

INTERNATIONAL CENTRE FOR THE SETTLEMENT
OF INVESTMENT DISPUTES

In the matter of

VANGUARD INTERNATIONAL

Claimant

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA

Respondent

(ICSID Case No. ARB/X/X)

MEMORANDUM FOR RESPONDENT

TABLE OF CONTENTS

List of Authorities.....	v
List of Legal Sources.....	vii
I. STATEMENT OF THE FACTS.....	1
A. Background.....	1
B. Claimant’s personnel never suffered harassment.....	1
C. Inside VanCal.....	2
II. ARGUMENTS.....	3
1. Jurisdiction.....	3
A. <i>Ratione materiae</i>	3
a. Separate agreements.....	3
i. Separate agreements are not covered investments.....	4
1. Salini test.....	4
i. Substantial commitment.....	5
ii. Duration.....	5
iii. Risk.....	6
iv. Contribution to Calpurnia’s development.....	6
b. Joint Venture agreement.....	7
i. VanCal shares are not covered investments.....	7
1. Portfolio investment.....	7
ii. Contract-based claims.....	7
1. Do not amount to treaty-based claims.....	8
2. No umbrella clause.....	9
c. Claims of events outside of VanCal.....	9
i. Police searches have no connection with the investment.....	9
ii. Court dismissals have no connection with the investment.....	10
B. <i>Ratione Personae</i>	10
C. Responsibility and attribution.....	11
a. Responsibility.....	11
b. Attribution.....	11
i. SFCDC’s conduct is not attributable to Calpurnia.....	11
1. Structural and functional tests.....	11
2. SFCDC’s conduct lacks governmental authority.....	13
D. <i>Ratione Temporis</i>	13
a. Cooling off period.....	13
E. Fork in the road.....	14
a. Proceedings before the Commercial Court.....	15
b. Proceedings before the Constitutional Court.....	15
F. Applicable law.....	16
a. Contract-based claims.....	16
b. Treaty-based claims.....	16
c. Customary international law.....	18

i. Responsibility from omissions.....	18
d. Calpurnia-Flatland BIT is not applicable.....	19
2. Merits.....	19
A. Full protection and security.....	19
a. Scope of the standard.....	19
b. Police searches.....	20
i. Legality of the searches.....	21
ii. Time span of the searches.....	21
iii. No charges filed.....	22
c. Press releases.....	23
d. Residences picketed.....	24
i. Conduct of individuals.....	24
ii. Conduct of public authorities.....	24
e. Legal security.....	25
i. Denial of business visa did not affect the legal security of the investment.....	26
f. Calpurnia has not failed to provide the investment full protection and security.....	26
B. Fair and Equitable Treatment.....	27
a. Scope of the fair and equitable treatment standard.....	27
b. Police searches.....	30
c. Court dismissals and denial of justice.....	30
i. Procedural denial of justice.....	31
ii. Substantive denial of justice.....	32
d. Alleged additional elements of fair and equitable treatment.....	34
i. Legality.....	34
ii. Legitimate expectations.....	35
1. Stable and transparent business and legal framework.....	36
i. Stability.....	36
ii. Transparency.....	37
2. Expectations from contractual Commitments.....	37
3. Claimant’s expectations have not been frustrated.....	38
iii. Proportionality.....	38
C. Interference.....	39
a. When is interference present?.....	39
b. Alleged interference outside VanCal.....	40
i. Police searches.....	40
ii. Denial of business visa.....	40
iii. Alleged impossibility to remain in the country.....	41
c. Alleged interference inside VanCal.....	42
i. Suspension of payment of dividends.....	42
ii. Reduced participation of Claimant’s personnel.....	44

iii. Alleged implementation of government policy.....	45
iv. Statements from SFCDC and its representatives.....	45
d. There was no intervention by Respondent.....	46
D. Discrimination and arbitrariness.....	47
a. Discrimination.....	47
i. Police searches.....	47
ii. Court dismissals.....	48
1. Not systematic or specifically targeted.....	48
iii. Denial of business visa.....	48
b. Arbitrariness.....	49
i. What is the bar for a finding on arbitrariness?.....	49
ii. Calpurnia’s conduct has not been arbitrary.....	49
1. Court dismissals.....	49
2. Police searches.....	49
E. Obstructed transfer of returns.....	50
a. There has been no obstruction of the transfer of returns.....	51
F. There has been no indirect expropriation.....	52
a. No substantial deprivation of fundamental rights.....	52
i. Outside of VanCal.....	53
ii. inside VanCal.....	53
1. Shares and dividends.....	53
2. Separate agreements.....	54
3. Claims are not of sufficient magnitude.....	54
4. Rights of representations.....	54
5. Rights have not been diminished.....	55
b. No substantial loss of value.....	55
c. No illegitimate substantial loss of control.....	56
i. VanCal’s legitimate restructuring process.....	56
ii. External elements.....	57
d. No expulsion of key personnel.....	57
e. Mere contractual disputes.....	58
f. No taking of Claimant’s property.....	58
G. Claimant’s burden of proof.....	59
H. Final submission.....	59

List of Authorities

1. A.F.M. Maniruzzaman, Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview, 8 J. Transnational Law & Policy (1998)
2. Acconci, Pia. "The Most- Favoured- Nation and International Law on Foreign Investment". Appears on The Oxford of Handbook International Investment Law. OXFORD University Press, New York 2008.
3. Bishop, Doak. Crawford, James. Reisman, Michael. Foreign Investment Disputes. Cases, Materials and Commentary. Kowler Law International, 2005.
4. Cohen Smutny, Abby. State Responsibility and Attribution: When is a State Responsible for the Acts of State Enterprises? In: International Investment Arbitration. Edited by Todd Weiler. London: Cameron May, 2005.
5. Costamagna, F. "Investor' Rights and State Regulatory Autonomy: the Role of the Legitimate Expectation Principle in the CMS v. Argentina case". Issue: Vol. 3, issue 2 Published : April 2006. Transnational Dispute Management.
6. Dolzer, Rudolph and Cristopher Schreuer. Principles of International Investment Law. OXFORD University Press 2007.
7. Fietta, Stephen. Expropriation and the "fair and equitable" standard: talk at the BIICL Fifth Investment Treaty Conference, 9 September 2005
8. Heiskanen, Veijo. "*Indirect Expropriation under US- Iran Claims Tribunal*". Issue 5 Vol. 3, December 2006. Transnational Dispute Management
9. McLachlan, Campbell; Shore, Laurence; Weiniger, Matthew. International Investment Arbitration: Substantive Principles. New York: Oxford International Arbitration Series, 2007.
10. OECD, Fair and Equitable Treatment Standard in International Investment Law. September 2004.
11. Schreuer Cristoph. "Fair and Equitable Treatment (FET): Interactions with other Standards". Vol. 4, issue 5, Published : September 2007.
12. Schreuer, Christoph "The Concept of Expropriation under the ETC and other Investment Protection Treaties", (2005), 2 Transnational Dispute Management, November 2005.
13. Schreuer, Christoph., "The ICSID Convention: A Comentary" Cambridge University Press (July 23, 2001).
14. Schreuer, Christoph., Fair and Equitable Treatment in Arbitral Practice, 6 JWIT 357, June 2005.

15. Sornarajah. "The International Law on Foreign Investment". Cambridge University Press; 2 edition (October 4, 2004)
16. Weiler, Todd. Saving Oscar Chinn: Non Discrimination in International Investment Law. In: International Investment Arbitration. Edited by Todd Weiler. London: Cameron May, 2005.

List of Legal sources

1. ADF Group Inc v United States, Award, ICSID Case No ARB(AF)/00/1, IIC 02 (2003) 9 January 2003
2. Amco v. Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389; 23 ILM (1984).
3. American Manufacturing & Trading, Inc. v. Republic of Zaire (Case No. ARB/93/1, Award of 21 February 1997, ICSID Reports V, p. 14, at p. 30) ARB/04/15, IIC 248 (2006) 22 June 2006.
4. Asian Agricultural Products Limited v. Republic of Sri Lanka (Case No. ARB/87/3, Award of 27 June 1990, ICSID Reports IV, p. 250
5. Autopista Concesionada de Venezuela, CA ('Aucoven') v Venezuela, Decision on Jurisdiction, ICSID Case No ARB/00/5, IIC 19 (2001) 27 September 2001
6. Azinian and ors v Mexico, Award, ICSID Case No. ARB(AF)/97/2, IIC 22
7. Azurix Corp. v. Argentine Republic, Decision on Jurisdiction, 8 December 2003, 43 ILM.
8. Bayindir Insaat Turizm Tecaret Ve Sanayi A# v Pakistan, Decision on Jurisdiction, ICSID Case No ARB/03/29, IIC 27 (2005) 14 November 2005
9. Benvenuti and Bonfant SRL v. the Government of the People's Republic of the Congo, 1 ICSID Rep. 340
10. Bilateral Investment Treaty Between Flatland and Calpurnia
11. Bilateral Investment Treaty Between Gaul and Calpurnia
12. Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Gana, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.
13. British Petroleum v. Libyan Arab Republic, 53 I.L.R. 329 (1973)
14. CMS Gas Transmission Company v. Republic of Argentina, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003); 7 ICSID Reports 494.
15. Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic (the Vivendi case), Decision on Annulment, 3 July 2002, 6 ICSID Reports 340

16. *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic (Vivendi I)*, Award 21 November 2000, 16 ICSID Review-FILJ 643 (2001), 5 ICSID Reports 296; 40 ILM 426 (2001)
17. *Eastman Kodak Co. v. Iran*, Award No. 329-227-3 of 11 November 1987
18. *Emilio Agustín Maffezini v. The Kingdom of Spain*. ICSID Case No..ARB/97/7 Decision of the Tribunal on Objections to jurisdiction, January 25, 2000.
19. *Eureko BV v Poland*, Partial Award. Ad hoc—UNCITRAL Arbitration Rules, IIC 98 (2005)
20. FDI Moot Problem
21. *Feldman v Mexico*, Award and Separate Opinion, ICSID Case No ARB(AF)/99/1, IIC 157 (2002) 16 December 2002
22. First Clarifications of the 2008 FDI Moot Problem
23. *Foremost Teheran, Inc. v. Islamic Republic of Iran*, Award No.. 222-37/231-1 (1986), 10 Iran-US CTR 228, 248.
24. *Genin v Estonia*, Award, ICSID Case No ARB/99/2, IIC 10 (2001) 25 June 2001
25. *Government of Ghana*, Award on Jurisdiction and Liability (1989), 95 ILR 183.
26. ICSID Convention
27. *Impregilo SpA v Pakistan*, Decision on Jurisdiction, ICSID Case No ARB/03/3, IIC 133 (2005) 22 April 2005
28. *Impreglio S.p.A v. Pakistan*, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245.
29. *Joy Mining Machinery Limited v Egypt*, Award on Jurisdiction, ICSID Case No ARB/03/11, IIC 147 (2004) 6 August 2004 Jurisdiction, 17 July 2003, 42 ILM 2003
30. LETCO- Award: paragraph 1 Nationalization. ICSID Reports vol. 2, page 366.
31. *Loewen v. United States*, Decision on Jurisdiction, 9 January 2001, 7 ICSID Reports 425.
32. *Noble Ventures, Inc. V. Romania* ICSID Case No. ARB/01/11.
33. *Occidental Exploration and Production Company v Ecuador*, Award, LCIA Case No UN3467, IIC 202 (2004).

34. *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005).
35. *Pope & Talbot Inc v Canada*, Award on Damages, Ad hoc—UNCITRAL Arbitration Rules, IIC 195 (2002) 31 May 2002
36. *PSEG Global Inc and ors v Turkey*, Decision on Jurisdiction, ICSID Case No ARB/02/5, IIC 197 (2004) 4 June 2004
37. *Ronald S. Lauder v. Czech Republic*. UNCITRAL ARBITRATION. Award.
38. *Salini Costruttori SpA and Italstrade SpA v Jordan*, Award, ICSID Case No ARB/02/13, IIC 208 (2006) 15 November 2004
39. *Salini Costruttori SpA and Italstrade SpA v Jordan*, Decision on Jurisdiction, ICSID Case No ARB/02/13, IIC 207 (2004) 15 November 2004
40. *Saluka Investments BV v Czech Republic*, Partial Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 210 (2006) 17 March 2006
41. *SD Myers Inc v Canada*, First Partial Award and Separate Opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (2000) 13 November 2000
42. Second Clarifications of the 2008 FDI Moot Problem
43. *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518; 42 ILM 1285 (2003).
44. *SPP v. Egypt*, Award and Dissenting Opinion, 20 May 1992, 3 ICSID Reports 189.
45. *Tecnicas Medioambientales Tecmed SA v Mexico*, Award, ICSID Case No ARB(AF)/00/2, IIC 247 (2003) 29 May 2003
46. *Telenor v. Hungary*, Award, 13 September 2006.
47. *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, (1984), 6 Iran-US CTR 219
48. *Tradex v. Albania*, Award, 29 April 1999, 5 ICSID Reports 70, 14 ICSID Review-FILJ (1999) 197.
49. United Nations Development Program. Human Development Chart and Report
50. United States of America 2004 Model BIT
51. *Waste Management, Inc. v. United Mexican States*, ICSID Case No.. ARB(AF)/00/3, (2004), 43 ILM 967 (2004).

I. STATEMENT OF THE FACTS

A. Background

1. Vanguard International (hereinafter Claimant or Vanguard), investor from Gaul, established a joint venture agreement with the State Fund for Commerce and Development in Calpurnia (hereinafter SFCDC) to provide mobile telecommunications services, which resulted in the company VanCal.
2. SFCDC owns 30% of VanCal and holds on deposit a further 22%, which is registered to the names of several hundreds of individual Calpurnian shareholders.

B. Claimant's personnel never suffered harassment

3. Throughout November 2003, the Conservative Conscience of Calpurnia (CCC) won the elections in a democratic process. The new viewpoint that now governed Calpurnia in deed differed from the one held in Gaul, but at no point these separate ideologies got involved with Claimant's investment, or situated them at grave risk.
4. Calpurnian security forces searched the residences of Pescara and Kolowenko due to a counter-espionage operation. Security forces proceeded under *periculum in mora* and were not violent. They were carried out over a prolonged period of time because they were part of an ongoing police investigation
5. The press releases were issued because there is an obligation to inform Calpurnian citizens about public affairs and they were always factually accurate, not incendiary.
6. The protests in front of the private residences of some of Claimant's representatives have no relation to the press releases and they were not Calpurnia's doing. The conduct of those individuals is not attributable to Calpurnia.
7. Before the end of the year 2003, Pescara and Kolowenko left Calpurnia by their own personal decision, not following a deportation or expulsion process.

8. Pescara's business visa was never denied in the manner that Claimant asserts, Pescara could very well enter Calpurnia under a visa waiver program to conduct her business.
9. The courts were always open to Claimant, legal remedies were reasonably available but Claimant chose not to activate them.

C. Inside VanCal

10. The events inside of VanCal are in the private sphere of a company and cannot be attributed to the State of Calpurnia.
11. The decisions taken by the board were legitimate and in compliance with all formal requirements. The suspension of payment of dividends was followed by the crediting of those dividends into Claimant's account in VanCal.
12. Statements have been made concerning the willingness to make any payments owed for dividends or license fees.
13. The payments owed for the technical assistance agreement have been suspended because the chief technical officer in charge of Vanguard's obligations under that agreement left the country and has not returned to this day.
14. Kolowenko decided to leave Calpurnia after the end of 2003 and never attempted to return. Later on in 15 November 2004 Ms. Pescara resigned to her position as Managing Director in use of her free will.
15. Poe and Korchnoi also resigned, in light of the fact that the company had more and more unoccupied managerial positions they had to be replaced with SFCDC directors.
16. On 15 April 2006 Shepherd voluntarily resigned from the board. Fowler and Hunter replaced Shepherd and Pescara without difficulty. Following Calpurnian corporate law they entered the board on 7 June 2006.

II. ARGUMENTS

1. Jurisdiction

17. This Center has no jurisdiction and the Tribunal lacks competence over the present dispute for the following reasons.

A. *Ratione Materiae*

18. To begin with, article 25 of the ICSID convention establishes that the Center will have jurisdiction over disputes arising directly out of investments. This is a central provision in the context of ICSID because it delineates its jurisdiction in accordance to the object and purpose of the Convention.¹

19. Claimant proposes to have the term investment interpreted broadly, but there is no legal foundation that would allow that. In fact, this would be contrary to the object and purpose of the ICSID convention because it would extend jurisdiction of the Center to disputes arising from any form of transaction and not exclusively from investments.

20. The fact that the Center's jurisdiction revolves around investment disputes is of fundamental importance, so much in fact, that it cannot be allowed for the parties to a certain dispute to define between them what may or may not be considered as an investment for jurisdictional purposes. If this were allowed, the outer limits of the ICSID convention would be breached.²

a. Separate agreements

21. This Tribunal cannot declare itself competent over the claims related to the separate agreements or the contractual rights thereof because they are not investments.

¹ Convention for the Settlement of Investment Disputes between States and Nationals of Other States. (ICSID Convention), Schreuer, *A commentary...* para. 149 (article 25).

² Joy Mining, paras 49-50.

22. In this section we will prove that those agreements are not investments, and that any dispute arising directly from them is not an investment dispute but merely a contractual-commercial dispute.

i. Separate agreements are not covered investments

23. Contractual rights may only be considered as investments if they originate from a concession contract under which the investor is to provide public services on behalf of the State³ or if in some other way the contract involves a fundamental public interest.⁴

24. The separate agreements are obviously no form of concession and they certainly do not involve a fundamental public interest. The joint venture was established to provide telecommunications services in Calpurnia, but as the Claimant has correctly stated, these are “separate” agreements that have nothing to do with a public service, only with license fees and technical assistance.

25. Besides, there were never any efforts on behalf of Claimant to have the separate agreements considered as investments or as part of the alleged central investment, this cannot be assumed from the facts of the case or from the Claimant’s Memorandum. There was never an intention to have those agreements considered as investments under Calpurnian law either.

1. Salini Test

26. Furthermore, the concept of investment must be subject to a set of objective criteria that has been correctly applied by tribunals in the sense that if those criteria are not met, there is no investment. This set of objective criteria has become known as the *Salini test* and this tribunal must acknowledge the fact that arbitral tribunals have consistently applied it for jurisdictional purposes.⁵

27. Consequently, an investment may only be said to exist if the following criteria are met: a) there must be a substantial commitment on the side of the investor, b)

³ Joy Mining para. 59.

⁴ Excerpt from Fedax, in Joy Mining, para. 60.

⁵ *Bayindir* paras. 130-138; *Joy Mining* para. 53

the project in question must have a certain duration over which it is implemented, c) the project must imply not only the expectance of profit, but there must also be an element of risk, and d) in accordance with the preamble of the ICSID Convention, the project must represent a significant contribution to the development of the host State.⁶

i. Substantial Commitment

28. First or all, it cannot be asserted that the separate agreements require a substantial commitment from the investor. They are mere commercial transactions⁷ by means of which Claimant was to supply incidental services⁸ such as technical assistance or make some business for its own profit in the case of the license fees.

29. The tribunal can determine if there has been a substantial commitment by Claimant by contrasting the facts and the subsequent findings from other cases. In particular, in the cases *Aucoven* and *Bayindir* it was accepted that not even the construction of a highway by itself was sufficient to consider the commitment by the investor as being substantial it was necessary for there to be a commitment of substantial resources over a significant period of time.⁹ With these precedents in mind, the Tribunal cannot consider that the separate agreements involve a substantial commitment by Claimant.

30. Also, there is no commitment from Claimant because the granting of license fees and in particular providing technical assistance are both part of the normal activity of the company that did not require any type of particular additional development or production that could be “assimilated” to an investment.¹⁰

ii. Duration

⁶ Id. Joy Mining

⁷ Joy Mining paras. 59-61.

⁸ Joy Mining, para. 55.

⁹ Bayindir, para. 128

¹⁰ Joy Mining para. 56.

31. Second, because of the very nature of the separate agreements, they involve no duration of time for their implementation. What Claimant expected from these agreements was the payment of the respective amounts owed under them, but they were never supposed to be implemented throughout a prolonged period of time, especially the license fees agreements.
32. Some tribunals have even considered the element of duration as a “paramount factor” to determine what may or may not be considered as investment in the ICSID arena.¹¹ Not only are we in the presence of ordinary sales contracts that represent no commitment in terms of capital investing for the Claimant but also they do not represent any other form of long-term commitments.¹²

iii. Risk

33. Third, there was certainly an expectance of profit by the investor from these separate agreements but it cannot be argued that they involve an element of risk. There was no risk whatsoever for the investor, the amounts of money were to be paid and there was no possible contingency that could eventually jeopardize that. If there were any risk involved it would have been no different than the risk that could be present in any other commercial contract like the possibility of termination of the contract or the absence of payment by one of the contractors.¹³
34. These agreements represent absolutely no risk for Claimant, it cannot even be argued that they have the inherent risks of long term contracts¹⁴ because they were supposed to be carried out immediately, especially the license fees agreements.

iv. Contribution to Calpurnia’s development

¹¹ Bayindir para. 132.

¹² Ibid. (Bayindir para. 132.)

¹³ Joy Mining, para. 57.

¹⁴ Bayindir, para. 136.

35. Finally, it cannot be asserted that the separate agreements represent any form of contribution to Calpurnia's development; the truth is that they only represent profit for Claimant. In certain cases, the transferring of know-how may be considered as a contribution to the host state's development but this cannot be inferred to have happened since the agreements were only for the provision of technical assistance.

36. These separate agreements cannot be considered as anything more than ordinary commercial transactions.

37. For the reasons stated above, the tribunal must come to the conclusion that the contractual rights resulting from the license fees and technical assistance agreements are not investments.

b. Joint venture agreement

i. VanCal shares are not covered investments

38. The Tribunal has no jurisdiction over the claims concerning the suspension of payment of dividends.

1. Portfolio investment

39. Claimant's shares in VanCal and the dividends are forms of portfolio investment. Tribunals have not considered them as forms of investment that would be covered under BITs.¹⁵

40. Even if the tribunal considers that the shares and dividends are investments for jurisdictional purposes, it would nevertheless lack jurisdiction because they are contract-based claims¹⁶ and there is no umbrella clause in the applicable BIT.

ii. Contract-based claims

41. A distinction must be drawn between contract-based claims and treaty-based claims.¹⁷ The claims regarding the payment of dividends from Claimant's shares

¹⁵ McLachlan, page 193. Para. 6.97.

¹⁶ Impregilo, para. 262.

are beyond the scope of this tribunal's jurisdiction because they are, in reality, contract claims.¹⁸ They are cunningly manufactured to give the appearance that they constitute breaches of several treaty provisions when, in any case, they could only amount to breaches of the joint venture agreement.

1. Do not amount to treaty-based claims

42. The alleged facts related to these claims may only provide cause of action for a contract-based claim because they are not of sufficient magnitude to constitute violations of any treaty provisions.

43. First of all, there has been no interference because SFCDC acted exclusively through the corporate mechanisms to which any majority shareholder would be entitled to; there was never any use of governmental authority. Therefore, it cannot be argued that there has been a breach of the treaty, but only of the contract, since SFCDC has acted merely as a commercial party¹⁹ with no exercise of sovereign authority.²⁰

44. Second, the suspension of payment of dividends can in no case be equated with an outright repudiation²¹ of the obligation to pay those dividends, especially if they were eventually credited to Claimant's account in VanCal's books.

45. Third, there might be a debt concerning the dividends, but a claim related to a debt from a commercial entity that is VanCal can and must be settled in Calpurnia's courts. The tribunal must uphold the notion that there is a distinction between debt and expropriation, especially if an alleged debt is accompanied by the promise of payment, as in the present case.

46. For these reasons, the tribunal cannot consider that those alleged breaches of the joint venture agreement could constitute treaty violations. Some tribunals have required that in order to have contract disputes turn into investment disputes

¹⁷ McLachlan, page 99. Para. 4.64.

¹⁸ Joy Mining. Para. 75; Impregilo, para. 261.

¹⁹ McLachlan, Shore, Weiniger. Page. 103, para 4.73.

²⁰ Impregilo, para. 260.

²¹ PSEG para. 249.

under the treaty it would be necessary for there to be clear violations of the treaty, in case of contractual breaches, they have to be of such magnitude that they could trigger the protection of the treaty.²²

47. Clearly, it cannot be said that the alleged breaches of the present dispute are of sufficient magnitude so as to trigger the protection of the Calpurnia-Gaul BIT.

2. No umbrella clause

48. The jurisdiction of this tribunal is established by the Calpurnia-Gaul BIT and in the absence of treaty-based claims, it could only have jurisdiction over contract-based claims if an umbrella clause were present.

49. There is no umbrella clause in this BIT, therefore the tribunal has no jurisdiction over the claims that are related to the suspension of dividends or the separate agreements.

50. Claimant is trying to have a mere contractual dispute resolved by an international tribunal.

c. Claims of events outside of VanCal

51. There is no jurisdiction over the claims regarding events that occurred outside VanCal because they do not fulfill the requirements of article 25 of the ICSID Convention, namely they are not legal disputes arising directly out of an investment.

i. Police searches have no connection with the investment

52. Claimant has failed to prove that there is a direct relation between the protests or police searches and the investment. This will be demonstrated throughout the memorandum, but one proof of this is the fact that during the searches no trade secrets or other unauthorized information that could affect VanCal's or Claimant's interests was retrieved.²³

²² Joy Mining, para 81.

²³ FDI Moot 1st Clarifications, #11.

53. This tribunal's jurisdiction therefore cannot extend to those claims.

ii. Court dismissals have no connection to the investment

54. Throughout the memorandum it will be proven that the investment was not adversely affected by the court dismissals.

55. Consequently, this tribunal's jurisdiction cannot extend to the claims regarding the court dismissals because they have no direct relation to the investment.

B. *Ratione Personae*

56. Claimant's claims should be directed against the conduct of private company VanCal. The tribunal must know that Claimant and the SFCDC are parties to a joint venture agreement that establishes the company VanCal.

57. The entity that has celebrated the separate agreements with Claimant is VanCal, not SFCDC; therefore those payments are VanCal's responsibility. SFCDC is a shareholder in VanCal, but not the only one, there are other shareholders that are also responsible for those payments.

58. The tribunal cannot allow the State of Calpurnia to be responsible for the debts of all the shareholders in VanCal when SFCDC's participation is limited to 30%.

59. The claim regarding the suspension of dividends is also VanCal's responsibility, and SFCDC's responsibility only extends to its 30% participation.

60. Vanguard's claims against Calpurnia, if the tribunal finds that SFCDC's actions are attributable, must be limited to the 30% equity interest that belongs to SFCDC.

61. Alternatively, if the tribunal finds that there is no attribution, Calpurnia cannot be held responsible for the observance of contractual commitments into which it never entered²⁴ and that were signed by a separate and distinct entity.²⁵

²⁴ Impreglio v. Pakistan. Decision on Jurisdiction. Para. 223.

²⁵ Impreglio v. Pakistan. Decision on Jurisdiction. Para. 223

C. Responsibility and Attribution

a. Responsibility

62. State responsibility can only be generated in the extent of the damages suffered by Claimant. In this case, there simply are no damages that could be attributed to Calpurnia. Claimant wants to have Calpurnia declared responsible for inexistent damages.
63. Calpurnia's responsibility cannot rise from an agreement into which it never entered. SFCDC, not Calpurnia, is a shareholder in VanCal. VanCal, not SFCDC or Calpurnia, has suspended the payment of dividends and of the amounts due under the separate agreements.
64. The Calpurnia-Gaul BIT governs Calpurnia's responsibility exclusively.

b. Attribution

i. SFCDC's conduct is not attributable to Calpurnia

65. The Conduct of SFCDC is not attributable to the State of Calpurnia and as consequence all related claims against Calpurnia are inadmissible.
66. Claimant mentions the *Maffezini* case to convince this tribunal that SFCDC's conduct should be attributable to Calpurnia. This is very interesting especially because the approach that the tribunal took in that case was actually beneficial to Respondent's case.

1. Structural and Functional tests

67. It is true that in that case the tribunal conducted "structural" and "functional" tests to determine whether some particular actions of a public entity were attributable to the host State.
68. Like in this case, a structural test was not sufficient to solve the matter. Many of the facts surrounding SFCDC's creation and incorporation are unclear. Which is why this tribunal must conduct a functional test of SFCDC's actions. And since Claimant has mentioned the *Maffezini* case, this tribunal must conduct that test in the same way.

69. First of all, it must be noted that in the *Maffezini* case the issue of attribution was raised regarding the conduct of a public entity, and yet, its public nature by itself was not sufficient to establish that its conduct was attributable to the State.²⁶
70. Because the nature of the public entity in that case was uncertain, in the sense that it was evolving from being a public entity to a commercial one, some of its functions were governmental and some of them were commercial.²⁷ The conclusion was that the commercial acts could not be attributed to the State, and on the other hand the governmental acts should be attributed.²⁸ Other tribunals have correctly upheld this dividing line.²⁹
71. The tribunal had to analyze each of the actions of that entity to determine if it acted in a governmental or in a commercial capacity.³⁰
72. The acts that were conducted with a governmental capacity were ones in which the entity could manage the investor's accounts and when it intervened on behalf of the investment before the authorities³¹ as a public entity in order to benefit from a certain degree of leniency regarding loans.³²
73. On the other hand, acts conducted with a commercial capacity were some advisory functions concerning the feasibility and costs of the project,³³ the fact that such entity had ownership over some equity interest in the investment,³⁴ contributed to consider some acts as commercial.

²⁶ See generally, Cohen.

²⁷ Cohen, page 22.

²⁸ *Maffezini*, para. 62.

²⁹ Joy Mining, in Impregilo, para. 261.

³⁰ *Maffezini* para. 57.

³¹ *Maffezini*, para. 79.

³² *Maffezini*, para. 78.

³³ Cohen, page. 24. *Maffezini*, para. 63.

³⁴ *Maffezini*, para. 63.

2. SFCDC's conduct lacks governmental authority

74. As the tribunal will surely realize, SFCDC's actions can in no way be considered to be actions conducted through governmental capacity. SFCDC only acted on behalf of its private commercial interests through the corporate mechanisms it was entitled to by law as a majority shareholder.

75. The suspension of payment of dividends was a legitimate decision taken via the corporate functions any private shareholder could have access to. Also, replacements of members of the corporate bodies inside VanCal were also made through the legitimate and democratic corporate mechanisms provided.

76. There was never an exercise of governmental authority inside VanCal, SFCDC only acted as a private commercial contracting party. Consequently there has been no government interference, and the conduct of SFCDC cannot be attributed to the State of Calpurnia.

D. *Ratione Temporis*

a. "Cooling off" period

77. This tribunal lacks jurisdiction because Claimant has not pursued the 18 months period of amicable settlement before submitting the dispute to ICSID Arbitration, according to Art. 11 (2) of the Calpurnia- Gaul BIT.³⁵

78. If Claimant would have pursued amicable settlement for the time he was legally obliged to, we might not even have a dispute, but they were so quick to turn to this tribunal that there was no chance to negotiate in any way.

79. Claimant cannot be allowed to use the MFN clause from the Calpurnia-Gaul BIT for procedural rights but only substantive.³⁶ The wording of the provision does not refer to "all rights...or to all matters subject to the agreement"³⁷ which could lead to an assumption of extending the MFN clause over dispute resolution

³⁵ FDI Moot 2nd Clarifications, #47.

³⁶ Telenor v. Hungary, Award, 13 September 2006. Para 100

³⁷ Salini v. Kingdom of Jordan. Para 117.

mechanisms. However, the provision in the Calpurnia-Gaul BIT is not so wide and therefore it cannot be interpreted to extend over procedural matters.³⁸

80. Respondent echoes the conclusion of several ICSID Tribunals that chose to avoid undesirable treaty shopping by investors³⁹ as is Vanguard's intention.

81. Because the Calpurnia-Gaul BIT is a basic treaty, the MFN provision cannot be construed so as to incorporate dispute settlements as a whole.⁴⁰ This would only be possible if the basic treaty would leave no doubt that it was the intention of the Contracting Parties.⁴¹

82. Furthermore, the MFN clause cannot be used to invoke benefits from other BITs. Through article 5(c) of the Calpurnia-Gaul BIT, Calpurnia cannot be obliged to extend to Gaulois investors the benefit of any privilege that has already been conferred to the investors of any third country by virtue of any treaty relating to investments.

83. The fact that the treaty with Flatland predates the Calpurnia-Gaul BIT means that this exception from article 5(c) must be interpreted as referring to the benefits contained in the Calpurnia-Flatland BIT. Consequently, Vanguard cannot, through an MFN clause, invoke the privileges that Flatland investors are entitled to because there is an express limitation in article 5(c) of the Calpurnia-Gaul BIT.

E. Fork in the road

84. The Tribunal has no jurisdiction because the investor triggered the "fork in the road" provision of Article 11 (3) of the Calpurnia-Gaul BIT.

³⁸ Salini v. Kingdom of Jordan. Para 119.

³⁹ See. Telenor v. Hungary, Award, 13 September 2006. Para 100. Salini v. Kingdom of Jordan. Decision on Jurisdiction, 29 November 2004. Para 117. And Plama v. Bulgaria, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005).

⁴⁰ Plama v. Bulgaria, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005). Para 223.

⁴¹ Plama v. Bulgaria, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005). Para 223.

a. Proceedings before the Commercial Court

85. The claims before Calpurnia's Commercial Court of June 14 2006 must be considered as a waiver of ICSID jurisdiction concerning the claims for the payment of dividends.⁴²

86. The coincidence between the basis of the present claim and the claim brought before the local court⁴³ is indisputable.

87. Claimant should not be allowed to have recourse to the ICSID arbitration option in the treaty because this could lead to a double recovery.

b. Proceedings before the Constitutional Court

88. The proceedings before the Constitutional Court must also be considered as a waiver of ICSID jurisdiction over any and all claims concerning the lawfulness of the police searches and any compensation thereof.

89. There is identity of the parties since Vanguard was the claimant in the action brought to the Constitutional Court and is also Claimant in this ICSID arbitration. The causes of action are the same as well because their purpose is to have the searches declared unlawful and seek compensation from them. The parties and the causes of action under separate instruments the same.⁴⁴

90. The fact that Claimant was by no means under any legal obligation to submit those claims⁴⁵ to Calpurnian Courts and yet he did, adds to the argument that they are waivers of ICSID jurisdiction.

⁴² CMS v. Argentina. Para 78, see also Benvenuti and Bonfant SRL v. the Government of the People's Republic of the Congo, 1 ICSID Rep. 340 at para 1.14; Azurix v. Argentina. Para 90. Genin v. Estonia. Para 311. Waste Management, Inc. v. United Mexican States (hereinafter Waste Management) and Vivendi I.

⁴³ Waste Management, Inc. v. United Mexican States, June 2, 2000, 5 ICSID Rep. 443.

⁴⁴ Azurix v. Argentina. Decision on Jurisdiction. Para. 89.

⁴⁵ Occidental Exploration and Production Company v Ecuador, Award, LCIA Case No UN3467, IIC 202 (2004). Para 60, 61.

91. Claimant cannot now have recourse to one of the arbitral tribunals mentioned in Article 11(2) of the BIT.⁴⁶

F. Applicable law

a. Contract-based claims

92. If this tribunal were to declare itself competent over the claims regarding the payment of dividends and the separate agreements, it is Respondent's position that they are not of sufficient magnitude so as to constitute breaches of the BIT and they must therefore be resolved applying Calpurnian law.

93. Accordingly, article 42(1) of the ICSID Convention establishes that in absence of agreement between the parties to a dispute the tribunal shall apply domestic law and international law "as may be applicable."⁴⁷

94. The essence of the controversy is commercial domestic law, which must be applied as *lex specialis* due to the nature of the Joint Venture agreement,⁴⁸ the character of VanCal as a corporation and the fact that the place of incorporation is Calpurnia. Several Tribunals have found that the applicable law in commercial and civil matters is domestic law, unless the parties expressly agree upon another one.⁴⁹

95. Regarding these claims, international law could only be applied as a secondary source of law,⁵⁰ that is, only to the extent that domestic law has lacunae concerning a specific issue of the dispute, or if there is contradiction between them.⁵¹

b. Treaty-based claims

⁴⁶ Azurix v. Argentina. Para 89 and CMS v. Argentina. Para. 77.

⁴⁷ Article 42, ICSID Convention

⁴⁸ Bishop & Others, page 632

⁴⁹ Benvenuti and Bonfant, para 4.3, Agip Spa, para 45

⁵⁰ Dolzer, Schreuer. page. 74.

⁵¹ SPP LTD, see in Bishop & Others, page 635

96. If this tribunal declares itself competent over the claims based on standards of protection from the Calpurnia-Gaul BIT, Respondent holds that this tribunal must consider those standards in connection with Calpurnia's level of development.
97. According to the latest UNDP Human development rank, Gaul is given 89 points while Calpurnia is given 79 points.⁵² This places Calpurnia in a level of medium development while placing Gaul at a level of high development.⁵³
98. Respondent holds that this difference in the level of development must play a role in determining the scope through which the Tribunal will analyze Calpurnia's obligations under the Calpurnia-Gaul BIT.
99. The fact that investors consider the level of development of the host State when deciding whether to invest, along with the notion that BITs are not insurance policies against those decisions that could shield investors from the consequences of that State's level of development, leads to the conclusion that investors "cannot expect to claim under the treaty for actions resulting from that level of development."⁵⁴
100. Thus, the tribunal will have to consider the circumstances⁵⁵ of Calpurnia's level of development in order to determine if there have been any

⁵² FDI Moot 2nd Clarifications # 23

⁵³ UNCTAD Human Development Chart and Report, <http://www.unctad.org/Templates/Meeting.asp?intItemID=2068&m=6665&info=&lang=3>

⁵⁴ Gallus, page 9.

⁵⁵ Gallus, page 5; footnote 15: "*Ronald Lauder v. Czech Republic*, Final Award, 3 September 2001 at para. 308. See also: *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, reprinted in 6 ICSID Rev - FILJ 526; and *CME Czech Republic B.V. v. Czech Republic*, Final Award, March 14, 2003 at para. 353. It is important to note that the *AMT v. Zaire* Tribunal appeared not to find room for reasonableness within the test, instead holding the host state to an "obligation of vigilance": *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, reprinted in Yearbook Comm. Arbitration 22 (1997) 60 at para. 38."

breaches of the Calpurnia- Gaul BIT.⁵⁶ Calpurnia's diligence must be considered in light of its particular capacities and practices⁵⁷ because the assessment of the standards contained in the BIT cannot escape the context in which they are applied.

c. Customary International Law

101. Generally speaking, Claimant's contention that customary international law is to be applied to the present case has not been satisfactorily proven, the tribunal must therefore remain within the legal framework of Calpurnian law and the Calpurnia-Gaul BIT to determine Calpurnia's responsibility.

102. The Tribunal cannot apply the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts because of article 55 of that very instrument; State responsibility in this case would be governed by another *lex specialis*, i.e. the Calpurnia-Gaul BIT.

103. Consequently, this tribunal cannot impose upon Calpurnia obligations that may arise from customary international law. The only obligations that may be enforced upon Respondent are those found in the Calpurnia-Gaul BIT. The mechanisms for establishing State responsibility under customary international law are also not applicable to the present case because the *lex specialis* already provides those mechanisms for establishing Calpurnia's responsibility.

104. It has been Calpurnia's precise intention to have a set of special rules apply to its relations with Gaul, so as to allow them to depart from the inconsistent and unclear rules of customary international law; they did this by becoming parties to a bilateral treaty.

i. Responsibility from omissions

105. Calpurnia's responsibility from omissions would not rise from customary international law but from the Calpurnia-Gaul BIT exclusively, and only to the extent that such omissions are proven to be in breach of the obligations under the

⁵⁶ Gallus, page 5.

⁵⁷ Gallus, page 17, is quoting Brian Smith.

that instrument. Consequently, responsibility will only arise if there is proof that such omissions directly affect the investor's rights under the Calpurnia-Gaul BIT.

106. Therefore, Claimant must prove that the alleged omissions of Calpurnia generate responsibility because it had the obligation to act in a certain manner under the Calpurnia-Gaul BIT. Customary international law plays no role in this respect. Claimant however, has only tried to prove that Calpurnia may be responsible for its omissions under customary international law. No attempt was made to prove that the alleged omissions gave rise to Calpurnia's responsibility for being in breach of an obligation to act contained in the Calpurnia-Gaul BIT.

d. Calpurnia-Flatland BIT is not applicable

107. By virtue of article 5(c) of the Calpurnia-Gaul BIT, the Calpurnia-Flatland BIT is not applicable to the present dispute, as explained above.

2. Merits

A. Full Protection and Security

108. Respondent has not failed to provide full protection and security to Claimant.

a. Scope of the Standard

109. This standard imposes only an obligation of due diligence and not of strict liability.⁵⁸ Such an obligation could only be imposed through a specific treaty provision. An obligation of strict liability can only be imposed upon a State if there is a specific treaty provision to that effect.⁵⁹

⁵⁸ Noble Ventures, Para. 163.

⁵⁹ Lauder para. 308, is quoting *Dolzer and Stevens, Bilateral Investment Treaties*, p. 61

110. Also, this obligation must be assessed in light of the degree of protection that would be reasonable “under the circumstances.”⁶⁰
111. Furthermore, Calpurnia can only be required to “provide the protection that [its] level of development allows.”⁶¹
112. Moreover, the interpretation of this standard cannot “be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”⁶² Investors cannot be allowed to bring claims against host governments for any disturbance that may have an impact on their programmed revenues. BITs are not insurance policies that can shield them from any and all adverse elements.⁶³
113. The scope of this standard cannot be fixed to what Claimant expects, imposing upon Calpurnia an obligation that is “ever present” is contrary logic and reason, no one can expect such level of security and protection from everything that can potentially affect him. And what is worse, Claimant expects Calpurnia to be accountable on that basis, this simply cannot be allowed to happen because the state is not a guarantor of the Claimant’s investment, where would we find the element of risk in those investments?
114. Having established the scope, Respondent will demonstrate has not breached its obligation under the full protection and security standard.

b. Police searches

⁶⁰ *Asian Agricultural Products Limited v. Republic of Sri Lanka* (Case No. ARB/87/3, Award of 27 June 1990, ICSID Reports IV, p. 250 and at pp. 278 *et seq.*) and in *American Manufacturing & Trading, Inc. v. Republic of Zaire* (Case No. ARB/93/1, Award of 21 February 1997, ICSID Reports V, p. 14, at p. 30) *TECNICAS MEDIOAMBIENTALES TECMED S.A. v. THE UNITED MEXICAN STATES* CASE No. ARB (AF)/00/2. *Lauder v. Czech Republic*. Award Ad Hoc- UNCITRAL Arbitration Rules. *Noble Ventures, Inc. V. Romania* ICSID Case No. ARB/01/11 Para.164. *Eureko BV v Poland*, Partial Award. Ad hoc—UNCITRAL Arbitration Rules, IIC 98 (2005)

⁶¹ Gallus, page 5.

⁶² AAP vs. Sri Lanka. Para. 49.

⁶³ *Maffezini* Award, para. 64.

115. The police searches were conducted through a legal exercise of sovereign authority that was necessary to protect Calpurnia's national security interests.

116. Calpurnia has not breached this obligation through the police searches.

i. Legality of the searches

117. The searches were not unlawful.⁶⁴

118. The searches were conducted under *periculum in mora*.⁶⁵ As the tribunal will surely understand, these types of procedures rely wholly on secrecy and confidentiality. Having the information about these operations divulged would have greatly jeopardized their success.

119. Consequently, Respondent had no choice but to take action immediately and without initiating proceedings that would have surely alerted any suspects and possible criminals of what the official strategy was. The security forces had no other reasonable course of action available to them. Any other approach would have endangered Calpurnia's national security.

120. With all this considered, Respondent at all times upheld the right of those suspects to be considered innocent unless proven otherwise and for that reason the searches were thorough but were never violent.

ii. Time span of the searches

121. Respondent will prove to this tribunal that the extended time period in which the searches were conducted is proof that the authorities acted diligently.

122. Those searches were part of an ongoing police investigation over very serious accusations, which, if proven true, would have lead to uncover criminals that would be eventually punished severely. For these reasons extreme caution was necessary in all instances leading to the build up of the case. Thus, the searches took several hours and were quite thorough.⁶⁶ Each search was only

⁶⁴ FDI Moot 1st Clarifications, #17.

⁶⁵ FDI Moot 1st Clarifications # 17.

⁶⁶ FDI First Clarifications, # 17.

ordered when it was considered extremely necessary to do so. Obviously this circumstance of necessity was not going to be present very often. Which is why the security forces only took action when and to the extent that it was necessary to do so.

123. Now, the fact that that circumstance extended itself over a long and intermittent period of time can in no way operate to hold Calpurnia responsible as if it was acting in an inconsistent and capricious manner. Actually, the truth is the complete opposite, the security forces acted in accordance with what the situation required. During the time when no searches were conducted the necessary investigations continued, thus the notion that they were separate in time was only apparent to Claimant's representatives but that was not the reality.

iii. No charges filed

124. Claimant alleges that the police searches were façades, staged to interfere in Claimant's investment by preventing them from carrying out their functions in normalcy, and that no charges were filed in order to prevent them from exercising their right of defense, but this cannot be considered by the tribunal as anything more than a fantastic story.

125. No charges were filed against Pescara and Kolowenko because the searches did not render sufficient evidence to that effect. If the authorities would have filed charges against them, having no conclusive of their relation to espionage activities, then and only then could Claimant have a reason to argue that the authorities were being hostile towards him. On the contrary, authorities concluded that the evidence that was retrieved from their residences was not indicative or sufficient to prove that there was involvement with espionage activities.

126. Why would the authorities then file charges against Pescara and Kolowenko? Such action would have been clearly discriminatory and it would have constituted an arbitrary and excessive exercise of Calpurnia's police power. This did not happen, proving Calpurnia's unquestionable respect for the rule of law.

127. The *Genin* tribunal was faced with a claim for harassment based on criminal investigations and accusations of false charges that did not result in authorities pursuing a criminal case against the company.⁶⁷ In that case, the claimant alleged that the purpose of the investigations had been to intimidate rather than to prosecute⁶⁸ and that threatening criminal charges had violated the substantive provisions of the applicable BIT.⁶⁹ That tribunal rejected the claim on the grounds that the facts of the dispute were insufficient to amount to a violation of the BIT, indeed those facts were not even found to amount to harassment.⁷⁰ Due to the similarity of the facts in both cases, the Tribunal must seriously consider the conclusions reached by that tribunal.

c. Press releases

128. The press releases do not constitute a breach of the fair and equitable treatment standard.

129. First of all, the content of the press releases was factually accurate. Calpurnia, as any other constitutional and democratic State has the obligation to keep its people informed regarding the actions of its public authorities, especially in relation to matters that concern national security interests.

130. The fact that that information has been misinterpreted by isolated members of the public is not directly Calpurnia's responsibility; they were not instruments of instigation.

131. There were never any statements encouraging the people to take action against Claimant's representatives because this never was nor could have ever been Calpurnia's intention. Claimant alleges that Calpurnia issued those press releases to bring upon his representatives a climate of hostility and insecurity, this tribunal, along with declaring this claim aberrant and appalling must dismiss it.

⁶⁷ *Genin*, para. 95

⁶⁸ *Id.*

⁶⁹ *Genin*, para. 97.

⁷⁰ *Genin*, para. 374

d. Residences picketed

i. Conduct of individuals

132. Regarding the protests that were assembled outside the residences of Pescara and Kolowenko, Respondent will have this tribunal note that no government authorities had any relation whatsoever with them. Individuals or groups that have no relation to the government⁷¹ such as the CCC Women's League conducted them.

133. If this link cannot be established, Claimant must be required by this tribunal to present sufficient evidence to allow the conduct of such people to be attributed to Calpurnia under international law.⁷² The truth is that there is no connection between the State of Calpurnia and those individual protestors.

134. Any actions of these individuals are not attributable to Calpurnia, and so the necessary consequence is that all the claims related to those events must be dismissed because the Calpurnia-Gaul BIT does not provide protection "against any possible loss of value caused by persons whose acts could not be attributed to the State."⁷³

ii. Conduct of public authorities

135. According to the scope that must be given to this standard, Calpurnia was only required to exercise due diligence as reasonable under the circumstances⁷⁴ and consequently, investors cannot expect from that standard a warranty that their property will never be occupied or disturbed.⁷⁵

136. Claimant's representatives were high officials of the largest telecommunications company in Calpurnia⁷⁶ and as such, their affairs

⁷¹ FDI Moot 1st Clarifications, #18

⁷² *TECMED S.A v. United States of Mexico*. Para. 175.

⁷³ *Lauder*. Para. 308

⁷⁴ *Lauder vs. Czech Republic* 3/9/01. Para. 308.

⁷⁵ *ICJ, ELSI CASE*, Para.108.

⁷⁶ FDI Moot Clarifications #53.

represented a matter of public interest. They were consequently exposed to a higher degree of public scrutiny and had to cope with some measure of exposure.

137. There is a reason for why Calpurnian authorities declined to intervene when the residences were being picketed and that is because Claimant did not provide evidence of the situation being of sufficient magnitude to give rise to the obligation to protect.⁷⁷ In that sense, the tribunal must ponder on the fact that the fifty protestors⁷⁸ were simply exercising their right of freedom of speech over public property in a non-violent manner.⁷⁹ They never broke into either one of the residences, thus their property and privacy were always respected. Yes, there was a minor inconvenience in the sense that vehicle access to the property was obstructed, but they could always do so on foot.⁸⁰ Also, there were no signs that any aggression towards them would break out.

138. The tribunal will surely agree that this situation did not require the police to intervene. Nevertheless, authorities remained alert at all times in case intervention would have really become necessary.

139. The truth is that Claimant's representatives suffered absolutely no harm to their person or property. Claimant's argument that the simple fact that they could have been endangered in some degree is enough to hold Calpurnia accountable and give rise to an obligation to compensate them is completely absurd. If this were accepted, any situation in the territory of Calpurnia that could pose a risk to a foreign investor would not only be attributed to the State but would also give rise to an obligation to compensate for mere probabilities that would not need to materialize.

e. Legal security

⁷⁷ Noble para. 163.

⁷⁸ FDI Moot 2nd Clarifications, #41.

⁷⁹ FDI Problem. Pag. 6

⁸⁰ See First Clarifications pag.3

140. There is no legal basis to argue that full protection and security extends beyond physical protection. This tribunal is not bound by other tribunals' decisions that uphold this unfounded extension and it must establish the extent of this standard for the present case. Accordingly, there are no elements that could allow the tribunal to expand the scope of protection of this standard in that sense.

141. In case that this tribunal considers legal security to be included within the protection of this standard is it Respondent's argument that the notion of legal security is only limited to the duty to keep the judicial system available to the Claimant to have its claims examined and decided in accordance with law.⁸¹ Calpurnia's compliance with this obligation will be discussed below.

i. Denial of business visa did not affect legal security of the investment

142. The fact that a business visa was denied can in no way be considered as a deprivation of the legal security upon which the investment could reasonably rely. The issuance of visas is part of Calpurnia's sovereign discretionary power, and even if there was an obligation under the Calpurnia-Gaul BIT to consider Pescara's application, Calpurnia never had the obligation to accept her application.

143. Pescara's functions inside VanCal could have been perfectly exercised through a tourist visa under the waiver program.⁸²

f. Calpurnia has not failed to provide the investment full protection and security

144. For the reasons stated above the tribunal must decide that there is simply no breach of the fair and equitable treatment standard.

145. If the tribunal were to find a situation "sufficiently grave to regard it as a violation"⁸³ of the standard, Claimant would have to prove that Calpurnia's

⁸¹ Lauder. Para. 314.

⁸² FDI moot 1st Clarifications. #6.

noncompliance prejudiced him to a material degree,⁸⁴ but as mentioned before, such damage never became a reality.

146. Furthermore, Claimant has failed to prove that these incidents resulted in a reduction of his ability to control or manage the investment. Those incidents did not prevent Claimant's representatives from carrying out their abilities.⁸⁵

147. Claimant cannot prove that if Calpurnia had exercised a higher degree of due diligence, the alleged injuries or losses would have been prevented.⁸⁶

148. Claimant is trying to get this tribunal to find a breach of this standard when the truth is that the police searches and the press releases along with the protests did not impair their ability to manage or control the investment in any way. Claimant lost control over the management inside VanCal because of internal corporate decision-making dynamics, and they are trying to hold Calpurnia responsible for it so that they can obtain compensation from wherever they can.

149. This tribunal must realize the obviousness of Claimant's intentions in this sense.

150. For these reasons, Respondent argues that there has been no breach of the full protection and security standard.

B. Fair and Equitable Treatment

151. Respondent will prove that there has been no failure to provide fair and equitable treatment even if the tribunal upholds the notion that this standard contains additional elements of protection for foreign investors.

a. Scope of the fair and equitable treatment standard

⁸³ Noble Ventures, Inc. V. Romania ICSID Case No. ARB/01/11 Para. 166.

⁸⁴ Noble Ventures, Inc. V. Romania ICSID Case No. ARB/01/11. Para. 166

⁸⁵ Noble Ventures, Inc. V. Romania ICSID Case No. ARB/01/11. Para. 165.

⁸⁶ Noble Ventures, Inc. V. Romania ICSID Case No. ARB/01/11. Para. 166-167.

152. Fair and equitable treatment must be limited to the international minimum standard.⁸⁷
153. There is no evidence that the intention of the Contracting Parties to the Calpurnia-Gaul BIT was to have a higher standard of protection than that of customary international law.
154. To argue that the wording of a BIT is sufficient to determine the scope of the standard is overly formalistic and contrary to the intention of the host States. The treaty must be interpreted in accordance with the principle of good faith. In this case a *bona fide* approach would be one in which other tribunals' determination of the scope of this standard is considered.
155. In the NAFTA context, the Free Trade Commission has clearly established that the fair and equitable treatment standards are not free-standing obligations, and that they constitute obligations only to the extent that they are recognized by customary international law.⁸⁸
156. This has become the new inclination in international law; proof of this is the 2004 U.S. Model BIT, in particular its article 5(2) clearly states that the standard does not create additional substantive rights other than the basic rights of due process and protection from denial of justice.⁸⁹
157. Jurisprudence has established a threshold to determine if there has been a breach of this standard, and this tribunal must consider it. The tribunal in *S.D. Myers* has established that it is necessary for an investor to be treated in such an unjust and arbitrary manner that it rises to a level that is unacceptable under international law.⁹⁰
158. The *Waste Management* tribunal rightly established that a breach of this standard required conduct that is "arbitrary, grossly unfair, unjust or

⁸⁷ OECD, page 10.

⁸⁸ NAFTA FTC Interpretation of Article 1105.

⁸⁹ US Model BIT 2004.

⁹⁰ *Myers*, para. 263.

idiosyncratic” and it is also necessary for the investor to be exposed to sectional or racial prejudice.⁹¹

159. The *Genin* tribunal was also correct in its appreciation of the scope of this standard by establishing that a finding of a breach of this standard would require acts that show a “willful neglect of duty, an extreme insufficiency of action falling far below international standards”⁹² this tribunal even required subjective bad faith. Evidently, the bar set for there to be a breach of this standard is considerably high.

160. Furthermore, the Tribunal must reject Claimant’s notion that this standard contains additional obligations imposed upon States on the grounds that it is an overarching principle or quasi-constitutional provision because this argument lacks authority. International tribunals have not expressly upheld it and it clearly represents the point of view of a minority.

161. Finally, Respondent holds that the level of development must play a decisive role in determining the scope of Calpurnia’s obligations under the fair and equitable treatment standard. The reason is that it is a practical standard, and therefore it must always have regard to the possibilities of the governments under existing conditions.⁹³ Consequently, the rights of a foreigner are subject to variations as there is a transition between “peaceful times and times of disturbance.”⁹⁴ The status of the government itself⁹⁵ will also have an impact, this standard cannot be held to require a “uniform degree of governmental efficiency.”⁹⁶

⁹¹ *Waste Management*, para. 98.

⁹² *Genin*, para. 367.

⁹³ *Gallus*, page 16, is quoting Elihu Root.

⁹⁴ Elihu Root, in *Gallus*, page 16.

⁹⁵ *Gallus*, page 17, is quoting Pierre Dupuy,

⁹⁶ *Gallus*, page 16, is quoting James Brierly.

162. Having established the scope that the tribunal will apply, it will be proven that there has been no breach of the standard.

b. Police searches

163. The fair and equitable treatment standard has not been breached by the police searches.

164. There was no subjective bad faith motivating the police searches. On the contrary, a credible tip gave the police department enough reason to believe that some Gaulois nationals might have been involved in espionage activities.

165. These searches may have brought upon Claimant or its representatives some kind of hassle, but the sheer frequency and number of times it happened should play in Respondent's favor in the sense that three searches over a period of almost eight months cannot be considered as something capable of subjecting the entire investment to unfair and inequitable treatment. The fact that they were never conducted in a violent manner must also add to this argument.

166. The searches were not unjust or arbitrary. They were conducted under a veil of confidentiality due to their very nature, but that is not enough to establish their illegality, especially after considering the fact that they were not violent. Even if the tribunal finds that they were illegal in some minor degree it would not be sufficient to consider them as being overtly contrary to international law.

167. The current high threshold for finding a breach would require an evident harassment with certifiable damages to property or fundamental rights such as life or physical integrity occurring consistently over a prolonged period of time, which result in diminishing in some form the investor's rights in connection with the investment.

168. The police searches are not of sufficient magnitude so as to constitute violations of international law.

c. Court dismissals and denial of justice

169. As to the court dismissals, it is Respondent's defense that they do not constitute a denial of justice.

170. The bar for finding a denial of justice set by other tribunals is considerably high and simply put, the facts of the present case do not allow for a finding in that sense.

171. Respondent will demonstrate that there has been no denial of justice in the sense that judicial procedures were reasonably available to Claimant and the decisions were correctly made on solid legal grounds.

i. Procedural denial of justice

172. Regarding the threshold for finding a denial of justice for procedural matters, the tribunal in *Waste Management* asserted that there would have to be a manifest failure of natural justice in the court proceedings through an outcome that offends judicial propriety.⁹⁷ In the present case, the claims were legally admitted and entertained and they were dismissed without subjecting them to undue delay.⁹⁸

173. The *Genin* tribunal has accurately established that a procedural irregularity would have to be qualified by bad faith or a “willful disregard of due process of law or an extreme insufficiency of action”⁹⁹ so that it may amount to a violation of a BIT. It has not been proven by claimant that the courts acted in bad faith or that there has been a willful disregard of due process. Therefore there cannot be a finding of denial of justice in breach of the Calpurnia-Gaul BIT.

174. Even if the tribunal were to accept the notion that in order to find a denial of procedural justice it is only necessary for an observer to be surprised,¹⁰⁰ it cannot be seriously argued that the procedural aspects of the claims before both courts are manifestly unjust or flawed to the extent that they surprise this tribunal in that sense. This claim must be considered under the high

⁹⁷ *Waste Management*, para. 98.

⁹⁸ *Azininan* para. 102.

⁹⁹ *Genin*, para. 371.

¹⁰⁰ *Pope and Talbot (Damages)* para 63.

measure of deference within which international law allows countries to control matters within its own borders.¹⁰¹

175. The fact that Claimant or its representatives initiated these claims is evidence that the judicial system was available to them.¹⁰²

176. Moreover, Pescara had the right to appeal the decision that was rendered by the Commercial Court and she decided not to exercise that right.¹⁰³ How could Calpurnia be held responsible for denial of justice when the right to appeal the court's decisions and other remedies such as the National Treatment Regime¹⁰⁴ were reasonably available to Claimant? Their decision to have no recourse to those legal remedies cannot play against Respondent's case.

177. There should be no requirement to exhaust local remedies, but there were other local remedies available and claimant simply chose not to activate them, the tribunal, in order for there to be a finding of a denial of justice must be in the presence of a complete breakdown of the system.¹⁰⁵

ii. Substantive denial of justice

178. First of all, the tribunal must consider that international tribunals cannot act as courts of appeal to revise the decisions of the local courts.

179. The bar for a finding of denial of substantive justice is also considerably high. In fact, a simple error from the national court would not be enough to constitute a breach, there would have to be a "manifest injustice," a "gross unfairness" or a flagrant, inexcusable and palpable violation, in which the decision in question was evidently motivated by bad faith instead of by a judicial error.¹⁰⁶ Even more so, the claimant would have to prove that the error in

¹⁰¹ Myers, 1st Partial Award. Para. 263.

¹⁰² *Lauder v. Czech Republic* para. 314

¹⁰³ FDI Moot 2nd Clarifications, #6.

¹⁰⁴ FDI Moot 2nd Clarifications, #25.

¹⁰⁵ MacLachlan, Shore, Weiniger, Page 233. Sec. 7.98.

¹⁰⁶ Loewen, para. 129.

question was “operating to his prejudice.”¹⁰⁷ Some tribunals require a “seriously inadequate administration of justice.”¹⁰⁸

180. Some tribunals have established that a finding of substantive bad faith in relation to a claim under the fair and equitable treatment standard would require a decision to be “clearly improper and discreditable” and also that the decision would have to be sufficient to subject the investment to unfair and inequitable treatment¹⁰⁹ by itself.

181. In this case, the claims were dismissed because the ones that that did not have the right to bring forth those claims initiated them.¹¹⁰ The ones entitled to have the searches of the residences declared unlawful were Pescara and Kolowenko exclusively and each of them only for the declaration concerning their residence alone.

182. The claim before the Commercial Court was also dismissed because the dividends that Pescara was requesting are deposited to her personal account were not registered in her name, but in the name of another person, a legal person.¹¹¹

183. These findings cannot be said to constitute a manifest injustice or gross unfairness, motivated by subjective bad faith. They are legally correct; they are not clearly improper or discreditable. Claimant should have been aware that there were basic procedural rules that governed the admissibility of its claims.

184. It simply cannot be argued that these decisions are sufficient to subject the entire investment to unfair or inequitable treatment. The investor must abide by domestic procedural law and cannot hide behind fair and equitable treatment to escape its application.

¹⁰⁷ Loewen, para. 130.

¹⁰⁸ Azinian, para 102.

¹⁰⁹ Mondev, para. 127.

¹¹⁰ FDI Moot Problem. Pag. 4

¹¹¹ FDI Moot Problem. Pag. 8

d. Alleged additional elements of fair and equitable treatment

185. There is simply no legal basis to argue that this standard contains further obligations. In fact this tribunal should decide that fair and equitable treatment according to international law, only imposes upon states the obligation to “maintain and make available to aliens a fair and effective system of justice.”¹¹²

186. However, if the tribunal were to extend the scope of the standard, it is Respondent’s position that Calpurnia has not breached those additional obligations and that there is consequently no breach of the fair and equitable treatment standard. The Claims that will be countered in this section are the ones that allegedly occurred within VanCal.

i. Legality

187. Claimant’s argument that a simple illegality under domestic law is enough to constitute a breach of the fair and equitable treatment standard is erroneous. In fact, it is necessary for the alleged violations of domestic law to be “systemic” and capable of affecting the stability and transparency of the investment’s legal environment.¹¹³ Additionally, the possibility of succeeding in a claim of this sort would be substantially undermined if there were domestic remedies available to the claimant.¹¹⁴

188. The alleged illegalities are not systemic and they cannot be considered as being of sufficient magnitude as to constitute violations of the substantive provisions of the Calpurnia-Gaul BIT.

189. A mere suspension of payment of dividends, accompanied by the subsequent crediting of those amounts in Claimant’s account in VanCal, followed by assurances that those payments would be made, cannot reasonably be considered as a breach of the domestic legal system that affects the investment’s legal environment and that in turn amounts to a breach of a substantive provision of the Calpurnia-Gaul BIT.

¹¹² Loewen para. 129.

¹¹³ Schreuer, *Interactions*. Page 22.

¹¹⁴ Id. Schreuer, *Interactions*. Page 22.

190. In this context, the statements made concerning the willingness to make any payments owed for dividends or license fees¹¹⁵ have to be considered as proof of good faith and as such they must operate to counter balance any instances of disregard of legal requirements that the tribunal may find.¹¹⁶ No statements were made regarding the technical assistance agreements because Kolowenko was responsible for carrying them out and he was simply nowhere to be found.

ii. Legitimate expectations

191. Claimant's expectations have to be subjected to Calpurnia's level of development¹¹⁷ and must therefore differ from the expectations an investor could have when investing in a highly developed country. The tribunal must consider this level of development in order to determine if Calpurnia has failed to provide fair and equitable treatment by frustrating Claimant's expectations.¹¹⁸

192. Claimant decided to invest in Calpurnia after taking into consideration "its prospects and potential pitfalls,"¹¹⁹ the Calpurnia-Gaul BIT cannot now be used as a mechanism to exclude the latter, leaving the operation risk-free.

193. Besides, a change of government must be considered as an expected risk on behalf of any diligent investor,¹²⁰ and therefore his legitimate expectations cannot reasonably remain unchanged.

194. Even if the tribunal refuses to take into account Calpurnia's level of development, it will be proven that Claimant's expectations have not been frustrated, by analyzing each one separately.

¹¹⁵ FDI Moot Problem.

¹¹⁶ *GAMI Investments, Inc. v. Mexico*, Award, 15 November 2004. para 97.

¹¹⁷ Gallus, page 4.

¹¹⁸ Gallus, page 4.

¹¹⁹ *Generation Ukraine*, para. 20.37.

¹²⁰ Olguin

1. Stable and transparent business and legal framework

195. The tribunal in *Saluka* made a correct analysis concerning the real extent of investor's expectations to a stable and transparent business framework. It recognized that even though an investor might reasonably expect general standards as good faith and due process, the terms that compose this expectation cannot be taken "too literally" because that would impose unrealistic and inappropriate obligations upon States.¹²¹

196. This tribunal should also uphold the notion that the scope of protection that these expectations can receive cannot be determined by the "investor's subjective motivations and considerations exclusively."¹²²

i. Stability

197. In the present case, the claims concerning this particular expectation are of such minimal transcendence that the tribunal could not possibly consider them as being sufficient to destroy the stability of the investment's business and legal framework.

198. Could the tribunal seriously consider a suspension of payment of dividends, to create a fund for severance pay fund, decided by the board of a private company as illegitimate frustrations of an investor's expectations? How about the restructuring of a private company done through the legitimate mechanisms established for that effect in the articles of association? The only reasonable answer is no.

199. The denial to renew a business visa would not frustrate the expectation of stability because such discretion is an inherent element of a State's sovereignty.

200. Finally, the stability of the investment's legal environment has not been destroyed because the joint venture and the trademark licensing agreement remain in force.¹²³

¹²¹ *Saluka*, para 304.

¹²² *Id.*

ii. Transparency

201. The simple fact that one person in a private company instead of giving a written response to an email sent by Claimant gave only verbal responses¹²⁴ cannot be considered as an act that defies the transparency to which the investment was accustomed.

202. Also, the modification of policies concerning the access to information of the investment cannot be considered capable of jeopardizing the consistency of the investment's business framework, especially if it was done in strict accordance with domestic law and if all information to which shareholders were entitled was being made available to them.¹²⁵

2. Expectations from contractual commitments

203. The suspension of payment of dividends and the incidents related to the separate agreements are not sufficient to frustrate Claimant's legitimate expectations so as to constitute a breach of the fair and equitable treatment standard.

204. The *Waste Management* tribunal categorically established that the non-payment of debts is not enough to constitute a breach of the fair and equitable treatment standard.¹²⁶ Another tribunal upheld a rationale from this tribunal in the sense that "the acknowledged failure to fulfil contractual obligations did not suffice to create liability under this standard."¹²⁷

205. Claimant has to prove that it relied on those expectations to run its investment, in the sense that being deprived of them would make it impossible for the investment to continue its operations. Claimant could have easily bypassed these inconveniences.

¹²³ FDI Moot 2nd Clarifications, # 15.

¹²⁴ FDI Moot 2nd Clarifications, # 21.

¹²⁵ FDI Moot 1st Clarifications, # 10.

¹²⁶ *Waste Management*, para. 115.

¹²⁷ *Gami*, para. 96.

206. A breach of the fair and equitable treatment standard would in turn imply that the investment has been destroyed, not only disrupted.¹²⁸ This however, cannot be said to have happened because the investment has not been significantly undermined by those minute non-payments.

3. Claimant's expectations have not been frustrated

207. In any case, Claimant's expectations would have to rise to a level of legitimacy and reasonableness in light of the circumstances¹²⁹ in order to be protected under the Calpurnia-Gaul BIT. One of these circumstances is Calpurnia's level of development, another, is the fact that most events transpired within the corporate dynamics of a private company.

208. The protection of investor's expectations cannot be considered as a shield against all possible business risks.

209. For these reasons, Claimant's expectations are not reasonable in degree in light of the circumstances, and moreover, they have not been frustrated to a point where Calpurnia would have to compensate them.

iii. Proportionality

210. Declaring Claimant's proxies invalid for the November 16 meeting was not disproportionate. Knowing that there was going to be another meeting, Claimant should have exercised some due diligence on its part to make sure that its representatives had the necessary legal documents.

211. Those proxies were ruled invalid because they were issued for a meeting that was legally postponed for more than one month. Calpurnian law requires, *inter alia*, that a proxy precisely state the event for which it is issued.¹³⁰ This could not have been inconsequential because more than one month had passed since the postponement of the meeting.

¹²⁸ Fietta. Expropriation and Fair and Equitable Treatment

¹²⁹ Saluka. Para. 304

¹³⁰ FDI Moot 2nd Clarifications # 20.

212. Claimant had sufficient time to take care of those matters because the meeting was postponed meeting all legal requirements¹³¹ and to accept those proxies would have been to act in contradiction with Calpurnian law. Moreover, Claimant's representatives were allowed to be present at the meeting, only they could not vote.¹³²

213. For all of the reasons stated above, Respondent holds that there has been no breach of the fair and equitable treatment standard.

C. Interference

214. Claimant alleges that Calpurnia has interfered with his investment, from outside of VanCal and from inside it as well. Respondent will prove otherwise.

a. When is interference present?

215. The following benchmarks from jurisprudence can provide this tribunal with a measure against which to assess Calpurnia's conduct to determine if there has been interference.

216. Tribunals have considered state actions that bring about an "irreparable cessation of work on the project"¹³³ through outright measures that materially impede the investor from continuing his operations. Other tribunals have found interference when there has been some form of decree or "legislative enactment, embodying the act of nationalization"¹³⁴ which would imply the use of some degree of governmental authority. An outright repudiation of a contract has indeed been considered as interference when all of the obligations of the State

¹³¹ FDI Moot 1st Clarifications # 8

¹³² FDI Moot 2nd Clarifications, #26.

¹³³ *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and Government of Ghana*, Award.

¹³⁴ *LETCO*- Award: paragraph 1 Nationalization. ICSID Reports vol. 2, page 366.

have been repudiated,¹³⁵ or when the contract itself has been nullified by the use of sovereign authority.¹³⁶

217. Thus, the bar for finding interference must satisfy at least the requirement that there has been a “deliberate governmental interference”¹³⁷ which had the effect of depriving the investor of the use and benefit of its investment. Several tests for determining the level of interference have been conducted but the point of connection between them is that interference must be sufficient so as to “substantially deprive the investor of the economic value, use or enjoyment of its investment.”¹³⁸

218. It is within this framework that the tribunal must consider Calpurnia’s conduct to determine if interference has materialized.

b. Alleged interference outside VanCal

i. Police searches

219. As mentioned above, the searches were conducted due to imperative national security reasons. Claimant will have this tribunal believe that they were conducted in order to prevent its representatives from exercising their investment-related functions. Of course, the tribunal will see these allegations for what they are, very creative and fantastic fabrications.

220. Not only is it inconceivable, but also there is also no evidence that Calpurnia’s intention was to interfere in the investment via the police searches.

ii. Denial of business visa

221. The allegation that Calpurnia denied a visa renewal to a foreign national so that a Calpurnian company could take control over a joint venture is simply implausible.

¹³⁵ *British Petroleum v. Libyan Arab Republic*, 53 I.L.R. 329 (1973); in *Foreign Investment Disputes*, Cases, Materials and Commentary; Bishop & Others.

¹³⁶ *Phillips Petroleum*. In Bishop & Others

¹³⁷ *IRAN US-Tippets. CME* par. 608. ICSID Reports- issue 9- page 237.

¹³⁸ *Telenor Mobile*, para 65

222. Claimant himself is stating that the diplomatic relations between Calpurnia and Gaul had deteriorated since the change in government, could this have been a more logical reason behind the denial of a business visa? Of course it could. The fact that after this incident Claimant supposedly started to lose control over the investment is most unfortunate (for Claimant) but the investor can never seriously expect a *status quo* to remain at the corporate level of any company. Such dynamics are bound to change as time passes and an investor cannot be allowed to use a BIT to seek compensation for those changes that are inherent to commercial and business practices anywhere.

223. For these reasons, the tribunal cannot consider the denial of the renewal of the business visa, or the supposed effects thereof, as a form of interference by Calpurnia.

iii. Alleged impossibility to remain in the country

224. The fact that Claimant's personnel decided to leave the country does not mean that Calpurnia expelled them. The tribunal is very well aware that the difference between these two concepts is central for determining State interference.

225. After 2003 Kolowenko decided not to return to Calpurnia and it cannot be said that he was forced into making that decision.¹³⁹ He was terminated from his position for not reporting to work in 2004.¹⁴⁰ It would be impossible to find some form of interference here; Kolowenko did not even choose to renew his business visa.¹⁴¹

226. The same goes for Pescara who was less and less frequently in Calpurnia as time passed, fact which ultimately lead the authorities to confirm the belief that she did not need a business visa and could continue her business operations under the visa waiver program.

¹³⁹ FDI Moot 2nd Clarifications, #7, 8.

¹⁴⁰ FDI Moot 2nd Clarifications, #7.

¹⁴¹ FDI Moot 2nd Clarifications, #48.

227. As the tribunal will note, their decision to leave the country and the denial of the renewal of the business visa can in no way be compared to an expulsion from the country. Especially in the case of the latter, because she could reenter Calpurnia alternatively.

228. The *Biloune* case is not applicable because that case dealt with the outright expulsion of foreign investors,¹⁴² something that has not happened in the present case. *Benvenuti and Bonfant* cannot be considered either because in this case no criminal proceedings¹⁴³ have been initiated against any of Claimants representatives in Calpurnia. In fact, the security forces were very cautious and did not even file charges because the evidence was insufficient.

c. Alleged interference inside VanCal

229. Even though SFCDC's conduct is not attributable to Calpurnia, Respondent will prove that there was no interference inside VanCal.

i. Suspension of payment of dividends

230. The decision to suspend the payment of dividends was taken up for a specific purpose and not exclusively to prejudice Claimant.

231. The suspension of payment of dividends was decided so that a reserve fund for severance pay could be created. These funds serve as backup budgets to pay indemnifications to employees who could possibly terminate their labor relationship with the company. Any company lacking such a fund might find itself in quite a predicament if there would be a massive discharge and the employees would sue the company. The creation of the reserve fund for severance pay cannot be considered as a form of unlawful interference but instead as a measure of protection for the investment.

232. Additionally, the tribunal must reflect upon the fact that the degree of inconvenience caused by this decision was minuscule. The term "suspension" leads to a temporary situation, not a permanent one. To that effect, this

¹⁴² *Biloune*. See Generally

¹⁴³ *Benvenuti & Bonfant*, para 4.59.

suspension was only in force until the dividends were credited to Claimant's account.

233. This was an administrative decision concerning the management of VanCal, taken by the legitimate body, in compliance with all the necessary formal requirements,¹⁴⁴ under Calpurnian statutes and VanCal's constitution.¹⁴⁵ Claimant, as a shareholder, had the obligation to abide by that decision, and instead what he is doing is alleging government interference because he is displeased with the decisions taken by the board.

234. Claimant cannot allege that this decision was an act of government interference because there were never any official statements or proclamations from government entities or instrumentalities to that effect.¹⁴⁶ The truth of the matter is that this decision was taken by an entity completely separate from the government. Claimant will have this tribunal believe that Calpurnia influenced SFCDC in the process of making this decision, but that is false.

235. Further evidence that this decision was not a form of government interference is the fact that it was taken through the democratic channel of voting in the board. As the tribunal is well aware, the SFCDC is not the only entity that has representation in the board and therefore the consequences of such a decision could not possibly be attributed to the SFCDC alone, but to VanCal as a whole. Even more so, this decision was carried out and executed, not by a member of the SFCDC, but by the Managing Director of VanCal at the time, Korchnoi,¹⁴⁷ who had no affiliation whatsoever with SFCDC.¹⁴⁸

236. How can it be alleged that this decision is a form of government interference when the board voted on it, it was not dictated by the SFCDC; and its implementation was left in the hands of the Managing Director of the

¹⁴⁴ FDI Moot 1st Clarifications. #3

¹⁴⁵ FDI Moot 2nd Clarifications. # 40

¹⁴⁶ FDI Moot 1st Clarifications. # 12.

¹⁴⁷ FDI Moot 1st Clarifications, # 33.

¹⁴⁸ FDI Moot 2nd Clarifications # 1.

company, who had no relation with the SFCDC, and who of course could have never exercised any form of governmental authority?

ii. Reduced participation of claimants personnel

237. An important point of Claimant's arguments is the alleged "ousting" of Pescara from the board of VanCal.

238. First of all it must be noted by this tribunal that Pescara was never "ousted" from the board of directors. She was legitimately removed by the vote of the majority of the shareholders present at that meeting.¹⁴⁹

239. This decision was in strict accordance with Calpurnian law and VanCal's Constitution because it is not necessary for the shareholders to have a cause for the dismissal of a member from the board.¹⁵⁰ Also, that proposal was included in the meeting's agenda two weeks before the meeting took place¹⁵¹ and thus Claimant cannot hold that it was an irregular or arbitrary for of interference. Besides all the members of the board present at that meeting were exercising the corresponding rights of representation legitimately.¹⁵²

240. Foreign investors cannot be allowed to bring claims before host States under BITs on the grounds that they expect the standards of protection contained therein to effectively guarantee their control over the investment's corporate structure. The directorate of a company with many shareholders is always bound to change and BITs cannot be wielded to shield foreign investors from this reality.

241. Ultimately, it was Claimant who decided to withdraw its representatives from the board, never were they expelled or ousted by the SFCDC or Respondent. And besides, the fact that Swift suggested Claimant to withdraw the

¹⁴⁹ FDI Moot 1st Clarifications # 3

¹⁵⁰ FDI Moot 2nd Clarifications. # 30.

¹⁵¹ FDI Moot 2nd Clarifications. # 36.

¹⁵² FDI Moot 1st Clarifications. # 34.

resignations and to designate new directors to the board¹⁵³ is a clear indication that it was never SFCDC's intention to obtain control over the corporate directorate of VanCal by alternatively suppressing Claimant's participation.

242. Regarding the fact that a director from SFCDC eventually replaced Korchnoi, who was not affiliated with the SFCDC, it is Respondent's defense that VanCal was increasingly suffering from having its directors resign or leave the country designating no replacement whatsoever. Those managerial positions had to be occupied and SFCDC's directors were readily available at the time. There was nothing left to do.¹⁵⁴

iii. Alleged implementation of government policy

243. Claimant alleges that government policy was being implemented by SFCDC within VanCal, which operated to his detriment.

244. The general adversity towards Gaul in connection to the deterioration of diplomatic relations and some statements made by SFCDC employees cannot be considered as indicators of the fact that mechanisms for the implementation of government policy were in operation. Calpurnia cannot control and even less, act, through those phenomena.

245. The decisions of the board of a private joint venture taken to manage its expenditures or to restructure its corporate directorate levels by voting some members off the board cannot be considered as manifestations of public policy being implemented inside VanCal. There is simply no possible way for a connection to be made between them.

246. SFCDC has never been Calpurnia's corporate vehicle for the implementation of government policy.

iv. Statements from SFCDC and its representatives.

247. Respondent argues that these statements by themselves cannot constitute measures that could have any effect on Claimant's investment and consequently,

¹⁵³ FDI Moot Problem

¹⁵⁴ *See contrario sensu*, Sornarajah, page 389

the tribunal cannot possibly uphold the argument that interference was present through these statements.

248. The statements made by Swift in the sense that he did not regard VanCal as really being a private company or the insinuation that Claimant's representatives to the board were "Gaulois spies"¹⁵⁵ received special attention by Claimant when constructing the argument on interference. However, jurisprudence has established that such statements could not even constitute a measure under the treaty because they have no effect over the investment.¹⁵⁶

249. Even more so, it has been established that a statement made by a member of an entity very similar to the SFCDC could not be attributable as such to that entity and to the State. Conversely, it can only be considered as a personal opinion of that member.¹⁵⁷ Those statements could only constitute interference by being measures capable of breaching the Calpurnia-Gaul BIT.¹⁵⁸

250. The declarations made by the SFCDC as a public entity through its representatives in the sense that the board of VanCal looks after the interests of the country and that it has done all in its power to achieve that end cannot be considered as measures under the BIT either because they had absolutely no effect on Claimant's investment.¹⁵⁹

251. These statements do not bring upon the investment sufficient effects so as to consider them as measures under the treaty.¹⁶⁰ Furthermore, they were never accompanied by actions so as to consider them as measures. A finding on interference is therefore simply not possible.

d. There was no intervention by Respondent

¹⁵⁵ Korchnoi affidavit. FDI Moot Problem. Pag.9

¹⁵⁶ Lauder vs. Czech Republic. Para. 245.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

252. The Calpurnia-Gaul BIT does not create a duty of due diligence for Calpurnia to intervene in a dispute between two companies, i.e. SFCDC and Vanguard, over the nature of their legal relationships¹⁶¹ under the joint venture agreement.

253. However, the tribunal must reflect upon the scenario in which Calpurnia would have interfered to prevent the implementation of a legitimate decision adopted by the board of a private company. Only then would government interference be present. But the reality of the matter is that Calpurnia always remained alienated from the internal procedures of VanCal.

D. Discrimination and arbitrariness

a. Discrimination

254. Claimant must prove that the measures that alleged discriminatory measures were directed against a particular party for reasons that hold no relation to the substance of the matter, and that like persons were being treated in a different manner.¹⁶²

255. Respondent will prove that Claimant was not discriminated against.

i. Police searches

256. The police searches were conducted on those residences because of objective reasons. Foreign nationality was an inherent element for investigating espionage activities. In this case, nationality is an integral part of the substance of the matter. It is inconceivable that the searches would be conducted on Calpurnian citizens' residences all the same.

257. The searches were motivated by a credible tip¹⁶³ that provided the security forces with a reasonable suspicion that the person concerned may have

¹⁶¹ Lauder. Para. 314.

¹⁶² Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. Transnational Law & Policy 57-59. (1998)

¹⁶³ FDI Moot 1st Clarifications, #20

committed the offence.¹⁶⁴ They were based on an objective criterion that was essential to the nature of the accusation, nationality. This cannot be basis for a claim of discriminatory treatment.

ii. Court dismissals

1. Not systematic or specifically targeted

258. Tribunals require for a finding on discriminatory treatment under international law, for there to be several acts that result in the “adoption of a systematic policy or practice” by the State.¹⁶⁵ The Courts dismissed the claims because they were legally inadmissible. There has been no systematic policy by Calpurnia to prevent Gaulois nationals to access the judiciary.

259. Also, there is no indication that the Courts of Calpurnia specifically targeted Claimant in a discriminatory way. It has not been proven that other equally flawed received favorable decisions and only Gaulois nationals had their claims summarily dismissed.¹⁶⁶

260. Furthermore, it has not been proven that the courts dismissed those claims with the intention of harming Claimant or its representatives, or treating them in a discriminatory way.¹⁶⁷ They were motivated by basic rules of procedure and legitimacy to bring forth any claim legally.

iii. Denial of business visa

261. The denial to renew the business visa was not done with the intention of harming Pescara or treating her in a discriminatory manner.¹⁶⁸

262. Furthermore, there was never any obligation upon Calpurnia to renew that visa. Sovereign States have many criteria by which they decide who will be allowed to enter their territory and under what status.¹⁶⁹

¹⁶⁴ *ECHR, Case Fox, Campbell y Hartley v. United Kingdom*, Judgment of 30 August 1990, para. 32

¹⁶⁵ Feldman, Dissenting opinion. sec. 9

¹⁶⁶ *Genin*, para. 369.

¹⁶⁷ *Id.* and *LG&E Liability*, para. 146.

¹⁶⁸ *Genin*, para. 369 *see footnote* 95.

263. Pescara was allowed to reenter the country for the necessary periods of time to perform her now reduced functions inside VanCal; the visa waiver program in fact provided a suited solution for her specific situation.¹⁷⁰

b. Arbitrariness

i. What is the bar for a finding on arbitrariness?

264. Jurisprudence has been consistent in establishing that arbitrariness is not so much something that is opposed to a rule of law as something that is opposed to *the* rule of law, a willful disregard for due process of law, an act which shocks or at least surprises a sense of judicial propriety.¹⁷¹

265. Other tribunals have described them as “insufficiencies that would be recognized by any reasonable and impartial man.”¹⁷²

ii. Calpurnia’s conduct has not been arbitrary

1. Court dismissals

266. Some tribunals have established that procedural decisions are not grossly unfair by themselves.¹⁷³

267. The courts followed proper procedure and legally dismissed the claims.

2. Police searches

268. The police searches were not of sufficient magnitude so as to constitute a willful disregard for due process of law. The manner in which they were conducted was necessary in light of the circumstances, in any case they cannot be said to be manifestly illegal.

¹⁶⁹ FDI Moot 2nd Clarifications, # 46.

¹⁷⁰ FDI Moot 1st Clarifications, # 6 and 2nd Clarifications # 45.

¹⁷¹ ICJ, ELSI Case.

¹⁷² Tecmed, para. 154.

¹⁷³ ADF, para 189.

269. Claimant would also have to prove that they were grossly unfair and unreasonable. The tribunal must have special consideration for the fact that Calpurnia's national security was at stake.

270. The fact that the searches were never conducted in a violent manner also constitutes a strong argument in the sense that the searches were not arbitrary.

E. Obstructed transfer of returns

271. Claimant alleges that the State of Calpurnia has obstructed the transfer of his returns. This cannot be accepted because it was the company VanCal that suspended the payment of dividends and has failed to make the payments owed under separate agreements.

272. SFCDC's actions are not attributable to the State of Calpurnia and even if they were, it was not the SFCDC that decided to suspend the payment of dividends, but VanCal as a private company through the democratic channels that were provided to that effect.

273. Additionally, it is VanCal that owes Claimant the amounts due under the separate agreements, not SFCDC. The non-payment of those amounts is VanCal's responsibility, not SFCDC's, and even less so, Respondent's.

274. In order to find that Calpurnia has obstructed the transfer of Claimant's returns it is necessary for such obstruction to be ordered by government authorities.¹⁷⁴ This is clearly not an issue in the present case and therefore Calpurnia cannot be held responsible for those minor setbacks regarding Claimant's revenues.

275. Consequently, Respondent never obstructed the transfer of Claimant's returns and it cannot be argued that Calpurnia has an obligation to pay any amounts of money whatsoever to Claimant.

276. However, in case this tribunal would mistakenly consider that SFCDC's actions are attributable to Calpurnia, and that the decision to suspend the payment of dividends and the non-payment of the amounts owed under the

¹⁷⁴ Id, para 10

separate agreements are the sole responsibility of the SFCDC, Respondent will prove that the transfer of Claimant's returns has not been obstructed in anyway.

a. There has been no obstruction of the transfer of returns

277. An obstruction of the transfer of returns should only be considered to be present in case that the Claimant has been deprived completely of his rights to those returns.¹⁷⁵ It is a matter of gradation, so that if Claimant's rights to those returns are not completely destroyed¹⁷⁶ or there is not at least a substantial deprivation¹⁷⁷ thereto, it could not be argued that the transfer of those returns has been obstructed.

278. Accordingly, the payment of the dividends as a transaction has not been subjected to an outright repudiation, on the contrary, they have been credited to Claimant's account in VanCal's books,¹⁷⁸ leaving those returns intact.

279. The form of payment may have changed, but there has been no intention to deprive Claimant of its rights concerning those shares, including his property rights. The Tribunal must understand that the political situation was rather complex during that time and even so, there was never a statement in the sense that the payment of dividends would be cancelled, but only "suspended for the time being."¹⁷⁹

280. Actually, in light of the circumstances, the temporary suspension of payment and the subsequent crediting of those dividends to Claimant's account should be considered as a formidable solution to the situation at hand. With all things considered, it was rather beneficial to Claimant, it could have been worse.

281. Also, the tribunal must appreciate the fact that VanCal has made statements regarding its willingness to make any payment of license fees owed

¹⁷⁵ Foremost, see in Bishop & Others page 861

¹⁷⁶ Id, page 861

¹⁷⁷ Telenor Mobile, para 65

¹⁷⁸ See table of Evidence, 28 September 2006

¹⁷⁹ FDI Moot problem.

under the separate agreements.¹⁸⁰ This scenario can hardly be conceived as one in which the transfer of Claimant's returns was willfully obstructed.

282. Regarding the nonpayment of the amounts due under the technical assistance agreement, the tribunal must keep in mind that Kolowenko was chief technical officer and he was therefore responsible for Vanguard's obligations under that agreement.¹⁸¹ Due to the fact that Kolowenko voluntarily left Calpurnia and never made an attempt to return after 2003,¹⁸² that agreement could not be carried out and therefore the payment of those amounts was suspended.

F. There has been no indirect expropriation

283. Respondent will prove that Claimant's investment has not been indirectly expropriated because there has been no deprivation of the rights related to the investment, because there has not been a substantial loss of control or value, because key personnel were never expelled from Calpurnia, because expropriation claims cannot be made from mere contractual disputes and because Claimant's property has not been appropriated.¹⁸³

284. When considering whether these irregularities may constitute an indirect expropriation, the determinative factors are the intensity and duration of the economic deprivation suffered by the investor as the result of them.¹⁸⁴ Claimant has failed to prove that there has been sufficient intensity or duration along with the other irregularities so as to constitute a creeping expropriation.

a. No substantial deprivation of fundamental rights

¹⁸⁰ Abstract from Respondents reply

¹⁸¹ FDI Moot 2nd Clarifications, #29.

¹⁸² FDI Moot 2nd Clarifications, # 7, 8.

¹⁸³ See Bishop & Others Generally, See Mobile Telenor generally, See Reinisch p

¹⁸⁴ Schreuer, para 82

285. Claimant's allegations concerning the substantial deprivation of his investment-related rights try to establish a link between elements that have no relation between them.

i. Outside of VanCal

286. The police searches and court dismissals are random events that have no relation to the decisions taken within VanCal's corporate structure.

287. Furthermore, they did not deprive Claimant of its fundamental rights in connection with the investment because they were not of sufficient magnitude.

288. Claimant has made a deceitful case by connecting these events into some form of fantastic machinery of the State, directly aimed at expropriating his investment by the deprivation of substantial rights. However, it was proven above that those incidents were motivated by genuine public interests, not to hamper Claimant's access to, or control over his, investment.

ii. Inside VanCal

289. Regarding the events inside VanCal, it will also be proven that there has been no substantial deprivation of Claimant's rights.

1. Shares and dividends

290. In that sense, Claimant is still owner of his equity interest and of his rights to trademark.¹⁸⁵ In order for the suspension of dividends to be considered as indirect expropriation Claimant would have to prove that that decision radically deprived him of the economic use and enjoyment of the investment, as if all the income and benefits from the investment would have ceased to exist.¹⁸⁶

291. To argue that this decision brought about consequences of such magnitude is simply to manipulate the facts to one's convenience. It must be

¹⁸⁵ FDI Moot 2nd Clarifications, #15.

¹⁸⁶ TECMED, para 115

noted that temporary deprivation of wealth has been considered to have only a limited value when making an expropriation claim.¹⁸⁷

2. Separate agreements

292. The trademark licensing agreement remains in force and statements have been made concerning the willingness to pay any amounts due thereto.

293. Even if the tribunal were to find that there has been an obstruction of the transfer of returns in this sense, there is no way that they could be considered as being sufficient to constitute an expropriation because in any case such obstruction would be merely ephemeral.¹⁸⁸

3. Claims are not of sufficient magnitude

294. These minor disputes cannot be elevated to the level of an expropriation because they are not of sufficient magnitude. Even in case of a permanent obstruction of returns some tribunals have considered it as a form of lesser interference, but not of expropriation.¹⁸⁹

295. This tribunal must make a distinction between a mere debt and an expropriation claim, especially when the debt is accompanied by an offer of payment.¹⁹⁰ A mere refusal of payment could not be considered as an expropriation especially when other remedies are available.¹⁹¹

4. Rights of representation

296. Claimant's rights of representation have never been affected, except in Pescara's case, which was conducted legitimately. Moreover, Claimant

¹⁸⁷ Pope and Talbot, see in Reinisch page 96.

¹⁸⁸ Tippetts, *CME* par. 608. IR- 9-237.

¹⁸⁹ Eastman Kodak, para 60

¹⁹⁰ *LETCO*- Award: Sec. 1 Nationalization. ICSID Reports vol. 2, page 366.

¹⁹¹ *SGS v. Phil*, Objections to jurisdiction. par. 161 i.f. IR-8, pag 563.

withdrew his representatives from the board by his own accord, it was Claimant's decision to part from the investment.¹⁹²

297. Accordingly, Claimant's proxies were found to be invalid because they did not comply with the formal requirements of which they were well aware. This was not an unprecedented or arbitrary application of the law. The Calpurnia-Gaul BIT cannot be used to exempt Claimant from the necessary diligence with which every businessman has to conduct himself.

5. Rights have not been diminished.

298. Claimant's rights have not been diminished by the supposed interference of State authorities inside VanCal. Besides, the measures that allegedly constitute expropriation do not benefit the State of Calpurnia in any way.¹⁹³ This would at least lead to an assumption that there was no expropriatory intent.

b. No substantial loss of value

299. Claimant's investment has not suffered a substantial loss of value,¹⁹⁴ especially in light of the fact that VanCal is still a profitable company¹⁹⁵ and continues to be the largest mobile telecommunications company in Calpurnia.¹⁹⁶

300. The tribunal in the *Foremost* case found that because the value of the shares themselves had not diminished and the shareholder had the possibility to dispose of its shares there could not be a finding of expropriation.¹⁹⁷ In the present case there is no limitation imposed upon shareholders to dispose of their shares either.¹⁹⁸ Because the facts of these two cases are astonishingly similar,

¹⁹² Lauder, para 201, 202

¹⁹³ Lauder, para 57

¹⁹⁴ Telenor Mobile, para 77

¹⁹⁵ *Id.*

¹⁹⁶ FDI Moot 2nd Clarifications, # 53.

¹⁹⁷ *Foremost*, para 250-253

¹⁹⁸ FDI Moot 2nd Clarifications, # 54.

the tribunal should reach the same conclusion in the sense that there has been no expropriation by substantial loss of value of the investment.

301. Even if this tribunal were to find that the value of the shares has been reduced to some extent, this would actually fall quite short of being considered as an indirect expropriation¹⁹⁹ because even though they would have lost some of their substance, the shares and their respective rights have not disappeared.²⁰⁰

c. No illegitimate substantial loss of control

302. The tribunal must make out what Claimant's true intentions are in bringing this claim. A private company underwent a restructuring process from which Vanguard was not very satisfied, and because there is a Calpurnia-Gaul BIT, Claimant is attempting to have those setbacks reversed or eliminated by obtaining compensation from Calpurnia.

i. VanCal's legitimate restructuring process

303. First of all, the tribunal cannot approve of Claimant's unsubstantiated arguments in the sense that interference with the management and control of a foreign controlled company constitutes a taking.²⁰¹ In principle, the process by which a company is restructured should not be considered as a compensable taking of property.²⁰² The reason behind this argument is that the legitimate body, in this case the board, indifferently of who controls it, may take decisions considering the political and economic objectives of the company. Such measures must be considered as part of ordinary business risk.²⁰³

304. Furthermore, control over the company can never be said to have been a legitimate or even an investment-backed expectation. This can be easily proven by the fact that when the joint venture was established, Claimant never sought to

¹⁹⁹ Sporrong and Lonroth, para 63

²⁰⁰ Id, para 63

²⁰¹ ICJ ELSI Case, see in Sornarajah page 388

²⁰² Sornarajah, page 367

²⁰³ Sornarajah, page 367

have more than 50% of VanCal's shares. In fact there was a point in which Vanguard owned 86% equity and afterwards that stock was voluntarily reduced to 30%. If Claimant expected to retain control over the investment, why did he not keep more than 50% of the stock when he had the chance? It cannot be argued at this point that a loss of control over the investment is Calpurnia's doing and even worse, that it is Calpurnia's responsibility.

305. Additionally, any events that Claimant alleges worked to deprive him of the control over the investment were conducted in accordance with Calpurnian law as it was demonstrated above. The foreign shareholder is entitled to such control and management of his investment as he pleases, but it must be subject of course to the general laws of the host state.²⁰⁴ The notion that Claimant's control over the investment must be preserved even against decisions taken by private bodies in accordance with the law is simply unacceptable.

306. Finally, the assumption of control must be permanent in order to be regarded as a taking.²⁰⁵ The board's decision concerning the replacement of its members responded to a legitimate and effective use of shareholders' rights. If they wish to reinstate those members, they have the right to do so leaving and that shift in control would have been only momentary.

ii. External elements

307. The alleged loss of control over the investment is, in reality, due to the fact that Claimant's representatives left the country. Calpurnia had no involvement in those representatives leaving the country. Claimant's alleged loss of control over the company was only the foreseeable consequence of his representatives leaving the country.

d. No expulsion of key personnel

308. There was never an expulsion of the Claimant's key personnel to the investment. No outright actions taken directly against Claimant's representatives, Kolowenko and Pescara left the country voluntarily.

²⁰⁴ Sornarajah, page 387

²⁰⁵ Foremost, see in Bishop & Others page 860

e. Mere contractual disputes

309. In order for mere contractual claims to constitute an expropriation that connection must be substantially justified.²⁰⁶ This would only be possible in the extent that a breach of the contract rights is confiscatory,²⁰⁷ or done using legislative or executive authority at least,²⁰⁸ or sufficient to dissolve the agreement itself²⁰⁹ and if that measure brought upon Claimant a substantial deprivation, as if the related rights had ceased to exist.²¹⁰

310. As the tribunal will surely agree, the alleged breaches of the joint venture agreement are not of sufficient magnitude as to constitute an expropriation. In any case, they would only deprive the investor of a minimum amount or value for a short period of time furthermore, the agreement itself still stands and the operations may be resumed at any time.²¹¹

f. No taking of Claimant's property

311. There has been no expropriation of Claimants property in VanCal.

312. The 30% equity interest and the additional 1% in the name of Pescara remain in Claimant's possession. The mere suspension of payment of dividends is not enough to constitute an expropriation because even if the nature of the investment were found to have changed, the property rights over the shares remain untouched.²¹²

²⁰⁶ AMCO, para 191

²⁰⁷ AZINIAN Award: Par. 88. IR 5-288.

²⁰⁸ Id.

²⁰⁹ SPP(ME) & SPP LTD, para 169, 170 and Phillips Petroleum, para 79

²¹⁰ Tecmed-Award: paragraph 115. ICSID Reports vol. 10, page 174

²¹¹ SPP(ME) & SPP LTD, para 51

²¹² Lauder, para 201, 202 and Tradex para 74, 75

313. Furthermore, Claimant still has the contractual rights under the trademark licensing agreement.²¹³

314. Besides, there is authority that supports the notion that a consented act must not be considered as an expropriation.²¹⁴ In this case, Claimant accepted the articles of association and consequently had the obligation to accept all the legitimate decisions that would be taken by the board in the company's name.

G. Claimant's burden of proof

315. Claimant's failure to prove its allegations would render the claim unsubstantiated.²¹⁵ If the investor cannot prove such irregularities, as in the present case, the more likely conclusion is that a political risk has materialized and the investor should bear the consequences.²¹⁶

316. Because Claimant has failed to prove its unsubstantiated allegations, the Tribunal must condemn the Claimant to the payment of all litigation and administrative costs.²¹⁷

H. Final submission

317. For all the reasons stated above Respondent holds that this tribunals has no jurisdiction, but alternatively assuming that jurisdiction is declared, there have been no breaches of the standards of protection contained in the Calpurnia-Gaul BIT and there is no expropriation of Claimant's investment.

318. The tribunal must dismiss all of Claimant's claims.

²¹³ FDI Moot 2nd Clarifications, # 15.

²¹⁴ Tradex, para 177, 178

²¹⁵ Tradex, para 74, 75

²¹⁶ Heiskanen, page 18

²¹⁷ Telenor Mobile, para 77-80, 108 (2)

Government of the Republic of Calpurnia

-0-