

Team Registration Name: KLAESTAD

VANGUARD INTERNATIONAL [Claimant]

V.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA [Respondent]

MEMORANDUM

FOR

RESPONDENT

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# STATEMENT OF FACTS

## CLAIMANT

1 Claimant, Vanguard International (Vanguard), is a telecommunication company from Gaul. In 1997 Claimant established a joint venture company, VanCal, in Calpurnia. VanCal provides telecommunication services in Calpurnia under Claimant's trademark. From 1997 to 2004, Claimant was a major player in managing VanCal and having active representatives on VanCal's board of directors. Claimant's interest and reach into Calpurnia increasingly effected Respondent's economic and political environment. By the end of 2004, Claimant directly owned 30% of VanCal's stocks, and an additional 1% in the name of Francesca Pescara. Starting in late 2003, Claimant alleges that the use and benefit of its 31% interest in VanCal was diminished and that Respondent failed to pay license fees for the use of Claimant's trademark leading to a claim of expropriation without compensation.<sup>1</sup>

2 Claimant's country, Gaul, is a party to the following international treaties:

1. Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention)
2. Calpurnia-Gaul Bilateral Investment Treaty (Calpurnia-Gaul BIT)<sup>2</sup>
3. 1969 Vienna Convention on the Law of Treaties<sup>3</sup>

## RESPONDENT

3 Respondent is the Government of the Republic of Calpurnia. In November of 2003, Respondent faced a political shift that was in the best interests of its country both economically and politically. The new political environment resulted in deterioration of relationships with Claimant's country, Gaul. The State Fund for Commerce and Development in Calpurnia (SFCDC), which is 100% owned by the State of Calpurnia, owns 30% of VanCal's stock

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<sup>1</sup> Abstract from Claimant's Request for Arbitration, Record, p. 2-4.

<sup>2</sup> The text of the Calpurnia-Gaul BIT is attached to the Record.

<sup>3</sup> 2<sup>nd</sup> clarifications, number 32.

directly. In addition to its direct ownership, SFCDC, the governmental entity, votes on behalf of another 22% of individual shareholders. However, those individual shareholders are the actual owners of the stocks, preserving the right to sell their stocks.

4 Respondent is a party to the following international treaties:

1. The ICSID Convention
2. Calpurnia-Gaul BIT
3. Calpurnia-Flatland Bilateral Investment Treaty (Calpurnia-Flatland BIT)<sup>4</sup>
4. 1969 Vienna Convention on the Law of Treaties

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<sup>4</sup> The text of the Calpurnia-Flatland BIT is attached to the Record.

## KEY PERSONNEL

### CLAIMANT

Francesca Pescara	Claimant's representative on VanCal's board of directors. She was also VanCal's managing director before she resigned from that post.
Neil Shepherd	Claimant's representative on VanCal's board of directors.
Mr. Rindler	Shareholder proxy on behalf of Claimant.
Mr. Kolowenko	VanCal's chief technical officer, a national of Gaul.
Mr. Hunter	Claimant's representative on VanCal's board after both Ms. Pescara and Mr. Shepherd no longer served on the board.
Mr. Fowler	Claimant's representative on VanCal's board after both Ms. Pescara and Mr. Shepherd no longer served on the board.

### RESPONDENT

Dr. Jonathan Swift:	Calpurnian chairman of VanCal's board of directors. He is also on the board of SFCDC. <sup>5</sup>
Mr. Shelly:	VanCal's board member, representing SFCDC.
Mr. Poe	Respondent's representative on VanCal's board of directors and the Chair of the SFCDC.

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<sup>5</sup> 2<sup>nd</sup> clarifications number 52(b)

INDEPENDENT

Mr. Korchnoi: The only Calpurnian neutral individual on VanCal's board of directors. He replaced Ms. Pescara as managing director after her voluntary resignation.

## SUMMARY OF EVENTS<sup>6</sup>

7 December 2003	Calpurnian Security Forces searched the homes of Francesca Pescara and David Kowlowenko under suspicion of unlawful data collection and espionage, seeking to protect Respondent's economic and political environment.
January – October 2004	Ms. Pescara's home was picketed during this time. Calpurnian police declined Ms. Pescara's request to remove the protestors in order to allow citizens to practice their freedom of speech.
3 June 2004	Calpurnian Security Forces searched the residence of Ms. Pescara and Mr. Kolowenko.
16 July 2004	Calpurnian Security Forces searched the homes of Ms. Pescara and Mr. Kolowenko and seized possessions that were threatening to the economic and political environment of Calpurnia.
September 2004	Ms. Pescara's application for renewal of her three-year business visa was denied. Ms. Pescara was advised orally that it would suffice for her to enter the country under Calpurnia's visa waiver program for tourists which allows her a stay for up to 30 days.
14 October 2004	Dr. Swift and Mr. Shelly, SFCDC's representatives, were <i>elected</i> to the board of directors.
15 November 2004	VanCal board of directors accepted Ms. Pescara's voluntary resignation as managing director.

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<sup>6</sup> Summary of the Evidence/Calendar of Events chart, Record, p. 6-9.

17 February 2005 A board meeting to discuss the year's accounts and decide on the distribution of the company's profits was held. Mr. Rindler, who was serving as proxy for both Claimant directors, was absent from this meeting.

10 March 2005 Another board meeting held. At this meeting, the board noted that due to the political conditions, payments to Claimant might be suspended. However, the board did not come to any final decision on this matter.

27 May 2005 Upon Claimant's request from Mr. Korchnoi to open a bank account for Claimant's dividends, Mr. Korchnoi emailed Claimant back stating that he could not fulfill the request.

16 November 2005 At a shareholders meeting, the two proxies held by Mr. Rindler on behalf of Claimant were found not to be formally valid for the purpose of the meeting. Also, Ms. Pescara was voted off the board of directors by the majority votes of shareholders. Mr. Poe, and Mr. Korchnoi resigned from the board, and were replaced by two directors representing the SFCDC. At this point of time, Claimant held only one seat on the board, occupied by Mr. Rindler on proxy from Neil Shepherd.

15 April 2006 Neil Shepherd also resigned from the board.

7 June 2006 At a shareholder's meeting Mr. Hunter and Mr. Fowler were elected as Claimant representatives.

28 September 2006 An email from Mr. Swift to Claimant stated that the dividends had been credited on VanCal's books to Claimant's account.

23 October 2006 Claimant informed VanCal via email that it “no longer sees a reason to continue its presence at board of directors and shareholder meetings of VanCal.” Thereafter, Claimant’s two representatives on the board resigned.

5 February 2007 Claimant claimed expropriation by Calpurnian state entities and requested compensation through a letter to Mr. Poe.

31 July 2007 Claimant requests institution of arbitration proceedings in accordance with ICSID Rules of Procedure.

## Arguments

### I. THE TRIBUNAL IS COMPETANT TO DETERMINE ITS OWN JURISDICTION AND IT SHOULD DECLINE JURISDICTION.

5 ICSID Art. 41 states that the tribunal “shall be the judge of its own competence.” The arbitration law of the place of arbitration has no bearing on ICSID because ICSID is self-contained and independent.<sup>7</sup> It is well established in international arbitration that the doctrine of Competence-Competence grants arbitral tribunals the power to determine their own jurisdiction.<sup>8</sup> This doctrine was developed to resolve the particular issue of whether the national courts or the arbitral tribunals decide the admissibility of arbitration when the parties’ agreement, or in this case a BIT, has not yet been evaluated.<sup>9</sup> Disputes over an arbitral tribunal’s jurisdiction are common because of the ambiguity of the interaction between the applicable laws and the express terms of the contract.<sup>10</sup> Moreover, parties may challenge an arbitral tribunal’s jurisdiction as a tactic to delay proceedings.<sup>11</sup> The principle of Competence-Competence resolves such disputes and prevents delays by assigning the determination of jurisdiction to the arbitral tribunal itself.<sup>12</sup>

6 The reasons supporting why this Tribunal should decline jurisdiction are many and are fully explained in the following section. However, to name a few, in relevant part, the Calpurnia-Gaul BIT Art. 11(2) states “the investor has the choice of submitting the case to ICSID,” or pursuing other avenues of legal resolve. Here, Claimant has first chosen to pursue a remedy other than through ICSID arbitration. Moreover, the validity, application, and protections of the Calpurnia-Gaul BIT do not extend to the dispute herein. The parties have not chosen ICSID arbitration according to the express language and preconditions set forth in the Calpurnia-Gaul BIT. The purpose of choosing ICSID arbitration is to ensure that the parties can enjoy the benefits of neutrality, party autonomy, flexibility, finality, confidentiality, and expedience. The Tribunal must keep in mind that these characteristics, which the parties have

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<sup>7</sup> Reed, Paulson, Blackaby, p. 110 .

<sup>8</sup> Poudret and Besson, para. 459.

<sup>9</sup> Lew, Mistelis, Kroll, para. 14-16.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

not availed themselves of, are only applicable when ICSID arbitration is appropriate. The Tribunal must find that it does not have jurisdiction to hear this dispute.

## II. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION BECAUSE NEITHER THE PROPER PEOPLE NOR THE PROPER SUBJECT MATTER ARE BEFORE THE ARBITRAL TRIBUNAL, AND THE DISPUTE IS BROUGHT AT AN IMPROPER TIME.

7 For this Tribunal to have jurisdiction, the proper people and the proper subject matter must be before the Tribunal at the right time.<sup>13</sup> In this arbitral proceeding, the Tribunal does not have jurisdiction because (A) the proper people are not before the Tribunal; (B) the proper subject matter is not before the Tribunal; and (C) it is not the right time for the Tribunal's jurisdiction.

*A. The Tribunal's jurisdiction is not over the proper people because even though Gaul and Calpurnia are parties to the ICSID Convention, neither party has consented to ICSID arbitration.*

8 The Tribunal can have jurisdiction only over the proper parties.<sup>14</sup> Under Art. 25 of the ICSID Convention, an arbitral tribunal has jurisdiction over the persons before it when two requirements are satisfied: First, the dispute must be between a state and a national of another contracting state (i); second, both the host country and the investor's country must be parties to ICSID Convention which is not disputed in this case; and third, the investor must have consented to ICSID arbitration (ii).

i. The Arbitral Tribunal does not have jurisdiction over the person of the parties because the dispute is not between a contracting state, and a national of another contracting state.

9 The Arbitral Tribunal has jurisdiction according to Art. 25 of the ICSID Convention. In relevant part, Art. 25 states:

(1)The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the

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<sup>13</sup> See, Nathan, p. 100; ICSID Convention.

<sup>14</sup> ICSID Convention, Article 25.

Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Both Gaul and Calpurnia are contracting parties to the ICSID Convention.<sup>15</sup> This is not in question here. Nevertheless, the dispute in this case does not involve Respondent. Claimant has solely dealt with VanCal, a privately owned company not representing the government of Calpurnia. The Tribunal has to ensure that the government of Calpurnia, as Respondent, has taken measures that “attribute to the State liability for the actions of an entity distinct from the State...” For the reasons discussed in greater depth below, such liability is not imputed to Respondent in this case because VanCal was not acting on behalf of the government. Accordingly, this dispute involves Claimant, a national of another contracting party to the ICSID Convention, and VanCal, a privately owned company that is not a contracting party to the ICSID Convention. Respondent has been wrapped into this dispute between Claimant and VanCal in an attempt by Claimant to circumvent the authority of the ICSID Convention. For these reasons, jurisdiction fails. Perhaps more importantly, because consent is not present, the Tribunal’s jurisdiction also fails.

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<sup>15</sup> See, Claimant’s Request for Arbitration, p. 3.

ii. The Tribunal does not have jurisdiction over the person of the parties because neither of the parties have consented to ICSID arbitration.

10 Consent of the parties is the cornerstone of the jurisdiction of the Tribunal.<sup>16</sup> Consent must be clear, mutual, and in writing.<sup>17</sup> Non-contractual ICSID arbitration arises where a BIT between the host State and the investor's home State exists.<sup>18</sup> In non-contractual arbitration, the parties give their consent in two steps. First, the host State consents by including a standing offer to submit to ICSID jurisdiction in its national legislation or in a BIT.<sup>19</sup> Second, the investor consents by accepting that offer, either in writing to the host State at any time or by filing a request to arbitrate with ICSID.<sup>20</sup> The Tribunal does not have jurisdiction over the present dispute because (a) Respondent has not made a standing offer for ICSID arbitration; and (b) even if there is a standing offer, Claimant has not accepted Respondent's standing offer for ICSID arbitration.

a. Parties have not consented to ICSID arbitration because the Calpurnia-Gaul BIT is not a standing offer from The Government of the Republic of Calpurnia for ICSID arbitration.

11 Consent from the State comes from a treaty.<sup>21</sup> Namely, referral to ICSID arbitration in a BIT is a standing offer that ICSID arbitration is proper and that the Tribunal may have jurisdiction.<sup>22</sup> The conditions of Respondent's consent are inextricably linked to the Calpurnia-Gaul BIT. Specifically, Calpurnia-Gaul BIT Art. 11(2)(a)-(b) states:

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

- (a) the competent courts of the Contracting Party in whose territory the investment is made;
- (b) The International Centre for Settlement of Investment Disputes (ICSID)...

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<sup>16</sup> ICSID Convention, Article 25.

<sup>17</sup> Reed, Paulson, Blackaby, p. 177.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; ICSID Convention, Article 25(1).

<sup>20</sup> Reed, Paulson, Blackaby, p. 181.

<sup>21</sup> *See LANCO v. Argentina.*

<sup>22</sup> *Id.*; *see also, Salini v. Morocco.*

The Contracting Parties give their irrevocable consent in respect of the fact, that all disputes relating to investments are submitted to the above mentioned court, tribunal or alternative arbitration procedures.

Furthermore, in Art. 11(3), a party may be precluded from pursuing ICSID arbitration:

An investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article.

The conditions precedent to Respondent's offer of ICSID arbitration have not been met and, therefore, there is no standing offer to ICSID arbitration under the facts of this case because (1) Claimant has failed to seek 18 months of amicable settlement; and (2) Claimant has prohibited itself from seeking ICSID arbitration by first resorting to competent domestic courts of Respondent.

1. Vangaurd International has not sought 18 months of amicable settlement.

12 Claimant has failed to amicably resolve this dispute for 18 months with Respondent as required by the Calpurnia-Gaul BIT Art. 11(2). The first amicable attempt by Claimant to draw resolution to its claims against Respondent occurred by way of email on 21 May 2005. In that email, Claimant requested that the amount of the dividend payable be placed in a separate bank account to be opened in the name of Claimant.<sup>23</sup> The only other attempt by Claimant to resolve this dispute occurred through another email on 5 June 2005, less than one month after its initial attempt. But Claimant went no further and has wholly failed to reach the 18 month requirement of amicable settlement. Accordingly, this precondition of Respondent's offer to ICSID arbitration has not been met by Claimant; therefore, Respondent has never effectively extended an offer to Claimant to ICSID arbitration.

13 Although discussed earlier with regard to consent, Claimant will likely attempt to persuade this Tribunal to find such an 18 month requirement discriminatory because of the Calpurnia-Flatland BIT. This assertion fails because such treatment is actually more favourable to Claimant than a Flatland investor, and even if it is not found to be more favourable, Claimant has failed to meet the 2 month requirement provided under the Calpurnia-Flatland BIT.

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<sup>23</sup> See Record, p. 7.

14 Specifically, Art. 7 of the Calpurnia-Flatland BIT requires only seeking 2 months of amicable settlement. The Most Favored Nation Treatment, Art. 4 of the Calpurnia-Gaul BIT, requires that Claimant receive treatment that is identical to any other nation's treaty with Respondent, or whichever is more favourable. Accordingly, Claimant must pursue amicable settlement for 18 months as required by the Calpurnia-Gaul BIT since the Calpurnia-Flatland BIT is no longer authoritative.

15 Claimant seeks a remedy with this Tribunal based, in large part, on the bilateral investment treaty between Calpurnia and Flatland. However, the Calpurnia-Flatland BIT is unpersuasive because Flatland has denounced the ICSID Convention in 2003.<sup>24</sup> As Such, the Calpurnia-Flatland BIT does not recognize the importance or relevance of ICSID and it is improper for this Tribunal to compare the Calpurnia-Gaul BIT to that of Flatland. Indeed, the purpose of a comparison of BIT's is to ensure favourable treatment to investors. What could be more fair than Calpurnia-Gaul's BIT which gives effect to ICSID, while the Calpurnia-Flatland BIT no longer recognizes the ICSID Convention.

16 Moreover, Claimant has not even met the 2 month requirement of amicable settlement. Claimant's first email seeking settlement was sent 21 May 2005 and last email seeking settlement was sent 5 June 2005, within less than one month of each other. Even more importantly is the fact that the nature of these two emails does not constitute "amicable settlement". To be amicable, more is required than a demand for payment. Claimant has never attempted to negotiate, explain, or suggest a resolution to this dispute. In fact, at the time the 21 May 2005 and 5 June 2005 emails were sent, Claimant had never acknowledged Respondent's perspective as to this dispute, nor has Claimant ever indicated a willingness to meet somewhere in the middle. Claimant has utterly failed to comply with the 18 month requirement, the 2 month requirement, and even if Claimant has complied with the timeframes set forth by the respective BIT's, such attempts by Claimant have not been amicable.

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<sup>24</sup> See Record, p. 5.

2. Vanguard International first resorted to competent domestic courts, and only after an adverse judgment has Vanguard initiated this proceeding.

17 “Consent of the parties to arbitration under [ICSID] shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”<sup>25</sup> This presupposes that ICSID arbitration is the first request, which is not the fact of this case. Instead, as discussed earlier, Claimant has sought a remedy first in Respondent’s domestic courts. This further supports a finding by this Tribunal that jurisdiction is inappropriate.

18 The Calpurnia-Gaul BIT Art. 11(3) states that “an investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals.” The exclusive nature of this clause ousts the Tribunal’s jurisdiction. An exclusive forum selection clause does not exclude tribunals’ jurisdiction only when the subject-matter before the domestic courts in question differs from the dispute before the ICSID tribunal.<sup>26</sup> The critical question that arises in the application of clauses of this kind is whether any of the proceedings that may have been initiated are in respect of the same dispute. These types of clauses are based on the “fork in the road” principle.<sup>27</sup> In order to trigger these clauses, courts and tribunals require that the domestic court and arbitral proceedings concern the same type of claims.<sup>28</sup> However, where claims are brought before a commercial court regarding a breach of contract or other similar causes of action not involving a BIT, the action fails to function as a waiver of the claimant’s rights under the BIT and the ICSID Convention.<sup>29</sup>

19 The terms of the Calpurnia-Gaul BIT Art. 11(3) preclude Claimant from seeking ICSID arbitration because Claimant first resorted to the domestic courts of Respondent. As such, Respondent’s offer to ICSID never properly stood in effect for Claimant to accept. Claimant’s representative Ms. Pescara was managing director and board member of VanCal and brought claims in the domestic courts regarding investments made in VanCal. The domestic court of Calpurnia stated “Ms. Pescara, as mere nominee, has no beneficial interest in the shareholding and therefore lacks standing to bring this action.”<sup>30</sup> The domestic court recognized that Ms.

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<sup>25</sup> ICSID Article 26.

<sup>26</sup> *LANCO v. Argentina*; see, *Vivendi I*.

<sup>27</sup> Weiler, p. 302.

<sup>28</sup> *Id.*

<sup>29</sup> *Vivendi I*.

<sup>30</sup> *See Record*, p. 8.

Pescara was merely bringing claims on behalf of Claimant; as such, the domestic court reasoned that it was essentially Claimant's claims being brought before the court, which Ms. Pescara had no standing to bring. Clearly, Claimant has chosen to pursue resolution of this dispute through domestic courts rather than ICSID arbitration. Any offer to ICSID arbitration no longer existed nor was in effect as a result of Claimant's attempt to seek a remedy in domestic courts.

b. Parties have not consented to ICSID arbitration because Vanguard has failed to accept The Government of the Republic of Calpurnia's standing offer for ICSID arbitration.

20 Consent from the investor comes from a request for arbitration or written consent to arbitration.<sup>31</sup> This written consent or request operates as acceptance of the standing offer from the investor for ICSID arbitration.<sup>32</sup> Here, although Claimant has requested ICSID arbitration (which is the reason this Tribunal has been convened), such a request does not operate as acceptance because there is no offer from Respondent for ICSID arbitration and, even if there were an offer, Claimant has no standing to rely on such an offer.

21 The initial issue to be addressed is whether Claimant can rely on Calpurnia-Gaul BIT as an offer for ICSID arbitration. It is fallacious for Claimant to assert that it has accepted Respondent's offer to arbitrate when none of the preconditions to arbitration have been met, as discussed in the preceding section. Claimant simply can not be allowed to assert reliance on any offer from Respondent to arbitrate without also indicating compliance with the prerequisite provisions of the Calpurnia-Gaul BIT, such as Art. 11(3).

22 For these reasons, Claimant's assertion that consent exists under the facts before this Tribunal is availing. This Tribunal should find jurisdiction improper because were this proceeding to continue, it would not be over the proper parties.

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<sup>31</sup> ICSID Convention, Article 25(1).

<sup>32</sup> Reed, Paulson, Blackaby, p. 133.

*B. The Tribunal's jurisdiction is improper because the subject matter of the dispute is not within the ambit of the Calpurnia-Gaul BIT.*

23 The subject matter of the dispute, or its legality, must be within that which is covered by the BIT in order for the Arbitral Tribunal to have proper jurisdiction.<sup>33</sup> For the Arbitral Tribunal to have jurisdiction over a dispute, not only should the dispute exist between a contracting state and a national of another contracting state, but the dispute should be a legal dispute and arise out of an investment. Accordingly, the dispute must (i) be a legal dispute; and (ii) arise directly out of an investment.

i. The Tribunal does not have jurisdiction over the subject matter of the dispute because the dispute is not a legal dispute.

24 A party can not be prevented from making a claim, but his legal right to the claim can only be settled by the arbitral tribunal after due process.<sup>34</sup> An arbitral tribunal must be obliged to assess the dominating character of a dispute before assuming jurisdiction.<sup>35</sup> If a claim is made without a legal basis and the claim is merely an expression of interest, the claim must be dismissed by the tribunal.<sup>36</sup> The standard of scrutiny required to determine a legal dispute from a mere expression of interest is not high because all the party needs is to show that the dispute is not manifestly outside the jurisdiction of the tribunal.<sup>37</sup> The purpose of the ICSID Convention is to concern itself with “legal rights, contractual rights, or property rights.”<sup>38</sup> In instances where the dispute is predominantly political, commercial, or environmental, the arbitral tribunal does not have jurisdiction because the dispute is not a legal dispute.<sup>39</sup>

25 Here, the dispute before the Tribunal is manifestly outside the jurisdiction of the Tribunal because the dispute is not a legal dispute. The claims asserted by Claimant are expressions of interest with a focal point predominantly around both political and commercial causes. While it is unfortunate that Claimant's investment may not have gone quite as it had planned, Respondent is not liable for the substantive claims that Claimant seeks. These reasons will be discussed later

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<sup>33</sup> ICSID Convention, Article 25(2)(b).

<sup>34</sup> Nathan, p. 99.

<sup>35</sup> *Id.*, at 105.

<sup>36</sup> *Id.*

<sup>37</sup> ICSID Convention, Article 36(3).

<sup>38</sup> *History of the Convention*, Vol. II, Part 1, p. 54.

<sup>39</sup> Brown and Cheng, p. 97.

in this brief, but it is important for the Tribunal to understand that for the purposes of jurisdiction, mere expressions of interest because of political or commercial causes is not enough to have jurisdiction. Respondent underwent a political shift that, because of public interest, resulted in a shift away from foreign direct investment. The commercial ties to Claimant began to be severed as a result of this political shift. As such, this dispute is not over any legal claim related to the investment between Claimant and Respondent, but is instead a complaint brought by Claimant with regard to Respondent's political perspective. A decision by this Tribunal would have the effect of determining whether Respondent's political viewpoints are proper or not. Such a decision is manifestly outside the jurisdiction of this Tribunal.

ii. The Tribunal does not have jurisdiction over the subject matter of the dispute because the dispute fails to arise directly out of an investment.

26 The ICSID Convention is designed to protect investments by the foreign party which enters a state to invest as a result of inducements from the state provided directly under its investment laws and bilateral investment treaties.<sup>40</sup> Typically, the foreign investor is concerned with the security of its investments and the ICSID Convention provides resolution of any legal dispute arising directly out of an investment.<sup>41</sup>

It is well accepted that foreign direct investment is usually meant to include:

investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise.<sup>42</sup>

27 Similarly, the ICSID Convention has recognized that the notion of an investment should be viewed by an economic concept of investment that entails looking at the investment from the recipient's point of view; namely, from the host state's viewpoint.<sup>43</sup> From the state's standpoint, investment's that benefit the state's economy are vital investments.<sup>44</sup> For example, civil engineering contracts are considered investments under the economic concept approach to

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<sup>40</sup> Nathan, p. 106.

<sup>41</sup> See, ICSID Convention Article 25(1).

<sup>42</sup> *The IMF Balance of Payments Manual (4<sup>th</sup> Ed. 1977)*.

<sup>43</sup> Delaume, p. 117; see Nathan, p. 106.

<sup>44</sup> *Id.*

defining an investment.<sup>45</sup> In that case, the issues centered around the setting up of a company with equity participation paid in cash and in kind to engage in entrepreneurial civil engineering projects, which were held to be investments.

28 The Calpurnia-Gaul BIT Art. 11 deals generally with disputes “relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party.” The present dispute before this Tribunal does not arise out of an investment because the dispute, from Respondent’s viewpoint, is not fundamental to the improvement and benefit of its own economy. Rather, the relationship with Claimant was nothing more than a commercial venture that brought financial gain to Respondent itself and to Calpurnian investors.

29 Further, entering into the technical assistance and trademark licensing arrangements with Claimant were not an investment made under the Calpurnia-Gaul BIT. Significantly, it was VanCal that had these arrangements with Claimant, not Respondent. Nonetheless, assuming that any liability of VanCal can be imputed to Respondent, those arrangements are still controlled by separate agreements between Claimant and Respondent and to the extent that Claimant’s claims relate to those arrangements, such claims do not arise under the Calpurnia-Gaul BIT.<sup>46</sup> This Tribunal has no jurisdiction over claims that are not made under the Calpurnia-Gaul BIT; therefore, jurisdiction is not over the proper subject matter.

*C. Even if the proper people and the proper subject matter are before the Tribunal, the dispute failed to arise at the right time; therefore, jurisdiction is not warranted.*

30 According to Art. 25(1) and (2)(a)-(b) of the ICSID Convention, the Arbitral Tribunal’s jurisdiction extends to any legal dispute between a contracting state and a national of another contracting state. A national of another contracting state is:

any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to...arbitration;

and

any juridical person which had the nationality of Contracting State other than the State party to the dispute on the date on which the parties consented to submit

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<sup>45</sup> See *Klockner v. United Republic of Cameroon*.

<sup>46</sup> See Record, p. 3.

such dispute to...arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

31 As the preceding discussion illustrated, consent to jurisdiction of this Tribunal has not been established between the parties. The Tribunal's jurisdiction is simply unfounded at this time. The ICSID Convention has been in effect between Respondent and Gaul, and the Calpurnia-Gaul BIT has been in force since its inception on 1 August, 1995. Because this dispute arose in 2003, the protections and obligations that flow from the Calpurnia-Gaul BIT could prevail over this dispute, for example, if Claimant had sought 18 months of amicable settlement and did not bring claims before the domestic courts; however, such protections and obligations have not come to fruition absent consent by the parties and the Tribunal's jurisdiction is unwarranted.

*D. The Tribunal should decline jurisdiction because the policies underlying the purpose of ICSID do not support a finding of jurisdiction in this case.*

32 Arbitral tribunals have powers to invent a rule of law where it does not exist and that rule can be influenced by interests such as overwhelming public interest.<sup>47</sup> It is repeatedly emphasized that the *raison d'être*, or the reason for being, of ICSID is to encourage the flow of foreign private capital into the development of the economies of the poor nations of the world.<sup>48</sup> Parties have full control over their dispute settlement because arbitration is based on the parties' choice and not bound by any civil rules.<sup>49</sup> As a result, arbitration is more flexible and efficient.

33 In this case, the parties never fully agreed to arbitration and Claimant has entirely failed to comply with various pre-conditions to arbitration. It is axiomatic that without consent to jurisdiction, and without compliance with all the terms of the Calpurnia-Gaul BIT, it is inappropriate for Claimant to believe that jurisdiction of the Tribunal is appropriate and even more improper to force Respondent to succumb to the jurisdiction of this Tribunal. Additionally, it is VanCal that is the proper entity that Claimant should be seeking redress from, not Respondent. The policies underlying the purpose of ICSID arbitration do not support a finding of

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<sup>47</sup> Nathan, p. 100.

<sup>48</sup> Shihata.

<sup>49</sup> *Id.*

jurisdiction where consent is wholly absent and the proper parties are not even before the Tribunal in the first place. Perhaps most importantly, this whole dispute is a result of Respondent's right to guard its public interest and policy. The purpose of ICSID arbitration cannot work to undermine a country's ability to determine for itself what economic and political policies are in its best interest. Therefore, ICSID arbitration under the facts of this case is inappropriate and the Tribunal should decline to exercise jurisdiction.

### III. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA HAS NOT EXPROPRIATED VANGUARD INTERNATIONAL'S INVESTMENT BECAUSE THE INVESTMENT STILL REMAINS PRIVATELY CONTROLLED.

34 Art. 6(1) of the Calpurnia-Gaul BIT outlaws expropriation:

Investment 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, under due process of law and against prompt, adequate and effective compensation.

Respondent has not violated this provision because (A) Respondent did not limit Claimant's control over its investment because the decisions of the board of directors of VanCal is not attributable to Respondent; and (B) even if the Arbitral Tribunal finds that the decisions of VanCal board of directors could be attributed to Respondent, such decisions did not amount to expropriation.

*A. The Government of the Republic of Calpurnia did not expropriate Vanguard International's investment through representatives at VanCal's board of directors because VanCal's government-employed board members were not acting on behalf of the Government.*

35 Expropriation in general means government taking.<sup>50</sup> In other words, it is only a government or its agents that are bound by anti-expropriation provisions in Bilateral Investment Treaties. Therefore, before one evaluates whether the measures taken have been severe enough

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<sup>50</sup> Friedman, p. 1-4.

to result in expropriation, one has to ensure that those measures were taken by the government. “To attribute to the State liability for the actions of an entity distinct from the State, there must be a further link shown which engages the responsibility of the State in the matter. Under various principles of international law, this link may be that the entity was acting as an agent of the State, that the entity was authorized to act on behalf of the Government on the matters in question and/or that it acted at the State’s discretion.”<sup>51</sup> For instance, Iran-US claims tribunal “felt comfortable to attribute to the State expropriations that had been caused by the enactment of nationalization laws, laws seizing and transferring funds,” because it was clear that the legislator acted as an agent of the state in a conduct that resulted in investor’s deprivation.<sup>52</sup>

36 Respondent did not expropriate Claimant’s investment because Respondent did not authorize VanCal’s government-employed board members to act on behalf of Respondent in conducts that have allegedly resulted in expropriation. Respondent did not appoint Dr. Swift as the chairman of the board of directors of VanCal. In fact, majority and minority shareholders of VanCal *elected* Dr. Swift to the board of directors.<sup>53</sup> Other government-employed board members were also chosen through the same process.<sup>54</sup> Therefore, it cannot be claimed that Respondent appointed these individuals to the board of director of VanCal as its agents to implement its policies and to neutralize Claimant’s interests in the investment.

37 Claimant alleges that the VanCal’s board of directors suspended the payment of dividends to Claimant. As a result of this decision, Claimant alleges that it has suffered loss of enjoyment of its investment. However, Dr. Swift and other government-employed board members’ decisions cannot be attributed to the government of Calpurnia, Respondent. There is nothing in the record that shows the Dr. Swift and government-employed board members were acting as an agent of Calpurnia. Or, that they were authorized to act on behalf of Respondent at the state of Calpurnia’s discretion. It was not Respondent that deprived Claimant from its

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<sup>51</sup> Drahozal and Gibson, p. 217.

<sup>52</sup> Drahozal and Gibson, page 219: citing to these cases: *American Int’l Group, Inc. v. Islamic Republic of Iran*, Award No. 93-2-3, 4 Iran-U.S. Cl. Trib. Rep. 96 (Dec. 19, 1983); *Amoco Int’l Finance Corp. v. Islamic Republic of Iran*, Partial Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189 (July 14, 1987); *American Bell Int’l Inc. v. Islamic Republic of Iran*, Award No. 255-48-3, 12 Iran-U.S. Cl. Trib. Rep. 170 (Sept. 19, 1986).

<sup>53</sup> Record, p.6.

<sup>54</sup> *Id.*

dividends. It was the decision of the board members of VanCal. Therefore, Respondent did not interfere with Claimant's investment; let alone expropriating it.

38 Respondent, the Calpurnian government, did not exert any control over VanCal, and VanCal is still individually owned. Even though majority of the shareholders are government entities, that does not change the private characteristic of the company. VanCal is still in the hands of individuals, and the government has not implemented its own policies in the company. Therefore, Respondent has not expropriated Claimant's investment. If Claimants, minority shareholders, are unhappy with majority shareholders' exercise of their legitimate management rights, they should bring their grievances before the courts of Calpurnia.

*B. Even if the Arbitral Tribunal attributes the decisions of the government-employed board members to the Government of the Republic of Calpurnia, those decisions have not amounted to expropriation.*

39 Expropriation, which is undefined in the Calpurnia-Gaul BIT, is equivalent to dispossession.<sup>55</sup> Taking physical possession of an investment so that the foreign investors no longer own the investment is considered expropriation of the direct kind.<sup>56</sup> In addition to direct expropriation, there are indirect ways that a government could expropriate foreign investment. Determining what governmental measures may constitute indirect expropriation is not set out in the Calpurnia-Gaul BIT. Since a variety of measures could lead to indirect expropriation, each case needs to be evaluated "on the basis of its attending circumstances."<sup>57</sup> When the government takes measures that indirectly neutralize the investor's enjoyment of the benefits of its investment, indirect or creeping expropriation takes place.<sup>58</sup> Art. 6(1) of the Calpurnia-Gaul BIT prohibits both kinds of expropriation; direct and indirect.

40 Iran-U.S. Claims Tribunal has already decided a case that is factually parallel to the case at hand.<sup>59</sup> Foremost, an American corporation brought expropriation action against the government of Iran claiming (a) failure to pay Foremost the dividends declared in 1979 and 1980 and paid to other shareholders, (b) ousting one of Foremost's two representatives from the Pak

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<sup>55</sup> Dolzer, p. 98.

<sup>56</sup> Folsom and Gordon, p. 1125; *See also*, Aldrich, p.174.

<sup>57</sup> Dolzer, p. 100.

<sup>58</sup> *Id.* at 99.

<sup>59</sup> *Foremost Tehran, Inc. v. Islamic Republic of Iran*, Award No. 220-37/231-1, 10 Iran-U.S. Cl. Trib. Rep. 228 (Apr. 11, 1986).

Dairy (the investment company) board of directors, rejecting shareholder proxies, and preventing election of a replacement director, and (c) the actions of Dr. Mohsen Ameli, the government-employed chairman of Pak Dairy's board, instructing the company's managing director to stop sending accounts, financial statement or other information to U.S. citizens or translating such material into English as had been the practice. The Iran-U.S. Claims Tribunal in this case held:

Having examined the totality of the evidence in the present Cases, the Tribunal reaches the conclusion, on balance, that interference with the substance of Foremost's right did not [] amount to an expropriation.

Even though the decision of the Iran-U.S. Claims Tribunal is not necessarily binding on this Arbitral Tribunal, however, their analysis of this factually identical case could persuade this Arbitral Tribunal to come to the same conclusion in the case at hand to find that Respondent did not expropriate Claimant's investment.

41 In the present case, Respondent could not have expropriated Claimant's investment directly because to this day, Claimant is still the owner of its 31% shares at VanCal. There is nothing in the record that proves Respondent took any attempt to confiscate Claimant's shares.

42 Respondent did not expropriate Claimant's investment indirectly either due to several reasons. First, Respondent did not enact any specific decree or legislation that resulted in Claimant's indirect loss of control over its investment. Claimant has not shown any statutory restriction on its right to sell or otherwise dispose of its shares. Therefore, Respondent has not taken any measure that would have the same or similar effect as depriving Claimant from its investment.

43 Second, Respondent did not expel Claimant from management to take possession of VanCal. Ms. Pescara independently *resigned* from her position as managing director in November 2004.<sup>60</sup> Ms. Pescara remained Claimant's representative on VanCal's board of directors after her resignation from management.<sup>61</sup> Respondent did not issue a business visa for Ms. Pescara because her continuous presence in Calpurnia as the managing director was no longer required. Ms. Pescara was still able to enter the country on a visitor's visa to perform her duties on the board. In addition, Respondent did not outs Ms. Pescara off of the board of directors; on 16 November 2005, Ms. Pescara was fairly voted off of the board of directors by

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<sup>60</sup> Record, p. 6.

<sup>61</sup> *Id.*

the majority vote of the shareholders. Moreover, Respondent did not oust all of Claimant representatives from the board meetings. Mr. Rindler proxy was only for 11 October 2005 meeting and Mr. Rindler was correctly held unacceptable for the shareholders' meeting of 16 November 2005.

44 Third, even if the government-employed board members were representing Respondent on VanCal's board of directors, those representatives did not expropriate Claimant's investment by suspending payment of dividends. In 10 March 2005 meeting, no final decision was made as far as not paying dividends to foreign shareholders. There is nothing in the record that shows that Mr. Korchnoi had the authority from the board of directors to tell Claimant on 27 May 2005 that their dividend payments were suspended. Mr. Korchnoi's testimony states that Dr. Swift particularly told him not to take any actions, until the board "determines the best way to handle it." This testimony shows that the board of directors did not have a final decision either to pay or not to pay Claimant. On 28 September 2006, the board of directors recognized the right of Claimant to its dividends by crediting Claimant's account on VanCal's books. Therefore, the evidence shows that VanCal board of directors never actually intended to deprive Claimant from its right to receive dividends. The reason for Claimant not receiving dividends during the years in dispute is not clear from the record. However, it could be speculated that there were administrative complications. It cannot be concluded with certainty that the board of directors were intending to discriminate and deprive Claimant from the dividends.

45 Claimant's participation on the board ended only when it withdrew its representatives by email on 23 October 2006 and declined to replace them. Respondent did not take any measures directly or indirectly to neutralize Claimant's enjoyment of its investment. Therefore, Respondent did not violate its obligation under Art. 6(1) of the Calpurnia-Gaul BIT.

IV. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA DID NOT VIOLATE ITS OBLIGATION TO PROVIDED FULL PROTECTION AND SECURITY TO VANGUARD INTERNATIONAL BECAUSE THE INVESTIGATION OF MR. PESCARA AND MR. KOLOWENKO WERE CONDUCTED LEGITIMATELY IN SUPPORT OF NATIONAL SECURITY REQUIREMENTS.

46 Art. 2(2) of the Calpurnia-Gaul BIT states: "Each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable

treatment and *full and constant protection and security*.”<sup>62</sup> However, there is no clear definition of the term “full and constant protection and security.” Scholars state that this standard provides an obligation for the host state to take appropriate measures and be vigilant and exercise due diligence in protecting the investment.<sup>63</sup> However, it is not a guarantee that the investors will never be damaged.<sup>64</sup> It is not a strict liability or an insurance policy.<sup>65</sup> Providing full protection and security does not mean immunity from lawful investigation either.

47         Simply put, the standard obliges the parties to “exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.”<sup>66</sup> For example, when a foreign investor has a hotel that has been broken into, the government has not shown due diligence in protecting the foreign investment when they send the police 4 days after the incident to address the issue. Such unreasonably late reaction is in violation of protection and security clause of the BIT.<sup>67</sup>

48         In the case at hand, Respondent did not fail to provide full protection and security for several reasons. First, Respondent’s Security Forces had suspected that Ms. Pescara and Mr. Kolowenko were engaging in illegal activities. The protection and security clause does not provide an immunity against legal investigations. Therefore, by conducting an investigation in order to ensure the legality of Ms. Pescara and Mr. Kolowenko’s conducts, Respondent was simply ensuring the safety and security of its own citizens, a right that it did not sign off of by signing into the Calpurnia-Gaul BIT. Therefore, Respondent did not violate the protection and security clause. If Ms. Pescara and Mr. Kolowenko feel invaded and damaged by Respondent’s Security Forces’ search and seizures, and they claim that such searches and seizures were illegitimate, only Ms. Pescara and Mr. Kolowenko had standing to challenge the lawfulness of the searches under Calpurnian law of their private residences in the domestic courts of Calpurnia. Note that, their claim about the lawfulness of searches and seizures would be based on the law of Calpurnia and not the Calpurnia-Gaul BIT, and this Arbitral Tribunal will not have jurisdiction over that subject matter.

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<sup>62</sup> Emphasis added.

<sup>63</sup> Dolzer, p. 61.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Lauder v. Czech Republic*, para. 308; *See also*, Dolzer, p. 61.

<sup>67</sup> *Wena Hotels v. Egypt*.

49 Second, Respondent did not violate the security and protection clause by disclosing the accurate information found in the searches to the Calpurnian public. The protection and security clause does not guarantee against release of accurate information that are not in favor of foreign investors. The press releases issued by the Calpurnian Security Directorate in connection with the searches were factually accurate, and Respondent bears no responsibility for any misinterpretation by isolated members of the public. Therefore, Respondent has simply practiced its right to inform the public, and it has not failed to protect Claimants from any insecurities.

50 Third, the protesters near Ms. Pescara's home were private citizens lawfully exercising their freedom of speech on public property in a non-violent manner, and there was no basis for the police to intervene on the occasions when they were requested to do so by Ms. Pescara. This situation is distinguishable from the case where the security forces failed to exercise due diligence and did not show any reaction until after 4 days proceeding a robbery. Police unresponsiveness in the case at hand does not show Respondent's lack of due diligence in protecting Claimant's personnel, it simply shows their concern for providing an environment welcoming freedom of speech.

51 Respondent's Security Forces exercised their national obligation to keep Calpurnian citizens safe by conducting searches of Ms. Pescara, and Mr. Kolowenko's homes. The information legitimately disclosed to the public was factually accurate, and the police unresponsiveness to the picketing incident was in order to provide Calpurnian citizens a chance to exercise their freedom of speech. Therefore, Respondent did not fail to be vigilant and exercise due diligence in protecting VanCal against any insecurities. Respondent did not violate Art. 2(2) of the Calpurnia-Gaul BIT.

**V. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA DID NO DISCRIMINATE AGAINST VANGUARD INTERNATIONAL BECAUSE THE GOVERNMENT TREATED ALL SHAREHOLDERS ALIKE.**

52 Under Art. 4 of the Calpurnia-Gaul BIT, Respondent is obligated to grant foreign investors the highest standard of treatment available to its own investors or investors of any third state. More specifically, Art. 4(2) states:

Investors of one Contracting Party shall be accorded by the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of

their investment, treatment which is not less favourable than the latter Contracting Party accords its own investors or to investors of any third State, whichever is the most favourable to the investor.

53 As it was discussed above, the government-employed board members were not representing Respondent at VanCal. Therefore, their decisions are independent of Respondent. The decision to suspend payment of dividends to Claimant while such payments were declared and paid to national shareholders were the decision of VanCal board members, not Respondent. Respondent did not appoint the individuals on VanCal board members, and did not specifically instruct them to implement Respondent's policies by suspending payments. Therefore, the actions taken by VanCal board members cannot be attributed to Respondent. Moreover, Respondent has not enacted any laws or legislation that is discriminatory. Simply because a private company decides to take a certain action due to political atmosphere does not make that conduct a governmental conduct. The board members of a privately owned company, VanCal, determined not to pay dividends to Claimant, and their decision was independently made without the intervention of any government oversight.

54 Even if the Arbitral Tribunal finds that government-employed board members were representing Respondent, the conducts of government-employed board members were not discriminatory for two reasons.

55 First, distribution of information and notices about VanCal was made as late as September 2006.<sup>68</sup>

56 Second, suspension of payments to Claimant was unauthorized. Mr. Korchnoi's email on 27 May 2005 stating that no further payments are going to be made to foreigners was not authorized by VanCal's board of directors. Mr. Korchnoi's email was superseded by VanCal showing its willingness to pay the license fees and dividends. Respondent simply suspended the dividends, it did not terminate the payment of dividends. This does not amount to discrimination necessarily or that Respondent wanted to give its national investors a better treatment than foreign investors. Because the board of directors did not officially terminate payments in its entirety, it cannot be concluded that they have discriminated. By definition, foreign shareholders are situated differently from national shareholders and in some conditions the political environment of the country makes it effectively impossible to be treated equally; however, in this

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<sup>68</sup> See Record, p. 8.

case making the business judgment to merely suspend the payment of dividends due to a political atmosphere does not amount to discrimination. Therefore, as long as they perform a good faith effort to provide an equal playing field the purpose of non-discrimination provisions is met.

57 The government-employed board members of VanCal are not government representatives, and therefore, their conducts such as suspending payment of dividends cannot be attributed to Respondent. However, if the Arbitral Tribunal finds otherwise, since information about the investment was available to Claimant and because the suspension of payments was temporary and not finalized by the board of directors, the government-employed board members conducts has not discriminated against Claimant.

## **Conclusion**

58           The Arbitral Tribunal is well within its own competence and authority to decline to hear this dispute and, in fact, must decline jurisdiction. The Arbitral Tribunal does not have jurisdiction over the person of the parties because the requisite consent is absent as between Vanguard and Calpurnia and the dispute does not focus around an investment as defined by the Calpurnia-Gaul BIT. Furthermore, the Arbitral Tribunal is competent to determine its own jurisdiction and it should decline jurisdiction. The fundamental, underlying principles of ICSID Arbitration were created for circumstances contrary to the facts of this dispute and are not meant to intrude on the economic and political policies of Calpurnia; therefore, the Arbitral Tribunal should find jurisdiction improper.

59           Respondent respectfully asks this Arbitral Tribunal to hold that VanCal's board of directors' decisions were not attributable to Respondent. Therefore, Respondent could not have expropriated or discriminated against Claimant's investment by representation through VanCal's board of directors. Furthermore, Respondent did not fail to fully protect and secure Claimant's investment because Respondent legitimately conducted searches, disclosed to the public factually accurate information, and its unresponsiveness to the picketing incidents was justified.

Accordingly, Respondent respectfully requests that this Arbitral Tribunal find in its favor.