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International Centre for Settlement of Investment Disputes

VANGUARD INTERNATIONAL
[CLAIMANT]

and

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA
[RESPONDENT]

MEMORANDUM FOR RESPONDENT

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LIST OF ABBREVIATIONS

ALI	American Law Institute
BITs	Bilateral Investment Treaties
Calpurnia-Gaul BIT	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-Flatland BIT	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
CCC	Conservative Conscience of Calpurnia
FTC	NAFTA Free Trade Commission
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID Review-FILJ	ICSID Review – Foreign Investment Law Journal
ILC	International Law Commission
ILC Articles	International Law Commission Articles on State Responsibility
ILM	International Legal Materials
ILR	International Law Reports
Int ALR	International Arbitration Law Review
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement

OECD	Organization for Economic Co-operation and Development
SFCDC	State Fund for Commerce and Development in Calpurnia
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nation Treaty Series
VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF FACTS

1. RESPONDENT is the Republic of Calpurnia (hereinafter RESPONDENT). CLAIMANT, Vanguard International (hereinafter CLAIMANT), is a mobile telecommunications company incorporated in Nova Parigi, the capital city of the Federated States of Gaul (hereinafter Gaul). In 1997, CLAIMANT participated in the establishment of a joint venture company, VanCal, which is located in Calpurnia.
2. RESPONDENT has not failed to fulfil treaty obligations stipulated in the 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 (hereinafter Calpurnia-Gaul BIT) as alleged by CLAIMANT.
3. The State Fund for Commerce and Development in Calpurnia (hereinafter SFCDC) has shareholdings in VanCal. The SFCDC is available to and does act as a mere nominee for individual Calpurnian farmers and workers who have chosen to invest in VanCal. Pursuant to a Purchase/Agency Agreement, the ownership of VanCal's shares rests with these individuals while the voting rights are exercised by the SFCDC. Voting rights revert to the individual owner upon payment of the purchase price of the shares. At no time has the SFCDC attempted to utilise its rights as shareholder or depository in order to implement government policy. VanCal is not government controlled.
4. There has never been a specific decree or legislative act by RESPONDENT which has interfered with or in any way expropriated CLAIMANT's investment. VanCal has remained an independent private corporation at all relevant times. In the years ending December 2004 and December 2005, out of VanCal's issued shares, Calpurnian firms, banks and companies held 41%, foreign companies held 30% and natural persons, including farmers and workers, held 29%.
5. All shareholders of VanCal have been treated alike with regard to the access of corporate reports and notices. Information has been made available to all investors,

including CLAIMANT. There is no evidence that CLAIMANT is or was ever entitled to any special privilege in this regard.

6. All changes to the members of the VanCal board of directors have been in accordance with Calpurnian statutes and the VanCal corporate constitution. The CLAIMANT's personnel were not unlawfully removed from management. All board of directors meetings and shareholders meetings of VanCal were conducted in compliance with all formal requirements. The proxies held by Mr Rindler on behalf of CLAIMANT's interests were appropriately ruled unacceptable for the shareholders meeting of 16 November 2005. It was CLAIMANT who decided to end its participation on the Board of Directors, when CLAIMANT withdrew its representatives, Mr Hunter and Mr Fowler, by email on 23 October 2006 and when CLAIMANT, despite the suggestion by the Chairman of the Board, Dr Swift, declined to replace them.
7. Ms Pescara was denied a renewal of her visa in September 2004. The granting of visas is at the discretion of the immigration authorities. There is no obligation on the Immigration office to state the reasons for the refusal of any visa renewal. The Calpurnian visa waiver programme permits short term business visits up to 30 days each time and the Calpurnian corporate law does not require that directors be citizens or (and more significantly in this instance) residents.
8. Ms Pescara and Mr Kolowenko's homes were searched routinely and lawfully, pursuant to national security requirements. The press releases issued by the Calpurnian Security Directorate relating to the searches were factually accurate. The "picketers" were private citizens lawfully exercising their freedom of speech on public property in a non-violent manner. The police had no basis to intervene when they were requested to do so by Ms Pescara.
9. VanCal declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders, including CLAIMANT.

1 OUTLINE OF RESPONDENT’S SUBMISSIONS

10. This memorandum replies to the Memorandum for CLAIMANT submitted on 12 September 2008. RESPONDENT submits that CLAIMANT cannot bring its claim against RESPONDENT before this Tribunal as the Tribunal lacks jurisdiction. Even if the Tribunal determines it possesses jurisdiction over this claim, RESPONDENT submits it is not responsible for any actions it has taken in respect of CLAIMANT or its investment. Further, even if the Tribunal establishes state responsibility on the part of RESPONDENT, breaches of the Calpurnia-Gaul BIT have not occurred.
11. First, RESPONDENT introduces in its preliminary issues the applicable law and relevant treaty interpretation rules regarding this dispute.
12. Second, it is submitted that within the issue of jurisdiction, CLAIMANT has not fulfilled all the jurisdictional elements contained in Article 25(1) of the ICSID Convention. Further, the “Fork in the Road” provision cannot be invoked as the same claim and same parties were involved; and the attempt of amicable settlement has not commenced with reference to the 18-month period and the use of MFN treatment.
13. Third, state responsibility has not been established because the acts of the SFCDC, Dr Swift, Mr Poe, SFCDC shareholders and VanCal are not attributable to RESPONDENT.
14. Fourth, RESPONDENT has not violated its obligations under the Calpurnia-Gaul BIT. There has been no discrimination as both national treatment and fair and equitable treatment have been provided. There has been no unlawful interference of investments and no obstruction of transfers of returns. Further, RESPONDENT has accorded sufficient protection and security. Ultimately, RESPONDENT submits that there has been no expropriation of CLAIMANT’s investment.

2 PRELIMINARY ISSUES

2.1 The Applicable Law

15. Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention), to which both RESPONDENT and Gaul are parties, provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.¹

16. There is no express agreement between RESPONDENT and CLAIMANT as to the law under which the dispute should be decided. Although rules of international law as contained in the Calpurnia-Gaul BIT are applicable in cases where a legal dispute arises out of a contracting state and a national of another contracting state, the Calpurnia-Gaul BIT does not apply to the current case as no international law issues are involved.

17. Alternatively, if issues of international law are involved, Article 38(1) of the Statute of the International Court of Justice² (hereinafter ICJ Statute) sets out the sources of international law on which RESPONDENT relies. The ICJ Statute is “widely recognized as the most authoritative statement as to the sources of international law.”³ This Article states:

the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). [Adopted on 18 March 1965; Entered into force on 14 October 1966.].

² The Statute of the International Court of Justice (ICJ statute). [26 June 1945, 59 Stat. 1055, UNTS, 993.].

³ See also Malcolm N. Shaw, *International Law* (Cambridge University Press 5th ed. 2003) at 66; Ian Brownlie, *Principles of International Law* (Oxford University Press 6th ed. 2003) at 3; Robert Jennings & Arthur Watts (eds.), *Oppenheim’s International Law: Peace* (Longman 9th ed. London 1992) 1, at 24; Manley O. Hudson, *The Permanent Court of International Justice* (The Macmillan Company 1934) at 601.

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

18. Consistent with Article 38(1)(a) of the ICJ Statute, under RESPONDENT's alternative position, the Calpurnia-Gaul BIT is the primary source of substantive international law applicable in this dispute. Where necessary, reliance will be placed on customary international law. This consists of wide-spread state practice coupled with *opinio juris*, meaning, respectively, the actual behaviour of the states and states' belief that they are bound by these customary rules.⁴ Relevant international arbitral awards in addition to the writings of well-known jurists will also be relied on in support of the RESPONDENT's arguments.

19. In relation to international arbitral awards, it should be noted that no doctrine of precedent exists in international arbitration.⁵ However, to maintain stability and consistency of international investment law, earlier arbitral awards need to be taken into account when a tribunal makes a decision.⁶ The tribunal in *Saipem v Bangladesh*⁷, for example, stated that although there is no binding precedent rule in

⁴ *North Sea Continental Shelf* cases (*Germany v Denmark/ Germany v Netherland*), Judgment, ICJ Reports (1969), at para 77.

⁵ See *SGS SGS v Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518; 42 ILM 1285 (2003), at para 97.

⁶ *Saipem v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction, 21 March 2007, at para 67; Thomas W. Wälde, "Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues", 1 Transnational Dispute Management 1 (2004). [Noting that much care must be taken to maintain the rule of law and to provide a degree of certainty to the future of international investments arbitration, and thus contradictory awards should be avoided due to the given pressure to establish a well respected system in international investments arbitration].

⁷ *Saipem v Bangladesh*, *supra* note 6.

international arbitration, a tribunal has a duty “to adopt solutions established in a series of consistent cases”.⁸ Additionally, that tribunal stated that arbitral tribunals also have a duty to ensure that they “contribute to the harmonious development of investment law”.⁹

2.2 Treaty Interpretation

20. Articles 31 and 32 of the Vienna Convention on the Law of Treaties¹⁰ (hereinafter VCLT) will be applied where any treaty provision is required to be interpreted in these submissions. These provisions of the VCLT are binding on RESPONDENT and Gaul, as they are parties to that Convention. Moreover, Articles 31 and 32 of the VCLT are considered to express rules of customary international law.¹¹ According to Article 31(1), treaties should be interpreted:

in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹²

21. Article 32 provides that supplementary means of interpretation may be used as an aid to interpret the treaty if the application of Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to result which is manifestly absurd or unreasonable.

⁸ *Supra* note 5, at para 97.

⁹ *Id.*

¹⁰ Vienna Convention on the Law of Treaties. [Done at Vienna on 23 May 1969; Entered into force on 27 January 1980.].

¹¹ *Iron Rhine ("Ijzeren Rijn") Railway*, arbitration between the Kingdom of Belgium and the Kingdom of the Netherlands, Award of the Arbitral Tribunal, 24 May 2005, at para 45. [Observing that since the adoption of the VCLT in 1969, the ICJ has never failed to apply rules of customary international law as formulated in Articles 31 and 32]; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)*, ICJ Reports (1992), at para.373, and 586, at para 380; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, ICJ Reports (1994), at para 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility, Judgment, ICJ Reports (1995), at para 33.

¹² *Supra* note 10, Article 31(1).

3 JURISDICTION

22. This Tribunal does not have jurisdiction. RESPONDENT submits: that the parties have not submitted to the jurisdiction of ICSID in writing as required by Article 25 of the ICSID Convention [3.1]; alternatively Article 11 of the Calpurnia-Gaul BIT (the fork in the road provision) precludes CLAIMANT from bringing these claims to this Tribunal [3.2]; further and in the alternative, the attempt of amicable settlement by the CLAIMANT has not commenced [3.3].

3.1 Article 25 of the ICSID Convention

23. Article 25(1) of the ICSID Convention provides that:

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

24. RESPONDENT submits that CLAIMANT has not succeeded in fulfilling all the jurisdictional elements contained in Article 25(1) of the ICSID Convention because the parties to the dispute have not consented in writing to submit to the Centre.

25. The fact that it is a legal dispute arising directly out of an investment and between a Contracting State and a national of another Contracting State is not contested. It is acknowledged that CLAIMANT's establishment of telecommunications operations within Calpurnia falls within the definition of investment provided under Article 1(1) of the Calpurnia-Gaul BIT. It is also accepted that CLAIMANT is a foreign juridical entity which possesses the nationality of another Contracting State other than that of RESPONDENT.¹³ It is a juridical person of Gaulois nationality as it was

¹³ *Supra* note 1, Article 25(2)(b).

incorporated in Gaul and its headquarters are based in Nova Parigi, the capital city of Gaul.¹⁴

26. With regard to the required consent for a dispute to be submitted to the Centre by the parties, RESPONDENT asserts it has not given such consent. RESPONDENT submits that it has consented to the bringing of a claim by a Gaulois investor only if the 18-month time period fixed in Article 11(2) of the Calpurnia-Gaul BIT has expired. This has not occurred and therefore RESPONDENT has not consented to the submission of this dispute.

3.2 **“Fork in the Road” Provision**

27. It is important to read Article 11 of the Calpurnia-Gaul BIT as a whole. The provision provides that an investor could only bring a dispute claim to (a) a competent court of Calpurnia; (b) ICSID tribunal, (c) the Additional Facility of ICSID; or (d) an *ad hoc* arbitration tribunal if the investor has *NOT* already submitted the dispute to the competent courts of the Contracting Party.¹⁵

28. What is colloquially referred to as a “fork in the road” provision becomes a jurisdictional issue if the *same party* brings the *same claim* to a domestic court of the state and then subsequently to an international arbitral tribunal.¹⁶ RESPONDENT submits that CLAIMANT and Ms Pescara (as an agent of CLAIMANT) have made claims in both the Calpurnian Constitutional Court and the Commercial Court of San Innocente de Irkoutsk, and have now brought these same claims before this Tribunal. The “fork in the road” provision, a threshold jurisdictional requirement, has not been met.

¹⁴ *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Review-FILJ 205 (2005); 11 ICSID Reports 313. [Stating that in interpreting the ICSID Convention on Jurisdictional requirements, the tribunal found that corporate form was the correct focus].

¹⁵ Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul, Article 11(2) and (3).

¹⁶ C Schreuer, “Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road”, 5 Journal of World Investment and Trade 231 (2004).

3.2.1 Same Claim

29. RESPONDENT submits that the claims brought by CLAIMANT and its agent before the local courts and this Tribunal are the same. Although CLAIMANT has now framed its claims in such a way that they may at first seem different. Upon closer examination, it can be seen they are in fact the same claims. RESPONDENT acknowledges that in some cases an application of breach of contractual rights to a local court is not the same as an international claim alleging a treaty breach even if it is based on the same facts.¹⁷ However, that is not what is before this Tribunal. It may seem obvious to note that had CLAIMANT been successful in the two claims brought before the domestic courts of RESPONDENT, it would not now be before this international tribunal. But, in RESPONDENT's submission, is fundamental to this point. CLAIMANT is illegitimately attempting to appeal the decisions of the Calpurnian courts.

30. *Res judicata* is recognised in both common law and civil law jurisdictions. It is submitted that RESPONDENT, having a "mixed jurisdiction", also observes this principle.¹⁸ RESPONDENT submits that this principle extends to general international law as Article 38(1)(c) of the VCLT provides that "general principles of law recognized by civilized nations" are also a source of international law.¹⁹

31. The principle of *res judicata* states that if an event which was previously the subject of a legal cause of action has been decided between parties, those parties will be barred from bringing the same suit again. RESPONDENT submits that CLAIMANT

¹⁷ *Compañía de Aguas del Aconquija SA & Vivendi Universal* (formerly *Compagnie Générale des Eaux*) v *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Challenge to the President, 3 October 2001, 17 ICSID Review-FILJ 168 (2002); 6 ICSID Reports 330; *Genin (Alex) & Ors v Republic of Estonia*, 25 June 2001, 6 ICSID Reports 241; 17 ICSID Review-FILJ (2002) 395; *Eudoro A Olgún v Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000.

¹⁸ FDI Moot 1st Clarifications of Problems, Number 9.

¹⁹ Please see paragraph 20 on preliminary issues for further elaboration.

is in fact bringing the same claim to this Tribunal as an avenue of appeal because *res judicata* prevents it from relitigating the same claim again in the domestic courts.

32. Two claims were brought before the domestic courts of RESPONDENT. The first concerned the dividends claim made by Ms Pescara on behalf of CLAIMANT at the Commercial Court of San Inocente de Irkoutsk. The second related to the search of premises claim made by CLAIMANT in the Calpurnian Constitutional Court. It would be inappropriate at this point in time for RESPONDENT to comment on the outcome of any decision of the Calpurnian Courts, other than to state its faith in the ability of the independent judiciary of Calpurnia to fairly and justly determine the matters that come before it.
33. RESPONDENT submits that the claims now brought before ICSID are the same claims brought before the local courts of RESPONDENT. CLAIMANT is simply using ICSID as an appeal mechanism in respect of claims that have already been dismissed.

3.2.2 Same Party

34. In the first claim, Ms Pescara acted on behalf of CLAIMANT when bringing the claim to the Commercial Court of San Inocente de Irkoutsk. In the claims before this Tribunal and that brought to the Commercial Court, in both instances, it is and was brought by CLAIMANT.
35. As mentioned above, CLAIMANT has submitted two cases to the domestic courts of Calpurnia. According to the Calpurnia-Gaul BIT Article 11(3), CLAIMANT is barred from submitting the case again to this Tribunal. If this Tribunal accepts the RESPONDENT's argument on this point, the Tribunal will have no jurisdiction to continue hearing this dispute and CLAIMANT's case must fail. However, if RESPONDENT's argument is not accepted, additional alternative arguments disputing jurisdiction are provided below.

3.3 Amicable Settlement

36. RESPONDENT submits that before this Tribunal would have jurisdiction, CLAIMANT must have attempted amicable settlement, and such attempts should be given an opportunity to succeed over an 18 month period. There has been no attempt at amicable settlement by CLAIMANT. This has the further consequence that no time period could thus have been triggered. Article 11(1) and (2) of the Calpurnia-Gaul BIT states that:

1. Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment in the territory of the latter Contracting Party shall if possible be settled amicably.
2. If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration [...].

37. With regard to the counting of the 18 months stated in the BIT, Article 11(2) provides that the starting date be “the date of request for amicable settlement”. If no such request was made, RESPONDENT submits that the 18-month period never commenced.

38. It is RESPONDENT’s submission that CLAIMANT did not attempt amicable settlement at all. Although an email was sent to Mr Poe,²⁰ this cannot be viewed as an attempt. Mr Poe is not a government official and the CLAIMANT was well aware of this fact. The email, itself, requests Mr Poe to transmit the contents of the email to his superiors including the appropriate Ministers.²¹ Furthermore, Mr Poe replied to this email by

declining to involve the Government in what is merely an internal shareholder dispute and stating Government has no authority in any event.²²

²⁰ The table of “Evidence/Calendar of Events”, CLAIMANT letter to Poe, 5 February 2007.

²¹ *Id.*

²² *Supra* note 20, Poe letter to CLAIMANT, 21 February 2007.

39. This reply should have prompted CLAIMANT to take further action if it were truly its intent to settle. RESPONDENT cannot be said to have known, or ought to have known, about the dispute. CLAIMANT may contend that there has been no intent from RESPONDENT's perspective to settle, but in reality, RESPONDENT has been kept in the dark as to the presence of the dispute. This failure is the fault of CLAIMANT and should not prejudice RESPONDENT to the benefit of the CLAIMANT.
40. Alternatively, RESPONDENT submits that even if such an attempt has occurred and thus triggered the 18-month time period stated in Article 11(2) of the Calpurnia-Gaul BIT, this time period has not been observed [3.3.1]. Alternatively, MFN treatment cannot be invoked as a dispute resolution mechanism [3.3.2].

3.3.1 18-month Period

41. Even if an attempt at amicable settlement has occurred and consequently triggered the 18-month time period stated in Article 11(2) of the Calpurnia-Gaul BIT, this time period has not yet elapsed. It has merely been 5 months since the email from CLAIMANT was sent to Mr Poe.²³
42. This 18-month period has been mutually agreed between RESPONDENT and Gaul. It is irrelevant that it may seem a long period compared to other periods in bilateral investment treaties between other countries.²⁴ The intention of the parties to provide for an 18 month period can be clearly ascertained from the text of the Calpurnia-Gaul BIT.²⁵ This intent should not be ignored even though CLAIMANT might seek to

²³ *Supra* note 20, CLAIMANT letter to Poe, 5 February 2007; The table of "Evidence/Calendar of Events", *supra* note 20, CLAIMANT Requests Arbitration, 31 July 2007.

²⁴ Australia-Mexico BIT, Article 13(4) [... after six months have elapsed since the events giving rise to the dispute occurred]; Canada-Slovakia BIT, Article IX(2) [...] within a period of six months from the date on which the dispute was initiated]; Thailand-Hong Kong BIT, Article 18 [...] after a period of six months from written notification of the claim]; USA-Estonia BIT, Article VI(3) [...] that six months have elapsed from the date on which the dispute arose]; Lebanon-Iceland BIT, Article 10(2) [...] during a period of six months starting from date of the request by any party of the dispute].

²⁵ *Supra* note 10, Article 31.

waive this period simply as a procedural delay. RESPONDENT is of the view that 18 months is necessary for attempts at amicable settlement of foreign investment disputes.

3.3.2 MFN Treatment Does Not Extend to Dispute Settlement Mechanisms

43. Additionally, it is submitted that the MFN treatment clause in the Calpurnia-Gaul BIT does not extend to dispute settlement mechanisms such as those in Article 7 of the Calpurnia-Flatland BIT.
44. The relevant MFN treaty clause should be construed in accordance with Article 31 VCLT to give its “ordinary meaning”. In doing so reference should be given to the particular wording of the clause.
45. Referring to that particular wording, the MFN clause in Article 4(1) and (2) of the Calpurnia-Gaul BIT entitles CLAIMANT to receive MFN treatment in certain areas:
1. Investments [...] or returns [...] shall be accorded treatment which is not less favourable than [that accorded to] investments and returns made by [...] investors of any third State, whichever is the most favourable to the investor.
 2. Investors [...] shall be accorded [...] as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favourable than [...] [that accorded to] investors of any third State, whichever is the most favourable to the investor.
46. It is acknowledged that CLAIMANT and its investment should be given MFN treatment in the way stipulated in Article 4. The relevant question is whether MFN treatment should extend to dispute resolution mechanisms.
47. A few cases such as *Maffezini v Spain*²⁶ and *Siemens v Argentina*²⁷ suggest that MFN treatment should extend to dispute resolution mechanisms. However, it is submitted

²⁶ *Maffezini v Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, 40 ILM 1129 (2001); 5 ICSID Reports 396; ICSID Review-FILJ 212 (2001).

that these are only a small number of cases representing a minority view and departing from the majority of cases.

48. Most of the cases as well as authoritative academic opinions are of the view that MFN treatment should not extend to dispute settlement provisions. The *Plama v Bulgaria*²⁸ tribunal rejected the reasoning in *Maffezini* after a thorough examination. The *Maffezini* decision stated that

the application of most favoured nation clauses to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements.²⁹

However, the decision was strongly criticized by the *Plama* tribunal as it was based on an inappropriate “basis for analysis”³⁰ and led to “a chaotic situation – actually counterproductive to ‘harmonization’ which the *Maffezini* tribunal had referred.”³¹

49. The *Plama* tribunal commented, that:

[...] it is one thing to add to the treatment provided in one treaty more favourable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.³²

and that:

[...] dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting states cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution

²⁷ *Siemens v Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005).

²⁸ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, 44 ILM (2005) 721; 20 ICSID Review-FILJ (2005) 262.

²⁹ *Supra* note 26, at para 62.

³⁰ *Supra* note 28, at para 218.

³¹ *Id.*, at para 218-219.

³² *Id.*, at para 209.

provisions from other treaties negotiated in an entirely different context.³³

50. This is also the view preferred by the International Court of Justice (hereinafter ICJ). The ICJ indicated in *East Timor (Portugal v Australia)*,³⁴ that the scope of application of a substantive obligation is an entirely separate question to the conferral of jurisdiction upon an international tribunal.

51. Apart from the ICJ, this is also the view taken by most ICSID tribunals, for example in *Salini v Jordan*³⁵, *Telenor v Hungary*³⁶, as well as by academics. Mr Stephen Fietta has commented that

where limits placed by the basic treaty upon the substantive rights granted to investors ‘go to the core of matters that must be deemed to be specifically negotiated by the contracting parties’, it is likely that tribunals will continue to hesitate before allowing MFN provisions to be used to override those limits by incorporating more generous rights from treaties with third states.³⁷

It has also been pointed out in a leading text on investment arbitration that,

Jurisdiction in international law depends solely upon consent.[...] Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty [...]. In those circumstances, it is particularly important to construe the ambit of the State’s consent strictly [...] It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in

³³ *Supra* note 28, at para 207.

³⁴ *East Timor Case (Portugal v Australia)* ICJ Reports (1995).

³⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 29 November 2004, 44 ILM (2005) 569.

³⁶ *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Decision on Jurisdiction, 13 September 2006.

³⁷ Stephen Fietta, “*Most favoured nation treatment and dispute resolution under bilateral investment treaties: a turning point?*”, *International Arbitration Law Review Int. A.L.R.* 131 (2005).

other treaties, negotiated with other State parties and in other circumstances.³⁸

52. Dispute settlement procedures are specifically negotiated in light of the needs and wants of the parties in a particular case. As a consequence, CLAIMANT should not be allowed to “treaty-shop” and import dispute resolution procedures which both CLAIMANT and RESPONDENT have not contemplated through MFN treatment.
53. Based on the foregoing reasoning, it is submitted that the relevant MFN clause does not extend to jurisdictional provisions such as in Article 7 of the Calpurnia-Flatland BIT.

³⁸ Campbell McLachlan QC, Laurence Shore, Matthew Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press 2007), at 257.

4 STATE OF CALPURNIA IS NOT RESPONSIBLE

54. No state responsibility has been established. RESPONDENT submits: that the acts and conduct of SFCDC [4.1]; Dr Swift [4.2]; Mr Poe [4.3]; SFCDC Shareholders [4.4]; and VanCal [4.5] are not attributable to RESPONDENT.

55. With regard to state organs, it is acknowledged the acts of state organs are attributable to the state. However, the Calpurnian police in searching the homes of Ms Pescara and Mr Kolowenko, and not stopping the protesters, have acted dutifully. Similarly, the Courts of Calpurnia in dismissing the cases brought by CLAIMANT have also acted dutifully and lawfully. Thus, there are no wrongful acts that are attributable to RESPONDENT.³⁹

4.1 SFCDC

56. SFCDC is a 100% state-owned entity. However, any acts by the SFCDC are not directly attributable to the state. As stated by the *Maffezini v Spain*⁴⁰ tribunal, it must be established whether any such acts are governmental or commercial in nature. Only acts that are governmental in nature can be attributable to the RESPONDENT.

57. In the present case, the SFCDC did not implement governmental measures through its agents or exercise its rights as shareholder or depositary. SFCDC representatives did not act “as [an] agent[s] for the government or are discharging an essentially governmental function.”⁴¹ It is submitted that SFCDC has not engaged any state responsibility to RESPONDENT.

4.2 Dr Swift

58. Article 5 of the International Law Commission Articles on State Responsibility (hereinafter ILC Articles) states:

³⁹ This will be further dealt with in paragraph 143-151 regarding full and constant protection and security.

⁴⁰ *Supra* note 26, at para 80.

⁴¹ *Supra* note 26, at para 79.

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Under Article 5 of the ILC Articles, only acts that are directed by the state can be attributable to RESPONDENT.

59. It is denied that any acts of Dr Swift are attributable to RESPONDENT. The proposals made by Dr Swift were his own and presumably intended to benefit VanCal. He was not under the direction of the government. It is submitted that his acts were in the capacity as a director of a company. A director's decision as to the conduct of a commercial company cannot be attributable to RESPONDENT.

4.3 Mr Poe

60. Mr Poe is the chairman of SFCDC and a member of the CCC. However, Mr Poe was not acting under the direction from the government. Similar to the reasoning above, a director's decision of a commercial company cannot be attributable to RESPONDENT.

61. Thus, neither directors' commercial acts are attributable to RESPONDENT.

4.4 SFCDC Shareholders

62. Article 8 of the ILC Articles states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

63. In the present case, at least one-half of the VanCal shares, which CLAIMANT counts as the SFCDC's, are in fact registered in the names of individual farmers and

workers. These individual shareholders have not acted under the direction of RESPONDENT. Subject to the Purchase/Agency Agreement, SFCDC could vote for the natural persons. This could only be done, however, when the shares are not paid up. Once the shares are paid up, these voting rights will belong to the natural persons who hold the shares. SFCDC does not hold the voting rights indefinitely. After the voting rights are handed over to the shareholders, SFCDC has no control over how individual shareholders choose to exercise their votes. The votes of individual shareholders cannot be attributed to RESPONDENT.

4.5 VanCal

64. In relation to whether VanCal's acts are attributable to the State, the structural test and the functional test must be applied.

65. The *Maffezini v Spain*⁴² tribunal referred to the structural test as follows:

Here 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. The same result will obtain if an entity is controlled by the State, directly or indirectly.⁴³

It is submitted that the RESPONDENT has no direct investment in VanCal. Even if the SFCDC is considered to be a state entity, the shares were registered under the name of natural persons, not SFCDC.

66. Even if this Tribunal decided that SFCDC, being a state entity, holds the majority share of VanCal through the individual shareholders, this is not conclusive that VanCal is a state entity. Another consideration is the functional test.

67. Turning to the functional test, the tribunal of *Maffezini v Spain*⁴⁴ observed:

⁴² *Supra* note 26.

⁴³ *Supra* note 26, at para 77.

⁴⁴ *Supra* note 26, at para 80.

State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were “essentially commercial rather than governmental in nature”.

68. To that effect, the *Maffezini v Spain*⁴⁵ tribunal observed that the functional test required an examination as to whether the entity at issue carried out functions which were governmental in nature or which were reserved for the state but were now performed by private companies or individuals.

69. It is a fact that VanCal is a telecommunications company. VanCal operated on a profit-basis. VanCal has never been responsible for any function that is governmental in nature. All that VanCal has ever provided are telecommunication services which are strictly commercial in nature. It is submitted that VanCal does not fulfil the structural test and thus cannot be considered a state entity.

⁴⁵ *Supra* note 26.

5 THE RESPONDENT HAS NOT VIOLATED THE CALPURNIA-GAUL BIT

70. The Calpurnia-Gaul BIT has not been violated. RESPONDENT submits: actions of RESPONDENT do not constitute discriminatory conduct [5.1]; there has been no unlawful interference of CLAIMANT's investment [5.2]; transfer of returns from CLAIMANT's investment has not been obstructed [5.3]; and sufficient protection and security has been provided to CLAIMANT [5.4].

5.1 The RESPONDENT's Actions Do Not Constitute Discriminatory Conduct

71. CLAIMANT has not been discriminated against. Article 2(3) of the Calpurnia-Gaul BIT provides:

Each Contracting party shall not impair by unreasonable, arbitrary or discriminatory measures the management, maintenance, use, enjoyment, acquisition or disposal of investments in its territory of investors of the other Contracting Party.

The obligation on the part of the RESPONDENT is therefore to provide reasonable, non-arbitrary or non-discriminatory measures with regard to investments and investors of Gaul.

72. These three terms are addressed separately below.

“Unreasonable”

73. There is no clear definition to determine whether an act is reasonable or not. Wälde has commented that unreasonableness depends on each unique situation:

[...]what is unreasonable should be determined in the same way as what is not 'fair and equitable', i.e. by reference to objective, authoritative, preferable legal standards applicable to the country and the region in question.⁴⁶

⁴⁶ Thomas W. Wälde, *Supra* note 7, quoted in Norbert Horn (ed.), *Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects*, Studies in Transnational Economic Law, 19, at 213.

“Arbitrary”

74. In *Lauder v The Czech Republic*⁴⁷, the tribunal defined “arbitrary”, in accordance with the *Black’s Law Dictionary*, as “[...] founded on prejudice or preference rather than on reason or fact.”⁴⁸ Furthermore, in the *ELSI*⁴⁹ case, the tribunal commented that

arbitrariness is not so much something opposed to the rule of law, [...] it is a wilful disregard of due process of law, and act which shocks, or at least surprises, a sense of judicial propriety.⁵⁰

“Discriminatory”

75. As for defining what constitutes a discriminatory conduct, the tribunal in the *ELSI* case stated four requirements in discriminatory measure, namely, (i) an intentional treatment (ii) in favour of a national (iii) against a foreign investor and (iv) that is not taken under similar circumstances against another national. In addition, the tribunal in *LG&E v Argentina*⁵¹ addressed that

in the context of investment treaties, and the obligation thereunder not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.⁵²

76. In applying the above definitions of these three terms to the facts in this case, the acts of VanCal should not be considered as unreasonable, arbitrary or, in particular, discriminatory as: national treatment has been provided [5.1.1]; and fair and equitable treatment has been provided [5.1.2].

⁴⁷ *Lauder v Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66.

⁴⁸ *Id.*, at para. 221.

⁴⁹ *Eletronica Sicula SpA (ELSI) Case (United States of America v Italy)*, ICJ Reports (1989).

⁵⁰ *Id.*, at 76.

⁵¹ *LG&E Energy Corporation v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, 46 ILM (2007) 36.

⁵² *Id.*, at para 146.

5.1.1 National Treatment Has Been Provided

77. Article 4 of the Calpurnia-Gaul BIT states:

1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or [...], whichever is the most favourable to the investor.
2. Investors of one Contracting Party shall be accorded by the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favourable than the latter Contracting Party accords its own investors or [...]whichever is the most favourable to the investor.

78. RESPONDENT, in accordance with this Article, is bound to treat CLAIMANT in a way that is no less favourable than the manner it treats its own nationals. A violation under such will be constituted as discriminatory and consequently, a breach of the Calpurnia-Gaul BIT. However, Article 4(1) and (2) of the Calpurnia-Gaul BIT has not been breached as the following section of this Memorandum will demonstrate.

79. Therefore, with reference to the tribunal in *Lauder v The Czech Republic*⁵³, a discriminatory measure is simply one that fails to provide national treatment. By providing national treatment through the declaration and distribution of dividends [5.1.1.1]; through proper representation of the Board [5.1.1.2]; and through providing company information [5.1.1.3] to CLAIMANT, it is submitted that CLAIMANT have been treated like Calpurnian nationals and there has been no discrimination against it as a foreign investor.

5.1.1.1 VanCal Declared and Distributed Dividends to all Shareholders

80. VanCal declared cash dividends in 2004, 2005, 2006 and 2007, and in each case, these dividends were calculated on profits earned in the previous year. VanCal paid

⁵³ *Supra* note 47, at para 220.

those dividends to Calpurnian stockholders. It has been alleged that VanCal refused payment to CLAIMANT pursuant to a March 2005 decision by the VanCal board of directors.⁵⁴ There was an email sent out on 27 May 2005 by Mr Korchnoi, the Managing Director of VanCal at the time stating that:

due to decision and instruction of the board of directors, VanCal cannot pay any sums of money for any reason to foreign shareholder.⁵⁵

However, VanCal rectified this matter by confirming that the email sent was not authorized by the board of directors and no such decision had been made. Further, statements by VanCal showed its willingness to pay any dividends owed to any shareholders. As notified by an email from Dr Swift on behalf of VanCal board to CLAIMANT⁵⁶, VanCal has credited dividends to CLAIMANT's account on VanCal's books. As can be seen, it cannot be alleged that a decision was made not pay foreign shareholders dividends or that such a decision was implemented.

81. CLAIMANT has been provided treatment at least as favourable as the treatment provided to Calpurnian shareholders and thus Article 4(1) of the Calpurnia-Gaul BIT has not been breached.

5.1.1.2 VanCal Provided CLAIMANT Proper Representation on the Board

82. Pursuant to Article 4(2) of the Calpurnia-Gaul BIT, RESPONDENT must allow CLAIMANT managerial treatment to its investment that is no less favourable than any domestic investor. Prior to the dispute, CLAIMANT has always held two of the six seats on VanCal's board of directors. At the 16 November 2005 board meeting, CLAIMANT alleged that proper representation has been denied due to the invalidation of proxies.⁵⁷ The reason for denying the said proxies held by Mr Rindler on behalf of Ms Pescara and Mr Shepherd was because those proxies were certified

⁵⁴ *Supra* note 20, Meeting Minutes of VanCal (2003-2008), VanCal board meeting minutes, 10 March 2005.

⁵⁵ *Id.*, Email from Mr. Korchnoi to Vanguard, 27 March, 2005.

⁵⁶ *Id.*, Email from Mr. Swift (on behalf of VanCal Board), 28 September 2006.

⁵⁷ *Id.*, VanCal board meeting minutes, 16 November 2005.

and approved of for the 11 October 2005 board meeting and not for the 16 November 2005 board meeting. It is a requirement of Calpurnian law that a proxy precisely states the full names of the shareholder, the proxy-holder, and the event for which it is issued. It is due to no fault of VanCal that such proxies were necessarily denied at the 16 November 2005 meeting.⁵⁸

83. Furthermore, proxies are supposedly used because a person cannot attend a meeting on a specific date. It is therefore logical that a new proxy be issued for a new date regardless of whether or not it is a postponement of the event. It was the responsibility of CLAIMANT to issue new proxies for that meeting rather than use proxies that were valid for the 11 October 2005 meeting.

84. Managerial treatment at least as favourable as provided to Calpurnian nationals has been extended to CLAIMANT. It was the carelessness of CLAIMANT that resulted in its underrepresentation at the said meeting. RESPONDENT is therefore not in breach of Article 4(2) of the Calpurnia-Gaul BIT.

5.1.1.3 VanCal Provided all Relevant Information to CLAIMANT

85. It is admitted that the chairman of VanCal's board of directors, Dr Jonathan Swift, instructed Mr Korchnoi not to send any accounts, financial statements or any another information to Gaulois citizens.⁵⁹ However, this is not in breach of any Calpurnian legislation. The said information is all freely available to Calpurnian shareholders at the offices of VanCal.⁶⁰ This information was made available to CLAIMANT up to September 2006.⁶¹

86. Personnel of CLAIMANT such as Ms Pescara were not prevented from entering Calpurnia, in fact, under the Calpurnian visa waiver program,⁶² Ms Pescara is

⁵⁸ *Supra* note 20, Issuance of Proxies for 11 October 2005 meeting.

⁵⁹ Abstract from CLAIMANT's Request for Arbitration, at para 16.

⁶⁰ FDI Moot 2nd Clarifications of Problems, Number 22.

⁶¹ Abstract from RESPONDENT's Reply to Request for Arbitration, at para 15.

⁶² *Supra* note 18, Number 6.

allowed to visit and stay up to 30 days at a time.⁶³ This provides Ms Pescara as well as all other shareholders equal opportunity to information access at VanCal's office.

87. RESPONDENT is under no obligation to require VanCal to provide special treatment to CLAIMANT by sending accounts, financial statements or other information to Gaulois citizens or translating such material into Gaulois.⁶⁴ Ceasing a previous practice does not mean treatment any less favourable to Calpurnian nationals has been given. All shareholders, at any given time, were treated at least as favourably or at times better than domestic shareholders. Article 4(2) of the Calpurnia-Gaul BIT has not been breached by RESPONDENT as CLAIMANT was given equal or better managerial treatment at all times relevant.

5.1.2 Fair and Equitable Treatment has been Provided

88. Fair and equitable treatment, as ruled by the *CMS v Argentina*⁶⁵ tribunal, "is not different from the international law minimum standard and its evolution under customary law."⁶⁶ The definition for discrimination is described in paragraph 75 above. When compared, the threshold for proving fair and equitable treatment is much lower.

89. CLAIMANT has alleged discrimination, a treaty breach which has a higher threshold than fair and equitable treatment. The breach of fair and equitable treatment does not mean such measures are discriminatory in nature.⁶⁷ Even if there is a breach of fair and equitable treatment, there might not necessarily be discrimination.

90. The fair and equitable treatment provision is set out in Article 2(2) of the Calpurnia-Gaul BIT, which provides:

⁶³ *Supra* note 60, Number 45.

⁶⁴ *Supra* note 18, Number 22.

⁶⁵ *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, 44 ILM (2005) 1205.

⁶⁶ *Id.*, at paras 282-284.

⁶⁷ *Supra* note 51, at paras 162-163.

Each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment [...].

91. Fair and equitable treatment standard is only a reflection of the international minimum standard, as contained in customary international law.⁶⁸ It does not stand alone as a separate and additional standard higher than that required by general international law.
92. The fair and equitable treatment standard has been officially interpreted by the Free Trade Commission (hereinafter FTC) in regard to the North America Free Trade Agreement (hereinafter NAFTA).⁶⁹ The FTC states that the fair and equitable treatment standard in the NAFTA⁷⁰ reflects the customary international law minimum standard and does not require treatment in addition to or beyond that which is required by customary international law. (Such standard is also purported by the *Neer Claims*⁷¹ which is still relied by NAFTA.) Further, the FTC determined where there has been a breach of another provision of the NAFTA, or of a separate international agreement, it does not establish that there has been a breach of the fair and equitable treatment stated in NAFTA.⁷²
93. Many NAFTA tribunals have accepted the FTC interpretation.⁷³ Subsequently, BIT practice of the United States⁷⁴ and Canada⁷⁵ has also adopted this interpretation.

⁶⁸ Notes and Comments to the OECD Draft Convention on the Protection of Foreign Property of 1967, 7 ILM (1968); Swiss Foreign Office of 1979 in (1980) 36 *Annuaire Suisse de Droit International* 178; Dissenting Opinion of arbitrator KB Asante to *Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award, 27 June 1990, 4 ICSID Reports 250; 30 ILM (1991) 577, at 639.

⁶⁹ NAFTA Article 1131(2) [FTC is a body with representatives from all three states parties with the power to adopt binding interpretation].

⁷⁰ *Id.*, Article 1105(1) [Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment [...]].

⁷¹ *Neer Claim (U.S. v Mexico)* (1926) 4 RIAA 60.

⁷² FTC Note of Interpretation of 31 July 2001.

⁷³ *Pope & Talbot Inc v Government of Canada*, 26 January 2000; Interim Award, 26 June 2000, 122 ILR (2002) 316; Award, 10 April 2001, 7 ICSID Reports 102, 122 ILE (2002) 352, at paras 17-69; *Mondev International Ltd v United States America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, 42 ILM (2003) 85, 6

94. It is noted that this interpretation is of limited relevance when taken out of NAFTA context. However, tribunals outside of NAFTA are also of the view that the difference between the treaty standard of fair and equitable treatment and that of customary minimum standard “when applied to the specific facts of a case, may well be more apparent than real.”⁷⁶ In both cases of *Occidental v Ecuador*,⁷⁷ and *CMS v Argentina*⁷⁸, the tribunals found that for the purpose of those particular cases, treaty law and customary law in respect of fair and equitable treatment are the same.

95. In the present case, RESPONDENT has at all relevant times treated the CLAIMANT’s investment at an above minimum international law standard. RESPONDENT submits that it has not denied justice [5.1.2.1]; has accorded with legitimate expectations [5.1.2.2]; has not breached contractual obligations [5.1.2.3]; did not cause coercion and harassment [5.1.2.4] and did not act in bad faith [5.1.2.5]. Thus, the BIT standard of fair and equitable treatment has not been breached.

ICSID Reports 192, at paras 100 *et seq.*; *United Parcel Service of America Inc v Government of Canada*, Decision on Tribunal on the Place of Arbitration, 17 October 2001, at para 97; *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/3, Award, 9 January 2003, 18 ICSID Review-FILJ (2003) 195; 6 ICSID Reports 470, at paras 175-178; *Loewen v USA*, ICSID Case No ARB(AF)/98/3, Decision on Jurisdiction, 9 January 2001, 7 ICSID Reports 425; 42 ILM 811 (2003), at paras 124-128; *Waste Management Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, 43 ILM 967 (2004), at paras 90-91; *Methanex Corp v United States of America*, Final Award, 3 August 2005. 44 ILM (2005) 1345 (NAFTA Claim), at paras 17-24; *Thunderbird v Mexico*, Award, 26 January 2006 (NAFTA Claim), at paras 192, 193; *Metalclad Corp v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, 5 ICSID Reports 209; 16 ICSID Review-FILJ 168 (2001), at paras 61-65.

⁷⁴ Chile-United States Free Trade Agreement (2003), Article 10.4; United States-Uruguay Bilateral Investment Treaty (2004), Article 5.

⁷⁵ Agreement Between the Government of Canada and [Country] For the Promotion and Protection of Investments (Canada Model BIT), Article 5.

⁷⁶ *Saluka Investments BV v The Czech Republic*, Decision on Jurisdiction, 7 May 2004; Partial Award, 17 March 2006, at para 291; *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, at para 361; *Supra* note 65, at paras 282-284; *Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 1 July 2004, 12 ICSID Reports 59, at para 190.

⁷⁷ *Id.*, *Occidental v Ecuador*.

⁷⁸ *Supra* note 65.

5.1.2.1 *Denial of Justice*

96. A claim for denial of justice is generally recognised in customary international law.

It is a situation where

[...] a local court or administrative tribunal denies access to its machinery, unreasonably delays a case, commits grave procedural irregularities, or when it decides a case in a manifestly unjust way. A decision that is merely wrong will not rise to the level of a denial of justice.⁷⁹

Procedural Failures and Lack of Due Process

97. There is no denial that fair procedure is an essential part of the fair and equitable treatment standard. However, there has been no lack of due process in the present case as CLAIMANT has alleged. RESPONDENT has rightly exercised its judicial right by dismissing CLAIMANT's application to the Calpurnian Constitutional Court and Ms Pescara's application to the Commercial Court of San Inocente de Irkutsk.

98. In relation to the dismissal of CLAIMANT's application to the Calpurnian Constitutional Court, it must be noted that the police searches of Ms Pescara and Mr Kolowenko's homes were conducted lawfully and in support of national security requirements.⁸⁰ CLAIMANT does not have standing to appear before Calpurnian courts in this matter. Its challenge concerns the unlawfulness of home searches of Ms Pescara and Mr. Kolowenko's private homes. Only they as individuals have standing to bring such a claim before the Calpurnian Constitutional Court.⁸¹ The fact that no warrant was issued is not relevant, the Calpurnian police entered the premises under *periculum in mora*⁸², which means that,

⁷⁹ R Doak Bishop, James Crawford, W. Michael Reisman, *Foreign Investment Disputes – Cases, Materials and Commentary*, The Hague, The Netherlands, Kluwer Law International 2005, at 16.

⁸⁰ *Supra* note 61, at para 17.

⁸¹ *Id.*

⁸² *Supra* note 18, Number 17.

when a State believes its very life and vital interests to be endangered beyond possibility of redress if immediate action is not taken [...].⁸³

99. Allegations of unlawful data collection and espionage are extremely serious as they reflect the threat towards the national security of Calpurnia. Furthermore, with regard to the “anonymous tip” that provided “sufficient details of mobile telecommunications procedures generally and in particular those of VanCal,”⁸⁴ the police had reason to consider the tip credible as details regarding VanCal suggested that the person making the tip had insider information on VanCal.⁸⁵

100. With regard to Ms Pescara’s application to the Commercial Court of San Inocente de Irkoutsk to order VanCal to transfer to her account in Gaul dividends on 1% shareholding, she, as a mere nominee in holding the 1% shareholding, had no beneficial interest. Therefore she lacked standing to bring the action and her application was dismissed.⁸⁶ In the event an application to the Commercial Court was required, CLAIMANT was the proper entity to have applied to that court for the transfer.

5.1.2.2 *Legitimate Expectations*

101. The concept of legitimate expectations is one that is greatly linked with fair and equitable treatment. According to Professor Vasciannie,

if a host country provides an assurance of fair and equitable treatment, it presumable wishes to indicate to the international community that investments within its jurisdiction will be subject to treatment compatible with some of the main expectations of foreign investors.⁸⁷

⁸³ Jenks, C. Wilfred, “Hersch Lauterpacht - The Scholar as Prophet”, 36 British Year Book of International Law, 1960, at 16.

⁸⁴ *Supra* note 18, Number 20.

⁸⁵ *Id.*

⁸⁶ *Supra* note 20, Meeting Minutes of VanCal (2003-2008). Commercial Court of San Inocente de Irkoutsk, 14 June 2006.

⁸⁷ S Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’ (1999) 70 British Year Book of International Law 99, at 99.

Furthermore, it is considered as “a protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties”,⁸⁸ meaning the state need not respect every single expectation that an investor could possibly have.⁸⁹

102. In the present case, the legitimate expectation of CLAIMANT has been upheld. CLAIMANT alleged that dividends have not been paid and that it has a legitimate expectation to have dividends paid to shareholders when company makes a profit. This argument cannot be sustained. CLAIMANT relies on an unauthorized email by Mr Korchnoi in its claim for breach of legitimate expectation. As explained in paragraph 80 of national treatment, VanCal provided in a statement that it is willing to pay all debts owed, in particular, that of dividends.⁹⁰ Crediting on VanCal’s books to CLAIMANT’s account⁹¹ shows that there is no breach in legitimate expectation in terms of the payment of dividends.

Specific representations

103. Although VanCal did initially send CLAIMANT relevant company information, translated into Gaulois, the cessation of this practice does not breach the legitimate expectation standard. The practice of sending and translating information to CLAIMANT was first of all, not required by any legislation,⁹² and secondly, was not a factor that induced the investment. Moreover, all shareholders, including CLAIMANT, must have the knowledge of such information being stored at the VanCal office. Ceasing to continue with such practice could not have made a difference on decisions relating to CLAIMANT’s investment. Such an action does

⁸⁸ *Generation Ukraine Inc v Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240; 44 ILM 404 (2005), at para 20.37.

⁸⁹ Federico Ortino, Audley Sheppard, and Hugo Warner (eds.), *Investment Treaty Law: Current Issues II*, London : British Institute of International and Comparative Law, 2006, at 135.

⁹⁰ *Supra* note 61, at para 16.

⁹¹ *Supra* note 20, VanCal’s Board (Swift) email to CLAIMANT, 28 September 2006.

⁹² *Supra* note 18, Number 22.

not make it impossible for CLAIMANT to continue making sound decisions with the information provided at VanCal's office.

5.1.2.3 Contractual Obligations

104. A simple breach of contract would not trigger a violation of the fair and equitable treatment standard. In *Waste Management v Mexico*⁹³, the tribunal mentioned that:

[...] even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105⁹⁴, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.⁹⁵

The current contract in question is the licensing agreement between CLAIMANT and VanCal. CLAIMANT has alleged that there is a breach of contract due the non-payment of outstanding license fees. However, similar to the circumstances in *Waste Management*, this breach does not amount to a repudiation of the transaction. Other remedies are available to resolve this problem, and VanCal has attempted to do so by giving an assurance and showing the willingness that license fees owed will be paid to CLAIMANT.⁹⁶

5.1.2.4 Coercion and Harassment by State Authorities

105. Arbitral tribunals have also considered within fair and equitable treatment the notion of "freedom from coercion and harassment". Treatment to an investor would be considered unfair "when the individual is subjected coercion and harassment by State

⁹³ *Waste Management v Mexico*, *supra* note 73. [Found that failure to make payment under a concession agreement does not amount to a violation of fair and equitable treatment].

⁹⁴ *Supra* note 69, Article 1105(1) – fair and equitable treatment standard.

⁹⁵ *Waste Management v Mexico*, *supra* note 73, at para 115.

⁹⁶ *Supra* note 61, at para 16.

officials.”⁹⁷ RESPONDENT has neither harassed nor committed coercive acts to cause mistreatment of the investor.

106. First, as explained above, VanCal did not refuse to pay dividends to foreign shareholders. Such an allegation is a simple misunderstanding. Since the unauthorized email was sent by Mr Korchnoi,⁹⁸ the problem had been addressed by statements by VanCal and dividends had been credited to the CLAIMANT’s account⁹⁹. The misunderstanding has been sufficiently corrected in these circumstances.

107. Second, also mentioned above, the private home searches of Ms Pescara and Mr Kolowenko were not unlawful because the police entered under *periculum in mora*,¹⁰⁰ believing the matter at hand was one concerning national security¹⁰¹ and based on concerns for the national security of Calpurnia.

108. Third, the press releases by the Calpurnian Security Directorate stated the factual truth regarding the searches; it is of no fault of RESPONDENT that the members of the public misinterpreted the press releases in a negative light.¹⁰²

109. Fourth, the “coercive and harassing” behaviour of the protestors claimed by Ms Pescara was merely an exercise of the freedom of speech of those citizens on public property.¹⁰³ At no time was there any threat of physical harm towards Ms Pescara, or any trespassing of Ms Pescara’s property.

⁹⁷ *Supra* note 38, at p.242.

⁹⁸ *Supra* note 20, Email from Mr. Korchnoi to Vanguard, 27 March, 2005.

⁹⁹ *Supra* note 20, Email from Mr. Swift (on behalf of VanCal Board), 28 September 2006.

¹⁰⁰ *Supra* note 18, Number 17; See definition at paragraph 98.

¹⁰¹ *Supra* note 61, at para 17.

¹⁰² *Id.*

¹⁰³ *Id.*

110.Fifth, no prior information given to CLAIMANT has been withheld; all relevant information was freely accessible to CLAIMANT at VanCal's offices¹⁰⁴ up until September 2006.¹⁰⁵

111.Lastly, the refusal of Ms Pescara's application for the renewal of her visa was legal and valid. The Calpurnian immigration department has wide discretion in issuing visas. It is of the view that because Ms Pescara was no longer the managing director of VanCal, there is no need for her continuous presence in Calpurnia.¹⁰⁶ Further, she is entitled to stay up to 30 days every visit she makes under the Calpurnian visa waiver program.¹⁰⁷ In the event she needs to keep day-to-day contact with VanCal, there are other forms of communication available to her such as teleconferencing or videoconferencing.

5.1.2.5 *Bad Faith*

112.Many arbitral tribunals are of the view that good faith is inherent in the fair and equitable treatment standard.¹⁰⁸ The cases of *Waste Management v Mexico*¹⁰⁹, *Bayindir v Pakistan*¹¹⁰ and *Saluka v Czech Republic*¹¹¹ took the view that the *bona fide* principle plays a central role in the international law requirement of fair and equitable treatment.

113.Acts that CLAIMANT has alleged were in bad faith include dismissal of domestic court applications and VanCal's failure to comply with the Calpurnian Commercial

¹⁰⁴ *Supra* note 60, Number 22.

¹⁰⁵ *Supra* note 61, at para 15.

¹⁰⁶ *Supra* note 61, at para 18.

¹⁰⁷ *Supra* note 60, Number 45.

¹⁰⁸ *Genin (Alex) & Ors v Republic of Estonia*, *Supra* note 17, at para 241. [Acts that would violate this minimum standard [of fair and equitable treatment] would include...subjective bad faith, at para 367].

¹⁰⁹ *Supra* note 73.

¹¹⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005.

¹¹¹ *Saluka v Czech Republic*, *Supra* note 76.

Code. This argument cannot be sustained. RESPONDENT has acted in *bona fide* manner at all relevant times.

5.2 No Unlawful Interference of Investments

114. RESPONDENT has not unlawfully interfered in CLAIMANT's investment. RESPONDENT submits: direct expropriation [5.2.1]; and indirect expropriation [5.2.2] has not occurred.

115. It is submitted that there has been no unlawful interference of CLAIMANT's investments by RESPONDENT. The underlying test is whether RESPONDENT has expropriated the investment of CLAIMANT because expropriation is the ultimate threshold for:

whether that interference is sufficiently restrictive to support the conclusion that the property has been "taken" from the owner.¹¹²

thus causing unlawful interference.

116. The Calpurnia-Gaul BIT provides in Article 6(1) that:

Investments 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 the effect, either directly or indirectly, equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation") except for a public interest, on a non-discriminatory basis, under due process of law, and against prompt, adequate and effective compensation.

¹¹² *Pope & Talbot Inc v Government of Canada*, *Supra* note 73. [The case provides for what "tantamount to expropriation" is]; *GAMI Investments Inc v United Mexican States*, Final Award, 15 November 2004, 44 ILM (2005) 545 [Cited that the affected property must be impaired to such an extent that it must be seen as "taken"]; *Otis Elevator Co v Islamic Republic of Iran and Bank Mellat*, Award No.304-284-2, 14 Iran-U.S. Cl. Trib. Rep. 283 (Apr. 29, 1987) [Stated that...to be successful...it is necessary for it to prove...that its property rights had been interfered with to such an extent that its use of those rights or the enjoyment of their benefits was substantially affected].

This provision is reflective of customary international law.¹¹³ Expropriation from a level of customary international law level is

the minimum standard for the protection of aliens came to place limitations on the territorial sovereignty of the host state and to protect alien property¹¹⁴

The article effectively gives preconditions for and consequences of expropriation and thus codifies customary international law.

5.2.1 Direct Expropriation

117. There is no direct expropriation in the present case. Accordingly, there has been no unlawful interference with CLAIMANT's property. The tribunal of *TECMED v Mexico*¹¹⁵ described that:

...expropraition means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect.¹¹⁶

118. CLAIMANT has at all times maintained title over all its investment, namely the 30% shares held in VanCal. RESPONDENT has not at any point "deprived"¹¹⁷ or "taken"¹¹⁸ investment belonging to CLAIMANT. No specific decree or legislative acts was present to find direct expropriation.

5.2.2 Indirect Expropriation

119. RESPONDENT has not indirectly expropriated CLAIMANT's investment. RESPONDENT submits that the degree of interference required has not been reached

¹¹³ *Supra* note 38, at para 1.42.

¹¹⁴ Dolzer and Schreuer, *Principle of International Investment Law*. Pg 89.

¹¹⁵ *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, 43 ILM 133 (2004); 10 ICSID Reports 133.

¹¹⁶ *Id.*, at para 161.

¹¹⁷ Robert Jennings & Arthur Watts (eds), *supra* note 3.

¹¹⁸ *Amoco International Finance Corp v Government of the Islamic Republic of Iran et al*, Partial Award No.310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189 (July 14, 1987).

[5.2.2.1]; control of VanCal has not been taken over [5.2.2.2]; management of VanCal has not been interfered [5.2.2.3]; access to information has been freely available [5.2.2.4]; there has been no direct interference [5.2.2.5] and no deprivation of contractual rights [5.2.2.6].

5.2.2.1 *Degree of Interference Required*

120. Indirect expropriation occurs when:

Covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.¹¹⁹

121. Another definition states:

Substantial effects of an intensity that reduces and/or removes the legitimate benefits related with the use of the rights targeted by the measure to an extent that they render their further possession useless.¹²⁰

122. Furthermore, in *Telenor v Hungary*,¹²¹ it was stated that the conduct complained of must have “a major adverse impact on the economic value of the investment”.¹²²

Finally, the tribunal in *TECMED v Mexico*¹²³ observed that:

it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent.¹²⁴

¹¹⁹ *Metalclad Corp v United Mexican States*, *supra* note 73, at para 103.

¹²⁰ *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Final Award, 22 December 2003, at para 69 (original in French: “[...] avoir des effets substantiels d’une intensité certaine qui réduisent et/ou font disparaître les bénéfices légitimement attendus de l’exploitation des droits objets de ladite mesure à un point tel qu’ils rendent la détention de ces droits inutile”).

¹²¹ *Supra* note 36.

¹²² *Id.*, at para 64. [Held that the interference with the investor’s rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment, at para 65].

¹²³ *Supra* note 115.

¹²⁴ *Id.*, at para 116.

123. All of the above definitions emphasize indirect expropriation as interference that takes away value and use of an investor's investments. RESPONDENT has not "taken" the value or use of the investment away from CLAIMANT. Alternatively, even if it is the view of the Tribunal that CLAIMANT's investment has been somehow indirectly expropriated, it was not permanent.

5.2.2.2 Control of VanCal

124. RESPONDENT has not unlawfully interfered with CLAIMANT's control in VanCal. Despite the structural change in equity interest in the company, it remains an independent private corporation. The change in equity interest in no way increased the control SFCDC has over the company. Of the 52%¹²⁵ VanCal shares CLAIMANT has counted as SFCDC's, at least one-half are in fact owned by individual farmers and workers. The SFCDC actually holds these shares pursuant to a Purchase/Agency Agreement only. Voting rights merely stays in the hands of SFCDC while the purchase price of the shares remains unpaid.¹²⁶ These individuals are at all times registered owners of the shares.¹²⁷ The SFCDC does not own majority interest in VanCal's shares for the reason mentioned above.

125. Moreover, SFCDC does not exercise its shareholder's rights to implement government policy.¹²⁸ Simply because the SFCDC is temporarily voting on behalf of these farmers and workers does not entail that the SFCDC have control over their shares. The SFCDC has not taken control over VanCal and there has been no expropriation of CLAIMANT's property.

126. Alternatively, if it is not accepted that the SFCDC does not have majority share ownership in VanCal, it remains that VanCal was at all times a private company and has not been transformed into a state-owned entity as suggested by CLAIMANT. In this sense, it is irrelevant that a government owned entity holds majority share. The

¹²⁵ *Supra* note 59, at para 9.

¹²⁶ *Supra* note 61, at para 8.

¹²⁷ *Supra* note 59, at para 9.

¹²⁸ *Id.*, at para 7.

dispute arises out of CLAIMANT, a minority shareholder, and its displeasure over the exercise of power by majority shareholders.

5.2.2.3 *Management of VanCal*

127. There has been no interference with the management of VanCal which was affected as CLAIMANT's investment.

128. It was observed by the tribunal in *Azurix v Argentina* that:

the management of the company must be sufficiently affected for the tribunal to find that an investment was expropriated.¹²⁹

The removal of Ms Pescara from the board of directors at the 16 November 2005 board meeting was completely justified. The proxies were invalidated at the said meeting due to CLAIMANT's failure to apply for proxies for that particular meeting. The issuance of proxies was for the 11 October 2005 board meeting and not for the 16 November 2005 board meeting.¹³⁰

129. Alternatively, RESPONDENT asserts that CLAIMANT has mistakenly issued the proxy in the name of Mr Shepherd,¹³¹ who on the facts of the case was not a shareholder for CLAIMANT. With regard to the Request to Arbitration by CLAIMANT, it was stated that two shareholder proxies held by Mr Rindler on behalf of the CLAIMANT, was improperly rejected.¹³² It is understood that Ms Pescara herself was a shareholder as she held 1% as trustee for CLAIMANT.¹³³ However, there is no evidence to show that Mr Shepherd was holding shares on behalf the CLAIMANT. If Mr Shepherd was not a shareholder for CLAIMANT, the invalidation of the proxy held by Mr Rindler on the 16 November 2005 board

¹²⁹ *Azurix Corp v The Argentine Republic*, *Supra* note 76, at para 322.

¹³⁰ *Supra* note 20, Meeting Minutes of VanCal (2003-2008). Issuance of Proxies for 11 October 2005 meeting. 5 October 2005.

¹³¹ *Supra* note 60, para 26.

¹³² *Supra* note 59, at para 15.

¹³³ *Id.*, at para 9.

meeting would not have been an invalidation of CLAIMANT's proxy, but rather the proxy held for Mr Shepherd in his personal capacity as a shareholder. Moreover, the vote was made with the majority of the shareholders present and the verdict was unanimous.¹³⁴

130. The minutes of the 16 November 2005 board meeting confirms that Mr Shepherd, on proxy by Mr Rindler, continues to hold one seat on the board on behalf of the CLAIMANT.¹³⁵ Once Mr Shepherd resigned from the VanCal board of directors, two new board representatives for CLAIMANT were elected to replace Ms Pescara and Mr Shepherd.¹³⁶ This once again gives CLAIMANT the management power as prior to Ms Pescara's removal.

131. The above two board representatives for CLAIMANT resigned four months after their appointment and CLAIMANT refused to replace these representatives.¹³⁷ VanCal even extended an invitation to CLAIMANT to withdraw its resignation and to appoint new board representatives. However, CLAIMANT has still not reappointed new directors. It was by its own choice that CLAIMANT ended its participation on VanCal's board of directors on 23 October 2005.

132. Since there has been no managerial effect until the resignation of CLAIMANT's board representatives, no expropriation occurred.

5.2.2.4 Access to Information

133. There has been no denial of access to relevant company information. All information needed for effective management and control of VanCal is available in offices of VanCal as it is available to any other shareholders.¹³⁸ No indirect expropriation has occurred as information was steadily available so long CLAIMANT has a

¹³⁴ *Supra* note 20, Meeting Minutes of VanCal (2003-2008). Shareholders meeting. 16 November 2005.

¹³⁵ *Supra* note 20, Meeting Minutes of VanCal (2003-2008). Shareholders meeting. 16 November 2005.

¹³⁶ *Id.*, VanCal board meeting minutes, 7 June 2005.

¹³⁷ *Id.*, Email from CLAIMANT to VanCal, 23 October 2005.

¹³⁸ *Supra* note 60, para 22.

representative in Calpurnia at all relevant times. Even after Ms Pescara was no longer on the board of directors, Mr Rindler was still present in Calpurnia as he was a proxy for Mr Shepherd¹³⁹ until Mr Shepherd's resignation on 15 April 2006.¹⁴⁰ Soon after, two representatives of CLAIMANT were elected on the board of directors. Once again, this provides CLAIMANT with representatives within Calpurnia to check VanCal's information at its leisure.¹⁴¹

5.2.2.5 Direct Interference

134. It is submitted that RESPONDENT has not acted in a manner that would amount to direct interference of CLAIMANT's investment. The State of Calpurnia has not implemented specific decrees or legislative acts¹⁴² which is necessary to show the "forcible taking" of property by the government.¹⁴³ At no time did the government play a part in directly interfering with CLAIMANT's property.

135. If VanCal as a company directly interfered with CLAIMANT's investment, this is a matter that belongs to the domestic courts of Calpurnia and is not for an international tribunal to decide.¹⁴⁴ This is because VanCal is not government controlled¹⁴⁵ and is in fact a private company.¹⁴⁶

5.2.2.6 Deprivation of Contractual Rights

136. Failure to pay the licence fee for the use of the VANGUARD INTERNATIONAL trade mark may constitute a breach of contractual obligations. However, a simple

¹³⁹ *Supra* note 20, Meeting Minutes of VanCal (2003-2008). Shareholders meeting. 16 November 2005.

¹⁴⁰ *Id.*, Meeting Minutes of VanCal (2003-2008). 15 April 2006.

¹⁴¹ Please see paragraph 85-87 on national treatment for further elaboration.

¹⁴² *Supra* note 61, at para 10.

¹⁴³ *Supra* note 115, at para 161.

¹⁴⁴ Please see paragraph 22 on jurisdiction for further elaboration.

¹⁴⁵ *Supra* note 61, at para 7.

¹⁴⁶ *Id.*, at para 11.

breach of contract does not always amount to expropriation.¹⁴⁷ Many tribunals have found that the determining factor is whether or not the state acts in an official, governmental capacity.¹⁴⁸

137. This breach of contractual obligation for non-payment is not the act of RESPONDENT, but rather the acts of VanCal. Alternatively, if it was found that VanCal was in breach of contract, it is submitted that the breach did not happen under an official governmental capacity,¹⁴⁹ but rather in VanCal's capacity as a commercial entity.

138. In particular, tribunals have held that a failure to pay a debt under a contract does not amount to an expropriation.¹⁵⁰ Here, the failure to pay for licence fees amounts to a failure to pay a debt under a contract. However, VanCal has shown its willingness in a statement that they are willing to pay outstanding licence fees owed to CLAIMANT.¹⁵¹ It is unknown under the laws of Calpurnia if the situation is in fact a breach of contract scenario.

5.3 No Obstruction of Transfer of Returns

139. It is submitted by RESPONDENT that there has been no obstruction of transfer of returns. It is further said that transfer of funds is not an issue in the current case. Article 8 of the Calpurnia-Gaul BIT states:

¹⁴⁷ For detailed discussion, see SM Schwebel, "on Whether the Breach by a State of a Contract with an Alien is a Breach of International Law" in *International law at the Time of its Codification, Essays in Honour of Roberto Ago, III* (1987) 401.

¹⁴⁸ Restatement (Third) of the Foreign Relations Law of the United States, American Law Institute (1986) Vol. 2, at 201: "[...] a state is responsible for such a repudiation or breach only [...] if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons[...]."

¹⁴⁹ *Impregilo S.p.A. v Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, at para 281; *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş v Islamic Republic of Pakistan*, *Supra* note 110, at para 257; *Supra* note 10, at para 315.

¹⁵⁰ *Supra* note 5, at para 161; *Waste Management Inc v United Mexican States*, at *Supra* note 73.

¹⁵¹ *Supra* note 61, at para 16.

1. Each 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. Such payments shall include in particular, though not exclusively:
[...]
(b) returns;
[...].
2. Transfers referred to in paragraph 1 of this Article shall be made without any restriction or delay, in a freely convertible currency and at the prevailing market rate of exchange applicable on the date of transfer in the currency to be transferred.

140. Such a provision is only an issue if CLAIMANT is of the view that the RESPONDENT has prevented the transfer of its returns from its investment into and out of the State of Calpurnia. RESPONDENT has at no time stopped CLAIMANT from transferring its returns out of Calpurnia. In fact, there is no evidence on the facts of the case to show that CLAIMANT have even intended to transfer funds out of Calpurnia.

141. Further, an obstruction of transfer will only occur if RESPONDENT has implied rules to prevent such a transfer. No governmental decree were evident from the facts and thus RESPONDENT submits that transfer of funds have not been obstructed.

142. In such event that CLAIMANT's argument under this claim also suggests a failure to pay dividends, and therefore there has been an obstruction of transfer, RESPONDENT submits that there has been no failure to pay dividends to CLAIMANT. This argument is therefore not applicable.¹⁵²

¹⁵² Please see paragraph 80 on discrimination for further elaboration.

5.4 Sufficient Protection and Security has been Provided

143. Full and constant protection and security has been provided to CLAIMANT. RESPONDENT submits: the police searches [5.4.1]; the allowance of picketers outside of Ms. Pescara's home [5.4.2]; and the press releases by the Calpurnian Security Directorate [5.4.3] did not breach full and constant protection and security.

144. Article 2(2) of the Calpurnia-Gaul BIT provides the full and constant protection and security provision:

Each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party [...] and full and constant protection and security.

145. It is generally accepted that this standard of protection does not equate to an absolute protection against physical or legal infringement.¹⁵³ According to the tribunal in *AAPL v Sri Lanka*, the host state does not have the obligation of strict liability to prevent violations of such standards nor to provide a “guarantee” or “insurance” to the foreign investor against any risks that may occur.¹⁵⁴ Thus, the host state only has to show that it has exercised due diligence and have taken reasonable measures to protect investors and their investments under the given circumstances.

5.4.1 Police Searches

146. As commented by the tribunal in the *ELSI* case,

[...] the provision of “constant protection and security” cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.¹⁵⁵

¹⁵³ *Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award, 27 June 1990, 4 ICSID Reports 250; 30 ILM (1991) 577, at para 45; *Elettronica Sicala S.p.A. (ELSI)* *Supra* note 49, at para 108; *Supra* note 115, at para 177.

¹⁵⁴ *Id.*, *AAPL v Sri Lanka*, at para 45.

¹⁵⁵ *Supra* note 49, at para 108.

147. The Calpurnian police have searched the homes of Ms Pescara and Mr Kolowenko as a result of justified concerns, and under lawful procedures. This was supported by the national security requirements that they were both suspected of unlawful data collection and espionage. Even if Ms Pescara and Mr Kolowenko were to challenge the lawfulness of such searches of their private residences, it is only they who had standing to do so and not CLAIMANT.

5.4.2 Picketing

148. According to the tribunal in *Eureko v Poland*¹⁵⁶, in order to breach the standard of full and constant protection and security, there should be evidence to show that the state was the “author or instigator of the actions in question”.¹⁵⁷ However, in the present case, the protesters near Ms Pescara’s home were merely private citizens who were lawfully expressing their freedom of speech on public property in a non-violent manner.

149. In the case of *TECMED v Mexico*¹⁵⁸, the tribunal observed that “the guarantee of full protection and security is not absolute and does not impose strict liability”. The state organs were considered to have accorded full and constant protection and security because they “have not reacted reasonably [...] to the direct action movements conducted by those who were against the Landfill.”

150. In addition, with reference to the reasoning of the tribunal in *TECMED v Mexico*, there was no evidence in the present case to show that the authorities had not reacted unreasonably either.¹⁵⁹ That is to say, it was reasonable of the Calpurnian police to allow such lawful expressions of the public as there was no basis for the police to intervene, even when they were requested to do so by Ms Pescara.

¹⁵⁶ *Eureko B.V. v Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335.

¹⁵⁷ *Id.*, at para 237.

¹⁵⁸ *Supra* note 115,.

¹⁵⁹ *Id.*

5.4.3 Press Releases

151. The press releases which were issued by the Calpurnian Security Directorate in connection with the searches were completely accurate as to the facts contained therein. RESPONDENT should not bear any responsibility for any misinterpretation by isolated members of the public, as alleged by CLAIMANT.

5.5 No Expropriation

152. Property of CLAIMANT has not been expropriated. RESPONDENT submits: the acts either in isolation or cumulatively did not amount to expropriation [5.5.1]. Alternatively, the alleged “taking” of property did not fulfil the required degree of permanence [5.5.2].

5.5.1 Acts in Isolation and Cumulative Effect

153. CLAIMANT has alleged that the acts and omissions of acts of the RESPONDENT have amounted to expropriation of the CLAIMANT’s investment. RESPONDENT submits that neither direct nor indirect expropriation contrary to Article 6(1) of the Calpurnia-Gaul BIT and international law has been breached.

154. The alleged acts of RESPONDENT whether looked at in isolation or cumulatively¹⁶⁰ do not amount to expropriation. CLAIMANT claims that RESPONDENT has discriminated against CLAIMANT, unlawfully interfered in CLAIMANT’s investment, obstructed the transfer of returns from CLAIMANT’s investment, and failed to provide CLAIMANT and its investment full protection and security. This Memorandum has addressed the conduct and acts of individuals, entities and the government which CLAIMANT believes have contributed to expropriation on its investment. RESPONDENT submits none of these acts amounts to expropriation for reasons mentioned in the above sections.

¹⁶⁰ *Eritrea v Ethiopia*, Partial Award, Loss of Property in Ethiopia Owned by Non-Residents Eritrea’s Claim 24, Eritrea-Ethiopia Claims Commission (2004).

155. It is further submitted that cumulatively, in looking at end results of these alleged acts, property has not been “taken” by State authorities nor has the investor been deprived of property by State authorities.¹⁶¹

5.5.2 Degree of Permanence

156. If this Tribunal does not accept RESPONDENT’s argument that expropriation has not occurred, it is further submitted that the expropriation is not permanent. The *TECMED v Mexico*¹⁶² tribunal took the view that for expropriation to occur in indirect expropriation, the result must be irreversible and permanent.¹⁶³

157. In the present case, the “taking” of property which would have amounted to expropriation from CLAIMANT’s perspective, is rectifiable and has no lasting effect. The credited amount in VanCal’s books,¹⁶⁴ once received by CLAIMANT, would solve the problem of “unpaid dividends” by VanCal. Additionally, if CLAIMANT replaces the board representatives they voluntarily withdrew, the original control CLAIMANT had over VanCal would return to the way it previously was. Such “deprivation”¹⁶⁵ of property from the investor, even if it occurred, cannot amount to expropriation because it is of a temporary and reversible in nature.

¹⁶¹ *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) 488; ICSID Reports 341, para 336.

¹⁶² *Supra* note 115.

¹⁶³ *Id.*, para 116.

¹⁶⁴ *Supra* note 20, Meeting Minutes of VanCal (2003-2008). VanCal Board (Swift) email to CLAIMANT. 28 September 2006.

¹⁶⁵ *Tippetts, Abbott, McCarthy, Stratton, v TAMS-AFFA Consulting Engineers of Iran* (1984) 6 Iran-USCTR 219, 225 [Stated that it “prefers the term ‘deprivation’ to the term ‘taking’].

6 PRAYER FOR RELIEF

158. For the foregoing reasons set out in this Memorandum, the REPUBLIC OF CALPURNIA respectfully requests the Tribunal to find:

1. That it has not discriminated against CLAIMANT.
2. That it has not unlawfully interfered in CLAIMANT's investment.
3. That it has not obstructed the transfer of returns from CLAIMANT's investment.
4. That it has provided CLAIMANT and its investment full protection and security.
5. That it has not expropriated CLAIMANT's investment.
6. That it is not responsible to pay compensation or provide any other remedy for any related damage incurred by CLAIMANT.