TEAM NAME: BENGZON

NO. ARB/X/X

IN THE

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
ICSID

VANGUARD INTERNATIONAL,
CLAIMANT,

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA,
RESPONDENT.

MEMORANDUM FOR RESPONDENT

SHIHATA E ASSOCIATI
Attorneys for Respondent

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

(1) Arbitration Case No. ARB/X/X, *Vanguard International v. The Government of the Republic of Calpurnia*.

(2) The undersigned counsel certifies the following listed entities have an interest in the outcome of this case:

Respondent:
THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA
A public entity with seat in San Inocente de Irkoutsk, capital city of the Republic of Calpurnia.

Counsel for Respondent:
Mr. 1, Mr. 2
SHIHATA E ASSOCIATI
16534 – G Via Romana
Rome, Italy 34
Telephone: (+39) 06-555-1355

Claimant:
VANGUARD INTERNATIONAL
A private company incorporated and with seat in Nova Parigi, capital city of Federated States of Gaul.

Counsel for Claimant:
Mr. 1, Mr. 2, Mr. 3, Mr. 4, Mr. 5
BROCHES & PARTNERS
1100 South Street
Washington D.C., 1007002
Telephone: (345) 234-0000

(3) The undersigned counsel certifies the following listed persons are indirectly involved in this case:

Respondent:
Mr. Poe, Calpurnian national;
Dr. Jonathan Swift, Calpurnian national;
Mr. Shelly, Calpurnian national;
Mr. Korchnoi, Calpurnian national.

Claimant:
Ms. Francesca Pescara, Gaul national;
Mr. David Kolowenko, Gaul national;
Mr. Neil Shepherd;
Mr. Rindler.

__________/s/_________
Mr. 1
Attorney for Respondent

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES 1
TABLE OF CONTENTS 2
LIST OF ABBREVIATIONS 4
LIST OF AUTHORITIES 5
LIST OF LEGAL SOURCES 8
ISSUES PRESENTED 1
STATEMENT OF FACTS 1
SUMMARY OF THE ARGUMENT 4
ARGUMENTS 4
PART I: THE CENTRE'S JURISDICTION 4
I. THE CENTRE DOES NOT HAVE JURISDICTION OVER THIS DISPUTE. 5
A. The BIT's Condition Precedent for Consent to Arbitrate has not been met. 5
B. The Centre does not have Subject Matter Jurisdiction. 5
C. The Centre does not have Personal Jurisdiction. 7
a. The SFCDC is not an Agent of the Calpurnian Government. 7
D. The BIT's Ratione Temporis Requirements have not Been Met. 9
a. Vanguard has not Pursued Amicable Settlement. 9
(i) The "Cooling Off" Period is a Complete Bar for Jurisdiction. 10
b. The MFN Clause does not Cover Dispute Resolution Mechanisms. 11
(i) Alternatively, Flatland was not a Contracting State at the Relevant Time. 12
II. VANGUARD CANNOT RECOURSE TO THE ARBITRAL OPTION. 12
A. Vanguard may no Longer Elect an Arbitral Remedy. 13
B. All of Vanguard's Claims Related to VanCal are Contractual. 14
III. CONCLUSIONS ON JURISDICTION. 15
PART II: ARGUMENTS ON THE MERITS 15
I. CALPURNIA NEITHER DISCRIMINATED AGAINST NOR FAILED TO TREAT VANGUARD IN ACCORDANCE WITH INTERNATIONAL LAW. 15
A. Calpurnia did not Discriminate Against Vanguard. 16
a. Shareholders' and Board of Directors' Actions cannot be Imputed to Calpurnia. 16
(i) SFCDC as a Shareholder is Entitled to Seek its Benefit. 16
(ii) SFCDC as a Board Member is Obligated to Seek the Corporation's Benefit. 16
(iii) SFCDC did not act Under Color of Authority. 17
b. Calpurnia did not Obstruct the Transfer of Vanguard's Returns. 18
(i) VanCal's Calpurnian Directors Acted Individually. 19
(a) Although These Directors Represented the SFCDC they did not have Authority to Decide as they did. 19
- Actual and Apparent Authority 20
- Vanguard Consented to the Suspension Decision. 20
(ii) VanCal accounted for all Dividends and Royalties Accruing to Vanguard. 21
(iii) VanCal was under no Obligation to pay Dividends in Currency Different than Calpurnian Libras. 21

B. Calpurnia Acted Within International Law Standards. _____ *21*
a. Calpurnia Complied with the International Law Minimum Standard for the Treatment of Aliens. _____ 21
(i) Calpurnia did not Violate the Fair and Equitable Treatment Standard. _____ 22
(a) Calpurnia Respected General Principles of Due Process. _____ 24
(b) Calpurnia acted in Good Faith. _____ 24
- Calpurnia Acted within its Police Authority, Never for Improper Purposes or to Coerce or Harass Vanguard's Representatives. _____ 25
- Calpurnia did not Breach any of Vanguard's Legitimate Expectations. 25
- There was no Disproportionate Impact for Vanguard. _____ 26

(c) The Caveat Investor Standard is Fully Applicable. _____ 27
(ii) Calpurnia did not Breach the Full Protection and Security Standard. _____ 27
(a) Calpurnia was under no Duty to Act. _____ 28
(b) Calpurnia did not Encourage, Foster or Contributed to the Protests. _____ 29
b. As a Sovereign State Calpurnia has Complete Freedom to Grant or Deny Visas. __ 29
II. CALPURNIA DID NOT EXPROPRIATE VANGUARD'S INVESTMENT. _____ 30
A. Calpurnia did not Take Any Measure to Further any Expropriation. _____ *30*
a. The Calpurnia-Gaul BIT Requires State Action for a Finding of Expropriation. __ 31
b. SFCDC's Exercise of Shareholding or Board Member Rights is not State Action._ 31
B. There has Been no Interference with Vanguard's Shareholder Rights. _____ *32*
a. Calpurnia Never Interfered with Vanguard's Rights in VanCal. _____ 32
b. There are no Other Measures Affecting Property Rights. _____ 34
C. Alternatively, if There was any Interference, it was not Expropriatory. _____ *35*
a. If there was any Interference, it was not Significant. _____ 35
b. If there was any Interference, it did not Neutralize Vanguard's Investment. _____ 37
(i) Vanguard Investment was not Neutralized. _____ 37
(ii) Vanguard Spoiled its own Investment Expectations. _____ 38
III. CONCLUSIONS ON THE MERITS. _____ 39
REQUEST FOR RELIEF _____ 39

LIST OF ABBREVIATIONS

No.	Full Term	Abbreviation
1	Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments	Calpurnia-Gaul BIT
2	Agreement between the Government of the Republic of Calpurnia and the Government of the State of Flatland on the Mutual Promotion and Protection of Investments	Calpurnia-Flatland BIT
3	Bilateral Investment Treaty(s)	BIT or BITs
4	VanCal's Board agreement to suspend payment of dividends to foreign shareholder	Suspension Decision
5	Calpurnian Security Directorate	CSD
6	CCC Women's League	CCCWL
7	Conservative Conscience of Calpurnia	CCC
8	Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention or Convention
9	Fair and Equitable Treatment	FET
10	Federated States of Gaul	Gaul
11	Full Protection and Security	FPS
12	International Centre for Settlement of Investment Disputes	ICSID or the Centre
13	International Court of Justice	ICJ
14	Minimum Standard for the Treatment of Aliens	MSTA
15	Most Favored Nation Clause	MFN
16	National Treatment	NT
17	Republic of Calpurnia	Calpurnia
18	State of Flatland	Flatland
19	State Fund for Commerce and Development in Calpurnia	SFCDC
20	Subject Matter Jurisdiction	SMJ
21	Technical Assistance Contract or Agreement	TAA
22	Vanguard International	Vanguard

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All references to "Procedural Order" refer to the subsequent rounds of clarifications held in June (Procedural Order No. 1) and August (Procedural Order No. 2), 2008.

ISSUES PRESENTED

1.- The Government of the Republic of Calpurnia (Calpurnia) submits a challenge to the Tribunal's jurisdiction and request the Tribunal to answer in the negative the question of whether the International Centre for Settlement of Investment Disputes (ICSID) has jurisdiction over this dispute, in light of the Agreement between Calpurnia and the Government of the Federated States of Gaul (Gaul) on the Promotion and Protection of Investments (Calpurnia-Gaul BIT)?

2.- Calpurnia submits a challenge to Vanguard International's (Vanguard) claims of discrimination and expropriation, respectfully requesting the Tribunal to answer the following questions in the negative:

A. Whether Calpurnia discriminated against Vanguard in violation of the Calpurnia-Gaul BIT, and in doing so violated international law and failed to provide full protection and security?

  a. Whether Calpurnia unlawfully interfered with Vanguard's investment, in violation of the Calpurnia-Gaul BIT, so as to constitute expropriation by May 27, 2005?

STATEMENT OF FACTS

3.- In August 1995 Calpurnia and Gaul signed a BIT to intensify economic cooperation by creating and supporting favorable conditions for investment. Two years later, in 1997, Vanguard, a mobile telecom corporation with headquarters Gaul, participated in the creation a Joint Venture Company headquartered in Calpurnia's capital. VanCal, had the purpose of providing mobile telecom services in Calpurnia.

4.- VanCal ownership is divided between the State Fund for Commerce and Development in Calpurnia (SFCDC) with direct ownership of 30% and holding voting rights of an additional 22% of VanCal's stock. Vanguard owns 31% of VanCal's stock; 1% of that amount is held in trust by Ms. Francesca Pescara. The remaining 17% is owned directly by other Calpurnians.

5.- VanCal's corporate structure is typical. The shareholders exercise ultimate decision making powers. A board of directors of six (6) members handles the "business" decisions. During the time prior to these proceedings Vanguard had two (2) representatives in VanCal's board, the SFCDC had three (3) and one (1) was a non-affiliated Calpurnian citizen, Mr. Korchnoi. In addition, VanCal has two (2) contractual relations with Vanguard. First, a license to the "Vanguard International" trademark. Second, a Technical Assistance Agreement (TAA).

6.- Between 1997 and 2003 the parties' relations develop normally. However in November 2003, the Conservative Conscience of Calpurnia (CCC) was elected to be the majority in the Calpurnian Parliament. This caused some frictions with other liberal nations.

7.- The SFCDC became more active as VanCal shareholder and board member. Dr. Swift and Mr. Shelly, SFCDC representatives were elected to the board. Personal frictions arose between Dr. Swift and Ms. Pescara which concluded on her resignation. This happened merely a month after Dr. Swift and Mr. Shelly's appointment. Despite Ms. Pescara's resignation Vanguard continued participating in VanCal's board with its two (2) members.

8.- Later, in VanCal's board meetings held on February 17 and March 10, 2005, the board discussed ways to appropriate VanCal's profits for the 2004 tax year. The board discussed the creation of a "reserve fund for worker's severance pay;" and evaluated distribution of "the minimum amount of legal dividend" as well as distributions in shares. During the meeting held on March 10, 2005 VanCal's board agreed to distribute a "reasonable percentage" of profits, because that was in the best interest of VanCal's shareholders. By April 15, 2005 VanCal had declared dividends for 2004, 18% in cash and 10% in stock.

9.- Soon after, via e-mail dated May 21, 2005, Vanguard requested Mr. Korchnoi, Managing Director, that Vanguard's dividend be placed in a separate bank account. Mr. Korchnoi replied informing VanCal could not pay any sum of money to foreign shareholders. On June 5, 2005, Vanguard sent another e-mail to Mr. Swift and Mr. Korchnoi demanding that the board communicate directly and inform them of the decision explaining the legal basis. This demand

was not answered. Mr. Korchnoi's e-mail was unauthorized and was later superseded by VanCal's statements of its willingness to make any payments it owed.

10.- Later, in preparation for VanCal's shareholders meeting, Mr. Rindler's two (2) proxies were rejected based on formal invalidity. The remaining shareholders in the meeting by majority voted Ms. Pescara off the board. Other actions were also taken by VanCal's administration such as Dr. Swift's, chairman of VanCal's board, instructions to Mr. Korchnoi to cease sending or translating financial statements or any other information to Gaulois citizens. All of these actions are corporate decisions divorced from any government involvement.

11.- VanCal declared cash dividends from 2004 to 2007. It paid those dividends to all VanCal's shareholders. Vanguard was paid by credits in VanCal's books. Ms. Pescara, based on her 1% shareholding as trustee, petitioned the Commercial Court of San Inocente de Irkoutsk to order VanCal to transfer the dividends. However her demand was summarily dismissed.

12.- Based on these facts, Vanguard, by letter dated February 5, 2007, addressed to Mr. Poe (SFCDC), complained of a *de facto* expropriation by Calpurnia and demanded fair and just compensation. The letter also requested Mr. Poe to transmit the complaint to the appropriate Ministers. Mr. Poe replied refusing to involve the government in merely a shareholders' dispute.

13.- In addition, in December 2003, January and July 2004 there were three (3) police searches of the homes of Ms. Pescara and Mr. Kolowenko, which were conducted routinely and lawfully, based on national security requirements. Vanguard's applications to have the searches declared unlawful and seek compensation were correctly dismissed by the Calpurnian Constitutional Court. The searches were followed by press releases issued by the Calpurnian Security Directorate (CSD). The press releases were factually accurate and Calpurnia bears no responsibility for any misinterpretation by isolated members of the public. The protesters near Ms. Pescara's home were private citizens lawfully exercising their fundamental right of free speech. They were on public property and behave in a civil manner. Their actions where non-violent, thus there was no basis to support police intervention.

14.- Finally, in September 2004, Ms. Pescara's application for renewal of her business visa was denied. Because she was no longer a director of VanCal, her continuous presence in Calpurnia was not needed. She could perform her duties by other means, like occasional visits or teleconference. Ms. Pescara was told that when her current business visa expired then she could enter the country under Calpurnia's visa waiver program for tourists.

15.- On July 31, 2007, Vanguard requested ICSID arbitration under Article 36 of the Convention and Article 11 of the Calpurnia-Gaul BIT.

SUMMARY OF THE ARGUMENT

16.- ICSID does not have jurisdiction over this dispute under Article 25 of the Convention. Calpurnia's consent to arbitrate was subject to a condition precedent of amicable settlement of disputes. Also, subject matter jurisdiction (SMJ) and personal jurisdiction are lacking.

17.- Also, the BIT's *ratione temporis* requirements, particularly "cooling off" period, which is a complete bar to jurisdiction, have not been met. In addition, Vanguard claims are all contract based. Therefore, the Centre does not have jurisdiction over this dispute.

18.- Furthermore, Calpurnia did not discriminate against Vanguard. Calpurnia did not impose or authorized the imposition of the decision not to pay dividends to foreign shareholders (Suspension Decision). In addition, no violation of international law standards occurred. Calpurnia respected the International Minimum Standard for the Treatment of Aliens (MSTA), which includes Fair and Equitable Treatment (FET) standard. The Full Protection and Security standard (FPS) has not been breached either because CSD acted under national security interests.

19.- Finally, a finding of expropriation is not warranted. No measure was taken and no interference took place. However, if the Tribunal were to find interference, it was not enough to constitute expropriation. Therefore, Vanguard's claims should be dismissed.

ARGUMENTS
PART I: THE CENTRE'S JURISDICTION

I. THE CENTRE DOES NOT HAVE JURISDICTION OVER THIS DISPUTE.

20.- The Centre does not have jurisdiction according to Article 25 of the Convention. Article 25 requires (i) consent by the parties; (ii) subject matter jurisdiction, including a legal dispute arising directly out of an investment; and (iii) personal jurisdiction, requiring the dispute to be between a contracting state and a national of another contracting state.[1] All three of these requirements are not met, thus the Centre does not have jurisdiction to adjudicate this dispute.[2]

A. THE BIT'S CONDITION PRECEDENT FOR CONSENT TO ARBITRATE HAS NOT BEEN MET.

21.- The Calpurnia-Gaul BIT contains conditions that prevent the investor from acting without previously complying with such conditions.[3] The BIT requires that there be an eighteen (18) month settlement phase where both parties would try to reach an agreement to solve the dispute.[4] If Vanguard had followed the BIT's precondition then the parties' consent to arbitrate would be complete. However, the facts in this case show that Vanguard has not done so and therefore Calpurnia did not consent to the Centre's jurisdiction.

B. THE CENTRE DOES NOT HAVE SUBJECT MATTER JURISDICTION.

22.- ICSID arbitration tribunals have consistently repeated that their subject matter jurisdiction (SMJ) over "investment" disputes regarding BITs are based two different tests.[5] The first test looks at whether the specific activities, concerning the dispute, qualify as an "investment" under the Calpurnia-Gaul BIT.[6] The second test is whether the underlying activity is to be characterized as an "investment" according to Article 25 of the Convention.[7]

[1] *See* Art. 25 of the ICSID Convention.
[2] *McLachlan* at 164 (explaining that "[t]he importance of Article 25 of the ICSID Convention in ICSID arbitrations is that it places limits upon the parties ability to consent to ICSID jurisdiction, whether that consent be expressed in concession agreements or in a treaty.").
[3] *See* Art. 11(2) of the Calpurnia-Gaul BIT.
[4] Further discussion on timing requirements maybe found in section D.
[5] *See Reinisch II* at 3.
[6] *Id.*
[7] *See id.*

23.- Regarding the latter argument, there has never been clear a definition of the term "investment." The *Report* acknowledges no attempt was made to define "investment."[8] The contracting parties should define which disputes would be considered "investments" and which ones would not.[9] In the absence of a definition, arbitral tribunals have tried to identify several elements to determine whether the specific activities qualify as an "investment." The elements considered have been (i) duration, (ii) a regularity of profit and return, (iii) a risk, (iv) a substantial commitment and (vi) a significant contribution to the host State's development.[10]

24.- There has been a particular emphasis on the last element, "contribution to the economic development of the host country".[11] The *Mitchell ad hoc* Annulment Committee analyzed the case of a law firm providing services in another country.[12] The Committee found the law firm's services did not amount to an "investment."[13] The Committee "held that it was *not clear* whether the law firm had any special consulting relationship to the host state or had helped the host State to attract foreign investors."[14] (Emphasis added). The Committee had issues with an original failure of the Tribunal to find that "through his knowhow, the Claimant has concretely assisted the [Democratic Republic of Congo], … by providing it with legal services in a regular manner or by specifically bringing investors." [15]

25.- The *Mitchell* case is similar to the case at hand. In this case it is also not clear whether claimant had any special consulting relationship with Calpurnia. Furthermore, it would also be reasonable to conclude that it is Vanguard's burden show that there is a clear relationship, which they have not done. Additionally, Vanguard has not help the host state in attracting foreign investors. If anything Vanguard's actions have reduced foreign investment and hindered future investments by bringing claims to the ICSID. As a result, this Tribunal should follow the ruling

[8] *Report* at ¶ 27.
[9] *McLachlan* at 164 (explaining that the absence of any clarification in the ICID Convention means that, within a wide area of discretion, the parameters of what constitutes an investment fall to be supplied by the parties' consent and ultimately by tribunals).
[10] *See Reinisch II* at 3.
[11] *See id.*
[12] *Id.* at 3 (citing *Mitchell*).
[13] *Id.*
[14] *Id.* at 3.
[15] *Id.*

in the *Mitchell* case and hold that the Centre does not have SMJ because under the "contribution"[16] test the facts do not show there was an "investment" in the sense of Article 25.

C. THE CENTRE DOES NOT HAVE PERSONAL JURISDICTION.

26.- For Personal Jurisdiction the parties to the dispute must be a contracting state and a national of another contracting state.[17] Here, both Calpurnia and Vanguard's country, Gaul, are contracting states of the Convention.[18] Thus, Vanguard is a national of another contracting state.

27.- However, Calpurnia is not part of this dispute because the SFCDC, when acting *vis-à-vis* Vanguard, acted as shareholder of VanCal.[19] SFCDC did not exercise any action under color of authority or as a mean to implement government policy. As a result, the Centre does not have personal jurisdiction over this dispute.

a. The SFCDC is not an Agent of the Calpurnian Government.

28.- The SFCDC is an independent agency which cannot be considered the Calpurnian government because it did not perform public functions and was not properly designated. Article 25 of the Convention was designed to encompass a broad range of agencies, subdivisions, entities, etc. of a contracting state allowing maximum flexibility to account for national peculiarities.[20] However the overarching quality, "what matters [to give the Centre jurisdiction] is that [the agency] performs public functions on behalf of the Contracting State … ."[21] This quality must be evaluated in light of the facts of the case. Here such important element is missing. In addition the contracting state must designate the entity or subdivision before the ICSID.[22] That designation is also missing. In this case SFCDC did not perform any public functions on behalf of Calpurnia. Its acts where those of a shareholder or board member.

[16] *See Id.*
[17] *See* Art. 25 of the ICSID Convention.
[18] Record at 3.
[19] *Id.* at 5.
[20] *See Schreuer I* at 151, ¶ 148.
[21] *Id.*
[22] Art. 25(1) of the ICSID Convention.

29.- Doctrine and jurisprudence have developed tests (the "functional" and the "structural" tests) to determine whether an agency can be considered the state for purposes of jurisdiction.[23] In *Maffezini,* a Tribunal applied both tests in evaluating the nature of an agency, "Sociedad para el Desarrollo Industrial de Galicia - SODIGA."[24] The "functional" test analyzed the intent of the government in creating SODIGA and concluded that it was likely to be a state entity because the intent was to create an entity to carry out governmental functions.[25] In turn, the "structural" test evaluated SODIGA's ownership and control, concluding that a "finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity."[26] However, *Maffezini* only creates a rebuttable presumption that SFCDC is a state entity. The Tribunal concluded that even if all of the test's factors point in the direction of state action, the result will always be a presumption moving "closer to being conclusive;"[27] a final determination must be made when analyzing the merits of the case.[28]

30.- Nevertheless, our case can be distinguished from *Maffezini.* The SFCDC is outside the "formal" structure of the state but it is not a private commercial corporation like SODIGA.[29] There is no intent on the part of Calpurnia to allow SFCDC the exercise of governmental functions beside the administration of the development fund.[30] Any action taken by SFCDC *vis-à-vis* VanCal was taken in its shareholder condition, divorced from any government involvement.[31] As a result, it is Vanguard's burden to demonstrate that SFCDC is a state entity, and this burden has not been met.

31.- The SFCDC did not act as a state entity but as VanCal's majority shareholder, in its own best interest and in the best interest of those who deposited their shares with SFCDC. In addition, as a board member, SFCDC acted only to promote VanCal's best interest. As a result, SFCDC's acts should not be considered state action, and the presumption considered rebutted.

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[23] *See Myrsalieva*, at 452 (citing *Shcreuer*, at 151, ¶ 148).
[24] *Maffezini* at 412, ¶ 71.
[25] *Id.* at 415-16, ¶¶ 82-86.
[26] *Id.* at 413, ¶ 77.
[27] *Id.* at 415, ¶ 81.
[28] *See Schreuer I* at 545, ¶ 68 (explaining that some jurisdictional questions are so intimately linked to the merits that it is impossible to dispose of them preliminarily).
[29] *Id.* at 415, ¶ 83.
[30] Record at 2.
[31] *Id.* at 5-8 (showing that all decisions were made during VanCal's board or shareholders meetings).

32.- Giving the conclusion that for the purposes of SFCDC's actions in VanCal, SFCDC neither performed public functions nor was designated in ICSID as authorized agency. SFCDC's actions cannot be imputed to Calpurnia. Thus, this Tribunal does not have jurisdiction.

D. THE BIT'S *RATIONE TEMPORIS* REQUIREMENTS HAVE NOT BEEN MET.

33.- According to the Calpurnia-Gaul BIT, both parties are required to fulfill at least two temporal conditions before the dispute could be presented to the Centre.[32] First, Vanguard must try to amicably settle any dispute.[33] Second, if the dispute cannot be settled within eighteen (18) months then Vanguard would be allowed to pick a forum for its resolution.[34] Vanguard has not fulfilled any of these conditions and as a result the Centre does not have jurisdiction at this time.

a. Vanguard has not Pursued Amicable Settlement.

34.- The Calpurnia-Gaul BIT contains a "cooling off" period requiring the parties to amicably settle any dispute, prior to opting for the dispute resolution methods provided by the BIT.[35] Here there are no facts to indicate Vanguard formally requested negotiations to resolve this dispute.

35.- Vanguard may contend that its May 21, 2005 e-mail to Mr. Korchnoi requesting Vanguard's dividend be placed in a bank account was a "trigger letter."[36] Such argument must fail because the e-mail did not contain a formal request for negotiations.[37] It was simply a demand for payment. Thus, it is valid to assume that if Vanguard would have made a formal request this information would have been brought to light.

36.- In conclusion, Vanguard has failed to request negotiations when a disagreement arose. The Calpurnia-Gaul BIT's requirement to amicably settle has not been met and thus the *ratione temporis* requirements restrict the Centre's jurisdiction.

[32] Art. 11 of the Calpurnia-Gaul BIT.
[33] *See* Art. 11(1) of the Calpurnia-Gaul BIT.
[34] *See* Art. 11(2) of the Calpurnia-Gaul BIT.
[35] *Id.*
[36] *Reed* at 56
[37] Record at 6 (June 5th, 2005 Claimant's e-mail to VanCal (Korchnoi, Swift)).

(i) The "Cooling Off" Period is a Complete Bar for Jurisdiction.

37.- The above mentioned "cooling off" period acts as a bar to jurisdiction. The Calpurnia-Gaul BIT provides "if the dispute cannot be settled amicably 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration."[38] Vanguard has not respected such timing requirement causing the Cantre's jurisdiction to fail. Precedent supports such conclusion.

38.- In the *Enron* case the Tribunal held that the "cooling off" period was jurisdictional in nature.[39] It stated that "[s]uch requirement is … very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction."[40] The Tribunal did not elaborate further on the issue because it considered it moot.[41]

39.- In *Lauder*, the Tribunal concluded the opposite[42] and stated that the "purpose of [the "cooling off" period] is to allow the parties to engage in good-faith negotiations before initiating the arbitration."[43] The *Lauder* Tribunal evaluated the "cooling off" period based on whether negotiations had started and whether the host state had a favorable, willing attitude towards amicable resolution of the investor's claims.[44]

40.- However, our case is distinguishable from *Lauder*. In *Lauder* the investor provided notice of its intent to negotiate.[45] Here, there are no facts to indicate that Vanguard requested negotiations. The facts do show however that Vanguard's actions imply they are not willing to negotiate. On November 2004, Ms. Pescara surprisingly resigned from VanCal's board of directors and her position as Managing Director.[46] The appointed proxies were only authorized

[38] Art. 11(2) of the Calpurnia-Gaul BIT.
[39] *See Enron* at 290-91, ¶¶ 82-88.
[40] *Id.* at 291, ¶ 88.
[41] *Id.* at ¶ 87.
[42] *Lauder* at 89 ¶ 188.
[43] *Id.* ¶ 187.
[44] *See Id.* at 89.
[45] *Id*. at 83, ¶ 140.
[46] Record at 5 (November 15th, 2004 VanCal board meeting minutes).

for specific shareholder meetings.[47] Vanguard removed all its personnel from Calpurnia and refused to replace them.[48] These reveals Vanguard's lack of intent to negotiate with Calpurnia to solve the dispute and also the futility of any Calpurnian attempt to initiate negotiations.

b. The MFN Clause does not Cover Dispute Resolution Mechanisms.

41.- The Calpurnia-Gaul BIT's most favored nation (MFN) clause does not cover dispute resolutions mechanisms such as the ones found in the Calpurnia-Flatland BIT. The Calpurnia-Gaul BIT's MFN clause does not enable the application of the Calpurnia-Flatland BIT. The Calpurnia-Gaul BIT's MFN clause states that investments are entitle to:

> "[T]reatment which is not less favorable than the host Contracting Party accords to the investments … by investors of any third State, whichever is the most favorable to the investor."[49]

42.- The Calpurnia-Flatland BIT, Article 7, requires only a two (2) month "cooling off" period. However, the Calpurnia-Gaul BIT's MFN clause is not applicable to Article 7 of the Calpurnia-Flatland BIT because that could not have been the intent of the Contracting States. Such intent can be ascertained in many ways. The meaning of the words used in the agreement, analyzed in the context in which they were used is compelling.[50] The Calpurnia-Gaul BIT was entered into in August 1995.[51] The Calpurnia-Flatland BIT was entered into in February 1992.[52]

43.- Calpurnia and Gaul carefully drafted the contents of their 1995 investment agreement and included an eighteen (18) month "cooling off" period.[53] When this happened the two (2) month "cooling off" period from the 1992 Calpurnia-Flatland BIT was already in place and in force.[54] Vanguard would like this Tribunal to apply the shorter "cooling off" period from the 1992 Calpurnia-Flatland BIT. However, such argument does not represent the intent of Calpurnia and Gaul. Both parties agreed that the eighteen (18) month "cooling off" period would apply. If they wanted the shorter "cooling off" period they could have based the wording of the 1995

[47] *Id.* at 6 (Mr. Rindler's proxy was authorized for the October 11th, 2005 shareholders meeting).
[48] *Id.* at 7 (October 23, 2006 e-mail from Vanguard to VanCal).
[49] Art. 4(1) of the Calpurnia-Gaul BIT.
[50] *See* Art. 31 of the *Vienna Convention*.
[51] Calpurnia-Gaul BIT, signature block.
[52] Calpurnia-Flatland BIT, signature block.
[53] *See* Art. 11(2) of the Calpurnia-Gaul BIT.
[54] *See* Art. 7 of the Calpurnia-Flatland BIT.

Calpurnia-Gaul BIT in the corresponding clause from the 1992 Calpurnia-Flatland BIT. As a result, the Calpurnia-Gaul BIT's MFN Clause cannot extend the application of the two (2) month "cooling off" period from the Calpurnia-Flatland BIT.

44.- Furthermore, it is not clear that the two (2) month cooling off period would even benefit Vanguard. As discussed, there are no facts that indicate Vanguard has formally requested negotiations to resolve this dispute. The two (2) month cooling off period would only be triggered when there has been an amicable attempt to reach a settlement.[55]

(i) Alternatively, Flatland was not a Contracting State at the Relevant Time.

45.- The Centre's jurisdiction cannot be based on the Calpurnia-Gaul BIT's MFN clause because Flatland was not a signatory of the Convention. Flatland denounced the Convention on May 3, 1992[56] and deposited its notice with ICSID on August 23, 1997.[57] The Convention entered into force for Flatland on September 23, 1997[58] and ICSID received Flatland's denunciation of the Convention on May 2, 2003.[59] Having denunciated the Convention, Flatland effectively removed its consent to arbitrate under the BIT.[60]

46.- Vanguard claims that the expropriatory actions of SFCDC ripen into a valid claim on May 27, 2005.[61] This is two years after Flatland denounce the treaty. The ripening of the expropriation claim marks the point of application of the MFN clause.[62] Such application would bring to the Calpurnia-Gaul BIT a provision of the Calpurnia-Flatland BIT that does not contain ICSID arbitration. Thus, the MFN clause from the Calpurnia-Gaul BIT cannot incorporate the shorter "cooling off" period from the Calpurnia-Flatland BIT.

II. VANGUARD CANNOT RECOURSE TO THE ARBITRAL OPTION.

[55] *See id.*
[56] *See* Record at 4, n.1.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *See* Art. 72 of the ICSID Convention.
[61] Record at 3.
[62] *See Maffezini* at 418, ¶ 98.

47.- Vanguard is not free to pursue the ICSID arbitral option. The Calpurnia-Gaul BIT provides limitations on the investor's option to choose a dispute resolution mechanism.[63] This "Fork-in-the-Road" or "*Electa una Via*" clause is designed to "preclude [parties] resort to any other option"[64] of conflict resolution once one has been chosen. The facts show that Vanguard's agent had already filed claims with Calpurnian courts. Once this "road" has been chosen Vanguard must travel it to its longest extents.

A. VANGUARD MAY NO LONGER ELECT AN ARBITRAL REMEDY.

48.- The Calpurnia-Gaul BIT states that, "[a]n investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse [from] the arbitral tribunals… ."[65] The Tribunal would otherwise have jurisdiction pursuant to the BIT, however a party may lose the ability to avail itself to such jurisdiction by choosing another forum.[66] The important questions that the Tribunal has to consider is "the legally-binding extent of what was adjudicated by the prior tribunal; and the requisite extent of identity between the parties and the cause in the prior action, and that of the second action brought before the tribunal."[67]

49.- On June 14, 2006 the Commercial Court of San Inocente de Irkoutsk summarily dismissed Ms. Pescara's application for an order instructing VanCal to transfer, to an account in Gaul, dividends on Ms. Pescara's 1% shareholding. Ms. Pescara pursued her claim in Calpurnia's court. She represented Vanguard in her condition as Vanguard's trustee.[68] As such she holds the legal title to the shares while Vanguard has an equity title. By requesting such order from the Calpurnian commercial courts Ms. Pescara's availed herself and Vanguard to Calpurnian law and courts in prejudice of her arbitral option.[69]

50.- Despite the fact that the Commercial Court summarily dismissed Ms. Pescara's application because "as mere nominee, [she] has no beneficial interest in the shareholding and

[63] Art. 11(3) of the Calpurnia-Gaul BIT.
[64] *McLachlan* at 128.
[65] Art. 11(3) of the Calpurnia-Gaul BIT.
[66] *McLachlan* at 91.
[67] *Id.*
[68] Record at 2.
[69] *See McLachlan* at 128-130.

therefore lacks standing to bring this action," her choice and Vanguard's was made.[70] Ms. Pescara requested the transfer of her dividend.[71] This is the same claim that Vanguard is making. Therefore, Vanguard can no longer elect an arbitrary remedy. Once a "road" has been chosen Vanguard must travel it.

51.- In addition, the Tribunal must consider the public policy considerations attached to a different holding. If the Tribunal finds here that Ms. Pescara did not represented Vanguard in the Calpurnian courts, this would open the door to "test" litigation. It would incentive the use of trustees with minimum shareholdings who would "test" the local courts to see how they rule before going to ICSID. This would be and abuse or rights[72] and *contra bonos mores*.

B. ALL OF VANGUARD'S CLAIMS RELATED TO VANCAL ARE CONTRACTUAL.

52.- All of Vanguard's claims are contractual. The "Fundamental Basis of the Claim" test developed in the decision on Annulment in the *Vivendi* case is applicable. The *Vivendi* Tribunal considered that in "a breach of contract [case], [it] will give effect to any valid choice of forum clause."[73] However in a treaty case, "the existence of an exclusive jurisdiction clause cannot operate as a bar to the application of the treaty standard."[74]

53.- A treaty breach, as opposed to a breach of contract, requires the exercise of sovereign authority by the state.[75] There has been no state action in this case. SFCDC acted as shareholder or board member in VanCal. The evidence demonstrates that Calpurnia has not violated its obligations under the Calpurnia-Gaul BIT. Furthermore, Vanguard's claims are based on contractual law, governing the relations between a shareholder and its company. Vanguard is making here the same claims that Ms. Pescara did in court and the result should be the same. This claim should be summarily dismissed.

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[70] Record at 7 (citing the June 14, 2006 decision of the Calpurnian Commercial Court).
[71] *Id.* at 6 (May 21, 2005 letter to Mr. Korchnoi).
[72] *See Gutteridge* at 32-39.
[73] *Reed* at 60 (citing *Vivendi*); *See also SGS*, at 555-56, ¶¶ 133-34; *See also Oil Platforms*, at 850, ¶ 14 (Separate Opinion of Judge Higgins)(explaining that the ICJ found that it had jurisdiction because the claim was "based on" a treaty).
[74] *Id.*.
[75] *Impreglio* at 297, ¶ 260; *See generally Cremades* (discussing the difference between treaty based and contract based claims).

III. CONCLUSIONS ON JURISDICTION.

54.- The Centre does not have jurisdiction over this dispute because Article 25 of the Convention is not satisfied. First, the BIT's condition precedent for Calpurnia's consent to arbitrate has not been met. The BIT requires that both parties try to settle any dispute amicably but the facts reveal Vanguard has not tried to do so.

55.- Also, the Centre does not have SJM because there was no "investment." Under the "contribution" test Vanguard does not hold an "investment." The Centre does not have personal jurisdiction because SFCDC cannot be considered an agent of Calpurnia. SFCDC did not implement government policy, it only acted as VanCal's shareholder or board member. As a result, Article 25 of the Convention is not fulfilled.

56.- Furthermore, the BIT's *ratione temporis* requirements have not been met. The BIT requires the parties to try to settle any dispute amicably. This condition has not been met by Vanguard. Additionally, the "Fork-in-the-Road" provision is applicable. Vanguard's agent elected to go before domestic courts and is now barred to take the dispute to the Centre.

57.- Finally, there are no treaty claims. The evidence presented here shows that Calpurnia has not violated its obligations under the BIT. For the foregoing reasons the jurisdiction of the Centre and this Tribunal must fail.

PART II: ARGUMENTS ON THE MERITS

I. CALPURNIA NEITHER DISCRIMINATED AGAINST NOR FAILED TO TREAT VANGUARD IN ACCORDANCE WITH INTERNATIONAL LAW.

58.- Calpurnia submits that no discrimination existed against Vanguard. The evidence demonstrates that Calpurnia strictly complied with international law, particularly the International Minimum Standard for the Treatment of Aliens (MSTA) and others.

A. CALPURNIA DID NOT DISCRIMINATE AGAINST VANGUARD.

a. Shareholders' and Board of Directors' Actions cannot be Imputed to Calpurnia.

59.- SFCDC's actions taken as and in representation of VanCal's shareholders or as member of VanCal's board cannot be imputed to Calpurnia. The SFCDC is a state agency owned exclusively by Calpurnia,[76] but which in this case acted exclusively as the majority shareholder in VanCal. SFCDC's actions had no component of government authority and had no intention of furthering any government policy.[77]

(i) SFCDC as a Shareholder is Entitled to Seek its Benefit.

60.- SFCDC, as shareholder of VanCal, is entitled to seek its benefit. Its actions in the shareholder's meeting were aimed at such result and no other.[78] A share is, as Dr. Swift noted "a right [to VanCal's profits] in proportion to their capital investment, therefore, whether there is a distribution in cash, or a stock dividend, or a reservation of a portion as undivided profit, it will not … change the rights of the shareholders to the profits earned."[79] This reflects the concept that a share "is primarily a profit-sharing contract a unit of interest in the corporation based on contribution to the corporate capital."[80] The SFCDC as owner of 30% of VanCal's shares[81] and depositary and voting agent of an additional 22% of VanCal's shares is entitled to exercise its rights in this profit-sharing contract in its exclusive best interest.

(ii) SFCDC as a Board Member is Obligated to Seek the Corporation's Benefit.

61.- The basic corporate idea rests on the premise that "the corporation is to conduct business with a view to enhancing profit and shareholder gain."[82] For such purpose the shareholders elect

[76] Record at 2.
[77] *Id.* at 4.
[78] *Id.*
[79] *Id.* at 6 (March 10, 2005 VanCal board meeting).
[80] *Cox* at 328.
[81] Record at 2, 4.
[82] *Bainbridge*, at 417 (citing the [U.S.] National Association of Corporate Directors, Report of the NACD Blue Ribbon Commission on Director Compensation: Purposes, Principles, and Best Practices (1995)).

a board of directors.[83] The board is the "supreme authority in matters of … regular management" and particularly in "determining the dividend payments, financing and capital changes."[84]

62.- Here there is no question; SFCDC was successful in its efforts to maximize VanCal's wealth. The company obtained profits for four (4) consecutive years, distributing dividends for the benefit of each and all of its shareholders, including Vanguard.[85] The decision to pay dividends was independently made by the board. There was no law, directive, executive order or other official statement in Calpurnia issued by the government that would require this outcome.[86]

63.- Although one may criticize some of VanCal board member's expressions, like "to preserve the rights of Calpurnian shareholders" or "the payment of profits to the foreign shareholders has been suspended," these represent the exclusive beliefs of those directors who made them and do not necessarily reflect the views of Calpurnia. One may also question and challenge a decision like the one taken by VanCal's board to suspend payments of dividends to foreigners (Suspension Decision).[87] However, there were no irregularities in the conduct of board and there is no government action of any kind to justify an imputation of responsibility to Calpurnia. Responsibility for such decisions and expressions should fall only on VanCal and by no means in Calpurnia. These are claims between shareholders of a company which is and remains an independent private corporation. The current dispute arises solely from minority shareholders' dissatisfaction with the board's actions and the majority shareholders' exercise of their legitimate rights. Such grievances should have been brought before the Calpurnian courts.

(iii)SFCDC did not act Under Color of Authority.

64.- As demonstrated, SFCDC acted here only in its shareholder and board member capacities. These are exercises of private or contractually based rights, completely unrelated to any governmental authority. These facts resemble those of the *Maffezini* case where the

[83] Procedural Order No.1 at ¶ 30 (explaining that under Calpurnian law a director's responsibility is to the corporation, and all the shareholders collectively, and not to any individual shareholders or class of shareholders).
[84] *Cox* at 149.
[85] Record at 4
[86] Procedural Order No. 1 at ¶ 12.
[87] Record at 6 (March 10, 2005 VanCal board meeting).

Tribunal, in the context of analyzing jurisdictional issues, evaluated whether SODIGA was a state entity.[88] There the Tribunal cited the International Law Commission's Draft Articles on State Responsibility and considered that:

> "The conduct of … entity which is not part of the formal structure of the State … but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall be considered as an act of the State …, provided the organ was acting in such capacity in the case in question."[89]

65.- The Tribunal also discussed a presumption that arises when there is state ownership of the entity. The rebuttable presumption[90] mentioned before has been effectively rebutted here where the evidence demonstrated that SFCDC's actions where commercial and contractual in nature and not under the authority of the government.[91]

b. Calpurnia did not Obstruct the Transfer of Vanguard's Returns.

66.- Calpurnia never obstructed the transfer of returns from Vanguard's investment in VanCal. Such allegation is completely unfounded. Calpurnia has strictly complied with its obligations under the Calpurnia-Gaul BIT which provides that:

> "[e]ach Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of payments in connection with an investment [including, but not exclusively] returns, payments in respect to management fees and payments in connection with contracts."[92]

67.- This obligation is complemented by a duty to ensure that such transfers are "made without any restriction or delay, in a freely convertible currency and at the prevailing market rate of exchange[93]. Vanguard has failed to put-forth any evidence suggesting that Calpurnia violated any of the foregoing obligations under the BIT. The evidence demonstrates that there was no law, regulation, decree or any other state action prohibiting or limiting the transfer of returns

[88] *See Maffezini.*
[89] *Id.* at 414, ¶ 78.
[90] *Id.* at 413, ¶ 77.
[91] *See id.* at 416, ¶ 89 (explaining that "[w]hether SODIGA is responsible for the specific acts and omissions complained of, whether they are wrongful, whether all these acts or omissions always were governmental rather than commercial in character, and, hence, whether they can be attributed to the Spanish State, are questions to be decided during the proceedings on the merits of the case.").
[92] Art. 8(1) of the Calpurnia-Gaul BIT.
[93] Art. 8(2) of the Calpurnia-Gaul BIT.

from Calpurnia to Gaul.[94] Moreover the Calpurnian Libra was, at all relevant times for this dispute, fully convertible to Gaulois Dollars.[95] All Vanguard's evidence suggests is individual action by the Calpurnian directors in VanCal's board.

(i) VanCal's Calpurnian Directors Acted Individually.

68.- Calpurnia concedes the CCC's agenda advocates for a return to traditional values.[96] Nevertheless, it is worth noting that CCC only controls the Parliament, not the Executive,[97] and the evidence demonstrates there has been no legislative action supporting Vanguard's allegations.[98] In addition, the evidence demonstrates that CCC was elected by an overwhelming majority of the population who share its views and ideas.[99] This fact explains certain attitudes of many VanCal's board members, even of those not related to the government, as Mr. Korchnoi.

69.- This however does not imply governmental support for those attitudes, expressions and actions. These VanCal directors, individually and without any authority from the Calpurnian government, furthered their own ideas and what they thought to be their country's interests. The Calpurnian government rejects the actions individually taken by those directors. By now the responsible directors have resign from their positions in VanCal and SFCDC.[100]

(a) Although These Directors Represented the SFCDC they did not have Authority to Decide as they did.

70.- SFCDC acted as VanCal's shareholder and not as a government entity. Moreover, representatives to SFCDC board of directors are appointed by the Calpurnian Executive branch, independently from the CCC and Calpurnian Parliament. Therefore, the actions of SFCDC's appointed directors in VanCal reflected their individual views on how to achieve the best interest of the company.[101] Calpurnia did not authorize them to act or decide as they did in this case.

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[94] Procedural Order No. 1 at ¶ 1.
[95] *Id.*
[96] Record at 2.
[97] *Id.*
[98] Procedural Order No. 1 at ¶ 12.
[99] *Id.*
[100] Record at 7 (Nov. 16th, 2005 shareholders meeting, Mr. Poe and Mr. Korchnoi resigned). *See also* Procedural Order No. 2 ¶ 52(a)(explaining that there were rumors that Mr. Poe and Mr. Korchnoi resigned allegedly for mishandling the Vanguard issue).
[101] Procedural Order No. 1 ¶ 30.

- ***Actual and Apparent Authority***

71.- Actual authority exists when there is a manifestation of intent by the principal that the agent is authorized, such that the agent actually believes, reasonably, that he is authorized to act.[102] Here there is no such authority. SFCDC, did not instruct its agents, Mr. Poe and Mr. Swift, in any form or fashion, to vote for the Suspension Decision.[103] No one in the Calpurnian government, not even the SFCDC board of directors,[104] manifested any intent to SFCDC's appointed directors to make the Suspension Decision. Thus there was no actual authority.

72.- Apparent Authority is found when the third party actually believes, reasonably, that agent is authorized.[105] SFCDC's agents were Chair and member of the SFCDC's board of directors. They presided and attended the two (2) VanCal board meetings that discussed the distribution of dividends and creation of the reserve fund for severance payments.[106] However, none of them had any apparent authority to speak for SFCDC on issues aside from the severance pay fund. VanCal's board had no reason to believe that Mr. Poe and Mr. Swift had authority to propose and vote on issues not included in the agenda as the Suspension Decision.[107] Thus, there was no apparent authority of Mr. Poe or Mr. Swift to decide on such controversial issue.

- ***Vanguard Consented to the Suspension Decision.***

73.- In addition, Vanguard's representatives were absent from the February 17th meeting.[108] Then, in the minutes of the March 10th meeting, when they were present, there is no record of Mr. Rindler's objection to the Suspension Decision.[109] Thus having remained silent and not

[102] *See Gregory* at 36-38.
[103] Such instructions are not expressly or impliedly included in the Record.
[104] Procedural Order No. 2 at ¶ 17 (describing that SFCDC's board is fully appointed by the Calpurnian Executive Branch).
[105] *See Gregory* at 64.
[106] Record at 5-6.
[107] *Id.* at 5 (informing that the purpose of the February 17th meeting was to "discuss the year's accounts and decide on the *distribution* of company's profits" (emphasis added) and not any kind of suspension of distributions to foreign shareholders).
[108] Record at 5 (informing that Mr. Rindler, who was serving as proxy for both Vanguard's directors, was absent from the February 17th, 2005 VanCal board meeting).
[109] *Id.* at 6.

raised a voice of opposition in the face of the Suspension Decision, Calpurnia can validly infer that Vanguard consented to it.[110]

(ii) VanCal accounted for all Dividends and Royalties Accruing to Vanguard.

74.- Despite the above mentioned attitudes of Calpurnian board members, the Suspension Decision and the apparent consent from Vanguard, VanCal's administration accounted for all monies owed to Vanguard derived either from dividends or from royalties and stands ready to pay.[111] Mr. Korchnoi's communications with Vanguard stating something different were unauthorized.[112] Moreover, Mr. Korchnoi is not an SFCDC representative; he is independent. This shows that Vanguard is, and has been all this years, free to collect its dividend payments and royalties. Calpurnia never restricted such right.

(iii)VanCal was under no Obligation to pay Dividends in Currency Different than Calpurnian Libras.

75.- Calpurnia submits to the Tribunal however that the above mentioned payments will be made in Calpurnian Libras, a freely convertible currency.[113] There is no legal or contractual requirement to pay Vanguard in Gaul Dollars.[114]

B. CALPURNIA ACTED WITHIN INTERNATIONAL LAW STANDARDS.

a. Calpurnia Complied with the International Law Minimum Standard for the Treatment of Aliens.

76.- The MSTA is an ambiguous concept that incorporates different levels of protection drawn from different sources of International Law. The Organisation for Economic Co-operation and Development (OECD) defines the MSTA as a norm of customary international law that governs the treatment of aliens and provides "for a minimum set of principles which

[110] *See Bronwlie* at 507-508 (explaining that abandonment of claims may occur by unilateral acts of acquiescence implied from conduct).
[111] Record at 4.
[112] *Id.*
[113] Procedural Order 1 at ¶ 1; See also Art. 8(2) of the Calpurnia-Gaul BIT.
[114] Procedural Order 1 at ¶ 1.

States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property."[115]

77.- This "minimum set of principles" has been considered to incorporate the FET standard as well as the Full Protection and Security (FPS) standard.[116] The *SD Myers* Tribunal considered the MSTA as "a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner"[117] In doing so, the *SD Myers* Tribunal concluded that the terms:

> "*fair and equitable treatment* … and … *full protection and security* cannot be read in isolation. They must be read in conjunction with … the introductory phrase … *treatment according to international law*."[118] (Emphasis in original).

78.- Current practice has made it a norm to include this standard in the BITs as a general rule of treatment of investors incorporating FET, FPS and National Treatment (NT).[119] The Calpurnia-Gaul BIT is no different; it incorporates those standards for the treatment of foreign investors under the BIT.[120] Calpurnia submits to this Tribunal that it has acted strictly within or even above those standards.

(i) Calpurnia did not Violate the Fair and Equitable Treatment Standard.

79.- Calpurnia has not violated the FET *vis-à-vis* Vanguard. The Calpurnia-Gaul BIT generally provides that each Contracting Party shall accord investors of the other Contracting Party, at all times, fair and equitable treatment.[121] The BIT does not define fair and equitable or what it encompasses. This lack of definition is a common problem. The contours and contents of the FET has been scarcely litigated[122] forcing Tribunals to interpret the BIT's language with a view to uniformity and predictability. However, the litigation that has taken place attempted to

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[115] *OECD Working Paper* at 8, n.32.
[116] *Id.*
[117] *SD Myers* at 55, ¶ 259.
[118] *Id.* at 56, ¶ 262.
[119] *See Westberg* at 469.
[120] Art. 2(2) of the Calpurnia-Gaul BIT.
[121] *See id.*
[122] *See ADF Group* at 529, ¶183 (explaining that the issue relating to the structure and content of the customary international law minimum standard of treatment has not been adequately litigated and that neither concordant state practice nor judicial or arbitral case law provides convincing substantiation (or, for that matter, refutation) of the Investor's position [in that case]); *See also Westberg* at 469.

identify elements of the FET.[123] Those identified are divided in categories: a) vigilance and full protection and security, b) due process including non-denial of justice and lack of arbitrariness, c) good faith, which includes transparency and lack of arbitrariness, and d) fairness.[124] Scholars have also outlined factors that may show a breach of the standard.[125] These factors are included in the mentioned categories or elements of the FET.

80.- "Countervailing factors" have also been outlined which may indicate compliance with the standard.[126] These are: (i) objective basis for a decision; (ii) no disproportionate impact on the investor; (iii) the investor's claim is not supported by any national or international recognized right; and (iv) the "*caveat investor*" standard.[127]

81.- On the question of when is the FET infringed, some arbitral tribunals have answered stating that it requires conduct attributable to the host state and harmful to the investor and that:

> "[the] conduct [be] arbitrarily, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety, …, or a complete lack of transparency and candour in an administrative process"[128]

82.- Other Tribunals have considered that a breach of FET occurs only when:

> "it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. … In light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders"[129]

83.- Thus, here the FET analysis will address due process, good faith, which includes the investor's expectations[130] and their impact in the context of arbitrary application of the laws. We will also evaluate the *caveat investor* standard. The FPS will be analyzed separately, including

[123] *See OECD Working Paper* at 26.
[124] *See id.*
[125] *See McLachlan* at 234.
[126] *See generally McLachlan* at 233-47 (analyzing the treatment of investors in the context of the international review of administrative actions).
[127] *Id.* at 243-47.
[128] *Waste Management* at 986, ¶ 98
[129] *SD Myers* at 56, ¶ 263.
[130] *See Kalicki* at 45-52.

vigilance and protection. Calpurnia submits that Vanguard has failed to put forth any evidence to prove that Calpurnia breached any of the elements of FET and thus Calpurnia acted within International Law.

(a) Calpurnia Respected General Principles of Due Process.

84.- Due process is a principle that has many interpretations. It is normally recognized as the "conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights."[131] In the context of foreign investment it has a narrow sense and an intermediate sense. The narrow sense considers due process as "limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgement". The intermediate sense, considers it "employed in connection with the improper administration of … justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions."[132]

85.- Here no such situation exists. The Calpurnian courts keep their doors open and Vanguard has acted before them.[133] Vanguard, through Ms. Pescara, took its claim to the Commercial Court.[134] Also, Vanguard acted before the Calpurnian Constitutional Court, in order to declare the police searches unlawful.[135] The dismissal of those actions was justified in its own facts and it is the independent decision of those courts under Calpurnian law.[136]

(b) Calpurnia acted in Good Faith.

86.- Calpurnia never exercised any power in bad faith. Vanguard claims a conspiracy by which the Calpurnian government, acting through SFCDC, CSD, the Judiciary, the police and the media, harassed and mistreated Gaulois citizens and Vanguard's representatives. Such conspiracy does not exist.

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[131] *Black's Law Dictionary* at 538.
[132] *OECD Working Paper* at 29 (citing F.V. García-Amador et al., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 180 (1974); *See also Brownlie* at 506.
[133] Record at 3, 7 (showing that Vanguard acted before the Constitutional Court and before the Commercial Court).
[134] Record at 7.
[135] *Id.* at 3.
[136] See *id.* at 3, 7 (dismissing both claims due to lack of standing).

- ***Calpurnia Acted within its Police Authority, Never for Improper Purposes or to Coerce or Harass Vanguard's Representatives.***

87.- The few instances in which Calpurnia, as opposed to VanCal, actually acted are all within a general principle of sovereignty and in the interest of national security.[137] The searches conducted in Ms. Pescara and Mr. Kolowenko's homes were always justified by credible tips and never to harass or coerce.[138] They were conducted lawfully, in support of national security requirements.[139] Although they were conducted based on credible tips[140] and supported by *periculum in mora*,[141] the lawfulness of the searches has been ratified by the Constitutional Court's dismissal of Vanguard's claims.[142]

- ***Calpurnia did not Breach any of Vanguard's Legitimate Expectations.***

88.- Vanguard can only claim expectations that induced it to invest. Such expectations in VanCal are, most likely, economical. Some authors and arbitral tribunals have also included the stability of the legal and business structure.[143] Calpurnia did not violate any of these expectations. To do so would require state action that is arbitrary, unfair, unjust, discriminatory and prejudicial.[144] Also, this state action has to violate due process and offend judicial propriety, taking into consideration the host state's sovereignty. Here there is no state action and, as demonstrated before, there was no violation of due process.

89.- First, Calpurnia did not interfere with the transfer of Vanguard returns. VanCal's board independently adopted the Suspension Decision. However, Vanguard's dividends, royalties and fees were fully accounted for.[145] Second, Vanguard's management rights were not affected by any action of Calpurnia or its representatives. These rights were subject to Vanguard's

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[137] *Id.* at 5 (demonstrating by the press releases that Calpurnia only acted when required by national security concerns).
[138] *See Demarest* at 331 (citing Hugo Grotious, explains that spies if caught are treated most severely). We complement by asking, how is a state going to capture spies if it does not search under *periculum in mora*? Information is transmitted and can disappear, documents destroyed.
[139] Record at 5.
[140] *Id.* at 3. *See also Mousa* at 430 (explaining, although in the context of granting asylum, that "searches, interrogation, and even threatening phone calls do not constitute 'persecution' for asylum purposes").
[141] Procedural Order 1 at ¶ 17.
[142] Record at 3.
[143] *Occidental* at 23, ¶ 183
[144] See *SD Myers; See also ADF Group.*
[145] Record at 4.

participation in VanCal, which was a minority.[146] Vanguard's personnel they were not expelled from management.[147] Ms. Pescara voluntarily resigned from her position.[148] She nevertheless remained in contact with VanCal.[149] During the time she was absent she appointed proxies who represented Vanguard in VanCal's board.[150] Mr. Kolowenko did not return to its working post and was discharged.[151] None of these actions are or could be imputed to Calpurnia. They are in no way an exercise of sovereignty or state power. Even if these actions could be imputed to Calpurnia, they are not so arbitrary, unfair, unjust, discriminatory and prejudicial to be an offense to due process.

90.- Regarding the stability of the legal system there has been no change in Calpurnia. [152] Although Calpurnia acknowledges that the impact of CCC's policies has been important and may have changed the business environment, what the standard requires is a change in legal framework. This is confirmed by case law, which shows that changes in the country's whole legal system,[153] or lack of transparency, without warning the investor,[154] could be considered violations of the FET.

- ***There was no Disproportionate Impact for Vanguard.***

91.- Within this analysis it is necessary to asses the impact of the alleged infringing measures.[155] Vanguard contends a disproportionate impact of the measures. The foreign investors were unable to collect the dividends from VanCal and were deprived of the ability to enjoy and administrate their investment.

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[146] *Id.* at 3, 6 (mentioning Calpurnia's Commercial Code cumulative voting provisions and discussing that participation in VanCal is subject to the shareholders capital investment – March 10th, 2005 VanCal board meeting).
[147] *Id.* at 4.
[148] *Id.* at 5 (minutes of the November 15, 2004 VanCal board meeting).
[149] *Id.* at 4.
[150] *Id.* at 5 (minutes of the November 15, 2004 VanCal board meeting).
[151] Procedural Order 2 at ¶ 7.
[152] Procedural Order 1 at ¶ 12.
[153] *See CMS Gas* at 1236, ¶ 281 et seq. (recognizing that Argentina's change of legal framework, particularly with regard to its currency, caused a breach of the FET).
[154] *See Metalclad* at 227-29, ¶¶ 74 et seq. (Explaining that when the authorities of the central government … become aware of any scope for [legal] misunderstanding or confusion … it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed … in accordance with all relevant laws).
[155] *See McLachlan* at 243-247.

92.- First, Calpurnia submits that it did not take any infringing measures. The Suspension Decision was a VanCal's board agreement adopted independently and not opposed by Vanguard. Second, if this is considered a measure taken by Calpurnia, the impact is not disproportionate because Vanguard's dividends were accounted for and are simply waiting to be collected. Third, the inability to administrate VanCal can only be imputed to Vanguard and its representatives who resigned or abandoned their post.

(c) The Caveat Investor Standard is Fully Applicable.

93.- The *caveat investor* standard suggests that it is the investor who must take measures to ensure that its investment will be safe.[156] This encompasses a duty of due diligence "as to the state of the law and the totality of the business environment at the time of investment"[157] and also a duty to "consider parameters such as business risk or industry regular patterns"[158] including the duty to factor in the political risk of investing in a developing country.[159] Vanguard relied only in the situation as it stood in 1997 when the investment was originally made.[160] Although nothing material in the legal framework has changed since then,[161] the political conditions in the country have changed.[162] Vanguard should have prepared for such changed circumstances by contracting necessary and advisable insurance.

(ii) Calpurnia did not Breach the Full Protection and Security Standard.

94.- Calpurnia did not violate the other major component of the FET, the FPS standard. The FPS normally refers to the "minimum level of police protection against criminal conduct" required as a matter of customary international law.[163] Its primary concern is the exercise of the state's police powers[164] and its omission to exercise due diligence to protect the investor's

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[156] *See Id.*
[157] *Kalicki* at 47 (citing *Saluka v. Czech Republic*, UNCITRAL Partial Award, March 17, 2006 at ¶ 301).
[158] *Id.* at 46 (citing *LG&E Energy v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, at ¶ 130).
[159] Organizations such as the Multilateral Investment Guarantee Agency (MIGA), part of the World Bank Group, or the Overseas Private Investment Corporation – OPIC, an independent U.S. government agency, offer insurance to cover possible damage or loss of tangible assets, value of investment, earnings or return of the investment. *See Dolzer* at 56; *See also Broches I* at 81.
[160] Record at 2.
[161] *Id.*
[162] *Id.*
[163] *ADF Group* at 504-05, ¶ 110
[164] *McLachlan*, at 247.

property from "actual damages caused by … State officials, or … others."[165] The FPS standard is concerned with *actual damages* to the investor's property.

95.- This standard is normally breached when "the host state failed to prevent the physical destruction of property"[166] by omitting to exercise reasonable care in the performance of common government functions.[167] Classic examples of this are *AMT*[168] or *Wena*[169] cases where property was affected or destroyed. The *Tecmed* Tribunal gave clear guidance concluding that if the authorities did not do any of the following, the standard was not breached:

> "encouraged, fostered, or contributed their support to the people or groups that conducted the [protests] against the [investment or investors] or [did] not [react] reasonably, in accordance with the parameters inherent in a democratic state,"[170]

96.- Here none of those actions or omissions took place. Calpurnia's alleged infringement would be not repressing the protestors, lead by the CCC Women's League (CCCWL), who gathered in front of Ms. Pescara's house. However it was under not duty to do so.

(a) Calpurnia was under no Duty to Act.

97.- The protests were conducted by "private citizens, exercising their freedom of speech" non-violently, on public property.[171] Thus, there was no "criminal conduct" to justify police intervention.[172] This is an exercise of freedom of speech, recognized by Calpurnian legislation, as well as by the International Covenant on Civil and Political Rights (*Covenant*),[173] although, the *Covenant* is not self-executing in Calpurnia.[174]

98.- Much like in our case, in *Tecmed* the Tribunal faced the upraising of a segment the population in protest against a hazardous waste landfill. The protestors block the landfill and pressure the government forcing the landfill to close. The Tribunal discounted the protest

[165] *Id.*
[166] *Redfern & Hunter* at 492.
[167] *See id.*
[168] *See generally AMT* (describing the "destruction caused by elements of the armed forces of Zaire … ").
[169] *See generally Wena* (describing officials from the Egyptian Hotels Company stormed the hotels and expel the investor).
[170] *Tecmed* at 181, ¶ 176.
[171] Record at 4.
[172] *ADF Group* at 504-05, ¶ 110.
[173] *See generally Covenant* (establishing the people's recognized civil and political rights).
[174] Procedural Order No. 1 at ¶ 37.

because they small.[175] The Tribunal implied that a "massive" protest would be needed to "constitute a real crisis or disaster… ."[176] Moreover, the actions of the protestors could not be directly linked to the government.[177] Same situation in *AMT*, where the protestors destroyed facilities but were never linked to the government.[178] Nevertheless, the Tribunal found responsibility there but not for the actual protests but for failing to prevent vandalism.[179]

99.- Here as in *Tecmed*, small groups of protestors got together by an independent organization[180] with no ties to the government, as the CCCWL, gather in public property near Ms. Pescara's house and peacefully but loudly protested.[181] The protest was by no means "massive,"[182] it was not violent and did not completely block access to Ms. Pescara's residence. The government cannot warrant that there would never be a "disturbance."[183] Based on those facts there was no basis for police intervention.[184]

(b) Calpurnia did not Encourage, Foster or Contributed to the Protests.

100.- Calpurnia in no way encouraged, fostered or contributed to the protests that took place in the vicinity of Ms. Pescara's home. "Encouraging" is defined as an action that instigates, that incites action.[185] Calpurnia did nothing to instigate public action against Vanguard's representatives. The CSD published some press releases in connection with the searches.[186] However, they should not be considered instigation because they were factually accurate. Calpurnia should bear no responsibility for any misinterpretation by members of the public.

b. As a Sovereign State Calpurnia has Complete Freedom to Grant or Deny Visas.

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[175] *Tecmed* at 181, ¶ 176 (discussing the gathering of only two hundred people the first time and of four hundred people the second time that the landfill was blocked).
[176] *Id.* at 188, ¶ 144.
[177] *Id.*
[178] *AMT* at 31, ¶¶ 6.13-.14; *Cf. Wena* (discussing the linkage of the destructive acts to the government).
[179] *Id.*
[180] Procedural Order No. 1 at ¶ 18 (explaining that the CCCWL is not a government body and there is no evidence that it receives direct funding from the Government).
[181] Record at 3.
[182] *Tecmed* at 188, ¶ 144.
[183] *ELSI* at 65 ¶ 108 (discussing why should there be no warranty).
[184] Record at 5.
[185] *See Black's Law Dictionary* at 568.
[186] Record at 5.

101.- With regard to the denial of Ms. Pescara's business visa, the immigration authorities enjoy wide discretion[187] and there should be no international review of such decision.[188]

102.- Ms. Pescara's continuous presence in Calpurnia was not necessary because she was no longer managing director of VanCal.[189] She could adequately perform her reduced VanCal board functions and pursue Vanguard's interests through occasional visits under the Calpurnian visa waiver program or via teleconference.[190] Based on this arguments and facts, Calpurnia submits to this Tribunal that it acted within the framework of international law and did not violate the FET or FPS standards.

II. CALPURNIA DID NOT EXPROPRIATE VANGUARD'S INVESTMENT.

103.- There has been no expropriation here. As the evidence will demonstrate Vanguard still owns its investment and it would still be able to manage it, but for its abandonment.

A. CALPURNIA DID NOT TAKE ANY MEASURE TO FURTHER ANY EXPROPRIATION.

104.- The right to expropriate is a recognized right of a sovereign state provided certain conditions are satisfied.[191] The Calpurnia-Gaul BIT provides that:

> "[i]nvestments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures having [that] effect."[192]

105.- The BIT does not make any effort to define what expropriation is or how could it happen, but it prohibits it for purposes different than public interest or when conducted in a discriminatory manner, against due process and without prompt, adequate, and effective compensation.[193]

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[187] *Id.*; See *Brownlie* at 522 (supporting the position that a state may choose not to admit aliens or may impose conditions on their admission).
[188] *See Kolev*; *See also Disney* (explaining that the consular official's decision to issue or withhold a visa is not subject to full administrative or judicial review, although the court in Disney recognized that now courts do have jurisdiction).
[189] Record at 5 (showing that Ms. Pescara resigned to her Managing Director position in VanCal on November 15, 2004).
[190] Procedural Order No. 1 at ¶ 6 (informing that there is no limitation to conduct business in such ways).
[191] Conditions such as public interest, non discrimination, respect of due process and compensation. *See R3FR* § 712; *See* Art. 1 of the *ECHR First Protocol*; *See also Litvinoff*, at 226; *See also Broches II*, at 208-209; *See also Appleton*, at 42.
[192] Art. 6(1) of the Calpurnia-Gaul BIT.
[193] Art. 6 of the Calpurnia-Gaul BIT.

a. The Calpurnia-Gaul BIT Requires State Action for a Finding of Expropriation.

106.- The Calpurnia-Gaul BIT requires the Contracting Party to take *measures* to expropriate.[194] Here Calpurnia has not taken any measures nor has authorized SFCDC to take any measures to expropriate. A measure is defined as "an action taken as a means to an end" or also "a legislative bill or enactment."[195] Additionally, measure is defined as a "prima facie … lawful exercise of power of government"[196] All these definitions imply that the state has to somehow act with the intent to deprive the investor of its property.

107.- Calpurnia has not taken any expropriatory measure or measures having that effect. Calpurnia has not participated in any way in the crux of this dispute except for the actions of the SFCDC, which were taken exclusively as a shareholder of VanCal, a private company. There is nothing in the record that would suggest that Calpurnia wanted or intended in any way to take measures to expropriate Vanguard's investment or other measures that will have that effect. Isolated expressions of some SFCDC's representatives, as Mr. Swift who said that he did not regard VanCal as really being a private company, are his own personal view and should not be imputed to Calpurnia.[197]

b. SFCDC's Exercise of Shareholding or Board Member Rights is not State Action.

108.- The measures that supposedly prevented Vanguard's exercise of its investment rights are the Suspension Decision, coupled with Mr. Korchnoi's e-mail stating that there was nothing he could do about the payment of dividends.[198] In addition, the rejection of Mr. Rindler's proxy for the October 11, 2005 shareholder's meeting allegedly aided in such goal.[199]

[194] *See* Art. 6(1) of the Calpurnia-Gaul BIT.
[195] WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY at 736.
[196] *Brownlie* at 535.
[197] Record at 5 (minutes of the November 15, 2004 VanCal board meeting).
[198] *Id.* at 3 (claimant's request for arbitration).
[199] *Id.*

109.- As discussed, all these acts are nothing more than valid majority shareholder actions. Shareholder's grievances against those actions are against the company and its administration, thus a private matter for the Calpurnian courts to decide.

B. THERE HAS BEEN NO INTERFERENCE WITH VANGUARD'S SHAREHOLDER RIGHTS.

110.- The other way in which expropriation could have taken place is by indirect acts of the host. Definition of indirect, *de facto* or creeping expropriation[200] has been framed as follows:

> "[I]nterference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonable–to–be–expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[201]

111.- The "'test is whether that interference is sufficiently restrictive to support the conclusion that the property has been 'taken' from the owner'."[202] An interference with the continuation of management tasks has been considered expropriatory.[203] Authors regularly cite to the jurisprudence of the Iran-U.S. Claims Tribunal, where the appointment of government managers was "qualified as indirect expropriation either by itself, … or in conjunction with other acts effectively depriving an investor" of its property.[204]

a. Calpurnia Never Interfered with Vanguard's Rights in VanCal.

112.- Here however, Calpurnia validly exercised its majority shareholder rights in VanCal through the SFCDC. It did not interfere in any way with Vanguard's rights. They were both shareholders in the same company. It is their relations as such what is being confused with expropriation here. SFCDC representatives in VanCal's board were not appointed by Calpurnian government in an exercise of its governmental power. Those managers are just the consequence of the SFCDC's and other Calpurnian citizens' majority shareholding in VanCal.[205]

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[200] *See Litvinoff* (supporting the use of the term "creeping"); *See also Dolzer and Bloch* (referring to "indirect" expropriation).
[201] *Metalclad* at 91-92, ¶¶ 103.
[202] *McLachlan* at 298 (citing *Pope & Talbot*).
[203] *See Mouri* at 129 *et seq*; *See also generally Reinisch I* (supporting the assertion that interference with management could be expropriatory).
[204] *Reinisch I* at 41 (citing *Phillips Petroleum Co. v. Iran*, 21 Iran-U.S. C.T.R. 79 (1989); *See also Mouri* at 51-52.
[205] *See Mouri* at 140-42 (explaining why the exercise of majority shareholder rights by the government is not *per se* expropriatory).

113.- The Iran-U.S. Claims Tribunal addressed the issue of appointment of managers and concluded that there was no indirect expropriation when the appointment of managers was just the exercise of rights as majority shareholder.[206] In *Phelps Dodge*, the claimant complaint of expropriation after Iran transferred shares owned by Iranian Banks to its government. The Tribunal considered that there was not a serious interference with the claimant's rights and interests.[207] It was not until the Iranian government, by a 1980 Bill, forcefully appointed managers that the Tribunal considered that an expropriation had happened.[208]

114.- In *Foremost*, a case identical to ours in almost every aspect, the Tribunal analyzed the same kind of actions as those taken by SFCDC here. There the claimant complaint of the expulsion of Foremost's expatriate personnel from Iran, the refusal to pay dividends since 1979, the ouster of Mr. Fisher from the board of directors and the interference with the provision of basic information to Foremost.[209] The *Foremost* Tribunal considered that there was no expropriation.[210] It first concluded that there was "no record of any attempt formally to confiscate [Foremost's] shares." [211] Then analyzing the above mentioned facts concluded that any interference did not amount to expropriation.[212]

115.- The Tribunal continued to explain that not even the departure of Foremost's personnel from Iran had an expropriatory effect.[213] Although the Tribunal acknowledged that it diminished the enjoyment of Foremost's rights it did not change the conclusion.[214] Thus, we can infer such diminution is irrelevant for purposes of determining whether interference has ripened into expropriation. In addition the Tribunal considered important to point that there were no legal limitations for Foremost to sell its shares.[215] The *Foremost* case is so similar to ours that it necessarily calls for the same result, no expropriation happened.

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[206] *See id.* at 140-45 (explaining that the Tribunal denied expropriation claims in companies where Iran became the majority shareholder.)
[207] *See Phelps Dodge* at 129, ¶ 20.
[208] *See Id.* at 129-30, ¶ 21.
[209] *Foremost* at 235.
[210] *See Foremost* at 257 (dismissing the claim of expropriation).
[211] *Id.* at 248.
[212] *Id.* at 250.
[213] *Id.*
[214] *Id.*
[215] *Id.*

116.- Here there were no limitations to sell Vanguard's participation in VanCal, regardless of the fact that it could be difficult considering the level of development of Calpurnia's capital market. The Suspension Decision was a VanCal's board decision and did not have an expropriatory effect because VanCal accounted and stands ready to pay for all of Vanguard's dividends. The failure to pay royalties and fees under the Trademark License and the TAA are contract claims and again VanCal stands ready to pay. The rejection of Mr. Rindler's proxy and the limitation on the provision of information in Gaulois language, were actions taken strictly under Calpurnian law and did not affect Vanguard's rights to the point of constituting a "more or less irreversible deprivation."[216] Thus there was no expropriation.

b. There are no Other Measures Affecting Property Rights.

117.- The *Foremost* Tribunal went on and analyzed the case based on the *Claims Settlement Declaration*[217] language which allowed the U.S.-Iran Claims Tribunal to evaluate "other measures affecting property rights."[218] However here, unlike in *Foremost*, the Tribunal would not be allowed by the BIT to make such finding.

118.- The Calpurnia-Gaul BIT does not contain an over-reaching clause for measures affecting property rights.[219] The BIT limits the protection to expropriatory measures or measures having such effect.[220] Having concluded, like the *Foremost* Tribunal, SFCDC's actions as VanCal shareholder were not expropriatory and did not ripen to the level of expropriation, the Tribunal cannot extend the BIT's language. This conclusion is supported by the *Vienna Convention's* plain meaning rule of interpretation.[221] The Tribunal has to base its decision on the BIT's words and only if an ambiguity is found the use of other interpretative measures is allowed.[222]

[216] *Id.* at 249.
[217] *See* Art. II, ¶ 1 *Claims Settlement Declaration* at 9 (establishing the jurisdiction of the Iran-U.S. Ckaim Tribunal to include "other measures affecting property rights").
[218] *See Foremost* at 251. (citing Art. II of the *Claims Settlement Declaration*).
[219] *See* Art 6 of the Calpurnia-Gaul BIT.
[220] *Id.*
[221] *See* Art. 31 of the *Vienna Convention*.
[222] *Id.*

119.- The Calpurnia-Gaul BIT's language is clear and unambiguous. It protects against expropriation and measures having such effect.[223] It does not extend to "other measures affecting property rights," which, as concluded by the *Foremost* Tribunal, may not necessarily be expropriatory in nature.[224]

C. ALTERNATIVELY, IF THERE WAS ANY INTERFERENCE, IT WAS NOT EXPROPRIATORY.

120.- As discussed, Calpurnia denies any expropriatory measures with regard Vanguard's rights in VanCal or any interference with those rights to the point of expropriation. However, Calpurnia submits to this Tribunal, in the alternative, that if any interference existed it was not significant enough to constitute expropriation.

a. If there was any Interference, it was not Significant.

121.- The general consensus is that to constitute indirect or "creeping" expropriation, the impact of the interference in the investment has to be "of a certain 'magnitude or severity'."[225] To be significant what is required is a "substantial loss of control or value."[226] The *SD Myers* Tribunal dealt with the degree of interference when analyzing trade measures adopted by Canada, which affected SD Myer's investment. It stated that severity and substantial "usually [amount] to a lasting removal of the ability of an owner to make use of its economic rights," although some times temporary measure could also apply. Evaluating the impact of the trade measures in the investment the SD Myer Tribunal concluded that there was no expropriation.

122.- Also, in *Lauder* the Tribunal dealt with a broadcaster in Czech Republic whose license rights were interfered with by the Czech regulatory agency. Much like in our case the Lauder Tribunal determined that Claimant's property was actually maintained until the contractual relationship between business partners concluded. It was at that time, and at that time only, that Mr. Lauder's property rights were affected. Based on that the Tribunal concluded that the proceedings started by the state agency, considered interference, did not amount to expropriation.

[223] Art. 6(1) of the Calpurnia-Gaul BIT.
[224] *See* Art. II, ¶ 1 *Claims Settlement Declaration* at 9 (referring to "expropriations or other measures affecting property rights," which suggest a clear distinction between both kinds of claims).
[225] *Reinisch I* at 30 (citing *Pope & Talbot, Inc. v. Government of Canada*, (Interim Award) 7 ICSID Rep 43, 69).
[226] *Id.* at 29 (citing UNCTAD, Taking of Property 41 (2000)).

123.- Also, as we have seen in *Foremost* the actions taken by Iran, which are substantially identical to those taken here by SFCDC, allegedly imputed to Calpurnia, were not considered expropriatory. There are not many cases that find for expropriation in situations like ours where the value of the investment was preserved. VanCal was producing revenue and dividends, these were accounted for thus exist and can be collected by Vanguard. The contractual royalties and fees also exist and are accounted for. Neither Vanguard nor VanCal have claimed a breach of contract. Thus there was no loss of value.

124.- Regarding control, by the time this dispute arose Vanguard was no longer in control of VanCal and by its own actions its capacity to intervene in the decision making process was further reduced. Thus, Calpurnia had no influence in the acts that caused a loss of Vanguard's control in VanCal.

125.- The cases that have actually found indirect of creeping expropriation[227] have done so in situations where disproportionate and discriminatory tax increases[228] were found or takings of third party property, as consequence, rendered worthless patents and management contracts.[229] Also, interference with contract rights causing the breach or termination of contracts between investors or business partners was found to be expropriatory.[230] Concerning expropriatory interference with management rights, substantiality has been found in cases of arrest and expulsion of the investor or its appointed management. Also in cases where the government replaced the investor's management with its own.[231] Finally, substantiality has also been found in cases where the government, or its subdivisions, acting contradictorily or non-transparently revoked free zone permits, operating licenses, or construction permits.[232]

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[227] *See id.* at 38-42.
[228] *See id.* at 38 (citing *In the Matter of Revere Copper and Brass Inc. v. Overseas Private Investment Corporation*, 56 ILR 258 (Award of August 24, 1978)).
[229] *See id.* at 39 (citing *Case concerning certain German interests in Polish Upper Silesia* (Germany v. Poland), Judgement, May 25, 1926, PCIJ Ser. A, No. 7 (1926)(*Chorzów Factory* Case)).
[230] *See id.* at 39 (citing *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Arbitral Tribunal, Partial Award of September 13, 2001).
[231] *See id.* at 40 (citing *Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability of October 27, 1989, 95 ILR 189 (2003) and also *Benvenuti & Bonfant v. Congo*, Award of August 8, 1980, 1 ICSID Reports 330 (1993)). *See generally also Ahmadou Sadio Diallo* (showing in an extreme case how the authorities arrested, deported and later expropriated Mr. Diallo's properties in Congo).
[232] *See id.* at 41-43 (citing *Goetz & ors v. Republic of Burundi*, Award, September 2, 1998, 6 ICSID Reports 5 (2004); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, April 12, 2002, 7 ICSID Reports 178 (2005);

126.- Most cases in situations like VanCal's held no expropriation existed. In making its final determination this Tribunal should follow cases like *Foremost*, *SD Myers*, *Lauder* and others, which are the majority, and support a no expropriation conclusion.

b. If there was any Interference, it did not Neutralize Vanguard's Investment.

(i) Vanguard Investment was not Neutralized.

127.- Substantial interference is considered one of the elements of indirect expropriation. The other element, often considered key, is the circumstances of a particular government action and its effects.[233] Here, and only if the Tribunal considered there was interference, there were no negative effects for Vanguard's investment.

128.- Case law and doctrine have developed two tests to analyze the issue. The "sole effect" doctrine[234] which evaluates the "reality of the impact"[235] of the measures, giving less importance to their form[236] and, on the other hand, a mixed analysis which evaluates purposes, context, as well as effect of the measures.[237] Neither of these tests should lead the Tribunal to a finding of expropriation. The effects only perspective requires that a change in circumstances triggered by government action produce a deprivation of "fundamental rights of ownership," in a permanent fashion.[238] Intent or purpose of the actions that triggered the change in circumstances is irrelevant.[239] In turn, the mixed analysis tries to ascertain the government's intent and purpose when taking a measure with expropriatory effect.[240]

Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, Award, May 29, 2003, 10 ICSID REPORTS 138 (2006); and also *Metalclad Corporation v. United Mexican States*, Award, August 30, 2000, 5 ICSID REPORTS 212 (2002)).

[233] *Dolzer & Bloch*, at 156.

[234] *See McLachlan* at 296 (characterizing the rule as controversial); *See Redfern & Hunter* at 494-96.

[235] *McLachlan* at 295; *See also Appleton* at 38 (explaining that the U.S. Supreme Court considered that "regulatory takings require the court to look to the impact of the regulation and to establish the existence of a substantial impact.").

[236] *See generally Phelps Dodge* (explaining that the Iranian government appointment of managers to the company was an expropriation because the investor's shares were rendered useless by the government interference); *See also Brunetti*, at 207 (discussing the importance of the *Phelps Dodge* holding).

[237] *See Dolzer & Bloch* at 158; *See also Reinisch I* at 33; *See also McLachlan* at 296; *See also Appleton* at 39-46.

[238] *See Dolzer & Bloch* at 161.

[239] *See id.* at 162.

[240] *See id.* at 159.

129.- Here there is no such fundamental and permanent depravation. Vanguard was and still is free to exercise its rights in VanCal. Vanguard has chosen not to do so. It was Vanguard itself who on October 23, 2006 withdrew its representatives from VanCal's board.[241] In addition, and even though Vanguard had retired its representatives in May 2006, VanCal's corporate information was being made available for Vanguard under the traditional terms until September 2006.[242] This was done despite the fact that Mr. Swift had instructed Mr. Korchnoi that corporate information should be available for shareholders to review in accordance with Calpurnian law, meaning "originals available for inspection in the head office."[243]

130.- Thus, SFCDC's actions as VanCal shareholder, if imputed to Calpurnia, had no negative effects on Vanguard's investment. VanCal is still operating profitably and Vanguard is free to exercise its rights when ever it sees fit. The SFCDC representatives encouraged this outcome with no success.[244] The analysis under the mixed approach is even clearer because Calpurnia had no intent of expropriating Vanguard's minority participation in VanCal. Even when some SFCDC's representatives saw VanCal as a public entity,[245] SFCDC in no way obstructed the investment.[246]

(ii) Vanguard Spoiled its own Investment Expectations.

131.- This element of the indirect expropriation analysis refers to the "reasonably-to-be-expected" benefits from the investment. These benefits are recognized by international law. The breach of these expectations is spoliation and requires a case by case analysis.[247] The issue is whether the investor could reasonably foresee that its investment would depreciate and loose all its value or a substantial part of it in a short period of time due to government actions.[248]

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[241] Record at 7 (October 23, 2006 e-mail from Vanguard to VanCal).
[242] *Id.* at 4.
[243] *Id.* at 8.
[244] *Id.* at 7 (e-mail from Mr. Swift (VanCal) to Vanguard).
[245] *Id.* at 5 (statements by Mr. Swift in the November 15, 2004 VanCal's board meeting).
[246] See above discussion regarding the free transfer of returns.
[247] *See Reinisch I* at 36-37; *See also Schreuer II* at 4-5.
[248] *See McLachlan* at 303-04; *See also Appleton* at 45 (explaining that only substantial depravations are recognized as expropriations).

132.- As the evidence here demonstrates Vanguard spoiled its own investment. Vanguard still owns VanCal's shares.[249] Nevertheless, Vanguard itself temporarily suspended the use of such shares. It was Vanguard who gave up control in VanCal when it allowed its ownership to slip into the current 30% levels, which makes them a minority. It was Vanguard who retired its representatives from VanCal's board. Even if security concerns were the reason for such renunciation, there was no reason, legal or otherwise, to not participate via teleconference.

III. CONCLUSIONS ON THE MERITS.

133.- Calpurnia did not discriminate against Vanguard. No violation of the BIT occurred. SFCDC was acting as a private shareholder. Calpurnia did not authorized the imposition of the Suspension Decision and thus, did not obstruct the transfer of returns to Gaul. In addition, no violation of international law standards occurred. Calpurnia complied with the MSTA. The FPS standard was not breached because the CSD acted in pursuance of national security interests. Also, Calpurnian police did not have a basis to remove the protestors.

134.- Moreover, a finding of expropriation is not warranted. Calpurnia did not take any expropriatory measures or measures having that effect and did not interfere with Vanguard's investment. However, if the Tribunal finds an interference, it did not amount to expropriation because there was no significant loss of control and value over the investment. Also, there was no expropriation because Calpurnia did not neutralized or spoiled Vanguard's investment.

REQUEST FOR RELIEF

135.- In light of the foregoing submissions the Government of the Republic of Calpurnia, Respondent in these proceeding, respectfully requests the Tribunal to find that:

A. It did not have jurisdiction over this dispute.

B. It did not discriminate against Vanguard International in violation of the Agreement between the Government of the Republic of Calpurnia and the

[249] *See* Record at 2 (Vanguards Request for Arbitration revealing that nothing in the record suggest that Vanguard no longer owns VanCal's shares).

Government of the Federated States of Gaul on the Promotion and Protection of Investments, and it did not violate established standards of international law,.

C. It did not take any expropriatory measures. However, if the Tribunal were to find that an interference existed, it did not reach expropriatory levels, mainly because such alleged interference was not significant or substantive; and Vanguard's investment was never neutralized or spoiled by the Government of the Republic of Calpurnia.

Respectfully submitted on October 10th, 2008 by

_______/s/________ _______/s/________
Mr. 1 Mr. 1

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