authority in Favour of Claimants Position regarding the Expansion of the Scope of the MFN Clause to Provisions *ratione personae*

39. There is furthermore no case in international investment jurisprudence where tribunals extended the scope of an MFN clause to *ratione personae* provisions or at least made indications to this effect. Claimant cannot base its arguments on one single case or any other legal authority. This lack of precedent is in fact not surprising. When concluding a multilateral or bilateral investment treaty with specific *ratione personae* provisions, states cannot be expected to leave those provisions to future (partial) replacement by different *ratione personae* provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT¹⁰, but not in the pertinent BIT).
40. However, cases where tribunals expanded the scope of MFN clauses beyond the merit stage to the dispute settlement provisions were such where either the relevant BIT contained an MFN clause with a wide scope (e.g. “*In all matters subject to this Agreement, this treatment shall not be less favourable ...*”¹¹) or cases where the arbitration clause limited the investor’s substantive rights.¹²
41. However, apart from the fact that these cases are heavily disputed,¹³ they have to be distinguished from the present case because they concerned an entirely different context than the case at hand. Dispute settlement provisions are not comparable to provisions concerning the application of the BIT: here, the provisions *ratione personae*.

¹⁰ See note 4.

¹¹ See above. Art. IV(2) of the Argentina-Spain BIT; See also Art. 3(2) of the UK – Argentina BIT.

¹² See *RosInvest v Russia*, Award on Jurisdiction, October 2007, paras. 106-134 and Art. 8 (1) of the UK – Soviet BIT.

¹³ Schill, JWIT, pp. 189, 190; Sornarajah, *The International Law on Foreign Investment*, p. 301; Dolzer/Stevens, *Bilateral Investment Treaties*, p. 191.

42. Nevertheless, even if the Tribunal were of the opinion that the case at hand is comparable with such former decisions, it would come to no other result, since the majority of investment tribunals so far has rejected to accord jurisdictional effect to the MFN clauses in question.¹⁴
43. In *Plama v Bulgaria* the tribunal rejected the idea of a broad application of an MFN clause to more generous dispute settlement provisions from other BITs through the MFN clause.¹⁵ It argued:
- “207. Conversely, dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under **that** treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.”*¹⁶(emphasis added)
44. In addition, the tribunal invoked the difference between substantive rights and their procedural implementation and asserted a conceptual difference between substance and procedure.¹⁷ In sum, the tribunal emphasised that a broad application of MFN clauses would lead to *“a chaotic situation – actually counterproductive to harmonization – [that] cannot be the presumed intent of the Contracting parties.”*¹⁸ Many other Tribunals have followed the same approach and declined the extension of MFN clauses to procedural provisions.¹⁹

¹⁴ See *Plama v Bulgaria*, Decision on Jurisdiction, 2005, paras. 183 *et seq.*; *Telenor v Hungary*, Award, 2006, para. 100; *Salini v Jordan*, Decision on Jurisdiction, 2004, para. 119; *Berschader v Russia*, SCC Case, Award and Correction, 2006, paras. 151-208; *Wintershall v Argentina*, Award, 2008, paras. 158-197.

¹⁵ *Plama v Bulgaria*, Decision on Jurisdiction, 2005, para. 227.

¹⁶ *Ibid.*, para. 207.

¹⁷ *Ibid.*, para. 209.

¹⁸ *Ibid.*, para. 219.

¹⁹ *Telenor v Hungary*, Award, September 2006, para. 100. *Salini v Jordan*, Decision on Jurisdiction, November 2004, para. 119. *Berschader v Russia*, SCC Case, Award and Correction, April 2006, paras. 151-208. *Wintershall v Argentina*, Award, December 2008, paras. 158-197.

45. In *Telenor v Hungary*, for example, the tribunal declined to extend the MFN clause, stating that to do so would be to

*“use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.”*²⁰

46. As demonstrated above, the wording of Art. 3 Bergonia – Conveniencia BIT is narrowly stipulated in order to limit its provisions to substantive issues and therefore cannot be bypassed.

47. If this honourable Tribunal finds that Art. 3 is not clearly stipulated, Respondent refers to the case of *Berschader v Russia* where it was mentioned by the tribunal that:

*“(…) the failure by the Contracting Parties to clarify whether or not Article 2 (MFN clause) was to extend to arbitration provisions tends to support the view that none of the Contracting Parties had any such intention.”*²¹

48. In *Maffezini v Spain*²² the tribunal though extended the MFN clause to the dispute settlement provision, however, one has to consider the completely different context of the case as well as the completely different wording of the MFN clause.

49. One can distinguish the case of *Maffezini v Spain*²³ where the tribunal though extended the MFN clause to the dispute settlement provision. This case concerned a completely different context as well as a completely different wording of the MFN clause. It dealt with an 18 month exhaustion of local remedy rule – which is not comparable to any provision *ratione personae* – and, thus, reflected exceptional circumstances.²⁴ The

²⁰ *Telenor v Hungary*, Award, 2006, para. 92.

²¹ *Berschader v Russia*, SCC Case, Award and Correction, 2006, para. 205.

²² *Maffezini v Spain*, Decision on Jurisdiction, 2000, ICSID Case No ARB/97/7.

²³ *Maffezini v Spain*, Decision on Jurisdiction, 2000.

²⁴ See *Maffezini v Spain*, Decision on Jurisdiction, 2000, paras. 58-60.

importance of this exceptional circumstance was highlighted by the Tribunal in *Plama v Bulgaria*.²⁵

50. However, such exceptional circumstances are not evident here regarding the definition *ratione personae*. Quite to the contrary, the definition of nationality in Art. 1 (3) (b) Bergonia – Conveniencia BIT is one of the most commonly used definitions in international investment treaties.²⁶ Therefore, there is no reasonable cause or any legal argumentation for an expansion of the MFN clause to jurisdictional provisions of the BIT.
51. As far as Claimant relies its arguments on the case of *RosInvest Co. v Russia* it is so far to be mentioned that the tribunal though extended the scope of the MFN clause in the UK-Russia BIT to dispute settlement provisions but it also asserted that MFN clauses in actual fact are intended for substantive protection.²⁷
52. In *RosInvest Co. v Russia* the claimant was hindered to claim for damages because of expropriation, since the arbitration clause (Art. 8 of the UK – Soviet BIT) only applied to disputes concerning the “*amount or payment of compensation (...) consequential upon an act of expropriation*” but not the existence of an expropriation.²⁸ This was considered as a vast encroachment of the investors substantive rights. The tribunal explicitly mentioned that MFN clauses do not generally cover procedural clauses.²⁹ It argued that if an arbitration clause in a BIT rules (directly or indirectly) substantive rights of the investor then the scope of the MFN clause also covers that specific arbitration clause.³⁰ With this statement the tribunal indicated that the scope of an MFN clause in fact is meant to cover substantive issues.

²⁵ *Plama v Bulgaria*, Decision on Jurisdiction, 2005, para. 224.

²⁶ Dolzer/Schreuer, *Principles of International Investment Law*, p. 186.

²⁷ *RosInvest v Russia*, Award on Jurisdiction, 2007, para. 132.

²⁸ Art. 8 (1) UK – Soviet BIT.

²⁹ *RosInvest v Russia*, Award on Jurisdiction, 2007, para. 137.

³⁰ *Ibid.*, para. 128-130.

d. Conclusion

53. Neither the legal logic, the BIT's overall systematic structure, the wording of the MFN clause nor any case law and legal authority support the invocation of Art. VI (8) Bergonia – Tertia BIT through the MFN clause in Art. 3 Bergonia – Conveniencia BIT. It is the Tribunal's responsibility to avoid an arbitrary extension of the MFN clause which would increase the risk of so-called 'treaty shopping' and cause more uncertainty and instability in the international investment jurisprudence.³¹

54. For the aforementioned reasons, Respondent respectfully requests that this honourable Tribunal find that Claimant is not permitted to invoke Art. VI (8) Bergonia – Tertia BIT through the MFN clause. As a result, Respondent upholds that the Claimant remains a national of Bergonia and, thus, the Tribunal lacks jurisdiction *ratione personae*.

3. In the Alternative, according to Art. 3 (3) Bergonia – Conveniencia BIT Claimant's Application of Art. 3 (1) and (2) must be denied

55. If the Tribunal considered the stipulated provisions *ratione personae* in the Bergonia – Conveniencia BIT as 'treatment' and came to the conclusion that Claimant is treated 'less favourable', the MFN clause is not applicable regarding the exceptions in Art. 3 (3) which denies the right to MFN treatment for reasons of 'public health or morality'.

56. The relevant last sentence of Art. 3 (3) stipulates that

"[m]easures that have to be taken for reasons of public security and order, public health or morality shall not be deemed 'treatment less favourable' within the meaning of this Article."

57. Claimant licensed BioLife Co. to utilise Patent No. AZ2005, its alleged investment. After terminating the License Agreement on 31 March 2007, no company was able to produce the medical products which were based on Claimant's technology. Claimant did not issue his patent to other companies in order to utilize it and provide the people

³¹ *Telenor v Hungary*, Award, 2006, paras. 93, 94; *Plama v Bulgaria*, Decision on Jurisdiction, 2005, paras. 222, 223; *Salini v Jordan*, Decision on Jurisdiction, 2004, para. 115.

of Bergonia with the important and necessary medical supplies they needed. There is no reason why Claimant is not willing to provide the licence to other companies, since supply would moreover have been paid adequately. This behaviour cannot be considered as an exercise of rights but rather as an immoral conduct. Thus, Claimant's omission of providing other companies with his license is highly unethical. Therefore, in regard to public health and security and with special respect to morality, Respondent was under the duty regarding its own people to act. Bergonia is responsible for the health of its people and cannot be expected to omit help when helping is possible. The measures were therefore taken for reasons of public security and order and in particular with regard to public health concerns and therefore do not qualify as 'treatment less favourable'.

58. Hence, the MFN clause in Art. 3 (1) and (2) is not applicable since the requirements of Art. 3 (3) are fulfilled.

4. Even if the MFN Clause applied, Claimant would not enjoy Protection with View to the Provision *ratione personae* of the Bergonia – Tertia BIT in Connection with Art. 25 (2)(b) ICSID Convention

59. Even if the Tribunal were of the opinion that Art. 3 Bergonia – Conveniencia BIT was applicable and had the effect to enable the application of the provisions of the Tertia-Bergonia BIT concerning *ratione personae*, the requirements of jurisdiction *ratione personae* would still not be fulfilled.

60. Art. VI (8) Bergonia – Tertia BIT stipulates that

“any company legally constituted under the applicable laws and regulations of a party (...) but that (...) 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.”

61. Accordingly, Art. VI (8) refers to the relevant criteria of Art. 25 ICSID Convention, which have to be examined. In applying Art. 25 ICSID Convention it becomes clear that no protection is given. Apart from the fact that the existence of the required

‘agreement’ is highly doubtful, Claimant is not controlled by nationals of Conveniencia.

a. Respondent has not agreed to treat the Investor as a National of another Contracting State

62. Since it is a general rule that a state cannot be brought before an international forum by its own nationals, an agreement under the second clause of Art. 25 (2)(b) ICSID Convention constitutes an exception to that general rule.³² Such an exception will be admitted only if it is explicitly and unambiguously expressed.³³ In the present case, such an agreement does not even exist.

63. Invocation of such an agreement between the host state and another state through an MFN clause is unacceptable since such a misuse would run against the object and purpose of Art. 25 (2)(b) and has never occurred in ICSID jurisprudence. Where there is no agreement between the parties jurisdiction according to the second clause of Art. 25 (2) (b) ICSID must be declined.³⁴

b. Claimant is not controlled by Nationals of Conveniencia

64. In the event that the Tribunal should however come to the conclusion that Art. VI (8) of the Bergonia – Tertia BIT is to be considered as an agreement between the parties in the meaning of Art. 25 (2) (b) ICSID Convention, Claimant is not controlled by nationals of Conveniencia.

³² *Ibid.*, para. 509.

³³ Amerasinghe, *Interpretation of Article 25 (2)(b)*, pp. 233-35; Delaume, *ICSID Arbitration in Practice*, 2 International Tax and Business Lawyer, 58-63 (1984). See also: Lalive, *The First ‘World Bank’ Arbitration*, p. 141.

³⁴ *CableTV v St. Kitts a. Nevis*, Award, January 1997, 13 ICSID Review – Foreign Investment Law Journal 328, 367/8 (1998).

65. The ICSID Convention is designed to facilitate the settlement of investment disputes between states and nationals of other states, both being members of the ICSID Convention. It is not meant for disputes between states and their own nationals.³⁵
66. Control is an objective requirement that needs to be examined in its ordinary meaning as well as its object and purpose in accordance with Art. 31 VCLT and Art. 25 ICSID. Once decided to pierce the corporate veil in order to find the controller of a company, it cannot be that the tribunal stops at the very first layer and disregards the fact that there might be another person having ultimate control over the ‘visible’ controller of the company.³⁶ Such an approach would be inconsequential and lead to inaccurate solutions: that is, that nationals would find standing to claim against their own state. Here, Dr. Frankensid controls MedX and MedBerg is trying to indirectly enjoy investment protection. Due to the concern that citizens could circumvent international investment law in this manner, also recent ICSID cases and commentators came to the conclusion that the notion of control is to be understood as ‘ultimate’ or ‘true’ control.³⁷
67. According to the agreed statement of facts, Claimant is controlled to 50% by MedScience which is a national of Laputa, a non-contracting party to the ICSID Convention, and to 50% by Mr. Frankensid, a dual national of Bergonia and Amnesia. According to Art. VI (8) of the Bergonia – Tertia BIT the controller must be a national

³⁵ Schreuer, *A Commentary*, para. 760; Weil, *Dissenting Opinion*, 29 April 2004.

³⁶ Schreuer, *A Commentary*, para. 849; *TSA v Argentina*, Award, December 2008, para. 153; McLachlan/Shore/Weiniger, para 5.88; *Aguas del Tunari*, Decision on Jurisdiction, 2005, Dissenting Opinion of Alberro-Semerena, paras. 27, 40.

³⁷ *TSA v Argentina*, Award, December 2008, para. 153; *S.A.R.L. v Congo*, Decision on Jurisdiction and Admissibility, July 2008; see also *SOABI v Senegal*, Decision on Jurisdiction, 1984, 2 ICSID Reports, p. 175-190, paras. 35-38; *Vacuum Salt v Ghana*, Award, 1994, 4 ICSID Reports, p. 320, paras. 38 *et seq.*; *Plama v Bulgaria*, Decision on Jurisdiction, 2005, para. 170; See also *Aguas del Tunari*, Decision on Jurisdiction, 2005, Dissenting Opinion of Alberro-Semerena, paras. 27, 40; McLachlan/Shore/Weiniger, para. 5.88; Schreuer, *A Commentary*, para. 849.

of the other contracting party. In the present case this would be a national of Conveniencia.

68. Though Claimant is formally owned by the holding company MedX, a national of Conveniencia, MedX itself however is controlled by MedScience and Dr. Frankensid, none of them being a national of Conveniencia. To find the true controller the corporate veil must be pierced as MedX that claims to have control over the local company is a mere vehicle to control the Bergonian company through other nationals. Company stockholding is not enough but must be accompanied by effective control.³⁸ Claimant has not furnished any proof that it is ultimately controlled by MedX. Therefore, even if the Tribunal applied the control test, this should be done consequently. Thus, it cannot stop at the second corporate layer and disregard the true controllers behind this layer.

69. In this respect Prof. Schreuer raises the following rhetorical question:

“Is it sufficient for nationals of non-Contracting States or even of the host State to set up a company of convenience in a Contracting State to create the semblance of appropriate foreign control?”

70. And his answer is that

“(…) the better approach would appear to be a realistic look at the true controller thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State”.³⁹

71. In the very recent decision *TSA v Argentina*, the tribunal pierced the corporate veil until it reached the ultimate controller.⁴⁰ The tribunal stated:

“(…) a significant difference between the two clauses of Article 25(2)(b) is that the first uses a formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of ‘foreign control’ in order to pierce the corporate veil and reach for the reality behind the cover of nationality.”⁴¹

³⁸ *Plama v Bulgaria*, Decision on Jurisdiction, February 2005, para. 170.

³⁹ Schreuer, *A Commentary*, para. 849.

⁴⁰ *TSA v Argentina*, Award, 2008, paras. 133-163.

⁴¹ *Ibid.*, para. 140.

72. It furthermore states correctly that

*“It would not be consistent with the text [second clause of Art. 25 (2)(b)], if the tribunal, when establishing whether there is foreign control, would be directed to pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source, using the same criterion with which it started.”*⁴²

73. The tribunal further insisted that control through an intermediate holding company is insufficient for Art. 25 (2) (b) ICSID Convention if ultimate control is vested in a person having the nationality of the host state,⁴³ like in the present case regarding Mr. Frankensid. In his Commentary of the ICSID Convention, Professor *Schreuer* supported this approach in the *TSA Case*.⁴⁴

74. Moreover, the solution adopted in *SOABI v Senegal* has found support among commentators.⁴⁵ In that case, the local company’s immediate controller was a Panamanian company which itself was controlled by Belgian nationals. Since Belgium was a contracting state but Panama was not, the issue of whether to pierce the corporate veil was decisive. The tribunal pierced the corporate veil and lifted the second layer and decided that *SOABI* was a national of Belgium since the true controller were Belgian nationals.⁴⁶ In addition, the tribunals in *S.A.R.L. v. Congo* and *Vacuum Salt v Ghana* followed the same approach.⁴⁷

⁴² *Ibid.*, para. 147.

⁴³ *Ibid.*, para 153.

⁴⁴ Schreuer, *A Commentary*, para. 849, see footnote 1155a.

⁴⁵ Amerasinghe, *Interpretation of Art. 25 (2)(b)*, p. 236; Delaume, *How to Draft an ICSID Arbitration Clause*, p. 178; Hirsch, *The Arbitration Mechanism of the ICSID*, p. 104.

⁴⁶ *SOABI v Senegal*, Decision on Jurisdiction, August 1984, 2 ICSID Reports, p. 175-190, paras. 35-38.

⁴⁷ *S.A.R.L. v Congo*, Decision on Jurisdiction and Admissibility, July 2008; *Vacuum Salt v Ghana*, Award, February, 1994, 4 ICSID Reports, p. 320, paras. 38 *et seq.*

75. The majority of writers and commentators is in favour of piercing the veil under Art. 25 (2) (b) ICSID Convention and going for the real control and nationality of controllers.⁴⁸
76. Hence, if one questions the role and legal position of MedScience and Mr. Frankensid in relation to MedX and MedBerg, then it becomes obvious, as a matter of fact, that they are effectively and legally controlling both companies to 100%.
77. Hence, Claimant does not comply with the requirements in Art. 25 (2) (b) of the ICSID Convention, since it is not a national of another contracting states other than the state party to the dispute, nor is it controlled by nationals of Conveniencia. Therefore the requirements of Art. VI (8) of the Bergonia – Tertia BIT in connection with Art. 25 (2) (b) ICISD Convention are not fulfilled. Consequently, the Tribunal lacks jurisdiction *ratione personae*.

5. Conclusion

78. Claimant is not an investor under the Bergonia – Conveniencia BIT, due to the fact that it is seated in Bergonia. Furthermore, Claimant is not permitted to invoke Art. IV (8) Bergonia – Conveniencia BIT, as such a misuse of the MFN clause militates against the logic of the BIT, the wording and a systematic interpretation of the clause. Moreover it cannot be supported by any precedent or legal authority in the field of international investment law.

⁴⁸ E.g. Delaume, *How to Draft an ICSID Arbitration Clause*, ICSID Rev —FILJ vol. 7 (1992), p. 168 at 178; Broches, *Denying ICSID's Jurisdiction: The ICSID Award in Vacuum Salt Products Ltd*, Journal of International Arbitration, vol. 13 (1996), p. 21; Hirsch, *The Arbitration Mechanism of the ICSID* (1993), p. 104; Schreuer, "Access to ICSID Disputes Settlement for Locally Incorporated Companies", in Friedleweiss, Deuters & de Waart (eds.) *International Economic Law with a Human Face* (1998), p. 497; Schreuer, *A Commentary*, pp. 317-318, paras. 562-563; Burgstaller, "Nationality of Corporate Investors and International Claims against the Investor's own State", Journal of World Investment and Trade, vol. 7, no 2 (Dec. 2006), p. 857.

79. Even if the Tribunal should find that provisions *ratione personae* of the Bergonia – Tertia BIT can be invoked through the MFN clause, the exception clause of Art. 3 (3) Bergonia – Conveniencia BIT applies, since the measures that have been taken by Respondent were based on reasons of public health and morality.
80. In the alternative, the requirements in Art. 25 ICSID Convention to which Art. IV (8) refers are not complied with, since the necessary agreement to regard Claimant as a Conveniencian company is not given. Furthermore Claimant is not under foreign control within the meaning of Art. 25 (2) (b) of the ICSID Convention.
81. For all these reasons, the Tribunal lacks jurisdiction *ratione personae*.

II. The Tribunal lacks Jurisdiction *ratione materiae*

82. It is furthermore submitted that the Tribunal lacks jurisdiction *ratione materiae*.
- 1. As Claimant relies on the Bergonia - Tertia BIT regarding Jurisdiction *ratione personae*, consequently the relevant Standard *ratione materiae* is also to be found in that same BIT**
83. Claimant asserts that the patent (Bergonian Patent No. AZ2005) regarding health-related products constitutes an investment under Art. 1 (1) of the Bergonia-Conveniencia BIT.
84. It is not disputed that the wording of Art. 1 (1) includes patents to the scope of protection of the BIT.
85. However, the problem arises from the fact that Claimant itself does not rely on the Bergonia-Conveniencia BIT in order to justify the Tribunal's jurisdiction *ratione personae* but relies on the Bergonia-Tertia BIT.
86. Should the Tribunal contrary to the above submissions follow the Claimant on the applicability of the MFN clause to provisions concerning the application of the

Bergonia-Conveniencia BIT and should the Tribunal furthermore find, that criteria *ratione personae* of the treaty with Tertia are met, the Tribunal cannot rely on the standard of the Bergonia-Tertia BIT regarding *ratione personae* in isolation, but has to apply the whole jurisdiction standard stipulated in the Bergonia-Tertia BIT including *ratione materiae* as well as possible limitations to jurisdiction stemming from Art. 1 (2), if applicable.

87. Allowing Claimant to select jurisdiction *ratione personae* standards from one BIT and *ratione materiae* standards from another would overstretch the function of the most favoured nation clause. First and foremost, such a wide interpretation of the MFN clause would put the investor in a better position than actually intended by the parties due to the disregard of what was actually intended within the context of the provisions of the BIT.⁴⁹ To come to a different conclusion would force states to provide a much higher level of protection than intended and/or granted to any investor.⁵⁰
88. Furthermore, due to the coherence and inextricableness of the relevant provisions within the treaty, it is not possible to pick out just one single phrase of a certain BIT in order to overcome a procedural obstacle because it would deviate from the system of BITs and MFN clauses. It would elide and circumvent the volition of the states.⁵¹ The MFN clause is not meant to fundamentally subvert the carefully negotiated BIT's between certain states.⁵² The rights granted by the states to the investors constitute an entwined system where the several provisions are in line with each other. These dispute settlement provisions can only be imported from one treaty to another as a whole package.⁵³

⁴⁹ Vesel, YJIL, 125, 187.

⁵⁰ Chuckwumerije, JWIT, p. 597, 621.

⁵¹ Newmark/Poulton, SchiedsVZ, 30, 33.

⁵² McLachlan/Shore/Weiniger, para. 7.162.

⁵³ Vesel, YJIL, 125, 187.

89. Hence, the possibility to cherry-pick certain individual phrases or paragraphs has to be rejected.⁵⁴ It circumvents the intention of the MFN system which is intended to set up equal conditions for all investors.
90. Accordingly, the Tribunal cannot only apply the standard jurisdiction *ratione personae*. It has to apply the whole jurisdiction standard of the Bergonia-Tertia BIT.
91. This means accessorially to the standard jurisdiction *ratione personae*, Art. 1 (1)(a) regarding *ratione materiae* jurisdiction of the Bergonia-Tertia BIT is applicable as well as Art. 1 (2) and (3).

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

92. While the Respondent would be willing to accept that the patent in question may be regarded as an investment under Art. 1 (1)(a), the benefits flowing from that Treaty can, however, be denied as will be demonstrated in the following sections.

3. Respondent can deny the Benefits of the Treaty to Claimant invoking Art. 1 (2) of the Bergonia-Tertia BIT since the Denial of Benefits forms Part of the Provisions on Jurisdiction

93. Should the MFN clause be applied, an application of the jurisdictional rules within the Bergonia-Tertia BIT in their entirety is – as demonstrated above – required. The rule regarding the denial of benefits forms part of these rules. According to ICSID jurisprudence, questions of a denial of benefit clause have to be considered in the context of jurisdiction.⁵⁵ In the case at hand, the denial of benefit clause is connected with the jurisdiction prerequisites of Art. 1 of the Bergonia-Tertia BIT, therefore, it has to be regarded at the jurisdictional stage. Thus, the denial of benefit clause is subject to the jurisdiction and comes into play here.⁵⁶

⁵⁴ Newmark/Poulton, SchiedsVZ, 30, 33.

⁵⁵ *Generation Ukraine*, Award, 2003, para. 15.1-15.9.

⁵⁶ *BP et al. v Argentina*, Decision on Preliminary Objections, 2006, paras. 209, 221.

94. Art. 1 (2) of the Bergonia-Tertia BIT in specific circumstances rents out the possibility for Respondent “to deny to any company the advantages of this treaty”. Accordingly, Respondent may declare a denial of benefits of the treaty advantages in the event that any of the situations provided for in Art. 1 (2) of the Bergonia-Tertia BIT is fulfilled.

a. The Meaning of the Denial of Benefits pursuant to Art. 1 (2)

95. Art. 1 (2) of the Bergonia-Tertia BIT provides that the host state can deny the advantages of the treaty in situations where “nationals of any third country control such company” and where the controlling company does not have “substantial business activities” in its state of incorporation. The object and purpose of Art. 1 (2) is to prevent forum shopping. This is because, firstly, third country nationals are excluded from treaty protection. Secondly, any investor from a third state who has created a so-called mailbox company in order to bring itself within the scope of treaty protection, but who does not have substantial economical activities in that country is also excluded from the protection of the BIT.⁵⁷ Such protection was not intended by the contracting parties of the BIT.

96. The present situation is similar to that before the tribunal in *Generation Ukraine*. In line with the tribunal in *Generation Ukraine* Art. 1 (2) provided that a “company of the other party” is the company which controls the company in the respondent state. Accordingly, Respondent can deny benefits if the controlling company itself (1) is controlled by third state nationals and (2) does not have substantial business in the state of its incorporation.⁵⁸ Put differently, Respondent can deny BIT benefits if MedX is controlled by third state nationals or does not have substantial business activities in Conveniencia.

b. Claimant is controlled by Nationals of a third Country

97. Claimant is controlled by MedX. MedX is a Holding Corporation of the ultimate controllers MedScience and Mr. Frankensid. Although the agreed statement of facts

⁵⁷ Sinclair, ICSID Review, FILJ, p. 357, 388, para. 4.

⁵⁸ *Generation Ukraine v Ukraine*, Award, 2003, para. 15.9.

does not indicate whether MedX has any independent controlling ability, it is presumably a mailbox company. The agreed upon statement of facts indicates that MedScience, incorporated in Laputa, and Dr. Frankensid, a national of Amnesia, govern the invention, which led to the registration of a patent in Bergonia. MedScience is a company established under the laws of Laputa. However, Laputa is not a contracting party to neither BIT and thus, a third state national. On top of that Dr. Frankensid also holds the Amnesian nationality. Therefore, he exercises control by a third state national. Consequently, Claimant is controlled by third state nationals and, hence, Respondent can deny the advantages of the treaty.

c. No Substantial Business Activities in Conveniencia

98. MedX has no substantial business activities in Conveniencia.

99. It must be emphasised that the terms ‘substantial business’ and ‘investment’ diverge. The denial of benefits clause does neither require having a protected investment nor are the terms ‘substantial business activities’ synonymic to the term ‘investment’ of the BIT to invoke that right. Business activities which have to be *substantial* imply a much higher threshold since it is not enough that just some random business operations are carried out.⁵⁹ Thus, Claimant’s business activities have to be regarded detached from the notion of the term investment.

100. MedX is likely a shell company for MedScience. Indeed, the facts do not indicate that MedX has any substantial business. Instead, as reflected even in the company’s name MedX Holdings Ltd, that it is a mere holding corporation, dependent on the decisions of its controlling owners MedScience and Dr. Frankensid. The simple administration of shares in connection with the aim of getting under the scope of protection of a forum which otherwise would not have existed cannot be regarded as a substantial business activity.

⁵⁹ Sinclair/Jagusch in Coop/Ribeiro, p. 20.

101. It follows from the basic rules of logic that a *substantial* business activity must mean more than simple ‘minimum required business activities’ such as the mere compliance with statutory duties or acting according to the company’s articles of association and bylaws. The same must hold true for the administration of shares. It is thus submitted that indications for conducting substantial business activities in a host country are at least that a company employs staff, possesses own premises and has business activities to an extent which allow it to have made the investment at issue. However, this does not hold true for the case at hand which is why substantial business activities of MedX have to be denied.

102. The substantiality of the business activity is the additional limiting element of Art. 1 (2) of the Bergonia-Tertia BIT. Even if this Tribunal concludes that the activities of a holding company may be regarded as a business activity for the purpose of Art. 1 (2) of the Bergonia-Tertia BIT, this can under no circumstances be considered as business of a *substantial* nature. According to *D’Allaire* substantial is “*something of large in size, value or importance*”.⁶⁰ Here, MedX’s activities do not rise to the level of being ‘substantial.’ Indeed, MedX’s activities consist of the mere holding of a company whose sole activity is the marketing of a single patent.

d. MedX was created in an Effort to bring Claimant within the Protection of the ICSID Convention

103. The denial of benefits clause grants the host state the right to hinder abuses of BIT protection that result from the ever increasing incidence of treaty shopping in international investment law.⁶¹ This treaty shopping occurs when companies incorporate so-called mailbox companies in countries with favourable BITs. The single purpose of these companies is to provide their investment the highest standard of treaty protection possible, even where otherwise the investment would not be eligible for such protection.⁶² This activity is contrary to the intentions of the states

⁶⁰ D’Allaire, JWIT, p. 39, 57.

⁶¹ Sinclair, ICSID Review, FILJ, p. 357, 388, para. 3.

⁶² Sinclair/Jagusch in Ribeiro/Coop, p. 39; Sinclair, ICSID Review, FILJ, p. 357, 385.

creating BITs.⁶³ To restrict that conduct the denial of benefit clause rents out the possibility to deny treaty protection in those cases. Furthermore, *D'Allaire* adduces the case that commonly corporate entities with shareholders from different countries fall under the specific exclusion of the denial of benefits in connection with the criterion of substantial business activities.⁶⁴ This is exactly the case here.

104. MedX does not have substantial business activities in Conveniencia. It is merely a mailbox company, established for juridical advantages. Furthermore, the whole establishment of MedX was unnecessary. For the purpose of marketing, export or exploitation of MedScience's invention it would have sufficed to directly establish MedBerg in Bergonia. However, the investment was likely not structured in this manner because MedScience is established under the laws of Laputa. Laputa is not a member to the ICSID Convention and, hence, there would have been no BIT protection. This leads to the conclusion that the likely motivation for establishing MedX was in order to bring the investment within the scope of BIT protection. Such motives are precisely what the denial of benefits clauses are intended to address.
105. Even if the Tribunal concludes that both conditions have to be fulfilled cumulatively since the 'third state national control'-criterion pervades the rest of the Article, Respondent has shown that both conditions are met.

e. Respondent has the Right to exercise Denial of Benefits

106. As far as Claimant relied on the argument that the right to deny has to be exercised at the time when the investment was established, this argument has to be rejected. The right to deny is an absolute right reserved to the states in order to exclude companies which should not be subject to protection from the scope of BIT protection.⁶⁵ To burden the states with the explicit exercise of the right to deny at the very moment the investment begins defeats this right and is, furthermore, impossible for states in

⁶³ D'Allaire, JWIT, p. 39, 55, para. 3.

⁶⁴ D'Allaire, JWIT, p. 39, 59.

⁶⁵ Sinclair, ICSID Review, FILJ, p. 357, 385.

Respondent's position to manage. This absolute right may at first glance be harsh toward the investor. It is, however, narrowed by the conditions set up in the relevant clause.

107. Furthermore, Article Art. 1 (2) states: “*Each party reserves the right to deny ...*”. The word “*reserves*” does not imply that this right has to be exercised immediately. Rather, it indicates that the right can be exercised at any time. Where a right is ‘reserved’ the relevant party has the opportunity to make use of it in the future. An interpretation to the contrary that limits the right to deny temporally would contradict the ordinary meaning of the word *reserve*. A consistent construction of both the ordinary meaning of the term ‘reserved’ and the circumstances in which a right to deny may be invoked, leads to the logical understanding that the right to deny benefits can be exercised (1) at any time and (2) without retrospective effect. An alternative interpretation of the clause would lead to an inconsistent and perhaps even nonsensical result. Indeed, it cannot be demanded that, at the time of the initial investment, the state has to obtain a complete overview over all and every investment/investor relationship and situation. Investment constellations are often highly complex and the chain of companies behind the claiming company cannot realistically be surveyed by the state.⁶⁶

108. The market of foreign investments is constantly increasing so that it is simply not possible for a state to assess each and every single investor and their BIT rights the moment that they enter the market. It must therefore be possible to effectively exercise a denial of benefits retrospectively.⁶⁷ Any other interpretation would run counter to the object of purpose of the denial of benefits clause since it would favour those investors that would actually fall within the scope of the denial of benefits clause. If the right to deny benefits could only be exercised in retrospect, these investors would contrary to the object and purpose of the clause in fact be exempt from a denial of benefits. This is surely not the result that was anticipated when drafting that clause.

⁶⁶ Sinclair/Jagusch in Coop/Ribeiro, p. 35.

⁶⁷ Sinclair, ICSID Review, FILJ, p. 357, 386.

109. Therefore, Respondent's exercise of the right to denial is valid and does have retrospective effect. As a result, because Respondent has acted within the scope of the BIT in denying Claimant BIT rights, Claimant is not entitled to the protection of the Bergonia-Tertia BIT.

4. No Jurisdiction *ratione materiae* under Art. 25 of the ICSID Convention

110. Claimant does not have an investment which falls within the scope of protection of Art. 25 (1) ICSID Convention. In the following Respondent will demonstrate that the Tribunal has no jurisdiction *ratione materiae* since the dispute does not arise out of an investment under Art. 25 (1) ICSID Convention. Moreover, Respondent will prove that the asserted 'investment' lacked substantial commitment and a sufficient duration. Even if this were not the case Respondent will show that Claimant's 'investment' did not contain any commercial risk and did nothing to further the economic development of the host state Bergonia. Therefore, an investment in the sense of Art. 25 (1) of the ICSID Convention has to be denied.

a. The Dispute does not arise out of an Investment under Art. 25 (1) ICSID Convention

111. For the purpose of Art. 25 (1) and, thus, the jurisdiction of the Tribunal, there has to be a "dispute arising directly out of an investment".

112. Respondent objects that the mere holding of a patent without using it or allowing it to be used can be regarded as an investment according to Art. 25.

113. The ICSID Convention does not define the term "investment" since the definition should be left to the consent of the parties negotiating the relevant BIT.⁶⁸ There are, however, some criteria that are generally recognized under Art. 25 (1) ICSID Convention as giving guidelines for defining the term "investment." Today, those

⁶⁸ *Report of the Executive Directors*, ICISD Reports Vol. 1, para. 27; Schreuer, *A Commentary*, para. 89.

criteria are generally referred to as the so-called *Salini* test which was first considered by the tribunal in the *Fedax* case.⁶⁹

114. Under the *Salini* test, an investment should usually comprise a *substantial commitment, certain duration of the project, a commercial risk, and economic development*.⁷⁰ However, especially the last criterion has become subject to disagreement and, thus, should not be accorded important weight.⁷¹ It will be demonstrated that at least three of the criteria are not fulfilled.

b. The so-called ‘Investment’ did not involve a substantial Commitment, required under the *Salini* Test

115. A substantial commitment is one that involves any significant financial resource or transfer of know-how, equipment, and personnel.⁷² Respondent denies that the investment constitutes any substantial commitment.

116. A license of a patent was granted by Claimant to BioLife Co. a company from Bergonia which used it to produce health related products. However, Claimant is simply holding the patent and there is no further activity. The question is not only whether holding a patent is a commitment, but rather whether it is a *substantial* commitment.

117. The licence agreement merely amounts to a normal leasing or sales contract. In line with tribunal in *Joy Mining v Egypt*, Respondent submits that the terms of such contracts are entirely normal commercial terms”.⁷³ The production costs, marketing,

⁶⁹ *Bayindir v Pakistan*, Decision on Jurisdiction, 2005, para. 130; *Fedax v Venezuela*, Decision on Jurisdiction, 1997, para. 43.

⁷⁰ *Salini v Morocco*, 2001, para. 52; Dolzer/Schreuer, p. 68; Reed/Paulsson/Blackaby, p. 15.

⁷¹ Dolzer/Schreuer, p. 69; Schlemmer in Muchlinski/Ortino/Schreuer, p. 68.

⁷² *Bayindir v Pakistan*, Decision on Jurisdiction, 2005, para. 131; Dolzer/Schreuer, p. 68; McLachlan/Shore/Weiniger, para. 6.08.

⁷³ *Joy Mining v Egypt*, Award on Jurisdiction, 2004, para. 56.

and managing of the production units is all done by BioLife Co., a Bergonian company.

118. After the termination of the license agreement with Bergonian BioLife the alleged investment ceased to exist. The negotiations regarding the extension of the agreement were terminated by Claimant. There is at least no further evidence that the licensing project could go on and maintain the business activities. One can hardly regard the mere possession of a patent as investment unless it is used.

119. Accordingly, Claimant's alleged investment does not constitute a substantial commitment.

c. The denied 'Investment' was not of a sufficient Duration to be considered an Investment under the *Salini* Test

120. The duration criterion is of important relevance since mere short-term projects with a short profit margin should not fall within the scope of BIT protection. In this respect, generally five years have been considered to satisfy the duration of a project.⁷⁴ Recently, the tribunal in *Bayindir v. Pakistan* confirmed that a contract over three years, where the Claimant has sought to lengthen the contract for a further twelve months, would suffice.⁷⁵ However, in the case at hand Claimant started its investment with the licensing of BioLife on 31 March 2005. The time that the Claimant spent applying for the patent is part of the pre-investment phase and cannot be subject to claim and, hence, not subject to the duration criterion.⁷⁶ Furthermore, Claimant did not even attempt to undertake noteworthy efforts to conclude a follow-up Licence Agreement although there were no indications that there was no demand for it from the market.

⁷⁴ *History of the ICSID Convention*, para. 116.

⁷⁵ *Bayindir v Pakistan*, Decision on Jurisdiction, 2005, para. 133.

⁷⁶ *Mihaly v Sri Lanka*, Award, 2002, para. 60.

121. Consequently Claimant had a contract on basis of the patent with BioLife because only two years which was not extended despite the great endeavour of BioLife. In addition, Claimant indicated through its conduct of terminating negotiations after only three days that it did not envisage the project as having a long duration for the future.

122. Accordingly, the required duration of the project is by no means satisfied regarding the patent licensing as an investment.

d. The purported ‘Investment’ did not pose or contain a commercial risk as required under the *Salini* Test

123. Taking a commercial risk generally means taking the risk of losing gains or the possibility of the failure of the project. Respondent furthermore contests that Claimant bears a commercial risk regarding its alleged investment. Here, Claimant merely applied for patent in order to license a company in Bergonia. Accordingly, Claimant was neither involved in the management, marketing, production or delivery of the final products. In order to make a profit, it simply had to make a deal with BioLife with respect to license agreement. Claimant did not take part in either the run of process, the maintenance of the business or the profit guarantee. From the day of the licensing, these important aspects were others’ responsibility and risk. Even if BioLife had failed with the production, still Claimant would have had the claim to the license fee.

124. Consequently Claimant never had a commercial risk.

e. The so-called ‘Investment’ did not further economic Development in Bergonia under the *Salini* Test

125. Respondent sees considerable doubts that there is economic development to Bergonia in connection with the patent. This is in particular due to the termination of the agreement there are considerable doubts that the patent would contribute to economic development in Bergonia. Indeed, from the moment that Claimant terminated the use of the patent, the patent did not exercise any positive effects on the development anymore.

126. While one may have doubts to what degree all the criteria contained in the *Salini* test have to be applied.⁷⁷ Indeed, in the decision *LESI Dipenta v Algeria* the tribunal found the *Salini* criterion on economic development to be irrelevant as to whether there is an investment.⁷⁸ However, a project which lacks so many relevant criteria does not constitute an investment under Art. 25 ICSID Convention.
127. Therefore, Respondent submits that Claimant do not have an investment for the purpose of Art. 25 (1) ICSID Convention. Accordingly, the tribunal shall deny jurisdiction *ratione materiae* for the purpose of Art. 25.

5. Conclusion

128. As has been shown, Claimant neither falls within the jurisdiction *ratione personae* nor *ratione materiae*. Furthermore, Respondent denies treaty protection to Claimant.
129. Therefore, Respondent asks the Tribunal to declare it incompetent to proceed with the merit stage due to lack of jurisdiction.

⁷⁷ Dolzer/Schreuer, p. 69.

⁷⁸ *LESI Dipenta v Algeria*, Decision on Jurisdiction, 2006, para. 72.

C. Merits

130. Even if this Tribunal found that it has jurisdiction over the dispute, which Respondent denies, Respondent submits that this dispute is without merit. Accordingly, Respondent will show in the following that the Bergonia – Conveniencia BIT is not applicable in the present dispute. Furthermore, Respondent will demonstrate that even if the Bergonia – Tertia BIT was applicable, Respondent has at all times acted in compliance with its obligations and none of the standards stipulated in the Bergonia – Conveniencia BIT have been violated at any time.

I. Applicable Law

131. Without so much as considering the issue of the applicable law, Claimant alleges that several BIT provisions have been breached in the present dispute. However, as a preliminary issue a thorough examination and identification of the law governing this dispute has to be conducted. This is even more in light of the fact that both Bergonia as well as Conveniencia are parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which focuses on provisions on intellectual property. Hence one has to take into account that this agreement might exclusively govern this dispute which will be demonstrated in the following.

1. The TRIPS Agreement enjoys Primacy over the BIT

132. Therefore, first and foremost the question of which law is applicable law to the dispute has to be determined.
133. The TRIPS Agreement is a multilateral agreement that was created in an attempt to strike a fair balance between creating incentives for innovation and the transfer of this knowledge as contribution to the public welfare. In other words, the TRIPS Agreement has been designed to maintain this carefully adjusted balance agreed upon by a majority of the state community.⁷⁹ This object and purpose would be thwarted if

⁷⁹ Bernieri, *Compulsory Licensing and Public Health: TRIPS-plus standards in investment agreements*, 6 TDM 2 (2009), at 5.

a random BIT was able to simply overrule the TRIPS Agreement.⁸⁰ The TRIPS Agreement is thus an expression of the legal maxim *lex specialis derogat legi generali*. Hence it constitutes a self-contained regime as *lex specialis* with regard to the Bergonia – Conveniencia BIT.

134. This *lex specialis* cannot be frustrated by subsequently concluded bilateral investment treaties which focus on a completely different subject matter, namely the protection of foreign direct investments. Allowing such treaties to be applied in the field of intellectual property would cause even more turmoil in a field which already suffers from sufficient legal uncertainty. On top of that, such a development would be made at the expense of social welfare.
135. Therefore, taking its object and purpose into account, the TRIPS Agreement has primacy over the BIT and is the applicable law together with general international law provisions.

2. No Violation of the TRIPS Agreement has occurred

136. All requirements of the TRIPS Agreement have been met, especially the prerequisites as set out in Art. 31 of the TRIPS Agreement which deals with the conditions under which use without authorisation of the patent owner is legitimate. Respondent submits that it has acted in full compliance with these conditions.
137. To begin with Respondent has considered the authorisation of the licence on its individual merits as required by Art. 31 (a) TRIPS Agreement and nothing in the facts suggests anything to the contrary.
138. In addition, the proposed user has made every effort to obtain the required authorisation from the holder of the right as required under Art. 31 (b) TRIPS Agreement within a reasonable period of time and these efforts have failed. Although

⁸⁰ Also cf. Bernieri, *Compulsory Licensing and Public Health: TRIPS-plus standards in investment agreements*, 6 TDM 2 (2009), at 25.

BioLife Co. has attempted to obtain this authorisation on reasonable commercial terms and conditions, it is Claimant who discontinued these negotiations after only three days. Hence, Claimant cannot rely on the fact that the requirement of negotiating the authorisation within a reasonable period of time has not been met when it was Claimant itself who terminated the negotiations and refused to resume them. Such behaviour would be contradictory to Claimant's prior conduct and in fact amount to *venire contra factum proprium*.

139. However, even if Claimant were to act in such an inconsistent manner and assert that Art. 31 (b) TRIPS Agreement has not been complied with by reason of negotiations that were not conducted within a reasonable period of time, Respondent upholds that in any case the requirement of attempting to obtain prior authorisation from the right holder has been effectively waived under Article 31 (b) (second sentence) TRIPS Agreement. This provision allows for a waiver from the attempt to obtain authorisation in cases of national emergency or circumstances of extreme urgency. While Respondent would not go so far as to state that it finds itself in a state of national emergency, it invokes circumstances of extreme urgency here. The increasing percentage of the Bergonian people suffering from obesity is an alarming signal that needs to be taken care of as fast as possible. More than one third of the whole Bergonian population is already suffering from the disease⁸¹ and given the genetic pre-disposition of Bergonians toward obesity⁸² the number of victims is expected to increase if they do not receive proper treatment. Nothing in the facts suggests that there are generic products on the market that could possibly alleviate and reduce this effect.⁸³ On the other hand, research studies have shown the efficacy of the MedBerg's product in treating this type obesity.⁸⁴ Respondent therefore invokes circumstances of extreme urgency in the sense of Art. 31 (b) TRIPS Agreement that required the issuance of the compulsory licence. Hence, the requirement to attempt to obtain prior authorisation has effectively been waived.

⁸¹ See Clarification 65.

⁸² See Clarification 26; also cf. Clarification 40.

⁸³ Cf. Clarification 103.

⁸⁴ See Clarification 26.

140. Respondent believes that there is a limited scope of the patent which is regulated by the market itself. Due to the genetic disposition to obesity which is endorsed by the traditional diet of the Bergonian population the product is bound to primarily establish itself on the domestic market. Respondent has further restricted the use of the compulsory licence to 48 months as the minimum period to verify the impact of the product in reducing obesity and its overall recognition on the market.⁸⁵ Scope and duration of the licence have thus been limited for the authorised purpose, hence complying with Art. 31 (c) TRIPS Agreement.
141. In accordance with Art. 31 (d) TRIPS Agreement, the licence was further non-exclusive and in fact six Bergonian companies had invoked the licence as of January 1, 2009.
142. As has already been elaborated above, the use of Patent No. AZ2005 was primarily authorised to take care of the acute medical needs of the Bergonian market and the associated medical implications involved.⁸⁶ Respondent thus contends that it acted in conformity with Art. 31 (f) TRIPS Agreement, authorising the use of the patent predominantly for the supply of the domestic market.
143. In addition, Art. 31 (h) TRIPS Agreement requires that the right holder shall be paid adequate remuneration, considering the economic value of the authorisation. Respondent firmly believes that it has complied with this criterion when it offered the royalties collected from the six companies that invoked the licence to Claimant.
144. While Respondent does not deny that the royalties offered were moderately lower than the fee in the Licence Agreement,⁸⁷ Respondent contends that it did factor in its economic value and that the remuneration offered was thus more than adequate. After careful consideration, Respondent came to the conclusion that a moderately lower fee

⁸⁵ Cf. Clarifications 24 and 66.

⁸⁶ Cf. Clarifications 26 and 40.

⁸⁷ Cf. Clarification 88.

was justified in light of the fact that MedBerg did not have to carry any business risk and that it did not need to make any commitments in terms of administration of the patent, facilities or human resources. In fact, Claimant did not need to make any expenses and would have received the royalties at no risk. Therefore, Respondent wishes to emphasise that MedBerg was offered an adequate remuneration in accordance with Art. 31(h) TRIPS Agreement.

145. Lastly, even if an infringement of the TRIPS Agreement would be found, Respondent submits that Claimant would have no standing to bring the dispute before this honourable Tribunal. The Tribunal does not have jurisdiction to decide upon alleged infringements of the TRIPS Agreement. The TRIPS Agreement was designed for state to state disputes which are to be resolved before the World Trade Organization (WTO) Dispute Settlement Body.⁸⁸ Therefore the appropriate forum to bring a claim for breach of the TRIPS Agreement would be the WTO Dispute Settlement Body. However, only states are entitled to bring a claim in that forum. Claimant as a private juridical person and investor would hence lack *locus standi* and could not invoke an infringement of their rights.

II. The BIT has not been breached

146. Even if this Tribunal considered the Bergonia – Conveniencia BIT to be applicable, which is explicitly denied, Respondent will show that none of the BIT's provisions have been violated and thus no breach under the BIT can be invoked by Claimant. In particular, Respondent will show that no expropriation took place and that even if this were the case, the purported expropriation would have been justified and thus been lawful under the BIT and standards of international law. Furthermore, Respondent will demonstrate that Claimant was at all times treated fair and equitable and that the compulsory licence did not amount to an arbitrary or discriminatory measure.

⁸⁸ See *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Annex 2 of the Agreement Establishing the WTO, available at: http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

1. No Expropriation occurred at any Time

147. The issuance of the compulsory neither constituted a direct nor an indirect expropriation in the sense of Article 4 (2) of the Bergonia – Conveniencia BIT. While it is generally recognised that a compulsory licence could never constitute a direct expropriation,⁸⁹ Respondent also contends that issuing the licence does not even amount to an indirect expropriation. Claimant remains the owner of Patent No. AZ2005 and none of its ownership rights have been touched. Thus they have remained perfectly intact.
148. As for the limitations imposed upon Claimant through the compulsory licence, Respondent would like to point out that such minor limitations are the very essence of a compulsory licence and emphasise that it is widely accepted in international law that states do have such authority.⁹⁰ To determine whether such limitations amount to an indirect expropriation, one has to examine the degree of interference caused by the state measure at issue.⁹¹
149. However, in the present case it must be concluded that the licence issues does not amount to a substantial deprivation of Claimant's ownership rights nor does it impede

⁸⁹ Cf. e.g. Bernieri, *Compulsory Licensing and Public Health: TRIPS-plus standards in investment agreements*, 6 TDM 2 (2009), at 25, available at: www.transnational-dispute-management.com; Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation*, 6 TDM 2 (2009), at 18 *et seq.*, available at: www.transnational-dispute-management.com.

⁹⁰ For the latter statement see Mendenhall, *Fair Treatment of Intellectual Property Rights under Bilateral Investment Treaties*, 6 TDM 2 (2009), at 18, available at: www.transnational-dispute-management.com; Griebel, p. 76; Newcombe/Paradell, p. 321 *et seq.*

⁹¹ Cf. Paulsson/Douglas, *Indirect Expropriation in Investment Treaty Arbitration*, in: Horn (ed.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, at 148; Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation*, 6 TDM 2 (2009), at 23, available at: www.transnational-dispute-management.com; Gutbrod/Hindelang/Kim, *Protection against Indirect Expropriation under National and International Legal Systems*, GoJIL, Vol. 1, No. 2 (2009), p. 297 *et seq.*

Claimant to continue the licensing of Patent No. AZ2005. As has already been shown above, Respondent has carefully considered the issuance of the licence, limited its scope and duration to the necessary minimum period of time and offered an adequate remuneration in the form of the royalties collected. Thus one has to conclude that the licence constituted a mere regulatory measure that was perfectly admissible.

150. In addition, possible legitimate expectations on Claimant's side have to be carefully considered. In this respect Respondent submits that given the situation at the time Claimant could not have had any legitimate expectations with regard to Patent No. AZ2005. Respondent did in no way meddle with Claimant's reasonably to be expected prospects. Claimant was fully aware that it was in the possession of a patent that constituted a breakthrough in the treatment of obesity and that was of high importance for the Bergonian people because of their genetic predisposition. Nevertheless it terminated the Licence Agreement with the only domestic company making use of the patent at the time and refused to resume negotiations on a possible follow-up licence agreement after only three days of negotiations. In other words, Claimant took its product off the market while the medical situation became more acute. Nothing suggests that MedBerg was ready to renegotiate or was making preparations to make use of the patent itself. It was only after these facts were on the record that Respondent initiated proceedings for the issuance of a compulsory licence. Given this background, there are hence no legitimate expectations on behalf of Claimant that could have been infringed by issuing the licence.
151. Moreover, it has to be accounted for the fact that Respondent's intention was clearly directed on alleviating the tense situation for the Bergonian people while the generation of profits was not an issue in the debate at all. As has been said before, Respondent only resorted to this measure when Claimant had stopped all negotiations on licensing Patent No. AZ2005 on the Bergonian market and thus left Respondent no choice but to initiate proceedings for a compulsory licence in view of the imminent threats for the Bergonian population.

152. It is thus submitted that the issuance of the licence constituted a permissible regulatory measure that cannot possibly be equated with a measure tantamount to expropriation under Article 4 (2) Bergonia – Conveniencia BIT.

2. The denied ‘Expropriation’ would have been justified

153. Even if the Tribunal found that issuing the compulsory licence constituted a measure tantamount to expropriation under Article 4 (2) of the Bergonia – Conveniencia BIT, Respondent contends that such an expropriatory measure would have been justified under the BIT. More precisely, Respondent will demonstrate that the compulsory licence served an overriding public interest, that it was not issued on a discriminatory basis and that prompt, adequate and effective compensation as required under Article 4 (2) of the BIT has been offered.

a. The Compulsory Licence serves a Public Benefit

154. Respondent was driven by overriding public health concerns that required instant action. As it was totally unclear whether and when Claimant would make Patent No. AZ2005 available for the Bergonian people, Respondent had no other choice than to intervene in a regulatory manner. The technology contained in Patent No. AZ2005 is urgently needed to ensure the functioning of the Bergonian society as a whole. As a threshold country⁹² Bergonia was also faced with serious economic concerns. A further increase in obesity would have unduly burdened the health system to an unprecedented extent that might even have caused its breakdown.

155. The compulsory licence was the gateway to bridge the technology gap with regard to further developed countries.⁹³ Respondent was further acting in compliance with international law. The so-called Doha Declaration on the TRIPS Agreement and

⁹² Cf. Clarification 44 which averages Bergonia’s gross domestic product per capita at US \$7,535, a typical figure for emerging markets.

⁹³ UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (2005), at 487.

Public Health⁹⁴ to which both Bergonia and Conveniencia are parties grants the right to issue compulsory licences and to determine the grounds upon which such a licence is granted. Furthermore, a member state has the right to determine what constitutes a national emergency or other circumstances of extreme urgency. Respondent has already extensively illustrated that it has complied with all these requirements. Taking all these arguments into account, Respondent therefore maintains that the compulsory licence served an overwhelming public benefit.

b. The Compulsory Licence was not discriminatory

156. Contrary to Claimant's assertions nothing indicates that Respondent acted in a discriminatory manner when issuing the compulsory licence. While it is conceded that other local companies were operating in the same business sector as Claimant⁹⁵ none of these companies was to Respondent's knowledge in possession of a similar technology to save the Bergonian people. As compulsory licensing has to be handled in a restrictive manner and only after careful examination of the facts at issue, Respondent neither saw a need to issue similar licences with regard to other products nor did it consider the requirements to issue such a licence were fulfilled.

157. In issuing the licence Respondent acted in good faith and for the benefit of the Bergonian people. Nothing in its conduct suggests that discriminatory issues were decisive in this assessment. Therefore Respondent maintains that the licence was not issued on a discriminatory basis.

c. Respondent has offered an adequate and appropriate Compensation

158. Claimant cannot validly assert that no compensation has been offered by Respondent. On the contrary, Respondent has regularly collected royalties from all five Bergonian companies which have invoked the compulsory licence for Patent No. AZ2005 and

⁹⁴ *Doha Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/W/2, November 14, 2001, available at: <http://www.who.int/medicines/areas/policy/tripshealth.pdf>.

⁹⁵ See Clarification 84.

offered these royalties to MedBerg. Claimant however, has refused to accept these payments and instead now asserts that no compensation has been paid.

159. However, Claimant cannot in a first step refuse the compensation offered and then in a next step claim that no such compensation has actually been paid. The reason for non-payment of compensation lies precisely in Claimant's sphere. If Claimant now asserts that no compensation has been paid, it is acting contrary to its own previous behaviour. It is not acting in good faith, but running counter to the principle of *venire contra factum proprium*. However, in international law one is not allowed to "blow hot and cold – to affirm at one time and deny at another."⁹⁶ Hence, since the reason that Claimant has not received any remuneration lies in the fact that it denied the compensation offered, it cannot invoke an unlawful indirect expropriation on these grounds.

160. While one of the most heavily disputed issues involving compulsory licenses is the issue of appropriate compensation, Respondent submits that the compensation offered was more than appropriate. The royalties offered did not involve any business risk on Claimant's part nor did they require Claimant to make any commitments in terms of the administration of the patent, securing adequate facilities or acquiring human resources. No expenses of such kind were needed. This justifies a moderately lower rate at no risk or commitment. As has been elaborated above, offering royalties that were moderately lower were thus a perfectly appropriate compensation.

d. Conclusion

161. In consideration of the aforementioned arguments, Respondent cannot but conclude that no expropriation took place and that the BIT has thus not been violated on such grounds.

⁹⁶ See Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, at 141 (2006) (citing England, Court of Exchequer: *Cave v. Mills* (1862) 7 Hurlstone & Norman, at 927).

3. Respondent observed the Standard of Fair and Equitable Treatment

162. Respondent further maintains that it has constantly observed the standard of fair and equitable treatment as set out in Article 2 (2) of the Bergonia – Conveniencia BIT. This standard has generally been defined as being infringed

“(...) if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectorial or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”⁹⁷

163. Respondent submits that in issuing the licence it has neither acted in an arbitrary nor grossly unfair manner that could be identified as unjust or idiosyncratic or discriminatory in any way. On the contrary, while acting on behalf of an overriding public interest, Respondent has tried to act most carefully, delimiting the use of Claimant’s patent as far as possible, especially by imposing time limits to its use and averting potential damage by offering an adequate compensation as has been explained above.
164. As regards justice in judicial proceedings Respondent wishes to note that although Claimant has issued a request for settlement under Article 10 (2) of the Bergonia – Conveniencia BIT on December 1, 2007, it never went beyond that stage until now and has never pursued an independent review of its case neither before a national nor before an international forum. Had it done so, it goes without saying that due process would have been granted.

⁹⁷ *Waste Management v Mexico*, Final Award, at para. 98; also cf. Schill, “*Fair and Equitable Treatment*” as an Embodiment of the Rule of Law, in: Hofmann/Tams (eds.), *The International Convention for the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years*, p. 41 *et seq.*

165. As far as the proceedings before the Patent Review Board are concerned, nothing in the facts suggests that the principle of due process was infringed.⁹⁸ On the contrary there are no indications that the Patent Review Board failed to allow Claimant to participate in these proceedings and present its case. Thus the principle of due process was complied with.
166. Furthermore, Respondent did not destroy any expectations that Claimant might legitimately have harboured. Claimant terminated the exclusive Licence Agreement it had in Bergonia and took Patent No. AZ2005 off the market in full awareness of the fact that its medical need in Bergonia was higher than ever. At the same time it refused to resume negotiations on further licensing the patent. One could even go so far as assume that Claimant did this in an attempt to make its product more attractive while the Bergonian population was suffered for lack of proper treatment with the product in question. Furthermore,

“[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.”⁹⁹

167. Taking all these issues into account, Respondent upholds that no legitimate expectations were destroyed and that overall, it acted fairly and equitably, thus complying with Article 2 (2) of the BIT at all times. Claimant’s rights were thus not infringed.

4. The Compulsory Licence does not amount to an Arbitrary or Discriminatory Measure

168. As has already sufficiently been explained above, Respondent’s behaviour did not amount to an arbitrary or discriminatory measure and there is nothing in the facts that

⁹⁸ This has been confirmed in Clarification 82.

⁹⁹ *Saluka v Czech Republic*, Partial Award, at para. 305.

would support an opposing viewpoint. On the contrary, Respondent devoted sufficient and careful consideration to the issuance of the licence and made its decision on this basis. Therefore, neither arbitrary nor discriminatory conduct can be detected in Respondent's behaviour.

5. Conclusion

169. For all of the aforementioned, Respondent denies all of MedBerg's claims in full. As has been shown the BIT provisions are not applicable in the present case. Even if they were applicable, Respondent has demonstrated that all of its standard have been complied with to their fullest extent and that thus no violation of the Bergonia – Conveniencia BIT occurred. In particular, Claimant has failed to establish a breach of expropriation, fair and equitable treatment or an arbitrary or discriminatory measure. Hence, Respondent cannot but conclude that Claimant's assertions are unfounded and constitute mere smoke and mirrors.

D. Respondent's Requests for Relief

170. Respondent respectfully requests that the Tribunal issue an award in favour of the Democratic Commonwealth of Bergonia and against MedBerg
- a. declaring that this Tribunal lacks jurisdiction over the present dispute, in particular for lack of *ratione personae* and *ratione materiae*;
 - b. denying and dismissing MedBerg's claims in their entirety; and thus
 - c. declaring that the case is without merit.