

**FIRST ANNUAL FOREIGN
DIRECT INVESTMENT
INTERNATIONAL MOOT
COMPETITION 2008**

TEAM MCNAIR

**INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT
DISPUTES**

ICSID CASE No. ARB/X/X

BETWEEN:

VANGUARD INTERNATIONAL

THE GOVERNMENT OF THE
REPUBLIC OF CALPURNIA

CLAIMANT/INVESTOR

RESPONDENT/PARTY

MEMORIAL FOR THE RESPONDENT

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Art.	Article
CCC	Conservative Conscience of Calpurnia
Claimant	Vanguard International Inc
ed(s).	Editor(s) <i>or</i> Edition(s)
et al.	And others
Gaul	Federated States of Gaul
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID Rules	International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings
Moot Problem	First Annual Foreign Direct Investment International Moot Competition Problem
No.	Number
Para.	Paragraph
Respondent	Republic of Calpurnia
SFCDC	State Fund for Commerce and Development in Calpurnia
the Code	Calpurnian Commercial Code
the Commercial Court	Commercial Court of San Inocente de Irkoutsk, Calpurnia

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Agreement between the Government of the Republic of Calpurnia and the Government of the State of Flatland on the mutual promotion and protection of investments, 8 February 1992

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965

Vienna Convention on the Law of Treaties, 23 May 1969

STATEMENT OF FACTS

A. The Investment

1. In 1997, Vanguard International (**the Claimant**) established a joint venture company, VanCal, in the territory of the Government of the Republic of Calpurnia (**the Respondent**). The Claimant holds a 31% interest in VanCal; 30% held directly and an additional 1% registered in the name of Francesca Pescara held on trust for the Claimant. The State Fund for Commerce and Development in Calpurnia (**SFCDC**) owns 30% of VanCal's stock; a further 22% of VanCal stock is registered in the names of several hundred individual shareholders; and the remaining 17% is held directly by Calpurnian Nationals.

B. The Claimant

2. The Claimant is a mobile telecommunications company. It has GSM operations in emerging markets including Latin America, Middle East, Africa and South Asia. The Claimant's headquarters are located in Nova Parigi, the capital of the Federated States of Gaul.

C. The Respondent

3. The Conservative Conscience of Calpurnia (**CCC**) is the governing party of the Respondent. The CCC won an absolute majority in both chambers of the Calpurnian Parliament in November 2003. The CCC's agenda advocates traditional Calpurnian values of hard work, family, modesty, thrift and self-sufficiency.

D. SFCDC and its role within VanCal

4. The SFCDC is an entity 100% owned by the Respondent. The SFCDC did not exercise its rights as a shareholder as a means to implement government policy. The alleged majority share ownership by the SFCDC did not alter the private character of VanCal.

E. The Claimant and its role within VanCal

5. The Claimant, through its participation on the board of VanCal, played a role in the management of VanCal between 1997 and 2004. The Claimant also provided management

skills and personnel. The Claimant alleges that it was deprived of representation on the board, but the Claimant's participation on the Board only ended on 23 October 2006 when it withdrew its representatives. VanCal suggested that the Claimant should withdraw the resignation and designate new directors.

F. Alleged Climate of Hostility

6. The Claimant alleges that VanCal ceased sending accounts, financial statements and other information. Additionally, the Claimant alleges that the Respondent prevented its Gaulois representatives from entering Calpurnia by denying business visas and conducting police searches on the private homes of their personnel.
7. However, information about VanCal was made available to the Claimant at all relevant times. Further, the Claimant's representatives were granted entrance into Calpurnia through Calpurnia's visa waiver program, and all police searches were legally justified under Calpurnian domestic laws regulating the Respondent's security agencies.

G. Payment of dividends and licence fees

8. The Claimant alleges that it has not been paid dividends declared between 2004 and 2007. However, VanCal is willing to pay all outstanding licence fees and dividend payments. These payments have been credited on VanCal's books to the Claimant's account.

H. The Claimant retains the use, benefit and control of its investment

9. VanCal remains an independent private corporation and the current dispute arises solely from the Claimant's dissatisfaction with the majority shareholders exercise of their legitimate management rights. Such grievances should be brought before the courts of Calpurnia.

ARGUMENTS

Part One:

THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE DISPUTE

10. According to Article 41(1) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)* “the Tribunal shall be the judge of its own competence.”
11. Article 25(1) *ICSID Convention* states that -
“The jurisdiction of the Centre shall extend to any legal dispute...which the parties to the dispute consent in writing to submit to the Centre”.
12. Written consent of the parties is “the cornerstone of the jurisdiction of the Centre”.¹ The Respondent submits that this Tribunal does not have jurisdiction to hear this dispute because the Respondent has not consented to the proceedings.
13. Article 11(2) *Calpurnia-Gaul BIT* states that -
“the investor concerned may submit the dispute to international arbitration. The investor has the choice of submitting the case either to...(b) The International Centre for Settlement of Investment Disputes (ICSID)”.
14. While the Respondent has contemplated that disputes might be resolved through ICSID, a “dispute...shall, if possible, be settled amicably”.² The Respondent only gave conditional consent to arbitration, as the right to commence arbitral proceedings only arises -
“If the dispute cannot be settled amicably within 18 months from the date of

¹ ICSID Director’s Report, paragraph 23

² Article 11(1) *Calpurnia-Gaul BIT*

request for amicable settlement”.³

15. Further, according to the agreement between the parties, an investor who submits a dispute to the Respondent's national courts forgoes their right to arbitrate through ICSID. Article 11(3) states that -

“An investor who has already submitted the dispute to the competent courts of the Contracting Party shall have no more recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article.”

16. This tribunal does not have jurisdiction because (A) the Claimant has not sought to amicably settle the dispute for 18 months; (B) the Claimant has waived its right to arbitrate; and (C) Article 7 *Calpurnia-Flatland BIT* does not replace the need for consent.

A. The Claimant has not sought to amicably settle the dispute for 18 months

17. Mere references to ICSID in a BIT dispute resolution clause will not constitute consent for the purposes of the Convention.⁴ Parties are free to give conditional consent to arbitrate through ICSID. For example, it is common for parties to give consent to ICSID arbitration only on the condition that amicable settlement is first sought for a specified period of time.⁵

18. In *Enron v Argentina*, the tribunal stressed the importance of parties complying with minimum negotiation periods. The tribunal stated that a minimum negotiation requirement is an issue that is -

“very much a jurisdictional one. A failure to comply with that requirement would

³ Article 11(2) *Calpurnia-Gaul BIT*

⁴ Sornarajah, page 251

⁵ See Article 8(2) *Austria Model Agreement*; Article 9 *Denmark Model Agreement*; Article 8(3) *United Kingdom Model Agreement*; Article 24(3) *US Model BIT*, Article 11(2) *German Model BIT*; Article 2 *Sri Lanka Model BIT*; Article 26(2) *Energy Charter Treaty*

result in a determination of lack of jurisdiction.”⁶

19. The Claimant filed its Request for Arbitration on 31 July 2007.⁷ This tribunal can only have jurisdiction if an attempt at amicable settlement was commenced 18 months prior to this date, on or before 31 January 2006.
20. Amicable settlement could not have commenced by 31 January 2006, as the events giving rise to the dispute had not yet transpired. One basis of the claim is the assertion that the “absence of Claimant's personnel severely hampered its ability to preserve the value of its investment”.⁸ The Claimant's involvement on VanCal's board did not end until 23 October 2006, when the Claimant voluntarily withdrew its representatives from the board by email and declined to replace them.⁹
21. In *Salini v Morocco*, the tribunal stated that an attempt to reach an amicable settlement must include the existence of grounds for complaint and indicate a desire to resolve the matter out of court.¹⁰ On 5 June 2005, the Claimant emailed Dr Swift and Mr Korchnoi, directors of VanCal, “requesting that the board of directors communicate to us directly their decision in this matter and express to us the legal basis for this denial.”¹¹ This is not an attempt at amicable settlement as it did not include the existence of grounds for complaint, nor did it indicate a desire to resolve the matter out of court. Further, this request for information was made to the VanCal board, not directly to the Respondent, so it cannot be seen as a proper attempt to settle this matter.

⁶ *Enron v Argentina*, paragraph 88

⁷ Moot Problem, Evidence/Calendar of Events, 31 July 2007, page 9

⁸ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

⁹ Moot Problem, Evidence/Calendar of Events, 23 October 2006, page 8

¹⁰ *Salini v Morocco*, paragraph 20

¹¹ Moot Problem, Evidence/Calendar of Events, page 7

22. The Claimant made its first and only allegation of expropriation on 5 February 2007, after withdrawing its representatives from VanCal's board.¹² In *Tradex v Albania*, the tribunal found that there was a good faith attempt to amicably settle a dispute because the investor had contacted the contracting state on five separate occasions with a view to settling the dispute. It is doubtful whether the Claimant's single allegation of 5 February 2007 amounts to an attempt at amicable settlement. In any event, arbitral proceedings were instituted only 6 months after this communication. As such, the Claimant has not commenced proceedings in accordance with Article 11(2) *Calpurnia-Gaul BIT*.

B. The Claimant has no recourse to arbitration because it submitted the dispute to the domestic courts

23. Article 11(3) *Calpurnia-Gaul BIT* is characterised as a 'fork in the road' clause, because it requires a potential Claimant to elect one forum in which to have their dispute heard. Fork in the road clauses are used because they encourage efficiency by preventing parties from 'forum shopping', while at the same time reducing the risk of double recovery.¹³
24. It is important to note that the fork in the road clause in Article 11(3) *Calpurnia-Gaul BIT* states that a party will no longer have recourse to ICSID arbitration if they have already "submitted" their dispute to a competent national court. Regardless of the result of the previous proceedings, the Claimant is bound by the principle of *electa una via, non datur recursus ad alteram*,¹⁴ Since the Claimant has 'submitted' this dispute to the domestic courts of Calpurnia, this tribunal does not have jurisdiction to hear this dispute.
25. In *CMS v Argentina*, the tribunal held that -
- "Had the Claimant renounced recourse to arbitration, for example by resorting to the courts of Argentina, this would have been a binding selection under the BIT",

¹² Moot Problem, Evidence/Calendar of Events, 5 February 2007, page 8

¹³ McLachlin/Shore/Weineger, page 109, paragraph 4.91

¹⁴ "When one way has been chosen, no recourse is given to another"

with the effect that the tribunal would have no jurisdiction under the BIT.¹⁵ A fork in the road provision will be upheld where parallel proceedings before state courts and an ICSID tribunal have “the same parties, have the same object, and are founded upon the same cause of action”.¹⁶ These elements reflect the requirements for *res judicata*: “the same object or relief, the same legal grounds and the same parties.”¹⁷ The Claimant has no recourse to arbitration because both the present claim and the domestic court claim relate to (1) the same parties (2) the same object and (3) the same cause of action.

1. The claims relate to the same parties

26. The Claimant has sought redress in judicial fora on multiple occasions. The Claimant brought an application before the Calpurnian Constitutional Court to seek compensation for the acts of the Respondent.¹⁸ As such, that claim involved the same parties to the present proceedings.
27. Further, the Claimant, through its representative and employee Ms Francesca Pescara, applied to the Commercial Court of San Inocente de Irkoutsk, Calpurnia (the Commercial Court), for an order that dividends be transferred to an offshore bank account.¹⁹ Ms Pescara holds the shares as trustee for the Respondent.²⁰ Under Calpurnian law, the act of filing of a suit by a trustee is always assigned to a beneficiary.²¹ As such, both proceedings were brought by the same Claimant.

¹⁵ *CMS v Argentina*, paragraph 81

¹⁶ *McLachlin/Shore/Weineger*, page 105-106, paragraph 4.81

¹⁷ *Sheppard*, page 224

¹⁸ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 17

¹⁹ Moot Problem, Evidence/Calendar of Events, 14 June 2006, page 8

²⁰ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 9

²¹ Moot Problem, Second Clarifications, Clarification 4

28. The claim before this tribunal is premised on the erroneous basis that VanCal and the Respondent are the same party. As the Commercial Court proceeding was against VanCal, both claims relate to the same Respondent.

2. The claims relate to the same object

29. In the proceedings before the Calpurnian Constitutional Court, the Claimant requested compensation for loss it alleges that it suffered from acts of the Respondent's security forces.²² In the Commercial Court, the Claimant, through Ms Pescara, sought payment for dividends on Claimant's capital stock in VanCal.²³ Similarly, the present expropriation claim relates to compensation for the alleged withholding of dividends, and for the acts of the Respondent's security forces. Therefore, the present claim has the same object as previous judicial proceedings.

3. The claims relate to the same cause of action

30. The proceedings in the Constitutional Court related to limitations on the exercise of sovereign power by the Respondent, through its security forces.²⁴ Similarly, the present cause of action relates in part to these security forces' obligation to provide full protection and security to the Claimant and its investment.²⁵
31. The proceedings in the Commercial Court related to the Claimant's entitlement to receive a dividend under domestic law.²⁶ It is well established that shareholders' rights at international

²² Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

²³ Moot Problem, Evidence/Calendar of Events, 14 June 2006, page 8

²⁴ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

²⁵ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 6

²⁶ Moot Problem, Evidence/Calendar of Events, 14 June 2006, page 8

law are determined with reference to “relevant institutions of municipal law”.²⁷ What amounts to an internationally wrongful act towards a shareholder is “defined by the domestic law of that State”.²⁸ A claim for indirect expropriation is an allegation that the shareholder’s rights have been rendered useless.²⁹ Therefore, the present claim is based on the alleged deprivation of the Claimant’s shareholder rights under municipal law.

C. Article 7 Calpurnia-Flatland BIT does not replace the need for consent

32. Article 4(1) *Calpurnia-Gaul BIT* states-

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

Article 4(2) *Calpurnia-Gaul BIT* applies this obligation to “management, maintenance, use, enjoyment or disposal” of investments.

²⁷ *Barcelona Traction*, paragraph 37

²⁸ *Diallo*, paragraph 64

²⁹ *Metalclad v Mexico*, at paragraph 103; *CME Czech Republic*; *Seismograph Service Corp v Iran*; *Tippetts v Iran*, page 225; *Occidental v Ecuador*

33. Such a provision is known as a most favoured nation clause. It obliges the Respondent to give the Claimant's investment "the best treatment it accords to any other country in like matters".³⁰ The Respondent is a party to the *Calpurnia-Flatland BIT*. However, Article 7 *Calpurnia-Flatland BIT* does provide for dispute resolution. Article 7 *Calpurnia-Flatland BIT* does not replace the need for consent because (1) Article 4 *Calpurnia-Gaul BIT* does not extend to dispute resolution, and (2) Flatland was not a contracting state of the *ICSID Convention* at the relevant times.

1. Article 4 *Gaul-Calpurnia BIT* does not extend to dispute resolution mechanisms

34. A most favoured nation clause "can only attract matters belonging to the same category of subjects as that to which the clause itself relates".³¹ A most favoured nation clause should be interpreted restrictively, in order to ensure that states retain control over their economic obligations.³²

³⁰ Kurtz, page 524

³¹ *Ambatielos*, page 106

³² Asante, page 212

35. A treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purposes.”³³ As a provision in a treaty, a most favoured nation clause must be interpreted to give effect to the intention of the state parties.³⁴ In *Telenor v Hungary*, the tribunal refused to apply a most favoured nation clause to a dispute resolution provision, stating that this would be contrary to this state parties’ intention to allow an investor to subvert conditions of dispute resolution in a BIT by invoking a most favoured nation clause.³⁵ It would be inconsistent with the purposes of the BIT to allow the investor to use the clause to “treaty shop” in order to get a favourable dispute resolution mechanism, while ignoring the actual terms of what was agreed between the two states.³⁶
36. The extent of application of a most favoured nation clause is a matter of construction. Clauses do not apply to dispute resolution if they specifically apply to investments and returns from investments, but do not mention dispute resolution.³⁷ In *Telenor v Hungary*, the tribunal gave the most favoured nation clause its ordinary meaning to find that the words of the clause plainly state that it should affect substantive rights, but “there is no warrant for construing [the most favoured nation clause] as importing *procedural* rights as well.”³⁸

³³ Article 31 *Vienna Convention on the Law of Treaties*

³⁴ McLachlin/Shore/Weiniger, page 25

³⁵ *Telenor v Hungary*, paragraph 100

³⁶ *Telenor v Hungary*, paragraph 93

³⁷ *Salini v Jordan*, paragraph 104

³⁸ *Telenor v Hungary*, paragraph 92

37. In the present case, the most favoured nation clause applies to “Investments...or returns related thereto”,³⁹ and extends to “management, maintenance, use, enjoyment or disposal”,⁴⁰ of investments. As the clause comprehensively describes substantive rights, making no mention of procedural rights, it does not apply to dispute resolution provisions. Therefore, the Claimant cannot rely on *Calpurnia-Flatland BIT* to bring these proceedings.

2. Flatland was not a contracting state of the *ICSID Convention* at the relevant times

38. Even if the Claimant has most favoured nation status under Article 4 *Calpurnia-Gaul BIT*, and even if it could extend to dispute resolution, this tribunal still does not have jurisdiction to hear this dispute. This is because Flatland was not a contracting state of the *ICSID Convention* at the relevant times.
39. Flatland denounced the *ICSID Convention* in May 2003.⁴¹ According to Article 71 *ICSID Convention*, denunciation takes effect 6 months after ICSID receives notice. As such, Flatland’s denunciation took effect in November 2003, well before the issues in dispute arose, and over three years before the Claimant requested arbitration through ICSID.⁴²
40. The critical date for determining whether or not an investor is a national of a contracting state is the time of the institution of proceedings.⁴³ At the time the Claimant requested arbitration on 31 July 2007, Flatland was not a contracting state of the *ICSID Convention*.

³⁹ Article 4(1) *Calpurnia-Gaul BIT*

⁴⁰ Article 4(2) *Calpurnia-Gaul BIT*

⁴¹ Moot Problem, footnote 1, page 5

⁴² Moot Problem, Evidence/Calendar of Events, 31 July 2007, page 9

⁴³ *Schreuer*, page 163

41. Further, in *Plama v Bulgaria* the tribunal found that a most favoured nation clause cannot be used to imply a parties' consent to ICSID.⁴⁴ Using a most favoured nation clause in this way would mean that any dispute resolution mechanisms agreed on in a BIT would be open to future replacement by other agreements.⁴⁵
42. The most the Claimant can gain from the most favoured nation clause is treatment no less favourable than that afforded to Flatland investors. Since Flatland is no longer a contracting state of the *ICSID Convention*, Flatland investors are no longer nationals of a contracting state for the purposes of Article 25(1). As such, ICSID does not have jurisdiction to hear investor disputes brought by nationals of Flatland. While the Claimant may be entitled to treatment not less favourable than Flatland investors by virtue of a most favoured nation clause, this does not entitle the Claimant to bring an arbitral claim to ICSID.

⁴⁴ *Plama v Bulgaria*, paragraph 184

⁴⁵ *Plama v Bulgaria*, paragraph 212

Part Two:

**THE RESPONDENT HAS NOT UNLAWFULLY
INTERFERED WITH THE CLAIMANT’S INVESTMENT**

43. Article 2 *Articles on State Responsibility* states –
- “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”
44. The Respondent is not liable under international law for the actions of the VanCal board as (A) the interference is not attributable to the Respondent; and (B) the interference does not breach the Respondent’s obligations under Article 6 *Calpurnia-Gaul BIT*.

A. VanCal’s interference with the Claimant’s investment is not attributable to the Respondent

45. The actions of VanCal are not attributable to the Respondent as (1) VanCal is a legal entity separate from the Respondent; (2) VanCal is not a de facto state organ; and (3) the Respondent does not control VanCal.

1. VanCal is a separate legal entity

46. VanCal is a separate and private legal entity. International law recognises “the corporate entity as an institution”,⁴⁶ and acknowledges the “firm distinction between the separate entity of the company and that of the shareholder”.⁴⁷ The fact that the State establishes a corporate entity is not a sufficient basis for the attribution to the State of the subsequent conduct of that

⁴⁶ *Barcelona Traction*, page 3, paragraph 38

⁴⁷ *Barcelona Traction*, page 3, paragraph 41

entity.⁴⁸ The principles of international law allow this veil to be lifted “only in exceptional circumstances.”⁴⁹

47. At international law, private corporate entities are separate entities to their owners. This position of separateness is maintained even though the corporation may be owned by and in that sense subject to the control of the State. The fact that the Respondent is a shareholder of VanCal does not in itself render it liable for the actions of VanCal.

2. VanCal is not a de facto state organ

48. A corporation will be a de facto state organ, and its acts will be attributable to the state, if it exercises elements of governmental authority.⁵⁰ Article 5 *Articles on State Responsibility* states –

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

49. Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purposes of attribution of the conduct of an entity to the State. Therefore, it is a question to be answered on a case by case basis.⁵¹
50. VanCal does not operate a government-sanctioned monopoly, but is one of many

⁴⁸ *Schering v Iran; Otis v Iran; Kodak v Iran*

⁴⁹ *Barcelona Traction*, page 3, paragraph 57

⁵⁰ *SEDCO v National Iranian Oil Company; Technical Products v Iran; Flexi-Van v Islamic Iran*, page 349

⁵¹ Crawford, page 101

telecommunications providers in Calpurnia.⁵² The fact that VanCal operates under a license⁵³ indicates that it is permitted by the Respondent to operate a telecommunications network, and has no inherent power to do so. As VanCal was incorporated as a joint venture company with a private telecommunications industry investor, it is clear that VanCal's purpose was to generate profits, rather than to function as a government instrumentality.

3. The Respondent does not control VanCal

51. Article 8 *Articles on State Responsibility* states that –

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

52. The Respondent submits that the actions of VanCal are not attributable to the Respondent as VanCal is a separate legal entity which is neither under (a) the control, or (b) the instruction, and, or, direction, of the Respondent.

a. The Respondent does not control VanCal

53. Where a State controls a private entity, the conduct of the entity is considered conduct of the State.⁵⁴ In *Salini v Morocco* the tribunal confirmed that, in the context of ICSID arbitration, the issue of control turns on the state's degree of control and participation in the company. The tribunal's assessment of control was based on two criteria: the first, structural, relating to the structure of the company and, in particular, to its shareholders; secondly, functional, relating to the objective of the company.⁵⁵

⁵² Moot Problem, Second Clarifications, Clarification 53

⁵³ Moot Problem, First Clarifications, Clarification 4

⁵⁴ Article 8 *Articles on State Responsibility*

⁵⁵ *Salini v Morocco*, paragraph 31

54. The Respondent submits that the private actions of VanCal are not attributable to the Respondent as it does not ‘control’ VanCal. The Respondent does not ‘control’ VanCal as it neither controls (i) VanCal through the structure and ownership of its capital stock; nor (ii) the functional objectives of the company.

i. The Respondent does not control VanCal through the structure and ownership of its capital stock

55. It has been established in *Foremost Tehran*,⁵⁶ *Hollyfield*⁵⁷ and *PepsiCo*⁵⁸ that the “majority share ownership...establishes control”. The Respondent owns only 30% of VanCal’s capital stock.⁵⁹ This is less than the majority ownership necessary in order to attribute the actions of VanCal’s board to the Respondent under international law.

56. A further 22% of VanCal’s capital stock is “registered in the names of several hundred individual shareholders”.⁶⁰ These shareholders retain the right to proportionate ownership in assets of the company, transfer of share ownership, inspection of the company, file suit against VanCal for wrongful acts, and share in liquidation proceedings.⁶¹ The existence of a shareholder’s agreement between these shareholders and the Respondent does not fundamentally alter these rights.

⁵⁶ *Foremost Tehran v Iran*, pages 241-242

⁵⁷ *Hollyfield v Iran*, page 279

⁵⁸ *PepsiCo v Iran*, pages 19-21

⁵⁹ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 8

⁶⁰ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 10

⁶¹ Moot Problem, Second Clarifications, Clarification 12

ii. The Respondent does not control the functional objectives of VanCal

57. The functional test is crucial for determining State liability for the wrongful actions of private entities.⁶² An ICSID tribunal applied this functional test in *Ceskoslovenska Obchodni Banka v the Slovak Republic*. In that case, it was held that state ownership of shares of a corporate entity was not enough to decide whether the actions of a private entity could be attributed to a Contracting State. The tribunal held that for the functional test to be satisfied the specific activities of the company must ‘essentially be governmental rather than commercial in nature’.⁶³ Identical approaches have been adopted by recent ICSID Tribunals in *Maffezini v Spain*⁶⁴ and *Salini v Morocco*.⁶⁵
58. In *Salini v Morocco* the private entity had the role and function of “construction, maintenance and operation of the highways and communication routes of a large dimension, *granted by the State*.”⁶⁶ The tribunal held that as the private entity was exercising elements of governmental authority the actions of the private entity were attributed to the State.

⁶² *Military and Paramilitary Activities in and Against Nicaragua*, paragraph 32-33; Crawford, page 112

⁶³ *Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic*

⁶⁴ *Maffezini v Spain*, paragraph 52

⁶⁵ *Salini v Morocco*, paragraph 32

⁶⁶ *Salini v Morocco*, paragraph 32, emphasis added

59. VanCal was incorporated as a joint venture company with the Claimant, establishing a separate entity. The Claimant is a leading private mobile telecommunications company with GSM operations in seven markets, having a total population under licences of approximately 360 million.⁶⁷ VanCal was incorporated with the purpose of selling a telecommunication service to the population within the territory of the Respondent. There is no evidence provided in the facts that suggest VanCal is exercising elements of governmental authority. The only conclusion that can be derived from the facts is that the provision of a mobile telecommunication service for profit is an activity that is commercial in nature rather than governmental.
60. Further, the Respondent does not control the functional objectives of VanCal because it does not have control of VanCal's management. The VanCal board consists of six members.⁶⁸ At the relevant times, the Respondent had three representatives on the VanCal board. The Respondent's representatives were Dr. Swift, Mr. Shelley and Mr. Poe,⁶⁹ comprising 50% of the board. The Claimant's representatives were originally Ms Pescara and Mr Shephard, who were replaced by Mr Hunter and Mr Fowler on 7 June 2006.⁷⁰ The sixth member of the Board was Mr. Korchnoi, who was appointed by neither the Claimant nor the Respondent.⁷¹
61. The composition of VanCal's board does not give the Respondent the requisite majority necessary to control the actions of VanCal. As such the Respondent at the material time did not have the ability to control the management and functional objectives of VanCal.

⁶⁷ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 7

⁶⁸ Second Clarifications, Clarification 1

⁶⁹ Moot Problem, Evidence/Calendar of Events, 10 March 2005, page 7; 14 October 2004, page 6; 5 February 2007, page 8

⁷⁰ Moot Problem, Evidence/Calendar of Events, 7 June 2006, page 8

⁷¹ Moot Problem, Evidence/Calendar of Events, 16 November 2005, page 7

b. VanCal was not acting under the ‘instruction’ or ‘direction’ of the Respondent

62. Conduct of a private entity is attributed to the State if the conduct is authorised and, or, instructed by the State.⁷² Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private groups to act as auxiliaries.⁷³ There is no evidence provided in the facts that prove that the actions of VanCal’s board were under of the instruction of the Respondent.
63. Further, the conduct of a private entity acting under the direction or instruction of a State will only be attributed to the State only if it directed the specific operation. The level of direction required to attribute the conduct of a private entity to a State was examined in *Military and Paramilitary Activities in and Against Nicaragua*. The ICJ held that only incidents based upon actual participation and directions given by the State are attributable to the State.⁷⁴
64. The ICJ confirmed that a general situation of dependence and support would be insufficient to justify the attribution of the conduct to the State.⁷⁵ There is no evidence provided in the facts to show that the actions of VanCal’s board were directed by the Respondent. In fact, as the Claimant has asserted, the conduct of VanCal was never in response to any governmental order or decree.⁷⁶

B. The alleged interference does not amount to expropriation

65. In order to substantiate a claim that property has been indirectly expropriated, the Claimant

⁷² Crawford, page 110, Article 8, paragraph 2

⁷³ Crawford, page 110, Article 8, paragraph 2,

⁷⁴ *Military and Paramilitary Activities in and against Nicaragua*, page 62,64-5

⁷⁵ *Military and Paramilitary Activities in and against Nicaragua*, page 62,64-5

⁷⁶ Moot Problem, Evidence/Calendar of Events, 5 June 2005, page 7

must establish that the alleged interference was so restrictive that the property was “taken”.⁷⁷ Interference amounts to expropriation where three conditions are satisfied: first, the governmental measures substantially interfere with the investor’s property rights;⁷⁸ second, the measures conflict with the investors legitimate expectations;⁷⁹ and third, the benefit of the investment transfers from the investor to the host State.⁸⁰

66. The Respondent submits that there can be no finding of expropriation because (1) the alleged measures do not amount to a substantial interference; (2) the alleged measures have not interfered with the Claimant’s legitimate expectations; and (3) there has been no transfer of benefit to the Respondent. Additionally, VanCal has not expropriated the Claimant’s contractual rights.

1. The alleged measures do not amount to “substantial interference”

67. Governmental interference amounts to expropriation when the alleged measures have substantially interfered with the investor’s control, use and benefits of its investment rendering the investment totally useless.⁸¹ The Respondent submits that the alleged measures do not constitute substantial interference as the Claimant still has the (a) use and benefit and (b) control of its investment.

a. The Claimant has the use and benefit of its investment

68. The Tribunal held in *TECMED v Mexico* that a measure constitutes a deprivation of the use and benefit of an investment when the income or benefits cease to exist.⁸² Similarly, it was

⁷⁷ *Pope & Talbot v Canada*, page 89; *Gami v Mexico*

⁷⁸ *Metaclad v Mexico*, paragraph 103

⁷⁹ *Metaclad v Mexico*, paragraph 103

⁸⁰ *S D Myers v Canada*, page 59

⁸¹ *Starrett Housing v Iran*

⁸² *TECMED v Mexico*, paragraph 115

held in *Pope & Talbot v Canada* that there was no expropriation because, whilst the Claimant's export regime had been interfered with, it was still able to earn substantial profits, and as such still enjoyed the use and benefit of its investment.⁸³

69. The Claimant alleges that VanCal's failure to pay licence fees and declared stock dividends deprived the Claimant of its use and benefit of its interest in VanCal.⁸⁴ However, it is the Respondent's submission that the Claimant's income and benefits have not ceased to exist.

70. Cash dividends have been declared for the years in contention; 2004 to 2007.⁸⁵ These dividends have been credited to the Claimant's account on VanCal's books. Dividend profits have continued to accrue to the Claimant. As the Claimant has been able to generate profits on its investment, there is a continued use and benefit and as such, no expropriation has occurred.

b. The Claimant has control of its investment

71. In *PSEG Global v Turkey*, the tribunal held that, in order for there to be an expropriation, -
"there must be some form of deprivation of the investor in the control of the investment [or] the management of day-to-day-operations of the company".⁸⁶

72. In its Request for Arbitration, the Claimant has argued that through representation on the board to which it was entitled under the Calpurnian Commercial Code (**the Code**),⁸⁷ it was able to play a major role in the management of VanCal by providing management skills and personnel.⁸⁸ The Claimant alleges that the Respondent deprived the Claimant of this board

⁸³ *Pope & Talbot v Canada*, paragraph 100-101

⁸⁴ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 13; page 4, paragraph 19

⁸⁵ Moot Problem, Evidence/Calendar of Events, 28 September 2006, page 8

⁸⁶ *PSEG Global v Turkey*, paragraph 278

⁸⁷ Moot Problem, Evidence/Calendar of Events, page 4, paragraph 15

⁸⁸ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 11

representation, with the effect that it was deprived of its control of the investment.

73. However, VanCal did not deny the Claimant representation on the Board. Rather, the Claimant voluntarily withdrew its representation.⁸⁹ VanCal emailed the Claimant suggesting that it withdraw the resignation and designate new directors.⁹⁰ Furthermore, the Claimant was only entitled to two out of the six positions on the board. Therefore, at the times relevant to the dispute the Claimant did not have the right to control VanCal or its operations as it did not have a majority on the Board.
74. All rights of control associated with a minority-shareholding have been maintained. The Claimant has maintained its voting rights, its right to sell and its right to collect dividends. The only control that the Claimant has lost is that associated with its board members, which it voluntarily withdrew.

2. The alleged measures have not interfered with the Claimant's legitimate expectations

75. In *International Thunderbird Gaming v Mexico*,⁹¹ the tribunal held that the concept of 'legitimate expectations' relates to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor. The representations must induce the investor to act in reliance, such that a failure by the host state to honour those expectations would cause the investor to suffer loss. The tribunal in *TECMED v Mexico* held that the notion of legitimate expectations requires the host state to provide treatment to investments that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.⁹² Therefore, in determining whether an expropriation by the host State has occurred, the tribunal must consider any expectation of economic benefit

⁸⁹ Moot Problem, Evidence/Calendar of Events, 23 October 2006, page 8

⁹⁰ Moot Problem, Evidence/Calendar of Events, 11 November 2006, page 8

⁹¹ See also *Petrobart v Kyrgyz Republic*; *Azurix v Argentina*; *Encana v Ecuador*

⁹² *TECMED v Mexico*, pages 105-106

held by an investor.⁹³

76. In the present case, there has been no interference with the Claimant's legitimate expectations of gaining an economic benefit from the investment into VanCal. Since October 2004,⁹⁴ when its role in the management of VanCal was diminished, the company "has in no way been in a worse condition in the two or three recent fiscal periods".⁹⁵ As VanCal has consistently generated profits and dividends, the Claimant's legitimate expectations to gain an economic benefit from the investment have not been interfered with.

3. The Respondent has gained no benefit from VanCal's actions

77. In *S D Myers v Canada*, the tribunal held that there was no expropriation because the host state did not benefit from the measure, and there was no transfer of property or benefit away from the investor to the host state.⁹⁶ Instead, the tribunal found that there had only been a delay in opportunity, and this did not constitute expropriation.⁹⁷
78. The factual scenario in the present case is similar to that of *S D Myers v Canada*. As the Respondent did not benefit from VanCal's actions, there has been no transfer of a benefit from the Claimant to the Respondent. The Claimant characterises the facts as a failure to pay dividends. In reality, there has merely been a delay in opportunity, as the payment of dividends has been credited to the Claimant on VanCal's books.⁹⁸ Therefore, the Claimant is gaining the benefit of its investment, and it will not be transferred to the Respondent.

⁹³ Fortier/Drymer, pages 306-308

⁹⁴ Moot Problem, Evidence/Calendar of Events, 14 October, 2004, page 6

⁹⁵ Moot Problem, Evidence/Calendar of Events, 21 February 2007, page 8

⁹⁶ *SD Myers v Canada*, page 59.

⁹⁷ *SD Myers v Canada*, page 59.

⁹⁸ Moot Problem, Evidence/Calendar of Events, 28 September 2006, page 8

4. VanCal has not expropriated the Claimant's contractual rights

79. The Claimant contends that VanCal has failed to pay license fees for the use of the VANGUARD INTERNATIONAL trademark, and for other sums due under the technical assistance agreement.⁹⁹ However, VanCal has expressed on many occasions its willingness to pay all licence fees owed.¹⁰⁰
80. Under the technical assistance agreement, VanCal is entitled to use the trademark in exchange for licence fees. As VanCal is willing to pay the licence fees owed, there has been no expropriation of the Claimant's intellectual property rights.

⁹⁹ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 19

¹⁰⁰ Moot Problem, Abstract from Respondent's Reply to Request for Arbitration, page 5, paragraph 16

Part Three:

**THE RESPONDENT HAS NOT DISCRIMINATED AGAINST
THE CLAIMANT**

81. Article 2(3) *Calpurnia-Gaul BIT* states that host states must not –
“impair by unreasonable, discriminatory or arbitrary measures the management, maintenance, use, enjoyment, acquisition or disposal of investments in its territory of investors of the other Contracting Party.”
82. In its Request for Arbitration, the Claimant has contended that the “Respondent has discriminated against the Claimant”, and through this and other “acts and omissions has expropriated the Claimant’s investment”.¹⁰¹
83. The Respondent has not discriminated the Claimant because (A) there has been no direct discriminatory act by the Respondent; and (B) there has been no indirect discriminatory act by the Respondent through VanCal.

A. There has been no direct discriminatory act by the Respondent

84. Under Article 2(3) of the *Calpurnia-Gaul BIT*, the Respondent must not impair, by discriminatory measures, the management, maintenance, use, enjoyment or disposal of the Claimant’s investment.
85. The Respondent has not issued a specific decree or legislative act that has discriminated against either the Claimant specifically or foreign investors generally.¹⁰² Whilst there has been a change in government since the Claimant invested in Respondent’s territory, there is nothing in the facts to show that there has been any governmental decrees or acts that have

¹⁰¹ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 6

¹⁰² Moot Problem, Abstract from Respondent’s Reply to Request for Arbitration, page 5, paragraph 10

discriminated against the Claimant's investment in any way. Therefore, there has been no direct discriminatory act by the Respondent.

B. There has been no indirect discriminatory act by the Respondent through VanCal

86. The Respondent has argued in Part Two of this memorial that the Respondent is not responsible for the acts of VanCal at international law. However, even if the acts are attributable to the Respondent, there is no breach of the discrimination duty as VanCal has not discriminated against the Claimant.
87. The test for discrimination is whether treatment accorded to the foreign investor is at least as favourable as the treatment accorded to domestic investors.¹⁰³ VanCal has not discriminated the Claimant because the Claimant has been accorded the same treatment as the domestic investors.
88. The concept of equality requires only that equals must be treated equally.¹⁰⁴ The Tribunal held in *Lauder v Czech Republic* that a discriminatory measure is simply one that fails to provide national treatment.¹⁰⁵ The ICJ also held in the *Case Concerning ELSI* that a discriminatory measure is one that fails to provide equal treatment.¹⁰⁶
89. In the present case, VanCal has provided national and non-national investors equal treatment. All shareholders are being paid stock dividends at the equal minimum rate for the years in contention, 2004 to 2007.¹⁰⁷ Additionally, corporate reports and notices have been made available to all investors, and dividends are being paid in Calpurnian Libras, a freely

¹⁰³ *UPS v Canada*, paragraph 83; *Lauder v Czech Republic*, paragraph 220

¹⁰⁴ Sornarajah, page 398

¹⁰⁵ *Lauder v Czech Republic*, paragraph 220

¹⁰⁶ *Case Concerning ELSI*, paragraph 122

¹⁰⁷ Moot Problem, Evidence/Calendar of Events, page 5, paragraph 16

convertible currency.¹⁰⁸

¹⁰⁸ Moot Problem, Abstract from the Respondent's Reply to Request for Arbitration, page 5, paragraph 15; First Clarifications, Clarification 1

Part Four:

THE DELAY IN TRANSFERRING DIVIDENDS DOES NOT AMOUNT TO AN EXPROPRIATION

90. Article 8(1) *Calpurnia-Gaul BIT* requires the Respondent to -
“ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of payments in connection with an investment, including...(b) returns...and (d) payment of royalties and licence fees.”
91. Article 8(2) *Calpurnia-Gaul BIT* states that these transfers “shall be made without any restriction or delay, in a freely convertible currency.”
92. In its Request for Arbitration, the Claimant argues that the Respondent “obstructed the transfer of returns from the Claimant’s investment”, and that this amounted to an expropriation.¹⁰⁹ This assertion is incorrect because, as established in Part Two of this Memorial, that the acts of VanCal are not attributable to the Respondent. Additionally, the delay does not amount to an expropriation because (A) VanCal has ensured the free transfer of returns in a freely convertible currency; and (B) the delay was not permanent.

A. VanCal has ensured the free transfer of returns in a freely convertible currency

93. VanCal is obliged to pay dividends and licence fees to the Claimant. VanCal has expressly acknowledged that it is obliged to pay to the Claimant the dividends declared between 2004 and 2007.¹¹⁰ VanCal has done this by crediting the payment of these dividends to the

¹⁰⁹ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 6

¹¹⁰ Moot Problem, Abstract from Respondent’s Reply to Request for Arbitration, page 5, paragraph 16

Claimant's account on the VanCal books.¹¹¹ Additionally, VanCal has confirmed that it is willing to pay any licence fees owed to the Claimant.¹¹²

94. VanCal is only obliged to pay dividends in Calpurnian Libras.¹¹³ Calpurnian Libras and Gaul Dollars are freely convertible currencies.¹¹⁴ By crediting the Claimant's dividend payments in Calpurnian Libras, VanCal has complied with its obligation to transfer payments in a freely convertible currency.

B. The delay was not permanent

95. Even if there was a delay amounting to a breach of Article 8(1) *Calpurnia-Gaul BIT*, there was no expropriation because the delay was not permanent. A measure –
“of temporary duration...will generally not be seen as an expropriation, even when it gives rise to liability on the part of the host state for violation of the national treatment and fair and equitable treatment clauses.”¹¹⁵
96. In general, a measure may only amount to an expropriation if it “amounts to a lasting removal of the ability of an owner to make use of its economic rights”,¹¹⁶ not merely a temporary removal.¹¹⁷ For example, in *Hauer v Land Rheinland-Pfalz*, a measure lasting several years was held to not be sufficiently permanent to amount to an expropriation. Similarly, in *S D*

¹¹¹ Moot Problem, Evidence/Calendar of Events, 28 September 2006, page 8

¹¹² Moot Problem, Abstract from Respondent's Reply to Request for Arbitration, page 5, paragraph 16

¹¹³ Moot Problem, Abstract from Respondent's Reply to Request for Arbitration, page 5, paragraph 16

¹¹⁴ Moot Problem, First Clarifications, Clarification 1

¹¹⁵ Lowenfeld, 480

¹¹⁶ *S D Myers v Canada*, paragraph 283

¹¹⁷ *Starrett Housing v Iran*, paragraph 154

Myers v Canada, the measure was “only valid for a [limited] time”, and therefore “an opportunity was delayed”, but there was no expropriation.¹¹⁸

97. The facts indicate that there is no permanence in the alleged interference. On 28 September 2006 the dividend payments owed were credited on VanCal’s books to the Claimant’s account.¹¹⁹ Further, the statement by Mr Korchnoi to the Claimant that dividends weren’t going to be paid was unauthorised. This representation has been superseded by statements of VanCal of its willingness to pay any licence fees and dividends payments owed.¹²⁰ The delay could only ripen into an expropriation upon the continued retention of the property.¹²¹
98. Since VanCal is willing to pay the dividends, the delay of dividends is only temporary. Even if the tribunal attributes VanCal’s actions to the Respondent, the delay in payment does not constitute an obstruction.

¹¹⁸ *SD Myers v Canada*, paragraphs 287-8

¹¹⁹ Moot Problem, Calendar of Events, 28 September 2006, paragraph 8

¹²⁰ Moot Problem, Respondent’s Reply for Arbitration, page 5, paragraph 16

¹²¹ Cheng/Schwarzenberger, page 38; see also *Norway v United States*

Part Five:

THE RESPONDENT HAS PROVIDED THE CLAIMANT AND ITS INVESTMENT FULL PROTECTION AND SECURITY

99. Article 2(2) *Calpurnia-Gaul BIT* states that the Respondent must –
“at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.”
100. This obligation “does not impose strict liability upon the State that grants it.”¹²² Rather, it “obliges the parties to exercise such due diligence as reasonable under the circumstances.”¹²³ The Respondent has met this obligation as (A) the physical security of the investment was maintained at all times; (B) the acts of the Respondent’s security agencies did not amount to breaches of the obligation; and (C) the demonstrations do not amount to breaches of the obligation to provide full protection and security. In any event, (D) the absence of Ms Pescara did not impair the Claimant’s investment

A. The physical security of the Claimant and the investment were maintained at all times

101. In ICSID jurisprudence, the obligation of full protection and security is interpreted “firmly on precedents which existed in the past.”¹²⁴ The obligation
“applies essentially when the foreign investment has been affected by civil strife and physical violence...[it] is not meant to cover just any kind of impairment of an

¹²² *TECMED v Mexico*, paragraph 117; see also *Lauder v Czech Republic*, paragraph 308; *AAPL v Sri Lanka*, paragraph 49

¹²³ *Lauder v Czech Republic*, paragraph 308

¹²⁴ Sornarajah, page 343

investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."¹²⁵

102. Although the obligation has been applied to the adverse effects of administrative actions on the investment,¹²⁶ "only exceptionally will it be related to the broader ambit".¹²⁷ In particular, a claim relating to administrative measures will not be considered exceptional.¹²⁸
103. As the present claim relates to the acts of the Respondent's security agencies, the tribunal must examine only whether the physical security of the investment was maintained. In particular, the Respondent has no obligation in relation to the subjective perception of safety of an investor or the representatives of an investor, nor would it be practical to impose such an obligation.
104. The Claimant has not suggested that the Respondent's security agencies caused any physical damage or injury to the Claimant, its representatives or the investment. Although it is claimed that Ms Pescara felt intimidated by the demonstrators, they did not prevent access to her home.¹²⁹ Regardless of Ms Pescara's subjective perceptions, her physical security was maintained at all times.

¹²⁵ *Saluka v Czech Republic*, paragraph 484

¹²⁶ *CME Czech Republic v Czech Republic*

¹²⁷ *PSEG Global v Turkey*, paragraph 258

¹²⁸ *PSEG Global v Turkey*, paragraphs 257-259

¹²⁹ Moot Problem, First Clarifications, Clarification 19

B. The acts of the Respondent’s security agencies did not amount to breaches of the obligation to provide full protection and security

105. The Respondent’s Security Directorate conducted three searches of the homes of Ms Francesca Pescara and Mr David Kolowenko, representatives of the Claimant, between 8 December 2003 and 17 July 2004.¹³⁰ The Calpurnian Constitutional Court declined to rule the searches illegal.¹³¹
106. Although the Claimant contends that it suffered loss from the acts of the Respondent’s security agencies, this does not in itself give rise to a right to compensation. In *TECMED v Mexico*, the tribunal said it was “undisputable” that –
- “the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever”.¹³²
107. Similarly, in *Emmanuel Too v Greater Modesto Insurance*, the tribunal said that –
- “a State is not responsible for loss of property or for other economic disadvantage resulting from [an] action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.”¹³³
108. The Respondent has established in Part Three of this memorial that its acts were not discriminatory. Therefore, the acts of the Respondent’s security agencies did not amount to a breach of the obligation to provide full protection and security as (1) the acts were within the Respondent’s police power; (2) the acts were not calculated to harm the investment; or alternatively because (3) the measures were not devoid of legitimate concern.

¹³⁰ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 17

¹³¹ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 17

¹³² *TECMED v Mexico*, page 163

¹³³ *Emmanuel Too v Greater Modesto Insurance*, page 378; see also *Restatement (Third) Foreign Relations of the United States*, volume 1, section 712, comment g

1. The acts were within the Respondent's police power

109. A measure is within the police power of a state if it is proportional with regard to public and private interests.¹³⁴ The searches were prompted by intelligence received by the Respondent's Police Force indicating that VanCal was engaged in illegal data collection for Gaulois Security Services.¹³⁵ The Respondent's Police Force considered the intelligence credible, as it provided –

“Sufficient details of mobile telecommunications procedures [of] VanCal to suggest that the tipster had inside knowledge”.¹³⁶

These concerns were particularly justified in light of the “existing dispute between the governments of Calpurnia and Gaul”.¹³⁷

110. In *Tokios Tokeles v Ukraine*, the investor claimed that repeated searches of premises by government investigators were “a disguise for an intimidation which had nothing to do with a genuine suspicion”.¹³⁸ Despite procedural irregularities in the documents authorizing the search,¹³⁹ the tribunal emphasised that the significance of the searches “should not be overstated”, as there was “no personal violence”, “Nobody was hurt”, and there was “no damage done to the premises”.¹⁴⁰ Similarly, in the present case, there is no suggestion that the security agencies caused any violence, injury or damage to property. Therefore, the actions of the Respondent's security force were appropriate in the circumstances. Additionally, there is nothing in the present facts to suggest an abuse of power.

¹³⁴ Dolzer, page 79; Dolzer/Bloch, page 158

¹³⁵ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

¹³⁶ Moot Problem, First Clarifications, Clarification 20

¹³⁷ Moot Problem, Evidence/Calendar of Events, 10 March 2005, page 7

¹³⁸ *Tokios Tokeles v Ukraine*, paragraph 130

¹³⁹ *Tokios Tokeles v Ukraine*, paragraph 131

¹⁴⁰ *Tokios Tokeles v Ukraine*, paragraph 130

2. The acts were not calculated to harm the investment

111. In *Tokios Tokeles v Ukraine*, a host state’s agency issued a press statement that was factually inaccurate, falsely asserting that it was investigating the investor for money laundering.¹⁴¹ The tribunal considered that this statement would only amount to a treaty violation if the “serious flaw in the Press Statement is evidence of conspiracy being put into effect”.¹⁴² In the present case, the press reports accurately described the nature of the authorities’ investigations. The Respondent concludes that the press releases issued by its security agencies are irrelevant to the obligation to provide full protection and security.
112. In *MCI Power v Ecuador*, the investor alleged that the host state had engaged in a series of acts in order to “frustrate” the investor’s “attempts to enforce its rights”, including threats of a tax audit, investigations of the investor’s representatives, and the commencement of legal proceedings by a state-owned enterprise.¹⁴³ In rejecting the claim, the tribunal focused on the procedural regularity of the measures, holding that they were in accordance with “routine procedure”,¹⁴⁴ and part of the “normal and routine activity of public administration”.¹⁴⁵ In the present case, the searches were conducted “routinely and lawfully”.¹⁴⁶ This was confirmed by the Calpurnian Constitutional Court, which rejected an application to declare the searches unlawful.¹⁴⁷

¹⁴¹ *Tokios Tokeles v Ukraine*, paragraph 29

¹⁴² *Tokios Tokeles v Ukraine*, paragraph 128

¹⁴³ *MCI Power v Ecuador*, paragraph 354

¹⁴⁴ *MCI Power v Ecuador*, paragraphs 366, 363

¹⁴⁵ *MCI Power v Ecuador*, paragraphs 367

¹⁴⁶ Moot Problem, Abstract from Respondent’s Reply to Request for Arbitration, page 6, paragraph 17

¹⁴⁷ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 17

113. In order for the conduct of criminal proceedings directed at an investor to be an element in the breach of an investment treaty, there must be “a manifest and gross failure to comply with the elementary principles of justice”.¹⁴⁸ Even the institution and discontinuance of a prosecution on three separate occasions, without more, would be insufficient to demonstrate such a failure.¹⁴⁹ In order to prove a breach, the investor would need to demonstrate that the prosecutions were not legally justified.¹⁵⁰ In the present case, no prosecution has ever been commenced against the Claimant or its representatives. Moreover, there is no evidence before the tribunal that the prosecutions were not legally justified.

3. Alternatively, the measures were not devoid of legitimate concern

114. Alternatively, even if legitimate national security concerns only partially motivated the security agencies, there is no breach of the obligation to provide full protection and security. In *Saluka v Czech Republic*, the tribunal considered whether the state had breached the full protection and security standard by suspending trading of securities in which the Claimant had invested.¹⁵¹ The tribunal found no breach because the measures were not “totally devoid of legitimate concerns relating to the securities market”.¹⁵² As it is stipulated that the Respondent’s Police Force considered the intelligence credible,¹⁵³ the Respondent concludes that the measures were not totally devoid of legitimate concerns.

¹⁴⁸ *Tokios Tokeles v Ukraine*, paragraph 133

¹⁴⁹ *Tokios Tokeles v Ukraine*, paragraph 133

¹⁵⁰ See *Tokios Tokeles v Ukraine*, paragraph 133

¹⁵¹ *Saluka v Czech Republic*, paragraph 490

¹⁵² *Saluka v Czech Republic*, paragraph 490

¹⁵³ Moot Problem, First Clarifications, Clarification 20

C. The demonstrations did not amount to breaches of the obligation to provide full protection and security

115. In the Abstract from its Request for Arbitration, the Claimant has argued that demonstrations outside the homes of the Claimant’s representatives amounted to a failure to afford full protection and security.¹⁵⁴ The Claimant argues that the full protection and security obligation required the Respondent to forcibly remove the protestors. However, in declining to take such action, the Respondent has acted proportionally and appropriately, having regard to the rights of the Claimant, its representatives, and Calpurnian nationals.
116. In *TECMED v Mexico*, the tribunal noted that the content of the full protection and security obligation must be determined in light of citizens’ democratic rights. In the context of public demonstrations against a investor, the test was whether the state had “not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements” the investment.¹⁵⁵
117. In the present matter, these parameters are informed by the Respondent’s other obligations at international law. In particular, the Respondent is a signatory to the *International Covenant on Civil and Political Rights (ICCPR)*.¹⁵⁶ According to Article 19(2) *ICCPR*, “Everyone shall have the right to freedom of expression; this right shall include freedom to...impart information”. Further, Article 21 states that “The right of peaceful assembly shall be recognized.”
118. The fact that these articles are not self-executing for the Respondent¹⁵⁷ does not affect the Respondent’s obligations, as “The characterization of an act of State as internationally wrongful is governed by international law”, and this “is not affected by the characterization of the same act as lawful by internal law”.¹⁵⁸

¹⁵⁴ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 17

¹⁵⁵ *TECMED v Mexico*, paragraph 117

¹⁵⁶ First Clarifications, paragraph 31

¹⁵⁷ First Clarifications, paragraph 31

D. The absence of Ms Pescara did not impair the Claimant's investment

119. Even if the tribunal finds that the Respondent has not exercised due diligence, the Claimant must also establish that “non-compliance with the obligation prejudiced the Claimant, to a material degree”.¹⁵⁹
120. In determining whether a series of events, when taken together, constitute a breach of an investment treaty obligation, it is relevant to view the events “not as an undifferentiated bulk but in their chronological development”.¹⁶⁰ The chronology in the present case demonstrates that the claim relates to a series of unrelated events, rather than a systematic failure by the Respondent to provide full protection and security. The security agencies’ measures were not ongoing, but rather were conducted over seven months between December 2003 and July 2004.¹⁶¹ For four months following these events, Ms Pescara felt able to continue in her role as Managing Director.¹⁶² This is inconsistent with the Claimant’s suggestion that Ms Pescara felt so threatened by the searches as to be unable to remain in the Respondent’s territory.
121. In any event, as a minority shareholder, the Claimant had no right to appoint a Managing Director. The Managing Director may be appointed and removed by a vote of the majority of shareholders at a general meeting, as confirmed by the fact that Ms Pescara was removed by “the majority vote of the shareholders present at the meeting” of 16 November 2005.¹⁶³ Ms Pescara did not require a business visa in order to act as a Director. The Respondent allowed

¹⁵⁸ Article 3 *Articles on State Responsibility*

¹⁵⁹ *Noble Ventures v Romania*, paragraph 166

¹⁶⁰ *Tokios Tokeles v Ukraine*, paragraph 135

¹⁶¹ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 17

¹⁶² Moot Problem, Evidence/Calendar of Events, 15 November 2004; Abstract from Respondent’s Reply to Request for Arbitration, page 6, paragraph 18

¹⁶³ Moot Problem, Evidence/Calendar of Events, pages 7-8

her¹⁶⁴ to enter and remain in its territory for business purposes under its visa waiver program.¹⁶⁵

122. Even if Ms Pescara was unable to return to the country, several other persons represented the Claimant's interests in the Respondent's territory from time to time, any of whom could have provided board representation. These persons include Mr Kolowenko, Chief Technical Officer of VanCal;¹⁶⁶ Mr Hunter, who has acted as a Director and Company Secretary of VanCal;¹⁶⁷ Mr Fowler, who was also a Director of VanCal;¹⁶⁸ and Mr Rindler, who has attended board meetings on behalf of the Claimant.¹⁶⁹ Apart from an investigation of Mr Kolowenko by the Respondent's Security Directorate in early 2004,¹⁷⁰ the Claimant has failed to identify any events that may have affected these representatives' ability to remain in the Respondent's territory.
123. Given that the Claimant voluntarily withdrew its representatives,¹⁷¹ the Claimant's investment has not been hampered by a "forced absence" of these representatives.¹⁷² As such there has been no breach of the obligation to provide full protection and security.

¹⁶⁴ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 19

¹⁶⁵ Moot Problem, Second Clarifications, Clarification 45

¹⁶⁶ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

¹⁶⁷ Moot Problem, Evidence/Calendar of Events, 7 June 2006, page 8

¹⁶⁸ Moot Problem, Evidence/Calendar of Events, 7 June 2006, page 8

¹⁶⁹ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 15

¹⁷⁰ Moot Problem, Evidence/Calendar of Events, 17 July 2004, page 6

¹⁷¹ Moot Problem, Evidence/Calendar of Events, 23 October 2006, page 8

¹⁷² Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

CONCLUSION

124. In this Memorial, the Respondent has established that this Arbitral Tribunal does not have jurisdiction to hear the substantive matters in this dispute because the Claimant has not pursued amicable settlement as required by the *Calpurnia-Gaul BIT*. Further, the Claimant has no recourse to arbitration because it has previously submitted the dispute to the domestic courts of Calpurnia.
125. As outlined in this Memorial, the Claimant has complained of acts of VanCal, which are not attributable to the Respondent at international law. The Respondent has not unlawfully interfered with the Claimant's investment, nor discriminated against the Claimant, nor obstructed the transfer of the Claimant's returns. Additionally, this Memorial has demonstrated that the Respondent has afforded the Claimant and its investment full and constant protection and security. Finally, the Claimant has established that none of these acts separately, nor taken together, amount to an expropriation of the Claimant's investment. As requested by this Arbitral Tribunal, this Memorial has been limited to a discussion of these issues only.¹⁷³
126. The Respondent commends the arguments in this Memorial to the Arbitral Tribunal to achieve "a just and effective resolution" of the dispute.¹⁷⁴

¹⁷³ Moot Problem, Abstract from Claimant's Request for Arbitration, paragraph 6, page 3; Third Clarifications, Clarification 33

¹⁷⁴ Article 1 *IBA*

PRAYER FOR RELIEF

The Respondent requests that this tribunal make the following findings:

1. The Tribunal does not have the jurisdiction to hear the dispute;
2. The actions of VanCal are not attributable to the Respondent;
3. The Respondent did not obstruct the transfer of the Claimant's returns;
4. The Respondent did not impair the Claimant's investment;
5. The Respondent did not fail to afford the Claimant or its investment full and constant protection and security; and
6. The above findings, whether taken individually or together, do not amount to expropriation of the Claimant's investment.