

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 CLAIMANT

2008

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- A. F. Lowenfeld „International Economic Law” Second Edition, Oxford 2008
- E. Gaillard „International Arbitration Law” New York Law Journal, 2 June 2005
- M. Matsushita, T. J. Schoenbaum, P. C. Mavroidis, The World Trade Organization Law Practice and Policy, Oxford 2003
- M. Sornarajah, The International Law on Foreign Investment: Second Edition, Cambridge 2004
- R. Dolzer, Ch. Schreuer, “Principles of International Investment Law”, Oxford University Press 2008
- S. Vesel „Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties”
The Oxford English Dictionary
- Y. Fortier, S. Drymer, Indirect Expropriation in The Law of International Investment: I Know It When I See It, 2004, ICSID Review-FILJ 293305

LIST OF LEGAL SOURCES

International Cases

- AAPL v Sri Lanka, Award, 27 June 1990, 30 ILM (1991)
- ADF Group Inc. Vs United States, ICSID case No. ARB (AF)/00/1, 9 January 2003
- Amoco International Finance Corp. v. Iran, Award, 14 July 1987, Iran-U.S. CTR 189
- Ceskoslovenska Obchodni Banka A.S. v The Slovak Republik, Award, 29 December 2004
- CME v Czech Republic, Partial Award, 13 September 2001, 9 ICSID Reports 121
- CMS Gas Transmission Company v. Argentine Republic, ICSID Case no. ARB/03/8, 12 May 2005
- Elettronica Sicula S.p.A. (ELSI) (United States v Italy), judgment, 20 July 1989, ICJ Reports 295
- Enron v Argentina, Award, 22 May 2007
- Eureko B.V. v. Poland, Partial Award, 19 August 2005, 12 ICSID
- Genin v Estonia, Award 25 June 2001, 17 ICSID Review – FILJ (2002) 395;
- Genin, Counter-Memorial, para. 1108 citing ELSI, Judgment, 20 July 1989, ICJ Reports (1989)
- Hotels v Egypt, Award, 8 December 2000, 41 ILM (2002)
- Lauder v Czech Republic, Award, 3 September 2001, 9 ICSID Reports 66
- LGOE Energy Corp. v. Argentina Republic, ISCID Case no. ABR/02/1, 3 October 2006
- LGöE v Argentyana, Decision on Liability, 3 October 2006
- Maffezini vs. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction
- Middel East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, Award, 12 April 2002, 7 ICSID Reports 178
- Phelps Dodge Corp. v. The Islamic Republic of Iran, Iran-U.S. Claims Tribunal, Award No. 217-99-2, 19 Mar. 1986
- Pope and Talbot v Canada, Second Award
- Revere Copper v OPIC, Award, 24 August 1978, 56ILR (1980) 258
- S D Myers v Canada, Award 13 November 2000, 40 ILM (2001) 1408, para 259
- Salini v Morocco, Decision on Jurisdiction, 23 July 2003

Saluka Investments BV (The Netherlands) The Czech Republic, Partial Award, 17 March 2006

Siemens AG v Argentya, Investment Claims, No IIC 227, Oxford University Press 2008

Starrett Housing Corp. v. Iran, Iran-U.S. Claims Tribunal, 19 December 2003

Tecnicas Medioambientales Temced S.A. v. The United Mexican States, Award, 29 May 2003, 43 ILM 133 (2004)

Tippetts, Abbett, McCarthy, Stratton v. Tams-Affa, 6 Iran-U.S. C.T.R. – 219

Wena Hotels v Egypt, Award, 8 December 2000, 41 ILM (2002) 896

Treaties and United Nations documents

Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments

Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001

North America Free Trade Agreement, 1994

Vienna Convention On The Law Of Treaties, 23 May 1969

STATEMENT OF FACTS

The Government of the Republic of Calpurnia and the Government of the Federated States of Gaul are both parties to the Agreement on the Promotion and Protection of Investments. Each party has obliged itself to encourage and create favourable conditions, fair and equitable treatment as well as full constant protection and security for investments maintained in its territory.

The Claimant, Vanguard International, is a mobile telecommunications company which made an investment in Calpurnia. It was one of the founders of a joint venture company, VanCal. Originally Vanguard owned 50% shares in VanCal, but at the end of 2004 the Claimant held 30% directly and an additional 1% registered in the name of Francesca Pescara. The state-owned SFCDC possessed 30% of VanCal's shares directly and 22% indirectly. The remaining 17% of shares were registered in the name of other Calpurnian shareholders.

Between 1997 and 2004, the Claimant played a major role in the management of VanCal. But after the Conservative Conscience of Calpurnia (CCC) won the majority of votes in Calpurnian Parliament in November 2003, the relationship between Vanguard International and Calpurnia got worse. The SFCDC implemented a series of decisions that effectively deprived the Claimant of the use and benefit of its interest in VanCal.

In December 2003, June 2004 and July 2004 Calpurnian Security Forces searched the private homes of Vanguard International employees under suspicion of unlawful data collection and espionage. No charges were ever filed. Vanguard sought compensation before the Calpurnian Constitutional Court, but the application has been dismissed. Moreover, the press releases issued by the Calpurnian Security Directorate in connection with the searches agitated public sentiment against Vanguard, Ms. Pescara and Mr. Kolowenko. In the period between January and October 2004 Ms. Pescara's home was picketed but the police declined Ms. Pescara's demands to remove the protesters. What is more, Pescara's application for renewal of a „three-year business visa” was denied, so she was forced to hand in her resignation.

In 2005 VanCal refused to pay the cash dividends to Claimant. It also failed to pay license fees for the use of the Vanguard International trade mark and other sums due to the technical assistance agreement.

On 16 November 2005 Ms Pescara was ousted from the VanCal board of directors by government representatives. At the same time two proxies held by Mr Rindler, on behalf of the Claimant were wrongly found not to be formally valid. As a result, the Claimant was prevented from electing a replacement to Ms. Pascara. On 23 October 2006 Claimant's representatives at board of directors resigned and the Claimant decline to replace them. On 31 January Claimant requested an institution of arbitration proceedings in accordance with ICSID's rules of procedure for the Institution of Conciliation and Arbitration Proceedings and notified State of Calpurnia about this request.

PLEADINGS

A. Tribunal does have a jurisdiction on the basis of art. 4 Calpurnia-Gaul BIT in connection with art. 7 of Calpurnia-Flatland BIT.

1. Most Favoured Nation clause in art. 4 of Calpurnia-Gaul BIT extends to dispute settlement provisions of Calpurnia-Flatland BIT.

Calpurnia has violated many provisions of Calpurnia-Gaul BIT since CCC won the majority of votes in Calpurnian Parliament. According to Art. 11 (2) of Calpurnia – Gaul BIT a dispute between contracting parties can not be settled amicably within 18 months from the date of a request for amicable settlement, investor may submit the dispute to the international arbitration. In Vanguard – Calpurnia case 5 months passed between the date of arequest for amicable settlement and the date of a request for arbitration.

Reffering to the MFN Clause, the Claimant based its request on art. 7 of Calpurnia-Flatland BIT where it is said that if the dispute can not be settled friendly within two months of the notification date by either party, a request for international arbitration may be submitted to the local judicial authorities by the investor. The Claimant did not pursued amicable settlement for 18 months, because it referred to the MFN clause, which gives the right to use a third state rights if they are more favourable than its own rights resulting from the treaty.

The Most Favoured Nation principle is one of the fundamental principles of international trade and investment law¹. MFN clause remains at the heart of the contemporary international trade system as Art. 1 of the General Agreement on Tariffs and Trade (GATT)² and it is included in all modern commercial agreements. In the second half of the twentieth century, it

¹ M. Matsushita, T. J. Schoenbaum, P. C. Mavroidis, *The World Trade Organization Law Practice and Policy*, Oxford 2003, p. 143, A. F. Lowenfeld „*International Economic Law*” Second Edition, Oxford 2008

² S. Vesel „*Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*”

was incorporated into the emerging field of international investment law³ and now it can be found in all bilateral investment treaties. MFN standard can be applied when „the basic treaty” and „third party treaty” concern similar subject (for example both treaties concern promotion and protection of investments). The purpose of MFN clause is to prevent discrimination against the nationals of different countries and ascertain equality of treatment regardless of nationality.⁴

The MFN clause from art. 4 of Gaul-Calpurnia BIT does not directly refer to dispute settlement provisions, but according to Tribunal’s holding in Maffezini Case „there are good reasons to conclude that today dispute settlement agreements are inextricably related to the protection of foreign investors”⁵. Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement „it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s right and interests than this in a basic treaty, such provision may be extended to the beneficiary of the MFN Clause as they are fully compatible with the *ejusdem generis* principle”⁶. The upshot of the Tribunal’s holding is that it is neither possible nor desirable to separate treaty rights from treaty remedies and then to apply the MFN principle only to the rights and not to the remedies⁷. The Tribunal confirmed this broad reading of MFN clause in Simens Case concluding that the term „treatment” and phrase „activities related to the investments” are sufficiently wide to include settlement dispute⁸. MFN clause in art. 4 of Calpurnia-Gaul BIT says that „Investments made by investors (...), or returns related thereto shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors of any third State, whichever is the most favourable to the investor.” According to the Tribunal’s jurisdiction, this provision is satisfactory enough to include dispute settlement provisions to the MFN clause contained in art. 4 of Calpurnia-Gaul BIT.

³ Ibidem

⁴ E. Gaillard „International Arbitration Law” New York Law Journal, 2 June 2005

⁵ Maffezini vs. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 54

⁶ Maffezini vs. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 56

⁷ S. Vesel „Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties”

⁸ Siemens vs. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 102-103

On the basis of the abovementioned arguments there is no doubt that Most Favoured Nation clause in art. 4 of Calpurnia-Gaul BIT extends to dispute settlement provisions such as art 7 Calpurnia-Flatland BIT.

2. The Claimant has not pursued its claim before domestic courts of Calpurnia.

The Respondent has alleged that Claimant pursued claims before domestic courts and according to art. 11 (3) of Gaul – Calpurnia BIT, no other arbitral remedy may be elected. The fact is that Vanguard did not file a claim with court. Ms Pescara did it in her own name and it concerned only the issue of transfer to her account dividends on 1% shareholding, which Ms Pescara was held in trust for the Claimant. The phrase „hold in trust” means that entity can dispose of specified things or property rights, which are its property, but such a disposal is on third party beneficiary. The result is that this claim can not be considered as a use of right to settle a dispute, because this 1% shareholding was Ms Pescara’s property and Vanguard had nothing in common with filing this claim. Aside from this fact, the statement of claim included only a demand to pay dividends. Calpurnia violated many provisions of the Treaty, thus if the Vanguard wanted to file a claim, it would more demands would be included.

3. The fact that Flatland has not been a Contracting State of ICSID Convention does not adversely affect the jurisdiction of this Arbitrual Tribunal.

The Respondent contends also the fact that even if article 7 of the Calpurnia – Flatland BIT was applicable, Flatland has not been a Contracting State at the time relevant for jurisdiction of ICSID Arbitral Tribunal. Flatland noticed the ICSID Convention on 2 May 2003 – but it is not vital in this case. The point is that Gaul – Flatland BIT provides that after the period of 2 months the dispute can be submitted to arbitration, so the time limit is much more shorter than in Calpurnia – Gaul BIT. It is not crucial who will solve the problem, but when the party can submit the dispute for arbitration. Claimant referred to Calpurnia-Flatland BIT willing to take advantage of MFN Clause. What really matters in this case is that both the Claimant and the Respondent are Contracting States of ICSID Convention. The mere fact that Flatland is no longer a Party to this Convention is not meaningful in this case.

B. The Respondent is responsible for actions of SFCDC and Vancal

The general rule of the customary international law has it that actions by a variety of state organs are attributable to the state. These may include inter alia the actions by members of the government, by police or by courts. Similarly, the state is responsible for all its territorial units. This principle of attribution follows from the concept of the unity of the state and applies to organs at all levels regardless of the position of the organ in the state's administrative organization.⁹ However, in many countries, the matters concerning foreign investments are not handled by state organs directly. That is where state entities are created. Generally, state entities are separate from the state and their actions cannot be attributed to the state. The past awards of the International Centre for Settlement of Investment Disputes and other tribunals, however, have shown a number of exceptions to this rule. That is, in fact, the matter in this case. The Claimant – Vanguard International is to prove that the Respondent should be deemed fully responsible for actions of SFCDCS and that SFCDC was used by the Conservative Conscience of Calpurnia as a means of implementation of government policy, the aim of which was to deprive the Claimant of the major role it played in the management of VanCal.

1. The actions of SFCDC are attributable to the Respondent

The State Fund for Commerce and Development in Calpurnia, hereinafter referred to as SFCDC, is an entity 100% owned by the State of Calpurnia. The SFCDC directly owns 30% of VanCals stock. At the same time it holds on deposits and votes the next 40% of the shares, which are registered in the names of individuals or other companies. In fact, the voting rights of 69% of the shares of VanCal are directly executed by SFCDCS, which practically puts all the control over VanCal in the hands of people nominated by the ruling party. This aforementioned situation bears a striking resemblance to *Salini v. Morocco*¹⁰ case. The Moroccan company ADM constructed and maintained highways and major communication routes. The tribunal considered, on the structural side, that ADM was a commercial company,

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

¹⁰ *Salini v Morocco*, Decision on Jurisdiction, 23 July 2003, para 31-35

incorporated as a limited liability company with its own legal personality.¹¹ The state owned 89% of the shares of this company. Moreover, it was run by people connected with the government (including the Minister of Infrastructure as the President of the company and some other officials). Thus, the state practically controlled the company.

In the aforementioned case the tribunal stated also that the tasks performed by ADM were the business of the state: “ADM being, both from a structural and functional point of view, a body distinguishable from the State only by virtue of its legal status, the Tribunal concludes that the Italian companies have shown that ADM is a State company, acting in the name of Kingdom of Morocco”¹². The similar conclusion could be drawn in Vanguard International – Calpurnia case. There are no doubts that telecommunications industry is the state’s business. In the past few years the role of telecommunications has increased, which can be derived from the development of information technology. Nowadays the state is obliged to ensure its citizens the access to telecommunications services and set the standards which comply with the international provisions. The Claimant, Vanguard International, is a leading mobile telecommunications company with 360 million people under licence. The experience and skills of Vanguard employees as well as the Claimant’s role in the management of VanCal were the crucial factors which helped VanCal to gain recognition among the telecommunications service users of Calpurnia. Only then was the Claimant de facto deprived of the use of its interest in the company.

To sum up, in Vanguard International – Calpurnia case the private character of the company has been drastically altered and it cannot be treated as a state- independent company anymore. The state of Calpurnia de facto exercises control over 69% of the shares of the company. VanCan is, then, indirectly owned by the state of Calpurnia and the actions of SFCDC are fully attributable to Calpurnia.

The SFCDS acted under control of Calpurnia

¹¹ R.Dolzer, C.Schreuer, Principles of International Investment Law, Oxford University Press, 2008, p.202

¹² Salini v Morocco, Decision on Jurisdiction, 23 July 2001, paras 31-35

In Article 8 of the International Law Commission's Articles on State Responsibility we read: "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 the conduct"

But what does "under the direction and control" mean? The Commentary to ILS's Articles adds the following explanation: "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 State's direction or control".¹³ The ownership of VanCal did not escape from the control of Calpurnia. Quite the contrary. Since November 2003 the Respondent exercised greater and greater control by gradually depriving the Claimant of his rights, which resulted in expropriation without compensation. And further: " when there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State"¹⁴.

In our opinion there is no doubt that SFCDC is a state entity which is exercising public powers. Not only is it 100% owned by the State of Calpurnia, but it also holds more than two thirds of VanCal stocks. Moreover the Complainant believes that Calpurnia was using its control of VanCal "in order to achieve a particular result", i.e. to destabilize and deteriorate the relations with Gaul. The Claimant's situation as a shareholder in VanCal has drastically deteriorated after the Conservative Conscience of Calpurnia won the elections. This cannot be regarded as a mere coincidence.

¹³ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p.18

¹⁴ Ibidem

C. Respondent violated the Calpurnia - Gaul BIT since it discriminated against the Claimant, unlawfully interfered in the Claimant's investment, obstructed the transfer of returns from the Claimant's investment, and failed to provide the Claimant and its investment full protection and security.

1. Actions of Calpurnian authorities constituted violation of Article 2.3 of Calpurnia-Gaul BIT.

Art. 2.3. prohibits from any arbitrary or discriminatory interference into the investments. Generally it has been specified that "arbitrary" means "depending on individual discretion"¹⁵. Moreover, the act shall be surprising for the other party¹⁶. The principle of not using arbitrary measures has raised to the international minimum standard that have to be fulfilled by the hosting state¹⁷.

Moreover, within trade relations discrimination mainly has national character, hence when other subjects that differ only by nationality are treated better than other subjects. Hence, the measure is discriminatory if its intent is to discriminate against foreign investors or has such an effect¹⁸.

According to the facts of the case, Calpurnia violated art. 2.3. of the Calpurnia – Gaul BIT by using arbitrary and discriminatory measures.

1.1. The payment of profits to the foreign shareholders has been suspended.

At VanCal's board meeting held on 10 March 2005 the representatives of the SFCDC made a decision not to pay any profits to the foreign shareholders solely. This actions were both arbitrary and discriminatory, therefore were in violation of Article 2.3 of Calpurnia-Gaul BIT.

¹⁵ *Lauder v Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, para 221

¹⁶ *ICJ, ELSI*, 20 July 1989, ICJ Reports (1989) 15 at 76

¹⁷ *ICJ, ELSI*, 20 July 1989, ICJ Reports (1989) 15 at 76

¹⁸ *LG&E v Argentina*, Decision on Liability, 3 October 2006, para 146

According to the Vienna Convention on the Law of Treaties and its provisions concerning the interpretation of treaties, it shall be noticed that the treaties' provisions shall be interpreted in good faith and within ordinary meaning of particular words¹⁹. In its ordinary meaning, "arbitrary" means "derived from more opinion", "capricious", "unrestrained".²⁰ Specifically it has been defined that "measures without engaging in a rational decision – making process" are arbitrary²¹. This process shall include a consideration and the balance of the interest of the State with any burden imposed on the investments²². The concept of arbitrariness defined by the ICJ in ELSI case: "It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"²³, is the most authoritative interpretation of international law and is close to the ordinary meaning of the term emphasizing the willful disregard of the law.²⁴ Arbitrary measures are measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process.²⁵ Moreover, it has been noticed that arbitrary measures take place when depriving of the contractual rights of a party is a result²⁶, what took place in present case. The decision on not paying any profits was arbitrary, because this action was founded on preference rather than on reason of fact. The VanCal's board meeting held on 10 March 2005 was dominated by the chairman of the board, Dr. Jonathan Swift, who was also on the board of SFCDC. At that meeting Swift noted, that the payments of profits to the foreign shareholders has been suspended for the time being, due to the existing dispute between the governments of Calpurnia and Gaul. It can be clearly seen that it is the person who plays the key role in the company, who has the biggest influence on whether such a decision will be made or not. In this case the decision not to pay any profits to foreign shareholders was not *de facto* the decision of the board of directors of VanCal. It was a decision of the SFCDC directed against

¹⁹ Art. 31 (1) Of Vienna Convention On The Law Of Treaties, 23 May 1969

²⁰ The Oxford English Dictionary,

²¹ LG&E v Argentina, Decision on Liability, 3 October 2006, para 158

²² LG&E v Argentina, Decision on Liability, 3 October 2006, para 158

²³ Genin, Counter-Memorial, para. 1108 citing ELSI, Judgment, 20 July 1989, ICJ Reports (1989), para. 128,

²⁴ Siemens AG v Argentya, Investment Claims, No IIC 227, Oxford University Press 2008,

²⁵ LG&E v Argentya, Decision on Liability, 3 October 2006, para 158,

²⁶ CME v Czech Republic, Partial Award, 13 September 2001, 9 ICSID Reports 121, para 162

the Claimant. However, no political disputes between two states can be the basis for such a decision. The explanation given by the board of directors was unjustified and surprising. This action was aimed at creating hostile environment for the Claimant's investment.

Furthermore, the measures are not recognized as arbitrary if their aim is to prevent from the crisis, hence the State uses them in specific and hard situation²⁷. However in present situation Calpurnia was not in any state of emergency which could be a justification for using such a measure.

There is no doubt that certain measure taken by Calpurnian authorities were not based on lawful reason. It is also clear that this action was discriminatory. Discrimination can take a number of forms. It can be based on race, religion, disability, political affiliation, but in the context of the treatment of foreign shareholders, the most frequent problem is discrimination on the basis of nationality.²⁸ To discriminate means to treat two subjects who are in similar situation in a different way. There is no doubt that actions of Calpurnian authorities were discriminatory, because the decision not to pay any profits to foreign shareholders referred only to foreign shareholders, narrowly to the citizens of Gaul. Mainly, although VanCal declared cash dividends in 2004, 2005, 2006 and 2007, in each case based on profits earned in the prior year, and paid those dividends to Calpurnian shareholders, it refused to pay them to Claimant pursuant to a March 2005 decision. That means that payment of profits to Calpurnian citizens was not suspended. This shows that the Calpurnian authorities treated foreign shareholders less favourable than its own citizens. Moreover, Dr. Swift said at shareholders meeting held on 16 November 2005 that "the main objective [of the company] is to protect the interest of the country", so the interest of the Claimant was not very important.

Moreover, it has been recognized that each using of arbitrary measures constitute a violation of fair and equitable treatment²⁹, hence in present case the violation of art. 2.3. implicates the violation of art. 2.2. of Calpurnia – Gaul BIT.

²⁷ Enron v Argentina, Award, 22 May 2007, para 281

²⁸ R. Dolzer, Ch. Schreuer, "Principles of International Investment Law", Oxford University Press 2008, p. 176

²⁹ CMS v Argentina, Award 12 May 2005, 44 ILM (2005) 1205, para 290; MTD v Chile, Award, 25 May 2004, 12 ICSID Reports 6, para. 196

According to the facts of present case, the Responding State behaved in a way amounting to violation of article 2.3 of Calpurnia-Gaul BIT. Its discriminatory and arbitrary measures impaired Claimant's ability to use and enjoy investment.

1.2. Calpurnian authorities found the two proxies held by Mr. Rindler not be formally valid even though the proxies has the same form as had been accepted in earlier meetings.

Calpurnian authorities have violated Article 2.3 of Calpurnia-Gaul BIT through making it impossible for Claimants' representatives to manage VanCal. The decision not to find the two proxies held by Mr. Rindler formally valid was arbitrary and unreasonable, mostly because at earlier meetings proxies in the same form had been accepted by Calpurnian representatives. It is clear that there was no lawful reason for this action. It was another act of hostility towards Claimant.

The proxies for the 11 October 2005 Meeting were issued on the 5th of October 2005, subsequently the meeting was postponed until 16 November 2005. According to the corporate law, proxies issued for the purpose of a meeting that was postponed are formally valid. The meeting on 16 November 2005 had the same purpose as the 11 October 2005 Meeting was supposed to have. That means that Calpurnian authorities did not have any legal reason to found Mr. Rindler's proxies not to be formally valid.

Moreover, it was a purposeful action, because at the same meeting one of the Claimants' representatives- Ms. Pescara was voted off the board of directors and Mr. Poe and Mr. Korchnoi have resigned. They were replaced by two directors representing the SFCDC. Those actions lead to the situation where Claimant did not have any real influence on activity of the company. Without hesitation it can be said that the only aim was to deprive Claimant of its right to manage VanCal, what constitutes violation of Respondents' obligation not to impair by unreasonable and arbitrary measures the management or use of investments.

2. Calpurnia is responsible for violation of Article 2.2. of Calpurnia-Gaul BIT.

One of the most important principles which aim is to create such circumstances that allow for the investor to develop its investment without any fear. This is so called minimum standard of treatment which consists from two aspects: fair and equitable treatment as well as full protection and security³⁰.

2.1. The Responding State did not ensure the Claimant with fair and equitable treatment.

The FET standard is recognized as a rule of international law and cannot be determined by the internal law of the hosting state³¹.

It has been defined that fair and equitable treatment is the “creation of hospitable climate that would insulate investors from political risks or incidents of unfair treatment”³². According to the fact that in present case the policy of the Responding State resulted in unfair treatment of foreign investor comparing to the domicile subjects, the Respondent violated this provision of Calpurnia – Gaul BIT.

It has been recognized by the judiciary that such activities as threats, denying information, obliging to unnecessary expenses or even resulting in loss of reputation in government circles are violation of fair and equitable treatment provision³³. Hence if as in present case, the Claimant was not informed, has been prevented from getting returns and from managing the company, the violation of fair and equitable treatment took place certainly.

Moreover, the violation of fair and equitable treatment concerns also the personal goods of the company. The press releases issued by the Calpurnian Security Directorate in connection with

³⁰ Art. 1105 (1) of NAFTA

³¹ Genin v Estonia, Award 25 June 2001, 17 ICSID Review – FILJ (2002) 395, para 367; S D Myers v Canada, Award 13 November 2000, 40 ILM (2001) 1408, para 259; CME v Czech Republic, Partial Award, 13 September 2001, 9 ICSID Reports 121, para 611

³² M. Sornarajah, The International Law on Foreign Investment, Cambridge University Press 2004, p. 336

³³ Pope and Talbot v Canada, Second Award, para. 181

the searches agitated public sentiment against Claimant, Ms. Pescara and Mr. Kolowenko and were a violation of Article 2.3. of Calpurnia-Gaul BIT. In press releases Calpurnian Security Directorate used the name of Vanguard. This action was an infringement of Claimant's personal goods.

2.2. The Responding State did not ensure the Claimant with full protection and security.

The Respondent State has violated its obligation under Article 2.2 of Calpurnia-Gaul BIT which more particularly provides that each Contracting Party shall accord to the investments of investors covered by the Calpurnia-Gaul BIT "full protection and security".

"The full protection and security" standard obliges the host state to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners.³⁴ It has been recognized that if a hosting state fails to provide the protection for the investor who is threatened as a result, violates the provision of full protection and security³⁵. Moreover, the responsibility may arise from both willful and negligent acts³⁶ and both of them did take place in present dispute.

Calpurnia has failed to accord Vanguard's investment full protection and security by its oppressive use of public powers, post- forced administration, with a view to depriving Vanguard of any residual economic benefit or use of its investment and by harassing its employees.

Claimant's employees, especially Ms. Pescara and Mr. Kolowenko, are a part of Vanguard. A company is not only a capital substratum but also a very important personal substratum. This is the reason why the protection under the Calpurnia- Gaul BIT extends over Ms. Pescara and Mr. Kolowenko and everything they own. For that reason Respondent's responsibility towards Claimant for treatment of Ms. Pescara and Mr. Kolowenko should be considered.

³⁴ See OECD Working Papers, *supra* note 18, at 26-28 ("obligation of vigilance and protection"),

³⁵ Middle East Shipping and Handling Co. v Egypt (2002) ICSID ARB/99/6, para 143

³⁶ M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press 2004, p. 342

2.2.1. Respondent failed to accord Claimant’s investment “full protection and security” by searching Ms. Pescara’s and Mr. Kolowenko’s homes

There were three police searches of private homes of Ms. Pescara and Mr. Kolowenko- on 7 December 2003, on 3 June 2004 and 15 July 2004. These police actions were legally unjustified and violated not only Article 2.2 of Calpurnia-Gaul BIT, but also Ms. Pescara’s and Mr. Kolowenko’s fundamental rights to the inviolability of privacy and home.

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.³⁷ Taking into account that Ms. Pescara by the 15 November 2004 was the managing director of VanCal, searches of her house raises amazement, especially that no warrants were issued and there were no charges filed against Ms. Pescara, Mr. Kolowenko, VanCal or Vanguard. Moreover, an initiator of this action was anonymous and said that VanCal was engaged in illegal data collection for Gaulois security Services. As it was mentioned no charges were ever filed. There is no doubt that this information was a purposeful action of Calpurnian authorities against Claimant.

It has to be said that the searches of Claimant’s representatives homes were in violation of the principles of democratic state, because they lasted several hours and were quite thorough. It was a harassing Vanguard’s employees.³⁸ The fact that one of the houses which were searched belonged to the managing director of VanCal, the representative of Claimant, allows to make a statement that it was not a private case, but the action pointed purposfully at Claimant.

What is more, Claimant’s application to have those searches declared unlawful and seek compensation was dismissed by Calpurnian Constitutional Court.

³⁷ R. Dolzer, Ch. Schreuer, “Principles of International Investment Law”, Oxford University Press 2008, p. 149

³⁸ See AAPT v Sri Lanka, Award, 27 June 1990, 30 ILM (1991) 577, paras 45 et seq, 78 et seq; Wena Hotels v Egypt, Award, 8 December 2000, 41 ILM (2002) 896, para 84,

According to the facts mentioned above, Respondent has failed to provide to Claimant full protection and security.

2.2.2. Respondent failed to accord Claimant's investment "full protection and security" also by not reacting to picketing in front of Ms. Pescara's home

Respondent did not prohibit members of the CCC Women's League to picket in front of Ms. Pescara's home, which happened several times in 2004. Ms. Pescara's demands to remove the protesters have been rejected. It was an infringement of Calpurnia's obligation to afford the Claimant's investment full protection and security.

The principle of full protection and security reaches beyond physical violence and requires legal protection for the investor.³⁹ Case law supports the view that the usual formula of "full protection and security" also provides protection against infringements of the investor's rights.

Picketing in general is not illegal; it is an aspect of freedom of speech on public property in a non-violent manner, but when the picketers violate rights of other people, then the police should intervene. Although vehicle access to and from the property of Ms. Pescara was obstructed and the chants were considered by Ms. Pescara to be "threatening" and although the picketers were audible within the home, also during the night, the police declined Ms. Pescara's demands to remove the protesters. It can not be said that such a behavior was non-violent. Quite the contrary - if Ms. Pescara was threatened by the protesters and the access to her own property was obstructed, the actions of the protesters definitely were violent and encroach not only on Ms. Pescara's but also on Claimant's rights. Ms. Pescara was a managing director of VanCal and the main representative of Claimant, that is why those actions can be considered as actions pointed at Claimant.

This picketing and idleness of the police were connected with the general hostility towards the Claimant. Ms. Pescara was identified with Claimant. In this case this idleness has violated

³⁹ Saluka Investments BV (The Netherlands) The Czech Republic, Partial Award, 17 March 2006, paras 483, 484; Ceskoslovenska Obchodni Banka A.S. v The Slovak Republik, Award, 29 December 2004, at para 170

Respondent's obligation to accord to the investments of investors covered by the BIT "full protection and security".

3. Respondent by its actions violated art. 4 of the Calpurnia – Gaul BIT.

Art. 4 of the BIT stated that the subjects of one state shall not be treated less favourable than the subjects of the hosting state or subjects of the third state depending on which treatment is more beneficial. Hence, this provision constitutes two standards which shall be used: the national standard of treatment and the most favoured nation (hereinafter: MFN) treatment.

The national standard of treatment concerns the pre-entry as well as post-entry phase and simply obliges to treat the subjects of investing state not worse than its own companies.

The most favoured nation principle obliges the state to treat the subject of investing state the same as investors from other states.

Due to the fact that in present case within Vancal only two types of subjects exist, the Calpurnian and Gaulian ones, hence generally national treatment shall be considered.

The national treatment principle is treated differently while speaking about pre-entry and post-entry phase. Although it is met to differ the subjects while dealing with pre-entry phase, it is common that in post-entry phase the subjects both national and foreign ones are treated as the same⁴⁰. In present case by its actions Respondent violated the national treatment while concerning the post-entry phase, since two types of subjects – national and foreign ones - have been treated differently mainly while dealing with returns and managing the company, what has not been justified.

The national treatment violation could be justified only if the national regulations imposed a particular obligation on all investors and the foreign subject cannot fulfill it. But it shall be justified by important for the state policy and legal acts⁴¹. Moreover it has been decided that

⁴⁰ M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press 2004, p. 320, 321

⁴¹ *ADF Group Inc. Vs United States*, ICSID case No. ARB (AF)/00/1, 9 January 2003

actions of the state organ according to state's policy is not a proper justification⁴². Hence, when state wants to violate the national treatment principle, it shall affect the same national subjects as well as shall be based upon a legal act. Due to the fact that in present case no such a basis has been invoked and the actions of the Calpurnian subjects were only politically determined, it cannot be treated as a justification.

Hence, as if in present case, the treatment was different for national subjects than to foreign ones, it constitutes the violation of national treatment principle certainly⁴³.

4.Respondent is responsible for violation of art. 8 of Calpurnia – Gaul BIT.

Each contracting party to the BIT obliged itself to ensure the free transfer of goods – especially the returns (art. 8 (1) (b)) - from the hosting state to the state of nationality of the investor. In present case, by passing the dividend which shall belong to Gaul's company, the Responding State de facto blocked the transfer of refunds to any other State than Calpurnia. The Climant was not able to transfer their money to its state of nationality, hence Gaul, nor to any other. Thus, Calpurnia violated the art. 8 (1) (b) of Calpurnia – Gaul BIT.

⁴² S.D. Myers v Kanada, NAFTA/UNICITRAL Tribunal, 21 October 2002

⁴³ M. Sornarajah, The International Law on Foreign Investment, Cambridge University Press 2004, p. 326

D. Actions and omissions of Respondent constitute expropriation in the light of Calpurnia-Gaul BIT.

Calpurnia-Gaul BIT in its art. 6 clearly prohibits expropriation and other measures having the same effect, either direct, or indirect. Actions taken by SFCDC on behalf of State of Calpurnia, and its negligence in ensuring full protection for Vanguard International investment, constitute *de facto* expropriation as investor no longer can suffice from its investment. Calpurnia measures had the same effect as expropriation, hence, where in a clear violation of Calpurnia-Gaul BIT.

1. Actions and omissions of Respondent constitute indirect expropriation.

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 has to be decided on case by case basis⁴⁴. However when dealing with the problem of actions that have a similar effect to expropriation, there are always two main factors that have to be taken into account. The first one is whether the control over investment remains in investors' hands; the second one is extent to which the investor has been deprived of his profits. In the present case Vanguard International has no control over investment and does not receive any profits. Hence, there is no doubt that the indirect expropriation in fact occurred.

1.1. Respondent actions deprived Vanguard of any control over its investment.

The control over investment is a fundament aspect of ownership. As emphasized in Revere Copper case without exercising effective control over investment, investor loose substantial part of its investment⁴⁵. Moreover, as pointed out in may ICSID cases, the control over

⁴⁴ M. Sornarajah, *The International Law on Foreign Investment: Second Edition*, Cambridge 2004, p. 346

⁴⁵ *Revere Copper v OPIC*, Award, 24 August 1978, 56ILR (1980) 258.

investment is the most important factor in deciding whether expropriation took place⁴⁶. In a present case Vanguard International, due to actions of SFCDC, like appointing additional board of director members, made it impossible for Claimant to execute its rights. Hostile environment of work, an example being the declaration of Dr Swift that he would not stay at the meeting with Gaulois spies, resulted in lack of possibility to exercise control over investment even when Ms. Pascara was still a member of the board of directors. Facts of the case undisputedly show that investor had no control over the investment, hence the first prerequisite of expropriation is fulfilled.

1.1.2 Even if Vanguard proxies where not formally valid under Calpurnia domestic law, the expropriation still took place.

Respondent may claim, that it was not its intent to deprive the Complainant of its control over VanCal, and it is only Vanguard's fault that its proxies did not meet standards of Calpurnian law. However, the recognized rule in international investment law is that the intention of the state is not a deciding factor when dealing with a question of expropriation⁴⁷. Following international tribunals decisions in Tecmed v. Mexico⁴⁸, Siemens v. Argentina⁴⁹, Tippetts⁵⁰, Phelps⁵¹ and Starrett Housing v. Iran cases⁵², the only thing that matters when deciding on expropriation is the outcome of the measure taken by a state. Therefore even if the action taken has been made in compliance with national laws a regulations, its outcome is expropriation, and so, it violates art. 6 of Calpurnia-Gaul BIT.

⁴⁶ CMS Gas Transmission Company v. Argentine Republic, ICSID Case no. ARB/03/8, 12 May 2005, para. 252-265, LGOE Energy Corp. v. Argentina Republic, ISCID Case no. ABR/02/1, 3 October 2006, para 198-200

⁴⁷ R. Dolzer, C. Schreuer, Principles of International Investment Law, Oxford 2008, p. 103

⁴⁸ Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Award, 29 May 2003, 43 ILM 133 (2004)

⁴⁹ Siemens v. Argentina, Award, 6 February 2007

⁵⁰ Iran-US Claims Tribunal, Tippetts, Abbett, McCarthy, Stratton v. Tams-Affa, 6 Iran-U.S. C.T.R. - 219

⁵¹ Phelps Dodge Corp. v. The Islamic Republic of Iran, Iran-U.S. Claims Tribunal, Award No. 217-99-2 (19 Mar. 1986),

⁵² Starrett Housing Corp. v. Iran, Iran-U.S. Claims Tribunal, 19 December 2003 CTR 122.

1.2. Respondent actions made it impossible for Vanguard International to derive profits from its investment.

The second prerequisite that constitutes expropriation is depriving investor of the possibility to acquire profits from his investment⁵³. In Temced case tribunal stated that the sole base of expropriation is depriving investor of a rights related to income and benefits, to the extent that they cease to exist⁵⁴. In the present case Vanguard International does not receive a dividend from its 30% of Vancal shares, had no possibility to challenge board of directors decision which resulted in using almost all of Vancal profits to create a workers fund, instead of investing it or paying to shareholders. Moreover, Vanguard International did not receive payments for the usage of its trademark and technical support. All these factors show, that Vanguard cannot suffice from its investment even to the smallest extent, hence, the expropriation in violation of Calpurnia-Gaul BIT took place.

Based on the facts presented Complainant asks the Tribunal to decide that Vancal International has no control over its investment and by no means can suffice from it, therefore Respondents actions constitute illegal indirect expropriation.

2. Actions of the Respondent constitute a partial expropriation of Vanguard investment.

Even if this Tribunal would decide that the expropriation of an investment as a whole did not occur, without a doubt it occurred in regard to some rights of the claimant, which can be objects of commercial transactions. It is recognized that a partial taking, still constitute an

⁵³ A. F. Lowenfeld, *International Economic Law*, Second Edition, Oxford 2008, p. 563, R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford 2008, p. 101, Y. Fortier, S. Drymer, *Indirect Expropriation in The Law of International Investment: I Know It When I See It*, 2004, ICSID Review-FILJ 293305,

⁵⁴ *Tecnicas Medioambientales Temced S.A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133, para. 115

expropriation⁵⁵. In the present case Respondent expropriated Vanguard International trade mark, technical support, know how.

2.1. Actions of Respondent result in expropriation of Vanguard investments in Calpurnia, namely its trade mark and technical assistance.

Vanguard International investment in Calpurnia consisted of not only funds necessary to create Vancal, but also of rights to its trade mark and technical assistance, for which a joint venture company was obliged to issue payments. Since 2004 though, no such payments have been made to investor, while the trade mark, and technical assistance are still being used and there are no information, provided by SFCDC which would indicate that Vancal plans to stop the use of Vanguard International assets. This clearly show that the expropriation indeed took place in a present case. As underlined in a cement case⁵⁶ license, can be acknowledged as a part of investment which can be expropriated separately. Also in Eureko case⁵⁷ the Tribunal ruled, that expropriation can affect only part of an investment. Based on the facts and law presented, Applicant plead to the Tribunal to decide, that Calpurnia actions constituted expropriation of Vanguard International assets in the light of international law.

⁵⁵ Amoco International Finance Corp. v. Iran, Award, 14 July 1987, Iran-U.S. CTR 189, para. 108

⁵⁶ Middel East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, Award, 12 April 2002, 7 ICSID Reports 178

⁵⁷ Eureko B.V. v. Poland, Partial Award, 19 August 2005, 12 ICSID Reports 335