

VANGUARD INTERNATIONAL

CLAIMANT,

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA

RESPONDENT.

(ICSID CASE NO. ARB/X/X)

MEMORANDUM FOR

CLAIMANT

CODE: FLEISCHHAUER

I.	DEFINITIONS AND ABBREVIATIONS	III
II.	TABLE OF AUTHORITIES	IV
III.	STATEMENT OF FACTS	1
A.	CLAIMANT’s Investment	1
i.	The VanCal Joint Venture	1
ii.	VanCal’s Share Capital	1
iii.	CLAIMANT’s Leading Role in VanCal	1
B.	New Public Policy	2
i.	Police searches	2
ii.	Pickets at Ms. Pescara’s Home.....	3
iii.	Regulatory Harassment.....	3
iv.	Hostility towards CLAIMANT	4
C.	The New Policy in Practice: VanCal’s Internal Affairs	4
D.	Notice of Dispute to Calpurnia	6
IV.	JURISDICTIONAL ISSUES	7
A.	The Tribunal Has Jurisdiction	7
i.	Jurisdictional Requirements Were Met	7
1.	CLAIMANT Has Standing under the ICSID Convention	7
2.	CLAIMANT Qualifies for Protection under the Calpurnia-Gaul BIT	10
ii.	CLAIMANT Complied with Calpurnia-Gaul BIT Art.11	11
1.	CLAIMANT Notified Calpurnia of Its Intent to Begin Amicable Negotiations	11
2.	In the Alternative, Notice of Dispute Is Not a Jurisdictional Prerequisite	11
3.	As Calpurnia Refused to Negotiate, Amicable Settlement Was Not Possible.	12
iii.	Alternatively, CLAIMANT Complied with the Negotiations Period Set Forth in the Calpurnia-Flatland BIT.....	12
1.	The Calpurnia-Flatland BIT Provisions on Amicable Settlement Are More Favorable To Investor	12
2.	The MFN Provisions in Calpurnia-Gaul BIT Allow CLAIMANT to Invoke the Most Favorable Jurisdictional Treatment	13
3.	The Calpurnia-Flatland BIT Dispute-Settlement Requirements Are Met	18
iv.	In the alternative, CLAIMANT Is Entitled to Submit the Dispute to ICSID Directly.	18
v.	CLAIMANT Did Not Trigger The Fork-In-The-Road Provision.....	19
B.	Conclusion	20
V.	MERITS OF THE CASE	21
A.	Calpurnian Organs’ Actions and Omissions are Attributable to RESPONDENT	21
i.	SFCDC’s Acts Are Attributable to Calpurnia.....	21
ii.	In the Alternative, SFCDC’s Conduct is Attributable to Calpurnia Due to the Latter’s Direction or Control	23
iii.	Calpurnian Organs Failure to Comply with International Duties	24
B.	Calpurnia Unlawfully Expropriated CLAIMANT’s Investment	25
i.	CLAIMANT’s Investment Is Protected against Unlawful Expropriation under Calpurnia-Gaul BIT	25
ii.	Calpurnia Subjected CLAIMANT’s Investments To Indirect Expropriation	26
1.	Calpurnia’s Actions and Omissions Constitute a Taking of Property	26
2.	Government Measures Amounting to Indirect Expropriation.....	31
3.	Calpurnia’s Taking of CLAIMANT’s Property Was More than “Ephemeral” and Constituted an Expropriation Without Compensation	35
iii.	Conclusion: Calpurnia Expropriated CLAIMANT’s Investment	36
C.	Calpurnia Unlawfully Prevented the Free Transfer of Payments owed to CLAIMANT	36
D.	Calpurnia-Gaul BIT Guarantees Fair and Equitable Treatment to Investors	37
i.	Calpurnian Investment Environment Changed	39
ii.	CLAIMANT’S Legitimate Expectations.....	39

iii.	Calpurnia Did Not Follow the Rule of Law and Failed to Protect CLAIMANT’s Due Process Rights	40
iv.	RESPONDENT Showed a Lack of Transparency Regarding the Rules Applicable to CLAIMANT’s Investment	41
v.	RESPONDENT Breached Calpurnia-Gaul BIT Art.2(3)	43
vi.	Discrimination.....	44
vii.	Conclusion	45
E.	Calpurnia Failed to Accord CLAIMANT Full and Constant Protection And Security ...	45
i.	Calpurnia-Gaul BIT Accords FPS to CLAIMANT	45
ii.	The Meaning of “Constant” Protection	46
iii.	Calpurnia’s Acts and Omissions Constituted a Breach of FPS.....	47
VI.	REQUEST FOR RELIEF	49

I. DEFINITIONS AND ABBREVIATIONS

<i>¶(¶)</i>	Paragraph(s)
<i>Arb.</i>	Arbitration
<i>BIT(s)</i>	Bilateral Investment Treaty(ies)
<i>Board</i>	VanCal's Board of Directors
<i>BYIL</i>	British Yearbook of International Law
<i>Calendar</i>	Calendar of Events as provided in the Final Problem
<i>Calpurnia</i>	Republic of Calpurnia
<i>Calpurnia–Flatland BIT</i>	Agreement between the Government of Calpurnia and the Government of Flatland on the Mutual Promotion and Protection of Investments
<i>Calpurnia-Gaul BIT</i>	Agreement between the Government of Calpurnia and the Government of Gaul on the Promotion and Protection of Investment
<i>CCC</i>	Conservative Conscience of Calpurnia
<i>CLAIMANT</i>	Vanguard International
<i>CLA-Abst.</i>	Abstract of CLAIMANT's Request for arbitration
<i>Clarifications-1</i>	FDI Moot First Clarifications, dated 05/12/2008
<i>Clarifications-2</i>	FDI Moot Second Clarifications, dated 09/01/2008
<i>CSD</i>	Calpurnia Security Directorate
<i>Expat Personnel</i>	Vanguard's expatriate personnel in Calpurnia
<i>FET</i>	Fair and Equitable Treatment Standard
<i>Flatland</i>	State of Flatland
<i>FPS</i>	Full and Constant Protection and Security Standard
<i>Gaul</i>	Federated States of Gaul
<i>i.e.</i>	Id est (that is)
<i>ICJ</i>	International Court of Justice
<i>ICSID</i>	International Center for Settlement Investment Disputes
<i>ICTFY</i>	International Criminal Tribunal for the Former Yugoslavia
<i>ILC</i>	International Law Commission
<i>Iran-US Tribunal</i>	Iran-United States Claims Tribunal
<i>Jurisdiction</i>	Decision on Jurisdiction
<i>MFN(C)</i>	Most Favored Nation Treatment Standard (Clause)
<i>NAFTA</i>	North American Free Trade Agreement
<i>No.</i>	Number

<i>OECD</i>	Organization for Economic Co-Operation and Development
<i>p(p)</i>	Page(s)
<i>PCIJ</i>	Permanent Court of International Justice
<i>RESP-Abst.</i>	Abstract of RESPONDENT's Reply to Request for arbitration
<i>SFCDC</i>	State Fund for Commerce and Development in Calpurnia
<i>UK</i>	United Kingdom of Great Britain and Northern Ireland
<i>UN</i>	United Nations
<i>UNCITRAL</i>	United Nations Commission on International Trade Law
<i>UNCTAD</i>	United Nations Conference on Trade and Development
<i>UNRIAA</i>	United Nations Reports on International Arbitral Awards
<i>US</i>	United States of America

II. TABLE OF AUTHORITIES

STATUTES AND TREATIES

<i>Germany-Argentina BIT</i>	Agreement between the Federal Republic of Germany and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investments.
<i>UK-Argentina BIT</i>	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments.
<i>Vienna Convention</i>	Vienna Convention on the Law of Treaties, 1969.

CASE LAW

<i>AAPL</i>	Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No.ARB/87/3, Award, 1990.
<i>African Holding</i>	African Holding Company of America & S.A.R.L. v. Congo, ICSID Case No.ARB/05/21, Award, 2008.
<i>Ambatielos</i>	Award of the Commission of Arbitration established for the

<i>(Commission)</i>	Ambatielos claim (Greece v. UK), 1956.
<i>Ambatielos (ICJ)</i>	Ambatielos Case (Greece v. U.K.), ICJ, Merits, 1953.
<i>American Bell</i>	American Bell International Inc. v. Iran, Iran-US Tribunal, Award No.93-2-3, 1983.
<i>Amoco</i>	Amoco International Finance Corporation v. Iran, Iran-US Tribunal, Award No.310-56-3, 1987.
<i>AMT</i>	American Manufacturing and Trading, Inc. v. Zaire, ICSID Case No.ARB/93/1, Award, 1997.
<i>Azurix jurisdiction</i>	Azurix v. Argentina, ICSID Case No.ARB/01/12, Jurisdiction, 2003.
<i>Azurix</i>	Azurix v. Argentina, ICSID Case No.ARB/01/12, Award, 2006.
<i>Barcelona Traction</i>	Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ, Award, 1970.
<i>Bayindir</i>	Bayindir Insaat Turizm Ticaret Ve Sanaya A.S. v. Pakistan, ICSID Case No.ARB/03/29, Jurisdiction, 2005.
<i>Benvenuti & Bonfant</i>	Benvenuti & Bonfant srl v. Congo, ICSID Case No.ARB/77/2, Award, 1980.
<i>Biloune</i>	Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, UNCITRAL, Jurisdiction and Liability, 1989.
<i>Biwater</i>	Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No.ARB/05/22, Award, 2008.
<i>Camuzzi</i>	Camuzzi International S.A. v. Argentina, ICSID Case No.ARB/03/7, Jurisdiction, 2005.
<i>CDC</i>	CDC Group plc v. Seychelles, ICSID Case No.ARB/02/14, Award, 2003.
<i>Certain German Interests</i>	Case concerning certain German interests in Polish Upper Silesia, (Germany v. Poland), PCIJ, Judgment, 1926, 1926.
<i>Chattin</i>	B. E. Chattin v. Mexico, 4 UNRIAA 282 , 1927
<i>Chorzów Factory</i>	Case Concerning the Factory at Chorzów (Germany v. Poland), Judgment on the Merits, PCIJ, Judgment, 1928.
<i>CME</i>	CME Czech Republic BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, 2001.
<i>CMS</i>	CMS Gas Transmission Company v. Argentina, ICSID Case No.ARB/01/8, Jurisdiction, 2003.
<i>Continental</i>	Continental Casualty Company v. Argentina, ICSID Case No.ARB/03/9, Jurisdiction, 2006.

<i>CSOB</i>	Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. Slovak Republic, ICSID Case No.ARB/97/4, Jurisdiction, 1999.
<i>Currie</i>	Currie Case, 14 UNRIAA 21, 1954.
<i>Difference Relating to Immunity</i>	Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 ICJ 62.
<i>Dispute concerning the interpretation of article 79</i>	Dispute concerning the interpretation of article 79 of the Treaty of Peace, 13 UNRIAA 389, 1955.
<i>Kodak</i>	Eastman Kodak Company v. Iran, Iran-US Tribunal, Award No.310-56-3, 1987.
<i>Enron</i>	Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case No.ARB/01/3, Jurisdiction, 2004.
<i>Ethyl</i>	Ethyl Corporation v. Canada, UNCITRAL, Jurisdiction, 1998.
<i>Eureko</i>	Eureko B.V. v. Poland, Ad Hoc Proceeding, Partial Award on Liability, 2005.
<i>Fedax</i>	Fedax N. V. v. Venezuela, ICSID Case No.ARB/96/3, Award, 1998.
<i>Foremost</i>	Foremost Tehran, Inc., others v. Iran, Iran-US Tribunal, Award No.220-37/231-1, 1986.
<i>Gas Natural</i>	Gas Natural SDG, S.A. v. Argentina, ICSID Case No.ARB/03/10, Jurisdiction, 2005.
<i>Generation Ukraine</i>	Generation Ukraine, Inc. v. Ukraine, ICSID Case No.ARB/00/9, Award, 2003.
<i>Genin</i>	Alex Genin et.al. v. Estonia, ICSID Case No.ARB/99/2, Award, 2001.
<i>German Settlers</i>	German Settlers in Poland, Adv.Op., PCIJ, Ser.B, No.6., 1923.
<i>Hyatt</i>	Hyatt International Corporation v. Iran, Iran-US Tribunal, Award No.54-134-1, 1985.
<i>Impregilo</i>	Impregilo S.p.A. v. Pakistan, ICSID Case No.ARB/03/3, Jurisdiction, 2005.
<i>International Thunderbird</i>	International Thunderbird Gaming Corporation v. Mexico, Award, 2006.
<i>Jan de Nul</i>	Jan de Nul N.V. and Dredging International N.V. v. Egypt, ICSID Case No.ARB/04/13, Jurisdiction, 2006.
<i>Lanco</i>	Lanco International Inc. v. Argentina, ICSID Case No.ARB/97/6, Jurisdiction, 1998.
<i>Lauder</i>	Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award, 2001.
<i>L.E.S.I.</i>	Consortium Groupement L.E.S.I.-DIPENTA v. Algeria, ICSID Case No.ARB/03/08, Award, 2004.
<i>Link-Trading</i>	Link-Trading Joint Stock Company v. Department for Customs

	Control of Moldova, UNCITRAL, Jurisdiction, 2001.
<i>Lotus</i>	Lotus case (France v. Turkey), PCIJ, Judgment, 1927.
<i>Maffezini</i>	Emilio Agustín Maffezini v. Spain, ICSID Case No.ARB/97/7, Jurisdiction, 2000.
<i>M.C.I.</i>	M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador, ICSID Case No.ARB/03/6, Award, 2007.
<i>Middle East Cement</i>	Middle East Cement Shipping and Handling Co. S.A. v. Egypt, ICSID Case No.ARB/99/6, Award, 2002.
<i>Metalclad</i>	Metalclad Corp. v. Mexico, ICSID Case No.ARB/96/3, Award, 2000.
<i>Nicaragua</i>	Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgment, 1986.
<i>National Grid</i>	National Grid PLC v. Argentina, UNCITRAL, Jurisdiction, 2006.
<i>Norwegian Shipowners</i>	Norwegian Shipowners' Claims (Norway v. US), Award, 1 UNRIAA 307, 1922.
<i>Nycomb</i>	Nykomb Synergetics Technology Holding AB v. Latvia, Award, 2003.
<i>Olguin</i>	Eudoro Armando Olguin v. Paraguay, ICSID Case No. ARB/98/5, Jurisdiction, 2000.
<i>Otis</i>	Otis Elevator Company v. Iran, Iran-US tribunal, Award No.304-284-2, 1987.
<i>PanAmerican</i>	Pan American Energy LLC and BP Argentina Exploration Company v. Argentina, ICSID Case No.ARB/03/13, Decision on Preliminary Objections, 2006.
<i>Petrobart</i>	Petrobart v. Kyrgyz, Arbitration Institute of the Stockholm Chamber of Commerce, Arb. No.126/2003, Award, 2005.
<i>Phillips Petroleum</i>	Phillips Petroleum Company Iran v. Iran, Award No.425-39-2, 1989.
<i>Phosphates</i>	Phosphates in Morocco, PCIJ, Ser.A./B., No. 74, 06/14/38.
<i>Plama</i>	Plama Consortium Ltd. v. Bulgaria, ICSID Case No.ARB/03/24, Jurisdiction of 2005.
<i>Rudloff</i>	Rudloff Case (US v. Venezuela), Interlocutory Decision, 1903, 9 UNRIAA 244, 1959.
<i>Saipem</i>	Saipem S.P.A. v. Bangladesh, ICSID Case No. ARB/05/07, Jurisdiction, 2007.
<i>Salini v. Morocco</i>	Salini Consultori S.p.A. an Italstrade S.p.A. v. Morocco, ICSID Case No.ARB/00/4, Jurisdiction, 2001.
<i>Salini v. Jordan</i>	Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan, ICSID Case No. ARB/02/13, Jurisdiction, 2004.

<i>Salvador</i>	Salvador Commercial Company v. US, Award of Arbitrators, 1902. (at http://untreaty.un.org/cod/riaa/cases/vol_XV/467-479.pdf)
<i>Saluka</i>	Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award 2006
<i>Santa Elena</i>	Compañía del Desarrollo de Santa Elena, SA v Costa Rica, ICSID Case No.ARB/96/1, Award, 2000
<i>Schering</i>	Schering Corporation v. Iran, Iran-US Tribunal, Award No. 122-38-3, 1984.
<i>Sedelmayer</i>	Franz Sedelmayer v. Russia, ad hoc arbitration in Stockholm, Award, 1998.
<i>SGS v. Pakistan</i>	SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No.ARB/01/13, Jurisdiction, 2003.
<i>SGS v. Philippines</i>	SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6, Jurisdiction, 2004.
<i>Siemens</i>	Siemens A.G. v. Argentina, ICSID Case No.ARB/02/8, Jurisdiction, 2004.
<i>Starrett</i>	Starrett Housing Corporation v. Iran, Iran-US Tribunal, Interlocutory Award No.ITL32-24-1, 1983.
<i>Suez</i>	Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentina, ICSID Case No.ARB/03/17, Jurisdiction, 2006.
<i>Tadić</i>	Prosecutor v. Duško Tadić, ICTFY, Case IT-94-1-A, 1999.
<i>TECMED</i>	Técnicas Medioambientales TECMED v. Mexico, ICSID Case No.ARB(AF)/00/02, Award, 2003.
<i>Telsim</i>	Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan, ICSID Case No.ARB/05/16, Award, 2008.
<i>Tippetts</i>	Tippetts v. TAMS-AFFA, Iran-US Tribunal, Award No.141-7-2, 1984.
<i>Wena Award</i>	Wena Hotels Ltd. v. Egypt, ICSID Case No.ARB/98/4, Award, 2000.
<i>Wena Jurisdiction</i>	Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, Jurisdiction, 1999.

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III. STATEMENT OF FACTS

A. CLAIMANT's Investment

i. The VanCal Joint Venture

1. In 1997 CLAIMANT, together with SFCDC and several Calpurnian nationals, established a joint venture, VanCal, under the laws of Calpurnia to provide mobile communication services within the territory of Calpurnia under the "Vanguard International" trademark.¹
2. CLAIMANT holds a 31% interest in VanCal, in the form of a 30% interest in its own name, and an additional 1% registered in the name of Ms. Francesca Pescara, who holds it in trust for Vanguard.² CLAIMANT's participation in VanCal was of paramount importance to foster the mobile telecommunication industry in Calpurnia. By separate contracts, CLAIMANT provides technical assistance and trademark licensing, management skills and personnel to VanCal.³

ii. VanCal's Share Capital

3. Apart from Vanguard's 31% interest, VanCal's share capital is currently composed as follows:
 - SFCDC holds 30% directly. It also holds on deposit and votes a further 22% interest registered in the names of several hundred individuals. Therefore, SFCDC controls a 52% aggregate stake in VanCal.
 - The remaining 17% is held directly by other Calpurnians.

iii. CLAIMANT's Leading Role in VanCal

4. Between 1997 and 2003, Vanguard played a significant management role in VanCal,⁴ which started to wane in late 2003 due to a radical increase of State influence which became noticeable throughout 2004. Until November 16th, 2005, Vanguard's two representatives in

¹ CLA-Abst., ¶8.

² CLA-Abst., ¶9.

³ *Id.*

⁴ CLA-Abst., ¶11.

the Board⁵ were Ms. Pescara and Mr. Neil Shepherd,⁶ although, by February 17th, 2005 Mr. Rindler was appointed as their attorney-in-fact.⁷ Moreover, until November 2004, Vanguard appointed VanCal's Managing Director, an vested this position in Ms. Pescara.⁸

B. New Public Policy

5. The execution of the Calpurnia-Gaul BIT, together with the formerly favorable climate offered by Calpurnia to foreign investment, had encouraged Vanguard to invest in that country. However, as from December 2003 –subsequent to the overwhelming CCC's victory in the parliamentary elections–, Calpurnia's relations with capital-exporting countries began to deteriorate, leading to a mounting diplomatic situation with Gaul.⁹ Starting in late 2003, Calpurnia implemented a series of policies aimed at depriving CLAIMANT of the use and benefit of its investment, including unsubstantiated accusations of espionage against Gaul which generated a negative image and reaction towards Gaulois citizens and investments.¹⁰
6. One of the ways pressure was exercised against CLAIMANT's investment was through a persistent harassment towards its key representatives. This had many faces, including police searches, pickets, and regulatory harassment, which were politically motivated, and constituted, in the aggregated, a policy of harassment.

i. Police searches

7. On December 7th, 2003, June 3rd, 2004 and July 15th, 2004, Calpurnian police authorities conducted three unwarranted searches at the homes of Expat Personnel.¹¹
8. Lacking any valid justification, RESPONDENT alleged to have acted under *periculum in mora*.¹² The record shows that these allegations constituted but a mere excuse, as six months passed between the first and second searches. This, coupled with the fact that no charges were ever filed against Expat Personnel, clearly evidences that police actions were part of an orchestrated operation against Vanguard.¹³

⁵ Clarifications-2, No.1.

⁶ Calendar, 11/15/2004.

⁷ Calendar, 02/17/2005.

⁸ Calendar, 11/15/2004.

⁹ CLA-Abst., ¶12

¹⁰ Id.

¹¹ CLA-Abst., ¶17.

¹² Id.

¹³ Id.

9. On December 8th, 2003, June 4th and July 17th, 2004, respectively, the CSD issued three press releases containing allegations of espionage by Expat Personnel.¹⁴ Their inflammatory language naturally entailed a strong bias against Gaul nationals.

ii. Pickets at Ms. Pescara's Home

10. CSD's actions agitated public sentiment towards Vanguard and its key personnel,¹⁵ and caused the violent pickets on Ms. Pescara's home on January 1-2, March 15-17, June 5-7, July 17-19, and October 25-28, 2004, respectively.¹⁶ The CCC's Women's League's organization of these pickets was part of the Calpurnian widespread policy of harassment.¹⁷
11. RESPONDENT wrongly alleges that the pickets were conducted in a "*non-violent manner*."¹⁸ However, these so-called non-violent pickets were conducted during day and night,¹⁹ by picketers brandishing signs that read "*A WOMAN'S PLACE IS ON THE HOME-GO HOME!*," and "*SPY IN YOUR OWN BACKYARD!*,"²⁰ so close to Ms. Pescara's home that they were audible from inside.²¹
12. Furthermore, the picketers prevented vehicle access to and from the property,²² forcing anyone entering the premises to walk through the angry mob.
13. Even though the pickets implied a threat to Ms. Pescara's physical security,²³ and that she desperately called to report the situation, the police simply refused to assist her.²⁴

iii. Regulatory Harassment

14. In September 2004, the immigration authorities refused to renew Ms. Pescara's business visa²⁵ alleging that a tourist visa would be enough to enter Calpurnia and perform her reduced

¹⁴ Calendar, 12/08/2003, 06/04/2004 and 07/17/ 2004.

¹⁵ CLA-Abst., ¶17.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Clarifications-1, No.19.

²⁰ CLA-Abst., ¶17.

²¹ Clarifications-1, No.19.

²² Id.

²³ Id.

²⁴ CLA-Abst., ¶17.

²⁵ CLA-Abst., ¶18.

duties in VanCal.²⁶ However, at the time of the application, Ms. Pescara was still acting Managing Director of VanCal. No changes in the scope of her activities had taken place which justified a departure from the former immigration policies adopted consistently throughout CLAIMANT's investment.

15. Evidently, only through an orchestrated multi-agency campaign, could the immigration authorities be aware that Ms. Pescara would soon leave her Managing Director position in VanCal.
16. Under the immigration regulations of Calpurnia, tourist visas only permit short-term business visits,²⁷ and it is rather unclear whether a person in Ms. Pescara's position would, under a tourist visa, be allowed to perform the duties required of her in VanCal even after leaving her position as Managing Director without breaching applicable immigration regulations.²⁸

iv. Hostility towards CLAIMANT

17. The government-induced climate of hostility toward Gaulois nationals in Calpurnia forced Vanguard's Expat Personnel to leave Calpurnia at the end of 2003.²⁹ This situation severely hampered its ability to preserve the value of its investment as it interfered with CLAIMANT's control, management and enjoyment.

C. The New Policy in Practice: VanCal's Internal Affairs

18. Also, several measures taken or induced by Calpurnia within VanCal detrimentally interfered with CLAIMANT's investment.
19. Since October 2004,³⁰ RESPONDENT, abusing its majority stake within VanCal through the voting power vested in SFCDC, began to implement the new government's policy in VanCal, causing the company's organs to take certain decisions that ultimately deprived Vanguard from its investment.
20. Dr. Swift's appointment to the Board, alongside other members of the State Fund, was one of the measures induced by the new government's policy.³¹ As will be further discussed, certain

²⁶ CLA-Abst., ¶18 and RESP-Abst., ¶18.

²⁷ Clarifications-1, No.6.

²⁸ Id.

²⁹ CLA-Abst., ¶17. *See also*, Clarifications-2, No. 50-51.

³⁰ Calendar, 11/14/2004.

³¹ Id.

decisions and statements by Dr. Swift demonstrate that he was appointed by RESPONDENT to put the interest of Calpurnia before the interests of VanCal and its shareholders.

21. RESPONDENT also interfered with CLAIMANT's control over its investment by ousting Ms. Pescara from her position in the Board, preventing CLAIMANT from controlling managerial decisions.³²
22. During 2005, SFCDC made every effort to avoid making any of the payments VanCal owed to CLAIMANT. These efforts reached a climax when CLAIMANT was informed by Mr. Korchnoi on, May 27th, that VanCal would not pay any sums to foreign shareholders due to an alleged diplomatic dispute between Gaul and Calpurnia.³³
23. Shortly afterwards, Ms. Pescara filed a claim in Calpurnia seeking an order to have the dividends on her 1% stake in the company transferred to her bank account in Gaul.³⁴ The Court summarily dismissed her application under the unfounded argument that "*Ms. Pescara, as mere nominee, has no interest in the shareholding and therefore lacks standing to bring this action.*"³⁵ However, Ms. Pescara was the rightful owner of the 1% interest in VanCal, even if she held it in trust for a third-party beneficiary,³⁶ and the fact remains that the company never made payment of those dividends to its foreign shareholders, in clear violation of its applicable treaty obligations.
24. On November 2005, during a VanCal Shareholders' Meeting, CLAIMANT was prevented from exercising its voting rights by an unlawful refusal to accept the proxies held by one of its representatives.³⁷ Indeed, on October 5th, 2005, CLAIMANT issued proxies in favor of Mr. Rindler to exercise its rights in the Shareholders' Meeting scheduled for October 11th, 2005. These proxies were issued with all the formalities that had always been accepted in previous meetings.³⁸
25. The October 11th, 2005, Shareholders' Meeting was adjourned until November 26th, 2005.³⁹ The adjournment was used to introduce an issue in the agenda: the ousting of Ms. Pescara from the Board.⁴⁰ At the beginning of the meeting, the proxies held by Mr. Rindler were unlawfully rejected, on the basis that they had been issued for the October 11th, 2005,

³² Calendar, 11/16/2005.

³³ Calendar, 05/27/2005. *See also* Calendar 04/22/2007.

³⁴ Calendar, 06/14/2006.

³⁵ *Id.* *See also* Clarifications-2 No.4-5.

³⁶ Clarifications-2, No.4

³⁷ Calendar, 11/16/ 2005. *See also* CLA-Abst., ¶15; and, Clarifications-2, No.20.

³⁸ Calendar, 10/05/2005.

³⁹ Clarifications-1, No.8.

⁴⁰ Clarifications-2, No.36.

meeting.⁴¹ Calpurnian law only requires that the proxy should state the event for which it is issued,⁴² which had remained the same, as the meeting had only been adjourned for this new date.⁴³

26. The rejection of the proxies had been carefully planned by SFCDC to prevent CLAIMANT from voting, and therefore to reach the required majority to vote Ms. Pescara off the Board.⁴⁴
27. Moreover, since November 2005, in furtherance of the CCC's mandate, Dr. Swift instructed Mr. Korchnoi to cease sending any information regarding VanCal's business operations to CLAIMANT, as had been the consistent practice since 1997.⁴⁵
28. This decision implied that CLAIMANT could only access VanCal's information by inspecting it in VanCal's offices in Calpurnia,⁴⁶ and purported to prevent CLAIMANT from accessing information since, by that time, it had no representatives in Calpurnia as security concerns had caused its Expat Personnel to leave the country.
29. On September 2006, in an attempt to escape liability for its unlawful behavior, the Chairman of the Board wrote to CLAIMANT that the dividends had been "*credited on VanCal's books to Claimant's account.*"⁴⁷ It should be noted that neither VanCal's Articles of Association, nor Calpurnian Law authorizes the company to credit dividends to a shareholder's account on the company's books instead of actually paying them.⁴⁸
30. These measures destroyed Vanguard's investment. CLAIMANT, after concluding that the presence of its representatives at meetings was a "futility", decided to definitively withdraw them from the Board.⁴⁹

D. Notice of Dispute to Calpurnia

31. On February 5th, 2007 CLAIMANT formally notified Calpurnia of the existence of a dispute through a letter to Mr. Poe, a State official⁵⁰ and SFCDC's Chairman⁵¹ and requested Mr. Poe to convey the notice of dispute to his superiors within the Calpurnian government, including

⁴¹ RESP-Abst., ¶13.

⁴² Clarifications-2, No.20.

⁴³ Clarifications-1, No.8.

⁴⁴ Clarifications-1, No.3. *See also* Calendar, 11/16/2005.

⁴⁵ Calendar, 04/22/2007.

⁴⁶ *Id.*

⁴⁷ Calendar, 09/28/2006.

⁴⁸ *Id.* Clarifications-2, No.13.

⁴⁹ Calendar, 10/23/2006.

⁵⁰ Clarifications-2, No.18.

⁵¹ Clarifications-2, No.52(b).

any relevant government ministers.⁵² Mr. Poe's so reaction was to reply that there was nothing that they, as a public entity, could do.⁵³

32. On July 31st, 2007 Vanguard filed its request for arbitration with ICSID.⁵⁴

IV. JURISDICTIONAL ISSUES

A. The Tribunal Has Jurisdiction

33. CLAIMANT submits that the Tribunal has jurisdiction as: (i) all jurisdictional requirements under both the ICSID Convention and the Calpurnia-Gaul BIT have been met; (ii) CLAIMANT complied with Calpurnia-Gaul BIT Art.11; (iii) the MFNC in the Calpurnia-Gaul BIT permits the application of the negotiation period set forth in other BITs, including especially, the Calpurnia-Flatland BIT; (iv) CLAIMANT would in any event be entitled to resort to ICSID arbitration directly as Calpurnia's political context would make any amicable negotiations futile; and, lastly, (v) CLAIMANT did not trigger the fork-in-the-road provision in the Calpurnia-Gaul BIT.

i. Jurisdictional Requirements Were Met

34. ICSID jurisdiction is determined on the basis of two steps, namely, the ICSID and Calpurnia-Gaul BIT requirements, respectively.⁵⁵ CLAIMANT complied with both sets of requirements.

1. CLAIMANT Has Standing under the ICSID Convention

35. ICSID Convention Art.25(1) sets forth the jurisdictional requirements of ICSID arbitration.

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally

36. CLAIMANT's submissions meet all of the above-mentioned requirements.

⁵² Calendar, 02/05/2007.

⁵³ Calendar, 02/21/2007. *See also*, Clarifications-2, No.13.

⁵⁴ Calendar, 07/31/2007.

⁵⁵ Waibel, p.719.

1.1. There Is a Legal Dispute

37. In the words of the Executive Directors' Report, for a legal dispute to exist:

[It] must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.⁵⁶

38. In this connection, the *L.E.S.I* tribunal found that:

The wording must be understood in its broadest sense. It covers all questions relating to conclusions based on the claims of one party against the other by virtue of legal rules, whether they are based on a contract or in law.⁵⁷

39. As stated in a wide array of decisions,⁵⁸ a dispute of legal nature exists when an obligation under International Law is allegedly breached. The legal nature of the present dispute is based on Calpurnia's breaches of Calpurnia-Gaul BIT provisions.

1.2. The Dispute Arises Directly out of CLAIMANT's Investments

40. The link between the legal dispute and the investment is found in Calpurnia's breaches of Calpurnia-Gaul BIT that severely affected CLAIMANT's investment.

41. The tribunal in *Salini v. Morocco* held that the notion of "investment" implies: a substantial contribution, a certain duration over which the project is implemented, a sharing of the operational risks, and a contribution to the host State's development.⁵⁹ As these elements may be closely intertwined, they should be examined in their totality.⁶⁰

42. Even if not binding in nature,⁶¹ the so-called "Salini Test" was followed by many ICSID tribunals in construing the notion of "investment".⁶² In the instant case, applying the "Salini Test" leads to the conclusion that CLAIMANT made an investment in the terms of the ICSID Convention.

43. First, CLAIMANT substantially contributed in VanCal in terms of know-how, trademarks, personnel and in financial terms. Further, CLAIMANT has participated as a shareholder in

⁵⁶ Executive Directors' Report, ¶26.

⁵⁷ *L.E.S.I.*, ¶8.

⁵⁸ *Biwater*, ¶232; *Continental*, ¶67; *Suez*, ¶34-37; *Lanco*, ¶47; *Gas Natural*, ¶23; *Camuzzi*, ¶43; *Jan de Nul*, ¶74.

⁵⁹ *Salini v. Morocco*, ¶199.

⁶⁰ *L.E.S.I.*, ¶13.

⁶¹ *Biwater*, ¶312. *M.C.I.*, ¶165.

⁶² *Bayindir*, ¶130; *L.E.S.I.*, ¶13; *Saipem*, ¶99.

VanCal,⁶³ since its establishment and during the development of the mobile telecommunication industry in Calpurnia.

44. Second, regarding the duration of the project, CLAIMANT made its investment in 1997,⁶⁴ and played a major role in VanCal's management until 2004, when acts attributable to Calpurnia interfered with its projected long-term investment, depriving it of its value.⁶⁵
45. Third, CLAIMANT shared operational risks, not only as a shareholder but also as a trademark, technology and know-how provider. In fact, in light of RESPONDENT's conduct, each of these risks resulted in a loss to CLAIMANT.
46. Finally, CLAIMANT especially contributed to the economic development of Calpurnia. The tribunal in *L.E.S.I.* understood that often this condition is already included in the three classical conditions set out in the "Salini Test,"⁶⁶ but, even if considered in isolation, CLAIMANT contributed to upgrading Calpurnia's telecommunications infrastructure.
47. Other tribunals added the requirement of regularity of profit and return.⁶⁷ In the instant case, even if remaining unpaid to this date, dividends were declared in VanCal from 2004 to 2007.⁶⁸
48. Thus, CLAIMANT's investment has complied with all of the aforementioned elements.

1.3. The Dispute Is Between an ICSID Contracting State and a National of Another Contracting State

49. At the date of submission of the dispute to ICSID, Calpurnia remained a party to the ICSID Convention.⁶⁹
50. CLAIMANT is a Gaul national.⁷⁰ Gaul is also a party to the ICSID Convention.⁷¹ Hence, pursuant to Art.25(2)(b) CLAIMANT is a "National of Another Contracting State".

1.4. The Parties Have Consented in Writing to Submit the Dispute to ICSID Arbitration

⁶³ CLA-Abst., ¶9.

⁶⁴ CLA-Abst., ¶8.

⁶⁵ CLA-Abst. ¶11.

⁶⁶ *L.E.S.I.*, ¶13(v).

⁶⁷ *Biwater*, ¶237.

⁶⁸ CLA-Abst., ¶14.

⁶⁹ Clarifications-1, No.14.

⁷⁰ CLA-Abst., ¶5.

⁷¹ Clarifications-1, No.14.

51. Calpurnia’s offer to arbitrate is contained in Calpurnia-Gaul BIT Art.11(2). CLAIMANT accepted this offer by submitting the request for arbitration on July 31st, 2007.⁷² As held by *Azurix*⁷³ and *Generation Ukraine*,⁷⁴ among others,⁷⁵ this constitutes “consent in writing”.

2. CLAIMANT Qualifies for Protection under the Calpurnia-Gaul BIT

2.1. CLAIMANT Is a Protected Investor

52. Calpurnia-Gaul BIT Art.1(2)(b) defines an “Investor” as:

Any legal person such as company, corporation, firm, business, association, institution or other entity constituted in accordance with the laws and regulations of the Contracting Party and having its seat within the territory of that Contracting Party.

53. The Calpurnia-Gaul BIT protects “investments” made by “investors” of the two contracting States, Calpurnia and Gaul, in the “territory” of the other contracting State. Art.1(4) of the Calpurnia-Gaul BIT defines the “Territory” of Gaul as all the Federated States of Gaul. Hence, CLAIMANT is a qualifying Gaulois investor in Calpurnia.

2.2. CLAIMANT’s Investment Is Protected

54. Calpurnia-Gaul BIT Art.1(1) defines an “Investment” as:

Every kind of assets and more particularly though not exclusively... (b) shares, stocks and debentures and other kinds of interests in companies; (c) titles to money or to any performance having an economic value; (d) intellectual and industrial property rights, including rights with respect to copy rights patents, trademarks, trade names, industrial designs, trade secrets, technological processes, know-how and goodwill.

55. The Calpurnia-Gaul BIT’s definition of “Investment” is the broadest among similar general definitions contained in other investment treaties.⁷⁶ CLAIMANT’s investment falls within the scope of Calpurnia-Gaul BIT Art.1, as it includes:

- 31% direct and indirect shareholding in VanCal;⁷⁷

⁷² Calendar, 07/31/2007.

⁷³ *Azurix Jurisdiction*, ¶56.

⁷⁴ *Generation Ukraine*, ¶¶12.2-12.3.

⁷⁵ *Impregilo*, ¶108; *Bayindir*, ¶83; *Biwater*, ¶253.

⁷⁶ Rubins, p.292.

⁷⁷ CLA-Abst., ¶9.

- Agreement with VanCal for technical assistance services;⁷⁸
- Trademark licensing to VanCal;⁷⁹
- Returns related to these investments, which, pursuant to Calpurnia-Gaul BIT Art.1(2) shall enjoy the same treatment as the original investments.

ii. CLAIMANT Complied with Calpurnia-Gaul BIT Art.11

56. Under Calpurnia-Gaul BIT Art.11(1):

Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment in the territory of the latter Contracting Party shall, if possible, be settled amicably. [emphasis added]

1. CLAIMANT Notified Calpurnia of Its Intent to Begin Amicable Negotiations

57. CLAIMANT effectively complied with the requirement of notice under Calpurnia-Gaul BIT Art.11(2) by serving the letter of February 5th, 2007, addressed to a Calpurnian government official, Mr. Poe,⁸⁰ thus giving Calpurnia notice of the dispute that arose from the breach of its international obligations toward CLAIMANT.⁸¹

2. In the Alternative, Notice of Dispute Is Not a Jurisdictional Prerequisite

58. Even if the Tribunal were to find that CLAIMANT did not fulfill the notice requirement, this does not constitute a jurisdictional prerequisite.⁸²

59. The purpose of the notice requirement is to allow the possibility of an agreed settlement before formal proceedings.⁸³ The *African Holding* tribunal noted that the fact that the investor has attempted to negotiate satisfied the notification requirement.⁸⁴

60. Indeed, CLAIMANT attempted to negotiate with Calpurnia several times, in particular when it requested to have the dividends paid in a proper bank account,⁸⁵ and when it requested

⁷⁸ CLA-Abst., ¶9.

⁷⁹ CLA-Abst., ¶8-9.

⁸⁰ Clarifications-2, No.18.

⁸¹ Calendar, 02/05/2007.

⁸² *Bayindir*, ¶100.

⁸³ *Salini v. Morocco*, ¶20.

⁸⁴ *African Holding*, ¶107.

⁸⁵ Calendar, 05/21/2005.

VanCal's Board to explain the legal basis for the decision not to pay any monies to foreign shareholders.⁸⁶

61. However, in response to the first attempt, Mr. Korchnoi informed that any payment to foreign shareholders had been suspended.⁸⁷ Calpurnia remained silent with respect to CLAIMANT's second attempt.

3. As Calpurnia Refused to Negotiate, Amicable Settlement Was Not Possible.

62. Despite CLAIMANT's efforts to negotiate, it was not possible to pursue amicable settlement.
63. The final set of negotiations was effectively terminated on February 21st, 2007, when Mr. Poe responded to CLAIMANT's letter in the following terms: "*there is nothing we can do.*"⁸⁸
64. In the words of the CMS tribunal:

Provided the parties have had an opportunity to engage in negotiations, and in particular where the host State has shown no willingness to take this opportunity, the registration period requirement must be deemed to be satisfied. Moreover, it is concluded, [the Contracting State] has suffered and will suffer no prejudice [as a result].⁸⁹

65. CLAIMANT complied with the requirement set forth in Calpurnia-Gaul BIT Art.11, as, despite its attempts at amicable settlement, it was not possible to negotiate and, therefore, the negotiation period was to be deemed concluded.

iii. Alternatively, CLAIMANT Complied with the Negotiations Period Set Forth in the Calpurnia-Flatland BIT

1. The Calpurnia-Flatland BIT Provisions on Amicable Settlement Are More Favorable To Investor

66. Under Calpurnia-Gaul BIT Art.11 if an investment dispute cannot be settled amicably within 18 months the investor may submit the dispute to arbitration. Conversely, under the

⁸⁶ Calendar, 06/05/2005.

⁸⁷ Calendar, 05/27/2005.

⁸⁸ Calendar, 02/21/2007.

⁸⁹ CMS, ¶122.

Calpurnia-Flatland BIT, investors should pursue amicable negotiations for two months before submitting their claims to arbitration.⁹⁰

67. The shorter negotiations period in the Calpurnia-Flatland BIT shows that Calpurnia grants Flatland investors a more favorable treatment.

2. The MFN Provisions in Calpurnia-Gaul BIT Allow CLAIMANT to Invoke the Most Favorable Jurisdictional Treatment

68. Calpurnia-Gaul BIT Art.4(2), dealing with “Treatment of Investments”, states:

Investors of one Contracting Party shall be accorded by the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favourable than the latter Contracting Party accords its own investors or to investors of any third State, whichever is the most favourable to the investor.

69. This allows CLAIMANT to rely on the more favorable treatment afforded to investors from third States. Negotiation periods constitute no exception.

70. As stated in *Siemens*:

Access to [dispute-settlement] mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN[C].⁹¹

71. As far back as 1956, in the *Ambatielos (Commission)* decision it was recognized that MFNC extended to matters related to protection of rights.⁹²

72. Nearer in time, the *Maffezini*, *Camuzzi* and *Gas Natural* ICSID tribunals found that MFN treatment encompasses dispute-settlement provisions.⁹³

73. The *Maffezini* tribunal stated that:

Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute-settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute-settlement arrangements are inextricably related to the protection of foreign investors... if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than

⁹⁰ Calpurnia-Flatland BIT, Art.7(1).

⁹¹ *Siemens*, ¶102.

⁹² *Ambatielos (Commission)* p.107.

⁹³ *Maffezini*, ¶¶53-56,64; *Camuzzi*, ¶28; *Gas Natural*, ¶31.

those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.⁹⁴

74. The scope of the MFN can only be limited by the BIT itself. The Calpurnia-Gaul BIT clearly includes dispute-settlement arrangements within the scope of its MFNC.

2.1. *MFNC Interpretation*

75. The MFNC in Art.4(2) shall be construed in accordance with the rules of International Law as expressed in Vienna Convention Art.31, *i.e.* in good faith, under the ordinary meaning to be given to the terms of the clause, in its particular context and in the light of its object and purpose.
76. Several tribunals, including those in *Siemens*,⁹⁵ *Camuzzi*,⁹⁶ *Suez*,⁹⁷ and *National Grid*,⁹⁸ applied this rule to interpret BITs, finding that MFNCs encompass dispute-settlement arrangements.

2.1.1 *Terms of the MFNC*

77. The need to settle disputes is implied in the plain meaning of the wording used in the Calpurnia-Gaul BIT. Negotiations required when a dispute arises are included among the measures necessary for the “*management, maintenance, use, enjoyment or disposal of [the] investment.*”⁹⁹
78. The *National Grid* tribunal, in interpreting an MFNC similar to that in Calpurnia-Gaul BIT, found that an MFNC granting investors treatment no less favorable as regards their management, maintenance, use, enjoyment or disposal of their investments¹⁰⁰ made it possible for the investors to resort to arbitration under the more favorable dispute-settlement provisions contained in third-party treaties.¹⁰¹
79. The *Siemens* tribunal was also faced with similar wording. The MFNC made reference to investors’ “*activity in connection with investments*”¹⁰² while the Protocol to the relevant BIT

⁹⁴ *Maffezini*, ¶¶54,56.

⁹⁵ *Siemens*, ¶80.

⁹⁶ *Camuzzi*, ¶26.

⁹⁷ *Suez*, ¶54.

⁹⁸ *National Grid*, ¶80.

⁹⁹ Calpurnia-Gaul BIT Art.4(2).

¹⁰⁰ UK-Argentina BIT Art.3(2).

¹⁰¹ *National Grid*, ¶¶79-93.

¹⁰² Germany-Argentina BIT Art.3(2).

stated that “activities” referred to the management, maintenance, use and enjoyment of an investment. That tribunal found that wording to be general and intending a wide scope, and concluded that a plain and contextualized reading of the MFNC does not limit the treatment to commercial and economic transactions, which meant, in practice, that exploitation and management of investments include dispute-settlement procedures.¹⁰³

80. The *Suez* tribunal also found that investors are entitled to no less favorable treatment with respect to dispute-settlement than that accorded to third-party’s investors.¹⁰⁴
81. For the above reasons, CLAIMANT submits that access to a more favorable amicable dispute-settlement provision is implied by the plain wording of the MFNC in the Calpurnia-Gaul BIT.

2.1.2 Context of the MFNC. BIT Object and Purpose.

82. The meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose. As stated by the PICJ, the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole.¹⁰⁵
83. Accordingly, the context of the MFN language in Calpurnia-Gaul BIT strongly implies that dispute-settlement provisions are to be covered by the MFNC. Art.5 provides an exhaustive list of matters that the contracting States excluded from the MFNC in Art.4. Dispute-settlement is not among them.
84. The absence of any reference to dispute-settlement procedures among these exclusions reinforces the interpretation that the MFNC includes dispute-settlement matters.
85. This interpretation is supported by several tribunals.¹⁰⁶ In *Siemens*, the tribunal ruled that:

The need for exceptions confirms the generality of the meaning of treatment or activities rather than setting limits beyond what is said in the exceptions.¹⁰⁷

86. In *National Grid* it was held that:

As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*.¹⁰⁸

¹⁰³ *Siemens*, ¶¶82-86,110.

¹⁰⁴ *Suez*, ¶55.

¹⁰⁵ See Draft Articles on the Law of Treaties, p.221.

¹⁰⁶ *National Grid*, ¶82; *Siemens*, ¶85; *Suez* ¶63.

¹⁰⁷ *Siemens*, ¶85.

¹⁰⁸ *National Grid*, ¶82.

87. The very appearance of a listing of exceptions shows that the broad scope of the MFNC would otherwise extend to all possible investment matters.¹⁰⁹
88. The purpose of Calpurnia-Gaul BIT, as expressed in its title and preamble,¹¹⁰ provides additional support to CLAIMANT's argument. It was devised to protect and promote investments. In this context, it is difficult to maintain that the parties intended to limit the scope of the MFNC beyond the express exceptions mentioned above.¹¹¹ As clearly stated by the *SGS v. Philippines* tribunal, it is legitimate to resolve misgivings in BIT interpretation so as to favor the protection of covered investments.¹¹²
89. By applying the "object and purpose" principle, the MFNCs and the treaties that contain them:
90. should be construed in a way that promotes investment protection by allowing more favorable dispute settlement procedures to be incorporated into the basic treaty through the MFNC in a non-discriminatory way.¹¹³

2.2. Calpurnia's Public Policy Would Not Be Affected

91. It should be noted that no public policy considerations are being overridden by the operation of the MFNC.¹¹⁴ The lack of consistency¹¹⁵ among the BITs entered into by Calpurnia leads to the conclusion that the requirement of pursuing amicable negotiations for eighteen months cannot be considered a sensitive issue of economic or foreign policy conditioning Calpurnia's consent to arbitration.¹¹⁶
92. RESPONDENT may be tempted to argue, following the tribunals in *Salini v. Jordan* and *Plama*, that, to the extent that the State has not given its consent to submit a claim to ICSID, such jurisdiction could not be invoked by relying on MFNCs.¹¹⁷ It must be noted, though, that the doctrine laid by these cases is inapposite in the present case, as there is common ground that RESPONDENT has agreed to ICSID jurisdiction under Calpurnia-Gaul BIT. In these presents, the MFNC in Calpurnia-Gaul BIT is being called upon only to avail from a shorter

¹⁰⁹ UNCTAD1, p.7.

¹¹⁰ Draft Articles on the Law of Treaties, ¶12.

¹¹¹ *Siemens*, ¶81.

¹¹² *SGS v. Philippines*, ¶116.

¹¹³ Freyer&Herlihy, p.63.

¹¹⁴ *Maffezini*, ¶62-63; *Siemens*, ¶109.

¹¹⁵ Calpurnia-Flatland BIT Art.7; Calpurnia-Gaul BIT Art. 11 and Clarifications-1 No.15-16.

¹¹⁶ *Siemens*, ¶105.

¹¹⁷ *Salini v. Jordan*, ¶¶102-119; *Plama* ¶¶183-184, 227.

procedural step required under another BIT, without affecting Calpurnia's consent in writing to submit this dispute to ICSID arbitration.

93. As has been said:

It is evident that some claimants may have tried to extend an MFN clause beyond appropriate limits.... But cases like *Plama* do not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case. The MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.¹¹⁸

2.3. Irrelevance of Flatland's Denunciation of the ICSID Convention

94. The arguments above are not hampered by Flatland's denunciation of the ICSID Convention.¹¹⁹ The Calpurnia-Flatland BIT contains a complex, divisible provision dealing with dispute-settlement.¹²⁰ Flatland's denunciation does not impede an investor from resorting to arbitration after a two-month period, and CLAIMANT merely relies on the shorter period required to commence arbitration proceedings under the Calpurnia-Flatland BIT. By reason of such divisibility, the fact that ICSID arbitration may not be primarily available under that BIT bears no effect on CLAIMANT's availability of ICSID remedies under the Calpurnia-Gaul BIT directly.¹²¹

95. In *Plama*, the claimant party relied on the doctrine laid by the *Siemens* and *Maffezini* tribunals, as does CLAIMANT in these presents. In analyzing such contentions, the *Plama* tribunal concluded that:

[I]n none of these cases was it held that the dispute-settlement provisions in the basic treaty are replaced *in toto* by the dispute-settlement provisions contained in the other treaty through operation of the MFN provision in the basic treaty.¹²²

96. Consequently, claiming a benefit under an MFNC only triggers the application of the claimed benefit, but not of the whole clause or the whole treaty. In this regard, the *Siemens* tribunal found that:

¹¹⁸ *National Grid*, ¶ 92.

¹¹⁹ RESP-Abst., ¶ 5.

¹²⁰ Cf. "...may be submitted by the investor request either to:" (Calpurnia-Flatland BIT, Art.7) [emphasis added]

¹²¹ Calpurnia-Gaul BIT, Art.11.2(b).

¹²² *Plama*, ¶ 210.

as a general matter, claiming a benefit by the operation of an MFN[C] does not carry with it the acceptance of all the terms of the treaty which provides for such benefit whether or not they are considered beneficial to the party making the claim; neither does it entail that the claiming party has access to all benefits under such treaty.¹²³

3. The Calpurnia-Flatland BIT Dispute-Settlement Requirements Are Met

97. The two-month negotiation period under the Calpurnia-Flatland BIT was fully complied with, since, between the date of notification on February 5th and CLAIMANT's filing of its claim with ICSID on July 31st, 2007, almost six months elapsed. Consequently, the requirements of the Calpurnia-Flatland BIT have been met.

iv. In the alternative, CLAIMANT Is Entitled to Submit the Dispute to ICSID Directly.

98. Even if this Tribunal were to find that CLAIMANT did not attempt to amicably settle the dispute, it would still have jurisdiction over the instant case since this requirement can be overridden.

99. Several international tribunals have treated the amicable negotiations as an admissibility requirement –not affecting the consent- that can be disregarded if the investor shows that negotiation would have been futile or any attempt at negotiating would have failed. This stance was adopted in the decisions rendered in the cases of *Nicaragua*,¹²⁴ *Ethyl*,¹²⁵ *Lauder*,¹²⁶ and *PanAmerican*,¹²⁷ among others.¹²⁸

100. In the same vein, the Tribunal in *Biwater* found:

This six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. If it did so, the provision would have curious effects, including:

¹²³ *Siemens*, ¶109.

¹²⁴ *Nicaragua*, ¶427-429.

¹²⁵ *Ethyl*, ¶84.

¹²⁶ *Lauder*, ¶¶187, 190-191.

¹²⁷ *PanAmerican*, ¶39.

¹²⁸ *Wena Jurisdiction*, ¶232; *Continental*, ¶67; *SGS v. Pakistan*, ¶184; *Sedlmayer*, p. 82; *Link-Trading*, ¶6.

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason.¹²⁹

101. The tribunal in *Lauder*¹³⁰ found that if there is no evidence that the parties would have reached a settlement, the insistence of a waiting period would amount to an unnecessary excessive formalism, which would not serve any legitimate interests of the parties to the dispute.¹³¹

102. In this regard, Prof. Schreuer states:

By the time a tribunal is ready to make a decision on jurisdiction, the period prescribed for a negotiated settlement will normally have expired.... It would hardly make sense to decline jurisdiction in a situation when the waiting period had passed in the interim. The only consequence of such finding would be to compel the claimant to start the proceedings anew, which would be a highly uneconomical solution.¹³²

103. Given the climate of hostility towards Gaul investors and the allegations by Calpurnian officials that a dispute existed between the governments of Calpurnia and Gaul,¹³³ it follows beyond doubt that Calpurnia was unwilling to settle any dispute with CLAIMANT. Thus, as has been explained above (see §IV.A.ii.3), any attempt at negotiating was futile. Insistence on this requirement would go against CLAIMANT's legitimate interests. Hence, CLAIMANT is entitled to have direct resort to ICSID arbitration.

v. CLAIMANT Did Not Trigger The Fork-In-The-Road Provision

104. Calpurnia-Gaul BIT Art.11 is a fork-in-the-road provision, which offers investors a choice between submitting the dispute to domestic courts or to arbitration, but precludes recourse to either option after the other has been chosen.

105. Investors are often involved in legal disputes. However, not every appearance before a court constitutes a choice under the fork-in-the-road provision. While some disputes may relate in some way to the investment, they are not necessarily identical to "the dispute" within the meaning of the BIT provisions. A large number of ICSID tribunals reached such

¹²⁹ *Biwater*, ¶343.

¹³⁰ *Lauder*, ¶¶188-189.

¹³¹ *Lauder*, ¶190.

¹³² Schreuer2, p. 248.

¹³³ Calendar, 03/10/2005.

conclusion.¹³⁴ For preclusion to operate, tribunals have applied a triple identity test, consisting in identity of parties, of object and of cause of action. If one of these elements fails to be identical within the disputes, the fork-in-the-road-provision is not triggered.

106. Furthermore, when an application before the court is of a defensive nature, it does not, as a consequence, trigger the fork-in-the-road-provision.¹³⁵
107. The record shows that two different applications were filed in Calpurnia.
108. CLAIMANT filed a legal action with the Constitutional Court of Calpurnia in order to (i) obtain a declaration that the searches in Expat Personnel domiciles were unlawful, and (ii) seek compensation for breaches to provisions of Calpurnian domestic law.¹³⁶ Unlike in the instant case, the substantive standards of protection from Calpurnia-Gaul BIT were not invoked.¹³⁷ Even if the parties to the dispute before the Constitutional Court were the same parties to the instant case, the cause of action and the object involved are different. In this regard, Prof. Schreuer writes that seeing any utilization of domestic courts as a choice under the fork-in-the-road provision would put the investor in an intolerable position. The investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration.¹³⁸
109. In the case brought before the Commercial Court the parties were Ms. Pescara and VanCal, and the dispute concerned a request to have VanCal transfer Ms. Pescara's dividends to her bank account in Gaul.¹³⁹ No claim was made by Ms. Pescara under breaches to the Calpurnia-Gaul BIT.¹⁴⁰ Again, the triple identity test fails since the parties, the cause of action and the subject matter involved are different from the ones of the dispute at hand.

B. Conclusion

110. As all jurisdictional requirements under the ICSID Convention and Calpurnia-Gaul BIT have been met, this Tribunal has jurisdiction over the instant case.

¹³⁴ *Genin*, ¶¶331-333; *CMS*, ¶80; *Olguín*, ¶30; *Lauder*, ¶30; *Middle East Cement*, ¶71; *Azurix Jurisdiction*, ¶90; *Enron*, ¶¶97-98.

¹³⁵ *CMS*, ¶¶77-81; *Occidental*, ¶¶60-61; *Enron*, ¶97.

¹³⁶ *CLA-Abst.*, ¶17.

¹³⁷ *Clarifications-2*, No.24.

¹³⁸ *Schreuer2*, p. 249.

¹³⁹ *Calendar*, 06/14/2006.

¹⁴⁰ *Clarifications-2*, No.24.

V. **MERITS OF THE CASE**

A. **Calpurnian Organs' Actions and Omissions are Attributable to RESPONDENT**

111. Calpurnian organs' actions and omissions are attributable to RESPONDENT according to ILC Articles Art.2, which states that:

There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

112. The PCIJ linked the creation of international responsibility with the existence of an “act being attributable to the State and described as contrary to the treaty right[s] of another State.”¹⁴¹ As Prof. Crawford stated:

[T]he general rule is that the only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *i.e.* as agents of the State.¹⁴²

113. As discussed below, Calpurnia's revised public policies were implemented through different State organs; thus, all actions and omissions are attributable to that State under International Law.

i. SFCDC's Acts Are Attributable to Calpurnia

114. Under customary International Law, the actions of SFCDC are attributable to Calpurnia as the former is a public entity controlled by that State, which exercises elements of governmental authority.¹⁴³ As SFCDC exercises direct control over VanCal's Board, the latter's conduct shall also be considered an act of the State.

115. The ILC Articles constitute a relevant means for determining the scope of customary International Law, even when the Articles themselves are not binding.¹⁴⁴ The ILC Articles codify the rules under which the conduct of an entity other than an organ of the State but

¹⁴¹ *Phosphates*, ¶10.

¹⁴² *ILC Commentary*, Chapter II(2). *See also*, *Browlie*2, pp.132-166; and *German Settlers*, p.22.

¹⁴³ *CLA-Abst.*, ¶10.

¹⁴⁴ *Bove*, pp.51-52; *Ruys&Verhoeven*, pp. 289-300; *Townsend*, pp.635-678.

empowered to exercise elements of governmental authority shall be considered an act of the State under International Law.¹⁴⁵ “Governmental authority” encompasses the manner in which the entity is empowered by the State, the content of the power conferred, and the links between the entity and the State organs.¹⁴⁶

116. In the present case, SFCDC’s public nature arises clearly out of its very name: “State Fund for Commerce and Development in Calpurnia.” The use of the preposition “for” as a function word to indicate purpose,¹⁴⁷ explains that the State Fund was created to promote Calpurnian State policies in matters of commerce and development. SFCDC’s aim - contributing to the development and promotion of the national economy-, is a clear delegation of governmental authority by State.

117. Moreover, SFCDC performs a number of functions not normally open to ordinary commercial entities, which include the implementation of governmental policies relating to industrial promotion,¹⁴⁸ and providing a tax shelter only available through State entities.¹⁴⁹

118. The particular result sought by Calpurnia, and enacted by SFCDC, is the implementation of the public objectives of the controlling governing party, the CCC. The CCC’s policies are present in the political motivation of SFCDC’s acts. Links between SFCDC and VanCal are clear, as *eg* Mr. Poe, a CCC member, was at the same time a member of VanCal’s Board and SFCDC’s Chair,¹⁵⁰ and, more conclusively even, SFCDC votes an absolute majority of the voting power of VanCal’s shares.

119. The ILC Commentary states that the term “Entity” reflects a wide variety of bodies, even private companies, which are empowered by the law of the State to exercise functions of a public character.¹⁵¹ In such cases, the activities carried out by that entity shall be deemed manifestations of the government authority of that State.¹⁵²

120. SFCDC is a State-created entity, empowered by the State to exercise a function, and thus exercises elements of governmental authority, with unequivocal links with government officials and State organs. Hence, SFCDC’s acts are attributable to Calpurnia under International Law.

¹⁴⁵ ILC Commentary, Art 5(1).

¹⁴⁶ Dolzer, *pp.*200-201; Hyatt, p.88; Schering, pp.361-371.

¹⁴⁷ Merriam-Webster.

¹⁴⁸ *Maffezini*, ¶78. *See also* ILC Commentary, Art. 5(5).

¹⁴⁹ Clarifications-1, No.13; Clarifications-2, No.9.

¹⁵⁰ Clarifications-2, No.18.

¹⁵¹ ILC Commentary, Art.5(2). *See also* Hyatt, pp. 88-94.

¹⁵² *Schering*, p.361; *Otis*, p.283; *Kodak*, p.153.

ii. In the Alternative, SFCDC's Conduct is Attributable to Calpurnia Due to the Latter's Direction or Control

121. In case this Tribunal finds that SFCDC shall not be considered an organ of Calpurnia under International Law, its actions shall nevertheless be attributable to RESPONDENT due to Calpurnia's direction or control.

122. The ILC Articles prescribe that the conduct of a person shall be considered an act of a State under International Law if the person is in fact acting under the direction or control of that State in carrying out the conduct.¹⁵³ The ILC Commentary states that a conduct is attributable to a State if it controls, instructs or directs a company specifically in order to achieve a particular result.¹⁵⁴

123. In the *Tadić* tribunal found that:

The requirement of International Law for the attribution of States of acts performed by private individuals is that the State exercises control over the individual. The degree of control may, however, vary according to the factual circumstances of each case.¹⁵⁵

124. Moreover, the tribunal in *Foremost* stated that:

the two main indicators of government control of a corporation are the identity of its shareholders and the composition and behavior of its board of directors, which must be examined altogether.¹⁵⁶

125. Similarly, the *Thunderbird* tribunal interpreted that control:

can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise.¹⁵⁷

126. The members of SFCDC's board are basically appointed by the Ministry of Economy, the Department of Labor and Social Services, the Environmental Protection Agency and the National Security Council.¹⁵⁸

127. Moreover, RESPONDENT's control over SFCDC representatives in VanCal's Board is further shown by certain statements of Dr. Swift, who stated that he did not considered

¹⁵³ ILC Articles, Art.8.

¹⁵⁴ ILC Commentary, Art. 8(6). *See also Foremost*, p.228; *American Bell*, p.170.

¹⁵⁵ *Tadić*, ¶117.

¹⁵⁶ *Foremost*, p.11.

¹⁵⁷ *Thunderbird*, ¶180.

¹⁵⁸ Clarifications-2, No.17.

VanCal as a real private company, implying the public interest involved in its handling,¹⁵⁹ that became patent when he stated that:

the main objective [of the company] is... to protect the interests of the country as well as to preserve the industry and the interests of all shareholders including the minor ones within the framework of the general interests of the country; and the Board of Directors has done all in its power to achieve this end.¹⁶⁰

128. In fact, in the meeting dated November 16th, 2005, Mr. Poe and Mr. Korchnoi resigned as directors of the Board. Both were replaced by representatives of SFCDC.¹⁶¹ It is clear that all decisions of the Board were controlled by Calpurnia, since SFCDC appointed four out of five then acting directors.¹⁶²

129. In a rather similar context, the *Foremost* tribunal stated that:

[T]hus, six of the seven seats were government-controlled. In conjunction, majority share ownership and control of the board establish that Pak Dairy is an "entity controlled by the Government of Iran."¹⁶³

130. Thus, under the thresholds set forth by the aforementioned cases, SFCDC, and VanCal, shall be considered entities controlled and directed by Calpurnia government, and its actions are attributable to RESPONDENT.

iii. Calpurnian Organs Failure to Comply with International Duties

131. Several breaches of International Law were performed directly by Calpurnian organs.

132. The State is responsible for the conduct of its own organs, of whatever kind of classification, according to the principle of the unity of the State.¹⁶⁴

133. The *Salvador* tribunal said:

State is responsible for the acts of its rules, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity.¹⁶⁵

¹⁵⁹ Calendar, 11/15/2004.

¹⁶⁰ Calendar, 11/16/2005.

¹⁶¹ Id.

¹⁶² Cf. CLA-Abst., ¶15; Calendar 11/16/2005; Clarifications-2, No.1.

¹⁶³ *Foremost*, p.11.

¹⁶⁴ *ILC Commentary*, Art.4(5) and (6).

¹⁶⁵ *Salvador*, ¶455. See also, *Chattin*, ¶¶285-286; and *Dispute concerning the interpretation of article 79*, ¶438.

134. The ICJ stated that according to a well-established rule of customary International Law, the conduct of any organ of a State must be regarded as an act of that State.¹⁶⁶

135. In the present case, the police searches in Expat Personnel's homes¹⁶⁷ are directly attributable to Calpurnia. As was stated in *AMT*:

The State has a '*primary obligation*' to exercise due diligence to provide adequate protection. The State's failure to comply with this objective obligation due to the mere lack of diligence is sufficient, without any need to establish malice or negligence.¹⁶⁸

136. Mixed commissions after WWII often had to consider the conduct of minor organs of the State, such as administrators, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.¹⁶⁹

137. Therefore, police and judicial actions and omissions are attributable to Calpurnia. The dismissal of the applications of CLAIMANT¹⁷⁰ and Ms. Pescara¹⁷¹ by Calpurnia's Courts are also attributable to RESPONDENT,¹⁷² and trigger its international responsibility. This denial of justice entails a breach of an international obligation by Calpurnia.

B. Calpurnia Unlawfully Expropriated CLAIMANT's Investment

i. CLAIMANT's Investment Is Protected against Unlawful Expropriation under Calpurnia-Gaul BIT

138. Calpurnia has breached its obligation under Calpurnia-Gaul BIT Art.6.(1), which states:

Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalization (hereinafter referred to as "expropriation") except for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation.

¹⁶⁶ *Difference relating to immunity*, ¶62.

¹⁶⁷ CLA-Abst., ¶17.

¹⁶⁸ *AMT*, ¶¶6.05–6.06,6.13; *See also AAPL*, ¶49.

¹⁶⁹ *Currie*, at p.24, ¶21; *See also, Dispute concerning the interpretation of article 79*, pp.431-432.

¹⁷⁰ CLA-Abst., ¶17.

¹⁷¹ Calendar, 06/14/2006.

¹⁷² *Lotus*, p.24; *See also Ambatielos (ICJ)*, ¶10.

139. As will be discussed below, Calpurnia has, by its acts and omissions, indirectly expropriated CLAIMANT's investment.

ii. Calpurnia Subjected CLAIMANT's Investments To Indirect Expropriation

1. Calpurnia's Actions and Omissions Constitute a Taking of Property

140. RESPONDENT has unreasonably interfered with CLAIMANT's investment through a series of measures which constitute a taking of property.

141. International Investment Law has considered that ownership rights permit investors to use, enjoy and dispose of its property. The Harvard Articles include, as takings of property, any:

unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.¹⁷³

142. In the instant case, Calpurnia's actions and omissions have deprived CLAIMANT of its investment, *i.e.* the shares and contracts with VanCal.

143. Contractual rights are protected against expropriation under International Investment Law,¹⁷⁴ and, more specifically, under Calpurnia-Gaul BIT Art.1(1) when referring to "*rights to performance having an economic value.*" International tribunals, including the Iran-US Tribunal¹⁷⁵ and ICSID tribunals,¹⁷⁶ have also held this criterion for over a century.¹⁷⁷

144. Shareholding rights are also protected by the Calpurnia-Gaul BIT.¹⁷⁸ The ICJ, in *Barcelona Traction*,¹⁷⁹ recognized the central role of shareholders as investors, and international tribunals have held that shareholder rights can be the object of expropriation.¹⁸⁰

¹⁷³ Harvard Articles, Art. 10(3)(a).

¹⁷⁴ Sacerdoti, p.381; Kriebaum&Schreuer, p.8; Weston, pp.112-113; Higgins, p.271; Christie, p.311; *UNCTAD3*, p.36; Paulsson&Douglas, p.152; Sampliner, p.14; Alexandrov, p.559.

¹⁷⁵ *Starrett*, p. 156; *Amoco*, ¶108; *Phillips Petroleum*, ¶76. *See also* Aldrich, p.598.

¹⁷⁶ *Eureko*, ¶241; SPP, ¶¶228-229; *Wena Award*, ¶98; *Bayindir*, ¶225; *CSOB*, p.335; *Salini v. Jordan*, ¶67; *SGS v. Philippines*, ¶¶99-112; *Nycomb*, ¶4.3.3.d); *Petrobar*, pp.69-72.

¹⁷⁷ *Rudloff*, p.250; *Norwegian Shipowners*, 307, 318, 325; *Chorzów Factory*, p. 44.

¹⁷⁸ Calpurnia-Gaul BIT Art. 1.1 expressly covers "*shares, stocks, debentures or other form of participation in a company.*"

¹⁷⁹ *Barcelona Traction*, pp.35-36.

¹⁸⁰ *Starrett*, pp.156-157; *Amoco*, pp.189-289; *CME*, ¶591.

145. CLAIMANT is entitled to a bundle of rights¹⁸¹ attached to its shares: (1) control rights, which include the voting rights in shareholders' meetings; (2) economic rights, which include the right to receive dividends when declared, and the right to sell shares; and (3) information rights, which allow shareholders to protect their economical and control interests.¹⁸²
146. Notwithstanding the fact that CLAIMANT currently holds stock in VanCal, due to Calpurnia's actions and omissions, its interest therein has become useless, causing Calpurnia's acts and omissions to amount to a taking of property.

1.1. Calpurnia Has Deprived CLAIMANT from the Right to Control Its Investment

147. CLAIMANT remained in control of its investment until 2003, when the CCC won the elections and set off a climate of hostility towards Gaulois citizens,¹⁸³ and the implementation of a multi-agency harassment against CLAIMANT and its Expat Personnel.
148. Regarding control rights, Prof. Christie has stated that:
- the most fundamental right that an owner of property has is the right to participate in its control and management.¹⁸⁴
149. Several authors concluded that the decisive element to determine if a taking of property amounts to indirect expropriation is the substantial loss of control of a foreign investment.¹⁸⁵
150. The control that CLAIMANT enjoyed over its VanCal investment was based on:
- Ms. Pescara's position as Managing Director;
 - her presence, together with Mr. Shepherd's, in the Board; and
 - the voting rights of its 31% interest.
151. The Government's policy was aimed at destroying CLAIMANT's control in all three faces, and it was, indeed, successful.

¹⁸¹ Higgins, p.278.

¹⁸² Thompson, pp.216-218; Velasco, pp.413-421.

¹⁸³ Clarifications-2, No.51

¹⁸⁴ Christie, p.337.

¹⁸⁵ Schreuer3, p.5. *See also* Brownlie, p.534; Higgins, p.351; UNCTAD3, p.41.

152. Ms Pescara’s position as Managing Director, and her presence alongside Mr. Shepherd in the Board, enabled CLAIMANT to control very closely the day-to-day activity, and to overview the managerial decisions of VanCal, thus protecting CLAIMANT’s contractual rights *vis-à-vis* VanCal.
153. Calpurnian security forces, in furtherance of a harassment policy, conducted, under the recurrent pretext of a so-called “investigation,” police searches in the homes of Expat Personnel.
154. These searches were not orderly conducted and therefore “[can]not be characterized as a bona fide exercise of investigative authority.”¹⁸⁶ Faced with similar circumstances, the *Tokios Tokelés* tribunal, addressing the unwarranted searches performed by Ukrainian tax authorities, stated that:
- [I]ts significance for present purposes relates not to a claim against the tax authorities for an inordinate use of their investigatory powers, but to an allegation that they were using them as a disguise for an intimidation which had nothing to do with a genuine suspicion of economic misconduct.¹⁸⁷
155. This type of conduct has been considered as a breach of International Law by other international tribunals.¹⁸⁸
156. Furthermore, the climate of hostility toward Gaulois nationals in Calpurnia forced Expat Personnel to leave the country at the end of 2003.¹⁸⁹
157. Although Ms. Pescara was able to return to Calpurnia on a few occasions during 2004, she was not allowed to perform her duties in a proper way. As already stated (see §III.B.ii), the ruling party instigated, through the CCC Women’s League, pickets at her home, which ultimately caused her not to return to the country.¹⁹⁰
158. Ms. Pescara’s forced absence, together with the rejection of her business visa, led to her resignation as Managing Director of VanCal,¹⁹¹ just a few days after the last picket, enabling the State Fund to continue the harassment against CLAIMANT within VanCal.
159. In sum, the forced absence of CLAIMANT’s representatives caused the loss of control over its investment.

¹⁸⁶ *Tokios Tokelés*, dissenting opinion, ¶5.

¹⁸⁷ *Tokios Tokelés*, ¶103.

¹⁸⁸ *Sedco*, ¶278. See also *Tippetts*, ¶225; *Benvenuti&Bonfant*, ¶357.

¹⁸⁹ CLA-Abst., ¶17.

¹⁹⁰ *Id.*

¹⁹¹ Calendar, 11/15/2005; Clarifications-2, No.44.

1.2. Calpurnia Has Deprived CLAIMANT from the Right to Vote Its Shares

160. After gaining control of the Board,¹⁹² SFCDC made every possible effort to force certain decisions of the Shareholders Meeting, and Board action that ultimately led to the deprivation of CLAIMANT's rights.

161. CLAIMANT's remaining control over its investment was ended by SFCDC in the Shareholders' Meeting of November 16th, 2005. The events at this meeting demonstrated the intentions of SFCDC to forbid CLAIMANT's exercise of its voting rights, and to consolidate its dominant position on the Board.

162. As a consequence of RESPONDENT's actions, by 2005 Vanguard's Expat Personnel had abandoned Calpurnia. Therefore, CLAIMANT was forced to appoint Mr. Rindler as a proxy to exercise its rights. This left CLAIMANT in a very weak position, which SFCDC took advantage of.

163. The sudden rejection of the proxies held by Mr. Rindler,¹⁹³ prevented CLAIMANT from being present at the Shareholders' Meeting. Availing from the circumstances, SFCDC representatives proposed to vote Ms. Pescara off the Board, and succeeded (see §III.C).

164. SFCDC's actions were not conducted in good faith and had a specific objective: to deprive CLAIMANT from voting its shares, and to definitely oust its key representative in VanCal, Ms. Pescara.

165. In sum, due to RESPONDENT's policy, CLAIMANT was left without its key representative and without the possibility to vote in the Shareholders' Meeting, and therefore lost control over its investment.

1.3. Calpurnia Has Deprived CLAIMANT from the Right to Receive the Benefits of Its Investment

166. During 2005, the SFCDC made every effort to avoid declaring dividends in cash for 2004 through 2007, and making any kind of payments owed by VanCal to CLAIMANT.

167. Firstly, SFCDC officials proposed to set up a Severance Pay Reserve Fund in order to "hold the amount paid to the foreigners to the minimum."¹⁹⁴ However, once again, public

¹⁹² Calendar, 10/14/2004.

¹⁹³ Calendar, 11/16/2005.

¹⁹⁴ Calendar, 03/10/2005.

interest drove SFCDC's actions, and the Board finally decided, regarding the profits of 2004, that:

[I]n order to preserve the rights of the Calpurnian shareholders, it seems essential that a reasonable percentage of the company's profits be divided in the form of cash or a stock dividend.¹⁹⁵

168. However, in order to curtail the undesired side-effect that any Gaul shareholder might receive dividends as well, the Board resolved that:

[D]ue to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign shareholders has been suspended for the time being.¹⁹⁶

169. Finally, on April 15th, 2005, dividends were declared: just 18% of the profit was to be distributed in cash.¹⁹⁷ The rest of the profit was destined to set up a Severance Pay Reserve Fund.¹⁹⁸

170. On May 21st, 2005, Vanguard requested payment of its dividends to the newly appointed Managing Director of VanCal, Mr. Korchnoi.¹⁹⁹ The Board instructed Mr. Korchnoi to inform Vanguard on May 27th that VanCal would not pay any sums to foreign shareholders, and therefore he could not do anything regarding the request.²⁰⁰

171. Through these actions, attributable to Calpurnia, CLAIMANT was deprived of its 31% cash dividends declared from 2004, to 2007, and of the payments due to its VanCal contracts.

172. Regarding indirect expropriation, Paulsson and Douglas concluded that:

Legal title to the property is not disturbed. Rather, its income producing potential is somehow diminished by acts attributable to the Host State.²⁰¹

173. CLAIMANT's impossibility to receive the economic benefits of its investment turns it useless, and amounts to a taking of property, which is a consequence of Calpurnia's actions, and hence breached Art.6(2) of the Calpurnia-Gaul BIT.

¹⁹⁵ Calendar, 03/10/2005.

¹⁹⁶ *id.*

¹⁹⁷ Calendar, 04/15/2005.

¹⁹⁸ Calendar, 03/10/2005.

¹⁹⁹ Calendar, 05/21/2005.

²⁰⁰ Calendar, 05/27/2005. *See also* Calendar, 04/22/2007.

²⁰¹ Paulsson&Douglas, p.152.

1.4. Calpurnia Has Deprived CLAIMANT from the Right to Receive Information

174. Since 1997, all the information regarding VanCal's operation and accounts translated into Gaulois had been sent directly to CLAIMANT's headquarters.²⁰² Dr. Swift, appointed to the Board by SFCDC, ordered, in November 2005, to cease sending this information to CLAIMANT. As a consequence, Vanguard could only access this information by inspecting it at the head office of the company.²⁰³
175. The real motive behind Dr. Swift's decision was to virtually prevent CLAIMANT's access to information, since -by that time- CLAIMANT had no personnel in Calpurnia to collect it personally. Therefore, CLAIMANT had no real possibility of accessing VanCal's information, and thus was deprived of this right.
176. It must be noted that Swift's decision was issued at a time in which, as a consequence of SFCDC's pressure to vote off Ms. Pescara two weeks before -i.e. November, 16th 2005-, CLAIMANT had only one representative in the Board, while the State Fund had four out of the five members in the Board.²⁰⁴ SFCDC clearly took advantage of the situation it had created to diminish CLAIMANT's control over its investment.
177. In sum, CLAIMANT was denied its corporate rights, and SFCDC's actions have deprived Vanguard from its control.

2. Government Measures Amounting to Indirect Expropriation

178. Calpurnia-Gaul BIT Art.6 forbids "*measures having the effect, either directly or indirectly, equivalent to expropriation,*" where not accompanied by proper compensation.
179. The concept of "indirect expropriation" has developed since the 1920's, having first been introduced in the *Norwegian Shipowners* case, and a few years later in the *Certain German Interests* case. Analyzing that case-law, Prof. Christie, concluded that they establish that:

1)a State may be considered to expropriate property, where it interferes with it, even though the State expressly disclaims any such intention [and that] 2)even though a State may not purport to interfere with rights to property, it may, by its

²⁰² CLA-Abst., ¶16.

²⁰³ Calendar, 04/22/2007.

²⁰⁴ Calendar, 11/16/2005. *See also*, Clarifications-2, No.1.

actions, render those rights so useless that it will be deemed to have expropriated them.²⁰⁵

180. In the same vein, Reisman and Sloane have expressed that:

International tribunals, jurists, and scholars have consistently appreciated that states may accomplish expropriation in ways other than by formal decree; indeed, often in ways that may seek to cloak expropriatory conduct with a veneer of legitimacy. For this reason, tribunals have increasingly accepted that expropriation must be analyzed in consequential rather than formal terms. What matters is the effect of governmental conduct... on foreign property rights or control over an investment... For purposes of state responsibility and the obligation to make adequate reparation, international law does not distinguish indirect from direct expropriation.²⁰⁶

181. The Iran-US Tribunal stated that an expropriation can be effected “through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”²⁰⁷ Previously, the *Starrett* tribunal had stated that:

[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.²⁰⁸

182. Likewise, within the context of NAFTA, the tribunal in *Metalclad* stated that:

Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.²⁰⁹

183. Finally, Prof. Brownlie stated:

²⁰⁵ Christie, p.311.

²⁰⁶ Reisman&Sloane, p.121.[footnotes omitted]

²⁰⁷ *Tippetts*, p.255.

²⁰⁸ *Starrett*, p.154.*See also* UNCTAD3, p.20

²⁰⁹ *Metalclad*,¶103.

the essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management in control.²¹⁰

184. In these presents, Calpurnia has interfered with CLAIMANT's investment by taking away the control it had and all economic benefit over its property, finally to turn its investment useless.
185. Under International Law, it is widely accepted that tribunals should focus on the circumstances and particularities of each case in order to determine the existence of indirect expropriation.²¹¹
186. In this particular case, expropriation is the ultimate effect of several actions attributable to RESPONDENT, even if any given one of them, considered in isolation, "*can [not] necessarily be identified as the decisive event that deprived the foreign national of the value of its investment.*"²¹² The cumulative effect of those actions and omissions in the period started in late 2003 does amount to an expropriation of CLAIMANT's investment, even if title over VanCal shares has not changed, because they have become useless. Similarly, the remainder of CLAIMANT's investment –i.e. the contracts with VanCal- has become valueless. Therefore, this is a clear case of "creeping expropriation", defined by the *Santa Elena* tribunal as follows:

It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property.²¹³

2.1. *The Irrelevance of the Expropriatory Intention against the Effects of the Measures*

187. As has been discussed throughout this submission, the joint analysis of RESPONDENT's actions and omissions demonstrates that they were deliberately articulated and targeted to render CLAIMANT's investment useless and valueless.
188. Nonetheless, even if the Tribunal understands that the intention of each individual act and omission cannot be established with certainty, CLAIMANT submits that the intention

²¹⁰ Brownlie, p.531.

²¹¹ *Lauder*, ¶200.

²¹² Reisman&Sloane, p.128.

²¹³ *Santa Elena*, ¶76. [emphasis added]

fuelling the expropriatory acts is irrelevant to determine whether or not an expropriation has occurred.

189. Regarding the expropriatory intention of the host State in creeping expropriations, it has been said that:

[T]hat intent, though possibly present at some level of the host state's government, will be difficult, if not impossible, to discern. Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.²¹⁴

190. Thus, the relevant element concerning the determination of whether an expropriation has occurred is the expropriatory effect. International tribunals' case law disregards the State's expropriatory "intention" as a requisite for indirect expropriation to exist.²¹⁵

191. In this line, the PCIJ found, in the *Chorzów Factory* case, that the State can expropriate property, even if it denies such intention.²¹⁶ Later, the *Tippetts* tribunal concluded that:

the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.²¹⁷

2.2. Calpurnia's Actions and Omissions Had an Expropriatory Effect

192. Through a series of actions and omissions, Calpurnia deprived CLAIMANT of the rights that it had over its investment, and turned its investment into a mere formal property title devoid of the value it had before the undue interference.

193. In the instant case the effects of RESPONDENT's actions and omissions have clearly effected a taking of Vanguard's investment, since CLAIMANT:

- can no longer receive and enjoy the economical benefits of its 31% shareholding in VanCal;

²¹⁴ Reisman&Sloane, pp.123-124.

²¹⁵ *TECMED*, ¶116.

²¹⁶ *Chorzów Factory*, p.27. See also *Biloune*, p.209.

²¹⁷ *Tippetts Award*, pp.225-226.

- has lost the control it had over its shares and VanCal, since it has lost its voting rights and access to relevant information on VanCal’s affairs; and
- can no longer receive any payments regarding the contracts entered with VanCal

194. Given that “the decisive element in an indirect expropriation is the substantial loss of control or economic value of a foreign investment without a physical taking,”²¹⁸ Calpurnia’s actions can be deemed as expropriatory and a breach of Calpurnia-Gaul BIT Art.6(1).

3. Calpurnia’s Taking of CLAIMANT’s Property Was More than “Ephemeral” and Constituted an Expropriation Without Compensation

195. Brower has identified the position of the Iran-US Tribunal as implying that:

If the taking is of an ongoing business, through a chain of events, for example, beginning with minor management interferences and culminating with the transfer of title, the taking will not necessarily be found to have occurred at the time of either the first or the last such event, but rather when the interference becomes an ‘irreversible deprivation’.²¹⁹

196. This problem was addressed by the ILC Articles, in its Section 15(1):

The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.²²⁰

197. The ILC Commentary on this provision states that:

[P]aragraph I of article 15 defines the time at which a composite act “occurs” as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series.²²¹

198. In the instant case, the taking became “more than ephemeral” when CLAIMANT was informed by Mr. Korchnoi, on May 27th, 2005, that VanCal would not “pay any sums of

²¹⁸ Schreuer3, ¶12.

²¹⁹ Brower, p.657. See also *Phillips Petroleum*, ¶101.

²²⁰ Section 15(1), ILC Articles.

²²¹ *ILC Commentary*, p.143.

money for any reason to foreign shareholders.”²²² Since the reason for this decision was never communicated to CLAIMANT, and as Calpurnia controls the Board and, through SFCDC, more than half of the shares of the company, this situation became “more than ephemeral”. Proof of this circumstance is that, even though VanCal has declared dividends every year since 2003 and paid them to local shareholders, CLAIMANT has not received any payments of such dividends,²²³ and neither VanCal nor Calpurnia has given any indication that this situation will be cured anytime soon.

iii. Conclusion: Calpurnia Expropriated CLAIMANT’s Investment

199. From the above it follows that Calpurnia’s actions and omissions amounted to expropriation without compensation, triggering responsibility for breach of Calpurnia-Gaul BIT Art.6.

200. CLAIMANT has shown that RESPONDENT’s actions and omissions amounted to a non ephemeral taking of its investment, equivalent to an indirect expropriation, and has not received any form of compensation. Therefore, Calpurnia breached its international obligations under Calpurnia-Gaul BIT, and should pay due compensation to CLAIMANT.

C. Calpurnia Unlawfully Prevented the Free Transfer of Payments owed to CLAIMANT

201. Calpurnia-Gaul BIT Art.8 expressly grants investors the possibility of transferring, without any restriction or delay, payments in connection with an investment, including returns and payments in connection with contracts.

202. The ability to transfer profits, capital and other payments back to Gaul must be considered a key condition for the proper operation of CLAIMANT's investment.²²⁴

203. RESPONDENT has obstructed the free transfer of CLAIMANT’s returns mainly through the following actions: (i) the Board decision to suspend all payments to CLAIMANT, including payment of dividends and of royalties for use of the trade mark and technical assistance provided by CLAIMANT, which prevented Vanguard from transferring these monies back to Gaul; and (ii) the decision of the commercial courts of Calpurnia that

²²² Calendar, 05/27/2005.

²²³ CLA-Abst., ¶14.

²²⁴ UNCTAD, p.56.

summarily dismissed Ms. Pescara's application,²²⁵ which entailed an illegal obstruction of transfers since, under Calpurnian law, Ms. Pescara acted as a trustee seeking to protect the assets given to her in trust, and should not have been deprived of legal standing.²²⁶

204. In sum, RESPONDENT failed to assure CLAIMANT the free transfer of its returns.

D. Calpurnia-Gaul BIT Guarantees Fair and Equitable Treatment to Investors

205. Under Calpurnia-Gaul BIT Art.2(2) and Art.3, Calpurnia must grant Gaulois nationals a "fair and equitable treatment" ("FET"). RESPONDENT failed to do so in breach of its international obligations.

206. The *Azurix* tribunal found that:

[t]he notion of fair and equitable treatment... represents an independent, self contained principle which must be given its plain meaning pursuant to Art.31 of the Vienna Convention.²²⁷

207. The term "fair" requires that treatment does not involve bias, fraud, or injustice. "Equitable" treatment would in turn be characterized by equity or fairness, and for being fair, just, and reasonable.²²⁸

208. Prof. Mann has stated that:

the terms of a [FET] clause are to be understood and applied independently and autonomously... A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable.²²⁹

209. The purposes of the Calpurnia-Gaul BIT are stated in its preamble, that reflects that the contracting parties:

Desir[ed] to intensify economic co-operation to the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors of one contracting Party in the territory of the other contracting Party.

210. Thus, by breaching this standard, RESPONDENT failed to comply with the expressed purposes of the BIT.

²²⁵ Calendar, 06/14/2006.

²²⁶ Clarifications-2, No.4 and No.5.

²²⁷ *Azurix*. p.234.

²²⁸ Merriam-Webster.

²²⁹ Mann, cited in Bishop, p.156.

211. In Prof. Mann’s view the statement that investments shall be accorded FET is an overriding obligation, going beyond the non-arbitrary, non-discriminatory or non-abusive treatment and embracing other BIT protections. If the contracting States to the Calpurnia-Gaul BIT intended to limit the FET to the international minimum standard, they should have clearly stated so, but they did not. Moreover, there is no indication in the Calpurnia-Gaul BIT supporting such interpretation. Quite to the contrary, the kind of protection granted in the Calpurnia-Gaul BIT amounts to a wide list of prerogatives that RESPONDENT certainly did not comply with.

212. The tribunal in *TECMED* held that the FET is a manifestation of the “*bona fide* principle” acknowledged by International Law, by stating that:

[I]n light of the good faith principle established by international law, [FET] requires the contracting state 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. The foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.²³⁰

213. The *CME* tribunal concluded that:

the broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment.²³¹

214. The tribunal in *MTD* found that:

[FET] should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement –“to promote”, “to create”; “to stimulate”-rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.²³²

215. Pursuant to the above quoted cases the FET provision in Calpurnia-Gaul BIT must be interpreted as providing: just treatment, not idiosyncratic and according to the good faith principle; a behavior conducive to fostering the promotion of foreign investment; and, fair

²³⁰ *TECMED*, ¶154.

²³¹ *CME*, ¶156.

²³² *MTD*, ¶113 [emphasis added].

treatment, not different to the treatment received by nationals. Calpurnia has failed to accord such treatment to CLAIMANT.

i. Calpurnian Investment Environment Changed

216. Encouraged by the pro-investment environment and the legal framework –including the Calpurnia-Gaul BIT- created during the nineties, CLAIMANT decided to establish its investment in Calpurnia.

217. As stated above, as soon as the CCC won the elections, the investment environment changed radically, and foreign investors turned undesirable. The CCC’s policies were implemented in VanCal through SFCDC, which used its majority stake to alter the *status-quo* and the regular usages of the company against CLAIMANT’s interests.

1. Calpurnia Became Hostile Towards CLAIMANT and Implemented a Policy of Harassment

218. Calpurnia implemented a multi-agency strategy to pester CLAIMANT, through the following actions, which have been discussed above:

- the unwarranted police searches followed by the issuance of several press releases containing inaccurate information with an inflammatory language;
- the pickets organized by the CCC’s Womens League;
- the rejection of the business visa to Ms. Pescara;
- the decisions forced by SFCDC, within VanCal, against CLAIMANT’s interests.

ii. CLAIMANT’S Legitimate Expectations

219. The *TECMED* tribunal understood that FET:

requires the Contracting Parties 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.²³³

220. CLAIMANTS’s expectations were related to a stable framework allowing it to maintain and further the achievements VanCal obtained from 1997 to 2003. CLAIMANT expected that the environment would not be radically changed, so that it would obtain no

²³³ *TECMED*, ¶154.

more and no less than it got during that period. However, as already discussed, since the CCC won the elections, radical changes did occur within and without VanCal, resulting in a severe detrimental effect on CLAIMANT's investment.

iii. Calpurnia Did Not Follow the Rule of Law and Failed to Protect CLAIMANT's Due Process Rights

221. The private residences of Expat Personnel were recurrently searched over and over throughout 2004 by Calpurnian security forces and no warrant or other form of judicial authorization was requested or obtained for any of these searches.²³⁴

222. Even if this in itself was not construed as a breach of the rule of law, in the present case, no judicial proceedings were ever brought in furtherance of the alleged suspicions, and no proceedings were ever brought or charges prosecuted in connection with the alleged information received on the activities of CLAIMANT or any of its personnel.

223. By virtue of the FET due to CLAIMANT, Calpurnia should have respected due process. In spite of that, Calpurnian security forces searched the houses of Expat Personnel with no actual grounds (see §III.B.i), and no government ever initiated a judicial or administrative proceeding supporting that alleged investigation. Certainly, this is contrary to any reasonable concept of due process of law.

224. In addition, CLAIMANT filed applications before Calpurnian Courts to have the police searches declared unlawful. Both applications, however, were dismissed by the Calpurnian Constitutional Court,²³⁵ which did not cure, but instead expanded, RESPONDENT's breach of its obligation to provide due process guarantees.

225. Facing a similar situation, the *Telsim*, tribunal held:

[T]he process that led to the decision of the Working Group appointed by the Ministry of Industry and Trade on June 9, 2003 lacked transparency and due process. The Working Group was appointed in relation to the termination of the Investment Contract, to perform the verification of the fulfillment by Kar-Tel of the terms and conditions of the Contract, including investment obligations, "for the purpose of settlement of this issue prior to the arbitration." The Working Group issued a three and a half pages decision, summarily reasoned, and concluded that the Contract was lawfully terminated.²³⁶

²³⁴ Calendar, 12/08/2003; 06/04/2004; 07/17/2004.[emphasis added]

²³⁵ CLA-ABST., ¶17.

²³⁶ *Telsim*, ¶617

**iv. RESPONDENT Showed a Lack of Transparency Regarding the Rules
Applicable to CLAIMANT's Investment**

226. Calpurnia-Gaul BIT Art.3 provides that:

Each contracting Party shall ensure that its laws, regulations, procedures, administrative rulings and judicial decisions of general application, as well as international agreements after their entry into force, which may affect the investment of investors of the other contracting Party in its territory, are promptly published or otherwise made publicly available.

227. The *Telsim* tribunal found that FET:

requires that the State acts in a transparent manner, namely that there is no ambiguity in the legal framework relating to the investor's operations and that the decision affecting the latter be traceable to that legal framework.²³⁷

228. Furthermore, the *Metalclad* tribunal found that "transparency" implies that all relevant legal requirements for the purpose of investing should be capable of being readily known to all investors,²³⁸ and that it requires the investor be informed about "*the laws and administrative or other binding decisions before they are imposed.*"²³⁹

229. In the instant case, RESPONDENT has showed a lack of transparency and thus failed to provide FET to CLAIMANT.

1. Suspension of Payment to Foreign Shareholders

230. As stated above, on March 10th, 2005, SFCDC representatives in VanCal stated that payment of dividends to foreign investors had been suspended.²⁴⁰

231. CLAIMANT requested information regarding the grounds for such suspension, but no reasonable explanation as to why that was required or permissible under Calpurnian law was ever provided.

232. In fact the only answer CLAIMANT received in that regard was later superseded by an e-mail, stating that such answer had been unauthorized.²⁴¹

233. The *Telsim* tribunal, facing similar facts, ruled that:

²³⁷ *Telsim*, ¶584.

²³⁸ *Metalclad*, ¶76.

²³⁹ *Telsim*, ¶585.

²⁴⁰ Calendar, 03/10/2005.

²⁴¹ RESP-Abst., ¶16.

the process that led to the decision of the [State entity] lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle. Since the [State entity] acted as an organ of the State, the violation amounts to a breach of the BIT by the Republic.²⁴²

234. In addition, the claim filed by Ms. Pescara before Calpurnian courts requesting remittance of the profits she was entitled to as a shareholder in VanCal was summarily dismissed.²⁴³

235. Neither the government representatives on the State Fund, nor any Governmental agency or, even, the judiciary, has ever provided CLAIMANT with a legal explanation for its inability to receive the profits stemming from its investment. Calpurnia's omission to provide CLAIMANT with some reasonable explanation constitutes a breach of the transparency due under FET.

2. The Visa Situation

236. As stated above (see §III.B.iii), Calpurnia's immigration authorities surprisingly rejected Ms. Pescara's application for a new business visa without explaining the basis for the new issuance policies. At the time Pescara requested such renewal it was expectable for her to obtain it, since her position in VanCal remained the same as when she had obtained her former visa,

237. The tribunal in *Metalclad* stated:

Metalclad was led to believe, and did believe that the Federal and States permits allowed for the construction and operate of the landfill.²⁴⁴

[T]he absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.²⁴⁵

238. All these acts and omissions committed by the State Fund and other Government agencies lacked transparency, as CLAIMANT was never provided with an explanation or legal grounds, for the sudden and detrimental changes in policy towards investors.

²⁴² *Telsim*, ¶618.

²⁴³ Calendar, 06/14/2006.

²⁴⁴ *Metalclad*, ¶35.

²⁴⁵ *Metalclad*, ¶88.

v. RESPONDENT Breached Calpurnia-Gaul BIT Art.2(3)

239. Calpurnia-Gaul BIT Art.2(3) sets forth:

Each contracting Party shall not impair by unreasonable, arbitrary or discriminatory measures the management, maintenance, use, enjoyment, acquisition or disposal of investments in its territory of investors of the other contracting Party.

240. Legal scholars have interpreted that governmental conduct must, in order to be deemed arbitrary, pass a four-tier test. Governmental action would be deemed arbitrary if: the action taken was not authorized by law; the action was taken for an improper purpose; the action was taken because of irrelevant circumstances; or the action was patently unreasonable.²⁴⁶

241. Following this definition, all the acts and omission committed by Calpurnia and discussed herein were manifestly arbitrary.

242. The decision to suspend payment of dividends and contractual royalties alleging a diplomatic dispute (see §III.C), was illegal, taken for an improper purpose, because of irrelevant circumstances and patently unreasonable.

243. The rejection of the proxies²⁴⁷ and the ousting of Ms. Pescara from the Board, taken by SFCDC in pursuance of governmental policy and under State control, certainly were taken with an improper purpose affecting management, maintenance, use, enjoyment of CLAIMANT's investment.

244. The rejection of Pescara's application for a business visa²⁴⁸ was taken with an improper purpose and patently unreasonably, and deprived CLAIMANT from the management and disposal of its investment. In this regard, scholars have asked:

For what purpose did the actor exercise its discretionary power? If that purpose is inconsistent with or the irrelevant to the statutory authority, then the acts fails the test and is an arbitrary exercise of power.²⁴⁹

²⁴⁶ *Hamrock*, p.857.

²⁴⁷ Calendar, 11/16/2005.

²⁴⁸ CLA-Abst., ¶18.

²⁴⁹ *Hamrock*, p.857.

245. The searches conducted in Expat's Personnel's homes,²⁵⁰ were certainly based on an improper purpose, because of irrelevant circumstances and patently unreasonable (see §III.B.i)

vi. Discrimination

246. Under the new political scenario, Calpurnia's allegations of espionage and destabilization against CLAIMANT constituted a harassment policy. (see §III.B.i)

247. The Saluka tribunal understood that "the standard of 'nondiscrimination' requires a rational justification of any differential treatment of a foreign investor."²⁵¹

248. As already mentioned, the inflammatory language contained in the press releases that followed the police searches,²⁵² resulted in several pickets in front of Ms. Pescara's home conducted by members of the CCC's Women's League.

249. The aforementioned actions, together with the Board's decision, to suspend the payment of dividends to CLAIMANT without any reasonable explanation, entails discrimination, since RESPONDENT has failed to provide the reasons for the differential treatment accorded to CLAIMANT.

250. It has been said that:

[M]easures which are aimed exclusively at alien-owned in a field where there are also interest constitutes illegal discrimination... Measures which are general in scope but with single out alien property... for unfavorable treatment (usually in the matter of payment of compensation) constitute a breach of the (alien non-discrimination rule) rule unless there is justification for such treatment in treaty provisions.²⁵³

251. On March 10th, 2005, SFCDC's representatives in VanCal's Board decided that the minimum dividend possible should be distributed among local shareholders.²⁵⁴ In fact, all forms of payment to foreign shareholders were suspended. This action was, clearly, general in scope. However it was pointed at CLAIMANT's property and thus clearly constituted a discriminatory measure, and was aimed to harm its investment, and its investment alone.

²⁵⁰ CLA-Abst., ¶17.

²⁵¹ *Telsim*, ¶679.

²⁵² Calendar, 12/08/2003; 06/04/2004; 07/17/2004.

²⁵³ Bishop, p.202.

²⁵⁴ Calendar, 03/10/2005.

252. Every fact in the record of this case shows that CLAIMANT's status as a foreign investor, and that of its Expat Personnel as foreigners, was the only cause of all of the actions undertaken or induced by RESPONDENT which detrimentally affected CLAIMANT's investment.

vii. Conclusion

253. Calpurnia breached its international obligations as from the moment the CCC arrived to the Parliament pursuing an ultra nationalist rhetoric,²⁵⁵ and implemented it in the form of formal and informal discriminatory policies affecting CLAIMANT's investment.

254. Governmental actions described above amounted to answerable discrimination against foreigners, and therefore Calpurnia has failed to accord CLAIMANT FET.

255. The change in political sign experienced in Calpurnia did not, *per se*, constitute an international wrongful act, but in no event could it justify the breach of its international obligations under the Calpurnia-Gaul BIT.

256. As has been stated by the Iran-US Tribunal:

[a] revolutionary regime may not simply excuse itself from legal obligations by changing governmental policies, nor take the public benefit without compensation businesses operated by private persons under the previous regime.²⁵⁶

257. Calpurnia, undertook to comply with all the standards of treatment guaranteed under Calpurnia-Gaul BIT, irrespective of any political change. Despite these commitments, RESPONDENT failed to accord FET to CLAIMANT and destroyed its investment.

E. Calpurnia Failed to Accord CLAIMANT Full and Constant Protection And Security

i. Calpurnia-Gaul BIT Accords FPS to CLAIMANT

258. Calpurnia-Gaul BIT Art.2(2), provides:

Each Contracting Party shall at all times accord in its territory... full and constant protection and security.

²⁵⁵ CLA-Abst. ¶12.

²⁵⁶ Aldrich, p.8.

259. At its origins FPS was aimed at protecting investors from suffering any physical destruction of its property,²⁵⁷ or being subjected to serious threat of physical destruction. Later on, tribunals adopted a broadened scope to include protection from legal interferences, which includes the right to be free from any act or measure that might jeopardize the investor's investment.²⁵⁸
260. Later even, the *Azurix* tribunal revised the matter and broadened the standard's scope, deciding that FPS:

was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.²⁵⁹

261. The protection granted under this standard becomes increasingly relevant during periods of insurrection, civil unrest and other public disturbances, including protection against damage or losses sustained by an investor as a result of episodes of violence, whether directly due to government acts or otherwise as a result of the lack of adequate investment protection by the State organs,²⁶⁰ as was the case with respect to CLAIMANT's investment in Calpurnia.

262. In the words of Prof. Schreuer:

[t]he wording of [FPS] clauses suggests that the host state is under an obligation to take active measures to protect the investment from adverse effects. The adverse effects may stem from actions of the host state and its organs or from third parties.²⁶¹

263. There are also several decisions supporting this proposition.²⁶² In the *AMT* case it was held that:

the obligation incumbent on the host state is an obligation of vigilance, in the sense that the host state shall take all measures necessary to ensure the full enjoyment of protection and security of the investments.²⁶³

ii. The Meaning of "Constant" Protection

²⁵⁷ *AAPL*, ¶49; *AMT*, ¶¶6.05-6.06.

²⁵⁸ *Siemens*, ¶286.

²⁵⁹ *Azurix*, ¶408.

²⁶⁰ UNCTAD2, p.40.

²⁶¹ Dolzer, p.149.

²⁶² *Wena Award* ¶ 84; *Biwater* ¶712; *Saluka* ¶484.

²⁶³ *AMT v. Zaire*, ¶¶6.05-6.06.

264. Under Calpurnia-Gaul BIT, protection and security must not only be “full” but also “constant”. Moreover, the term “constant” denotes something that remains unchanged over time or otherwise, not changing or not capable of change.²⁶⁴ The guarantee to provide constant protection and security does often refer to Principles of International Law requiring a minimum level of physical protection for foreign property, and also to the protection of investors’ rights.

265. RESPONDENT undertook to accord CLAIMANT full and constant protection and security while its business was settled in Calpurnia. A positive action on its part was required to preserve CLAIMANT’s investment.²⁶⁵ These actions required of the host state were not fulfilled.

266. As explained above, FPS is understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; rather it extends to the stability afforded by a secure investment environment.

267. It has been said that:

The addition of words like “constant” or “full” to strengthen the required standard of “Protection and Security” could justifiably indicate the Parties’ intention to require within their treaty relationship a standard of “due diligence” higher than the minimum standard of the general international law.²⁶⁶

268. The *Azurix* tribunal decided that:

when the terms ‘protection’ and ‘security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.²⁶⁷

iii. Calpurnia’s Acts and Omissions Constituted a Breach of FPS

269. Irrespective of the scope considered to be included in FPS as contained in Calpurnia-Gaul BIT, RESPONDENT’s actions constituted an infringement of its provisions. Not only did it breach the standard by failing to provide physical protection, but it also failed to provide levels of legal protection and stability commensurate with its obligations under Calpurnia-Gaul BIT.

²⁶⁴ Merriam-Webster.

²⁶⁵ Dolzer, p.149.

²⁶⁶ Bishop, p.1052.

²⁶⁷ *Azurix*, ¶408.

270. As stated in *AMT*:

The State has a ‘primary obligation’ to exercise due diligence to provide adequate protection. The State’s failure to comply with this objective obligation due to the mere lack of diligence is sufficient, without any need to establish malice or negligence.²⁶⁸

271. Among other actions, RESPONDENT entered into CLAIMANT’s Expat Personnel’s homes capturing laptops and other work materials. These police searches themselves had no legal basis, and, were in fact never followed by any form of prosecution. Besides that, there were three press releases reporting on such police searches in inflammatory terms, also accusing CLAIMANT’s Expat Personnel of espionage.²⁶⁹ The press releases show, without any doubt, that the only purpose of this line of action by Respondent was to stir public sentiment against foreign investors. This resulted in a severe undermining of CLAIMANT’s goodwill and in the rise of a violent sentiment which ultimately led to the pickets in front of CLAIMANT’s personnel’s homes in Calpurnia.

272. The pickets were held in front of Ms. Pescara’s home, led by members of the CCC Women’s League, and notably violent.²⁷⁰ Vehicle access to and from the property was totally obstructed. It was not possible to access the house on car, but only by foot, which meant physical exposure to the protesting hordes, and a clear threat to the physical security of CLAIMANT’s personnel. Moreover, the police, in ignoring Ms. Pescara’s requests did nothing to protect CLAIMANT’s property and employees.²⁷¹

273. The *Saluka* tribunal commented that:

the “full security and protection” clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.²⁷²

274. For the following reasons, Calpurnia failed to accord FPS to CLAIMANT.

275. It conducted unwarranted and unjustified police searches at the homes of CLAIMANT’s representatives (see §III.B.i);

²⁶⁸ *AMT*, ¶¶6.05-6.06,6.13; *see also AAPL*, ¶¶76-77.

²⁶⁹ Calendar, 12/08/2003; 06/04/2004; 07/17/2004.

²⁷⁰ Clarifications-1, No.19.

²⁷¹ CLA-Abst., ¶17.

²⁷² *Saluka*, ¶484. *See also, AMT*, ¶¶6.05-6.06.

276. The press releases affected CLAIMANT's goodwill, they contained allegations of espionage against CLAIMANT;

277. The police refused to protect Ms. Pescara's home when requested to do so, and failed to take all the necessary measures to protect her house from the violent picketers.

VI. REQUEST FOR RELIEF

278. For the above mentioned submissions, CLAIMANT respectfully requests this Tribunal to find that:

- It has jurisdiction to rule over the present dispute;
- RESPONDENT expropriated CLAIMANT's investment without paying due compensation;
- RESPONDENT unlawfully prevented the free transfer of CLAIMANT's returns;
- RESPONDENT failed to accord fair and equitable treatment and full and constant protection and security; and
- RESPONDENT discriminated against CLAIMANT.

X

[Sgd]