

CODE: FLEISCHHAUER

VANGUARD INTERNATIONAL

CLAIMANT,

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA

RESPONDENT.

(ICSID Case No. ARB/X/X)

MEMORANDUM FOR

RESPONDENT

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A. DEFINITIONS AND ABBREVIATIONS

<i>¶(¶)</i>	Paragraph(s)
<i>Arb.</i>	Arbitration
<i>BIT(s)</i>	Bilateral Investment Treaty(ies)
<i>Board</i>	VanCal's Board of Directors
<i>BYIL</i>	British Yearbook of International Law
<i>Calendar</i>	Calendar of Events as provided in the Final Problem
<i>Calpurnia</i>	Republic of Calpurnia
<i>Calpurnia–Flatland BIT</i>	Agreement between the Government of Calpurnia and the Government of Flatland on the Mutual Promotion and Protection of Investments
<i>Calpurnia-Gaul BIT</i>	Agreement between the Government of Calpurnia and the Government of Gaul on the Promotion and Protection of Investment
<i>CCC</i>	Conservative Conscience of Calpurnia
<i>CLAIMANT or Vanguard</i>	Vanguard International
<i>CLA-Abst.</i>	Abstract of CLAIMANT's Request for arbitration
<i>Clarifications-1</i>	FDI Moot First Clarifications, dated 05/12/2008
<i>Clarifications-2</i>	FDI Moot Second Clarifications, dated 09/01/2008
<i>CSD</i>	Calpurnia Security Directorate
<i>ECHR</i>	European Court of Human Rights
<i>FET</i>	Fair and Equitable Treatment Standard
<i>Flatland</i>	State of Flatland
<i>FPS</i>	Full and Constant Protection and Security Standard
<i>Gaul</i>	Federated States of Gaul
<i>ICJ</i>	International Court of Justice
<i>ICSID</i>	International Center for Settlement Investment Disputes
<i>i.e.</i>	Id est (that is)
<i>ILC</i>	International Law Commission
<i>Iran-US Tribunal</i>	Iran-United States Claims Tribunal

<i>Jurisdiction</i>	Decision on Jurisdiction
<i>MFN(C)</i>	Most Favored Nation Treatment Standard (Clause)
<i>NAFTA</i>	North American Free Trade Agreement
<i>No.</i>	Number
<i>OECD</i>	Organization for Economic Co-Operation and Development
<i>p(p)</i>	Page(s)
<i>RESP-Abst.</i>	Abstract of RESPONDENT's Reply to Request for arbitration
<i>SFCDC</i>	State Fund for Commerce and Development in Calpurnia
<i>UNCITRAL</i>	United Nations Commission on International Trade Law
<i>UNCTAD</i>	United Nations Conference on Trade and Development
<i>UNRIAA</i>	United Nations Reports on International Arbitral Awards
<i>US</i>	United States of America

B. TABLE OF AUTHORITIES

STATUTES AND TREATIES

<i>Argentina-France BIT</i>	Agreement on the reciprocal promotion and protection of investments between Argentina and France, 1991.
<i>Calpurnia-Flatland BIT or the "BIT"</i>	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
<i>Calpurnia-Gaul BIT</i>	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
<i>ICJ Statute</i>	Statute of the International Court of Justice
<i>ICSID Convention</i>	Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, 1965.

Jordan-Bahrain BIT Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the State of Bahrain on the Mutual Promotion and Protection of Investments, 2000.

Vienna Convention Vienna Convention on the Law of Treaties, 1969.

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AAPL Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No.ARB/87/3, Award, 1990.

Ambatielos The Ambatielos Case (merits: obligation to arbitrate), Judgement, I.C.J. Reports 1953.

American Nationals in Morocco Case Concerning Rights of Nationals of the United States of America in Morocco (France v. USA), Judgement, I.C.J. 1952.

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Anglo-Iranian case Anglo-Iranian Oil Co. case (Preliminary objection). Judgment. 1952, I.C.J. Reports 1952, p. 110.

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Bershader Vladimir Berschader and Moise Berschader v. Russia. Arbitration Institute of the Stockholm Chamber of Commerce. Case No. 080/2004. Award. 2006.

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<i>Genin</i>	Alex Genin et.al. v. Estonia, <i>ICSID Case No.ARB/99/2, Award, 2001.</i>
<i>International Technical Products</i>	International Technical Products v. Iran, <i>Iran-US Tribunal</i> , 1985.
<i>James</i>	James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) 9, 1986.
<i>LG&E</i>	LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine, ICSID Case No.ARB/02/1, Decision on Liability, 2006.
<i>Maffezini</i>	Emilio Agustín Maffezini v. Spain, ICSID, Case No.ARB/97/7, Decision on objections to Jurisdiction, 2000.
<i>Metalclad</i>	Metalclad Corp. v. Mexico, ICSID Case No.ARB/96/3 Award, 2000.
<i>Neer</i>	L. F. H. Neer and Pauline Neer (U.S.A.) v. Mexico, IV RIAA 60-66, 1926.
<i>Noble</i>	Noble Ventures, Inc. v. Romania, ICSID Case No.ARB/01/11, 2005.
<i>North American Dredging</i>	North American Dredging Company of Texas (U.S.A.) v. Mexico, IV RIAA 26-35, 1926.
<i>OEPC</i>	Occidental Exploration and Production Company v. The Republic of Ecuador LCIA Case No.UN3467 (US/Ecuador BIT), 2004.
<i>Otis</i>	Otis Elevator Company v. Iran, Iran-US Tribunal, Award No.304-284-3, 1987.
<i>PanAmerican</i>	Pan American Energy LLC and BP Argentina Exploration Company v. Argentine ICSID Case No.ARB/03/13, Decision on Preliminary Objections, 2006.
<i>Plama</i>	Plama Consortium Ltd. v. Bulgaria, ICSID Case No.ARB/03/24, Jurisdiction of 2005.
<i>Pope&Talbot</i>	Pope & Talbot Inc v Canada, Interim Award, 2000, available at < http://www.naftalaw.org >

<i>Salini</i>	Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan, ICSID Case No.ARB/02/13, Jurisdiction, 2004.
<i>Santa Elena</i>	Compañía del Desarrollo de Santa Elena, SA v Costa Rica, ICSID Case No.ARB/96/1, Award, 2000.
<i>Schering</i>	Schering Corporation v. Iran, Iran-US Tribunal, Award, 1994.
<i>SD Myers</i>	SD Myers Inc v Canada, Final Award and Dissenting Opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 251, 2002.
<i>Sea-Land</i>	Sea-Land v. Iran, Iran – US Claims Tribunal, Award, 1984.
<i>SGS v. Pakistan</i>	SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan ICSID Case No.ARB/01/13, Jurisdiction, 2003.
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<i>Siemens</i>	Siemens A.G. v. Argentina, ICSID Case No.ARB/02/8, Jurisdiction, 2004.
<i>Starrett</i>	Starrett Housing Corporation v. Iran, Iran-US Tribunal, Interlocutory Award, 1983.
<i>Suez</i>	Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentina, ICSID Case No.ARB/03/17, Jurisdiction, 2006.
<i>TECMED</i>	Técnicas Medioambientales TECMED v. Mexico, ICSID Case No.ARB(AF)/00/02, Award, 2003.
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<i>Tippetts</i>	Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, <i>Iran-US Tribunal</i> , Award, 1984.
<i>Vivendi</i>	Compañía de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine, Decision on Annulment, ICSID Case No.ARB/97/3,2000.
<i>Waste Management</i>	Waste Management Inc. v. Mexico, ICSID Case No.ARB(AF)/00/3, Award, 2000.
<i>Wena</i>	Wena Hotels Ltd. v. Egypt, ICSIDCase No.ARB/98/4, Award, 2000.

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- Sacerdoti* G.SACERDOTI, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Collected Courses (1997).
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- Townsend* G. TOWNSEND, *State Responsibility for acts of de facto agents*, Arizona Journal of International Law, (1997).
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C. CHRONOLOGY OF EVENTS

1997 Vanguard International invested in Calpurnia in a 50% equity in a joint venture named VanCal. Vanguard's ownership of VanCal later raised to 86%.

2003 In late 2003, senior management appointed by CLAIMANT in VanCal left the country.

In December, Calpurnian authorities initiated an investigation on espionage activities by VanCal and certain Gaulois nationals, including members of VanCal's personnel provided by CLAIMANT, which led to the seizure of unlicensed equipment, portable computers and hidden stolen data left behind by CLAIMANT's personnel. Later, this was a subject of a claim by CLAIMANT before local courts.

2004 On different occasions, small groups of local demonstrators gathered near Ms. Pescara's former home. No damages or other incidents were caused, although police authorities remained alert.

Having forfeited her resident status, Calpurnian immigration authorities rejected Ms. Pescara's application for a business visa, as she was eligible for the Calpurnian visa waiver program.

On November 15th, Ms. Pescara resigned to her position as Managing Director of VanCal.

2005 On March 10th, following VanCal's auditors' recommendation, the Board decided to set up a reserve fund for severance payments. None of the directors appointed by CLAIMANT attended this meeting.

Following heated arguments within several corporate meetings, dividends were declared on April 15th, 2005 and later distributed among the shareholders. CLAIMANT later attempted to revise the corporate policies regarding payment mechanisms.

On November 16th, Mr. Rindler irregularly attempted to appear at a corporate meeting on behalf of two of the members of the Board with invalid proxies.

2006 October 23rd, CLAIMANT informed it would withdraw the members it appointed to the Board disregarding VanCal's request to maintain them.

2007 February 5th, CLAIMANT sent a letter to Mr. Poe claiming *de facto* expropriation, wrongfully pursuing to notify the State. Mr. Poe expressed that the SFCDC had no authority to resolve CLAIMANT's request.

D. PRELIMINARY STATEMENT: The Real Purpose of CLAIMANT

1. Vanguard has filed this claim alleging that Calpurnia failed to comply with its international obligations under Calpurnia-Gaul BIT to the detriment of CLAIMANT's investment. However, CLAIMANT's assertions on the facts are either false, or misleadingly twisted.
2. For reasons unknown to RESPONDENT, CLAIMANT has engaged in a divestment strategy regarding its investment in Calpurnia. It may be more than a coincidence that this strategy was implemented at a time when links between CLAIMANT and certain espionage activities started coming to light, and investigation efforts by Calpurnian authorities started shedding some results, but the fact remains that, in the few years before commencement of the ICSID proceedings, CLAIMANT sold, in terms unknown to this representation, its controlling interest in VanCal, and ceased exercising any managerial or governance role in the company. Two facts are strikingly clear in unthreading the real motives underlying CLAIMANT's current procedural stance:
 - CLAIMANT argues that RESPONDENT's actions expropriated its investment, as, it claims, they deprived its residual 31% direct and indirect holdings in VanCal of its expected value.¹ No indication exists in the record as to any such loss of value, but, more importantly, CLAIMANT fails to comment on the terms and circumstances under which, in a short period of time, it realized the majority of its interest in VanCal, amounting to an aggregate 55% of the capital stock of the company.² If, as CLAIMANT contends, RESPONDENT's actions amounted to an indirect expropriation, certainly the Tribunal would be hearing from CLAIMANT about how some alleged measure forced it to reduce its interest from 86% to 31%. Surprisingly enough, no such argument is to be found in the record.
 - When the enquiry into the espionage activities developed by Gaul interests in Calpurnia eventually led to the seizure of unlicensed telecommunications, data collection equipment and hidden stolen data found in the possession of CLAIMANT's expatriate personnel, the two individuals involved rapidly fled the country, although no charges had been filed against them. One of them randomly

¹ CLA-Abst., ¶19.

² CLA-Abst., ¶9.

returned to Calpurnia in the months that followed, and later resigned from its managerial position within VanCal,³ and the other simply vanished into the night, and failed to appear again at work, not to be seen or heard of ever since.⁴ CLAIMANT has unsuccessfully maintained before Calpurnian courts that it had an interest in declaring the search procedures declared unlawful,⁵ but it did not even attempt an explanation as to what was the purpose of holding or using that unlicensed equipment or stolen data, and, accordingly, no claim was ever made for the return of the seized material.

3. RESPONDENT hereby submits that it has not interfered with CLAIMANT's investment and that CLAIMANT's arguments have no legal or factual grounds. Further, the present claim entails an abuse of process and therefore should be dismissed.
4. CLAIMANT's divestment strategy reached its limits due to the reduced size and liquidity of the Calpurnian market, and this is the real cause of the present claim. CLAIMANT's purpose is to complete its divestment by achieving a damages award, which would abusively force Calpurnia to pay the selling price of CLAIMANT's remaining equity in VanCal. This is a bold abuse of procedure: ICSID cannot be used by investors as a mechanism to be compensated for abandoning investments.
5. Furthermore, the facts of this case only reveal, if anything, a shareholder's disagreement with the decisions taken by the new controlling shareholders. This kind of dispute cannot be settled through ICSID proceedings.
6. For the above reasons, the present claim has to be dismissed.

E. STATEMENT OF FACTS

E.1. Vanguard's Investment

7. In 1997 CLAIMANT invested in the Republic of Calpurnia by participating in the creation of VanCal, a joint venture between CLAIMANT and a number of local

³ Calendar, 11/15/2004.

⁴ CLA-Abst., ¶17; Clarifications-2, Nos. 7, 8, 48.

⁵ CLA-Abst., ¶17; RESP-Abst., ¶17.

shareholders, including SFCDC.⁶ CLAIMANT alleges to hold, in addition to its equity participation in VanCal, certain contractual relationships with VanCal.⁷

8. At the time of incorporation, CLAIMANT held a 50% interest in VanCal.⁸ The rest of the stock was divided among several Calpurnian individuals which, presumably, had no knowledge regarding the telecommunications industry, and whose purpose in investing was not to achieve control of the company (for which they had no expertise), but simply to acquire into a passive investment.
9. Encouraged by the pro-investment environment in Calpurnia, CLAIMANT later increased its controlling interest in VanCal up to 86%.⁹

E.2. CLAIMANT's Divestment Strategy

10. For reasons still unknown to RESPONDENT, and for which no explanation is provided by CLAIMANT, CLAIMANT engaged, at some point before 2003, in a strategy leading to the liquidation of its investments in Calpurnia.
11. This divestment strategy was designed and implemented absent any change in the political, business or legal environment in Calpurnia, except the fact that, as the record shows, Calpurnian authorities had initiated an investigation on some of CLAIMANT's personnel's involvement with a Gaulois espionage network. As an example of the evidence pointing to this undisclosed strategy, we mention:
 - CLAIMANT's sale of its controlling interest in VanCal occurred before any of the events narrated by CLAIMANT in its statement of claim and caused CLAIMANT's 86% interest in VanCal to be reduced, after a series of sales which terms remain undisclosed,¹⁰ to only 30%, plus an additional 1% allegedly held by a Ms. Pescara for the account and benefit of CLAIMANT.¹¹
 - CLAIMANT's senior expatriate management of VanCal resigned to their management position in VanCal and left the country in late 2003, when their links to

⁶ CLA-Abst., ¶¶8-9; Clarifications-2, No.35.

⁷ CLA-Abst., ¶9.

⁸ CLA-Abst., ¶9.

⁹ CLA-Abst., ¶9.

¹⁰ CLA-Abst., ¶9; Clarifications-2, No.2.

¹¹ CLA-Abst., ¶9.

espionage activities in Calpurnia started being investigated.¹² As a side comment, we note that their fleeing the country took place before any of the demonstrations criticized by CLAIMANT.¹³

- The directors appointed by CLAIMANT to the Board ceased attending board meetings regularly, either by person or proxy.¹⁴
- CLAIMANT willingly failed to appoint directors to VanCal's Board despite VanCal's suggestions to reconsider its decision, in practice abandoning its investment in the hands of CLAIMANT's local partners.¹⁵

12. The consequences of this strategy explain certain aspects of the case that CLAIMANT has conveniently covered in its narrative of the facts.
13. CLAIMANT is a key international player who has the entrepreneurial experience and knowledge to establish and manage a telecommunications company.¹⁶ Its divestment strategy left VanCal in the hands of underprepared local management and an otherwise unlikely controlling local majority. None of these management and shareholders had the requisite knowledge or experience to handle the everyday management of a large company as VanCal. Unsurprisingly, the resulting fuzzy logic underlying governance issues was followed by a thread of contradictory ideas and communications by individual members of management bodies.
14. As will be further explained [see §E.4.1], the decisions taken by VanCal which CLAIMANT characterizes as expropriatory were in fact a consequence of CLAIMANT's own actions.

E.3. ICSID Remedy as an Exit Mechanism

15. Contrary to CLAIMANT's allegations,¹⁷ when the CCC obtained a majority in the Parliament in legitimately and validly held elections, Calpurnian investment policies remained unchanged. A different composition of the Parliament can only lead to a

¹² See CLA-Abst., ¶17 RESP-Abst., ¶17; Clarifications-2, Nos. 7, 8; Calendar, 12/08/2003, 06/04/2004 and 07/17/2004.

¹³ See §E.6 for a further discussion of this matter.

¹⁴ Calendar, 02/17/2005 and 11/16/2005.

¹⁵ Calendar, 10/23/2006 and 11/11/2006.

¹⁶ CLA-Abst., ¶7.

¹⁷ CLA-Abst., ¶¶12, 17.

different investment policy if the activity within that Parliament in fact amends or revises investment legislation or any regulations dealing with investment or with the industries in which such investment is made. The record, however, shows that no changes in legislation or regulation occurred as a consequence of the new parliamentary majority. The legal framework under which CLAIMANT invested in Calpurnia remains unchanged to this date, and is as open to foreign investment now as it was when Calpurnia entered into Calpurnia-Gaul BIT. If a dispute exists at all regarding CLAIMANT's investment in VanCal, it is a mere shareholder dispute, and should be settled under the laws governing corporate relationships between shareholders, including any applicable dispute resolution provisions. CLAIMANT's attempt to transform its grievances into an investment dispute has the purpose or effect of leading the Tribunal into error.

16. As a careful analysis of CLAIMANT's conduct in the last few years will show, CLAIMANT, having found itself in a difficult position to realize its residual assets in Calpurnia's small and illiquid market,¹⁸ is abusing its foreign investor status to forge an exit strategy through the ICSID mechanism. Allowing this would transform an otherwise valuable channel for resolution of legitimate investment disputes into a put option for CLAIMANT's remaining shares in VanCal, which would be untenable. The Tribunal should be wary of these condemnable tactics, and should accordingly decide that CLAIMANT's submissions lack any credit both on the issues of jurisdiction and merits.

E.4. VanCal's Internal Disputes

17. CLAIMANT has alleged that certain decisions taken within VanCal amount to an unlawful interference by the State of Calpurnia with its investment.¹⁹ These allegations are groundless, because the decisions taken by or within VanCal are but internal disputes between shareholders or between a shareholder and the company it has chosen to cease to control, to which RESPONDENT is not privy, and which involve decisions taken and arguments held by private persons, behind private doors, in which RESPONDENT did not partake.

¹⁸ Clarifications-1, No.2.

¹⁹ CLA-Abst, ¶13.

18. CLAIMANT basically supports these allegations on three decisions taken by VanCal: (i) the alleged suspension of the payment of dividends by the Board; (ii) the decision taken by the majority shareholders to remove Ms. Pescara from the Board; and (iii) the decision not to have VanCal information translated and sent to CLAIMANT in Gaul.²⁰ We shall deal with each such allegation separately.
19. Before entering into detailed analysis, it must be noted that the “decisions” challenged by CLAIMANT are either personal statements of members of the Board, or lawful decisions taken in CLAIMANT’s willful absence and not to any governmental action.

E.4.1. The Issue of Payments

20. CLAIMANT alleges that VanCal refused to pay dividends to CLAIMANT “*pursuant to a March 2005 decision by the VanCal board of directors.*”²¹ This allegation is false. No such decision has been taken by the Board. The record contains nothing but statements of particular individuals in management suggesting the possibility, but there is no corporate decision whatsoever.
21. Although RESPONDENT does not have inside knowledge of VanCal’s inner workings, the record shows that VanCal had a particular payment mechanism,²² which apparently had been used since before the change in management resulting from Vanguard’s divestment strategy.
22. The change in management happened in late 2004.²³ Under the new management, the first dividends were declared on 2005.²⁴ Surprisingly, according to the record, the first formal contact that CLAIMANT had with VanCal’s new management took place six months later, through a letter dated May 21st, 2005, in which it requested to change the payment mechanism it itself had established in VanCal when in control. The prior payment mechanism clearly did not include separate bank deposits, because CLAIMANT’s letter specifically instructed the Board to make such payments by depositing it in a separate bank account to be opened in the name of CLAIMANT.²⁵

²⁰ CLA-Abst., ¶¶13,14,15 and 16.

²¹ CLA-Abst., ¶14.

²² Calendar,05/21/2005.

²³ Calendar,10/14/2004.

²⁴ Calendar,04/15/2005.

²⁵ Calendar,05/21/2005.

23. For reasons unknown to RESPONDENT, the Board did not follow CLAIMANT's request.
24. It must be noted that the discussion that took place during 2005 related to the mechanism through which payments had to be made henceforth, but it was never disputed that dividends belonged to CLAIMANT.²⁶ The way in which payments were made was part of the corporate relations between a parent company and its affiliate. The host State has nothing to do with this relation.²⁷ The record does not show whether Vanguard, either before or after relinquishing its control, initiated any claim against VanCal regarding any payment.
25. As stated above, due to CLAIMANT's divestment, VanCal's management logic became fuzzy. An early and deep understanding of these facts helps clarifying the contradictory communications that followed CLAIMANT's letter.
26. The email sent by Mr. Korchnoi on May 27th, 2005, which wrongly informed CLAIMANT of a nonexistent "*decision and instruction of the board of directors*,"²⁸ was unauthorized, and constitutes a personal statement for which only he is responsible. Mr. Korchnoi himself later recognized that no decision had been taken by the Board on how to handle CLAIMANT's request.²⁹
27. Furthermore, CLAIMANT did not consider Korchnoi's email as a valid or binding decision, and, on June 5th, 2005, CLAIMANT wrote an email to VanCal requesting the Board to communicate whether a decision as Korchnoi informed about existed.³⁰ Nevertheless, contradicting its own actions, CLAIMANT now alleges that Korchnoi's email informed a "decision" to suspend payment. This constitutes an untenable inconsistency in Vanguard's claim.
28. The above demonstrates that CLAIMANT is alleging, as an international wrongful act, what in reality is but a mere internal shareholder dispute, and purports to attribute to the State of California actions of private employees who, according to CLAIMANT's own communications, did not even have the capacity to validly represent the corporation in

²⁶ CLA-Abst., ¶14.

²⁷ North American Dredging, p.34.

²⁸ Calendar, 05/27/2005.

²⁹ Calendar, 04/22/2007.

³⁰ Calendar, 06/05/2005.

which CLAIMANT invested. This type of issues should be settled in the local courts of Calpurnia and not in an ICSID proceeding.

E.4.2. Changes in the Composition of the Board of Directors

29. CLAIMANT alleges that the removal of Ms. Pescara from the Board implied a detriment to its investment. This is a misleading interpretation of the facts. The simple truth is that, on November 16th, 2005, a properly constituted shareholders' meeting adopted, with all requisite majorities, the decision to remove Ms. Pescara from the Board, all of which happened in accordance with applicable law.³¹ CLAIMANT is cunningly silent on the fact that, as the record shows, Ms. Pescara's links with an espionage network were under investigation, and she had fled the country almost a year before.³²
30. CLAIMANT did not even attempt to appear, by proxy or otherwise, at that shareholders' meeting. CLAIMANT's biased version of the events surrounding the decision to vote Ms. Pescara off the Board fails to mention that the proxies presented by Mr. Rindler, in an attempt to participate in the shareholders' meeting, had been issued by the directors appointed by CLAIMANT in VanCal, but not by CLAIMANT,³³ who could, and probably would have been present, had it not willfully abandoned its investment in VanCal.
31. Furthermore, the decision to vote Ms. Pescara off the Board did not affect CLAIMANT's right to appoint new directors.³⁴ This course of action further demonstrates CLAIMANT's lack of interest in its residual investment in Calpurnia, and that this claim is brought in an abuse of process.

E.4.3. Translation and Delivery of Corporate Information.

32. Calpurnian corporate law prescribes that shareholders have the right to inspect the Company's information at its premises. There is no provision in the Law or in VanCal

³¹ Clarifications-1, No.3.

³² Calendar, 11/16/2005, 12/8/2003, 06/04/2004, 07/17/2004.

³³ Clarifications-2, No.26.

³⁴ Calendar, 06/07/2006.

bylaws that obliges the Company to send translated information to the private domicile of any shareholder.³⁵

33. CLAIMANT, while on control, caused VanCal to translate and send to Gaul all the corporate and financial information at VanCal's cost.³⁶ This constituted an abusive practice, since CLAIMANT was the only foreign shareholder in VanCal.
34. Maintaining such practice meant a discrimination against local shareholders, who had to bear the costs thereof.³⁷
35. When CLAIMANT relinquished control over VanCal, this abusive practice became untenable and was abolished.³⁸ Furthermore, the decision was not directed against CLAIMANT, since it affected every single shareholder.³⁹
36. Finally, CLAIMANT is not entitled to any special privilege regarding the dissemination of information,⁴⁰ and it continued to have access to such information.⁴¹

E.5. Enquiry Into Espionage Activities

37. CLAIMANT alleges that the investigation initiated against VanCal and its employees in Calpurnia implied an unlawful interference with its investment.⁴² This is a false and misleading interpretation of the facts.
38. RESPONDENT submits that the probes conducted cannot be considered as an unlawful interference since they were conducted lawfully and in furtherance of national security concerns.⁴³
39. In December 2003, Calpurnian authorities initiated an investigation on espionage activities by certain Gaulois nationals, including VanCal personnel provided by CLAIMANT, which led to the seizure of unlicensed equipment, portable computers and hidden stolen data left behind by CLAIMANT's personnel.⁴⁴

³⁵ Calendar 04/22/2007; Clarifications-1, No.22.

³⁶ CLA-Abst., ¶16.

³⁷ Clarifications-2, No.22.

³⁸ Calendar, 04/22/2007.

³⁹ Clarifications-2, No.22.

⁴⁰ RESP-Abst., ¶15.

⁴¹ RESP-Abst., ¶15; Clarifications-1, No.10.

⁴² CLA-Abst., ¶17.

⁴³ RESP-Abst., ¶17.

⁴⁴ CLA-Abst., ¶17; Clarifications-1, No.11.

40. As was already stated [see §D], as soon as the investigation begun to involve Vanguard employees, they abandoned their positions in VanCal and fled the country.⁴⁵
41. Later, CLAIMANT filed a claim before local courts challenging the police's right of access to the locations where the materials were seized,⁴⁶ but did not explain what that material was for or what it was doing in the homes of its employees, who suddenly fled the country. This claim was dismissed because only Ms. Pescara and Mr. Kolowenko had standing to challenge the searches, and they did not exercise such right.⁴⁷
42. The police acted as any security agency would when faced with a credible tip that describes in detail the way in which the security interests of the state are being infringed.⁴⁸ The reasons or circumstances that led CLAIMANT's employees to flee the country remain uncertain, and CLAIMANT's explanations of the facts are biased, since nothing on the record indicates that any significant number of foreigners left Calpurnia due to the so-called "*climate of hostility*".⁴⁹

E.6. Public Demonstrations Near Ms. Pescara's Former Home

43. CLAIMANT alleges that some pacific demonstration carried out during 2004 near Ms. Pescara's former residence, somehow implies an interference with its investment.⁵⁰ These allegations are false.
44. At the time the demonstrations were carried out in 2004, Ms. Pescara was no longer living in Calpurnia, since she had fled the country in late 2003.⁵¹
45. CLAIMANT alleges that the press releases issued by the CSD somehow led to the public demonstrations in front of Ms. Pescara's former home.⁵²
46. The link between the issuance of the press releases and the demonstrations is far from clear. The record shows that the press releases were factually accurate, and were issued

⁴⁵ CLA-Abst., ¶17.

⁴⁶ CLA-Abst., ¶17.

⁴⁷ CLA-Abst., ¶17, RESP-Abst., ¶17.

⁴⁸ Clarifications-1, No.20.

⁴⁹ Clarifications-2, No.50.

⁵⁰ CLA-Abst., ¶17.

⁵¹ CLA-Abst., ¶17.

⁵² CLA-Abst., ¶17.

in a very objective language.⁵³ Therefore, the misinterpretation that a reduced group of the public may have reached cannot be attributed to Calpurnia under any circumstances.

47. On the other hand the demonstrations in front of Ms. Pescara's former home were pacific and no damages whatsoever were caused.
48. Contrary to CLAIMANT's allegations, the police remained alert and acted in a proper manner. Ms. Pescara at some point requested to have the protesters removed,⁵⁴ but the police refused to do so, as they had caused no damage and that they were peacefully exercising their freedom of speech.⁵⁵

E.7. Ms. Pescara's Immigration Status

49. CLAIMANT alleges that the decision of Calpurnian immigration authorities to deny a business visa to Ms. Pescara posed an interference with its investment.⁵⁶
50. Ms. Pescara's request for a renewal was filed in 2004. As already mentioned, Ms. Pescara fled the country alongside other Vanguard employees in 2003, at the time when investigations on them began to shed some results.
51. Her fleeing of the country meant the forfeiture of her residency in Calpurnia. Accordingly, because she was no longer living in Calpurnia, the immigration authorities refused to renew her business visa. Calpurnian Law confers wide discretion to the immigration authorities regarding the issuance of visas.⁵⁷
52. Furthermore, although the immigration authorities refused to issue a business visa, they never forbid Ms. Pescara from entering and remaining in Calpurnia. CLAIMANT acknowledges that Ms. Pescara was allowed to enter the country after her visa was rejected⁵⁸ and, furthermore, immigration authorities told Ms. Pescara that she did not need a business visa to carry her duties in VanCal.⁵⁹
53. Finally, the rejection did not impair Ms. Pescara's possibilities to fulfill her duties, since she could adequately perform her tasks in VanCal under the Calpurnian visa waiver

⁵³ RESP-Abst., ¶17.

⁵⁴ CLA-Abst., ¶17.

⁵⁵ RESP-Abst., ¶17.

⁵⁶ CLA-Abst., ¶18.

⁵⁷ RESP-Abst., ¶18.

⁵⁸ CLA-Abst., ¶17.

⁵⁹ RESP-Abst., ¶18; CLA-Abst., ¶18.

program.⁶⁰ Under said program Ms. Pescara is allowed to perform “*short term business visits*” for up to thirty days,⁶¹ which is a reasonable time to conduct the duties of a corporate director.

F. THE REPUBLIC OF CALPURNIA IS NOT A PROPER PARTY TO THE DISPUTE

54. CLAIMANT bears the double burden of proving that (a) a breach of international obligations has occurred, and that (b) such breach is attributable to Calpurnia. These requirements stem from international customary law, which has been codified in the ILC Draft Articles. Article 2 of the ILC Articles states:

There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

55. CLAIMANT purports (i) to attribute Calpurnia responsibility for acts performed by members of VanCal’s Board of Directors,⁶² and (ii) that certain conducts by Calpurnian State organs are in breach of its international obligations.⁶³ As will be explained below, none of those allegations has any merit.

F.1. None of the Actions by Private Individuals Can Be Attributed to RESPONDENT.

56. CLAIMANT has alleged that RESPONDENT has breached several international obligations through the actions of the SFCDC.⁶⁴ However, a careful perusal will show that, in fact, the alleged actions were opinions or statements of individuals not representing the SFCDC [see §E.4].
57. Customary international law has established, as a general principle, that the conduct of private persons or entities is not attributable to the State.⁶⁵

⁶⁰ CLA-Abst., ¶18; RESP-Abst., ¶18.

⁶¹ Clarifications-1, No.6; Clarifications-2, No.45.

⁶² CLA-Abst., ¶13.

⁶³ CLA-Abst., ¶¶17, 18.

⁶⁴ CLA-Abst., ¶13.

⁶⁵ ILC Commentary, Art.8, Cmt. 1.

58. The SFCDC is a not an organ of the State but a private entity. If the SFCDC were a public entity it would not be predicated that it was “owned”⁶⁶ by RESPONDENT but, instead, that it is a part of the State. It follows, then, that its actions, as is also the case with the actions of individual persons, will not in principle be attributable to RESPONDENT.
59. International law has established limited exceptions to this principle, which require certain elements to be present in the conduct of an entity in order to attribute its consequences to the State. These requirements have been condensed in the ILC Articles which Articles 5 and 8 prescribe that the conduct of a private entity can be attributed to the State whenever (1) it exercises elements of governmental authority and is empowered by law to do it,⁶⁷ or (2) it acts on the instructions of or under the direction or control of that State.⁶⁸ No action by private persons alleged by CLAIMANT falls within any of these categories.
60. As to the first exception, no law or decree exists which empowers any of these private persons to exercise elements of governmental authority.
61. Regarding the second exception, nothing in the record shows an exercise of control over, or, even, instructions to, the SFCDC or the individual members of VanCal’s Board by any Calpurnian authority, and thus the actions cannot be attributed to Calpurnia. On a side note, the ILC commentary on this Article refers generally to military activities and not to the inner works of a corporate entity.⁶⁹
62. In addition, the wording of Art.8 is clear in establishing that the person or entity must be in fact acting on instructions or control by the State. This means that the action under review must have a factual public character which is essential for attribution⁷⁰ and which is missing in the instant case.
63. In the case at hand, the fact that the members of the Board of the SFCDC are appointed by Ministers of Calpurnia does not mean that they act on behalf of Calpurnia. SFCDC Board members do not act or stand for Calpurnia through delegated authority. Besides, none of the acts imputed to the SFCDC bear a public character, as, as a mere

⁶⁶ CLA-Abst.,¶10. *See also Schering*, ¶361, *Otis*, ¶283, and *Eastman*, ¶153.

⁶⁷ ILC Articles, Art.5.

⁶⁸ ILC Articles, Art.8.

⁶⁹ ILC Commentary, Art.8.

⁷⁰ Townsend, p.639. Cfr. Townsend, p.635.

shareholder, it only appeared and voted at corporate meetings in a fashion consistent with the commercial nature of its investment.

64. As stated above [see §E.4], CLAIMANT complains about three different incidents occurred after its relinquishment of management, none of which entails RESPONDENT's responsibility. Indeed, contrary to CLAIMANT's allegations, no decision to suspend payments ever existed, and as for the decision to remove Ms. Pescara, and the decision that adjusted VanCal's information access to Calpurnian law, both were taken by VanCal's organs and are not attributable to RESPONDENT.
65. Even if the Tribunal were to consider that SFCDC's actions are attributable to RESPONDENT, VanCal's organs' actions cannot be attributed to SFCDC, and, therefore, neither to RESPONDENT.
66. VanCal is not government-controlled, and the fact that it was CLAIMANT itself who controlled the company until 2004⁷¹ is sufficient proof therefore. CLAIMANT does not challenge that it was by its own will that it ceased to have a controlling role in the company, both in the equity structure and the day-to-day management of the company [see §E.2].
67. Moreover, VanCal's directors were appointed by its shareholders, and according with Calpurnian law a director's responsibility is to the corporation and all shareholders collectively, not to any individual shareholder.⁷²
68. As stated above [see §E.4.1], CLAIMANT acknowledged that an individual director has no standing to act on behalf or represent the company. CLAIMANT's reasoning in commencing proceedings against Calpurnia seems to be that a director of VanCal can create liability on VanCal, who can in turn create liability on the SFCDC, who can in further turn create liability on Calpurnia. Naturally, challenging the link between the first named director and VanCal, as CLAIMANT did,⁷³ will inevitably lead to its actions not being attributable to RESPONDENT.

F.2. Calpurnian Organs Acted in Accordance with International Law

⁷¹ CLA-Abst.,¶11.

⁷² Clarifications-1,No.30.

⁷³ Calendar,5/21/2005.

69. The breach of an international obligation gives rise to responsibility. In this case, there was no breach of an international obligation neither under Calpurnia-Gaul BIT nor under general international law.
70. Every single claim submitted by CLAIMANT must be dismissed, as Calpurnian organs complied with RESPONDENT's international obligations.
71. As stated before [see §E.5], the searches on VanCal's personnel's former residences were conducted lawfully, in furtherance of national security interests,⁷⁴ and did not affect CLAIMANT's investment. As will be discussed below [see §H.4.2], the police proceeded in good faith further to a legitimate investigation, following a credible tip which led to the successful seizure of the anticipated suspicious material.
72. Regarding the rejection of Ms. Pescara's visa application, as discussed above [see §E.7], she, having forfeited her residence status, did not qualify for a business visa, but, that notwithstanding, she remained eligible for the visa waiver program. Ms. Pescara was never prevented from entering Calpurnia under said visa waiver program.⁷⁵
73. In regard of the public demonstrations at Ms Pescara's former home [see §H.4.2] the acts of the individual members of the CCC Woman's League, being private individuals, cannot be attributed to Calpurnia. No damage or incidents occurred at any of these demonstrations, and the protesters were exercising the legitimate freedom of speech. The record shows that the police remained alert at all times, and that a forcible removal of the demonstrators was never required and would not have been justified. The ILC Commentary supports the view that in circumstances such as these, no ground for State responsibility exists.⁷⁶
74. Under customary international law, a State's responsibility is triggered by conduct incompatible with its international obligations. As was recently explained, Calpurnian organs acted in accordance with international law, and no wrongful act can be attributed to RESPONDENT.

F.3. Conclusion

⁷⁴ RESP-Abst., ¶17. Calendar, 12/8/2003.

⁷⁵ Clarifications-1, No.6.

⁷⁶ ILC Commentary, Chapter-II, Cmt.4.

75. Since the actions of private persons are not attributable to Calpurnia, and the actions of Calpurnian state organs do not breach any international obligation, the present claim should be dismissed by this Tribunal.

G. JURISDICTIONAL OBJECTIONS

76. RESPONDENT submits that this Tribunal has no jurisdiction based on four major objections. Namely: (1) CLAIMANT did not comply with Calpurnia-Gaul BIT dispute-settlement provisions; (2) CLAIMANT cannot avail from Calpurnia-Flatland BIT dispute-settlement provisions through the MFNC; (3) CLAIMANT's applications before domestic courts triggered the fork-in-the-road provision; and, (4) the requirements under ICSID Convention Art. 25 are not met.

G.1.First Objection: CLAIMANT Did Not Comply with Calpurnia-Gaul BIT Dispute-Settlement Provisions.

G.1.1. Amicable Settlement Is the Main Dispute-Settlement Mechanism Provided under Calpurnia-Gaul BIT

77. Calpurnia-Gaul BIT Art.11(1) provides that:

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.⁷⁷

78. From a plain reading of this article, it is uncontestable that amicable settlement is the main dispute-settlement mechanism provided for under this BIT. It must be noted that, differently from other BITs where the negotiation period is included as a jurisdictional pre-requisite to arbitration, under Calpurnia-Gaul BIT amicable settlement is the dispute-settlement mechanism *par excellence*.⁷⁸

79. Under Calpurnia-Gaul BIT, it is only after eighteen months have elapsed from the filing of a request for amicable settlement that the parties are entitled to resort to the subsidiary mechanism within such BIT– *i.e.* international arbitration or domestic courts.

80. This subsidiary mechanism is established in art.11(2) which provides that:

⁷⁷ Calpurnia-Gaul BIT Art.11(1)[emphasis added].

⁷⁸ See Calpurnia-Flatland BIT Art.7, Jordan-Bahrain BIT, Art.7.

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.

81. Therefore, it is clear that international arbitration or resort to domestic courts would only be available after the principal dispute-resolution mechanism has proved unsuccessful.

G.1.2. CLAIMANT Never Filed a Request for Amicable Settlement

82. Calpurnia-Gaul BIT Art.11(2) provides that a request for amicable settlement is necessary for the eighteen-month negotiations period to begin. However, as it clearly arises from the record, CLAIMANT never filed such request. CLAIMANT does not even allege to have done so. The lack of compliance with such a clear treaty provision should not be tolerated.
83. In fact, RESPONDENT only learnt about the dispute on July 31st, 2007, when it was notified of CLAIMANT's request for ICSID arbitration.⁷⁹ No other communication was addressed to RESPONDENT. The institution of arbitral proceedings is a request to arbitrate, not to negotiate amicably.
84. Calpurnia-Gaul BIT clearly provides that the investor must request for amicable settlement at least eighteen months before instituting arbitration.⁸⁰ Hence, the request for ICSID arbitration could never be construed as a request for amicable settlement. They are two different and independent dispute settlement mechanisms.
85. Although CLAIMANT sent a letter to Mr. Poe, a mere SFCDC employee, on February 5th, 2007,⁸¹ it is patent that such letter could never be construed as a request for amicable settlement under the BIT. Firstly, because such a letter was not addressed to the State of Calpurnia. Secondly, because no intention to negotiate can be inferred from its wording. Finally, the letter was sent not eighteen months, but only five months before instituting arbitration.
86. Mr. Poe was a mere employee of an entity that it is clearly not an organ of the State [see §F]. The fact that CLAIMANT asked Mr. Poe to transmit its claims to the appropriate

⁷⁹ Calendar,07/31/2007.

⁸⁰ Calpurna-Gaul BIT Art.11.

⁸¹ Calendar,02/05/2007.

Ministers shows that CLAIMANT was aware that Mr. Poe was not the suitable recipient for notifying RESPONDENT.⁸² Indeed, Mr. Poe declared that he could do nothing regarding such claim, evidencing his lack of authority.⁸³ Faced with such a response, any diligent person would have taken proper action to notify the competent officers. However, CLAIMANT did nothing. Moreover, Mr. Poe had no obligation to transmit the claim to the proper Ministers. It was CLAIMANT who was obliged to do so by Calpurnia-Gaul BIT, but it intentionally omitted to do it. Put differently, CLAIMANT's had an *intuito personae* duty to notify Calpurnia and, instead, requested a third party to notify Calpurnia's ministers.

87. Besides, CLAIMANT's letter did not seek to amicably settle the dispute. That letter alleged a *de facto* expropriation and demanded compensation. Hence, CLAIMANT shows no willingness to negotiate the dispute.
88. Finally, as stated above, the BIT requires an eighteen-month period to settle the dispute amicably and CLAIMANT's letter was sent only five months before instituting arbitration.
89. It is thus clear that CLAIMANT never complied with the request for amicable settlement provided for in the BIT.

G.1.3. Calpurnia-Gaul BIT's Main Dispute Settlement Mechanism Cannot Be Overridden

90. As stated above, Calpurnia-Gaul BIT prescribes amicable-settlement as its principal dispute-resolution mechanism.⁸⁴
91. The eighteen-month negotiation period within the BIT is long enough as to give the parties to the dispute a real possibility to reach an amicable-settlement. This mechanism was envisaged to avoid further expenses and delays resulting from the submission of disputes to either domestic courts or arbitral tribunals.
92. Even in those cases in which negotiations are not an independent mechanism but a requirement to access arbitration, ICSID Tribunals recognized its jurisdictional nature. The tribunal in *Enron* stated that:

⁸² Calendar,02/05/2007.

⁸³ Calendar,02/21/2007.

⁸⁴ Calpurnia-Gaul BIT Art.11(2).

[The negotiation period] requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.⁸⁵

93. In the present case, nothing in the record shows that Calpurnia showed no willingness to negotiate. Any allegation of a hostile business climate falls in the face of the utter absence of any changes in the legal framework of Calpurnia. No law nor administrative act or any other measure was taken by the State to sustain such a contention.⁸⁶ [See §E.2]

G.2.Second Objection: CLAIMANT Cannot Avail from Calpurnia-Flatland BIT Dispute-Settlement Provision through the MFN

G.2.1. CLAIMANT Cannot Avail from a BIT Executed Prior to Calpurnia-Gaul BIT

94. CLAIMANT is trying to receive, through an MFNC included in a BIT entered into in 1995,⁸⁷ an alleged more-favorable-treatment given to Flatland in a BIT that was signed in early 1992,⁸⁸ *i.e.* three years before such MFNC entered into force. However, contrary to CLAIMANT's allegations,⁸⁹ the jurisdiction of this Tribunal could never be established according to Calpurnia-Flatland BIT.
95. It is an accepted rule that the coming into force of a MFNC cannot retroactively influence the position of the host State.⁹⁰
96. The ILC, when faced with the issue regarding the moment in which the right of the beneficiary to MFN treatment arises, found the rule of non-retroactivity to be correct and in conformity with the MFN Draft Articles.⁹¹
97. While commenting the MFN Draft Articles, the ILC quoted scholars stating that:

Although the clause permits enjoyment of the advantages granted to nationals of the favoured State, it does not retroactively make the

⁸⁵ *Enron*, ¶88.

⁸⁶ Clarifications-1,12.

⁸⁷ Calpurnia-Gaul BIT.

⁸⁸ Calpurnia-Flatland BIT.

⁸⁹ CLA-Abst., ¶5.

⁹⁰ Cfr. MFN Draft Articles, Art.20 and its commentary.

⁹¹ Cfr. MFN Draft Articles, Art.20 and its commentary, especially p.54.

beneficiary State a party to the treaty concluded between the granting State and the favoured State.⁹²

Most-favoured-nation treatment ... applies only to the future.⁹³

G.2.2. The MFN Does Not Apply to Jurisdictional Issues

98. Contrary to CLAIMANT's allegations, the Calpurnia-Gaul BIT MFNC does not extend to dispute-settlement provisions.⁹⁴ Pursuant to the principle of international customary law of *ejusdem generis* no other rights can be claimed under a MFNC than those falling within the limits of the subject-matter of the clause.

99. The *ejusdem generis* principle has been accepted by several international tribunals,⁹⁵ as was recognized by the ILC in Art.9 and 10 of its MFN Draft Articles.

100. The ILC MFN Commentaries are conclusive on the matter:

The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.⁹⁶

101. From the wording of the Calpurnia-Gaul BIT MFNC, it is plain that the subject-matter covered by such clause is limited to substantive treatment exclusively, and in no event can it be extended to jurisdictional issues. The MFNC reads as follows:

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 to investors of any third State, whichever is the most favourable to the investor.⁹⁷

102. According to the Vienna Convention, such wording must be interpreted pursuant the ordinary meaning to be given to the terms.⁹⁸ The MFNC at hand contains a series of activities related to the investments. Such enumeration was aimed at limiting the scope of the MFNC to the expressly enumerated subjects. The omission to include jurisdictional issues among the covered matters equals to its exclusion.

⁹² MFN Draft Articles,p.54,quoting P. Level.

⁹³ MFN Draft Articles,p.54,quoting Ch. Gavalda.

⁹⁴ CLA-Abst.,¶5.

⁹⁵ *Anglo-Iranian case*,p.110,*Ambatielos*,p.10.

⁹⁶ MFN Draft Articles,p.30,¶12.

⁹⁷ Calpurnia-Gaul BIT,Art.4(2).

⁹⁸ Vienna Convention,Art.31(1).

103. The tribunal in *Plama* ruled that:

[T]he intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.⁹⁹

Conversely, 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 provisions from other treaties negotiated in an entirely different context.¹⁰⁰

104. This understanding was shared by the tribunal in *Salini*, when it refused to interpret a MFNC as extensive to jurisdictional issues since it did not “*include any provision extending its scope of application to dispute settlement*”.¹⁰¹

105. In the *Berschader* case it was stated that:

[The] general uncertainty about the scope of MFN clauses leave little room for any general assumption that the contracting parties to a BIT intend an MFN provision to extend to the dispute resolution clause. ... [A]n MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.¹⁰²

106. It must be also noted that the MFNC included in Art.4(2) is not the only MFNC that can be found in Calpurnia-Gaul BIT. Art.7(1) dealing with “Compensation for losses” contains a MFN provision “*as regards restitution, indemnification, compensation or other settlement*”. Further, Art. 13 provides for MFN treatment regarding “*Application of other rules*”.

107. The MFNC provided in Art.4(2) cannot be interpreted as one of a broad scope including all the subjects covered by the agreement, without rendering Arts.7 and 13 useless, a result that would be abhorrent to the principle of effectiveness in treaty interpretation. ICSID tribunals quite frequently resort to *effet utile* reasonings to reject interpretations that would make specific provisions of the treaty useless.¹⁰³

⁹⁹ *Plama*, ¶206.

¹⁰⁰ *Plama*, ¶207.

¹⁰¹ *Salini*, ¶118.

¹⁰² *Berschader*, ¶180-1.

¹⁰³ Fauchald, p. 318. See also *TECMED*, ¶156, *PanAmerican*, ¶132, *Noble*, ¶50, *SGS v. Pakistan*, ¶150, *Continental*, ¶80, *Salini*, ¶95.

108. Finally, it is to be noted that even in the cases in which some tribunals found a MFNC as a means to avoid first resorting to local courts, such tribunals were faced with MFNCs drafted in patently broader terms.¹⁰⁴

109. The tribunal in *Maffezini* stated:

The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of “all matters subject to this Agreement” in its most-favored-nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that “this treatment” shall be subject to the clause, which is of course a narrower formulation.¹⁰⁵

110. The tribunal in *Maffezini* also recognized that:

It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.¹⁰⁶

G.2.3. CLAIMANT Is Using the MFN to Avail from an Unavailable Dispute Resolution Mechanism

111. CLAIMANT is trying to mislead this Tribunal pretending that it is availing from the MFN to negotiate for a shorter period of time than the one required under Calpurnia-Gaul BIT.

112. Quite to the contrary, CLAIMANT’s real aim is to avoid the dispute-resolution mechanism under Calpurnia-Gaul BIT, *i.e.* amicable settlement, and to obtain direct access to ICSID, which would be available under the basic treaty only in the alternative, subject to exhaustion or impossibility of the amicable-settlement process. This practice has been unanimously rejected by the tribunals facing the issue.¹⁰⁷

113. For example, the Tribunal in *Plama* stated that:

It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria-Cyprus BIT (ad hoc arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be

¹⁰⁴ See *Maffezini*, ¶38, *Siemens* ¶82, *Camuzzi* p.13, *Gas Natural* ¶26, *Suez* ¶55.

¹⁰⁵ *Maffezini*, ¶60.

¹⁰⁶ *Maffezini*, ¶63.

¹⁰⁷ *Plama*, ¶¶184-227; *Salini*, ¶119; *Telnor*, ¶100; *Berschader*, ¶¶159-208.

replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.¹⁰⁸

114. Even the tribunal in *Maffezini*, which found the MFN invoked in that case to be broad, recognized that:

Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties.¹⁰⁹

115. Moreover, CLAIMANT fails to argue or explain why or whether complex, costly and time-consuming transnational arbitration proceedings are in any way “more favorable” than a bilateral negotiation leading to amicable settlement, which, in practice, precludes CLAIMANT from invoking the MFN as intended.

116. As the *Plama* tribunal decided:

[T]he doubt as to the relevance of the MFN clause in one BIT to the incorporation of dispute resolution provisions in other agreements is compounded by the difficulty of applying an objective test to the issue of what is more favorable.¹¹⁰

G.2.4. Alternatively, Flatland Has Not Been a Contracting State at the Relevant Times

117. Even if the Tribunal were to find that the dispute settlement clauses are within the scope of the MFNC provided in Calpurnia-Flatland BIT, the right to resort to ICSID arbitration would still not be available since Flatland denounced the ICSID Convention in 2003.¹¹¹

¹⁰⁸ *Plama*, ¶209. See also, ¶212.

¹⁰⁹ *Maffezini*, ¶63.

¹¹⁰ *Plama*, ¶208.

¹¹¹ RESP-Abst., footnote 1.

118. Such denunciation affects Calpurnia-Flatland BIT directly, since the investors protected under such BIT cannot resort to ICSID arbitration anymore. It is plain that if a provision is not available for the beneficiaries of the treaty, it is not available to third-party investors either.
119. Then, CLAIMANT's allegation is groundless. By applying the most elemental logic, it is noticeable that CLAIMANT is invoking a "more-favorable treatment" that in fact does not exist.
120. MFN Draft Articles Art.21(1) is clear on this respect. The ILC commentary to this article is conclusive:

It follows from the very nature of the most-favoured-nation clause that the right of the beneficiary State—and hence the functioning of the clause—ceases when the third State loses its privileged position. The privilege having disappeared, the fact which put the clause into operation no longer exists, and therefore the clause ceases to have effect.¹¹²

121. The ILC concludes that:

The right of the beneficiary State to the favoured treatment obviously expires or is suspended at the moment when the relevant treatment by the granting State of the third State terminates or is suspended, as the case may be.¹¹³

122. The ICJ in the case *American Nationals in Morocco* was called upon to decide on a similar claim. The Court rejected the reliance by the United States on a MFN to access to consular jurisdiction because Spain and the United Kingdom had terminated the provisions consenting to such jurisdiction. The ICJ held that

[The opposite conclusion] ...would lead to a position in which the United States was entitled to exercise consular jurisdiction in the French Zone notwithstanding the loss of this right by Great Britain. This result would be contrary to the intention of the most-favoured-nation clauses to establish and maintain at all times fundamental equality without discrimination as between the countries concerned.¹¹⁴

G.2.5. Alternatively, CLAIMANT Did Not Comply with Calpurnia-Flatland BIT Dispute-Settlement Provision

¹¹² MFN Draft Articles,p.55.

¹¹³ MFN Draft Articles,p.57,¶8.

¹¹⁴ *American Nationals in Morocco*,p.192.

123. CLAIMANT never filed a request for amicable-settlement, and hence, did not negotiate with Calpurnia for eighteen months nor for any period of time [see §G.1].
124. Consequently, CLAIMANT cannot avail from Calpurnia-Flatland BIT dispute-settlement mechanism since it did not negotiate with Calpurnia for the two months required under such provision.¹¹⁵
125. As stated above [see §G.1.1] this requirement is much of a jurisdictional nature and cannot be overridden by CLAIMANT.

G.3.Third Objection: CLAIMANT's Applications before Domestic Courts Triggered the Fork-in-the-Road Provision

126. Calpurnia-Gaul BIT Art.11 is a fork-in-the-road provision which offers investors a choice between submitting the dispute either to domestic courts or to international arbitration, but precludes recourse to the other if one of them has been chosen. Hence, *the choice, once made, is final.*¹¹⁶
127. Calpurnia-Gaul BIT Art.11, after giving the parties the forum choice, reads:
- [A]n investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article.
128. It is thus clear that once the investor has chosen to submit its investment disputes to the court, that decision is irrevocable and recourse to international arbitration is no longer available.
129. In the case at hand, by filing an application with the Constitutional Court of Calpurnia, CLAIMANT has already chosen to submit its investment dispute to Calpurnian national courts. That application constituted a final choice of forum. That choice becomes even clearer with the application before the Commercial Court of Calpurnia to transfer to a Gaulois account the 1% shareholding interest held indirectly by CLAIMANT, which is also claimed before this Tribunal.¹¹⁷

¹¹⁵ Calpurnia-Flatland BIT,Art.7.

¹¹⁶ Schreuer,p.18.

¹¹⁷ Calendar,06/14/2006.

130. In its Request for Arbitration, CLAIMANT alleges that the police searches in Ms. Pescara's and Mr. Kolowenko's former domiciles affected its investment.¹¹⁸ Even when Calpurnia avers that those searches did not affect neither directly nor indirectly CLAIMANT's investment (see ¶142 below), CLAIMANT has already made a choice under Calpurnia-Gaul BIT Art.11 when filing an application with the Constitutional Court seeking a declaration that those searches were unlawful and to obtain the resulting compensation.

131. In its applications, CLAIMANT did not mention a breach of Calpurnia-Gaul BIT.¹¹⁹ However, Calpurnia-Gaul BIT Art.11 is wide enough to cover:

[A]ny dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment.

132. In dealing with a substantially identical provision¹²⁰ to the one in Calpurnia-Gaul BIT, the first Annulment Committee in *Vivendi* noted:

Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.¹²¹

133. Thus, CLAIMANT's choice cannot be disregarded alleging that no breach of the BIT was mentioned in its application before local courts.

134. In conclusion, by submitting the above referred disputes to local courts, CLAIMANT has forked the road, and thus ICSID arbitration is no longer available.

G.4.Fourth Objection: This Tribunal Lacks Jurisdiction Under ICSID Convention Art.25

135. For a dispute to fall within the jurisdiction of ICSID it is necessary to comply with the four restrictive elements required in Art. 25 of ICSID Convention.¹²²

136. These restrictive elements required were purposeful; the drafters of the Convention intended to fill only a specific and narrow gap in the international dispute resolution

¹¹⁸ CLA-Abst., ¶17.

¹¹⁹ Clarification-2, No.24.

¹²⁰ Argentina-France BIT, Art.8.

¹²¹ *Vivendi*, ¶55.

¹²² UNCTAD, p.92.

scheme,¹²³ consistent with the notion of an international tribunal as a *jude d'exception*.¹²⁴

137. The first element is written consent. The second and third elements come under the category of *Jurisdiction Ratione Materiae*: the dispute must arise directly out of an investment and it needs to be of a legal nature. The fourth element is related to the parties, one party must be a “Contracting State” and the other party must be a foreign “National of another Contracting State.” This element comes under the category of *Jurisdiction Ratione Personae*.¹²⁵
138. Each of CLAIMANT’s claims fails to comply with at least one of the above-mentioned elements.

G.4.1. No Jurisdiction Ratione Materiae

139. CLAIMANT’s claims concerning the public demonstrations near Ms. Pescara’s home, the discretionary powers of the Immigration Authorities, the probes and the alleged failure by Calpurnia in granting free transfer of profits fail to comply with the *Jurisdiction Ratione Materiae* requirements.
140. As discussed above [see §E.6], demonstrations were peaceful and resulted in no damages or other incidents affecting CLAIMANT’s investment or otherwise. Therefore, the claims related to same should be disregarded.
141. The claim regarding the non-renewal of Ms. Pescara’s business visa application does not concern CLAIMANT’s investment either. As explained above [see §E.7], a visa of that kind was not necessary to fulfil CLAIMANT’s activities within VanCal and therefore its investment has not been affected neither directly nor indirectly.
142. The claim regarding the probes carried out further to suspicions of espionage had no effect on CLAIMANT or its employees, as they only resulted in the seizure of unlicensed equipment and stolen data left behind by two individuals upon fleeing the country [see §E.5]. Therefore, this tribunal does not have jurisdiction regarding this claim.

¹²³ Larsen,p.355.

¹²⁴ Amerasinghe,p.168.

¹²⁵ Akyüz,p.338.

143. Even when any issue regarding the free transfer of profits arises directly out of an investment, in the case at hand the legal nature of the dispute is missing.

144. For a legal dispute to exist an obligation must be breached. In the words of the Executive Directors' Report:

[the legal dispute] must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.¹²⁶

145. The record contains no reference to any attempt by CLAIMANT to transfer any profits which met a restriction by CLAIMANT. Calpurnia could not even be aware of CLAIMANT's alleged intention. The latter, since CLAIMANT did not try to transfer profits at any time. If anything, the record shows that CLAIMANT did not even collect the monies he was allegedly impeded from transferring, and that he did not make any serious efforts to collect them. Hence, Calpurnia did not breach any obligation, and the requisite legal nature of the dispute is missing, and this claim shall be dismissed as well.

G.4.2. No Jurisdiction Ratione Personae

146. An ICSID tribunal can have jurisdiction only over disputes between a contracting State and a national of another contracting State, but not disputes between States or between private parties.¹²⁷ Hence, if the claims are not attributable to a contracting State, there are no grounds for ICSID's jurisdiction.

147. In the case at hand, none of the claims concerning breaches of Calpurnia-Gaul BIT are related to acts by Calpurnia [see §F.1], but to decisions taken by a Board of Directors of a Company in which CLAIMANT has a 31% interest. Calpurnia lacks standing since is in no way involved in those decisions.

148. Hence, the requirement regarding the *Jurisdiction Ratione Personae* is missing and this Tribunal lacks jurisdiction for such claims.

G.5. Conclusion

149. For the reasons stated above, Calpurnia avers that this Tribunal does not have jurisdiction to hear this case.

¹²⁶ Executive Directors' Report, ¶26.

¹²⁷ Tupman, p.816.

H. CLAIMS

H.1. RESPONDENT Did Not Expropriate CLAIMANT's Investment

150. As was discussed above [see §D], CLAIMANT has brought this claim in a clear abuse of procedure, and its real interest lies in fulfilling its divestment strategy, and leave Calpurnia transferring the losses derived from its own business decisions to RESPONDENT.

H.1.1. The Concept of Expropriation

151. CLAIMANT alleges that its investment was unlawfully expropriated by Calpurnia. In order to explain why this was never the case, we must first demarcate the concept of expropriation, and define the occurrences which would fall within its boundaries. Calpurnia-Gaul BIT Art.6(1) provides that:

Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalization (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.

152. This provision encompasses the concept of direct expropriation under general international law, which has been defined by Prof. Sacerdoti in the following terms: “[b]y expropriation is meant the coercive appropriation by the State of private property, usually by means of individual administrative measures.”¹²⁸ It has been sufficiently established that, in direct expropriation, there is a formal transfer of ownership in favor, in principle, of the expropriating State.¹²⁹

153. The ICSID tribunal in the *TECMED* case stated that a direct expropriation requires a State regulation and the transfer of property to the State:

[E]xpropriation 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.¹³⁰

¹²⁸ Sacerdoti, p.379.

¹²⁹ Sornarajah, p.129; *Metalclad*, ¶103.

¹³⁰ *TECMED*, ¶113. See also, *Metalclad*, ¶102

154. Since there has been no state intervention or regulation, and title to the investment is still in hands of CLAIMANT, there are no grounds to find, in the instant case, a direct expropriation.

155. To the extent that CLAIMANT relies in arguing an “indirect” expropriation case, Art.6(1) of Calpurnia-Gaul BIT refers to indirect expropriations as “*measures having the effect, either directly or indirectly, equivalent to expropriation.*”

156. International law, as evidenced by a constant array of decisions, is consistent in the understanding that an indirect expropriation can also be achieved through the aggregate effect of different actions, even if any given one of them, considered in isolation, “*can [not] necessarily be identified as the decisive event that deprived the foreign national of the value of its investment.*”¹³¹ This kind of expropriation is known as “*creeping expropriation*”, which an ICSID tribunal defined by stating:

It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property.¹³²

157. In the present case, there is neither a single action nor a series thereof, attributable to Calpurnia, that can be deemed to have an expropriatory effect since, as was stated, CLAIMANT has no actual treaty grievances against RESPONDENT but is instead using ICSID as an exit mechanism to force Calpurnia to pay the price of Vanguard’s residual stock in VanCal and, therefore, accomplish its divestment strategy.

158. International tribunals have identified certain requirements in international law to reach a finding of indirect expropriation. These requirements are: (1) interference with property must be substantial; (2) interference lasting for a certain period of time.¹³³

H.1.1.1. Substantial Interference

159. The interference by the State in the investment must be substantial for expropriation to exist.¹³⁴ This means that the investor must be deprived of fundamental property rights.¹³⁵

¹³¹ Reisman&Sloane,p.128.

¹³² *Santa Elena*,¶76 [emphasis added].

¹³³ OECD,p.10-14.

160. In general, it is understood that:

International tribunals have often refused to require compensation when the governmental action did not remove essentially all or most of the property's economic value.¹³⁶

161. According to the tribunal in *LG&E*:

In considering the severity of the economic impact, the analysis focuses on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need for compensation due to expropriation... Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation.¹³⁷

162. Despite the fact that no such measures were adopted by the State in this case, which alone makes an expropriation allegation groundless, it is also true that CLAIMANT still holds title to its investment, and its value remains unaltered. In fact, the company is profitable,¹³⁸ and made statements of its willingness to pay, any sums it might owe to CLAIMANT.¹³⁹ The record shows that the dividends claimed by CLAIMANT are recorded in VanCal's books and nothing indicates that CLAIMANT made any attempt to collect them through the existing payment mechanisms. Consequently, CLAIMANT has not suffered any economic impact, much less a severe one.

H.1.1.2. Duration of the Interference

163. Time is another requisite that international case-law has imposed. International tribunals have concluded that the effect of the measures has to be "*more than ephemeral*". Time plays a very important role in cases of indirect expropriation. For instance, the tribunal in *LG&E* stated that "*the expropriation must be permanent, that is to say, it cannot have a temporary nature,*"¹⁴⁰ while the tribunal in *International Technical Products* required the existence of an "*irreversible taking*" of property rights to award compensation.¹⁴¹

¹³⁴ *LG&E*, ¶191; *Pope&Talbot*, ¶102; *Santa Elena*, ¶76.

¹³⁵ Higgings, p.278.

¹³⁶ OECD, p.10.

¹³⁷ *LG&E*, ¶191. See also *Pope&Talbot*, ¶101-102; *Otis*, ¶47.

¹³⁸ CLA-Abst., ¶14.

¹³⁹ RESP-Abst., ¶16; Calendar, 09/28/2006.

¹⁴⁰ *LG&E*, ¶193.

¹⁴¹ See also, *International Technical Products*, ¶240-241; *Starret*, pp.122,154; *Tippets*, p.219.

164. Since nothing has been taken from CLAIMANT in this case, there will be no need to enter into a detailed analysis on the fulfillment of this requisite.

H.1.2. CLAIMANT's Investment Was Not Expropriated

165. As was stated, nothing in the present case supports a claim for expropriation: CLAIMANT still holds title to its investment, and there is no action or measure, or any series thereof, attributable to RESPONDENT, that may by itself, or considered in the aggregate, be, or be tantamount to, an expropriation.

H.1.2.1. SFCDC's Actions Cannot be Attributed to Calpurnia

166. CLAIMANT has alleged that certain decisions of the SFCDC amounted to an expropriation of its investment.¹⁴²

167. As was discussed above [see §F], RESPONDENT cannot be held responsible for the actions of the SFCDC or individual members within its management.

H.1.2.1.1. In any case, SFCDC's Actions Do Not Have an Expropriatory Effect

168. Even if the tribunal considered that the actions of the SFCDC are attributable to Calpurnia, the record shows no action or decision by the SFCDC amounting to an expropriation.

169. As already discussed [see §E], what CLAIMANT alleges to be decisions taken by VanCal against its interests are, in fact, the product of its own divestment strategy, which left the company in the hands of investors who lacked the knowledge or experience to handle Calpurnia's "*largest mobile telecommunications service provider*,"¹⁴³ and, in any event, amount to internal shareholders' disputes, which this Tribunal has no jurisdiction to solve.

H.1.2.1.1.1. VanCal's Payments

¹⁴² CLA-Abst., ¶13.

¹⁴³ Clarifications-2, No.53.

170. CLAIMANT alleged that, as part of some expropriatory scheme implemented by the SFDC, VanCal did not pay the cash dividends declared. As was discussed above [see §E.4.1], what actually happened is that, after abandoning its investment, CLAIMANT attempted to force the Board to implement a different payment mechanism. The new, inexperienced Board and management, disagreed with such request, and in fact CLAIMANT was not entitled to receive any preferential treatment by collecting its dividends in a different manner than the rest of the shareholders. In fact, it is undisputed that VanCal did not challenge CLAIMANT's rights over its dividend, and this is clearly shown by the fact that such rights were recorded in VanCal's books. In sum, CLAIMANT has not been subject to any loss.
171. CLAIMANT's allegations that the communication received from Mr. Korchnoi on May 27th, 2005, informing a "decision" of the Board that suspended the payment of profits "rose to the level of expropriation",¹⁴⁴ is not consistent with its behavior following said communication. As discussed above [see §E.4.1.], the email sent by Mr. Korchnoi was unauthorized, and was a product of the disorganization reigning the corporate affairs of VanCal after the departure of Vanguard. CLAIMANT was apparently aware of this situation and did not consider Korchnoi's email as valid or binding on VanCal, and immediately required the Board to clarify this situation.
172. CLAIMANT's lack of consistency between the present claim and its past behavior is further shown by the fact that the whole discussion that took place during 2005 was related to the payment mechanism, and not to whether Vanguard had the right to receive its dividends [see §E.4.1.].
173. Moreover, CLAIMANT received all of the stock dividend declared.¹⁴⁵
174. In sum, CLAIMANT's title to both its stock and cash dividends was undisputed, and the record shows no interference with their control or enjoyment. Being recorded in VanCal's books, CLAIMANT was free to collect, assign or discount its dividends at its absolute will. Therefore, CLAIMANT has not been deprived of the enjoyment of the benefits of its property. Regarding the contracts held with VanCal, the payment mechanism is part of the legal and contractual relationship between the parties, and RESPONDENT, being unaware of the terms and conditions of said relationship, cannot

¹⁴⁴ CLA-Abst., ¶18.

¹⁴⁵ RESP-Abst., ¶16.

be held responsible for VanCal's refusal to change a preexisting payment mechanism, especially when VanCal has stated its willingness to pay.¹⁴⁶

H.1.2.1.1.2. Changes in the Composition of the Board

175. CLAIMANT also alleged that the removal of Ms. Pescara off the Board, together with the rejection of invalid proxies, is tantamount to an expropriation.¹⁴⁷
176. As discussed above [see §E.4.2], Ms. Pescara was voted off the Board of Directors while she was being investigated for illegal espionage and had fled Calpurnia almost two years before the November 16th, 2005, shareholders' meeting that took the decision. It is worth mentioning that the shareholders' meeting did not vote off CLAIMANT's other appointed Director, Mr. Shepherd, who was not a suspect of the ongoing investigation.
177. Furthermore, as already explained [see §E.4.2.] the proxies held by Mr. Rindler were correctly ruled invalid for the purpose of that shareholders' meeting, and only purported to allow Mr. Rindler to represent two (non-voting) directors, but not CLAIMANT, a (voting) shareholder, who willfully avoided participating in the Shareholders' Meeting for reasons it has chosen to keep unknown.
178. In sum, the decision to remove Ms. Pescara off the Board was taken lawfully by the majority shareholders of VanCal. CLAIMANT was not denied of any right, and the only cause that prevented it from voting was its own disinterest in protecting its investment in Calpurnia, for which RESPONDENT cannot be held responsible.

H.1.2.1.1.3. Access to Information

179. CLAIMANT somehow alleges that VanCal's decision to adjust internal policies of access to corporate information to Calpurnian law is part of RESPONDENT's expropriatory scheme.¹⁴⁸
180. As was discussed above [see §E.4.3.], the previous policy of translating and delivering all corporate information directly to CLAIMANT's offices in Gaul was an abusive practice, implemented while it had control over VanCal.

¹⁴⁶ RESP-Abst., ¶16.

¹⁴⁷ CLA-Abst., ¶15.

¹⁴⁸ CLA-Abst., ¶16.

181. CLAIMANT was the only shareholder that enjoyed this privilege. The rest of the local shareholders had access to information in accordance with Calpurnian law –i.e. inspection in the headquarters of the company-. Therefore, after CLAIMANT had decided to abandon its investment, the newly-appointed Board simply decided to abolish this unfair, costly and abusive practice, but never prevented CLAIMANT from accessing that information.

H.1.2.1.2. Conclusion

182. To conclude, none of the above actions and decisions described amount to an expropriation, since CLAIMANT still holds title to its equity in VanCal, and neither the company nor the shares have lost any value. It has been held that when the right to an investment remains “*in existence and available*” there is no substantial deprivation of claimant’s right.¹⁴⁹

H.1.2.2. Calpurnia’s Actions Do Not Amount to an Expropriation of CLAIMANT’s Investment

183. Before entering into a detailed analysis of CLAIMANT’s allegations, RESPONDENT requests the Tribunal to bear in mind that the present claim has been brought by Vanguard, not seeking remedy for an international wrongful act, but with other purposes.

H.1.2.2.1. Anti Espionage Investigation

184. CLAIMANT alleged that the searches performed in the former homes of its espionage-suspected employees are tantamount to an expropriation of its investment, since it created a “climate of hostility” that “forced” its expatriated personnel to leave Calpurnia.¹⁵⁰

185. As stated above [see §D], it is no coincidence that CLAIMANT’s suspected personnel left the country at the very same time when police enquiries had found unlicensed equipment in their former homes. Also, CLAIMANT never gave an explanation of what

¹⁴⁹ *Sea-Land*, §II.A.iii).b).

¹⁵⁰ CLA-Abst., ¶17.

those devices were for, and how they had ended in the former homes of Ms. Pescara and Mr. Kolowenko.

186. Nevertheless, as stated above [see §E.5] the searches were performed in furtherance of a serious investigation (serious enough to make certain suspects rapidly leave the country), prompted by very credible tips.¹⁵¹

187. In addition, the probes represent a legitimate and reasonable exercise of the State's sovereign power, since they were performed in support of national security and falling within the State's "margin of appreciation",¹⁵² and therefore CLAIMANT is not entitled to receive compensation for any damage it may have produced, which was none. Prof. Brownlie supported this criterion,¹⁵³ which has also been followed by several international tribunals. In particular, the tribunal in *TECMED* held that:

the principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.¹⁵⁴

188. In sum, the enquiry into espionage activities by Calpurnian authorities, based on reliable information, does not amount to an unlawful interference and the causes of the fleeing of CLAIMANT's personnel are still uncertain.

H.1.2.2.2. Demonstrations Near Ms. Pescara's Former Home

189. CLAIMANT alleged that the press releases issued by the CSD led to public demonstrations near Ms. Pescara's former home, and that they are part of the "climate of hostility" that forced Ms. Pescara to flee the country.

190. As discussed above [see §E.4.6], these allegations are false.

191. The press releases were objective and factually accurate and the link between its issuance and the demonstrations has not been established by CLAIMANT. In any case, RESPONDENT is not responsible for any misinterpretation of reduced groups of the public.

¹⁵¹ Clarifications-1, No.20.

¹⁵² Criterion held by the ECHR in the cases *James*, p.32; and *Former King*, ¶87.

¹⁵³ Brownlie, p.509. See also Harvard Draft Convention, Art.10(5).

¹⁵⁴ *TECMED* ¶119. See also, *LG&E* ¶195.

192. Furthermore, at the time the demonstrations were held –*i.e.* 2004–, Ms. Pescara was no longer living in Calpurnia, since she had fled the country in late 2003, simultaneously with the first police enquiries on her links to espionage activities, and the seizure of suspicious materials in her possession.

H.1.2.2.3. Business Visa

193. Finally, CLAIMANT alleged that the refusal of the immigration authorities to renew Ms. Pescara’s business visa was also part of the “climate of hostility”.¹⁵⁵

194. As already state [see §E.7.], the rejection was due to the fact that Ms. Pescara had forfeited her residency in Calpurnia when fleeing the country in late 2003 and, in any event, she could enter the country and perform her duties under the visa waiver program.

195. In addition, RESPONDENT never prevented Ms. Pescara from entering the country, as CLAIMANT recognized in its submission that she was allowed to reenter the country after her visa was rejected

H.1.3. Conclusion

196. As has been discussed in the above paragraphs, none of CLAIMANT’s allegations support a finding of expropriation. In any case, they simply show a desperate and abusive attempt to fulfill its divestment in Calpurnia by forcing RESPONDENT to subsidize its exit, by means of a damages award.

H.2.RESPONDENT Has Not Impeded the Free Transfer of CLAIMANT’s Profits

197. Calpurnia-Gaul BIT Art.8 provides that:

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.

198. CLAIMANT alleges that Calpurnia obstructed the free transfer of its returns.¹⁵⁶ No facts on the record support this allegation.

¹⁵⁵ CLA-Abst.,¶17.

199. As explained above [see §E.4.1.], CLAIMANT did not claim that VanCal was not paying dividends, which were credited to CLAIMANT, but, rather, it questioned the mechanism by which those payments were done. As was explained, VanCal had been left in inexperienced hands that simply continued to handle most corporate affairs in the same way they had always been handled. Thus, CLAIMANT's requests, contained in the letter dated May 21st, 2005, implied a change in what used to be the company's standard practice. This envisages nothing but a corporate dispute regarding the payment mechanism applicable to distributions of profits. RESPONDENT has no responsibility on this matter.
200. Furthermore, there is nothing on the record showing that CLAIMANT actually tried to transfer returns back to Gaul and RESPONDENT obstructed it.
201. In addition, the decision of the Calpurnia Commercial Court on June 14th, 2006, cannot be considered as an obstruction to the transfer of profits, as it was merely a claim between the company and one of its shareholders, under which the shareholder tried to force VanCal to change the mechanism by which it made payments. This application was dismissed on the basis that the claimant had no standing.¹⁵⁷ Moreover, if CLAIMANT or Ms. Pescara were not satisfied with the decision they could have appealed the decision, but chose not to, causing the decision to acquire *res judicata* status. Therefore, CLAIMANT is precluded from bringing this issue to the consideration of this Tribunal, as ICSID cannot be used as a court of appeals.
202. To conclude, since the record does not show that RESPONDENT ever obstructed any transfer of returns, the Tribunal should dismiss this claim.

H.3.RESPONDENT Accorded CLAIMANT Fair and Equitable Treatment.

203. CLAIMANT alleges that Calpurnia's actions breached the obligations set forth in Art. 2(2) of Calpurnia-Gaul BIT, which states:

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

¹⁵⁶ CLA-Abst.,¶6.

¹⁵⁷ Calendar,06/14/2006.

204. As discussed above [see §F], none of the acts alleged by CLAIMANT¹⁵⁸ as a breach of FET are attributable to RESPONDENT. In any case, as will be further discussed, RESPONDENT accorded to CLAIMANT the FET due.

H.3.1. RESPONDENT's Obligations under Art. 2(2).

205. In determining the scope of the obligations of RESPONDENT under FET, the Tribunal must apply Art. 42 of the ICSID Convention, which governs the issue of applicable law, and calls for the application of international law when the agreement of the parties or the domestic laws of the host state to the dispute are silent or insufficient to fill interpretation *lacunae*.¹⁵⁹

206. In turn, the sources of international law are generally accepted as being encapsulated under Art. 38(1) of the ICJ Statute,¹⁶⁰ and, thus, to comprise treaties, international custom, general principles of law, and case law and scholarly works.¹⁶¹

207. Vienna Convention Art.31 establishes that treaties must be interpreted in good faith and in accordance with the ordinary meaning to be given to their words.¹⁶² Absent any indication in Calpurnia-Gaul BIT as to the actual meaning of FET, the ordinary meaning of the term will naturally invoke the scope granted to this complex of rights under customary international law, and FET under Calpurnia-Gaul BIT will thus equal the minimum standard of treatment due under general international law.

208. The *Neer* tribunal determined the content of that minimum standard and found that State conduct, in order to violate the FET standard, must amount to an “*outrage, to bad faith, to willful neglect of duty,*” such that an “*impartial man could recognize its insufficiency.*”¹⁶³

209. Similarly, the tribunal in *Genin* found that:

[FET] is generally understood to ‘provide a basic and general standard which is detached from the host State domestic law’. While the exact

¹⁵⁸ CLA-Abst.,¶6.

¹⁵⁹ ICSID Convention,Art.42(1).

¹⁶⁰ Tudor,p.10.

¹⁶¹ ICJ Statute,Art.38(1).

¹⁶² Vienna Convention,Art.31[Emphasis added].

¹⁶³ *Neer*,p.60.

content of this standard is not clear, the tribunal understands it to require an ‘international minimum standard’.¹⁶⁴

210. In addition, other international tribunals dealing with investment disputes, such as the ones in *Azinian*, *SD Myers* and *Waste Management II*, agreed to this concept of FET.¹⁶⁵
211. Following this interpretation, it must be concluded that, in order to violate this standard the host state must incur in “acts showing a willful neglect of duty, an insufficiency of an action falling far below international standards”.¹⁶⁶

H.3.2. Art. 2(2) Must Not Be Construed as a Catch-All Provision

212. In the words of Prof. Dolzer:

The open ended language of clauses on FET gives rise to speculations which assumes that, if only properly argued, it will be possible to identify one or more aspects, individually or combined, which may amount to an act of violation. ...the approach is so general in nature that the clause may appear to amount to catch all provision.¹⁶⁷

213. Such interpretation could not result from the ordinary meaning given to the wording of the relevant clause. Moreover such interpretation would mean that any action of the State not favoring the investment could amount to a breach of FET. Also, any such reading would result in the FET provisions of Calpurnia-Gaul BIT lacking any *effet util*, as every violation of another standard would, as an automatic consequence, be a violation of FET.

H.3.3. The Legal Framework and CLAIMANT’s Legitimate Expectations.

214. The State of Calpurnia signed a BIT with Gaul, and acted in accordance with its provisions in maintaining the legal framework of the market in which CLAIMANT operates.¹⁶⁸
215. The OEPC tribunal mentioned that stability of the legal framework is an essential element of the FET.¹⁶⁹ However this tribunal, as mentioned above, concluded that the FET standard applicable was the minimum international law standard.¹⁷⁰

¹⁶⁴ *Genin*, ¶367. See also, *OEPC*, ¶183,190.

¹⁶⁵ *Azinian*, ¶92, *SD Myers*, ¶263, *Waste Management*, ¶98.

¹⁶⁶ *Genin*, p.367.

¹⁶⁷ Dolzer, p.88.

¹⁶⁸ Clarification-1, No.12 and 14.

216. In the instant case the legal framework in which CLAIMANT made its investment in 1997 was not amended, and remains unchanged to this date. [see §E.2].
217. The tribunal in *TECMED* explained that the host State is obliged to provide a treatment that does not affect the basic expectations of the investor.¹⁷¹

H.3.3.1. CLAIMANT's Legitimate Expectations Arising out of the BIT

218. The telecommunications industry is a regulated market in Calpurnia,¹⁷² which regulations remained unchanged as from 1997, when CLAIMANT made its investment.
219. As stated above [see §E.2], the CCC's victory in the parliament did not result in any legislation, decree or pronouncement affecting CLAIMANT's operations or otherwise foreign investment policies. The new political sign of government in practice did not alter the legal framework; *ergo*, CLAIMANT's legitimate expectations were not affected.

H.3.3.2. CLAIMANT's Legitimate Expectations Arising out its Equity Shares

220. As stated above [see §E.2], CLAIMANT sold on its own accord its majority ownership in VanCal,¹⁷³ in practice relinquishing control over the company.
221. As a consequence, a major telecommunications company became controlled by inexperienced local shareholders, which prior to that had a merely passive investment.
222. Most of the company's management policies remained the same, even in matters related to the payment of dividends [see §E.4.1].
223. At the recommendation of the auditor,¹⁷⁴ the Board decided to set up a fund for severance payments.¹⁷⁵ However, this decision did not affect CLAIMANT's rights as a shareholder, but, rather, it protected them. CLAIMANT does not challenge in its submissions the appropriateness of the auditor's recommendation, which must thus be

¹⁶⁹ *OEPC*, ¶183.

¹⁷⁰ *OEPC*, ¶190.

¹⁷¹ *TECMED*, ¶154 [Emphasis added].

¹⁷² Clarification-1, No.4.

¹⁷³ CLA-Abst., ¶9.

¹⁷⁴ Calendar, 2/17/2005.

¹⁷⁵ Calendar, 3/10/2005.

considered expressly or constructively consented to by CLAIMANT. As stated above [see§E.4.1] dividends were declared and distributed as was the usual corporate practice.¹⁷⁶

224. This clearly shows that there was no attack on CLAIMANT's legitimate expectations, since the managing policies remained unchanged.
225. What indeed changed was CLAIMANT's controlling role within VanCal, and, hence, its legitimate expectations concerning corporate governance, cannot exceed the expectations of a minority shareholder.
226. Its 31% equity interest entitled CLAIMANT to appoint two directors. However, CLAIMANT withdrew the directors it had appointed to the Board,¹⁷⁷ and refused to replace them despite VanCal's request.
227. Furthermore, as the record shows, CLAIMANT's personnel abandoned Calpurnia,¹⁷⁸ and were absent from Board meetings, either under instructions by CLAIMANT to disregard their duties to the company, or else failing to perform their duties to CLAIMANT diligently.¹⁷⁹ None of the above circumstances can give rise to RESPONDENT's liability.
228. CLAIMANT alleges that VanCal refused to pay dividends to CLAIMANT. The record only contains statements of particular individuals in management suggesting a suspension. But, in fact, the Board never took such a decision.¹⁸⁰ In addition CLAIMANT's economic rights were recognized, since the dividends were distributed and credited in VanCal's books to CLAIMANT's account.¹⁸¹
229. As stated above [see §E.4.1], all that happened was that CLAIMANT requested the management to change the mechanism for the payment of dividends which it itself had established in VanCal, when it instructed the Board to deposit payments in a separate bank account to be opened in the name of CLAIMANT.¹⁸²

H.3.4. RESPONDENT Acted Transparently

¹⁷⁶ Calendar,4/15/2005.

¹⁷⁷ Calendar,10/23/2006.

¹⁷⁸ CLA-Abst.¶17.

¹⁷⁹ Calendar,2/17/2005.

¹⁸⁰ Calendar,3/10/2005.

¹⁸¹ Calendar,9/28/2006.

¹⁸² Calendar,5/21/2005.

230. Art. 3 of Calpurnia-Gaul BIT reads:

Each Contracting Party shall ensure that, its laws, regulations, procedures, administrative rulings and judicial decisions of general application, as well as international agreements after their entry into force, which may affect the investments of investors of the other Contracting Party in its territory, are promptly published, or otherwise made publicly available.¹⁸³

231. As explained above [see §E.2] in the case at hand there are no laws, regulations or other binding rules enacted or coming into force having affected CLAIMANT's investment. There is no allegation or evidence in the record of any acts of government which were not published or otherwise made publicly available.

232. For instance, CLAIMANT was perfectly aware that its personnel were subject to an investigation for espionage activities, since the all the information regarding those proceedings was published by the State. As further developed in §E.5, that investigation was routinely and lawfully conducted.

H.3.4.1. Ms. Pescara's Immigration Status

233. Ms. Pescara applied for a business visa, which was rejected¹⁸⁴ since she had fled the country when the investigation against her started,¹⁸⁵ forfeiting her resident status. Calpurnia's immigration authorities never forbid Ms. Pescara from entering Calpurnia. Quite to the contrary, she was advised by immigration authorities that she qualified for the Calpurnian visa waiver program, under which she could enter Calpurnia for all required purposes without any further procedures.¹⁸⁶ Ms. Pescara never availed herself from this facility, but, instead, two months later, she quit her management position.¹⁸⁷

H.3.4.2. VanCal's Internal Affairs

234. CLAIMANT alleges that some decisions of the Board, such as the alleged suspension of payments and the removal of Ms Pescara from the Board, lacked transparency.

235. As already stated [see §E.4.1], there was never a corporate decision not to pay profits. CLAIMANT is knowingly basing this claim in a twisted construction of the meeting's

¹⁸³ Calpurnia-Gaul BIT, Art.4.

¹⁸⁴ CLA-Abst.¶18.

¹⁸⁵ CLA-Abst.¶17.

¹⁸⁶ Clarification-1, No.6.

¹⁸⁷ Calendar, 11/15/2004.

minutes, reading only certain statements by individuals, which did not result in a corporate resolution. The only relevant corporate resolution of VanCal regarding payment of dividends was the April 15th, 2005, decision¹⁸⁸ to declare dividends in stock and cash.

236. In addition, CLAIMANT alleges that those decisions are attributable to RESPONDENT, notwithstanding that CLAIMANT was VanCal's shareholder and it either participated, could participate, or should have participated, in VanCal decisions, while RESPONDENT did not.

237. The decision to remove Pescara from the Board was lawfully taken pursuant to all proper proceedings.¹⁸⁹ It should be noted that, at that time, Ms. Pescara was being investigated for espionage and that she had fled Calpurnia.¹⁹⁰

238. CLAIMANT alleges that the removal of Ms. Pescara from the Board affected its control rights in VanCal. This allegation is completely groundless. CLAIMANT remained at all times enabled to attend and vote at the shareholders' meetings, and to appoint the same number of directors in VanCal as it did while controlling the company. CLAIMANT, on its own motion, chose to do neither.

H.3.5. RESPONDENT Respected Due Process

H.3.5.1. Enquiry into Espionage Activities

239. CLAIMANT alleges that the probes conducted by the police in the former homes of Ms. Pescara and Mr. Kolowenko were unlawful,¹⁹¹ and its allegations in these proceedings can lead to the understanding that it construes in that a breach of due process rights. However, they were part of an investigation that linked VanCal personnel appointed by CLAIMANT with espionage activities.¹⁹²

240. Concerning the lawfulness of such proceedings, it must be said that the police acted under *periculum in mora*,¹⁹³ following credible and accurate anonymous tips, and

¹⁸⁸ Calendar,4/15/2005.

¹⁸⁹ Clarifications-1,No.3.

¹⁹⁰ CLA- Abst.,¶17.

¹⁹¹ CLA-Abst.,¶17.

¹⁹² Calendar,12/8/2003; 6/4/2004; 7/17/2004.

¹⁹³ Clarification-1,No17.

eventually found unlicensed telecommunication devices and hidden stolen data, and seized them.¹⁹⁴

241. Notably enough, the seized materials were never claimed back. On the contrary, CLAIMANT's personnel fled Calpurnia after the first probe. When subsequent procedures were conducted at CLAIMANT's personnel former residences, they were no longer living in Calpurnia.
242. In addition, CLAIMANT filed an action before Calpurnia's Constitutional Court requesting it to declare the searches unlawful. The Court dismissed CLAIMANT's petition.¹⁹⁵

H.3.6. RESPONDENT Did Not Discriminate Against CLAIMANT

243. Art 2(3) of Calpurnia-Gaul BIT prescribes:

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.¹⁹⁶

244. RESPONDENT complied with this provision, since it never adopted any measure impairing in any way CLAIMANT's investment or the market in which VanCal operates.
245. CLAIMANT alleges that RECONDENT discriminated against it, however, as already stated all the acts that CLAIMANT presents as discriminatory are not attributable to Calpurnia [see§F.1].
246. The issue of dividend payments is discussed in depth at §E.4.1, and we shall only add that all dividends were distributed among all shareholders, local and foreigners alike.
247. CLAIMANT was afforded at all times the same treatment that any minority shareholder would have been afforded in Calpurnia.
248. CLAIMANT also failed to prove that the investigation involving its personnel resulted in discrimination, since the seizure of unlicensed equipment and stolen data in the suspects' former residences demonstrates that there were grounds to investigating.

¹⁹⁴ Calendar 12/8/2003.

¹⁹⁵ CLA-Abst.,¶17.

¹⁹⁶ Art.2(3) Calpurnia-Gaul BIT.

H.3.7. Conclusion

249. As stated in this section, RESPONDENT complied with the FET due under Calpurnia-Gaul BIT.
250. Since it maintains the legal framework necessary to comply with CLAIMANT's legitimate expectations, it also acted transparently, granted due process, and did not incur any discriminatory measure against CLAIMANT.

H.4.RESPONDENT Granted CLAIMANT Full and Constant Protection And Security

H.4.1. Treatment Due under the Full Protection and Security Standard

251. Calpurnia-Gaul BIT Art.2(2) provides:

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

252. The tribunal in *Azurix* stated that:

[T]he 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.¹⁹⁷

253. Furthermore, tribunals have indicated that this obligation is not one of result, but rather an obligation of making good-faith efforts to protect the foreign property.¹⁹⁸

254. RESPONDENT submits that the correct interpretation of the FPS in Calpurnia-Gaul BIT is the one provided by Prof. Dolzer in the following terms:

This standard does not provide an absolute protection against physical or legal infringement. In terms of the law of the state responsibility, the host state is not placed under an obligation of strict liability to prevent such violations. It is generally accepted that the host state will have to exercise "due diligence" and will have to take such measures protecting the foreign investment as are reasonable under the circumstances.¹⁹⁹

¹⁹⁷ *Azurix*, ¶408.

¹⁹⁸ *AMT*, ¶6.05,6.06; *AAPL* ¶8. and *Wena*, ¶84.

¹⁹⁹ Dolzer, pp.149-150. See also *ELSI* ¶105 and *Noble*, ¶166.

255. This standard has been referred to as one of “due diligence” on the part of the host state. As stated in *AAPL*, this standard cannot be interpreted as a “*warranty that property shall never under any circumstances be occupied or disturbed.*”²⁰⁰
256. Finally, it should be noted that the words “constant” or “full” by themselves are not sufficient to establish that the parties intended to transform this obligation into strict liability.²⁰¹

H.4.2. RESPONDENT’s Actions Did Not Breach the FPS Standard

257. As stated above [see §§E.5, E.6], CLAIMANT, in order to allege that RESPONDENT failed to provide FPS and to support this abusive claim, has given a misleading interpretation to certain facts.
258. CLAIMANT contends that the probes conducted in the former homes of Ms. Pescara and Mr. Kolowenko, in furtherance of espionage investigations, amounted to a breach of RESPONDENT’s obligation to grant FPS.²⁰²
259. Contrary to CLAIMANT’s allegations, the probes were conducted lawfully and were a necessary step to further the ongoing probe in matters of national security.²⁰³
260. The police considered that the probes were required, having been prompted by credible anonymous tips describing in detail how VanCal and its personnel were engaged in certain espionage activities for Gaulois Security Services.²⁰⁴ The police acted under *periculum in mora* and thus performed them with no warrants.²⁰⁵
261. Ultimately, the probes led to the seizure of unlicensed equipment, portable computers and stolen data, and the police assumptions supporting *periculum in mora* were confirmed by the fact that the investigated individuals fled the country right after the first probes,²⁰⁶ and one of them, eventually ousted from the Board, kept returning erratically to Calpurnia during the investigations.

²⁰⁰ *AAPL*, ¶49.

²⁰¹ *AAPL*, ¶49.

²⁰² CLA-Abst., ¶17.

²⁰³ RESP-Abst., ¶17.

²⁰⁴ Clarifications-1, No.20 and CLA-Abst., ¶17.

²⁰⁵ Clarifications-1, No.17.

²⁰⁶ Calendar, 12/08/2003.

262. The above shows that RESPONDENT acted diligently according to the circumstances of the case.
263. As already stated [see §D], at the time the investigation began to shed results, CLAIMANT's personnel fled the country, without providing sufficient explanation. One of the investigated subjects quit her position as managing director of the company (although she remained a member of the Board until later voted off in December, 2005²⁰⁷). The other one, meanwhile, simply failed to ever come back to work, without so much as a resignation note or a farewell letter.²⁰⁸
264. It is noteworthy, also, that there is no evidence in the record showing that either CLAIMANT or the investigated personnel ever asked for the seized materials to be returned. Quite to the contrary, the record does show that CLAIMANT attempted to have the searches declared unlawful,²⁰⁹ but not the goods returned. This application failed on grounds of procedural defects.²¹⁰
265. CLAIMANT alleges that the CSD press releases somehow led to the public demonstrations peacefully held during 2004 near Ms. Pescara's former home. Contrary to CLAIMANT'S allegations, the intention of these press releases was merely to report accurately on the activities that took place on December 7th, 2003, June 3rd, 2004 and July 15th, 2004,²¹¹ and RESPONDENT bears no responsibility for any misinterpretation by isolated members of the public.
266. CLAIMANT alleges that the police did not act as required to put an end to the demonstrations by members of the CCC Women's League near Mrs. Pescara's former house.²¹² But, as a matter of fact, Calpurnia's police acted according to appropriate procedures, and found no reason or justification to prevent a peaceful exercise of freedom of speech by a non-violent group of women.²¹³

H.4.3. Conclusion

²⁰⁷ Calendar, 11/16/2005.

²⁰⁸ Clarifications-2, No. 7.

²⁰⁹ CLA-Abst., ¶17.

²¹⁰ RESP-Abst., ¶17.

²¹¹ CLA-Abst., ¶17.

²¹² CLA-Abst., ¶17.

²¹³ RESP-Abst., ¶17.

267. For the above reasons, it follows that Calpurnia's actions amounted to the full security and protection required under Calpurnia-Gaul BIT.

I. Prayer for Relief

268. Pursuant to the above considerations of law and fact, the Republic of Calpurnia respectfully requests that the Tribunal *find* that it has no jurisdiction to rule over the present dispute.

269. In the alternative -and unlikely- case that the Tribunal considers to have jurisdiction over the presents, this Tribunal should issue an award:

- dismissing each and every claims submitted by CLAIMANT; and
- ordering CLAIMANT to pay the costs, expenses and counsel fees incurred as result of these proceedings.

Respectfully submitted,
[SIGNATURE]