

BADAWI

**ICSID CASE NO. ARB/X/X
VANGUARD INTERNATIONAL**

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA

**MEMORIAL FOR CLAIMANT
VANGUARD INTERNATIONAL**

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STATEMENT OF FACTS

1. In 1997, Claimant Vanguard International, with its headquarters in Nova Parigi, Gaul participated in the establishment of a joint venture company, VanCal, which was incorporated and has its headquarters in San Inocente de Irkoutsk, the capital city of Calpurnia.

2. In November 2003, the Conservative Conscience of Calpurnia (CCC) won absolute majority in both chambers in the Calpurnian Parliament. Shortly after, on 7 December 2003, the Calpurnian police searched the homes of Francisca Pescara and David Kolowenko, who were at the time, respectively, VanCal's Managing Director and Chief Technical Officer. The police searched their homes two more times: on 3 June and on 15 July 2004. Claimant's application to have the three searches declared unlawful and seek compensation were rejected by the Calpurnian Constitutional Court.

3. Moreover, Pescara's home was picketed five times during 2004. The police declined Pescara's requests to remove the protesters. On September 2004, her application for a "three-year business visa" was rejected.

4. On October 14, 2004, two representatives of State Fund for Commerce and Development in Calpurnia (SFCDC), viz. Dr. Jonathan Swift and Mr. Shelly were elected to VanCal's Board of Directors.

5. On November 15, 2004 Ms. Pescara's resignation as managing director was accepted. The Claimant maintained its two places on the board in the person of Ms. Pescara, who appointed a proxy, and Mr. Neil Shepherd.

6. At the end of 2004, the Claimant held 30% directly, and an additional 1% registered in the name of Francesca Pescara was held in trust for the Claimant.

7. On March 10, 2005 in the VanCal board meeting which Mr. Poe presided held at Dr.Swift's SFCDC office, the board noted that "due to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign shareholders has been suspended for the time being,"

8. In May 21, 2005, the Claimant wrote a letter to Mr. Korchnoi requesting that the amount of the dividend payable be placed in a separate bank account to be opened in the name of Claimant.

9. On May 27, 2005, Mr. Korchnoi replied the email to the Claimant saying:

"I have to inform you that due to decision and instruction of the board of directors, VanCal cannot pay any sums of money for any reason to foreign shareholders. So I cannot take any action regarding your request."

10. On June 5, 2005, Claimant sent an email to VanCal “requesting that the board of directors communicate to us directly their decision in this matter and express to us the legal basis for this denial. We are not aware of any Calpurnian regulation or decree which permits the unequal treatment of the shareholders of a Calpurnian company”.

11. On November 16, 2005 at a shareholders meeting, Ms. Pescara was voted off the board of directors.

12. On February 17, 2005, the Board of Directors held a meeting to decide on the distribution of the company’s profits. Dr. Jonathan Swift, the government employed chairman of the Board, proposed that the minimum amount of the legal dividend be paid to the shareholders and the balance be appropriated for the purpose of creating a reserve fund for severance pay.” Mr. Rindler, who was serving as proxy for both claimant Directors, was absent from the meeting.

13. On March 10, 2005, the Board voted in favour of the severance pay agreement, which allowed the company to distribute only the legal minimum dividend between the shareholders, in order to “hold the amount paid to the foreigners to the minimum”. Later that month, the Board decides not to pay any money to foreign shareholders (VanCal’s Shareholder’s Meeting Minutes).

14. On November, 2005, Government representatives forced Ms. Pescara, one of Claimants’s two representatives, from the VanCal Board of Directors. Calpurnian Government representatives prevented Claimant from electing a replacement for Ms. Pescara, thus depriving Claimant of the representation to which the cumulative voting provision of the Calpurnian Commercial Code entitled it.

15. As of December, 2005, Dr. Jonathan Swift issued an order to stop sending financial related information to Gaulois citizens or to translate such material into Gaulois as had been the practice.

ARGUMENTS

I. THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES HAS JURISDICTION OVER THE PRESENT DISPUTE.

1. For the International Centre for Settlement of Investment Disputes (hereinafter “the Centre”) to have jurisdiction over a dispute (A) the requirements of article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter “the ICSID Convention”), and (B) the parties must have expressed their consent in some manner have to be met.

A. The requirements of article 25 of the ICSID Convention have been met.

2. Article 25 of the ICSID Convention establishes three main requirements regarding jurisdiction: (1) there must exist a legal dispute, (2) the dispute must have arisen directly out of an investment, and (3) the parties to the dispute must be an investor with the nationality of a Contracting Party and a Contracting Party of the ICSID Convention.

1. *There exists a “legal dispute”.*

3. The concept “legal dispute” has been defined as “a disagreement on a point of law or fact, a conflict of legal views or interests between parties”¹. In this sense, it has been considered that a legal dispute exists when it concerns legal rights and obligations under an agreement between the parties.² In the present case, there exists a dispute in both formal and substantive provisions of the Gaul-Calpurnia and Flatland-Calpurnia BIT’s.³ Therefore, there exists a legal dispute in the terms of article 25 of the ICSID Convention.

¹ *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90, ¶ 22; Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.*

² Schreuer, Christoph H., *The ICSID Convention: A Commentary*, CUP (2001), p. 106; see also *Cable TV v. St. Kitts and Nevis, Award, 13 January 1997*, 13 ICSID Review-Foreign Investment Law Journal 328, 362 et seq. (1998)

³ See generally *Abstract from Claimant’s Request for Arbitration* and *Abstract for Respondent’s Reply to Request for Arbitration*.

2. *The Centre has jurisdiction ratione materiae.*

4. For the Centre to have jurisdiction, the legal dispute must have “arisen directly out of an investment”⁴. Article 1, paragraph 1(b) of the Gaul-Calpurnia BIT establishes that “shares, stocks, debentures or other form of participation in a company” as an investment. In the present case, the dispute regarding both the treatment of the investment and the investor has arisen directly out of the refusal of the State Fund for Commerce and Development in Calpurnia (hereinafter “SFCDC”) to allow Vanguard International to exercise its rights as stockholder of VanCal.⁵ Therefore, the dispute undoubtedly arises out of an investment.

3. *The Centre has jurisdiction ratione personae.*

5. Article 25 of the ICSID Convention further requires, for the Centre to have jurisdiction, that the parties to the dispute must be on one hand, a national of a Contracting Party, and on the other another Contracting Party. It is well established that both, Calpurnia and Gaul have ratified the ICSID Convention.⁶ The nationality of the Claimant can easily be determined by applying the well established rule which states that a company is national of a state if its has been incorporated under that State’s law and has a registered office in that state.⁷ Claimant has been incorporated under the laws of Gaul and has its headquarters in Nova Parigi, its capital.⁸ Therefore, Claimant is a national of Gaul, which complies with the subjective requirement to establish jurisdiction of the Centre.

⁴ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, article 25.

⁵ See *Abstract from Claimant’s Request for Arbitration*, ¶ 5.

⁶ See *competition website*: <http://www.fdimoot.org/problem.php>; see also *Abstract from Claimant’s Request for Arbitration*, ¶ 5.

⁷ *Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections*, I.C.J. Reports 1964, pp. 33-34, ¶ 38.

⁸ See *Abstract from Claimant’s Request for Arbitration*, ¶ 5.

B. Most-Favourable-Nation treatment under article 4 of the Gaul-Calpurnia BIT encompasses dispute resolution mechanism benefits such as those contained in article 7 of the Flatland-Calpurnia BIT.

6. The general rules of interpretation of treaties contained in article 31 of the 1969 Vienna Convention on the Law of Treaties, of which both Calpurnia and Gaul are parties to⁹, establish that treaties will be interpreted in accordance with (1) their ordinary meaning, (2) in their context, and (3) in accordance with their object and purpose. Claimant argues that the Most-Favourable-Nation (hereinafter “MFN”) clause contained in article 4 of the Gaul-Calpurnia BIT should permit the application of article 7 of the Flatland-Calpurnia BIT if interpreted in accordance with General International Treaty Law. Claimant submits as well that no “public policy considerations” bar the Centre from having jurisdiction.

1. Article 4 of the Gaul-Calpurnia BIT encompasses procedural matters in accordance the ordinary meaning of the treaty.

7. It has been argued that broadly phrased MFN clauses apply without limitation to all “treatment”, including dispute settlement mechanisms.¹⁰ Article 4 of the Gaul-Calpurnia BIT neither expressly includes nor excludes dispute settlement mechanisms. Therefore, article 7 of the Flatland-Calpurnia BIT may be applied.

2. Article 4 of the Gaul-Calpurnia BIT encompasses procedural matters in accordance the context and with the object and purpose of the treaty.

8. In application of the *ejusdem generis* principle, dispute resolution mechanism benefits have been considered to fall within the scope of “treatment” pursuant to MFN clauses.¹¹ This view is

⁹ See *Second Clarifications*, ¶ 32.

¹⁰ Freyer, Dana et al., *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” is “Most-Favored”?*, ICSID Review, 2005, Vol. 20, No. 1, p. 62.

¹¹ See *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal in Objections to Jurisdiction, 25 January 2000, 40 ILM 1129 (2001), at 1137; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB.02/8, Decision on Jurisdiction, 2 August 2004, at ¶¶102-103; *Camuzzi International, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decision on Jurisdiction of June 10, 2005, ¶ 34(iii); *Gas Natural SDG, S.A. v.*

in accordance with the object and purpose of the treaty which is to, *inter alia*, “create favorable conditions for investors of one Contracting party in the territory of the other Contracting Party”¹². Furthermore, by analyzing the treaty in context, it can be argued that when the contracting states decide to expressly mention exceptions to MFN provisions in their BIT’s, no other exceptions should be deemed to exist.¹³ In this case, article 5 of the Gaul-Calpurnia BIT contains three exceptions to the application of MFN treatment under article 4, none of which refers to dispute settlement mechanisms. In this sense, Article 7 of the Flatland-Calpurnia BIT would be applicable to establish jurisdiction since Claimant has complied with the two-month period established therein.

3. No “public policy exceptions” bar jurisdiction of the Centre in the present dispute.

9. It has been recognized that exceptions to the extension of MFN provisions may exist, specifically when these exceptions respond to “public policy considerations”.¹⁴ One of these exceptions is the irrevocable choice of forum established in article 11, ¶2 (3) which bans the investor from submitting a dispute to any of the arbitration mechanisms listed in the preceding paragraph (including arbitration before the Centre) when it has submitted the dispute to the competent municipal courts. The facts show that although a claim was pursued by Claimant before the Calpurnian Constitutional Court, the subject matter of that claim was not the same as the present dispute. The first claim was mainly concerned with the right to privacy of representatives of the investor in Calpurnia while the present dispute deals mainly with the Claimant’s rights as stockholder. In this sense, no exception bars the application of the MFN clause to establish jurisdiction of the Centre.

Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction of June 17, 2005, ¶ 34; *Ambatielos case (jurisdiction)*, Judgment of July 1st, 1952: I.C.J. Reports 1952, p. 28.

¹² Gaul-Calpurnia BIT, Preamble; see also *Siemens*, *supra* note 11, ¶ 81.

¹³ See *Siemens*, *supra* note 11, ¶ 85.

¹⁴ See *Maffezini*, *supra* note 11, ¶ 63.

II. THE REPUBLIC OF CALPURNIA HAS UNLAWFULLY DISCRIMINATED AGAINST CLAIMANT.

A. The acts taken by the Republic of Calpurnia constitute a violation of the principle of national treatment.

10. The discrimination against a foreign investor violates the principle of national treatment under international law. National treatment can be defined as a principle whereby a host country extends to foreign investors treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances.¹⁵ The guarantee of national treatment is an important feature of modern investment treaty practice.¹⁶

11. The key to the national treatment issue is the comparison with the treatment received by domestic investors in “like” or “similar” circumstances.¹⁷ In the case of *Marvin Roy Feldman v. The United Mexican States* the tribunal accepted that the national treatment principle was intended to protect against discrimination because of the foreign status of the investor.¹⁸ In the email sent on May 27th, 2005 from Mr. Korchnoi to the Claimant, it is clear that there is a discriminatory treatment based solely on the fact that they are foreigners. An excerpt of the email states:

¹⁵ *UNCTAD: National Treatment*, New York and Geneva, UN (1999) p. 1; see also *UNCTAD: Investor-State Disputes arising from Investment Treaties: A Review*, New York and Geneva, UN (2005), p. 32; *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000.

¹⁶ *UNCTAD: Dispute Settlement: Investor- State, Series on issues on international investments agreements*, Geneva, UN (2003) p. 72.

¹⁷ See *Pope & Talbot, Inc. v. the Government of Canada*, UNCITRAL, Interim Award on Merits, 26 June 2000; *Pope & Talbot, Inc v. the Government of Canada*, UNCITRAL, Award on the Merits, 10 April 2001; *Pope & Talbot Inc. v. the Government of Canada*, UNCITRL, Award on Damages, 31 May 2002; *Pope & Talbot Inc. v the Government of Canada*, UNCITRAL, Award on Costs, 26 November 2002; *Methanex v. United States*, UNCITRAL, Decision on *Amici Curiae*, 15 January 2001; *Methanex v. United States*, UNCITRAL, Preliminary Award on Jurisdiction and Admissibility, 7 August 2002; *Methanex v. United States*, UNICITRAL, Final Award, 3 August 2005.

¹⁸ *Marvin Roy Feldman v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award on Merits, 16 December 2002 (NAFTA).

“I have to inform you that due to decision and instruction of the board of directors, VanCal cannot pay any sums of money for any reason to foreign shareholders. So I cannot take any action regarding your request.”

With this action, only foreign shareholders are being deprived of their rights. National citizens did receive the payment of the profits.

12. It is clear that by limiting and restricting the Claimant’s rights, without any legal basis to do so, and by placing them in disadvantage in comparison to other shareholders, the Respondent is undoubtedly incurring in discriminative practices which violate the national treatment principle.

B. The Republic of Calpurnia has failed to provide claimant with a “fair and equitable treatment”.

13. Part of the non-discrimination principle is the fair and equitable treatment standard in international investment law.¹⁹ The acts of the Republic of Calpurnia have also violated this aforementioned standard.

14. The reference to fair and equitable treatment in an International Investment Agreement usually appears in a provision that also requires the parties to accord full or constant protection and security to foreign investments and not to impair the management, maintenance, use, enjoyment or disposal of foreign investments by unreasonable or discriminatory measures.²⁰

15. Various tribunals have found that the full protection and security standard has been breached because the investment has been subject to unfair and inequitable treatment.²¹ In the *TECMED S.A. v. The United Mexican States* case, the Arbitral Tribunal considered that international law requires the contracting parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign

¹⁹ Organisation for Economic Cooperation and Development, *Fair and Equitable Treatment Standard in International Investment Law* (2004), p. 2; see also *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004.

²⁰ UNCTAD: *Key terms and concepts in IIAs: A Glossary*, New York and Geneva, UN (2004), p. 79.

²¹ UNCTAD: *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, New York and Geneva, UN (2007), p. 47.

investor when it made the investment.²² By not paying the profits to the foreign shareholders, the Respondent is not complying with the accorded treatment, thus affecting the expectations that the Claimant had at the time of the investment.

16. Article 2 of the *Gaul-Calpurnia BIT* on the Promotion and Protection of Investments accords to grant to the other Party fair and equitable treatment and full and constant protection and security.²³ This treaty evidently binds both Nations into conferring optimum treatment to the other country's investors. They are expressively binding themselves into protecting the investor and the investment. In *Occidental Exploration and Production Company v. Ecuador* the Tribunal stated the following:

" [...] *full protection (...) is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.*"²⁴

17. These standards were completely shattered by the hostile treatment that the Respondent exerted on the Claimant. Francesca Pescara and David Kolowenko, two Galuois nationals and Vanguard International employees, were victims of invasion of property and of intimidation on behalf of the Republic of Calpurnia, all this without any basis to do so (formal charges were never even filed). Also, Ms. Pescara's home was picketed for a number of days, and the police declined her demands to remove the protesters. This clearly demonstrates the Respondent's failure in providing protection and security to its Galuois investors. Furthermore, by suspending the payment of the profits to the Claimant, the Respondent is jeopardizing the investment which is a clear violation of all of the above.

18. The overall result of the decisions to date is that fair and equitable treatment provisions may be construed as no longer applicable solely to what would be considered egregious abuses of government power, or disguised uses of government powers for untoward purposes, but to any open and deliberate use of government powers that fails to meet the requirements of good

²² *Técnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID case No ARB(AF)/00/2 (Award) (May 29, 2003).

²³ See *Gaul-Calpurnia BIT*, article 2.

²⁴ *Occidental Exploration and Production Company v. Ecuador*, London Court of International Arbitration, Case No. UN 346, Award, 1 July 2004.

governance, such as transparency, protection of the investor's legitimate expectations, freedom from coercion and harassment, due process and procedural propriety and good faith.²⁵

19. Thus, it is evident that the Republic of Calpurnia has acted in various ways that violate the principles of national treatment, non-discrimination, and fair and equitable treatment.

C. Discriminatory acts and omissions taken by the SFCDC, in prejudice of Vanguard International, are attributable to the State of Calpurnia.

20. Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts establishes that:

*“[T]he conduct of a person, or group of persons, shall be considered an act of a State under international law, if the person, or group of persons, is in fact acting on instructions of, or under the direction or control of that State in carrying out the conduct”.*²⁶

21. In compliance with the abovementioned article, if the activities of a person or a group of persons are directed or controlled by the State, they should therefore be considered State conducts. Because the SFCDC is owned and controlled by the Calpurnian state, all international wrongful acts performed by the first, are imputable to the latter.

22. SFCDC is currently the major stockholder of VanCal. Even though some of the stocks are registered in the names of individual farmers and workers, SFCDC still holds the voting rights. The legitimate management rights upon these stocks are still being exercised by the company; therefore, the attribution of responsibility upon the use of these stocks -in addition to the ones registered under SFCDC name- shall also be attributed to the company, and hence to the State of Calpurnia.

23. As recognized by the United States Supreme Court in the “Zafiro case”²⁷, an “entity”, even if it is not constituted as an organ of the State, can perform conducts that involve public

²⁵ UNCTAD: *Investor-State Disputes arising from Investment Treaties: A Review*, New York and Geneva, UN (2005), p. 39; see also Weiler, Tom, *Saving Oscar Chin: Non-Discrimination in International Investment Law*, in *International Investment Law and Arbitration*, Weiler, Tom (ed.), Cameron May (2005), p. 579.

²⁶ *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83, article 8.

²⁷ See UN, *Reports of International Arbitral Awards*, Volume VI, (Washington, United Nations, 2006) at 160.

interest protected and controlled by that State. Many Tribunals, as in the *Maffezini vs. Spain*²⁸ case, have highly accepted the attribution to the State of acts performed by private individuals. It is not necessary for that conduct to involve governmental activities in order for it to be imputable; it is sufficient with demonstrating that such conduct has been authorized by the State. Through its employees, the government of Calpurnia was exercising managing rights on the Board of Directors of Vancal. Therefore, the government should be held responsible for the conduct of its surrogates.

24. The harmful acts performed against Vanguard International, such as instructing the Gaulois managing director to cease sending accounts, financial statements, and other information to Gaulois citizens; as well as to stop translating such material into Gaulois as it was usually practiced; are examples of hostile and unequal treatment towards the foreign investors-performed by Calpurnian government employees, properly authorized to the effect- and represent a breach of the Calpurnia-Gaul BIT. The State of Calpurnia, in that case, also failed its obligation of ensuring the observance of the Bilateral Treaty.

25. In consequence, the State of Calpurnia is, by International Law, liable for all the aforementioned discriminatory practices performed by SFCDC. The State of Calpurnia must respond for the lack of good faith that characterized its entities, the inobservance of international law regulations, customary international law principles, and subscribed bilateral treaties. As a State, it holds legal responsibility for all the discriminatory actions and omissions taken by SFCDC.

III. THE ACTIONS TAKEN AGAINST CLAIMANT'S REPRESENTATIVES IN CALPURNIA CONSTITUTE ARBITRARY INTERFERENCE WITH THE INVESTMENT AND INVESTORS.

A. Respondent failed to provide fair and equitable treatment and full protection and security to Claimant's investment.

27. Article 2 of the Gaul-Calpurnia Bilateral Investment Treaty states the basis for the protection of the investment. Respondent's arbitrary actions interfered with the privacy of the Claimant's representatives, and made it difficult for the Claimant to exercise its property rights.

28. In accordance to the *pacta sunt servanda* principle, the contracting state is obliged to facilitate the investor's activities and to "*create, in general, favourable conditions to the*

²⁸ See *Maffezini*, supra note 11, general case.

investment”, as well as provide its investment with “full and constant protection and security”.²⁹ Respondent violated the above stated principles by subjecting Ms. Pescara and Mr. Kolowenko to several police searches that interfered with their privacy. These actions were not explained to the Claimant’s representatives by any Calpurnian authority, nor were charges ever raised, violating a basic principle of due process.

29. The *Waste Management v. Mexico* case the tribunal pointed out that :

“...[t]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process”³⁰

B. The Flatland-Calpurnia BIT is applicable, according to the Most Favoured Nation Principle.

29. The Flatland Calpurnia BIT is applicable in substantive matters, according to the MFN principle.³¹ According to the ICSID Tribunal, the application of the MFN standards can be imported from a different BIT as long as they do not impact the balance of rights in a significant way.³² The protection of the investment is given a broader mention in the Flatland- Calpurnia BIT, in the sense of guaranteeing a fair and equitable treatment and adequate protection and security.³³ Also, Article 4 of the Flatland-Calpurnia BIT guarantees the entry of the investor’s personnel to the country, obligating the host state to grant temporal access to citizens of the other contracting party. Calpurnian authorities refused to renew the business visa that was necessary for Ms. Pescara to continue representing the firm in a stable fashion, offering a tourist visa instead, which would have been unsuitable, since this type of visa would not allow her to

²⁹ *Gaul-Calpurnia BIT*, article 2.

³⁰ *Waste Management Inc. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, ¶ 98.

³¹ *See: Tecmed*, supra note 22. ¶ 69

³² Maffezini, supra note 11, ¶64

³³ *See Gaul Calpurnia BIT*, article 2.

participate in any business activities, and she would be put in an unstable position if she chose to continue attending the meetings.

C. The actions of the Calpurnian Authorities constitute a violation of the “minimum standard of treatment” principle.

30. The fair and equitable treatment is not only considered in relation to the eventual internal legitimacy of legal actions taken against the investors. An essential consistency with the basic principles of due process must exist, especially if the actions that are to be taken by the contracting state constitute a violation of the Investor’s representative’s privacy. (This fair and equitable treatment is independent from the internal legislation of the country, and must be based upon the basic principles of international law.)

31. Ms. Pescara and Mr. Kolowenko, although aware of the false allegations manifested by the Government and the Calpurnian press that stated that they were “spies” for their country, were not officially contacted to appear before an authority and defend their position, in a clear breach of due process. Not only did the Respondent’s actions violate the BIT, but were clearly done in bad faith. The investor has the right to expect, at least, a “minimum standard of treatment” according to Customary International Law, when there is no contract between the parties. It is clear that not even this minimum standard has been met, even though there is a previous agreement where the standard is set to guarantee a more extensive protection.

32. The “minimum standard of treatment” principle provides us with a guide to understand and interpret the promise of fair and equitable treatment in the Gaul-Calpurnia BIT.³⁴ The searches that took place in the houses of the Claimant’s representatives constitute unjust decisions that were not sufficiently adjusted to due process of law. “The State violates international law if it *arbitrarily* impairs the private rights of aliens, even through a legislative act.”³⁵ It is not relevant, then, if the actions of the Calpurnian Government were legal in their jurisdiction, because those actions constituted arbitrary interference with the privacy of the Claimant’s representatives and were directed to create a state of discomfort while residing in that country.

³⁴ *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention*, OECD (1967), pp.13-15.

³⁵ *Ibid.*, p. 29.

33. This treatment constitutes a clear manifestation of bad faith. It falls short to the promises made by the state of Calpurnia in the BIT and also to the minimum level of treatment to be expected as a premise to invest in a country, according to customary international law.³⁶ Thus, the state of Calpurnia is responsible for the damages caused to the Claimant's interests, and to the property and privacy of its representatives.³⁷

IV. RESPONDENT HAS UNLAWFULLY EXPROPRIATED THE CLAIMANT'S INVESTMENT.

A. Respondent has effectively deprived Claimant of its property rights.

1. Claimant has suffered from an indirect expropriation.

34. Indirect or creeping expropriation is known as a state's action which seeks "...[t]o achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned."³⁸ Here, a state's actions do not effectively transfer the property title but they do however have similar effects in depriving the investor's property. It is important to note that "expropriation" or deprivation of property could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even when the property is not seized and the legal title to the property is not affected³⁹.

35. Not all state actions which affect the investor's property are equitable with expropriation, as the *Restatement Third of Foreign Relations Law of the United States* illustrates:

³⁶ See Van Aaken, Anne, *Perils of Success? The Case of International Investment Protection* (2007), *European Business Organization Law Review (EBOR)*, Vol. 9, No. 1, pp. 1-27, March 2008.

³⁷ OECD Draft Convention, *supra note* 34, p. 8.

³⁸ *Restatement (Third) of Foreign Relations Law of the United States*, Volume 1, Section 712, Reporter's Note 7 (1987).

³⁹ "*Indirect Expropriation*" and the "Right to regulate" in *International Investment Law*, OECD Directorate for Financial and Enterprise Affairs, Working Paper for International Investment (2004), p. 10.

“A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or any other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory...”⁴⁰

36. The difficulty of determining whether expropriation has occurred in cases of creeping expropriation is resolved by looking at criteria which aid in concluding if acts enacted by the government are tantamount to expropriation. (a) Loss of managerial participation in the property and (b) the severity of the economic impact are recognized as litmus tests in order to determine such existence⁴¹.

a. Claimant has lost managerial participation in the company.

37. International principles on corporate governance recognize a shareholder’s right to obtain relevant and material information on the corporation on a timely and regular basis as well as the right to participate and vote in general shareholder meetings⁴².

38. In *Starret Housing vs Iran* the tribunal reasoned that: “(Property rights) must be deemed to compromise the physical property as well as the right to manage the Project (...)”⁴³ Property rights go beyond the mere possession of a property title, the owner must be able to exercise his/her rights in accordance with the principles of its right as an owner in harmony with the investment goals.

39. In this case the government of Calpurnia has rendered Vanguard International’s 31% stake in VanCal useless for it has deprived it of its rights to participate in the management of the company.

40. Firstly, police searches in the homes Francesca Pescara and David Kolowenko are clearly directed toward harassing them for their condition as Vanguard International directors in VanCal. Such actions hamper their feeling of self confidence in the country and therefore their ability to freely represent Vanguard’s interests in Calpurnia.

⁴⁰ *Restatement (Third)*, *supra* note 38, Comment g, section 712.

⁴¹ *Indirect Expropriation*, *supra* note 39, p. 10.

⁴² *OECD Principles of Corporate Governance*, OECD (2004), p. 18.

⁴³ *Starret Housing Corporation et al v. The Government of the Islamic Republic of Iran et al.* (1987) I.U.S.C.T. 112.

41. Furthermore, the hostile climate toward Gaulois nationals forced Ms. Pescara, VanCal's managing director to leave Calpurnia, and although she visited three times during 2004, she found it impossible to safely return after November 1st 2004. Due to these same circumstances, Mr. Kolowenko, VanCal's chief technical officer had to leave at the end of 2003, and could never return. The forced absence of Claimant's personnel severely hampered its ability to preserve the value of its investment and exercise due managerial functions.

42. Secondly, the November 2005 ousting of Ms. Pescara from the VanCal board on behalf of government representatives; as well as the act of preventing Vanguard from naming a replacement through the blockage of two shareholder proxies is further proof of how Government officials made the Claimant's right as a shareholder utterly precarious.

43. Thirdly, the 1 December 2005 instruction on behalf of the government- employed chairman of VanCal's board: Dr. Jonathan Swift to cease sending accounts, financial statements or other information to Gaulois citizens or translating such material into Gaulois, clearly discriminates on a national origin basis and further deprives the Claimant from one of its essential rights as a shareholder: the right to obtain relevant and material information on the corporation⁴⁴

44. Calpurnia's actions follow a common trend directed toward hampering Vanguard International's ability to freely participate in the management of its investment. Thus, it can be concluded that by depriving the investor of its fundamental right as a shareholder, Calpurnia has committed an action tantamount to expropriation.

b. Respondent's actions have caused a severe economic impact on Claimant's property.

45. Judging the severity of the economic impact is a key element in determining whether property has been deprived in cases of creeping expropriation⁴⁵. Expropriation exists when government interference with the foreigner's investment extends to the point where the fundamental rights of ownership are deprived.⁴⁶ Treaty law applicable in this case⁴⁷ protects the investor from the above stated actions.

⁴⁴ *OECD Principles of Corporate Governance*, supra note 42, p. 18.

⁴⁵ OECD, "Indirect Expropriation" and the "Right to regulate in International Investment Law", supra note 39, p. 10.

⁴⁶ *Ibid.* p. 11.

46. Proper corporate governance laws dictate that one of the fundamental rights of a shareholder is to “share in the profits of the corporation.”⁴⁸ A deprivation of such, to the extent that Claimant receives no share of its profit from May 2005 to present, is a clear indicator that its investment has been expropriated.

47. In the TAMS-AFFA case the tribunal concluded that the interference of a State with the enjoyment of the benefits in an investment constitutes a taking of property under international law, even if the property title is not affected⁴⁹

Similarly, The Iran- U.S. claims tribunal pointed out in *Starret Housing vs. Iran* that:

“It is recognized by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”⁵⁰

48. The acts enacted by the government of Calpurnia which deprive Gaulois investors from one of their fundamental rights shareholders are equal to rendering their property useless and therefore constitute expropriation under the parameters of international law and article 6 of the Calpurnia-Gaul BIT.

2. Acts enacted by SFCDC directors which deprive Claimant from its investment are attributable to the State of Calpurnia.

49. International law recognizes that :

“the conduct of a person or group of persons is considered an act of a State if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.”⁵¹

50. The acts of property deprivation enacted by VanCal’s management are attributable to the state of Calpurnia because (a) the SFCDC is a government owned enterprise and (b) SFCDC exercises control over VanCal’s management.

51. In the *Foremost Tehran* case, the tribunal established that:

⁴⁷ *Gaul-Calpurnia BIT*, article 6.

⁴⁸ OECD Principles of Corporate Governance, *supra note* 42, p.18.

⁴⁹ *Tippets, Abbet, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic of Iran et al.*, (1984) I.U.S.C.T.R. 219.

⁵⁰ *Starret Housing v. Iran*, *supra note* 43.

⁵¹ *Responsibility of States for Internationally Wrongful Acts*, *supra note* 26.

“...[t]he two main indicators of government control of a corporation are the identity of its shareholders and the composition and behavior of its board of directors.”⁵² (emphasis added)

a. Calpurnia is responsible because the SFCDC is a government owned enterprise.

52. The SFCDC is an entity owned 100% by the state of Calpurnia. Directors appointed by the entity to VanCal management also hold government positions, such as Dr. Jonathan Swift whom served simultaneously on the VanCal board and the SFCDC board. Similarly, another board member, Mr. Poe, is also an SFCDC employee. In accordance to the rule referenced above, by being controlled by the government of Calpurnia the SFCDC’s actions are attributable to the state.

b. Calpurnia is responsible because it exercises control over VanCal’s management.

53. The SFCDC directly owns 30% of VanCal shares, however it also holds on deposit and votes an additional 22% of VanCal stock in the in the name of individual farmers and workers , giving it direct control over a total of 52% of company shares. Even though the Respondent attempts to evade responsibility arguing that it does not own the above stated 22%, the fact that it exercises the rights over these shares fulfils the requirement of governmental control and therefore attributes responsibility to the State ⁵³

3. Expropriation does not require a specific decree or legislative act.

54. The Gaul- Calpurnia BIT protects investors not only from an official act which expropriates but also against

“any measures having the effect either directly or indirectly, equivalent to expropriation or nationalization.”⁵⁴

55. To constitute as expropriation, a government’s actions relative to the foreigner’s investment must effectively deprive that investor from enjoying the benefits of its property, just as if it had been taken away from him/her, even when legal property to the title is not affected.⁵⁵ In the Starret Housing Corporation vs. Iran case it is pointed out that expropriation exists because

⁵² *Foremost Tehran Inc. v. the Government of the Islamic Republic of Iran*, (1986) I.U.S.C.T.R. 228.

⁵³ *Ibid.*

⁵⁴ *Gaul-Calpurnia BIT*, article 6.

⁵⁵ See, *Tippets v. TAMMS-AFFA*, *supra* note 49.

“...[t]he Government of Iran had interfered with the Claimants’ property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken.”⁵⁶

56. The fact that the government of Calpurnia directly owns or controls a majority of Vancal stock, and the fact that through this ownership it has deprived Gaulois shareholders of exercising their legitimate right as property owners by denying the payment of dividends to foreign shareholders in 2004, 2005, 2006, and 2007 (paragraph 14), severing the shareholder’s right to information by prohibiting the sending of accounts, financial statements or other information to Gaulois citizens, prohibiting the translation of important documents into Gaulois as it was accustomed (paragraph 16) and hampering their representation in Vancal’s board by ousting Ms. Pescara and Mr. Kolowenko in 2003 and 2004 (paragraph 17) have caused immense damage to Gaulois shareholders and can only be equated to expropriation because such actions for all practical purposes have rendered the investment useless. This fact makes the respondent liable under article six of the Calpurnia-Gaul BIT, which is why it must compensate Vanguard International for the damages suffered.

B. Respondent has expropriated Claimant’s investment without respecting due process guarantees required by international Law.

57. Under international law, expropriation is allowed if: (1) it is preceded by a legally determined public interest; (2) it is conducted in a non-discriminatory manner, (3) and respecting the due process of law⁵⁷. Additionally, (4) compensation for this expropriation must be payment must be prompt, adequate, and effective⁵⁸.

⁵⁶ *Starret Housing Corporation et al. v. The Government of the Islamic Republic of Iran et al.* (1987) I.U.S.C.T. 112.

⁵⁷ *UNCTAD, Taking of Property*, 1st ed., New York and Geneva, UN (2000) pp. 12-16.

⁵⁸ Clagget, Bruce M., *Present State of the International Law of Compensation for expropriated property and Repudiated State Contracts*, in: The Southwestern Legal Foundation (ed.), *Private Investors Abroad*, Dallas 1989, at 12-1 et seq, p. 12-3; Brownlie, Ian, *Principles of Public International Law*, 4th ed., Oxford 1990, p. 509.

1. The expropriation of Claimant's investment was not preceded by a legally determined public interest.

58. The criterion of public interest as a justification of taking of property would require an admission of the taking on behalf of the state⁵⁹. Case in point, paragraph six of the Respondent's Reply to Request for Arbitration states that

"[t]he Claimant's investment has not been expropriated, nor has the Respondent failed to treat the investment in accordance to international law".

59. Furthermore by flat out denying that an expropriation has occurred, the respondent implicitly acknowledges that it has not carried through with the legal procedures which make expropriation legal under international law. Paragraph 10 of the Respondent's reply further proves this point as it states that

"[t]here has been no interference with the rights of Claimant as a shareholder, or any expropriation of its interests."

2. The deprivation of Claimant's investment has been carried out in a discriminatory manner.

60. Events in Calpurnia demonstrate a trend of animosity toward Vanguard International representatives. Repeated searches in the private homes of Gaulois nationals and Vanguard International employees Francesca Pescara and David Kolowenko were carried out on 8 December 2003, 4 June 2004, and 17 July 2004, in addition to police refusal to clear demonstrators from Ms. Pescara's home demonstrate the above mentioned tendency. Furthermore, statements such as those made by SFCDC representative on the VanCal board Dr. Jonathan Swift about how he would not stay in a meeting with "Gaulois Spies" further cements the discrimination argument. Finally, objectionable and unjustified decisions such as the one adopted on 10 March 2005 by the VanCal board of suspending the payment of profits to foreign shareholders demonstrate the hostile tactics of Calpurnian officials toward the investors, whose investment was effectively expropriated based upon a national origin argument.

61. Treaty law directly applicable to this case prohibits discriminatory expropriation processes and establishes certain parameters, or a "minimum standard"⁶⁰ under which each party's investment should be treated.

⁵⁹ See *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, ¶18.

62. International law largely considers the non discrimination principle to be engulfed by the principle of “*fair and equitable treatment*”⁶¹. The fair and equitable treatment standard requires host nations to provide a secure environment so that the investor’s basic expectations taken into account when making the investment are not significantly affected⁶². Additionally, stable legal and business environment has been considered an essential element of fair and equitable treatment⁶³

63. The above stated actions are a breach of the commitment to provide “fair and equitable treatment and full and constant protection and security”⁶⁴, proving Calpurnia’s antagonistic approach to foreign investors and cementing the fact that the expropriatory process was indeed discriminatory.

3. Respondent did not respect due process provisions.

64. Article 6, paragraph 1 of the Gaul-Calpurnia BIT requires that the expropriation of investments must follow the “due process of law”. Due process of law has been considered as an element within the *fair and equitable treatment* standard⁶⁵. It signals not only that the country must follow its own legal procedures when expropriating property, but must also give the investor the right of judicial review of compensation.⁶⁶

65. In the case concerning Elettronica Sicula S.P.A. (ELSI), the ICJ considered that

⁶⁰ *Gaul-Calpurnia* BIT, articles 2 and 6.

⁶¹ See *S.D. Myers, Inc. v. Canada*, (November 13, 2000), Partial Award. International Legal Materials 408; United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties* (1988), p. 42.; WTO, Working Group on the Relationship between Trade and Investment, *Non-Discrimination, Most-Favoured-Nation Treatment and National Treatment*, Note by the Secretariat, WT/WGTI/W/118, 4 June 2002.

⁶² See, *Tecmed*, *supra* note 22 , ¶ 136.

⁶³ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, at: <http://ita.law.uvic.ca/documents/cms.pdf>, at p. 7 et seq, p. 80.

⁶⁴ *Gaul-Calpurnia* BIT

⁶⁵ OECD, *Fair and Equitable Treatment*, *supra* note 19, p. 26; *Gaul-Calpurnia BIT*, article 2.

⁶⁶ *Taking of Property*, *supra* note 57, p. 16.

“It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”⁶⁷

66. For this case, the respondent does not claim to have followed a determined legal process to deprive the Claimant of its property; moreover it specifically denies any act of expropriation alleging that:

“A finding of expropriation would require a specific decree or legislative act, neither of which is present”⁶⁸.

67. As it will be proven, the argument which considers that expropriation requires a specific decree or legislative act is invalid under international law; nevertheless it does provide a glimpse into what the Calpurnian Government’s due process of law would require for expropriation: a specific decree or legislative act. Ergo, under the own admission of the respondent, it is clear how neither of these instruments are present, which comes to prove how the due process of law was not followed.

4. Prompt, adequate and effective compensation is non existent.

68. Promptness means that the investment must be paid at or before the time which the investment is taken⁶⁹. Effectiveness refers to the fact that the payment must be made in realizable exportable form; payment in nonconvertible currency, unmarked bonds or I.O.U.s is not effective.⁷⁰ Adequacy points to the full compensation for the value of the property which the owner must receive.⁷¹

69. In this specific case it can be agreed that there has been no compensation. The Respondent sees no need to compensate for it denies any act of expropriation. This in combination with the Claimant’s request that it be compensated is proof in itself that there has been no previous payment.

⁶⁷ *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, ¶128.

⁶⁸ See *Abstract from Respondent’s Reply to Request for Arbitration*, ¶10.

⁶⁹ Clagget, Bruce M., *supra note 58*, p. 12-3.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

PRAYER FOR RELIEF

Claimant asks the Tribunal to adjudge and declare that:

- I. The International Centre for the Settlement of Investment Disputes has jurisdiction over the present dispute.**
- II. The Republic of Calpurnia has unlawfully discriminated against Claimant.**
- III. The actions taken against Claimant's representatives in Calpurnia constitute arbitrary interference with the investment and investors.**
- IV. Respondent has unlawfully expropriated Claimant's investment.**

Vanguard International