

FDI Moot Problem 2008 Analysis

The purpose of this Bench Brief is not to exhaustively list all legal issues that might be raised by the parties in the oral rounds. It is also not intended to provide definitive answers to all issues of the case, for most of them are well-known or emerging battle fields of international investment arbitration. The Bench Brief will only outline the framework, the standards at opposite ends, within which the parties may construct their arguments.

Most teams favored the suggested structure of dividing their memorandums into two parts: jurisdiction of the tribunal and merits of the claim. Our analysis of the case will follow the same structure.

I. Jurisdiction

1. ICSID Requirements

The starting point for analyzing the jurisdiction of an ICSID Tribunal is the ICSID Convention, but this will also lead to consideration of the instruments by which the parties consented to the jurisdiction of the Tribunal, in our case putatively one or more bilateral investment treaties (BITs).

The ICSID Convention regulates the jurisdiction of ICSID arbitral tribunals in its Article 25. Article 26 (and to a much lesser extent Article 27) may also impact on the jurisdiction of an ICSID arbitral tribunal. Article 25(1) sets out four basic requirements: 1) a legal dispute, 2) arising directly out of an investment, 3) between a Contracting State and a national of another Contracting State, and 4) their written consent to submit the dispute to ICSID arbitration. In turn, each of these presents several issues. Here we shall only consider those which appear relevant to the Problem.

The Problem does not provide any traction for arguments that the dispute is non-legal, not ripe, non justiciable, or has become moot. In the practice of ICSID tribunals, this has rarely been an issue or even seriously raised as a defense (Schreuer).

The problem also leaves little doubt that the dispute arises directly out of an investment. The “investment” would seem to fall within the *Salini* criteria which, according to most commentators, form the outer limit of the investment concept for the purposes of ICSID arbitration. This outer limit, however, may be constricted by the terms of the parties’ consent, i.e., the BITs.

Article 1(1) of the Calpurnia-Gaul BIT defines the **term “investment”**, not in a way that would appear to exclude Vanguard’s investment. Similarly, Article 1(2) of the BIT does not define **“investor”** in such a way that would exclude Vanguard – it was established and incorporated in Gaul *and* has its seat there (some teams sought clarifications relating to the nationality or residence of Vanguard’s shareholders, but this line of argument would not appear particularly relevant in the present case). The Problem and subsequent clarifications have left little doubt that the Claimant is a national of Gaul and that Gaul is and has been a Contracting State at all relevant times. It is similarly clear that Calpurnia is and has been a Contracting State. The question whether the State of Calpurnia is properly named Respondent in the present case, i.e., whether actions/omissions of either SFCDC or VanCal can be attributed to Calpurnia will be analyzed in the part on the merits.

2. Contract-Based v. Treaty-Based Claims

Respondent may argue that the current dispute arose out of contract-based claims (joint venture agreement and separate agreements) and not out of Treaty-based claims (Calpurnia-Gaul BIT). Some practitioners allege that contractual rights may only be considered as investments if they originate from a concession contract under which the investor is to

provide public services on behalf of the State or if in some other way the contract involves a fundamental public interest. Alternatively, an ICSID tribunal could only have jurisdiction over contract-based claims if an umbrella clause were present in the BIT. Since there is no umbrella clause in the Calpurnia-Gaul BIT, Respondent might argue that this Tribunal has no jurisdiction over the claims that are related to the suspension of dividends under the joint venture agreement or the separate agreements concluded between separate legal entities.

On the other hand, Claimant may sustain the jurisdiction of the Tribunal by arguing that contract disputes may turn into investment disputes under the treaty if there are clear violations of the treaty and that contractual breaches are of such magnitude that they could trigger the protection of the treaty.

We feel that in the problem as stated, although Claimant might have asserted contract claims that perhaps would have lowered the threshold for establishing a breach by Respondent, it has not relied on breaches of the contracts, but rather alleges the breach of the Calpurnia-Gaul BIT.

4. Amicable Settlement Requirement

4.1. Period of 18 Months v. 2 Months

According to Article 11(2) of the Calpurnia-Gaul BIT, the investor may submit a dispute to arbitration if “the dispute cannot be settled amicably **within 18 months** from the date of request for amicable settlement”. Pursuant to the case, on 5 February 2007, Claimant sent a letter to Mr. Poe, a member of the VanCal board and the chair of the SFCDC board, claiming *de facto* expropriation, demanding compensation and requiring Mr. Poe to transmit the letter to competent ministers. On 31 July 2007, Claimant sent its request for arbitration, which means that the 18 months period as required by the Calpurnia-Gaul BIT was not observed. Claimant seems to admit that, however insists that the more favorable 2-months period for amicable settlement as foreseen by the Calpurnia-Flatland BIT shall be applied here.

Claimant might seek to rely on the consent to ICSID arbitration contained in Article 7 of the Calpurnia-Flatland BIT by virtue of the Calpurnia-Gaul BIT’s **most favored nation clause** (MFN) (Article 4.1). Whether an MFN clause extends to dispute resolution mechanisms has been debated in recent cases and academic writings. While some have suggested that an MFN clause *per se* cannot extend to a dispute settlement mechanism, this may be too categorical. Observing the interpretative rules set out in the Vienna Convention on the Law of Treaties (VCLT, Arts. 31 and 32), an MFN clause that expressly includes or excludes dispute settlement mechanisms presents little difficulty. However, a generic MFN clause, such as that in the Calpurnia-Gaul BIT, would at least demand recourse to the context of the treaty (together with those factors mentioned in VCLT Art 31.3) and supplementary means of interpretation (VCLT, Article 32). While - laudably - some teams sought clarification as to these matters, the organizers felt this would overwrought the competition and chose not to offer such additional interpretative material. The teams should discuss the case law and argue their positions trying to compare and distinguish facts of previously decided cases.

Another issue which may arise in this context is whether the dispute resolution provisions of Art. 11 of the Calpurnia-Gaul BIT, in particular, its 18-months amicable settlement period, represent public policy of Calpurnia and thus, should not be overridden by the MFN clause. Some scholars and several awards (*Maffezini*, *Plama*) support the idea that a provision of very high importance to the contracting state and which is specifically negotiated cannot be bypassed by an MFN clause. Whether the 18-months amicable settlement period in the Calpurnia-Gaul BIT may be considered as representing **public policy of Calpurnia** is a

matter of fact to be decided by the Tribunal. On the one hand, the waiting period of Calpurnia-Gaul BIT indeed is 6 times longer than under the Calpurnia-Flatland BIT which, given the difficult relations between Calpurnia and Gaul, might support the idea of specific importance of this dispute resolution provision – although the facts suggest that the relationship only deteriorated long after the BIT was concluded. On the other hand, if any deviating provision would fall under the public policy exception, there would be no room left for the MFN clause application.

4.2. Effects of Flatland's Denunciation of the ICSID Convention

There is currently no precedent where a tribunal has decided the legal effect of denunciation of the ICSID Convention. So far, only one state, Bolivia in May 2007, has denounced the Convention. While Nicaragua and Venezuela also declared their intention to denounce the Convention, they have not done so. Precisely what consequences such a drastic measure will have upon access to international arbitration remains unknown. The issue which the Flatland's denunciation of the Convention raises here is whether Claimant may still rely on dispute resolution provisions of Article 7 of the Calpurnia-Flatland BIT via MFN.

Flatland gave notice to ICSID of denunciation of the Convention on 2 May 2003, which took effect on 2 November 2003 (ICSID, Art. 71). Most scholars agree and the drafting history of the ICSID Convention confirms that a pre-existing contractual consent to ICSID arbitration (obligation) survives denunciation, whereas an unaccepted consent (offer) for ICSID arbitration expires upon denunciation. Article 7 of the Calpurnia-Flatland BIT seems to contain an offer, since the state consent would have been turned into an obligation in case an investor would have elected ICSID arbitration from the available dispute resolution mechanisms and submitted a request of arbitration to ICSID. Therefore, Flatland's consent to ICSID arbitration expired on 2 November 2003. However, does it automatically make Article 7 of the Calpurnia-Flatland BIT inoperational in whole? Respondent might allege that since ICSID arbitration is no longer available on the menu of dispute resolution mechanisms, the whole of Article 7 becomes inoperative. Since neither Calpurnia nationals investing in Flatland, nor Flatland nationals investing in Calpurnia would be allowed to bring their disputes with the respective host states before the Centre, Claimant should not be allowed to invoke dispute resolution mechanism from a third party BIT, which is not accessible even to the nationals of the very contracting parties to the BIT.

Claimant, on the other hand, may contend that the other three dispute resolution methods mentioned in the Calpurnia-Flatland BIT and the 2-months cooling off period remain in force and may be referred to by Claimant via MFN provisions.

This argument may raise an interesting issue of **depeçage**, i.e., to what extent can the most favorable elements of various clauses be separated off? E.g., if the Flatland BIT does not allow ICSID dispute resolution as compared to the Calpurnia-Gaul BIT, could a Claimant rely on the former's shorter and more favorable waiting period without also accepting the part denying ICSID jurisdiction?

4.3. The Content and the Addressee of the Letter of 5 February 2007

Whether **the content of the letter** may be considered as constituting a "request for arbitration" is disputed by the parties. Claimant may argue, that the BIT does not contain any specific requirements as to the content of the "request", neither does it prescribe a procedure to be followed in requesting amicable settlement, because the specified period should be considered as a simple "cooling off" period, with no particular obligations on the parties. Respondent on the other hand, will argue that for Article 11(2) of the Calpurnia-Gaul BIT (or alternatively Article 7 of Calpurnia-Flatland BIT) to have any legal effect and meaning (as required by Art. 31 of the VCLT), Claimant was supposed to undertake positive actions to

settle the dispute. At the same time, cannot Respondent be stopped from raising this argument, since it itself failed to undertake positive actions to resolve the dispute amicably?

The parties may raise another legal issue of whether Claimant's letter of 5 February 2007, sent to Mr. Poe, was **properly addressed**, which is closely connected with the attribution arguments of the parties.

4.4. Necessity of Amicable Settlement

If this Tribunal finds, that Claimant did not satisfy the amicable settlement requirement for whatever reason, the Claimant might argue that the said requirement was not a prerequisite, but rather a procedural rule, intended to merely **encourage consultations** between the parties. Such position indeed was expressed by some scholars (Schreuer, Polasek, Redfern, Hunter) and supported by case law (*Wena Hotels v. Egypt*, *SGS v. Pakistan*). On the other hand, since amicable settlement provision is expressly included into the Calpurnia-Gaul, would not the disdain of this provision amount to the violation of *pacta sunt servanda* principle and disregard of the major interpretation principle of the VCLT (Art. 31) that every treaty provision is to be given an ordinary meaning?

Given the circumstances of the present case confirming problematic relationships between Calpurnia and Gaul, Claimant may rely on the argument, supported by arbitration doctrine and several cases that the amicable settlement requirement may be totally disregarded since any **attempt to settle the case would be futile**. This position is also supported by the very language of the Calpurnia-Gaul BIT, which opens the door to arbitration "if the dispute *cannot* be settled amicably", rather than "if the dispute *is not* settled amicably". Whether to follow this argument and whether indeed any attempt to settle the dispute would be impractical, is left to the Tribunal to decide.

If this Tribunal finds that the request for settlement was forwarded to Respondent on 5 February 2007, by the moment of the commencement of the oral hearings in November 2008, the 18 months period would have already expired. Even if the arbitrators conclude that the 18 months did not expire, for either the request was made on 31 July 2007 or no request was made at all, what kind of interest does Respondent seek in stopping the current arbitration since none of the parties has shown any sign of willingness to settle the dispute amicably? Would not the stop of the current proceedings reward Respondent for its failure to seek amicable settlement of the dispute as well?

5. Fork in the Road Provision

Pursuant to Article 11.3 of the Calpurnia-Gaul BIT, "an investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals", including the ICSID arbitration, which gives rise to the fork in the road argument. Article 7 of the Calpurnia-Flatland BIT also imposes a fork in the road condition, though not as expressly as in Article 11 of the Calpurnia-Gaul BIT. The parties seem to agree upon the exclusionary nature of the alternative methods of dispute resolution of both BITs. The major dispute arises as to whether Claimant has already referred to the competent courts of Calpurnia to resolve the dispute.

It is an undisputed fact that two claims had actually been lodged before the courts of Calpurnia in relation to the present dispute. The first one was made by Claimant, who asked the Calpurnian Constitutional Court to declare 2003 and 2004 searches of the private homes of Ms. Pescara and Mr. Kolowenko unlawful. The second one was made by Ms. Pescara who asked the Commercial Court of San Inocente de Irkoutsk to order VanCal to transfer to her account in Gaul dividends on 1% shareholding.

Claimant's resort to arbitration may be blocked if this Tribunal finds that the **same dispute** between the **same parties** have been submitted to the courts of Calpurnia (some tests also include the "**same cause**" criteria).

The proceedings before the Constitutional Court were initiated indeed between the same parties – Vanguard against the State of Calpurnia, however whether the subject matter of the dispute was the same, i.e., whether police searches of the homes of VanCal's employees may be considered a violation of Claimant's rights under the Calpurnia-Gaul BIT, is a matter of fact to be determined by this Tribunal.

Ms. Pescara's action before the Commercial Court, which was dismissed on 14 June 2006, may be considered identical to the subject matter of the current claim. Claimant might counter such a fork in the road argument by arguing that Ms. Pescara's action - and its summary dismissal – falls short of submitting the (full breadth and essence of) Claimant's dispute with Respondent to the competent court or that there is not identity between the parties (since Ms. Pescara acted on her own against VanCal and not against the State of Calpurnia). Moreover, might not the Commercial Court's judgment (denying her standing) estopp Calpurnia from raising the fork in the road argument, or at least from attributing Ms. Pescara's action to Vanguard?

There is an interesting line of arguments that may be raised by Claimant regarding the content of the Calpurnia-Gaul BIT, namely, the *contra proferentem* rule. It is true that the BIT was negotiated by both states, none of them may be considered as a sole drafter in the strict sense. However, is it possible to argue that the Claimant, as a private party of one of the contracting states may consider Respondent as a drafting state and thus invoke the *contra proferentem* argument, thus interpreting any ambiguity of the BIT to the detriment of Respondent?

II. Merits

The parties' position on the substantive claims will have to completely rely on the arguments and analysis of arbitral awards and court decisions and the relevant scholarly writings, since there are no definite rules which could explain which actions amount to expropriation, breach of fair and equitable treatment, violation of full and constant security and protection, and non-discrimination standards.

The following acts may amount to violation of Calpurnia's obligations under the Calpurnia-Gaul BIT: refusal to transfer the returns of Claimant's investment; refusal to accept Mr. Rindler's proxies at the shareholders' meeting on 16 November 2006; revocation of Ms. Pescara's business visa; searches of residences of Ms. Pescara and Mr. Kolowenko; press releases by the Calpurnian Security Directorate; seizure of laptops and other communication devices of VanGuard's key persons at issue; rejection of claims by both the Commercial Court of San Inocente de Irkoutsk and the Constitutional Court of Calpurnia, failure to move away pickets of the CCC Women's League; and the combination of all these facts.

1. Attribution Issues

Both parties seem to agree that the acts of police and immigration authorities are attributed to Respondent. The major dispute arises as to the attribution of acts of SFCDC and VanCal to Respondent.

The SFCDC having a separate legal personality is 100% owned by Respondent. Its directors are appointed by the Respondent, through the Respondent's Ministries and Departments. VanCal is a joint venture company, which was incorporated by Claimant and the SFCDC under the laws of Respondent. At the moment, the SFCDC directly owns 30% shares and holds on deposit and votes further 22% shares (under the Calpurnia Harmonized

Revenue Code which also waived the payment of withholding tax to all dividends and interest income on shares that are placed in the custody of a state fund).

International law recognizes that a state may be responsible not only for the conduct of state organs, but also for conduct of persons or entities whose acts are attributable to the state. The standards of attribution are expressed in Draft Articles on State Responsibility which, though not binding *per se*, are recognized as incorporating rules of customary international law. According to the Draft Articles, the conduct of a legal entity may be attributed to a state if the entity is 1) exercising elements of governmental authority; or 2) acting on the instruction of, or under the direction and control of the state in carrying out the conduct (Arts. 5, 7 and 8).

1.1. Exercise of Governmental Authority

The tribunal in *Maffezini* case set the two-step standard for examining whether acts of a legal entity may be attributed to the state: **structural (or formal) and functional tests**. Structural examination of attribution is based on a rebuttable presumption that entities owned by the State are State entities. Rebuttal is furnished through a functional analysis, examining whether “specific acts or omissions are essentially commercial rather than governmental in nature.” As the end result of the test, commercial acts cannot be attributed to the State. In that case, a corporation which was established to promote regional industrial development was considered to satisfy this test. This two-step standard was widely accepted and followed by arbitral tribunals. For example, in *Phillips Petroleum Company Iran v. Iran*, the Tribunal attributed the acts of a company to the Government, because the company’s acts helped implement the Government’s national oil policy.

In the case at hand, Respondent may argue that neither the SFCDC and VanCal are part of the state infrastructure, nor do they act on State’s behalf. Rather they act in the telecommunications sector on their own and on behalf of their investors with the aim to gain profit.

Claimant, in its turn, may rely on the recent *Noble Ventures v. Romania* case, where the tribunal rejected the application of the functional test and found that „the distinction between attribution of governmental and commercial conduct, the latter not being attributable, plays an important role only in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, [there is no] any reason why commercial acts, should by definition not be attributable while governmental acts, should be attributable.” Accordingly, the tribunal concluded that the acts of two companies which were of relevance in that case were attributable to the Respondent for the purposes of assessment under the applicable BIT.

1.2. Instruction, Direction or Control

In *Hollyfield v. Iran*, the tribunal considered that that “decisive elements for a finding of control are the identity of the company’s shareholders, the composition and behavior of its board of directors, and whether the government appointed managers were in charge” (*Foremost Teheran v. Iran, PepsiCo v. Iran, Maffezini, Thunderbird*). In *Wintershall v. Qatar Case*, the corporation in question, Qatar General Petroleum Corporation (QGPC), was wholly-owned by the Respondent. The Tribunal recognized that QGPC was created as a separate independent legal personality under Qatari law, however, the Board of Directors of QGPC consisted of 7 to 11 members, the majority of whom were officials of the state Departments. As a conclusion, the tribunal declared that the QGPC was acting as an agent of the Government of Qatar and all actions attributed to QGPC were attributed to the Government. These case law supports Claimant’s position that conduct of SFCDC and VanCal are attributed to respondent, since Respondent controls them.

At the same time, Respondent may rely on *AMCO Asia Corporation v. Indonesia*, where under much stronger set of facts for attribution than the present fact pattern the tribunal refused to attribute the acts to the state. In that case, the tribunal held that seizure of a hotel by the state army and police could not be attributable to the Indonesian government. In contrast with the strong link between Indonesia and its army and police in *Amco Asia*, the link between the SFCDC and VanCal on the one hand and Calpurnia on the other hand, is virtually nonexistent. The present fact pattern falls far below the threshold established by the *Amco Asia* tribunal. Thus, under the *Amco Asia* standard, the SFCDC's and VanCal's actions are not attributable to Calpurnia due to the lack of link between the state and the entities.

Moreover, Respondent may allege that the lost of control over the VanCal happened as a result of Claimant's own action. According to the Problem, Claimant historically held up to 84% of VanCal's shares and disposed of them in the normal course of business. Moreover Claimant voluntarily withdrew its representatives from the VanCal's Board and refused to replace them. Therefore, Respondent may argue that all harm Claimant suffered is self inflicted and thus cannot be attributed to Respondent.

2. Expropriation

Article 6(1) of the Calpurnia-Gaul BIT expressly prohibits direct and indirect expropriation of investment. Direct expropriation normally is the result of formal transfer of title or outright physical seizure. Since none of this happened, Claimant alleges that Respondent has *indirectly expropriated* its investment (for the purposes of state responsibility, international law does not distinguish between direct and indirect expropriation). There is no exact definition of indirect expropriation, therefore, all its elements are to be analyzed on the case-by-case basis.

The doctrine and arbitration practice have elaborated several criteria which may have the same detrimental effect on investment as direct taking of property and thus may be taken into account by arbitrators in deciding whether a host state may be responsible for indirect expropriation. These criteria include, *inter alia*, **interference with property and inability to use and benefit from investment**.

For example, according to Paulson and Douglas, the "taking of property" takes place even if "the legal title to the property is not disturbed. Rather its income producing potential is somehow diminished by acts attributable to the Host State". Several NAFTA tribunals also equated taking of property with interference with the investment. Numerous decisions of the Iran-US Claims Tribunal decided that "a state can interfere with property rights to such extent that these rights are rendered so useless that they must be deemed to have been expropriated" (*Tippetts*, also *Starrett Housing*)

In *Metalclad*, the tribunal decided that the "interference with property which has the effect of depriving the owner in whole or in significant part of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State" amounts to expropriation.

In *Eureko v. Poland*, the investor had acquired a minority share in a privatized insurance company and had the right to acquire further shares in the company to attain control of the company; however, later the State withdrew the right to acquire additional shares. The tribunal found that the right to acquire further shares constituted "assets" which were separately capable of expropriation, and concluded that even if the control over the basic investment remained unaffected, the taking of specific rights that are related to the basic investment may amount to expropriation.

On the other hand, Respondent may argue that arbitral tribunals refused to find expropriation when the impact of state measures was *minor* or the investment remained

operational, even if the investor's profit decreased (*Pope & Talbot v. Canada*). In *LG&E v. Argentina* case, the tribunal found that "interference with investment's ability to carry on its business is not satisfied where investment continues to operate even if profits are diminished". In *Starret Housing*, "the expropriation is only found when property rights are rendered so useless there is no other explanation but a finding of expropriation".

In *Foremost Teheran v. Iran*, the Iran-US Claims Tribunal found that the suspension of the payment of dividends did not alter the fundamental nature of the investor's property rights, because it still could enjoy the opportunity to dispose of its property. Several scholars also support the idea that the fundamental right of a foreign investor is the right to dispose of property and not the right to receive payment of dividends from the property (Bishop).

In several decisions, tribunals elaborated upon another element of indirect expropriation - **substantive loss of control by the investor over the investment** (*Pope & Talbot v. Canada*, *Revere Copper*). For example, replacement of investment management may result in indirect expropriation (*Starrett Housing*, *Tippetti*). In *Biloune v. Ghana Investment Center*, the *ad hoc* tribunal found the state responsible for indirect expropriation, because it was denying the foreign-investor manager the entrance into the country and undertook other measures to keep him out of the country.

On the other hand, in several cases tribunals refused to satisfy expropriation claims for the investor's own conduct which led to a loss of control (*ELSI*, *Noble*). In *Generation Ukraine*, the tribunal held that the failure to seek redress from national authorities disqualified the international claim, "because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction". Whether the two applications to the Commercial and Constitutional Courts of Calpurnia meet the said criteria is a matter of fact to be determined by this Tribunal.

Regarding the loss of control over the investment, Respondent may also refer to *Eastman Kodak*, where the tribunal did not find expropriation in appointment of a governmental manager "inasmuch as the manager did not anyhow affect the operation of Kodak". In *Foremost Teheran v. Iran*, faced with almost identical facts of voting off the investor's representatives from the management board and their replacement with the representatives of a state entity, a split tribunal refused to find Iran responsible for indirect expropriation. Other Iran-US Claims Tribunals similarly ruled that the exercise of a majority shareholder rights by the state was not *per se* expropriation (*Mouri*).

The Claimant may argue that several tribunals found expropriation as a result of **cumulative effect of measures** taken by the state to deprive the investor of the use, value and enjoyments of its investment (*Compania del Desarrollo de Santa Elena*, *Starrett Housing*).

Respondent's answer may be based on the finding of several tribunals that the state's measures shall have **permanent effect** - "expropriation cannot have a temporary nature" (*LG&E v. Argentina*, *Tecmed*). For example, in *S.D. Myers v. Canada*, the tribunal held that there was no expropriation because the host state did not benefit from the measure and there was no transfer of property or benefit away from the investor to the host state, as a result the state's measures resulted in "a delay in opportunity" and did not constitute expropriation.

Several tribunals have also analyzed state's actions against **legitimate expectations of investors** in determining whether expropriation has taken place (*Metalclad*, *Tecmed*, *LG&E*). In *Tecmed*, the tribunal discerned 3 factors forming the legitimate expectations criteria: i) reasonable expectations of the investor for a return; ii) whether the state failed to protect the investor's rights; and iii) whether the measures taken were proportionate to the investor's expectations. At the same time, the tribunal recognized that states have the right to adopt social and general welfare measures and these measures will not amount to expropriation as

long as such “measures are proportional to the public interest presumably protected thereby”, even if they are severe and do affect investors.

3. Fair and Equitable Treatment

The fair and equitable treatment (FET) is set out in Article 2(2) of the Calpurnia-Gaul BIT. Due to the abstract nature of the FET standard there have been several interpretations thereof in scholarly writings and arbitral and judicial decisions, which range from the very restrictive ones (*Neer v. Mexico*) to the very wide interpretations which would cover almost all conceivable acts (Schreuer, Sornarajah).

Several tribunals interpreted the FET as an autonomous self-contained concept which goes beyond the customary international law minimum standards (*Pope & Talbot, Saluka*). In *Saluka*, the tribunal decided that FET is detached from domestic law and provides a higher standard of protection than that of domestic law. In *MTD v. Chile*, the tribunal went so far as to decide that a host state has to **undertake positive acts** to ensure that the FET standard is met, which means that the FET is more than “prescriptions for a passive behavior of the state or avoidance of prejudicial conduct to the investors”.

On the other hand, numerous tribunals stated that the FET should not be used as an absolute guarantee since “not every business problem experienced by a foreign investor is a denial of fair and equitable treatment” (*GAMI*) and the fact that foreign investor loses money does not indicate the breach of the FET standard (*Lauder v. Czech Republic*).

Most tribunals interpret the FET as a standard of treatment that should be equated with the **customary international law minimum standard** (*AAPL v. Sri Lanka, Genin v. Estonia*); others question the point of FET treaty clauses if they only equate to the customary standard.

According to the OECD working paper on FET, the standard includes the following obligations of the host state: i) vigilance and protection; ii) due process; iii) transparency; and iv) good faith. In *Waste Management*, the tribunal found that the FET may be breached if “the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectoral or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in administrative process”.

The FET standard also obliges the state to guarantee that all relevant requirements for the purpose of investing should be capable of being readily known to the investors (*Tecmed, Metalclad, MTD v. Chile*). In *Tecmed*, the tribunal decided that the “foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investment”. At the same time, *Waste Management* tribunal heavily criticized the *Tecmed* tribunal for writing a stabilization clause into the FET standard, whereas normally stabilization clauses have to be negotiated by the parties themselves.

Several tribunals decided that the FET obliges host states to provide to international investors treatment that does not affect the basic expectations that were taken into account by the foreign investors to make the investment (*Tecmed, Saluka*). At the same time, “not every expectation of the investor is protected”, but only legitimate expectations should be protected and only if there was reasonable reliance on them (*LG&E v. Argentina, Occidental*). In *MTD v. Chile*, the government promised land to the investors, which according to the tribunal, created reasonable expectations for the investors that they would be able to build on the land. As a result, the revocation of the permit by the state amounted to the breach of the FET.

In *Saluka*, the tribunal decided that the FET standard involves balancing the investor's legitimate and reasonable expectations with the host state's legitimate regulatory interests, accordingly, it is not reasonable to expect circumstances "prevailing at the time of the investment is made remain totally unchanged" and not to take into account and disregard the host state's right to regulate domestic matters (also *Maffezini*). Therefore, Respondent may argue that in balancing the interests of the investor and the host state, the tribunal shall take into account the countervailing factors developed by the doctrine and case law, where the breach of the FET cannot be found. These factors include: i) objective basis; ii) absence of disproportionate impact; iii) caveat investor, etc.

4. Full and Constant Protection and Security

Article 2(2) of the Calpurnia-Gaul BIT also obliges Calpurnia to accord to the investors full and constant protection and security. Though in *Occidental v. Ecuador*, the tribunal held that "a treatment that is not fair and equitable automatically entails an absence of full protection and security", most tribunals consider these two standards separate.

4.1. Pickets in front of Ms. Pescara's home

Numerous arbitral tribunals recognized that the Full Protection and Security (FPS) standard is violated if the host state fails to exercise **due diligence**, i.e., to adopt reasonable measures for the protection of foreign investors and investment (*Wena Hotels*, *AAPL*, *Azurix*). In *Saluka*, the tribunal decided that the FPS obliged the host state to adopt all reasonable measures "protect foreign investor's assets and property from threats or attacks targeting foreigners or certain class of foreigners".

At the same time, Respondent may argue that the standard of "full protection and security is not absolute and does not impose strict liability upon the State that grants it" (*Tecmed v. Mexico*), or that this standard "does not oblige the [state] to protect foreign investment against any possible loss of value" (*Lauder v. Czech Republic*).

To rebut the FPS not being a strict liability standard, Claimant may argue that the wording of the Calpurnia-Gaul BIT provides a particularly high standard of protection by embracing the formula of "full and *constant* protection and security" as compared to the "full protection and security" phrase normally employed by BITs. In the *APPL*, the tribunal found that the inclusion of the word "constant" into the protection and security provision is a "**stronger wording**" and could heighten the requirement of FPS creating an even higher threshold of protection.

On the other hand in *ELSI*, the International Court of Justice asserted that the reference to the FPS "cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed". In *Tecmed*, the foreign investor alleged that there was a lack of protection from Mexico due to Mexican authorities, including police officers, failure to prevent or end social demonstrations and protest against operations of the investor's landfill. The tribunal stated that the state may be found in violation of the FPS if it "encouraged, fostered, or contributed their support to the people or groups that conducted the community or political movements against the Landfill or that such authorities have participated in such movements". As a result, the tribunal found that the police and other Mexican authorities responded adequately to social demonstrations and acted reasonably in the situation. Similarly, in *Vivendi*, the tribunal stated that "when government officials incite the population ... the government under international law is responsible for the actions taken by the population".

Claimant may argue that failure to protect foreign investment may be tantamount to **endorsement of measures** (*AMT v. Zaire*, *Wena Hotels*). In *Wena Hotels*, the tribunal found the FPS requirement breached due to the Egypt's condoning of the actions. In that case,

employees of a state entity participated in the seizure of two hotels of a foreign investor and no immediate action was taken by the government or its affiliates to return the assets. Egypt also failed to impose sanctions on the officials, which lead to the breach of the FPS standard.

4.2. Police searches, seizure of property and availability of judicial remedies

Claimant may argue that the FPS standard implies more than just the physical protection of the investor and its investment. For example, in *Vivendi v. Argentina*, the tribunal decided that the FPS “can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized.”

Respondent, on the other hand may cite the *Genin* case, where the tribunal was faced with a claim of harassment based on criminal investigations and accusations of false charges that did not result in authorities pursuing a criminal case against the company at issue. The claimant alleged that the purpose of the investigations had been to intimidate the investor, had nothing to do with genuine suspicion and that the threatening criminal charges had violated the BIT obligations of the host state. The tribunal rejected the claimant’s arguments on the ground that the facts of that case were neither sufficient to amount to a violation of the BIT, nor could give rise to harassment against the investor. Similarly, in *Tokios Tokeles v Ukraine*, the tribunal, faced with the repeated searches of premises by the government investigators, emphasized that the significance of the searches “should not be overstated”, as there was “no personal violence”, “Nobody was hurt”, and there was “no damage done to the premises”. (also *MCI Power v. Ecuador*).

Moreover, in *Tokios Tokeles v. Ukraine*, when host state’s agency issued a press statement that was factually inaccurate, falsely asserting that it was investigating the investor for money laundering, the tribunal considered that this statement would only amount to a treaty violation if the “serious flaw in the Press Statement is evidence of conspiracy being put into effect”.

Several tribunals held that denial of judicial protection may amount to the breach of the FPS standard (*AMT v. Zaire, Saluka*). In *Saluka v. Czech Republic*, the claimant contested the police searches and seizures of assets as invasive of privacy and ownership rights. However, the tribunal, due to the claimant’s successful petitioning to the Czech Constitutional Court and subsequent court decision in favor, held that the host state did not breach the FPS standard of treatment. Whether in the case at hand Claimant was denied judicial protection – is a matter of fact to be determined by the present Tribunal.

5. National Treatment, Discrimination

Article 2(3) of the Calpurnia-Gaul BIT prohibits unreasonable, arbitrary and discriminatory treatment of foreign investors.

In *LG&E v. Argentina*, the tribunal having analyzed the previous case law discerned elements of discriminative behavior of the host state as follows: i) intentional treatment; ii) in favor of a national; iii) against a foreign investor; and iv) that is not taken under the similar circumstances against another national (also *Pope & Talbot, UPS v. Canada, Lauder*).

Several tribunals added another substantive element into their analysis in order to find discriminative behavior – whether the investor has suffered loss as a result of host state’s actions (*S.D. Myers, US-Trucking*). For example, in *ADF Group Inc. v. USA*, the measure precluded the claimant from participating in a construction project. The tribunal rejected the discrimination claim since there was no clear evidence of a loss.

Claimants may also accuse Respondent of arbitrary behavior. In *Azurix v. Argentina*, an arbitrary action alone was sufficient to violate host state’s obligations under the BIT. The tribunal in that case stated that “a measure needs only to be arbitrary to constitute a breach of

the BIT”. Respondent may argue that for example, the ICJ in *ELSI* defined the term “arbitrary” to mean “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”. In *Lauder*, tribunal stated that arbitrary treatment is founded “on prejudice or preference rather than on reason or fact”.

During the oral rounds, the teams may raise other violations of the Calpurnia-Gaul BIT, such as lack of transparency, unlawful interference, obstructed transfer of funds, sympathetic consideration, etc, however, we believe that all these arguments may be considered under the issues analyzed above.