

TEAM [AGO]

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

VANGUARD INTERNATIONAL
[CLAIMANT]

V.

THE GOVERNMENT OF
THE REPUBLIC OF CALPURNIA
[RESPONDENT]

MEMORIAL FOR RESPONDENT

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STATEMENT OF FACTS

1. Claimant, Vanguard International (Vanguard), with its headquarters in Nova Parigi, the capital city of Gaul, is a leading mobile telecommunications company with GSM operations in seven emerging markets in Latin America, the Middle East, Africa and South Asia, having a total population under license of approximately 360 million.
2. In early 1997, Claimant participated in the establishment of a joint venture company, VanCal, incorporated and with its headquarters in San Inocente de Irkoutsk, the capital of Calpurnia. VanCal provides GSM/UMTS (3GPP) services in Calpurnia under the “VANGUARD INTERNATIONAL” trademark.
3. Claimant initially owned a 50% equity interest in VanCal. By separate agreements, it provided technical assistance and trademark licensing. The equity interest held by Claimant varied subsequently, rising at one point to 86%, but then declining as the result of a number of share sales. At the end of 2004, Claimant held 30% directly; an additional 1% registered in the name of Francesca Pescara was held in trust for the Claimant.
4. The State Fund for Commerce and Development in Calpurnia (SFCDC) owns 30% of VanCal's stock directly. The SFCDC is an entity 100% owned by the State of Calpurnia. The SFCDC holds on deposit and votes a further 22% of VanCal stock registered in the names of several hundred individual shareholders. Other Calpurnian nationals directly hold the remaining 17% of VanCal's stock.
5. Between 1997 and 2004, Claimant played a major role in the management of VanCal, having provided management skills and personnel, including participation on the board of directors.
6. In November 2003, the Conservative Conscience of Calpurnia (CCC) won an absolute majority in both chambers of the Calpurnian Parliament. The CCC's agenda advocates a “return to the traditional Calpurnian values of hard work, family, modesty, thrift and self-sufficiency”. The ruling party's rhetoric is markedly more hostile than its predecessor's towards liberal, individualist, consumption- and leisure-oriented societies: Calpurnia's diplomatic relations with several States that the CCC characterizes in those terms, including Gaul, have deteriorated. This deterioration has been marked by mutual, hitherto unsubstantiated allegations of political and industrial espionage and destabilization. Since the beginning of the CCC's rule, there emerged a climate of hostility around VanCal (2nd Clarifications, para 51).
7. Starting in late 2003, SFCDC implemented a series of decisions that effectively deprived

the Claimant of the use and benefit of its 31% interest in VanCal. In particular, 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 stockholders, it refused to pay them to Claimant pursuant to a March 2005 decision by the VanCal board of directors not to pay any money for any reason to foreign shareholders, basing its position on the internal law of Calpurnia. The SF CDC representative to the Board and chairman of the Board Mr. Poe stated the board decision is dictated by the

8. In November 2005, government representatives ousted Ms. Pescara, one of Claimant's two representatives, from the VanCal board of directors. At the same time, by rejecting the two shareholder proxies held by Mr. Rindler, on behalf of Claimant, Calpurnian government representatives also prevented Claimant from electing a replacement to Ms. Pescara.
9. As of 1 December 2005, Dr. Jonathan Swift, the government-employed chairman of VanCal's board of directors, instructed Mr. Korchnoi, Ms. Pescara's replacement as managing director, to cease sending accounts, financial statements or other information to Gaulois citizens or translating such material into Gaulois as had been the practice.
10. On 7 December 2003 and on 3 June 2004 and 15 July 2004 there were three police searches of the private homes of Ms. Pescara and Mr. Kolowenko, prompted by "anonymous tips" that VanCal was engaged in illegal data collection for Gaulois Security Services. The searches were conducted without any warrant and were based on the "periculum in mora" provision of Calpurnian law. (1st Clarifications, para 17). No charges were ever filed against Ms. Pescara, Mr. Kolowenko, VanCal or Vanguard. Vanguard's applications to have the December 2003, April 2004 and July 2004 searches declared unlawful and seek compensation were dismissed by the Calpurnian Constitutional Court.
11. The press releases issued by the Calpurnian Security Directorate in connection with the searches agitated public sentiment against Vanguard, Ms. Pescara and Mr. Kolowenko. Ms. Pescara's home was picketed on 1-2 January, 15-17 March, 5-7 June, 17-19 July, and 25-28 October 2004. This picketing was led, inter alia, by members of the CCC Women's League brandishing signs reading "A woman's place is in the home – go home!" or "Spy in your own backyard!" The police declined Ms. Pescara's demands to remove the protesters.
12. In September 2004, Ms. Pescara's application for renewal of a "three-year business visa" was denied. She was advised orally that when her current business visa expired, it would

- suffice for her enter the country under Calpurnia's visa waiver program for tourists.
13. The climate of hostility toward Gaulois nationals in Calpurnia forced its expatriate personnel, including Ms. Pescara, VanCal's managing director until November 2004, and Mr. Kolowenko, the chief technical officer, to leave the country at the end of 2003. The prevailing circumstances prevented Mr. Kolowenko's return altogether, while Ms. Pescara, who visited Calpurnia three times during 2004, found it impossible safely to return there after 1 November 2004.
 14. Dr. Swift, the Chairman of SFCDC and the latter's representative in VanCal's board, has repeatedly stated that VanCal is a public company with public functions. On 15 November 2004 he said at the board meeting, that the SFCDC did not "regard VanCal as really being a private company". At the shareholders' meeting of 16 November 2005 Mr. Swift outlined that the main objective of VanCal is "to protect the interests of the country as well as to preserve the industry and the interests of the shareholders including the minor ones within the framework of the general interests of the country."
 15. On 14 June 2006 the Commercial Court of San Inocente de Irkoutsk dismissed the claim of Ms. Pescara to order VanCal to transfer the dividends for 1 % shares that she held in trust for the lack of standing. In the position of the court, only the actual shareholder has standing to demand the dividends.
 16. Under the technical assistance agreement, Claimant conveyed its trade mark "VANGUARD INTERNATIONAL" to VanCal. While the trade mark belongs to Claimant (2nd Clarifications, para 15), VanCal is obliged to pay licence fees for the use thereof. VanCal uses the trade mark until the present moment (2nd Clarifications, para 31), while the licence fees are not paid since 2005. On 27 May 2005, Claimant received an official e-mail from VanCal informing it of the decision of the board of directors to make no payments to foreign shareholders
 17. On 5 February 2007 Claimant sent an official e-mail to Mr. Poe, Chairman of SFCDC, where it claimed de facto expropriation of its investment, committed by Calpurnian state authorities. Mr. Poe transmitted it to his superiors including the appropriate Ministers.
 18. On 31 July 2007 Claimant requested institution of arbitration proceedings in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules).

PART ONE

**OBJECTIONS TO JURISDICTION OF THE TRIBUNAL OVER
THE DISPUTE**

- A. The Claimant has not pursued amicable settlement for the 18 months as required by Article 11(2) Calpurnia-Gaul BIT.
- B. The Claimant has pursued its claims before the domestic courts of Calpurnia and according to Article 11 (3) of the Calpurnia-Gaul BIT, the Claimant may therefore no longer elect an arbitral remedy.
- C. Article 4 of the Calpurnia-Gaul BIT does not extend to dispute resolution mechanisms, such as those referred to in the Calpurnia-Flatland BIT Article 7.
- D. Even if Article 7 of the Calpurnia-Flatland BIT were applicable, Flatland has not been a Contracting State at the times relevant for the jurisdiction of this Arbitral Tribunal.

A. THE CLAIMANT HAS NOT PURSUED AMICABLE SETTLEMENT FOR THE 18 MONTHS AS REQUIRED BY ARTICLE 11(2) CALPURNIA-GAUL BIT

19. Calpurnia-Gaul BIT requires an eighteen months amicable settlement period (so called “cool-off” period) before initiating arbitration proceeding. Article 11(2) states:

“If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration.”

20. Jurisdiction of the Tribunal is based on the state consent to arbitration. At the present case such consent has been qualified by amicable dispute settlement period. Thus, cool-off provision of Calpurnia-Gaul BIT is jurisdictional requirement, and consequently failure to comply causes lack of jurisdiction of the Tribunal.
21. Thus in *Enron Corporation v Argentina*¹ the Tribunal faced with situation, where claims against few Argentinean provinces were submitted without observation of six-month negotiation period envisaged by US-Argentina BIT. Tribunal rejected respective

¹ *Enron Corporation and Ponderosa Assets LP v Argentina*, Decision on Jurisdiction, ICSID, Case No ARB/01/3, IIC 92 (2004). 14 January 2004.

objections of respondent on the base of identical nature with other pursued before the arbitration claims, where such conditions were met. However, the Tribunal pointed out:

“The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement... Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.”²

22. Since the Tribunal entertained the claim, all cited above should be treated as said *obiter dictum*, but it is relevant to the present case.
23. In *Tokios Tokeles v. Ukraine*³, the Tribunal decided over jurisdictional compliance of the claim. Apart from other matters, it ruled over cool-off period observation, mentioning it as jurisdictional⁴. Tribunal rendered award on jurisdiction considering adherence of respective period. Thus, non-observance of corresponding provisions could lead to tribunal’s conclusion of jurisdiction defect.
24. In *Generation Ukraine Inc v. Ukraine*⁵, BIT contained a stipulation that six months must elapse from the date on which the dispute arose before the submission of the dispute to binding arbitration by the investor. The Tribunal was “hesitant to interpret a clear provision of the BIT in such a way so as to render it superfluous, as would be the case if a “procedural” characterization of the requirement effectively empowered the investor to ignore it at its discretion”⁶.
25. According to the facts of the present case, claim was submitted to the respective Tribunal on 31 July 2007, while requested for amicable settlement only on 5 February 2007.

²*Enron Corporation v Argentina*, para. 88.

³ *Tokios Tokeles v Ukraine*, Decision on Jurisdiction and Dissent, ICSID Case No ARB/02/18, IIC 258 (2004). 29 April 2004.

⁴ *Tokios Tokeles v Ukraine*, para. 102.

⁵ *Generation Ukraine Inc v Ukraine*, Award, ICSID Case No ARB/00/9, IIC 116 (2003). 16 September 2003.

⁶ *Generation Ukraine Inc v Ukraine*, para. 14.3.

26. Thus, claimant failed to comply with jurisdictional requirement according to Article 11(2) of

27. Calpurnia-Gaul BIT. Therefore, this Tribunal lacks jurisdiction to rule over the dispute.

B. THE CLAIMANT HAS PURSUED ITS CLAIMS BEFORE THE DOMESTIC COURTS OF CALPURNIA AND ACCORDING TO ARTICLE 11 (3) OF THE CALPURNIA-GAUL BIT THE CLAIMANT MAY THEREFORE NO LONGER ELECT AN ARBITRAL REMEDY

(i) Claimant has no right to commence an arbitral proceeding since such commencement is in violation of the Calpurnia-Gaul BIT

28. Claimant has commenced a proceeding before the domestic court of Calpurnia and by such action has shown its intention to resolve the dispute by national dispute resolution remedies.

29. Article 11(3) of the Calpurnia-Gaul BIT stipulates that "An investor who has already submitted the dispute to the competent court of the Contracting Party shall no more have recourse to one of the arbitral tribunal (...)".

30. These provisions offer the investor a choice between the host State's domestic courts and international arbitration. The choice, once made, is final. Therefore, if the investor has resorted to the host State's domestic courts to have its dispute settled it has lost its right to resort to arbitration.⁷

31. Such *fork-in-the-road* mechanism is widely recognized in international law. Stipulation in the BIT that if the investor chooses to submit a dispute to the local courts of the host State, or to any other agreed dispute resolution procedure, the investor forever loses the right to submit the same claims to the international arbitration procedure in the BIT.⁸

32. The purpose of such clauses is at making irrevocable the choice of the investor who would have otherwise a generous choice of jurisdictions.⁹

⁷ Schreuer, Christoph: *Consent to arbitration*; dated July 12, 2005 p. 18

⁸ Guide to ICSID p.98

⁹ OECD: Working Papers on international investment No.2006/1, Improving the system of investor-state dispute settlement: an overview

33. *Fork-in-the-road* provisions may prevent an unsuspecting investor who has commenced proceedings from taking the international arbitration "fork" offered in the treaty as an alternative to the courts.

(ii) *The claim before the Domestic Court is essentially the same as the claim before the Tribunal*

34. Actions of Ms. Pescara should be interpreted as actions of the Claimant. Under the relevant trust law of both Calpurnia and Gaul, the action of a trustee to bring suit on behalf of a beneficiary always preclude further suit by a beneficiary. The act of filing of a suit by a trustee is always assigned to a beneficiary.¹⁰

35. The claims brought by Ms. Pescara were essentially the same as claims presented by the Claimant in this arbitration. Though she didn't explicitly rely on the specific provisions of the BIT, the subject matter were the same.

36. The difference between contract-based claims and treaty-based claims has been discussed by various international arbitral tribunals as evidenced by the decisions in *Lauder v. Czech Republic*¹¹, *Genin v. Estonia*¹², and *Azurix v. Argentin Republic*¹³. The main point in all cases is that claims should be essentially (not formally) the same in court and in arbitration procedure.

37. The international procedure does not normally require specific reference to the provisions of a treaty in question if the basis of the claim could have been understood from the circumstances in which it was presented.

38. If the *same investment claim* has been commenced before the State Court the Claimant loses its right to start an arbitral proceeding. The sense of the claim of Ms.Pescara in the

¹⁰ 2nd Clarifications No.4

¹¹ *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 September 2001

¹² *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2

available at: <http://www.worldbank.org/icsid/cases/conclude.htm>

¹³ *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, International Law in Brief available at: <http://www.asil.org/ilib/azurix.pdf>.

domestic court of Calpurnia - transferring the dividends - is essentially the same as the *claim* before the Tribunal. Thus, Claimant has no right to commence an arbitral proceeding.

C. ARTICLE 4 OF THE CALPURNIA-GAUL BIT DOES NOT EXTEND TO DISPUTE RESOLUTION MECHANISMS, SUCH AS THOSE REFERRED TO IN THE CALPURNIA-FLATLAND BIT ARTICLE 7

39. Most favourable nation clause (MFN) contained in Calpurnia-Gaul BIT does not extend to judicial matters. Thereby, claimant can not rely on Calpurnia's-Flatland BIT article 7 to avoid amicable settlement period provided by Calpurnia-Gaul BIT. (i)

40. Additionally, by switching fork-in-the-road provision, claimant chooses its dispute settlement forum and therefore can not elect arbitral remedy (ii)

(i) *The Claimant can not rely on extension of MFN clause in basic treaty on dispute settlement provisions, since there was no intention of the Contracting Parties to the BIT on such widening*

41. Question concerning interaction of MFN clauses in the BIT's with dispute settlement provisions in third-party treaties appears to be disputable. However, some authors notice at this case, that appropriate attention to contracting parties' will should be paid¹⁴. Such will has been reflected in respective treaty provisions that should be examined in proper way to discover contracting parties intention and leave any ambiguity. According to Vienna Convention on the Law of Treaties, which is applicable¹⁵, provisions of the treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty"¹⁶.

¹⁴Gaillard, Emmanuel: *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, in: New York Law Journal, Vol. 223 No. 105.

¹⁵ 2nd Clarifications to the Problem, No. 32.

¹⁶ *Vienna Convention on the Law of Treaties 1969*, Article 31.

42. In *Berschader and Berschader v Russian Federation*¹⁷ tribunal stated:

“Firstly, the Tribunal must express its firm view that the fundamental issue in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of each individual treaty. In each case, the question must be asked as to whether the contracting parties to the treaty intended the MFN provision to incorporate by reference the dispute settlement provisions of other treaties.”¹⁸

43. Traditionally¹⁹, MFN clause relied on regarding substantive rights, therefore it should be interpreted accordingly, until circumstances will show otherwise²⁰.

44. Tribunal in *Plama Consortium Limited v Bulgaria*²¹ specially pointed out, that Contracting Parties can not be presumed to be agreed on widening scope of application of MFN clauses to dispute settlement provisions.²² Also, the Tribunal stated that “the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed”²³. As example, it referred to UK model BIT, where reference by MFN clause to dispute settlement provisions is explicitly allowed, and to exclusion from the effect of

¹⁷ *Berschader and Berschader v Russian Federation*, Award and Correction, SCC Case No 080/2004, IIC 314 (2006). 21 April 2006.

¹⁸ *Berschader and Berschader v Russian Federation*, para. 175.

¹⁹ Tackaberry, John; Marriott, Arthur: *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*; 4th Edition, Vol. 1, Sweet and Maxwell in Conjunction with Chartered Institute of Arbitrators, London, 2003, para 10-037, p. 725.

²⁰ *Telenor Mobile Communications AS v Hungary*, Award, ICSID Case No ARB/04/15, IIC 248 (2006). 22 June 2006. Para. 92.

²¹ *Plama Consortium Limited v Bulgaria*, Decision on Jurisdiction, ICSID Case No ARB/03/24, IIC 189 (2005). 8 February 2005.

²² *Plama Consortium Limited v Bulgaria*, para. 207.

²³ *Plama Consortium Limited v Bulgaria*, para. 204.

MFN clause dispute settlement provisions in North American Free Trade Agreement (NAFTA) and Free Trade Area of the Americas (FTAA).

45. Thereby, question of whether in present case Claimant can rely on dispute settlement provisions in third-party BIT should be considered according to Calpurnia-Gaul BIT contracting parties intention that should be clear and unambiguous, considering also text of MFN clause²⁴.

46. Article 4 of Calpurnia-Gaul BIT states:

“1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favorable than the host Contracting Party accords to the investments and returns made by its own investors or by investors of any third State, whichever is the most favorable to the investor.

2. Investors of one Contracting Party shall be accorded by the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favorable than the latter Contracting Party accords its own investors or to investors of any third State, whichever is the most favorable to the investor.”

47. Demonstrated article presents a “system” of general and special rule, where general rule (Article 4.1), broad enough, has been narrowed by special rule (Article 4.2) only to “the management, maintenance, use, enjoyment or disposal” of investment. With all respect to meaning of presented matters, none of them could be treated wide enough to include dispute settlement regarding investments. At least, it could not be meant as explicit intention of the Contracting Parties to incorporate judicial rights of investor in scope of MFN clause application.

²⁴ *Berschader and Berschader v Russian Federation*, para. 175; Gaillard, Emmanuel: *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, in: *New York Law Journal*, Vol. 223 No. 105.

48. Under given circumstances, Respondent believes that they sufficiently differ from those in *Maffezini v Kingdom of Spain*²⁵, where MFN clause regarded to “all matters”²⁶ only, and in *Siemens v. The Argentine Republic*²⁷, where MFN clause, broad as well, as in *Maffezini v Kingdom of Spain*, was supplied with exceptions, none of them related to dispute settlement²⁸.

49. Since at the present case MFN clause is substantially narrower than in mentioned above and there is no clear and undoubtful intention of the contracting parties to include dispute settlement provisions in the scope of application of MFN clause, Claimant can not rely on respective provisions in Calpurnia-Flatland BIT.

(ii) *The Claimant also can not rely on MFN provision to extend its effect on dispute settlement in third-party BIT since he has triggered fork-in-the-road provision (B) in basic treaty*

50. As it have been submitted above, intention of the contracting parties to the BIT is of significant importance.

51. It would be extremely dubious to treat intention of the parties to Calpurnia-Gaul BIT as they have intended to allow investors to avoid fork-in-the-road provisions through MFN clause. Moreover, the Tribunal in *Maffezini v Kingdom of Spain*, even though it permitted extention of MFN clause to judicial matters, specially mentioned fork-in-the-road clauses as limitation of application of most favourable nation treatment.

52. According to the facts of the case, the Claimant have elected dispute resolution forum, and can not choose another remedy instead.(B)

53. Therefore the Claimant can not address to ICSID arbitration under Calpurnia-Flatland BIT through MFN clause.

²⁵ *Emilio Augustin Maffezini v Kingdom of Spain*, ARB/97/7, Decision on objections to jurisdiction. 25 January 2000.

²⁶ *Maffezini v Kingdom of Spain*, para. 38.

²⁷ *Siemens v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision of 3 August 2004.

²⁸ *Siemens v. The Argentine Republic*, para. 82-83.

D. IF ARTICLE 7 OF THE CALPURNIA-FLATLAND BIT WERE APPLICABLE, FLATLAND HAS NOT BEEN A CONTRACTING STATE AT THE TIMES RELEVANT FOR THE JURISDICTION OF THIS ARBITRAL TRIBUNAL

54. Like other types of arbitration, investment arbitration under ICSID is based on agreement between the parties. Article 25(1) of the ICSID Convention²⁹ establishes the conditions for the

55. jurisdiction of the Centre, stating:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

56. Thus, parties should express their consent to arbitration. According to the second sentence of the Article 25(1), arbitration becomes binding when both parties have given their consent. Such scheme forms arbitration agreement.

57. It is widely adopted, that consent could be given through various instruments, including provisions of the BIT³⁰. ICSID Convention requires written form only.

58. Therefore, provisions of the BIT referring to ICSID arbitration should be meant as offer of consent. It is not binding and can be withdrawn unilaterally until investor gives his own consent to form agreement between parties.

59. At the present case, Claimant relies on MFN provisions in basic treaty to benefit from dispute settlement mechanism set in Calpurnia-Flatland BIT referred to ICSID arbitration. According to the facts of the case, Flatland is not contracting party to ICSID Convention since it denounced it in 2003.

²⁹ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, in force 14 October 1966, 575 UNTS 159, 4 ILM 524 (1965).

³⁰ Schreuer, Christoph: *Consent to arbitration*; dated July 12, 2005. p. 1.; Gaillard, Emmanuel: *The Denunciation of the ICSID Convention*, in: New York Law Journal, Vol. 237 No. 122.

60. Under Article 72 of ICSID Convention denunciation is not affecting the obligations of the contracting parties arisen before this moment. However, at the case at hand, no obligations arose for Flatland under this provision because no arbitration agreement has been formed by the reason of absence of investor's acceptance of offer of consent.
61. Thereby, Claimant can not benefit from Calpurna-Flatland BIT dispute settlement provisions referred to ICSID arbitration.
62. Another objection is that ICSID Convention, establishing requirement to jurisdiction of the Centre, qualifies parties to the dispute requiring nationality of contracting state to ICSID Convention at the day of the parties mutual consent on ICSID arbitration³¹. Thereby, nationals of Flatland could not submit disputes under respective BIT after denunciation of ICSID Convention, and Claimant can not bank on establishing jurisdiction of the present Tribunal through MFN clause.

³¹ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Article 25(2)(a)-(b)

PART TWO

OBJECTIONS TO STATE RESPONSIBILITY OF CALPURNIA

UNDER THE GENERAL RULES OF CUSTOMARY INTERNATIONAL LAW ON ATTRIBUTION CALPURNIA IS NOT INTERNATIONALLY RESPONSIBLE FOR CONDUCT OF CALPURNIAN PRIVATE NATIONALS

(i) *Burden of proof of the State Responsibility of Calpurnia shall be performed by the Claimant rather than by the Respondent*

63. As a matter of general principles of the customary and statutory international procedural law each party has to prove the circumstances and arguments it relies on in its pleadings.³² Therefore, the burden of proof of the State Responsibility of Calpurnia for the conduct and decisions carried out by either SFCDC, or VanCal, or any other private individuals or entities falls on the Claimant since the general presumption is that the State is not responsible for its private individuals and entities.³³ However, The Respondent will exceed its scope of burden of proof in order to substantiate it for the Tribunal that there are no grounds for attributing the conduct and the decisions of SFCDC and VanCal to the State of Calpurnia.

(ii) *Applicable law*

64. In absence of any statutory law on State Responsibility applicable to the dispute at hand the general principles of customary international law and international case law are to be the governing law on the matter of the State Responsibility of Calpurnia. In certain situations, however, the applicable law especially the case law seems to be inconsistent and even sometimes contradictory. To avoid it the Tribunal should kindly follow the most authoritative legal sources. The Respondent believes that the general international

³² B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge (1987), p. 329-331

³³ International Law Commission, Report on the work of its 53 session (2001), General Assembly, Official Records, Fifty-Sixth Session Supplement No. 10 (A/56/10), p. 47

law mostly reflects in the awards of ICSID, judgments of the International Court of Justice, other institutional arbitration and in the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted on the fifty-third session of the International Law Commission of the United Nations in 2001 (“ILC Draft Articles”).

65. The ILC Draft Articles from a strictly formalistic point of view are only “draft” articles, rather than articles of a treaty in force. The Claimant submits that the ILC Draft Articles are fully applicable to investment arbitration in general and to the dispute at hand. There is a general consensus in doctrine of international public law that the ILC Draft Articles reflect customary international law on state responsibility.³⁴ Moreover, the ILC Draft Articles are frequently referred to in a number of arbitral awards and court decisions in connection with matters of the State responsibility and attribution. However, it should be noted that due to the status of the ILC Draft Articles they should be referred to only with consideration of the respective case law.

(iii) There are no grounds for attribution of the conduct and decisions of SFCDC and VanCal to the State of Calpurnia

66. The Respondent states that there are no grounds for attribution of conduct and decisions of SFCDC and especially of VanCal to the State of Calpurnia since the general conditions under the attribution doctrine are not observed in the case at hand.

67. Article 5 of the ILC Draft Articles that may be dealt with in the dispute at hand sets the condition of exercising the governmental authority as the main requirement for attribution.

68. The Respondent states that neither SFCDC, nor VanCal were empowered to execute governmental authority. It is not denied that (i) SFCDC is an entity with 100% interest of the State of Calpurnia and (ii) that SFCDC according to 1st Clarifications of the Problem, “plays a custodial role. Nothing requires shareholders to place the shares in the custody of the SFCDC, but dividends and interest income not in the custody of one of the State funds are subject to withholding tax”.³⁵

³⁴ K. Hober, State Responsibility and Attribution / The Oxford Handbook of International Investment Law, edited by P. Muchlinski, F. Ortino, C. Schreuer, p. 553

³⁵ The 1st Clarifications, para. 13

69. However, it should be stressed that in the sense of Article 5 of the ILC Draft Articles “the existence of a greater or lesser State participation in its [entity alleged to be attributable to the State], or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purposes of attribution of the entity’s conduct to State”.³⁶ Thus, the shareholder’s control or the executive control is not enough condition for the means of attribution. Consequently, VanCal even had no direct interest of the State for the means of international responsibility since it is stated that the conduct of SFCDC is not attributable to the State of Calpurnia.
70. Article 5 of the ILC Draft Articles deals with the term of “governmental authority”, and even though the term is not defined it should be stressed that (i) neither SFCDC nor VanCal were empowered to exercise governmental authority, and that (ii) the conduct of SFCDC and VanCal that is claimed to amount to the alleged expropriation is commercial conduct rather than acts of exercising the governmental authority.
71. The Respondent believes that the taxation preferences of SFCDC might hardly be deemed as governmental authority. The German Government substituted the term governmental authority with “delegation of powers’ and used it as a synonym³⁷ to “governmental authority”. However, the term “governmental authority” should be distinguished from the term “public function” since the scope of the latter is wider and also includes acting in so-called “public interests”. The taxation preferences and privileges is a form of fulfilling public interests and is a kind of stimulation of social activity in private investments.
72. With regard to VanCal there is no evidence of any empowering it with any governmental authority since it is a private company carrying out commercial activities.
73. In *In Maffezini v. Kingdom of Spain* the arbitral tribunal ruled as follows: “the Tribunal must again rely on the functional test that is, it must establish whether specific acts or omissions [claimed to amount the alleged expropriation] are essentially commercial

³⁶ International Law Commission, Report on the work of its 53 session (2001), General Assembly, Official Records, Fifty-Sixth Session Supplement No. 10 (A/56/10), p. 43

³⁷ League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (Doc. C.75.M.69.1929.V.), p. 90

rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial act cannot be attributed to the [...] State, while governmental act should be so attributed”.³⁸ Both SFCDC and VanCal are entities carrying out commercial activities and, therefore, their conduct is not attributable since all the acts that are claimed to amount the alleged expropriation were performed in the form of corporate decisions in the normal course of business. Thus, SFCDC carried out its main function and acted in own interests and interests of private owners by voting the shares of VanCal. VanCal, in turn, adopted all the corporate decisions with observing of all the requirements.³⁹

74. The general attribution test is the test of the degree of control of the State over the act and omissions of the private national. The widely used test for the effective control was used in *Military and Paramilitary case*.⁴⁰ The tribunal ruled that the degree of control should be so that the State could effect every single act or action of the entity or person that is claimed to have amounted expropriation. This position was supported in *Bosnian Genocide*.⁴¹
75. It was already substantiated that the corporate control is not that degree of control enough for attribution of conduct to State. In *Bosnian Genocide* it was emphasized that the requirement under the control test (“Nicaragua test”) is that the acts should be carried out under instruction, direction or control of the State. The degree of the “effective control” may vary, even though, it should be stressed that all the decisions taken by both SFCDC and VanCal were out of States control, all there corporate proceedings were observed, since that they should be deemed performed independently.
76. The Respondent respectfully asks the Tribunal to find the conduct of either SFCDC, or VanCal, or any other private nationals of Calpurnia non-attributable to the State of Calpurnia.

³⁸ The Problem, p. 3

³⁹ The 1st Clarifications, para. 3

⁴⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p.14.

⁴¹ *Bosnia and Herzegovina v. Serbia and Montenegro*, Merits, ICJ Report 2007, p. 142-148

PART THREE

CALPURNIA DID NOT COMMIT ANY VIOLATIONS THAT AMOUNTED TO THE ALLEGED EXPROPRIATION

- A. The Respondent states that it did not illegally expropriate Claimant's investment either directly or indirectly.
- B. The Respondent states that it complied with its obligation to accord Gaulois investors with fair and equitable treatment as well as with full and constant protection and security.

A. CALPURNIA DID NOT ILLEGALLY EXPROPRIATE THE CLAIMANTS INVESTMENT

77. In early 1997, Claimant has arranged together with the SFCDC a joint-venture company called VanCal (¶ 8 of the Claimant's Request for Arbitration). By late 2004, Claimant owned 31% stock in VanCal and two Directors in the latter's Board (¶ 9 of the Claimant's Request for Arbitration). Until the present moment, Claimant has retained its 31 % stock and two places in the VanCal Board (Evidence/Calendar of Events). At the same time, the Respondent has conducted several searches at the residences of the Claimant's representatives in the VanCal Board that were grounded upon anonymous tips and revoked the visa of Ms Pescara, one of the said representatives, the substitute for the Claimant's board representatives Mr Rindler was denied from participation in several Board meetings because of undue form of proxies and the Claimant did not receive the investment returns. The Respondent submits that no expropriatory measure was in place in the case at hand.

78. Indeed, the term 'expropriation' covers not only formal transfer of property rights over the investment but also the measures that interfere with the said rights to a sufficient extent. As Professors Sohn and Baxter stated in their 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, "a taking of property includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an interference that the owner thereof will not able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference".⁴² Given that the

⁴² Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,

Respondent neither increased its stock in VanCal at the Claimant's expense nor took any property belonging to the Claimant, the Claimant would apparently claim that the Respondent interfered with the use and enjoyment of the Claimant's property in such a way that the said interference reached the level of expropriation.

79. In order to satisfy the Tribunal with the expropriation claim, it is for the Claimant to show that the Respondent by its regulatory measures crossed the threshold of indirect expropriation established in international law.
80. In *Tradex v. Albania* the tribunal, having come to the conclusion that none of the single decisions and events alleged by Tradex to constitute an expropriation can indeed be qualified by the Tribunal as expropriation, noted that "it might be possible that, and the Tribunal, therefore need to examine and evaluate hereafter whether the combination of the decisions and events can be qualified as expropriation of Tradex' foreign investment in a long, step-by step process by Albania."⁴³ Insofar as the case at hand concerns not one act, but a series of allegedly illegal actions taken by Calpurnia, it is for the Tribunal to follow the logic of *Tradex* and, firstly, to consider legality of each particular action and, secondly, to consider legality of all the actions taken together.
81. It is therefore for the Tribunal to consider whether following actions amount to expropriation:
- (a) revocation of Ms Pescara's visa;
 - (b) searches at the residences of the Claimant's board representatives;
 - (c) refusal to give Mr Rindler a place in the Shareholder meeting of 16 November 2006 because of invalidity of the proxies that gave him necessary powers of participation;
 - (d) the visa revocation, the searches and the refusal of Mr Rindler proxies, as a deprivation of control over VanCal;
 - (e) refusal to transfer returns of the Claimant's investment; and finally
 - (f) the whole bundle of the above-said actions.

82. Under general principle of international law, "a Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal

art. 10(5), reprinted in Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, p. 548 (1961)

⁴³ *Tradex Hellas S.A. v. Republic of Albania*, Award, 29 April 1999, 14 ICSID Review-FILJ (1999), para 191

of their truth, lest they be disregarded for want, or insufficiency, of proof⁴⁴. This rule is universally recongized as a principle of general allocation of the burden of proof in international law.⁴⁵ For the purposes of this case, it is for the Claimant to prove that the measures listed above have indeed reached the level of becoming expropriatory.

a. Revocation of Ms Pescara's visa does not amount to expropriation

83. Revocation of state permits and licenses may involve regulatory expropriation, (i) if the said permits or licences are necessary to operate in certain sectors of the economy and it is impossible to proceed the business without the said licence and (ii) if the foreign investment licence, even being not critical for the business, is withdrawn in violation of due process guarantees.⁴⁶ In the case at hand, revocation of Ms. Pescara's visa, being a subset the considered cancellation of permits, does not satisfy any of the listed requirements.

(i) Ms. Pescara's visa was not necessary for the operation of VanCal

84. The facts of the case do not reveal any adverse consequences of the revocation of Ms. Pescara's visa. Rather, the facts demonstrate that Ms. Pescara soon after her visa revocation resigned as managing director and was substituted by other person (Evidence/Calendar of Events). It also follows from the facts that its was possible for Ms. Pescara to mitigate her absence in the Board by appointing a proxy (Evidence/Calendar of Events). The permission of Ms. Pescara's further presence in Calpurnia was not so vital for the operation of VanCal, as were the respective permits, for instance, in

⁴⁴ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, (1987), p. 327

⁴⁵ *Norwegian Loans (France v. Norway)*, ICJ 1957, July 6th General List: No. 29; *Abraham Rahman Goldshani v. The Government of the Islamic Rebulbic of Iran*, Iran-U.S. Claims Tribunal, YCA 1994, at 421, 429; *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, 6 ICSID Review-FILJ (1991), p. 527; *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ARB/99/6 para 89

⁴⁶ M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed. Cambridge, p. 389-390

*Metalclad*⁴⁷ or *Biloune*⁴⁸, where the revocation of the said permits led to the complete cessation of business operation.

85. Moreover, even if the Tribunal finds that Ms. Pescara was personally necessary for the further operation of VanCal, the facts demonstrate that revocation of Ms. Pescara's visa did not mean full elimination of any opportunity for Ms. Pescara to visit Calpurnia, since

86. The Claimant cannot as well refer to any legitimate expectations that could have been formed by previous granting of visa to Ms. Pescara, since Calpurnia did not make any specific representations with regard to Ms. Pescara's visa. Adversely, in *Metalclad*, where the tribunal found legitimate expectations, Mexican Government by its representations and conduct assured the investor that the specific landfill permit would remain in force.⁴⁹ Likewise, in *Revere Copper*, the host state has given explicit and affirmative assurances not to increase taxes.⁵⁰ In the case at hand, Calpurnia made no assuring representatiuons, on which the Claimant could rely, and therefore teh Claimant could not have any legitimate expectations.

(ii) *Ms. Pescara's visa does not amount to an investment permit and in any case was revoked in full compliance with due process of law*

87. International jurisprudence does not provide any example where visa could be considered as a permit pertaining to investment, or investment permit. *Biloun*⁵¹ and *Metalclad*⁵²wer concerned with revocation of build permit, *Goetz v. Burundi*⁵³ and *Middle East Cement Shipping v. Egypt*⁵⁴ were connected with free-zone license, whareas in *CME v. Czech*

⁴⁷ *Metalclad Corp.v. Mexico*, Award, 30 August 2000, 5 ICSID Reports (2002) 209, para 108

⁴⁸ *Biloune, et al. v. Ghana Investment Centre, et al.*, 95 ILR 183, 207-10 (1993)

⁴⁹ *Metalclad Corp.v. Mexico*, Award, 30 August 2000, 5 ICSID Reposrts (2002) 209, para 107

⁵⁰ *Revere Copper v. OPIC*, Award, 24 August 1978, 56 ILR (1980) 258 at p. 271

⁵¹ *Biloune, et al. v. Ghana Investment Centre, et al.*, 95 ILR 183

⁵² *Metalclad Corp.v. Mexico*, Award, 30 August 2000, 5 ICSID Reposrts (2002) 209

⁵³ *Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review-FILJ (2000) 457

⁵⁴ *Middle East Cement Shipping v. Egypt*, Award, 12 April 2002, 7 ICSID Reports (2005) 178

*Republic*⁵⁵ investor complained of the revocation of media license. In all those cases the licenses or permits given by host states had a direct connection with the activity of investors and thus their cancellation affected the course of operation the projects, if were not crucial for the ability to continue operation of investments. Visa of one of VanCal managers, given the ability to substitute Ms. Pescara, did not have such a direct connection to VanCal's activity. Given the general obligation of the Claimant to prove the law, which it proposes⁵⁶ it is for the Claimant to produce a case or otherwise persuade the Tribunal that the considered rule work with regard to the procedure of granting of visa.

88. In *ELSI* case the ICJ stated on the matter of breach of due process that "arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."⁵⁷ Therefore, it is for the Claimant to show, why is it shocking or surprising that a state refuses to give visa without stating any ground.

b. Searches at the residences of the Claimant's board representatives do not amount to expropriation

89. In *Too v. Greater Modesto Insurance Associates Iran-United States Claims Tribunal* stated that 'a state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price'.⁵⁸

⁵⁵ *CME v. Czech Republic*, Partial Award, 13 September, Partial Award, 13 September 2001, 9 ICSID Reports 121

⁵⁶ I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford, 2003, p. 12; *S.S. Lotus (France v. Turkey)* PCIJ Ser. A, No. 10, p. 18

⁵⁷ *Eletronica Sicula SpA (ELSI) (United States v. Italy)*, 1989 ICJ Reports 15 at 76

⁵⁸ *Too v. Greater Modesto Insurance Associates*, 23 Iran-United States Claims Trib. Rep 378

90. Searches, being a matter of police powers, were conducted *prima facie* in good faith, since “there is a well-established general principle of law according to which bad faith may not be presumed”.⁵⁹

91. The searches were made in full compliance with national procedure. The Claimant cannot claim that Ms. Pescara or Mr. Kolowenko were discriminated in the course of the searches or by the searches themselves. As it was stated in *Feldman*, there are several interpretative hurdles that must be observed in considering, such as like circumstances and proof that it is the nationality that serves as a ground for differentiation.⁶⁰ However, the facts of the present case do not contain any information as to whether there were other persons who were subjected to the like searches, therefore the necessary basis for comparison is absent. Thus it becomes impossible for the Claimant to prove discrimination here.

92. At the same time, there is no factual background to state that the searches were designed to force Mr. Kolowenko and Ms. Pescara to abandon any property.

93. For these reasons, the searches in the case at hand do not amount to expropriation.

c. Refusal to give Mr Rindler a place in a Shareholder meeting of 16 November 2006 because of invalidity of the proxies that gave him necessary powers of participation does not amount to expropriation

94. Refusal to give the sole representative of the foreign investor the place in Shareholder meeting because of formal invalidity of proxies took place in *Foremost*, however the Iran-US Claims Tribunal did not find any violation with respect of the said refusal.⁶¹ The Tribunal emphasized in this regard, that the proxies held by *Foremost* representative Mr. Vahdati were found to be formally invalid for the purpose of the meeting where one of *Foremost* directors was voted off the Board by the majority of the shareholders present at

⁵⁹ *Lac Lanoux* (France v. Spain), 12 RIAA 283, at 305 (November 16, 1957) (translation from french: “car il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas.”).

⁶⁰ *Marvin Feldman v. Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) para 166

⁶¹ *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-United States Claims Trib. Rep. 228, at 250

the meeting.⁶² Insofar as the outvoted Foremost director was substituted by another person and the Shareholder meeting did not take any decisions to the damage of Foremost in the absence of Mr. Vahdati, the Tribunal did not see there any actions of expropriatory nature.

95. As in Foremost, in this case the denial of representation of the Claimant in the 16 November 2006 meeting also did not cause any damage for the Claimant and therefore this is not the case of expropriation.

96. The effect of the refusal was harmless and at least because of that harmlessness there was no taking. Likewise, in *Eastman Kodak* the Iran-US Claims Tribunal did not find expropriation in an appointment of a governmental manager inasmuch as the manager did not anyhow affect the operation of Kodak.⁶³ The refusal made in this case is however in itself entirely lawful, unlike the above-considered forced appointment of governmental manager in *Eastman Kodak*, which is recognized in international law as *prima facie* a taking by the state⁶⁴, and therefore it is even clearer that the said refusal to be represented did not amount to expropriation.

d. Calpurnia did not deprive the Claimant of control over its investment or, if the said is the case, the deprivation of control in this case does not amount to expropriation

97. Adversely, in the case at hand the Claimant did not have any control over VanCal, being a minority shareholder. The Claimant has retained both its places in VanCal's Board, as well as the full amount of its 31% stock in the company. Again, in *Foremost*, the Iran-US Claims Tribunal, having the same complex of actions before it, did not find any expropriation due to the loss of control.⁶⁵

98. Even shall the Tribunal decide that the Claimant has nevertheless lost a part of its control over its investment in VanCal, the practice of arbitral tribunals establishes a very high standard of loss of control in order to equate it to the effect of expropriation. The

⁶² Ibid.

⁶³ *Eastman Kodak Co. v. Government of Iran*, 17 Iran-United States Claims Trib. Rep. 153

⁶⁴ M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., Cambridge, p.387

⁶⁵ *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-United States Claims Trib. Rep. 228, at 253

requirement of total or substantial deprivation has led these tribunals to deny the existence of an expropriation where the investor had retained control over the overall investment even though it had been deprived of specific rights.⁶⁶ In *Azurix* the tribunal, in order to decide whether that was the case of expropriation due to the loss of control, has concentrated itself on checking the changes in the ABA company's stock and came to the conclusion that there was not expropriation since Azurix retain all 90 % in the stock.⁶⁷ As in *Azurix*, the Claimant in this case did retain its stock in VanCal intact.

99. Moreover, the facts reveal that the actions the Claimant complains of did not preclude the operation of VanCal, although the Claimant does not receive proceeds from that. In *LG&E v. Argentina* it was specifically stated that 'interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if the profits are diminished.'⁶⁸

100. For these reasons, the Respondent submits that there was not loss of control on the part of the Claimant and that in any case it did not reach the threshold of expropriation.

e. Refusal to transfer returns of the Claimant's investment does not amount to expropriation

101. Under international law, the refusal to transfer funds abroad does not constitute taking of property.⁶⁹ Accordingly, the tribunals have denied compensation for restrictions on international transfer of funds⁷⁰ and restrictions on bank account transfers.⁷¹

⁶⁶ R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford, p. 107; *Marvin Feldman v. Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) paras 142, 152; *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005, paras 263, 264; *Enron v. Argentina*, Award, 22 May 2007, para 245

⁶⁷ *Azurix v. Argentina*, Award, 14 July 2006, ICSID Case No ARB/01/12, IIC 24 (2006), para 322

⁶⁸ *LG&E v. Argentina*, Decision on Liability, 3 October 2006 21 ICSID Review-FILJ 203 (2006) para 191

⁶⁹ G.C.Christie, *What constitutes a taking of property under international law?*, 38 Brit.YB Int'l L 307, (1962), 318; B.Wortley, *Expropriation In Public International Law* (1959) p. 107

102. Even shall the Tribunal find that the said restrictions constitute expropriation, the Respondent would submit that it is for the Claimant to prove that the rules regulatory expropriation through refusal to transfer funds are applicable to the decision of state as a shareholder not to pay dividends.
103. For instance, in *Foremost* the Tribunal did not find expropriation in the actions of the Iranian shareholders of Pak Dairy.⁷²

f. The actions of Calpurnia and the actions of the SFCDC attributable to the former taken together do not create creeping expropriation

104. In order to prove creeping expropriation, the Claimant must show expropriatory effect, which all the claimed regulatory measures had as a result. In *Generation Ukraine* the tribunal stated that ‘creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.’⁷³ Similarly, in *Siemens v. Argentina* the tribunal compared the last act in the chain of creeping expropriation with the straw that breaks the camel’s back.⁷⁴
105. Essentially, this test draws the Tribunal back to the requirement for indirect expropriation, which was depicted in *Starrett Housing* as the extent of interference that

⁷⁰ *Dallal v. Iran*, 3 Iran-United States Claims Trib. Rep. 10; *Hood Corporation v. Iran*, 7 Iran-United States Claims Trib. Rep. 36.

⁷¹ *Sea-Land Service Inc v. Iran* (1984) 6 Iran-United States Claims Trib. Rep.149, at 152.

⁷² *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-United States Claims Trib. Rep. 228, at 255

⁷³ *Generation Ukraine v. Ukraine*, Award, 16 September 2003, 44 ILM (2005) 404, para 20.26

⁷⁴ *Siemens v. Argentina*, Award, 6 February 2007, ICSID Case No ARB/02/8, IIC 227 (2007) para 263.

makes the property rights useless.⁷⁵ In any case, the minimum threshold, which is not crossed by the alleged Respondent's actions, is "effect equivalent to expropriation".⁷⁶

106. According to the facts, neither the amount of shares nor the principles of control over the investment have changed for the Claimant.

107. In *Foremost*, the Iran-US Claims Tribunal had before it the same factual background and the same plea for creeping expropriation. The tribunal was however not persuaded that in that case expropriation occurred.⁷⁷

108. For these reasons, the Respondent submits that its actions do not amount to expropriation.

B. THE RESPONDENT COMPLIED WITH ITS OBLIGATIONS TO ACCORD GAULOIS INVESTORS WITH FAIR AND EQUITABLE TREATMENT, AS WELL AS WITH CONSTANT PROTECTION AND SECURITY UNDER ARTICLE 2 OF CALPURNIA-GAUL BIT

109. In *Azinian* the tribunal stated as follows:

"It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints...NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing it is terms so provides."⁷⁸

110. The Respondent submits that, although the Claimant has been subjected to the enforcement measures of Calprunian police and felt negative emotions in that respect, this does not automatically mean a violation of any treatment standards.

⁷⁵ *Starrett Housing Corp. v. Iran*, Iran-US Claims Tribunal, 19 Decemebr 1983, 4 Iran-United States Claims Trib. Rep. 122 para 154

⁷⁶ Calpurnia-Gaul BIT, Article 6

⁷⁷ *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-United States Claims Trib. Rep. 228, 255

⁷⁸ *Azinian and others v. The United Mexican States*, Award, November 1, 1999, ICSID Review-FILJ, Case No. ARB(AF)/97/2, para. 83

a. The Respondent did duly accord fair and equitable treatment to the Claimant.

(i) *In case if the Tribunal decides that the Respondent is liable for SFCDC's actions, the Respondent's actions as a shareholder of VanCal do not constitute violation of fair and equitable treatment standard*

111. Under international law, the fair and equitable treatment standard relates to the judicial and administrative system of the host state⁷⁹, and it is for the Claimant to prove that the standard may be applied to the state's commercial activities as well.

112. Meanwhile, there is no case in the international jurisprudence, which would name state's commercial actions as violations of the standard. *Metalclad* and *Genin* dealt with transparency in the rules applicable to the granting of licenses, *SD Myers* was concerned with imposition of export ban, *ADF v. United States* was also based on the allegedly unlawful administrative measure.⁸⁰

(ii) *Administrative actions of the Respondent do not violate fair and equitable treatment standard*

113. In *Saluka* the tribunal state that the guarantee of fair and equitable treatment entails obligation of the host state not to 'act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)'.⁸¹ The *Tecmed* decision has also included into the standard the requirement of consistency, transparency and non-arbitrariness.⁸²

114. Administrative actions of the Respondent (i.e. searches at the Claimant directors' residences and revocation of Ms. Pescara's visa) did not entail any discrimination or arbitrariness.

115. Again, as it was stated in *Feldman*, discrimination can be proven only when an opportunity is present to make a comparison with other persons who were subjected to

⁷⁹ M. Sornarajah "The International Law on Foreign Investment" Cambridge, p.333-341

⁸⁰ Ibid.

⁸¹ *Saluka Investments B.V. v. Czech Republic*, Partial Award, 17 March 2006, para 309

⁸² *TECMED v. Mexico*, Award, 29 May 2003, 43 ILM (2004) 133

the same measures in like circumstances if there is evidence that it is the nationality that serves as a ground for differentiation.⁸³ It is however impossible to find the said prerequisites in the facts of the case, since they are absent there.

116. Arbitrariness was defined in *Lauder v. Czech Republic* with the reference to Black's Law Dictionary, which interpreted 'arbitrary' as 'depending on individual discretion' or refers to action 'founded on prejudice or preference rather than on reason of fact.'⁸⁴ Accordingly, the tribunal in *Lauder* did find that the granting of license to the Company CET 21 was arbitrary, since the law "accepted applications from companies with foreign equity participation, but on mere fear reflected national preference".⁸⁵ In the case at hand the police searches were based upon the facts of anonymous notices, as required by Calpurnian law, which is entirely different to the absence of any fact for the basis of measure whatsoever in *Lauder*.

117. Therefore, the actions of the Respondent do not constitute violation of fair and equitable treatment standard.

b. The Respondent did duly accord full and constant protection and security to the Claimant.

118. The Claimant might contend that the Respondent violated the said obligation under Article 2 of Calpurnia-Gaul BIT by abstaining from protecting the residence of Ms. Pescara from the demonstration of the women branch of the Collective Conscience Organization.

119. However, obligation to accord full protection and security is violated, when it is the host state that instigated the violent activities.⁸⁶

120. Moreover, the International Court of Justice stated in *ELSI* that the rule establishing full protection and security obligation for the host state "cannot be construed as the giving of

⁸³ *Marvin Feldman v. Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) para 166

⁸⁴ *Lauder v. Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, para 221

⁸⁵ *Lauder v. Czech Republic*, para 232

⁸⁶ *Eureko v. Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335, paras 236-237

the warranty that property shall never in any circumstances be occupied or disturbed”⁸⁷, thus setting the threshold as to the scale of the offensive actions. Even if Ms. Pescara can be considered as a proper object of offence for the purposes of full protection and security obligation, she was only disturbed, which is not insufficient within the terms of ELSI standard.

121. For these reasons, the Respondent did duly accord full and constant protection and security to the Claimant.

⁸⁷ *Elettronica Sicula SpA (ELSI)* (United States v Italy), 1989 ICJ Reports 15, para 108

PRAYER FOR RELIEF

The Respondent kindly requests the Tribunal to adjudge and declare that:

- I. The case is out of jurisdiction of the Tribunal;
- II. Calpurnia is not internationally responsible for the conduct of the SFCDC and VanCal;
- III. Calpurnia did not illegally expropriate Claimant's investment either directly or indirectly
- IV. Calpurnia complied with its obligation to accord Gaulois investors with fair and equitable treatment as well as with full and constant protection and security.

Respectfully submitted,
AGENTS OF RESPONDENT