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 CLAIMANT

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LIST OF AUTHORITIES

	TREATIES AND OTHER INTERNATIONAL PUBLICATIONS	CITED IN
ILC Addendum to the First Report	*Addendum to the First Report on State Responsibility*, International Law Commission, A/CN.4/490/Add.5, 22 July 1998	23
Argentina–US BIT	Argentina – United States BIT (1991)	27
Austria-Georgia BIT	Austria - Georgia BIT (2001)	34
MIGA	*Convention Establishing the Multilateral Investment Guarantee Agency (MIGA),* 11 October 1985, 1508 U.N.T.S. 100	
UNCTAD Bilateral Investment Treaties	Cf. UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rule-Making* (2007) 44	31
Resolution 1803	*General Assembly Resolution 1803* (XVII) on Permanent Sovereignty over Natural Resources, 17th Session, Agenda Item 39 para 4, UN Documents A/RES/1803 (XVII) (1962)	29
Articles on State Responsibility	International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, , Yearbook of the International Law Commission, 2001, vol. II (Part Two) (2001)	21,22
NAFTA	*North American Free Trade Agreement* (1994)	27
TRIPS	*Trade Related Aspects of Intellectual Property Rights*	
Vienna Convention	*Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969)	10,12,14,22

BOOKS		**CITED IN**
Akehurst	Akehurst's *Modern Introduction to International Law*	29
ALI Restatement	American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, Vol. 1 (1987) Section 712	28, 30
Standards of Investments Protection	August Reinish (ed.), ***Standards of Investments Protection***, Oxford University Press (2007)	8, 9, 10
Investor-State Arbitraton	Ch. F Dugan, D. Wallace Jr., N. Rbbins, B. Sabahi, *Investor-State Arbitration*, Oxford University Press (2008)	4, 8, 25, 33
ICSID Commentary	Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press (2001)	3,6,7,12,16,19
Principles of Public International Law	Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 6th. edn, 2003.	25, 30
Crawford	J. Crawford, *The International Law Commision's Articles on State Responsibility: Introduction, Text, Commentaries*, Cambridge University Press (2002)	21, 22
The International Law on Foreign Investment	M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 2nd ed. (2004)	27
Kinsella	N. Stephan Kinsella, Noah D. Rubins, *International Investment, Political Risk and Dispute Resolution*, Oxford University Press (2005)	
Akehurst's Modern Introduction to International Law	P. Malanczuk, *Akehurst's Modern Introduction to International* Law, 7th Edition (1997)	
The Oxford Handbook	Peter Muchlinski, Federico Ortino, Christoph Schreuer, eds., ***The Oxford Handbook of International Investment Law***, Oxford University Press (2008)	7
Multinational Enterprises and the Law	Peter Muchlinski, *Multinational Enterprises and the Law*, Oxford University, Press (2007)	30, 37
Schreuer	R. Dolzer, Ch. Schreuer, *Principles of international investment law*, Oxford University Press (2007)	8, 10, 25, 26, 29, 32, 33, 35, 36, 37

	ARTICLES	**CITED IN**
Jurisdiction Rationae Personae	A. Vincze, *Jurisdiction Ratione Personae in ICSID Arbitration*, in *European Integration Studies*, issue: 1 / 2004	3
Expropriation of Alien Property	A.F.M. Maniruzzamaan, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law on Foreign Investment: An Overview*, 8 Journal of Transnational Law and Policy (1998) 57	30
Indirect Epropriation	Anne K. Hoffman, *Indirect Epropriation*, in ***Standards of Investment Protection***, 151-170, Oxford University Press (2008)	25
Legality of Expropriations	August Reinish, *Legality of Expropriations*, in ***Standards of Investments Protection,*** 171-204, Oxford University Press, (2007)	28, 30, 31
The Concept of Expropriation	C. Schreuer, *The Concept of Expropriation under ECT and other Investment Protection Treaties*, in C. Ribeiro (ed.), *Investment Arbitration and the Energy Charter Treaty* (2006)	12, 25
Amerasinghe	C.F. Amerasinghe, *Interpretation of article 25(2) (b) of the ICSID Convention*, In: Lilich- Brower, International Arbitration in the 21st Century: Towards Judicialization and Uniformity?, Richard B. Lilich- Charles N. Brower, Transnational Publishers, Inc, 1993.	4
Krishan	D. Krishan , *A notion of ICSID investment*, Transnational Dispute Management (2008)	13, 14, 15
Schlemmer	Engela Schlemmer, *Investment, Investor, Nationality and Shareholders*, in ***The Oxford Handbook*** (2008)	
Christie	G. C. Christie, *What Constitutes a Taking of Property*	28

	under International Law? (1962) 38 British Year Book of International Law 307	
Hobér	Kaj Hobér, *State Responsibility and Attribution*, 552-582, in *The Oxford Handbook* (2008)	21, 22, 24
Attribution of Conduct in Peace Operations	Kjetil Mujezinovi Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, (2008) 19 Eur. J. Int'l L. at 3.'	
Responsibility for the Injuries	LB Sohn and RR Baxter, *Responsibility of a States for the Injuries to the Economic Interest of Aliens*, (1961) 55 AJIL 545, 553	27
The Notion of Investment	Sebastien Manciaux, *The Notion of Investment: New Controversies*, in *The Journal of World Investment and Trade*, Vol. 9 no. 6, December 2008	15, 17, 18, 19, 20
The Concept of Investment	*The Concept of Investment*, in Ch. F Dugan, D. Wallace Jr., N. Rbbins, B. Sabahi, *Investor-State Arbitrator*, Oxford University Press (2008)	12, 18
Taking of property	UNCTAD, *Taking of property, Series on Issues in International Investment Agreements* (2000) 20	28

LIST OF LEGAL SOURCES

	CASES	CITED IN
ADC v Hungary	*ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary*, Final award on jurisdiction, merits and damages, 27 September 2006, ICSID Case No ARB/03/16, IIC 1 (2006)	35
ADF v US	*ADF Group INC, v US*, Award, 9 January 2003, 18 ICSID Review-FILJ (2003)195, 6 ICSID Reports 470	33
AES Corp. v Argentina	*AES Corporation v Argentina*, Decision on jurisdiction, ICSID Case No ARB/02/17; IIC 4 (2005); 12 ICSID Rep 308	14
Aguas v Bolivia	*Aguas del Tunari SA v Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, IIC 8 (2005)	13
Amco v Indonesia	*Amco Asia Corporation and others v Republic of Indonesia*, 25 September 1983, ICSID Case No. ARB81/1, Decision on Jurisdiction, 1 ICSID Reports 389, 524-50 (1993)	3, 4
Amco v Iran	*Amoco International Finance Corp. v Iran*, 15 Iran-US CTR 189 (1987)	33
Autopista I	*Autopista Concesionada de Venezuela CA (Aucoven) v Venezuela*, Decision on Jurisdiction, 27 September 2001, ICSID Case No ARB/00/5; IIC 19 (2001)	
Autopista II	*Autopista v Venezuela*, Decision on Jurisdiction, 27 September 2001, 6 ICSID Reports	4
AWG Group Ltd	*AWG Group Ltd v Argentina*, Decision on Jurisdiction, Ad hoc —UNCITRAL Arbitration Rules, IIC 21 (2006)	9
Azurix	*Azurix Corp v Argentina*, Decision on Jurisdiction, ICSID Case No ARB/01/12; IIC 23 (2003)	13
Bayindir	*Bayindir Insaat Turizm Tecaret ve Sanayi A. S. v Pakistan*, 14 November 2005, Decision on Jurisdiction, ICSID Case No ARB/03/29; IIC 27 (2005).	19
Cable TV	*Cable TV v St. Kitts and Nevis*, Award, 13 January 1997,	6

	13 ICSID Review- Foreign Investment Law Journal 328, 366-370 (1998)	
Camuzzi v Argentina	*Camuzzi International SA v Argentina*, Decision on Objections to Jurisdiction, ICSID Case No ARB/03/2; IIC 41 (2005)	9
Upper Silesia Case	*Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ Series A, No. 7 (1926)	28
Chorzow Factory Case	*Factory at Chorzow, Germany v Poland*, Order, Merits, 13 September 1928, PCIJ Series A no 17; ICGJ 255 (PCIJ 1928)	31
CME I	*CME Czech Republic BV v Czech Republic*, Final Award and Separate Opinion, 14 March 2003, Ad hoc—UNCITRAL Arbitration Rules, IIC 62 (2003)	4, 5
CME II	*CME v Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121 (2005)	25, 26
CSOB	*Ceskoslovenska Obchodni Banka AS v Slovakia*, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/4; IIC 49 (1999)	12
de Sabla Claim	*de Sabla Claim (US v Panama)*, Award, 29 June 1933, 6 UNRIAA 358, 366	31
Eureko v Poland	*Eureko BV v Poland*, Partial Award and Dissenting Opinion, 19 August 2005, Ad hoc—UNCITRAL Arbitration Rules, IIC 98 (2005)	21, 24
Fedax v Venezuela	*Fedax NV v Venezuela*, Decision on Jurisdiction, ICSID Case No ARB/96/3; IIC 101 (1997)	13
Feldman	*Feldman v Mexico*, Award, 16 December 2002, 1 ICSID Review FILJ (2003) 488	32
Gas Natural v Argentina	*Gas Natural v Argentina*, Decision on jurisdiction, ICSID Case No ARB/03/10; IIC 115 (2005)	9
Generation Ukraine	*Generation Ukraine v Ukraine*, Award, 16 September 2003, 44 ILM (2005) 404	28
Gruslin v Malaysia	*Gruslin v Malaysia*, Award, ICSID Case No ARB/99/3; IIC 129 (2000)	13

Helnan I	*Helnan International Hotels A/S v Egypt*, 17 October 2006, Decision of the Tribunal on Objection to Jurisdiction, ICSID Case No ARB/05/19; IIC 130 (2006)	
Helnan II	*Helnan International Hotels AS v Egypt*, Award, date ICSID Case No. ARB/05/19; IIC 340 (2008)	
Holiday Inns	*Holiday Inns v Morocco*, Decision on Jurisdiction, 12 May 1974	7
IBM v Ecuador	*IBM World Trade Corporation v Ecuador*, Decision on Jurisdiction and Competence and Dissenting Opinion, ICSID Case No ARB/02/10, IIC 132 (2003)	13
Impregilo	*Impregilo SpA v Pakistan*, Decision on Jurisdiction, 22 April 2005, ICSID Case No ARB/03/3; IIC 133 (2005)	23
Klockner	*Klockner v Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15/16	3, 4
Lauder v Czech Rep.	*Lauder v The Czech Republic*, Final Award, 3 September 2001	25, 35
LETCO	*LETCO v Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 352	3
LG&E v Argentina	*LG&E v Argentina*, Decision on Liability, 3 October 2006	36
MHS v Malaysia I	*Malaysian Historical Salvors Sdn Bhd v Malaysia*, Award on Jurisdiction, 10 May 2007, ICSID Case No ARB/05/10; IIC 289 (2007)	16, 17
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Maffezini I	*Maffezini v Kingdom of Spain*, Award, ICSID Case No ARB/97/7, IIC 86 (2000), 11 November 2000	23
Maffezini II	*Maffezini v Kingdom of Spain*, Decision on Objections to Jurisdiction, 25 January 2000, ICSID Case No ARB/97/7, IIC 85 (2000)	9, 23
Marvin Feldman	*Marvin Feldman v United Mexican States*, 16 December 2002, Case No. ARB. (AF)/99/1, , 42 I.L.M. 625 (2003)	25
Mercantile Bank	*Mercantile Bank of Iran & Holland*, Award, 22 June	

	1984, Case No. 7, 6 Iran-U.S. Cl. Trib. Rep. 219	
Metalclad	*Metalclad Corporation v The United Mexican States*, Award, 30 August 200, Case No. ARB(AF)/97/1, 5 ICSID Reports (2002)	26, 27, 37
Middle East Cement	*Middle East Cement and Handling Co. SA v Arab Republic of Egypt*, Award, 12 April 2002, 7 ICSID Reports 178	26
Mihaly v Sri Lanka	*Mihaly International Corporation v Sri Lanka*, Award, ICSID Case No ARB/00/2; IIC 170 (2002); (2002) ICSID Rev—Foreign Investment L J 142	12
Mitchell v Congo	*Mitchell v The Democratic Republic of the Congo*, 1 November 2006, Decision on the Application for Annulment of the Award, ICSID Case No. ARB/99/7; IIC 172 (2006)	
National Grid	*National Grid plc. v The Argentine Republic*, 20 June 2006, Decision on Jurisdiction,	10
Nykomb v Latvia	*Nykomb Synergetics Technology Holding AB v Latvia*, Award, 16 December 2003, SCC Case No 118/2001, IIC 182 (2003)	
Phoenix v Czech Rep	*Phoenix Action Ltd v Czech Republic*, 15 April 2009, Award, ICSID Case No. ARB/06/5; IIC 367 (2009)	16, 19
RFCC v Marocco	*RFCC v Marocco*, Award, 22 December 2003, 20 ICSID Review-FILJ (2005) 391	26
Salini v Jordan	*Salini Costruttori SpA and Italstrade SpA vThe Hashemite Kingdom of Jordan*, 29 November 2004, Decision on Jurisdiction, ICSID Case No. ARB/02/13	
Salini v Morocco	*Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, Decision on Jurisdiction, 16 July 2001, ICSID Case No. ARB/00/4, 42 ILM 609 (2003)	15, 19, 24
SD Myers	*SD Myers v Canada*, Award, First Partial Award, 13 November 2000, 40 ILM (2001) 1408	32
Siemens v Argentina I	*Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), 06 February 2007	
Siemens v Argentina II	*Siemens AG v Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No ARB/02/8, IIC 226 (2004)	10, 28

Siemens v Argentina III	*Siemens AG v Argentina*, Award, 6 February 2007	
SOABI v Senegal	*SOABI v Senegal*, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports 182	6
Starrett Housing	*Starrett Housing Corp., Starrett Systems, Inc. Starrett Housing Int'l, Inc. v Government of the Islamic Republic Of Iran, Bank Mellat,* Interlocutory Award No. ITL-32-24-1, 19 December 1983, Case No. 24, 4 Iran-U.S. Cl. Trib. Rep. 122	25, 27
Suez and Ors	*Suez and Ors v Argentina*, Decision on Jurisdiction, ICSID Case No ARB/03/19; IIC 232 (2006)	9
Tecmed	*Tecmed v United Mexican States,* 29 May 2003, ICSID Case No. ARB (AF)/00/2	37
Tokio Tokeles	*Tokio Tokeles Decision on Jurisdiction*	24
Trippets	*Tipplets, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, the Government of the Islamic Republic of Iran, Civil Aviation Organization, Plan and Budget Organization, Iranian Air Force, Ministry of Defence, Bank Melli, Bank Sakhteman,*	25
Tradex v Albania	*Tradex v Albania,* Award, 29 April 1999, 14 ICSID Review-FILJ (1999) 197	28
Vacuum Salt	*Vacuum Salt Products Ltd. v. Republic of Ghana,* Award, 16 February 1994, ICSID Reports 329,342	6
Flether Claim	*Walter Fletcher Smith Claim* (Us v Cuba), Award, 2 May 1929	
Waste Management	*Waste Management v Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967	37

LIST OF ABBREVATIONS

BIT	Bilateral Investment Treaty
Conveniencia BIT	Treaty between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia concerning the encouragement and reciprocal protection of investments
e.g.	exempli gratia ('for example')
i.e.	id est ('that is')
ICJ	International Court Of Justice
IIA	International Investment Arbitration
IP Office	the Bergonian Intellectual Property Office
FET	Fair and Equitable Treatment
License Agreement	License Agreement between MedBerg Co. and BioLife Co.
MFN	Most Favourated Nation
Tertia BIT	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. Bergonia and Conveniencia are ICSID Contracting States and have ratified the Convention as well as the Vienna Convention.

4. Bergonia and Conveniencia are members of the World Trade Organisation and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights.

5. 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.

6. MedBerg Co. is the owner of Bergonian Patent No.AZ2005, which was granted by Bergonian IP Office on 15 March 2005.

7. MedBerg Co. licensed BioLife Co. to utilize Bergonian Patent No.AZ2005 on 31 March 2005 according to the License Agreement. The contract was terminated on 31 March 2007 by Claimant in accordance to provisions of the License Agreement.

8. The Bergonian IP Office issued a compulsory license for Patent No.AZ2005 on 1 November 2007 for 48 months, ivoking the alleged need to address important domestic medical needs.

9. Six Bergonian companies operating in the same business sector as Claimant were utilizing the Patent No. AZ2005 and IP Office collected royalties from them. None of the domestic companies were pursuant to the measures similar to the ones conducted in case of Claimant's

patent. The percentage royalty rate was significantly lower than the rate that had been in effect under the terms of the License Agreement between MedBerg and BioLife.

10. Between 1 June and 1 November 2007 MedBerg Co. has announced its objections to the Bergonian IP Office. Firstly, MedBerg Co. has announced its objections as soon as it took notice of the commencement of the proceedings connected with issuing the compulsory license. The Claimant refused to accept the arbitrary imposed royalty fees.. The Claimant filled an appeal following the IP Office decision to issue the compulsory license. The appeal was reviewed by the Patent Review Board, which is a quasi-judicial body paid for their service by the Bergonian IP Office.

11. The ICSID commenced arbitration proceedings on 1 November 2008.

PART ONE: JURISDICTION

I. THE CLAIMANT SHOULD BE TREATED AS A NATIONAL OF ANOTHER CONTRACTING STATE (CONVENIENCIA) ACCORDING TO ARTICLE 25(2)(B) OF ICSID CONVENTION.

A. A national of Conveniencia has got control over the Claimant within the meaning of article 25(2)(b) of ICSID Convention.

According to article 25(2)(b) the jurisdiction of the ICSID Convention may be extended to a juridical person which has the nationality of the Contracting State - party to the dispute on the date on which the parties consented to jurisdiction and which, because of the foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of the Convention. This provision plays a crucial role nowadays when the situation in which the host State requires from the foreign investor to establish, for the purpose of carrying out investment, a local subsidiary is common.[1] In the absence of this provision many companies would fall outside the scope of the ICSID Convention.

1. The Claimant exercises control according to the objective foreign control test.

Firstly it should be argued that article 25(2)(b) requires an objective foreign control. ICSID tribunals have permanently examined 'the actual existence of foreign control over the local company'[2]. The Claimant agrees that an agreement on the nationality of an investor creates only a presumption in favor of the existence of foreign control so the existence of it needs to be undoubtedly proved.

In *Amco v Indonesia*[3] the Tribunal recognized the fulfillment of the requirement of the objective foreign control by looking at the nationality of the immediate controller. In *Klockner v Cameroon* the Tribunal stated that 'SOCAME was a Cameroonian company, but subject to the majority control of foreign interest'[4]. In *LETCO v Liberia*[5] the Tribunal also easily recognized that the locally incorporated company was under French control.

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[1] *Jurisdiction Rationae Personae*, p.116.
[2] *ICSID Commentary*, p. 309.
[3] *Amco v Indonesia*,
[4] *Klockner*,
[5] *LETCO*,

2. Claimant is a national of Conveniencia.

Determination of the foreign nationality by the Tribunals has been recognized throughout many cases in different manners especially when they were forced to deal with juridical persons which were controlled by many various foreign companies.[6] In general Tribunals recognize two types of control: direct and indirect control.

What is crucial, after the analysis of the outcomes of those cases it should be stressed that the Tribunals take into account only as close control as it is necessary to establish its jurisdiction.[7] C.F. Amerasinghe suggests that the search of a foreign controller should be continued until foreign control by nationals of a Contracting State can be established.[8]

The very best example of this rule is *Amco v Indonesia* where the Tribunal refused to pierce the corporate veil after it determined the standing of the US company Amco Asia before the Tribunal. In this case the Tribunal:

> '[r]efused to engage in an inquiry regarding the ultimate nationality of foreign controlling party because such an investigation would open the door to an unending examination of the chain of control, and would be both exceedingly taxing on the arbitration process as well as undermine the objects and purposes of the ICISD Convention'.[9]

Moreover, the Tribunal stated that the concept of nationality is based on the law under which the juridical person has been incorporated. Furthermore, there is an exception to this rule in the situation of the foreign control but it does not refer to the nationality of foreign controller.

Therefore, in the present case, on the basis of the article 1 point 3 subsection a) of the Conveniencia BIT, MedBerg Co. is a Bergonian company because of the fact of establishment in Bergonia. However, due to the foreign control exercised by MedX Holdings Ltd, MedBerg Co. should be treated as a company of Conveniencia. At the same time, according to the abovementioned *passus* from the *Amco v Indonesia,* it is not necessary to pertain to the second- grade controllers like MedSience Co. and Dr. Frankensid.

[6] *Klockner, Autopista II, Amco v Indonesia, CME I*
[7] *Investor-State Arbitrator,* p. 319.
[8] *Amerasinghe,* p. 236.
[9] *Investor-State Arbitration,* p. 321

In *SOABI v Senegal* the Tribunal, only seemingly, made a contradictory decision. In that case the Tribunal did not stop at the first grade of control and went further to the second grade of control. However, in this case the immediate controller of the juridical person in question was not a company of Contracting State and that is the only reason why the Tribunal accepted to appeal to the indirect control to establish his jurisdiction.

The present case is different from the *SOABI v Senegal* because the first grade controller is MedX Holding Ltd which is a company of Contracting State, therefore there is no reason for appealing to the second grade controller like it was in *SOABI v Senegal* case.

Also *CME Czech Republic BV v. Czech Republic* case illustrates the tendency of the Tribunal to end the jurisdictional analysis as quickly as it is possible, i.e. immediately when it recognized the entity with standing.

In instant case MedBerg Co. (a juridical person locally incorporated in Bergonia) is completely controlled by MedX Holding Ltd (a juridical person established in Conveniencia). It is clearly viewed that MedBerg Co. should be treated, because of the foreign control, as a Conveniencia company. The Tribunal should pierce the corporate veil and look at the controller of the MedBerg Co. which is, in fact, MedX Holding Ltd.

Accordingly, there is no need to go further in order to establish the jurisdiction. Such a step would be pointless in the light of the nationalities of the shareholders of the MedX Holding Ltd. It would be impossible for the Tribunal to establish his jurisdiction on the basis of nationalities of the second- grade controllers.[10]

MedScience Co., which owns 50% shares of MedX Holding Ltd, is incorporated in Laputa, the country which is not an ICISD Contracting State. What is more the second shareholder of MedX Holding Ltd is Dr. Frankensid who has got dual nationality of Amnesia and Bergonia. (the host State). It should be stressed that article 25(2)(a) of ICSID Convention explicitly excludes dual nationals in the situation where one of the nationalities is the nationality of the host state, therefore it is clear that from this point of view the jurisdiction could not be establish either.

[10] *CME I*

It should be also stressed that there is a link between the fact of foreign control and the agreement to treat the investor as a national of another Contracting State by the word 'because'. This connection implies that the nationality of the foreign controllers should be the same as the agreed nationality.[11]

The article 25(2)(b) does not explicitly state whether the nationality of the foreign control should be the one of the another Contracting State or any other state, even non the Contracting one. It is only obvious that the control cannot be exercise by the host State. However, from the purpose of the ICSID Convention it can be inferred that only foreign control by nationals of other Contracting States is acceptable.[12]

That is why it would be unreasonable to accept a control exercised by Laputa's or Amnesia's nationals as neither of them is a Contracting State. Also in *SOABI v Senegal* the Tribunal had no doubts that the foreign control had to be exercised by nationals of the Contracting States.[13]

3. Claimant's form and extent of the control exercised over MedBerg Co. is sufficient according to article 25(2)(b).

The third element is the accurate form and extent of the control which can be based on different factors, e.g., voting rights, decision- making procedure, exercise of management, or last but not least capital or share ownership.

In many cases the Tribunal stated that the capital or share ownership criterion can be decisive in some circumstances, especially in a situation of overwhelming majority control of foreign interest.[14]

In present case there is a very similar situation to the *SOABI v Senegal* case. The MedX Holdings Ltd has got also 100% of the share ownership in MedBerg Co. that is why the criterion of the objective control is fulfilled. In *Vacuum Salt v Ghana*[15] the Tribunal assumed that '100 percent foreign ownership almost certainly would result in the foreign control'. Also in *Cable TV v St. Kitts and Nevis*[16] the

[11] *ICSID Commentary*, p. 313.
[12] *ICSID Commentary* p. 313;
[13] *SOABI v Senegal*
[14] See for instance the *SOABI v Senegal*
[15] *Vacuum Salt, para 43.*
[16] *Cable TV*

Tribunal established the US control because of the ownership of 99,9% percent of shares by nationals of United States.

The Award in the *LETCO v Liberia* also supports this contention. The Tribunal found that in the situation where foreign control exists, the agreement to treat the company as a foreign national is because of this foreign control. It means that the objective fact of foreign control, the host state's awareness of the latter and a valid consent to ICSID jurisdiction are all of the requirements from the article 25(2)(b) which need to be proved in order to establish the jurisdiction of the Tribunal.[17]

Claimant stresses that all of the aforementioned requirements are fulfilled. The objective fact of foreign control has been already proved, article 10 subsection 1 Conveniencia BIT included a valid consent to ICSID jurisdiction and last but not least, as the ownership structure of the MedBerg Co. was available in the Bergonian corporate registry at all times[18] one can presume that Bergonia must have been aware of the fact of the foreign control exercised by MedX Holdings Ltd.

B. ***The Respondent consented to treat Claimant as a national of Conveniencia according to article VI.8 of Tertia BIT***

The fourth element of article 25(2)(b) is the existence of an agreement to treat a juridical person which has the nationality of the Contracting State, because of the foreign control, as a national of another Contracting State, for the purposes of the Convention.

It should be stressed that Convention does not require any specific form for this agreement.[19] In general, tribunals demand the agreement to be explicit but on the other hand in *Holiday Inns v Morocco* [20] the tribunal accepted an implicit agreement as well. It can be said that 'ICSID tribunals are readily prepared to accept even implicit agreement'[21] between the parties to treat a juridical person which has the nationality of the host state as a national of another Contracting State because of foreign control.

The Respondent consented to treat Claimant as a national of Conveniencia according to article VI..8 of Tertia BIT of which all requirements are fulfilled, it means:

[17] *ICSID Commentary*, p. 310.
[18] *Clarification, Q. No*. 59.
[19] *ICSID Commentary*, p. 294.
[20] *Holiday Inns*
[21] *The Oxford Handbook*, p.78.

a) MedBerg Co. is legally constituted under the law of Bergonia,

b) just before the occurrence of the event which gave rise to the dispute MedBerg Co. had been an investment of the company of Conveniencia,

that is why MedBerg Co. should be treated as a national of Conveniencia according to article 25(2)(b) of the ICSID Convention.

The Claimant would like again to underline, that the requirement from the foreign investor to establish a local company is common nowadays, and on the other hand routing an investment through a third- party to gain protection of a BIT is not only not forbidden, but can be described as a legitimate practice.[22] That is why it can be even said that corporations should receive protection even when the relevant Contracting State is merely that of Contracting State of convenience. It should be stressed that 'nationality planning or 'treaty shopping' is not illegal or unethical as such'[23], therefore even if MedBerg Co. would be only a company of convenience Bergonia is not entitled to deny the protection based on the Conveniencia BIT.

C. The Claimant can invoke article VI.8 of Tertia BIT on the basis of article 3 of Conveniencia BIT (MFN clause).

Parties include MFN clauses in treaties to ensure that each party will treat another in a manner at least as favourable as it treats any other party.[24] MFN clause is a 'source of international obligations other than those explicitly included in the basic treaty'.[25]

It has been argued that MFN clause can be applied not only to the substantive standards of investment protection but also to procedural rights of the investor-to-state dispute settlement.[26] There is no consistent line of jurisprudence on this issue but one has to admit that ICSID tribunals generally tend to apply the MFN clause to procedural issues.

There are numerous cases in which tribunals espoused the extension of application of the MFN clause to procedural rules. One of the very good example of this phenomenon is a cornerstone case *Maffezini v*

[22] *Investor-State Arbitrator*, p. 331.
[23] *Schreuer*, p.55.
[24] *Schreuer*, p.186.
[25] *Standards of Investments Protection*, p.64.
[26] *Standards of Investments Protection*, p.85.

Spain[27] where the Tribunal stated that the application of MFN clause is not limited only to substantive or material aspects but also to procedural and jurisdictional matters. The approach adopted by the Tribunal in that case has been followed in many subsequent cases, e.g., *Camuzzi v Argentina, AWG Group Ltd v Argentina, Suez, Sociedad General de Aguas de Barcelona S.S, Vivendi Universal S.A v Argentina*[28].

As the tribunal stated in *Maffezini v Spain*:

> '[n]otwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce'[29].

However, to apply the MFN clause the so- called *ejusdem generis* (of the same kinds, class or nature) principle has to be fulfilled. In present case this condition is completed for the reason that Conveniencia BIT has got the same subject matter as Tertia BIT.[30]

In another significant case *Gas Natural v Argentina* the tribunal stated that:

> '[a]ssurance of independent international arbitration is an important — perhaps the most important — element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement'[31].

In this case the Tribunal also found a broad application of MFN clause which explicitly invokes 'all matters' which covered also dispute settlement.

There are many different types and versions of MFN clauses which are adopted in treaty practice. In the present case, article 3 of Conveniencia BIT includes quite detailed wording. The MFN clause comprises of seven subsections which deal with various circumstances.

In the present case Claimant invokes on the second subsection of the MFN clause.

> '(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

[27] *Maffezini II*
[28] *Camuzzi v Argentina, AWG Group Ltd, Suez and Ors*
[29] *Maffezini II*, para. 54.
[30] *Standards of Investments Protection*, p.74.
[31] *Gas Natural v Argentina* , para. 49.

> favourable than it accords to its own investors or to investors of any third State, whichever is more favourable to the investors.' [32]

Also in instant case, like in *National Grid v Argentina* [33] the MFN clause does not explicitly refer to dispute settlement. However, dispute resolution is not also enumerated among exceptions to the application of the clause.

In the absence of such exclusion Claimant contends that there is no convincing reason to distinguish between substantive standards and dispute settlement provisions. It is difficult to justify, in the light of treaty interpretation rules, why a broadly formulated MFN clause which refers to the very general notion of 'treatment' should only apply to substantial matters, but not to dispute settlement issues. [34]

Like it was said in *National Grid v Argentina*[35] the tribunal is obliged to interpret the treaty in accordance with article 31 of Vienna Convention.[36] Specifically treaty needs to

> "[b]e interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

Therefore it is clear that the most important is the intention of the parties which is enclosed in the text of the particular treaty.

According to textual rule of interpretation *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) items which are not on the list are assumed not to be covered by the statute. Therefore it can be said, that as in *National Grid v Argentina*[37] the MFN clause in Conveniencia BIT is meant to operate in all areas except those explicitly excluded. This means that clause should also be applied to jurisdictional matters.[38] It is clear that it was also the intention of Bergonia and Conveniencia.

It is really important to remember that MFN clause 'allows borrowing treaty provisions from other treaties or possibly State practice regarding third States' [39], like in *Siemens v Argentina*[40] where the Tribunal allowed the investor to choose, among other agreements, dispute settlement provisions which

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[32] Conveniencia BIT
[33] *National Grid*
[34] *Schreuer*, p.257.
[35] *National Grid*, para. 80.
[36] *Vienna Convention*, Article 31.
[37] *National Grid*
[38] *Schreuer*, p.188.
[39] *Standards of Investments Protection*, p.64.
[40] *Siemens v Argentina II*, para 116.

were more favourable for him. That is why also in this case the Claimant is entitled to invoke Article VI.8 of Tertia BIT.

D. The Respondent cannot invoke the article I.2 of Tertia BIT (denial benefit clause) because of the lack of fulfillment of the requirements.

Many countries in order to avoid the process of nationality planning or 'treaty shopping' include in the treaties the so-called denial of benefits clauses. It was the case also in Tertia BIT where this type of clause is included in article I.2.

Claimant submits that Bergonia cannot invoke this provision in the present case in order to deny benefits, especially the application of article VI.8 of Tertia BIT, because the requirements set in Article I.2 of the Tertia BIT are not fulfilled.

First of all, Claimant contends that MedBerg Co. is a company established in Bergonia and because of the place of incorporation it is a Bergonian company.

Furthermore, MedBerg Co. on the basis of control which is exercised by MedX Holding, a company incorporated in Conveniencia, should be treated as Conveniencia company.

Because of the fact that Conveniencia and Bergonia do maintain normal economic relations of which the very best example is BIT concluded between these two States, Bergonia cannot deny Conveniencia advantages of the Tertia BIT.

CONCLUSION ON JURISDICTION

On the basis of the arguments presented the Claimant respectfully contends that this Tribunal has jurisdiction to hear the dispute. All the conditions required to apply the Article 25(2)(b) of the ICSID Convention are satisfied because Conveniencia has got control over MedBerg Co. within the meaning of this article. Moreover, Respondent consented to treat Claimant as a national of Conveniencia on the basis of Article VI.8 of Tertia BIT which Claimant is entitled to invoke because of the MFN clause expressed in article 3 of Conveniencia BIT. Finally, Respondent cannot deny benefits from the Tertia BIT because the requirements from article I.2 of Tertia BIT are not fulfilled.

PART TWO:MERITS OF THE CLAIM

II. THE CLAIMANT'S EXPLOITATION OF ITS INTELLECTUAL PROPERTY RIGHTS IN BERGONIA CONSTITUTED AN INVESTMENT UNDER APPLICABLE INTERNATIONAL LAW.

A. The exploitation of the intellectual property rights constitutes a protected investment under Article 1 of the Conveniencia BIT.

1. There is no legally binding general definition of investment under ICSID Convention nor under any other rule of international law

According to Article 25 (1) of the ICSID Convention, to bring the case before the ICSID Tribunal such case has to arise 'directly out of investment'. However, the Convention does not provide for any legal definition of the notion of investment. The history of the drafting of the ICSID Convention shows that there were some unsuccessful attempts to limit that notion. It is however commonly accepted that this lack is intentional[41]. The primary goal of the Convention`s drafters was to leave maximum flexibility to the parties of the dispute.[42]

Taking into account this lack of any valid general definition of investment, what is required is the valid consent of the parties to the dispute to treat the particular activity as an investment for the purposes of the ICSID arbitration.[43] Such an interpretation is confirmed by ordinary meaning, context as well as the object and purpose[44] of the Article 25 of the ICSID Convention.

The jurisprudence of Arbitral Tribunals confirms that the key factor is the consent of the Contracting Parties. Such a view is confirmed e.g. by the *MHS v Malaysia II*[45], *CSOB v Slovakia*[46], *Mihaly v Sri Lanka*[47], *Philippe Gruslin v Malay*sia[48] and *IBM v Ecuador*[49].

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[41] *The Concept of Investment*, p. 257.
[42] *ICSID Commentary*, p. 124.
[43] *The Concept of Investment*, p. 257.
[44] *Vienna Convention*, Article 31.
[45] *MHS v Malaysia II*, para 68.
[46] *CSOB v Slovakia*, para 67-68.
[47] *Mihaly v Sri Lanka*, paras 375-381.

In the annulment decision in the *MHS v Malaysia II* the Committee unequivocally stated that the – 'Consent of the parties is the cornerstone of the jurisdiction of the Centre'. [50] The creation of definition of an investment is the task of the Contracting Parties. As one of the commentators stipulates:

> '[t]he consent of the parties required in Article 25(1) can be expressed in a variety of written instruments. Moreover, the offer to arbitrate may be contained in one type of written instrument, the acceptance in another.'[51]

This line of argument can be also found in decisions in *Gruslin v Malaysia*[52] and *Azurix Corp. v Argentina*[53].

2. The Claimant's exploitation of the intellectual property constitutes an investment according to Article 1 of the Conveniencia BIT

In present case both Contacting Parties – Bergonia and Conveniencia are the Parties of the ISCID Convention and by this both have agreed for the Centre`s jurisdiction.

The Parties indicate conditions of investment in treaties by giving consent to consider particular sort of activity as an investment.[54] Accordingly, in the Article 1 of the Conveniencia BIT Contracting Parties adopted a very broad definition of the protected investment. This definition is not exclusive. Such a definition is a common feature of the IIA's and can be described in accordance with the so-called all-assets approach. In the present case the Claimant's activity concentrated on health-related products and the dispute between Claimant and Respondent focuses on the exploitation of the Bergonian Patent No. AZ2005. The Claimant draws the attention to the fact, that this kind of activity is expressly mentioned in the Conveniencia BIT. Hence, this is uncontested fact that the Claimant's activity constituted protected investment.

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[48] *Gruslin v Malaysia*, sec. 13.1-13.2.
[49] *IBM v Ecuador*, paras 11-18.
[50] *MHS v Malaysia II*, para 70; *Fedax v Venezuela*, para 21.
[51] *Aguas v Bolivia*, para 75.
[52] *Gruslin v Malaysia*, sec.13.6.
[53] *Azurix Corp. v Argentina*, para 56.
[54] *Krishan*, p. 27.

B. Assuming the objective meaning of the concept of investment, the Claimant's activity still has to be treated as investment for the purpose of the present arbitration.

1. The tribunal is not bound by the decisions of the previous tribunals

The notion of the investment under ISCID Conventions is very controversial. It is noteworthy that there is no uniform line of jurisprudence in this regard. The Tribunals in respective cases present different approaches to features of investment. Also the doctrine is equivocal on that issue.[55] The Claimant underlines that the Tribunal in the present case is not bound to follow any of the previous decisions.[56] Each dispute is specific because of the separate facts and the doctrine of *stare decisis* is not applicable in the international arbitration. Hence, the Tribunal has to take into account the whole factual background and interpret the provisions of the Washington Convention and other norms binding parties to the dispute according to the proper rules of interpretation.

2. The Claimant's activity constitutes an investment in the light of the Article 31 of the Vienna Convention on the Law of Treaties

Vienna Convention[57] is one of the basic documents stipulating rules about contracts between parties. Both Bergonia and Conveniencia are parties to the *Vienna Convention*[58]. The interpretation of each treaty should be based on the ordinary meaning of the terms used within their context as well as the object and purpose of the treaty. The ordinary meaning of term investment could be found, e.g., in The Economist Dictionary of Economics (2003) p. 203:

> '[I]nvestment" - "capital formation (e.g. the production or maintenance of machinery or the construction of dwellings) that will produce a stream of goods and services for future consumption. Investment involves the sacrifice of current consumption and production of investment goods that are used to produce commodities and includes the accumulation of inventories.'[59]

As to the object and purpose of the Washington Convention, one should look at the Preamble, which confirms as the one of the considerations:

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[55] *Krishan,* p. 5.
[56] *AES Corp. v Argentina,* para 23.
[57] *Vienna Convention,* Article 31.
[58] *Clarifications, Q. No 108.*
[59] *Krishan,* p. 27.

> 'the need for international cooperation for economic development, and the role of private international investment therein'.

In present case the Parties agreed for the specific definition of investment and included this notion into the Conveniencia BIT. This definition could be described in accordance with the so-called all-assets approach and is resembling the definition mentioned above. The object and purpose of the BIT can also be found in the Preamble, which focuses on the economic co-operation between both countries and creating favourable conditions to increase investments in its territory. Accordingly, the interpretation of the BIT should take into account the aim to create favourable conditions for investments.

Therefore, there is no room for limiting the notion of investment by any objective criteria such as those adopted by the Tribunal in the *Salini v Morocco* . Certain World Bank officials pointed out that the objective understanding is needed only in two situations:

> '[f]irst, when the parties have not made any agreement defining investment; and second, when the parties have made an agreement but the underlying transaction is manifestly or obviously not an investment.'[60]

Accordingly, in the current case this circumstances are not relevant.

C. The Claimant's activity constitutes an investment even if the so-called Salini test would be applied

1. <u>The activity of MedBerg Co. is an investment in the light of the Salini Criteria.</u>

Even though the so-called Salini test is widely criticized, the Claimant's activity meets the essential features.[61] This test had been adopted by the Tribunal in *Salini v* Morocco and consists of the following elements.:

1. a certain duration,
2. regularity of profit and return,
3. an element of risk
4. contributions of resources,
5. a contribution to the host State's development.[62]

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[60] *Krishan*, p.11.
[61] *The Notion of Investment*, p. 260.
[62] *Salini v Morocco*, para 52.

As Ch. Schreuer stated:

> '[t]hese features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.'[63]

The Tribunals not always strictly follow this features, e.g., in *L.E.S.I S.p.A v Algeria* the Tribunal considered only three attributes: a contribution of the resources, a certain duration and an element of risk.[64] As the Tribunal in *MHS v Malaysia I*[65] noticed, there is no basis for rote, or overly strict, application of the five Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. Moreover, there is no commonly accepted hierarchy between those features..

i. The Claimant's activity fulfilled the criterion of duration.

The Claimant, MedBerg Co., was established in Bergonia on 30th of January 2004. The scientist employed by MedScience Co., Dr. Frankensid, credited several patents including Bergonian Patent No. AZ2005. Claimant applied for a patent in relation to Dr. Frankensid invention on 5th of February 2005. It licensed BioLife Co., a Bergonian Company, to utilize Bergonian Patent No. AZ2005 on 31st of March 2005. Claimant terminated the License Agreement to 31st of March 2007. The Bergonian IP Office issued a compulsory license for Patent No. AZ2005 on 1st of November 2007. There is information that Bergonian companies were using Patent No. AZ2005 at least to 1st of January 2009.

This set of facts can be perceived in three ways. First, it could be said that the investment lasted three years and three months, taking into consideration period of time from setting the company to the termination of agreement of using the patent. Second,, one can argue that the investment was held from the establishment until the use of patent in 2009, so the investment lasted five years. Finally, the different method is counting only the period between registration of the patent and the termination of the agreement, so the investment lasted two years.

The latest idea is acceptable, as usually the exploitation of the intellectual property takes place from the registration to the termination of the validity of the patent. Thus, the investment`s duration is two, three or five years. As the ICSID Convention does not provide us with any strict rule on the duration of an investment, there is no clear-cut criteria for the fulfillment of that condition.

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[63] *ICSID Commentary*, p. 140.
[64] *Phoenix v Czech Rep*, para 84.
[65] *MHS v Malaysia I*, para 70-72.

In the present case the actual exploitation of the intellectual property rights lasted for two years, but one has to take into consideration that to set up intellectual property rights of economic value there must be a company, employees and the activities of the company. Dr. Frankensid worked for MedScience Co. from the establishment of the company and he made his invention on behalf of the Company one year later. Therefore, one could say that he was using his invention from 2004, no matter when the license was imposed.. On the other hand, after the termination of the agreement, the intellectual property right of the Company was still exploited by Bergonian companies. Accordingly, the investment lasted for five years. Thus, the duration requirement has been fulfilled.

ii. The Claimant's activity fulfilled the criterion of regularity of profits and returns

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.[66] Moreover, the Tribunal in *MHS v Malaysia I* admitted that he feature of regularity of profits and returns is not a decisive one.[67]

In spite of this, one has to agree that in fact there were regular profits and returns, because of the permanent activities of the company, which are ongoing since 2004. As the regularity of profits and returns is the common consequence of the duration of the company, one has to consider, that this criteria should not be treated too literally. In the present case, BioLife Co., a Bergonian company, had to pay royalty to Claimant for the use of its patent. The License Agreement lasted for two years and in this period of time the MedBerg Co. was receiving regular income of money. Therefore, the second requirement of the Salini test has been fulfilled.

iii. The Claimant's activity fulfilled the criterion of the assumption of risk

[66] *The Notion of Investment*, p. 458.
[67] *MHS v Malaysia I*, supra note 76, para 108.

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.[68]

As the market is not predictable, each entrepreneur incurs several kinds of risk. According to S. Manciaux:

> '[I]t 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.)'[69]

The risk starts with the establishment of acompany and follows through development of an enterprise. There is always a fear that the planned capital expenditure will not bring expected profits, or even will not return. It is common that businessman has to involve a lot of various assets, beginning with money capital, through employing people, to contract agreements. The risk is common, because if the investment did not operate as expected, the entrepreneur could stand at the verge of collapse. Nevertheless, if the company pass test on a start, there is not straight way to make a success. Thre is also another kind of risk, maybe less visible one, but worse in results. The entrepreneur faces all kinds of threat to its company, such as compulsory license or expropriation. Moreover, it is also a political risk that the investor has to assume. Some political events in the host State, such as internal turmoil, conflicts could diminish the profitability of the enterprise.

Some Tribunals distinguish another types of risk of more economic character, e.g., the risk of change in production costs, of a warranty period, of a work stoppage, which separate an investment from normal commercial activity.[70]

In present case the Claimant – MedBerg Co. came across all abovementioned kinds of risk. The MedBerg Co. could not predict results of License Agreement and future of the Patent AZ2005. Accordingly, the activity of Claimant meet third of the Salini test's criterion.

iv. The Claimant's activity involved the contribution of resources

[68] *The Notion of Investment*, p. 455.
[69] *The Notion of Investment*, p. 455.
[70] *The Concept of Investment*, p. 270.

The jurisprudence distinguishes between several types of assets, which could determine the existence of an investment. This includes equipment, human resources and financial resources.[71] Doctrine points to the list of typical rights treated as contribution: traditional property rights, participation in companies, money claims and rights to performance, intellectual and industrial property rights, concession or similar rights. [72]

The line of jurisprudence shows that contribution could be divided in two larger groups: material assets (such as financial resources, equipment) and immaterial assets (such as intellectual property rights, concession).

In case *Bayindir v Pakistan* the Tribunal noted that assets in know-how, equipment, personnel, finance, shares or other kind of participation in company[73] could be treated as sufficient contribution.[74] In the present case in Article 1 of the Conveniencia BIT there is a definition of protected investment agreed by Contracting Parties. The definition of an investment contain examples of assets and the intellectual property rights is expressly included.

Accordingly, the Claimant invested in intellectual property, exactly in exploitation of Patent AZ2005, which was health-related product, and which was invented by Dr. Frankensid on 5 February 2004. The MedBerg Co. is the owner of the abovementioned patent and is entitled to use it. One of the methods of using the intellectual property rights is rendering them accessible for other entrepreneurs in exchange for royalties. Hence, the Claimant licensed Biolife Co. to utilize the Patent AZ2005. The Bergonian Patent was the most relevant contribution and indeed a very substantial one. Besides, the Claimant made a contribution by providing MedBerg Co. with the equipment, personnel, finance resources and utilize them to develop enterprise. Without those assets, there would not be the Patent AZ2005.

v. The Claimant's activity contributed to the host State's development is fulfill.

According to Ch. Schreuer, the requirement of the "contribution to the host State development" is the only objective criterion proceeding directly from the Preamble to the ISCID Convention.[75] This basic

[71] *The Notion of Investment*, p. 460; *Salini v Morocco*, para 52.
[72] *ICSID Commentary*, p. 129.
[73] *Phoenix v Czech Rep*, para 121.
[74] *Bayindir*, supra note 73.
[75] *ICSID Commentary*, p. 140.

document in the first sentence of its Preamble indicates that contribution to the economic development of a host State is the most important and is the cause of establishment of this act. Although, according to the Claimant this is kind of overstatement, it argues that this requirement has also been fulfilled in the present case.

There is no uniform line of argument as to what constitutes a significant contribution. One could accept that there is no need to look into the investor`s motivation Frequently foreign investments are not destined to satisfy the direct needs of Host State, so investors participate indirectly in the economic development of the host State.[76] The typical investor is an entrepreneur so he aims at the development of his own business.

In the present case the Claimant participated in the economic development of Bergonia. The MedBerg Co. is he owner of the Patent AZ2005, the product related with health. The Patent AZ2005 was an invention of Dr. Frankensid and contained innovative medical technology. The patent covers a breakthrough treatment useful for treatment obesity, which has been a serious problem among a large population group in Bergonia (response to Request No.65 – 34% of males and 38% of females are obese)[77]. The Patent AZ2005 has significant role in the development of health care in Bergonia. This fact is confirmed by the Bergonian Intellectual Property Office by imposing a compulsory license and in statement of the IP Office that technology covered by the Patent AZ2005 is needed to address important domestic medical needs. The economic development follows the medical one. The State commenced to behave as proprietor by starting to utilize the patent, and in consequence draw the economic benefits from using the invention. Moreover, Bergonia pursued its economic development directly by exporting the products covering Patent AZ2005.
Accordingly, the Claimant submits that MedBerg Co. significantly participated in economic development of Bergonia.

CONCLUSION ON THE EXISTENCE OF THE PROTCTED INVESTMENT

The activity of MedBerg Co. was protected investment under the Conveniencia BIT and in the light of Article 25 of ICSID Convention. Hence, the ISCID Tribunal could hear the dispute.

[76] *The Notion of Investment*, p. 458.
[77] *Clarifications, Q. No. 65.*

III. THE COMPULSORY LICENCE AMOUNTS EITHER TO EXPROPRIATION OR DISCRIMINATION IN VIOLATION OF THE APPLICABLE INTERNATIONAL LAW

A. Acts taken by Bergonian Intellectual Property Office are attributable to the state of Begonia.

The compulsory license which effected in indirect expropriation of the Claimant's investment is attributable to the Respondent State. The IP Office is a Bergonian organ whose competence covers issuing compulsory licenses. The decisions made by the Bergonian IP office are attributable to the State of Bergonia.

Articles of State Responsibility applies to all cases where a state may have committed an internationally wrongful act.[78] It covers *all* international obligations of the state, including those owed not only to the states, but also to other *parties*[79], including the Claimant as an alien investor.

Article 4 subsection 1 of the *Articles of State Responsibility* indicated by the ICJ as reflecting international customary law[80], presents the universal definition of the responsibility of the State for the conduct of its organs and is a basic principle of attribution[81]:

> '[T]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.'[82]

This provision stipulates that the conduct of *any* state organ[83] shall be considered as an act of that state under international law and this applies irrespective of the position the organ holds in the state organization[84] (structural test) and it is not always sufficient to look at the internal law of the state to determine the status of a state organ.[85]

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[78] *Hobér*, p. 552.
[79] *Crawford*, p. 192-193.
[80] *See Crawford.*
[81] *Hobér*, p. 555; *see* also *Eureko v Poland*, para 127.
[82] *Articles on State Responsibility*, article 4. (1).
[83] *Ibidem.*
[84] *Hobér*, p. 551.
[85] *Ibidem*, p. 555.

Functional test of the IP Office shows that it *in fact* exercises governmental authority thus it is classified as an state organ for the purposes of attribution.[86] In other words, just because IP Office was not expressly characterized as a 'state organ' it does not mean that it is not a state organ for the purposes of attribution.[87]

Moreover the state of the Respondent cannot avoid responsibility for the activities of IP Office simply by denying it status under its own law.[88] Since article 27 of the *Vienna Convention* states:

> '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.'[89]

The organ of State is defined in subsection 2 of the abovementioned article 4 *Articles on State Responsibility* as including 'any person or entity which has that status in accordance with the internal law of the State.'[90] The Bergonian IP Office is an organ empowered to exercise the Intellectual Property Law of Bergonia which was entered into force in 1997. It stays beyond doubt that it falls 'within the scope of this provision.'[91]

Even if the IP Office would not be considered by the Tribunal as an organ of a state the *Articles on State Responsibility* also regulate the *conduct of persons and entities* which are not organs of a State, but which are empowered by municipal legislation to exercise elements of the governmental authority.[92] The conduct of such organs is also considered as an act of a State and thus attributable to it under international law, provided the entity is acting in such a capacity in the particular situation.[93] The IP Office exercised elements of governmental authority when issued a compulsory license justifying this decision by invoking the domestic medical needs.

Reading article 4 together with article 1 of the *Articles of Responsibility* leads to a conclusion that Bergonia is fully responsible for the acts and omissions of the IP Office under international law.

Additionally it has been found that:

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[86] *Ibidem*, p. 556.
[87] *Crawford*, p. 98.
[88] *Hobér*, p.555.
[89] *Vienna Convention*, article 27.
[90] *Articles on State Responsibility*, article 4 (2).
[91] *Attribution of Conduct in Peace Operation*.
[92] *Articles on State Responsibility*, article 5.
[93] *Articles on State Responsibility*, article 12, See also *Hobér*, p. 551.

> '[t]he State can act only through individuals, whether those individuals are organs or agents or are otherwise acting on behalf of the State.'[94]

These standards have evolved and been applied in the context of the law of State responsibility in the field of the foreign investment.[95] Here, the test that has been developed focuses on various factors, such as the ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken.

The tribunal in *Maffezini v Spain*[96] applied both structural and functional test. Referring to the functions of SODIGA the arbitrators included processing loan applications with respect to public resources providing guarantees for such loans. Tribunal performed functional test not only for the purposes of attribution but also in determining the responsibility of the state. It stated in jurisdictional decision that:

> '[M]any of these objectives and functions are by their very nature typically governmental tasks […] and therefore, cannot normally be considered to have commercial nature.'[97]

The same result may be obtained if an entity is controlled by the State, either directly or indirectly. The similar presumption arises if an entity's purpose or objectives include carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.[98]

An additional test has been developed, a functional test, which looks to the functions of or the role to be performed by the entity.[99] The IP Office is an organ whose actions are said to be in favor of the people of Bergonia. The compulsory license issued by this Office was said to be for public needs. The functions performed by the Office is a role of a state not of a private entity.

Therefore contrary to the conclusion made by the tribunal in *Maffezini case* the IP Office was discharging a public function so its particular activity can be attributable to the Respondent.[100]

Similarly to SODIGA in *Maffezini case* the Bergonian IP Office was performing number of functions, not normally performed by commercial companies (such as collecting royalties).

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[94] *ILC Addendum to the First Report*, para 150.
[95] *Impregilo*, para H390.
[96] *Maffezini II*, para. 89.
[97] *Maffezini II*, para 86.
[98] *Maffezini II*, para 77.
[99] *Maffezini II*, para 79.
[100] *Maffezini I*, para 62.

Another aspect of attribution was raised in *Sallini v Morocco case*. The tribunal faced with the problem if Societé Nationale des Autoroutes du Maroc (ADM) was a state entity. It applied functional test and came to the conclusion that ADM was acting in the name of the state[101] since ADM's main activity was the construction, maintenance (…) granted by the state.[102]

In *Nykomb v Latvia* case the tribunal faced the issue whether there should be full attribution in the sense that the state was responsible for the double tariff agreement between the investor's domestic subsidiary.[103] It admitted right of a Claimant that any conduct that was not 'merely commercial', but had s significant element of governmental function (IP Office decision did have), should result in attribution.

All acts taken by the Bergonian IP Office rest directly with the Respondent. The IP Office is not a private company, whose acts would not attributable to the state.[104] Thus, the state is responsible for all the acts of its organs regardless of 'whether or not they have separate legal personality under its internal laws'[105] and even more, that

> '[i]t is irrelevant for the purposes of attribution that the conduct of a state organ may be classified as *commercial* or as *acta iure gestionis*.'[106]

The activity of MedBerg Co. was protected investment under the Conveniencia BIT and in the light of Article 25 of ICSID Convention. Hence, the ISCID Tribunal could hear the dispute

B. The compulsory license violated article 4(2) of the Conveniencia BIT which protects investors against direct or indirect expropriation.

1. The compulsory license constitutes an expropriation under article 4(2) ob Conveniencia BIT

Conveniencia BIT in article 4(2) provides:

> '[I]nvestments 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.'

[101] *Sallini v Morocco*, para 35.
[102] *Ibidem*, para 33., *See* also *Tokio Tokèles*, paras 45-6.
[103] *Hobér*, p. 555.
[104] Contrary to *Maffezini I*, para. 45.
[105] *Eureko v Poland*, para 131.
[106] *Eureko v Poland*, para 129.

i. The compulsory license amounted to the indirect expropriation within the meaning of article 4(2) of the Conveniencia BIT and general international law

Expropriation, also known as *emitent domain*[107] in common law, is the taking by a government of privately owned property and effectively neutralized enjoyment of it[108]. Such *taking* has occurred in the Republic of Bergonia with regard to the Claimant's property. Governmental authorities of the Respondent took measures which interfered with property rights to such an extent that these rights were rendered useless[109] and deprived the investor of all meaningful benefits.[110]

Conveniencia BIT in article 4(2) forbade the Respondent to take steps which would have an effect[111] of expropriation (direct or indirect) or be tantamount to it. Issuing a compulsory license was a measure which indirectly expropriated Claimants property.

As a matter of fact, in the modern world of the law of expropriation, the question is not so much whether the requirements of a legal expropriation have been met, but rather whether it has occurred in the first place. [112] Direct expropriations, i.e. open taking of foreign property, has become less frequent in last few decades. States, such as the Respondent, became more aware that such drastic steps may attract negative publicity and make damage to the reputation of a host state. Hence, the typical form in which states acts today is that of an 'indirect expropriation'.[113]

Definition of the indirect expropriation provides that an indirect expropriation leaves the investor's legal title not affected[114] but deprives him of the possibility to utilize the investment in a meaningful way.[115]

After the Bergonian IP Office issued a compulsory license for Patent No. AZ2005 on 1 November 2007 the Claimant was deprived of the right to use its investment. Six commercial companies which received

[107] *Investor-State Arbitrator*, p. 429.
[108] *Lauder v Czech Republic*, para. 200; *see* also *CME II*.
[109] *Starrett Housing*, § IV(b).
[110] *Marvin Feldman*, para. 100.
[111] *Principles of Public International Law*, p. 508-09.
[112] *The Concept of Expropriation*, p. 108, 111.
[113] *Indirect Expropriation* p. 150.
[114] *Tipplets*, para. 219.
[115] *Schreuer*, p. 92.

compulsory license, used it for commercial purposes[116] on the territory of Bergonia and exported some of the products to other countries.

The term 'indirect expropriation' was defined by the Tribunal in *Metalclad v Mexico Case*. Indirect expropriation was described as:

> '[a]n interference with the use of property, which has the effect of depriving the owner in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.'[117]

Reliance on this definition allows the Claimant to define the compulsory license issued by Bergonian IP Office as a form of indirect expropriation.

The compulsory license ought to be treated as an indirect expropriation since it is not the physical invasion of the property which characterizes nationalizations or expropriations but rather the erosion of the rights associated with the ownership by state interferences. [118]

The Claimant's investment lost its economic viability. The important rights that determine its profitability were extinguished. That situation was the result of the administrative decision of the Bergonian IP Office.

In *Middle East Cement v Egypt* case the tribunal decided that a license can be qualified as an investment when 'the measures that prevented the exercise of the right under it amounted to expropriation.'[119]

The tribunal also confirmed in more recent *CME v Czech Republic case* that:

> '[e]xpropriations or indirect expropriations, i.e. measures that do not involve overt taking but that effectively neutralized the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law.'[120]

The decision of the IP Office constituted an indirect expropriation since the measures had 'substantial effects of an intensity that reduces and/or removes the legitimate benefits related with the use of the rights targeted by the measure to the extent that they render their further possession useless.[121]

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[116] *Clarification, Q. No. 37*.
[117] *Metalclad*, para 103.
[118] *Schreuer*, p. 90.
[119] *Middle East Cement*, para 178.
[120] *CME v Czech Republic*, para 178.
[121] *RFCC v Marocco*, para 391.

The expropriation of the Claimant's property was illegal under the Conveniencia BIT. Where a taking is done in the violation of a treaty, the taking will be considered illegal.[122] Conveniencia BIT in article 4(2) expressly states that any measure which effects in expropriation violates the treaty.

Even though the Claimant retained the formal title to the Patent No. AZ2005, the economic benefit of the property were vanished. In today's world it is generally accepted that that certain types of measures affecting foreign property will be considered an expropriation even though the owner retains the formal title.[123] The measures taken by the IP Office affected Claimant property. The Claimant was not able to utilize its investment, Patent No. AZ2005, in a meaningful way.

Most bilateral and multilateral treaties and draft treaties typically contain a reference to indirect expropriation or to measures tantamount to expropriation. Some of them contain detailed elaboration of the fundamental principles concerning expropriation[124], some are more succinct[125].
Expropriation is:

> '[n]ot 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 […] of property.'[126]

Bilateral Investment Treaty article 4(2) between Bergonia and Conveniencia protects investor against such measures.

This article expresses directly that expropriation or measures tantamount to expropriation are abandoned. Formula of article 4(2) of Conveniencia BIT excludes the right of the home state to expropriate, unless expressly named conditions occur. Reading this article in literal manner leads to the conclusion that the Republic of Bergonia had no right to expropriate the Claimant.

Taking includes not only the outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy, or dispose with the property within a reasonable period of time after the inception of such interference.[127]

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[122] *The International Law on Foreign Investment*, p. 395.
[123] *Starrett Housing*, § IV(b).
[124] *NAFTA*, article 1110.
[125] *See Argentina – US BIT*, article IV.
[126] *Metalclad*, para. 103.
[127] *Responsibility for the Injuries, p. 545, 553 (Article 10(3)(a)).*

The interference of Respondent into the Claimant's investment was an indirect expropriation. The conduct of a respondent state prevented the effective control over the investment by the Claimant what amounted to expropriation.

The facts of the case lead to the conclusion that Claimant was expropriated from its patented rights. The measure taken by the Bergonian IP Office affected the Claimants patented rights covered by Conveniencia BIT, which is not justified and also oversteps the limits set by the generally accepted principles of international law.[128]

ii. The acts of the Respondent against the Claimant Investment may also be treated as a "creeping expropriation".

The expropriation may occur in "outright or in stages."[129] 'Creeping expropriation' as a form of indirect expropriation is defined as a 'series of acts attributable to the State overt a period of time culminate in the expropriatory taking of […] property.'[130]

Issuing a compulsory license on 1 June 2007 by the IP Office and than as of January 1st issuing the license to the six commercial Bergonian entities may also be treated as an act of a State which had the 'effect of expropriation'.[131] This 'step-by-step process'[132] qualified those decisions as expropriation.

2. Expropriation which affected Claimant's property was illegal under general international law and Conveniencia BIT.

For the expropriation to be deemed legal under general international law[133] it must not be a discriminatory against investors, has to be for a 'public purpose' and must be accompanied by the full compensation which is prompt, adequate, and effective.[134] None of those conditions were fulfilled by the Respondent. There is a general agreement that taking of property which lacks a public purpose and a discriminatory taking are illegal under international law.

[128] *Upper Silesia*, para 43.
[129] *ALI Restatement*, Section 712*; See* also *Chriestie*, p. 307.
[130] *Generation Ukraine*, para. 404.
[131] *Siemens v Argentina II*, para. 263.
[132] *Tradex v Albania*, 197.
[133] *Legality of Expropriations*, p. 173.
[134] *Taking of property*, p. 20.

Moreover, not only does the customary international law define conditions under which a State may lawfully expropriate the property of foreigners but also Conveniencia BIT in article 4(2) states:

> '[I]nvestments […] shall not directly or indirectly be expropriated, except, […] for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation.'

Those fairy clear rules of Conveniencia BIT on the legality requirements for expropriation were not satisfied.

i. The compulsory license cannot be justified by the public good

The Respondent has not fulfilled the requirement of a public purpose[135] to legitimate the expropriation under Conveniencia BIT and customary international law. Issuing a compulsory license was not, in good faith, for the purpose of a public utility.[136]

For justifying the compulsory license as a measure issued in need of a public good it must refer to 'grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests.'[137]

The Bergonian IP Office issued a compulsory license just seven months after Claimant terminated the License Agreement. Issuing a license just after such short time is in violation of its international obligations since the obesity health problem is not new in the Respondent State. Compulsory license was issued for the economic purpose of the national companies. Six of them, which invoked the license, were exporting produced drugs and selling abroad.[138]

ii. The compulsory license had a discriminatory nature

[135] *Akehurst*, p. 235.
[136] *Schreuer*, p. 93.
[137] *Resolution 1803*, article 4.
[138] *Clarifications, Q. No. 56.*

The issue of the aforementioned public purpose is closely connected to a discriminatory nature of taking.[139] The treatment given to the Claimant was discriminatory in comparison to the treatment given to domestic competitors. This illegitimate discriminatory treatment was inconsistent with the Conveniencia BIT, customary international law and the most treaty provisions addressing the legality of expropriations.[140] An eloquent definition of discriminatory taking defines it as 'one that singles out a particular person or group of people without a reasonable basis'[141] Though an expropriation that singles out aliens of particular nationality, or particular aliens, would violate international law.[142] The Claimant was such an alien.

The product patented by the Claimant was the only one in the Bergonian market. Terminated License Agreement between BioLife Co. and the Claimant was an exclusive license[143] and none of the other Bergonian companies had a possibility to sell this product on the domestic or exterritorial market. By issuing a compulsory license the IP Office acted in favor of domestic companies and in a discriminatory way to the Claimant. Compulsory license targeted the only entity on the market – MedBerg Co. and it was not incidental.[144]

Discriminatory decision was a result of unreasonable policy of the Respondent.[145] As was proven by two published studies patented product was effective in treating the type of obesity towards which Bergonian population is genetically pre-disposed. The Claimant was the only company selling this particular product on the Bergonian market. The decision made by Bergonian IP office influenced only the foreign investment of the Claimant. Other entities operating in the same business sector in Bergonia were not pursuant to any measures similar to the ones conducted in a case of the Claimant's patent.[146]

iii. The Respondent failed to provide to provide the Claimant with the prompt, adequate and effective compensation.

[139] *Multinational Enterprises and the Law*, p. 600.
[140] *Expropriation of Alien Property*, 57.
[141] *Legality of Expropriations*, p. 186.
[142] *ALI Restatement*, 307.
[143] Clarifications, Q. No. 32.
[144] *Principles of Public International Law*, p. 515.
[145] *Legality of Expropriations*, p. 190.
[146] Clarifications, Q. No. 84.

Expropriation of the property of an alien attributable to a state gives rise under international law to liability for compensation.[147]

As defined in 1929 by PCIJ *Chorzow Factory Case*:

> "[R]eparation must, as far as possible, wipe all consequences of illegal act and reestablish the situation which would, […] have existed if the act had not been committed."[148]

Moreover the prevailing view is that 'acts of government in depriving an alien of his property without compensation impose international responsibility.[149]

The so called *Hull* formula, which is generally accepted by IIA's and jurisprudence, demands from the State to pay 'prompt, adequate and effective compensation[150] for the expropriation. The required adequate compensation should be understood as a 'fair market value'. In addition 'prompt' means within a reasonable time and with interest and 'effective requires compensation in a convertible currency.[151]

Tribunals have affirmed that States are obliged to pay compensation in case of expropriation.[152] The Respondent failed to satisfy the Claimant with appropriate compensation since royalties were lower than the income from selling obesity drugs before compulsory license was issued.. Moreover the compensation must equal the full value of the expropriated property as it stood on a date of taking[153] and The Respondent failed to comply with this standard by offering percentage lower royalties.

C. The conduct of Bergonian IP Office was discriminatory as it favored the national companies against the Claimant's interests

1. <u>The Claimant and the domestic companies were in a 'like situation'.</u>

[147] *Chorzow Factory Case*, para. 106.
[148] *Chorzow Factory Case*, para 47.
[149] *de Sabla Claim*, paras 358, 366.
[150] *UNCTAD Bilateral Investment Treaties*, 44.
[151] *Legality of Expropriations*, p. 196.
[152] Ibidem, p. 196.
[153] Ibidem, p. 197.

The comparable settings of the Claimant and domestic investors have to be determined to prove a denial of national treatment. Non-national and domestic investors are in a comparable setting when they are operating in the same business[154] or economic/business sector.[155]

The Claimant and domestic companies were in the same medical sector.[156] Hence it is inevitable that MedBerg and home-state companies were in comparable setting.

2. The Respondent failed to provide Claimant national treatment.

Conveniencia BIT in article 3 requires from either of the contracting States of a treatment that is not less favorable (i.e. unequal treatment in case of impeding the marketing products inside or outside the country) that the one it accords to the investments of its own investors or to investors from any third State.

The purpose of the concept of national treatment is to:

> '[o]blige 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.'[157]

The tribunal in *Feldman case* explained that:

> '[t]he concept of discrimination had been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances.'[158]

None of the national companies operating in the same business as Claimant were pursuant to the measures similar to ones in

3. There was a differentiation in treatment between the Claimant and domestic companies

Differentiation existed since the Respondent denied national treatment[159] the Claimant. The treatment between the Claimant and domestic competitors on the market of obesity drugs was unfavorable to the

[154] *Feldman*, para 171.
[155] *SD Myers*, para 250.
[156] Clarifications, Q. No. 84.
[157] *Schreue*r, p. 178.
[158] *Feldman*, paras 155-56.
[159] *Schreuer*, p. 181.

foreign entity.[160] None of the domestic companies were pursuant to the measures similar to the ones conducted in case of Claimant's patent.[161]

4. The Respondent has no justification for differential treatment

Differentiating measure had no justification under general international law. Differentiating measure is justifiable if rational grounds are shown.[162] The tribunal in *ADF v US case* found that there is no violation of national treatment clause when acts of 'the government projects applied equally to both national and foreign contractors.'[163] Hence, Respondent's actions can not be justified neither as taken on the grounds of rational policy, nor in order to protect public interest.[164]

The Claimant is not required to prove that acts of the Respondent were taken to favor the national. The tribunal in *SD Myers case* seems to focus on the practical impact rather than on intent.[165]

D. The conduct of Bergonian IP Office constituted a denial of justice in violation of the obligations owed by Bergonia to the Claimant

The Claimant made its investments on Bergonian market on behalf of Respondent's commitments made in Conveniencia BIT which was signed recognizing encouragement and contractual protection.
Though the government's intent of purpose for enacting a measure[166] has been a subject of considerable debate it ought to be noted that the tribunal in *Tecmed* said that:

> '[t]he government's intention is less important than the effects of the measures on the owner […] and a form of deprivation measure is less important than its actual effects.'[167]

The royalties offered by the Bergonian IP Office were inadequate.[168] The royalty rate set by the IP Office was lower than it would have been if the terms of the License Agreement between MedBerg Co.

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[160] *Amco v Iran*, paras 139-142.
[161] Clarifications, Q. No. 84.
[162] *Schreuer*, p. 181.
[163] *ADF v US*, paras 156-158.
[164] *Schreuer*, p. 181.
[165] *Schreuer*, p. 183.
[166] *Investor-State Arbitrator*, p. 461.
[167] *Schreuer*, p. 101-04.
[168] Clarifications, Q. No. 42.

and BioLife Co. were effective.[169] Moreover, terminating the License Agreement the Claimant had no plans to sell further its intellectual property to a third party.[170]

The royalties offered by the Bergonian IP Office were inadequate.[171] The royalty rate set by the IP Office was lower than it would have been if the terms of the License Agreement between MedBerg and BioLife were effective.[172] Moreover, terminating the License Agreement the Claimant had no plans to sell further its intellectual property to a third party.[173]

1. The Claimant was denied of a right of independent review of Bergonian IP Office decision

The Claimant was unable to depend on the review of the IP Office decision. The Patent Review Body which heard the appeal filed by the Claimant could not provide the independent review. The Bergonian judges sitting in this quasi-judicial body are financially dependent on the Bergonian IP Office.[174] They are paid by the aforementioned body, so any independent review on its decision is not plausible.

2. The compulsory license was not taken according to a 'due process of law' and therefore was illegal

This typical legality requirement of an expropriation includes the rights of an investor of a Contracting Party to prompt review on its case.[175] The Claimant was denied a right of the valuation of investment and the payment of compensation by a judicial authority or another competent and independent authority. None of those guaranties were satisfied.

Conveniencia BIT in article 4 subsection 3 states that the legality of expropriation should be subject to review by due process of law according to the respective national legal system.

[169] Clarifications, Q. No. 25.
[170] Clarifications, Q. No. 42.
[171] Clarifications, Q. No. 42.
[172] Clarifications, Q. No. 25.
[173] Clarifications, Q. No. 42.
[174] Clarifications, Q. No. 29.
[175] *Austria - Georgia BIT*, Article 5(3).

Nevertheless, the compulsory license was not taken under a 'due process of law' since the Claimant was denied reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to asses the actions in the dispute.[176]

E. The Respondent treated Claimant in an arbitrary and discriminatory manner

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

> '[i]n any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of [their] investments.'

There have been adopted a legal standard of protection against such measures. The separate listing of this standards and protection against either of these suggests disjunctive formulation of the standard and effective embodies two different standards with its own significance and scope.[177]

The Respondent failed to provide compensation for its actions to the Claimant. Respondent's failure has subjected Claimant to arbitrary and discriminatory treatment. For that reason the Respondent has violated Conveniencia BIT article 2 (3).

1. Arbitrary Treatment

Some treaties defines arbitrary measures as 'unjustified actions' or 'unreasonable measures'[178] presumed terms are interchangeable. According to the definition declared in *The Black's Law Dictionary* arbitrary means 'depending on individual discretion'.

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.'[179] Accordingly, the Respondent's acts fail within the scope of this definition and shall be considered as arbitrary. Similarly to the aforementioned case the Respondent decision lacked clarity and was rather motivated by the prejudice to alien investor than any reason of fact.

[176] *ADC v Hungary*, para 435.
[177] *Schreuer*, p. 173.
[178] Ibidem, p. 173.
[179] *Lauder v Czech Rep.*, para. 318.

The acts taken by the Respondent were taken without engaging in a rational decision-making process[180] and cannot be justified in any manner. Actions of the state of the Respondent are unjustified by the concerns of the state policy or economic development.

2. Discriminatory Treatment

Discriminatory measure can take number of forms. In the light of the treatment of foreign investments the discrimination based on nationality prevails.[181] Respondent's actions and decisions were discriminatory on the basis of nationality.

The decision of commencing proceedings for the issuance o a compulsory license affected the Claimant. None of similar actions were taken to other commercial entities operating on the same business sector of the Bergonian market were pursuant to any measures similar to the ones conducted in a case of Claimant's patent.[182]

Consequently, the Claimant was treated by the Respondent in arbitrary and discriminatory manner

F. The Respondent has violated the obligation to provide fair and equitable treatment to the Claimant's investment

The Conveniencia BIT in the preamble underlines that contracting states desire to 'create favourable conditions to increase investments by investors'. Furthermore, article 2 (2) of mentioned BIT stresses that the state of Bergonia shall 'in any case accord investments by investors of [the Claimant]… fair and equitable treatment.'

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

[180] *LG&E v Argentina*, para. 158.
[181] *Schreuer*, p. 176.
[182] Clarification, Q. No. 84.

weighing up of what is right in all the circumstances.[183] FET standard is a treatment in an even-handend and just-manner, conductive to fostering the promotion of foreign investment.[184]

The tribunal founded in *Waste Management* case that FET standard is breached

> '[b]y the conduct attributable to the state and harmful to the Claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory, and exposes the claimant to sectional or racial prejudice, or involves a lack of a due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.[185]

Respondent has breached rule of transparency and protection of the Claimants legitimate expectations.

Breaching of the Claimant legitimate expectations also violates the principle of FET standard by the Respondent. The tribunal in *Tecmed* had found that state should act in a consistent manner so that foreign investor may know beforehand all rules and regulations that will govern its investments.[186] This standard was breached by the State of Bergonia since it acted in unjust manner by issuing a compulsory license.

Te Claimant was denied to expect that a State of Bergonia would act consistently, i.e. without arbitrarily revoking or preexisting decisions.[187] The IP Office decisions were inconsistent with the Claimant expectations since Claimants objections to the decision were not resolved to the Claimant's satisfaction and MedBerg Co. was denied independent review of IP Office decision. Moreover royalties offered to the Claimant's are moderately lower than that one found in a License Agreement.

The State of Bergonia denied the Claimant right of legitimate expectations when failed to guarantee predictable framework[188] for the Claimant business planning and investment.

G. The Respondent failed to provide full protection to the Claimant's investment.

[183] *Multinational Enterprises and the Law*, p. 635.
[184] *Schreuer*, p. 131.
[185] *Waste Management*, para. 98.
[186] *Tecmed*, para 154.
[187] *Tecmed*, para 154.
[188] *Metalclad*, para 99.

Under Conveniencia BIT, article 2 subsection 2 the state of Bergonia shall 'in any case accord investments by investors of … [the Claimant] … fair and equitable treatment as well as full protection.'

The Respondent is responsible for any acts taken by the state or its organs eventually entities.[189] The state of Respondent owed to the alien investor, the Claimant, full protection.

Therefore, the Respondent failed to protect the Claimant from economic and legal harm and moreover failed to take reasonable measures to provide full protection to the Claimant's investment. Additionally, the Respondent failed to take reasonable steps to protect Claimant's investment from any forms of damage.

[189] *See* Part I.

CONCLUSION ON MERITS OF THE CLAIM

The Respondent has breached its international obligations and Conveniencia BIT provisions. Through its organs expropriated Claimants property in a discriminatory manner, without prompt, adequate and effective compensation and restraint to national treatment and justice. The activity of MedBerg Co. was protected investment under the Conveniencia BIT and in the light of Article 25 of ICSID Convention. Hence, the ISCID Tribunal could hear the dispute.

PART THREE: RELIEF REQUESTED

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

1) that this Tribunal has jurisdiction to hear the dispute;
2) the activity of the Claimant was protected investment under the Conveniencia BIT and in the light of Article 25 of ICSID Convention.
3) that Respondent violated its obligations under Article 2, Article 3, Article 4 of the Conveniencia BIT.
4) and that this arbitration should proceed to the second stage on remedies.

RESPECTFULLY SUBMITTED ON SEPTEMBER 7, 2009