

TEAM LACHS

**THE ARBITRAL TRIBUNAL OF THE**  
**INTERNATIONAL CENTRE FOR SETTLEMENT**  
**OF INVESTMENT DISPUTES**

BOSTON MASSACHUSETTS, THE UNITED STATES OF AMERICA

THE 2008 FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT  
COMPETITION

**CASE CONCERNING**  
**EXPROPRIATION OF INVESTMENT**

**FEDERATED STATES OF GAUL**  
(CLAIMANT)

vs.

**REPUBLIC OF CALPURNIA**  
(RESPONDENT)

**MEMORIAL FOR THE RESPONDENT**

2008

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## STATEMENTS OF FACTS

The Government of the Republic of Calpurnia and the Government of the Federated States of Gaul entered into the agreement on the Promotion and Protection of Investments. Both Parties have agreed to ensure favorable conditions for investors of one Contracting Party on the territory of the other Contracting Party.

The Claimant, Vanguard International, participated in the establishment of a joint venture company - VanCal. In the years ending December 2004 and December 2005, Calpurnian firms, banks and companies held 41%, foreign companies (Claimant) held 30% and natural persons, including farmers and workers, held 29% of VanCal's issued shares.

In the end of year 2003 and in the middle of year 2004 Calpurnia Security Forces searched the homes of Claimant's two representatives Francesca Pescara and David Kolowenko under suspicion of unlawful data collection and espionage. The searches of the houses of Ms. Pescara and Mr. Kolowenko were conducted routinely and lawfully, in support of national security requirements. Calpurnian Security Directorate issued the press releases which were in connection with searches.

On the Shareholders meeting, which took place on 16 November 2005 Ms Pescara was voted off the board of directors by majority of vote of the shareholders present at the meeting. In the same time proxies held by Claimant's representative Mr. Rindler were found not to be formally valid for the purpose of that meeting. The proxies were properly certified in relation to a meeting scheduled for 11 October 2005 which did not take place.

VanCal declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders, including Claimant. The prior email sent by Mr. Korchnoi to Claimant on 27 May 2005 stating that no further payments could be made to foreign shareholders was unauthorized and had been superseded by statements by VanCal of its willingness to make any license fee and dividend payments it owed.

On 23 October 2006 Claimant withdrew its representatives from Board of Directors and declined to replace them.

On 31 July 2007 Claimant requested institution of arbitration proceedings in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ( Institution Rules) and informed Respondent about this fact.

## Pleadings

### **A. The ICSID Arbitral Tribunal lacks jurisdiction in the present dispute.**

#### **1. The Claimant has not pursued amicable settlement for 18 months as required by Article 11(2) of Gaul-Calpurnia Bilateral Investment Treaty.**

According to Gaul – Calpurnia BIT any dispute arising from investment made by one Contracting Party in the territory of the other Contracting Party shall be settled amicably. In turn, when dispute cannot be settled through diplomatic channels within 18 months from the date of a request for amicable settlement, the investor concerned may submit the dispute to international arbitration. The Claimant did not wait 18 months to pursue the dispute to international arbitration and did not put much effort into trying to settle the dispute amicably. On 5 February 2007 Claimant sent the letter to Respondent alleging that it was expropriated and demanded compensation. It is doubtful whether this “letter of demands” was the first step undertaken in order to settle a dispute by diplomatic channels. The Claimant did not show any willingness to negotiate the problem, it only presented claims. For that reasons the Claimant’s behavior leaves doubt whether it indeed wanted to solve the dispute amicably. Even if the aforementioned letter was read as the request for amicable settlement, 15 months have passed from the moment of receiving it and the moment of Claimant’s requests for arbitration – not 18 months as required by Art. 11 (2) of Gaul – Calpurnia BIT.

#### **2. The Claimant has pursued its claims before the domestic courts of Calpurnia and according to Article 11(3) of Gaul – Calpurnia BIT, the Claimant may therefore no longer elect an arbitral remedy.**

On 14<sup>th</sup> June 2006 one of Claimant’s representatives Ms Pescara filed an application with Commercial Court of San Inocente de Irkoutsk demanding to transfer to her account in Gaul dividends on 1% shareholding. The court dismissed Ms Pescara’s claim and based its decision on the fact that Ms Pescara as mere nominee has no beneficial interest in the shareholding. Notwithstanding that the court dismissed this application, the Claimant used its right to submit the dispute to the competent court of

Contracting Party and according to art. 11(3) of Calpurnia – Gaul BIT has no more recourse to the arbitral tribunal.

**3. Most Favored Nation Treatment Clause in Article 4 of the Gaul-Calpurnia BIT does not extend to dispute resolution mechanisms such as those referred to in the Calpurnia-Flatland BIT Article 7.**

Most Favored Nation Treatment Clause is one of fundamental principles of international investment law. An MFN Clause requires State B to give investors from State A treatment that is at least as favorable as the treatment it extends to investors from any third State<sup>1</sup>. The MFN Clause is by its nature a very general provision<sup>2</sup>. The precise wording and structure of MFN Clauses differ from investment agreement to investment agreement. As a result, MFN Clauses can vary in their meaning and scope<sup>3</sup>.

The issue which has brought difficulties was the question whether MFN Clause can be applied to dispute settlement provisions. Some tribunals have tended to construe MFN Clause generously for investors – for example *Maffezini vs. Spain* where Tribunal found that dispute settlement provisions are inextricably related to the protection of foreign investors<sup>4</sup>. But on the other hand there appeared a tendency to interpret MFN Clause in much more restrictive way. Indeed, several recent decisions have endorsed presumptions against extending MFN treatment to procedural matters<sup>5</sup>. In *Plama Consortium Ltd. v. Bulgaria* the Tribunal found “ an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty

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<sup>1</sup> Etan G. Shenkman, *International Arbitration* 2006

<sup>2</sup> S. Vesel „Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties”

<sup>3</sup> Etan G. Shenkman, *International Arbitration* 2006

<sup>4</sup> *Maffezini vs. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 54

<sup>5</sup> Etan G. Shenkman, *International Arbitration* 2006

leaves no doubt that the Contracting Parties intended to incorporate them”<sup>6</sup>. Another holding concerning this problem was *Salini S.p.A. v. Jordan* where the Tribunal found : “The Tribunal observes that bilateral investment treaties carry varying provisions that address this issue. Some of those treaties provide expressly that the most-favored-nation treatment extends to the provisions relating to settlement of disputes. (...) In other treaties, the MFN Clause does not contain such a provision, but refers to ‘all rights’ contained in the agreement, or to ‘all matters’ subject to this agreement. (...) The Tribunal observes that the circumstances of this case are different. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provisions extending its scope of application to dispute settlement. It does not envisage “all rights or all matters covered by the agreement“. Furthermore, the Claimant has submitted nothing which would indicate that the common intention of the Parties was to have the most-favored-nation clause taken into account in dispute settlement. As a result, the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned. <sup>7</sup> The outcome of this holding is that “Tribunal starts from presumption that MFN clause does not apply to dispute settlement, unless it can be specifically demonstrated that parties intended it to apply to the specific issue in question”<sup>8</sup>.

Article 4 of Gaul-Calpurnia BIT states that : Investments made by investor (...) or returns related thereto, shall be accorded treatment which is not less favorable than the host Contracting Party accords to the investments and returns made by its own investor or by investor of any third State, whichever is the most favorable to the investor. This definition does not contain a term similar to ‘all matters to subject to this agreement’ and with according to Tribunal’s rulings MFN clause in this case can not be applied to dispute settlement. The meaning of MFN clause contained in Gaul-Calpurnia BIT leaves no doubt that the Parties did not intend to have dispute settlement being applied. The international relations are based on consent. In this case

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<sup>6</sup> *Plama Construction Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para 223

<sup>7</sup> *Salini Construction S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, paras. 115-119

<sup>8</sup> S. Vesel „Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties”

the Parties did not agree to include dispute settlement within MFN clause scope and that is why the Claimant has no right to take advantage of art. 7 of the Calpurnia-Flatland BIT.

## **B. The Respondent is not responsible for actions of SFCDC and VanCal.**

In the Request for Arbitration the Claimant states that Calpurnia discriminated against Vanguard International and unlawfully interfered with Vanguard's investments. Vanguard claims that the actions of the State Fund for Commerce and Development in Calpurnia were influenced by the newly elected Calpurnian government. There are many more allegations which are not based on facts and are simply not true. The State of Calpurnia is the owner of 100% shares of SFCDC but at the same time it does not have any impact on its actions. Legally the State and SFCDC are separate entities, and the latter does not fulfill governmental aims. The government has no control over state entities and it certainly cannot force them into implementing governmental policy. The Respondent is to explain below that it bears no responsibility for actions of either SFCDC or VanCal

### **1. The actions of SFCDC are not attributable to the State of Calpurnia.**

Under customary international law, a state is responsible for all its organs.<sup>9</sup> The principle of attribution is clearly set out in article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, which states as follows:

“1. The 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.” Further we read: “2. An organ includes any person or entity which has that status in accordance with the internal law of the State”. The SFCDC is not the organ of the State of Calpurnia according to the abovementioned provision. It has not been empowered to exercise any form of governmental control. It is neither an organ of the central government nor a territorial unit of Calpurnia.

The SFCDC is, however, an entity 100% owned by the Republic of Calpurnia. Its aim is to secure commerce and development in Calpurnia by dealing with foreign investors. The existence of such separate national entities has raised issues of attribution of acts of these

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<sup>9</sup> R.Dolzer, C.Schreuer, Principles of International Investment Law, Oxford University Press, 2008, p.195

entities to the state.<sup>10</sup> The principle is that state entities are separate, so their acts are not attributable to the state. There are, of course, a few exceptions which qualify this rule.<sup>11</sup> None of them can, however, be applied to SFCDC. Matters of responsibility of states for action of their entities are often regulated in treaties (e.g. Article 22 of the Energy Charter Treaty provides for special legal obligation of each state in regard to activities on the part of state enterprises). There is no treaty between Vanguard International and Calpurnia which would regulate the matter of state responsibility. The VanCal is a private company. The state of Calpurnia does not own any shares of the company directly. It is therefore clear that the actions of SFCDC are not attributable to the state of Calpurnia.

## **2. The SFCDC did not act under control of Calpurnia.**

The State may bear responsibility for the actions of the individuals or entities which do not perform public functions, if they act under the direction or control of the State. Article 8 of the ILC Articles provides: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that State in carrying out that conduct”. How to determine whether conduct is carried out “under the direction and control” of the state? The Commentary to the ILC articles explains: “ Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control”.<sup>12</sup> Did the government of Calpurnia control VanCal? The answer is no.

First of all, the SFCDC directly owns 30% of VanCal’s stock. Another 30% is owned by foreign companies and the rest is held by natural persons, including farmers and workers. It is a fact that the SFCDC votes these VanCal shares pursuant to the agreements which place ownership in the hands of the individuals, but leaves voting in the hands of the SFCDC. It is,

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<sup>10</sup> Ibidem, p.195

<sup>11</sup> Barcelona Traction Case, International Court of Justice Judgment, 5 February 1970; *Philips Petroleum v Iran*, 21 Iran - USCTR 79;

<sup>12</sup> J.Crawford, *The International Law Commission’s Articles on State Responsibility* (2002), p.18

however, clear that the SFCDC does not own the majority of the shares, so the private character of the corporation is not altered. VanCal remains an independent private company owned mainly by farmers and workers as well as foreign investors.

The Claimant tries to convince the court(chyba Tribunal) that the SFCDC exercised its rights as shareholder in order to implement the governmental policy. There is no factual evidence to back this opinion. The Conservative Conscience of Calpurnia which won the parliamentary elections in 2003 is a party which advocates “a return to the traditional values of hard work, family, modesty, thrift and self-sufficiency”. The party is not hostile towards the state of Gaul or any other state. There is no link between the CCC and SFCDC. The latter is an independent entity, which does not even have the majority of shares in VanCal and is certainly not politically governed. The net of connections drawn by the Claimant does not exist. The current dispute arises solely from minority shareholders’ dissatisfaction with the legitimate management rights which the majority of shareholders exercise.

**C. The Responding State did not violate the Calpurnia – Gaul Bilateral Investment treaty.**

**1. The Republic of Calpurnia did not violate art. 2.2 of Calpurnia – Gaul’s BIT.**

**1.1. The Republic of Calpurnia acted accordingly to the fair and equitable treatment principle and hence it has not been violated.**

Fair and equitable treatment has become a basic principle of international investments, having the aim of preventing the investor from discriminatory treatment, recognized pretty often as a *bona fides*<sup>13</sup> principle. According to UNCTAD fair and equitable treatment is based upon two aspects. First of all it includes the plain meaning approach and secondly equating fair and equitable treatment with the international minimum standard<sup>14</sup>.

Taking into consideration the first meaning it shall be recognized that from the point of view of various parties, the principle is interpreted differently, hence the interpretation should be in capacity of the third, neutral body. Although there are some actions that *a priori* are recognized as acting fraudulently and in bad faith or leading to unjustified enrichment of the State<sup>15</sup>, hence which are automatically the violation of the principle in question, in present case none of them have taken place nor were they provided by the Responding State.

The second aspect concerns international minimum standard in international law. It means that the investor deserves a certain level of treatment, otherwise it is entitled to compensation arising from liability of the State. However, it shall be noticed that fair and equitable treatment is not a simple synonymous of international minimum standard, hence it does not

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<sup>13</sup> Tecnicas Medioambientales Tecmed S.A. v. Estados Unidos Mexicanos, ICSID case no ARB (AF)/00/2 (2003), Award 29 May 2003

<sup>14</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreign Investment Disputes*, Kluwer Law International, 2005, p. 1011

<sup>15</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreign Investment Disputes*, Kluwer Law International, 2005, p. 1012

incorporate automatically the second standard, unless any relevant document provides so<sup>16</sup>. For instance, such an approach has been provided in NAFTA. According to the fact that in the present case and in Calpurnia – Gaul BIT no such mark has been made, these two standards cannot be treated in the same way but the relevant tribunal shall decide whether the action was unfair and inequitable or not<sup>17</sup>. Moreover, this standard certainly does not require treatment being additionally or beyond the minimum standard of treatment<sup>18</sup>.

Taking into consideration abovementioned notices, although recently in almost every investment treaty the principle of fair and equitable treatment is included, there is no definition of it. Due to this fact, fair and equitable treatment constitutes rather a general principle than a particular provision, hence it is not specified what kind of treatment was asked from the Responding State and thus what it is responsible for.

The definition was tried to be given by the doctrine in connection to the general principle of interpretation of treaties<sup>19</sup>, which provides that the State is in violation of this provision if its actions were cumulatively unfair – hence were not free from bias, fraud or injustice and by the same token inequitable – thus were not fair, just and reasonable<sup>20</sup>. However in present case no activity of State may be recognized as such.

Moreover, it shall be well recognized that all actions being unfair and inequitable, concern issuing legal acts as decisions, licenses, bans on export, revoking preexisting decisions and other acts provided by legal instruments of the authorities of the state<sup>21</sup>. It may also concern

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<sup>16</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreign Investment Disputes*, Kluwer Law International, 2005, p. 1013

<sup>17</sup> F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 *Brit. Y. B. Int'l L.* 241, 1981, p. 28

<sup>18</sup> NAFTA Free Trade Commission Notes on Interpretation of Certain Chapter 11 Provisions, 31 July, 2001;

<sup>19</sup> Art. 31 of the Vienna Convention on the Law of Treaties; *Pope & Talbot, Inc. v. The Government of Canada*, UNICITRAL (NAFTA), Award on Merits, 10 April 2001, para. 53

<sup>20</sup> S. Vascianne, *Fair and Equitable Treatment*, 70 *Brit. Y.B. Int'l Law* 99 (2000), p. 47

<sup>21</sup> *Tecnicas Medioambientales Tecmed S.A. v. Estados Unidos Mexicanos*, ICSID case no ARB (AF)/00/2 (2003), Award 29 May 2003, para. 154; *CME Czech Republic B.V. (The*

application of legislation and differences in treatment in law of the investor by the state authorities<sup>22</sup>. However, still the actions of State's authorities have to be in question<sup>23</sup>. Therefore the obligation of fair and equitable treatment concerns "justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world"<sup>24</sup>. Under the facts of the case it is known that any activity and actions claimed by the Investor have been made by the internal organ of the company, not State authorities. There was no decision that has been issued or cancelled or any other that is recognized as the action of the State. Due to this fact the Republic of Calpurnia is not responsible for any treatment which the Investor was subjected to.

### **1.2. The Responding State did not breach its obligation to accord full and constant protection and security.**

According to Article 2.2 of Calpurnia-Gaul BIT each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party full and constant protection and security. The Respondent did not breach its obligation under this Article.

According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

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Nederlands), UNICITRAL Partial Award, 13 September 2001, para. 611; Occidental Exploration and Production Company v Republic of Ecuador; Award, 1 July 2004, case no UN 3467, para. 181; S.D. Myers, Inc. v. Gouvernement of Canada, UNICITRAL, Partial Award, 13 November 2000, para. 263; Pope & Talbot, Inc. v. The Government of Canada, UNICITRAL (NAFTA), Award on Merits, 10 April 2001, para. 109

<sup>22</sup> Waste Management, Inc. V. United Mexican States, ICSID, ARB (AF) 00/03/3, Award 25 June 2003, para. 109; Gami Investments, Inc. v The Government of the United Mexican States, UNICITRAL, Award, 12 November 2004

<sup>23</sup> S. Vasciannie, The Fair and Equitable Treatment Standard In Intenational Investment Law and Practice, 70 Brit. Int'l Law 99 (2000), p. 163; N. Rubins, N. S. Kinsella, International Investment, Political Risk and Dispute Resolution, Oceana Publications 2005, p. 214

<sup>24</sup> Dominican Republic – Central American Free Trade Agreement, art. 10.5.2

the treaty in their context and in the light of its object and purpose. Pursuant to the ordinary meaning of the “full protection and security” standard, the host state is obliged to protect the investor against various types of physical violence including the invasion of the premises of the investment.<sup>25</sup> But there is broad consensus that the standard does not provide an absolute protection against physical or legal infringement.<sup>26</sup> It is clear that the standard expressed in Article 2.2. of Calpurnia-Gaul BIT is not absolute and does not impose strict liability upon the State that grants it.<sup>27</sup>

The “full protection and security standard” obliges the host state to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.<sup>28</sup> It has to be said that the Respondent acted in a way that was appropriate to situations that had occurred.

### **1.2.1. The Responding State did not violate Article 2.2. of Calpurnia-Gaul BIT by searching Ms. Pescara’s and Mr. Kolowenko’s homes**

The primary ratio of the “full protection and security” standard is the need to protect the investor against various types of physical violence including the invasion of the premises of the investment.<sup>29</sup>

First of all, the police searched private homes of Ms. Pescara and Mr. Kolowenko. And according to the ordinary meaning of Article 2.2 of Calpurnia-Gaul BIT the Responding State is obliged to accord full protection and security to the investment, including the premises of the investment. However, private homes of Claimant’s employees are beyond the scope of

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<sup>25</sup> R. Dozler, Ch. Schreuer , Principles of International Investment Law, Oxford University Press 2008, p. 149

<sup>26</sup> R. Dozler, M. Stevens, Bilateral Investment Treaties (1995), p. 61; see AAPL v Sri Lanka, Award, 27 June 1990, 30 ILM (1991), para 53; TECMED v Mexico, Award, 29 May 2003, 43 ILM (2004) 133, para 177

<sup>27</sup> TECMED v Mexico, ICSID 2003, para 177

<sup>28</sup> Lauder v Czech Republic, UNCITRAL 2001, para 308

<sup>29</sup> R. Dozler, Ch. Schreuer , Principles of International Investment Law, Oxford University Press 2008, p. 149

the premises of the investment. The scope of the “full protection and security” standard is limited to properties of the investor and does not apply to property which belongs to investor’s employees. For that reason actions of the Respondent’s representatives were justified. The police in fact did not infringe the Claimant’s investment, because according to the national law Respondent’s representatives did have right to search private homes located in its territory.

Even if searches of Claimant’s representatives’ homes would be considered as the searches of the premises of the investment, it did not have any influence on the physical integrity of the Claimant’s investment. The practice of arbitral tribunals seems to indicate that the “full protection and security” clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.<sup>30</sup>

Secondly, the police searches were conducted routinely and lawfully, in support of national security requirements. The actions of the police were a response to the information given by anonymous author that VanCal was engaged in illegal data collection for Gaulois Security Services. These information were recognized as credible and suggested that the anonymous author had inside knowledge of what VanCal was up to. The reaction of Respondent authorities was a standard action aimed at explanation of all circumstances of that case. The aim of the police searches was not to impair the premises of the investment, especially that seized during the searches; laptops and storage media did not contain any trade secrets or other information unauthorized access to which could affect the interest of Claimant. The aim was to protect the interest of the State.

According to the facts mentioned above Respondent has not failed to provide to Claimant full protection and security.

**1.2.2. Respondent did not fail to accord Claimant’s investment “full protection and security” by not reacting to picketing in front of Ms. Pescara’s home**

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<sup>30</sup> Saluka v Czech Republic, Award 2006, para484

In 2004 several picketing of members of the CCC Women's League took place in front of Ms. Pescara's home. The protesters were private citizens lawfully exercising their freedom of speech on public property in a no-violent manner. Picketing is not illegal; it is an aspect of freedom of speech, which is protected not only by national but also by international law. There were no basis for the police to intervene on occasions when they were requested to do so by Ms. Pescara. For that reason the Respondent State did not violate the "full protection and security standard".

The Calpurnia-Gaul BIT does not oblige the Respondent to protect foreign investment against any possible loss of value caused by persons who acts could not be attributed to the State.<sup>31</sup> Picketers were private citizens and even if their behavior could affect the Claimant's investment, their actions are not attributed to the State, therefore the Respondent do not bear responsibility for those actions.

**2. Respondent did not violate art. 2.3. of Calpurnia – Gaul BIT since it did not impair arbitrary or discriminatory measures on the claimant the management, maintenance, use, enjoyment, acquisition or disposal of investments.**

Provisions prohibiting arbitrary or discriminatory treatment may be found in some investment treaties, not in majority of them though. Due to the fact that it is a different clause that these ones treating about nationality (such as most favoured nation or national treatment principle), it is recognized that the basis for this prohibition are other criteria such as race, ethnicity or sector of economic activity<sup>32</sup>. However, taking into account present case, neither arbitrary nor discriminatory treatment took place.

**2.1. The measures which are supposed to be ascribed to the Respondent were not arbitrary.**

First and foremost the arbitrary treatment shall be the effect of an order, which under both – international and domestic law is found as illegal and unjustifiable, hence which afterwards

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<sup>31</sup> *Lauder v Czech Republic*, UNCITRAL 2001, para 308

<sup>32</sup> N. Rubins, N. S. Kinsella, *International Investment, Political Risk and Dispute Resolution*, Oceana Publications 2005, p. 229, 234

might be recognized by the state judicial organs as illegal<sup>33</sup>. Due to the fact that present actions which are in question are not contrary to internal legal system of the Responding State, they may not be recognized as arbitrary measures.

Moreover, it is also recognized that the act in question shall be an order of a state or municipal authority<sup>34</sup>. There shall be proven the real conduct of State, since mere actions even being consistent with state's policy may not automatically result in state liability<sup>35</sup>. In present case, however, no such an act has taken place, since all activities appeared within one company provided by its board of directors and shareholders.

Furthermore, the decision or any act may not be recognized as arbitrary if there is a possibility to bring the claim based upon the act before the national court<sup>36</sup>. Taking into account that one may sue the board of the company before the civil court as mere legal person and there exist the remedies of appeal it not an arbitrary and authoritarian act of the State. Therefore the action taken place may not be treated as arbitrary within the meaning of art. 2.3. of the BIT.

It also has been recognized that the word 'arbitrary' as such consists of four conditions, which have to be fulfilled cumulatively<sup>37</sup>.

The first one is the legal authority test, which aim is to answer whether any act of law entitled the State authority to act as it did. In present case, however, there are no governmental actors, who would be the subject of the actions. Moreover, even if it was assumed that the

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<sup>33</sup> *Electronica Situla, SA (ELSI) Case (US v. Italy) (ICJ)*, Judgment of 20 July 1989, para. 123, 124

<sup>34</sup> *Electronica Situla, SA (ELSI) Case (US v. Italy) (ICJ)*, Judgment of 20 July 1989, para. 124; *Ronald S. Lauder v The Czech Republic, UNICITRAL*, Final Award, 3 September 2001, para. 214, 225

<sup>35</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreign Investment Disputes*, Kluwer Law International, 2005, p. 951

<sup>36</sup> *Electronica Situla, SA (ELSI) Case (US v. Italy) (ICJ)*, Judgment of 20 July 1989, para. 129

<sup>37</sup> K. Hamrock, *The ELSI case: Toward an International Definition of "Arbitrary" Conduct*, 27 *Tex. Int'l L. J.* 837 (1992)

Responding State is responsible for the actions of the shareholders, it is still needed to exercise that the state entity acted beyond the law. And that is the question for the national court to decide whether in fact the actions are illegal under domestic law, hence if the claimant would like to bring the present dispute it may only before the national court of Calpurnia. Hence the first condition has not been fulfilled in present dispute.

The second test concerns the proper-purpose test, which accords to the intention of the actor. Mainly the bad-faith may be proved if the action is provided in order to benefit one individual instead of foreign one. In present case however there was no third party which aim was to benefit anyone. Hence, also the second condition is not fulfilled.

The third condition is relevant-circumstance test, which deals with the aspect of factors that the subject considered in reaching its decision. The test would not be fulfilled if the State that would be said to be responsible for the actions would show that the factors were relevant to the subject's exercise of powers. What took place in present case.

And finally, the fourth test is the patent-reasonableness test, which checks the justification for the action, precisely "does a rational connection exist between the statutory power and the action taken?". Hence it means that the action taken is not guaranteed under any statute. However in present case, all actions that took place within the company were consistent with the statute and governing law of Calpurnia.

According to the fact that none of the prerequisites have been fulfill, nor were they fulfilled cumulatively, the actions taken by the shareholder may not be recognized as arbitrary and hence the Republic of Calpurnia is not responsible for them.

### **3. The actions which are supposed to be ascribed to the Responding State did not constitute discriminatory treatment.**

The prerequisite prohibits the behaviour which first and foremost is directed against specified foreign investor<sup>38</sup>. Therefore it has the aim to weaken the position of particular company within domestic market. Under the facts of the case it is known that the organ of the company

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<sup>38</sup> Ronald S. Lauder v. The Czech republic, UNICITRAL Award, 3rd September 2001, para 231, 256

due to economic reasons prohibited paying dividends to any subject who wanted them in foreign currency. Hence, it was not discriminatory, since all foreign shareholders were treated in the same way<sup>39</sup>.

Moreover, the action shall similarly to one constituting arbitrary measure, be provided by the authorities of the State what in present case also did not take place<sup>40</sup>.

As another point of view it has been recognized that in order to decide whether the actions were discriminatory, they shall be based upon discriminatory legal act as well as there shall be no justification for these acts<sup>41</sup>.

Taking into account the first prerequisite according to the facts of the case, no act of law provided any treatment which might be recognized as discriminatory nor there was any decision of municipal government in this case.

Secondly, the decision of the organ of the company was justified by the economic condition of the State, what is an extreme situation and which provides that no subject may order from the hosting state to act as to endanger its economy and internal market<sup>42</sup>. The situation implies reasonable, just and equitable basis for the actions in question. Therefore, if there is a rational and logical distinction, which is not simply directed against particular nationality, just as economic policies protecting the state to which the State has certain right, the State may not be found as liable. Hence the measure discussed in the present case was not discriminatory as well.

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<sup>39</sup> Ronald S. Lauder v. The Czech republic, UNICITRAL Award, 3rd September 2001, para 257

<sup>40</sup> Ronald S. Lauder v. The Czech republic, UNICITRAL Award, 3rd September 2001, para 220

<sup>41</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreign Investment Disputes*, Kluwer Law International, 2005, p. 1090

<sup>42</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreign Investment Disputes*, Kluwer Law International, 2005, p. 1091

According to above presented arguments, the measure implemented by the organ of the company did not constitute arbitrary nor discriminatory measure within the meaning of international investment law and art. 2.3. of Calpurnia – Gaul BIT.

**4. There was no violation of art. 4 of Calpurnia – Gaul BIT, nor the Responding State is responsible for any action in that matter.**

Art. 4 of Calpurnia - Gaul BIT provides two standards of treatment of foreign investor depending on which of them is more favourable to the investor. First of them is the national treatment principle and the second – the most favoured nation principle. However under the facts of the case none of these standards of treatment was violated.

**4.1. The measures taken within the company did not constitute violation of National Treatment principle.**

The national treatment principle is recognized as the most favourable one to foreign investors as well as the most difficult to exit in practice. It guarantees then the treatment of foreigners no less favourable than receive the nationals of the State<sup>43</sup>. There are either no distinctions between the foreign subjects and domestic ones or even foreign investors may be treated more favourably than national subjects concerning particularly establishment, acquisition, expansion, management, conduct, operation and sale<sup>44</sup>. Mainly it is recognized that in developing states due to economic grounds it may even be necessary to distinguish the national from foreign entities and hence to discriminate the second<sup>45</sup>. It may take place when the foreign investors are well developed companies recognized as economically powerful transnational corporations (TNCs)<sup>46</sup>. Under such circumstances many domestic subjects,

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<sup>43</sup> NAFTA, art. 1102; N. Rubins, N. S. Kinsella, International Investment, Political Risk and Dispute Resolution, Oceana Publications 2005, p. 227

<sup>44</sup> NAFTA, art. 1102; art II para 1, 8 of U.S. Model BIT (1992) ; art. 10, para 2, 3, 7, 10 of the Energy Charter Treaty

<sup>45</sup> M. Sornarajah, The International Law on Foreign Investment, Cambridge University Press, 1999, p. 211

<sup>46</sup> United Nations Conference on Trade and Development (UNCTAD), National Treatment, 1999

being mainly “infant” enterprises may be endangered and put in weaker position. In such circumstances it is recognized, that some exceptions to national treatment may be enforced<sup>47</sup>.

Moreover, the national treatment principle is said to concern the treatment in law, i.e. the acts of legislation<sup>48</sup>. Basically it is recognized as discrimination *in iure*. It may be possible however to be discriminated not directly through the act of law, but also by the result of this act, what is known as discrimination *de facto*. However in present case the subject in matter is rather practical issue of the treatment within one company and the policy of the board according to the shareholders. Hence it seems being doubtful whether such treatment may be recognized as violation of national treatment principle.

If some actions treat without equality foreign and domestic subjects, the violation of national treatment principle would not exist if there was justification of such measures<sup>49</sup>. It is widely recognized that some sectors, being important for the internal matters of the State, may be excluded from the national treatment principle. In particular they are: air transportation, banking, insurance, energy production, natural resources, radio and television as well as telephone services<sup>50</sup>. Due to the fact that present case concerns telecommunication market, it is considered as a subject of exclusion from national treatment. Therefore even if the measures taken place might be said to violate the national treatment provision and the Responding State might be said to be responsible for them, according to the sector of activity there could be no violation of national treatment provision since it does not apply.

The main circumstance, widely recognized and without any doubts is that the national treatment obligations are binding only for the host State government and governmental

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<sup>47</sup> United Nations Conference on Trade and Development (UNCTAD), National Treatment, 1999

<sup>48</sup> M. Sornarajah, The International Law on Foreign Investment, Cambridge University Press, 1999, p. 218

<sup>49</sup> S.D. Myers, Inc. V Kanada, Partial Award, 13 November 2000, para 241

<sup>50</sup> Protocol to US – Argentina BIT, 1991, N. Rubins, N. S. Kinsella, International Investment, Political Risk and Dispute Resolution, Oceana Publications 2005, p. 228

organs<sup>51</sup>. None of any shareholders having the majority of shares nor any deciding body within the Company had any constitutional powers to enforce legal acts nor state policy in binding for other subjects manner. Although such subjects may be also sub-divisions of the parties, they still have some deciding power even administrative one, contrary to mere private individuals or companies. Only governmental organs or entities may be liable for violation of national treatment provision according to its meaning within the international investment law. Therefore in present case firstly the obligation of national treatment may not be imposed upon the organ of the Company nor it may be found as liable for violating is as well as the Republic of Calpurnia.

#### **4.2. The measures which are supposed to be ascribed to the Responding State did not violate most favoured nation treatment.**

The most favoured nation treatment principle states that the party in question shall receive no less favourable treatment as receives in like circumstances the investor of another party<sup>52</sup>. The treatment concerns in particular establishment, acquisition, expansion, management, conduct, operation and sale.

There are two main conditions that have to be fulfilled in order not to violate this principle: first and foremost the party to the dispute shall receive the same treatment as other foreign subject in the hosting state; and secondly, the circumstances in which different foreigners would act shall be even not identical but just similar<sup>53</sup>.

Taking into account the first prerequisite it shall be noticed that under the facts of the case no activity has been directed against Gaul's company since all foreigners have been treated in

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<sup>51</sup> United Nations Conference on Trade and Development (UNCTAD), National Treatment, 1999

<sup>52</sup> NAFTA, art. 1103; N. Rubins, N. S. Kinsella, International Investment, Political Risk and Dispute Resolution, Oceana Publications 2005, p. 228

<sup>53</sup> Maffezini v Spain, ICSID case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, 16 ICSID Rev. FILJ 212 (2001), para 38, 47; UNCTAD, Most Favoured Nation Treatment (1999); UNCTAD, Bilateral Investment Treaties in the Mid-1990s (1998)

exactly the same way. If there were other individual shareholders, being other nationality than Calpurnian, they would be treated in exactly the same manner.

Moreover, the conditions in which the nationals of Gaul as well as all others would be subjected to particular measures, were identical. Therefore also the likeliness of situations takes place.

Taking into account all basic conditions for applying the most favoured nation treatment principle, all of them have been fulfilled, since even if the Responding State was said to be liable for the action of the organ of the Company, it did not violate its obligation in this matter.

#### **5. The Republic of Calpurnia is not liable for suspending of payments in foreign currencies.**

First and foremost it shall be recognized that the decision concerning suspension of transfer has been issued by the organ of the company not being any State authority. Therefore the Republic of Calpurnia is not responsible for the action of individual legal persons. However, if under any circumstances the Responding State would be found liable, the suspension has been justified.

One of the basis for foreign investments is to ensure the investor the possibility of transferring his funds. However, according to the UNCTC Draft Code it is allowed for the developing states to suspend the possibility of transfer for some period of time<sup>54</sup>. It is justified mainly during exchange crises in order to protect the economy of the State.

Poorer states find it difficult to guarantee the payment of essential goods under unlimited rights. Possible sudden reparation of payments may have a very adverse effect to their whole economic situation<sup>55</sup>. One of few problems that may take place is exchange availability and

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<sup>54</sup> M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 1999, p. 209

<sup>55</sup> UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 1988

related with this concept of monetary sovereignty<sup>56</sup>. This principle is a right of a State to decide about its own currency and currencies that are allowed to be subject of transfer within its territory including into this restrictions or prohibition of transfer of foreign currencies. Therefore the provision concerning free transfer of funds is not treated as an absolute one, but State is entitled to impose some restrictions on it<sup>57</sup>.

Due to this reason art. 8 of Calpurnia – Gaul BIT includes para. 3 which provides that the State is entitled to delay the transfer of payment under specified and important reason. Therefore if the economic situation of the State required that it was forced to stop the payment in any other than national currency, it was entitled to do so. Furthermore, the action was equitable and non – discriminatory since it concerned all payments done in foreign currencies. Therefore all conditions requested by para 3 of art. 8 of Calpurnia – Gaul BIT have been met and hence the situation in question is covered by this provision. And by the same the art. 8 of the BIT has not been violated by the Responding State.

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<sup>56</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreing Investment Disputes*, Kluwer Law International, 2005, p. 1107

<sup>57</sup> R.D. Bishop, J. Crawford, W. M. Reisman, *Foreing Investment Disputes*, Kluwer Law International, 2005, p. 1107

**D. Actions taken towards Vanguard International do not amount to expropriation in the light of international law and Calpurnia-Gaul BIT.**

In the international law expropriation is considered to be the most severe action taken by a state that interferes with the investment. That is why the standards that are required to establish expropriation are very strict<sup>58</sup>. In the present case none of the prerequisites of expropriation, either direct or indirect has occurred. Hence, this tribunal has no basis to rule that there was a violation of art. 6 of Calpurnia-Gaul Bilateral Investment Treaty or any other norm of international law.

**1. Actions taken by Vancal do not constitute direct expropriation in the meaning of international law.**

Direct expropriation occurs when the legal title to the investment has been affected by the action of the state<sup>59</sup>. In a present case not only was there no action of a state that would anyhow influence the investment, but also the legal title to Vanguard's shares in Vancal remained unchanged. That is why there is no doubt that direct expropriation did not take place.

**2. Actions taken by Vancal do not constitute indirect expropriation in the meaning of international law.**

The notion of indirect expropriation has been widely discussed by international courts and tribunals. That is why there exist a clear distinction between actions that constitute Expropriation and those that are accepted by international community as mere regulatory actions. It is agreed that all cases of indirect expropriation have to be decided on case by case basis<sup>60</sup>. However, when dealing with the problem of actions that have a similar effect to

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<sup>58</sup> M. Sornarajah, *The International Law on Foreign Investment: Second Edition*, Cambridge 2004, p. 346

<sup>59</sup> R. Dolzer, Ch. Schreuer, *"Principles of International Investment Law"*, Oxford University Press 2008, p. 92

<sup>60</sup> M. Sornarajah, *The International Law on Foreign Investment: Second Edition*, Cambridge 2004, p. 346

expropriation, there are always two main factors that have to be taken into account. The first one is whether actions of a state deprived the investor of the possibility to exercise control of its assets; the second one is that it is deprived of all profits that it could reasonably expect. Such point of view has been underlined in cases like: *Azurix v. Argentina*<sup>61</sup> and *LGE v. Argentina*<sup>62</sup>. In a present case Vanguard made an independent decision to withdraw its representatives in a board of directors and the value of the investment did not change; hence, no prerequisites of indirect expropriation have been fulfilled.

### **2.1. Actions taken by Vancal Board of Directors did not deprive Vanguard International of the control over its investment.**

Vanguard International as a minority shareholder has not been entitled to appoint the managing director, but only to place its representatives in the board of directors, and according to the facts of the case it has never been deprived of this right. It decided to withdraw all of its representatives from Vancal voluntarily. Vanguard may claim that by not allowing its proxies to attend the meeting of 16 October 2005 Vancal board of directors *de facto* deprived the investor of its right to exercise control. However, it has to be noted that those proxies were illegal by virtue of Calpurnia domestic law. Hence, members of board of directors had no other choice but to prohibit their participation in the session. On that basis it is clear, that Vanguard decided to stop participating in management of Vancal by itself, as it was the only possibility to bring the case before arbitrary tribunal with the accusation of indirect expropriation. Based on the facts provided, respondent pleads to the court to decide that Calpurnia did not deprive Vanguard of the possibility to exercise control over its investment. Therefore, the first prerequisite of indirect expropriation is not fulfilled.

### **2.2. Actions taken by Vancal Board of Directors did not deprive Vanguard International of the reasonably expected profits from its investment.**

Actions taken by Vancal Board of Directors made it impossible for Vanguard to enjoy just a small part of its assets, namely, profits of Vancal. As underlined in international jurisprudence, the whole or the majority of the investment has to be made worthless for the

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<sup>61</sup> *Azurix v. Argentina*, Award, 14 July 2006, ICSID case. No. ARB/01/12

<sup>62</sup> *LGE v. Argentina*, Decision on Liability, 3 October 2006, 46 ILM 36

investor for the expropriation to occur. Following ECHR in Sporrong/Lonnroth case, when the right in question lose some of its substance but do not disappear completely, one cannot talk about indirect expropriation<sup>63</sup>. Moreover, in all other cases where tribunals decided that expropriation in fact took place, they considered situations in which the value of the investment dropped almost to zero<sup>64</sup>. It has to be noted that the right to freely dispose Vancal shares has not been anyhow influenced by any actions of Calpurnia or Vancal. Hence, Vanguard could sell all of its shares, including the profits generated in the last years that have been placed on Vancal account and in that way reclaim all of its reasonably expected profits. Based on the facts presented, it is clear that even if this Tribunal decides that in fact Vanguard lost some of its profits, the amount was not significant enough to constitute indirect expropriation.

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<sup>63</sup> Sporrong/Lonnroth vs. Sweden, ECHR, 23 September 1982, series A52, para. 63

<sup>64</sup> Middel East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, Award, 12 April 2002, 7 ICSID Reports 178, CME v. Czech Republic, Partial Award, 13 September 2001, ICSID Reports 121, Metal Clad Corp. v. Mexico, Award, 30 August 2000, 5 ICSID Reports 209, Goetz v. Burundi. Award, 10 February 1999, 15 ICSID Review-FILJ 457