

# **MEMORIAL FOR RESPONDENT**

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**GOVERNMENT OF THE REPUBLIC OF CALPURNIA**

RESPONDENT

v.

**VANGUARD INTERNATIONAL**

CLAIMANT

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ICSID Case No. ARB/X/X

**Winiarski**

2008

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## **ABBREVIATIONS**

<b>§</b>	Paragraph
<b>Art.</b>	Article
<b>BIT</b>	Bilateral Investment Treaty
<b>Calpurnia- Gaul BIT</b>	Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investment
<b>CCC</b>	Conservative Conscience of Calpurnia
<b>CLAIMANT</b>	Vanguard International
<b>Contracting Parties</b>	Government of the Republic of Calpurnia and the Government of the Federated States of Gaul
<b>CP2</b>	Second Clarifications of Problem
<b>CRA</b>	Claimant's Request for Arbitration
<b>Ed</b>	Edition
<b>e.g.</b>	exempli gratia
<b>EJIL</b>	European Journal of International Law
<b>emph. add.</b>	Emphasis added
<b>Et al.</b>	And other authors
<b>Evidence</b>	Evidence/ Calendar of Events
<b>FDI</b>	Foreign Direct Investment
<b>Flatland-Gaul BIT</b>	Agreement between the Government of the Republic of Calpurnia and the Government of the State of Flatland on the Mutual Promotion and Protection of Investments
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>MFN</b>	Most Favoured Nation
<b>MNP</b>	Martinus Nijhoff Publishers
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OPIC</b>	Overseas Private Investment Corporation
<b>OUP</b>	Oxford University Press
<b>P./pp.</b>	Page / pages

<b>Parties</b>	Vanguard International and the Government of the Republic of Calpurnia
<b>RESPONDENT</b>	Government of the Republic of Calpurnia
<b>RRA</b>	Respondent's Reply to Request for Arbitration
<b>SFCDC</b>	State Fund for Commerce and Development in Calpurnia
<b>Treaty</b>	Calpurnia- Gaul BIT
<b>v.</b>	versus
<b>UNCTAD</b>	United Nations Conference on Trade and Development

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## **STATEMENT OF FACTS**

**CLAIMANT** Vanguard International (hereinafter referred to as “CLAIMANT”) is a leading mobile telecommunications company with GSM operations in seven emerging markets in Latin America, the Middle East, Africa and South Asia.

**RESPONDENT** Calpurnia is a Contracting State of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) as are the Federated States of Gaul, where Claimant is incorporated and has its headquarters.

**1997** Claimant participated in the establishment of a joint venture company, VanCal, incorporated and with its headquarters in San Inocente de Irkoutsk, the capital of Calpurnia. VanCal provides GSM/UMTS services in Calpurnia under the “VANGUARD INTERNATIONAL” trademark.

**14 Oct 2004** Dr. Swift and Mr. Shelly, two SFCDC representatives are elected to the board of directors of VanCal.

**31 Dec 2004** In the years ending December 2004 and December 2005, Calpurnian firms, banks and companies held 41%, foreign companies held 30% and natural persons, including farmers and workers, held 29% of VanCal’s issued shares.

**17 Feb 2005** Dr. Swift, on behalf of SFCDC, proposes a minimum amount of dividend to be paid to the shareholders with the purpose of creating a reserve fund, under the recommendation made by VanCal’s auditor. Claimant’s proxy, Mr. Rindler, wasn’t present.

**10 Mar 2005** Decision taken by representatives of SFCDC, Mr. Poe and Dr. Swift, to set up the reserve fund. It is agreed that the minimum dividend is to be divided among shareholders and profits to be credited to the reserve fund, issuing no stock dividend. Due to the

- dispute of both countries it is agreed, that it would be better if the payment of profits to foreign shareholders will be suspended.
- 15 Apr 2005** Dividend is declared in the form of 18% of the profit in cash, and 10% in stock.
- 21 May 2005** CLAIMANT writes a letter to Mr. Korchnoi, requesting for the amount of dividend payable to be placed in a separate account opened in CLAIMANT'S NAME.
- 27 May 2005** Mr. Korchnoi replies CLAIMANT'S letter with an unauthorized email, stating that no further payments could be made to foreign shareholders. His email response superseded VanCal's statements which expressed its willingness to make any licence fee and pay the dividends it owed.
- 16 Nov 2005** Two proxies held by Mr. Rindler were correctly ruled unacceptable for the shareholders' meeting of 16 November 2005 as they had not been properly certified and had been given only in relation to a meeting scheduled for 11 October 2005.
- 16 Nov 2005** Mr. Shelly and Ms. Pescara are voted of the board of directors by a majority vote of the present shareholders. Mr. Poe and Mr. Korchnoi also resign. Van Cal Board accepted Ms. Pescara's resignation as managing director "after thanking her for her efforts during several years in office." Claimant maintained its two places on the board in the person of Ms. Pescara, who appointed a proxy, and Mr. Neil Shepherd. In the same meeting, Dr. Swift stated that the main objective of the company is (between other objectives) "to protect the interests of the country as well as to preserve the industry and the interests of all shareholders including the minor ones within the framework of the general interests of the country; and the Board of Directors has done all in its power to achieve this end".
- 15 Apr 2006** Mr. Shepherd resigns from VanCal Board
- 7 Jun 2006** Two new CLAIMANT board representatives, Mr. Hunter and Mr. Fowler elected (replacing Mr. Shepherd and Ms. Pescara).

- 23 Oct 2006** CLAIMANT's participation on the Board ended only when it withdrew its representatives Mr. Hunter and Mr. Fowler by their resignation. CLAIMANT declines to replace it's representatives by email.
- 11 Nov 2006** Dr. Swift replies CLAIMANT's email, with a suggestion to withdraw its resignation, followed by a designation of new directors.
- 5 Feb 2007** CLAIMANT sends letter to Mr. Poe, claiming an expropriation the facto by Calpurnian State Entities, violating international obligations. On the same letter, CLAIMANT, demands compensation and the issue to be transferred to the appropriate Ministers.
- 21 Feb 2007** Mr. Poe answers CLAIMANT via letter, stating a denial to involve government in what is a mere internal shareholder dispute in which no governmental authority is involved. He also assures that the "company had in no way been in a worse condition in the two or three recent fiscal periods" than during the period when Claimant had controlled the management."
- 31 July 2007** CLAIMANT requests the institution of arbitration proceedings in accordance to the ICSD's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, and notifies the State of Calpurnia.

## **PRELIMINARY OBJECTIONS ON JURISDICTION**

1. Regarding CLAIMANT's request for International Arbitration, the Government of the Republic of Calpurnia, hereinafter referred to as RESPONDENT, manifests the lack of jurisdiction of this Tribunal and requests that based on the principle of *Kompetenz-Kompetenz*, which grants any Arbitral Tribunal the ability to rule on the question of whether it has jurisdiction on the particular case it was constituted for<sup>1</sup>, discharge CLAIMANT's request for arbitral procedures. For this purpose, RESPONDENT submits the following preliminary objections on jurisdiction:
  - a. The 18 month period for amicable settlement stipulated in the Calpurnia-Gaul BIT through article 11 (1) and (2) as a requirement previous to the submission of the dispute to international arbitration has not been exhausted therefore preventing CLAIMANT from accessing to international arbitration; and
  - b. CLAIMANT has pursued its claims before the domestic courts of Calpurnia and according to article 11 (3) of the Gaul-Calpurnia BIT, may therefore no longer elect an arbitral remedy.

### **ISSUE 1: CLAIMANT HAS FAILED TO EXHAUST THE AMICABLE SETTLEMENT PERIOD, CONSEQUENTLY IT CANNOT PURSUE INTERNATIONAL ARBITRATION**

2. Article 11 (1) and (2) of the Calpurnia-Gaul BIT regarding states that:

“Any dispute between an investor of one Contracting party and the Other Contracting Party concerning an investment in the territory of the latter Contracting Party shall, if possible, be settled amicably. If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration.”<sup>2</sup>

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<sup>1</sup> BARCELO III, P. 2.

<sup>2</sup> Calpurnia-Gaul BIT, Art. 11 (1) (2).

3. The article is clear and does not allow any another interpretation other than that by which we conclude that the parties decided that international arbitration could only be accessed after the negotiation period of 18 months expired without any kind of settlement.
4. The article determines to important issues that must be answered in order to determine whether the actions executed by CLAIMANT complied with the regulations of the treaty: a) Was there an attempt on behalf of CLAIMANT to solve the dispute by amicable settlement?, and b)What are the consequences of ignoring this requirement? We will address both issues orderly:

A. Nonexistence of an amicable settlement attempt

5. In order to determine if there was in fact an attempt on behalf of CLAIMANT to solve the dispute amicably we must first find out what constitutes an attempt to reach amicable settlement.
6. Negotiation is a dialogue intended to resolve disputes, to produce an agreement upon courses of action; it is the primary method of alternative dispute resolution.<sup>3</sup> Although negotiations carry a substantial degree of flexibility and are generally characterized by informality, there are still certain basic requirements for a true and effective negotiation. One of those basic steps, is the request for the initiation of the negotiation process.<sup>4</sup> This request must include enough information to ensure that the requested counterpart knows he is being offered a negotiation. At the same time, they must establish the basic means through which the negotiation process will take place (means of communications, date of meetings, etc). And finally, both parties should be clear on who is entitled to carry out negotiations on behalf of each one of them. Without these requirements, it cannot be said that a true and legitimate negotiation process has been held. CLAIMANT did not comply with such requirements.

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<sup>3</sup> Bazerman et al., at p. 280.

<sup>4</sup> Álvarez et al., at p. 119.

7. CLAIMANT says it complied with the requirement for negotiations, claiming that a series of letters that took place from February 5th, 2007 and February 21<sup>st</sup>, 2007 constitute an attempt for amicable resolution. It is true that in some cases, a period of communication through a series of letters has been acknowledged as negotiations yet that decision has great dependancy on the content of such letters. The first letter regarding an arising dispute was sent by CLAIMANT to the Chair of SFCDC Poe. In this letter, CLAIMANT claimed expropriation by Clapurnian state entities and demanded compensation, and the transmission of this letter to his superiors including the appropriate Ministers. On February 21<sup>st</sup>, 2007, Poe sent a letter to CLAIMANT declining to involve government in what is merely an internal shareholder dispute an stating government had no authority in any event.
  
8. CLAIMANT's first letter, was nothing more that a mere accusation: there was no invitation to engage negotiation procedures neither was there any indication that this letter would be understood to be the beginning of amicable settlement. Finally, this letter lacked any kind of description of the intentions of CLAIMANT and the terms under which amicable settlement would take place. Therefore, we cannot establish that there was any hint that could lead RESPONDENT to believe he was engaged in negotiations.
  
9. Regarding the content of the response from Poe to CLAIMANT, in which he expressed his refusal to involve government in a mere shareholder dispute, CLAIMANT asserts this was a clear manifestation of RESPONDENT's lack of interest in carrying on negotiations an that it was under this interpretation of the letter that they ended amicable settlement. This interpretation was not only radical and premature, but also mistaken. Given that there was no indication that the first letter was the beginning of the amicable settlement attempts, Poe's response cannot be understood as anything more than his opinion over the matter. In fact Mr. Poe's letter is only evidence of his perception that the situation did not constitute a foreign investment conflict. Even under

CLAIMANT's assumption that this was a negotiation, the response's content was not a clear refusal for negotiation. Therefore, the least CLAIMANT could do was request for a clarification in order to have a clear declaration of RESPONDENT's standing point. CLAIMANT's interpretation of the matter is nothing more than an ill intentioned attempt to avoid the procedure to which he willingly agreed when he first invested in Calpurnian territory.

10. For these reasons, the argumentation used in the *Ethyl v. Canada* case, where Tribunal emphasized on the existence of a principle which allows claimant to pursue Arbitration without exhausting negotiations when these procedures are impossible to be applied<sup>5</sup> cannot apply in this case since there was no such certainty

#### B. Application of the MFN clause to dispute settlement mechanisms

11. CLAIMANT, on a second attempt to avoid the due process to which it agreed regarding dispute settlement mechanisms, also argued the applicability of a MFN clause found in the Basic treaty in order to benefit from a dispute settlement mechanisms provision found in the Third party treaty. The third party provision states that:

“All disputes related to investments between any of the two contracting parties and an investor from the other contracting party concerning his investment, if the dispute can not be settled friendly within two months of the dispute notification date by either party it may submitted by the investor request either:

C: The international center for the settlement of investment dispute according to procedure provided for in the convention on settlement of investment disputes between states and nationals of other states, opened for signature at Washington on 18 March 1965.”<sup>6</sup>

12. The provision states a period of two months of negotiations prior to international arbitration. CLAIMANT argues that as an effect of the MFN clause they have the right to apply this period of time to their dispute. Although this argument has no sway over the fact that CLAIMANT did not pursue amicable settlement at

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<sup>5</sup> *Ethyl v. Canada*.

<sup>6</sup> Calpurnia-Flatland BIT, art. 7.

all, we will address the issue of MFN treatment to dismiss CLAIMANT's pretensions:

13. First of all, there cannot be an application of MFN clauses to dispute settlement mechanisms for several reasons: a) Procedural regulations do not create a more beneficial or unfavorable circumstance for parties, they simply describe a process to be followed; and, b) MFN clauses cannot be used to avoid a specific and predetermined procedures without violating the *pacta sunt servanda* principle.
14. The essential reason because of which MFN clauses can not be applied to dispute settlement mechanisms regardless of some misleading awards is a matter of the nature of these regulations. Procedural norms do not create a more favorable or unfavorable situation for different parties since they merely describe a procedure that must be followed. Two different processes that obey the basic principles and rights can not be compared in order to determine which one represents a greater benefit for the parties. As long as both regulations comply with the basic principles of justice and international law, neither one of them harms the parties; the circumstances around a dispute may vary yet, the process described remains neutral and does not affect a subject's situation. CLAIMANT's alleged detrimental situation is not affected by the procedure that has been determined for any dispute that might arise between it and a State.
15. MFN clauses are applied without doubt to substantive issues mainly because clauses like "Equitable Treatment", and "Non-discrimination" tend to be broad clauses that could cover a series of conducts that could lead to different treatments unforeseen by the parties. On the contrary, procedural clauses are detailed and specific, consequently they leave very little room for interpretation and describe a particular conduct that can be expected. This means that regarding procedural clauses, the parties know what their effects are since they first submit to them. Parties to a treaty can not argue that they did not consent to those particular circumstances since they are clear and predictable. If MFN clauses were to be applied to dispute mechanisms, then it would lose its nature

and become an abusive tool for the avoidance of previous commitments. At the same time, applying the MFN clause to this particular case would be a breach of the *pacta sunt servanda*<sup>7</sup> principle. According to this principle, treaties are binding and must be performed in good faith. MFN clauses are contained in treaties and therefore they can not be interpreted in such a way as to violate a basic principle of international law; applying the MFN clause in this case would be just that. Simultaneously, the *pacta sunt servanda* principle, forces CLAIMANT to fulfill the procedure to which it has granted consent.

16. Lastly, even if MFN clauses were applicable to dispute settlement mechanisms, in this case, the clause can not be invoked to receive the treatment stipulated in the Calpurnia-Flatland BIT because the BIT is no longer valid. The Calpurnia-Flatland BIT entered into force in 1992, and according to its article 13:

“The Agreement shall remain in force for a period of ten years and thereafter shall remain in force except the case of denunciation in writing by one of the Contracting Parties one year before the expiry date . After the expiry of the initial period , the Agreement may denounced any time with not less than one year written notice .”<sup>8</sup>

The treaty terminated in 2002, and since the origin of the right requested by CLAIMANT through the MFN clause is the third party treaty<sup>9</sup>, it can no longer be argued that nationals of a third party enjoy a more beneficial treatment.

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## RESULTS OF ISSUE 1:

17. CLAIMANT has failed to exhaust the amicable settlement period. The MFN clause can not be used in this case to avoid the negotiation period established in main treaty, and even if it were applicable, CLAIMANT did not carry out any kind of negotiation process initiative. Consequently, CLAIMANT can not access international arbitration since they have not exhausted the previous requirements.

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<sup>7</sup> Art. 26, Viena Convention on the Law of Treaties, 1969.

<sup>8</sup> Art. 13, Calpurnia-Flatland BIT.

<sup>9</sup> Art. 8, Draft Articles on MFN clauses.

## ISSUE 2: CLAIMANT PURSUED ITS CLAIMS BEFORE DOMESTIC COURTS AND THEREFORE CAN NO LONGER PURSUE INTERNATIONAL ARBITRATION

18. CLAIMANT can no longer request international arbitration because it has already chosen a different forum to solve the present dispute: CLAIMANT pursued its claims before the domestic courts of Calpurnia.

19. Article eleven of the Calpurnia-Gaul BIT states the following:

“If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration. The investor has the choice of submitting the case either to:

(a) the competent courts of the Contracting Party in whose territory the investment is made;

(b) The International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the “Centre”), if the Centre is available, [...]”<sup>10</sup>

20. The previous article constitutes a fork-in-the-road clause: a clause that determines the choice of either pursuing its claims before a domestic court, or before an arbitration tribunal established under a BIT<sup>11</sup>. Once a dispute is presented before one court, it can not be pursued under any other. The clause is triggered only where the parties and the cause of action are identical<sup>12</sup>. Furthermore, in order to determine whether the cases are identical, the fork in the road jurisprudence seems to borrow heavily from traditional criteria developed primarily in the *res judicata* context 4 determining the identity

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<sup>10</sup> Art. 11, Calpurnia-Gaul BIT.

<sup>11</sup> Radi, Yannick

<sup>12</sup> Azurix v. Argentina.

between one proceeding and another; the parties, subject matter and the causes of claim must be the same (triple identity test)<sup>13</sup>.

21. There were three police searches of the private homes of Ms. Pescara and Mr. Kolowenko, on December 7<sup>th</sup>, 2003, June 3<sup>rd</sup>, 2004, and July 15<sup>th</sup>, 2004. Vanguard then submitted an application to have those searches declared unlawful and seek compensation. The motion was dismissed but it still represented a pursue of justice before domestic courts, now we will address whether this claim triggered a fork-in-the-road clause:
  
22. The first element regards the parties involved in both claims: CLAIMANT not only applied to the present procedures but was also the one that submitted the claim before domestic courts on behalf of Ms. Pescara and Mr. Kolowenko. The subject parties are the same.
  
23. The second element in the test is subject matter. The claims before domestic courts tackled the three police searches described above, and “illegal” data collection by the police on behalf of RESPONDENT. Although the claim before the arbitral tribunal is broader by referring to other events, both claims refer to the same events as CLAIMANT expects this Tribunal to declare that those searches represented acts of discrimination towards VanCal employees, particularly Gaulois nationals. Both claims essentially treat the same facts, although this claim addresses other events in order to support their pretensions. The differences in subject matter are too superficial to dismiss the similarities and referrals to the same events as those tackled in domestic courts. The identity in subject matters has very close relations with the identity in causes of action, by considering and their relation we conclude that this element does not distinguish the claim before domestic courts from the one presented to this tribunal.

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<sup>13</sup> CME v. Czech Republic.

24. Finally, the cause of action is the last element by which identity is defined: here is where we find the most similarities between both claims. Claimant argues that RESPONDENT has:

- a. Discriminated against CLAIMANT,
- b. Unlawfully interfered in CLAIMANT`s investment,
- c. And failed to provide the CLAIMANT and its investment full protection and security.

25. In the claim before domestic court, it was argued that the searches performed by the police were not sufficiently justified and that they had been in fact based on discrimination, therefore, this claim is identical to the one referred to as claim A. the main purpose of the domestic claim was to declare unlawful the police searches and data collection, considering that these were in fact a means of interference by RESPONDENT over CLAIMANT`s investment. By claiming that RESPONDENT had performed unlawful police searches, it is implied that RESPONDENT failed to provide full protection and security to CLAIMANT. In conclusion, the claims have too many similarities to be considered different claims and should lead to the lack of jurisdiction of this Tribunal based on the fact that these claims have already been pursued by CLAIMANT through domestic courts.

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**RESULTS OF ISSUE 2:**

26. CLAIMANT`s claim before domestic courts and before international arbitration meet the triple identity test, triggering the fork-in-the-road clause. As A Result of this, CLAIMANT can no longer access international arbitration as mechanism of dispute settlement.

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## **ARGUMENTS TO THE SUBSTANTIVE ISSUES**

27. BITs are dynamic instruments that evolve over time to meet the needs of both investor/investment protection and the scope of host country rights of regulation, especially in the context of the development needs of countries. In these circumstances, a major task of international tribunals is to strike a balance between these concerns in the interpretation of BITs provisions<sup>14</sup>.
28. The Contracting Parties agreed on signing the Treaty, and by that, they committed themselves to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party. CLAIMANT alleges that RESPONDENT has breached the Treaty in several ways, but those breaches are results of misinterpretation of the Treaty. Therefore, it will be demonstrated that RESPONDENT has not violated any of the Treaty clauses and is not liable for any compensation to CLAIMANT.

### **ISSUE 1: RESPONDENT IS NOT LIABLE FOR THE ACTS TANTAMOUNT TO THE ALLEGED EXPROPRIATION**

29. A government official can act either in the exercise of its governmental powers, or as a private person, in which case is not vested with governmental authority. The same can be said for government owned entities. When these subjects act as a private person they do so without representing the State, therefore such acts cannot be attributed to the latter as a subject of public law but rather as a subject of private law.
30. In the present case RESPONDENT cannot be held liable under the Treaty for the acts that constitute the alleged expropriation because SFCDC, as a shareholder in a private company, was not acting in the public interest of the State but rather on its own interest of making profit from a private corporation. These acts were neither in the exercise of governmental authority, nor in the public interest of the

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<sup>14</sup> UNCTAD, *Investor-State Disputes*, at p. 41

RESPONDENT. Therefore SFCDC in its relations to other shareholders, including CLAIMANT, was acting as an equal, in a relation governed by private law.

31. Another relevant point is that the decisions CLAIMANT asserts as tantamount of expropriation were taken not by SFCDC's personnel, which as stated was not in the exercise of their governmental powers, but by VanCal's board of directors. The fact that members of the board were SFCDC personnel as well doesn't alter the fact that such board is part of a private corporation.
32. If SFCDC's personnel within the board were acting as private subjects, and the board is part of a private corporation under the laws of California as well, one can only conclude that the decisions of the board cannot be attributed to the State as a public entity, but to the board itself.
33. SFCDC's personnel in the board were acting according to the powers invested in them as directors, which derive from VanCal's Articles of Association, therefore if any law was violated it was this Articles and the statutes of the corporation and not the obligations that derive from the BIT, and this clearly means that the character of those acts is merely private even though carried out by government officials.
34. On this matter it is important to clarify the legal effects of some declarations made by SFCDC's personnel in the board meetings and in shareholder's meetings. On the minutes of the board meeting of November 15<sup>th</sup> 2004 Dr. Swift stated that the SFCDC did not regard VanCal "as really being a private company". And on the minute of shareholder's meeting of November the 16<sup>th</sup> 2005 it appears that Dr. Swift stated that "the main objective [of the company] is . . . to protect the interests of the country as well as to preserve the industry and the interests of all shareholders including the minor ones within the framework of the general interests of the country; and the Board of Directors has done all in its power to achieve this end."

35. Even if there are declarations by SFCDC's personnel stating that they do not regard the company as really being private, or that it serves the public purpose of the RESPONDENT, it is not their view of the company and of its purpose which governs the public or private character of it, but rather the laws that govern its behavior, which is corporate law an essentially private law.
36. The fact that the members of the Board of Directors were part of the SFCDC<sup>15</sup> is not solid evidence to declare that their decisions were manipulated by the Government. As case law declares, in the *Central Soya Inc.* case:
- “There was no solid evidence that seizure of Central Soya's property by its employees was taken, ratified or condoned by the government of Venezuela within the meaning of the contract”.
37. Neither can it be proved in this case that RESPONDENT ratified their decisions, nor that they represented directly RESPONDENT's ideals.
38. This distinction of the public or private character that the act of a government has is important to clarify when RESPONDENT is obliged to act in the protection of CLAIMANT's investment. If it is acting with its sovereign powers then it must fulfill its undertakings under the Treaty, if not, it is only obliged to comply with the law that applies to private subjects in private relations e.g.: Corporate Law, Articles of Association, etc. Accordingly, the conclusion must be that, if in any way this tribunal should find that the board discriminated against CLAIMANT, these acts are not governed by the Treaty, because they only seek to protect Investors from the Host State when the latter acts with its governmental authority, and in this case not being so, any controversy that arises from the facts disputed in the present proceedings are far beyond the scope of the Treaty.
39. One must point out the danger that arises from an eventual interpretation widening the scope of the Treaty stating that it protects investors from the acts of the board of directors because its composition includes government officials. Such interpretation would hold accountable a State for acts in which it has no

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<sup>15</sup> CP2, # 17

control because they are exercised outside the scope of the powers it invests its officials with. This would result in a cost that a State would probably take into account before signing a BIT, and the expansion of this International Law instrument, vital for the spreading of foreign investment around the world, would be severely hampered. Developing countries that lack internal resources to create jobs and other conditions for development depend on foreign financing to do so. FDI is the single largest source of external financing for developing countries around the world, and even though economic factors play a key role, the legal climate in a country is an important advantage or cost to be weighed before making an investment.<sup>16</sup> The spread of BITs has been a great contributor in creating a favorable legal climate for Investors because it clarifies existing general law and develops new law.

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**RESULTS OF ISSUE 1:**

40. SFCDC's personnel were acting outside their governmental authority when making decisions as members of VanCal's board of directors, and such board is a private entity even though some of its members are government officials. Also SFCDC as a shareholder was governed by corporate law. Hence such acts cannot be attributed to SFCDC as a subject of public law, more specifically, as a subject of the Treaty Obligations

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**ISSUE 2: THE ACTS ALLEGEDLY COMMITTED BY RESPONDENT DO NOT AMOUNT TO INDIRECT EXPROPRIATION**

A. Not all intervention with property by the Government results in a de facto expropriation

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<sup>16</sup> Dolzer and Stevens. at p. xi

41. Neither according to the Treaty, nor to general International law on foreign investment, do the measures allegedly taken by RESPONDENT constitute a de facto expropriation. Art. 6 (1) of the treaty defines what would constitute a direct expropriation as “any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalization”.

42. One must clarify that not all intervention with property by the government results in a de facto expropriation, considering that every State enjoys enough sovereignty to regulate the form in which individual rights are to be exercised. Now the point is if in the case that the Tribunal finds that the acts resulting in the expropriation Claimant asserts are attributable to RESPONDENT, those acts lead to such interference with its investment to be considered as an expropriation.

43. As in the *International Bank v. OPIC* case<sup>17</sup>:

“The actions of the Government of the Dominican Republic were not “expropriatory actions” for at least two reasons: As a first reason, measures applied to EXPLOMA by the Government of the Dominican Republic were not by their “express terms for the purpose of nationalization, confiscation, or expropriation (including but not limited to intervention, condemnation, or other taking), ... (were) reasonably related to the constitutionally sanctioned government objectives, ... (were) not arbitrary, ... (were) based upon a reasonable classification of entities to which, ... (they) applied), and ... (did) not violate generally accepted international law principles [...]”. As a second reason why the actions of the Dominican Government were not “expropriatory actions” within the meaning of the Contract Guaranty, they did not have the effect of preventing “the Foreign Enterprise from exercising effective control over the use or disposition of substantial portions of its property or from constructing the Project or operating the same”

44. So did the measures taken in this case, did not prevent CLAIMANT from having effective control over the disposition of their property:

45. The measures include first of all interfering with CLAIMANT’s ability to administrate its investment by denying its rights to take part in the decisions made by the board of directors and shareholder meetings. CLAIMANT’s

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<sup>17</sup> Bishop et al, at p. 518

representatives to the board have the right to attend and intervene in the matters which are discussed in the board's meetings, and have the right to attend the shareholder's meetings, but such rights are to be exercised with the formalities that corporate law requires.

46. From the evidence it is clear that the rejection of Mr. Rindler's proxy to attend the November 16<sup>th</sup> 2006 shareholder's meeting was based on the fact that the proxy was issued by Claimant for an October 11<sup>th</sup> 2006 meeting, therefore Mr. Rindler did not possess proper powers to represent Claimant in the said meeting.

47. Also it is clear that Respondent did not prevent Claimant to designate the two board representatives that it withdrew. From Jonathan Swift's email to Claimant on November the 11<sup>th</sup> 2006 we can see that such measure was never intended. The motivation for this withdrawal, that their participation in the board is futile, is insufficient to sustain that such act is imputable to Respondent's behavior. One thing must be clarified, Claimant's participation in the board is protected by allowing him to designate board representatives according to his right as a shareholder in VanCal, and that those representatives are not unlawfully prevented from attending the meetings. But in any way Respondent must secure that the criteria and interests of those representatives should prevail in the decisions adopted by the board, which is the reason why Claimant says that the said participation is futile.

48. In what concerns the suspension of the payment of the dividends, they were declared and credited in favor of Claimant on VanCal's books; accordingly no suspension of payment was performed. Even if the tribunal declares that this is still a suspension of payment, and finds that because of government officials participation in the board and in the company's equity alters the private essence of the corporation, the supposed suspension of payment is not considered a measure of expropriation by the Treaty, neither it is under general international law.

49. It is true that such intervention would affect the market value of the share which constitutes the investment, but not all measures that lead to this result are to be considered an expropriation. Most BITs define indirect expropriation as measures that lead to the same result as a *De Jure* expropriation or use the formula “measures tantamount to expropriation”<sup>18</sup>. An example of what is considered to be possibly the provision with the greatest scope in indirect expropriation, is the one found in BITs signed by the United States. They include a clause that reads as follows:

“Any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of the investment, or the impairment or deprivation of its management, control or economic value”<sup>19</sup>

50. Most authors are very certain in stating that the inclusion of measures that cause the impairment of the economic value of an investment, equates expropriation with a host of measures which might not otherwise be considered as such under general international law, let alone under liberal systems of domestic law.<sup>20</sup>

51. If Art. 6 of the Treaty is compared with the provision above, one can only assert that it was not the purpose of the parties to consider such measures as an expropriation. In addition if we consider that such measures are taken into account in Art. 2 (3) of the Treaty, which provides for Promotion and Protection of Investments, it can be inferred that this is tantamount to the intention of the parties to leave such measures outside the scope of the definition of indirect expropriation.

52. These measures are not considered indirect expropriation by international law because they do not affect the fundamental content of the right of property over the investment.

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<sup>18</sup> Dolzer and Stevens, at p. 102.

<sup>19</sup> US-Zaire BIT, Art. III

<sup>20</sup> MNP, at p. 102.

53. Case-law records the *Foremost v. Iran Case*, when the Tribunal was of the opinion that the suspension of the payment of dividends does not alter the fundamental nature of the Investor's property rights, because it still enjoys the faculty to dispose of this property. In this award it is sustained that is this ability to dispose the property what constitutes the fundamental nature of the right and if it is hindered to the point in which such faculty is impossible to exercise such a result would lead to an expropriation, and the right to perceive a payment of dividends declared from a company's profit does not form part of this fundamental nature.<sup>21</sup>
54. This *Foremost v. Iran Case* relates closely to the dispute between CLAIMANT and RESPONDENT.
55. Mr. Fisher in that case, was CLAIMANT's managing director, such as Ms. Pesacara was VanCal's. After Mr. Fisher resigned from that office in November 1979, Mr. Asghari, a colleague of long standing, was appointed to succeed him as managing director at a board meeting held on 15 November 1979, when the board accepted Mr. Fisher's resignation "after thanking him for his efforts during several years in office". This can be related to Evidence on 15 November 2004, when Ms. Pescara's resignation as management director was received.
56. Foremost maintained its two places on the board in the person of Mr. Fisher, who appointed a proxy, and Mr. Neil Dinaut, who represented Foremost Shir, such as CLAIMANT maintained its two places on the board in the person of Ms. Pescara, who appointed a proxy, and Mr. Neil Shepherd, as Evidence on 15 November 2004 shows.
57. The *Foremost. v. Iran Case* continues establishing that there was held a meeting, which had as its object the discussion of the year's accounts and decision on the distribution of the company's profits. On behalf of the Financial Organisation, Dr. Ameli, part of the Board of Directors, proposed that "the minimum amount of the legal dividend be paid to the shareholders and the balance be appropriated

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<sup>21</sup> Bishop et al, at p. 861

for the purpose of creating a reserve fund for severance pay” for the company's workers. The proposal as to severance pay was based on the recommendation of Pak Dairy's auditor, and it was extensively debated at the meeting. Mr. Vahdati, who by now was serving as proxy for both Foremost directors, was absent from the meeting. In the present case, Evidence on 17 February 2005 shows that the exactly same facts happened, being the proposal made by Dr. Swift and Mr. Rindler, who was at the time serving as proxy for both CLAIMANT directors, was the one absent on the meeting.

58. Back to the *Foremost v. Iran Case*, Mr. Vahdati was, however, present when the discussion was resumed at the next meeting, held at Dr. Ameli's office on 10 March 1980, again under the chairmanship of Mr. Haghshenas. A decision was taken at that meeting to set up the severance pay reserve fund. In the ensuing discussion about dividends, the minutes state that “the representatives of the Financial Organization [...] expressed their opinion that the minimum dividend should be divided among the shareholders; that the balance [of the profit] be credited to the company's reserve fund and that no stock dividend be issued. Their reason for this action was the presence of foreign shareholders in the company. By this action, they wanted to hold the amount paid to the foreigners to the minimum”. It was also stated that the profits made by the company under current laws and regulations belonged to the company and, the shareholders had a right thereto in proportion to their capital investment, therefore, whether there is a distribution in cash, or a stock dividend, or a reservation of a portion as undivided profit, it will not in principle change the rights of the shareholders to the profits earned; especially because due to the existing dispute between the governments of Iran and the United States, the payment of profits to the foreign shareholders has been suspended for the time being [...]. This same decision and statements were made in a meeting on 10 March 2005, when Mr. Rindler was present. Mr. Poe said that the amount paid to the foreigners could be held to the minimum, and Dr. Swift noted exactly the same facts about profits made by the company under current laws and regulations.

59. Furthermore, on the *Foremost v. Iran Case*, a dividend of eighteen percent of the profit in cash and ten percent in stock was declared on 15 April 1980, such as the same percentages were declared in the present case on 15 April 2005.
60. Foremost wrote a letter to Mr. Asghari on 21 May 1980 requesting that the amount of the dividend payable to the Foremost companies, 29,864,280 Rials, be placed in a separate bank account to be opened in the name of Foremost-McKesson. On 21 May 2005, CLAIMANT wrote a letter to Mr. Korchnoi with the exact same request of placing the amount of money in a separate bank account.
61. Mr. Asghari replied by telex dated 27 May 1980 in the following terms: “I have to inform you that due to decision and instruction of the board of directors, Pak Dairy can not pay any sums of money for any reason to foreign share holders. So I cannot take any action regarding your request”. The exact same words were used by Mr. Korchnoi in an email to CLAIMANT on 27 May 2005.
62. The Tribunal in this *Foremost v. Iran Case* finally concluded that:
- “[...] having examined the totality of the evidence, on balance, that the interference with the substance of Foremost's rights *did not*, by 19 January 1981, and still less by 27 May 1980, amount to an expropriation.  
The above conclusion is not altered by consideration of the effect of the departure of Foremost's personnel from Iran. While this contributed to the diminution of the enjoyment of Foremost's rights, it did not affect their fundamental nature. In this context, it is significant that after Foremost withdrew its two directors in October 1981, Pak Dairy replied with a telex of 11 November 1981 suggesting that the resignation be withdrawn and new directors designated”. [emph. add.]
63. Although the claimant in that case, a minority shareholder, had been refused payment of a declared dividend, it retained its representation on the Board of Directors and the ownership of its shares until at least late 1981<sup>22</sup>.

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<sup>22</sup> Aldrich, at p. 207

64. Therefore, for the identical facts of the cited case with the present one, the final conclusion of the Tribunal that there was no expropriation, can be used in the present case, as International Law has recognized that the decisions of Tribunals are a subsidiary means for the determination of rules of international law<sup>23</sup>, and so is established in Art. 38 (1. d) of the Statute of the International Court of Justice when recognizing the judicial decisions as subsidiary means for the determination of rules of law.

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**RESULTS OF ISSUE 2:**

65. RESPONDENT did not unlawfully interfere with CLAIMANT'S rights to administrate its investment and to perceive its benefits. There was no suspension of the payment of dividends therefore no de facto expropriation ever occurred. Even if this tribunal finds that such suspension of payment was made, this measure is not considered as an indirect expropriation neither under the Treaty nor according to general international law.

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**ISSUE 3: RESPONDENT DID NOT DISCRIMINATE AGAINST CLAIMANT**

A. RESPONDENT did not violate Art. 2.2 of the Treaty.

66. One of the arguments of CLAIMANT is that RESPONDENT violated Art. 2.2 of the Treaty. In International Law, one of most debated issues in arbitral disputes under investment agreements is the meaning of the standards of "fair and equitable treatment" and "full protection and security". This expression does not have a concrete and unique interpretation, and that is the reason why Contracting Parties may find a variety of possible breaches to it, but most of them will be manipulated facts to one's convenience.

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<sup>23</sup> UNCTAD, Investor-State Disputes, at p. 41

67. The overall result of the decisions to date is that fair and equitable treatment provisions are not only applicable to what would be considered abuses of government power, or disguised uses of government powers for untoward purposes, but to any open and deliberate use of government powers that fails to meet the requirements of good governance, such as transparency, freedom from coercion and harassment, due process and procedural propriety and good faith<sup>24</sup>. Therefore, these are the rights and characteristics a contracting party must guarantee to the other contracting party in their relations. All of these characteristics have been fulfilled by RESPONDENT.

68. This standard of full protection and security has a special treatment in periods of political transitions, such as the period RESPONDENT was going through when the actions took place.

69. Between 1997 and 2004, CLAIMANT played a major role in the management of VanCal, having provided management skills and personnel, including participation on the Board of Directors<sup>25</sup>. These circumstances changed when the CCC won an absolute majority in both chambers of the Calpurnian Parliament. Even so, these changes did not result in effective damages or losses to CLAIMANT by RESPONDENT who, consequently, did not breach the Treaty.

i. The decisions were taken with transparency

70. The meeting that took place on 17 February 2005, had the object to discuss the year's accounts and decide on the distribution of the company's profits. This meeting was made known to CLAIMANT and, its only representative was absent. Mr. Rindler himself decided not to attend to the meeting. The debates of the meeting concluded in the decision of creating the reserve fund for the company's workers. The debates were opened to CLAIMANT. RESPONDENT

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<sup>24</sup> UNCTAD, *Investor-State Disputes*, at p. 39

<sup>25</sup> CRA, at p. 2

did not violate its obligation to act with transparency. A decision being taken by the other members of the Board and with no representation of CLAIMANT was a consequence of CLAIMANT not exercising its right to vote and not to a lack of transparency from RESPONDENT.

ii. RESPONDENT provided CLAIMANT with freedom from coercion and harassment, due process and procedural propriety and good faith

71. CLAIMANT argues that the police searches of the homes of Ms. Pescara and Mr. Kolowenko were unlawful and had to be compensated. Its request to the Calpurnian Constitutional Court was dismissed.

72. This dismissal is not a denial of access to justice, therefore, is not a breach to the Treaty. RESPONDENT fulfilled its obligation to provide CLAIMANT with freedom from coercion and harassment, due process and procedural propriety and good faith, meaning that the mere access to tribunals, or in this case, to the Calpurnian Constitutional Court, fulfills this requirement. Due process and procedural propriety does not mean a favorable decision must be awarded to a person who resorts to judicial or administrative authorities.

73. On the other hand, a government must take all reasonable measures in order to protect an investment of a foreign country under the fair and equitable treatment provision, but it must also take into account other rights it makes aside in protecting such investment in a test of proportionality. In particular, what concerns the public manifestations in front of Ms. Pescara's residence, the government cannot interfere with the people's right to freedom of speech in a public property to provide for an amicable atmosphere of CLAIMANT's personnel. A measure restricting this freedom of speech would not be proportional if the purpose is to maintain favorable conditions for an investment. Furthermore, there is no evidence neither to demonstrate that RESPONDENT forced the CCC Women's League to participate in the manifestation, nor to prove that it receives direct funding from RESPONDENT.

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**RESULTS OF ISSUE 3:**

74. The acts allegedly amounting to expropriation were not carried out in secrecy, the decisions were taken in meetings in which CLAIMANT was present, the said decisions were a result of transparent processes, and CLAIMANT was granted proper access to jurisdiction with due and undelayed process. Therefore there was no discrimination against CLAIMANT's rights as an investor.

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