

Team: MO

Frankfurt International Arbitration Centre

Medberg Co. v. The Government of the Republic of Bergonia

Memorial for Respondent

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List of Abbreviations

Art / Arts.	Article / Articles
AZ2005	Bergonian Patent No. AZ2005
BIT	Bilateral Investment Treaty
Doha Declaration	Declaration on the TRIPS agreement and public health, World Trade Organization, Adopted on 14 November 2001
ICSID	International Centre for Settlement of Investment Disputes
MBC	MedBerg Co.
MFN	Most-Favoured Nation
MXH	MedX Holdings, Inc.
TRIPS	1995 World Trade Organization Agreement on the Trade Related Aspects of Intellectual Property Rights
Waiver	Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, World Trade Organization, Decision of the General Council of 30 August 2003
WTO	World Trade Organization

List of Authorities:

- Dolzer and Stevens** Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, Brill, Leiden, 1995
- Kogan** Lawrence Kogan, *Forced Licensing of Drug Patents Reflects “IP Counterfeiting” Efforts on World Stage*, Washington Legal Foundation, 2007
- Schreuer** Christoph Schreuer, *The ICSID Convention: A Commentary*, 2001
- UNCTAD** Investor-State Dispute Settlement and Impact on Investment Rulemaking (2009)
- World Trade Organization** WTO Intellectual Property (TRIPS) §5 Art. 31

List of Legal Sources:

Maffezini v. Spain, 31 January 2001 (ICSID)

Methanex v. United States, 15 January 2001 (ICSID)

Occidental Exploration and Production Co. v. Ecuador, 29 April 2005 (ICSID)

Olguin v. Republic of Paraguay, 08 August 2000 (ICSID)

Plama Consortium v. Ltd. v. Bulgaria, 06 September 2005 (ICSID)

Saluka v. Czech Republic, 17 March 2006 (ICSID)

S.D. Myers v. Canada, 21 October 2002 (ICSID)

Tecmed S.A. v. Mexico, 29 March 2003 (ICSID)

Telenor Mobile Communications v. Republic of Hungary, 13 September 2006 (ICSID)

Vacuum Salt v. Ghana, 16 February 1994 (ICSID)

Statement of Facts:

1. CLAIMANT, MedBerg Co., was established in Bergonia on 30 January 2004 [Annex 3 ¶ 1]. MedBerg Co. is owned by MedX Holdings Ltd., a Conveniencia company, which is in turn half owned by MedScience Co., a Laputian company, and half owned by Dr. Frankensid, a national of both Amnesia and Bergonia [Id. ¶ 2].
2. Dr. Frankensid, a scientist employed by MedScience Co., is credited with a breakthrough that lead to several patents, including Bergonian Patent No. AZ2005 [Id. ¶ 4]. Bergonian Patent No. AZ2005 was granted to MedBerg Co. on 15 March 2005 [Id. ¶ 5].
3. CLAIMANT licensed BioLife Col., a Bergonian company, to use Bergonian Patent No. AZ2005 on 31 March 2005 [Id. ¶ 6]. In accordance with the License Agreement's notice and termination provisions, CLAIMANT terminated the License Agreement on 31 March 2007 [Id.].
4. On 1 June 2007, the Bergonian Intellectual Property Office began proceedings to issue a compulsory license for Patent No. AZ2005, alleging that the technology covered by this patent is necessary for domestic medical needs [Id. ¶ 7]. The compulsory license was issued on 1 November 2007, and as of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license [Id.]. BioLife and the five other Bergonian entities are using the technology covered by this patent to produce a variety of products that serve to improve health and address ongoing public health problems, and three of these companies have been accused of exporting these health-related products to other countries [Id.].
5. Bergonia and Conveniencia entered into a Bilateral Investment Treaty with one another [Annex 1]. Article 4 ¶ (2) of this treaty prohibits either Party to the treaty from expropriating, or taking action tantamount to expropriating, the investment of an investor from the other country Party to the treaty [Annex 1 Art. 4 ¶ 2].”
6. Article 3 (2) of the Bergonia-Conveniencia Bilateral Investment Treaty specifies that neither Contracting State shall subject investors of the other contracting State to treatment that is less favorable than that given to the investors of its own State or investors from States that are parties to any and all other treaties or agreements [Id. at Art. 3 ¶ 3].
7. Bergonia and Tertia have entered into a Bilateral Investment Treaty with one another [Annex 2].

8. Amnesia, Bergonia, and Conveniencia are ICSID Contracting States and all have ratified the Convention. They are also Members of the World Trade Organisation and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights. Laputa is neither an ICSID Contracting State nor a Member of the WTO [Annex 3 ¶ 3].

Arguments:

I. THE TRIBUNAL LACKS JURISDICTION IN THE PRESENT DISPUTE

1. RESPONDENT submits that the Tribunal lacks jurisdiction to hear a claim brought by Claimant.

A. The Tribunal does not have jurisdiction *ratione personae*

2. 1. RESPONDENT submits that the Tribunal lacks jurisdiction in the present dispute because a national of Conveniencia does not have control of the CLAIMANT. The Bergonia-Conveniencia BIT does not contain an agreement between the host state and the investor that allows MBC to be treated as a national of the host state of their parent company, MXH. The host state does not make an offer of consent to jurisdiction in the BIT, and thus there is no proviso in the BIT stating that a local company such as MBC would be treated as a national of that foreign country.¹ Even if such an agreement existed in the BIT that conforms with Article 25(2)(b), the requisite “foreign control” was not present in this situation.² Simply because MBC is the wholly owned subsidiary of MXH does not automatically imply foreign control: factors such as “equity participation, voting rights, and management” are important.³
3. RESPONDENT also submits that nationality, rather than the place of incorporation, is key to determining jurisdiction in this case. The Bergonia-Conveniencia BIT does not give a clear indication that incorporation is the only relevant criterion, and therefore this tribunal should permit a piercing of the corporate veil to look at the nationality of MXH’s owners, neither of whom is from Conveniencia. In addition, MBC is a shell company for

¹ See R Dolzer and M Stevens, *Bilateral Investment Treaties* (1995), p. 142.

² See *Vacuum Salt v. Ghana*, Award, 16 February 1994, 4 ICSID Reports 329 (noting foreign control sets an objective limit beyond which ICSID jurisdiction is not valid).

³ *Vacuum Salt*, at paragraphs 43-53. For a detailed discussion of control, see *Aguas Del Tunari v Bolivia*, Decision on Jurisdiction, 21 October 2005.

the activities of MXH that played the limited role of facilitating the patents of Dr. Frankensid.⁴

4. In addition, RESPONDENT has not consented to treat CLAIMANT as a national of Conveniencia. There is no contractual consent between the two countries, through the Bergonia-Conveniencia BIT or another source, to provide such treatment.

B. The Tribunal does not have jurisdiction *ratione materiae*

5. RESPONDENT contends that the Tribunal does not have jurisdiction *ratione materiae* because the intellectual property owned by them in Bergonia did not constitute an investment under the two part test laid out in *CSOB v. Slovakia*. According to this test, the matter in question would need to constitute an investment under both the ICSID Convention and the bilateral investment treaty invoked by the parties. AZ 2005 is not an investment under this test.
6. RESPONDENT contends that AZ2005 is not an investment within the meaning of Article 25 of the ICSCID Convention according to the test laid out in *Salini v. Morocco*. This test requires: 1) that the “investor” has made a contribution, 2) that there is a certain duration of project, 3) that the investor participates in the risks of the transaction, and 4) that there was a contribution to the host state’s economic development.
7. With regards to the first factor, the investor did contribute their intellectual property, but did not make a significant financial contribution to the country. The certain duration of the project is relevant to distinguish an investment from a short term financial transaction. It has been held that typically investments should be five years in duration to qualify. CLAIMANT’s project was only active in the Bergonian market for two years. It is also not clear that claimant participated in any real risks in the transaction. The significant capital expenditures in procuring a patent generally occur at the research and development phase. The research for AZ2005 was conducted in Laputia, accordingly the mere act of patenting and licencing the development in Bergonia does not constitute a material risk taken on the part of the claimant.

⁴ See *Saluka v. Czech Republic*, Partial Award, 17 March 2006.

C. The Most-Favoured Nations Clause of the Bergonia-Conveniencia BIT does not broaden the jurisdiction of the Tribunal

8. CLAIMANT contends that the MFN clause of the Bergonia-Conveniencia BIT (Art. 3) broadens the jurisdiction of the Tribunal because it incorporates through a procedural bridge clause VI. 8 of the Bergonia-Tertia BIT. This clause states that a company legally owned as an investment of nationals or companies of the of the other party shall be treated as a company of such other party in accordance with Article 25(2)(b) of the ICSID Convention.
9. However, ICSID jurisprudence does not accord with the use of a procedural bridge to expand jurisdiction. In *Plama Consortium v. Republic of Bulgaria*, the tribunal robustly rejected the Claimant's position that the MFN clause should be accorded expansive interpretation.⁵ This principle was expanded upon in *Telenor v. Republic of Hungary*, in which the Tribunal established guidance that is germane to the present dispute: An MFN clause in a BIT providing for most favoured nation treatment of investment should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties.⁶
10. The *Telenor* decision is applicable in the case at hand because Art VI. 8 of the Bergonia-Tertia BIT establishes criteria on which a dispute may arise. Therefore, based on the analysis in the *Telenor* decision, the clause should not be incorporated through a procedural bridge.
11. Furthermore, in *Plama* as well as in *Telenor*, the Tribunals expressed concern that an overly broad reading and application of an MFN clause could result in treaty-shopping. In *Telenor*, the Tribunal noted that such treaty-shopping could play havoc with the policy objective of underlying treaty provisions.

⁵ *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. Arb/03/24, Decision on Jurisdiction, 8th February 2005, paras. 219 and 223.

⁶ *Telenor v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13th September 2006, para. 91.

II. RESPONDENT'S ACTIONS DID NOT CONSTITUTE A VIOLATION OF THE SUBSTANTIVE PROTECTIONS PROVIDED FOR IN THE BERGONIA-CONVENIENCIA BIT.

12. RESPONDENT submits that in issuing the compulsory license it did not violate the guarantees of fair and equitable treatment, full protection, nor did it expropriate or take action that would amount to expropriation of CLAIMANT'S investment.

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

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

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

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

⁷ See *Maffezini v. Spain*, Award, 31 January 2001, Oxford Reports on International Investment Claims.

⁸ See *id.*

⁹ See *Olguin v. Republic of Paraguay*, Award, 08 August 2000, Oxford Reports on International Investment Claims.

¹⁰ See *id.*

the investor's investment backed expectations. This is because the industry itself was of such a kind that any investment carried a certain degree of risk of bankruptcy.¹¹

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

13. RESPONDENT'S actions also comported with due process. The compulsory license was obtained through an established procedure-by applying through Bergonian Patent Office. CLAIMANT should have been aware of this procedure, as it is part of RESPONDENT'S domestic law. As the *Tecmed* tribunal stated "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments."¹³ Bergonia acted transparently by submitting the application to a governing body, through a procedure which is part of RESPONDENT'S laws.

14. Finally, RESPONDENT has not acted in bad faith. While it has not initiated such compulsory licensing procedures against companies from within its territory, this is not indicative of bad faith. CLAIMANT'S patent produced a drug whose superiority in fighting obesity was unmatched. RESPONDENT petitioned for the compulsory license not as a way of targeting a foreign company, but because it wanted to fight obesity, a serious national health problem, in the most effective way possible.

B. The RESPONDENT did not act in a way that violated the guarantee of full protection and security.

¹¹ *Id.*

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

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

15. The guarantee of full protection and security deals with the physical protection of the investor's property from civil strike. RESPONDENT did not breach this protection as there was no physical strife in this case. CLAIMANT may argue that certain tribunals have interpreted this security protection to include activity taken by the State that frustrates the legitimate expectations of the investor.¹⁴
16. The legitimate expectations of the investor, however, must also account for the investor's knowledge and experience with the particular business in which he deals.¹⁵ In *Olguin*, the investor claimed that the actions of the Paraguayan authorities caused his bank to go bankrupt. The tribunal held this did not qualify as frustrating his objectives because as he was a relatively experience investor, he should objectively understand the risks involved with making such an investment in another country.
17. Similarly in our case, Medberg's legitimate expectations were not frustrated. Pharmaceutical patents are subject to government interference at times when the state feels the product is necessary to the wellbeing of its citizens. While Medberg may not have subjectively anticipated such interference from RESPONDENT, the nature of its industry is one in which the CLAIMANT should objectively anticipate such a possibility [See above discussion].

C. RESPONDENT has not expropriated CLAIMANT's investment nor has it acted in such a way that is tantamount to having expropriated CLAIMANT'S investment.

18. CLAIMANT'S expropriation claim will fail because CLAIMANT has not alleged a substantial deprivation of ownership rights¹⁶, nor can they demonstrate that awarding the compulsory license will fully neutralize the value of the patent.¹⁷ CLAIMANT'S case will also fail because CLAIMANT will be unable to demonstrate that awarding the compulsory license ran contrary to Medberg's investment backed expectations.

¹⁴ See *Occidental Exploration and Production Co. v. Ecuador*, Award, 29 April 2005, Oxford Reports on International Investment Claims.

¹⁵ See *Olguin v. Republic of Paraguay*.

¹⁶ See *Methanex v. United States*, Award, 15 January 2001, Oxford Reports on International Investment Claims.

¹⁷ See *Tecmed v. Mexico*, Award, 29 May 2003, Oxford Reports on International Investment Claims.

19. RESPONDENT’S actions do not amount to a substantial deprivation of CLAIMANT’S property. In *Methanex*, the claimant maintained control over its assets, this control manifesting itself primarily through its ability to continue to manufacture the product.¹⁸ Our case is similar because RESPONDENT has not deprived CLAIMANT of the ability to manufacture the drug. Furthermore, the CLAIMANT in *Methanex* argued for a deprivation based on a loss of customer base and market share but the tribunal dismissed both arguments stating they did not amount to a substantial deprivation.¹⁹ Were CLAIMANT to make a similar argument in our case, it should also be dismissed.
20. Another requirement of a substantial deprivation is a lasting deprivation of ownership rights . In this case the Tribunal did not find indirect expropriation had occurred because the export ban was temporary, lasting for only 16 months. Similarly in our case, the compulsory license expires after 48 months, and so the issuance of the license does not qualify as a lasting deprivation of ownership rights.
21. Furthermore, RESPONDENT’S actions do not amount to an expropriation because these actions have not neutralized the value of CLAIMANT’S investment.²⁰ As the tribunal in *Tecmed* stated the important question is whether the “negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.”²¹ In our case such neutralization has not occurred because Medberg is still fully capable of manufacturing and selling its product. Furthermore, Medberg has been offered compensation by Conveniencia, but has declined to accept it.

D. In the alternative, if the tribunal finds RESPONDENT’s actions do amount to expropriation, such expropriation is lawful.

22. An expropriation is lawful if the following four conditions are met: 1) the measure is for a public purpose; 2) it is taken in accordance with applicable laws and due process; 3) it

¹⁸ See *Methanex v. United States*.

¹⁹ See *id.*

²⁰ See *Tecmed v. Mexico*.

²¹ *Id.*

is non-discriminatory; and 4) it is accompanied by compensation.²² RESPONDENT'S actions meet all four criteria.

23. CLAIMANT'S product is an anti-obesity drug. Obesity is a serious health problem that indirectly causes a handful of the diseases attributed with millions of death each year. Such disease include heart failure, diabetes and stroke. While not explicitly stated, RESPONDENT'S actions satisfy the first criteria as it is acting out of an interest in preventing obesity, in order to prevent against these other fatal diseases. The manner in which the compulsory license was awarded comported with due process. RESPONDENT issued the license through its own transparent bureaucratic process, and has even reviewed the process several times at CLAIMANT'S request.
24. There is no evidence that the decision to seek or award the compulsory license was discriminatory. Simply put, CLAIMANT manufactured a drug that no national company manufactured at the time, and in the interest of the health and wellbeing of its citizens
25. RESPONDENT acted in order to combat the threat of obesity. Finally, CLAIMANT has been offered compensation throughout this process, but has failed to accept it. As a result, all four criteria for a legal expropriation have been met.

E. The Most Favored Nation clause in the Bergonia-Conveniencia BIT does not allow for the incorporation of additional protections from the Bergonia-Tertia BIT

26. The Bergonia-Conveniencia Most Favored Nation (MFN) clause cannot apply substantive protections from the Bergonia-Tertia BIT because a) such substantive protections were not explicitly contemplated in the Bergonia-Conveniencia MFN,²³ and b) because importing such protections could affect the balance of rights between Conveniencia and CLAIMANT in a significant way.²⁴
27. In *Plama*, Claimants attempted to take a dispute resolution provision from another IIA and incorporate it into their own IIA based on an MFN clause much like the one between

²² See "Investor-State Dispute Settlement And Impact on Investment Rulemaking", (2009) at <http://www.unctad.org/Templates/webflyer.asp?docid=9438&intItemID=2068&lang=1>.

²³ See *Plama Consortium Ltd. v. Bulgaria*, Award, 06 September 2005, Oxford Reports on International Investment Claims.

²⁴ See *Tecmed v. Mexico*

Bergonia and Conveniencia.²⁵ The tribunal held that because the borrowing of such a provision was specifically contemplated in Claimant's IIA, it could not be incorporated.²⁶ By the same logic the MFN contained in the BIT between Conveniencia and Bergonia does not specifically contemplate borrowing substantive protections from the Bergonia-Tertia BIT, specifically the guarantee that each country will in no case be accorded treatment less than that required by international law.

28. Much like the finding in *Tecmed*, the MFN in our case should not allow CLAIMANT to incorporate the substantive protection guaranteeing either party treatment no less than that required by international law. The tribunal in *Tecmed* ruled that because the desired provision would subject the RESPONDENT to a different substantive legal regime, it would fundamentally alter the balance of rights as contemplated by the parties in their own IIA.²⁷ Allowing CLAIMANT to incorporate this provision would subject RESPONDENT to substantive provisions under international law, most notably TRIPs, which would alter the balance of rights in substantial fashion. Therefore this tribunal should rule similarly to the *Tecmed* tribunal.

F. In the alternative, if the Bergonia-Conveniencia MFN is found to incorporate the protections offered by international law from the Bergonia-Tertia BIT, Respondent has not violated any applicable laws.

29. Respondent has acted in accordance with provision 31 of the TRIPs agreement of the WTO, as well as the waiver provision authorizing the RESPONDENT to manufacture CLAIMANT'S drug for international sale.²⁸

i. Respondent has complied with Article 31 of the TRIPs agreement.

30. Subsection (b) requires that the proposed user has made efforts to obtain the patent through reasonable commercial terms and conditions.²⁹ BioLife applied for a renewal of

²⁵ See *Plama Consortium Ltd. v. Bulgaria*.

²⁶ See *id.*

²⁷ See *Tecmed v. Mexico*.

²⁸ See WTO Intellectual Property (TRIPs) §5 Art. 31.

the patent from Medberg, but after three days MedBerg terminated the application process. In accordance with subsection (d), the use of the compulsory license is non-exclusive as MedBerg still has the ability to manufacture the drug. In accordance with subsection (h) MedBerg has been offered adequate remuneration, but has refused to accept it. Furthermore, the validity of the authorization of the use of the patent has been subject to judicial review on various occasions by the Bergonian IP Office. The most contentious portion of Article 31 is subsection (f) stipulating that such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use.³⁰ Although a significant portion of the drug that is manufactured is sold overseas, section (f) stipulates that in order to comply with Article 31 that any such use shall be authorized “predominantly for the domestic market of the Member authorizing such use.” Because the Bergonian countries are exporting a significant portion of the patented drug does not mean that they are necessarily non-compliant with this subsection: they could sell a significant portion overseas, say 30%, but still sell the predominant amount domestically-the remaining 70%.

ii. In the alternative, the exportation of the drug by companies in RESPONDENT’S territory is not the subject of this tribunal and will be dealt with domestically pursuant to RESPONDENT’S laws.

31. This tribunal has been asked to resolve the alleged non-compliance by RESPONDENT with the substantive protections in the Bergonia-Conveniencia BIT. The actions of companies in RESPONDENT’S territory, while possibly in contravention of the Article 31 Waiver, are not the subject of this tribunal.

32. RESPONDENT authorized companies within its territory to use the patent for the manufacture and production of the obesity drug. The relevant substantive issue that has been brought before the Tribunal, therefore, is whether the compulsory license violates, among other things, general international law or applicable treaties. By arguing that RESPONDENT has contravened TRIPS Article 31 because companies within

²⁹ See *id.*

³⁰ See *id.*

RESPONDENT'S territory have exported what may be determined to be a predominant share of the manufactured drug, CLAIMANT is arguing a point outside of this Tribunal's scope.

33. A distinction must be made between the RESPONDENT'S actions in awarding the compulsory license, and activities by companies within RESPONDENT'S territory with regards to that license. The exported volume of the drug is immaterial to the current proceeding, as it does not deal with Bergonia's compliance with Article 31. The relevant provision of Article 31, subsection (f), stipulates that "any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use." As no evidence has been brought forth that RESPONDENT did not authorize the use of the patent predominantly for the domestic market, the tribunal should decline to rule on the issue.