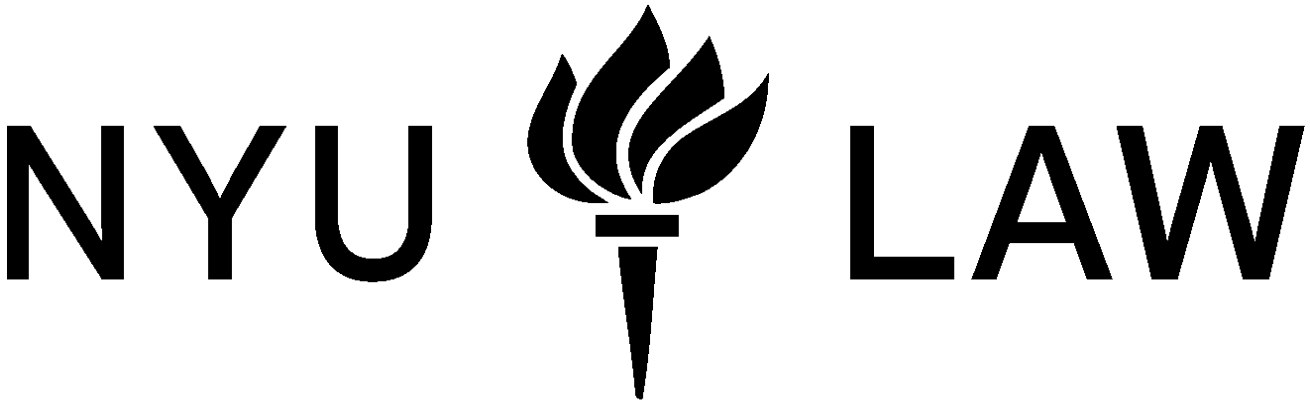
First Annual
Foreign Direct Investment International Moot Competition
31 October to 2 November 2008

Vanguard International,
Claimant

v.

Government of the Republic of Calpurnia,
Respondent

MEMORANDUM FOR CLAIMANT



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STATEMENT OF FACTS

1. The Republic of Calpurnia ("Respondent") and the Federated States of Gaul entered into an Agreement on the Promotion and Protection of Investments on August 1, 1995. Respondent and the State of Flatland entered into an Agreement on the Mutual Promotion and Protection of Investments on February 8, 1992.

2. In 1997, Vanguard International ("Claimant"), a Gaulois corporation, participated in establishing a joint venture company, VanCal, Inc. ("VanCal"), providing GSM/UMTS services in Calpurnia, along with the State Fund for Commerce and Development in Calpurnia ("SFCDC"). Benefitting from Claimant's expertise and leadership, VanCal expanded in the Calpurnian market through the provision of quality communications, becoming the nation's largest mobile telecommunications service provider.[1]

3. Since late 2004, Claimant has held 31% of VanCal's common stock, with 1% of that 31% held in trust by Pescara. Additionally, Claimant licenses its intellectual property and provides technical assistance to VanCal.

4. SFCDC is a wholly State-owned entity.[2] Respondent also appoints the directors of SFCDC's Board.[3] Since late 2004, SFCDC has voted and controlled 52% of VanCal's common stock.

5. In November 2003, a conservative party with a hostile view towards Gaul came to power in Calpurnia; bilateral relations deteriorated rapidly thereafter.

6. Between January 1 and October 28, 2004, a key employee was harassed at length on five occasions by organization protesting against Claimant's participation in the investment, the Calpurnian Conservative Coalition's ("CCC") Women's League.[4] Respondent failed to send police protection despite repeated requests for support.

7. On December 8, 2003, June 4, 2004 and July 17, 2004, Calpurnian police conducted warrantless searches of Claimant's key employees' homes, based on a justification not

[1] *Second Clarification*, Q. 53.
[2] Record at 3, ¶10.
[3] *Second Clarification*, Q. 17.
[4] Record at 4, ¶17.

recognized under Calpurnian law. Respondent then promoted baseless charges of espionage against Claimant and key employees through public press releases.[5]

8. In September 2004, Calpurnian immigration authorities arbitrarily denied a business visa for a key employee appointed by Claimant.

9. On October 14, 2004, Respondent elected Dr. Swift, a government employee,[6] and Mr. Shelly, to the VanCal Board.[7] As of November 15, 2004, half of VanCal's directors were representatives of the SFCDC.[8] Dr. Swift stated that SFCDC did not "regard VanCal as really being a private company."[9]

10. On March 10, 2005, SFCDC-appointed directors declared that, "the payment of profits to the foreign shareholders has been suspended"; the Board thereafter paid a dividend only to local shareholders.[10] Since May 2005, VanCal has not paid Claimant for use of Claimant's intellectual property, claiming payments could not be made to foreign shareholders.[11] No payments have been made to Claimant since March 10, 2005.

11. On November 16, 2005, SFCDC-appointed directors expelled Claimant's representative from the VanCal Board.[12]

12. On February 5, 2007, Claimant informed Respondent's agent – Mr. Poe, the government-appointed Chair of SFCDC – that it sought compensation for an expropriation. Mr. Poe refused to look into the matter, saying that the government "has no authority in any event" and "[t]here is nothing we can do." On July 31, 2007, Claimant initiated this arbitration.

[5] *Id*.
[6] Record, at 4, ¶16.
[7] Record, at 6, 14 October 2004.
[8] *Second Clarification*, Q. 1.
[9] Record, at 6, 15 November 2004.
[10] Record, at 7, 10 March 2005.
[11] Record, at 4, ¶19.
[12] Record, at 7-8, 16 November 2005.

SUMMARY OF ARGUMENT

13. **JURISDICTION.** This dispute satisfies Article 25(1) of the Convention. Respondent's three objections are meritless. First, this dispute is not solely a contractual dispute, and even if it was, this Tribunal also has jurisdiction over contractual disputes. Second, this arbitration is not barred by fork-in-the-road preclusion. The prior domestic suit does not share an identity of party, object, or cause of action with this arbitration. The prior domestic suit was also not a voluntary election of remedy. Third, this arbitration is not barred by any amicable settlement provision. Amicable settlement provisions are procedural matters that do not bar jurisdiction, and Respondent is estopped from claiming amicable settlement as grounds to deny jurisdiction. Alternatively, jurisdiction is established pursuant to a more favorable amicable settlement provision which Claimant can rely on through an MFN clause in the Calpurnia-Gaul BIT, despite a third country's denunciation of the Convention.

14. **MERITS OF THE CLAIM**. The acts and omission of SFCDC, the Calpurnian Police and Ministry of Interior, and immigration officials are attributable to the state. Respondent has breached several provisions of the Calpurnia-Gaul BIT which has harmed Claimant's investment. First, Respondent has expropriated claimant's property and must provide compensation. Second, Respondent has denied Claimant national treatment. Third, Respondent has failed to provide Claimant's investment full protection and security. Fourth, Respondent failed to provide fair and equitable treatment to Claimant's investment. Fifth, Respondent treated Claimant in an arbitrary and discriminatory treatment. Finally, Respondent has breached its duty of transparency.

ARGUMENT

PART ONE: JURISDICITION

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

15. Article 25(1) of the Convention provides for ICSID jurisdiction over

> 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…to submit to the Centre.

16. This dispute concerns Respondent's violations of its express obligations under the Calpurnia-Gaul BIT towards Claimant's investments in VanCal, a corporation incorporated in Calpurnia.

17. Both parties satisfy the standing requirements of Article 25(1). Calpurnia and Gaul are Contracting States to the Convention.[13] Claimant, a corporation incorporated and based in Gaul, owns 30% of VanCal.[14]

18. VanCal is an investment under the terms of the Calpurnia-Gaul BIT and Article 25 of the Convention. VanCal meets Article 1 of the Calpurnia-Gaul BIT: it is an "Investment" because it is an "asset established or acquired" by a Gaulois investor in Calpurnia. VanCal also satisfies the Article 25 definition of an investment:[15] VanCal is a joint venture established by Claimant, satisfying transfer of capital; VanCal is intended to provide telecommunications, and thus is a long-term project intended to create regular income; Claimant retained participation in the project through a Technical Assistance Agreement; and Claimant, as a shareholder, shares the project's benefits and risks.[16]

19. In Article 11 of the Calpurnia-Gaul BIT, Respondent gives "irrevocable consent" to ICSID arbitration over "any dispute" between itself and a Gaulois investor "concerning an investment." Respondent raises three objections to jurisdiction that essentially argue that the scope of Respondent's consent in Article 11 does not encompass this dispute. Respondent's

[13] Record, at 3, ¶5
[14] Record, at 3, ¶9.
[15] *Dolzer*, at 61.
[16] Record, at 3, ¶6-14.

objections are without merit because **(II)** this dispute is not barred as a contractual claim; **(III)** there is no fork-in-the-road preclusion; **(IV)** and the 18-month waiting period does not divest this Tribunal of jurisdiction.

II. THIS DISPUTE IS NOT BARRED AS A CONTRACTUAL CLAIM

20. Respondent asserts that this dispute is a shareholder dispute over which this Tribunal has no jurisdiction. Respondent's argument fails because **(A)** this dispute concerns treaty-based obligations; and **(B)** Article 11 of the Calpurnia-Gaul BIT also applies to contractual disputes.

A. This Dispute Involves Treaty-Based Obligations

21. Arbitral tribunals "retain[] jurisdiction [over] breaches of contract that…[also] constitute…a violation of the Bilateral Treaty."[17] Respondent's actions have violated several obligations of the Calpurnia-Gaul BIT.[18] That Respondent also violated domestic law is not surprising, given the depravity of Respondent's misconduct.

B. Article 11 of the Calpurnia-Gaul BIT Also Applies to Contractual Disputes

22. In any event, Article 11 of the Calpurnia-Gaul BIT covers "<u>any</u> dispute between a [Gaulois] investor…[and Respondent]."

23. The phrase "any dispute" in Article 11 includes domestic claims.[19] The phrase "tous les différends ou divergences" ("all differences and disagreements") has provided for jurisdiction to contract claims.[20] Interpreting "any dispute" to include contract disputes is also common-sense. Finally, less expansive language, which does not include the word "any" before "dispute," has provided for jurisdiction over contract disputes.[21]

[17] *Salini v. Morocco*, at ¶62.
[18] *Infra* Part Two.
[19] *Id; accord Consent to Arbitration*, at 838.
[20] *Salini v. Morocco*, at ¶61.
[21] *E.g.*, *S.G.S. v. Phillipines*, at ¶131.

24. While some tribunals who have interpreted "disputes with respect to investments" to refer only to treaty-based violations concerning an investment,[22] such an interpretation is unconvincing. First, the modifier "any" expands "dispute" to cover domestic claims. Second, compelling policy considerations caution against denying jurisdiction over contract claims. ICSID tribunals can apply domestic law to domestic claims:[23] allowing for jurisdiction over both contractual and treaty-based obligations unites these claims under one forum, a benefit to all parties.[24]

25. For these reasons, this claim is not barred as a contractual claim.

III. FORK-IN-THE-ROAD PRECLUSION DOES NOT BAR THIS TRIBUNAL'S JURISDICTION

26. Respondent argues that a prior suit in a Calpurnian court bars jurisdiction.[25] While Article 11 of the Calpurnia-Gaul BIT does contain a "fork-in-the-road" provision, i.e. a requirement that an investor choose between arbitration and a domestic remedy, this dispute is not subject to "fork-in the road" preclusion.

27. Before June 14, 2006, Pescara, as trustee of Claimant's 1% holding in VanCal,[26] sued VanCal in Calpurnia court for payment of unlawfully withheld dividends.[27] Respondent argues that Pescara's suit constitutes Claimant's election of a domestic remedy. Respondent's argument fails because **(A)** Pescara's suit and this arbitration do not share a common identity of parties, objects, or causes of action; **(B)** the *Aguas II* standard is also not met; and **(C)** Pescara's suit does not constitute a voluntary election of remedy.

A. Pescara's Suit and This Arbitration Do Not Satisfy the Triple Identity Test

28. A domestic suit precludes international arbitration only if there is a triple identity of parties, object, and causes of action. This triple identity rule (or a variation where only one failure of

[22] *E.g.*, *S.G.S. v. Pakistan,* at ¶161.
[23] *Convention*, Art. 42; *accord Spiermann*, at 102-107.
[24] *SGS v. Phillipines*, at ¶132(c).
[25] Record, at 5, ¶5.
[26] Record, at 3, ¶9.
[27] Record, at 8, 14 June 2006.

identity is given as a reason to disallow fork-in-the-road preclusion) is followed by most arbitral tribunals.[28] Some tribunals have ignored identity of object, and only looked to identity of part and causes of action;[29] however, because none of the identities is met here, these tribunals would also find against fork-in-the-road preclusion.

29. The triple identity test satisfies compelling policy considerations.[30] If tribunals "assume lightly that choices of forum have been made…in favour of the host State's judicial system," then "there [is] little use in setting up arbitral procedures for investment disputes."[31] Investors routinely file domestic suits to protect their investments; oftentimes, domestic courts have no jurisdiction over treaty breaches, and ICSID tribunals may not have jurisdiction over domestic claims. To restrict a party's ability to appear before an arbitral tribunal solely because she brought domestic suit on similar facts forces a false choice between international or domestic protection.[32] Therefore, the strict formalism of the triple identity rule is preferable to looser tests for fork-in-the-road preclusion.

30. Here, Pescara's suit and this arbitration do not share an identity of **(1)** parties, **(2)** objects and **(3)** causes of action.

1. There Is No Identity of Parties

31. Fork-in-the-road preclusion requires that both the domestic suit and the international arbitration involve identical parties.[33] The action of a subsidiary or a related party cannot, under international standards, preclude suit by a "parent" or related claimant.[34] Piercing the corporate veil does not trigger fork-in-the-road preclusion.[35] "[O]nly the investor can [choose

[28] *Aguas I*, at ¶53 (discussing identity of causes of action), *rev'd Aguas II*, ¶55 (denying that identity of cause of action was not a requirement); *Olguín,* at ¶30; *Middle East Cement,* at ¶71 (discussing identity of cause of action); *Azurix,* at ¶88; *Enron & Ponderosa,* at ¶97; *Occidental*; *Champion Trading*,at §3.4.3.
[29] *Genin*, at ¶330; *Lauder v. Czech Republic*, at ¶161; *Pan American,* at ¶155*; C.M.S. Jurisdiction,* at ¶¶77-82.
[30] *See generally Sinclair Declaration.*
[31] *Pan American*, at ¶¶155-156.
[32] *Occidental*, at ¶53.
[33] *See, e.g.*, *Lauder v. Czech Republic*, at ¶161.
[34] *Id.*, at ¶162.
[35] *Champion Trading Co.,*at § 3.4.3.

to take] a claim to the local courts or to arbitration" and that choice cannot be inferred through a third party's suit.[36]

32. Pescara did not sue Respondent, she sued VanCal.[37] Thus, there is no identity of parties.

33. Even if Pescara acted for Claimant's benefit, her suit cannot be attributed to Claimant, just as a corporation's domestic suit could not be attributed to its owner filing for arbitral relief in *Champion Trading.*[38] Therefore, there is no identity of plaintiffs. That Calpurnian law might preclude suit in these circumstances is moot: the standard is international, not domestic.

34. In contrast, the *Genin* tribunal allows veil piercing when related parties act in such a way that the "election of remedy" can be attributed to the "group" as a whole.[39] However, there is no evidence that Pescara and Claimant made a group decision to file domestic suit, so there is no "group…election."

2. There is No Identity of Object

35. Fork-in-the-road preclusion only occurs when the international and domestic suits concern the same underlying "object" or "material facts."[40] Preclusion does not occur simply because the underlying facts of both suits overlap: the facts alleged to constitute a legal breach must be identical in both suits.[41]

36. That is not the case here. Pescara's suit involved a claim against a corporation for payment of dividends.[42] Claimant initiated this arbitration not just for a failure to pay dividends, but also for Respondent's failure to provide protection and security and Respondent's failure to renew the business visa of Claimant's key employees. Different material facts support these claims, and thus identity of objects cannot be met.

3. There Is No Identity of Causes of Action

[36] *C.M.S. Jurisdiction*, at ¶78.
[37] Record, at 8, 14 June 2006.
[38] *Champion Trading Co.,*at §3.4.3.
[39] *Genin*, at ¶330.
[40] *Azurix Corp,* at ¶88; *Cross-Jurisdictional Forum Non Conveniens,* at 2188.
[41] *Occidental*, at ¶58.
[42] Record, at 8, ¶5.

37. Even when the parties and material facts are identical, there is no fork-in-the-road preclusion when the causes of action are not identical.[43] Unless a treaty provides otherwise, contract claims are not identical to treaty-based claims.[44] Pescara's suit was for a withholding of dividends by a corporation. This dispute concerns Respondent's violations of several treaty obligations. None of these claims is a contract claim like Pescara's claims. Therefore, no identity of causes of action exists.

B. Application of the Aguas II *Standard Also Prevents Fork-in-the-Road Preclusion*

38. The *Aguas II* tribunal stated that a domestic suit "is *prima facie*…a 'final' choice of forum and jurisdiction" as long as the materials facts in the domestic suit were "coextensive" with treaty-based claims. This vague approach fails to account for the policy considerations that argue for the triple identity rule.[45]

39. The instant treaty-based dispute concerns more than Pescara's withheld dividends: it also involves claims of inadequate protection and security; failure to be transparent; discriminatory treatment; and unfair and inequitable treatment. These treaty-based claims are more extensive than Ms. Pescara's suit. Thus, the *Aguas II* test for fork-in-the-road preclusion is not met.

C. Pescara's Suit Was not a Voluntary Suit in Domestic Court

40. Fork-in-the-road preclusion requires that the choice to pursue domestic remedy is not made under duress.[46] Legal obligations – such as short statute of limitations for tax disputes[47] or the duty of a corporation to protect shareholder interests[48] – are considered duress. Pescara's suit was filed pursuant to her fiduciary duty to the Claimant. Thus, she did not voluntarily elect a domestic remedy.

41. For all these reasons, there is no fork-in-the-road preclusion.

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[43] *See e.g.*, *Middle East Cement*, at ¶7
[44] Among others, *Azurix Corp.*, at ¶89; *Occidental*, at ¶51.
[45] *See infra* Sec. III(A).
[46] *Occidental*, at ¶59; *Genin*, at ¶330; *Enron Corp.*, at ¶98.
[47] *Occidental*, at ¶60-61.
[48] *Genin*, at ¶332–333.

IV. THE AMICABLE SETTLEMENT PROVISION DOES NOT BAR JURISDICTION

42. Article 11(2) of the Calpurnia-Gaul BIT allows for arbitration if a "dispute cannot be settled amicably within 18 months from the date of request for amicable settlement." Amicable settlement requires no formal process.[49] A request for amicable settlement is a statement to that articulates "the existence of grounds for complaint and a desire to resolve these matters out of court."[50]

43. On February 5, 2007, Claimant informed Respondent's agent – Mr. Poe, the government-appointed Chair of SFCDC – that it sought compensation for an expropriation.[51] Thus, Claimant articulated grounds for complaint and sought an out-of-court settlement. Therefore, the letter to Poe constitutes a "date of request for amicable settlement."[52]

44. Sixteen days later, Poe refused to discuss Claimant's request.[53] On July 31, 2007, nearly six months after Claimant's request for settlement but prior to the 18-month period of Article 11(2), Claimant sought arbitration.[54]

45. Respondent erroneously asserts that Claimant's failure to wait 18 months bars jurisdiction. But **(A)** amicable settlement provisions are a procedural, not jurisdictional, matter. Also, **(B)** Respondent itself made amicable settlement impossible. Finally, **(C)** Claimant may also invoke the Calpurnia-Gaul BIT's most-favored-nation (MFN) clause of to rely on the shorter waiting period Article 7 of the Calpurnia-Flatland BIT.

A. As a Procedural Issue, Amicable Settlement Provisions Do Not Bar Jurisdiction

46. Failure to abide by an amicable settlement provision is a procedural failing that does not bar jurisdiction. Many tribunals agree that a "notice requirement does not constitute a prerequisite to jurisdiction"[55] because it is a "procedural rule."[56] First, the only practical

[49] *See Wegen*, at 73.
[50] *Salini v. Jordan,* at ¶20.
[51] Record, at 8, 5 February 2007.
[52] *Id.*
[53] Record, at 8, 21 February 2007.
[54] Record at 9, 31 July 2007.
[55] *Bayindir,* at ¶100.

effect of enforcing an amicable settlement provision is to require Claimant to restart arbitral proceedings.[57] This increases the length of arbitration,[58] without protecting the "legitimate interests of" either party.[59] Second, strictly enforcing amicable settlement provisions is an "unnecessary… formalistic approach"[60] that hinders flexibility and efficiency, two benefits of international arbitration.[61]

47. In this case, the 18-month waiting period expired on August 5, 2008. No purpose is served in requiring Claimant to re-file for arbitration and wait for proceedings to recommence.

48. Nor does strict enforcement of amicable settlement provisions create an *ex ante* incentive to pursue amicable settlement. Amicable settlement, an inexpensive and informal means of dispute avoidance, occurs naturally when parties wish to cooperate. But when there is no desire to cooperate, amicable settlement provisions simply force parties to wait for arbitration. If this wait is too long (like, say, 18 months), investor rights can be severely impacted.[62]

49. The *Enron & Ponderosa*[63] and *Goetz*[64] tribunals suggested, in *dicta*, that amicable settlement provisions are actually conditions for jurisdiction. Neither Tribunal explained itself. This Tribunal should accept the more persuasive rule.[65] Here, that rule is the above *Ethyl Corp.* rule.

B. Having Rebuffed Amicable Settlement, Respondent Cannot Now Use an Amicable Settlement Provision to Deny Jurisdiction

50. Investor-State tribunals have consistently held that a State's failure to attempt amicable settlement bars the State from using an amicable settlement provision to object to

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[56] *Lauder v. Czech Republic*, at ¶187; *accord Ethyl Corp.*, at ¶¶77-85; *Sedelmayer,*at §2.6.2; *S.G.S.. v. Pakistan*, at ¶184; *Link-Trading,* at §6.
[57] *E.g.*, *Ethyl Corp.*, at ¶85.
[58] *S.G.S. v. Pakistan,* at ¶184.
[59] *Lauder v. Czech Republic,* at ¶190.
[60] *Id.*
[61] *Lowenfeld on International Arbitration*, at 557.
[62] *See infra* Sec. IV(C)(1)(a)(ii)(b).
[63] *Enron & Ponderosa,* at ¶88.
[64] *Goetz,* at ¶¶91-93.
[65] *See Franck*, at 1558.

jurisdiction.[66] The reason for this rule is multifold. First, waiting periods before arbitration are intended to allow parties to seek amicable settlement. Where the State rebuffs settlement, the waiting period is thus waived.[67] Second, the rule that a negotiation period is void if negotiation "is impossible…in the circumstances of the case"[68] is analogized to the "requirement of exhaustion of remedies, which is disregarded when it is demonstrated that…any attempt at exhaustion would have been futile."[69] Finally, *estoppel* bars a State from resisting amicable settlement and then using the failure to reach amicable settlement to deny jurisdiction of an arbitral tribunal. *Estoppel* is a fundamental principle of law of civilized nations rooted in equity and the need for stability in international law,[70] and has been "applied by many international tribunals."[71]

51. This Tribunal should bar Respondent from benefitting from its recalcitrance. First, this would incentivize Respondent to pursue amicable settlement in the future, rather than simply ignore blighted investors. Second, it follows from the language of Article 11(2), which provides that "if the dispute cannot be settled amicably within 18 months" then the investor may seek arbitration. "Cannot" means something different than "[is] not": "cannot" is satisfied at the moment something becomes impossible, while "is not" requires a party to wait."[72]

52. In this case, Claimant contacted Respondent's agent, Mr. Poe, and asked for compensation after expropriation.[73] Poe refused to look into the matter, saying that the government "has no authority in any event" and "[t]here is nothing we can do.[74]" Claimant is entitled to rely on the word of this government agent.[75] Having relied on the statement that settlement was impossible, Claimant initiated this arbitration.

[66] *See, e.g.*, *Lauder v. Czech Republic*, at ¶189.
[67] *E.g., Ethyl Corp.*, at ¶84.
[68] *Bayinder,* at ¶99 (citations omitted).
[69] *Id.*
[70] *See e.g.*, *McGibbon*, at 468-469.
[71] *Pan American,* at ¶159; *accord Pope & Talbot,* at ¶¶39-41.
[72] *Id.,* at ¶98.
[73] Record at 8, 5 February 2007.
[74] Record at 8-9, 21 February 2007.
[75] *See infra* Part Two, Sec. I.

C. Alternatively, the MFN Clause of the Calpurnia-Gaul BIT Allows Claimant To Rely on the Shorter Waiting Period of the Calpurnia-Flatland BIT

53. Even if this Tribunal accepts that the 18-month waiting period of the Calpurnia-Gaul BIT bars jurisdiction, Claimant can still pursue arbitration because **(1)** the Calpurnia-Gaul BIT's MFN clause entitles Claimant to the two-month waiting period of Article 7 of the Calpurnia-Flatland BIT; and **(2)** Claimant has met the requirements for the application Article 7 of the Calpurnia-Flatland BIT.

1. The Calpurnia-Gaul BIT's MFN Clause Entitles Claimant to the Shorter Waiting Period of the Calpurnia-Flatland BIT

54. Claimant may rely on Article 7 of the Calpurnia-Flatland BIT, because **(a)** the MFN clause of the Calpurnia-Gaul BIT subsumes dispute resolution; **(b)** the two-month waiting period of Article 7 of the Calpurnia-Flatland BIT is more favorable; and **(c)** the 18-month waiting period of the Calpurnia-Gaul BIT is not a "question of overriding public policy."

a. <u>The Calpurnia-Gaul BIT's MFN Clause Subsumes Dispute Resolution</u>

55. The Calpurnia-Gaul BIT's MFN clause attracts dispute resolution, pursuant to the principle of *ejusdem generis*. First, **(i)** current arbitral precedent is that a "bare" MFN clause attracts dispute resolution. Second, **(ii)** the language of the Calpurnia-Gaul BIT's MFN clause includes dispute resolution.

i. Persuasive Precedent Suggests that MFN Clauses Attract Dispute Resolution

56. The correct rule is that an MFN clause, without restrictive language or drafting history, incorporates dispute resolution as *ejusdem generis*. *Ejusdem generis* is the established principle that MFN clauses attract provisions "belonging to the same subject matter or…category…to which the clause relates."[76]

[76] *OECD MFN Report*, at 9;*see also* Articles 9 and 10, *Draft Articles on MFN,* at 27–29.

57. An MFN clause providing only for non-discriminatory treatment subsumes dispute resolution. As early as 1956, in *Ambatielos*, it was established that the "administration of justice" is part and parcel of international commercial rights.[77]

58. Relying on *Ambatielos*, the *Maffezini*[78] tribunal, when interpreting the phrase "all matters subject to this Agreement," found that dispute resolution falls within the scope of an MFN clause because dispute resolution is "essential for the adequate protection of the rights" of traders and investors.[79] The *Siemens* and *National Grid* tribunals later determined that an MFN clause which referred only to an unqualified investment's "treatment" also attracted dispute resolution.[80] Indeed, even when considering an expansive MFN provision relating to "all matters" of the basic treaty, the *Aguas I* tribunal pointed out that the "ordinary meaning of [the term 'treatment'] within the context of investment includes the rights and privileges…covered by the treaty [including dispute resolution]."[81]

59. Some tribunals have taken a radically different approach. The tribunals in *Salini v. Jordan*,[82] *Plama*,[83] and *Telenor*[84] all said that claimants had to show specific intent on the part of a BIT's Contracting Parties before an MFN clause could attract dispute resolution. For a variety of reasons, the finding of these tribunals should be rejected.

60. First, the facts of *Maffezini* and its progeny are closer to this dispute than those of *Salini* and its progeny. Those tribunals applying *Salini*'s restrictive test all dealt with attempts to use MFNs clause to invoke drastic changes in dispute resolution: the *Salini* claimant attempted to sidestep a contractual dispute resolution scheme by attracting a third-party umbrella clause; the *Plama* claimant attempted to substitute ICSID rules for UNCITRAL rules; and the *Telenor* claimant attempted to arbitrate a claim excluded from arbitrability by the basic treaty. In contrast, *Maffezini et al.* deal with more subtle changes: for example, *Maffezini* used an MFN clause to sidestep an 18-month waiting period. Even the *Plama* tribunal found

[77] *See Ambatielos,* at 108.
[78] *Maffezini*, at ¶54.
[79] *Id.*, at ¶54.
[80] *Siemens*, at ¶103; *National Grid,* at ¶93.
[81] *Aguas III*, at ¶55.
[82] *Salini v. Jordan,* at ¶118.
[83] *Plama,* at ¶204.
[84] *Telenor,*at ¶91.

that *Maffezini* "[was] perhaps understandable" as an 18-month waiting period requirement was "nonsensical from a practical point of view."[85] Similarly, Professor Andreas Lowenfeld has suggested that *Salini* and *Maffezini* can be reconciled because *Salini* required a "greater leap" than *Maffezini*.[86] Giving force to the well-considered rules of academic scholars furthers the consistency of international arbitration.[87] In this case, Claimant seeks to avoid a discriminatory 18-month waiting period, a smaller procedural difference more akin to *Maffezini et al.* than *Salini et al.*.

61. Second, *Maffezini* squares betters with principles of treaty interpretation. Treaty interpretation begins with language, interpreted in light of the treaty's object and purpose.[88] The Calpurnia-Gaul BIT was signed to "intensify economic-cooperation," to "maintain fair and equitable conditions for investments," to "promot[e] and protect[]…investments," and to "stimulate business initiatives."[89] These purposes support more expansive MFN protections. BITs also create "flexibility in the resolution of investment disputes;"[90] and MFN clauses are designed to prevent the discriminatory treatment of foreign investors. Finding that MFN clauses attract dispute resolution serves all these purposes.

62. In contrast, the approach of *Salini et al.* overly relies on supplementary methods for treaty interpretation. *Salini*, *Telenor*, and *Plama* all use history and treaty practice extensively to establish the "intent" of the signatories. By doing so, they adopt an "absolutely negative approach…[that] is not in line with the concept of the most-favored nation treatment standard as a source of international law and with present trends in international investment law."[91] The methodology used by the *Salini et al.* fails because recourse to Article 32 methods of interpretation should supplement, not override, purposive interpretation.[92]

63. Finally, finding that bare MFNs attract dispute resolution mechanisms furthers the consistency of international arbitration. When choosing between two disparate rules, the

[85] *Plama,* at ¶224.
[86] *Int'l Econ. Law*, at 576;*accord Dolzer*, at 256.
[87] *Franck,* at 1613-1617;*accord* Art. 38(1)(C), *ICJ Statute*.
[88] Art. 31, *Vienna Conv. on the Law of Treaties*.
[89] *Preamble* of Calpurnia-Gaul BIT.
[90] *See Wong*, at 135.
[91] *Acconci*, at 402.
[92] Art. 32, *Vienna Conv. On the Law of Treaties*.

more popular rule is preferable because it creates consistency.[93]As Lowenfeld notes "[m]ost…cases raising the issue of whether an MFN clause can [attract dispute resolution] have followed…Maffezini."[94]

ii. The Language of Article 4 Places Dispute Resolution Within the Article's Scope

64. A treaty is read by its language, interpreted to further the treaty's purpose.[95] Here, the language and purpose of Article 4 attracts dispute resolution.

65. Because Article 4(1) provides for the MFN treatment of "[i]nvestments," and because dispute resolution is commonly considered part of investment's treatment, Article 4(1) applies to dispute resolution. Article 4(1) provides for MFN treatment of "[i]nvestments made by investors of one Contracting Party…or returns related thereto." Since 1956, the common understanding of international law is that the treatment of an "investment" includes the "administration of justice" through arbitration.[96]

66. The Calpurnia-Gaul BIT also includes dispute resolution in its definition of "Investment." In Article 1, "Investment" includes "intellectual…property rights" and "claims to money or rights to performance having an economic value." Immaterial property rights do not exist without formal mechanisms for their enforcement: by including property rights within the definition of investment, Gaul and Calpurnia acknowledged that dispute resolution – a necessary condition of these rights' existence – was a subject matter of the treaty and of the MFN clause.

67. This conclusion recurs in Article 4(2), which provides that investors shall be accorded MFN treatment in regards to the "maintenance, use, enjoyment or disposal of their investments." The *Siemens* tribunal found that the "right to have recourse to international arbitration is very much related to investors 'management, maintenance, use, enjoyment, or disposal of their

[93] *See Franck*, at 1558; *accord Dolzer*, at 35.
[94] *Int'l Econ. Law*, at 573.
[95] Art. 31, *Vienna Convention on the Law of Treaties*.
[96] *See Ambatielos,*at 108.

investment,'" especially as "'maintenance' of an investment…includes the protection of an investment."[97]

68. In a minority of cases, the effect of a listing like Article 4(2) constricts the scope of an MFN clause. Thus, to prevent the application of MFN clauses to dispute resolution, the Central American Free Trade Agreement ("CAFTA") provided that both investors and investments were entitled to MFN treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[98]

69. But, unlike CAFTA, Article 4(2)'s scope is limited to investors**,** and does not include investments. If the listing in Article 4(2) was meant to restrict the MFN clause's slope, a similar listing would have been included in Article 4(1). It was not.

70. Furthermore, Article 5 provides three exceptions to Article 4: customs unions; tax laws; and multilateral conventions. Because *expressio unius est exclusio alterius*, the failure to exclude dispute resolution from Article 4's scope suggests that dispute resolution is within its scope.

71. That Article 4 subsumes dispute resolution also flows from the treaty's purpose. As discussed above, the purposes of the Calpurnia-Gaul BIT are best served by finding that dispute resolution falls within the scope of Article 4.[99]

b. A Two-Month Waiting Period is More Favorable

72. For an investor to use MFN to attract more favorable treatment, the treatment sought must, in fact, be more favorable.[100] To determine whether a third-party treaty provides for more favorable treatment the difference in treatment must be discriminatory.[101] The test for discriminatory treatment is whether "the practical effect of the measure is to create a disproportionate benefit" for a third party over the protected investor.[102] In this dispute, the two-month waiting period of Article 7 of the Calpurnia-Flatland BIT is more favorable than the 18-month period of Article 11 of the Calpurnia-Gaul BIT.

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[97] *Siemens,* at ¶57.
[98] *CAFTA Draft Text*, arts.10.4(1),10.4(2) and 10.4 fn.1.
[99] *See infra* Sec. IV(C)(1)(i).
[100] *See McLachlan et al.*, at §7.193,293.
[101] *See id.*
[102] *S.D. Myers*, at ¶102.

73. Article 7(C) of the Calpurnia-Flatland BIT provides for ICSID jurisdiction "if the dispute can not be settled friendly within two months of the dispute notification date." In contrast, Article 11(2)(b) of the Calpurnia-Gaul BIT provides for ICSID jurisdiction if the dispute "cannot be settled amicably within 18 months from the date of request for amicable settlement." Flatland investors are thus entitled to more expeditious dispute resolution than Gaulois investors.

74. This discriminatory treatment disproportionately benefits Flatland investors. The difference between two and 18 months[103] is a significant difference in investor protection. In the event that the State makes amicable settlement impossible, as Respondent did here,[104] requiring an investor to wait two months before arbitration is far less burdensome than forcing her to wait 18 months.

75. In addition, Article 1 of both the Calpurnia-Gaul BIT and the Calpurnia-Flatland BIT define "investments" to include "intellectual…property rights" and "good-will." The treaties thus touch upon such significant issues as trademark dilution, patent protection, and the poaching of business contacts. In these matters, a year and four months makes all the difference: two months of negotiation are a chance for parties to negotiate intellectual property differences without prejudice; 18 months means that the party denied its intellectual property could suffer great harm. In this dispute, Respondent continues to use Claimant's brand, while disallowing denying Claimant's representative oversight of the brand's quality,[105] leading to trademark dilution.

c. <u>An 18-Month Waiting Period is Not a "Question of Overriding Public Policy"</u>

76. The *Maffezini* tribunal found that an MFN clause should not "override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance" of the basic treaty.[106] Allowing for arbitration after two months instead of after 18 months cannot be "envisaged" as a "fundamental condition" for a treaty's acceptance.

[103] *See infra* Sec. IV(C)(1)(b).
[104] *See infra* Sec. IV(B).
[105] Second Clarifications, Q. 15.
[106] *Maffezini*, at ¶62.

77. It is inconceivable that Gaul and Calpurnia would have failed to reach an investment treaty unless there was an 18-month amicable settlement provision. For Calpurnia, a powerful nation-state, negotiations of a year-and-a-half are not an essential condition of trade. In fact, the Calpurnia-Flatland BIT provides for a two-month waiting period, thus demonstrating that Respondent is not concerned with the length of any waiting period.

2. Claimant Is Entitled to Use the Two-Month Waiting Period of the Calpurnia-Flatland BIT

78. Claimant is entitled to use the two-month waiting period of the Calpurnia-Flatland BIT because **(a)** Claimant has satisfied the two-month waiting period; and **(b)** Flatland's denunciation of the Convention does not affect Claimant's right to rely on the two-month waiting period.

a. Claimant Has Satisfied the Two-Month Waiting Period

79. Claimant attempted amicable settlement for over five months before initiating these proceedings.[107] Thus, Claimant has satisfied the two-month waiting period of Article 7.

b. Flatland's Denunciation of the Convention Does Not Affect Claimant's Right to Rely on the Two-Month Waiting Period

80. MFN clauses can only attract favorable treatment from third-party treaty provisions that are operational.[108] Flatland denounced the Convention on May 2, 2003. On this basis, Respondent argues that Article 7 of the Calpurnia-Flatland BIT is no longer operational and therefore Claimant cannot rely on Article 7 to establish ICSID jurisdiction. Respondent's argument is without merit because **(i)** Flatland's denunciation of the Convention does not denounce its consent to ICSID arbitration under the Calpurnia-Flatland BIT; and **(ii)** even if

[107] *See infra* Sec. IV.
[108] *E.g.*, Article 21, *Draft Articles on MFN,* at 27–29.

Article 7 no longer provides for ICSID jurisdiction, Claimant can still rely on the two-month waiting period of Article 7 of the Calpurnia-Flatland BIT.

i. Flatland's Denunciation of the Convention Does Not Void Its Consent to Jurisdiction in the Calpurnia-Flatland BIT

81. Article 71 of the Convention allows Contracting Parties to denounce the Convention. Article 72, however, states that a notice of denunciation does not affect the "rights or obligations…arising out of consent to the jurisdiction of the Centre." The import of these provisions, coupled with the drafting history of the Convention, suggests that Article 71 denunciation does not simultaneously abrogate consent to ICSID jurisdiction contained within a BIT.

82. When co-drafting Article 72, Aaron Broches made two observations: pre-existing contractual consent to ICSID arbitration survives denunciation; and an unaccepted offer for ICSID arbitration expires upon denunciation.[109] In other words, an obligation to pursue ICSID arbitration survives denunciation, while an offer to do so does not.

83. The central question, then, is whether a BIT provision providing consent for ICSID arbitration is an obligation or an offer. While some have suggested that such a provision is an offer,[110] the correct interpretation is that it is an international obligation.[111] First, a treaty "that unequivocally expresses an obligation of the signatory state…[cannot] in good faith be interpreted to constitute an 'offer' only."[112] Second, to claim that an international treaty obligation is equivalent to a contractual or legislative provision undermines *pacta sunt servanda*. Finally, BITs, like the Calpurnia-Flatland BIT, generally contain specific procedures outlining how the BIT might be denounced. A State should not be able to sidestep these specifically negotiation BIT denunciation procedures by denouncing a third treaty.

[109] *Nolan and Sourgens*, at 1008-1010.
[110] *ICSID Commentary*, Article 72, ¶2.
[111] *Nolan and Sourgens*, at 38.
[112] *Id.*

84. Article 7 of the Calpurnia-Flatland BIT provides for ICSID arbitration as one of many forms of dispute resolution. This form of provision is considered consent to ICSID jurisdiction.[113] Because BIT provisions consenting to ICSID are obligations, not offers, Flatland's denunciation of the Convention does not abrogate Article 7. Therefore, Article 7 remains operational and may be relied upon by Claimant through an MFN clause.

ii. Claimant May Still Rely on the Two-Month Waiting Period of Article 7

85. Even if this Tribunal finds that Flatland's denunciation abrogates Flatland's Article 7 consent to ICSID arbitration, Claimant may still rely on the two-month waiting period of Article 7 because **(a)** Flatland's denouncation of the Convention does not preclude reliance on Article 7; and **(b)** as an unconditional MFN clause, Article 4 of the Calpurnia-Gaul BIT does not require that Claimant "pay the price" of ICSID jurisdiction for relying on the two-month waiting period in the Calpurnia-Flatland BIT.

(a) Flatland's Denunciation of the Convention Does Not Preclude Reliance on Article 7

86. Even if this Tribunal finds that Flatland's denunciation voided Article 7(C), that denunciation does not affect the other provisions of Article 7. Article 7 consists of five provisions: a two-month waiting period, and four choices for dispute resolution. Even if this Tribunal found that Flatland has taken the ICSID choice off the table, the rest of the Article's provisions continue in force. Claimant can still rely on any of these provisions, including the two-month waiting period.

87. It cannot be said that recourse to ICSID arbitration was such an essential element of Article 7 that without it the entire Article is nonoperational. ICSID was only one of four dispute resolution mechanisms listed in Article 7.

(b) Claimant Need Not "Pay the Price" of ICSID Jurisdiction to Rely on the Two-Month Waiting Period

[113] *ICSID Commentary*, Article 25, ¶261.

88. Under an unconditional MFN clause, a beneficiary need not sacrifice one form of favorable treatment in order to receive another.[114] Article 4 of the Calpurnia-Gaul BIT provides only that investors "shall be accorded treatment which is not less favourable than…accord[ed] to [investors or investments of] any third State." It neither says "provided that" nor is there any other condition present; therefore, the MFN clause is unconditional.

89. As described by Sir Arnold McNair, an unconditional MFN clause lets a beneficiary "claim the Boon without the Price" as long as the Price "is not an inherent element of the Boon."[115]

90. Because Article 4 is an unconditional clause, there is no requirement that, in order to rely on the two-month waiting period, Claimant must sacrifice his right to ICSID arbitration. We have here the following situation. Flatland and Gaul have a treaty which provides for an 18-month waiting period and ICSID arbitration. Flatland and Calpurnia, now, have a treaty which provides for a two-month waiting period and no ICSID arbitration. Obviously, the Gaulois investor need not pay the Price of ICSID arbitration in order to have the Boon of the two-month waiting period.

91. Nor is the lack of ICSID arbitration an "inherent element" of Article 7 of the Calpurnia-Flatland BIT. First, the negotiated Article 7 actually included ICSID arbitration. Second, because the Calpurnia-Gaul BIT gives "irrevocable consent" to ICSID jurisdiction but the Calpurnia-Flatland BIT does not, this suggests that ICSID arbitration was not a *sin qua non* to Article 7's adoption.

92. For all these reasons, this Tribunal has jurisdiction to hear this dispute.

CONCLUSION ON JURISDICTION

93. This Tribunal has jurisdiction to hear this dispute. Article 25(1) of the Convention is satisfied. This dispute is not solely a contractual claim, and even if it was, this Tribunal would still have jurisdiction to hear the dispute. No interpretation of a fork-in-the-road provision divests this Tribunal of its jurisdiction over this dispute. The Calpurnia-Gaul BIT's

[114] *Schwarzenberger*, at 101.
[115] *McNair*, at 287.

amicable settlement provision is not a bar to jurisdiction. Even if it was, Claimant could rely on the Calpurnia-Flatland BIT.

PART TWO: MERITS OF THE CLAIM

94. Respondent, through its organs and agents, has breached a number of its obligations under the Calpurnia-Gaul BIT.

I. THE ACTS AND OMISSIONS OF SFCDC, THE CALPURNIAN POLICE AND THE IMMIGRATION AUTHORITIES ARE ATTRIBUTABLE TO THE STATE

95. "[T]he State *can* act only through individuals, whether those individuals are organs or agents or are otherwise acting on behalf of the State."[116] All internationally wrongful actions alleged in this dispute are attributable to the Respondent.

A. The Acts and Omissions of Calpurnia's Police Forces and Immigration Authorities Rest Directly with the Respondent

96. The failure to provide full protection and security by Respondent's police forces and the arbitrary and discriminatory treatment exercised by Respondent's police forces and Ministry of Interior set forth in Part II, Section IV, *infra*, necessarily rest with the Government of Calpurnia itself.

97. Article 4 of the Articles on State Responsibility codifies the universal understanding of a State's responsibility for the conduct of its organs. Subsection 1 provides, in pertinent part that:

> [t]he conduct of any State organ shall be considered an act of that State under international law […] whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[117]

98. Subsection 2 defines an organ as *including* "any person or entity which has that status in accordance with the internal law of the State."[118] Few State entities that are more explicitly organs of the State than its Ministries,[119] as well as State forces and police.[120] Calpurnia's police forces and immigration authorities are lawfully empowered organs that exercise key

[116] *ILC Addendum to First Report,* at ¶150.
[117] *Id.*, at ¶91.
[118] Art. 4, *Articles on State Responsibility.*
[119] *Texaco*, at ¶23.
[120] *Amco*, at ¶¶155,170-172; *AAPL.*

sovereign functions. Respondent's assertion that the omissions of its authorities are not actionable[121] is disingenuous. State responsibility is implicated when authorities fail to take clearly warranted and appropriate measures, particularly when inaction imperils the security and freedom of movement of foreign personnel.[122] "[U]nder international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions."[123] For example, the decision rendered in *Wena Hotels* relied heavily on Egypt's failure to protect, given that "there is substantial evidence that Egypt was aware of [its organ's] intentions to seize the [investment] and took no actions to prevent [its organ] from doing so."[124]

B. The Acts and Omissions of SFCDC Are Attributable to Respondent

1. SFCDC is an Agent of the Respondent

99. SFCDC is a State agent under the classical and universally recognized definition of an agent, notwithstanding Respondent's attempts to cloak its wholly-owned and controlled fund as a mere shareholder.

100. SFCDC is a wholly State-owned fund.[125] Respondent also appoints the directors of SFCDC's board.[126] An entity whose structure, function and control flow from governmental authority, as well as conduct of persons empowered by the State to "exercise elements of governmental authority," are considered the conduct of the State "provided that the person or entity is acting in that capacity in the particular instance."[127] Applying this standard, tribunals have attributed actions by state-owned entities with weaker indicia of control to the State.[128] Indeed, full State ownership of an entity together with appointment of its Board of Directors by State organs has already led to the conclusion that the entity was the State's agent.[129]

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[121] Record, at 6, ¶¶17-18.
[122] *U.S. Embassy Case*, at 3, ¶¶63,67.
[123] *Velásquez Rodríguez,* at ¶170; *see also Polish Nationality Case*, at ¶425.
[124] *Wena Hotels*, at ¶76.
[125] Record, at 3, ¶10.
[126] *Second Clarifications,* Q. 17.
[127] Art. 5, *Articles on State Responsibility.*
[128] *Klockner* and *Klockner II*; *Maffezini*, at ¶¶31-33; *cf. Aguas II*; *Metalclad I*, at ¶73.
[129] *Wintershall,* at 809.

2. It Is of No Legal Consequence that SFCDC Acted in a Commercial Capacity

101. Respondent is responsible for the acts of SFCDC irrespective of their characterization. That a State entity acts in a commercial capacity is not dispositive in the matter of attribution, given the frequency of state engagement in commercial ventures and privatization programs. In *Noble Ventures*, the entity in question participated in board meetings, voted shares held by the government and sold government-held shares.[130] That tribunal stated that:

> it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable. […] Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental.[131]

102. In light of their privatization activities, the *Noble Ventures* tribunal found that the agencies in question had acted as "the empowered public institution."[132] The application of the empowered public institution standard in this case would promote consistency, equity and cost savings by dissuading state usage of complex webs of private companies to escape liability.

C. Ultra Vires *Is Not a Defense to State Attribution*

103. As reaffirmed in the Articles on State Responsibility, a State remains liable for the *ultra vires* acts and omissions of its agents and organs. Pursuant to Article 7:

> [t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[133]

104. Respondent's assertions that SFCDC's staff and appointees acted outside of their official capacity or contrary to express direction or policy[134] are wholly irrelevant when determining liability for such acts. Respondent formed SFCDC, Respondent controlled SFCDC, and Respondent owned SFCDC. Respondent generally enabled and empowered SFCDC to

[130] *Noble Ventures*, at ¶134
[131] *Id*., at ¶82.
[132] *Id.*, at ¶79.
[133] Art. 7, *Articles on State Responsibility*.
[134] Record, at 5, ¶16.

participate in the management of Claimant's Investment. In such instances, the International Law Commission has made it clear that

> the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.[135]

105. Even in instances of illegal self-help by state police, the State bears responsibility for ensuing international wrongs.[136]

106. For these reasons, the actions of Respondent's organs and agents are attributable to Respondent.

II. RESPONDENT EXPROPRIATED CLAIMANT'S PROPERTY

A. Expropriation is Broadly Defined in the Calpurnia-Gaul BIT and under Customary International Law

107. Article 6(1) of the Calpurnia-Gaul BIT provides:

> Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be *expropriated*, *nationalised* or subjected to any other measures having the effect, *either directly* or *indirectly*, equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation") except for a public interest, on a non-discriminatory basis [emphasis added].

108. Respondent has expropriated Claimant's investment and must furnish compensation.

1. The Calpurnia-Gaul BIT Protects Investors Against Direct, Indirect and Creeping Expropriation by Respondent

109. A leading "eloquent"[137] definition of expropriation is found in *TAMS-AFFA*:[138]

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[135] Art. 7, *Articles on State Responsibility* (see also Comments to Article 7 ¶1).
[136] *Amco,* at ¶178.
[137] *Motorola*, at 95; *see also SAIC Claim,* at 17.
[138] *TAMS-AFFA*, at 225.

> [An expropriation] may occur under international law 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.

110. The relevant metric is the extent of investor deprivation, not the state's gain, from such interference. Under the *Restatement,* a state is held responsible for expropriation which is confiscatory or prevents, unreasonably interferes with, or unduly delays enjoyment of the investment.[139]

111. Even without direct interference, the repudiation of official guarantees prevents effective control over an investment, culminating in expropriation.[140] These may include a broad range of dispensations ranging from free zone certifications[141] or development and operation permits.[142] Expropriation is not only outright seizure but "also covert or incidental interference with the use of property" that "[deprives the owner] of the use or …economic benefit of property even if not […] to the obvious benefit of the host state."[143]

112. Expropriation may occur either in a single seizure, or through a pattern of acts constituting "creeping expropriation."[144] Though application of creeping expropriation has been the subject of considerable debate, such arguments are inapplicable where the treaty explicitly speaks to acts of indirect expropriation.[145] Article 6(1) of the Calpurnia-Gaul BIT does so.

2. The Definition of Investment in the Calpurnia-Gaul BIT Encompasses Monies, Shareholding and Intellectual Property

113. Giving meaning to the Respondent's commitment to refrain from expropriation of foreign investment, Article 1(1) broadly defines Investment as "*every* kind of asset established or *acquired by*" by a Gaulois investor in Calpurnia "including*, in particular though not exclusively* [specified Investor assets]" [emphasis added].

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[139] *Restatement,*Section 712,Comment g.
[140] *Revere*, at ¶292.
[141] *Goetz*, at ¶124.
[142] *Metalclad I*, at ¶132.
[143] *Id*., at ¶103 (referring to *Biloune*, at ¶108).
[144] *Waste Mgmt.*, at ¶17.
[145] *Metalclad I,* at ¶103.

114. The expansive definition of Investment set forth in the Calpurnia-Gaul BIT indicates the Contracting Parties' clear intent to create a climate favorable to foreign investment. For that intent to become a reality, investors must be constructively protected against expropriation.

a. The Definition of Investment Protects Minority Shareholder Rights

115. Shareholding is protected when a BIT defines it as investment.[146] Article 1 of the Calpurnia-Gaul BIT does so. Shareholder control rights relate not only to the shares themselves but also other assets, such as know-how and managerial skills.[147] For a shareholding to qualify as an investment, a tribunal need not find that "shareholders control[] a company or own[] the majority of its shares."[148]

116. Through interference in control, a State may destroy an investor's reasonable expectation of "a long-term investment relying on the recovery of its investment and the estimated return."[149] Loss of control neutralizes the benefit of the property, as ownership and enjoyment are "'neutralized' where a party no longer is in control […], or where it cannot direct the day-to-day operations."[150]

117. In *CMS Award*, the absence of means through which a shareholder could reassert control over its holdings led to the conclusion that:

> [W]hat was touched…was the Claimant's […] investment as protected by the treaty. What was destroyed was the commercial value of the investment."[151]

This protection of shareholder rights, including corporate governance rights, was subsequently upheld in *Eureko*.[152]

118. The protection of minority shareholders under the *CMS Award* standard was made explicit in *Enron & Ponderosa*, in which a broad definition of Investment and reference to shareholding

[146] *Genin*., at ¶324.
[147] *Id*.
[148] *CMS Jurisdiction*, at ¶51.
[149] *TECMED*, at ¶149.
[150] *LG&E*, at ¶188.
[151] *CMS Award,* at ¶67.
[152] *Eureko*, at ¶145.

led to the necessary conclusion that "[t]he definition of investment adopted in bilateral investment treaties is a clear example of protection of minority shareholders."[153]

b. The Definition of Investment Protects Monies

119. Article 1(1)(c) of the Calpurnia-Gaul BIT provides specific protection to "titles or claims of money or rights to performance having economic value." Cash and cash equivalents are an evident and fundamental protected investor asset.

c. The Definition of Investment Protects Intellectual Property Rights and Intangible Technical Assets

120. Article 1(d) of the Calpurnia-Gaul BIT specifically protects "intellectual property rights, such as patents, copyrights, technical processes, trade marks, industrial designs, business names, know-how and goodwill" as Investments. Intangible rights have been consistently found to be investments protected against expropriation, so long as the taking is permanent or of extended duration.[154]

B. Respondent Has Expropriated Claimant's Investment

121. When Claimant entered the Calpurnian market, it did so pursuant to Respondent's investor protection commitments. Because of Claimant's expertise and leadership, VanCal became Calpurnia's largest mobile telecommunications provider.[155]

122. In addition to the harassment and discrimination suffered by Claimant,[156] Claimant began to lose its investment in VanCal on October 14, 2004. On that date, Respondent elected Mr. Swift, a government employee,[157] and Mr. Shelly, Respondent's agent, to the VanCal Board.[158]

[153] *Id*., at 39.
[154] *Corn Products*, at ¶137.
[155] *Second Clarification*, Q. 53.
[156] *Infra,* Part II, Sections V,VI and VII.
[157] Record, at 4, ¶16.
[158] Record, at 6, 14 October 2004.

123. As of November 15, 2004, half of VanCal's directors were representatives of the Respondent.[159] Thereafter, Respondent explicitly stated that Respondent did not "regard VanCal as really being a private company."[160] On November 16, 2005, when Respondent expelled Claimant's representative from the VanCal Board,[161] Respondent's expropriation was complete.

124. Through interference with Claimant's voting rights and control of its shares, Respondent has assumed control not only of Claimant's shareholder rights and benefits, but also of VanCal itself. In the past four years, Respondent has taken:

- declared dividend payments due to Claimant, a "claim to money" specifically protected under Article 1(1)(c) and unreasonably withheld from 10 March 2005 through to the present time.

- Claimant's "shares … or other forms of participation in a company" specifically protected under Article 1(1)(b), through illegal nullification of Claimant's representation on the Board of directors of VanCal.

- Claimant's intellectual property rights specifically protected under Article 1(1)(d), through continued, unauthorized and unsupervised use of the lifeline of Claimant's telecommunications business – its intellectual property.

1. Respondent Continues to Withhold Payments Due to Claimant

125. It is conceded that VanCal declared dividends due to Claimant, but Claimant still has not been paid. Respondent, however, asserts that VanCal distributed dividends to Claimant,[162] through an unauthorized and illiquid credit.

[159] *Second Clarification*, Q. 1.
[160] Record at 6, 15 November 2004 (Statement of Dr. Jonathan Swift).
[161] Record at 7-8, 16 November 2005.
[162] Record at 5, ¶16.

126. Willfully asserting a written instrument for payment of money drawn upon corporate accounts through a corporate officer, while knowing that the corporation is not authorized to make payment upon the instrument's presentation, is a fraudulent payment.[163]

127. Respondent asserts here a fraudulent payment. The Articles of Association of VanCal do not authorize a "credit on VanCal's books to Claimant's account" as a form of dividend payment.[164]

128. In instances where the State's defense is its own illegal act, "the declarations made by the Government are so lacking in precision that […] the existence and persistence of the dispute are not in doubt."[165]

129. Respondent first expressed its intent to restrict dividend payments on February 17, 2005.[166] Respondent sought to create an unnecessary severance fund, foreseeing a liquidation of the investment inconsistent with Claimant's commitment to VanCal.[167]

130. On March 10, 2005, Respondent declared that, although "shareholders have a right to [company profits] in proportion to their capital investment, […] the payment of profits to the foreign shareholders has been suspended for the time being" under a theory of dispute between the nations of Calpurnia and Gaul.[168] The Board declared a dividend payable only to local shareholders.[169]

131. The generous stock-and-cash dividend later declared by VanCal would not be paid to Claimant, per the instruction of a Respondent-dominated Board and confirmed by an independent director of VanCal.[170] Calpurnian law does not provide a basis to deny dividend

[163] *First Sport* (South African court defining and enforcing compensation for a fraudulent payment made in England under English law).
[164] Record at 8, 28 September 2006.
[165] *AGIP*, at ¶42.
[166] Record, at 6, 17 February 2005.
[167] *Id*.
[168] Record at 7, 10 March 2005.
[169] *Id.*
[170] Record at 7, 27 May 2005.

payments to selected shareholders.[171] Further, the declared dividend included a considerable shareholding component, not capable of compensation through a credit.[172]

132. After notification of the Claimant's dispute to Respondent on June 5, 2005, months of silence would follow, until September 28, 2006, when Respondent claimed that the aforementioned unauthorized credit would suffice.[173] To date, no lawful payment has been made to Claimant, and Respondent continues to withhold Claimant's shares and monies.

2. Respondent Willfully Deprived Claimant of Effective Use and Enjoyment of Its Shareholding

133. Voting rights and board representation are key and distinct shareholder rights; these rights are capable of independent taking and their loss dilutes the value of the overall investment.[174]

134. The right to "participate and vote in the general shareholder meetings; elect and remove members of the Board; and share in the profits of the corporation" is fundamental to shareholding.[175] Respondent has willfully deprived Claimant of the right to participation.

135. Claimant has, since late 2003, maintained a 31% interest in VanCal,[176] of which 1% is held in trust for Claimant.[177] Respondent holds 30% of VanCal stock directly.[178] Respondent controls another 22% block of shares,[179] registered in a purely nominal capacity to several hundred farmers and workers pursuant to a Purchase/Agency Agreement, leaving Respondent with a controlling voting interest of 52%.[180]

136. Respondent's control through the Purchase/Agency Agreement demonstrates Respondent's attempts to control VanCal. Respondent owns these shares, assigning only nominal registration and income rights to the natural persons while retaining all other ownership

[171] *Second Clarification*, Q. 13.
[172] Record at 7, 15 April 2005.
[173] Record, at 8, 28 September 2006.
[174] *Eureko* (holding that withdrawal of a minority shareholder's right to acquire further shares pursuant to an agreement related to the investment gave rise to expropriation).
[175] Art. II(A), *OECD Principles*.
[176] Record at 3, ¶13.
[177] Record at 3, ¶9.
[178] Record at 4, ¶20.
[179] *Id*.
[180] Record at 5, ¶8.

rights.[181] Respondent also imposes a withholding tax on dividend payments that is higher than the prevailing tax rate on dividends paid to shareholders who do not assign their voting rights to Respondent.[182] Such withholding treatment is a form of taxation which frequently proves coercive in application.[183]

137. Respondent, from a position of Board dominance, has moved to take the value of Claimant's investment in its entirety, violating internationally recognized maxims of corporate governance. Respondent randomly invalidated Claimant's proxies for board participation and proceeded to hold a board meeting for which no proxies had been issued.[184] Specifically, "shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia."[185] The meeting at which Claimant's proxies were nullified had been arbitrarily delayed; Claimant, as a minority shareholder, had no power to issue a valid proxy of its own initiative. Instead of adhering to the core principle that "[m]inority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have an effective means of redress," [186] Respondent continued on its course of coercion.

138. After unilaterally invalidating Claimant's proxies, Respondent voted to remove Claimant's representative from VanCal's Board.[187] Respondent then assumed complete control after VanCal's one independent director resigned; Respondent replaced him with another agent of the Respondent.[188] Boards are obligated to "ensur[e] a formal and transparent Board nomination and election process"[189]; once dominated by Respondent, the Board proceeded with complete impunity towards Respondent's interest.

139. Leaving the November 2005 meeting, Claimant had only one representative on the Board,[190] dominated by Respondent's four representatives. Claimant's remaining representative

[181] *Second Clarification,* Q. 12.
[182] *Second Clarification,* Q. 9.
[183] *OECD on Tax Competition*, at ¶170.
[184] Record at 7-8, 16 November 2005.
[185] Art. II(C)(4), *OECD Principles*.
[186] Art. III(A)(2), *OECD Principles*.
[187] Record at 7-8,16 November 2005.
[188] *Id*.
[189] Art. VI(D)(5), *OECD Principles*.
[190] Record at 8, 16 November 2005.

resigned shortly thereafter.[191] Claimant continued to pursue normal business relations within the State-dominated VanCal in good faith, nominating two replacement Board members on June 7, 2006.[192] Nevertheless, Respondent continued to treat Claimant arbitrarily and withhold payments.[193]

140. By October 23, 2006, Claimant recognized the futility of efforts at settlement, in light of Respondent's refusal to engage.[194] Thereafter, Claimant withdrew its representation from the VanCal Board.[195]

3. Respondent Continues To Use Claimant's Intellectual Property

141. A wide range of intellectual property rights are involved in the execution of Claimant's Technical Assistance and Trademark Licensing Agreements with VanCal. Respondent, now in charge of VanCal, continues to use and dilute the value of these assets without Claimant's participation in management.[196] As of May 2005, Claimant has not been paid for use of its intellectual property as required under the technical assistance agreement.[197] Respondent has further allowed its police to harass Claimant's chief technical officer until he left the country in fear.[198]

142. An action may be tantamount to expropriation, even though the legal ownership of the assets in question is not affected;[199] hence, it is irrelevant that Claimant retains ownership absent control. Though Claimant retains formal ownership of its intellectual property,[200] Respondent's unauthorized use continues to radically erode these assets' value.

C. *Respondent's Expropriation Was Discriminatory, Without Due Process of Law and Without Public Purpose*

[191] Record at 8, 15 April 2006.
[192] Record at 8, 5 June 2006.
[193] Record at 8, 28 September 2006.
[194] Record at 8, 23 October 2006.
[195] Record at 8, 23 October 2006.
[196] *Second Clarification,* Q. 34.
[197] Record at 4, ¶19.
[198] Record at 4, ¶17.
[199] *TECMED*, at ¶116.
[200] *Second Clarification*, Q. 15.

143. Article 6(1) of the Calpurnia-Gaul BIT provides an exception for expropriation "for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation."

144. In similar circumstances, the Overseas Private Investment Corporation held that Venezuela had expropriated a foreign investment in an arbitrary and discriminatory manner, without a public interest justification and with neither due process nor compensation.[201] Venezuelan officials had publicly proclaimed their intent to restrict foreign investment,[202] stating their discriminatory motive.[203] Venezuelan officials publicly denounced the investor, invoking unsubstantiated charges of espionage.[204] A general labor union protesting the investment was found to be of the expropriating State's making, due to extensive official participation, and hence not relevant for public purpose exception.[205] Cumulatively, these actions prevented a finding of lawful expropriation.[206]

145. The CCC's Women's League, the organization protesting against Claimant's participation in the investment,[207] acted in concert with platform of Respondent's ruling party. Respondent has denounced Claimant and promoted unsubstantiated charges of espionage against Claimant through public press releases.[208] Cumulatively, the facts of the case clearly show that Respondent's expropriation was not for a public interest, and was implemented in a fully discriminatory manner without due process of law.

146. For these reasons, Respondent has illegally expropriated Claimant's investment and must furnish compensation.

III. RESPONDENT HAS BREACHED ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT TO CLAIMANT'S INVESTMENT

[201] *SAIC Claim*, at ¶¶15-19.
[202] *Id*., at ¶7.
[203] *Id*., at ¶16.
[204] *Id*., at ¶9.
[205] *Id*., at ¶5.
[206] *Id*., at ¶¶20-21.
[207] Record at 4.
[208] *Id*.

147. Article 2(2) of the Calpurnia-Gaul BIT provides that investors of each party are entitled to fair and equitable treatment. Also, the Preamble to the Calpurnia-Gaul BIT emphasizes that both parties desire to "maintain fair and equitable conditions for investments by investors of on Contracting Party in the territory of the other Contracting Party."

148. Tribunals have used various approaches to define the fair and equitable treatment standard. The most commonly used standards include factors such as: **(A)** arbitrariness and discrimination; **(B)** failure to protect legitimate expectations; and **(C)** failure to provide a stable, consistent, and predictable investment environment. The existence of malice and bad faith can aggravate the analysis under any of these factors. No one factor is decisive and a breach of any of these factors can give rise to a claim for a breach of fair and equitable treatment. Under each standard, Respondent has violated fair and equitable treatment.

A. Protection against Arbitrariness and Discrimination

149. While some investment treaties have specific provisions on arbitrary and discriminatory treatment, arbitral tribunals also place this element in the concept of fair and equitable treatment. The tribunal in *Waste Management* states that fair and equitable treatment is breached if:

> the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.[209]

150. The concepts of arbitrary treatment and fair and equitable treatment are interrelated because arbitrariness is closely connected with the idea of the rule of law, foundational to the fair and equitable treatment standard.[210] The fair and equitable treatment standard can be understood as "a rule of law standard that the legal systems of host states have to embrace as a standard for the treatment of foreign investors."[211] Thus, arbitrary treatment is sufficient for a finding of a violation of fair and equitable treatment.[212]

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[209] *See Waste Mgmt.,* at ¶98.
[210] *Schill*, at 41.
[211] *Id*.
[212] *Id.*, at 51.

151. Certain forms of discrimination such as racial discrimination are recognized as giving rise to a breach of fair and equitable treatment.[213] It is less clear whether discrimination on the basis of nationality already addressed in a national treatment claim gives rise to a breach.[214] The *Myers* tribunal found that "the breach of Article 1102 (National Treatment) in this case essentially established a breach of Article 1105 (Fair and Equitable Treatment) as well."[215]

152. Respondent's conduct was both arbitrary and discriminatory. These actions were arbitrary because sudden changes such as the ousting of Gaulois Board members, the cessation of the flow of financial information and failure to pay foreign shareholders were sudden changes which were not grounded in any rational policy. These actions were discriminatory because domestic shareholders were not subject to the same restrictions.

B. Protection of Legitimate Expectations

153. A breach of legitimate expectations can also amount to a violation of fair and equitable treatment. In *TECMED*, the tribunal established that actions that are contrary to an investor's expectations can be a violation of fair and equitable treatment.[216] The tribunal in *TECMED* found that if any part of the framework is changed *ex post*, the investor should be protected.[217] The *Occidental* decision differed from *TECMED* in that it stated that not every expectation of the investor is protected under the fair and equitable standard, but rather that there must be reasonable reliance and that only legitimate expectations will be protected.[218]

154. Under the *TECMED* approach, a breach of fair and equitable treatment would be found because the imposition of administrative hurdles such as the refusal to pay dividends to foreign shareholders, cessation of sending financial information to Gaulois citizens and deprivation of representation on the Board following the CCC's ascension to power were contrary to Claimant's expectations.[219]

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[213] *Paradell*, at 129.
[214] *Id.*,at 129.
[215] *See S.D. Myers*, at ¶237.
[216] *See TECMED,* at ¶154.
[217] *See Id*.
[218] *See, e.g.*, *Occidental*, at ¶181.
[219] *See TECMED,* at ¶154

155. Respondent's actions also violated the lower standard enunciated in *Occidental*. When Claimant participated in the establishment of VanCal in Calpurnia, Claimant reasonably expected that Gaulois shareholders would be treated similarly to Calpurnian shareholders and Gaulois Board members would be able to participate and be represented in the company to the same extent as Calpurnian Board members.

C. Stability, Predictability, Consistency

156. The *Metalclad* tribunal identified the requirement to provide a predictable, stable legal and business framework as an element of fair and equitable treatment.[220] The tribunal ultimately found that a violation of article 1105(1), NAFTA's provision on fair and equitable treatment, was based upon Mexico's failure to "ensure a…predictable framework for Metalclad's business planning and investment."[221]

157. Respondent failed to provide a predictable framework by changing the investment environment upon the CCC's rise to political power. The CCC targeted Gaul through negative propaganda and altered foreign policy objectives. This changed the investment environment from one where Claimant could participate meaningfully in VanCal management to a subordinate role in the company. Shareholder and Board participation rights were curtailed.[222] This stark contrast between Claimant's former and current role in VanCal points to the unpredictable nature of the Calpurnian investment environment.

D. Malice or Bad Faith

158. While it is not a necessary element of the claim, evidence that the host state acted with malice or bad faith can aggravate the analysis under each of the three standards articulated above.[223]

159. Here, Respondent acted in bad faith. Respondent's malicious disregard of Claimant's rights to be paid dividends, to receive financial information, and to representation on the Board aggravates Respondent's breach of the other elements of a fair and equitable treatment claim.

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[220] *See Metalclad I,* at ¶99.
[221] *See Metalclad I,* at ¶99.
[222] Record at 3, ¶14.
[223] *See C.M.S. Award*, at ¶280.

160. Therefore, Respondent breached their duty to provide fair and equitable treatment.

IV. RESPONDENT DENIED CLAIMANT NATIONAL TREATMENT

161. Articles 4(1) and 4(2) of the Calpurnia-Gaul BIT provides that investors and investments of a Contracting Party should not be accorded treatment less favorable than a state would accord to its own investors and investments. This national treatment requirement is a critical element fulfilling the contract party's desire "to intensify economic co-operation to the mutual benefit of both countries" and to "promot[e] and protect[] investments on the basis of [the] Agreement."[224]

162. The purpose of this clause is to: "…promote the position of the foreign investor to the level accorded to nationals."[225] The general contours of the inquiry are: whether the foreign and domestic investors are in a comparable setting, the existence of differential treatment, and the absence of a justification for such differential treatment.[226]

163. Claimant is not required to prove that Respondent intended to favor its nationals.[227] The impact of the allegedly discriminatory measure on the investment is the determining factor.[228] Additionally, Claimant is not required to prove that Respondent's actions were a result of nationality-based discrimination.[229]

164. Here, **(A)** Claimant was in a comparable position to Calpurnian shareholders, **(B)** Claimant received different treatment vis-à-vis Calpurnian shareholders, and **(C)** Respondent cannot articulate legitimate policy reasons that justify this differential treatment.

A. Gaulois and Calpurnian Shareholders Were in a Comparable Setting

[224] *Calpurnia-Gaul BIT* at Preamble.
[225] *Dolzer*, at 178
[226] *See Dolzer*, at 180-183; *U.P.S.*, at ¶83.
[227] *S.D. Myers*, at ¶254.
[228] *Id.*, at ¶254.
[229] *Feldman*, at ¶181.

165. A denial of national treatment claim assesses whether the parties were in a comparable setting.[230] Investor-state tribunals have found that foreign and domestic investors are in a comparable setting when they are in "like circumstances."[231]

166. Tribunals have compared foreign and domestic investors who are in the same line of business[232] and even the same economic sector.[233]

167. Here, the investors were shareholders in the very same company.[234] Thus, it is undisputable that Gaulois and Calpurnian shareholders in VanCal were in a comparable setting.

B. Claimant was Subject to Differential Treatment vis-à-vis Respondent's Nationals

168. Simply stated, a discriminatory measure is one that does not provide national treatment.[235] A *de jure* denial of national treatment occurs when the discrimination is on the face of the measure.[236] A *de facto* denial of national treatment occurs when there is a facially neutral measure but "the measure in question disproportionally disadvantages the foreign owned investments or investors."[237]

169. Respondent's actions rise to the level of both *de jure* and *de facto* denials of national treatment. There was a *de jure* denial of national treatment because there was a corporate policy in place intended to discriminate against foreign shareholders. A March 2005 decision by the VanCal Board of Directors established that money would not be paid to foreign shareholders.[238] VanCal paid dividends to Calpurnian stockholders but refused to pay dividends to Gaulois stockholders. As discussed above[239] these actions are attributable to Respondent. The discrimination was on the face of the measure.

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[230] *Dolzer*, at 179.
[231] *See*, *e.g.*, *S.D. Myers*, at ¶243.
[232] *See Feldman v. Mexico*, at ¶171.
[233] *See Occidental,* at ¶173.
[234] Record at 3, ¶9.
[235] *See e.g.*, *Lauder*, at ¶220.
[236] *See e.g.*, *Pope & Talbot,* at ¶43.
[237] *See Pope & Talbot,* at ¶43.
[238] Record at 3, ¶14.
[239] *See* Part II, Sec.1.

170. In addition, Respondent's actions constituted a *de facto* denial of national treatment because while some measures were facially neutral, they had the effect of disproportionately disadvantaging the foreign-owned investment. Respondent states that all shareholders were treated equally in the dissemination of corporate reports and notices.[240] However, the cessation of sending information to Gaulois citizens disproportionally disadvantaged Gaulois investors because they could access information only by traveling to VanCal headquarters whereas they previously had meaningful access.[241] In addition, while Respondent claims that Claimant's removal from the Board was effected according to corporate protocol, Claimant was actually ousted from a position of representation thus further diminishing their ability to preserve the value of their investment.

C. There was no Justification for the Differential Treatment

171. Generally, differential treatment is considered justifiable if rational grounds can be demonstrated.[242] In *S.D. Myers*, the tribunal found that legitimate public policy measures that were pursued in a reasonable manner could justify differential treatment.[243] Similarly, the *Pope & Talbot* tribunal found that differentiation in treatment could be justified by a showing that the treatment bore a "reasonable relationship to rational policies not motivated by preference of domestic over foreign-owned investments."[244]

172. The differential treatment between Gaulois and Calpurnian shareholders was not justified by rational policies and the means employed bore no rational relationship to these policies. The differential treatment accorded to Gaulois citizens cannot be justified by the alleged security threat posed by Gaulois efforts to destabilize the regime through political and industrial espionage. Gaul does not pose a security threat to Calpurnia and the allegations of political and industrial espionage are merely unsubstantiated allegations that stem from the reactionary foreign policy of the CCC, a conservative regime that took power in November of 2003.[245]

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[240] Record at 5, ¶15.
[241] Record at 4, ¶16.
[242] *Dolzer*, at 181.
[243] *S.D. Myers,* at ¶246.
[244] *Pope & Talbot,*at ¶79.
[245] *Id*.

173. Even if the CCC's policies of ensuring national security against Gaulois threats were viewed as rational policies, constricting the financial control and rights of Gaulois shareholders is not a reasonable way to achieve these policies. Thus, these actions were not motivated by rational policies but rather by a preference for domestic over foreign owned investments.

174. Therefore, Respondent has failed to provide Claimant with national treatment.

V. RESPONDENT FAILED TO PROVIDE FULL PROTECTION AND SECURITY TO CLAIMANT'S INVESTMENT

175. Article 2(2) of the Calpurnia-Gaul BIT provides that Calpurnia shall "accord in its territory to investments of investors of [Gaul]. . . full and constant protection and security."

176. This obligation extends to actions taken by state organs.[246] Respondent is also responsible to provide full and constant protection and security against actions undertaken by private citizens.[247]

177. Thus, it is clear that even when there is ambiguity in the relationship between the state and the actor, the duty to provide full protection and security endures.[248] In this case, VanCal's actions were attributable to Respondent.[249] However, even if this Tribunal were to find that the actions of VanCal are not attributed to Respondent, Respondent would nevertheless remain liable for various violations of Article 2(2) of the Calpurnia-Gaul BIT.

178. As described below, Respondent did not **(A)** protect Claimant from physical, economic, and legal harm and **(B)** failed to even take reasonable measures to protect Claimant's investment from these forms of harm.

[246] *AAPL*, at ¶45.
[247] *Amco Asia*, at ¶172.
[248] *Id*.
[249] *See* Part II, Sec.1.

A. *Respondent Failed to Provide Claimant's Investment with Full and Constant Protection of Its Physical, Economic and Legal Security*

179. Full protection and security encompasses physical protection,[250] economic protection[251] and legal protection.[252]

1. Physical Protection

180. Full protection and security provides that the state must protect a foreign investor from physical harm.[253] The duty to provide protection against physical harm applies to action by state organs as well as private acts.[254] In *Wena Hotels*, the tribunal found Egypt liable when employees of a state entity had seized a hotel and police authorities failed to intervene to protect the investor despite notice of the seizure.[255]

181. Here, the police invaded Pescara and Mr. Kolowenko's privacy by engaging in three unsubstantiated searches of their homes. On three different occasions in 2003 and 2004 state agents, the police force, entered into the private homes of Pescara and Mr. Kolowenko solely upon the basis of "anonymous tips" and seized private property, including two laptop computers.[256]

182. Respondent is also responsible for the acts of private individual's actions against Claimant. Like in *Wena Hotels*, Respondent failed to send police protection despite Pescara's notification that angry protestors were surrounding her home. Pescara was subjected to public protests on her property on several occasions in 2004; these protests lasted for a number of days. The protestors harbored animosity towards Pescara and Gaulois nationals by using "threatening chants"[257] like "a woman's place is in the home-go home!" and "spy in

[250] *See, e.g.*, *AAPL*, at ¶45; *Wena Hotels*, at ¶84.
[251] *Azurix*, at ¶172 (stating that full protection and security "is not only a matter of physical security; the stability afforded by a secure investment environment is as important form an investor's point of view.")
[252] *See Siemens*, at ¶303 (stating that "the obligation to provide full protection and security is wider than 'physical' protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.").
[253] *Dolzer*, at 15.
[254] *Dolzer*, at 150.
[255] *Wena Hotels*, at ¶84.
[256] Record at 6, 8 December 2003.
[257] *First Clarification*, Q. 19.

your own backyard." Despite this recurring and hostile environment, the police failed to intervene despite Pescara's repeated demands for help.

183. In these instances, Claimant's key employees were subject to harassment and the threat of physical violence.

2. Economic Protection

184. The *Azurix* tribunal established that the obligation to provide full protection and security extends not only to physical protection but also to economic protection.[258] The tribunal reasoned that "when the terms 'protection and security' are qualified by 'full'…they extend, in their ordinary meaning, the content of this standard beyond physical security."[259]

185. Here, Respondent failed to provide Claimant's investment with economic protection by failing to ensure that VanCal's dividends were paid to Gaulois shareholders, that representation was provided as guaranteed by the cumulative voting provision of the Calpurnian Commercial Code, and that financial information was shared with Gaulois shareholders.

3. Legal Rights

186. The requirement that a state provide full protection and security "reaches beyond physical violence and requires legal protection for the investor."[260]

187. The tribunal's decision in *CME v. Czech Republic* illustrates the principle that full protection and security requires that a state "provide[] protection against infringements of the investor's rights."[261] The tribunal in that case held that:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[262]

[258] *Azurix*, at ¶408.
[259] *Azurix*, at ¶408
[260] *See Saluka*, at ¶¶483,484; *Ceskoslovenska*, at ¶170.
[261] *Dolzer*, at 151.
[262] *CME v. Czech Republic,* at ¶613.

188. Respondent has not met this obligation. Respondent did not provide legal protection to Claimant when it failed to pay license fees for the use of the Claimant's trademark and for the Technical Assistance Agreement, despite the fact that VanCal continues to illegitimately use Claimant's trademark.[263]

B. Respondent Failed to take Reasonable Measures to Protect Claimant's Investment

189. Investor-state tribunals have differing interpretations regarding the appropriate standard of care for a full protection and security claim. A strict liability standard would require that a state take "all measures of precaution to protect…investments… on its territory."[264]

190. However, tribunals are converging upon a "reasonableness" or "due diligence" standard. The tribunal in *Lauder v. The Czech Republic* defined the reasonableness standard as requiring a state to do what is "reasonable under the circumstances" in order to protect foreign investment.[265] The reasonableness standard is objective, not a sliding scale depending on state capacity. A sliding scale standard would lower the requirement for developing countries. The tribunal in *Asian Agricultural* defined reasonableness as an objective standard that would be judged as "the reasonable measures of prevention which a well-administered government would be expected to exercise under similar circumstances."[266]

191. The standard of care in the Calpurnia-Gaul BIT likely provides a heightened level of protection to the due diligence standard. This is because the full protection and security clause in the BIT uses the phrase "full and *constant* protection and security." The inclusion of the word "constant" serves to strengthen the required standard of "protection and security" and indicates the Parties' intention to establish in their BIT a standard of "due diligence" that is higher than the "minimum standard" of general international law.[267]

192. Respondent failed to provide Claimant's investment with full protection and security pursuant to this higher standard. Respondent failed to take reasonable measures to protect Claimant's physical security. Respondent did not dispatch police despite notice of picketing

[263] *Second Clarifications*, Q. 31.
[264] *American Mfg*., at ¶6.05.
[265] *Lauder v. Czech Republic*, at ¶308.
[266] *Asian Agricultural,* at ¶77.
[267] *Id.,* at ¶50.

near Pescara's home, nor did Respondent take any measures to prevent or correct the unwarranted police searches conducted in Pescara and Mr. Kolowenko's homes. Respondent did not inquire into VanCal's non-conforming treatment of Gaulois shareholders and VanCal's failure to pay license fees for trademarks. Therefore, Respondent failed to take reasonable measures, much less the measures required under the elevated standard established in Article 2(2) of the BIT.

193. For the above reasons, Respondent has failed to provide Claimant's investment with full protection and security.

VI. RESPONDENT TREATED CLAIMANT IN AN ARBITRARY AND DISCRIMINATORY MANNER

194. Article 2(3) of the Calpurnia-Gaul BIT provides that investor shall not be subjected to "arbitrary or discriminatory measures in [their] investments." While tribunals have assumed that arbitrary and discriminatory are identical standards, the separate listing of these two standards, "suggests that each must be accorded its own significance and scope."[268]

195. In this case, Respondent failed to pay dividends to Gaulois stockholders, ceased to send account investment-related information to Gaulois citizens, and ousted Gaulois citizens from the Board. Respondent's failure to renew Ms. Pescara's business visa constitutes a violation of Article 2(3) as well as Article 2(5), which guarantees "a sympathetic consideration to applications for necessary permits."

196. By these actions, Respondent has **(A)** subjected Claimant to both arbitrary treatment and **(B)** discriminatory treatment. Accordingly, Respondent has violated Article 2(3) of the Calpurnia-Gaul BIT.

A. Arbitrary Treatment

[268] *Dolzer*, at 173.

197. Some tribunals have defined arbitrary by using the definition provided in Black's Law Dictionary.[269] In *Lauder v. Czech Republic*, the tribunal relied on this definition which provides that arbitrary actions are those that are "founded on prejudice or preference rather than on reason of fact."[270] Other tribunals choose to define arbitrary by referring to the concept of the rule of law.[271] The *ELSI* tribunal defined arbitrary as "a willful disregard of due process of law, an act which shocks, or at least surprises a sense of juridical propriety."[272]

198. Under either analytic approach, Respondent's actions should be considered arbitrary. Under the *Lauder v. Czech Republic* standard, the reason that Respondent took these actions were not grounded in reason, but were motivated by preference or prejudice. Like in *Lauder v. Czech Republic*, the sudden change in policy towards Gaulois shareholders was not motivated by any rational policy but rather by prejudice against foreigners as exemplified by the xenophobic platform of the newly-elected CCC.[273] Additionally, the 2005 decision by the VanCal Board of Directors, which included SFCDC representatives, not to pay money to foreign shareholders together with decisions made by government representatives to oust members of the Board and to cease sending important financial information fits squarely within the alternate definition provided in *ELSI*.

199. Respondent's actions cannot be justified. This case is unlike *ELSI*, where the tribunal found that the Italian government's order to reacquisition an American company was necessitated by the politically charged context of a worker's strike.[274] Here, Respondent's actions were not justified by concerns regarding political and industrial espionage by foreign states. Such claims are unsubstantiated because they merely represent the paranoid rhetoric of the CCC rather than any legitimate policy grounded in fact.

B. Discriminatory Treatment

[269] *See Lauder v. Czech Republic*, at ¶221.
[270] *See Lauder v. Czech Republic*, at ¶221.
[271] *Dolzer*, at 173.
[272] *See ELSI*, at ¶128.
[273] Record at 3, ¶12.
[274] *ELSI*, at ¶129.

200. Respondent's policies were discriminatory on their face. Measures such as 2005 decision to cease paying dividends to foreign shareholders, failing to send documents to Gaulois shareholders, and ousting Galois Board members while similar actions were not taken against Calpurnian shareholders makes these formally discriminatory measures.

201. Alternatively, even if Respondent's policies are found to be formally non-discriminatory, Respondent has the burden of proof to show that their actions were not prejudiced towards Gaulois shareholders. Respondent would fail to meet this burden of proof because Respondent's actions towards Gaulois shareholders were prejudiced.

202. Therefore, Respondent treated Claimant in an arbitrary and discriminatory manner.

VII. RESPONDENT HAS BREACHED ITS DUTY OF TRANSPARENCY

203. An affirmative obligation of official transparency is specifically provided for in Article 3 of the Calpurnia-Gaul BIT, which provides:

> Each Contracting Party shall ensure that, its laws, regulations, procedures, administrative rulings and judicial decisions of general application…which may affect the investments of investors…are promptly published, or otherwise made publicly available.

204. Through transparency, a host State commits to improving the public availability of laws and information exchange, promoting public responsiveness to investment policy-making, and ensuring accountability and good governance.[275]

205. In *Metalclad I,* an opaque administrative decision-making process constituted a failure by the state to "ensure a transparent and predictable framework for [investor's] business planning and investment."[276] In *Metalclad I,* the tribunal set forth the following comprehensive definition of "transparency":

> [Transparency includes] the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made… should be capable of being readily known to all affected investors of another Party.

[275] *Id*.
[276] *Metalclad I,* at ¶142.

206. *Metalclad I* formed the foundation for the tribunal's transparency holding in *TECMED,* which found that investors may rely on certain *expectations* of consistency, including freedom from ambiguity and transparency.[277] These transparency analyses provide meaningful substance for independent claims which emerge from specific transparency undertakings.[278]

207. Contrary to its treaty commitments, Respondent assumed an informal approach to foreign investment and dispute resolution replete with unexplained inconsistencies. Respondent's police conduct searches at will, with few avenues for judicial review.[279] Respondent's legal and regulatory frameworks are silent on matters essential to investment promotion and protection of dividend rights.[280] Respondent's Commercial Code fails to protect minority shareholders.[281] Respondent may declare an unofficial state of emergency at will,[282] simply to justify its coercion of foreign nationals. Respondent also refuses to publicly disseminate key information regarding its operations,[283] as well as holdings managed by the State.

208. For the reasons stated above, Respondent has breached Article 3 of the Calpurnia-Gaul BIT.

CONCLUSION ON MERITS OF THE CLAIM

209. Respondent, through its agents and organs, has breached its international obligations with respect to restraint from expropriation, national treatment, fair and equitable treatment, full protection and security, arbitrary and discriminatory treatment, and transparency.

[277] *TECMED*, at ¶¶78, 154.
[278] *Champion Trading* at ¶164.
[279] *First Clarification*, Q. 17.
[280] *Second Clarification*, Q. 13.
[281] *First Clarification*, Q. 26.
[282] Record at 7, 10 March 2005.
[283] Record at 4, ¶16; *First Clarification*, Q. 10.

PART THREE: RELIEF REQUESTED

210. In light of the submission made above, Claimant respectfully asks this Tribunal to find:

(1) that this Tribunal has jurisdiction over this dispute;

(2) that Respondent violated its obligations under Article 2, Article 3, Article 4, and Article 6 of the Calpurnia-Gaul BIT;

(3) and that this arbitration should proceed to the Quantification of Damages Phase.

RESPECTFULLY SUBMITTED ON SEPTEMBER 12, 2008 BY

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

Parisa Elahi, Anita Raman, and Gunjan Sharma

New York University School of Law

on behalf of Claimant

VANGUARD INTERNATIONAL