

TEAM SINGH

Vanguard International

v.

Government of the
Republic of Calpurnia

MEMORANDUM FOR RESPONDENT

INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTE

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
TABLE OF LEGAL SOURCES..... vi
STATEMENT OF FACTS 1
SUMMARY OF ARGUMENT 3
ARGUMENT 4

PART ONE: JURISDICTION..... 4

I. THIS TRIBUNAL LACKS JURISDICTION BECAUSE RESPONDENT IS IMPROPERLY NAMED AS A PARTY TO THIS DISPUTE 4

A. Claimant’s Alleged Shareholder Dispute Does Not Involve Respondent..... 5

 1. Municipal Law Should Apply Here, in the Absence of International Wrongs 5

 2. Alternatively, Third Party Harms are Not Attributable to Respondent Under International Principles 8

 3. Intervention in Shareholder Disputes is Contrary to the Object and Purpose of the Calpurnia-Gaul BIT..... 13

B. Claimant’s Allegations Concerning Calpurnian Police and Immigration Authorities Are Patently Meritless 14

II. THIS TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT ELECTED DOMESTIC REMEDY 14

A. Pescara’s Prior Suit is Attributable to Claimant and Was Directed at Respondent..... 15

B. Pescara’s Prior Suit Precludes This Arbitration Because It Is Coextensive with the Current Claims..... 16

 1. The “Coextensive” Standard Should Be Applied in Fork-in-the-Road Preclusion 16

 2. Pescara’s Prior Suit is Coextensive with These Claims 19

C. Pescara’s Prior Suit was Entirely Voluntary..... 19

D. Alternatively, This Tribunal Lacks Jurisdiction Because Claimant’s Prior Suit Concerned The Same Underlying Measures..... 20

III. THIS TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT DID NOT PURSUE AMICABLE SETTLEMENT 21

A. Amicable Settlement Provisions Are Preconditions for Jurisdiction 21

B. Claimant Has Not Satisfied the Calpurnia-Gaul Amicable Settlement Provision..... 23

 1. Claimant Failed to Communicate the Existence of a Dispute to and Failed to Seek Amicable Settlement with Respondent..... 23

 2. Claimant Initiated This Arbitration Before the Required 18-Month Period 25

C. Claimant Cannot Rely on the Calpurnia-Flatland Amicable Settlement Provision..... 25

 1. Claimant Failed to Satisfy the Calpurnia-Flatland Amicable Settlement Provision .. 26

 2. The Calpurnia-Gaul MFN Clause Does Not Attract the Calpurnia-Flatland Amicable Settlement Provision 26

3. Even if MFN Applied, Flatland’s Denunciation of ICSID Precludes Reliance on Article 7 to Establish Jurisdiction	32
<u>CONCLUSION ON JURISDICTION</u>	35
<u>PART TWO: MERITS</u>	37
I. RESPONDENT HAS NOT UNLAWFULLY EXPROPRIATED CLAIMANT’S PROPERTY	37
<i>A. There is No Expropriation Here, as Claimant Has Lost Nothing</i>	37
1. Expropriation Requires a Loss or Diminution in Value of an Investment.....	37
2. Claimant’s Investment Remains Intact.....	38
<i>B. Claimant Seeks Compensation For Its Poor Business Decisions</i>	40
1. Expropriation Does Not Protect Bad Investment Strategy	40
2. Claimant Made Poor Business Decisions	41
<i>C. Claimant Has No Cause to Complain of Measures Tailored to the Public Interest</i>	43
1. Narrowly Tailored General Welfare Measures Are Not Expropriatory	43
2. Respondent’s Measures Were Not So Broad As To Deprive Claimant of Enjoyment of Its Investment.....	44
II. RESPONDENT HAS MET ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT TO CLAIMANT’S INVESTMENT	44
<i>A. Respondent Has Provided Claimant a Stable, Predictable and Consistent Framework</i> ..	45
<i>B. Respondent’s Actions Conformed with Domestic Law</i>	46
<i>C. Respondent Protected Claimant’s Reasonable Expectations</i>	47
1. Claimant’s Reasonable Expectations Were Protected.....	47
2. This Tribunal Should Not Adopt the “Total Transparency” Standard	48
<i>D. Respondent did not Treat Claimant in an Arbitrary or Discriminatory Manner</i>	48
III. RESPONDENT DID NOT DENY CLAIMANT NATIONAL TREATMENT	49
<i>A. There Was No Differential Treatment between Calpurnian and Gaulois Shareholders</i> ..	49
1. Respondent Did Not Treat Claimant Differently with Reference to the Dissemination of Information.....	50
2. Respondent Did Not Treat Claimant Differently with Reference to Board Membership	51
3. Respondent Did Not Treat Claimant Different with Reference to the Crediting of Dividends	51
<i>B. Even if Differential Treatment Existed there was a Justification for the Differential Treatment</i>	52
1. Policy Reasons Justify The Changed Policy Regarding Disseminating Information .	52
2. Policy Reasons Justify the Changes Made to Board Membership	52
3. Policy Reasons Justify the Changes Made to the Policy Regarding Dividends.....	53
IV. RESPONDENT PROVIDED CLAIMANT’S INVESTMENT WITH FULL PROTECTION AND SECURITY	54
<i>A. Respondent Has Taken Reasonable Measures to Protect Claimant’s Investment</i>	54

1. Respondent Took Reasonable Measure to Provide Claimant with Physical Protection of its Investment	54
2. Respondent Took Reasonable Measures to Provide Claimant with Economic Protection of its Investment.....	56
4. Respondent Took Reasonable Measures to Provide Claimant with Legal Protection if its Investment.....	57
<i>B. Respondent is Not Required to Adhere to a Strict Liability Standard in Order to Protect Claimant’s Investment</i>	<i>58</i>
V. RESPONDENT HAS NOT TREATED CLAIMANT IN AN ARBITRARY AND DISCRIMINATORY MANNER	59
<i>A. Respondent Did Not Treat Claimant in an Arbitrary Manner</i>	<i>60</i>
<i>B. Respondent did Not Treat Claimant in a Discriminatory Manner.....</i>	<i>61</i>
VI. RESPONDENT HAS CONSISTENTLY MET ITS TRANSPARENCY OBLIGATIONS	61
<i>A. The Burden of Proof for Non-Transparency Rests with Claimant</i>	<i>62</i>
<i>B. Claimant Has Not Furnished Any Proof of Non-Transparency.....</i>	<i>62</i>
<u>CONCLUSION ON MERITS.....</u>	63
<u>PART THREE: RELIEF REQUESTED.....</u>	64

TABLE OF AUTHORITIES

TREATISES AND BOOKS		CITED IN ¶
<i>Dolzer</i>	Rudolf Dolzer and Christoph Schreuer, <u>Principles of International Investment Law</u> (Oxford University Press, 2008)	<i>Passim.</i>
<i>Hoffman and Tams</i>	Rainer Hofmann and Christian J. Tams, eds., <u>The International Convention on the Settlement of Disputes (ICSID): Taking Stock after 40 Years</u> (2007)	
<i>ICSID Commentary</i>	Christoph Schreuer, <u>The ICSID Convention: A Commentary</u> (2001)	139
<i>ICSID History</i>	Memorandum of the Meeting of the Committee of the Whole, February 25, 1965, ¶58 in <u>Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents Concerning the Origin and Formulation of the Convention II-2</u> , (ICSID, 1968).	138
<i>Lowenfeld, Int'l Econ. Law</i>	Andreas F. Lowenfeld, <u>International Economic Law: Second Edition</u> (2008)	119,120
<i>McLachlan</i>	Campbell McLachlan, Laurence Shore, and Matthew Weiniger, <u>International Investment Arbitration: Substantive Principles</u> , (Oxford University Press, 2007)	72,76,126-127,133,216
<i>RandomHouse</i>	Random House Unabridged Dictionary (2006).	125
<i>Sinclair on Vienna Conv.</i>	Ian Sinclair, <u>The Vienna Convention on the Law of Treaties: 2d Ed.</u> (1984).	117
<i>The Oxford Handbook</i>	Peter Muchlinski, Frederico Ortino, and Christoph Schreuer, eds., <u>The Oxford Handbook of International Investment Law</u> (Oxford University Press, 2008)	
ARTICLES		CITED IN ¶
<i>Doak</i>	Bishop, R. Doak, <i>International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea</i> , XXIII YCA 1131 (1998).	26
<i>Nolan</i>	M.D. Nolan and F.G. Sourgens, <i>The Interplay Between State Consent to ICSID Arbitration the Denunciation of ICSID Arbitration: The Possible Venezuela Case Study</i> , <u>Transnational Dispute Management</u> , Sept., 2007	141

<i>Reinisch</i>	August Reinisch, <i>The Use and Limits of Res Judicata and Lis Pendens As Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes</i> , 3 L. & Prac. of Int'l Courts and Tribunals 37 (2004)	69,76
<i>Schill</i>	Stephan Schill, "Fair and Equitable Treatment" as an Embodiment of the Rule of Law, in <i>Hoffman and Tams</i> , 31 (2007)	178,179,186
<i>Sheppard</i>	Audley Sheppard, <i>The Jurisdictional Threshold of a Prima-Facie Case</i> in <u>The Oxford Handbook</u> , 932, 941. (Sheppard)	17
SUBMISSIONS TO TRIBUNALS		CITED IN ¶
<i>Lowenfeld Declaration</i>	Declaration of Professor Andreas F. Lowenfeld, in <i>Occidental</i>	74,115

TABLE OF LEGAL SOURCES

ARBITRAL AND GOVERNMENTAL DECISIONS		CITED IN ¶
<i>ADF Group</i>	<i>ADF Group Inc. v. USA, Award, 6 ICSID Reports 470 (9 January 2003).</i>	125
<i>Aguas I</i>	<i>Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux (Vivendi) v. Argentine Republic, ICSID Case No. ARB/97/3, Award, November 21, 2000, 40 ILM 426 (2001), 5 ICSID Reports 296</i>	27,74,114
<i>Aguas II</i>	<i>Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux (Vivendi) v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, 41 ILM 1135 (2002), 6 ICSID Reports 340</i>	23,71
<i>Ambatielos</i>	<i>Ambatielos Claim (Greece v. United Kingdom), 12 U.N. Reports of Int'l Arbitral Awards 83, 108 (1956)</i>	115,116
<i>Amco</i>	<i>Amco Asia v. Indonesia, ICSID Case No. ARB81/1, Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389 at 524-20 (1983).</i>	24
<i>American Mfg.</i>	<i>American Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB19311 Award of 21 Feb. 1531 (1997)</i>	225
<i>Asian Agricultural</i>	<i>Asian Agricultural Products Ltd. v. Republic of Sri Lanka, Award of 27 June 1990, 4 ICSID Reports 246</i>	214,225,226
<i>Azurix</i>	<i>Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, Dec. 8, 2003</i>	220
<i>Bayindir</i>	<i>Bayindir Insaat Turizm Tecret Ve Sanayi v. Pakistan, ICSID Case No. ARB/03/29, Nov, 14, 2005</i>	95
<i>Biwater</i>	<i>Biwater Gauff (Tanzania) Ltd v Tanzania, ICSID Case No ARB/05/22; IIC 330 (Award of 18 July 2008).</i>	174
<i>CMS Award</i>	<i>CMS v. The Argentine Republic, ICSID Case No. ARB/01/8, Award (2005).</i>	182

<i>CMS Jurisdiction</i>	<i>CMS Gas Transmission Co. v. Republic of Argentina</i> , ICSID Case No. ARB/01/08, Decision on Objections to Jurisdiction, 42 ILM 788 (2003), July 17, 2003	75
<i>Cable Television</i>	<i>Cable Television of Nevis v. Federation of St. Kitts and Nevis</i> , ICSID Case No. ARB/95/2, Award of 13 January 1997, 5 ICSID Reports 106.	28
<i>Champion</i>	<i>Champion Trading Co. & Ameritrade International, Inc. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/02/9 (Award of 23 October 2006).	238
<i>Continental</i>	<i>Continental Casualty Co. v Argentina</i> , Award, ICSID Case No ARB/03/9; IIC 336 (Award of 5 September 2008).	173
<i>ELSI</i>	<i>Elettronica Sicula, SA (ELSI) Case</i> (ICJ), Judgment of 20 July 1989	163,178,183, 226,230
<i>Enron & Ponderosa</i>	<i>Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic</i> , ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004	92
<i>Ethyl Corp.</i>	<i>Ethyl Corporation v. Government of Canada</i> , UNICTRAL Arbitration, Award on Jurisdiction, June 24, 1998	96
<i>Feldman</i>	<i>Marvin Feldman v. Mexico</i> , ICSID Case No. ARB(AF)/99/1, NAFTA Award of 16 December 2002	42,164
<i>Gami</i>	<i>GAMI Investments, Inc. v. Mexico</i> , UNCITRAL (Final Award of 12 November 2004)	59,179,199
<i>Genin</i>	<i>Alex Genin and Others v. Republic of Estonia</i> , ICSID Case No. ARB/99/2, Award, June 25, 2001	42,67,81
<i>GenUkraine</i>	<i>Generation Ukraine v. Ukraine</i> , ICSID Case No ARB/00/9 (Award of 16 Sept. 2003), 44 ILM 404.	165
<i>Goetz</i>	<i>Antoine Goetz and Others v. Republic of Burundi</i> , 6 ICSID Reports 5, ICSID Case No. ARB/95/3, Award, Feb. 10, 1999	92
<i>Impregilo</i>	<i>Impregilo SpA v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005	22,23,25,27, 28,30

<i>Kodak</i>	<i>Eastman Kodak Co. v. Iran</i> , Award No. 329-227-3 of 11 November 11987, 17 Iran-U.S. Cl. Trib. Rep. 153.	173
<i>Lauder v. Czech Republic</i>	<i>Lauder v. Czech Republic</i> , NAFTA-UNCITRAL Arbitration, Final Award of 3 Sept. 200.	220,225,230
<i>LG&E</i>	<i>LG&E v. Argentina</i> , Decision on Liability, 3 October 2006, 46 ILM 36 (2007)	150,151,173, 233
<i>Maffezini</i>	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, Jan. 25, 2000 (2001) <i>ICSID Review – Foreign Inv. L. J.</i> 212	72,114
<i>Methanex</i>	<i>Methanex Corporation v. the United States of America</i> , Final Award on Jurisdiction and Merits of 3 August 2005, 2005 WL 1950817	164
<i>Maffezini Award</i>	<i>Maffezini v. Spain</i> , (ICSID Case No. ARB/97/7 (Argentina/Spain BIT), Award, 13 November 2000).	40,183
<i>Metalclad I</i>	<i>Metalclad Corp. v. United Mexican States</i> , ICSID Case No. ARB (AF)/97/1 (2000)	182
<i>Motorola</i>	<i>Motorola Inc. and Iran National Airlines Corp., et al.</i> , Award No. 374-481-3 reprinted in 19 Iran-U.S. CTR 93	174
<i>National Grid</i>	<i>National Grid, P.L.C. v. The Argentine Republic</i> , UNCITRAL Arbitration, Decision on Jurisdiction, June 20, 2006	114
<i>Noble</i>	<i>Noble Ventures v. Romania</i> , Award, ICSID Case No ARB/01/11, Oct., 12, 2005	163
<i>Occidental</i>	<i>Occidental Exploration and Production Co. v. Republic of Ecuador</i> , London Ct. of Int’l Arb. Case No. UN 3467, Final Award, July 1, 2004 (Vicuña, Brower, Sweeney)	72,73,75,80, 81,190
<i>Pan American</i>	<i>Pan American Energy L.L.C. and others v. Argentine Republic</i> , ICSID Case No. ARB/04/08, Decision on Preliminary Objections, July 27, 2006 (Caflich, Stern, Jan van dan Berg)	74
<i>Plama</i>	<i>Plama Consortium Ltd. v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005	113,116,117, 118,122,135

<i>Pope & Talbot</i>	<i>Pope & Talbot, Inc v. Canada</i> , NAFTA-UNICTRAL, Interim Award, June 26, 2000	151,199,206
<i>RFCC</i>	<i>Consortium RFCC v. Kingdom of Morocco</i> , ICSID Case No. ARB/00/6, Decision on Jurisdiction of 16 July 2001.	28
<i>S.D. Myers</i>	<i>S.D. Myers, Inc. v. Canada</i> , NAFTA Arbitration under UNCITRAL Rules, Partial Award, Nov. 13, 2000	206
<i>Salini v. Jordan</i>	<i>Salini Costruttori SpA v. Jordan</i> , ICSID Case No. ARB/02/13, Decision on Jurisdiction Nov. 15, 2004, IIC 2007 (2004)	113,115,116
<i>Salini v. Morocco</i>	<i>Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco</i> , ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001	27,101,104
<i>Siemens</i>	<i>Siemens v. The Argentine Republic</i> , ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004	114
<i>TECMED</i>	<i>Tecnicas Medioambientales S.A. v. The United Mexican States</i> , Award, 43 I.L.M. 133 (2004), May 29, 2003	192,173,178, 237
<i>Telenor</i>	<i>Telenor Mobile Communications A.S. v. Republic of Hungary</i> , ICSID Case No. ARB/04/15, Award, Sept. 13, 2006	113,112,134
<i>Tradex</i>	<i>Tradex Hellas S.A. v. Republic of Albania</i> , ICSID Case No. ARB/94/2 (Award of 29 April 1999).	42
<i>U.P.S. v. Canada</i>	<i>U.P.S. v. Canada</i> , Award, May 24, 2002	198
<i>Waste Mgmt.</i>	<i>Waste Mgmt. Inc. v. United Mexican States</i> , ICSID Case No. ARB(AF)/98/2, Award of 2 June 2000, 40 I.L.M. 56, 73 (2001)	76,85,162, 192,194
<i>Wena Hotels</i>	<i>Wena Hotels v. Egypt</i> , Award, 8 December 2002, 41 ILM 896 (2002)	214
<i>Wintershall</i>	<i>Wintershall, A.G. v. Gov't of Qatar</i> , 28 I.L.M. 795, 809 (1989)	26
TREATIES AND OTHER INTERNATIONAL PUBLICATIONS		CITED IN ¶
<i>CAFTA Draft Text</i>	Central American Free Trade Agreement (U.S.-D.R.) (Draft Text), Jan. 28, 2004	124

<i>Commentaries</i>	<i>Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts</i> , Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), ch IV.E.2, p. 87.	30
<i>ILC Articles</i>	International Law Commission, <u>Articles on Responsibility of States for Internationally Wrongful Acts</u> , <i>Yearbook of the International Law Commission, 2001</i> , vol. II (Part Two) (2001)	30,35,38
<i>Sovereignty over Natural Resources</i>	Declaration on Permanent Sovereignty over Natural Resources, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962).	26
<i>UNCTAD</i>	United National Conference on Trade and Development (UNCTAD), <i>National Treatment</i> (1999).	197
<i>Vienna Conv. On Law of Treaties</i>	Vienna Convention on the Law of Treaties art. 31, May, 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969)	93,121

STATEMENT OF FACTS

1. The Republic of Calpurnia (“Respondent”) and the Federated States of Gaul entered into an Agreement on the Promotion and Protection of Investments on 1 August 1995.¹ Respondent and the State of Flatland entered into an Agreement on the Mutual Promotion and Protection of Investments on 8 February 1992.²
2. Flatland denounced the ICSID Convention on 3 May 1992.³
3. In 1997, Vanguard International (“Claimant”), a Gaulois corporation, participated in establishing a joint venture company, VanCal, Inc. (“VanCal”), providing GSM/UMTS services in Calpurnia, along with the State Fund for Commerce and Development in Calpurnia (“SFCD”). VanCal is presently the nation’s largest mobile telecommunications service provider.⁴
4. Claimant has owned up to 84% of Vanguard’s outstanding stock.⁵ Since 2004, and as a result of share sales, Claimant has held 31% of VanCal’s common stock.⁶ Additionally, Claimant licenses its intellectual property and provides technical assistance to VanCal.⁷ SFCD owns not more than 30% of VanCal’s shares.⁸
5. In late 2003, Calpurnian police received credible information stating that Ms. Francesca Pescara and Mr. David Kolowenko were engaged criminal activities. The police searched their homes on three occasions.⁹

¹ Calpurnia-Gaul BIT.

² Calpurnia-Flatlands BIT.

³ R.,p.3,Notel.

⁴ R.,p.3,¶8.

⁵ R.,p.3,¶9.

⁶ R.,p.3,¶9.

⁷ R.,p.3,¶9.

⁸ R.,p.3,¶10.

⁹ R.,p.6,8December2003-17July2004.

6. In 2004, various women's association protested near Ms. Pescara's home¹⁰ on public property.¹¹ Police placed the number of protestors at 50 persons.¹²
7. In September 2004, Calpurnian immigration authorities denied a multiple-entry business visa to Ms. Pescara.¹³
8. In May 2005, Claimant requested payment of dividends in a separate bank account to be opened Claimant's name.¹⁴ An independent director denied Claimant's request.¹⁵ The VanCal Board has since credited dividends to a corporate account.¹⁶
9. Several disputes occurred between members of the VanCal Board of Directors ("Board") in 2005 and 2006.¹⁷
10. Ms. Pescara brought suit in Calpurnian court for transfer of dividends on 1% shareholding in VanCal. In June 2006, the suit was dismissed on standing grounds.¹⁸
11. On 23 October 2006, Claimant unilaterally withdrew its representatives from the Board and declined to replace them.¹⁹
12. On 11 November 2006, VanCal requested that Claimant reconsider these resignations.²⁰
13. On 5 February 2007, Claimant informed Mr. Poe that it sought compensation for an expropriation.²¹ On 31 July 2007, Claimant initiated this arbitration.²²

¹⁰ R.,p.4,¶17.

¹¹ R.p.6,¶17.

¹² *Second Clarifications*,Q41.

¹³ R.,p.4,¶18.

¹⁴ R.,p.7,21May2005.

¹⁵ R.,p.7,27May2005.

¹⁶ R.,p.8,28September 2006.

¹⁷ R.,pp.7-8,10March2005-16November2006.

¹⁸ R.,p.8,14June2006.

¹⁹ R.,p.8,23October2006.

²⁰ R.,p.8,11November2006.

²¹ R.,pp.8,21February2007.

²² R.,pp.9,31July2007.

SUMMARY OF ARGUMENT

14. **JURISDICTION.** This Tribunal lacks jurisdiction to hear this dispute. Respondent bears no responsibility for the international and contractual breaches alleged here. Claimant also previously elected domestic remedy. Moreover, Claimant's failure to pursue amicable settlement prevents jurisdiction. Claimant cannot rely on a more favorable amicable settlement provision because Claimant does not even satisfy that provision; because that provision is not subject to attraction by the relevant MFN clause; and because reliance on that provision would preclude jurisdiction as a result of Flatland's denunciation of the ICSID Convention.
15. **MERITS OF THE CLAIM.** Respondent has observed its commitments to investment protection as set forth in the Calpurnia-Gaul BIT, and any harm to Claimant's investment is self-inflicted. Claimant has lost nothing, and Respondent has not expropriated Claimant's property. Respondent has accorded Claimant national treatment. Respondent has provided Claimant's investment full protection and security. Respondent has provided fair and equitable treatment to Claimant's investment. Respondent has not treated Claimant in an arbitrary and discriminatory manner. Finally, Claimant has failed to meet its burden of proof on transparency.

ARGUMENT

PART ONE: JURISDICTION

I. THIS TRIBUNAL LACKS JURISDICTION BECAUSE RESPONDENT IS IMPROPERLY NAMED AS A PARTY TO THIS DISPUTE

16. Article 11 of the Calpurnia-Gaul BIT provides for ICSID jurisdiction only between “an investor of one Contracting Party and the other Contracting Party.” Similarly, Article 25(1) of the Convention limits ICSID jurisdiction to disputes between a “Contracting State...and a national of another Contracting State.” The plain import of these provisions is that this Tribunal only retains jurisdiction over those disputes between an investor and the Government of Calpurnia.
17. When considering whether a Claimant has satisfied Article 25(1) and the jurisdictional provisions of the Calpurnia-Gaul BIT, Tribunals conducting a unified proceeding – i.e., one where the jurisdiction and merits of the claim are considered together, as here – go beyond the Claimant’s pleadings, and evaluate the substance and evidence of the merits claims to determine if jurisdiction exists.²³ Here, Claimant pleads that Respondent has breached its international and contractual obligations to Claimant, and thus jurisdiction is satisfied.
18. Claimant’s contention is patently false. The actions alleged by Claimant to constitute a breach of Respondent’s international and contractual obligations either are **(A)** not attributable to the Respondent or **(B)** are patently meritless. For this reason, Respondent is not properly named in Claimant’s pleading, and thus this Tribunal has no jurisdiction over this dispute.

²³*Sheppard*,932,941.

A. Claimant's Alleged Shareholder Dispute Does Not Involve Respondent

19. Since 2004, Claimant has entered into numerous disputes with private persons, none of whom represent Respondent. Having failed to seek reasonable recourse, Claimant now proffers that these persons are the Respondent **(1)** disregarding municipal attribution principles; **(2)** relying on harms caused by unrelated parties; which **(3)** relies on Contracting Party interventions inconsistent with the Calpurnia-Gaul BIT.

1. Municipal Law Should Apply Here, in the Absence of International Wrongs

20. State responsibility **(a)** must be governed by municipal law **(b)** when, as here, the underlying claims are contractual in nature.

a. State Responsibility for Contractual Disputes is Determined by Municipal Law

21. The applicable law of attribution here is municipal law. A State is only properly named as a Respondent in arbitration of contractual disputes when it is responsible for contractual breaches under municipal law.

22. In *Impregilo*, Claimant sought to establish that an entity owned, mandated and controlled by the State was an organ of the State. There, the tribunal decided that:

a clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law, and the responsibility of a State for the conduct of an entity that breaches a municipal law contract.²⁴

23. In municipal law disputes, the formation, existence and liability of distinct persons prevails, in contrast with the application of international standards to treaty claims, because:

the State...is not liable for the performance of contracts entered into by [an entity], which possesses a separate legal personality under its own law and is responsible for the performance of its own contracts.²⁵

²⁴ *Impregilo*, ¶210.

24. Similarly, *AMCO* found that local law applies in determining the existence of duties, and hence attribution, including the use of state armed forces to reclaim property.²⁶
25. Affiliation of senior corporate executives with the host State, even directly employment thereby, is not sufficient to find an international wrong for which a State is responsible.²⁷
26. While tribunals have pierced the corporate veil in petroleum arbitrations, they have applied municipal agency principles when doing so.²⁸ In *Wintershall*, the head of state appointed key personnel of an agency that exercised the critical governmental function of natural resources allocation.²⁹ Considering the particular status of extractive industries and the permanent sovereignty exercised by States over natural resources,³⁰ commentators persuasively argue that the corporate veil principles emerging from these decisions are better characterized within a *lex petrolea*.³¹
27. But outside of the petroleum context, tribunals have consistently recognized that, regardless of who appointed them, corporate officers are responsible for their own decisions. A diverse range of provincial and corporate entities have been found distinct from their States of formation,³² respecting the form in which a society accepts the institution of contract. Application of binding local law to local disputes is also consistent with the Vienna Convention, to which Respondent is a party and under which international principles are merely persuasive.
28. Finally, when contract breaches are alleged against a party other than the State, BIT jurisdiction does not extend.³³

²⁵ *Aguas II*, ¶96; accord, *Impregilo*, ¶210.

²⁶ *Amco*, ¶24.

²⁷ *Impregilo*, ¶215.

²⁸ *Wintershall*.

²⁹ *Id.*, ¶812.

³⁰ *Sovereignty over Natural Resources*.

³¹ *Doak*, 1135.

³² E.g., *Impregilo*, ¶216; *Aguas I*, ¶97; *Salini v. Morocco*, ¶61.

³³ *Impregilo*, ¶¶214-15, citing *RFCC*, ¶68; *Cable Television*, ¶2.22.

29. For these reasons, municipal laws of agency should be applied to claims governed by municipal law.

b. This Dispute is Contractual

30. In the absence of an umbrella clause, a breach of contract does not constitute an internationally wrongful act unless it is the “result of behavior going beyond that which an ordinary contracting party could adopt.”³⁴ Only when a State acts through its “sovereign authority” is a State’s breach of contract an internationally wrongful act.³⁵

31. Claimant argues that SFCDC improperly withheld dividends and interfered with Claimant’s participation in VanCal. These allegations constitute a classic domestic contractual claim – namely, an ordinary dispute between shareholders. Even if this Tribunal finds SFCDC’s actions attributable to Respondent, none of these contractual breaches raise Claimant’s allegations to the status of international wrongs since SFCDC’s alleged actions do not invoke sovereign authority.

32. Moreover, Claimant, as a side matter, alleges that law enforcement and immigration authorities acted in contravention of Respondent’s international obligations. These ancillary claims are patently meritless,³⁶ and further resulted in either negligible or no damage to Claimant.³⁷ Harmless breaches of treaty provisions are not considered breaches of international obligations.

33. Thus, Claimant truly brings contractual claims before this Tribunal. As stated above,³⁸ municipal laws of attribution apply when investors bring solely contractual disputes before international fora.

³⁴ *Impregilo*, ¶260.

³⁵ *ILC Articles; accord Commentaries*.

³⁶ *See infra., Part Two, IV(A)*

³⁷ *Id.*

³⁸ *See infra., Part Two, IV(A)*

34. For these reasons, Calpurnia’s municipal law, under which SFCDC is formed as a distinct legal person, should be applied in the present dispute.

2. Alternatively, Third Party Harms are Not Attributable to Respondent Under International Principles

35. At the very outset of the *ILC Articles*, it is established that only the “internationally wrongful act of a State entails the international responsibility of that State.”³⁹ The ILC test is two-fold, analyzing whether an act is internationally wrongful and that of a State before attributing responsibility to the State.

36. Even if international attribution principles are applied, harms caused by natural and legal persons **(a)** not authorized and not controlled by a State can be attributed thereto and **(b)** Respondent has not authorized and does not control any of the persons allegedly harming Claimant.

a. Authorization of Or Command Over Natural and Legal Persons Is Required for Attribution

37. Attribution is improper even under international principles when harm is inflicted by **(i)** an entity not exercising a government function or **(ii)** unaffiliated third persons.

i. Absent A Government Function, Ownership Alone Does Not Merit State Attribution

38. The rules of attribution reinforce the principles of agency, control of actors *de facto* exercising governmental authority and encouragement of lawful behavior by States. Resting on these pillars, the acts of public and private companies may only be attributed to a State when:

³⁹ Article I, *ILC Articles*.

the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.⁴⁰

39. The exercise of governmental authority must be clear for attribution to follow from mere ownership, for it is a core principle of state responsibility that “state entities are separate and their acts will not be attributed to the state.”⁴¹ The corporate veil will be pierced only when: fraud and evasion motivate separate formation; the corporation exercises public power; and the state is exercising control in order ‘to achieve a particular result.’⁴²
40. Applying international attribution principles, the tribunal in *Maffezini* set the standard for formal or structural examination of attribution, based on a rebuttable presumption that entities owned by the State are State entities. Rebuttal is furnished through a functional analysis, examining whether “specific acts or omissions are essentially commercial rather than governmental in nature.”⁴³ Upon analysis, “commercial acts cannot be attributed to the...State.”⁴⁴

ii. *Policy Misperceptions by Unaffiliated Third Persons Are Not Attributable to the State*

41. Businesses routinely interact with a number of private persons and bodies, the actions of whom necessarily impact operations and profitability, and against whom the State cannot, and indeed should not, protect investors.
42. Investor misperception of a special exemption is not attributable to the State.⁴⁵ Neither is generalized public misconduct not entailing improper police action. In *Tradex Hellas*, the tribunal was called upon to decide if illegal occupation of investor property by private

⁴⁰ Comment 2 to Article 5, *ILC Articles*.

⁴¹ *Dolzer*, p198.

⁴² *Dolzer*, p198-99.

⁴³ *Maffezini Award* ¶52.

⁴⁴ *Id.*

⁴⁵ *See, e.g., Genin; Feldman.*

persons, perhaps under a false belief of State sanction, was caused by the State.⁴⁶ Absent any link to the State or causality, the tribunal found the private act not attributable.

43. For these reasons, States may be held internationally liable only for the acts of persons authorized or controlled by the State.

b. Both Authorization and Control Are Lacking Here

44. Respondent **(i)** does not control SFCDC, **(ii)** SFCDC does not exercise a governmental function, and **(iii)** SFCDC does not own or control VanCal. Further, many of Claimant's alleged injuries arise out of **(iv)** self-inflicted harm or **(v)** the acts of third parties.

i. *Respondent Does Not Control SFCDC*

45. Respondent owns all of SFCDC's outstanding shares.⁴⁷ Respondent appoints SFCDC's board members,⁴⁸ consistent with its shareholding interest. Claimant has not furnished evidence that Respondent exercised control over SFCDC staffing or management other than board nomination,⁴⁹ nor over SFCDC's investment management function,⁵⁰ because Respondent in fact does not exercise any such control.

46. Further, Claimant knows that Respondent does not control SFCDC. As discussed in Part One, II(A), *infra*, Claimant's key employee brought suit against VanCal regarding dividend payments. Respondent was not named as a party in this action, since Claimant did not consider Respondent a necessary party. Having failed to name Respondent in the domestic proceeding, Claimant is barred from conflating SFCDC with Respondent in the present arbitration.

⁴⁶ *Tradex*.

⁴⁷ R.,p3,¶10.

⁴⁸ *SecondClarifications*,Q17.

⁴⁹ R.

⁵⁰ R.

ii. SFCDC's Commercial Operations are Not a Governmental Function

47. The State Fund for Commerce and Development in Calpurnia (SFCDC) is an investment fund by its plain terms.⁵¹ There is no evidence of a mandate to exercise a governmental authority,⁵² because no such mandate, formal or informal, exists.

iii. SFCDC Does Not Control VanCal

48. Claimant has historically held up to 84% of VanCal's outstanding shares.⁵³ Since 2004, Claimant has held 31% of VanCal's common stock.⁵⁴ SFCDC owns not more than 30% of VanCal shares.⁵⁵ SFCDC's VanCal shareholding has historically been substantially less than Claimant's, and remains lesser to this day. SFCDC is a minority shareholder in VanCal. Claimant alleges that SFCDC controls another 22% of VanCal shares based on a Purchase/Agency Agreement – and no further evidence.

49. Calpurnian trust law provides for beneficiary rights and trustee responsibilities,⁵⁶ and Claimant knows it does. Claimant's employee brought the aforementioned shareholder suit based on certain VanCal shares.⁵⁷ Such shares are Claimant's,⁵⁸ under a strange trust arrangement of unknown purpose. The Commercial Court dismissed the claim, based on the plaintiff's merely nominal interest in the shareholding.⁵⁹

50. Given the existence of a domestic legal framework, it is misleading for Claimant to assert violation of trust and agency standards without furnishing evidence. Further, if Claimant contends that SFCDC has usurped the rights of beneficiary shareholders through voting

⁵¹ R.,p3,¶10.

⁵² R.,*passim*.

⁵³ R.p3,¶9.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *SecondClarifications*,Q4.

⁵⁷ R.,p8,14June2006.

⁵⁸ R.,p3,¶9.

⁵⁹ R.,p8,14June2006.

contrary to their benefit, such claim should be resolved by domestic courts applying Calpurnian law – not international arbitration.

iv. Claimant's Harm is Self-Inflicted

51. Claimant retains the right to maintain representation on the VanCal Board of Directors. While a business visa for Pescara was denied,⁶⁰ both Parties agree that Pescara was suspected of criminal conduct at the time.⁶¹ Pescara was later removed from the Board of VanCal in keeping with VanCal policy. At all times, Claimant has been free to nominate replacement representatives.

52. Indeed, Claimant nominated replacement Board members on 7 June 2006.⁶² However, shortly before commencing this proceeding, Claimant elected to withdraw its representatives.⁶³ Claimant even ignored a specific request from VanCal's management to renew its participation.⁶⁴

53. Respondent ascribes Claimant's unreasonable course of conduct to a desire to inflict self-injury in support of arbitral recompense. Regardless and irrespective of Claimant's motivation in so acting, Claimant's self-injury is not attributable to Respondent.

v. Acts of Private Third Parties Are Not Attributable to Respondent

54. On 15 April 2005, VanCal declared a cash-and-stock shareholder dividend, which Claimant believes has been withheld. Claimant hinges much of its claim on an email sent by Korchnoi stating that dividends could not be deposited.⁶⁵

⁶⁰ R.,p4,¶17.

⁶¹ R.,p6,8December2003–17July2004.

⁶² R.,p8,7June2006.

⁶³ R.,p8,23October2006.

⁶⁴ R.,p8,11November2006.

⁶⁵ R.,p.7,27May2005.

55. Korchnoi is an independent director, not affiliated with SFCDC.⁶⁶ There is no indication that Korchnoi holds any office within the Government of Calpurnia.⁶⁷ Korchnoi later resigned due to mishandling of Vanguard matters. Irrespective, the actions of Korchnoi, a private corporate employee,⁶⁸ are not attributable to Respondent.
56. Claimant also alleges unspecified damages arising out of a series of protests conducted by the CCC Women's League.⁶⁹ The CCC Women's League is not a government body, and there is no evidence that it receives government funding.⁷⁰
57. For the reasons stated above, the acts of those persons allegedly injuring Claimant are not attributable to Respondent.

3. Intervention In Shareholder Disputes is Contrary to the Object and Purpose of the Calpurnia-Gaul BIT

58. The Calpurnia-Gaul BIT's object and purpose is stated in its preamble, recognizing that "promotion and protection of investments...will stimulate business initiatives." For such stimulation, free markets must be operate without undue governmental interference. While a State may legitimately regulate industry within boundaries narrowly tailored to the public interest,⁷¹ excessive interference with commercial dealings will be held in violation of the State's treaty commitments.
59. In *Gami*,⁷² a potential regulatory failure was found not attributable to the State,⁷³ for:

The distinction between "adequate supervision" and "effective implementation" is hardly subtle...For an international tribunal the relevant conclusion [implies] that [claimant] has not shown that the government's self-assigned duty...was simple

⁶⁶ *SecondClarifications*,Q1.

⁶⁷ R.

⁶⁸ *SecondClarifications*,Q52(a).

⁶⁹ R.,p.4,¶¶17

⁷⁰ *FirstClarifications*,Q18.

⁷¹ Part Two,Sec.I(C)(1), *infra*.

⁷² *Gami*.

⁷³ *Id.*,¶¶110-115.

and unequivocal. It is impossible to conclude that the failures in [the regulatory scheme were] directly attributable to the government.⁷⁴

60. In *Gami*, the host state had arguably committed to regulate through its ratification of an affirmative framework. Here, the BIT commits Respondent to restraint from market interference, and the operation of other market mechanisms is not attributable to Respondent.
61. For these reasons, under either municipal or international law, Respondent is not responsible for any damages incurred by Claimant in the present shareholder dispute. Further, the aggressive intervention purportedly sought by Claimant would have been contrary to the Calpurnia-Gaul BIT's object and purpose.

B. Claimant's Allegation Concerning Calpurnian Police and Immigration Authorities Are Patently Meritless

62. Respondent concedes that the acts of its police and immigration authorities are those of Respondent. Such powers were exercised consistent with Respondent's domestic and international duty to police as set forth in Part Two, Section IV, *infra*. For all these reasons, Claimant's allegations are either not attributable to the Respondent or are patently meritless.

II. THIS TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT ELECTED DOMESTIC REMEDY

63. Article 11(3) of the Calpurnia-Gaul BIT provides that a Gaulois investor who submits an investment dispute to a Calpurnian court has no subsequent recourse to ICSID arbitration.
64. Claimant, using Pescara as a mask, has already submitted this dispute to a Calpurnian court. When the trial court found that Pescara had no standing, Claimant did not appeal the decision or comply with Calpurnian standing requirements. Instead, Claimant simply

⁷⁴ *Id.*, ¶110.

sought international arbitration. In short, Claimant already elected domestic remedy, and now seeks international arbitration because that remedy did not go Claimant's way.

65. Claimant's election of domestic remedy precludes this Tribunal's jurisdiction because **(A)** the prior suit by Pescara, Claimant's employee, is attributable to the Claimant; **(B)** Pescara's prior suit is coextensive with the current claims; and **(C)** Pescara's suit was entirely voluntary. Alternatively, **(D)** jurisdiction is precluded because Claimant's prior suit involved the same underlying measures.

A. Pescara's Prior Suit is Attributable to Claimant and Was Directed at Respondent

66. Fork-in-the-road preclusion occurs when an investor elects domestic remedy. Prior to 14 June 2006, Pescara, Claimant's "representative,"⁷⁵ filed suit against VanCal, seeking withheld dividends.⁷⁶

67. Under *Genin*, a prior domestic suit by a related party is attributed to a claimant when the "election of remedy" can be attributed to the "group" as a whole.⁷⁷ In this case, Pescara is Claimant's employee. It is inconceivable that Pescara's suit was conducted without the direction of Claimant; Pescara's suit thus constitutes a "group...election" of domestic remedy.

68. Moreover, although directed at VanCal, Pescara's prior suit should also be held to have been directed at Respondent. Respondent disclaims any control over VanCal. As explained above in Section I, the actions of VanCal and its shareholder cannot be attributed to Respondent. However, if this Tribunal finds that the activities of VanCal's acts are attributable to Respondent, then Respondent should also benefit from that ruling in this instance. Claimant cannot in one breath proclaim that Respondent and VanCal share a personality for state attribution, and then argue that there is no shared personality for fork-

⁷⁵ R.,3

⁷⁶ R.,8

⁷⁷ *Genin*, ¶330.

in-the-road preclusion. Accordingly, if the Tribunal attributes VanCal's acts to Respondent, Pecara's prior suit should also be attributed as having been against Respondent.

69. Claimant will argue that attribution for fork-in-the-road purposes requires a strict legal identity of both defendant and plaintiff in both the domestic and international actions. This overly formalistic "same name" approach should fail: it allows "individual [entities] of a corporate group" to "endlessly re-litigate the same dispute under the guise of separate legal entities."⁷⁸ Instead, this Tribunal should adopt a "realistic approach"⁷⁹ and see Pescara's suit for what it really was – a blatant attempt by Claimant to avoid fork-in-the-road preclusion by hiding behind its employee.

B. Pescara's Prior Suit Precludes This Arbitration Because It Is Coextensive With The Current Claims

70. Pescara's prior suit precludes this arbitration because **(1)** the best standard to determine fork-in-the-road preclusion is the *Aguas II* "coextensive" standard; and **(2)** this arbitral claim is coextensive with Pescara's prior domestic claim.

1. The "Coextensive" Standard Should Be Applied in Fork-in-the-Road Preclusion

71. Fork-in-the-road preclusion occurs when the prior domestic suit is sufficiently related to subsequent international arbitration. *Aguas II* correctly states that a domestic claim is a "'final' choice of forum and jurisdiction, if [the] claim [is] coextensive with a dispute...under [a] BIT."⁸⁰ This "coextensive" standard is the best test for fork-in-the-road preclusion because **(a)** it balances the competing interests in fork-in-the-road jurisprudence; and because **(b)** it eliminates the unnecessary distinction between contractual and international claims in fork-in-the-road jurisprudence.

⁷⁸Reinisch,59.

⁷⁹*Id.*,57–59.

⁸⁰*AguasII*,¶55.

a. The Coextensive Standard Balances the Interests At Stake in Fork-in-the-Road Jurisprudence

72. ICSID fork-in-the-road jurisprudence represents a clash of two values. On one hand, fork-in-the-road provisions are fundamental incidents of State public policy⁸¹ that protect against repetitive litigation of the same underlying dispute.⁸² On the other hand, fork-in-the-road provisions should not bar investors from international protection of their claims simply because they filed unrelated or incidental domestic suits concerning the same investments.⁸³

73. The *Aguas II* “coextensive” standard appropriately balances these values. First, the standard protects States from repetitive litigation.⁸⁴ Second, by requiring that the prior domestic claim and subsequent international arbitration be coextensive, *Aguas II* addresses the concern that any prior including unrelated incidental domestic suits would bar international protection for investors.

74. Claimant may argue for application of a strict standard that requires a formal identity of parties, objects, and causes of action, or a combination thereof, to allow for fork-in-the-road preclusion.⁸⁵ The “form of action”⁸⁶ strictness of this standard is predicated on the reasoning that if tribunals “assume lightly that choices of forum have been made...in favour of the host State’s judicial system,” then “there [is] little use in setting up arbitral procedures for investment disputes.”⁸⁷ The standard goes too far: per Professor Lowenfeld relates, it allows for dangerous multiple litigation which inevitably leads to inconsistent results.⁸⁸ Because of its strict formality, this standard singularly fails to consider the interest of the State against repetitive litigation and should not be used by this Tribunal.

⁸¹ *Maffezini*, ¶62.

⁸² *MacLachlan*, §4.21, 87.

⁸³ *Occidental*, ¶53.

⁸⁴ *Id.*

⁸⁵ *See, e.g., Aguas II*, ¶53

⁸⁶ *Lowenfeld Declaration*, ¶11.

⁸⁷ *PanAmerican*, ¶¶155-156.

⁸⁸ *Lowenfeld Declaration*, ¶¶11, 12.

b. The Coextensive Standard Eliminates the Arbitrary Distinction Between Contractual and International Claims

75. The *Aguas II* “coextensive” standard appropriately removes an artificial distinction between contractual and treaty claims in ICSID fork-in-the-road jurisprudence. Prior ICSID tribunals have determined that because “contractual claims are different from treaty claims,” there is no fork-in-the-road preclusion “even if there had been...recourse to the local courts [to resolve a contractual dispute on the same matter].”⁸⁹ The presumed purpose of this strict dichotomy is to avoid forcing an investor into a false choice between international and domestic protection.⁹⁰

76. This artificial distinction between contractual and treaty claims is flawed. The laws of preclusion are always crafted to “enable comparison between parallel courts in different legal systems” and “are always concerned with the effect of proceedings in courts of separate legal systems.”⁹¹ Just because similar underlying facts lead to multiple claims in multiple fora,⁹² there is no reason to require a party to repetitively litigate those same facts.⁹³ This is especially true in the international private legal sphere, where a State’s obligations are essentially identical across multiple domestic and international sources.⁹⁴

77. Moreover, here there is no false choice between international and domestic protection. The language of Article 11 of the Calpurnia-Gaul BIT expressly provides for either domestic or international resolution of “any” dispute, including both contractual and treaty disputes. Thus, as in *Aguas II*, there is no possibility here that Claimant will suffer a false choice between domestic and international protections. In these circumstances, Claimant should not benefit because it decided not to seek domestic resolution of its international claim at the time Claimant sought domestic resolution of his domestic claims.

⁸⁹ *CMS Jurisdiction*, ¶80.

⁹⁰ *Occidental*, ¶53.

⁹¹ *MacLachlan*, §4.21, 87.

⁹² *WasteManagement*, 40 I.L.M.56.

⁹³ *Reinisch*, 41–42.

⁹⁴ *WasteManagement*, 40 I.L.M.56.

78. For these reasons, this Tribunal should adopt the *Aguas II* standard.

2. Pescara's Prior Suit is Coextensive With These Claims

79. Application of *Aguas II* precludes Claimant's current arbitration because Claimant's prior suit is coextensive with the current arbitral claims. Claimant's prior suit was for allegedly withheld dividends based on Claimant's allegations of corporate malfeasance and improper denial of corporate control. That prior suit is identical to the current dispute, where Claimant seeks damages related to its allegations that VanCal, under the control of the SFCDC, withheld Claimant's dividend payments and denied Claimant its proportionate corporate control. Claimant's other allegations, related to denial of business visas and other incidental matters, are simply ancillary to these principal allegations.⁹⁵

C. Pescara's Prior Suit Was Entirely Voluntary

80. Fork-in-the-road requires that the prior election of domestic remedy was without duress.⁹⁶

81. While strict domestic legal duties may constitute duress, no legal duty forced Claimant to seek domestic remedy here. Claimant's choice was not constrained by an unduly restrictive statute of limitations.⁹⁷ Similarly, Claimant's employee, Pescara, could not seek suit to protect her beneficiary's interests.⁹⁸ In fact, under Calpurnian law, Pescara had no standing to sue for the allegedly withheld dividends as that right lies only with the real shareholder in interest – here, Claimant.

82. Because there was no duress requiring domestic suit, Claimant's domestic suit was voluntary.

⁹⁵ See *supra*, Sec.I(B).

⁹⁶ *Occidental*, ¶59.

⁹⁷ *Id.*, ¶¶60-61.

⁹⁸ *Genin*, ¶¶332-333.

D. Alternatively, This Tribunal Lacks Jurisdiction Because Claimant's Prior Suit Concerned The Same Underlying Measures

83. Tribunals lack jurisdiction when an investor has brought a sufficiently related suit in domestic court. That said, investors should not be denied international protection of their claims simply because they brought incidental or unrelated suits in domestic court. As discussed above, *Aguas II* represents an appropriate balance of these two interests, and should be adopted by this Tribunal in lieu of the standard requiring triple identity of parties, objects, and causes of action.⁹⁹
84. However, *Aguas II* does not represent the only possible balance between a State's need to avoid repetitive litigation and an investor's need for international protection. A similar balancing was achieved in *Waste Management*.
85. In *Waste Management*, the tribunal found that an investor had failed to satisfy NAFTA Article 1121's waiver requirements when its pending domestic suits and the international arbitral claim "[had] a legal basis derived from the same measures [i.e., the same alleged State acts]."¹⁰⁰ Like *Aguas II*, *Waste Management* balances the State interest against repetitive litigation with the investor's interest in retaining the right to international protection despite incidental domestic suits. *Waste Management* is therefore preferable to the standard which requires a triple identity of parties, objects, and causes of action.¹⁰¹
86. *Aguas II* should be given greater precedential effect than *Waste Management*. *Waste Management* discussed the preclusive effect of a NAFTA Article 1121 waiver, a type of preclusion which is more extensive than fork-in-the-road. For this reason, Respondent requests this Tribunal adopt *Aguas II*.
87. However, if this Tribunal chooses not to adopt *Aguas II*, the "underlying measures" standard in *Waste Management* is a viable alternative.

⁹⁹ *Supra*, Sec.II(B)(1).

¹⁰⁰ *Waste Management*, 40 I.L.M.56.

¹⁰¹ *See supra*, SecII(B)(1).

88. If this Tribunal adopts *Waste Management*, Claimant’s prior suit still precludes jurisdiction. Claimant’s prior suit and this international claim have a legal basis derived from the alleged withholding of dividends and denial of corporate control.¹⁰² As such, the *Waste Management* standard would preclude this Tribunal’s jurisdiction.

89. For all these reasons, jurisdiction is barred by Article 11(3)’s fork-in-the-road provision.

III. THIS TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT DID NOT PURSUE AMICABLE SETTLEMENT

90. Article 11(1) of the Calpurnia-Gaul BIT provides that parties “shall” seek to amicably settle any dispute. Article 11(2) allows for ICSID jurisdiction over a dispute only if the “dispute cannot be settled amicably within 18 months from the date of request for amicable settlement.”

91. In this case, Claimant did not contact any Government official or make any attempt at amicable settlement before arbitration. Claimant’s failure to pursue amicable settlement bars jurisdiction because **(A)** amicable settlement provisions are preconditions for jurisdiction; **(B)** Claimant failed to satisfy the Calpurnia-Gaul’s amicable settlement provision; and **(C)** Claimant cannot instead invoke Calpurnia-Flatland’s amicable settlement provision.

A. Amicable Settlement Provisions Are Preconditions For Jurisdiction

92. *Enron & Ponderosa*¹⁰³ and *Goetz*,¹⁰⁴ among other tribunals, found that amicable settlement provisions are prerequisites to jurisdiction. This same result follows from the language of the Calpurnia-Gaul BIT and from the purposes of amicable settlement provisions.

¹⁰² *Supra*, Sec.I(B).

¹⁰³ *Enron&Ponderosa*, ¶88

¹⁰⁴ *Goetz*, ¶91.

93. Article 11 of the Gaul-Calpurnia BIT firmly establishes that its amicable settlement provision is a prerequisite for jurisdiction. Article 11(2) of the Calpurnia-Gaul BIT provides for consent to ICSID jurisdiction only after an investor provides notice of the dispute and attempts settlement for 18 months. Article 11(1) reiterates this requirement, by stating that “any dispute...shall...be settled amicably [emphasis added].” The plain import of these two repetitive and meaningful statements is to require parties to pursue amicable settlement before initiating arbitration. Consistent with the general principle that a treaty is to be interpreted by its plain language, with every provision given due respect,¹⁰⁵ the most accurate interpretation of Article 11 is that its amicable settlement provision is a jurisdictional prerequisite.

94. Moreover, giving jurisdictional effect to amicable settlement provisions furthers their purposes. These provisions require investors and States to attempt friendly negotiation before resorting to formal dispute resolution. Requiring pursuit of amicable settlement protects States from “surprise” arbitrations and provides States an opportunity to correct any possible wrongdoings. Amicable settlement also encourages parties to maintain cordial relationships, in contrast to the animosity generated during arbitration. Giving jurisdictional effect to amicable settlement provisions furthers these laudable goals by providing an incentive for all parties to comply with the requirements contained therein.

95. The alternative standard – that amicable settlement provisions are not a prerequisite to jurisdiction, but are easily waived procedural matters¹⁰⁶ – nullifies the benefits of these provisions: once amicable settlement provisions become procedural issues that are waived as a matter of course, investors will simply ignore these provisions without fear of legal consequence.

96. Despite the findings of some tribunals,¹⁰⁷ requiring claimants to pursue amicable settlement does more than simply restart arbitral proceedings. Legal rules should be applied not only because of their instant effect, but because of their *ex ante* effect. Giving jurisdictional

¹⁰⁵ *Vienna Conv. on Treaties*, art.31

¹⁰⁶ *See, e.g., Bayindir*, ¶100.

¹⁰⁷ *E.g., Ethyl Corp.*, ¶80.

force to amicable settlement provisions encourages parties to seek amicable settlement when disputes arise. Denying jurisdictional effect gives parties no incentive to seek amicable settlement.

97. In fact, this case is a quintessential example of the consequences of treating amicable settlement as a purely procedural matter. Claimant failed to give notice and pursue any amicable settlement. Claimant seems to believe that its unreasonableness would be sanctioned by an ICSID tribunal that believes amicable settlement is simply a “procedural” matter. Claimant should not, however, benefit from its non-compliance: the correct response is to bar the claim as precluded by Claimant’s failure to pursue amicable settlement.

98. Thus, the amicable settlement provision of Article 11 of the Calpurnia-Gaul BIT should be enforced as a jurisdictional prerequisite.

B. Claimant Has Not Satisfied The Calpurnia-Gaul Amicable Settlement Provision

99. Claimant has wholly failed to comply with its duty to provide Respondent notice of this dispute and attempt amicable settlement for 18 months. Specifically, Claimant **(1)** never sufficiently communicated to Respondent that a dispute existed for which it sought amicable settlement; and **(2)** Claimant initiated this arbitration prior to the required 18-month period.

1. Claimant Failed to Communicate the Existence of a Dispute to and Failed to Seek Amicable Settlement with Respondent

100. Article 11(2) of the Calpurnia-Gaul BIT provides that, before an investor “may” seek ICSID arbitration, the investor must notify Respondent about the existence of a dispute and request amicable settlement. However, Claimant **(a)** made no communications with Respondent concerning a dispute; and **(b)** never requested amicable settlement.

a. Claimant's Communications to Poe Were Not Communications to Respondent

101. Article 11 of the Calpurnia-Gaul BIT required Claimant to “request...amicable settlement” prior to arbitration. The provision serves to give notice to the Respondent, who is neither omniscient nor omnipresent, that a dispute exists, so that Respondent has an opportunity to pursue corrective measures.¹⁰⁸ Implicit in this idea is that Claimant must communicate with Respondent, and not with just anyone.

102. Claimant never communicated the existence of a dispute to Respondent. Claimant's 5 February 2007 communications with Poe,¹⁰⁹ the Chairman of the SFCDC, were not communications to Respondent. First, SFCDC is not an agent, organ, or entity of the government.¹¹⁰ Second, Poe's response to the Claimant – that he did not want to “involve government in an internal shareholder dispute” and that the “government had no authority” – provided Claimant with clear notice that Poe was not a government official.¹¹¹ Therefore, Claimant never notified Respondent about this dispute.

103. Claimant could have simply remedied its breach by sending a letter to any appropriate government official regarding this dispute. Instead, Claimant initiated arbitration only six months after communication with Poe. Claimant should not benefit from its presumptiveness.

b. Claimant Did Not Request Amicable Settlement

104. A request for amicable settlement requires notice of an “existence of grounds for a dispute and a desire to resolve these matters out of court.”¹¹² Claimant's communication to Poe merely stated the existence of a dispute – “de facto expropriation” – and demanded compensation. At no point did Claimant show any desire to “resolve these

¹⁰⁸ *Salini v. Morocco*, ¶21

¹⁰⁹ R.,5

¹¹⁰ *See, infra. sec. xx.*

¹¹¹ R.,5.

¹¹² *Salini v. Morocco*, ¶20.

matters out of court.”¹¹³ Thus, even if Claimant’s communications to Poe were communications to Respondent, these communications still fail to satisfy Article 11’s amicable settlement provision.

2. Claimant Initiated This Arbitration Before the Required 18-Month Period

105. Claimant initiated arbitration less than six months after communicating with Poe.¹¹⁴ Therefore, Claimant did not comply with Article 11’s required 18-month negotiation period.

106. Claimant might argue that it initiated arbitration because amicable settlement became impossible. Claimant’s belief that amicable settlement became impossible has no reasonable foundation. Poe simply stated that Claimant had suffered no damages because corporate profits remained stable, so there was “nothing [they] could do” regarding compensation.¹¹⁵ This legal opinion did not entitle Claimant to believe amicable settlement was impossible. During negotiations parties express different opinions; differences in opinion do not make settlement impossible.

107. For these reasons, Claimant failed to satisfy Article 11’s amicable settlement provision.

C. Claimant Cannot Rely on the Calpurnia-Flatland Amicable Settlement Provision

108. Article 4 of the Calpurnia-Gaul BIT provides that Gaulois investments “shall be accorded treatment which is not less favorable than...accord[ed] to...investors of any third State.” Similarly, Gaulois investors “shall be accorded...treatment which is not less favorable than” accorded to investors of any third State “as regards the management, maintenance, use, enjoyment, or disposal of their investments.”

¹¹³ R.,5

¹¹⁴ R.,5.

¹¹⁵ R.,5

109. Claimant argues that these MFN clauses give it the right to invoke the amicable settlement provisions of Article 7 of the Calpurnia-Flatland BIT. However, Claimant cannot rely on the Calpurnia-Flatland amicable settlement provision because **(1)** Claimant did not satisfy the Calpurnia-Flatland amicable settlement provision; **(2)** the Calpurnia-Gaul MFN clause does not attract the Calpurnia-Flatland amicable settlement provision; and **(3)** reliance on Article 7 precludes jurisdiction because Flatland denounced the Convention.

1. Claimant Failed to Satisfy the Calpurnia-Flatland Amicable Settlement Provision

110. Article 7 of the Calpurnia-Flatland BIT provides for investor-state dispute resolution only if “the dispute cannot be settled friendly within two months of the dispute notification date.” To “settle friendly” is to pursue “amicable settlement.” Claimant’s communications to Poe were not to Respondent.¹¹⁶ Moreover, Claimant made no attempt at amicable settlement.¹¹⁷ Therefore, Claimant does not even satisfy Article 7 and cannot use Article 7 to establish jurisdiction.

2. The Calpurnia-Gaul MFN Clause Does Not Attract the Calpurnia-Flatland Amicable Settlement Provision

111. Even if Claimant has satisfied the Calpurnia-Flatland amicable settlement provision, Claimant cannot rely on that provision because the Calpurnia-Gaul MFN clause does not attract the Calpurnia-Flatland amicable settlement provision. This follows because **(a)** the Calpurnia-Gaul MFN clause does not attract dispute resolution; **(b)** the two-month negotiation period of the Calpurnia-Flatland BIT is not “more favorable”; and **(c)** the 18-month negotiation period of the Calpurnia-Gaul BIT is a “question of overriding public policy.”

¹¹⁶ *Supra*, Sec. II(B)(1)

¹¹⁷ *Id.*

a. The Calpurnia-Gaul MFN Clause Does Not Attract Dispute Resolution

112. The Calpurnia-Gaul MFN clause does not attract dispute resolution because **(i)** MFN clauses generally do not attract dispute resolution; and **(ii)** the language of the Calpurnia-Gaul MFN clause reveals that it does not attract dispute resolution.

i. *Non-Expansive MFN Clauses Do Not Encompass Dispute Resolution*

113. *Salini v. Jordan*,¹¹⁸ *Plama*,¹¹⁹ and *Telenor*,¹²⁰ among other tribunals, all correctly concluded that BITs' MFN clauses do not normally encompass dispute resolution. These tribunals allow MFN to attract dispute resolution only when there is evidence that this was intent of the Contracting Parties.

114. Admittedly, other tribunals have come to the opposite conclusion. In *Siemens*¹²¹ and *National Grid*,¹²² and in dicta of *Aguas I*,¹²³ tribunals stated that even an MFN clause without expansive language encompasses dispute resolution. These tribunals followed on the heels of *Maffezini*, a case where the tribunal interpreted an expansive MFN encompassing "all matters subject to this Agreement."¹²⁴ For a variety of reasons, *Maffezini et. al* should be abandoned in favor of the precedent of *Salini v. Jordan*.

115. *First*, the reasoning of *Salini et al.* is consistent with principles of treaty interpretation. A treaty is interpreted by its words.¹²⁵ Words are defined by what they were understood to mean when they were used. When the Calpurnia-Gaul BIT was signed, no international body had applied MFN to dispute resolution: that was *Maffezini's* innovation in 2000. Even *Ambatielos*, on which *Maffezini* was presumably based, applied MFN only to the substantive obligation to administer justice and not to the procedural obligations of a

¹¹⁸ *Salini v. Jordan*, ¶118.

¹¹⁹ *Plama*, ¶204.

¹²⁰ *Telenor*, ¶91.

¹²¹ *Siemens*, ¶103.

¹²² *Nationa Grid*, ¶93.

¹²³ *Aguas I*, ¶55.

¹²⁴ *Maffezini*, ¶54.

¹²⁵ *Lowenfeld Declaration*, ¶8.

dispute resolution clause.¹²⁶ Thus, when the Calpurnia-Gaul BIT was signed, neither State understood MFN to apply to dispute resolution. Therefore, this MFN clause does not encompass dispute resolution.

116. The language of a treaty is also interpreted through the treaty's purpose.¹²⁷ A BIT's purpose is to provide substantive international protections to an investment; dispute resolution clauses are simply supporting clauses.¹²⁸ For this reason, MFN clauses in BITs relate to substantive protections and do not, absent countervailing evidence, subsume dispute resolution.¹²⁹

117. The argument that applying MFN to dispute resolution furthers the purpose of investor protection contains two flaws: (1) it expresses a BIT's purpose in purely investor-favorable terms, and ignores that BITs are treaties crafted by States for their own benefit;¹³⁰ and (2) it suffers from the teleological danger Ian Sinclair cautioned against—that over-emphasis on a treaty's purpose can obscure the intended meaning of the treaty's words.¹³¹

118. *Second*, there are other benefits to *Salini et al.*. It prevents treaty-shopping.¹³² It conforms to the principle that consent to arbitration must be unambiguous and clear.¹³³ Finally, it reflects the fact that dispute resolution provisions are specifically-crafted *lex specialis* that are defended from pre-emption.

119. Some¹³⁴ have argued that *Maffezini* and *Salini* are reconcilable: to them, small procedural changes, like *Maffezini*'s, are subsumed by MFN, while larger procedural changes, like

¹²⁶ *Ambatielos*, 108; accord *Salini v. Jordan*, ¶112.

¹²⁷ *Id.*

¹²⁸ *Plama*, ¶¶222-223.

¹²⁹ *Id.*

¹³⁰ Cf. *Plama*, ¶193.

¹³¹ *Sinclair on Vienna Conv.*, 130.

¹³² E.g., *Plama*, ¶204.

¹³³ See *Plama*, ¶198.

¹³⁴ *Int'l Econ. Law*, 576; *Dolzer*, 191.

Salini's, are not. This subjective standard provides little meaningful guidance: what constitutes a large procedural change and what does not?

120. Arbitral tribunals remain split on whether MFN attracts dispute resolution. On a numerical basis, *Maffezini* wins.¹³⁵ But popularity alone cannot defeat the reasoning above.

ii. *The Language of Article 4 Does Not Encompass Dispute Resolution*

121. Article 4(1) of the Calpurnia-Gaul BIT provides that an “[i]nvestment...or returns related thereto, shall be accorded treatment...not less favourable than...accord[ed] to...investments of any third State.” Article 4(2) provides that “[i]nvestors...shall be accorded...as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment...not less favourable than...accord[ed]...to investors of any third State.” Treaty clauses are interpreted by their language,¹³⁶ and the language of these MFN clauses establishes that they do not attract dispute resolution.

122. First, both clauses protect the “treatment” of an investor or an investment. “Treatment” refers to a BIT’s substantive protections, and not to dispute resolution, which is simply an ancillary procedural means of bolstering such protections.¹³⁷ This was the consistent precedent of international law before *Maffezini*:¹³⁸ even *Ambatielos* only applied MFN to a substantive duty, and did not apply it to procedural requirements.

123. Second, the phrase “management, maintenance, use, enjoyment, or disposal of their investments” in Article 4(2) restricts the clause’s application to dispute settlement. As a preliminary matter, the current claims involve the treatment of an investor and not an investment, so Article 4(2) – which deals with investors – applies and Article 4(1) – which deals with investments – does not. Namely, Claimant’s allegations – of withheld

¹³⁵ *Int’l Econ. Law*,573.

¹³⁶ *Vienna Conv. On Treaties*,art.31.

¹³⁷ *See, e.g., Telenor*,¶92.

¹³⁸ *Plama*,¶¶213-217.

dividends, loss of corporate control, etc. – all concern conduct affecting Claimant. Claimant does not allege any misconduct that harms the investment, VanCal. Thus, Article 4(2) applies.

124. Because *expressio unius est exclusio alterius*, the absence of dispute resolution in the phrase “management, maintenance, use, enjoyment, or disposal” in Article 4(2) precludes attraction of dispute resolution. The same result occurs in the Central American Free Trade Agreement. That treaty prevents application of MFN to dispute resolution by limiting its MFN clause to the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”¹³⁹
125. Admittedly, *Siemens* found that the phrase ““management, maintenance, use, enjoyment, or disposal of their investments” extended MFN to dispute resolution, because “maintenance” of an investment includes its protection. This reading patently overreaches: maintenance, which means “care or upkeep, as of...property,”¹⁴⁰ self-evidently refers to protection against an investment’s economic and physical depreciation, and not to dispute resolution. Moreover, all the other terms in the list – namely, management, use, enjoyment, and disposal - involve an investor’s practical right to control an investment, not to adjudicate treaty disputes. As listed terms should be read consistently, the term “maintenance” should also be limited to an investor’s practical rights, and should not extend to dispute resolution.

b. A Two-Month Negotiation Period is Not “More Favorable”

126. MFN clauses only attract treatment that is more favorable than the treatment of the basic treaty.¹⁴¹ The two-month negotiation period of the Calpurnia-Flatland BIT is not more favorable than the 18-month period of the Calpurnia-Gaul BIT; in fact, the two-month negotiation period is less favorable.

¹³⁹ *CAFTA Draft Text*, arts.10.4(1),10.4(2),10.4 fn. 1.

¹⁴⁰ *RandomHouse*.

¹⁴¹ *MacLachlan*, §§7.193,7.293

127. An investor's subjective preference does not determine favorability; the appropriate standard is whether the investor is discriminated against as compared to a third State's investor.¹⁴² The length of a negotiation period is not a discriminatory measure: the mere presence of a required negotiation period in both treaties demonstrates equality of treatment. Just because an investor wants to avoid negotiation does not mean the investor is discriminated against by a lengthier negotiation period.

128. In fact, a two-month period is actually less favorable for investors. Amicable settlement is less expensive and more efficient than raucous formal dispute resolution; these are obviously benefits to both the State and the investor. Brief negotiation periods in amicable settlement provisions are ineffectual, because they provide no opportunity for friendly resolution. That said, longer negotiation periods encourage parties to reach mutual accord, thus creating a cordial investment climate.

129. For these reasons, a two-month period is actually less favorable than an 18-month period.

c. An 18-Month Negotiation Period is a "Question of Overriding Public Policy."

130. *Maffezini* stated that an MFN clause cannot "override public policy considerations that...[can be] envisaged as fundamental conditions" of the basic treaty. Negotiation periods provide great benefits for a State: they provide notice of a dispute; allow the State to undertake corrective measures; and are an efficient means of dispute resolution. Moreover, short negotiation periods are ineffective, meaning that a State's decision to have a longer negotiation period evinces a specific intent to give meaning to the amicable settlement provision. Therefore, an 18-month negotiation period should be considered a "question of overriding public policy" that is immune from MFN preemption.

131. Claimant's argument suffers from a fundamental tension on this point. Claimant intones that the 18-month negotiation period is less favorable than the two-month period because of its hypothetical effects on an investment. At the same time, Claimant argues that the

¹⁴² *Id.*

18-month negotiation period is so inconsequential that it does not fall under the *Maffezini* public policy exception. Of course, Claimant cannot have it both ways: either the 18-month period is not more favorable, or it is a “question of overriding public policy.” In either event, this negotiation period is immunized from MFN preemption.

3. Even if MFN Applied, Flatland’s Denunciation of ICSID Precludes Reliance on Article 7 to Establish Jurisdiction

132. Flatland denounced the Convention on 2 May 2003.¹⁴³ Because of this, even if the Calpurnia-Gaul MFN clause attracts the “settle friendly” provision of Article 7 of the Calpurnia-Flatland BIT, the jurisdiction of this Tribunal would still not be established. This follows because **(a)** for MFN purposes, Claimant must rely on Article 7 as a whole. Therefore, **(b)** because Flatland’s denunciation of the ICSID Convention voids its consent to ICSID jurisdiction, any reliance on the amicable settlement provision of Article 7 precludes this Tribunal’s jurisdiction.

a. Claimant Must Rely as a Whole, Not in Parts

133. MFN clauses must attract full dispute resolution provisions *in toto*.¹⁴⁴ Because “the balance struck in . . . various dispute settlement options is . . . the subject of careful negotiation,” it should not be presumed that “that this [balance] can be disrupted by an investor selecting at will from an assorted menu of other options provider in other treaties.”¹⁴⁵ For this reason, one cannot cherry-pick certain words and sentences within a dispute resolution provision; the provision must be taken as a whole.¹⁴⁶ In practice, this means that one cannot be allowed to select certain sentences in a target dispute resolution provision that does not contain consent to ICSID and still retain ICSID jurisdiction by operation of a basic treaty’s offer of ICSID jurisdiction.

¹⁴³ R.,4.

¹⁴⁴ *McLachlan*,§7.168,257.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

134. This reasoning implicitly endorsed by *Telenor*, where the tribunal expressed concern that “as to whether the investor could select those elements of the wider dispute resolution that were apt for its purpose and discard those that were not”¹⁴⁷ while referring to dispute resolution as a specific negotiation between Contracting Parties.¹⁴⁸
135. Admittedly, dicta in *Plama* took a different view, where the tribunal felt that MFN clauses could only attract small changes in a BIT’s dispute resolution provision, but could not replace entire provisions. *Plama* is internally inconsistent: it refers to dispute resolution clauses as autonomous and separable clauses that represent specific bargains,¹⁴⁹ and yet refuses to preserve the integrity of those clauses against word-by-word cherry-picking. Moreover, the central holding of *Plama* – that MFN does not attract dispute resolution “in whole or in part” – squares better with the “take it all or leave it” approach to MFN attraction.
136. The disagreement between *Plama* and *Telenor* serves to highlight the problems with expanding MFN to dispute resolution. Namely, if an MFN clause attracts an entire dispute resolution provision, it overcomes a specific bargain between the Contracting Parties in violation of *Maffezini*, which exempts specific bargains from MFN attraction. But if an MFN clause attracts only small parts of a dispute resolution provision, it attracts incidental changes and does not actually lead to “more favorable” treatment.

b. Flatland’s Denunciation of the ICSID Convention Removes Its Consent to ICSID Jurisdiction in Article 7 of the Calpurnia-Flatland BIT

137. Article 71 of the Convention states that “[a]ny Contracting State may denounce this Convention.” Article 72 provides that a denunciation “shall not affect the rights and obligations under this Convention...arising out of consent to the jurisdiction of the Centre.” The plain purpose of these provisions is to provide a means for States to remove

¹⁴⁷ *Telenor*, ¶93.

¹⁴⁸ *Id.*, ¶95.

¹⁴⁹ *Plama*, ¶206.

themselves from using ICSID while protecting the rights of those investors who are currently engaged in, or have a contractual right to, ICSID arbitration.

138. The drafters made clear that Article 72 protects only contractually binding arbitration clauses. Thus, Aron Broches remarked that ICSID arbitration clauses provided for jurisdiction for the term arbitration was agreed to¹⁵⁰ or until “the termination of the clause.” However, where “the State withdraws its unilateral statement” of jurisdictional consent “before it has been accepted by an investor, no investor [can] later bring a claim.”¹⁵¹ Unilateral offers of ICSID jurisdiction only survive denunciation if the offer “has been accepted before the denunciation of the Convention,” i.e., only if they are contractually binding.¹⁵²
139. The approach of the drafters – that unilateral offers do not survive denunciation, but contracts do – conforms perfectly with the classical interpretation of ICSID. Christoph Schreuer notes that “[in] order to benefit from the continued validity under Art. 72, consent must have been...perfected.”¹⁵³ Because “[c]onsent is only perfected after it has been accepted by both parties,”¹⁵⁴ a consent clause in a BIT “on its own cannot amount to consent to the Centre’s jurisdiction.”¹⁵⁵
140. In this case, Flatland consented to ICSID jurisdiction in Article 7 of the Calpurnia-Flatland BIT. Unilateral declarations of ICSID consent in BITs are only offers to arbitrate; they become contractually binding only they are accepted. Flatland denounced ICSID on 23 August 1997,¹⁵⁶ well before Claimant initiated this arbitration on 31 July 2007.¹⁵⁷ As soon as Flatland denounced ICSID, Article 7’s consent to ICSID was no longer operational. As an unaccepted offer of jurisdiction, Article 7 does not survive

¹⁵⁰ *ICSID History*, 1009

¹⁵¹ *ICSID History*, ¶62, 1010.

¹⁵² *Id.*

¹⁵³ *ICSID Commentary*, art. 72-¶4, 1286.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*, art. 25-¶285, 210.

¹⁵⁶ R., 5.

¹⁵⁷ R., 9

Flatland's denunciation of ICSID. Thus, consent to ICSID jurisdiction cannot arise from Article 7.

141. Some practitioners have argued that a BIT clause offering ICSID jurisdiction is not an offer but an obligation.¹⁵⁸ They differentiate a treaty obligation from legislation offering ICSID arbitration. Doing so is futile. *First*, both treaty clauses and legislation are unilateral offers that only become contractual when accepted, and thus only survive denunciation if accepted before denunciation. *Second*, the plain intent of Article 71 of the Convention is to allow States to remove themselves from future ICSID jurisprudence. Without this Article, many States would never have accepted and might not accept ICSID adjudication now. Determining that any BIT statement survives denunciation would permanently lock states into ICSID despite their intent, precisely what the denunciation provisions of ICSID were designed to avoid.

142. Because MFN attracts whole dispute resolution schemes, MFN reliance by an investor on any part of a target dispute resolution provision that does not contain consent to ICSID jurisdiction means that the investor must forgo ICSID jurisdiction. Article 7 of the Calpurnia-Flatland BIT does not contain consent to jurisdiction because Flatland has denounced the Convention. This means that if Claimant attempts to rely on Article 7's amicable settlement provision it must forego ICSID jurisdiction. Thus, Claimant's attempted reliance on Article 7 does nothing to alter the fact that this Tribunal does not have jurisdiction.

143. For all the reasons above, this Tribunal does not have jurisdiction over these claims.

CONCLUSION ON JURISDICTION

144. This Tribunal lacks jurisdiction because the alleged breaches of international obligations either cannot be attributed to Respondent or are patently meritless. Moreover, this Tribunal lacks jurisdiction because Claimant has already elected domestic remedy under

¹⁵⁸ Nolan,38.

the “coextensive” standard or, alternatively, under the “same underlying measures” standard. In addition, this Tribunal lacks jurisdiction because Claimant failed to pursue amicable settlement as required by the Calpurnia-Gaul BIT. Claimant also cannot rely on the Calpurnia-Flatland BIT’s amicable settlement provision because Claimant failed to satisfy the provision; because the provision is not subject to attraction by Calpurnia-Gaul’s MFN clause; and because reliance on the provision voids this Tribunal’s jurisdiction as Flatland has denounced the Convention.

PART TWO: MERITS

145. If this Tribunal finds it has jurisdiction, Claimant's allegations are still meritless.

Respondent has not **(I)** unlawfully expropriated Claimant's property; **(II)** breached its obligation to provide fair and equitable treatment; **(III)** denied Claimant national treatment; **(IV)** denied Claimant full protection and security; **(V)** treated Claimant in an arbitrary and discriminatory manner; or **(VI)** breached its obligation of transparency.

I. RESPONDENT HAS NOT UNLAWFULLY EXPROPRIATED CLAIMANT'S PROPERTY

146. Article 6 of the Calpurnia-Gaul BIT provides that:

Investments...shall not be expropriated, nationalised or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalisation.

147. Article 5 of the Calpurnia-Flatland BIT provides for similar protection against expropriation.

148. Under the standards set by both treaties, Claimant's allegations of expropriation are meritless, as Claimant **(A)** retains its Investment in full, **(B)** is not entitled to compensation for its own poor decision-making and **(C)** has no cause to complain of measures tailored to the public interest.

A. There is No Expropriation Here, as Claimant Has Lost Nothing

149. Claimant ignores that **(1)** expropriation requires loss and **(2)** Claimant has lost nothing.

1. Expropriation Requires a Loss or Diminution in Value of an Investment

150. As a prerequisite to bringing an expropriation claim, an investor must actually lose its investment or the reasonable economic benefit in substantial part. The measure's economic impact must be severe to find expropriation; compensation will be denied if it does not affect "all or almost all the investment's economic value."¹⁵⁹

151. Expropriation has not been found when impact is minor¹⁶⁰ or the investment remains operational, even if investor profits fall.¹⁶¹ The interference must also be of substantial duration: in effect, permanent. Temporary interference only leads to expropriation when the investment's development depends on an inflexible timeline.¹⁶²

2. Claimant's Investment Remains Intact

152. Claimant has in fact lost nothing, since (a) dividends have been temporarily Claimant pending Claimant's clarification, (b) Claimant may continue to fully use and enjoy its shareholding and (c) Claimant retains ownership and control of its intellectual and technical property.

a. Dividends Have Been Credited to Claimant Due to Claimant's Refusal to Indicate a Reasonable Means of Payment

153. On 15 April 2005, VanCal declared a cash-and-stock shareholder dividend.¹⁶³ On 21 May 2005, Claimant requested that the dividend be placed in a bank account to be opened in Claimant's name.¹⁶⁴ Despite searching review, it remains unclear to Respondent how VanCal was expected VanCal to place stock in a depository account, how VanCal should have opened such account and how deposits could be effected to a prospective account.

¹⁵⁹ *LG&E*, ¶191.

¹⁶⁰ *Pope & Talbot*, ¶¶101-02.

¹⁶¹ *Id.*

¹⁶² *LG&E*, ¶193.

¹⁶³ R.p.7,15April2005.

¹⁶⁴ R.,p.7,21May2005.

Further, Claimant had received dividends declared in prior years, and Claimant's reasons for altering standard procedure remain unknown.

154. Amid this confusion, one Mr. Korchnoi sent a response to Claimant stating that dividends would not be deposited.¹⁶⁵ In his correspondence, Korchnoi stated his belief that dividends could not be paid to foreign shareholders at present.¹⁶⁶ Given the facts of the situation, there exists uncertainty whether the 2005 dividend remained temporarily unpaid to Claimant due to confusion over how to effect payment or as a result of Korchnoi's view of foreign nationals.

155. VanCal has credited dividend payments to Claimant's account following Korchnoi's resignation, and is likely awaiting further instruction from Claimant.

b. Claimant May Continue to Use and Enjoy Its Shareholding

156. At no time were Claimant's shares seized or frozen, nor were Claimant's rights disturbed. Instead, an unfortunate business misunderstanding seems to have occurred between Ms. Pescara, at the time suspected of criminal activity, and certain Board members. After the dispute festered, VanCal's Directors voted to remove Pescara. However, Claimant remains free to nominate replacements.

157. Indeed, VanCal continues to seek Claimant's re-engagement in corporate management.¹⁶⁷

c. Claimant Retains the Right to Control Its Intellectual Property Pursuant to Written Agreement

158. Claimant offers that Claimant and VanCal are party to a number of trademark licensing and technical assistance agreements. Such agreements remain in force:¹⁶⁸ so VanCal

¹⁶⁵ R.,p.7,27May2005.

¹⁶⁶ *Id.*

¹⁶⁷ R.,p8,11November2006.

¹⁶⁸ *SecondClarifications*,¶15.

continues to use licensed material,¹⁶⁹ while Claimant retains ownership of its intellectual property.¹⁷⁰

159. Claimant should attempt to terminate or enforce its agreement before initiating proceedings based upon property still subject to license.

B. Claimant Seeks Compensation For Its Poor Business Decisions

160. Expropriation standards (1) do not protect bad investment strategies (2) such as Claimant's.

1. Expropriation Does Not Protect Bad Investment Strategies

161. In recent years, a number of foreign investors have appealed to tribunals for relief from their poor business decisions and strategies. Tribunals have rightfully refused to countenance such expropriation claims.

162. The *Waste Management* tribunal established that investors should not seek arbitral recompense for their own errors, finding:

[I]t is not the function of the international law of expropriation...to eliminate the normal commercial risks of the foreign investor, or to place on [Respondent States] the burden of compensating for the failure of a business plan. A failing enterprise is not expropriated because debts are not paid or other contractual obligations are not fulfilled.¹⁷¹

163. In *ELSI*, which established the investor's duty to conduct business reasonably, an investor sought to establish expropriation of requisitioned facilities.¹⁷² Claimant argued that its national's right to control and manage its investment was violated by requisition.¹⁷³ The tribunal rejected Claimant's argument, finding that it was the investor's own conduct

¹⁶⁹ *Second Clarifications*, ¶31.

¹⁷⁰ *Second Clarifications*, ¶15.

¹⁷¹ *Waste Management*, ¶54.

¹⁷² *ELSI*.

¹⁷³ *ELSI*, ¶101.

which led to a loss of control, *a priori* any state action.¹⁷⁴ This standard was recently reaffirmed in *Noble*, where a state-ordered reorganization was found not expropriatory, in light of Claimant’s failure to manage its investment.¹⁷⁵

164. Investors must enter local economies with some knowledge of their regulatory processes, and the normal operations of regulatory agencies do not constitute expropriation.¹⁷⁶ In complying with national law, investors are obligated to seek competent counsel on contentious matters,¹⁷⁷ including clarification from the State of its legal opinions and interpretation.

165. In addition, investors are obliged to pursue reasonable resource for allegedly detrimental acts as an element of any expropriation claim. This reasoning was explicitly endorsed in *GenUkraine*, where the tribunal found that a failure to seek domestic correction annulled the ‘very reality’ of expropriatory conduct because:

...the failure to seek redress from national authorities disqualifies the international claim...because *the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction.*¹⁷⁸

166. The fundamental principle of investor reasonableness has been resoundingly reaffirmed thereafter, and should be affirmed here in light of Claimant’s conduct.

2. Claimant Made Poor Business Decisions

167. Claimant **(a)** acted to its own detriment based on unwarranted assumptions, and **(b)** never sought clarification or relief from Respondent.

¹⁷⁴ *Id.*

¹⁷⁵ *Noble*, ¶180.

¹⁷⁶ *Methanex*, ¶¶10, 5.

¹⁷⁷ *Feldman*, ¶114.

¹⁷⁸ *GenUkraine*, ¶1027 [emphasis added].

a. Claimant Acted to its Own Detriment Based on Unwarranted Assumptions

168. The events giving rise to the present dispute began in November 2003, when a fiscally conservative party won a parliamentary majority in Calpurnia.¹⁷⁹ According to Claimant, the fiscal conservatism of one party represented in one governmental branch evinces “a deterioration” in Calpurnia’s domestic and international situations.¹⁸⁰ Claimant’s expectations claim is, in essence, that Calpurnia should ‘stay liberal’ through time. Claimant’s expectation that fiscally conservative parties remain marginal in domestic politics is both bizarre and not protected under investment law, as making the popularity of a political party in democratic elections is irrelevant to the matter of expropriation.
169. Claimant simply lost interest in its investment – and deliberately embarked on a course of mismanagement and divestiture. Claimant persisted in representation through persons suspected of criminal wrongdoing, sought payment in a highly confusing form and acted to its own detriment claiming State policy as discussed in Sec.IV, *infra*. Claimant once held up to 84% of VanCal’s outstanding shares,¹⁸¹ but has decreased its holding to 31% of VanCal’s common stock by 2004.¹⁸²
170. Further, Claimant wants to control VanCal under the guise of discrimination. Upon analysis of Claimant’s conduct *in toto*, the attempt to control – rather than participate in – VanCal becomes evident. This may be the most unreasonable of Claimant’s expectations: had it wished to control VanCal, it should have not have sold its majority stake.

¹⁷⁹ R.p3, ¶12.

¹⁸⁰ *Id.*

¹⁸¹ R.p3, ¶9.

¹⁸² *Id.*

b. Claimant Never Requested Clarification Nor Relief From Respondent

171. Claimant never sought clarification from Respondent regarding Respondent's legal position on these matters, nor assistance in remedying the alleged harms, as discussed in Sec. II(B)(1), *supra*.

C. Claimant Has No Cause to Complain of Measures Tailored to the Public Interest

172. It is clear that (1) narrowly tailored measures are not expropriatory and (2) measures applied to Claimant were not so broad as to deprive Claimant of enjoyment of its investment.

1. Narrowly Tailored General Welfare Measures Are Not Expropriatory

173. A State has the right to adopt social or general welfare measures without a finding of an expropriation when "such actions or measures are proportional to the public interest presumably protected thereby."¹⁸³ Governments may regulate, so long as they do not impede the typical use of an asset."¹⁸⁴ Even when the measures adopted by a State are 'severe' and do impact Claimants' investment, such measures that "do not deprive the investors of the right to enjoy their investment" are not expropriatory.¹⁸⁵ Ownership rights are not expropriated unless either the legal title or the rights attached to shareholding are affected by a State's actions.¹⁸⁶

174. Similarly, staffing changes are not expropriation. An investor's decision to withdraw foreign personnel is not expropriatory, as the investor retains the right to nominate

¹⁸³ *Tecmed*, ¶122.

¹⁸⁴ *Continental*, ¶211.

¹⁸⁵ *LG&E*, ¶198.

¹⁸⁶ *Kodak*, ¶58.

replacement representatives.¹⁸⁷ Even when staff are deported, an investment is not expropriated absent significant economic loss.¹⁸⁸

2. Respondent's Measures Were Not So Broad As To Deprive Claimant of Enjoyment of Its Investment

175. Claimant has not proffered evidence of any applicable and damaging legislation or policy, public or non-public, as further set forth in paras. XX, *infra*. Rather, Respondent's measures were narrowly tailored to public interest.

176. All police searches were conducted upon evidence and pursuant to the State's duty to protect, as set forth above. The homes of only two suspected personnel were searched, not all of Claimant's representatives or Gaulois nationals. Further, dividend payments were restricted based on independent misunderstandings, not due to general government policy.

177. For the reasons above, Claimant's investment has not been expropriated.

II. RESPONDENT HAS MET ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT TO CLAIMANT'S INVESTMENT

178. Article 2(2) of the Calpurnia-Gaul BIT provides that each party is entitled to fair and equitable treatment. The fair and equitable treatment standard is vague and indeterminate,¹⁸⁹ the only consensus reached is that it is irrelevant whether the host state acted in bad faith and that the standard is independent from the domestic legal order.¹⁹⁰ The problem with this vague standard is that it raises the risk that fair and equitable treatment will be used as a "malleable tool of ex post facto control of host states' measures."¹⁹¹ The broad, open-ended nature of this inquiry is demonstrated by the

¹⁸⁷ *Motorola*.

¹⁸⁸ *Biwater*, ¶¶223,348.

¹⁸⁹ Schill,36.

¹⁹⁰ Schill,36.

¹⁹¹ Schill,37.

frequent reference to actions that “shocks, or at least surprises, a sense of juridical propriety” as a measure for the standard’s application.¹⁹²

179. The fair and equitable treatment obligation should not be used as an absolute guarantee, as “not every business problem experienced by a foreign investor is a...denial of...fair and equitable treatment.”¹⁹³ Indeed, the *Gami* tribunal found that not every act of maladministration amounts to a breach of fair and equitable treatment.¹⁹⁴
180. In evaluating a claim of fair and equitable treatment, the factors considered include legality, protection of legitimate expectations, failure to provide a stable, consistent and predictable investment environment and arbitrariness and discrimination.
181. Claimant cannot demonstrate that Respondent has failed to afford its Investment fair and equitable treatment on the basis of any of these factors. At all times since the inception of the Investment, **(A)** Respondent provided Claimant’s Investment with stability, predictability, and consistency; **(B)** Respondent’s actions conformed with domestic law; **(C)** Respondent protected Claimant’s reasonable expectations; and **(D)** Respondent did not treat Claimant in an arbitrary or discriminatory manner.

A. Respondent Has Provided Claimant a Stable, Predictable and Consistent Framework

182. *Metalclad*¹⁹⁵ and *CMS v. Argentina*¹⁹⁶ identified the requirement to provide a predictable, stable legal and business framework as an element of fair and equitable treatment.¹⁹⁷ The tribunal ultimately found that a violation of NAFTA article 1105(1), NAFTA’s provision on fair and equitable treatment, was based upon Mexico’s failure to “ensure a...predictable framework for Metalclad's business planning and investment.”¹⁹⁸

¹⁹² See, e.g., *Tecmed*, ¶154, *ELSI*, ¶128.

¹⁹³ Schill, 44.

¹⁹⁴ *Gami*, ¶110.

¹⁹⁵ *Metalclad*, ¶99.

¹⁹⁶ *CMS*, ¶274.

¹⁹⁷ See *Metalclad I*, ¶99.

¹⁹⁸ See *Metalclad I*, ¶99.

183. However, a host states' obligation to provide stability and predictability of domestic law is not an absolute requirement that guarantees that the framework will never change: "stability and predictability should not be misunderstood as a guarantee that the legal framework will never change or even serve as a business guarantee to investment projects."¹⁹⁹ Additionally, the stability of a legal order may change if a host state has to react to a serious crisis or an emergency situation.²⁰⁰
184. Respondent provided a stable legal framework for Claimant's Investment at all times. In fact, Claimant has not pled that the state of Calpurnia promulgated a single legal rule which changed the nature of the legal environment vis-à-vis their Investment. While Calpurnian foreign policy objectives and national security objectives may have changed to reflect modified circumstances, this did not result in any changes in law--even according to Claimant's version of the facts.
185. Thus, this case differs from *Metelclad* because Respondent did provide a predictable framework for Claimant's investment.

B. Respondent's Actions Conformed with Domestic Law

186. Compliance with domestic law can be used by a host state to deny a violation of fair and equitable treatment.²⁰¹
187. Claimant has consistently been treated in accordance with domestic law. The immigration authority's issuance of visas was done pursuant to national law and this

¹⁹⁹ *Maffezini Award*, ¶64.

²⁰⁰ *ELSI*, ¶74 ("...the right [to control and manage a company] cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like")

²⁰¹ *Schill*, 45.

refutes Claimant's allegation that Respondent violated the fair and equitable treatment standard. Immigration authorities have wide discretion in issuing visas.

188. Respondent has acted in accordance with the Calpurnian trade mark regime in the use of the Vanguard International trademark and this refutes the violation of the fair and equitable treatment standard. Finally, Respondent's cessation of translating materials into Gaulois was not contrary to domestic law as Calpurnian legislation is silent on the issue on the right of shareholders to translations in other languages.²⁰²

C. Respondent Protected Claimant's Reasonable Expectations

189. Protection of Claimant's reasonable expectations is another factor in determining fair and equitable treatment. Tribunals have adopted different approaches vis-à-vis investor expectations including **(1)** reasonable protection of Claimant's expectations and **(2)** Complete transparency.

1. Claimant's Reasonable Expectations Were Protected

190. Most tribunals find that not every expectation of the investor is protected under the fair and equitable treatment obligation; there must be reasonable reliance.²⁰³

191. In this case, Claimant continued to have access to information and could not have reasonably expected Respondent to continue the onerous task of translating and mailing out financial information.²⁰⁴ Claimant continued to have access to their dividends albeit in a different form and Claimant could not have reasonably expected that changes would not occur in Corporate policy or that errors would not be made. Lastly, Claimant could not have reasonably expected that there would not be any changes made to the composition of the Board implemented through established corporate protocol.²⁰⁵

²⁰² FirstClarifications, Q22.

²⁰³ See, e.g., *Occidental*, ¶181.

²⁰⁴ R., p.4, ¶16.

²⁰⁵ R., p.4, ¶15.

2. This Tribunal Should Not Adopt the “Total Transparency” Standard

192. The *Tecmed* tribunal established that “the foreign investor expect the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments...”²⁰⁶ The *Waste Management* tribunal criticized *Tecmed*’s interpretation because *Tecmed* was writing a stabilization clause into the fair and equitable treatment standard whereas normally stabilization clauses have to be bargained for.²⁰⁷
193. Claimant appears to suggest that its every expectation should have been protected and that the imposition of new policies--such as ceasing to mail information, crediting of dividends, and changes in Board composition--was contrary to their expectations. However, the *Tecmed* standard represents a minority position. The more appropriate standard of decision is that Claimant’s every expectation is not protected under the fair and equitable treatment obligation absent a stabilization clause, which was not bargained for in the Calpurnia-Gaul BIT.

D. Respondent Did Not Treat Claimant in an Arbitrary or Discriminatory Manner

194. The *Waste Management* tribunal states that fair and equitable treatment is breached if:
- the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety--as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in and administrative process.²⁰⁸
195. As per Section V, Respondent did not act arbitrarily or in a discriminatory manner. Thus, Claimant cannot establish its claim that it was denied “fair and equitable treatment” on this basis.

²⁰⁶ *Tecmed*, ¶154.

²⁰⁷ *Waste Mgmt.*, ¶98.

²⁰⁸ *See Waste Mgmt.*, ¶98.

196. Therefore, Respondent did not breach their duty to provide fair and equitable treatment.

III. RESPONDENT DID NOT DENY CLAIMANT NATIONAL TREATMENT

197. Articles 4(1) and 4(2) of the Calpurnia-Gaul BIT provides that investors and investments of a Contracting Party should not be accorded treatment less favorable than a state would accord to its own investors and investments. The obligation of national treatment requires that there should be formal equality between foreign and domestic investors.²⁰⁹

198. The analytical inquiry in a national treatment claim is: whether foreign and domestic investors are in a comparable setting, whether they are subject to differential treatment, and whether there is a justification for any differential treatment.²¹⁰ The inquiry is a fact-specific;²¹¹ there is no “hard-and-fast” approach to interpreting this clause.²¹² Calpurnian and Gaulois shareholders were in a comparable setting as they were investors in the same company. Claimant’s allegations of denial of national treatment must fail because **(A)** Respondent did not treat Calpurnian and Gaulois shareholders differently, and any difference in treatment was “merely incidental;” **(B)** even if differential treatment existed there are policy reasons that justify the differential treatment.

A. There Was No Differential Treatment between Calpurnian and Gaulois Shareholders

199. A *de jure* denial of national treatment occurs when the discrimination is on the face of the measure.²¹³ A *de facto* denial of national treatment occurs when there is a facially neutral measure but “the measure in question disproportionately disadvantages the foreign owned investments or investors.”²¹⁴ Misguided policy decisions that result in a purely incidental

²⁰⁹ United National Conference on Trade and Development (UNCTAD), National Treatment (1999).

²¹⁰ See Dolzer, 180-183, *UPS v. Canada*, ¶83.

²¹¹ Dolzer, 179.

²¹² Dolzer, 179.

²¹³ See e.g., *Pope & Talbot*, ¶43.

²¹⁴ See *Pope & Talbot*, ¶43.

differentiation do not suffice to show differential treatment.²¹⁵ In *ADF v. United States*, the tribunal found that the state had not violated the national treatment standard because a US requirement to use locally produced steel for government projects applied equally to national and foreign contractors.²¹⁶

200. Respondent did not accord Claimant differential treatment **(1)** in the cessation of sending investment-related information to Gaulois citizens; **(2)** in the removal of Board members. Further, **(3)** the difference created in crediting dividends resulted in a merely incidental difference.

1. Respondent Did Not Treat Claimant Differently with Reference to the Dissemination of Information

201. There was no differential treatment with reference to the dissemination of information. Pursuant to a new policy announced by Dr. Swift on 30 November 2005, all investment-related information would be provided according to Calpurnian law, which requires that originals be made available for inspection at the head office.²¹⁷ As in *ADF v. United States*, the measure was applied equally to both domestic and foreign investors.

202. Claimant may attempt to argue that this was a *de facto* denial of national treatment because this measure made it more difficult for Gaulois shareholders to access information as compared to Calpurnian shareholders. However, this was not the case. Vanguard is the only Gaulois shareholder in VanCal and Vanguard had representatives in Calpurnia. Thus, Vanguard had representatives in the head office who could easily access the original documents. In fact, it was easier for Vanguard, the only Gaulois shareholder, to access information due to their physical presence in the head office as compared to a Calpurnian national living in the countryside who had stock in VanCal.

²¹⁵ Gami, ¶114.

²¹⁶ See *ADF Group Inc. v. USA*, Award, 9 January 2003, 6 ICSID Reports 470, ¶¶156-158.

²¹⁷ R., p.9, 22 April 2007.

2. Respondent Did Not Treat Claimant Differently with Reference to Board Membership

203. Gaulois and Calpurnian members of VanCal's Board were treated alike. All actions concerning removal and replacement on the Board were undertaken pursuant to corporate policy. Calpurnian legislation does not admit any differences in the rights of shareholders based on nationality, age, gender or legal capacity. In fact, the constitution contains a general non-discrimination clause.²¹⁸ Pescara was voted off the Board by a majority vote of the shareholders.²¹⁹ Shepherd chose to resign from the VanCal board in April 2006.²²⁰ Claimant maintained their representation on the Board by replacing Pescara and Shepard with Hunter and Fowler.²²¹ Claimant maintained participation on the board until claimant willingly and unilaterally chose to withdraw its representatives by email dated 23 October 2006 and failed to replace them.²²²

3. Respondent Did Not Treat Claimant Different with Reference to the Crediting of Dividends

204. Claimant may argue that the decision to credit rather than pay dividends based on a March 2005 decision by the VanCal Board not to pay money to foreign shareholders was a *de jure* denial of national treatment. That is not the case: there was no law, directive, executive order or any other official statement issued by Respondent prohibiting the payment of dividends to foreign Shareholders.²²³

205. Even if Claimant is able to establish that this measure constituted a *de facto* measure, this would not rise to the level of differential treatment. The difference in treatment was merely incidental, because dividends were not paid but they were credited and as such the dividends were still made available to Claimant.

²¹⁸ *First Clarifications*, Q.29.

²¹⁹ R., p.7, 16 November 2005.

²²⁰ R., p.8, 15 April 2006.

²²¹ R., p.8, 7 June 2006.

²²² R., p.8, 23 October 2006.

²²³ *First Clarifications*, Q.12.

B. Even if Differential Treatment Existed It Was Supported By Policy

206. In any event, even if this Tribunal finds differential treatment, policy reasons justified differential treatment. In *S.D. Myers*, the tribunal found that legitimate public policy measures that were pursued in a reasonable manner could justify differential treatment.²²⁴ Similarly, the *Pope & Talbot* tribunal found that differentiation in treatment could be justified by a showing that the treatment bore a “reasonable relationship to rational policies not motivated by preference of domestic over foreign-owned investments.”²²⁵
207. Policy reasons justify the differential treatment with reference to **(1)** the sending of account investment-related information to Gaulois citizens; **(2)** changes made to Board Members, and; **(3)** the crediting of dividends.

1. Policy Reasons Justify The Changed Policy Regarding Disseminating Information

208. Even if Claimant argues that the decision to change the policy regarding access to information was a *de facto* denial of national treatment, the policy reason of cutting costs justified instituting this change. Mailing accounts and financial statements abroad in addition to covering the costs of translating these materials amounts to a significant sum. Ceasing to provide these unnecessary services and replacing them with a more cost-effective means of accessing information is a reasonable way to achieve the goal of cutting costs.

2. Policy Reasons Justify the Changes Made to Board Membership

209. Even if Pescara’s removal from the Board was the result of differential treatment, this differential treatment can be justified by the security threats posed by political and industrial espionage and destabilization. A lawful search of Gaulois citizens, including

²²⁴ *S.D. Myers*, ¶246.

²²⁵ *Pope & Talbot*, ¶79.

Ms. Pesacara, resulted in the discovery of unlicensed telecommunications devices.²²⁶ This evidence is bolstered by anonymous tips that illegal data collection was being conducted by Gaulois citizens. Thus Pescara's continued role on the Board of Directors posed substantial security concerns.

3. Policy Reasons Justify the Changes Made to the Policy Regarding Dividends

210. Fundamentally, the decision to credit dividends was a corporate mistake not attributable to Respondent. Even if the Tribunal finds that this policy was attributable to Respondent, it was an interim measure designed to serve as a stop-gap while SFCDC evaluated its proper legal approach. Dr. Swift made it clear that the Board was contemplating the best way to deal with this issue.²²⁷

211. Therefore, Respondent did not breach its obligation to provide Claimant with national treatment.

IV. RESPONDENT PROVIDED CLAIMANT'S INVESTMENT WITH FULL PROTECTION AND SECURITY

212. Article 2(2) of the Calpurnia-Gaul BIT provides that a Contracting Party shall "accord in its territory to investments of investors of the other Contracting Party...full and constant protection and security."

213. Respondent has satisfied its obligation to provide full protection and security because **(A)** Respondent has taken reasonable measures to protect Claimant's investment. **(B)** Further Respondent is not required to adhere to a strict liability standard in order to protect Claimant's investment; nevertheless, according to this standard, Respondent has met its obligation.

²²⁶ R.,p.6,8December2003.

²²⁷ R.,p.9,22April2007.

A. Respondent Has Taken Reasonable Measures to Protect Claimant's Investment

214. A State must only take reasonable measures to protect Claimant's investment. The reasonableness or "due diligence" standard is, "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."²²⁸ For instance, in *Wena Hotels*, the tribunal found that Egypt had violated its obligation to provide full protection and security in that it was aware of a seizure and yet failed to act in order to protect the investor from illegal actions.²²⁹

215. Respondent has taken reasonable steps to provide Claimant with (1) physical, (2) economic, and (3) legal protection.

1. Respondent Took Reasonable Measure to Provide Claimant with Physical Protection of its Investment

216. Principally, "full protection and security" protects an investor from physical violence.²³⁰ The standard is mainly concerned with the exercise of police power.²³¹ In *Tecmed*, the tribunal found that the police responded adequately to a social demonstration and that Mexican authorities acted reasonably in the situation.²³²

²²⁸ *Asian Agricultural*, ¶77.

²²⁹ *Wena Hotels*, ¶84.

²³⁰ Dolzer, 149.

²³¹ Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (Oxford University Press, 2007).

²³² *Tecmed*, ¶175-77.

a. Respondent Reacted Adequately to the CCC Women's League Peaceful Protests

217. Claimant decries peaceful protests conducted by the CCC Women's League near Ms. Pescara's home.²³³ Like in *Tecmed*, Calpurnian authorities reacted in a reasonable fashion to peaceful protests. Deployment of a police force which played a monitoring and surveillance function was a more than adequate response to a peaceful protest by fifty members of a civic organization.²³⁴

218. Unlike in *Wena Hotels*, where there was a dramatic seizure of a hotel, here there was merely a protest by peaceable citizens. Moreover, unlike *Wena Hotels*, the Calpurnian police responded once they had notice despite the peaceful nature of these protests; whereas in *Wena Hotels*, the police failed to respond to dramatic measures taken against an investor's investment. Calpurnia took reasonable measures that were proportionate to the situation to make sure that the Investor was protected from a negligible threat of physical harm. Thus, Calpurnia did not breach its duty to provide full protection and security.

b. Respondent Reasonably Conducted Routine and Lawful Police Searches

219. The searches were prompted by "credible"²³⁵ tips that VanCal was engaged in illegal data collection for Gaulois Security Services.²³⁶ During the course of these searches, Pescara

²³³ R.,p.4,¶17.

²³⁴ *SecondClarifications*, Q.41.

²³⁵ *FirstClarifications*, Q.20.

²³⁶ R.,p.6,8December2003.

and Kolowenko suffered no physical harm. In fact, these lawful and routine searches were undertaken for national security reasons and actually resulted in findings that these individuals were harboring unlicensed telecommunications devices.²³⁷

2. Respondent Took Reasonable Measures to Provide Claimant with Economic Protection of its Investment

220. *Azurix* has recently expanded the concept of full protection and security to include economic protection.²³⁸ The *Azurix* tribunal stated that full protection and security “is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view.”²³⁹ Despite this expansion, the obligation of full protection and security does not require the state to resolve every dispute that the investor may encounter.²⁴⁰

221. This Tribunal should not entertain *Azurix*’s extension of the full protection and security obligation to economic protection, as this would render the fair and equitable treatment obligation duplicative. In any event, Respondent has met this standard.

222. Respondent took reasonable measures to provide economic protection to Claimant’s Investment. However, Claimant is aware that every economic transaction involves economic risk. Additionally, Respondent is not responsible for Claimant’s omissions and repeated inaction. When dividends were credited instead of paid, Claimant failed to take

²³⁷ *Id.*

²³⁸ *Azurix*, ¶408.

²³⁹ *Azurix*, ¶172.

²⁴⁰ *Lauder v. Czech Republic*, ¶308.

actions to change this situation. Claimant merely communicated with one rogue individual, Korchnoi in order to obtain information regarding the crediting of dividends; Korchnoi eventually resigned due to the mishandling of the Vanguard situation.²⁴¹ Respondent took action regarding the issue of dividends as evinced by Swift's acknowledgement that the Board was trying to "determine[] the best way to handle this."²⁴² Claimant also failed to protect its stake in VanCal by choosing to withdraw its representatives from the Board.²⁴³ Claimant itself did not take reasonable steps to protect its Investment. It cannot now blame Respondent for its own unreasonable inaction.

3. Respondent Took Reasonable Measures to Provide Claimant with Legal Protection if its Investment

223. While full protection and security has also been interpreted to apply more broadly to encompass a duty to provide legal protection, such an interpretation is not warranted when a treaty contains other provisions—such as a fair and equitable treatment provision—that independently addresses legal protection of the investment.²⁴⁴

224. The Calpurnia-Gaul BIT contains a provision on fair and equitable treatment. Article 2(2) clearly provides that "each Contracting Party shall at all times accord in its territory to investments of investors of the other Contract Party fair and equitable treatment." Thus, there is no need to interpret the full protection and security obligation as creating an obligation to provide legal protection. Even if this Tribunal adopts such an

²⁴¹ *Second Clarifications*, Q.52(a).

²⁴² R., p.9, 22 April 2007.

²⁴³ R., p.5, ¶14.

²⁴⁴ Dolzer, 149.

interpretation, Respondent has already met this standard. As discussed in **paras XX**, Respondent has met the legality element of the fair and equitable treatment analysis.

B. Respondent Is Not Required to Adhere to a Strict Liability Standard in Order to Protect Claimant's Investment

225. The reasonableness standard is the dominant standard for a full protection and security claim. However, some investor-state tribunals have adopted a strict liability standard, which requires that a state take “all measures of precaution to protect...investments... on its territory.”²⁴⁵ This Tribunal should not apply the strict liability standard because the state is not “an insurer or a guarantor of...security.”²⁴⁶ Indeed, the tribunal in *Lauder* found that the strict liability standard could only be imposed upon a state through a specific provision in the applicable treaty.²⁴⁷

226. Claimant may assert that the inclusion of the word “constant” in Article 2(2) calls for application of a strict liability standard. This assertion is erroneous; mere addition of words such as “constant” and “full” is not sufficient to establish that parties intended application of a strict liability standard.²⁴⁸ In *ELSI*, the ICJ stated that “[t]he reference...to the provision of ‘constant protection and security’ cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”²⁴⁹

²⁴⁵ *American Mfg.*, ¶6.05.

²⁴⁶ *Asian Agricultural*, ¶49.

²⁴⁷ *Lauder v. Czech Republic*, ¶308.

²⁴⁸ *Asian Agricultural*, ¶49.

²⁴⁹ *ELSI*, ¶57.

227. Should this Tribunal find that the strict liability standard applies, notwithstanding that it represents the minority position and the fact that there is no specific language in the Calpurnia-Gaul BIT calling for its application, Claimant still fails to establish a violation of Article 2(2). The searches resulted in no physical harm. Respondent took all possible precaution by deploying a police force to monitor these peaceful protests. Claimant could not have reasonably expected Respondent to deploy its military forces and attack its own citizens, who were engaging in a non-violent expression of their freedom of speech rights.²⁵⁰

V. RESPONDENT HAS NOT TREATED CLAIMANT IN AN ARBITRARY AND DISCRIMINATORY MANNER

228. Article 2(3) of the Calpurnia-Gaul BIT provides that parties shall not be subjected to “arbitrary or discriminatory measures in [their] investments.” While “[i]t is sometimes assumed that the two standards are largely identical...the separate listing of the two standards, typically separated by the word ‘or,’ suggests that each must be accorded its own significance and scope.”²⁵¹

229. Respondent has not subjected Claimant to **(A)** arbitrary treatment or **(B)** discriminatory treatment. Accordingly, Respondent has not violated Article 2(3) of the Calpurnia-Gaul BIT.

A. Respondent Did Not Treat Claimant in an Arbitrary Manner

230. In *Lauder*, the tribunal, relying on Black’s Law Dictionary, defined arbitrary actions are those actions that are “founded on prejudice or preference rather than on reason of

²⁵⁰ R.,p.6,¶17.

²⁵¹ *Dolzer*,173.

fact.”²⁵² Other tribunals have defined arbitrary by referring to the concept of the rule of law; *ELSI* defined arbitrary as “a willful disregard of due process of law, an act which shocks, or at least surprises a sense of juridical propriety.”²⁵³ Respondent’s actions cannot be considered arbitrary under either definition.

231. Under the *Lauder* standard, Respondent did not act in an arbitrary manner. The government’s actions were not motivated by prejudice against foreigners but rather were based on legitimate reasons. The searches of Pescara and Kolowenko’s homes were based on suspicion of unlawful data collection and espionage; these suspicions were not unsubstantiated as they were based on credible tips, “providing sufficient details of mobile telecommunications procedures generally and in particular those of VanCal to suggest that the tipster had inside knowledge of what VanCal was up to.”²⁵⁴ The results of the search further substantiate Respondent’s actions because it was revealed that Pescara and Kolowenko’s laptops contained work-related information.²⁵⁵ In addition, unlicensed telecommunications devices were actually found in their homes.²⁵⁶

232. Similarly, Respondent did not act in an arbitrary manner under the *ELSI* standard. This case is similar to *ELSI*, in which the tribunal found that the Italian governments orders to reacquisition an American company was necessitated by the politically charged context of a workers strike. Here, national security threats created the need to implement necessary changes in Calpurnian policy. The searches conducted in Pescara and

²⁵² See *Lauder v. Czech Republic*, ¶221.

²⁵³ *Dolzer*, 173; *ELSI*, ¶128.

²⁵⁴ *First Clarifications*, Q.20.

²⁵⁵ *First Clarifications*, Q.11.

²⁵⁶ R., p.4, 8 December 2003.

Kolowenko's homes were conducted lawfully and for the purpose of implementing national security requirements. As in *ELSI*, the decision to cease sending investment-related information to Gaulois citizens was undertaken for national security concerns.

B. Respondent did Not Treat Claimant in a Discriminatory Manner

233. Various tribunals, including *LG&E v. Argentina*, have held that a State violates the arbitrary and discriminatory treatment provision when it discriminates against a foreign investor vis-à-vis its nationals.²⁵⁷ In this instance, as described above in Section V(B), Respondent has not discriminated against Claimant in comparison to any national. Therefore, Respondent has not treated Claimant in a discriminatory manner.

234. Therefore, Respondent did not treat Claimant in an arbitrary and discriminatory manner.

VI. RESPONDENT HAS CONSISTENTLY MET ITS TRANSPARENCY OBLIGATIONS

235. Claimant (A) bears the burden of proof on non-transparency claims and (B) has not met its burden of proof.

A. The Burden of Proof for Non-Transparency Rests with Claimant

236. Under Article 3 of the Calpurnia-Gaul BIT, Calpurnia commits to ensuring that:
its laws, regulations, procedures, administrative rulings and judicial decisions...which may affect the investments of investors...are promptly published, or otherwise made publicly available.

²⁵⁷ *LG&E v. Argentina*, Decision on Liability, 3 October 2006.

237. Investors asserting transparency claims independent of other treaty breaches rely on a misinterpretation of *TecMed*,²⁵⁸ wherein the tribunal is said to have held that investors are entitled to:

know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.²⁵⁹

238. *Champion Trading* properly interprets *TecMed* by placing the burden of proof for non-transparent action rested upon Claimants. In instances where all relevant laws are generally public, available or furnished upon request, the transparency claim cannot be maintained for want of evidence. Further, when investors “have not produced any evidence or even pertinent arguments that [Respondent State] violated the principle of transparency under international law” and the transparency claim has to be denied.²⁶⁰

B. Claimant Has Not Furnished Any Proof of Non-Transparency

239. Respondent avers that it has never been anything but wholly transparent with Claimant, but finds itself in the difficult position of trying to prove a negative. Luckily, *Champion* furnishes an alternative by properly placing the burden of proof on Claimant.

240. Further, Respondent proffers that the evidence of record strongly supports an independent finding of transparent state action. Calpurnia is a democratic nation, in which elections free from error and bias are held.²⁶¹ Calpurnian judicial decisions are readily available,²⁶² and public information is provided even on its national security activities.²⁶³

241. For the above reasons, Claimant’s non-transparency claim is meritless.

²⁵⁸ *Champion* ¶¶161-165.

²⁵⁹ *TecMed* ¶354.

²⁶⁰ *Id.*

²⁶¹ *First Clarifications*, ¶7.

²⁶² R., 8, 14 June 2006.

²⁶³ R., 6, 8 December 2003–17 July 2004.

CONCLUSION ON MERITS

242. Respondent has adhered strictly to its international obligations. Respondent has not expropriated Claimant's investment. Respondent has furnished Claimant with national treatment, fair and equitable treatment, full protection and security, predictable and nondiscriminatory treatment and transparency. Nevertheless, Claimant persists with poor business strategies and self-injury, and its allegations against Respondent are meritless.

PART THREE: RELIEF REQUESTED

243. In light of all the above, Respondent respectfully asks this Tribunal to find:

- (1) that this Tribunal does not have jurisdiction over this dispute;
- (2) that Claimant's allegations of contractual and international breaches by Respondent are meritless;
- (3) and that this arbitration is subsequently dismissed.

RESPECTFULLY SUBMITTED ON 10 OCTOBER 2008 BY

-----/s/-----

Team Singh

on behalf of Respondent

Government of Republic of Calpurnia