

**FABELA**

**MEMORANDUM FOR CLAIMANT**

**VANGUARD INTERNATIONAL  
CLAIMANT**

v.

**THE GOVERNMENT OF THE REPUBLIC OF  
CALPURNIA  
RESPONDENT**

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**I Annual Foreign Direct Investment International Moot Competition  
International Center for Settlement of Investment Disputes  
Case No. Arb /X/X**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

LIST OF ABBREVIATIONS..... iii

INDEX OF AUTHORITIES..... vii

INDEX OF CASES..... xv

INDEX OF LEGAL ACTS, MODEL LAWS AND OTHER SOURCES ..... xxviii

INDEX OF INTERNET SOURCES ..... xxxii

STATEMENT OF FACTS ..... 1

PART ONE: TRIBUNAL HAS JURISDICTION TO RULE IN THE PRESENT CASE..... 3

    I. REQUIREMENT OF AMICABLE SETTLEMENT HAS BEEN MET ..... 4

        1. MFN clause contained in Art. 4 of the CALPURNIA-GAUL BIT leads to the application  
        of Art. 7 of the CALPURNIA-FLATLAND BIT..... 5

        2. The fact that Flatland has renounced the Convention is without relevance ..... 9

            a) Calpurnia-Flatland BIT is still in force..... 9

            b) Flatland’s denunciation of the Convention cannot affect already vested rights..... 10

        3. Requirement of amicable period contained in Art. 7 of Calpurnia-Flatland BIT has been  
        fulfilled ..... 11

    II. REQUIREMENT OF AMICABLE SETTLEMENT IS NOT AN OBSTACLE TO THE  
    JURISDICTION OF THE TRIBUNAL..... 12

    III. TRIBUNAL IS NOT DEPRIVED OF THE JURISDICTION BY THE “FORK IN THE  
    ROAD” CLAUSE ..... 14

        1. There is no identity of the parties in the current arbitral proceedings and the court  
        proceedings before Commercial Court of San Inocente de Irkoutsk..... 15

        2. The subject matters of the current arbitral proceedings and court proceedings before the  
        Calpurnian Constitutional Court and Commercial Court of San Inocente de Irkoutsk are not  
        the same ..... 16

PART TWO: RESPONDENT HAS BREACHED CLAIMANT’S RIGHTS RELATED TO ITS  
INVESTMENT ..... 18

    I. ACTS OF SFCDC WHICH HAD DEPRIVED CLAIMANT OF THE USE AND BENEFIT  
    OF ITS INVESTMENT ARE TO BE ATTRIBUTED TO RESPONDENT ..... 18

II. RESPONDENT FAILED TO PROVIDE CLAIMANT TREATMENT GUARANTEED BY CALPURNIA-GAUL BIT AND CUSTOMARY INTERNATIONAL LAW .....	21
1. Respondent failed to provide Claimant’s investment fair and equitable treatment.....	22
a) Respondent’s actions are not in accord with the fair and equitable treatment defined as an autonomous self-contained concept .....	22
b) Respondent’s actions are not in accord with the fair and equitable treatment defined as an the minimum standard of treatment in international law .....	24
1) Respondent did not exercise its obligation of vigilance and protection of Claimant’s investment .....	25
2) Respondent violated due process requirement, including non denial of justice and lack of arbitrariness .....	25
3) Respondent did not provide transparency .....	26
4) Respondent failed to act in good faith .....	26
2. Respondent failed to provide Claimant’s investment full and constant protection and security.....	27
3. Respondent failed to provide Claimant and its investment national treatment .....	28
4. Respondent undertook unreasonable, arbitrary and discriminatory measures impairing Claimant’s investment .....	32
5. Respondent failed to give sympathetic consideration regarding the authorizations for engaging executives, managers, specialists and technical personnel of the Claimant’s choice .....	34
6. Respondent failed to promptly publish, or otherwise make publicly available all laws, regulations, procedures, administrative rulings and judicial decisions of general application which have affected Claimant’s investment.....	35
7. Respondent failed to provide Claimant free transfer of payments into and out of Calpurnia in connection with its investment .....	36
III.    RESPONDENT HAS EFFECTIVELY EXPROPRIATED CLAIMANT’S INVESTMENT IN CALPURNIA .....	37
REQUEST FOR RELIEF .....	42

## LIST OF ABBREVIATIONS

<b>Art./Arts.</b>	Article/Articles
<b>BIT</b>	Bilateral Investment Treaty
<b>CCC</b>	Conservative Conscience of Calpurnia
<b>Calpurnia–Flatland 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>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 Investments
<b>Claimant</b>	Vanguard International
<b>ed.</b>	Edition
<b>Ed./Eds</b>	Editor/Editors
<b>emph. add.</b>	emphasis added
<b>et seq.</b>	Et sequentes (and following)
<b>FDI</b>	Foreign Direct Investment
<b>fn.</b>	Footnote

<b>Centre or ICSID</b>	International Centre for Settlement of Investment Disputes
<b>Convention</b>	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
<b>Ibid</b>	Ibidem
<b>i.e.</b>	id est (that means)
<b>ILC</b>	International Law Commission
<b>Inc.</b>	Incorporated
<b>inter alia</b>	among other things
<b>LCIA</b>	London Court of International Arbitration
<b>Ltd.</b>	Limited
<b>MFN</b>	Most Favorable Nation Clause
<b>Mr.</b>	Mister
<b>Ms.</b>	Miss/Mrs.
<b>NAFTA</b>	North American Free Trade Agreement
<b>No./Nos.</b>	Number/s

<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>para./paras.</b>	Paragraph/Paragraphs
<b>Parties</b>	Claimant and Respondent referred to jointly
<b>p./pp.</b>	page/pages
<b>Prof.</b>	Professor
<b>q.</b>	question
<b>Reply</b>	Respondent's Reply to Request for Arbitration
<b>Respondent</b>	Republic of Calpurnia
<b>Request</b>	Claimant's Request for Arbitration
<b>SFCDC</b>	The State Fund for Commerce and Development in Calpurnia
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>U.S. Model BIT</b>	United States Model Bilateral Treaty
<b>v.</b>	versus

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***Bulgaria***

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Canada***  
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Mexican States***  
Case No. ARB (AF)/97/1  
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## STATEMENT OF FACTS

1. Early 1997 Claimant participated in the establishment of a joint venture company, VanCal, with SFCDC and several Calpurnian natural and juridical persons.
2. 11/2003 CCC won an absolute majority in both chambers of Calpurnian parliament.
3. 07/12/2003, 03/06/2004, 15/07/2004 Calpurnian security forces searched the homes of VanGuard Representatives in VanCal, Ms. Francesca Pescara and Mr. David Kolowenko.
4. 08/12/2003, 04/06/2004, 17/07/2004 The Calpurnian Security Directorate issued press releases in connection with the police searches.
5. 01/2004, 03/2004, 06/2004, 07/2004 Ms. Pescara's home was picketed.
6. 09/2004 Ms. Pescara's application for the renewal of a three-year business visa was denied.
7. 12/2004 VanGuard holds 31%, SFCDC 52%, Calpurnian nationals 17% voting rights in VanCal.
8. 10/03/2005 VanCal board of directors meeting. A decision is made to suspend the payment of profits to foreign shareholders for the time being.
9. 15/04/2005 Dividend declared 18% of profit in cash and 10% in stock
10. 27/05/ 2005 Mr. Korchnoi sent an e-mail to Claimant informing it that due to the board of director's earlier decision he cannot take any action regarding its request for transferring dividends to Claimant's account.
11. 16/11/2005 Shareholders meeting. The two proxies held by Mr. Rindler in the name of Claimant, were found not to be formally valid for this meeting. Ms. Pescara was voted off the board of directors. Mr. Poe and Mr. Korchnoi resigned.

12. 15/04/2006 Mr. Neil Shepherd, the last representative of Claimant in VanCal board of directors resigned.
13. 07/06/2006 Shareholders meeting. Mr. Hunter and Mr. Fowler were elected as Claimant's representatives in the board of directors.
14. 14/06/2006 The Comercial Court dismisses Ms. Pescara's application to order VanCal to transfer to her account in Gaul dividends on 1% shareholding.
15. 28/09/2006 Mr. Swift informed Claimant that dividends had been credited to its account on the company's books instead of paying them to Claimant.
16. 23/10/2006 Mr. Hunter and Mr. Fowler resigned from the board of directors, thus ending Claimant's participation in it. Claimant informed VanCal by e-mail that it will not replace them with other representatives.
17. 05/02/2007 Claimant sent letter to Mr. Poe (chairman of SFCDC) claiming de-facto expropriation by Calpurnian state entities and demanding compensation. Claimant also demanded that Mr. Poe transmits Claimant's request to appropriate ministers.
18. 21/02/2007 Mr. Poe sent a letter to Claimant informing it that he refused to involve government of Calpurnia into the present dispute.
19. 31/07/2007 Claimant initiates arbitration before ICSID by sending its Request for Arbitration.
20. 31/01/2008 Arbitral Tribunal is constituted in accordance with Rule 6 of ICSID Arbitration Rules.
21. 18/04/2008 The Tribunal held its First session.

**PART ONE: TRIBUNAL HAS JURISDICTION TO RULE IN THE PRESENT CASE**

22. The present case was brought before the International Center for Settlement of Investment Disputes (hereinafter the Center or ICSID) on 31 July 2007 when Claimant sent its Request for Arbitration to the Secretary General of the Center. The Parties agree that the Arbitral Tribunal (hereinafter the Tribunal) was properly constituted on 31 January 2008. The jurisdiction of the Center and of the Tribunal over the current dispute is established under Art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter the Convention) since all conditions set out in this Article are satisfied.
23. Firstly, the present dispute is *a legal dispute* - it clearly involves conflict of rights and not mere conflict of interests between the Parties.<sup>1</sup> Claimant's rights which were impaired by Respondent, and the legal remedies sought by Claimant are based on relevant provisions of the bilateral investment treaty signed and in effect between the Government of the Republic of Calpurnia and the Government of the Federal States of Gaul (hereinafter Calpurnia-Gaul BIT).<sup>2</sup>
24. Secondly, the present dispute *arises directly out of an investment*. Claimant's interest in VanCal, a company incorporated and with its headquarters in San Inocente de Irkoutsk, Calpurnia (hereinafter VanCal), without a doubt falls under the definition of an investment both under the Convention and the Calpurnia-Gaul BIT. VanCal operation involves a long-term duration, a regularity of profit and return, assumption of risk by both sides, a substantial commitment by Claimant and significance for the development of Calpurnia.<sup>3</sup> In addition, Claimant's business activity in the present case is an "asset established or acquired by [Claimant] in the territory of [Calpurnia]" and it involves "shares, stocks, debentures or other form of participation in a company", "titles or claims to money or rights to performance having an economic value" and "intellectual property rights", thus representing an investment pursuant to several counts of Art. 1(1) of the Calpurnia-Gaul BIT.

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<sup>1</sup> The Report, para. 26.

<sup>2</sup> Schreuer1, p. 105.

<sup>3</sup> Ibid, p. 140; *Fedax v. Venezuela*, para. 43; *Joy Mining v Egypt*, para. 53.

25. Thirdly, both Claimant and Respondent satisfy *rationae personae* conditions for application of the Convention and the Calpurnia-Gaul BIT. Respondent is a contracting state to the Convention and Claimant is a national of Gaul, another contracting state to the Convention.
26. Finally, Parties consented to submit the present dispute to the Center. Having entered and by ratifying the Calpurnia-Gaul BIT, Respondent effectively gave an advance consent to have all investment disputes with Gaulois nationals resolved before the Center. Claimant accepted this standing offer by sending the Request for Arbitration.<sup>4</sup>
27. Respondent does not object to any of these criteria. Instead, it invokes certain circumstances which allegedly deprive the Center and the Tribunal of their jurisdiction. It is Claimant's submission that Respondent's request to the Tribunal to declare itself without jurisdiction is completely unfounded for the following reasons: Requirement of amicable settlement has been met **(I)**; Requirement of amicable settlement is not an obstacle to the jurisdiction of the Tribunal **(II)**; The Tribunal is not deprived of jurisdiction by the "fork in the road" clause **(III)**.

#### **I. REQUIREMENT OF AMICABLE SETTLEMENT HAS BEEN MET**

28. Respondent has argued that the Tribunal lacks jurisdiction since Claimant has not pursued amicable settlement for the 18 months as required by Art 11(2) of the Treaty.<sup>5</sup> Contrary to Respondent's objection, Claimant would like to bring the Tribunal's attention to the fact that Art 11(2) of the Calpurnia-Gaul BIT is not applicable in the present case, but rather Art. 7 of the bilateral investment treaty signed and in effect between the Government of the Republic of Calpurnia and the Government of the State of Flatland (hereinafter Calpurnia-Flatland BIT), which prescribes 2 months as a period for pursuing amicable settlement. This 2 month period has been respected by the Claimant. This shall be demonstrated on three accounts: firstly, most favourable nation clause (hereinafter MFN clause) contained in Art. 4 of the Calpurnia-Gaul BIT leads to application of Art. 7 of the Calpurnia-Flatland BIT and, consequently, to the 2 month period prescribed therein **(I)**; the fact that Flatland has renounced the Convention is without

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<sup>4</sup> *AAPL v. Sri Lanka*, para 2; *Olguin v. Paraguay*, para 26; *Tradex v. Albania* p. 187; UNCTAD Dispute Settlement, p. 20; Schreuer p. 218; Spiermann p. 180.

<sup>5</sup> Reply, para. 5.

relevance (2), and finally, the requirement of amicable period contained in Art. 7 of the Calpurnia-Flatland BIT has been fulfilled (3).

**1. MFN clause contained in Art. 4 of the CALPURNIA-GAUL BIT leads to the application of Art. 7 of the CALPURNIA-FLATLAND BIT**

29. Art. 4 para. 1 of the Calpurnia-Gaul BIT states that

“[i]nvestments made by investors of one Contracting Parties in the territory of the other Contracting Party ... shall be accorded *treatment* which is not less favorable than the host Contracting Party accords to investments ... made by investors of any third State...” (emph. add.).

Deferring access to arbitration with a requirement of 18 months waiting period is obviously less favorable than deferring it for only 2 months. Consequently, application of the previously mentioned MFN clause necessarily leads to Art. 7 of Calpurnia-Flatland BIT as the applicable provision in the present case. Respondent wrongly asserts that the MFN clause does not extend to dispute resolution mechanisms. Contrary to this, it is Claimant’s submission that the MFN clause contained in Art 4 para 1 of the Calpurnia-Gaul BIT extends without any doubt to dispute resolution matters and clearly leads to application of Art. 7 of the Calpurnia-Flatland BIT.

30. From an investor’s point of view, standards and guarantees proclaimed in a BIT are of little practical value unless they are followed by an efficient and impartial way of redressing their non-observance. Hence, dispute resolution mechanism contained in a BIT stands on an equal footing with substantial standards of treatment and guarantees granted to a foreign investor. It is neither possible nor desirable to separate treaty rights from treaty remedies and then to apply the MFN principle only to the rights and not to the remedies.<sup>6</sup> In the words of *Mafezzini v. Spain* tribunal,

“today dispute settlement arrangements are inextricably linked to the protection of foreign investors”.<sup>7</sup>

Indeed, because access to international arbitration is perhaps the most important safeguard afforded to investors under BITs, it would be something of a paradox to exclude this particular safeguard from the scope of the MFN clause.<sup>8</sup> It would be unreasonable to make a distinction

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<sup>6</sup> Vesel, p. 20.

<sup>7</sup> At para. 54.

<sup>8</sup> Gaillard1, p.163.

between the protection of access to an independent tribunal from the substantive rights that the tribunal is supposed to protect. For this reason, pursuant to an MFN clause foreign investors are allowed to rely on most favorable dispute settlement provisions contained in BITs, just as they may rely on most favorable standards of treatment or guarantees contained in these treaties. This view has also been confirmed in numerous cases.<sup>9</sup>

31. Respondent might argue that some tribunals, faced with similar facts, have refused to apply the MFN clause to procedural issues.<sup>10</sup> Claimant urges the Tribunal to distinguish those cases from the one at hand. In those cases, claimants tried to establish jurisdiction of ICSID, although it has not been envisaged at all in the applicable BIT for that type of dispute. For example, there was an attempt in *Plama v. Bulgaria* case to replace the dispute resolution clause in the basic treaty *in toto* by a dispute resolution mechanism from a third party treaty.<sup>11</sup> On the other hand, in *Maffezini v. Spain*, *Siemens v. Argentina*, *Gas Natural v. Argentina*, *National Grid v. Argentina*, *Suez v. Argentina* and *Rosin Vest v. Russia*, ICSID's jurisdiction was envisaged in both the applicable (basic) BITs and the third party BITs and applying MFN in these cases did not change the scope of the tribunals' jurisdiction the BITs had envisaged, nor create consent where it was lacking. These cases dealt only with overriding of admissibility requirements, such as amicable settlement periods<sup>12</sup> and merely allowed tribunals to promptly hear claims over which they would later have jurisdiction.<sup>13</sup> Therefore the MFN clause should cover dispute resolution matters, unless it leads to provisions in a BIT which establish a totally different dispute resolution mechanism.<sup>14</sup> In the present case, no such exception exists. It does not revolve around establishing jurisdiction of the Tribunal without consent of the Parties. That consent is undisputed and the dispute resolution clause from Art. 11 of the Calpurnia-Gaul BIT undoubtedly covers the present dispute.

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<sup>9</sup> *Ambatielos v. UK*; *Maffezini v Spain*; *Siemens v. Argentine*; *Gas Natural v. Argentine*; *National Grid v. Argentine*; *Suez v. Argentine*; *RosInvest v. Russia*.

<sup>10</sup> *Salini v. Morocco*; *Plama v. Bulgaria*; *Telenor v. Hungary*.

<sup>11</sup> At para. 210.

<sup>12</sup> Rodriguez, pp. 94, 95.

<sup>13</sup> Freyer, Herlihy, p. 82-83.

<sup>14</sup> *Gas Natural v. Argentine*, para. 49.

32. Respondent might also argue that the MFN clause contained in Art. 4 of the Calpurnia-Gaul BIT may not be extended to dispute resolution matters due to the narrow wording of its para. 2. However, should the Tribunal choose to give preference to para. 2 over para. 1 of Art. 4, it is Claimant's submission that it should nevertheless reach the same conclusion. It is true that according to Art. 4(2) of the Calpurnia-Gaul BIT, MFN clause extends only to activities such as "management, maintenance, use, enjoyment or disposal of investments". The Vienna Convention on the Law of Treaties, to which both Calpurnia and Gaul are parties,<sup>15</sup> stipulates that the general rule of interpretation is that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose (Art. 31(1)). It gives primacy to the text of the treaty as evidence of the intention of the parties. In the present case, the term "maintenance", derived from the word "maintain", covers nothing else than defending, vindicating and sustaining,<sup>16</sup> and recourse to dispute settlement is a normal feature of the defending, vindicating and sustaining, i.e. maintaining of an investment. This view is not only supported by the plain meaning of the word "maintain", but by the case law as well. For example, in *National Grid v. Argentina* case, the tribunal was confronted with the same narrowly worded MFN clause<sup>17</sup> and concluded that the mentioned phrase was sufficiently wide to include settlement of disputes.<sup>18</sup>
33. Admittedly, the state parties to the Calpurnia-Gaul BIT have limited the scope of the MFN clause. This is, however, true only with regard to the benefits of any treatment, preference, or privilege by virtue of free trade area, customs union, common market, regional labor market agreement, international agreements relating wholly or mainly to the taxation and multilateral conventions.<sup>19</sup> As a matter of interpretation, specific mention of an item excludes other possible

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<sup>15</sup> 2<sup>nd</sup> Clarification, q. 32.

<sup>16</sup> Synonym Collection.

<sup>17</sup> In para. 56 of the award: "Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their *management, maintenance, use, enjoyment or disposal* of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State" (emph. add.).

<sup>18</sup> Ibid. para. 93.

<sup>19</sup> Art. 5 of Calpurnia-Gaul BIT.

items.<sup>20</sup> If the Parties had intended to exclude the provisions on dispute resolutions from the scope of the MFN clause, they would have done so explicitly just like they did with Art. 5 of Calpurnia-Gaul BIT. It would be an ineffective exercise of a BIT interpretation if one were to construct an MFN clause and subsequently narrow the scope of that clause on the basis of perceived limitations that have not been expressly stipulated by the parties.<sup>21</sup>

34. Finally, even if the Tribunal were to find that there are some ambiguities as to whether Art. 4 of the Calpurnia-Gaul BIT covers dispute settlement or not, such ambiguities have to be interpreted in the spirit of both Calpurnia-Gaul BIT and internationally recognized principles of interpretation of parties' intentions contained in Art. 31 of the Vienna Convention.<sup>22</sup> The Calpurnia-Gaul BIT states in Art. 2(1) that

“[e]ach Contracting Party shall encourage and create favorable conditions in its territory for investments by investors of the other Contracting Party...”

Therefore, the intention of the state parties was to create favorable conditions for and to stimulate private investments. Accordingly, it can be concluded that the state parties intended to grant wide protection to investors covered by the Calpurnia-Gaul BIT. Otherwise, the goal of encouraging and creating favorable investment conditions could not be achieved. Since dispute settlement provisions are, in words of *Mafezzini v. Spain* tribunal, inextricably linked to the protection of foreign investors, it would be highly unlikely that the state parties to the Calpurnia-Gaul BIT have considered it otherwise. Furthermore, as stated in *SGS v. Philippines* award

“[i]t is legitimate to resolve uncertainties in its [BIT's] interpretation so as to favor the protection of the covered instruments.”<sup>23</sup>

35. Having in mind that the current MFN clause covers dispute resolution matters and that it is governed by the *ejusdem generis* principle, which provides that the MFN clause attracts matters belonging to the same category of subject as that to which the clause itself relates,<sup>24</sup> it is

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<sup>20</sup> *National Grid v. Argentine*, para. 82.

<sup>21</sup> Gaillard2, p. 2.

<sup>22</sup> As the *Ambatielos v. UK* tribunal concluded at p. 116 “the scope of an MFN clause can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.”

<sup>23</sup> Para. 116.

<sup>24</sup> *Ambatielos v. UK*, p. 107.

Claimant's submission that it without doubt allows it to invoke more favorable dispute resolution provisions of Calpurnia-Flatland BIT. From the foreign investors' perspective and their need for swift and economical dispute resolution, 2 months waiting period, contained in Art. 7 of Calpurnia-Flatland BIT, is undoubtedly more favorable than the 18 months waiting period, contained in Art.11 of Calpurnia-Gaul BIT.

## **2. The fact that Flatland has renounced the Convention is without relevance**

36. Respondent states that Art. 7 of Calpurnia-Gaul BIT cannot be applied in the present case since Flatland has not been a Contracting State to the Convention at the times relevant for the jurisdiction of this Tribunal.<sup>25</sup> Contrary to this, Claimant submits that there are no obstacles for application of this provision since Calpurnia-Flatland BIT is still in force **(a)** and Flatland's denunciation of the Convention cannot affect already vested rights **(b)**.

### **a) Calpurnia-Flatland BIT is still in force**

37. Flatland sent the denunciation of the Convention, which ICSID received on 2 May 2003.<sup>26</sup> This denunciation became effective on 2 November 2003 in accordance with Art. 71 of the Convention. However, Flatland has never tried to terminate the BIT it had concluded with Respondent in the year 1992 and that BIT is still in force.

38. Significantly, Art. 4 of Calpurnia-Gaul BIT, which serves as a basis for invoking relevant provisions of Calpurnia-Flatland BIT, states that the host state has to grant the covered investors the same rights as it accords to a third state or its own investors. Therefore, the only relevant fact for appraisal of the Claimant's request for application of the MFN clause in the present case is whether Respondent has actually granted more privileges to a third state i.e. to Flatland investors. Respondent has accorded certain rights and privileges under Art. 7 of Calpurnia-Flatland BIT to Flatland investors and has never tried to repeal them. It is completely irrelevant whether rights and privileges accorded by Respondent are in effect being used by the

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<sup>25</sup> Reply, para. 5.

<sup>26</sup> Ibid, fn. 1.

beneficiaries. The taking into consideration of this fact is a circumstance neither mentioned in the quoted Art., nor should it be appraised by the Tribunal.

**b) Flatland's denunciation of the Convention cannot affect already vested rights**

39. Even if the Tribunal finds that the effective use of the envisaged dispute resolution mechanism by the beneficiaries is a relevant fact in deciding on whether the MFN clause should be applied, Claimant submits that in any event the denunciation of the Convention cannot affect already vested rights. According to Art. 72 of the Convention, the notice of denunciation cannot affect the rights or obligations arising out of unilateral consent to the jurisdiction of the Centre, i.e. unilateral consent given by a contracting state, before the notice was received by the depositary.
40. Art. 7 of Calpurnia-Flatland BIT clearly constitutes the contracting states' consent to the jurisdiction of, among others, the Center, since it leaves entirely and unconditionally to a covered investor to opt between the offered jurisdictions. The clause does not require additional approval of the contracting state for an investor's choice. In a case where an unqualified consent exist, just like in the present case, the rights and obligations attached to this consent should not be affected by the denunciation of the ICSID Convention. This argument is supported not only by the wording of Art. 72 of the Convention, which requires consent to the jurisdiction given by one of the party, but also by numerous authors.<sup>27</sup> Moreover, the drafting history of the Convention also indicates that the drafters of the Convention had in mind existence of unilateral consent of only one state party as a necessary condition for application of Art. 72, since many propositions to implement limitations in the article were dismissed.<sup>28</sup>
41. Consequently, a BIT designating ICSID as an arbitral mechanism constitutes consent to ICSID jurisdiction and this consent can be withdrawn only by withdrawing from the BIT.<sup>29</sup> Since Flatland has never withdrawn from Calpurnia-Flatland BIT, Claimant is entitled to seek arbitral remedy before the Center, as long as this BIT is in force. Although there is no case law on this

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<sup>27</sup> Gaillard3, p.3; Inchauste,Guevara, p.2.

<sup>28</sup> Drafting History, pp.1010-1011

<sup>29</sup> Schnabl, Bédard p.3.

particular matter, since so far only one party to the Convention (Bolivia) has denounced it, a number of authors confirm this standing.<sup>30</sup>

42. In the case at hand, ICSID entered into force for Flatland on 23 September 1997.<sup>31</sup> Notice of denunciation became effective on 2 November 2003. Consequently, the notice has no effect on investments carried out between these two dates. Since the Claimant's investment was made in the course of this period, Flatland's denunciation of the Convention cannot deprive Claimant of the rights it had obtained.

### **3. Requirement of amicable period contained in Art. 7 of Calpurnia-Flatland BIT has been fulfilled**

43. Acting in compliance with Art. 7 of Calpurnia-Flatland BIT which is, as previously argued in paras 29-35 of this Memorandum, applicable in the present case, Claimant notified Respondent of the dispute that had arisen between them.

44. It is important to notice that neither Art. 7 of Calpurnia-Flatland BIT nor Art. 11 of Calpurnia-Gaul BIT set out any particular procedure to be followed during attempts of amicable settlement. These Arts. only fix a term during which the parties should try to resolve their disputes amicably. When deciding on this matter, the Tribunal in *Salini v. Morocco* found that:

“The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether [...] Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute.”<sup>32</sup>

Accordingly, the question is whether Claimant actually took the necessary or appropriate steps to contact the appropriate authorities.

45. In the present case Claimant sent a letter to Mr. Poe, chairman of the board of directors of State Fund for Commerce and Development of Calpurnia (hereinafter SFCDC), on 5 February 2007, claiming *de facto* expropriation by Calpurnian state entities and demanding compensation. The notification also contained a request to Mr. Poe to transmit Claimant's demand to the appropriate

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<sup>30</sup> Escobar, p.18; Schnabl, Bédard p.3; Gaillard3, p.3; Inchauste, Guevara, p.2

<sup>31</sup> Reply, para.5, fn. 1.

<sup>32</sup> Para.19.

Calpurnian authorities.<sup>33</sup> Having in mind that SFCDC is an organ of the state of Calpurnia and that Respondent is responsible for acts and omissions of SFCDC (see paras. 63-69 of the Memorandum), Claimant rightfully presumed that this communication would be passed on directly to Respondent. It is Claimant's submission that the alleged failure of Mr. Poe, representative of SFCDC, to transmit this notification to Respondent is an occurrence for which Claimant cannot bear responsibility in any way.

46. Therefore, it is obvious that Claimant took necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement. Claimant submits that the Tribunal should find that it was the failure to act of Mr. Poe, representative of SFCDC, for which Respondent is liable.

## **II. REQUIREMENT OF AMICABLE SETTLEMENT IS NOT AN OBSTACLE TO THE JURISDICTION OF THE TRIBUNAL**

47. Even if the Tribunal, for any reason, finds that the obligation of pursuing amicable settlement has not been fulfilled, it is Claimant submission that the requirement of amicable settlement is not an obstacle to the jurisdiction of the Tribunal. Claimant submits that the Tribunal should assume jurisdiction in the present case and should not allow Respondent to further violate Claimant's rights.

48. It is widely accepted both in theory and practice, that the requirement of amicable settlement, set out in various BITs, is not a prerequisite for jurisdiction, but rather a procedural rule.<sup>34</sup> The purpose of this rule is only to encourage consultations and negotiations between the parties that may lead to avoidance of arbitration. Parties to a dispute can always settle, both before and during arbitration and they can always unilaterally hinder the conclusion of a settlement if they wish to do so. For this reason, a clause providing for search for an amicable settlement does not really add novel options. What it does essentially is to contribute toward a friendlier negotiating

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<sup>33</sup> Evidence/Calendar of Events, p.8.

<sup>34</sup> *Wena Hotels v. Egypt 1*, p.891; *SGS v. Pakistan* para.58; *Lauder v. Czech Republic*, para.187; *Ethyl v. Canada* paras.74-88; Schreuer1, p.239; Polasek p.14; Redfern, Hunter, Blackaby, Partasides, para.11-3.

environment.<sup>35</sup> On the other side, all conditions that have to be fulfilled in order for the Tribunal to have jurisdiction are set forth in Art. 25 of the Convention and they are all met in the present case, as has been already proven in paras. 22-26 of the Memorandum.

49. It is also Claimant's submission that, analogously to the international law requirement of exhaustion of local remedies, requirement of attempt of amicable settlement should be totally disregarded when it is demonstrated that in fact any attempt to reach a settlement would be futile.<sup>36</sup> Namely, requirement for amicable settlement does not have an absolute character and can be dispensed with in cases where it is evident that a consultation attempt would fail due to the definitiveness in the attitude of one party.<sup>37</sup> As highlighted by Prof. Schreuer, this kind of provision is

“not given effect where it is clear from the beginning that there is no chance of reaching settlement”.<sup>38</sup>

Otherwise, there would be little point in declining jurisdiction in cases where negotiations are obviously futile. This conclusion can also be derived from the wording of Art 11(2) of the Calpurnia-Gaul BIT which does not read: “if the dispute *is not* settled amicably within 18 months” but “if the dispute *cannot* be settled amicably within 18 months”. In the present case, there could have not been any reasonable expectation of reaching a settlement. In the situation when Claimant-appointed members of VanCal's top management are being accused of espionage, when Respondent's representatives in VanCal refuse any kind of compromise with Claimant's representatives, when Claimant and its proxies are being deprived of their fundamental rights as shareholders of VanCal, when Claimant is prohibited free transfer of payments in connection with its investment and in situation when all this is happening under patronage and silent approval of Respondent, there can hardly be any chance of resolving matters “amicably”. Any attempt to reach a settlement through negotiations would remain futile and as such would represent a mere waste of time. In similar situations, tribunals have found that the

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<sup>35</sup> Varady, p.12.

<sup>36</sup> *Ethyl v. Canada*, para.84.

<sup>37</sup> *Consortium v. Algeria*, para.32.

<sup>38</sup> Schreuer2, p.239.

insistence on the waiting period would amount to an excessive formalism and have decided to assume jurisdiction disregarding the requirement of the waiting period.<sup>39</sup>

50. Moreover, Claimant would like to point out to the Tribunal that there is no evidence whatsoever of any attempt on part of Respondent to achieve settlement within the period of 15 months from the day of initiating these proceedings. Had Respondent been genuinely willing to engage in negotiations with Claimant in the spirit of Art. 11(2) of the Calpurnia-Gaul BIT, it had many opportunities to do so during the last 15 months. It is the same passive attitude on behalf of the state that served as a basis of which the Tribunal in *SGS v. Pakistan* case decided that the requirement to seek a negotiated settlement could not have reached a desired result.<sup>40</sup> Declining jurisdiction and insisting on fulfillment of the amicable settlement requirement would only benefit Respondent's bad faith dilatory tactics.
51. Finally, it would be contrary to the spirit of the Convention for the Tribunal to decline its jurisdiction at this point, given that the period on which Respondent relies has almost passed in the meantime. The only consequence of such a finding would be to compel Claimant to start the proceedings anew, which would be highly inefficient.<sup>41</sup> In other words, by ordering reinstatement of the proceedings nothing would be achieved, and by continuing the proceeding there is little to lose. The only consequence of continuation of the proceedings would be additional time, which the Tribunal would spend on discussing this issue, which could be easily remedied by awarding costs against Claimant for the relevant part of the proceedings.<sup>42</sup>

### **III. TRIBUNAL IS NOT DEPRIVED OF THE JURISDICTION BY THE “FORK IN THE ROAD” CLAUSE**

52. Respondent further submits that the Tribunal lacks jurisdiction because Claimant has pursued its claims before the domestic courts of Calpurnia, thus triggering the so-called fork in the road clause contained in Art. 11(3) of the Calpurnia-Gaul BIT.<sup>43</sup> First of all, Claimant would like to

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<sup>39</sup> *Ethyl v. Canada; Lauder v. Czech Republic; Wena Hotels v. Egypt1; SGS v. Pakistan.*

<sup>40</sup> At para.185.

<sup>41</sup> Schreuer2, p. 239; *SGS v. Pakistan*. Para. 184.

<sup>42</sup> *Ethyl v. Canada* para.88.

<sup>43</sup> Reply, para.5.

turn the Tribunal's attention to the fact that two claims have been made before the courts of Calpurnia in relation to the present dispute. The first one was made by Claimant, who asked the Calpurnian Constitutional Court to declare 2003 and 2004 searches of the private homes of Ms. Pescara and Mr. Kolowenko by the Calpurnian police unlawful and to oblige Respondent to pay compensation.<sup>44</sup> The second one was made by Ms. Pescara who asked the Commercial Court of San Inocente de Irkoutsk to order VanCal to transfer to her account in Gaul dividends on 1% shareholding.<sup>45</sup> Contrary to Respondent's allegations, Claimant submits that the fact that these two proceedings were brought before the domestic courts of Calpurnia cannot trigger the fork in the road clause contained in Art. 11(3) of the Calpurnia-Gaul BIT and prevent Claimant from pursuing its claim before the Tribunal.

53. Considering every utilization of domestic courts as a choice under the fork in the road provision would put investors in an intolerable position.<sup>46</sup> The fork in the road provision and the consequent loss of access to international arbitration applies only if the *same dispute* between the *same parties* has been submitted to domestic courts or administrative tribunals of the host State before resorting to international arbitration.<sup>47</sup> In the present case, there is no identity of the parties in the current arbitral proceedings and the court proceedings before Commercial Court of San Inocente de Irkoutsk (1) and the subject-matter of the current arbitral proceedings and court proceedings before the Calpurnian Constitutional Court and Commercial Court of San Inocente de Irkoutsk is not identical (2).

**1. There is no identity of the parties in the current arbitral proceedings and the court proceedings before Commercial Court of San Inocente de Irkoutsk**

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<sup>44</sup> Request, para.17.

<sup>45</sup> Evidence/Calendar of Events, p.8.

<sup>46</sup> Schreuer2, p.249; Schreuer3, p.20.

<sup>47</sup> Schreuer1, p.276

54. The application of the fork in the road provision can be triggered only if there is identity of parties in proceedings pending before the state court and the international tribunal,<sup>48</sup> i.e. if both parties are identical.<sup>49</sup> In the present case, there is no such identity.
55. As it is recognized by a number of arbitral decisions, only the investor can make the choice of taking a claim to the local courts or to arbitration.<sup>50</sup> In initiating proceedings before the state court, there is nothing in the Record that would suggest that Ms Pescara did not act as a private litigant who decided to bring the action on her own. On the other hand, the Claimant in the current arbitral proceedings is Vanguard International as the investor. Consequently, Ms Pescara's claim before the Commercial Court of San Inocente de Irkoutsk cannot be an obstacle for pursuing an arbitral remedy.
56. Even if we assume that Ms. Pescara acted as a trustee, Claimant submits that respondents in the two proceedings are not the same. Respondent before the Commercial court of San Inocente de Irkoutsk was VanCal and Respondent in the present case is the state of Calpurnia.
57. Therefore, since there is no identity of the parties, neither on the side of claimants nor on the side of respondents, Respondent's motion to dismiss the present arbitral proceedings should be rejected.

**2. The subject matters of the current arbitral proceedings and court proceedings before the Calpurnian Constitutional Court and Commercial Court of San Inocente de Irkoutsk are not the same**

58. The application of the fork in the road clause also cannot be triggered unless there is identity of claims before the state courts and the international tribunal,<sup>51</sup> i.e. unless both claims before domestic and international judicial authorities are treaty claims.<sup>52</sup>

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<sup>48</sup> Friedman, Coe, Park, Prager, Smith p.10; Schreuer2, p.248; *SARL v. Congo*, para. 1.14; *CMS v. Argentine*, para.80; *Azurix v. Argentine*, paras 86-92; *Genin v. Estonia*, para.333.

<sup>49</sup> Schreuer2, p.248; *Azurix v. Argentine*, para. 90.

<sup>50</sup> *CMS v. Argentine*, para.80; *Enron v. Argentine*, para.97; *Azurix v. Argentine*, para.90; *Lauder v. Czech Republic*, para.163.

<sup>51</sup> Schreuer2, p.248; *Lauder v. Czech Republic*, para 162; *Enron v. Argentine*, para. 97.

<sup>52</sup> Schreuer2, p.248.

59. In the case at hand, petitions before Calpurnian courts were based on relevant rights upheld by Calpurnian corporate law and Constitution and concerned the violation of corporate and human rights protected by these legal instruments. In the proceedings before Calpurnian Constitutional Court, Claimant seek to protect the rights of two of its employees who were subject to unlawful search by the Calpurnian police.<sup>53</sup> In the proceedings before the Commercial Court of San Inocente de Irkoutsk, Ms Pescara was pursuing her rights as a shareholder under the Calpurnian corporate law, rights which derive their existence from the domestic law of Calpurnia. Furthermore, the Record unequivocally states that no substantive standards of protection from the BIT were invoked in the claims before the local courts.<sup>54</sup> Accordingly, these petitions do not fall within the scope of treaty claims and cannot represent a basis for triggering the fork in the road clause.
60. On the other hand, it is obvious that Claimant's request before the Tribunal is a treaty claim since it is grounded on violation of the BIT,<sup>55</sup> and therefore is to be determined in accordance with international law. Claimant's position on this matter is strongly supported by the case law. In a significant number of cases arbitral tribunals, faced with previous application to domestic judicial authorities under similar circumstances as in the present case, have found that there was no identity of claims and no place for triggering of the fork in the road provision.<sup>56</sup>
61. In conclusion, since there is neither identity of claims, nor identity of parties in the current arbitral proceedings and the proceedings before the national courts of Calpurnia, Claimant submits that the Tribunal should find that the application of the fork in the road clause has not been triggered and should not decline jurisdiction for this reason.

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<sup>53</sup> Request, para.17.

<sup>54</sup> 2<sup>nd</sup> Clarification, q.24.

<sup>55</sup> *Vivendi v. Argentine1*, para.42.

<sup>56</sup> *Olguin v. Paraguay*, para.30; *Lauder v. Czech Republic*, paras.162-163; *Vivendi v. Argentine1*, paras.40,42,53-55,81; *Genin v. Estonia*, para.332; *CMS v. Argentine*, paras.77-82; *Azurix v. Argentine*, paras.37-41; *Middle East Cement v. Egypt*, para.71; *Enron v. Argentine*, paras.97-98; *Occidental v. Ecuador*, paras.38-63; *LG&E v. Argentine*, paras.75, 76.

## **PART TWO: RESPONDENT HAS BREACHED CLAIMANT'S RIGHTS RELATED TO ITS INVESTMENT**

62. In 1997 Claimant participated in the establishment of a joint venture company, VanCal, incorporated and with its headquarters in Calpurnia. Today Claimant directly owns 30% of shares in VanCal and another 1% through a trustee. Starting in late 2003 SFCDC (which also directly owns 30% and indirectly another 22% of shares of VanCal) implemented a series of decisions which effectively deprived Claimant of its rights of use and benefit of its investment. Having in mind that the Parties have not agreed on the applicable law in the present case, the Tribunal should reach its decision by relying on applicable rules of international law and domestic law of Calpurnia, to the extent that it is in compliance with international law.<sup>57</sup> In accordance with these rules, the Tribunal should find that the acts of SFCDC are to be attributed to Respondent **(I)**. By undertaking these measures, Respondent failed to provide Claimant the treatment it was entitled to under the Calpurnia-Gaul BIT and customary international law **(II)**. All of these acts amounted to unlawful expropriation of Claimant's investment **(III)**.

### **I. ACTS OF SFCDC WHICH HAD DEPRIVED CLAIMANT OF THE USE AND BENEFIT OF ITS INVESTMENT ARE TO BE ATTRIBUTED TO RESPONDENT**

63. Claimant submits that actions of SFCDC which affected its investment are attributable to Respondent, the Government of Calpurnia, since SFCDC is to be treated as an organ of Respondent. This is supported by the fact that SFCDC is not only an entity fully owned and controlled by Respondent, but also an entity effectively used as a vehicle for achieving economic development goals of Calpurnia.

64. Since neither the Convention nor the Calpurnia-Gaul BIT establish guiding principles for deciding this issue, the Tribunal should turn to the applicable rules of international law, since the determination as to the juridical structure of this entity in the law of Calpurnia is not binding on the Tribunal.<sup>58</sup>

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<sup>57</sup> Art. 42(1) of the Convention; Redfern, Hunter, Blackaby, Partasides, paras. 11.19-11.22.

<sup>58</sup> Brownlie, p.136.

65. Claimant would like to draw Tribunal's attention to the *Maffezini v Spain* case, which revolved around essentially the same circumstances as the case at hand.<sup>59</sup> The tribunal in this case used two tests in deciding whether the entity in question was in fact a state organ: formal or structural test and functional test. According to the former, formal or structural test, a finding that an entity is owned or controlled by the state, directly or indirectly, creates a presumption that it is a state organ. According to the latter, functional test, functions or role to be performed by the entity are to be looked at.<sup>60</sup> A similar presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the state or which by their nature are not usually carried out by private business or individuals.<sup>61</sup> Moreover, these tests are included in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter Draft Articles) adopted by the International Law Commission,<sup>62</sup> the most authoritative document on the law of State responsibility<sup>63</sup> and confirmed by authors.<sup>64</sup> It is Claimant's submission that both tests are met in the present case and that the Tribunal should hold SFCDC to be an entity of Respondent.
66. SFCDC, *State Fund for Commerce and Development of Calpurnia*, is an entity whose name and legal form imply that it is far from being an ordinary commercial entity. Its name makes it clear firstly that it is an agency of the state of Calpurnia, and secondly that its main activities are advancing commerce and development of the state of Calpurnia. By looking solely at this fact, one can conclude that the main goal of this entity is not that of an ordinary company, i.e. making profit, but rather active participation in development of the country. This implies its close association with, and subordination to the state of Calpurnia and assumption of elements of governmental authority.

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<sup>59</sup> *Maffezini v. Spain*, paras.71-82. Also, Brownlie,p.132 et seq.

<sup>60</sup> *Maffezini v. Spain*, para.78; Broches, p.355.

<sup>61</sup> *Maffezini v. Spain*, para.77.

<sup>62</sup> Arts. 5 and 8; ILC Report, p.38.

<sup>63</sup> Hober, p.2; Malumfashi, p.9.

<sup>64</sup> Hober, p.10; Smutny, p.27.

67. These presumptions are supported by the facts of the case. The sole owner of SFCDC is Respondent,<sup>65</sup> which has therefore exercised total control over the activities of this entity. Respondent has at all times instructed SFCDC to act in the way it thought would best serve its interest. Furthermore, the role of SFCDC in the development of the country was so significant that its board member were appointed not only by the Ministry of Economy, Department of Labour and Social Services and the Environmental Protection Agency, but also by the National Security Council<sup>66</sup> and Mr. Poe, chair of SFCDC, was at the same time a member of Conservative Conscience of Calpurnia, the ruling party.<sup>67</sup> For this reason Respondent has endeavoured to enhance the influence of SFCDC and other state funds over the Calpurnian economy by waiving its right to collect withholding tax on privately owned shares, whose owners placed their voting right in the hands of these funds.<sup>68</sup> In this way, Calpurnian shareholders of VanCal and other local companies were given a very strong economic incentive to deposit their shares with SFCDC and other state funds, thus increasing their role in the management of local companies. Had SFCDC and other state funds been pure commercial entities, exercising no governmental functions, such an act of Respondent would have been unimaginable.

68. Moreover, statements of SFCDC representatives in the VanCal's board of directors clearly show that these representatives viewed SFCDC as a state entity. On 15 November 2004, Dr. Swift observed that SFCDC did not „regard VanCal as really being a private company“.<sup>69</sup> This was because Dr. Swift did not perceive SFCDC, a controlling shareholder of VanCal, as being a private company, but rather an entity exercising elements of government authority. Similarly, on 16 November 2005, Dr. Swift explained that

“the main objective [of VanCal] 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”.<sup>70</sup>

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<sup>65</sup> Request, para.10.

<sup>66</sup> 2<sup>nd</sup> Clarification, q.17.

<sup>67</sup> 2<sup>nd</sup> Clarification, q.18.

<sup>68</sup> 1<sup>st</sup> Clarifications, q.13.

<sup>69</sup> Evidence/Calendar, p 6.

<sup>70</sup> Ibid, p.8.

These statements are a strong indication that representatives of SFCDC regarded this company as the guardian of the state interest and used its position in VanCal to promote Respondent's economic goals, at the expense of Claimant's investment. As a consequence, on 10 March 2005, due to the existing dispute between the governments of Calpurnia and Gaul, the payment of VanCal's profits to foreign shareholders was suspended.<sup>71</sup> Claimant, a national of Gaul, was the only foreign shareholder of VanCal at that time. Had SFCDC been an ordinary commercial entity and exercised no governmental authority, the nationality of the shareholders of VanCal, whether Calpurnian or Gauloise, would not have been important. However, due to the political tensions between Calpurnia and Gaul this issue became relevant and SFCDC, as a controlling shareholder in VanCal, decided to cease all payments from VanCal's profits to Claimant, the sole Gauloise shareholder.

69. Having this in mind, it is Claimant's submission that SFCDC is an entity owned, controlled and instigated by Respondent, which exercises elements of government authority and that, for this reason, both under the existing case law and Draft Articles, acts of SFCDC are attributable to Respondent.

## **II. RESPONDENT FAILED TO PROVIDE CLAIMANT TREATMENT GUARANTEED BY CALPURNIA-GAUL BIT AND CUSTOMARY INTERNATIONAL LAW**

70. Due to the fact that the acts of SFCDC are attributed to the Government of Calpurnia, Respondent did not provide Claimant the treatment which was guaranteed to it under the Calpurnia-Gaul BIT and customary international law, and, in particular, fair and equitable treatment (1); full and constant protection and security (2) and national treatment (3). Moreover, Respondent unlawfully interfered in Claimant's investment by undertaking unreasonable, arbitrary and discriminatory measures impairing Claimant's investment (4); by failing to give sympathetic consideration regarding the authorizations for engaging executives, managers, specialists and technical personnel of the Claimant's choice (5); by failing to promptly publish, or otherwise make publicly available all laws, regulations, procedures, administrative rulings and judicial decisions of general application which have affected Claimant's investment (6); by

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<sup>71</sup> Evidence/Calendar. p. 7.

failing to provide Claimant free transfer of payments into and out of Calpurnia in connection with its investment (7).

### **1. Respondent failed to provide Claimant's investment fair and equitable treatment**

71. Art. 2(2) of the Calpurnia-Gaul BIT provides that

“[e]ach Contracting State shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment [...]”.

It is Claimant's submission that Respondent clearly failed to treat Claimant's investment in the fair and equitable manner.

72. As explained in para 32 of the Memorandum, the Vienna Convention on the Law of Treaties gives primacy to the text of the treaty as evidence of the intention of the state parties. According to a dictionary definition, a treatment is presumed to be “fair” or “equitable” when it is free from bias, fraud, or injustice, i.e. when it is characterized by equity or fairness.<sup>72</sup> Due to the abstract nature of the fair and equitable treatment standard there have been several interpretations thereof in scholarly writings, judicial decisions, and government statements. The two main interpretations are that, on one hand, it is an autonomous self-contained concept different from the customary international law minimum standard and, on the other hand, that it is a standard of treatment which should be equated with the customary international law minimum standard.<sup>73</sup> The application of either of these two interpretations, leads to the conclusion that Respondent breached its obligations under Art. 2(2) of Calpurnia-Gaul BIT.

#### **a) Respondent's actions are not in accord with the fair and equitable treatment defined as an autonomous self-contained concept**

73. According to the first interpretation, the fair and equitable treatment standard should be interpreted in the light of its “additive character” under which the fairness and equity elements

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<sup>72</sup> Oxford Dictionary; *MTD v. Chile*, para.113.

<sup>73</sup> Schreuer 4, p.9,17; OECD F&E, p.2; UNCTAD F&E, p.10,34; Sornarajah, p.332-333.

are distinct from the customary international law minimum standard.<sup>74</sup> Accordingly, it is generally misleading to equate the fair and equitable with the minimum standard due to the fact that

“the terms ‘fair and equitable treatment’ envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard”.<sup>75</sup>

74. According to this view, the fair and equitable treatment standard is particularly significant in regards to long term foreign investments. Initial costs of these investments are very high. That is why a prudent investor will only make such an investment upon careful due diligence and under a firm expectation that no future change of action on the part of the host state will occur and prevent the reasonable implementation of its business plan.<sup>76</sup> This standard requires host states

“to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”<sup>77</sup>

In particular, that means that any political change will not deprive the investor of its rights and legitimate expectations.

75. Without a doubt, Respondent failed to protect the legitimate expectations of Claimant. An investor’s decision to make an investment is based on an assessment of the legal framework and overall business climate in the host state at the time of the investment as well as on the investor’s expectation that the conduct of the host state subsequent to the investment will be fair and equitable.<sup>78</sup> The very existence of the Calpurnia-Gaul BIT, which proclaims the protection of investments made by Gaul investors and encourages and creates favourable conditions in its territory for these investments, stimulated Claimant to invest in Calpurnia.<sup>79</sup> Moreover, Claimant decided to embark on an investment with no other party than the State of Calpurnia, by

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<sup>74</sup> *Pope and Talbot v. Canada*, para.105-118; *PSEG v. Turkey*, para.239; *MTD v. Chile*, paras.110-112; *Saluka v. Czech Republic*, p.309; *Dumberry*, p.455; *Dolzer/Stevens*, p.60; *Muchlinski*, p.626; *Lavieć*, p.94; *Vasciannie*, pp.139-144.

<sup>75</sup> *Mann*, p.244.

<sup>76</sup> *Dolzer*1, p.104.

<sup>77</sup> *Tecmed v. Mexico*, para.154; *Saluka v. Czech Republic*, para.302.

<sup>78</sup> *Saluka v. Czech Republic*, para.301.

<sup>79</sup> Art. 2, Calpurnia-Gaul BIT.

establishing a joint venture company with SFCDC.<sup>80</sup> Therefore, Claimant safely assumed that its investment would be afforded the treatment that Respondent itself guaranteed in the Calpurnia-Gaul BIT. However, upon the political changes in Calpurnia in November 2003, the mood towards foreign investments has changed.<sup>81</sup> Claimant, being a foreign investor from Gaul, was subject to deprivation of the use and benefit of its investment, its personnel was harassed by the officials of SFCDC who referred to them as “Gaulois spies”<sup>82</sup>, their homes were ransacked by the authorities<sup>83</sup> and were constantly under the watchful eye of the angry protestors<sup>84</sup>, and then finally ousted out of Calpurnia.<sup>85</sup> All of these acts combined made it impossible for Claimant to effectively make use of its investment in Calpurnia.

**b) Respondent’s actions are not in accord with the fair and equitable treatment defined as an the minimum standard of treatment in international law**

76. The second view of the fair and equitable treatment standard is that it is sometimes regarded as being equal to the minimum standard of treatment in international law.<sup>86</sup> It is generally accepted under customary international law that foreign investors are entitled to a certain level of treatment, and that any treatment which falls short of this level, gives rise to responsibility on the part of the State.<sup>87</sup> In particular, the international minimum standard encompasses the following obligations a host state has towards foreign investors: 1) obligation of vigilance and protection,

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<sup>80</sup> Request, para.8.

<sup>81</sup> Request, para.12.

<sup>82</sup> Evidence/Calendar, p.6

<sup>83</sup> Request, para. 17, 1<sup>st</sup> Clarifications, q.17

<sup>84</sup> Request, para. 17, 1<sup>st</sup> Clarifications, q.19

<sup>85</sup> Request, para.15,17

<sup>86</sup> *AAPL v. Sri Lanka*, Judge Asante’s dissenting opinion, paras.634-639; *AMT v. Zaire*, para.6.10; *Genin v. Estonia*, para.367;Leben, p.7-28; Sacerdoti, p.341; Juillard, pp.132 -134; NAFTA Interpretation, para. B.1, B.2, B.3; OECD F&E, p.9; Commentary OECD Draft Convention 1967, p.9.

<sup>87</sup> OECD F&E, p.8; UNCTAD F&E, p.12.

2) due process, including non denial of justice and lack of arbitrariness, 3) transparency, and 4) good faith.<sup>88</sup> It is Claimant's submission that none of the following obligations were met by the Respondent in the present case.

***1) Respondent did not exercise its obligation of vigilance and protection of Claimant's investment***

77. The state has an obligation of vigilance, i.e. an obligation to exercise due diligence in protecting foreign investment.<sup>89</sup> It is not expected of the State to prevent every act that may occur on its territory: however, it does have the obligation to take all measures that are deemed necessary in order to ensure the full enjoyment of protection and security of investments.<sup>90</sup> As shown in paras. 83-87 of the Memorandum, Respondent failed to exercise due diligence in protecting Claimant's investment.

***2) Respondent violated due process requirement, including non denial of justice and lack of arbitrariness***

78. Denial of justice has always been considered a principle element of customary international law.<sup>91</sup> As shown in paras. 121-122 of the Memorandum, Claimant was not afforded his legitimate right to due process of law. Due to the fact that there was no legal or legislative act in establishing indirect expropriation Claimant could not commence proceedings before a judicial body to review such an act. However, as the facts of the case show, should Claimant have commenced these proceeding it can be argued that it would not have been afforded fair and adequate proceedings due to the climate that was created by Respondent.

79. In a number of cases, tribunals have dealt with the prohibition of arbitrariness in close conjunction with the fair and equitable standard.<sup>92</sup> Precisely, in *S.D. Myers v. Canada*, the

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<sup>88</sup> OECD F&E, p.26.

<sup>89</sup> OECD F&E, p.26.

<sup>90</sup> *AMT v. Zaire*, para.6.05; *Wena Hotels Ltd v. Egypt*2, para.84.

<sup>91</sup> Kinnaer,Bjorklund,Hannaford , p.1105-42.

<sup>92</sup> *Mondev v. USA*, para.94-127; *Waste Management v. Mexico*, para.98.

Tribunal referred to the concept of “arbitrary” as a definitional element of the fair and equitable standard.<sup>93</sup> As further elaborated in paras. 97-101 of the Memorandum, Respondent arbitrarily implemented a number of decisions that effectively deprived Claimant in managing, using and enjoying its investment.

### ***3) Respondent did not provide transparency***

80. The concept of transparency is defined by the idea that all relevant legal requirements for the purpose of investing should be capable of being readily known to all investors.<sup>94</sup> As explained in paras. 104-107 of the Memorandum, Respondent has failed to fulfill its duty of transparency by rejecting to disclose to Claimant the legal basis or establish practice on the basis of which the payment of dividends was refused. Thus Respondent committed a breach of the fair and equitable treatment at the same time

### ***4) Respondent failed to act in good faith***

81. According to Art. 26 of the Vienna Convention on the Law of Treaties, the good faith principle is the basic principle in the performance of a treaty by the State.<sup>95</sup> This principle encompasses the basic expectations of an investor to be treated by the State in a transparent, consistent, i.e. non-arbitrary manner which would not conflict with what a reasonable and unbiased observer would consider fair and equitable.<sup>96</sup> As has been shown in paras. 73-75, 88-101 and 104-107 of the Memorandum, Respondent neglected to act in a transparent, non-arbitrary manner, and failed to protect Claimant’s legitimate expectations.

82. Having all this in mind, regardless of the approach the Tribunal takes, it is Claimant’s submission that Respondent has failed to treat the Claimant’s investment in a fair and equitable manner.

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<sup>93</sup> *S.D. Myers v. Canada*, para.263.

<sup>94</sup> *Metalclad v. Mexico*, para.76.

<sup>95</sup> *Canfor Corporation v. USA*, para.182,323.

<sup>96</sup> *Tecmed v. Mexico*, para.154.

## **2. Respondent failed to provide Claimant's investment full and constant protection and security**

83. Art. 2(2) of the Treaty provides that

“[e]ach Contracting State shall at all times accord in its territory to investments of investors of the other Contracting Party [...] full and constant protection and security.”

It is Claimant's submission that Respondent failed to provide this standard to Claimant.

84. Some tribunals have equated the standard of full and constant protection and security with the fair and equitable treatment.<sup>97</sup> Having in mind that Respondent failed to treat Claimant's investment in a fair and equitable manner, as shown in paras. 71-82 of this Memorandum, the Tribunal could also automatically find that there has been a breach of the full protection and security standard.

85. Should the Tribunal decide to regard these two standards as two separate obligations, it is Claimant's assertion that there has nevertheless been a breach of the full and constant protection and security standard. Unlike other standards of treatment, the full and constant protection and security standard imposes certain positive obligations on the part of the host state to protect investments in its territory. The host state is required to act with due diligence and exercise reasonable care to protect investments.<sup>98</sup> The full security and protection clause is meant to cover not only the situations of violation of physical integrity of an investment by use of force,<sup>99</sup> but also situations in which an investor or its property are subject to harassment without actually being physically harmed or seized.<sup>100</sup>

86. The Record clearly indicates that Claimant's representatives have been harassed by the authorities of Calpurnia. In the course of 8 month, the Calpurnian police has conducted three unlawful searches, each time without presenting a warrant, of private homes of Ms. Pescara and Mr. Kolowenko, Claimant appointed employees in VanCal, each of which has lasted for several

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<sup>97</sup> *Wena Hotels v. Egypt*, para.84-95; *Occidental v. Ecuador*, para.187; *PSEG v. Turkey*, para.258.

<sup>98</sup> Redfern, Hunter, Blackaby, Partasides, para.11-28; *AMT v. Zaire*, para.6.08.

<sup>99</sup> *Saluka v. Czech Republic*, para.484.

<sup>100</sup> *Vivendi v. Argentine*, para. 7.4.17

hours.<sup>101</sup> After each of these searches press releases were issued by the Calpurnian Security Directorate, which agitated the public sentiment against Claimant, Ms. Pescara and Mr. Kolokwenko.<sup>102</sup> This eventually led to Ms. Pescara's home being picketed by a group which was led by the Conservative Conscience of Calpurnia's Women's League.<sup>103</sup> This group denied Ms. Pescara car access to her home and the only way she could have accessed it was to go by foot past the angry crowd, who kept on chanting threats day and night.<sup>104</sup> The Calpurnian police refused to take any action and remove the protestors.<sup>105</sup> Due to such a hostile climate, Claimant's personnel, including Ms. Pescara and Mr. Kolokwenko, were forced to leave Calpurnia.<sup>106</sup>

87. Having in mind that Respondent not only failed to take any action to protect and secure Claimant's representatives, but also instigated an insecure investment environment, the Tribunal should find that there has been a breach of the standard of full and constant protection and security.

### **3. Respondent failed to provide Claimant and its investment national treatment**

88. According to Art. 4 of the Calpurnia-Gaul BIT investors of one Contracting Party and investments made by such investors shall be accorded by the other Contracting Party treatment which is not less favourable than the latter Contracting Party accords to its own investors and investments made by them. The aim of the national treatment obligation is to subject the foreign and domestic investors to the same competitive conditions on the host country market and to prevent governmental measures favouring domestic investors.<sup>107</sup> In other words, the concept of national treatment is designed to prevent discrimination on the basis of nationality, or "by reason

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<sup>101</sup> Request, para.17; 1<sup>st</sup> Clarification, q.17.

<sup>102</sup> Request , para.17; Evidence/Calendar, p.6.

<sup>103</sup> Request, para.17.

<sup>104</sup> 1<sup>st</sup> Clarification, q.19.

<sup>105</sup> Request, para.17.

<sup>106</sup> Ibid

<sup>107</sup> UNCTAD National Treatment , p.8; Sornarajah, p.320.

of nationality”.<sup>108</sup> It is Claimant’s submission that Respondent failed to provide national treatment to Claimant and its investment, since it treated domestic shareholders more favourably than Claimant.

89. The provision of Art. 4 of the Calpurnia-Gaul BIT goes in line with the commonly used national treatment formulation. Claimant urges the Tribunal to note two characteristics of this provision. First of all, it is a national treatment provision with “no factual comparison”, since there is no “in like circumstances” clause. This approach offers the widest scope of comparison as, in principle, any matter that is relevant for determining whether the foreign investor is being given national treatment can be considered.<sup>109</sup> Secondly, it is a national treatment provision that offers “no less favourable” treatment. This formulation offers treatment as favourable as that received by national investors of the host country or better.<sup>110</sup> Therefore, in order for a breach of national treatment obligation to exist, it is necessary to establish that 1. Claimant has been discriminated against by treatment that was accorded to domestic investors, either *de jure* or *de facto* and that 2. the discrimination is based on its nationality.<sup>111</sup> Claimant submits that both criteria are met in the present case.
90. It is generally accepted in both theory and case law that the Tribunal should take into consideration the practical effect of governmental measures when deciding whether discrimination exists. If these measures effectively create disproportionate benefits for nationals over non-nationals, discrimination exists.<sup>112</sup> In the present case Respondent has introduced several measures that undoubtedly resulted in discrimination of Claimant.
91. Firstly, the payment of dividends to Claimant was rejected for the sole reason of it being a foreign shareholder, national of Gaul. Namely, VanCal declared cash dividends in 2004, 2005,

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<sup>108</sup> Kinnaer, Bjorklung, Hannaford, p.1102-10, 1102-35; Bishop, Crawford, Reismann, p.1150; *Pope & Talbot v. Canada*, para.3.

<sup>109</sup> UNCTAD National Treatment, p.34.

<sup>110</sup> *Ibid*, p.37.

<sup>111</sup> Bishop, Crawford, Reismann, p. 1150; Kinnaer, Bjorklung, Hannaford, p. 1102-10; *Feldman v. Mexico*, para. 166.

<sup>112</sup> Bishop, Crawford, Reismann, p. 1141; Kinnaer, Bjorklung, Hannaford, p. 1102-35; *S.D. Myers v. Canada*, para. 252.

2006 and 2007 and paid those dividends only to Calpurnian stockholders. It refused to pay them to Claimant.<sup>113</sup> Such decision was made by the VanCal's board of directors on 10 March 2005, because the payment of profits to foreign shareholders had been suspended for the time being, due to the existing dispute between the governments of Calpurnia and Gaul.<sup>114</sup> Consequently, on 27 May 2005, Mr. Korchnoi, in its e-mail as an answer to Claimant's request for transfer of payable dividends, stated that "VanCal cannot pay any sums of money for any reason to foreign shareholders".<sup>115</sup> Therefore, it is obvious that Claimant was treated discriminatory in comparison with other domestic shareholders. Consequently, this measure clearly favoured Calpurnian nationals over Claimant. However, Claimant might allege that it paid these dividends by crediting them on VanCal's books to Claimant's account.<sup>116</sup> Claimant submits that this act cannot constitute payment since neither Calpurnian law nor VanCal's Articles of Association authorizes this.<sup>117</sup>

92. Secondly, domestic shareholders, which had placed their shares in VanCal in the custody of SFCDC were not subject to withholding tax.<sup>118</sup> Admittedly this option was enabled by the Calpurnia Harmonised Revenue Code, which had existed even before the investment in VanCal was made.<sup>119</sup> However, the date of enactment of this Code is irrelevant since it clearly favoured domestic shareholders over foreign ones. It was effectively possible only for domestic shareholders to enjoy the tax benefit. Although formally Claimant could have done the same, exercising such a right would be against its interests of a foreign investor. Had Claimant put its shares in the custody of SFCDC, it would not have been able any more to vote these shares. This would effectively mean a waiver of its shareholder's rights to manage, maintain, use, enjoy and dispose with its investment. Pursuing such an option would run counter to the sole purpose of

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<sup>113</sup> Request, para.14.

<sup>114</sup> Evidence/Calendar, p.6.

<sup>115</sup> Ibid.

<sup>116</sup> Evidence/Calendar, p.8.

<sup>117</sup> Ibid; 2<sup>nd</sup> Clarification, q.13.

<sup>118</sup> 1<sup>st</sup> Clarifications, q.13.

<sup>119</sup> 2<sup>nd</sup> Clarification, q. 19.

investing. For that reason, Claimant was effectively precluded from enjoying this tax benefit, and for that reason put into an unequal position in relation to domestic shareholders.

93. Thirdly, another aspect of this Code enabled SFCDC to vote these shares that individual shareholders had put in its custody. Even though individual shareholders of VanCal were not obliged to place the shares in custody of SFCDC, they were highly encouraged by this tax benefit to do so. This measure effectively led to SFCDC having more votes than it would have had proportionately to the number of directly owned stocks. In this manner, besides 30% of stocks it directly owned, SFCDC held on deposit and voted a further 22% of VanCal stocks, registered in the names of several hundred individual shareholders. It is Claimant's submission that this led to discrimination against Claimant since it enabled SFCDC to exercise bigger, deciding influence on VanCal's affairs, even though both companies owned the same number of shares (30%) in VanCal. Not only that SFCDC gained overwhelming majority in VanCal's bodies this way, but it also abused this majority to adopt arbitrary measures impairing Claimant's investment, as shown in paras. 97-101 of this Memorandum.

94. None of these measures would have had discriminatory effect on Claimant, had Claimant not been of foreign nationality. Even statements of SFCDC's representatives clearly support this fact. For example, on the board of directors meeting of 10 March 2005 Mr. Poe stated that by dividing the minimum dividend among the shareholders "[VanCal] can hold the amount paid to the foreigners to the minimum."<sup>120</sup> On a previous meeting of 15 November 2004 Dr. Swift walked out of a meeting with Claimant's representatives declaring that he would not stay at a meeting with Gauloise spies.<sup>121</sup> On the next meeting he additionally observed that

"due to existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign shareholders has been suspended for the time being".<sup>122</sup>

95. According to the case law there is even no need to demonstrate that the reason for discrimination was Claimant's nationality if in fact Claimant was being treated less favorably than domestic investors.<sup>123</sup> The tribunals in *Feldman v. Mexico* and *Pope & Talbot v. Government of Canada*

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<sup>120</sup> Evidence/Calendar, p. 6.

<sup>121</sup> Ibid, p. 5.

<sup>122</sup> Evidence/Calendar, p.6.

<sup>123</sup> *Feldman v. Mexico*, para.182.

cases were prepared to assume that the differential treatment was a result of the claimant's nationality and that this presumptively represented a violation of national treatment obligation.<sup>124</sup>

96. For all these reasons Claimant respectfully asks the Tribunal to find that by undertaking measures that clearly favoured domestic investors Respondent breached its obligation under Art. 4 of Calpurnia-Gaul BIT.

#### **4. Respondent undertook unreasonable, arbitrary and discriminatory measures impairing Claimant's investment**

97. Some of the most important restrictions imposed by the international law to the ability of a state to take actions towards foreign investors and their investments are, *inter alia*, principle of non-discrimination and non-arbitrariness.<sup>125</sup> Article 2(3) of the Calpurnia-Gaul BIT clearly follows this approach and prohibits Respondent from impairing Claimant's investment by unreasonable, arbitrary or discriminatory measures. It is Claimant's submission that Respondent has obviously breached this obligation. This assertion is supported by the numerous facts of the case.

98. Firstly, as mentioned in para. 91 of the Memorandum, Claimant was the only shareholder of VanCal to whom payment of dividends was refused. Claimant would like to turn the Tribunal's attention to the fact that this was done in violation of the Calpurnian Constitution, according to which there can be no differences in rights of shareholders depending on nationality or other peculiarities.<sup>126</sup> This discrimination was unreasonable since it was solely based on nationality of Claimant.<sup>127</sup> These measures were also arbitrary, since the motives, purposes and methods of Respondent's actions were contrary to international law and could not be justified on grounds of genuine public interest.<sup>128</sup> Consequently, as a result of these measures, Claimant was impaired in particular in the use and enjoyment of its investment.

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<sup>124</sup> *Feldman v. Mexico*, paras.181,184; *Pope & Talbot v. Canada*, paras.78,79.

<sup>125</sup> Bishop, Crawford, Reisman, , Ch.8. II and III.

<sup>126</sup> 1<sup>st</sup> Clarifications, q.29.

<sup>127</sup> Bishop, Crawford, Reisman, p.950.

<sup>128</sup> Bishop, Crawford, Reisman, pp.951-952.

99. Secondly, Calpurnian authorities refused Ms. Pescara's application for renewal of a "three-year business visa".<sup>129</sup> The reason that was stated was that she was no longer managing director of VanCal and that it would suffice her to adequately perform her reduced functions of a member of VanCal's board of directors through occasional visits under visa waiver program for tourists.<sup>130</sup> However, Claimant would like to bring the Tribunal's attention to the fact that Ms. Pescara's application was refused in September 2004. In that point of time, Ms. Pescara was still performing her duty as a managing director of VanCal. Her resignation from this position did not occur before 15 November 2004.<sup>131</sup> Consequently, there should have been no reason for refusing Ms. Pescara's application. Moreover, by being refused the extension of the business visa, Ms. Pescara was effectively prohibited from performing her functions of a managing director. Tourist visa was more than inadequate since her continuous presence in Calpurnia was necessary. According to Calpurnian regulations short term business visa under the visa waiver program are allowed only for consultation with business associates, travel for a scientific, educational, professional or business convention, or conference on specific dates, settling of an estate, or negotiation of a contract...<sup>132</sup> It is obvious that long term obligations of a managing director of a Calpurnian company cannot fit this narrow frame. In conclusion, it is Claimant's submission that Calpurnian authorities unreasonably, discriminatively and arbitrarily prevented Ms. Pescara in exercising her rights and obligations as a managing director and thus impaired Claimant in managing, maintaining and using its investment.
100. Thirdly, Claimant was deprived of the representation in the board of directors, to which it was entitled under the cumulative voting provision of the Calpurnian Commercial Code.<sup>133</sup> Namely, at the meeting held on 16 November 2005, representatives of SFCDC ousted Ms. Pescara, Claimant's representative, from the board of directors.<sup>134</sup> On the other hand, they improperly rejected two proxies held by Mr. Rindler for the shareholders' meeting and therefore effectively

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<sup>129</sup> Request, para.18.

<sup>130</sup> Reply, para.18.

<sup>131</sup> Evidence/Calendar, p.7.

<sup>132</sup> 1<sup>st</sup> Clarifications, q.6.

<sup>133</sup> Request, para. 15.

<sup>134</sup> Ibid

prevented Claimant from electing replacement to Ms. Pescara. The pretext for rejecting Mr. Rindler's proxies was that they were originally issued for a meeting scheduled for 11 October 2005 and could not be used for subsequent meetings.<sup>135</sup> However, according to Calpurnian law a proxy should precisely state the full name of the shareholder, the proxy-holder and the event for which it is issued.<sup>136</sup> The proxies held by Mr. Rindler had all the necessary requirements. They were issued for the shareholders' meeting, the event that was supposed to be held on 11 October, which was postponed to 16 November. Since that meeting was nothing but the postponed session of 11 October, it was unreasonable to require Mr. Rindler to present new proxies. Furthermore, on 1 December 2005, Mr. Korchnoi ceased sending accounts, financial statements and other information to Claimant and stopped translating such material into Gauloise, as had been the practice.<sup>137</sup> By acting so, Respondent clearly unreasonably and arbitrarily prevented Claimant from managing, using and enjoying its investment.

101. Consequently, bearing in mind all the above mentioned facts, Claimant would like to ask the Tribunal to find that Respondent has impaired Claimant's investment by unreasonable, arbitrary and discriminatory measures and therefore breached Art. 2(3) of the Calpurnia-Gaul BIT.

**5. Respondent failed to give sympathetic consideration regarding the authorizations for engaging executives, managers, specialists and technical personnel of the Claimant's choice**

102. Article 2(5) of the Calpurnia-Gaul BIT states that

“each Contracting Party shall [...] give a sympathetic consideration to applications for necessary permits in connection with the investments in its territory, including authorizations for engaging executives, managers, specialists and technical personnel of investor's choice”.

It is Claimant's submission that Respondent breached this obligation by denying visa to Ms. Pescara.

103. Ms. Pescara, a person whom Claimant selected to be a managing director and appointed for a member of the board of directors of VanCal, was denied a business visa. As shown in para 99 of

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<sup>135</sup> Reply, para.13.

<sup>136</sup> 2<sup>nd</sup> Clarification, q.20.

<sup>137</sup> Request, para.16

the Memorandum, it is obvious that this decision was unreasonable, discriminatory and arbitrary and effectively prohibited Ms. Pescara to perform her duty of a managing director. The explanation that Ms. Pescara did not require visa since she was no longer a managing director was without merit. This clearly shows that Respondent did not even give a sympathetic consideration to the application made by Ms. Pescara.

**6. Respondent failed to promptly publish, or otherwise make publicly available all laws, regulations, procedures, administrative rulings and judicial decisions of general application which have affected Claimant's investment**

104. One important feature of a favourable investment climate is the transparency of local laws and administrative practices.<sup>138</sup> This view is clearly followed by Art. 3 of the Calpurnia-Gaul BIT, which obliges Respondent to ensure that its

“laws, regulations, procedures, administrative rulings and judicial decisions of general application ... which may affect the [Claimant's] investment are promptly published, or otherwise made publicly available”.

It is Claimant's submission that Respondent has clearly breached this obligation of transparency.

105. According to the existing case law, it is important

“that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments should be capable of being readily known to all affected investors of another Party... and there should be no room for doubt or uncertainty on such matters”.<sup>139</sup>

It is obvious that Respondent failed to fulfill this duty.

Namely, VanCal refused to pay dividends to Claimant, since the payment of profits to the foreign shareholders had been suspended due to the existing dispute between the governments of Calpurnia and Gaul.<sup>140</sup> Consequently, as explained by Mr. Korchnoi, VanCal was not able to pay any sums of money for any reason to foreign shareholders.<sup>141</sup> Neither VanCal nor Calpurnian authorities have ever communicated directly to Claimant the decision of the board of directors or

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<sup>138</sup> UNCTAD Transparency, p.24,25,76; Bishop, Crawford, Reismann, p.1167

<sup>139</sup> *Metalclad v. Mexico*, para.76.

<sup>140</sup> Evidence/Calendar, p.7

<sup>141</sup> Ibid

the legal basis on which such a decision was made,<sup>142</sup> nor has it ever been officially published. It is logical to assume that such a decision was reached on the basis of an act of Respondent, since it would have been highly unlikely that the decision could be made without being ordained by the state. In any event, since it could be inferred from the wording of art. 3 of Calpurnia-Gaul BIT, that this provision contains reference to “procedures”, it therefore represents a kind of provision that entails an obligation of the host state to make public any practices that are not clearly expressly addressed in the laws, regulations and administrative procedures of the State.<sup>143</sup> It is obvious that the practice of excluding Gauloise nationals from the benefits of their investments existed in Calpurnia, which was not made public by the Respondent.

106. Therefore, having in mind that the payment of dividends to Claimant was rejected on the basis of an act of the government of Calpurnia or on the basis of an established practice in that country, which were of general application since they were meant to affect all Gauloise investors, including Claimant, and having in mind that they were never communicated to Claimant, it is Claimant submission that Respondent breached its obligation of transparency.
107. Even if the Tribunal finds that no act of general application was ever adopted by Respondent and that no established practice of discriminating Gauloise investors existed in Calpurnia, it is Claimant’s submission that the act of rejecting payment of dividends to Claimant was in any event unreasonable, arbitrary and discriminatory and, as such, contrary to Art. 2(3) of the Calpurnia-Gaul BIT.

#### **7. Respondent failed to provide Claimant free transfer of payments into and out of Calpurnia in connection with its investment**

108. According to Art. 8 of Calpurnia-Gaul BIT, it was Respondent’s obligation to ensure free transfer, into and out of its territory, of payments in connection with the Claimant’s investment. This obligation, as widely accepted, obligated Respondent, as a host country, to permit the payment, conversion and repatriation of amounts relating to the investment.<sup>144</sup> The amounts that

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<sup>142</sup> Ibid

<sup>143</sup> UNCTAD Transparency, p.24,25.

<sup>144</sup> UNCTAD Transfer of Funds, p.1.

are object of this obligation are *inter alia* income and returns arising from the investment.<sup>145</sup> Since any governmental action, whether of a formal or informal nature, that impedes the making of international payments and transfers constitutes a violation of this obligation,<sup>146</sup> it is Claimant's submission that Respondent in the present case clearly breached its obligation under Art.8 of Calpurnia-Gaul BIT.

109. Firstly, in the present case, Parties agree that dividends were declared for 2004, 2005, 2006 and 2007. However, Claimant never received payment of these dividends.<sup>147</sup> In addition, Claimant did not receive as of 2004 payments for the services it provided to VanCal under technical assistance and trademark license agreements.<sup>148</sup> It is clear from the facts of the case that Claimant requested VanCal to have its dividends transferred to a separate bank account.<sup>149</sup> This request was replied by Mr. Korchnoi who communicated the decision of the VanCal's Board of Directors to stop paying any sums of money for any reason to foreign investors.<sup>150</sup> As a result, Claimant was effectively left without any return from its foreign investment for 4 consequent years.
110. For all these reasons, it is Claimant's submission that Respondent has failed to fulfill its free transfer of capital obligation by withholding payment of dividends and sums it owed under the technical assistance and trademark licensing agreements.

### **III. RESPONDENT HAS EFFECTIVELY EXPROPRIATED CLAIMANT'S INVESTMENT IN CALPURNIA**

111. According to Art. 6 of Calpurnia-Gaul BIT and existing international law standards, property of an investor cannot be subject to either direct or indirect expropriation, except in a very limited number of circumstances. Contrary to Respondent's statement that a finding of expropriation

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<sup>145</sup>Ibid, p.12; Art. 8 Calpurnia-Gaul BIT.

<sup>146</sup> UNCTAD Transfer of Funds, p.14.

<sup>147</sup> Request, para. 14.

<sup>148</sup> Ibid, para. 19.

<sup>149</sup> Evidence/Calendar, p.7.

<sup>150</sup> Ibid

would require a specific decree or legislative act,<sup>151</sup> Claimant submits that all acts which lead to the loss of management, use, control or significant depreciation of the value of assets of a foreign investor are to be equalized with direct takings, i.e. takings which are based on administrative or legislative acts.

112. Under customary international law, every act which erodes rights associated with ownership is regarded as an act of expropriation. All measures which have similar effects to expropriation are regarded as expropriation itself.<sup>152</sup> The same view is taken in Art. 6 of the Calpurnia-Gaul BIT, which says that any measure having the effect, either directly or indirectly, equivalent to expropriation is equated to expropriation. Therefore, it is Claimant submission that Respondent, primarily through acts and omissions of SFCDC, has effectively expropriated Claimant's investment.
113. In the present case, VanCal, acting under control of SFCDC, has refused to pay licenses fees, sums under technical assistance agreement and dividends to Claimant for the past four years, has obstructed Claimant in participation in the executive organs of VanCal by unjustifiably rejecting to prolong visa to Ms. Pescara, Claimant's appointed managing director and members of board of directors (para. 99 of the Memorandum) and by unjustified denial of Mr. Rindler's proxies for the shareholders' meeting of 16 November 2005 (para. 100 of the Memorandum). Furthermore, the atmosphere of lynch, which was created by the Calpurnian organs, precluded Claimant's employees from staying safely in Calpurnia and preserving Claimant's legitimate rights (part 83-87 of the Memorandum). Having in mind the role of Ms. Pescara and Mr. Korchnoi in VanCal, preventing them from doing their job amounted to a clear act of expropriation of Claimant's investment, as shown by case law.<sup>153</sup> Finally, by encouraging VanCal's shareholders to place their voting rights in the hands of SFCDC, and in that way severely eroding Claimants voting position (paras. 92-93 of the Memorandum), Respondent caused Claimant to lose control over its investment.<sup>154</sup> All these acts represent a clear case of expropriation.

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<sup>151</sup> Reply, para. 10.

<sup>152</sup> UNCTAD Taking of Property, p.20, World Bank Guidelines, IV(1); *Starret Housing Corp vs Iran*, p.233.

<sup>153</sup> *Biloune v. Ghana*, p.209.

<sup>154</sup> Schreuer5,p.5.

114. This conclusion can also be reached if one applies the universally undisputed effects test, which is normally used in determining whether expropriation occurred or not.<sup>155</sup> According to this test, expropriation occurred if measures of the host state caused effects which are the same as direct expropriation. Since the investor was effectively deprived of his managerial control rights and his ownership benefits, it is clear that the application of this test leads to the conclusion that expropriation has occurred.
115. Should the Tribunal find that the effects test is to be applied in conjunction with other factors such as the purpose of the measures, intention of the host State and, the legitimate expectations of the investor, than the same conclusion would be reached. In the present case the sole intention of the host State and the purpose of expropriation was to deprive the investor, as a national of Gaul, of its ownership rights, in violation of the Calpurnia-Gaul BIT and international law. Furthermore, it is clear, as stated above in paras. 73-75 of the Memorandum, that the legitimate expectations of the investor were betrayed by the host State.<sup>156</sup>
116. Respondent may allege that these acts do not represent a case of expropriation since the measures taken by VanCal were not permanent in nature, since dividends payable to Claimant were credited on Van Cal's books to Claimant's account and since Respondent showed intention to pay them eventually along with due service fees. However, Claimant submits that it is completely irrelevant if the measures adopted by VanCal were intended to have temporary or permanent effect. Case law clearly shows that it is only relevant that these measures actually occurred, regardless of their intended duration.<sup>157</sup> The fact the dividends have allegedly been credited on VanCal's books to Claimant's account does not make the compensation paid. Those dividends were not further transferable, since Claimant was not able to dispose them. It is clear from the e-mail that Mr. Korchnoi sent on 27 May to Claimant, stating that "VanCal cannot pay any sums of money for any reason to foreign shareholders", that Claimant was deprived of its substantial ownership rights. In addition, from the content of the same e-mail, it is obvious that the intent to pay did not exist. On the contrary, Respondent consistently deprived Claimant of its right by precluding it to manage VanCal's business and by clearly stating that no dividends

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<sup>155</sup> Kinnaer, Bjorklung, Hannaford, p.1110-14.

<sup>156</sup> *Metalclad vs Mexico*, para.29.

<sup>157</sup> *S.D. Myers v. Canada*, para.283.

would be paid to foreigners. Furthermore, Respondent himself regards those acts as takings equivalent to expropriation. In para. 11 of the Abstract from Respondent's Reply to Request for Arbitration, Respondent seems not to dispute that those acts represent expropriation, but tries to exculpate itself by arguing that it was not responsible for acts of SFCDC.

117. Admittedly, an expropriation can be regarded as lawful if it is done for a public interest, on a non-discriminatory basis, under due process of law and with effective compensation.<sup>158</sup> However, none of these conditions have been met in the present case.

**a) Public interest for the expropriation of Claimant's investment did not exist**

118. Expropriation can be executed only if the public purpose exists. Examples include public health or environmental concerns, or legitimate intent.<sup>159</sup> It is Claimant's submission that in the present case no evidence of public interest for expropriation existed. On the contrary, the expropriation was the result of bad relations between Calpurnia and Gaul after the Conservative Conscience of Calpurnia had come into power. It is an undoubtedly adopted position in international law that acts of reprisal are not legitimate and legal basis for expropriation, and certainly could not be regarded as a public purpose.<sup>160</sup>

**b) The expropriation of Claimant's investment was discriminatory**

119. For an expropriation to be legal, no singling out of a particular person or group on the basis of national or ethnic origin may occur.<sup>161</sup> The expropriation of Claimant's property clearly occurred on the basis of discriminatory criteria. The sole reason for expropriation was based on national origin of Claimant. This is obvious from various statements representatives of SFCDC made, as mentioned above in para. 94 of the Memorandum.

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<sup>158</sup> *Methanex v. US*, IV, Ch D, para.7; UNCTAD Taking of Property, p.12-13.

<sup>159</sup> OECD Indirect Expropriation, p.16.

<sup>160</sup> *BP v. Libya*, p.150; UNCTAD Taking of Property, p.25.

<sup>161</sup> Kinnaer, Bjorklung, Hannaford, p.1110-32.

**c) Claimant was not awarded prompt, adequate and effective compensation for expropriation of its investment**

120. Payment of compensation is required regardless of the fact whether an expropriation is lawful or unlawful. In this case, not only that expropriation was clearly unlawful, but it was also done without any compensation or even offer to compensate losses that Claimant had sustained. Furthermore, on 27 May 2005, Mr. Korchnoi, as previously stated in para 91. of the Memorandum, sent an e-mail to Claimant stating that no compensation or payment should be paid to Claimant.

**d) The expropriation of Claimant's investment was not done under due process of law**

121. It is universally undisputed that in the case of expropriation, an investor has to be granted right to challenge the legality of such an action before the courts of the host state.<sup>162</sup> In the present case, Claimant was obviously deprived of this legitimate right. Calpurnia has never admitted that it had expropriated Claimant's property. Having in mind that the present case deals with an indirect expropriation and that a formal act or document ordering expropriation of Claimant investment was never issued, no act or document could have been examined before Calpurnian courts. Claimant could not initiate these proceedings on its own because that would trigger the so-called "fork in the road" clause and deprive it of the right to pursue its claim before impartial international tribunals (see para. 53 of the Memorandum). However, even if any proceedings had been commenced before Calpurnian courts, it is arguable that they would have been fruitless. Citizens of Gaul were literally designated as state enemies, the state policy was aimed at creating strong animosity towards Gaul and its citizens and several other court proceedings have ended with rejecting legitimate and lawful requests in relation to Claimant's investment.
122. From all these circumstances, it is clear that Claimant was deprived of its right to challenge host state actions before its courts.

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<sup>162</sup> Paulsson, Douglas, p.148.

## REQUEST FOR RELIEF

In light of the above submissions, the Counsel for Claimant respectfully requests the Tribunal to find that:

- The Tribunal has jurisdiction to rule in the present case;
- The acts of SFCDC which had deprived Claimant of the use and benefit of its investment are to be attributed to the Respondent;
- Respondent should pay the declared dividends for 2005, 2006, 2007 and the fees under the license agreement and technical support agreement;
- Respondent should pay damages for other treaty breaches;
- Respondent should pay prompt, adequate and effective compensation for expropriation;
- Respondent should cover all costs of the arbitration, including all costs incurred by Claimant.

For Claimant, Vanguard International

Signed

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12 September 2008