

TEAM [AGO]

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INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

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VANGUARD INTERNATIONAL  
[CLAIMANT]

V.

THE GOVERNMENT OF  
THE REPUBLIC OF CALPURNIA  
[RESPONDENT]

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MEMORIAL FOR CLAIMANT

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## STATEMENT OF FACTS

1. Claimant, Vanguard International (Vanguard), with its headquarters in Nova Parigi, the capital city of Gaul, is a leading mobile telecommunications company with GSM operations in seven emerging markets in Latin America, the Middle East, Africa and South Asia, having a total population under license of approximately 360 million.
2. In early 1997, Claimant participated in the establishment of a joint venture company, VanCal, incorporated and with its headquarters in San Inocente de Irkoutsk, the capital of Calpurnia. VanCal provides GSM/UMTS (3GPP) services in Calpurnia under the “VANGUARD INTERNATIONAL” trademark.
3. Claimant initially owned a 50% equity interest in VanCal. By separate agreements, it provided technical assistance and trademark licensing. The equity interest held by Claimant varied subsequently, rising at one point to 86%, but then declining as the result of a number of share sales. At the end of 2004, Claimant held 30% directly; an additional 1% registered in the name of Francesca Pescara was held in trust for the Claimant.
4. The State Fund for Commerce and Development in Calpurnia (SFCDC) owns 30% of VanCal's stock directly. The SFCDC is an entity 100% owned by the State of Calpurnia. The SFCDC holds on deposit and votes a further 22% of VanCal stock registered in the names of several hundred individual shareholders. Other Calpurnian nationals directly hold the remaining 17% of VanCal's stock.
5. Between 1997 and 2004, Claimant played a major role in the management of VanCal, having provided management skills and personnel, including participation on the board of directors.
6. In November 2003, the Conservative Conscience of Calpurnia (CCC) won an absolute majority in both chambers of the Calpurnian Parliament. The CCC's agenda advocates a “return to the traditional Calpurnian values of hard work, family, modesty, thrift and self-sufficiency”. The ruling party's rhetoric is markedly more hostile than its predecessor's towards liberal, individualist, consumption- and leisure-oriented societies: Calpurnia's diplomatic relations with several States that the CCC characterizes in those terms, including Gaul, have deteriorated. This deterioration has been marked by mutual, hitherto unsubstantiated allegations of political and industrial espionage and destabilization. Since the beginning of the CCC's rule, there emerged a climate of hostility around VanCal (2<sup>nd</sup> Clarifications, para 51).
7. Starting in late 2003, SFCDC implemented a series of decisions that effectively deprived

the Claimant of the use and benefit of its 31% interest in VanCal. In particular, although VanCal declared cash dividends in 2004, 2005, 2006 and 2007, in each case based on profits earned in the prior year, and paid those dividends to Calpurnian stockholders, it refused to pay them to Claimant pursuant to a March 2005 decision by the VanCal board of directors not to pay any money for any reason to foreign shareholders, basing its position on the internal law of Calpurnia. The SF CDC representative to the Board and chairman of the Board Mr. Poe stated the board decision is dictated by the

8. In November 2005, government representatives ousted Ms. Pescara, one of Claimant's two representatives, from the VanCal board of directors. At the same time, by rejecting the two shareholder proxies held by Mr. Rindler, on behalf of Claimant, Calpurnian government representatives also prevented Claimant from electing a replacement to Ms. Pescara. Thus Claimant was deprived of any representation in violation of the cumulative voting provision of the Calpurnian Commercial Code. There is no legal opportunity to challenge the said board decision in Calpurnian courts (1<sup>st</sup> Clarifications, para 7).
9. As of 1 December 2005, Dr. Jonathan Swift, the government-employed chairman of VanCal's board of directors, instructed Mr. Korchnoi, Ms. Pescara's replacement as managing director, to cease sending accounts, financial statements or other information to Gaulois citizens or translating such material into Gaulois as had been the practice.
10. On 7 December 2003 and on 3 June 2004 and 15 July 2004 there were three police searches of the private homes of Ms. Pescara and Mr. Kolowenko, prompted by "anonymous tips" that VanCal was engaged in illegal data collection for Gaulois Security Services. The searches were conducted without any warrant and were based on the "periculum in mora" provision of Calpurnian law. (1<sup>st</sup> Clarifications, para 17). No charges were ever filed against Ms. Pescara, Mr. Kolowenko, VanCal or Vanguard. Vanguard's applications to have the December 2003, April 2004 and July 2004 searches declared unlawful and seek compensation were dismissed by the Calpurnian Constitutional Court.
11. The press releases issued by the Calpurnian Security Directorate in connection with the searches agitated public sentiment against Vanguard, Ms. Pescara and Mr. Kolowenko. Ms. Pescara's home was picketed on 1-2 January, 15-17 March, 5-7 June, 17-19 July, and 25-28 October 2004. This picketing was led, inter alia, by members of the CCC Women's League brandishing signs reading "A woman's place is in the home – go home!" or "Spy in your own backyard!" The police declined Ms. Pescara's demands to remove the protesters.

12. In September 2004, Ms. Pescara's application for renewal of a "three-year business visa" was denied. She was advised orally that when her current business visa expired, it would suffice for her enter the country under Calpurnia's visa waiver program for tourists.
13. The climate of hostility toward Gaulois nationals in Calpurnia forced its expatriate personnel, including Ms. Pescara, VanCal's managing director until November 2004, and Mr. Kolowenko, the chief technical officer, to leave the country at the end of 2003. The prevailing circumstances prevented Mr. Kolowenko's return altogether, while Ms. Pescara, who visited Calpurnia three times during 2004, found it impossible safely to return there after 1 November 2004.
14. Dr. Swift, the Chairman of SFCDC and the latter's representative in VanCal's board, has repeatedly stated that VanCal is a public company with public functions. On 15 November 2004 he said at the board meeting, that the SFCDC did not "regard VanCal as really being a private company". At the shareholders' meeting of 16 November 2005 Mr. Swift outlined that the main objective of VanCal is "to protect the interests of the country as well as to preserve the industry and the interests of the shareholders including the minor ones within the framework of the general interests of the country."
15. On 14 June 2006 the Commercial Court of San Inocente de Irkoutsk dismissed the claim of Ms. Pescara to order VanCal to transfer the dividends for 1 % shares that she held in trust for the lack of standing. In the position of the court, only the actual shareholder has standing to demand the dividends.
16. Under the technical assistance agreement, Claimant conveyed its trade mark "VANGUARD INTERNATIONAL" to VanCal. While the trade mark belongs to Claimant (2<sup>nd</sup> Clarifications, para 15), VanCal is obliged to pay licence fees for the use thereof. VanCal uses the trade mark until the present moment (2<sup>nd</sup> Clarifications, para 31), while the licence fees are not paid since 2005. On 27 May 2005, Claimant received an official e-mail from VanCal informing it of the decision of the board of directors to make no payments to foreign shareholders.
17. On 5 February 2007 Claimant sent an official e-mail to Mr. Poe, Chairman of SFCDC, where it claimed de facto expropriation of its investment, committed by Calpurnian state authorities. Mr. Poe transmitted it to his superiors including the appropriate Ministers.
18. On 31 July 2007 Claimant requested institution of arbitration proceedings in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules).

## PART ONE

### JURISDICTION OF THE TRIBUNAL OVER THE DISPUTE

- A. The Claimant respectfully submits that this Tribunal has jurisdiction to consider the claims submitted by the Claimant under Article 11 of the Calpurnia-Gaul BIT and Article 7 of the Calpurnia-Flatland BIT.
- B. Under the most-favored nation clause of Article 4 of the Calpurnia-Gaul BIT the Claimant may rely on the more favorable dispute resolution provisions of the Calpurnia-Flatland BIT (A). Furthermore, since Flatland remains bound by its consent to the ICSID arbitration, given in the BIT, the Claimant may rely on the provisions of the respective BIT despite Flatland's denunciation of the ICSID Convention (B).
- C. The Claimant submits that it has pursued attempts of friendly settlements of the dispute with the Respondent for 2 months as required by Article 7 of the Calpurnia-Flatland BIT. However, it is further submitted that the amicable settlement requirement was and remains in any event inapplicable in the face of Respondent's consistent denial of the claims of the Claimant both before commencement of the present proceedings and throughout their course.
- D. Finally, the Claimant submits that the claims submitted by the Claimant to the domestic courts of Calpurnia differ in all material respects from the claims submitted in current arbitration, and therefore the fact of the Claimant's recourse to the national courts of Calpurnia does not preclude The Claimant from recourse to arbitration. In any, event the Claimant is further entitled to rely on the provision of Article 11 (3) of the Gaul-Flatland BIT, which does not contain a "fork-in-the-road" provision.

**A. BY VIRTUE OF THE MOST-FAVORED NATION CLAUSE OF ARTICLE 4 OF THE CALPURNIA-GAUL BIT, THE CLAIMANT IS ENTITLED TO RELY ON MORE THE PROVISIONS OF OTHER CALPURNIAN BITS MORE FAVORABLE TO INVESTORS**

- 19. The Claimant submits that the regulation of the procedure for the settlement of investment disputes between the investors and a State forms integral part of the treatment of the investors by that State and therefore under the most-favored nations clause of the Calpurnia-Gaul BIT The Claimant may invoke provisions of other BITs entered into by

Calpurnia that contain more favorable dispute resolution provisions.

20. Article 4(2) of the Calpurnia-Gaul BIT provides:

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

21. The treatment as regards to management, maintenance, use, enjoyment or disposal of the investments would be ineffective if it is not supported by appropriate dispute settlement mechanisms. Therefore, the provisions regulating the dispute resolution form an inherent part of the treatment of investors with respect to maintenance and enjoyment of their investments, for without such provisions and respective settlement mechanisms any other guarantees would be only illusory.

22. Arguments such as raised by the Respondent to the effect that the MFN clauses extend only to the substantive provisions of the BITs, have been consistently rejected in the past by various ICSID tribunals and in the writings of most highly qualified publicists.<sup>1</sup> Thus, in the celebrated *Maffezini v. Spain* award the tribunal concluded that the the dispute settlement clauses are included within the scope of protection accorded to investors and therefore the investors of other states may rely upon them on the basis of MFN clauses.<sup>2</sup>

23. In *Siemens v. Argentina* the tribunal noted that certain BITs concluded by Argentina contain:

“as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause”<sup>3</sup>

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<sup>1</sup> E. Gaillard, "Establishing Jurisdiction Through a Most-Favored-Nation Clause", New York Law Journal dated June 2, 2005; C. Schreuer, "Consent to arbitration", 2005

<sup>2</sup> *Maffezini v. Kingdom of Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 369, 40 ILM 1129 (2001), para. 41-56.

<sup>3</sup> *Siemens v. Argentina*, ICSID Case No. ARB/02/8, para 102-103.

24. Provisions of Soviet BITs similar to that of Calpurnia-Gaul BIT, providing for most-favorable treatment with regard to “maintenance and use” of the investment have been interpreted in the past by the tribunals to encompass the dispute resolutions provisions.<sup>4</sup>
25. On this basis, The Claimant submits that it is entitled to rely on the dispute resolution provisions of the Calpurnia-Flatland BIT on the basis of Article 4(2) of the Calpurnia-Gaul BIT.

**B. EVEN IF ARTICLE 7 OF THE CALPURNIA-FLATLAND BIT WERE APPLICABLE, FLATLAND HAS NOT BEEN A CONTRACTING STATE AT THE TIMES RELEVANT FOR THE JURISDICTION OF THIS TRIBUNAL**

26. Consent to the jurisdiction of the centre does not arise solely from the fact that a state is a party to the ICSID Convention; consequently denunciation of the Convention does not mean revocation of the consent.
27. The fundamental question arises how to reconcile the obvious discrepancy between a state’s BITs providing for ICSID on the one side and the respective state’s denunciation of the ICSID on the other. The central regulation with this regard is obviously Article 25 and 72 of the ICSID .
28. Flatland in accordance to Article 25 and 72 of the ICSID Convention still remains bound by its consent to arbitration under the ICSID given in the BITs.
29. The most far reaching understanding of the article 72 provides for the possibility of accepting a state’s consent to ICSID arbitration stipulated in a BIT as long as respective bilateral agreement remains effected.<sup>5</sup>
30. The consent given by the host state under a BIT has to be regarded not merely as a revocable "offer to arbitrate" but rather as an "independent legal obligation" with the result that "protected investors will be unaffected by the denunciation of the Convention

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<sup>4</sup> See *RosInvestCo UK Ltd. v. Russian Federation*, Jurisdictional Award, SCC Case No, V079/2005, para. 130

<sup>5</sup> Tietje C., Nowrot K. and Wackernagel C., "Once and forever? The legal effects of a denunciation of the ICSID", 2008, p.9

[ICSID] not just for 6 month, but for the life of the treaty".<sup>6</sup> Yet the date in which the State expresses its consent its consent in the treaty is not just an offer. It is much more than it and it has specific legal effects, including obligation of the host State under the treaty.<sup>7</sup>

31. A denunciation provision is contained in Article 71 of the ICSID Convention: Any contracting state may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice. However, the critical question is not whether a contracting state may withdraw from the ICSID Convention but what consequences are attached to such withdrawal. The question is what becomes of the denouncing state's existing rights and obligations under the convention at the time of denunciation. The drafters of the ICSID Convention anticipated this type of difficulty by including a derogation provision in Article 72 to cover the situations where a denouncing state, one of its constituent subdivisions or agencies, or one of its nationals, has given consent to the jurisdiction of the centre prior to the notice of denunciation
32. The idea of the Art.72 also reflected in the Preliminary Draft and all subsequent drafts of the Convention (History, Vol. 1, p.302). Mr. Broches, the general counsel of the International Bank for Reconstruction and Development (IBRD) and the chairman of the Legal Committee during the negotiations of the convention, explained that the intention of the article was to make it clear that if a State consented to arbitration, subsequent denunciation of the Convention by the State would not relieve it from its obligation to go to arbitration if the dispute arose.<sup>8</sup>
33. The Article 25(1) of the ICSID Convention stipulates that "when the parties have given their consent, no party can withdraw his consent unilaterally". This provision which

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<sup>6</sup> Nolan M. and Sourgens F., "A Preliminary Comment – The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study", 2007, p. 37

<sup>7</sup> *Waguïh Elie George Siaig and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on jurisdiction of 11 April, 2007, Partial Dissenting Opinion by Francisko Orrego Vicuna, p. 63

<sup>8</sup> C. Schreuer, "The ICSID Convention: A Commentary," Cambridge University Press, 2001, p. 1285

makes a consent once given irrevocable is probably the most important provision of the Convention.<sup>9</sup>

34. Thus, consent may be not be withdrawn unilaterally and denunciation of the Convention shall not affect existing consent.<sup>10</sup>
35. The notion that a dispute could be brought before ICSID years after the denunciation of the ICSID Convention was raised during the negotiations of the convention. The statement made by Mr. Broches was unambiguous in that respect: “if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that state would still be bound to submit its disputes with that company under that agreement to the Centre.”<sup>11</sup>
36. Founders of the Convention did not specifically refer consent under the Convention to bilateral or multilateral investment protection treaties, since it were not common in state practice at the time the ICSID Convention was negotiated and adopted. At the time of drafting and entry into force of the ICSID Convention. Consent was typically given by both parties either by way of an arbitration clause in a respective state contract with regard to future possible disputes or in form of compromise concerning a dispute which has already arisen. Thus the mutual consent was most commonly given at the same time. To the contrary the consent given by the host state is now frequently stipulated already in the BIT. Thus, the principle of the dynamic-evolutionary treaty interpretation has to be taken in the account.<sup>12</sup>
37. Claimant states that ICSID provision should be interpreted in accordance to the object and purpose of the convention. ICSID is aimed at providing the investor and the host state with an effective and stable institutional form for the settlement of the investment disputes.

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<sup>9</sup> See Tietje C., Nowrot K. and Wackernagel C., "Once and forever? The legal effects of a denunciation of the ICSID", 2008

<sup>10</sup> C. Schreuer, “The ICSID Convention: A Commentary,” Cambridge University Press, 2001, p. 1268

<sup>11</sup> See E. Gaillard, "The denunciation of the ICSID Convention", New York Law Journal, dated June 26, 2007

<sup>12</sup> Tietje C., Nowrot K. and Wackernagel C., "Once and forever? The legal effects of a denunciation of the ICSID", 2008, p. 22

38. The qualification of the consent as binding and irrevocable declaration of submission to arbitration under the ICSID Convention is perfectly in conformity with, indeed strongly indicated by the object and purposes of the Convention.<sup>13</sup>

**C. THE CLAIMANT WAS ENTITLED TO SUBMIT THE PRESENT DISPUTE TO ARBITRATION BEFORE EXPIRATION OF THE 18-MONTH WAITING PERIOD**

39. The Claimant submits that this Tribunal has jurisdiction over the present dispute, despite the fact that it was submitted to the Tribunal before the expiration of the 18-month waiting period established by Article 11(2) of the Gaul-Calpurnia BIT. Firstly, The Claimant had pursued friendly settlement of the dispute for 3 months as required by Article 7(1) of the Calpurnia-Flatland BIT. Secondly, the amicable settlement of the dispute was at the time of submission of the dispute to this Tribunal and still remains futile, and therefore The Claimant was not obliged to wait for the expiration of the “cool-off” period.

**(i) The Claimant complied with friendly settlement of the dispute requirement of the Calpurnia-Flatland BIT**

40. Under Article 7(1) of the Calpurnia-Flatland BIT The Claimant was entitled to submit the claims to arbitration if the dispute was not settled by negotiations within 2 months of the notification of the dispute.

41. The Claimant submitted its case to arbitration on 31 July 2007. More than four months before that the Claimant wrote to the Chairman of the SFCDC Mr. Poe, who was and still remains a governmental official of the Respondent state evidently directly in charge of the handling of the VanCal matter. The Claimant in its letter explained its claims that form the subject-matter of the present arbitration.

42. On 21 February 2007, again four months before the submission of the present case, The Claimant received a clear response from Mr. Poe, stating that Calpurnia did not consider itself responsible for any wrongdoing and did not want to get “involved”. The clear message that this letter sent to the Claimant was formulated by Mr. Poe himself, when he wrote “there is nothing we can do”.

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<sup>13</sup> Tietje C., Nowrot K. and Wackernagel C., "Once and forever? The legal effects of a denunciation of the ICSID", 2008, p.21

43. Though the Respondent may dispute, whether the claims of the Claimant were properly addressed to Mr. Poe rather than the Government of Calpurnia, it is submitted that Mr. Poe was on the facts of the present case a governmental official of Calpurnia who in the Claimant's view was responsible for the exercise of governmental functions with respect to VanCal and in any event if such matters were outside the scope of his office should have either transmitted the letter of the Claimant to the responsible party or informed The Claimant of his incompetence with respect to the matter. The way he chose to proceed demonstrates that he evidently considered himself competent to deal with it and it is particularly illuminating that the Respondent never reproached him for such conduct.

44. In *Sallini v. Morocco* the Tribunal noted that

“the confusion surrounding the position held by ...[the governmental official]... cannot be invoked to uphold the premise that ...[the governmental official]... was aware in one of his capacities...[of the fact that] was unknown to him in another capacity”.<sup>14</sup>

45. Similar logic is applicable to the present case. Mr. Poe was a governmental official and the Government of Calpurnia though him became aware of the claims of The Claimant, but chose to ignore them.

46. The Claimant considers that its correspondence with Mr. Poe along with the conduct of the Government of Calpurnia that is discussed in more detail below, made any attempts of further friendly settlement futile and in any event, The Claimant had waited to no avail for more than two months required by the BIT, for any attempt of the government of Calpurnia to settle the dispute.

**(ii) Even if the Tribunal decides that the Calpurnia-Gaul BIT is applicable further attempts of settlement were obviously futile**

47. Article 11(2) lays down an essentially procedural requirement not uncommon to most of the BIT concluded nowadays. However, the tribunals have readily recognized that this requirement is not a precondition for the exercise of the tribunal's jurisdiction and failure to comply with it should not lead to dismissal of the claims.<sup>15</sup>

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<sup>14</sup> *Sallini Costruttori S.P.A and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No, ARB/00/4, para. 18

<sup>15</sup> See C. Schreuer "Consent to arbitration", 2005

48. In *SGS v. Pakistan* the request for arbitration was filed by the claimant two days after the existence of the dispute was notified to the respondent state, nevertheless the tribunal concluded that it had jurisdiction.<sup>16</sup> In *Lauder v. Czech Republic*, the investor filed request for arbitration 17 days after the notification of the dispute was provided to Czech Republic yet again the tribunal decided that failure to observe “cool-off” period does not affect the jurisdiction.
49. The conclusion above is reinforced by the fact that the respondent had clearly expressed its position that it does not recognize the claims of The Claimant before this case was submitted to arbitration. This is clear from the letter sent to The Claimant by Mr. Poe as well as general attitude of the Respondent government towards the claimant.
50. It has been consistent practice of the ICSID tribunals to reject objections based on non observance of the “cool off” period where the facts of the case demonstrated unwillingness of the respondent to negotiate a meaningful solution or indeed where the respondent’s position during the arbitration proceedings demonstrated that it disagreed with the claims of the claimant.<sup>17</sup>
51. The Claimant submits that this practice reflects general rule of customary international law that requirement of prior negotiations is dispensed with as soon as negotiations reach deadlock or one party expresses its firm disagreement with the claims of the other party. This practice dates back to decision of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions*<sup>18</sup> and have been repeatedly upheld by the International Court of Justice.<sup>19</sup>

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<sup>16</sup> See *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction (ICSID Case No. ARB/01/13)

<sup>17</sup> See *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Final Award of 3 September 2001; *Ethyl Corp. v. Canada*, Award on Jurisdiction (under NAFTA / UNCITRAL), Reprinted in 38 ILM 708 (1999)

<sup>18</sup> *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, PCIJ, Series A, No. 2, p. 6, 14

<sup>19</sup> See *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, p. 33-34, para. 55; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346.

52. The position of the Respondent before the submission by The Claimant of the request for arbitration as well as during this proceedings is unequivocal - it denies all the claims presented by the claimant, therefore The Claimant submits any further negotiations would not have yielded any positive result and therefore were futile.
53. Indeed, even shall this Tribunal decline jurisdiction in the present proceedings the only result would be that this case would be resubmitted by The Claimant in February 2009, when the 18-months period would expire. As such failure to observe the 18 months waiting period is no more than a technical defect that may be fixed by a unilateral action of the party in question. As such it may not properly serve as a ground for refusal of an international tribunal to exercise jurisdiction, which has been confirmed as early as in 1925 in the *Case concerning certain German interest in Polish Upper Silesia* the first expropriation dispute submitted to the Permanent Court of International Justice<sup>20</sup> and recently reaffirmed by the International Court of Justice in the *(Bosnian) Genocide*.<sup>21</sup> In the latter case, the court particularly noted that premature submission of application may not serve as a bar to the tribunal's jurisdiction.

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<sup>20</sup> *Case concerning certain German interests in Polish Upper Silesia*, Jurisdiction, Judgment of 25 August 1925, Series A., No. 6, p. 4, 14

<sup>21</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p.612, para. 24

**D. THE CLAIMS SUBMITTED BY THE CLAIMANT TO THE DOMESTIC COURT OF CALPURNIA DIFFER IN ALL MATERIAL RESPECTS FROM THE CLAIMS SUBMITTED IN CURRENT ARBITRATION. THEREFORE, THE FACT OF THE CLAIMANT'S RECOURSE TO THE NATIONAL COURTS OF CALPURNIA DOES NOT PRECLUDE TE CLAIMANT FROM RECOURSE TO ARBITRATION**

54. In accordance to Article 11(3) of the Gaul-Calpurnia BIT The Claimant may not refer to the different types of dispute resolutions and have to choose the one of them. Precisely these so-called fork-in-the-road provisions offer the investor a choice between the host State's domestic courts and international arbitration.
55. The Claimant does not argue this type of mechanism is widely recognized in international law, however relying on it in this case could not be applicable. Article 11(3) of the Gaul-Calpurnia BIT stipulates that "An investor who has already submitted the dispute to the competent court of the Contracting Party shall no more have recourse to one of the arbitral tribunal (...)". The Claimant states that there was no violation of the article 11(3) since the subject and parties in domestic court and in the Tribunal procedures are different.
56. The subject (the dispute) of the claim in domestic court is transferring to Ms Pescara her account in Gaul dividends on 1% shareholding.
57. The Article 11(3) of the Gaul-Calpurnia BIT stipulates that investor can choose only one type of dispute resolution – by national remedies (procedure in the national court) or by international remedies (procedure in Arbitral Tribunals, including Tribunal under the ICSID Convention). The Claimant by commencing of the arbitration procedure clearly shown that it had chosen resolution of the dispute by the ICSID Tribunal.

**PART TWO**  
**STATE RESPONSIBILITY OF CALPURNIA**

- A. The Claimant states that responsibility of Calpurnia for violations of Calpurnia-Gaul BIT and general international law against the Claimant is based on the Draft Articles on Responsibility of States for Internationally Wrongful Acts which are applicable to the dispute at hand without any limitations.
- B. The Claimant states that Calpurnia is responsible for any conduct of SFCDC as of entity exercising elements of governmental authority.
- C. The Claimant submits that the conduct of VanCal is to be attributed to the State of Calpurnia under Article 8 of the ILC Draft Articles as of an entity operating under control of the State.

**A. APPLICABILITY OF THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS TO THE DISPUTE AT HAND**

- 58. Responsibility of Calpurnia for violations of Calpurnia-Gaul BIT and general international law against the Claimant is based on the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted on the fifty-third session of the International Law Commission of the United Nations in 2001 (“ILC Draft Articles”). The respondent might argue that the applicability of the ILC Draft Articles to the investment arbitration in general, as well as to the case at hand is disputable; notwithstanding that fact, the Claimant will substantiate the applicability of the ILC Draft Articles.
- 59. The Claimant submits that the ILC Draft Articles cover all international obligations of the State and any disputes arising thereof, not only State v. State disputes as it is sometimes argued. The applicability of the ILC Draft Articles is clarified in the commentary to Article 1 thereof so that the ILC Draft Articles are applicable to *all* obligations of the State.<sup>22</sup> Therefore, the applicability of the ILC Draft Articles extends to human rights

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<sup>22</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text, Commentaries* (2002), p. 192-193

violations and other breaches of international law, i.e. where the beneficiary of the obligation breached is not the State, but individual or a legal entity.<sup>23</sup>

60. It is notable that the term “international obligation of the State” as set forth in second part of Article 2, which defines the internationally wrongful act, covers both treaty and non-treaty obligations.<sup>24</sup> Further, Article 12 sets forth the definition of breach of an international obligation by referring to an obligation “regardless of its origin or character”.<sup>25</sup>

61. The Respondent might argue that the ILC Draft Articles are not applicable to the dispute at hand due to their legal status: the ILC Draft Articles from a strictly formalistic point of view are only “draft” articles, rather than articles of a treaty in force. The Claimant submits that the ILC Draft Articles are fully applicable to investment arbitration in general and to the dispute at hand. There is a general consensus in doctrine of international public law that the ILC Draft Articles reflect customary international law on state responsibility.<sup>26</sup> Moreover, the ILC Draft Articles are frequently referred to in a number of arbitral awards and court decisions in connection with matters of the State responsibility and attribution.

62. *The United States Court of Appeal* when revising *the decision of the District Court on the enforcement of the arbitral award of Noga v. Government of Russian Federation* referred to Article 4 of the ILC Draft Articles.<sup>27</sup> In *Maffezini v. Kingdom of Spain*<sup>28</sup> the arbitral

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<sup>23</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text, Commentaries* (2002), p. 76

<sup>24</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text, Commentaries* (2002), p. 83

<sup>25</sup> K. Hober, *State Responsibility and Attribution / The Oxford Handbook of International Investment Law*, edited by P. Muchlinski, F. Ortino, C. Schreuer, p. 553

<sup>26</sup> K. Hober, *State Responsibility and Attribution / The Oxford Handbook of International Investment Law*, edited by P. Muchlinski, F. Ortino, C. Schreuer, p. 553

<sup>27</sup> *Judgment of the United States Court of Appeals for the Second Circuit*, 16 March 2004 (Docket Nos. 02-9237(L)-9272(CoN)).

<sup>28</sup> *Maffezini v. Kingdom of Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 369, 40 ILM 1129 (2001)

tribunal applied Article 5 of the ILC Draft Articles, as well as in *Noble v. Romania*<sup>29</sup>, etc. – most of the rendered awards in part of state responsibility refer to the IC Draft Articles.

**B. CALPURNIA IS RESPONSIBLE FOR ANY CONDUCT OF THE SFCDC AS OF ENTITY EXERCISING ELEMENTS OF GOVERNMENTAL AUTHORITY**

63. The Claimant states that Calpurnia is responsible for any conduct of SFCDC as of entity exercising elements of governmental authority. Though the SFCDC is not a governmental body it is a State entity 100% owned by Calpurnia, therefore, under Article 5 of the ILC Draft Articles the conduct of the SFCDC may be attributed to the State of Calpurnia.
64. The attribution of conduct of the SFCDC raises the question of State entities separate from the system of authorities of the State and, therefore, their act would not be attributed to the State in general. However, in a number of cases the exceptions are admissible for the purposes of the concept of State responsibility in international law: the separation will not be respected if the corporate veil has been created as a mean for fraud and evasion.<sup>30</sup> Also, such conduct will be attributed to the State in cases where the entity exercises public power.<sup>31</sup> Another exception is admissible in case of ownership by the State where control is exercised in order “to achieve a particular result”.
65. It is commonly agreed that the possibility of attribution of conduct carried out by a state entity to the State under Article 5 should be examined both from structural and functional points of view. In *Maffezini v. Kingdom of Spain* the arbitral tribunal ruled as follows: “The question whether or not SODIGA [a legal entity 100 % owned by the State and performing public functions] is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly gives rise to a rebuttable presumption that it is a State entity”. According to the Problem, the SFCDC is a 100 % directly owned by the State entity.<sup>32</sup>

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<sup>29</sup> *Noble Ventures v. Romania*, Award, 12 October 2005

<sup>30</sup> See International Court of Justice, *Barcelona Traction Case*, Judgment, 5 February 1970, ICJ Rep. (1970) 3, 39, para. 56-58

<sup>31</sup> See *Philips Petroleum v. Iran*, 21 Iran-U.S.C.T.R. (1989) p. 79

<sup>32</sup> The Problem, p. 3

66. With respect to the functional test Article 5 deals with not the organs, bodies and authorities of the State as set forth in Article 4, but with persons and entities *de jure* independent, but carrying out public functions in the capacity of governmental authority. The term “governmental authority” is not set forth in Article 5 or elsewhere, however, as it is pointed out in the Commentary to the ILC Draft Articles, the precise and detailed definition will depend on the history and tradition of the state in question.<sup>33</sup>
67. The record of 5 February 2007 in Evidence / Calendar of events directly shows that the SCFDC belongs to the governmental system of Calpurnia: “...and that Poe transmits this to his superiors including the appropriate Ministers”.<sup>34</sup> Moreover, as set forth in the 1st Clarifications of the Problem, “the SFCDC plays a custodial role. Nothing requires shareholders to place the shares in the custody of the SFCDC, but dividends and interest income not in the custody of one of the State funds are subject to withholding tax”.<sup>35</sup> That is a direct evidence of the fact that (i) the SFCDC is dependent of the State authorities of Calpurnia and, therefore, falls into the structure of governmental bodies, and that (ii) the SFCDC performs public functions. Taking into consideration the above said, the conduct of the SFCDC is attributable to the State of Calpurnia.
68. In *Hyatt International Corporation v. Government of the Islamic Republic of Iran*<sup>36</sup> which was brought before the Iran-United States Claims Tribunal, an autonomous entity established and owned by the State of Iran held property for charitable purposes under full governmental control. Therefore, the arbitral tribunal held it a public and not a private entity and attributed the conduct of the entity with respect of administration of alleged expropriation to the State of Iran.
69. In *Maffezini v. Kingdom of Spain* the conduct of the Spanish legal entity which led to the loss of investments of the claimant in the said dispute was attributed to the State. The arbitral tribunal held the legal entity as a state entity “for the purposes of determining the jurisdiction of ICSID and the tribunal” and the rendered award in this part was based on

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<sup>33</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text, Commentaries* (2002), p. 98

<sup>34</sup> *The Problem*, p. 8

<sup>35</sup> *The 1<sup>st</sup> Clarifications*, para. 13

<sup>36</sup> *Hyatt International Corporation v. Government of the Islamic Republic of Iran*, (1985) 9 Iran-U.S.C.T.R. 72, p. 88-94

Article 5 of the ILC Draft Articles. The similar motivation based on Article 5 of the ILC Draft Articles was applied in *Sallini Construttori S.P.A and Italstrade S.P.A. v. Kingdom of Morocco*<sup>37</sup> and in *Tokios Tokeles v. Ukraine*<sup>38</sup>.

70. The Claimant respectfully asks the Arbitral Tribunal to attribute the conduct of the SFCDC to the State of Calpurnia with regard to all the actions and decisions committed and carried out that amounted to the alleged expropriation.

**C. CALPURNIA IS RESPONSIBLE FOR ANY CONDUCT OF VANCAL AS OF ENTITY OPERATING UNDER CONTROL OF THE STATE**

71. The Claimant submits that the conduct of VanCal is to be attributed to the State of Calpurnia under Article 8 of the ILC Draft Articles. As a matter of principle, the State can not be held liable for the conduct of private individuals or entities. However, even in case an individual or an entity does not fall into the system of governmental bodies of the State or does not perform any public functions the conduct of such individual or such entity that amounted to an internationally wrongful act such as indirect expropriation is by virtue of Article 8 of the ILC Draft Articles may be still attributed to the State under certain conditions set forth in the said article. The said conditions are that the individual or the entity in question is acting on the instructions of, or under the direction or control of the state.

72. The degree of the control which must be exercised by the State for the proper attribution of the conduct to it was ruled on in the *Military and Paramilitary case*.<sup>39</sup> In this case the arbitral tribunal set forth the term of effective control, i.e. the degree of control over the conduct required for attribution of such conduct to the State.

73. There is no strict requirement as to the degree of the State control in sense of attribution rules; furthermore, the enough level of the State control may depend on the certain circumstances of the case in question. The Appeals Chamber of the International

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<sup>37</sup> *Sallini Construttori S.P.A and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No, ARB/00/4, Decision on Jurisdiction dated 16 July 2001, 42 ILM 609 (2003)

<sup>38</sup> *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Rev-FILJ 205 (2005)

<sup>39</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p.14.

Criminal Tribunal for the Former Yugoslavia when touching upon this issue in *Prosecutor vs. Tadic* ruled as follows: “The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”<sup>40</sup>

74. In *Foremost Tehran v. Iran*<sup>41</sup> the arbitral tribunal ruled as follows: “The two main indicators of the government control of a corporation are the identity of its shareholders and the composition and behavior of its board of directors, which must be examined together.” The identity of the shareholders with respect to the attribution rules means the interest of the State in the ownership of the entity in question.
75. The SFCDC owns 30 % of VanCal’s stock directly. 22 % of VanCal’s stock is held on the deposit of the SFCDC, the said stock is registered in the names of several hundred individual shareholders. It is notable, that the voting rights remain by the SFCDC. Other Calpurnian nationals own and vote 17 % of VanCal’s stock. It is submitted that the total interest of Calpurnia in VanCal stock by proxy of the SFCDC is at least 52 %. In *Foremost Tehran v. Iran* the arbitral tribunal touched upon the similar issues when the Financial Organisation of Iran held 11 % of the shares of the entity alleged of expropriation of the claimant’s investments. The arbitral tribunal in this respect ruled as follows: “It is therefore necessary to determine whether the rights in respect of these shares were, for practical purposes, exercised in the Financial Organisation. The shares were registered in the names of the workers and farmers... However, the Financial Organisation, which had loaned the purchase price in each case, retained the right under the individual purchase agreements to vote the shares as “undismissable attorney”... The Tribunal therefore concludes that this 11 % of Pak Dairy’s shares was, in effect, under the control of the Financial Organisation, thus bringing the total holding in the hands of governmental organizations to approximately 52 %.”

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<sup>40</sup> *Prosecutor v. Tadic*, Case IT-94-1 (1999) ILM, vol.38, p.1541, para. 117.

<sup>41</sup> *Foremost Tehran v. Islamic Republic of Iran* (1986) 10 Iran- U.S.C.T.R., p. 228

76. Furthermore, the Commentary to the ILC Draft Articles explains that "...where... the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State".<sup>42</sup>
77. In addition it is notable that Dr. Swift who may be regarded as a State official in this respect, "observed that SFCDC did not "regard VanCal as really being a private company".
78. Taking into consideration all the above said the Claimant respectfully asks the Arbitral Tribunal to attribute the conduct of VanCal to the State of Calpurnia with regard to all the actions and decisions committed and carried out that amounted to the alleged expropriation.

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<sup>42</sup> J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text, Commentaries* (2002), p. 112-113

## PART THREE

### VIOLATIONS OF CALPURNIA-GAUL BIT AND GENERAL INTERNATIONAL LAW COMMITTED BY CALPURNIA

- A. The Claimant states that Calpurnia expropriated Claimant's investment by (i) depriving the control over the investment and economic benefits thereof and (ii) arbitrarily refusing visa to Ms. Pescara and conducting searches in the premises of Claimant's personnel;
- B. The Claimant states that Calpurnia failed to comply with its obligations to accord Gaulois investors with fair and equitable treatment, as well as with full and constant protection and security under Article 2 of Calpurnia-Gaul BIT.

#### A. CALPURNIA ILLEGALLY EXPROPRIATED CLAIMANT'S INVESTMENT

79. In 1997 Claimant has arranged together with SFCDC, the state fund owned by Calpurnia, a joint-venture company called VanCal (§ 8 of the Claimant's Request for Arbitration). Claimant has invested its trademark into VanCal, although the trademark still legally belongs to Claimant (§15 of the 2<sup>nd</sup> Clarifications). By late 2004, Claimant owned 31 % stock in VanCal and two Directors in the latter's Board (§ 9 of the Claimant's Request for Arbitration). In 2003 the CCC gained absolute majority in the Calpurnian legislative (§ 12 of the Claimant's Request for Arbitration), and since then the climate around Claimant became hostile (§ 51 of the 2<sup>nd</sup> Clarifications). Through a series of its own actions or those of its 100% subsidiary, Calpurnia under new rule effectively deprived Claimant of its investment, specifically:

- (a) by revoking Claimant-appointed Managing Director's business visa;
- (c) by preventing the Claimant's representation in the VanCal's Board;
- (d) by ceasing to pay dividends against shares
- (e) by ceasing to pay trademark fees.

80. Thus, since 2005, Claimant has been left with assets, i.e. shares, but without dividends, means to participate in the management over the investment and any information that is to be provided to any shareholder regarding the latter's shareholding. At that, government-operated VanCal uses the trademark "VANGUARD INTERNATIONAL" owned by Claimant, without paying any fees for the said use.

81. As it was repeatedly stated in the decisions of various tribunals, whenever the effect of

the governmental measure is substantial and lasts for a significant period of time, it will be assumed *prima facie* that a taking of the property has occurred.<sup>43</sup> In the case at hand, the effect of the whole series of actions and omissions of Calpurnia, SFCDC and VanCal was that the Claimant, though retaining its title over 31 % stock in VanCal, has practically lost control and fruits of its investment. There is no time period of the restraining measures, and therefore the Claimant submits that the Tribunal has before it a *prima facie* case of taking of property. Consequently, it is generally for the state of Calpurnia to prove that the actions committed by or attributable to it did not amount to taking of property.

**1. Calpurnia's actions constitute an indirect expropriation of the Vanguard's investment**

82. The notion of expropriation covers not only the formal transfer of private property to the State but also “any unreasonable interference with the use, enjoyment or disposal of property so as to justify the interference that the owner thereof will not be able to use, enjoy or dispose of the property within reasonable period of time after the inception of such interference”.<sup>44</sup> It is further not necessary to show a single act or group of acts committed at one time in pleading expropriation.<sup>45</sup> In the present case the Claimant submits that there are two actions or groups of actions committed by or attributable to Calpurnia that either separately or taken together constitute an expropriation under both Calpurnia-Gaul BIT and general international law. In order to show the said international wrong, the Claimant will demonstrate below that (a) deprivation of control through

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<sup>43</sup> *Norwegian Shipowners' Claims*, 1 RIAA (1922) para 307; *Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review-FILJ (2000) para 457; *Middle East Cement v. Egypt*, Award, 12 April 2002, 18 ICSID Review-FILJ (2003) para 602; *Metalclad Corp. v. Mexico*, Award, 30 August 2000, 5 ICSID Rep. (2002) para 209; *CME v. Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Rep. para 121; R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP, p.101

<sup>44</sup> Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10(5), *reprinted in* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. (1961) 545, p. 548

<sup>45</sup> *Telenor Mobile Communications A.S. v. Hungary*, Award, 13 September 2006, 19 World Trade and Arbitr'n Mat'ls (2007) 1, p. 169-230, para 63

harassment of Ms. Pescara and arbitrary revocation of her visa, as well as through the obstruction of the Claimant's representation in VanCal's Board constitutes indirect expropriation of the Claimant's investment and, either alternatively or cumulatively, that (b) denial of transfer of returns, including dividends and license fees, constitutes indirect expropriation.

**a. Calpurnia expropriated Claimant's investment by depriving the latter of control over VanCal.**

83. The international jurisprudence consistently regards deprivation of control over the investment and economic benefits thereof as an indirect expropriation. In *Starrett Housing*, which dealt with the appointment of Iranian managers to the American project, the Tribunal opined that Iran expropriated the foreign investment by rendering the investor's property rights useless.<sup>46</sup> Claimant submits that Calpurnia denied its control over its investment in two ways: (i) by revoking Ms. Pescara's visa and (ii) by denying Claimant's representation in VanCal's Board.

*i. Revocation of Ms. Pescara's visa amounts to expropriation*

84. The critical value of the persons operating the investment was reaffirmed in *Biloune v. Ghana*<sup>47</sup>, where the tribunal dealt with arrest, detention and deportation of Mr. Biloune, the actual investor and head of the hotel project. Likewise, in *Revere Copper v. OPIC* the tribunal has stated that control over an enterprise is exercised by a continuous stream of decisions<sup>48</sup>, thus recognizing the vital importance of the management for the investment operation. In the case at hand Calpurnia without any reason refused to give visa to Ms. Pescara who had hitherto operated VanCal, thus practically reconstituting the situation in *Biloune*. The importance of Ms. Pescara for the Claimant's control over the investment is illustrated by the latter's loss of the managing director post after her forced departure from Calprunia. R.Dolzer and C.Schreuer in their *Principles of International Investment Law* have given the examples of host states' arbitrary practice connected with revocation

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<sup>46</sup> *Starrett Housing Corp. v. Iran* (1983), 4 Iran-U.S. Cl. Trib. Rep. 122, para 154.

<sup>47</sup> *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, 95 I.L.R. para 184

<sup>48</sup> *Revere Copper & Brass Inc. v. Overseas Private Investment Corporation* (1980), 56 I.L.R. para 292

of previously given entitlements.<sup>49</sup> Amongst others, in *Goetz v. Burundi*, where the state revoked the free-zone status accorded to the investor<sup>50</sup> and *Metalclad v. Mexico*, where the local government refused to give a construction permit,<sup>51</sup> the tribunals found the said measures to have similar effect as expropriation. Having in this case an issue of revocation of visa for a person that played the role in the investment no less important than the public approvals in *Goetz* and *Metalclad*, the tribunal here observes a prima facie expropriation. Although it is generally for the Claimant to prove the circumstances that it relies on, it is now for the State to demonstrate that it exercised its regulatory power not arbitrarily, but rather for a good public purpose.<sup>52</sup> Tribunals have so far formulated only two reasons of a public purpose that may excuse an otherwise unlawful state measure, which are appropriate taxation<sup>53</sup> and environmental protection<sup>54</sup> Given the indications in the facts of the case regarding the hostile climate around the Claimant's investment, it would be problematic for Calpurnia to demonstrate any purpose of the measures, other than an intention to take over VanCal. Therefore, Calpurnia's arbitrary revocation of visa of Ms. Pescara constitutes expropriation under international law.

ii. *Denial of representation in the Board*

85. As before 2005, Claimant, being one of the major shareholders of VanCal, had the right to be represented in the Board. On 16 November 2005 in a board meeting with Claimant's proxies denied the representatives of SFCDC outvoted Ms. Pescara as a managing director and diminished Claimant's representation in the Board. Meanwhile, as it was stated in *LG&E v. Argentina*, "ownership or enjoyment can be said to be

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<sup>49</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP, p.99

<sup>50</sup> *Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review-FILJ (2000) para 457

<sup>51</sup> *Metalclad Corp. v. Mexico*, Award, 30 August 2000, 5 ICSID Rep. (2002) para 209

<sup>52</sup> R. Doak Bishop, James Crawford, Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, Kluwer Law International (2005) p. 841

<sup>53</sup> *Marvin Feldman v. Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) para 136

<sup>54</sup> *Methanex v. USA*, Award, 3 August 2005, 44 ILM (2005) para 1345

‘neutralized’ where a party no longer is in control of the investment., or where it cannot direct the day-to-day operations of the investment.”<sup>55</sup>

86. In *Foremost Tehran Inc. et al. v. Iran et al*<sup>56</sup>. the Tribunal dealt with virtually the same factual background as in this case, i.e. there was a joint-venture, where the investor had 31 % interest and the balance belonged to state authorities. Foremost alleged that it was deprived of control over its interest in the joint-venture after a series of actions of Iranian authorities, including forced absence of the joint-venture’s managing director and chief engineer, rejection of two shareholder proxies and consequent denial of representation in the board. The Tribunal found the said complex of actions enough to constitute expropriation, although Foremost failed the claim because of the lack of standing that belonged to OPIC with respect all the violations happened after 19 January 1981. In the case at hand, Claimant does have ample standing to submit the claim.

87. Even if the tribunal finds that none of the described actions taken separately amounted to expropriation, all the described actions taken together constitute a creeping expropriation, recognized as a ground for international responsibility in a number of cases.<sup>57</sup>

**b. Calpurnia expropriated Claimant’s investment and violated Article 8 of Calpurnia-Gaul BIT by instructing SFCDC to deny to pay dividends and liscence fees that VanCal owed to Claimant**

88. Article 8 of Calpurnia-Gaul BIT obliges Calpurnia to ensure free transfer of all payments to be made in connection with investment. Technical assistance agreement, entered into by and between Claimant and VanCal, provides fro the license fees fro the use of trademark “VANGUARD INTERNATIONAL” that is owned by Claimant (¶ 15 of 2<sup>nd</sup> Clarifications). VanCal still uses the said trademark (¶ 31 of 2<sup>nd</sup> Clarifications). To that, although VanCal declared cash dividends in 2004, 2005. 2006 and 2007, it paid the said dividends only to Calpurnian shareholders pursuant to a respective board decision. In both cases it were the SFCDC representatives that voted for this decision. As Claimant has shown above, Calpurnia bears international responsibility for SFCDC’s actions.

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<sup>55</sup> *LG&E v. Argentina*, Decision on Liability, 3 October 2006, 46 I.L.M.(2007) 36 para 188

<sup>56</sup> *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-United States Claims Trib. Rep. 228, para 250

<sup>57</sup> *Generation Ukraine v. Ukraine*, Award , 16 September 2003, 44 I.L.M. (2005) para 404; *Tradex Hellas S.A. v. Republic of Albania*, Award, 29 April 1999, 5 ICSID Rep., para 197

89. State measures preventing the investor from using the fruits of his investment are also regarded as expropriation. In *Revere Copper* the tribunal dealt with the investor's factual loss of financial benefit because of the state's actions and regarded the latter as expropriatory.<sup>58</sup> Calpurnia may argue that VanCal dividends continue to be due to the Claimant and therefore it did not formally lost them, unlike in *Revere Copper*. International law, however, equates freezing of assets to the loss of the latter. Thus, in *Sea-Land Service* the State froze the investor's bank account stating that it was at Sea-Land's full disposal in the State's territory, and the said measure was regarded as an expropriation.<sup>59</sup> In that, "the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact".<sup>60</sup> In *Foremost*, though judging on different standard for expropriation, the tribunal held that state-controlled joint venture unlawfully withheld the dividends declared for several preceding years together with rental fees and awarded around \$ 1 500 000 against Iran.<sup>61</sup> Therefore, given that a host state may not refer to its national law to excuse its international wrong,<sup>62</sup> the denial to pay dividends based upon whatever national law ground constitutes expropriation if the state responsibility is proven. In the case at hand, the new management of VanCal, controlled by Calpurnia, denied the payment of dividends and license fees to the Claimant, thereby creating international responsibility for expropriation on the part of Calpurnia.

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<sup>58</sup> *Revere Copper & Brass Inc. v. Overseas Private Investment Corporation*, 56 I.L.R. 258, 259 (1980)

<sup>59</sup> *Sea-Land Service Inc. v. Iran*, 6 Iran-U.S. Cl. Trib. Rep.149 (1984)

<sup>60</sup> *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, (1984), 6 Iran-US CTR 219 paras 225-226

<sup>61</sup> *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-United States Claims Trib. Rep. 228, paras 257-8

<sup>62</sup> Vienna Convention on the Law of Treaties (1969) Article 27

**2. The expropriation by Calpurnia was internationally wrongful.**

90. Expropriation without prompt, adequate and effective compensation is illegal.<sup>63</sup> An obligation to compensate for the incurred loss is considered to be of a customary character.<sup>64</sup> Calpurnia-Gaul BIT also states that the expropriation is illegal, if the compensation for it is not provided. Calpurnia has not provided any compensation to the Claimant whatsoever. Therefore, expropriation by Calpurnia is illegal under international law.

**B. CALPURNIA IS IN BREACH OF ITS OBLIGATIONS UNDER ARTICLE 2 CALPURNIA-GAUL**

91. Claimant submits that Calpurnia violated its obligation under Article 2 of Calpurnia-Gaul BIT to provide the Claimant with fair and equitable treatment and full and constant protection and security (a) by discriminating against Claimant in making payments and providing corporate information regarding VanCal, (b) by conducting arbitrary searches, and arbitrarily revoking business visa for the managing director of the joint-venture and (c) by failing to accord to Claimant full and constant protection and security.

**a. Calpurnia violated Article 2 by discriminating against Claimant in making payments and providing corporate information regarding VanCal**

92. The "fair and equitable" standard, although depending heavily on factual circumstances of each case, "will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances"<sup>65</sup> In order to find discrimination, the Tribunal is to discern either discriminatory intent on the

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<sup>63</sup> *Amoco International Finance Corp. v. Iran* (1987), 15 Iran-U.S. Cl. Trib. Rep. 189, para 223

<sup>64</sup> *Chorzow Factory*, P.C.I.J., Ser. A, No. 17 (1928); *Resolution on Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, U.N. GAOR, 17<sup>th</sup> Sess., Supp. No. 17, U.N. Doc. A/S217 (1962); *Charter of Economic Rights and Duties of States* art. 2(2), G.A. Res. 3281, U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 12, 1974)

<sup>65</sup> U.N. Conference On Trade & Development: Fair And Equitable Treatment, Vol. III at 10, 15, U.N. Doc. UNCTAD/ITE/IIT/II, U.N. Sales No. E.99.II.D.15 (1999) (English version)

part of the host state, or discriminatory effect of the measure.<sup>66</sup> Claimant submits that this case reveals both the intent and the effect.

i. *Calpurnia discriminated Claimant against its nationals, since it had a discriminatory intent*

93. The chairman of VanCal's board Mr. Swift has explicitly stated on a board meeting of 10 March 2005 that the decision to cease paying dividends to Gaulois shareholders is dictated by a state of international relations between Calpurnia and Gaul. A discriminatory intent here is even clearer than it was in *CME v. Czech Republic*, where the tribunal evolved that intent from circumstantial evidence.<sup>67</sup>

ii. *Calpurnia discriminated Claimant against its nationals, since its actions had a discriminatory effect.*

94. As it was stated in *Feldman*, there are several interpretative hurdles that must be observed in considering, such as like circumstances and proof that it is the nationality that serves as a ground for differentiation.<sup>68</sup> The second item undoubtedly demonstrates discrimination, since, as Mr. Swift said, it were the dividends of the Gaulois shareholder that are to be withheld. As far as like circumstances are concerned, tribunals compare with the domestic companies operating in the same business sector, as investor, taking account of the main business function that the foreign investor does with regard to its investment. In *Feldman*, the tribunal compared the investor with domestic resellers of cigarettes for import,<sup>69</sup> in *S.D. Myers* it were the companies providing PCB waste remediation services.<sup>70</sup> In the case at hand, Claimant's main business function is to hold shares in VanCal, as well as it is, according to the facts, the main function of SFCDC. In the like circumstances, the said two entities were treated differently, since it was the Claimant that did not acquire declared dividends and business information of the joint-venture.

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<sup>66</sup> *LG&E v. Argentina*, Decision on Liability, 3 October 2006 21 ICSID Rev.-. F.I.L.J. 203 (2006) para 146

<sup>67</sup> *CME v. Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Rep. para 612

<sup>68</sup> *Marvin Feldman v. Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) para 166

<sup>69</sup> *Marvin Feldman v. Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) para 171

<sup>70</sup> *SD Myers v. Canada*, First Partial Award, 13 November 2000, 40 ILM (2001)1408, para 251

Given that the respective decision of VanCal's board has been taken in the light of disputes between Gaul and Calpurnia, the latter did discriminate Claimant against domestic VanCal shareholder, having thereby violated Article 2 of Calpurnia-Gaul BIT..

**b. Calpurnia violated Article 2 by by conducting arbitrary searches and arbitrarily revoking Ms. Pescara's visa**

95. Arbitrariness of a regulatory action indicates violation of the standard of fair and equitable treatment.<sup>71</sup> In *Lauder v. Czech Republic*, as well as in a number of subsequent decisions the tribunal in determining the meaning of the word 'arbitrary' relied on Black's Law Dictionary, which defines 'arbitrary' as 'depending on individual discretion' or refers to action 'founded on prejudice or preference rather than on reason of fact.'<sup>72</sup> As it follows from the facts of this case, the numerous searches at the residences of Claimant's representatives were prompted by anonymous tips, and the case does not reveal any facts confirming the suspicions of Calpurnian Security Directorate. Therefore, for the purposes of international law, these searches were arbitrary, i.e. based on prejudice not on the facts, even though Calpurnia excuses them with its internal laws of *periculum in mora*. Under international law, a State cannot refer to its internal laws as an excuse for its international wrong.<sup>73</sup> Likewise, Calpurnian authorities did not demonstrate any ground for revocation of Ms. Pescara's visa. As a result of the searches, Ms. Pescara was forced to leave Calpurnia, while revocation of visa precluded her from returning back. Given the importance of managers for the investment recognized in international investment law, Claimant subsequently has lost control over its investment, hence the searches and the revocation affected the Claimant's investment. Therefore, Claimant violated Article 2 of Calpurnia-Gaul BIT by committing arbitrary searches and revoking Ms. Pescara's visa..

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<sup>71</sup> *Elettronica Sicula S.p.A (ELSI) (USA v. Italy)* I.C.J.Rep. (1989) 15 para 76; *Asylum Case*, 20 November 1950, I.C.J. Rep. (1950) 266 para 284

<sup>72</sup> *Lauder v. Czech Republic*, Award, 3 September 2001, 9 ICSID rep. 66, para 221; *CMS v. Argentina*, Award, 12 May 2005, 44 I.L.M. (2005) 1205 para 291; *Occidental v. Ecuador*, Award, 1 July 2004, 12 ICSID Rep. 59, para 162

<sup>73</sup> Vienna Convention on the Law of Treaties (1969) Article 27; S.S. Wimbledon (1923) P.C.I.J., Ser. A, no. 1, p. 29; *Mavromattis Palestine Concessions*, Ser. A. No. 5; *Free Zones (1932)* P.C.I.J., Ser. A/B, no.46, p. 167; *Fisheries case*, ICJ Rep. (1951), 116 at 132

**c. Calpurnia violated Article 2 by failing to accord to Claimant full and constant protection and security**

96. The concept of full protection and security, being an integral part of fair and equitable treatment standard, should be understood and interpreted in conjunction with the latter.<sup>74</sup> Insofar as fair and equitable treatment is considered as higher standard than that required by international law<sup>75</sup>, the obligation to provide full protection and security sets higher level of responsibility than that established in international law. And indeed the International Court of Justice in the *ELSI* case stated that the standard “may go further” than general international law<sup>76</sup>, even though the FCN Agreement applicable to that case provided for “full protection and security required by international law”. In the instant case, Article 2 of Calpurnia-Gaul BIT does not contain any reference to international law at all. The tribunal is therefore to distinguish between general obligation of states to exercise due diligence, recognized by International Court of Justice in *Corfu Channel* case<sup>77</sup> and applicable to investor-state arbitrations<sup>78</sup> and treaty –based standard of full protection and security, which is even higher and applicable to this case. According to the facts, the residences of Ms Pescara and Mr. Kolowenko were repeatedly searched by Calpurnian police, while the CCC women branch has systematically picketed Ms Pescara’s home without any reaction from police authorities. Thus the actions of harassment in this case entailed both the actions directly attributable to Calpurnia, as well as those actions of third parties that Calpurnia manifestly knew about through its police. In *Wena Hotels* the tribunal found Egypt responsible for the breach of obligation to accord full protection and security to foreign investor, since Egyptian authorities knew of

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<sup>74</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Rep. 89, paras 84-95; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, 12 ICSID rep. 59, para 187; *PSEG v. Turkey*, Award, 19 January 2007, paras 257-259; *SD Myers v. Canada*, First Partial Award, 13 November 2000, 40 ILM (2001)1408, para 262

<sup>75</sup> *Azurix v. Argentina*, Award, 14 July 2006, para 361

<sup>76</sup> *Eletronica Sicula S.p.A (ELSI) (USA v. Italy)* I.C.J.Rep. (1989) 15 para 111

<sup>77</sup> *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Rep. (1949) 18, para 22

<sup>78</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law*, OUP, p. 150

the assaults onto the hotels.<sup>79</sup> In *Eureko*, where the investor suffered from raids by anonymous actors, the state of Poland succeeded because of the absence of evidence that it instigated the raids or at least knew about them.<sup>80</sup> Adversely, the case at hand disposes of ample evidence that the searches were committed by Calpurnian authorities and that Calpurnia knew about pickets and failed to stop them, having forced as a result Ms. Pescara to leave Calpurnia. Therefore, Calpurnia violated its Article 2 obligation to accord the Claimant with full and constant protection and security.

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<sup>79</sup> *Wena Hotels v. Egypt*, Award, 8 December 2000, 41 I.L.M. (2002) 896, para 84

<sup>80</sup> *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, 12 ICSID Rep. 335 paras 236-237

## PRAYER FOR RELIEF

**Claimant kindly requests the Tribunal to adjudge and declare that:**

- I. The case is within jurisdiction of the Tribunal, and Claimant has standing to bring its claims before the Tribunal;
- II. Calpurnia is internationally responsible for the conduct of the SFCDC and VanCal;
- III. Calpurnia, either through its own actions or through those committed by the entities under Calpurnia's control, has:
  - (a) unlawfully interfered in the Claimant's investment
  - (b) discriminated against the Claimant,
  - (c) obstructed the transfer of returns from the Claimant's investment, and
  - (d) failed to provide the Claimant and its investment full protection and security.

**Respectfully submitted,**  
***AGENTS OF CLAIMANT***