

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

In the Proceedings Between

MEDBERG CO.
(CLAIMANT)

v.

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA
(RESPONDENT)

(ICSID Case No. ARB/X/X)

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

<i>BIT</i>	Bilateral Investment Treaty
<i>Conveniencia BIT</i>	Treaty between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia concerning the encouragement and reciprocal protection of investments
<i>e.g.</i>	exempli gratia ('for example')
<i>i.e.</i>	id est ('that is')
<i>ICJ</i>	International Court Of Justice
<i>IIA</i>	International Investment Arbitration
<i>IP Office</i>	the Bergonian Intellectual Property Office
<i>FET</i>	Fair and Equitable Treatment
<i>License Agreement</i>	License Agreement between MedBerg Co. and BioLife Co.
<i>MFN</i>	Most Favoured Nation
<i>Tertia BIT</i>	Treaty between the government of Tertia and the Government of Bergonia concerning the reciprocal encouragement and protection of investment

STATEMENT OF FACTS

1. The Democratic Commonwealth of Bergonia ('Respondent') and The Sultanate of Conveniencia entered into Treaty Concerning the Encouragement and Reciprocal Protection of Investment
2. The MedBerg Co. ('Claimant') was established in Bergonia on 30 January 2004. MedX Holdings Ltd, company established in Conveniencia, has 100% of shares of MedBerg Co. MedScience Co., company established in Laputa, and Dr. Frankensid each have 50% of shares of MedX Holdings Ltd.
3. MedBerg has never been recognized as foreign or foreign-controlled business in terms of special registration, investment agreements, taxation, privileges, patent application fees or procedures.
4. Bergonia and Conveniencia are ICSID Contracting States and have ratified the Convention as well as the Vienna Convention.
5. Bergonia and Conveniencia are members of the World Trade Organisation and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights.
6. There have been tensions between Laputa and Bergonia, and Laputa has imposed sanctions on several occasions.
7. Dr. Frankensid, the employee of MedScience Co., invented the specific medical technology connected with the curing obesity on 5 February 2004, which was granted by Bergonian Patent AZ2005.
8. Dr. Frankensid is a Bergonian national by descent and birth. He was naturalized in Amnesia in 1991.
9. MedBerg Co. is the owner of Bergonian Patent No.AZ2005, which was granted by Bergonian IP Office on 15 March 2005.

10. MedBerg Co. licensed BioLife Co. to utilize Bergonian Patent No.AZ2005 on 31 March 2005 according to the License Agreement.
11. The Bergonian IP Office issued a compulsory license for Patent No.AZ2005 on 1 November 2007 for 48 months, invoking the need to address important domestic medical needs.
12. The technology covered by MedBerg's Patent No. AZ2005 is used to produce certain health-related products, which are important for Bergonia's domestic medical needs. In particular, the patent covers a breakthrough treatment (and related products) that certain medical experts believe is useful for treatment of obesity, which has been a serious problem among a large population group in Bergonia. Given the genetic make-up and traditional diet of this population, obesity has been a significant and long-standing issue, causing numerous other associated medical problems.
13. Six Bergonian companies operating in the same business sector as Claimant were utilizing the Patent No. AZ2005 and IP Office collected royalties from them.
14. MedBerg Co. was selling only limited quantities of its obesity treatment and products in Bergonia. The six companies which have invoked compulsory license, have sold 155% of products connected with the Patent AZ2005, of that sold previously by BioLife alone.
15. MedBerg Co. has announced its objections to the Bergonian IP Office. The Claimant refused to accept the imposed royalty fees, which was only moderately lower than fee imposed in License Agreement.
16. The ICSID commenced arbitration proceedings on 1 November 2008.

PART ONE: JURISDICTION

I. THE CLAIMANT SHOULD NOT BE TREATED AS A NATIONAL OF ANOTHER CONTRACTING STATE ACCORDINGLY TO ARTICLE 25(2)(B) OF ICSID CONVENTION

A. The Tribunal lacks jurisdiction because the Claimant cannot be treated as a national of another Contracting State.

1. According to the article 25(2)(b) of the ICSID Convention parties have a discretion to treat a party to the dispute, because of a foreign control, as a national of another Contracting State. However in the instant case there is no proof that the respondent agreed to treat the Claimant (MedBerg Co.) as a national of Conveniencia. *Ipsa facto* MedBerg as a national of Bergonia has not got a *jus standi* before the Tribunal.

2. It should be pointed out that Tribunals usually demand, that the agreement to treat locally established company as the national of another Contracting State, because of foreign control should be explicit. *Prima facie* the Tribunal in cases like *Holiday Inns v. Marocco*¹, *Amco v. Indonesia*² *Cable TV*³ or *Letco v. Liberia*⁴ accepted an implicit agreement, however all these cases should be distinguished from the situation at hand.

3. In *Holiday Inns v. Marocco* the main reason for such a ruling was that Government “has always considered local companies established by Holiday Inns as totally foreign controlled and treated them as such”⁵.

4. The same situation took place in *Amco v. Indonesia*. Also there PT Amco was referred to as a foreign business. Moreover Indonesian Government had agreed to treat PT Amco as a national of Contracting State in view of the Convention⁶.

¹ *Holiday Inns*.

² *Amco v. Indonesia*.

³ *Cable TV*.

⁴ *Letco*.

⁵ *ICSID Commentary*, p. 296.

⁶ *Amco v Indonesia*, para. 395.

5. In *Cable TV* a nationality of another State was inferred from granting of privileges that are reserved to foreign investors. In that case these were the currency convertibility, a tax holiday, recruitment of foreign nationals as well customs and duty exemptions⁷.

6. In *Letco v. Liberia*, Contracting State's law "require the foreign investor to establish itself locally as juridical person in order to carry out an investment"⁸.

7. It is essential to point out that circumstances in these cases were different in comparison to the instant case. Bergonia was not expressing any explicit, nor implied consent. Moreover MedBerg has never been recognized as foreign or a foreign-controlled business in terms of special registration, investment agreements, taxation, privileges, patent application fees or procedures. It was always treated as Bergonian established company⁹. Also in instant case there was not any compulsion to establish local company in order to run the business in Bergonia¹⁰.

B. Most Favored Nation Treatment does not permit to invoke the VI.8 of Tertia BIT.

8. The Claimant emphasizes that consent to treat the locally established company as foreign controlled cannot be inferred from provision of the article VI.8 of Tertia BIT on the grounds of the MFN clause.

9. It is true that according to article 3 of Conveniencia BIT Either Contracting State should not treat investors of the other Contracting State "*less favorable than it accords to its own investors or to investors of any third State, whichever is more favorable to the investors*"¹¹. This MFN clause stipulates that relevant parties treat each other in a manner at least as favorable as they treat third parties¹².

⁷ *Cable TV*, paras 152, 248.

⁸ *Letco v. Liberia*, para. 352.

⁹ *Clarifications, Q. No. 14*.

¹⁰ *Clarifications, Q. No. 107*.

¹¹ *Conveniencia BIT*, Article 3(2).

¹² *Schreuer*, p. 188.

10. Nonetheless in respondent's opinion the MFN clause contained in Conveniencia BIT does not permit to appeal to the procedural provisions of the Tertia BIT. In this chapter we try to delineate two reasons of such situation. First of all in our case we encounter on *ejusdem generis* principle. Secondly, the scope of MFN clause does not permit to extend its application to procedural rights.

1. *Ejusdem generis* principle

11. *Ejusdem generis* principle means that, the beneficiary of the MFN clause can invoke privileges and benefits granted to other countries, only if three premises are fulfilled. First, the object of the MFN clause should be identical or at least similar. Secondly, the nature of the privilege should be the same. Finally the legal context and legal basis of the MFN clause should be the same¹³.

12. In respondent's opinion one of the premises was not fulfilled in the instant case, namely the nature of privilege certainly are not the same. In Conveniencia BIT there is no consent to treat locally established company under foreign control in accordance with Article 25(2)(b) of the ICSID Convention. Such provision was made by the parties.

13. The intention of the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia was the limitation of the catalogue of entities entitled to benefit from BIT.

14. According to the Vienna Convention the main focus of the interpretation should be on the "ordinary meaning" given to the terms of the treaty¹⁴.

15. The parties to the BIT support narrower meaning of investor. If there were a will to use broaden, the investor should be defined like in Philippines-Switzerland BIT¹⁵ or there should be provisions that locally established entity should be treated as a national of the other Party in accordance with article 25(2)(b) of the ICSID Convention.

16. In this case the Claimant seems to select the most convenient provisions for him. Such behavior should be treated as disruptive treaty-shopping.

¹³ *Pescatore*, p. 209.

¹⁴ *Vienna Convention*.

¹⁵ See: *Philippines-Switzerland BIT*, art. 1a (ii): "qualifying Swiss companies include companies that are not incorporated under Swiss law but that are actually controlled by Swiss nationals"

2. No extension of the MFN clause to the procedural rights.

17. Finally, it is worth to underline that the MFN clause cannot be extended to the procedural rights. It is true that initially Tribunals had supported a rather broad construction of the MFN clause. It was visible especially in *Maffezini v Spain*¹⁶. However even there the Tribunal based its reasoning on the intention of the parties as expressed by the proper wording of the BIT.

18. It is worth to mention that some BITs contain explicit extension of the MFN clause to provisions regarding the settlement of disputes e.g. United Kingdom and Albania BIT¹⁷, or general wording like: “*all rights contained in the present Agreement*”¹⁸.

19. In the instant case the MFN clause is formulated in detailed way in order to limit the scope of the benefits stemming from it. Such omission was intended by the parties. Moreover the Tribunal have recently opted for the rather narrow construction of MFN clause in such cases as e.g. *Salini v Jordan*¹⁹, *Plama v Bulgaria*²⁰, and *Telenor v Hungary*²¹.

20. In *Salini* the Tribunal concluded that MFN clause cannot be interpreted as constituting the consent to submit a dispute to the ICSID Tribunal. The main reason of such ruling was the lack of express indication that MFN clause allow for the inclusion of the dispute resolution provisions. The Tribunal stated that the MFN clause should explicitly contain the scope of clause or the wording: “in all matters”. Any extension of the MFN clause’s scope should be made according to the intention of the parties.

21. The same opinion was stated in *Plama v Bulgaria*²². In this case a Cypriot company Plama Consortium Limited, filed a request for arbitration with the ICSID. The request relied on *inter alia* Most Favoured Nation Clause of a BIT between the Government of the Republic of

¹⁶ *Maffezini II*.

¹⁷ *The United Kingdom and Albania Agreement*.

¹⁸ *Chile and the Belgian–Luxembourg Economic Union Agreement*, Article 3 (3).

¹⁹ *Salini v. Jordan*.

²⁰ *Plama*.

²¹ *Telenor*.

²² *Plama*.

Cyprus and the Government of the People's Republic of Bulgaria. The tribunal limited the extent of the MFN clause only to the substantive protection, excluding jurisdictional rights of an investor²³. Solution made in *Plama v Bulgaria* was confirmed in *Telenor v Hungary*. According to the tribunal the term “treatment” included in MFN clause referred to substantive but not to the procedural right²⁴.

22. In the Respondent’s opinion there is no possibility to invoke the art. VI.8 of Tertia BIT on the grounds of MFN clause. Expansive reading of the MFN clause enhance uncertainty of international investment law and diminishes the real meaning of the Conveniencia BIT. In Respondent’s view the priority in construction of the BIT should be given to the intention of the parties and to the legal certainty.

C. Denial of benefits on the grounds of Article I.2 of Tertia BIT.

23. Even if we accepted the fact that there is a possibility that the Claimant can invoke article VI.8 of Tertia BIT on the grounds of MFN clause (article 3 of Conveniencia BIT), the Respondent would be entitled to deny benefits according to article I.2 of the Tertia BIT. This provision states that: “*Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of third country control such company and, in the case of a company of the other party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third with which the denying Party does not maintain normal economic relations*”.

24. However denial of benefits require piercing corporate veil at first. It is worth to mention that in instant case MedX Holdings Ltd is a mere shell company. It does not engage in substantial business activity in the territory of Conveniencia. There was only one reason of incorporation this company, namely disruptive treaty shopping. Due to such conduct MedBerg Co. seems to try to benefit from Conveniencia BIT.

25. Generally treaty shopping is not regard as illegal and unethical as such²⁵. Nonetheless in respondent’s opinion such conduct is undesirable and lead only to the abuse of rights. Such

²³ *Ibid* et para. 191.

²⁴ *Telenor*, para. 92.

²⁵ *Schreuer*, p. 54.

conduct of investor amounts to the lack of good faith and abuse of rights. In order to countermine this aim, it is necessary to pierce the corporate veil.

26. Although such veil-piercing appears to be rather rare in arbitral case law, it is worth to underline that there were at least few cases in which the Tribunals worked out premises of piercing corporate veil²⁶. The Tribunal in *Rumeli & Telsim v. Kazakhstan* stated that “piercing the corporate veil might be justified to prevent misuse of the corporation’s legal personality in the case of fraud or malfeasance, to protect creditors or purchasers, or to prevent the evasion of legal requirements or obligations”²⁷. The Tribunal in *Saluka v. Czech Republic* came to the same conclusions, i.e. that where fraud and malfeasance had been recognized as premises of piercing corporate veil.²⁸

27. In respondent’s opinion in the instant case the premises of piercing the corporate veil, namely abuse of rights in order to evade legal requirements were fulfilled. It is justified to consider MedBerg Co.’s conduct as disruptive treaty shopping. Moreover, even the Claimant supports some kind of piercing corporate veil. Namely it tries to establish the foreign control on the first grade of the control chain. Such an approach would be consistent with some certain decisions e.g. *Amco v Indonesia*, *CME Czech Republic BV v Czech Republic*. Nonetheless it seems to forget about newest achievements in investment arbitration.

28. The problem of the proper establishment of the grade of control was considered in *TSA Spectrum de Argentina v Argentina*. The tribunal stated that “the objective identification of foreign control must be traced back to its real source”²⁹. This statement seems to be the most justified in order to prevent the disruptive treaty shopping.

29. In the present case the examination of the real source of control of MedBerg Co. lead us to the statement that initial investors have never had *jus standi* to bring treaty claim before the Tribunal. The main reason for such a conclusion is the nationality of the shareholders of this company. MedX Holding is owned by MedScience Co. and Dr. Frankensid. MedScience Co. is a company incorporated in Laputa, which is not an ICSID Contracting State. Moreover,

²⁶ *The transfer of treaty Claims*, p. 458.

²⁷ *Rumeli*, para 203.

²⁸ *Saluka*, para 230.

²⁹ *TSA*, paras 135-137.

relations between Bergonia and Laputa certainly should not be treated as normal economic relations which means that Bergonia can deny benefits on the ground of the article 1(2) of Tertia BIT.

30. There have been tensions on trade issues between Laputa and Bergonia. Moreover Laputa has imposed sanctions on Bergonia on several occasions. There is no reason to treat such situation as normal economic relations and therefore the denial of benefits is well-founded³⁰.

31. As to the second owner – Dr Frankensid has got dual nationality of Amnesia and Bergonia. However, it seems that only a Bergonian nationality is effective – he is a Bergonian national by descent and birth. His Amnesia citizenship was acquired only in 1991 by naturalization³¹. It is worth to underline that such persons are generally excluded from the jurisdiction *ratione personae* of the ICSID Tribunal when they have also a nationality of another state.

32. According to article 25(2)(a), the jurisdiction of the ICSID Tribunal extends to *any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute (...)*³²,

33. This provision was confirmed in *Champion Trading Company v Egypt*, where three of the claimants had dual nationality – US and Egyptian. In their opinion the Egyptian nationality was not effective. The claimants were born and had spent most of their lives in the United States. Although they had tenuous connections to Egypt, the Tribunal revoked their statement, clearly stated that article 25(2)(a) explicitly preclude nationals of the host state from the scope of ICSID jurisdiction³³.

³⁰ Clarifications, Q. No. 36.

³¹ Clarifications, Q. No. 22.

³² ICSID Convention, article 25(2)(a).

³³ *Champion Trading*, paras 60-61.

CONCLUSION ON THE JURISDICTION

34. On the basis of the argumentation presented, the Respondent respectfully contends that this Tribunal does not have jurisdiction to hear the dispute. Neither of the conditions required by article 25(2)(b) of the ICSID Convention are satisfied. The Respondent has not consented to treat Claimant as a national of another Contracting State. According to the *ejusdem* principle there is no possibility to presume consent on the basis of article VI.8 of the Tertia BIT by invoking the MFN clause. Even if such consent was made on the grounds of the MFN clause, the premises of denial of benefits from article I.2 of Tertia BIT would be satisfied.

PART TWO: MERITS OF THE CLAIM

I. THE CLAIMANT'S EXPLOITATION OF ITS INTELLECTUAL PROPERTY RIGHTS IN BERGONIA DID NOT CONSTITUTE AN INVESTMENT UNDER APPLICABLE INTERNATIONAL LAW.

A. The consent of the parties to treat an activity as an investment is not sufficient to establish ICSID jurisdiction.

35. According to the ICSID Tribunals the definition contained in the BIT is not sufficient to treat a particular activity as an investment³⁴ and the objective determination is required. Such determination should be pursued according to the so-called Salini Test, which is established on jurisprudence and international practice.³⁵ The Salini Test presents the jurisdictional requirements of the protected investment, which have to be fulfilled in order to treat a particular activity as an investment. The jurisdiction is based on the ICSID Convention which is a proper instrument for an interpretation.

36. Thus, it appears that the fact of existence of the definition constructed by the Parties in BIT has secondary importance. One has to admit that the Conveniencia BIT in article 1 mentions intellectual property rights as a kind of investment. Nevertheless, the Contracting Parties

³⁴ CSOB, para 68.

³⁵ *The notion of investment*, p. 443.

‘cannot open the jurisdiction of The Centre to any operation they might arbitrarily qualify as an investment’.³⁶

37. This statement is also confirmed by the Report of the Executive Directors, which admitted that there is no way to leave unlimited freedom to create own definition without any restrictions.³⁷ ‘While the consent of both parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction.’³⁸

Therefore it is a legal requirement to apply the Salini Test. Such a view is confirmed by the numerous decisions e.g. in the *Mitchell v Congo*,³⁹ *Helnan I*,⁴⁰ *Jan de Nul v Egypt*,⁴¹ *Phoenix v Czech Rep.*,⁴² *MHS v Malaysia I*,⁴³ *CSOB*,⁴⁴ or *Bayindir v Pakistan*.⁴⁵

B. The Claimant’s activities did not constitute a protected investment under article 25 of the ICSID Convention.

38. The criteria required to call the activity an investment- the so called ”Salini Test”. The Tribunal presents five features:

- i. a contribution in money or other assets,
- ii. a certain duration,
- iii. an element of risk,
- iv. an operation made in order to develop economic activity in host State,
- v. regularity of profit and return.

39. Although there are some doubts whether those criteria constitute strict jurisdictional prerequisites, one has to apply the test a tool for the determination of the notion.

³⁶ *Mitchell v Congo*, para 31.

³⁷ *The ICSID Commentary*, p.125.

³⁸ *The Notion of Investment*, p. 446.

³⁹ *Mitchell v Congo*, para 31.

⁴⁰ *Helnan I*, para 77.

⁴¹ *Jan de Nul v Egypt*, para 91.

⁴² *Phoenix V Czech Rep.*, para 74.

⁴³ *MHS v Malaysia I*, para 54.

⁴⁴ *CSOB*, para 68.

⁴⁵ *Bayindir v Pakistan*, paras 122, 130.

1. The MedBerg's activity did not contribute to the Bergonia's development.

40. In the context of the ICSID arbitration this feature is the most relevant to examine whether the activity constitute an investment. This is due to the wording of the Preamble of the Washington Convention which has to be taken into account in the process of interpretation as a part of context . According to the first subparagraph of the Preamble ” Considering the need for international cooperation for economic development, and the role of private international investment therein”. Thus, the basic document in the first sentence indicates that contribution to the economic development of a host State is the most significant feature⁴⁶. This view is shared by . Professor Ch. Schreuer in his Commentary of the ICSID Convention⁴⁷.

41. This is true that the contribution to economic development of the Host State has to be a significant one, the assets cannot be not large.⁴⁸

42. The arbitral tribunals stressed this feature. For instance the Committee in *Mitchell v Congo* stated: ” in the opinion of the ad hoc Committee it is necessary for the contribution to the economic development of at least the interests of the State”.⁴⁹ In *MHS v Malaysia I* the Sole Arbitrator held that Claimant did not contribute significantly to the Respondent`s economy, despite the benefits in cultural and historical area and on that basis refused jurisdiction.⁵⁰

43. The failure of the investment to contribute to the economic development of the Host State was cause of dismissing the claim in other cases as well.⁵¹

44. In the present case MedBerg Co. did not contribute in adequate degree to the development of Bergonia in order to call its activity an investment.

⁴⁶ *The ICSID Commentary*, p.124.

⁴⁷ *The ICSID Commentary*, p.140.

⁴⁸ *CSOB*, para 88; *MHS v Malaysia I*, supra note 76.

⁴⁹ *Mitchell v Congo*, para 39.

⁵⁰ *MHS v Malaysia I*, para. 132.

⁵¹ *Mitchell v Congo*, paras 27-38.

45. Several facts support the view that MedBerg Co. did not aim to participate in economic development in Bergonia. The MedBerg Co. licensed Biolife Co. to utilize Bergonian Patent No. AZ2005 on 31 March 2005 and terminated the License Agreement to 31 March 2007. Hence the Parties agreed for the contract for a specified term – 2 years. The Bergonian company attempted to renegotiate the term of contact but the Claimant ended negotiations after only three days.

46. The IP Office stated that the technology connected with the Patent AZ2005 is needed to address important domestic medical needs and imposed compulsory license on the Patent AZ2005. The IP Office collected royalties from six Bergonian companies but Claimant refused to accept them. What is worth to stress, MedBerg Co. did not accept royalties because of conviction that offered royalties are inadequate, whereas royalties were only moderately lower than license fees.⁵²

47. If the Claimant aimed to participate in the economic development of Bergonia, the Claimant would agree to impose the compulsory license in order to contribute to the development of the healthcare. Especially, one has to take into consideration fact that Patent AZ2005 covers a breakthrough treatment useful for treatment of obesity, which was a serious problem in Bergonia.⁵³ However MedBerg Co. did not allow Bergonian companies to use patent and therefore reserved the right to Patent AZ2005 only to its own commercial activity. Even the MedBerg Co. was established in Bergonia, it was focused on management and development of its own business.

48. In the present case there is not even a slight participation in the economic development of Bergonia and certainly this contribution is not significant.

⁵² *Clarifications, Q. No.42, 88.*

⁵³ *Clarifications, Q. No.40.*

2. The MedBerg's activity last too short to be treated as an investment.

49. Although ICSID Convention does not indicate criterion of duration in explicit terms, the jurisprudence and the Doctrine hold that duration is one of the most important requirements of the definition of investment.⁵⁴

50. The investment is not merely a commercial activity of entrepreneur but is something more significant, accordingly has to last some time. In case of *Bayindir v Pakistan* the Tribunal stressed that: “duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions”.⁵⁵

51. This view is supported by the *travaux preparatoires* of the ICSID Convention. The Washington Convention's First Draft in definition of investment included term of certain duration for not less than five years: “investment will designate all monetary or other economically valuable property contributions made for an indeterminate time period or, if the period is specified, for at least five years”.⁵⁶ This statement indicates that intention of Drafters of Washington Convention was to create definition that covers only long-term investments.

52. In the present case there is a necessity to set proper dates for examination.. The MedBerg Co. is owner of the Bergonian Patent AZ2005, which was invention of Dr. Frankensid. The Patent AZ2005 is health-related product and Claimant licensed it for Bergonian company – BioLife Co. for two years. Although the MedBerg Co. was established on 30 January 2004, the proper date of beginning of investment was on 31 March 2005 – the date of signed of the License Agreement. The contract terminated on 31 March 2007.

53. Accordingly, the proper investment lasted only two years, therefore there is not possibility to treat activity of MedBerg Co. as an investment.

⁵⁴ *The ICSID Commentary*, p. 140.

⁵⁵ *The notion of investment*, p. 267 .

⁵⁶ *Ibidem*, p. 122.

3. The Claimant did not contribute, in money or other assets, enough to call its activity as an investment.

54. This feature is the most obvious one. As one of the commentators indicated: '*In outcome of these analyses, it appears that an investment should be defined as a contribution made by an economic agent in the hope of future revenue.*'⁵⁷

55. Nevertheless, the mere existence of contribution of resources is not enough to treat an economic activity as an investment. This contribution has to be substantial.⁵⁸

56. The Claimant did not contribute enough to treat its activity as an investment. The Claimant did not even invent the technology covered by the Patent AZ2005. The originator was Dr. Frankensid, was not employed by the Claimant. Dr. Frankensid was employee of MedScience Co.

57. The originator was Dr. Frankensid, even did not employed by the Claimant. Dr. Frankensid was employee of MedScience Co. Therefore, the only needed contribution of recourse of the Claimant was participation connected with organizing the enterprise. Hence, the activity of MedBerg Co. did not meet successive criterion of Salini Test.

4. The Claimant's activities did not involve the economic risk

58. The requirement of the assumption of risk concerns the ordinary commercial risk assumed by the entrepreneur in his commercial activity. This requirement is widely accepted by Doctrine and Tribunals.⁵⁹

59. According to S. Manciaux:

'It is noteworthy that the economic risk contained in an investment is double: on the one hand, an intrinsic risk to the transaction can occur in the event of a bad choice, whether commercial, technological, geographical, etc., and on the other hand, the risk of the economic situation can arise if an investor undertakes the investment during a recession phase (leading to the diminishing or disappearance of the project profits.)'⁶⁰

⁵⁷ *The Notion of Investment*, p. 463.

⁵⁸ *CSOB*, para 88; *MHS v Malaysia I*, supra note 76.

⁵⁹ *The Notion of Investment*, p. 455.

⁶⁰ *The Notion of Investment*, p. 455.

60. Moreover, what is worthy to stress, the usual risk connected with project is not enough to call an activity as an investment. ‘There must be more than just a superficial satisfaction of this condition.’⁶¹

61. What is interesting, the part of Doctrine believes that criterion of the assumption of risk is rather ‘*tricky and handle*’. This hallmark of Salini Test could not be decisive feature.⁶²

62. Despite the fact that this criterion is controversial, in present case the MedBerg Co. did not participate in commercial risk of the project. In order to treat an activity as an investment the entrepreneur has to participate in special risk joined with establishment of investment. The Claimant assumed of usual risk connected with establishment of enterprise and with organizing the activity of company, which is not enough to call an activity of MaedBerg Co. as an investment.

5. The Claimant’s activity did not fulfill the criterion of regularity of profits and returns.

63. As the Washington Convention’s Drafters’ aim was to facilitate directing claims to ICSID Centre, they have decided not to determine the strict criteria of the regularity of profits and returns in the Convention.⁶³ Moreover, the Tribunal in *MHS v Malaysia I* admitted that the feature of regularity of profits and returns is not a decisive one.⁶⁴

64. Nevertheless, if the mentioned above criterion would be accepted, the activity of the Claimant would not meet this feature. The only benefits of activity of MedBerg Co. was profits connected with sale of treatment and products covered by the Patent AZ2005.

⁶¹ *The Concept of Investment*, p. 270.

⁶² *The Notion of Investment*, p. 463.

⁶³ *The Notion of Investment*, p. 458.

⁶⁴ *MHS v Malaysia I*, supra note 76, para 108.

CONCLUSION ON THE LACK OF THE PROTECTED INVESTMENT

65. The activity of MedBerg Co. was not a protected investment under the Conveniencia BIT and in the light of Article 25 of ICSID Convention. Hence, the ICSID Tribunal could not hear the dispute.

III. THE RESPONDENT DID NOT EXPROPRIATE CLAIMANTS PROPERTY AND ITS ACTIONS WERE CONSISTENT WITH CONVENIENCIA BIT AND GENERAL INTERNATIONAL LAW

A. Actions taken by the Bergonian IP Office are not attributable to the State of Bergonia.

66. All the acts taken by the Bergonian IP Office can not be treated as the acts of a state of Bergonia. The basic rule for attribution is set forth in article 4 of the ILC *Articles on State Responsibility*, which clearly states that the conduct of any State organ, whether exercising legislative, executive, judicial or any other functions, shall be considered an act of that State.⁶⁵ This provision codifies a customary international law. Since the IP Office is not an organ of the state of Bergonia, none of its acts can be treated as the acts of the Respondent.

1. Acts of the Bergonian IP Office are neither the acts of Bergonian state organ nor its entity.

67. A term 'state organ' is not literally defined in *Articles on State Responsibility*. However, article 4 subsection 2 provides some guidance as to its definition stating that:

'if an internal law of the state characterizes the organ as a state organ, it is a state organ for purposes of attribution.'⁶⁶

The internal law of the Respondent does not state in any act that Bergonian IP Office is an organ of a state. It operates in private sector and has no structural position⁶⁷ in the governmental organization of the state of Bergonia.

⁶⁵ *Articles on State Responsibility*, article 4 (1).

⁶⁶ *Articles on State Responsibility*, article 4 (2).

⁶⁷ *Hobér*, p. 555.

68. Alternatively, in many cases it is not sufficient for the purpose of attribution⁶⁸ that state law is silent⁶⁹ on the issue. Since the definition of a state organ in article 4 of *Articles on State Responsibility* is wide, there is a need to look on the functions of the entity.

69. The functional test is set in article 5 of ILC *Articles*, which regulates a conduct of any person or entity which are not *de jure* an organ of a state⁷⁰ but are empowered by the law of that State to exercise elements of the governmental authority.⁷¹ The conduct of the aforementioned is also considered as an act of a state. The Bergonian IP Office was neither a person nor the entity of the Respondent. Moreover, it was not exercising the *de facto* Bergonian governmental authority. Therefore, its conduct is not in question attributable to the state of Bergonia since no ‘governmental authority’ was transferred to the IP Office in any way by the State of Bergonia.

2. Bergonian IP office was not acting under instructions or control of the Respondent.

70. Article 8 of the ILC *Articles* reads:

‘The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’⁷²

71. This provision deals with the conduct controlled, directed or taken under instructions of a state that can be attributed to that state. None of the Bergonian IP Office actions were either authorized⁷³ by the state of Bergonia or carried out under the direction of Bergonian government or controlled by the state.⁷⁴ The IP Office was making independent decisions regarding issuing compulsory licenses and was acting on its own initiative. It was acting on behalf of the investors in private sector rather than on the Respondent’s behalf.

⁶⁸ Crawford, p. 192-193.

⁶⁹ Hobér, p. 556.

⁷⁰ Hobér, p. 556.

⁷¹ *Articles on State Responsibility*, article 5.

⁷² *Articles on State Responsibility*, article 8.

⁷³ Hobér, p. 557.

⁷⁴ *Ibidem*, p. 557.

72. In *Maffezini v Spain* case the tribunal implied both structural and functional test of attribution. Contrary to the IP Office, SODIGA was an entity created by a decree of the Ministry of Industry⁷⁵ (structural test) and was established to carry out governmental functions⁷⁶ (functional test). None of those situations occurred in respect to the IP Office. It was performing neither public functions nor governmental authority.

73. It was illustrated by the tribunal in *Tradex*⁷⁷ case that for the acts of a person or a group of persons to be attributed to the state which is a situation under article 8 of Articles on State Responsibility, the Claimant needs to prove the existence, extent and relevance of any instruction, direction or control.⁷⁸

74. The issue of attribution was also considered by the tribunal in the *Nykomb*. The conduct of Latvia was found to be attributable to the state on behalf of the governmental functions. The tribunal found that Latvia must be considered responsible for Latvenergo actions under the rules of attribution, since the latter was state-owned company controlled by the state and was ‘clearly an instrument of a state in a highly regulated electricity market’ and a ‘vehicle to implement Republic’s decisions concerning the price setting for electric power.’⁷⁹ Thus, under decision of the tribunal in *Nykomb* case the IP Office lacks the standard of attribution. It was not owned or controlled by the state. Its decisions were independent from any governmental pressure, directions or control.

75. In *Eureko v Poland* case the tribunal confirmed attribution to the state the acts of State Treasury and responsibility of Poland. It held that the Minister of the State Treasury was acting pursuant to clear authority given by the Council of Ministers and in conformity with the policy of the government.⁸⁰ Thus, under these analyses the state of Bergonia is not responsible for the action undertaken by the IP Office because of lack of a link between IP Office decisions and the Respondent’s officially approved policy and authority.

⁷⁵ *Maffezini*, Jurisdictional decision, para 83.

⁷⁶ *Maffezini*, Jurisdictional decision, para 85.

⁷⁷ *Tradex*, paras 166, 169-170.

⁷⁸ *Hobér*, p. 563.

⁷⁹ *Nykomb*, para 31.

⁸⁰ *Eureko v Poland*, paras 129-134.

76. As a result of both: the provisions of Articles on State Responsibility and the decisions of the tribunal, it is undoubtedly confirmed that the Respondent is not responsible for the activity of the Bergonian IP Office since the latter is neither a state organ nor its entity acting on behalf of the decisions, instructions or control of the state of Bergonia.

77. For the aforementioned reasons the acts of Bergonian IP Office should not be attributed to the Respondent.

B. Alternatively, the Respondent had a right to expropriate Claimant's investment.

78. If this tribunal decided that actions taken by Bergonian IP Office are attributable to the Respondent, it should be also considered that compulsory license was not a direct or indirect expropriation. Alternatively, issuing a compulsory licence was not illegal as taken in violation of Conveniencia BIT and international law.

1. Right of a State to expropriate is broadly defined in Conveniencia BIT and customary international law as a lawful measure.

79. Conveniencia BIT in article 4 subsection 2 states that investment's by the investors:

'shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization.. [except] ...for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation.'⁸¹

80. The Claimant was not subjected to a violation of its rights protected by article 4(2) of Conveniencia BIT. The Respondent did not violate abovementioned article since IP Office decision to issue a compulsory license was not wrongful per se.

81. The host state has a right to expropriate alien property.⁸² For the expropriation to be lawful it has to fulfill certain conditions. Under customary international law and Conveniencia BIT the Respondent did have a right to expropriate the Claimant.

⁸¹ *Conveniencia BIT*, article 4(2).

⁸² *Schreuer*, p. 89.

82. The tribunal confirmed in *Metalclad case* that expropriation is:

‘not only an outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner of the use or reasonably to be expected economic benefit of property.’⁸³

83. The Claimant was able to use its investment, could continue to utilize its possession and the possibility of selling subsisted.⁸⁴ Moreover, in *Oscar Chinn case* the PCIJ confirmed that

‘the Court is unable to see in his [Oscar Chinn] position – which was characterized by the possession of customers and the possibility of making profit – anything in the nature of the vested right. [...] No enterprise can escape from the chances and hazards resulting from general economic conditions.’⁸⁵

84. Since MedBerg still is able to sell patented obesity treatment and products in Bergonia, however less⁸⁶, than the position of the Claimant is similar to Oscar Chinn’s. Change of economic conditions can not be treated as an unlawful expropriation of the Claimant’s investment.

85. Indirect expropriation⁸⁷ also effectively neutralizes the benefit of the foreign owner.⁸⁸ This neutralization occurs through the loss of control what did not happened in the situation of the Claimant. The compulsory license was issued only for 48 months and did not have an impact of the loss of control over the investment. The Claimant was still able to sell the product on the Bergonian market and still retains control over its enterprise.⁸⁹

86. Accordingly, the compulsory licence did not amount to expropriation under BIT

⁸³ *Metalclad*, para 103.

⁸⁴ *Sporrong*, para 63.

⁸⁵ *Oscar Chinn*, para 27.

⁸⁶ *Clarifications*, Q. No. 19.

⁸⁷ *Indirect expropriation*, p. 152.

⁸⁸ *LG&E v Argentina*, para 188.

⁸⁹ *Schreuer*, p. 107. See also *Azurix v Argentina*, Award 14 July 2006.

2. The compulsory license issued by the Bergonian IP Office was taken in accordance with the Conveniencia BIT and international law.

i. Expropriation was taken for a public benefit and purpose

87. The public purpose requirement for the issuance a compulsory license was complied. This requirement for licence to be considered as lawful can be found in Conveniencia BIT and is widely recognized as a part of customary international law. Issuing a compulsory licence was a measure taken solely for a public purpose.⁹⁰

88. The Respondent issue a license with respect to Patent No. AZ2005 because the technology covered by this patent was needed to address domestic medical needs. As was proved during wide research a large groups of population in Bergonia have a problem with obesity. The patented product and treatments are covering special type of obesity of people with genetic pre-disposition toward obesity.

89. The state of Bergonia had a right to determine the public purpose of the taken measure. As confirmed by the arbitral tribunals in *Libyan Oil Concessions* that:

‘motives are indifferent to international law, each State being free to judge for itself what considers useful or the necessary for the public good.’⁹¹

90. It is worth to mention that in *Feldman v Mexico* case an ICSID Additional Facility tribunal referred to the public purpose as being ‘not of major importance’.⁹²

ii. Expropriation of Claimant’s investment was taken on a non-discriminatory basis.

91. The measures taken by the Bergonian IP Office were non-discriminatory. It was never suggested that decision of issuing a license was taken because of the nationality of MedBerg company. Moreover, there was a reason for making such decision. The tribunal in *Amoco* case found that in the absence of any other evidence it s difficult to

‘draw a conclusion that expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated.’⁹³

⁹⁰ *Taking of property*, p. 348.

⁹¹ *Libyan Oil Concessions*, para 195.

⁹² *Reinish*, p. 183.

92. Furthermore the fact the Claimant was the only affected company by the compulsory licence, and that it was alien investor is not enough to constitute a discriminatory expropriation.⁹⁴ It was incidental⁹⁵ that a foreign investor, the Claimant, was subjected to the decision of the IP Office. The Claimant failed to provide appropriate and sufficient evidences which would confirm that the Respondent wished specifically to target Claimant's investment.

iii. The Respondent ensures the compensation by offering royalties.

93. The Respondent collected royalties from the six companies which invoked the compulsory license. Royalty payments were sincerely offered to MedBerg. However the Claimant refused to accept them without a reason. The compensation amounted to the real, fair market value of the investment. Thus, the compensation in royalties was 'adequate'.

94. The payment was offered short after invoking compulsory license by domestic companies. This reasonable time means that the compensation was 'prompt'. Furthermore, the compensation was as well effective since was proposed in convertible currency.

95. Tribunals have consistently held in number of cases, that an offer of compensation or other provision for it, in particular when the exact amount may be in controversy, is enough to satisfy this legality requirement.⁹⁶ Furthermore, the Respondent is 'entitled to determine the amount of the possible compensation and the mode of payment.'⁹⁷

⁹³ *Amoco*, para 142.

⁹⁴ *Kinsella*, p. 177.

⁹⁵ *Principles of Public International Law*, p. 515.

⁹⁶ *Legality of expropriations*, p. 198.

⁹⁷ UNGA Res. 3171.

C. The State of Bergonia had provided fair and equitable treatment to the Claimant's investment.

1. The Respondent treated the Claimant fairly and equitably

96. Conveniencia BIT in article 2 subsection 2 provides the standard of fair and equitable treatment of investments by investors of the other Contracting State. FET standard was complied by the state of Bergonia.

97. The tribunal in *Tecmed* case provided definition of FET standard which is treatment of the host state which acts

‘in 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.’⁹⁸

The Claimant failed to provide sufficient evidences that was pursuant to unjust and unfair treatment. Moreover it did not prove that acts of IP Office were unreasonable or lacked a diligence.

98. In *Neer* case of 1926 the Commission said that the treatment of an alien to constitute delinquency amount to bad faith, to willful neglect of duty, or to an insufficiency of governmental actions that every reasonable man would recognize its insufficiency.⁹⁹ None of those requirements amounted to the Respondent's actions. For that reason the respondent did not breach article 2(2) of Conveniencia BIT.

99. Issuing a license by IP Office was not in breach of FET standard. The Respondent did not violate treaty and customary law rule. The concept of ‘fair’ is defined by a Concise Oxford Dictionary as ‘just, unbiased, equitable, in accordance with rules’. The ‘equity’ means anything it suggests a balancing process and weighing up of what is right in all the circumstances.¹⁰⁰

⁹⁸ *Tecmed*, para 154.

⁹⁹ *Schreuer*, p. 129.

¹⁰⁰ *Multinational Enterprises and the Law*, p. 635.

100. In *Waste Management* case the tribunal founded that FET standard is breached when acts of a State are

‘grossly unfair, unjust or idiosyncratic, is discriminatory, and exposes the claimant to sectional or racial prejudice’¹⁰¹

In the case of issuing a compulsory license no manifest failure of natural justice in judicial proceedings occurred nor a lack of transparency in an administrative process.¹⁰²

101. Conveniencia BIT, article 2 subsection 2 states that the state of Bergonia shall ‘in any case accord investments by investors of ... [the Claimant] ... fair and equitable treatment as well as full protection.’

102. This standard provides protection against infringements of the investor’s rights. It does not however provide absolute protection against physical or legal infringement.¹⁰³ The only duty of the Respondent under this clause was to grant the investor access to its judicial system.¹⁰⁴ The Claimant could appeal from IP Office decision to Patent Review board. The Claimant utilized its right of the access to judicial system of the host State.

2. The acts were taken under a due process of law

103. The compulsory license was issued in accordance with due process of law. The Claimant had a right to prompt review of its case. Patent Review Board, which reviewed the decision taken by IP Office, is a quasi-judicial body. Existing Bergonian judges sit there, who are independent from executive and legislative power of Bergonia since they belong to Montesquieu judicial authority. The Claimant had a ‘reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.’¹⁰⁵ Moreover MedBerg was notified when the proceedings were initiated within the statutory time limits for such proceedings.¹⁰⁶

¹⁰¹ *Waste Management*, para. 98.

¹⁰² *Waste Management*, para. 98.

¹⁰³ *Schreuer*, p. 149.

¹⁰⁴ *Lauder*, para. 314.

¹⁰⁵ *ADC v Hungary*, para 435.

¹⁰⁶ *Clarifications*, Q. No. 46.

D. Claimant was granted the national treatment

1. Claimant was treated by the Respondent comparably to domestic companies in a like circumstances

104. The purpose of the concept of national treatment is to:

‘oblige a host state to make no negative differentiation between foreign and national investors [...] and to promote the position of the foreign investor to the level accorded to nationals.’¹⁰⁷

105. The tribunal in *Feldman case* explained that:

‘the concept of discrimination had been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances.’¹⁰⁸

106. There was no distinction in treatment between domestic companies and the Claimant. The fact the Claimant was the only affected company by the compulsory licence is not enough to constitute a denial of national treatment.

E. The Claimant was not treated in an arbitrary and discriminatory manner

1. Respondent acted accordingly to the article 2(3) of the Conveniencia BIT article 2 (3) which protects Claimant’s investment against arbitrary and discriminatory treatment

107. Article 2 subsection 3 of the Conveniencia BIT provides that investor shall not be:

‘in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of [their] investments.’

Respondent has not subjected Claimant to arbitrary and discriminatory treatment. For that reason the Respondent has not violated Conveniencia BIT article 2 (3).

¹⁰⁷ *Schreuer*, p. 178.

¹⁰⁸ *Feldman*, paras 155-56.

2. Arbitrary Treatment

108. Some treaties defines arbitrary measures as ‘unjustified actions’ or ‘unreasonable measures’¹⁰⁹, presuming that these terms are interchangeable. According to the definition declared in *The Black’s Law Dictionary* arbitrary means ‘depending on individual discretion’.

109. The tribunal defined arbitrary measure in *Lauder v Czech Rep.* case as an action which refers to ‘prejudice or preference rather than on reason of fact.’¹¹⁰ Accordingly, the Respondent’s acts were consistent within the scope of this definition and shall not be considered as arbitrary. The Respondents decision was clear and was not motivated by the prejudice to alien investor. The reason for issuing a compulsory license was a reason of fact. The type of obesity that people of Bergonia suffer can be treated by the patented product. The state of Bergonia was obliged to take all appropriate measures to protect its citizens. The facts are clear, the units sold by the six firms invoking the license is 155% on that sold previously by BioLife alone.

110. The acts taken by the Respondent were taken with engaging in a rational decision-making process¹¹¹. Actions of the state of the Respondent are justified by the concerns of the state policy and economic development.

3. Discriminatory Treatment

111. Discriminatory measure can take number of forms. In the light of the treatment of foreign investments the discrimination based on nationality prevails.¹¹² Respondent’s actions and decisions were not discriminatory on the basis of nationality.

112. The decision of commencing proceedings for the issuance o a compulsory license affected the Claimant. Some of the domestic entities were pursuant to similar actions to the ones conducted in a case of Claimant’s patent. The decision was not a result of unreasonable policy of the respondent.

¹⁰⁹ Ibidem, p. 173.

¹¹⁰ *Lauder v Czech Rep.*, para. 318.

¹¹¹ *LG&E v Argentina*, para. 158.

¹¹² *Schreuer*, p. 176.

113. Consequently, the Claimant was not treated by the Respondent in arbitrary and discriminatory manner.

CONCLUSION ON MERITS OF THE CLAIM

114. The Respondent has fulfilled its international obligations under both Conveniencia BIT provisions and general international law. There was no expropriation of the Claimants property and provided the Claimant with fair and equitable treatment and national treatment..

PRAYER FOR RELIEF

In light of the submission made above, Respondent respectfully asks this Tribunal to find:

- 1) that this Tribunal has no jurisdiction to hear the dispute.
- 2) the activity of the Claimant was not protected investment under the Conveniencia BIT and in the light of Article 25 of ICSID Convention.
- 3) that Respondent has not violated its obligations under Article 2, Article 3, Article 4 of the Conveniencia BIT.