FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION 2009

MEMORIAL FOR CLAIMANT

On Behalf of:
MedBerg Co. [CLAIMANT]

Against:
The Government of The Republic of Bergonia [RESPONDENT]

Team:
MO

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LIST OF ABBREVIATIONS

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

LIST OF AUTHORITIES

Alexandrov	Stanimir Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis*, 4 Law and Practice of International Courts and Tribunals 19, 2005
Dolzer and Schreuer	Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, 2008
Dolzer and Stevens	Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, Brill, Leiden, 1995
Gaillard	Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, New York Law Journal, 2 June 2005
Schreuer	Christoph Schreuer, *The ICSID Convention: A Commentary*, 2001
Vincze	Andrea Vincze, *Jurisdiction Ratione Personae in ICSID Arbitration*, Miskolc, 2006

LIST OF LEGAL SOURCES

ADC v. Hungary, *ICSID* (2006)
Cited as: *ADC*

Alex Genin v. Estonia, ICSID (2001)
Cited as: *Alex Genin*

Amco v. Indonesia, ICSID (1985)
Cited as: *Amco*

Case concerning the Barcelona Traction, Light and Power Co. Ltd. Judgment, I.C.J. (1970)
Cited as: *Barcelona Traction*

Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID (2003)
Cited as: *Champion Trading*

CMS v. Argentina, Decision on Jurisdiction, ICSID (2003)
Cited as: *CMS*

Fedax v. Venezuela, Decision on Jurisdiction, ICSID (1998)
Cited as: *Fedax*

Goetz v. Burundi, ICSID (1998)
Cited as: *Goetz*

Jan de Nul/Dredging International v. Egypt, ICSID (2006)
Cited as: *Jan de Nul*

Salini v. Morocco, Decision on Jurisdiction, ICSID (2003)
Cited as: *Salini*

Tokios Tokeles v. Ukraine, ICSID (2004)
Cited as: *Tokios Tokeles*

STATEMENT OF FACTS

CLAIMANT, MedBerg Co., was established in Bergonia on 30 January 2004 [*Annex 3* ¶ *1*]. MedBerg Co. is owned by MedX Holdings Ltd., a Conveniencia company, which is in turn half owned by MedScience Co., a Laputian company, and half owned by Dr. Frankensid, a national of both Amnesia and Bergonia [*Id.* ¶ *2*].

Dr. Frankensid, a scientist employed by MedScience Co., is credited with a breakthrough that lead to several patents, including Bergonian Patent No. AZ2005 [*Id.* ¶ *4*]. Bergonian Patent No. AZ2005 was granted to MedBerg Co. on 15 March 2005 [*Id.* ¶ *5*].

CLAIMANT licensed BioLife Col., a Bergonian company, to use Bergonian Patent No. AZ2005 on 31 March 2005 [*Id.* ¶ *6*]. In accordance with the License Agreement's notice and termination provisions, CLAIMANT terminated the License Agreement on 31 March 2007 [*Id.*].

On 1 June 2007, the Bergonian Intellectual Property Office began proceedings to issue a compulsory license for Patent No. AZ2005, alleging that the technology covered by this patent is necessary for domestic medical needs [*Id.* ¶ *7*]. The compulsory license was issued on 1 November 2007, and as of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license [*Id.*]. BioLife and the five other Bergonian entities are using the technology covered by this patent to produce a variety of health-related products, and three of these companies have exported some of these health-related products to other countries [*Id.*]. Despite CLAIMANT having communicated its objections to the Bergonian IP Office, there has been no independent review of the IP Office's decision to issue the compulsory license [*Id.* ¶ *9*].

Bergonia and Conveniencia entered into a Bilateral Investment Treaty with one another [*Annex 1*]. Article 4 ¶ (2) of this treaty prohibits either Party to the treaty from expropriating, or taking action tantamount to expropriating, the investment of an investor from the other country Party to the treaty [*Annex 1* Art. 4 ¶ *2*]."

Article 3 (2) of the Bergonia-Conveniencia Bilateral Investment Treaty specifies that neither Contracting State shall subject investors of the other contracting State to treatment that is less favorable than that given to the investors of its own State or investors from States that are parties to any and all other treaties or agreements [*Id.* at Art. 3 ¶ *3*].

Bergonia and Tertia have entered into a Bilateral Investment Treaty with one another [*Annex 2*]. Under Article VI. 8 of this treaty, any company constituted under the laws of a Party to the

treaty, that was an investment of nationals or companies of the other Party, will be treated as a national or company of the other Party in accordance with Article 25(2)(b) of the ICSID Convention [*Id.* at Art. VI ¶ *8*].

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

ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION IN THE PRESENT DISPUTE

Claimant submits that the Tribunal has jurisdiction to hear a claim brought by Claimant under the Bergonia-Conveniencia Bilateral Investment Treaty.

A. The Tribunal has jurisdiction ratione personae

Claimant submits that the Tribunal has jurisdiction ratione personae in the present dispute because MBC is the wholly-owned subsidiary of the Conveniencia-based corporation, MXH, therefore the applicable treaty is the Bergonia-Conveniencia Bilateral Investment Treaty.

Jurisdiction ratione personae has been found by an ICSID tribunal under a similar set of facts. In *Amco v. Indonesia*, Indonesia objected to jurisdiction on the ground that it had not expressed its agreement to treat PT Amco as a foreign national. Amco argued that no formal agreement was necessary, and the Tribunal agreed. It found that in order for a juridical person to be considered a foreign national, two conditions must be fulfilled: 1) that the juridical person must legally be a national of the Contracting State which is the other party and 2) the juridical person under foreign control must be treated as a foreign juridical person to the knowledge of the Contracting State.[1]

Claimant submits that the uncontested facts of the present dispute meet the conditions outlined in *Amco* used to establish foreign nationality. With regard to the first condition, MXH is a juridical person under the laws of Conveniencia. With regard to the second condition, MBC is a wholly-owned subsidiary of MXH. As expressed in *Amco*, complete ownership is indicative of foreign nationality.

This interpretation is consistent with the text of the Bergonia-Conveniencia BIT. The definition of investor under Article 1(3)(b) of the Bergonia-Conveniencia BIT includes "any juridical person having its seat in the territory of the Sultanate of Conveniencia in accordance with its laws." As described above, MXH is a juridical person with its seat in Conveniencia.

[1] Vincze, *Jurisdiction Ratione Personae in ICSID Arbitration*, p. 6.

The composition of MXH's ownership does not affect its standing in the present dispute. This is because the Bergonia-Conveniencia BIT defines nationality on basis of the place of incorporation, contains no other conditions with respect to nationality and is silent with respect to ownership. Mr. Alexandrov has noted that if these criteria are met, the answer is 'clear': a company incorporated in one contracting party has standing to submit a claim before ICSID against the other contracting party regardless of the nationality of its controlling shareholders or the company's level of economic activity in its State of incorporation.[2]

This standard has received broad support in recent arbitral decisions. In *Tokios Tokeles*, the Tribunal established that, if an investment treaty defines the nationality of juridical entities according to their State of incorporation, a foreign corporation has standing to bring investment-treaty claims against the host State regardless of the nationality of the corporation's shareholders and, in particular, regardless of the fact that the shareholders are nationals of the host State.[3] Furthermore, the Tribunal in *Champion Trading* also upheld the standing of a corporate entity to assert claims against the host State, Egypt, even though the individual shareholders of that entity were deemed Egyptian nationals for purposes of their individual claims and were thus barred from bringing claims of their own under the treaty.

B. The Tribunal has jurisdiction ratione materiae

Claimant submits that the Tribunal has jurisdiction ratione materiae in the present dispute because the intellectual property owned by them MBC in Bergonia constituted an investment under the ICSID Convention [1] and under Art 1(1)(d) of the Bergonia-Conveniencia BIT [2].

1. The dispute arises out of an investment, Bergonian Patent No. AZ2005, within the meaning of Art 25 of the ICSID Convention

Claimant submits that AZ2005 is an investment within the meaning of Art 25 of the ICSID Convention because it fulfills the four general criteria set forth by academic commentators and

[2] Alexandrov, *Shareholders as "Investors" under Investment Treaties*, p. 401.
[3] *Id.*

restated in *Salini v. Morocco*: contribution of the investor, certain duration of the project, existence of operational risk, and contribution to the host State's development.[4]

As to the qualities of the 'contribution' (or commitment) by the investor, any significant financial resources or transfer of know-how, equipment, and personnel will count.[5] The transfer of resources and know-how has occurred in the present instance because MBC has introduced AZ2005 to the market through a Bergonian licensee, and it will be further realized when related products become generic and may be manufactured without royalty to MBC. Concerning the duration of the project, an ICSID tribunal recently said that the threshold should not be 'excessively rigorous' and presumably a time of two years should be sufficient.[6] The health-related products made possible by AZ2005 were on the Bergonian market for over two years before Bergonia issued a compulsory license. The third element, the existence of risk for the investor, is inherent in the prospect that the research and development costs necessary to create the product may not be returned in profit. The fourth and final Salini factor, contribution to the host State's development, is present in the investment because AZ2005 served to improve the health of Bergonia's populace for two years (31 March 2005 – 31 March 2007), and MBC would have continued to make it available to the market had the Bergonia not interfered with a compulsory license.

In addition to meeting the *Salini* factors, the investment as defined in Art 25 of the ICSID Convention should be interpreted broadly. in *Fedax*, the Tribunal noted that the drafters of the ICSID Convention intended to leave a wide discretion to the parties to determine the types of arbitrable disputes.[7] As the definition of investment in the Bergonia-Conveniencia BIT is itself broad, so too should its interpretation be from the text of the ICSID Convention.

2. Under Art 1(1)(d) of the Bergonia-Conveniencia BIT, Bergonian Patent No. AZ2005 is an investment.

Claimant submits that AZ2005 is an investment Art 1(1)(d) of the Bergonia-Conveniencia BIT, which includes "intellectual property rights, in particular … patents" in its list of assets to

[4] Schreuer, *THE ICSID Convention: A Commentary*, p. 140.
[5] Dolzer and Schreuer, *Principles of International Investment Law*, p. 68.
[6] *Jan de Nul/Dredging International v. Egypt*, paras 93-96.
[7] *Fedax v. Venezuela*, paras. 21-29.

considered an investment. As AZ2005 is a patent that was registered in Bergonia, it meets the definitional requirement for investment established in Bergonia-Conveniencia BIT. Furthermore, the MFN clause in the Bergonia-Conveniencia BIT would apply the Bergonia-Tertia BIT Art I (1)(a)(iv) definition of investment, which includes "intellectual and industrial property which includes, inter alia, rights to: inventions in all fields of human endeavor." This would further broaden the scope of the definition of investment.

II. THE ISSUANCE OF A COMPULSORY LICENSE FOR CLAIMANT'S INTELLECTUAL PROPERTY CONSTITUTES EXPROPRIATION AND DISCRIMINATION, AND IT IS IN VIOLATION OF APPLICABLE TREATIES AND GENERAL INTERNATIONAL LAW

Claimant submits that the compulsory license issued by Bergonia for AZ2005 constitutes expropriation of and discrimination against its investment. Furthermore, Claimant submits that the compulsory license is in violation of applicable treaties and general international law.

A. Respondent's compulsory license is in breach of the requirements for expropriation outlined in the Bergonia-Conveniencia BIT

Claimant submits that Respondent's compulsory license is in breach of the requirements for expropriation outlined in the Bergonia-Conveniencia BIT. According to the Art 4 of the Bergonia-Conveniencia BIT, a Contracting State can only expropriate if the act of expropriation is 1) in accordance with the applicable laws of the Contracting State for the public benefit; 2) on a non-discriminatory basis, and; 3) against prompt, adequate and effective compensation.

The compulsory license fails to meet the requirement that it was for the public benefit because three of the six companies using AZ2005 are exporting products manufactured under the compulsory license, and these exports are for commercial purposes. In *ADC*, the Tribunal stated that:

> [A] treaty requirement for "public interest" requires some genuine interest of the public. If mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be

> rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.[8]

In the present dispute, Respondent achieves no "genuine interest of the public" in allowing its companies to profit at the expense of a foreign national. If domestic industry benefit were a legitimate basis for expropriation, then virtually any expropriation of a foreign investment would justified, as nearly all would be to the benefit of competing domestic enterprises.

Furthermore, Respondent's issuance of a compulsory license was discriminatory, in that there has been no independent review of the Bergonia IP Office's decision to issue a compulsory license.

Finally, Bergonia breaches the requirements for expropriation under the Bergonia-Conveniencia BIT because it did not provide prompt, adequate and effective compensation. The offer for compensation was inadequate as it was less than the rate that had been in effect under the terms of the License Agreement between MBC and BioLife. Furthermore, the compensation determination was never independently reviewed by Bergonia.

B. Respondent's compulsory license is in violation of international law and therefore constitutes an expropriation under the Bergonia-Conveniencia BIT

Claimant submits Respondent's compulsory license is in violation of international law and therefore constitutes an expropriation under Art 4 the Bergonia-Conveniencia BIT. Because of the MFN clause in Art 4(4), Claimant is to enjoy MFN treatment in the territory of the other Contracting State, and this treatment includes that found in the Bergonia-Tertia BIT. In Art 3(1) of the Bergonia-Tertia BIT, investments may only be expropriated in accordance with the general principles of treatment provided for in Art II(2). Art II(2)(a) states that an:

> 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

Therefore, an examination of international law is required in order to evaluate whether Respondent unjustly expropriated Claimant's investment. Included in international law are the

[8] *ADC v. Hungary*, para 432.

obligations required of WTO members by TRIPS and the Waiver. Respondent has violated the Waiver by allowing for the export of products manufactured under a compulsory license without notification to the TRIPS Council. Furthermore, Respondent violated TRIPS Art 31(h) by not paying the right holder adequate remuneration. In addition, Respondent violated TRIPS Art 31(b) by not making efforts to obtain authorization for use of the compulsory license from Claimant. Though this requirement may be waived in times of national emergency or public non-commercial use, neither of these criteria is met as there is no evidence of a national emergency and the use is commercial. Respondent violated TRIPS Art 31(i) and (j) by not providing Claimant any independent review of the IP Office's decision to issue a compulsory license. Finally, the use of a compulsory license to make available products related to obesity goes against the spirit of the Doha Declaration, which sought to mitigate the effects of HIV/AIDS, Malaria, and other epidemics. Though obesity may be a health problem in Bergonia, it is not one of the conditions identified in the Doha Declaration, and it is a chronic disease, which distinguishes it from all of the diseases identified. Because TRIPS and the Waiver are both international law, their violation by Respondent is, in effect, a violation of international law. Therefore Claimant's investment did not receive the full protection and security required by the Bergonia-Conveniencia BIT.

Finally, Art 8 of the Bergonia-Conveniencia BIT states that obligations under international law may function as a basis by which to establish a Contracting State's duty to an investor and their investment. Given that WTO obligations fall under the scope of Art 8, Respondent is in breach of the Bergonia-Conveniencia BIT even absent the application of its MFN clause.