

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

TEAM MCNAIR

**INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT
DISPUTES**

ICSID CASE No. ARB/X/X

BETWEEN:

VANGUARD INTERNATIONAL

THE GOVERNMENT OF THE

REPUBLIC OF CALPURNIA

CLAIMANT/INVESTOR

RESPONDENT/PARTY

MEMORIAL FOR THE CLAIMANT

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

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STATEMENT OF FACTS

A. The Investment

1. In 1997, Vanguard International (**the Claimant**) and the State Fund for Commerce and Development in Calpurnia (**SFCDC**) participated in the establishment of a joint venture company, VanCal. The SFCDC is wholly owned by the Government of Calpurnia (**the Respondent**). VanCal is incorporated in the territory of the Respondent, and its headquarters are located in San Inocente de Irkoutsk, its capital city. VanCal provides GSM/UMTS services in Calpurnia under the Claimant's "VANGUARD INTERNATIONAL" trademark.

B. The Claimant

2. The Claimant is a leading mobile telecommunications company with GSM and UMTS operations in seven emerging markets, with a total population under licence of approximately 360 million. The Claimant's headquarters are located in Nova Parigi, the capital of the Federated States of Gaul. Between 1997 and 2004, the Claimant played a major role in the management of VanCal, providing management skills and personnel, and participating on the board of directors.

C. The Respondent

3. In 2003, the Conservative Conscience of Calpurnia (**CCC**) won an absolute majority in both chambers of the Respondent's Parliament. The CCC's rhetoric is markedly hostile towards liberal, individualist, consumption and leisure-oriented societies. The Respondent's diplomatic relations with several states have deteriorated, including Gaul, the state in which the Claimant is domiciled.

D. Capital structure of VanCal

4. The Claimant initially held a 50% equity interest in VanCal. The interest declined as a result of a number of share sales. At the end of 2004, the Claimant held 30% directly and an additional 1% registered in the name of Francesca Pescara was held in trust for the Claimant. SFCDC owns 30% of VanCal's stock directly, and holds on deposit and votes a further 22% of VanCal stock registered in the names of several hundred individual shareholders. Other Calpurnian nationals directly hold the remaining 17% of VanCal's stock.

E. Interference

5. In late 2003, SFCDC implemented a series of decisions that effectively deprived the Claimant of the use and benefit of its 31% interest in VanCal. This includes the refusal to pay dividends to the Claimant between 2004 and 2007.
6. In September 2004, Ms Pescara, one of the Claimant's two board representatives, made an application to renew her three year business visa, which was denied. In November 2005, representatives of the Respondent ousted Ms Pescara () from the VanCal board and improperly rejected proxy votes, preventing the Claimant from electing a replacement for Ms Pescara.
7. Additionally, the Respondent instructed Mr Kornochi, VanCal's Managing Director, to cease sending accounts, financial statements or other information to Gaulois citizens or translating such material into Gaulois.

F. Climate of Hostility

8. On three occasions, the Respondent's Police Force searched the private homes of Ms Pescara and Mr Kolowenko, both Gaulois nationals and representatives of the Claimant. These searches were conducted on the basis of "anonymous tips". The Respondent's Security Directorate released press statements in relation to the searches that agitated public sentiment against the Claimant and its representatives. Ms Pescara's home was picketed on five occasions. Ms Pescara's requests to have the picketers removed were ignored by the Respondent's Police Force.

9. The climate of hostility forced Ms Pescara and Mr Kolowenko to leave the Respondent's territory at the end of 2003. Mr Kolowenko found it impossible to return altogether, and Ms Pescara found it impossible to safely return to the Respondent's territory after 1 November 2004.

ARGUMENTS

Part One: THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE

10. This Tribunal's jurisdiction is established under Article 11(2)(b) of the *Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion of Investments (Calpurnia-Gaul BIT)*.
11. The Tribunal has the authority to decide on its own jurisdiction. Article 41(1) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)* states that "The Tribunal shall be the judge of its own competence."
12. The Claimant submits that (A) the Tribunal has jurisdiction to hear the dispute under Article 25(1) *ICSID Convention*; and (B) the Tribunal's jurisdiction is not precluded by a requirement to pursue amicable settlement.

A. The Tribunal has jurisdiction under Article 25(1) ICSID Convention

13. Article 25(1) *ICSID Convention* states that "jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State...and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." This tribunal has jurisdiction to hear the dispute because (1) there is a legal dispute between the Claimant and Respondent; (2) the dispute arises directly out of an investment; (3) the parties to the dispute are a Contracting State and a national of another Contracting State; and (4) the parties have expressed written consent to arbitrate.

1. There is a legal dispute between the Claimant and Respondent

14. Although the Convention does not define ‘legal dispute’, the *ICSID Director’s Report* states that, “while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not.”¹ This is confirmed by the *ICSID History*, which states that a legal dispute is a conflict of rights as opposed to a mere conflict of interests.² A dispute concerning legal rights or reparations for breach of legal obligations is a ‘legal dispute’ for the purposes of the *ICSID Convention*.³
15. This dispute involves the legal rights and obligations that the Respondent owes under the *Calpurnia-Gaul BIT*. The Claimant is seeking reparations for the Respondent’s breach of legal obligations under Articles 2 and 6 *Calpurnia-Gaul BIT*. As such, this dispute is of a legal nature for the purposes of Article 25(1) *ICSID Convention*.

2. The dispute arises directly out of an investment

16. In order to establish that the subject of the dispute is an investment, the Claimant must satisfy the ‘double barrelled test’.⁴ This test is satisfied if “the dispute arises out of an investment within the meaning of the Convention”, and “as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions in Article 1 of the BIT.”⁵ The Claimant submits that (a) the subject of the dispute is an investment within the meaning of the *ICSID Convention*; and (b) within the meaning of *Calpurnia-Gaul BIT*.

¹ *ICSID Director’s Report*, paragraph 26

² *ICSID History*, pages 54, 203

³ *ICSID Director’s Report*, paragraph 26

⁴ *Malaysian Historical Salvors v Malaysia*, paragraph 55

⁵ *Salini v Morocco*, paragraphs 44, 52; see also *Ceskoslovenska Obchodni Banka v Slovak Republic* at paragraph 68

a. The subject of the dispute is an investment within the meaning of the *ICSID Convention*

17. Whether something is an investment for the purposes of Article 25 is determined according to the ‘Salini test’. This test consists of four elements: a contribution; a certain duration over which the project is implemented; sharing of operational risks; and a contribution to the host state’s development.⁶
18. The ‘contribution’ requirement may be “in terms of know-how, equipment and personnel, and in financial terms”.⁷ The Claimant has “provided management skills and personnel”,⁸ technical assistance and intellectual property.⁹
19. The element of duration “is a paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions”.¹⁰ In *Bayindir v Pakistan*, the tribunal noted that the duration requirement was satisfied by arrangements over an eight-year period.¹¹ In *Malaysian Historical Salvors v Malaysia*, the requirement of duration was satisfied through a four-year arrangement. The Claimant’s participation in VanCal has extended far longer than in those cases, beginning over ten years ago, in 1997.¹²

⁶ *Salini v Morocco*, paragraphs 44, 52

⁷ *Malaysian Historical Salvors v Malaysia*, paragraph 4; see also *Bayindir v Pakistan*, page 32, paragraphs 115-117

⁸ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 11

⁹ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 19

¹⁰ *Bayindir v Pakistan*, page 35, paragraph 32

¹¹ *Bayindir v Pakistan*, page 36, paragraph 133

¹² Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 8

20. The sharing of operational risks is inherent in the capital structure of VanCal. In a joint stock company, in the absence of an agreement to the contrary, the risks to each shareholder are shared in proportion with their capital contribution. In the absence of any contractual allocation of risk, the Claimant's ownership of shares in VanCal carries risks in the enterprise in proportion to ownership.
21. The Claimant's investment represented a significant contribution to the host state's development, as it facilitated the construction of an advanced third-generation mobile communications network in Calpurnia.¹³

b. The subject of the dispute is an investment within the meaning of the *Calpurnia-Gaul Bilateral Investment Treaty*

22. The parties have agreed in Article 1(b) *Calpurnia-Gaul BIT* that "shares, stocks, debentures or other form [sic] of participation in a company" are 'investments'. In this case, the dispute arises directly out of the Claimant's shareholding in VanCal. Therefore, the dispute arises directly out of an 'investment' as defined in the parties' consent to ICSID arbitration.

3. The parties to the dispute are a Contracting State and a national of another Contracting State

23. The jurisdiction of the Tribunal extends to signatories to the Convention to the extent that the signatory agrees to be bound.¹⁴ The Respondent is a contracting State of the *ICSID Convention*.¹⁵ As a contracting State, the Respondent has the right under Article 25(4) to limit the Tribunal's jurisdiction by specifying the classes of dispute it may submit to arbitration. Since the Respondent has not made such an election, this Tribunal's jurisdiction is not limited by Article 25(4) *ICSID Convention*.

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

¹⁴ Preamble *ICSID Convention*; Article 25(4) *ICSID Convention*

¹⁵ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 5

24. According to Article 25(2)(b) *ICSID Convention*, a “National of another Contracting State” includes “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration”. In *Amco v Indonesia*, the tribunal held that the nationality of a corporation can be determined according to the location of the company’s head office, and the laws under which the company is constituted.¹⁶ The Claimant has its headquarters in Gaul, and is constituted under the laws of Gaul.¹⁷ Therefore, the Claimant is a national of Gaul. As Gaul is a Contracting State,¹⁸ the Claimant is a National of another Contracting State for the purposes of Article 25(1) *ICSID Convention*.

4. The parties have expressed written consent to arbitrate

25. The requirement in Article 25(1) *ICSID Convention* that the parties express written consent to arbitrate reflects the general principle that the authority of an arbitral tribunal is derived from an arbitration agreement.¹⁹ The Claimant submits that (a) the Respondent made an offer to arbitrate disputes by acceding to the *Calpurnia-Gaul BIT*, (b) the Claimant accepted the Respondent’s offer to arbitrate by instituting arbitral proceedings; and (c) the validity of the consent to arbitrate is not affected by the domestic court proceedings.

¹⁶ *Amco v Indonesia*, paragraph 14(iii)

¹⁷ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 2-3, paragraph 5

¹⁸ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 5

¹⁹ Redfern/Hunter, paragraph 1-08; *Salini v Morocco* at paragraph 27

a. The Respondent made an offer to arbitrate disputes by acceding to the *Calpurnia-Gaul Bilateral Investment Treaty*

26. A clause in a bilateral agreement can qualify as consent under Article 25(1) *ICSID Convention*.²⁰ The Respondent's offer to arbitrate is on the terms of Article 11(2) *Calpurnia-Gaul BIT*, which states that "the investor concerned may submit the dispute to international arbitration." Moreover, Article 11(2)(b) specifically provides investors with the option of submitting investment disputes to ICSID for arbitration. As such, the Respondent has given its "irrevocable consent...that all disputes relating to investments are to be submitted" under that clause.²¹

b. The Claimant accepted the Respondent's offer to arbitrate by instituting arbitral proceedings

27. An investor "may accept the host state's offer by bringing a request to the Centre".²² In this case, the Claimant accepted the Respondent's offer to arbitrate by filing its Request for Arbitration on 31 July 2007.²³

c. The validity of the consent to arbitrate is not affected by the domestic court proceedings

28. Article 11(3) *Calpurnia-Gaul BIT* states that "an investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse" to an arbitral tribunal. Such a provision is referred to as a 'fork in the road' provision because it purports to require a party to make an irrevocable election as to forum.²⁴

²⁰ *Salini v Morocco* at paragraph 27

²¹ Article 11(2) *Calpurnia-Gaul BIT*

²² *Explanatory Notes*, 643; see also *ICSID History*, Vol II(2), 1069; 1 *ICSID Rep* 28

²³ Moot Problem, Calendar of Events, page 9

²⁴ *McLachlin*, 251 paragraph 7.153

29. The Respondent has contended in its Reply to Request for Arbitration that an ICSID arbitral tribunal would lack jurisdiction because Ms Pescara has already pursued a claim on behalf of the Claimant in the Commercial Court of San Innocente de Irkoutsk, Caluprnia (**the Court**). This is incorrect because the Court proceedings and arbitral proceedings (i) are brought under different substantive laws and (ii) were brought by different parties. Further, (iv) the ‘fork in the road’ clause is invalid because it is less favourable than the treatment afforded to Flatland investors.

i. The Court proceedings and arbitral proceedings are brought under different substantive laws

30. Rights created by treaty exist on the plane of international law, as distinct from rights under domestic law.²⁵ This distinction is exemplified by Article 27 *Vienna Convention on the Law of Treaties (VCLT)*, which states that –

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Indeed, in *Case Concerning ELSI*,²⁶ the tribunal noted that –

“Compliance with municipal law and compliance with the provisions of a treaty are different questions [because] What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.”²⁷

²⁵ McLachlin, 99 paragraph 4.65

²⁶ *Case concerning ELSI*, page 51

²⁷ *Case concerning ELSI*, page 51

31. Ms Pescara brought private civil proceedings to the Court in an attempt to enforce her right to a dividend. Her claim was heard in the Respondent's national courts, and was decided on the basis of domestic law. In contrast, the present dispute involves the Claimant's rights under a treaty. Given that the two claims are brought under different substantive laws, Ms Pescara's court proceedings do not affect the Claimant's right to arbitrate.
32. Further, only a minority of the present claim has been the subject of proceedings in the Court. The present claim relates to the Claimant's entire 31% shareholding, while Ms. Pescara's claim was for her 1% shareholding. Even if this tribunal were to attribute Ms Pescara's acts to the Claimant, this would only affect one per cent of the Claimant's shareholding, and does not affect the remaining 30% of the present claim.

ii. The Court proceedings and arbitral proceedings were brought by different parties

33. A fork in the road clause does not preclude parallel proceedings brought by different parties. In *Genin v Estonia*, domestic proceedings were brought in the name of the corporation in which the investor owned a partial shareholding. The investor subsequently instituted ICSID arbitral proceedings in respect of the investor's shares alone. The tribunal held that, as the parties to the proceedings were different, the court proceedings did not preclude ICSID arbitration.²⁸

²⁸ *Genin v Estonia* at pages 291-292

34. Ms Pescara brought an action in her capacity as a shareholder, not as an agent of the Claimant.²⁹ Ms Pescara does not have standing to bring a claim on behalf of the Claimant. This conclusion is consistent with the judgement of the Respondent's Court of 14 June 2005, in which it found that "Ms Pescara, as mere nominee, has no beneficial interest in the shareholding, and therefore lacks standing to bring this action."³⁰ Ms Pescara brought proceedings in the Court on her own behalf and these proceedings do not affect the Claimant's right to commence arbitral proceedings.

iii. The 'fork in the road' clause is invalid because it is less favourable than the treatment afforded to Flatland investors

35. Under Article 7 *Calpurnia-Flatland BIT*, a Flatland investor may institute arbitral proceedings, despite having already commenced court proceedings. The Claimant is similarly entitled to commence arbitral proceedings as (i) Gaulois investors are entitled to treatment no less favourable than Flatland investors; and (ii) the most favoured nation clause applies to the right to submit disputes to arbitration. Further, (iii) the denunciation of the *Calpurnia-Flatland BIT* does not affect the Claimant's right to arbitrate

(i) Gaulois investors are entitled to treatment no less favourable than Flatland investors

36. According to Article 4(1) *Calpurnia-Gaul BIT*, Gaulois investors –

“shall be accorded treatment which is not less favourable than the host contracting party accords to the investments and returns made by...investors of any third state”.

²⁹ Moot Problem, Calendar of Events, 14 June 2006, page 8

³⁰ Moot Problem, Calendar of Events, page 8

37. Article 4(2) *Calpurnia-Gaul BIT* extends this protection in respect of “management, maintenance, use, enjoyment or disposal of their investments.” The effect of this ‘most favoured nation’ clause is that the Respondent must treat Gaulois investors no less favourably than Flatland investors.

(ii) The most favoured nation clause applies to the right to submit disputes to arbitration

38. Article 7 *Calpurnia-Flatland BIT* allows an investor to submit disputes–

“either to...The international center for the settlement of investment dispute...Or to the local judicial authorities for of [sic] the other contracting party hosting the investment.”

39. Importantly, this treaty does not expressly preclude ICSID arbitration once domestic court proceedings have been commenced. In this way, *Calpurnia-Flatland BIT* affords Flatland investors treatment more favourable than that afforded to Gaulois nationals under *Calpurnia-Gaul BIT*.

40. Article 4 *Calpurnia-Gaul BIT* applies to dispute resolution provisions. A “most favoured-nation clause can only attract matters belonging to the same category of subjects as that to which the clause itself relates”.³¹ In determining the ‘category of subjects’ to which the clause applies, the tribunal has regard to the parties’ intention.³² This category of subjects is interpreted broadly. In particular, a clause expressly relating to substantive rights also applies to the “administration of justice, in so far as it is concerned with the protection of these rights”.³³

³¹ *Ambatielos*, page 106

³² *Ambatielos*, page 106; *Maffezini v Spain*, Award of 25 January 2000, paragraph 117; *Salini v Morocco*, paragraph 118

³³ *Ambatielos*, page 106

41. Article 4(1) *Calpurnia-Gaul BIT* relates to the Claimant's rights in respect of investment and returns. The right to submit disputes to arbitration relates to the administration of justice, and is concerned with the protection of these rights.³⁴ Therefore, Article 4(1) extends to the right to bring arbitral proceedings. As Flatland investors are entitled to commence ICSID arbitration despite having instituted court proceedings, the Claimant concludes that it is similarly entitled to commence ICSID arbitration.

(iii) The denunciation of the *Calpurnia-Flatland Bilateral Investment Treaty* does not affect the Claimant's right to arbitrate

42. ICSID received Flatland's denunciation of the *ICSID Convention* on 2 May 2003.³⁵ As Flatland is no longer a "Contracting State", an ICSID tribunal would not have jurisdiction over a dispute arising out of an investment in Flatland.³⁶ However, this does not render Article 7 *Calpurnia-Flatland BIT* inoperative, as an investor may instead submit disputes for resolution under the *UNCITRAL Rules*³⁷ or the *Settlement of the Consolidated Agreement for Agrarian Capital Investment in Semi-Arid Countries*.³⁸ Flatland investors have recourse to several different fora, so the fact that they can no longer bring claims to ICSID does not change the fact that they may commence both arbitral and court proceedings.

³⁴ See *Ambatielos*, page 106

³⁵ Moot Problem, Abstract from Respondent's Reply to Request for Arbitration, footnote 1

³⁶ See Article 25(1) *ICSID Convention*

³⁷ Article 7(A) *Calpurnia-Flatland BIT*

³⁸ Article 7(B) *Calpurnia-Flatland BIT*

43. Given that the Claimant is entitled to treatment no less favourable than that afforded to Flatland investors, the Claimant is entitled to bring arbitration and court proceedings without having to elect one or the other. Flatland's denunciation of the *ICSID Convention* does not affect the Claimant's right to most favoured nation treatment, so even if the Tribunal finds that the Claimant has commenced court proceedings through Ms Pescara, the Claimant is still entitled to commence arbitration.

B. The Tribunal's jurisdiction is not precluded by a requirement to pursue amicable settlement

44. Article 11(2) *Calpurnia-Gaul BIT* states that –

“If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration.”

45. In the Abstract from its *Reply to Request for Arbitration*, the Respondent has argued that “an ICSID Arbitral Tribunal would manifestly lack jurisdiction” because “The Claimant has not pursued amicable settlement for the 18 months as required”.³⁹ The Claimant argues that (1) the Claimant complied with the 18 month waiting period in the *Calpurnia-Gaul BIT*, and (2) in any event, the Respondent was not willing to amicably settle the dispute.

1. The Claimant complied with the 18 month waiting period in *Calpurnia-Gaul Bilateral Investment Treaty*

46. In *Salini v Morocco*, the Tribunal stated that an attempt to reach an amicable settlement need not be complete or detailed, but should include the existence of grounds for complaint and the desire to resolve the matter out-of-court.⁴⁰

³⁹ Moot Problem, pages 4-5, paragraph 5

⁴⁰ *Salini v Morocco*, paragraph 20

47. The issues in this dispute arose when VanCal's board suspended payment of profits to foreign shareholders.⁴¹ Upon learning of this decision, the Claimant immediately raised its concerns with the Respondent by email on 5 June 2005. The Claimant raised the issue of unequal treatment and demanded that the board formally communicate its decision to suspend the payment of dividends and provide a legal basis for its decision.
48. The Claimant's request evidenced an intention to amicably resolve the dispute. Initially, the Claimant did not threaten legal action, however the Respondent made no effort to co-operate with the Claimant to resolve the dispute following the communication of 5 June 2005. The Claimant ultimately requested arbitration on 31 July 2007.⁴²
49. Because the Claimant first attempted to resolve the dispute over two years before requesting arbitration, the Claimant has complied with the 18 month waiting period required by Article 11 (2) *Calpurnia-Gaul BIT*.

2. In any event, the Respondent was not willing to amicably settle the dispute

50. The purpose of the kind of waiting period provided in Article 11(2) "is to allow the parties to engage in good-faith negotiations before commencing the arbitration."⁴³ It follows that a Respondent cannot rely on such a clause where it was unwilling to engage in such negotiations.

⁴¹ Moot Problem, Calender of Events, 10 March 2005, page 6

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

⁴³ *Lauder v Czech Republic*, paragraph 187

51. The Claimant first brought the issues in dispute to the attention of the Respondent on 5 June 2005,⁴⁴ and continued to raise issue with the Respondent up until 5 February 2007.⁴⁵ On 21 February 2007, the Respondent told the Claimant that they would refuse to act, and that “There is nothing we can do.”⁴⁶ At that point, it became prospectively clear that, the claim could not be amicably settled within the following 18 months.
52. Despite the Claimant’s best efforts, the Respondent was unwilling to engage in good faith negotiations. The purpose of the waiting period was frustrated by the Respondent’s actions, and so the Claimant should not be bound to abide by the 18 month period required by Article 11(2).

⁴⁴ Moot Problem, Calendar of Events, 5 June 2005, page 7

⁴⁵ Moot Problem, Calendar of Events, 23 October 2006; 5 February 2007, page 8

⁴⁶ Moot Problem, Calendar of Events, 21 February 2007, page 8

Part Two:
THE RESPONDENT HAS UNLAWFULLY INTERFERED
WITH THE CLAIMANT’S INVESTMENT

53. Article 2 *Articles on State Responsibility* provides 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.”

54. The Respondent had an international obligation under Article 6(1) *Calpurnia-Gaul BIT*, which provides that the Claimant’s investment –

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

55. According to Article 6(1) *Calpurnia-Gaul BIT*, this obligation does not apply if the expropriation is –

“for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation.”

56. The Respondent is liable for the measures of VanCal as (A) the interference is attributable to the Respondent under international law; and (B) the interference constitute a breach of Article 6 *Calpurnia-Gaul BIT*. Further, (C) the Respondent’s measures are not legally justified.

A. The interference is attributable to the Respondent under international law

57. Through a chain of ownership and control, the actions of VanCal are attributable to the Respondent under international law. The Respondent is liable for VanCal’s acts because (1) SFCDC is a state institution; and (2) SFCDC controls VanCal.

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

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

59. The separate judicial status of an entity two or more levels removed from the Government itself is not a sufficient basis to conclude that the entity conducts its operations free of the control of the government. The Iran-US Tribunal has held in three awards that control by an independent government entity, over another independent entity was sufficient to satisfy the test for attribution.⁴⁷
60. The Claimant submits that the expropriatory acts of VanCal are attributable to the Respondent because VanCal is controlled by the SFCDC, which is a State-owned company controlled by Respondent.

1. SFCDC is a State institution

61. SFCDC is 100% owned by Respondent.⁴⁸ 100% state ownership of a company indicates that the company is a state institution notwithstanding the company having a separate legal personality.⁴⁹ The Respondent’s control of SFCDC is evident in that its directors are appointed by the Respondent, through the Respondent’s Ministry of Economy, Department of Labour and Social Services, Environmental Protection Agency and National Security Council.⁵⁰

⁴⁷ *Ultrasystems v Iran* at page 105; *Foremost Tehran v Iran* at 241; *CBS Incorporated v Iran*, page 140

⁴⁸ Moot problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 6

⁴⁹ *Salini v Morocco*; *Bouchez*; *Böckstiegel*

⁵⁰ Second Clarifications, Clarification 17

62. In *Phillips Petroleum Company Iran v Iran*, the Tribunal attributed the acts of a Company to the Government. This was because the Company's acts helped implement the Government's national oil policy.⁵¹ In the present matter, the Respondent denied the Claimant its rights in an attempt to reduce the amount of money paid to foreign shareholders. This is consistent with the Respondent government's agenda to "return to the traditional Calpurnian values of hard work, family, modesty, thrift and self-sufficiency."⁵² Following the reasoning in *Phillips Petroleum Company Iran v Iran*, the expropriation is an act of the Respondent because it assisted the implementation of a government policy.

2. SFCDC controls VanCal

63. Where a State controls a private entity, the conduct of the entity is considered conduct of the State.⁵³ The tribunal in *Foremost Tehran v Iran* held that –

“the two main indicators of government control of a corporation are the identity of its shareholders and the composition and behaviour of its board of directors, which must be examined together.”⁵⁴

In *Hollyfield v Iran*, the tribunal considered that that –

“decisive elements for a finding of control are the identity of the company's shareholders, the composition and behaviour of its board of directors, and whether the government appointed managers were in charge” –

⁵¹ *Phillips Petroleum Company Iran v Iran*, page 112

⁵² Moot Problem, Abstract from Request for Arbitration, page 3, paragraph 12

⁵³ Article 8 *Articles on State Responsibility*

⁵⁴ *Foremost Tehran v Iran* at pages 241-242

at the material time.⁵⁵ Similarly, in *PepsiCo v Iran* it was said that “majority share ownership and control over the board establishes control.”⁵⁶ In *Maffezini v Spain*⁵⁷ the tribunal confirmed that, in the context of an ICSID arbitration, the issue turns on the state’s degree of control and participation in the company. The tribunal’s assessment was based on the structure of the company, in particular its shareholders, and the government’s control of the objectives of the company.⁵⁸

64. Based on these authorities, the Claimant will establish that, as the Respondent votes a majority of the capital stock of VanCal, and controls the management of VanCal, the acts of VanCal are attributable to the Respondent. The Respondent, through SFCDC, controls VanCal (a) through the structure and ownership of VanCal’s capital stock; and (b) through the management of VanCal.

a. The Respondent controls VanCal through the structure and ownership of VanCal’s capital stock

65. VanCal is a joint venture company which was incorporated by the Claimant in 1997 under the laws of the Respondent.⁵⁹ VanCal’s capital stock is held in the following manner: 30% is held directly by SFCDC; SFCDC holds on deposit and votes a further 22%; 17% is held directly by Calpurnian Nationals; 30% is held directly by Claimant; with an additional 1% registered in the name of Francesca Pescara held in trust for Claimant.⁶⁰

66. The Respondent, through SFCDC, holds and controls the voting of 52% of the capital stock of VanCal, giving the Respondent majority control of VanCal.

⁵⁵ *Hollyfield v Iran* at page 279

⁵⁶ *PepsiCo v Iran* at pages 19-21

⁵⁷ *Maffezini v Spain*, Award of 13 November 2000

⁵⁸ *Maffezini v Spain*, Award of 13 November 2000; see also *Salini v Morocco*

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

⁶⁰ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 3, paragraph 9-10

b. The Respondent controls the management of VanCal

67. The VanCal board consists of six members,⁶¹ who are elected by simple majority at shareholder meetings.⁶² At the relevant times, the Respondent had four representatives on the VanCal board, while the Claimant had only two. The Claimant's representatives were originally Ms Pescara and Mr Shephard, who were replaced by Mr Hunter and Mr Fowler on 7 June 2006.⁶³
68. The Respondent's representatives included Dr. Swift, the Chairman of VanCal; Mr. Shelley, Mr. Poe, who are members of SFCDC.⁶⁴ The allegiance of the fourth member, Mr Korchnoi, is not expressly stated, however he obediently followed the instructions of Dr Swift during his time as Managing Director.⁶⁵ Mr Poe and Mr Korchnoi were later replaced by two unnamed SFCDC representatives.⁶⁶ At the shareholder meeting on 14 October 2004, the SFCDC began to take a more active role in the management of VanCal, initially with the appointment of two SFCDC representatives including the Chairman of the Board, Dr Swift.⁶⁷

⁶¹ Dr Swift, Moot Problem Calendar of Events, 14 October 2004; Mr Shelley 15 October 2004, Moot Problem Calendar of Events, 14 October 2004; Mr Poe, Moot Problem Calendar of Events, 10 March 2005 and 16 November 2005; Ms Pescara, Moot Problem Calendar of Events, 16 November 2005; Mr Shepherd, Moot Problem Calendar of Events, 15 April 2006; Mr Korchnoi, Paragraph 16, Page 4, Claimant's Request for Arbitration

⁶² Moot Problem, Calendar of Events, 16 November 2005, page 7

⁶³ Moot Problem, Calendar of Events, 7 June 2006, page 8

⁶⁴ Moot Problem, Calendar of Events, 10 March 2005, page 7; 14 October 2004, page 6; 5 February 2007, page 8

⁶⁵ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 16

⁶⁶ Moot Problem, Calendar of Events, 16 November 2005, page 7

⁶⁷ Moot Problem, Calendar of Events, 14 October 2004, page 6

69. SFCDC's majority ownership of the capital stock of VanCal gives it the ability to control the composition of the VanCal board. As such, the Respondent, through SFCDC, controls the management and functional objectives of VanCal. The Respondent's control over VanCal is demonstrated in its use of this control to achieve national policy objectives. At the meeting of the 16 November 2005, the Respondent's representatives voted to remove the Claimant's representative, Ms Pescara. At the same meeting, Dr Swift stated that "the main objective" of the company is –

“to protect the interests of the country as well as to preserve the industry and the interests of the shareholders including the minor ones within the general interests of the country”.⁶⁸

70. The Respondent acted to protect the interests of its own nationals by voting in favour of a payment of dividend, while voting to “suspend the payment of profits to foreign shareholders.”⁶⁹ This demonstrates that the Respondent used its control of VanCal's board to support the nationalistic policy of the CCC.

B. The Respondent's interference amount to expropriation

71. Expropriation is the taking or deprivation of the property of foreigners by a government.⁷⁰ Expropriation may occur even when legal title remains with the owner.⁷¹ An indirect expropriation deprives the owner of the possibility of utilising the investment but leaves the investor's legal title untouched.⁷²

72. Interference amounts to expropriation where the Governmental measures have a permanent

⁶⁸ Moot Problem, Calendar of Events, 16 November 2005, page 7

⁶⁹ Moot Problem, Calendar of Events, 10 March 2005, page 7

⁷⁰ August, page 77

⁷¹ Dolzer/Schreur, page 92

⁷² Dolzer/Schreur, page 92

character, substantially interfere with the investor's property rights and conflict with the investor's legitimate expectations.⁷³

73. The Respondent, through SFCDC, used its majority voting power on the VanCal board to approve decisions not to pay any money to foreign shareholders; and to cease sending accounts, financial statements or other information to foreign citizens. This amounts to an expropriation because (1) the measures have a permanent character; (2) the Respondent substantially interfered with the Claimant's property rights; (3) the Respondent's measures interfered with the Claimant's legitimate expectations; and (4) the Respondent has expropriated the Claimant's contractual intellectual property rights.

1. The Respondent's interference has a permanent character

74. The length of time the interference is in effect is the determining factor of the character of a governmental measure. The longer the interference is in duration, the more likely it will be viewed as an expropriatory measure.⁷⁴ Whether or not a measure of interference will be seen as temporary or permanent will depend on the facts of the case.⁷⁵
75. The relevant inquiry is the duration of the deprivation of rights or benefits, not the duration of the expropriatory acts themselves.⁷⁶ There is nothing in the facts that suggests that the Claimant's rights or benefits will be returned. In fact, the Respondent conceded that there was nothing they could do to return the rights.⁷⁷
76. The Claimant submits that, given the Respondent has provided no evidence as to the duration

⁷³ *Metalclad v Mexico* at paragraph 103; Dolzer, page 65-93

⁷⁴ *Goetz v Burundi; Middle East Cement v Egypt; Metaclad v Mexico; CME v Czech Republic*

⁷⁵ *Liselotte Hauer v Land Rheinland-Pfalz* at paragraphs 28-29; *Metalclad v Mexico* at paragraph 116; *Azurix v Argentina* at paragraph 285

⁷⁶ *Azurix v Argentina* at paragraph 285

⁷⁷ Moot Problem Calendar of Events, 21 February 2007

of the measure, it is prudent to err on the side of caution and view such facts as being indicative of permanency.

2. The Respondent substantially interfered with the Claimant's property rights

77. Indirect expropriation occurs when control over, or the economic value of any property has been rendered “essentially useless”.⁷⁸ Governmental interference amounts to expropriation when the measures have substantially interfered with the investor's control, use and benefits of its investment, and the measure has interfered with the investor's legitimate expectations.⁷⁹ Taking occurs if the interference substantially affects the economic benefit and value as well the control of the investment.⁸⁰
78. The Respondent substantially interfered with the Claimant's investment because the Respondent's measures (a) affected the Claimant's property; and (b) constitute substantial interference.

a. The Respondent's measures affected the Claimant's property

79. This dispute is centred upon the Claimant's 31% capital stock in the joint venture company VanCal.⁸¹ The Claimant owns 30% of the VanCal stock directly, and an additional 1% is registered in the name of Ms Pescara, held in trust for the Claimant.⁸² Therefore, the 31% stock and associated benefits is the sole property of the Claimant.

⁷⁸ *Metalclad v Mexico* at paragraph 103; *CME Czech Republic B.V. v Czech Republic*; *Seismograph Service Corp v Iran*; *Tippetts v Iran*, page 225; *Occidental v Ecuador*

⁷⁹ *Starrett Housing v Iran*

⁸⁰ Dolzer/Schreuer, 92

⁸¹ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 8

⁸² Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 9

80. Each case of expropriation turns on the particular facts of the interference.⁸³ The following measures of the Respondent sufficiently interfered with the use, benefits and control of the Claimant's investment to constitute expropriation.
81. Firstly, although VanCal declared cash dividends each year from 2004 to 2007 and paid those dividends to Calpurnian stockholders, it refused to pay them to the Claimant.⁸⁴
82. Secondly, in November 2005, the Respondent's representatives ousted Ms Pescara, one of Claimant's two representatives, from the VanCal board.⁸⁵ The Respondent's representatives improperly rejected the shareholder proxies held by Mr Rindler on behalf of the Claimant.⁸⁶ This prevented the Claimant from electing a replacement for Ms Pescara, leaving the Claimant without representation on the VanCal board.⁸⁷ These actions deprived the Claimant of the representation to which it was entitled under the Calpurnian Commercial Code.⁸⁸
83. Thirdly, Dr Swift, Chairman of VanCal and an employee of SFCDC, instructed Mr Korchnoi to cease sending accounts, financial statements and other company information to Gaulois citizens or translating such material into Gaulois.⁸⁹

⁸³ Dolzer/Schreur, 96

⁸⁴ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3-4, paragraph 14

⁸⁵ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 15

⁸⁶ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 15

⁸⁷ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 15

⁸⁸ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 15

⁸⁹ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 16

84. Fourthly, the Respondent's measures caused the Claimant's Gaulois representatives to leave the Respondent's territory.⁹⁰ The Respondent agitated public sentiment against Gaul nations generally, and the Claimant's representatives in particular. Specifically, the police conducted three searches on the representatives' private homes and the Respondent's Security Directorate issued defamatory press releases.⁹¹ Further, in September 2004, Ms Pescara's application for renewal of a three year business visa was denied.⁹²

b. The Respondent's measures constitute substantial interference

85. The Respondent's measures constitute interference because the Claimant was deprived of (i) the effective use and benefit of the investment; and (ii) the control of the investment. Alternatively, (iii) interference with use and benefit alone is sufficient to establish expropriation

i. The Claimant was deprived of the effective use and benefit of the investment

86. Economic considerations are relevant in determining whether there has been indirect expropriation.⁹³ Indirect expropriation exists if the measure constitutes a deprivation of the use and enjoyment of the right related to that use, such as income or benefits.⁹⁴

⁹⁰ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

⁹¹ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 17

⁹² Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 18

⁹³ Dolzer/Schreuer, page 101

⁹⁴ *TECMED v Mexico*, paragraph 115

87. In *Consortium RFCC v Morocco*, the tribunal stated that an indirect expropriation exists if the measures have “substantial effects of an intensity that reduces and/or removes the legitimate benefits related with the use of the rights targeted by the measure to an extent that they render their further possession useless”.⁹⁵
88. The *CME v Czech Republic* the tribunal found the Respondent’s actions and omissions caused the destruction of the investors operations, leaving the investor as a company with assets, but without business. What was destroyed was the commercial value of the investment.⁹⁶
89. The Respondent has destroyed the commercial value of the Claimant’s investment in VanCal as, under the current measures, the Claimant is prevented from deriving a return from its investment in the form of any payment whatsoever. Further, it would be difficult for the Claimant to dispose of its holdings in VanCal for fair value given the size of the share market in Calpurnia⁹⁷. The Claimant submits that, given it is prohibited from deriving a benefit from its investment and its is unable to dispose of its investment for fair value, the value of its investment has been render worthless.
90. In *LG&E v Argentina* the tribunal established the following test of control:
- “Ownership or enjoyment can be said to be ‘neutralized’ where a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment.”⁹⁸

⁹⁵ Dolzer/Schreuer, page 102

⁹⁶ *CME v Czech Republic*, paragraph 604

⁹⁷ First Clarifications, Clarification 2

⁹⁸ *LG&E v Argentina*, at paragraph 322

91. In the present case, the Claimant cannot direct the day-to-day operations of its capital stock in VanCal. The Claimant was denied representation on VanCal's board, despite its entitlement to representation under the Calpurnian Commercial Code. The denial occurred through a series of events including the ousting of Ms Pescara, the improper rejection of the proxy votes that prevented the Claimant to elect a replacement, the denial of renewing Ms Pescara's business visa.⁹⁹ Further, the Claimant was denied material information, accounts and financial statements necessary for the exercise of control over its investment.¹⁰⁰ These actions hampered the Claimant's ability to control and preserve the value of its investment.
92. The tribunal in *Revere Copper v OPIC* held that the investment had been expropriated on the basis that the Claimant was deprived of its control of the investment. The arbitrators concluded that control is exercised by a continuous stream of decisions, and held that the investment had been expropriated because they had been denied of their right to make decisions.
93. In the present case, the Claimant has been denied representation on the board of VanCal.¹⁰¹ It has lost control of its investment as it has been denied its ability to make and influence decisions about the investment.

⁹⁹ Moot Problem, Abstract from Claimant's Request for Arbitration, page 4, paragraphs 15-18

¹⁰⁰ Moot Problem, Calendar of Events, 22 April 2007, page 9

¹⁰¹ Moot problem, Abstract from Claimant's Request for Arbitration, page 4, paragraph 15-18

ii. Interference with use and benefit of the investment is sufficient to establish expropriation

94. The effective use, control and the benefits derived from the investment must all be considered together.¹⁰² In *Middle East Cement v Egypt*, *Waste Management v Mexico*¹⁰³ and *EnCana v Ecuador*,¹⁰⁴ the investors established an expropriation despite retaining control over their investments.¹⁰⁵ In *Revere Copper*, a mining lease was found to be expropriated as the investor's use and operation of its property was no longer effective.¹⁰⁶ This was despite the investor maintaining control of its assets.¹⁰⁷
95. In *Eureko B.V. v Poland*, the investor had acquired a minority share in a privatised insurance company. The investor had the right to acquire further shares to gain majority control of the company. The state withdrew the right to acquire additional shares. The tribunal found that the right to acquire further shares constituted 'assets', which were separately capable of expropriation.¹⁰⁸ It follows that even where control over the basic investment remains unaffected, the taking of specific rights that are related to the basic investment may amount to an expropriation.¹⁰⁹

¹⁰² Dolzer/Schreur, 107-108

¹⁰³ *Waste Management v Mexico* at paragraphs 141, 147

¹⁰⁴ *Encana v Ecuador*, paragraphs 172-183

¹⁰⁵ Dolzer/Schreur, 108

¹⁰⁶ *Revere v Cooper*, page 291-292

¹⁰⁷ *Revere v Cooper*, page 291-292

¹⁰⁸ *Eureko B.V. v Poland*, at paragraphs 239-241

¹⁰⁹ Dolzer/Schreur, 108

96. In the present case, the Respondent has interfered with the Claimant's right to receive dividends and information relevant to its investment. Therefore, even if the Claimant still has control of its investment, the Respondent has expropriated the Claimant's investment.

3. The Respondent's measures interfered with the Claimant's legitimate expectations

97. The Claimant had a legitimate expectation that its investment would generate a long term profit, free from expropriation or nationalisation. The legitimate expectations of an investor are assessed from the investor's point of view at the time the investment was made.¹¹⁰ The relevant factors in making this determination are the activities carried out, the corporate purpose of the investment, and the terms and conditions that were initially applicable to the investment.¹¹¹
98. The Claimant is a leading mobile telecommunications company with GSM operations in seven markets, having a total population under licences of approximately 360 million.¹¹² The ongoing nature of Claimant's activities demonstrates its legitimate expectation in generating a return on the operation of a mobile telecommunications network within the Respondent's territory.
99. The Claimant first invested in the Respondent's territory in early 1997, when the Claimant and Respondent established VanCal as a joint venture company.¹¹³ The establishment of a new joint venture enterprise, as opposed to the purchase of an existing enterprise, demonstrates that the Claimant's corporate purpose was to derive profits from the operation of its investment over a substantial period. This evidences that the Claimant had a legitimate expectation in a long term profit, free from expropriation.

¹¹⁰ *TECMED v Mexico*, page 163, paragraph 117

¹¹¹ *TECMED v Mexico*, page 163, paragraph 117

¹¹² Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 7

¹¹³ Moot Problem, Abstract from Claimant's Request for Arbitration, page 3, paragraph 8

100. The terms and conditions applicable at the commencement of the investment are demonstrated by the *Calpurnia-Gaul BIT*. Article 6 states that the Respondent would not “expropriate, nationalise or subject the investors of the other Contracting State to any other measure having the effect equivalent to expropriation or nationalisation”. Representations made by a host state may create a legitimate expectation that investments will not be expropriated.¹¹⁴ On the basis of Article 6 *Calpurnia-Gaul BIT*, the Claimant had a legitimate expectation that its assets would not be expropriated or nationalised.

4. The Respondent has expropriated the Claimant’s contractual intellectual property rights

101. The Claimant submits that by failing to fulfil its contractual obligation the Respondent has expropriated the Claimant’s investment. VanCal was obliged to pay the Claimant licence fees including a fee for the use of the Claimant’s trademark, VANGUARD INTERNATIONAL.¹¹⁵ The failure to pay the due sum arises out of the decision of the VanCal board not to make payments to foreign investors.¹¹⁶
102. The contractual rights fall under the definition of ‘investment’ under Article 1 *Calpurnia-Gaul BIT*, in particular, “(c) titles or claims to money or rights to performance having economic value.” Intangible property such as contractual rights may be expropriated.¹¹⁷

¹¹⁴ *Metalclad v Mexico*, page 209, paragraph 107

¹¹⁵ Moot Problem, Abstract from Claimant’s Request for Arbitration, page 4, paragraph 19

¹¹⁶ Moot Problem, Calendar of Events, 10 March 2005

¹¹⁷ *Siemens v Argentina*, paragraph 267; see also *Norway v United States*, page 325; *Germany v Poland*, page 44

103. Only where an investor has been denied access to a remedy for breach of contract, could such a breach amount to a definitive denial of a right amounting to an expropriation.¹¹⁸ For a claim of expropriation of a contractual right to succeed it is necessary to show a repudiation of the contract which prevents a party from exercising a right.¹¹⁹ It is also necessary to show that the investor did not have access to a remedy for the breach of contract.¹²⁰
104. The Respondent's breach of contract is an expropriation because it is a definitive denial of the Claimant's right to receive licensing fees. The Respondent's refusal to pay any money to foreign investors is a repudiation of the contract which prevents the Claimant from rightfully receiving the licence fees. Further, the Claimant is unable to remedy the breach of contract. On 5 February 2007 the Claimant wrote to the Respondent claiming expropriation of its interests and demanding that the breach of obligations be remedied.¹²¹ The Respondent notified the Claimant on 21 February 2007 that "there is nothing we can do."¹²²
105. Further, in *Siemens v Argentina* the tribunal found that "for a State to incur international responsibility", as opposed to mere contractual responsibility, -

"it must act as such, it must use its public authority. The actions of the State have to be based on its 'superior governmental power'."¹²³

¹¹⁸ *Waste Management v Mexico* at paragraph 174

¹¹⁹ *Waste Management v Mexico* at paragraph 175

¹²⁰ *Waste Management v Mexico* at paragraph 175

¹²¹ Moot Problem Calendar of Events, 5 February 2007

¹²² Moot Problem Calendar of Events, 21 February 2007

¹²³ *Siemens v Argentina*, paragraph 253

106. The Respondent's repudiation of the agreement to pay the Claimant fees due for the use of the Claimant's trademark and licence is a use of its public authority. The expropriatory actions of VanCal, the Respondent's agent, reflect the government's policy towards foreigners. The CCC came to power with the agenda of a "return to the traditional Calpurnian values of hard work, family, modesty, thrift and self-sufficiency".¹²⁴ In refusing to pay the licence fees owed to the Claimant, VanCal's board has acted to fulfil the government's policy. This amounts to an expropriation, in breach of the Respondent's treaty obligations.

C. The Respondent's measures were not legally justified

107. Under Article 6(1) *Calpurnia-Gaul BIT*, an expropriation is permissible –

“for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation.”

108. The Respondent's measures were illegal as they (1) were not for a public purpose; (2) were discriminatory; and (3) were not under due process of law. Contrary to the customary international law position that a public purpose alone may justify expropriation,¹²⁵ the Respondent's measures will be justified only if all four limbs of this provision are satisfied.

¹²⁴ Moot Problem, Claimant's Request for Arbitration, page 3, paragraph 12

¹²⁵ *Amoco v Iran*, paragraphs 113, 115

1. The Respondent's measures not for a 'public purpose'

109. The Respondent's measures were implemented purely for the purpose of political reprisal. The reason for the Respondent's policy not to pay any of VanCal's dividends to foreign shareholders has been documented in VanCal's board minutes for the meeting of 10 March 2005.¹²⁶ The board noted that "due to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to foreign shareholders has been suspended".¹²⁷ In *BP v Libya*, it was held that purely extraneous political reasons such as reprisal do not constitute a public purpose.¹²⁸ Therefore, the Respondent's measures were not for a public purpose.

2. The Respondent's measures were discriminatory

110. Discrimination is "treating differently, without an objective and reasonable justification, persons in 'relevantly' similar situations".¹²⁹ The Respondent's dividend payment policy is discriminatory because it treats Calpurnian and Gaulois investors differently.

¹²⁶ Moot Problem, Calendar of Events, 10 March 2005, page 7

¹²⁷ Moot Problem, Calendar of Events, 10 March 2005, page 7

¹²⁸ See also *Libyan American Oil v Libya*, page 317

¹²⁹ *Fredin v Sweden*, paragraph 60; see also *Goetz v Burundi*, page 457, paragraph 121; *CMS v Argentina*, paragraph 293; *CME v Czech Republic*, paragraph 612

111. At the VanCal board meeting on 10 March 2005, “the representatives of SFCDC...expressed their opinion that the minimum dividend should be divided among the shareholders”.¹³⁰ Mr. Poe, an SFCDC representative, stated, “by this action, we can hold the amount paid to foreign shareholders to a minimum.”¹³¹ The board then decided that a “reasonable percentage” of the company’s profits be issued as a dividend, “in order to preserve the rights of the Calpurnian shareholders”. The Board went on to note that “due to the dispute between the governments of Calpurnia and Gaul, the payment of profits to foreign shareholders has been suspended for the time being.”¹³² On 15 April 2005 a dividend was declared of 18% of the profit in cash and 10% in stock.
112. In accordance with the Respondent’s dividend policy, in the years 2004 to 2007, VanCal paid the declared dividends to Calpurnian shareholders, yet refused to pay them to the Claimant.¹³³ The Respondent claims to have “distributed” dividends to all shareholders.¹³⁴ However, it cannot be said that dividends merely credited to the Claimant’s account have been “paid”. VanCal’s articles of association do not authorise the company to credit dividends to shareholders’ accounts, rather than making payment in cash.¹³⁵ Given that the Respondent has credited dividends to the Claimants account rather than actually paying them, the Claimant has been deprived of the benefit of the dividend, whereas Calpurnian nationals have not.

¹³⁰ Moot Problem, Calendar of Events, 10 March 2005, page 7

¹³¹ Moot Problem, Calendar of Events, 10 March 2005, page 7

¹³² Moot Problem, Calendar of Events, 10 March 2005, page 7

¹³³ Moot Problem, Calendar of Events, 27 May 2005; Abstract from Claimants Request for Arbitration, page 3, paragraph 14

¹³⁴ Moot Problem, Abstract from Respondent’s Reply to Request for Arbitration, page 5, paragraph 16

¹³⁵ Moot Problem, Calendar of Events, 28 September 2006, page 8

3. The measures were not under due process of law

113. In *Case Concerning ELSI*, the court said that an ‘arbitrary’ act is one that demonstrates “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”¹³⁶ The Court held that when determining whether a measure is arbitrary, it is relevant to consider whether the measure was within the legal competence of the government agent; and whether the measure involved an unreasonable or capricious exercise of authority. In the present matter, the measures were arbitrary because they were (a) not within the power and competence of VanCal’s board; and (b) an unreasonable or capricious exercise of the Respondent’s authority.

a. The measures were not within the power and competence of VanCal’s board

114. VanCal’s Articles of Association do not authorise the company to credit dividend entitlements in lieu of payment.¹³⁷ Contrary to this, the Respondent, through VanCal, has credited the dividend for the period from 2004 to 2007 to the Claimant’s account on VanCal’s books, and has withheld cash payment.¹³⁸ The ‘taking’ of the dividends was not within the power and competence of VanCal’s board as that action was not authorised by VanCal’s Articles of Association.¹³⁹ This conduct is arbitrary because it shows a wilful disregard of due process of law which “shocks a sense of judicial propriety”.

¹³⁶ *Case Concerning ELSI*, paragraph 128

¹³⁷ Moot Problem, Calendar of Events, 28 September 2006, page 8

¹³⁸ Moot Problem, Calendar of Events, 28 September 2006, page 8

¹³⁹ Moot Problem, Calendar of Events, 28 September 2006, page 8

b. The measures were an unreasonable or capricious exercise of the Respondent's authority

115. According to *Case Concerning ELSI*, the Respondent's actions would be reasonable if the power was used in an attempt to resolve a difficult and distressing situation.¹⁴⁰ However, the decision was made by the Respondent, through VanCal, in order to "hold the amount paid to the foreigners to the minimum", "in order to preserve the rights of Calpurnian shareholders".¹⁴¹ Further, the decision was motivated because of "the existing dispute between the governments of Calpurnia and Gaul".¹⁴² As such, the Respondent's decision was unreasonable or capricious as its purpose was to maximise the benefit it could deliver to the citizens of Calpurnia, while prejudicing the interests of the Claimant.

¹⁴⁰ *Case Concerning ELSI*, paragraph 129

¹⁴¹ Moot Problem, Calendar of Events, 10 March 2005, page 7

¹⁴² Moot Problem, Calendar of Events, 10 March 2005, page 7

Part Three: THE RESPONDENT HAS DISCRIMINATED AGAINST THE CLAIMANT

116. Article 2(3) *Calpurnia-Gaul BIT* requires that the Respondent must not –
- “impair by unreasonable, discriminatory or arbitrary measures the management, maintenance, use, enjoyment acquisition or disposal of investments in its territory of investors of the other Contracting Party.”
117. The ICJ recognised in *Barcelona Traction*¹⁴³ that shareholders have a direct and enforceable right to any declared dividend. Accordingly, the Claimant has a right to any declared dividend. The Respondent impaired the Claimant’s use and enjoyment of this dividend by withholding payment.¹⁴⁴ These measures amount to a breach of Article 2(3) *Calpurnia-Gaul BIT* because the measures were discriminatory.
118. As established in Part One, section C(c) of this memorial, discrimination is “treating differently, without an objective and reasonable justification, persons in ‘relevantly’ similar situations.”¹⁴⁵ The Respondent’s dividend payment policy is discriminatory because the Claimant has been deprived of the benefit of the dividend, whereas Calpurnian nationals have not.

¹⁴³ *Barcelona Traction*, page 4, paragraph 47

¹⁴⁴ Moot Problem, Calendar of Events, 10 March 2005, page 7

¹⁴⁵ *Fredin v Sweden*, paragraph 60; *Goetz v Burundi*, page 457, paragraph 121; *CMS v Argentina*, paragraph 293; *CME v Czech Republic*, paragraph 612

119. The tribunal in *S D Myers v Canada* held that an export ban applying only to foreigners was discriminatory. Similarly, the Respondent has prevented the ‘export’ of the Claimant’s profits. In *Saluka v Czech Republic*, a financial benefit conferred only on domestic investors was held to breach the requirement of non-discrimination.¹⁴⁶ In the present case, the Respondent, through VanCal, has conferred a financial benefit in the form of a dividend which applied to domestic investors and not to the Claimant.
120. Further, Article 4(1) *Calpurnia-Gaul BIT* requires that the Respondent treat investments and returns of Gaulois investors no less favourably than it treats the investments of its own nationals. Since the Respondent paid dividends to its own nationals but not to the Claimant, this discriminatory payment policy is a breach of the Respondent’s obligations under Article 4(1) *Calpurnia-Gaul BIT*.

¹⁴⁶*Saluka v Czech Republic*, paragraphs 408-416

Part Four:
THE RESPONDENT HAS OBSTRUCTED THE TRANSFER
OF RETURNS FROM THE CLAIMANT'S INVESTMENT

121. Article 8(1) *Calpurnia-Gaul BIT* states that the Respondent must –

“...ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of payments in connection with an investment. Such payments shall include in particular, though not exclusively: (b) returns...and (d) the amounts required for the payment of expenses which arise from the operation of the investment, such as payment of royalties and license fees...”

122. Article 8(2) *Calpurnia-Gaul BIT* requires that the transfers referred to in Article 8(1) must be made without any restriction or delay, in a freely convertible currency and at the prevailing market rate of exchange applicable on the date of transfer.

123. The Respondent has obstructed the transfer of the Claimant's dividends declared between 2004 and 2007 by failing to pay a cash dividend and only crediting the amount owed to the Claimant's account on VanCal's books.¹⁴⁷ This impairment is in violation of Article 8(1), as the current form of the dividends makes it impossible for the Claimant to remove the returns from the Respondent's territory. Further, by only crediting the sum due the Respondent has breached Article 8(2) by subjecting the Claimant to an unreasonable delay.

124. According to Article 8(3) *Calpurnia-Gaul BIT*, a delay may be valid if it is to ensure compliance with the Respondent's law relating to taxation and dues. The Respondent has delayed the Claimant's return in order to expropriate the Claimant's interest in VanCal, and not for a valid reason as provided for in Article 8(3). As such, the Respondent has breached its obligations under *Calpurnia-Gaul BIT* by obstructing the transfer of returns from the Claimant's investment.

¹⁴⁷ Moot Problem, Calendar of Events, 28 September 2006, page 8

Part Five:
THE RESPONDENT HAS FAILED TO PROVIDE THE
CLAIMANT AND ITS INVESTMENT FULL PROTECTION
AND SECURITY

125. Article 2(2) *Calpurnia-Gaul BIT* states that the Respondent must –

“at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.”

126. The Claimant’s representatives were forced to leave the Respondent’s territory because of intimidation by the Respondent, by other entities and by individuals.¹⁴⁸ In establishing that the Respondent has breached this duty, the Claimant argues that the Respondent (A) was bound to protect the Claimant’s representatives; (B) failed to prevent intimidation of the Claimant’s representatives; and (C) failed to allow the Claimant’s representatives to remain in its territory.

¹⁴⁸ Moot Problem, Abstract from Request for Arbitration, page 4, paragraph 17

A. The Respondent was bound to protect the Claimant's representatives

127. The Claimant oversaw its investment in VanCal through two representatives, Ms Francesca Pescara, VanCal's Managing Director until November 2004, and Mr David Kolowenko, the Chief Technical Officer.¹⁴⁹ The presence of these representatives in the Respondent's territory was necessary in order to maintain the value of the Claimant's investment. Until 2004, the Claimant played a "major role" in the management of VanCal, including the provision of "management skills and personnel".¹⁵⁰
128. Mr Kolowenko, the Chief Technical Officer of VanCal,¹⁵¹ was responsible for the performance, administration and management of the Claimant's obligations under the Technical Assistance Agreement between the Claimant and VanCal.¹⁵² Without Mr Kolowenko's presence, it would be impossible to provide the technical expertise necessary to effectively operate an advanced cellular communications network. As the operation of this network is the primary activity of VanCal, Mr Kolowenko's presence was essential in order to maintain the value of the company.

¹⁴⁹ Moot Problem, Abstract from Request for Arbitration, page 4, paragraph 17

¹⁵⁰ Moot Problem, page 3, paragraph 11

¹⁵¹ Moot Problem, page 4, paragraph 17

¹⁵² Second Clarifications, Clarification 29

129. Moreover, the Claimant could not effectively exercise control over its shareholding unless fully informed about the VanCal's affairs. The presence of the Claimant's representatives was necessary for this purpose. Following the instructions of Dr Swift, Chairman of VanCal, information to shareholders and board members was provided only through "originals available for inspection at the head office",¹⁵³ and would no longer be sent to Gaulois investors.¹⁵⁴ Further, contrary to the Respondent's assertion,¹⁵⁵ it is doubtful that the Claimant could participate in the management of VanCal by teleconference, as the Respondent's domestic laws are silent on this matter.¹⁵⁶ As such, the physical presence of the Claimant's representatives was necessary in order to preserve the value of the Claimant's investment.

B. The Respondent failed to prevent intimidation of the Claimant's representatives

130. After the CCC won a parliamentary majority in the Respondent's parliament, a climate of hostility arose,¹⁵⁷ resulting in ongoing acts of intimidation towards the Claimant. These acts of intimidation, taken together, constitute a failure by the Respondent to afford full and constant protection and security to the Claimant. In particular, the Respondent (1) had a duty to prevent intimidation of the Claimant's representatives; and failed to prevent (2) unlawful searches of and (3) picketing outside the Claimant's representatives' homes.

¹⁵³ 30 November 2005, deposed in Mr Kornochi's affidavit, see Moot Problem, Calendar of Events, 22 April 2007, page 9

¹⁵⁴ Moot Problem, page 4, paragraph 16; Second Clarifications, Clarification 22

¹⁵⁵ Moot Problem, Page 6, paragraph 18

¹⁵⁶ First Clarifications, Paragraph

¹⁵⁷ Second Clarifications, Clarification 51

1. The Respondent had a duty to prevent intimidation of the Claimant's representatives

131. Article 2(2) *Calpurnia-Gaul BIT* should be read expansively as its requirement for “full *and constant* protection and security”¹⁵⁸ is more onerous than the equivalent provisions considered in many cases.¹⁵⁹ The obligation to provide “full protection and security may be breached even if no physical violence or damage occurs”.¹⁶⁰ This is consistent with *Occidental v Ecuador*¹⁶¹ and *Goetz v Burundi*, in which the tribunals found breaches of the obligation to provide full protection and security in situations where no physical violence arose. In particular, the tribunal in *Azurix v Argentina* noted that “the stability afforded by a secure investment environment is as important” as physical security.¹⁶² In *Vivendi v Argentina*, the tribunal confirmed that the obligation applies “to more than physical security”, because the investment “could be subject to harassment without being physically harmed or seized.”¹⁶³ In the present case, the investment environment was insecure in that the Claimant was unable to effectively oversee its investment.

¹⁵⁸ Emphasis added

¹⁵⁹ Such as *Azurix v Argentina*, *Vivendi v Argentina* and *AMT v Zaire*

¹⁶⁰ *Azurix v Argentina* paragraph 406; see also *Redfern/ Hunter*, paragraph 11-29

¹⁶¹ *Occidental v Ecuador*, paragraph 187

¹⁶² *Azurix v Argentina*, paragraph 408

¹⁶³ *Vivendi v Argentina*, paragraph 7.4.17

132. The obligation to provide full and constant protection and security is “principally concerned with the exercise of police power”.¹⁶⁴ In particular, “unreasonable acts of violence by police officers...give rise to responsibility” of the state.¹⁶⁵ In *AMT v Zaire* it was established that the onus is on the state to show that it has taken measures of precaution to protect the investment that are not less than the minimum standard of international law.
133. This minimum standard of protection includes the *International Covenant on Civil and Political Rights (ICCPR)*, to which the Respondent is a signatory.¹⁶⁶ In particular, Article 17 *ICCPR* states that “No one shall be subjected to arbitrary or unlawful interference with his...home or correspondence”. Further, Article 17(2) states that “Everyone has the right to the protection of the law against such interference or attacks.”
134. The relevant articles of the *ICCPR* are not self-executing for the Respondent.¹⁶⁷ Therefore, they “may not be enforced in the courts without prior legislative ‘implementation’”.¹⁶⁸ This fact does not affect the Respondent’s obligations under the *ICCPR*, as “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁶⁹ In particular, “The characterization of an act of State as internationally wrongful is governed by international law”, and this “is not affected by the characterization of the same act as lawful by internal law”.¹⁷⁰ As the present treaty claim is determined according to international law,¹⁷¹ the Respondent is bound by Article 17 *ICCPR*.

¹⁶⁴ McLachlin, page 247, paragraph 7.142

¹⁶⁵ Brownlie, 447

¹⁶⁶ First Clarifications, paragraph 31

¹⁶⁷ First Clarifications, paragraph 31

¹⁶⁸ Vasquez, 695; see also Buergethal, 317

¹⁶⁹ Art 27 *VCLT*

¹⁷⁰ Art 3 *Articles on State Responsibility*

¹⁷¹ See *Case Concerning ELSI*, page 74

2. The Respondent failed to prevent unlawful searches of the Claimant's representatives' homes

135. The Respondent, through its police agency, conducted searches of the homes Ms Pescara and Mr Kolowenko on 7 December 2003, 3 June 2004 and 15 July 2004.¹⁷² These searches were conducted by police without a judicial warrant,¹⁷³ being based only on anonymous tips.¹⁷⁴ Such a search could not reasonably have led to the suspicion necessary to render a search justified.
136. These searches “each lasted several hours and were quite thorough”.¹⁷⁵ In particular, they involved the seizure of the personal belongings of the Claimant's representatives.¹⁷⁶ The invasive and arbitrary nature of these searches significantly contributed to the intimidation of the Claimant's representatives.

¹⁷² Moot Problem, page 4, paragraph 17

¹⁷³ First Clarifications, Clarification 17

¹⁷⁴ See Moot Problem, Page 4, paragraph 17

¹⁷⁵ First Clarifications, Clarification 17

¹⁷⁶ First Clarifications, Clarification 11

3. The Respondent failed to prevent picketing outside the Claimant's representatives' homes

137. During 2004, Ms Pescara's home was picketed on four occasions for periods of several days. Although not "violent" in a literal sense, the protestors caused a significant deprivation of Ms Pescara's liberty in that it was impracticable for her to leave her home on foot through the protestors.¹⁷⁷ Moreover, her home was rendered practically uninhabitable by the protestors, whose chants were audible through the house at night.¹⁷⁸
138. The fact that the investor's loss is not caused by a state act "in no way excludes the duty to exercise a certain degree of vigilance".¹⁷⁹ It has been established that host state liability for loss may arise from non-state acts including looting,¹⁸⁰ insurgency¹⁸¹ and riots.¹⁸² Such a provision imposes a positive obligation of 'vigilance'.¹⁸³ In *AMT v Zaire*, in the context of a similar provision it was said that "the obligation incumbent on Zaire is an obligation of vigilance, in the sense that Zaire...shall take all measures necessary to ensure the full enjoyment of protection and security of its [sic] investments".¹⁸⁴ The Respondent was aware of the protestors, and decided that it would not act to remove them.¹⁸⁵ In declining to remove the protestors, the Respondent failed to discharge its obligation of vigilance.

¹⁷⁷ First Clarifications, Clarification 19

¹⁷⁸ First Clarifications, Clarification 19

¹⁷⁹ *Spaish Zone of Morocco Case*, page 229; see also Brownlie, page 453

¹⁸⁰ *AMT v Zaire*

¹⁸¹ *AAPL v Sri Lanka*

¹⁸² *Wena Hotels Ltd v Egypt*

¹⁸³ *Spaish Zone of Morocco Case*, page 229; see also *AMT v Zaire*

¹⁸⁴ *AMT v Zaire*, page 28

¹⁸⁵ Moot Problem, page 6, paragraph 17

139. In any event, the Respondent incited the picketers and is therefore liable for their actions. When “government officials incite the population...the government under international law is responsible for the actions taken by the population.”¹⁸⁶ Following the searches of the homes of the Claimant’s representatives, the Respondent’s Press Directorate issued a press release asserting that the Claimant’s representatives were “under suspicion of unlawful data collection and espionage”,¹⁸⁷ and subject to “ongoing investigation”¹⁸⁸ and pending charges.¹⁸⁹ Defamatory statements made by a host state which incite public hostility may constitute a failure to provide full protection and security.¹⁹⁰ In this case, the press releases contributed to the intimidation of the Claimant’s representatives in that it incited public intimidation towards the Claimant.

¹⁸⁶ *Vivendi v Argentina*, paragraph 5.3.15

¹⁸⁷ Calpurnian Security Directorate Press Release, Moot Problem, Calendar of Events, 8 December 2003, page 6

¹⁸⁸ Calpurnian Security Directorate Press Release, Moot Problem, Calendar of Events, 4 June 2004, page 6

¹⁸⁹ Calpurnian Security Directorate Press Releases, Moot Problem, Calendar of Events, 4 June and 17 July 2004, page 6

¹⁹⁰ Newcombe, 144

C. The Respondent failed to allow the Claimant's representatives to remain in its territory

140. In November 2004, Ms Pescara's application for renewal of a "three-year business visa" was denied.¹⁹¹ She was advised to enter the Respondent's territory under the visa waiver program.¹⁹² The effect of this was to prohibit Ms Pescara from entering the Respondent's territory for a period longer than thirty days.¹⁹³ Further, Ms Pescara was restricted to making a "short term business visit", which is generally appropriate for purposes that do not involve ongoing business in the Respondent's territory.¹⁹⁴

¹⁹¹ Moot Problem, page 4, paragraph 18

¹⁹² Moot Problem, page 4, paragraph 18

¹⁹³ Second Clarifications, Clarification 45

¹⁹⁴ First Clarifications, Clarification 6

141. By refusing to allow the Claimant’s representatives to remain in its territory, the Respondent has failed to afford the Claimant fair and equitable treatment. This “automatically entails an absence of full protection and security of the investment”.¹⁹⁵ The fair and equitable treatment obligation obliges the Respondent to “grant and maintain a stable and predictable legal framework necessary to fulfil the justified expectations” of the Claimant.¹⁹⁶ In particular, the tribunal in *Metalclad v Mexico* emphasised that host states must issue permits within a “transparent and predictable framework”.¹⁹⁷ In the present case, the Respondent did not provide a transparent and predictable framework for issuing ‘permits’ to remain in its territory. The Respondent’s immigration authority is not “transparent”, as it is “not required to state reasons” for refusing to renew a business visa.¹⁹⁸ The Respondent’s immigration authority is not “predictable” as it has “wide discretion” in issuing visas,¹⁹⁹ and is free to disregard its immigration guidelines.²⁰⁰

¹⁹⁵ *Occidental v Ecuador*, paragraph 187; see also *AAPL v Sri Lanka*, page 655

¹⁹⁶ *LG&E v Argentina*, paragraph 131; see also *TECMED v Mexico*, paragraph 154

¹⁹⁷ *TECMED v Mexico*, paragraph 99

¹⁹⁸ Second Clarifications, Clarification 46

¹⁹⁹ Moot Problem, page 6, paragraph 18

²⁰⁰ First Clarifications, Clarification 6

142. The fair and equitable treatment obligation requires the Respondent “to treat a foreign investor’s investment in a way that does not frustrate the investor’s underlying legitimate and reasonable expectations”.²⁰¹ In *TECMED v Mexico* it was said that the treatment must not “go against the basic expectations on the basis of which the foreign investor decided to make the investment.”²⁰² Doctrinal authority confirms that the key issue for the tribunal is “the impact of the measures on the reasonable investment backed expectations of the investor; and whether the State is attempting to avoid investment-backed expectations that the State created and reinforced through its own acts.”²⁰³
143. Since the establishment of VanCal, the Claimant had participated in the management of the company, including through the provision of management personnel.²⁰⁴ Therefore, the Claimant had a legitimate and reasonable expectation that its representatives would be permitted to enter and remain in the Respondent’s territory. In evaluating an investor’s legitimate and reasonable expectations, the tribunal should have regard to the purpose of the investment treaty creating the obligation.²⁰⁵ The preamble of the *Calpurnia-Gaul BIT* notes that the parties desire “to intensify economic co-operation to the mutual benefit of both countries”, and to “stimulate business activities”. It is a corollary of this purpose that the Claimant is entitled to expect that its representatives would be permitted to remain in the Respondent’s territory.

²⁰¹ *Saluka v Czech Republic*, paragraph 309

²⁰² *TECMED v Mexico*, paragraph 154

²⁰³ Paulsson, 22

²⁰⁴ Moot Problem, page 3, paragraph 11

²⁰⁵ *Azurix v Argentina*, paragraph 372

CONCLUSION

144. In this Memorial, the Claimant has established that this Arbitral Tribunal has jurisdiction to hear the substantive matters in this dispute because the parties have expressed their consent to arbitrate through the *Calpurnia-Gaul BIT* and the Claimant's Request for Arbitration. Further, the consent to arbitrate is not affected by the proceedings in the Court, nor a requirement to pursue amicable settlement.
145. As outlined in this Memorial, the Respondent has discriminated against the Claimant by treating it less favourably than Calpurnian investors. Additionally, by expropriating the Claimant's investment, the Respondent has unlawfully interfered in the investment and obstructed the transfer of returns. Finally, the Claimant has established that the Respondent has failed to provide the Claimant full and constant protection and security, and that the Claimant was therefore unable to maintain the value of its investment. As requested by this Arbitral Tribunal, this Memorial has been limited to a discussion of these issues only.²⁰⁶
146. The Claimant commends the arguments in this Memorial to the Arbitral Tribunal to achieve "a just and effective resolution" of the dispute.²⁰⁷

²⁰⁶ Moot Problem, paragraph 6, page 3; Third Clarifications, Clarification 33

²⁰⁷ Article 1 *IBA*

PRAYER FOR RELIEF

The Claimant requests that this tribunal make the following findings:

1. The tribunal has jurisdiction to hear the dispute in accordance with Article 41 *ICSID Convention*;
2. The Respondent interference amounted to expropriation of the Claimants investment contrary to Article 6(1) *Calpurnia-Gaul BIT*;
3. The Respondent obstructed the transfer of returns from the Claimant's investment;
4. The Respondent impaired the Claimant's investment by discriminatory or arbitrary measures contrary to Article 2(3) *Calpurnia-Gaul BIT*; and
5. The Respondent failed to afford Claimant full and constant protection and security as required by Article 2(2) *Calpurnia-Gaul BIT*.