

**Skadden, Arps**



**FOREIGN DIRECT INVESTMENT INTERNATIONAL  
MOOT COMPETITION (FDI MOOT)**

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**MINUTES OF THE FIRST SESSION OF THE ARBITRAL TRIBUNAL**

MEDBERG CO.[Claimant]

v.

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA [Respondent]

(ICSID Case No. ARB/X/X)

Frankfurt am Main, 16 February 2009

The first session of the Arbitral Tribunal was held on 16 February 2009 from 9:00 a.m. to 01:00 p.m. at the Frankfurt International Arbitration Center, Börsenplatz 4, 60313 Frankfurt Germany.

Present at the session were:

The Members of the Tribunal

XXX, President

YYY, Arbitrator

ZZZ, Arbitrator

ICSID Secretariat

XYZ, Secretary of the Tribunal

Representing the Claimant

Broches & Partners

Representing the Respondent

Shihata e Associati

The President of the Tribunal opened the session and welcomed the participants. It was agreed to consider the matters listed on the Provisional Agenda, which is attached to these Minutes as Attachment 1.

1. Constitution of the Tribunal and the Tribunal Members' Declarations

It was noted that the Tribunal had been properly constituted in accordance with Article 37(2)(b) of the ICSID Convention and the ICSID Arbitration Rules. The parties expressed their

agreement that the Tribunal had been properly constituted. Copies of the Declarations signed by the members of the Tribunal pursuant to ICSID Arbitration Rule 6(2) were distributed prior to the first session.

2. Representation of the Parties

It was noted that the Claimant is represented by:

Broches & Partners

and that the Respondent is represented by:

Shihata e Associati

3. Apportionment of Costs and Advance Payments to the Centre

The parties agreed that, in accordance with Article 61 of the ICSID Convention and Rule 14 of the ICSID Administrative and Financial Rules, the parties would defray the expenses of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to costs.

It was recalled that the Centre had requested in Case No. ARB/x/x each party to pay an amount of US\$25,000 to defray the costs of the proceeding during its first three to six months. The Claimant made the payment requested on 15 March 2008 and the Respondent on 17 March 2008.

4. Fees and Expenses of Tribunal Members

The parties agreed that in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of the Tribunal would receive:

- a fee of US\$3,000 (three thousand United States dollars), or such other fee as may be set forth from time to time in the Centre's Schedule of Fees, for each day of meetings or each eight hours of other work performed in connection with the proceeding; and
- subsistence allowances and reimbursement of travel and other expenses within limits set forth in Rule 14 of the ICSID Administrative and Financial Rules and the Memorandum on the Fees and Expenses of ICSID Arbitrators.

5. Applicable Arbitration Rules

It was noted that, pursuant to Article 44 of the ICSID Convention, the proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since 10 April 2006.

6. Place of Proceedings

It was confirmed that seat of arbitration shall be Frankfurt International Arbitration Center, Frankfurt am Main, Germany in accordance with the agreement of the Parties and following upon the Arbitral Tribunal's consultation with the Secretary General of ICSID in accordance with Article 62 and 63 of the ICSID Convention, and Arbitration Rule 13(3). This is without prejudice to holding sessions with the parties at any other place, with the agreement of the parties and after consulting the Secretary-General of the Centre if appropriate. In addition, it was agreed that the Tribunal may meet without the parties at any other place as convenient.

7. Procedural Languages

At the election of the parties, the language of the proceedings shall be English. It was agreed that all memorials, witness statements, expert reports, observations, and the like filed by

the Claimant or by the Respondent shall be in English. Consequently, it was agreed that neither the Claimant nor the Respondent shall be required to provide the other Party with Bergonian or Conveniencian translations and the English version of the originally filed instrument shall be the sole authoritative version.

It was also agreed that the Tribunal will render its decisions in English only. The every day communications from the Secretariat to the parties shall be made in English. In the case of communications from the Secretariat conveying instructions from the Tribunal, these will be made in English only.

8. Records of Hearings

The parties agreed that the records of the hearings shall be kept, and that there will be transcripts of each hearing. It was agreed that complete sound recordings would be made of this session and subsequent sessions.

9. Means of Communication and Copies of Instruments

It was agreed that ICSID Administrative and Financial Regulation 24 shall govern communications between the parties. It was agreed that all communications and written instruments in these proceedings were to be addressed to the Centre. It was further agreed that written instruments were to be submitted to the Centre in an original and five copies, except that brief communications that were not substantive applications or submissions could be transmitted by facsimile and e-mail. The Centre would arrange for the appropriate distribution of copies.

It was noted that, except as otherwise required by the Arbitration Rules, decisions of the Tribunal could be communicated to the parties through instructions to the Secretariat.

It was agreed that the date of filing of an instrument shall be the date of its dispatch by international courier, and that the parties will send a note, by fax, on the day of dispatch to the Secretary of the Tribunal informing him or her of such dispatch. It was also agreed that an electronic version of the text of the instrument shall simultaneously be sent to the Secretary of the Tribunal via e-mail. The *dies a quo* for the commencement of periods of time will be the day at which a written pleading with its translation and all its enclosures is received by the other party, a fact that will be certified by the Secretary of the Tribunal.<sup>1</sup>

10. Quorum

The parties agreed that all three members of the Tribunal shall be present at its sittings.

11. Decisions of the Tribunal by Correspondence or Telephone Conference

In accordance with ICSID Arbitration Rule 16(2), the Tribunal may take decisions by correspondence among its members, or by any other appropriate means of communication, provided that all members are consulted.

12. Delegation of Power to Fix Time-Limits and to Sign Procedural Orders on Behalf of the Tribunal

In accordance with ICSID Arbitration Rule 26(1), the President of the Tribunal will have the power to fix time-limits for the completion of the various steps of the proceedings and to sign procedural orders on behalf of the Tribunal, after consultation with the other members of the Tribunal as far as possible.

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<sup>1</sup> For the purposes of the FDI Moot Competition, submissions shall be by email only to admin@fdimoot.org

13. Pre-Hearing Conference

It was agreed that ICSID Arbitration Rule 21 shall govern with respect to pre-hearing conferences.

14. Written and Oral Procedures

It was agreed that the proceedings herein shall be comprised of both written and oral procedures. The Parties and the Tribunal have agreed on a procedure to the effect that at this stage the Tribunal shall only address the following:

- a) whether the Tribunal has jurisdiction in view of the nationality of those parties controlling the Claimant;
- b) whether Claimant's exploitation of its intellectual property in Bergonia constituted an investment under applicable international law; and
- c) whether the compulsory license amounts to expropriation or discrimination, or otherwise violates general international law or applicable treaties.

The Parties and the Tribunal have agreed on the following summary of their positions:

Claimant contends that Respondent's issuance of a compulsory license with respect to Claimant's intellectual property (Bergonian Patent No. AZ2005) violates its rights in accordance with general international law and applicable treaties, in particular Article 4 of the Bergonia Conveniencia BIT. Claimant seeks compensation and other remedies to be specified in its memorial.

Respondent contends that this Tribunal lacks jurisdiction because a national of Conveniencia does not have control of the Claimant within the meaning of ICSID Convention Article 25(2)(b), nor has Respondent consented to treat Claimant as a national of Conveniencia.

Claimant counters that if such express consent is required, then Article 3 of the Bergonia-Conveniencia BIT (MFN clause) permits it to invoke Article VI. 8. of the Bergonia-Tertia BIT.

Respondent counters that the Article 3 of the Bergonia-Conveniencia BIT may not be invoked in this way and that in any case according to Article I. 2. of the Bergonia-Tertia BIT, Respondent may deny Claimant the benefits of Article VI. 8.

Respondent contends that a patent as such does not constitute a protected investment and that the compulsory license in question is not unlawful and moreover complies with TRIPs. In addition, to the extent that Claimant invokes the terms of the Bergonia-Tertia BIT, its Article III. 4. expressly excludes compulsory licenses from being treated as an expropriation. Claimant is not entitled to compensation or other remedies.

If the Arbitral Tribunal confirms its jurisdiction and finds the Respondent to be liable, a separate second stage on remedies will follow.

15. Pleadings: Number, Sequence, Time Limits

It was agreed that contrary to the usual practice of four consecutive written pleadings (a memorial by the Claimant, a counter-memorial by the Respondent, a reply and a rejoinder) there would only be two consecutive written pleadings: a memorial by the Claimant, a counter-memorial by the Respondent.<sup>2</sup>

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<sup>2</sup> This limitation is a concession to the strictures of the competition.

After consultation with the parties and due deliberation by the Tribunal, the President announced that the pleadings are to be submitted within the following time-limits:

- The Claimant shall file its memorial by Monday, 7 September 2009.
- The Respondent shall file its counter-memorial within 14 days from the filing of the Claimant's memorial, that is, by Monday, 14 September 2009.

16. Dates of Subsequent Sessions

It was decided that Arbitration Rule 43 and ICSID Arbitration Rule 13(2) shall govern with respect to the scheduling of sessions of the Tribunal subsequent to the first session.

It was agreed that the hearing on 23 October 2009 will be tentatively scheduled for 8:30 a.m.

17. Production of Evidence

Without prejudice to the power of the Tribunal to request the parties to produce any further evidence at any stage of the proceeding, it was agreed that each pleading is to be accompanied by the documentation on which it relies, and by signed statements of the witnesses and experts on which it relies.

The Tribunal may allow a party to submit documentation at another time due to extraordinary circumstances.<sup>3</sup>

18. Publication of the Decisions Relating to the Proceedings and of the Award

In accordance with Article 48(5) of the Convention the president invited the parties to consider whether they would consent to publish the award or any decisions rendered by the Tribunal.

19. The Award

It was agreed that in accordance with ICSID Arbitration Rule 46 the preparation of the Award would be drawn up and signed within 120 days after the closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.

**II. Other Matters**

There being no further business, the President adjourned the meeting at 01:00 p.m. Sound recordings were made of the session and deposited in the archives of the Centre.

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Secretary of the Tribunal  
Frankfurt am Main, 23 February 2009

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President of the Tribunal  
Frankfurt am Main, 23 February 2009

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<sup>3</sup> The FDI Moot Competition will be based exclusively on the facts and evidence provided by the organizers. Pleadings should not be accompanied by the documentation or by signed statements of the witnesses and experts; references to the evidence provided by the organizers will suffice. Further relevant facts may come forward in the course of the clarifications.

**ANNEX 1 - TREATY BETWEEN THE DEMOCRATIC COMMONWEALTH OF BERGONIA AND THE SULTANATE OF CONVENIENCIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS**

The Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia (hereinafter referred to as the “Contracting States” and each referred to as the “Contracting State”)

- desiring to intensify economic co-operation between both countries and create favourable conditions to increase investments by investors of one of the Contracting States in the territory of the other Contracting State,
- recognizing that the encouragement and contractual protection of such investments are apt to increase the prosperity of both nations through their positive effects, such as the stimulation of business initiatives and transfer of capital and technology between the two countries
- have agreed as follows:

Article 1: Definitions

For the purposes of this Treaty

1. the term “investments” comprises every kind of asset invested in accordance with the laws and regulations of a Contracting State and shall include in particular, though not exclusively:

(a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and similar rights;

(b) shares of companies and other kinds of interest in companies;

(c) claims to money which has been used to create an economic value or claims to any performance having an economic value and any other titles to money;

(d) intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trademarks, trade-names, trade and business secrets, technical processes, know-how, and good will;

(e) concessions and licences conferred by law or under contract, including concessions to search for, extract, exploit or cultivate natural resources; any alteration of the form in which assets are invested or reinvested, done in accordance with the laws and regulations of the Contracting State in the territory of which the investment is made, shall not affect their qualification as investments;

2. the term “returns” means the amounts yielded by an investment or reinvestment for a definite period, such as profits, dividends, interest, royalties or other fees;

3. the term “investor” means

(a) in respect of the Democratic Commonwealth of Bergonia:

– Bergonians within the meaning of the Basic Law of the Democratic Commonwealth of Bergonia,

– any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Democratic Commonwealth of Bergonia, irrespective of whether or not its activities are directed at profit,

(b) in respect of the Sultanate of Conveniencia:

– any natural person having the nationality of the Sultanate of Conveniencia in accordance with its laws,

– any juridical person having its seat in the territory of the Sultanate of Conveniencia in accordance with its laws;

4. the term “territory” means the land, air space and territorial sea as well as the exclusive economic zone and the continental shelf where a Contracting State exercises sovereign rights or jurisdiction in accordance with the provisions of international law and its domestic law.

#### Article 2: Encouragement and Protection of Investments

(1) Each Contracting State shall as far as possible encourage investments by investors of the other Contracting State and create favourable conditions for such investments and shall admit such investments in accordance with its legislation.

(2) Each Contracting State shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under the Treaty. Returns from the investment and, in the event of their re-investment, the returns therefrom shall enjoy the same treatment and protection as the investment under the Treaty.

(3) Neither Contracting State shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State.

(4) The Contracting States shall within the framework of their legislation consider in good faith applications for the entry and sojourn of persons of either Contracting State who wish to enter the territory of the other Contracting State in connection with an investment; the same shall apply to employed persons who in connection with an investment wish to enter the territory of the other Contracting State and sojourn there to take up employment. The same also applies to work permits.

#### Article 3: National Treatment and Most-Favoured-Nation Treatment of Investments

(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.

(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity, in particular, though not exclusively, concerning management, maintenance, operation, enjoyment or disposal of their investments, to treatment less favourable than it accords to its own investors or to investors of any third State, whichever is more favourable to the investors.

(3) The following shall, in particular, be deemed “treatment less favourable” within the meaning of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country. Measures 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.

(4) Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market, a free trade area as well as any other form of regional

economic integration or by virtue of any agreements on avoidance of double taxation or other agreements regarding matters of taxation.

(5) Issues of taxation on income and on capital shall be dealt with in accordance with the Agreement for Avoidance of Double Taxation with Respect to Taxes on Income and Capital between the Contracting States. In case there is no such agreement between the Contracting States, the respective national tax law shall be applicable.

(6) The provisions of paragraphs (1) and (2) of this Article shall not oblige the Sultanate of Conveniencia to accord investors of the other Contracting State the same treatment that it accords to its own investors with regard to ownership of lands and real estate. The same applies to grants and soft loans in connection with specific development and social programs.

(7) The investors of either Contracting State are free to choose authorized international means of transport for the transport of persons or capital-goods directly connected with an investment within the meaning of this Treaty without prejudice to relevant bilateral or multilateral agreements binding on either Contracting State.

#### Article 4 Compensation in Case of Expropriation and Nationalization

(1) Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.

(2) Investments by investors of either Contracting State 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 (hereinafter referred to as “expropriation”) in the territory of the other Contracting State except, in accordance with the applicable laws of the latter Contracting State for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation has become publicly known.

(3) The compensation shall be paid without delay. It shall carry interest from the date of expropriation until the time of payment at a commercially reasonable interest rate, which is based on the relevant Euribor; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law according to the respective national legal system.

(4) Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article.

#### Article 5: Compensation for Losses

(1) Investors of either Contracting State whose investments suffer losses in the territory of the other Contracting State owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting State than that which the latter Contracting State accords to its own investors or investors of any third State whichever is more favourable to the investors. Such payments shall be freely transferable.

(2) The provision of paragraph (1) of this Article shall also apply to investors of one Contracting State who in any of the situations referred to in that paragraph suffer losses in the territory of the

other Contracting State resulting from: (a) requisitioning of their property by the forces or authorities of the latter Contracting State, or (b) destruction of their property by the forces or authorities of the latter Contracting State, which was not caused in combat action or was not required by the necessity of the situation.

#### Article 6: Transfers

(1) Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of payments in connection with an investment made in its territory, in particular (a) capital and additional capital amounts being used to maintain, increase or expand existing investments and any other amounts appropriated for the coverage of expenses connected with the management of the investments; (b) the returns; (c) the repayment of loans related to investment; (d) the proceeds from the liquidation or the sale of the whole or any part of the investment; (e) the compensation provided for in Article 4 and Article 5; (f) wages, remunerations and accruals of nationals of the other Contracting State and nationals of any other third state who are allowed to engage in activities related to an investment.

(2) Transfers under this Article, Articles 4, 5 and 7 shall be made without delay at the market rate of exchange applicable on the day of the transfer. A transfer shall be deemed to have been made “without delay” if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.

(3) Should there be no foreign exchange market the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights shall apply.

#### Article 7: Subrogation

If either Contracting State or its designated agency makes a payment to any of its investors under a guarantee it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall, without prejudice to the rights of the former Contracting State under Article 9, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim of such investor to the former Contracting State. The latter Contracting State shall also recognize the subrogation of the former Contracting State to any such right or claim (assigned claims) which that Contracting State shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments made by virtue of such assigned claims, Article 4 (2) and (3) as well as Article 5 shall apply *mutatis mutandis*.

#### Article 8: Applicability of other Rules and Provisions

(1) If the legislation of either Contracting State or obligations under international law existing at present or established hereafter between the Contracting States in addition to this Treaty contain a regulation, whether general or specific, entitling investments by investors of the other Contracting State to a treatment more favourable than is provided for by this Treaty, such regulation shall to the extent that it is more favourable prevail over this Treaty.

(2) Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State.

(3) Investments having formed the subject of a special commitment of one Contracting State with respect to an investor of the other Contracting State shall be governed by the terms of the said commitment to the extent that the latter includes provisions more favourable to the investor than those of this Treaty.

#### Article 9: Settlement of Disputes between the Contracting States

(1) Disputes between the Contracting States concerning the interpretation or application of this Treaty should as far as possible be settled amicably by the governments of the two Contracting States through diplomatic channels.

(2) If a dispute has not been settled within a period of six months from the date on which such negotiations were requested by either Contracting State, it shall upon the request of either Contracting State be submitted to an arbitral tribunal.

(3) Such arbitral tribunal shall be constituted ad hoc as follows: each Contracting State shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the governments of the two Contracting States. Such members shall be appointed within two months, and such chairman within three months from the date on which either Contracting State has informed the other Contracting State that it intends to submit the dispute to an arbitral tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting State may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice-President should make the necessary appointments. If the Vice-President is a national of either Contracting State or if he, too, is prevented from discharging the said function, the member of the Court next in seniority who is not a national of either Contracting State should make the necessary appointments.

(5) The arbitral tribunal shall decide on the dispute in accordance with the provisions of this Treaty and the principles of international law.

(6) The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be final and legally binding. Each Contracting State shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting States. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure. If any dispute should arise between the Contracting States as to the meaning or scope of a decision either Contracting State may request the arbitral tribunal to interpret its decision.

#### Article 10: Settlement of Disputes between an Investor and a Contracting State

(1) Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.

(2) If such a dispute cannot be settled within a period of three months from the date of receipt of request for settlement, the dispute shall be submitted at the request of the investor alternatively or consecutively to: (a) the competent court of the Contracting State in whose territory the investment has been made; (b) international arbitration under either: – the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), or – the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL), or – the rules of arbitration of the International Chamber of Commerce (ICC), or – any other form of dispute settlement agreed upon by the parties to the dispute. Each Contracting State herewith declares its acceptance of such international arbitral procedures.

(3) An award issued by an arbitral tribunal shall be final and legally binding upon the parties to the dispute and it shall be enforced in accordance with domestic law.

(4) During arbitration proceedings or the enforcement of an award, the Contracting State involved in the dispute shall not raise the objection that the investor of the other Contracting State has received compensation under an indemnity, guarantee or insurance contract in respect of all or part of the damage.

Article 11: Scope of Application of the Treaty

(1) This Treaty shall apply to all investments, whether made prior to or after its entry into force, but it shall not apply to any claims or disputes concerning such investments which have been raised or settled between the parties involved prior to its entry into force.

(2) This Treaty shall be in force irrespective of whether or not diplomatic or consular relations exist between the Contracting States.

Article 12: Entry into Force, Duration and Termination

(1) This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged as soon as possible.

(2) This Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of twenty years and shall be extended thereafter for a period of fifteen years unless denounced in writing through diplomatic channels by either Contracting State twelve months before its expiration. After the expiry of that latter period it shall remain in force for an unlimited period unless denounced in writing through diplomatic channels by either Contracting State giving twelve months' notice.<sup>4</sup>

(3) In respect of investments made prior to the date of termination of this Treaty, the provisions of the preceding Articles shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.

(4) Upon entry into force of this Treaty, the Treaty of 25 June 1979 between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia concerning Encouragement and Reciprocal Protection of Investments shall terminate. Done at Lefitoni on this 30th day of May 2003 in duplicate in the Bergonian, Conveniencian and English languages, all texts being authentic. In case of a divergent interpretation of the Conveniencian and Bergonian texts, the English text shall prevail.

For the Democratic Commonwealth of Bergonia  
Gulliver Lemuel

For the Sultanate of Conveniencia  
Abu Abdullah Muhammad Ibn Battuta

**ANNEX 2 - TREATY BETWEEN THE GOVERNMENT OF TERTIA AND THE  
GOVERNMENT OF BERGONIA CONCERNING THE RECIPROCAL  
ENCOURAGEMENT AND PROTECTION OF INVESTMENT**

The Government of Tertia and the Government of Bergonia (hereinafter referred to as the 'Parties');

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the, territory of the other Party;

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<sup>4</sup> Bergonia and Conveniencia exchanged instruments of ratification on 6 October 2003.

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and

Having resolved to conclude a Treaty concerning the reciprocal encouragement and protection of investment;

Have agreed as follows:

## ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) movable and immovable, property and tangible and intangible property, including rights such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual and industrial property which includes, inter alia, rights relating to:

literary and artistic works, including sound recordings;

inventions in all fields of human endeavor;

industrial designs;

semiconductor mask works;

trade secrets, know-how, and confidential business information; and

trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, including concessions to to search for , extract, or exploit natural resources, and any licenses and permits pursuant to law;

(b) 'company' of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

(c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

(d) "return" means an amount derived from or associated with an investment irrespective of the form in which it is paid, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) "associated activities" include, inter alia, the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business, and also include:

- the making, performance and enforcement of contracts;
- the acquisition, use, protection and disposition of property of all kinds including intellectual property rights;
- the borrowing of funds;
- the purchase, issuance, and sale of equity shares and other securities;
- the purchase of foreign exchange for imports;
- the granting of franchises or rights under licenses;
- access to registrations, licenses, permits and other approvals (which shall in any event be issued expeditiously);
- access to financial institutions and credit markets;
- access to their funds held in financial institutions;
- the importation and installation of equipment necessary for the normal conduct of business affairs, including, but not limited to, office equipment and automobiles, and the export of any equipment and automobiles so imported;
- the dissemination of commercial information;
- the conduct of market studies;
- the appointment of commercial representatives, including agents, consultants and distributors and their participation in trade fairs and promotion events;
- the marketing of goods and services, including through internal distribution and marketing systems, as well as by advertising and direct contact with individuals and companies;
- access to public utilities, public services and commercial rental space at nondiscriminatory prices, if the prices are set or controlled by the government; and
- access to raw materials, inputs and services of all types at nondiscriminatory prices, if the prices are set or controlled by the government.

(f) "territory" means the territory of Tertia or Bergonia, including the territorial sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which Tertia or Bergonia has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any 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 country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

## ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable.

2. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

3. Subject to the laws relating to the entry and sojourn' of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

4. companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

8. The treatment accorded by the Government of Tertia to investments and associated activities of nationals and companies of Bergonia under the provisions of this Article shall in any State, Territory, or possession of Tertia be no less favorable than the treatment accorded therein to investments and associated activities of nationals of Tertia resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of Tertia.

9. The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.

### ARTICLE III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in any freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.

4. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

### ARTICLE IV

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Transfers shall be made in a freely usable currency calculated at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

### ARTICLE V

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

## ARTICLE VI

1. For purposes of this Article, an investment dispute a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation, which may include the use of non-binding third-party procedures such as conciliation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
- (c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ('Centre') established by the Convention on the Settlement of Investment Disputes between states and Nationals of other States, done at Washington, March 18, 1965 ('ICSID Convention'), provided that the Party is a party to such Convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and (b) an 'agreement in writing' for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, 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.

#### ARTICLE VII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Permanent Court of Arbitration.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. (a) Each Party shall bear the costs of its own representation in the arbitral proceedings.

(b) The costs and expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of such costs be paid by one of the Parties.

#### ARTICLE VIII

The provisions of Article VI and VII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of Tertia or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

#### ARTICLE IX

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

#### ARTICLE X

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

#### ARTICLE XI

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI(1)(a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

#### ARTICLE XII

This Treaty shall apply to the political subdivisions of the Parties.

#### ARTICLE XIII

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.<sup>5</sup>

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

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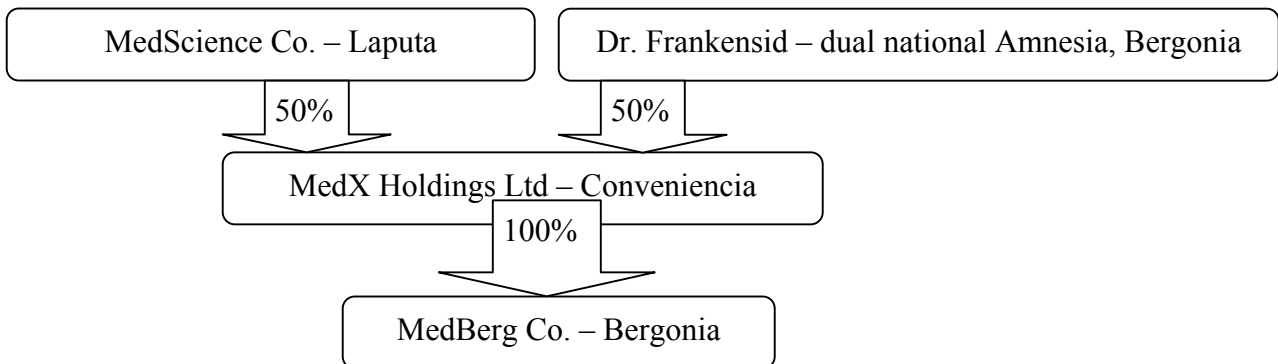
<sup>5</sup> Bergonia and Tertia exchanged instruments of ratification on 15 March 2003.

DONE in duplicate at Tertia Towne on the 1st day of January 2003, in the English and Tertian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF TERTIA FOR THE GOVERNMENT OF BERGONIA

### ANNEX 3 UNCONTESTED FACTS

1. Claimant, MedBerg Co., was established in Bergonia on 30 January 2004.
2. The ownership of Claimant is as depicted below:



3. Amnesia, Bergonia, and Conveniencia are ICSID Contracting States and all have ratified the Convention. They are also Members of the World Trade Organisation (WTO) and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Laputa is not an ICSID Contracting State nor a Member of the WTO.
4. Dr. Frankensid is the scientist employed by MedScience Co. and credited with a breakthrough leading to several patents including Bergonian Patent No. AZ2005.
5. Claimant applied for a patent in relation to Dr. Frankensid's invention on 5 February 2004, and was granted Bergonian Patent No. AZ2005 on 15 March 2005. Claimant is the owner of Bergonian Patent No. AZ2005.
6. Claimant licensed BioLife Co., a Bergonian company, to utilise Bergonian Patent No. AZ2005 on 31 March 2005 (the License Agreement). Claimant terminated the License Agreement in accordance with the License Agreement's notice and termination provisions on 31 March 2007. BioLife complained that upon receiving notice of termination it had sought to renegotiate the terms of the License Agreement, but that Claimant ended these negotiations after only three days.
7. On 1 June 2007, the Bergonian Intellectual Property Office (IP Office) commenced proceedings for the issuance of a compulsory license with respect to Patent No. AZ2005, stating that the technology covered by this patent is needed to address important domestic medical needs.
8. The Bergonian IP Office issued a compulsory license for Patent No. AZ2005 on 1 November 2007. As of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license. These companies are using the technology covered by Patent No. AZ2005 to produce certain health-related products. Three of these companies have exported some of the products to other countries. The Bergonian IP Office has collected royalties from the six Bergonian companies and has offered these royalty payments to Claimant, but as of the date on which these ICSID proceedings were initiated Claimant had refused to accept them.
9. On numerous occasions, Claimant communicated its objections to the Bergonian IP Office, but these objections were not resolved to the Claimant's satisfaction. Despite Claimant's objections, there has been no independent review of the IP Office's decision to issue the compulsory license.

10. On 1 November 2008, the ICSID Secretary General registered the dispute for arbitration.

### **IMPORTANT NOTE TO TEAMS**

~~Registered teams may request clarification of additional relevant legal and factual issues in connection with the problem.~~

~~Each team may pose 5 questions per month between 15 May and 15 August 2009, i.e. 5 by 15 June, a further five by 15 July, and a final 5 by 15 August.~~

~~Each team shall post its questions on an internet bulletin board accessible to all registered teams, i.e. each team can see the questions posted by other teams. Details about the URL and access credentials will be given to all teams after the registration deadline for teams has passed (15 May 2009).~~

~~The organisers' responses (clarifications) will be posted on 1 July, 1 August and 1 September respectively. Otherwise, the organisers will decide in their sole discretion as to the relevance of the requested information, and whether and how to respond in the best interests of a fair and educational competition.~~

Superseded by the 2009 Guidelines on Requests for Clarifications:  
<http://www.fdimoot.org/2009ClarificationGuidelines.pdf>