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TEAM NAME: **BENGZON**

No. ARB/X/X

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IN THE

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES  
ICSID**

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**VANGUARD INTERNATIONAL,**  
*CLAIMANT,*

**v.**

**THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA,**  
*RESPONDENT.*

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**MEMORANDUM FOR CLAIMANT**

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**BROCHES & PARTNERS**  
*Attorneys for Claimant*

ORAL ARGUMENT REQUESTED

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**CERTIFICATE OF INTERESTED PARTIES**

(1) Arbitration Case No. ARB/X/X, *Vanguard International v. The Government of the Republic of Calpurnia*.

(2) The undersigned counsel certifies that the following listed entities have an interest in the outcome of this case:

**Claimant:**

**VANGUARD INTERNATIONAL**

A private company incorporated and seated in Nova Parigi, capital city of the Federated States of Gaul.

Vanguard held this nationality during the full extent of the investment, during the time of consent, and during this dispute.

**Counsel for Claimant:**

Mr. 1, Mr. 2

**BROCHES & PARTNERS**

1100 South Street  
Washington D.C., 1007002  
Telephone: (345) 234-0000

**Respondent:**

**THE GOVERNMENT OF THE  
REPUBLIC OF CALPURNIA**

A public entity with seat in San Inocente de Irkoutsk, capital city of the Republic of Calpurnia.

The Republic of Calpurnia consented to ICSID jurisdiction.

**Counsel for Respondent:**

Mr. 1, Mr. 2, Mr. 3, Mr. 4, Mr. 5

**SHIHATA E ASSOCIATI**

16534 – G Via Romana  
Rome, Italy 34  
Telephone:(+39) 06-555-1355

(3) The undersigned counsel certifies that the following listed persons are indirectly involved in this case:

**Claimant:**

Ms. Francesca Pescara, Gaul national;  
Mr. David Kolowenko, Gaul national;  
Mr. Neil Shepherd;  
Mr. Rindler.

**Respondent:**

Mr. Poe, Calpurnian national;  
Dr. Swift, Calpurnian national;  
Mr. Shelly, Calpurnian national;  
Mr. Korchnoi, Calpurnian national.

\_\_\_\_\_/s/\_\_\_\_\_  
Mr. 1

Attorney for Claimant

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**LIST OF ABBREVIATIONS**

1	Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments	Calpurnia-Gaul BIT
2	Agreement between the Government of the Republic of Calpurnia and the Government of the State of Flatland on the Mutual Promotion and Protection of Investments	Calpurnia-Flatland BIT
3	Bilateral Investment Treaty(ies)	BIT or BITs
4	Calpurnian Security Directorate	CSD
5	Conservative Conscience of Calpurnia	CCC
6	Conservative Conscience of Calpurnia Women’s League	CCCWL
7	Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention, Washington Convention or the Convention
8	Fair and Equitable Treatment	FET
9	Federated States of Gaul	Gaul
10	Full Protection and Security	FPS
11	Intellectual Property	IP
12	International Centre for Settlement of Investment Disputes	ICSID or the Centre
13	International Court of Justice	ICJ
14	Most Favored Nation	MFN
15	National Treatment	NT
16	Republic of Calpurnia	Calpurnia
17	State of Flatland	Flatland
18	State Fund for Commerce and Development in Calpurnia	SFCDC
19	Subject Matter Jurisdiction	SMJ
20	Technical Assistance Contract or Agreement	TAA
21	Vanguard International	Vanguard

## LIST OF AUTHORITIES

		Cited in ¶¶
<b>BOOKS AND TREATISES</b>		
FARNSWORTH, ALLAN (cited as: <i>Farnsworth</i> )	CONTRACTS. Aspen Publishers, New York, USA (4th ed. 2004). ISBN 0735545405.	58, 129, 130
MANN, F.A. (Cited as: <i>F.A. Mann</i> )	THE LEGAL ASPECT OF MONEY: WITH SPECIAL REFERENCE TO COMPARATIVE PRIVATE AND PUBLIC INTERNATIONAL LAW. Oxford University Press, New York, USA, (5th ed. 1992). ISBN 0198256507.	82
McLACHLAN QC, CAMPBELL ET AL. (Cited as: <i>McLachlan</i> )	INTERNATIONAL INVESTMENT ARBITRATION. Oxford University Press, New York, USA (2007). ISBN 9780199286645.	<i>passim</i>
MOURI, ALLAHYRA (Cited as: <i>Mouri</i> )	THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-US CLAIMS TRIBUNAL. Martinus, Nijhoff Publishers, Dordrecht, The Netherlands (1994). ISBN 0792926547.	125, 127, 131, 133
REDFERN, ALAN AND HUNTER, MARTIN (Cited as: <i>Redfern &amp; Hunter</i> )	LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION. Sweet and Maxwell Ltd., London, UK (4th ed. 2004). ISBN 0421862408.	89, 137
REED, LUCY, PAULSSON, JAN AND BLACKABY, NIGEL. (Cited as: <i>Reed</i> )	GUIDE TO ICSID ARBITRATION. Kluwer Law International, The Hague, The Netherlands (2004). ISBN 9041120939.	37, 66, 67, 65
SCHREUER, CHRISTOPH H. (Cited as: <i>Schreuer I</i> )	THE ICSID CONVENTION: A COMMENTARY. Cambridge University Press, Cambridge, UK (2001). ISBN 0521803470.	34, 37, 50

Cited in ¶¶

## SCHOLARLY WORKS AND ARTICLES

Appleton, Barry (Cited as: <i>Appleton</i> )	<i>Regulatory Takings: The International Law Perspective</i> , in NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL, Vol. 11, 35 (2002).	119, 120, 137, 143
Broches, Aron (Cited as: <i>Broches I</i> )	<i>The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction</i> , in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol. 5, 263 (1966).	33, 34
Broches, Aron (Cited as: <i>Broches II</i> )	<i>Settlement of Disputes Arising out of Investment in Developing Countries</i> , in INTERNATIONAL BUSINESS LAWYER, Vol. 11, 206 (1983).	119
Brunetti, Maurizio (Cited as: <i>Brunetti</i> )	<i>The Iran-United States Claims Tribunal, NAFTA Chapter 11 and the Doctrine of Indirect Expropriation</i> , in CHICAGO JOURNAL OF INTERNATIONAL LAW, Vol. 2, 203 (2001).	137
Buffenstein, Daryl Rodney (Cited as: <i>Buffenstein</i> )	<i>Foreign Investment Arbitration and Joint Ventures</i> , in NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION, Vol. 5, 191 (1980).	50
Collins, David (Cited as: <i>Collins</i> )	<i>Review of 2006 ICSID Decisions</i> , in MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW, Vol. 3, Issue 3, 111 (2006).	143
Cremades, Bernardo M. (Cited as: <i>Cremades I</i> )	<i>Arbitration Between States and Investors: Some Jurisdictional Issues</i> , in BUSINESS LAW INTERNATIONAL, Issue. 2, 157 (2001).	32, 33
Cremades, Bernardo M. (Cited as: <i>Cremades II</i> )	<i>Clarifying the Relationship Between Contract and Treaty Claims in Investor-State Arbitrations</i> , in BUSINESS LAW INTERNATIONAL, Issue 3, 207 (2003).	44, 66
Dolzer, Rudolf & Bloch, Felix (Cited as: <i>Dolzer</i> )	<i>Indirect Expropriation: Conceptual Realignments?</i> , in INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL, Vol. 5, 155 (2003).	120, 136, 137

Garcia-Bolivar, Omar E. (Cited as: <i>Garcia-Bolivar I</i> )	<i>Comments on Some ICSID Decisions on Jurisdiction</i> , in INTERNATIONAL BUSINESS LAWYER, Vol. 32, 167 (2004).	33, 34, 52
Garcia-Bolivar, Omar E. (Cited as: <i>Garcia-Bolivar II</i> )	<i>Investor-State Disputes in Latin America: A Judgment on the Interaction Between Arbitration, Property Rights Protection, and Economic Development</i> , in LAW AND BUSINESS REVIEW OF THE AMERICAS, Vol. 13, 67 (2007).	58, 125, 149
Kirgis, Frederic L (Cited as: <i>Kirgis</i> )	<i>International Agreements and U.S. Law</i> , in ASIL INSIGHTS, The American Society of International Law, (May 1997), <a href="http://www.asil.org/insights/insigh10.htm">http://www.asil.org/insights/insigh10.htm</a> .	96
Litvinoff, Saul (Cited as: <i>Litvinoff</i> )	<i>"Creeping" Expropriation</i> , in REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO, Vol. 33, 217 (1964).	119, 148
Myrsaliev, Nurzat (Cited as: <i>Myrsaliev</i> )	<i>Jurisdictional Challenges in Investor-State Arbitration: Analysis of Typical Provisions in Bilateral Investment Treaties, With Specific Reference to the Treaty Between the US and the Kyrgyz Republic</i> , in EUROPEAN JOURNAL OF LAW REFORM, Vol. 7, 429 (2005).	44, 48
Paulsson, Jan (Cited as: <i>Paulsson</i> )	<i>Arbitration Without Privity</i> , in ICSID REVIEW FOREIGN INVESTMENT LAW JOURNAL, Vol. 10 No. 2, 232 (1995).	33
Paust, Jordan J. (Cited as: <i>Paust I</i> )	<i>Discrimination on the Basis of Resident Status and Denial of Equal Treatment: A Reply to Professor Weintraub's Response</i> , in HOUSTON JOURNAL OF INTERNATIONAL LAW, Vol. 27, 1241 (2005) available at <a href="http://www.entrepreneur.com/tradejournals/article/131007466_1.html">http://www.entrepreneur.com/tradejournals/article/131007466_1.html</a> .	95
Paust, Jordan J. (Cited as: <i>Paust II</i> )	<i>Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights</i> , in DEPAUL LAW REVIEW, Vol. 42, 1257 (1993).	95, 96

Reinisch, August (Cited as: <i>Reinisch</i> )	<i>Expropriation</i> , in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (P. Muchlinski, F. Ortino, Ch. Schreuer eds.) (forthcoming) <i>pre-published version available at</i> <a href="http://www.ila-hq.org">http://www.ila-hq.org</a> .	132, 133, 137, 143
Schreuer, Christoph H. (Cited as: <i>Schreuer II</i> )	<i>Fair &amp; Equitable Treatment</i> , in TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 2, issue 5 (2005).	74, 143
Suarez Anzorena, C. Ignacio, ET AL (Cited as: <i>Suarez</i> )	<i>International Commercial Dispute Resolution</i> , in THE INTERNATIONAL LAWYER, Vol. 40, 251 (2006).	83, 89
Tupman, Michael W. (Cited as: <i>Tupman</i> )	<i>Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes</i> , in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Vol. 35, 813 (1986).	44, 64
Vuylsteke, Charles (Cited as: <i>Vuylsteke</i> )	<i>Foreign Investment Protection and ICSID Arbitration</i> , in GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, Vol. 4, 343 (1974).	50

### LIST OF LEGAL SOURCES

Cited in ¶¶

#### TREATIES AND INTERNATIONAL MATERIALS

The Convention, ICSID Convention, or Washington Convention	<i>Convention on the Settlement of Investment Disputes between States and Nationals of Other States</i> done in Washington, D.C., USA on March 18, 1965 in INTERNATIONAL LEGAL MATERIALS, Vol. 4, 532 (1965) also in ICSID REPORTS Vol. 1, 3 (1993) <i>available at</i> <a href="http://icsid.worldbank.org/ICSID/Index.jsp">http://icsid.worldbank.org/ICSID/Index.jsp</a> .	<i>passim</i>
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> done in Vienna, Austria on May 23, 1969 in UNITED NATIONS TREATY SERIES, Vol. 1155, 331.	57, 128

*Covenant* *International Covenant on Civil and Political Rights* of December 16, 1966, United Nations General Assembly Resolution 2200A (XXI), in UNITED NATIONS TREATY SERIES, Vol. 999, 171 *also available as* United Nations Document A/6316 (1966) (entered into force Mar. 23, 1976). 92, 116

*ECHR First Protocol* *European Convention on Human Rights, First Protocol*, done in Paris, France on March 20, 1952 in UNITED NATIONS TREATY SERIES, Vol. 213, 262. 119

Cited in ¶¶

**TREATY REPORTS**

Report of the Executive Directors. (Cited as: *Report*) International Bank for Reconstruction and Development: Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States in INTERNATIONAL LEGAL MATERIALS, Vol. 4, 524 (1965) *also in* ICSID REPORTS Vol. 1, 23 (1993) *available at* <http://icsid.worldbank.org/ICSID/Index.jsp>. 31, 32, 37, 40

Cited in ¶¶

**ARBITRATION AWARDS****ICSID**

*American Manufacturing and Trading, Inc. v. Republic of Zaire* (Cited as: *American Manufacturing*) Award of February 21, 1997 in ICSID REPORTS Vol. 5, 11 (2002) *available at* <http://icsid.worldbank.org> (search for Case No. ARB/93/1). 105, 113, 118

*Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* (Cited as: *Bayindir*) Decision on Jurisdiction of November 14, 2005 ICSID ARB/03/29 *available at* [www.investmentclaims.com](http://www.investmentclaims.com). 61

<i>Camuzzi International SA v. Republica Argentina</i> (Cited as: <i>Camuzzi</i> )	Decision on Objections to Jurisdiction of June 10, 2005 (Spanish Original) <i>available only in Spanish at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/03/7) <i>available at</i> <a href="http://www.investmentclaims.com">www.investmentclaims.com</a> (translation).	55
<i>Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic</i> (Cited as: <i>CSOB</i> )	Decision on Jurisdiction of May 24, 1999 in ICSID REPORTS, Vol. 5, 330 (2002) <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/97/4).	31, 44
<i>CMS Gas Transmission Company v. The Argentine Republic</i> (Cited as: <i>CMS GAS</i> )	Award of May 12, 2005 in INTERNATIONAL LEGAL MATERIALS, Vol. 44, 1205 (2005) <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/01/8).	89
<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal (Formerly Compagnie Générale Des Eaux) v. Argentine Republic</i> (Cited as: <i>Vivendi</i> )	Decision on Annulment of July 3, 2002 in ICSID REPORTS, Vol. 6, 340 (2005); INTERNATIONAL LEGAL MATERIALS, Vol. 41, 1135 (2002) <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/97/3).	67, 68
<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> (Cited as: <i>Maffezini</i> )	Decision on Jurisdiction of January 25, 2000 in ICSID REPORTS, Vol. 5, 396, <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/97/7).	37, 48, 49, 55
<i>Eudoro Armando Olguín v. Republic of Paraguay</i> (Cited as: <i>Olguin</i> )	Decision on Jurisdiction of August 8, 2000 (Spanish Original) in ICSID REPORTS, Vol. 6, 156 (2005) (translation) also in ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL, Vol. 18, 133 (2003) (translation) <i>available only in Spanish at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/98/5).	31
<i>Fedax N.V. v. Republic of Venezuela</i> (Cited as: <i>Fedax</i> )	Decision on Objections to Jurisdiction of July 11, 2007 in ICSID REPORTS Vol. 5, 186 (2002); <i>also available in</i> INTERNATIONAL LEGAL MATERIALS, Vol. 37, 1378 (1998).	44

<i>Goetz &amp; ors v. Republic of Burundi</i> (Cited as: <i>Goetz</i> )	Award of February 10, 1999, Part 1, Decision on Liability of September 2, 1998 (French Original) in ICSID REPORTS, Vol. 6, 5 (2004) (translation) <i>also available at</i> ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL, Vol. 15, 457 (2000) (translation).	85
<i>Impreglio S.p.A. v. Islamic republic of Pakistan</i> (Cited as: <i>Impreglio</i> )	Decision on Jurisdiction of April 22, 2005 in ICSID REPORTS, Vol. 12, 242 (2007) <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/03/3).	66
<i>Metalclad Corporation v. United Mexican States</i> (Cited as: <i>Metalclad</i> )	Award of August 30, 2000 in ICSID REPORTS, Vol. 5, 212, <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB(AF)/97/1).	89, 119
<i>SGS Société Générale de Surveillance S.A. v. Republic of the Philippines</i> (Cited as: <i>SGS</i> )	Decision on Objections to Jurisdiction of January 29, 2004 in ICSID REPORTS, Vol. 8, 518 (2005) <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/02/6).	67
<i>Tecnicas Medioambientales Tecmed S.A. v. United Mexican States</i> (Cited as: <i>Tecmed</i> )	Award of May 29, 2003 in ICSID REPORTS, Vol. 10, 138 (2006) <i>also available at</i> INTERNATIONAL LEGAL MATERIALS, Vol. 43, 133 (2004).	104, 107, 118
<i>Tokios Tokelés v. Ukraine</i> (Cited as: <i>Tokios Tokelés</i> )	Decision on Jurisdiction of April 29, 2004, in ICSID REPORTS, Vol. 11, 313 (2007) <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/02/18).	33
<i>Tradex Hellas S.A. v. Republic of Albania</i> (Cited as: <i>Tradex</i> )	Decision on Jurisdiction of December 24, 1996 in ICSID REPORTS, Vol. 5, 43 (2002) <i>available at</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/94/2).	31
<i>Wena Hotels Ltd. v. Arab Republic of Egypt</i> (Cited as: <i>Wena</i> )	Award of August 8, 2000 in ICSID REPORTS, Vol. 6, 89 (2004), <i>affirmed in annulment</i> , ICSID Reports Vol. 6, 129 (2004) <i>also available at</i> INTERNATIONAL LEGAL MATERIALS, Vol. 41, 896 (2002) <i>and</i> <a href="http://icsid.worldbank.org">http://icsid.worldbank.org</a> (search for Case No. ARB/98/4).	105, 108

***Ad Hoc Arbitration Tribunals***

<i>Foremost Tehran, Inc. v. Government of the Islamic Republic of Iran</i> (Cited as: <i>Foremost Tehran</i> )	Award of the Iran-United States Claims Tribunal, Chamber One No. 220-37/231-1 of April 11, 1986 (Lagergren P.) <i>reprinted in</i> IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS, Vol. 10, 228.	138, 144, 145, 146
<i>Occidental Exploration and Production Co. v. Ecuador</i> (Cited as: <i>Occidental</i> )	Award of July 1, 2004, London Court of International Arbitration Case No. UN 3467, ICC 202 (2004) <i>available at</i> <a href="http://www.investmentclaims.com">www.investmentclaims.com</a> .	89
<i>Phelps Dodge Corp. and Overseas Private Investments Corp. v. The Islamic Republic of Iran</i> (Cited as: <i>Phelps Dodge</i> )	Award of the Iran-United States Claims Tribunal, Chamber Two No. 217-99-2 of March 19, 1986 (Briner P.) <i>reprinted in</i> IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS, Vol. 10, 121.	137
<i>Ronald S. Lauder v. The Czech Republic</i> (Cited as: <i>Lauder</i> )	Final Ad Hoc Arbitration Award of September 3, 2001 in ICSID REPORTS, Vol. 9, 66 (2006) <i>available at</i> <a href="http://www.investmentclaims.com">www.investmentclaims.com</a> .	61, 62, 120
<i>SD Myers Inc. v. Canada</i> (Cited as: <i>SD Myers</i> )	First Partial Ad hoc Arbitration Award and Separate Opinion of November 13, 2000, UNCITRAL Arbitration Rules, IIC 249 (2000) <i>available at</i> <a href="http://www.investmentclaims.com">www.investmentclaims.com</a> .	86, 88

Cited in ¶¶

**JUDICIAL DECISIONS*****The International Court of Justice or World Court***

<i>Barcelona Traction, Light and Power Co., Ltd.</i> (Cited as: <i>Barcelona Traction</i> )	Case Concerning <i>Barcelona Traction, Light and Power Co., Ltd.</i> (Belgium v. Spain), Judgment of February 5, 1970 in INTERNATIONAL COURT OF JUSTICE REPORTS, VOL. 1970, 3.	50
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<i>Elettronica Sicula S.p.A.</i> (Cited as: <i>ELSI</i> )	Case Concerning <i>Elettronica Sicula S.p.A. (ELSI)</i> (United States of America v. Italy), Judgment of July 20, 1989 in INTERNATIONAL COURT OF JUSTICE REPORTS, Vol. 1989, 15.	114
<i>Oil Platforms</i> (Cited as: <i>Oil Platforms</i> )	<i>Oil Platforms</i> (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment of December 12, 1996, in INTERNATIONAL COURT OF JUSTICE REPORTS, Vol. 1996 (II), 803.	67, 74
<b><i>United States Federal and State Courts Combined</i></b>		
<i>Bolling v. Sharpe</i>	United States Reports, Vol. 347, 497 (1954).	85
<i>Brown v. Board of Education</i>	United States Reports, Vol. 347, 483 (1954).	85
<i>Marx v. Akers</i>	New York Reports, Second Series, Vol. 88, 189 (1996).	63
<i>Strauder v. West Virginia</i>	United States Reports, Vol. 100, 303 <i>also in</i> United States Supreme Court Reports, Lawyer’s Edition, Vol. 25, 664 (1879).	85
<i>Washington v. Davis</i>	United States Reports, Vol. 426, 229 (1976).	85

Cited in ¶¶

**OTHER AUTHORITATIVE MATERIALS**

Restatement (3rd.) of the Foreign Relations Law of the United States (1987) (Cited as: <i>R3FR</i> )	94
United States Federal Rules of Civil Procedure. (Cited as: <i>Fed. R. Civ. P.</i> )	63
Black’s Law Dictionary (8th ed. 2004) (Cited as: <i>Black’s Law Dictionary</i> )	97, 147

All references to “Record” are to the FDI Moot Problem as published by the Organization on its web site. The problem has been assign page numbers. Excluding the cover page and the attached Treaties it has 13 pages.

All references to “Procedural Order” refer to the subsequent rounds of clarifications held in June (Procedural Order No. 1) and August (Procedural Order No. 2), 2008.

## **ISSUES PRESENTED**

- 1.- Does the International Centre for Settlement of Investment Disputes (ICSID) have jurisdiction over disputes between Vanguard International (Vanguard) and the government of the Republic of Calpurnia (Calpurnia)?
  
- 2.- Has Calpurnia violated its international obligations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Convention), the Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments (Calpurnia-Gaul BIT), or other relevant international law, by:
  - (i). Discriminating against Vanguard, based only on xenophobic attitudes; and
  - (ii). Unlawfully interfering with Vanguard's investment as to constitute expropriation?

## **STATEMENT OF FACTS**

- 3.- In August 1995, the Federated States of Gaul (Gaul) and Calpurnia signed a treaty for the promotion and protection of investments aimed at intensifying economic cooperation by the creation and support of favorable conditions for investment.
  
- 4.- Vanguard is a leading mobile telecom corporation with headquarters in Gaul's capital, Nova Parigi. It has operations in several countries and also owns the well known "Vanguard International" trademark.
  
- 5.- Early in 1997, Vanguard participated in the creation of VanCal, a Joint Venture Company headquartered in Calpurnia's capital, San Inocente de Irkoutsk. VanCal's purpose was to provide mobile services in Calpurnia. Vanguard's ownership in VanCal varied significantly over time, to current levels of 30%. In addition, a trustee for Vanguard, Ms. Francesca Pescara, owns 1% of VanCal shares. The remaining 69% is divided between the State Fund for Commerce and Development in Calpurnia (SFCDC) and Calpurnian nationals. The SFCDC owns 30% and holds the voting rights for 22% of VanCal's stock.

6.- VanCal has a typical corporate structure. The shareholders have the ultimate decision making power. A board of directors, of six (6) members, conducts the administration and “business” decision making. At the time of the events that led to this dispute, Vanguard had two (2) representatives in VanCal’s board; Ms. Pescara, also Managing Director, and Mr. Neil Shepherd. SFCDC had three (3) and there was one (1) non-affiliated Calpurnian citizen, Mr. Korchnoi.

7.- VanCal also has two (2) contractual relations with Vanguard. A license to the “Vanguard International” trademark and a Technical Assistance Agreement (TAA), managed by Mr. David Kolowenko, VanCal’s chief technical officer.

8.- Between 1997 and 2004 Vanguard exercised its shareholder rights, voted and appointed members for the board of directors. It also fulfilled its obligations under the TAA. VanCal paid its royalties for the trademark license and for the services under the TAA. However, since November 2003, when the Conservative Conscience of Calpurnia (CCC) won an absolute majority in the Calpurnian Parliament, things changed.

9.- The CCC advocates for a return to traditional values, hostile towards more liberal societies. This rhetoric has caused deterioration in Calpurnia’s relations with several states, including Gaul, amid allegations of espionage and destabilization. The CCC accused many Gaul citizens of espionage, including Vanguard’s representatives in VanCal, Ms. Pescara and Mr. Kolowenko, both Gaul citizens.

10.- Under the CCC, the SFCDC, owner and holder of voting rights of 52% of VanCal shares, started playing a major role in VanCal. At the October 14, 2004 shareholders meeting, the Calpurnian shareholders elected two (2) SFCDC representatives for VanCal’s board, Dr. Swift and Mr. Shelly. Merely a month later, on November 15, 2004, Ms. Pescara resigned from the board and her position as Managing Director, in response to the Calpurnian government’s failure to protect her individual rights from harassment. She, however, appointed Mr. Rindler as her proxy. By February 17, 2005 Mr. Rindler was holding proxy for both of Vanguard’s directors.

11.- Later, VanCal's board discussed ways to appropriate the 2004 profit without distributing dividends to the "foreign" shareholders. The board discussed the creation of a "reserve fund for worker's severance pay" and distributions in shares. During the February 17, 2005 meeting, one of SFCDC's representatives, Mr. Poe, said "[b]y this action, we can hold the amount paid to the foreigners to the minimum." On March 10, 2005, the board, in the best interest of Calpurnian shareholders, agreed to distribute a "reasonable percentage" of profits. They also imposed a suspension of payment of dividends to foreign shareholders, mainly Gauloises. The reason was an alleged dispute between Calpurnia and Gaul. No legal authority supported the decision. By April 15, 2005, VanCal had declared dividends for 2004, 18% in cash and 10% in stock.

12.- Soon after, on May 21, 2005, Vanguard requested via e-mail to Mr. Korchnoi, Ms. Pescara's substitute as VanCal's Managing Director, that its dividend be placed in a separate bank account. Mr. Korchnoi replied explaining that VanCal could not pay any sum of money to foreign shareholders. On June 5, 2005, via email addressed to Mr. Swift and Mr. Korchnoi, Vanguard demanded the board to inform it directly of their decision and explain the legal basis for it. This demand was never answered.

13.- Later, in October 2005, Vanguard issued proxies to Mr. Rindler to participate in the October 11th shareholder meeting. The meeting did not take place until November 16, 2005. At that time, VanCal's administration rejected the proxies based on formal invalidity, although VanCal had accepted proxies in the same form for previous meetings. Having ousted Mr. Rindler from the shareholders meeting, the Calpurnian shareholders voted Ms. Pescara off the board. This action left Vanguard with only one representative on the board and prevented it from electing a replacement, reducing its overall influence.

14.- Almost eight (8) months later, at the June 6, 2006 shareholder's meeting, Vanguard was able to appoint new board members. By this time Mr. Shepherd had also resigned and Vanguard appointed two (2) substitutes, Mr. Hunter and Mr. Fowler. In the meantime, Vanguard's flow of information from VanCal was completely cut-off. Dr. Swift, chairman of VanCal, instructed Mr.

Korchnoi to cease sending financial statements and any other information to Gaulois citizens, including Vanguard.

15.- VanCal declared cash dividends from 2004 to 2007. It paid those dividends to Calpurnian shareholders and refused to pay them to Vanguard, crediting them to Vanguard's account in VanCal's books. This was done without legal authority from VanCal's Articles of Association or Calpurnian legislation. Ms. Pescara received like treatment from the board when she requested the transfer of her percentage of dividends. She petitioned the Commercial Court of San Inocente de Irkoutsk to force the transfer. However, her demand was summarily dismissed. The Court considered her a mere nominee with no interest and thus no standing to bring the action.

16.- During the same period of time, 2004 to 2007, VanCal failed to pay the royalties for the trademark license and other amounts due under the TAA.

17.- These facts rose to the level of expropriation of Vanguard's investment in VanCal on May 27, 2005.

18.- In addition, since the CCC assumed power, Vanguard's representatives in Calpurnia were subject to constant harassment from the Calpurnian Security Directorate (CSD). The CSD conducted searches in Ms. Pescara and Mr. Kolowenko's private houses and also seized personal property. There were three (3) police searches, December 7, 2003, June 3, and July 15, 2004, prompted by "anonymous tips" of espionage. The police did not request and were not granted any search warrants but conducted thorough and extremely long searches, lasting several hours each time.

19.- No charges were ever filed against Vanguard's representatives. Applications to the Calpurnian Constitutional Court to have the searches declared unlawful and seek compensation were summarily dismissed.

20.- The searches were followed, the very next day, by press releases which stated that CSD, in their counter-espionage operations, searched the homes of Ms. Pescara and Mr. Kolowenko. The press releases agitated public sentiment against Vanguard and its agents, particularly from organizations such as the Conservative Conscience of Calpurnia Women's League (CCCWL).

21.- The CCCWL picketed Ms. Pescara's home on 1-2 January, 15-17 March, 5-7 June, 17-19 July and 25-28 October 2004. Altogether, there were fifteen (15) days in which Ms. Pescara was essentially held hostage in her home. The property was surrounded by a threatening mob holding insulting signs and constantly screaming "threatening" chants, audible within the home, during day and night. The police declined to remove the protesters and ignored Ms. Pescara's requests for help.

22.- Finally, in September 2004, Ms. Pescara's application for renewal of a "three-year business visa" was denied. She was verbally advised that when her current business visa expires, she would have to enter Calpurnia under the visa waiver program for tourists.

23.- Based on these abuses, Vanguard, by letter dated February 5, 2007, addressed to Mr. Poe (SFCDC), complained of a *de facto* expropriation by Calpurnia and demanded fair and just compensation. The letter also requested Mr. Poe to transmit the complaint to the appropriate Ministers. Mr. Poe refused to involve the government in a dispute that he described as "merely an internal shareholder dispute."

24.- On July 31, 2007, Vanguard requested ICSID arbitration under Article 36 of the Convention and Article 11 of the Calpurnia-Gaul BIT.

## **SUMMARY OF THE ARGUMENT**

25.- ICSID has jurisdiction over this dispute under Article 25 of the Convention. The parties to this dispute have manifestly consented to the Centre's jurisdiction. In addition, the Centre has subject matter jurisdiction (SMJ), as well as personal jurisdiction in this dispute. All timing

requirements have been satisfied and the jurisdictional limitations of the Calpurnia-Gaul BIT are not applicable.

26.- Based on the Calpurnia-Gaul BIT, Calpurnia has irrevocably consented to the Centre's jurisdiction. The BIT also allows Vanguard to select the forum that will hear the dispute. The Centre has SMJ because the dispute is legal in nature and arises directly out of an investment. Also, the Centre's personal jurisdiction is satisfied, because the dispute arose between a contracting state (Calpurnia) and a national of another contracting state (Vanguard).

27.- In addition, the Convention and the Calpurnia-Gaul BIT's timing requirements were satisfied. Here, the dispute preceded any attempt to invoke the Centre's jurisdiction; the applicability of the BIT's "cooling-off" period of eighteen (18) months is questionable; and Vanguard did not resort to Calpurnian courts for relief of any of its claims.

28.- Calpurnia has violated its international obligations by discriminating against Vanguard. This discrimination is abundantly proved. The evidence shows that VanCal's board suspended payment of dividends to foreign shareholders, particularly Gaul citizens. Also, Calpurnia prevented the lawful transfer of Vanguard's returns according to the BIT. Such discrimination led Calpurnia to violate several established international law standards. The evidence shows that Calpurnia violated both the Fair and Equitable Treatment standard (FET) as well as the National Treatment standard (NT) and also failed to comply with the Full Protection and Security standard (FPS) *vis-à-vis* Vanguard and its investors.

29.- Lastly, Vanguard's investment was expropriated by Calpurnia's unlawful and constant interference. Vanguard lost significant value and control over its investment. Such interference effectively neutralized the benefit of Vanguard's investments and its reasonable investment expectations were spoiled. Moreover, the Calpurnian government's actions were discriminatory and applied disproportionately.

## ARGUMENTS

### PART I: THE CENTRE'S JURISDICTION

#### I. THE CENTRE HAS JURISDICTION OVER THIS DISPUTE.

30.- The Centre has jurisdiction under Article 25 of the Convention. Article 25 requires (i) consent by the parties; (ii) SMJ, including a legal dispute arising directly out of an investment; and (iii) personal jurisdiction, requiring the dispute to be between a contracting state and a national of another contracting state.<sup>1</sup> These three (3) requirements are met, thus giving the Centre the authority to appoint this Tribunal which will then be able to assert its own competence<sup>2</sup> and adjudicate the merits of this dispute.

##### A. ALL PARTIES CONSENTED TO THE CENTRE'S JURISDICTION.

31.- "Consent is the corner stone of the jurisdiction of the Centre."<sup>3</sup> As the *Report* informs:

"[C]onsent may be given, for example, in a clause included in an *investment agreement*, providing for the submission to the Centre of future disputes arising out of that agreement ... . Nor does the Convention require that consent of both parties be expressed in a single instrument."<sup>4</sup> (Emphasis added).

##### a. Gaul and Calpurnia Manifested Consent to the Centre's Jurisdiction.

32.- Both Calpurnia and Gaul are Contracting States under the Convention.<sup>5</sup> Also, Article 11(2) of the Calpurnia-Gaul BIT contains the parties' irrevocable consent to submit any dispute with the host state to arbitration.<sup>6</sup> Therefore, the country's consent, manifested in a multilateral treaty or an international convention, is fully satisfied.<sup>7</sup>

##### b. Vanguard Consented to the Centre's Jurisdiction.

<sup>1</sup> See Art. 25 of the ICSID Convention.

<sup>2</sup> Art. 41(1) of the ICSID Convention.

<sup>3</sup> *Report*, at ¶ 23.

<sup>4</sup> *Report*, at ¶ 24; See generally *Olguin*, *CSOB*, and *Tradex* cases.

<sup>5</sup> Record, at 3.

<sup>6</sup> See Art. 11(2) of the Calpurnia-Gaul BIT.

<sup>7</sup> See *Cremades I*, at 160 (explaining that there are two levels of consent, country and investor).

33.- When signing the Calpurnia-Gaul BIT, each the state agreed to submit to arbitration a number of specifically named disputes.<sup>8</sup> This constitutes an offer to arbitrate open for acceptance by the investor.<sup>9</sup> Such is an application of the so called “Arbitration without Privity” principle, which has been accepted by many ICSID tribunals.<sup>10</sup> Here, by its July 31, 2007 request for arbitration, Vanguard has accepted Calpurnia’s offer to Arbitrate, and thus consented to the Centre’s jurisdiction.

**c. Consent was Written.**

34.- Article 25(1) of the Convention further requires that consent be in writing.<sup>11</sup> Calpurnia gave its written consent in the ratification, acceptance or approval of the Convention and also in the Calpurnia-Gaul BIT. Vanguard gave its written consent when petitioning for arbitration.<sup>12</sup> Consequently, the writing requirement is fully satisfied.

**B. THE CENTRE HAS SUBJECT MATTER JURISDICTION**

35.- For the Centre to have SMJ the dispute has to be “legal” and arise “directly” out of an investment.<sup>13</sup> Here, both requirements are satisfied.

**a. The Dispute is “Legal.”**

36.- Under the definition of “legal dispute,” as intended by the Convention’s framers and as applied by the Centre’s Arbitral Tribunals, all of Vanguard’s claims are of a legal nature creating a cognizable legal dispute between the parties.

37.- The *Report* states that by using the expression “legal dispute” the Convention implied that the dispute must refer to the scope, existence, and/or exercise of a legally enforceable right.<sup>14</sup>

<sup>8</sup> See *Garcia-Bolivar I*, at 171; See *Cremades I*, at 161 (explaining that the parties must also “consent to submit to ICSID the settlement of any dispute [that might arise] from this defined legal relation”).

<sup>9</sup> See *Broches I*, at 268-69.

<sup>10</sup> See generally *Paulsson*; See also *Tokios Tokelés*, at 337, ¶ 98.

<sup>11</sup> See Art. 25(1) of the ICSID Convention.

<sup>12</sup> There is wide academic and jurisprudential consent in this regard. See *Schreuer I*, at 218, ¶ 303; See also *McLachlan*, at 53-54, ¶¶ 3.25-.28; See also *Broches I*, at 272 (explaining the legislative history of the Convention and how the drafters considered that an ad hoc submission of the dispute to the Center was sufficient consent); See also *Garcia-Bolivar I*, at 171.

<sup>13</sup> See Art. 25(1) of the ICSID Convention.

In order to clarify the definition of “legal dispute,” ICSID tribunals have relied on case law from the International Court of Justice (ICJ). The *Maffezini*<sup>15</sup> case quoted the ICJ’s definition of legal dispute as a “disagreement on a point of law or fact, a conflict of legal views or interests between parties” and concluded that:

“dispute must relate to clearly identified issues between the parties and must not be merely academic. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim”<sup>16</sup>

38.- The nature of the dispute between Vanguard and Calpurnia fits this definition of “legal dispute.” All issues in this petition refer to the scope, existence, and/or exercise of Vanguard’s legal rights. Vanguard has the right under the Convention, the Calpurnia-Gaul BIT, and other relevant international provisions to demand it not be discriminated against,<sup>17</sup> to the free use and enjoyment of its investment,<sup>18</sup> and to freely transfer any payments, fruits and products of its investment.<sup>19</sup> Finally, Vanguard has the right to demand full and constant security for its investment and its employees, agents and representatives.<sup>20</sup>

39.- Therefore under the definition of “legal dispute,” as intended by the framers of the ICSID Convention and as applied by the Centre’s tribunals, all of Vanguard’s claims are of a legal nature creating a cognizable legal dispute between the parties.

#### **b. The Dispute Arises “Directly” out of an “Investment” in Calpurnia**

40.- The next requirement for the Centre’s SMJ is that the dispute arises “directly” out of an “investment.” First it is necessary to determine what an “investment” is. The *Report* states no attempt was made to define “investment” because, given the consent requirement, the contracting parties could define which disputes would be considered “investments” and which ones would not.<sup>21</sup>

<sup>14</sup> See *Report*, at ¶ 26 (adding the obligation and/or the nature, extent or amount of the compensation or reparation accruing from a breach of a legally enforceable right or obligation in the definition of legal dispute). See also *Reed*, at 15.

<sup>15</sup> See *Maffezini*, at 417, ¶ 94 (quoting International Court of Justice: Case concerning East Timor, ICJ. Reports 1995, 90, ¶ 22).

<sup>16</sup> *Id.* (quoting *Schreuer I*, at 337).

<sup>17</sup> See Art. 2 of the Calpurnia-Gaul BIT.

<sup>18</sup> See Art. 4 of the Calpurnia-Gaul BIT.

<sup>19</sup> See Art. 8 of the Calpurnia-Gaul BIT.

<sup>20</sup> See Art. 2(2) of the Calpurnia-Gaul BIT.

<sup>21</sup> *Report*, at ¶ 27.

41.- The Calpurnia-Gaul BIT defines investment and investor.<sup>22</sup> The definition states that an investment is “every kind of asset,” in particular, though not exclusively, “shares... or other form of participation in a company,”<sup>23</sup> and an “investor” is a person, national of a contracting party.<sup>24</sup> Here, Vanguard’s participation in VanCal falls squarely within those definitions

***(a) Vanguard’s Participation in VanCal is an Investment.***

42.- The Calpurnia-Gaul BIT gives an illustrative list of assets that should be considered investments and, as mentioned, shares are among them.<sup>25</sup> Vanguard’s investment in Calpurnia is precisely of this kind. Vanguard joined in the creation of VanCal, invested in its shares and currently owns 30% of the company.<sup>26</sup>

43.- Despite changes in Vanguard’s level of participation in VanCal, its investment characterization does not change. Alterations in the form in which assets are invested or reinvested do not affect their character as investment.<sup>27</sup> Thus, Vanguard’s participation in VanCal is an investment and should be treated as such.

***(b) The Dispute Arises “Directly” out of Vanguard’s “Investment.”***

44.- The Convention further requires the dispute to arise “directly” from such “Investment.”<sup>28</sup> The Calpurnia-Gaul BIT defines investment and dispute broadly without particularity.<sup>29</sup> Thus, in determining whether a dispute arises directly from an investment, the *Fedax* Tribunal stated that the term “‘directly’ relate[d] to the ‘dispute’ and not to the ‘investment’.”<sup>30</sup> The *CSOB* Tribunal, construing the *Fedax* language, concluded that a:

<sup>22</sup> See Art. 1(1) and (3) of the Calpurnia-Gaul BIT.

<sup>23</sup> Art. 1(1)(b) of the Calpurnia-Gaul BIT.

<sup>24</sup> Art. 1(3) of the Calpurnia-Gaul BIT.

<sup>25</sup> See Art. 1(1)(b) of the Calpurnia-Gaul BIT.

<sup>26</sup> Record, at 3.

<sup>27</sup> See Art. 1(1) of the Calpurnia-Gaul BIT.

<sup>28</sup> Art. 25 of the ICSID Convention.

<sup>29</sup> See Art. 11 of the Calpurnia-Gaul BIT; See also *Myrsaliev* at 444-45 (explaining that the starting point of the “arising directly” analysis has to be the BIT).

<sup>30</sup> *Fedax*, at 192, ¶ 24; See also *Myrsaliev*, at 444-45; See also generally *Cremades II* (discussing that case law show that the Convention’s language should be freely, openly interpreted by the Tribunal); See also *Tupman*, at 822 (discussing the holding in the *Alcoa Minerals of Jamaica v. Government of Jamaica*, ICSID Case No. ARB/74/2).

“[D]ispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.”<sup>31</sup> (Emphasis added).

45.- Here, the dispute arises directly from an investment in Calpurnia because Vanguard owns shares in VanCal. Thus, based on the definitions set forth in the Calpurnia-Gaul BIT and case law, all the claims satisfy the Convention’s jurisdictional requirements.

### **C. THE CENTRE HAS PERSONAL JURISDICTION.**

#### **a. The Parties are a Contracting State and a National of Another Contracting State**

##### ***(a) Gaul and Calpurnia are Contracting States of the ICSID Convention.***

46.- Both Calpurnia and Gaul, are contracting states of the Convention,<sup>32</sup> this is not controverted. However, Calpurnia acted through the SFCDC.

##### ***(i) The SFCDC is the Calpurnian Government.***

47.- The SFCDC is an independent agency of the Calpurnian administration performing state functions and should be considered the Calpurnian government.

48.- Doctrine and jurisprudence have developed tests (the “functional” and the “structural” tests) to determine whether an agency can be considered the state.<sup>33</sup> In *Maffezini*, a Tribunal applied both tests in evaluating the nature of an agency, SODIGA. The “functional” test analyzed the intent of the Spanish government in creating SODIGA and concluded that Mr. Maffezini had made a *prima facie* case that SODIGA was a state entity.<sup>34</sup> In turn, the “structural” test evaluated SODIGA’s ownership and control, concluding that a “finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is

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<sup>31</sup> *CSOB*, at 352, ¶ 72.

<sup>32</sup> *Record*, at 3.

<sup>33</sup> *See Myrsalieva*, at 452 (citing *Schreuer*, at 151, ¶ 148).

<sup>34</sup> *Id.*, at 415-16, ¶¶ 82-86.

a State entity.”<sup>35</sup> The Tribunal cited the International Law Commission’s Draft Articles on State Responsibility, and considered that:

“The conduct of ... [an] entity which is not part of the formal structure of the State ... but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall be considered as an act of the State ..., provided the organ was acting in such capacity in the case in question.”<sup>36</sup>

49.- Here the SFCDC is outside the “formal” structure of the state, but yet it is an entity created, wholly owned, and fully controlled by Calpurnia. SFCDC also exercises authority under Calpurnian internal tax law,<sup>37</sup> granting tax benefit to Calpurnian shareholders who deposit their shares with the agency. This power reveals governmental action and gives rise to the *Maffezini* presumption that the SFCDC is a state entity.

***(ii) Vanguard’s Nationality Satisfies the ICSID Convention.***

50.- Vanguard satisfied the Convention’s nationality requirements. Article 25(b)(2) of the Convention requires legal entities to be nationals of a contracting state other than the host.<sup>38</sup> However, the Convention does not define “nationality.” In determining the nationality of an entity the Centre is free to “apply criteria of ownership and control.”<sup>39</sup> The Centre is not bound by decisions like the *Barcelona Traction* case where the ICJ held that place of incorporation or location of principal office were the only criteria to determine corporate nationality.<sup>40</sup> This conclusion is supported by scholars who argue that “there is no reason to extend the principles dictated in inter-state decisions [to] the Convention [which] is designed to replace the classical pattern of diplomatic protection.”<sup>41</sup>

<sup>35</sup> *Id.*, at 413, ¶ 77.

<sup>36</sup> *Id.*, at 414, ¶ 78.

<sup>37</sup> See Procedural Order No. 2, at ¶ 19.

<sup>38</sup> Art. 25(b)(2) of the ICSID Convention (That article has a second clause, which regards legal entities incorporated in the host state and requires them to be under foreign control, and the parties to agree to foreign treatment).

<sup>39</sup> *Buffenstein*, at 198-200; See also *Schreuer I*, at 277-81.

<sup>40</sup> See *Buffenstein*, at 199 (citing the International Court of Justice: Case concerning *Barcelona Traction, Light and Power*, ICJ. Reports 1970, 3, 42-49).

<sup>41</sup> See *Vuyksteke*, at 357.

51.- Here Article 25(b)(2) is fully satisfied. Vanguard is an existing legal entity, constituted in accordance with the laws of Gaul and has its seat in Nova Parigi.<sup>42</sup> Vanguard has the nationality of a contracting state (Gaul) other than the host (Calpurnia).

**D. VANGUARD'S CLAIM SATISFIES ALL *RATIONE TEMPORIS* REQUIREMENTS.**

**a. The Convention's Timing Requirements are Fully Satisfied.**

52.- The Convention requires the parties to consent to the Centre's jurisdiction before the dispute arise or the claim is presented.<sup>43</sup> Here the dispute could have arisen as early as October 14, 2004. On that date, VanCal's shareholders elected SFCDC representatives to VanCal's board and a discriminatory campaign started against Vanguard (the Discrimination claim); or as late as May 27, 2005, when Vanguard's investment was expropriated (the Expropriation claim). Either way, it is clear that Vanguard's July 31, 2007 request for arbitration was presented many years after Calpurnia's consent to arbitration. This satisfies the Convention's "critical"<sup>44</sup> date and therefore fulfills the Convention's temporal requirements.

**b. The BIT's Timing Requirement, the "Cooling Off" Period, does not Affect the Centre's Jurisdiction.**

53.- The Calpurnia-Gaul BIT contains a "cooling off" period requiring the parties to amicably settle any dispute, prior to opting for any of the dispute resolution methods provided for in the BIT.<sup>45</sup> Vanguard submits that this "cooling off" period is not applicable, either because a shorter period should be applied or because it is procedural.

**(a) A Two (2) Month "Cooling Off" Period is Applicable.**

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<sup>42</sup> Record, at 3; See Art. 1(3) of the Calpurnia-Gaul BIT.

<sup>43</sup> See Article 25 of the ICSID Convention; See also *Garcia-Bolivar I*, at 169.

<sup>44</sup> See *Garcia-Bolivar I*, at 169 (explaining that "[f]or ICSID jurisdiction, the claim has to be submitted after the date the other party consented, provided the dispute arose after the date the parties consented to be the critical date.").

<sup>45</sup> Article 11 of the Calpurnia-Gaul BIT.

54.- Vanguard submits that the Centre’s jurisdiction is based on the Calpurnia-Gaul BIT’s MFN clause, which enables the application of the two (2) month “cooling off” period of the Calpurnia-Flatland BIT. The Calpurnia-Gaul BIT’s MFN clause states that:

“[T]reatment which is not less favorable than the host Contracting Party accords to the investments and returns made ... by investors of any third State, whichever is the most favorable to the investor.”<sup>46</sup>

55.- This clause is complemented by Article 13 of the BIT. The parties agree that if, either by local law or international commitment, any of them adopts a regulation or rule that affords investors a “treatment more favourable than is provided for by [the BIT], such provisions shall prevail over [the] Agreement.”<sup>47</sup> Thus, Gaul citizens are entitled to the favorable treatment provided for in the Calpurnia-Flatland BIT.<sup>48</sup>

56.- The Calpurnia-Flatland BIT, in its Article 7, requires only a two (2) month “cooling off” period, which would have expired on April 6, 2007. This would have placed Vanguard’s request for arbitration, of July 31, 2007, well after the expiration of the “cooling off” period. Nevertheless, Calpurnia argues that the Calpurnia-Gaul BIT’s MFN clause is not applicable to dispute resolution mechanisms referred to in Article 7 of the Calpurnia-Flatland BIT. Such argument is groundless.

57.- The obligation imposed by the MFN clause permeates the full extent of the agreement. The agreement is not and cannot be compartmentalized to the investment, its management or enjoyment merely because the treaty language is not precise.<sup>49</sup> The *Vienna Convention* requires treaties to be interpreted establishing the plain meaning of the words, used “in their context and in the light of its object and purpose.”<sup>50</sup> If such interpretations are still ambiguous then other interpretative tools can be used.<sup>51</sup>

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<sup>46</sup> Art. 4(1) of the Calpurnia-Gaul BIT.

<sup>47</sup> Art. 13 of the Calpurnia-Gaul BIT (providing for an umbrella clause by which the host state guarantees to the investor the most favorable treatment available).

<sup>48</sup> See generally *Maffezini*; See also *Camuzzi*, at ¶¶ 26 - 28 and 34(iii).

<sup>49</sup> See Art. 4 of the Calpurnia-Gaul BIT.

<sup>50</sup> See Art. 31 of the Vienna Convention.

<sup>51</sup> *Id.*, at Art. 32.

58.- Here, a plain meaning interpretation would lead to ambiguity because the MFN clause does not expressly encompass the dispute resolution mechanisms. However, an evaluation of the BIT, based on the maxim of interpretation *noscitur a sociis*,<sup>52</sup> would lead us to conclude that the MFN clause is all inclusive.<sup>53</sup> This is because Article 1 of the BIT also applies to the MFN clause, extending its scope to the full text of the agreement. In addition, the purpose of the BIT, the desire to “intensify economic co-operation to the mutual benefit”<sup>54</sup> of Calpurnia and Gaul, and the desire “to maintain fair and equitable conditions for investments,”<sup>55</sup> necessarily leads us to conclude the MFN clause is not limited to Article 4 of the BIT.

59.- Thus, based on the Calpurnia-Gaul BIT’s MFN clause, the application of the Calpurnia-Flatland BIT’s two (2) month “cooling off” period is justified and validates the Centre’s jurisdiction.

***(b) In the Alternative, the “Cooling Off” Period is Merely Procedural in Nature.***

60.- The Calpurnia-Gaul BIT “cooling off” period is not always a bar to jurisdiction. The Centre’s precedent supports such conclusion for two main reasons. First, Calpurnia has not manifested any intention to negotiate and second, any attempt to demand action from the board of directors would be futile.

61.- First, *Bayindir* and *Lauder* held that the “cooling off” period is not jurisdictional in nature but procedural.<sup>56</sup> In *Bayindir* the Islamic Republic of Pakistan objected to the Centre’s jurisdiction based on the lack of a “trigger letter.” The Tribunal ruled that such obligation was only a formal requirement to engage in negotiations and thus procedural.<sup>57</sup> In addition, the *Lauder* Tribunal, based on similar facts, concluded that the “purpose of [the period] is to allow

<sup>52</sup> See *Farnsworth*, at 457 n.9, § 7.11 (explaining that *noscitur a sociis* allows the meaning of a word to be ascertained by reference to the rest of the text).

<sup>53</sup> See *Garcia-Bolivar II*, at 83 (explaining how the application of *ejusdem generis* is also possible to extend the application of the MFN clause).

<sup>54</sup> Preamble of the Calpurnia-Gaul BIT.

<sup>55</sup> *Id.*

<sup>56</sup> See *Bayindir*, at 16, ¶ 100; See generally *Lauder*.

<sup>57</sup> See *Bayindir*, at 16, ¶ 100.

the parties to engage in good-faith negotiations before initiating the arbitration.”<sup>58</sup> The Tribunal evaluated the “cooling off” period based on whether negotiations had started and whether the host state had a favorable, willing attitude towards amicable resolution of the investor’s claims. The Tribunal considered that because “there [was] no evidence that the [host state] would have accepted to enter into negotiation”<sup>59</sup> the waiting period did not operate as a limitation on jurisdiction.

62.- Here, since SFCDC started intervening in the operation of VanCal, Vanguard has been repeatedly ousted from board of directors and shareholders meetings. Any attempt to appraise SFCDC to engage in meaningful negotiations has been futile.<sup>60</sup> Even the attempt to propose alternative courses of action, e.g. deposit of dividends in a Bank, has proven fruitless.<sup>61</sup> Moreover, in this case as in *Lauder*, more than six (6) month passed between the Notice of Arbitration, dated July 31, 2007 and the initiation of the proceedings in March 2008. During this time the Calpurnian government never attempted to negotiate. All these facts reveal a lack of interest by Calpurnia to fairly resolve the dispute in this case.

63.- Second, the shareholder should be excused from demanding “the action ... desire[d] from the directors”<sup>62</sup> when such effort would be “futile.” Futility requires proving that the majority of directors were (i) “interested” in the result; (ii) have failed to exercise reasonable care; or (iii) could not have used sound business judgment, because the challenged transaction was egregious on its face.<sup>63</sup>

64.- Here, the SFCDC’s directors are interested in furthering Calpurnian policies regarding the exclusion of foreigners (particularly Gauloises) and being self-sufficient. Also, the board’s decision to pay dividends only to Calpurnian shareholders is so egregious on its face that it cannot be characterized as an exercise of sound business judgment. Thus, it is not surprising that

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<sup>58</sup> *Lauder*, at 89, ¶ 187.

<sup>59</sup> *Lauder*, at 89, ¶ 188.

<sup>60</sup> See Record, at 5-8.

<sup>61</sup> See Record, at 6 (communications between Claimant and Mr. Korchnoi of 21st and 27th May, 2005).

<sup>62</sup> Fed. R. Civ. P. § 23.1.

<sup>63</sup> See generally *Marx v. Akers*.

Mr. Poe declined to involve the government, stating that it had no authority.<sup>64</sup> These issues show that any attempt to request any action from the board, consistent with the BIT, would be futile. This excuses Vanguard's duty to demand action from the board.<sup>65</sup>

## II. VANGUARD IS FREE TO PURSUE THE ICSID ARBITRAL OPTION.

65.- Vanguard is free to pursue the ICSID arbitral option. However, the Calpurnia-Gaul BIT provides some limitations on the investor's option to choose a dispute resolution mechanism.<sup>66</sup> This "Fork-on-the-Road" or "*Electa una Via*" clause is designed to "preclude resort to any other option"<sup>67</sup> of conflict resolution once one has been chosen. Additionally, this clause is limited by the nature of the claims. For example, if the claims are contractual then national laws apply, but if the claim is based on a treaty violation then international law will apply.<sup>68</sup> As stated above, Vanguard's claims are based on BIT violations.

### A. VANGUARD'S CLAIMS ARE ALL TREATY BASED.

66.- A treaty breach, as opposed to a breach of contract, requires the exercise of sovereign authority by the state.<sup>69</sup> This conceptual separation between treaty and contract claims implies that "the right to pursue ICSID arbitration for breach of Treaty [claims] is not waived ... by the investor's prior invocation of domestic or contractual remed[y] [because] the Treaty claim is fundamentally unlike"<sup>70</sup> a contract-based claim.

67.- The "Fundamental Basis of the Claim" test developed in the decision on Annulment in the *Vivendi* case is applicable. The *Vivendi* Tribunal considered that in "a breach of contract [case], [it] will give effect to any valid choice of forum clause."<sup>71</sup> However, in a treaty case "the

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<sup>64</sup> Record, at 7.

<sup>65</sup> See *Tupman*, at 815 (explaining that the investor is not required to exhaust local remedies unless the host state has conditioned its consent to that requirement).

<sup>66</sup> Art. 11(3) of the Calpurnia-Gaul BIT.

<sup>67</sup> *McLachlan*, at 128.

<sup>68</sup> See *Id.*; See *Reed*, at 58-59.

<sup>69</sup> *Impreglio*, at 297, ¶ 260.

<sup>70</sup> *McLachlan*, at 98; See also *Cremades II*, at 209 (citing *Vivendi*); See also *Reed*, at 60 (citing *Vivendi*).

<sup>71</sup> *Reed*, at 60 (citing *Vivendi*); See also *SGS*, at 555-56, ¶¶ 133-34; See also *Oil Platforms*, at 850, ¶ 14 (Separate Opinion of Judge Higgins)(explaining that the ICJ found that it had jurisdiction because the claim was "based on" a treaty).

existence of an exclusive jurisdiction clause cannot operate as a bar to the application of the treaty standard.”<sup>72</sup> Therefore, Vanguard may resort to the Centre’s arbitration.

68.- The evidence presented here shows that Calpurnia, in exercising sovereign authority, either by act or omission, violated its obligations under the BIT creating treaty-based claims. On the other hand, Ms. Pescara’s claims before Calpurnian courts are based on contractual law, governing the relations between a shareholder and its company.<sup>73</sup> Thus, all claims submitted here by Vanguard are based on treaty violations.

#### **B. THE “FORK-ON-THE-ROAD” PROVISION IS NOT APPLICABLE.**

69.- The “fork-on-the-road” provision is also not applicable because the Calpurnian Commercial Court, in dismissing Ms. Pescara’s petition, stated that she was a “mere nominee, [with] no beneficial interest in the shareholding and therefore lack[ed] standing to bring [the] action.”<sup>74</sup> This conclusion necessarily implies that Ms. Pescara did not represent Vanguard, who was the only party with standing. Therefore, Vanguard can not be considered to have acted before the Calpurnian court, which renders the “fork-on-the-road” provision inapplicable and keeps the arbitral option open. Thus, the “fork-on-the-road” provision is not a “bar to the application of the treaty standard”<sup>75</sup> and thus, ICSID arbitration.

### **III. CONCLUSIONS ON JURISDICTION.**

70.- ICSID has jurisdiction over this dispute because all requirements of Article 25 of the Convention are satisfied. Calpurnia granted its irrevocable consent in the Calpurnia-Gaul BIT and Vanguard has also consented by the request for arbitration.

71.- The Centre also has SMJ because, as shown, the dispute is legal in nature and arises directly out of Vanguard’s investment in Calpurnia. The personal jurisdiction requirement is

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<sup>72</sup> *Reed*, at 60.

<sup>73</sup> *See McLachlan*, at 128-130.

<sup>74</sup> *Record*, at 7.

<sup>75</sup> *See McLachlan*, at 128-130.

also satisfied, because the dispute involves a Convention’s contracting state and a national of another contracting state.

72.- Moreover, the dispute arose before the request for arbitration and before the Centre’s jurisdiction was seized, satisfying the Convention’s timing requirements. Also, in this case, the Calpurnia-Gaul BIT’s “cooling-off” period is not applicable and a two (2) month “cooling off” period should apply. In the alternative, such period is not a bar for jurisdiction because it is only procedural in nature.

73.- Finally, Vanguard’s claims are all supported by international law and thus any alleged petition to Calpurnia’s national courts does not operate as a bar to ICSID jurisdiction. Additionally, the “fork-on-the-road” provision is not applicable, because Vanguard did not directly apply for relief in Calpurnia’s national courts.

## **PART II: ARGUMENTS ON THE MERITS**

### **I. CALPURNIA DISCRIMINATED AGAINST VANGUARD AND IN DOING SO VIOLATED ITS INTERNATIONAL OBLIGATIONS.**

74.- The Calpurnia-Gaul BIT provides that both governments will “create favorable conditions for investments.”<sup>76</sup> The BIT also states the two parties will “accord investments fair and equitable treatment”<sup>77</sup> and will not “impair by discriminatory measures the management, maintenance, use, enjoyment, acquisition or disposal of investments.”<sup>78</sup> These standards are, as expressed in the *Oil Platforms* case, “legal terms of art well known in the field of overseas investment protection.”<sup>79</sup> Vanguard submits that Calpurnia violated these treaty based duties and standards.

#### **A. THE SFCDC AND ITS REPRESENTATIVES ARE THE CALPURNIAN GOVERNMENT.**

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<sup>76</sup> Art. 2 (1) of the Calpurnia-Gaul BIT.

<sup>77</sup> Art. 2 (2) of the Calpurnia-Gaul BIT.

<sup>78</sup> Art 2 (3) of the Calpurnia-Gaul BIT.

<sup>79</sup> *Oil Platforms*, at 858, ¶ 39 (Separate Opinion of Judge Higgins); *See also McLachlan*, at 200 (explaining the elusiveness and scant attention provided for these guarantees); *See also Schreuer II*, at 2.

75.- As shown above, SFCDC is an agency of the Calpurnian government operating under color of authority. SFCDC owns 30% of VanCal's stock and holds, based on a tax scheme, the voting rights of an additional 22%. In the exercise of its majority (52%) SFCDC has advanced state interests to "preserve the rights of the Calpurnian shareholders"<sup>80</sup> and further CCC's hostile policy towards more liberal societies.

76.- The evidence shows that SFCDC agents wanted to keep the dividend "amount paid to the foreigners to the minimum,"<sup>81</sup> and characterized the decision as one based on a "dispute between the governments of Calpurnia and Gaul."<sup>82</sup> This shows intent to promote the interests of the Calpurnian government which disregards Vanguard's interest, as one of VanCal shareholders.

77.- Based on those facts, the Tribunal should conclude that the SFCDC is a state agency of the Calpurnian government acting under color of authority in the best interest of its government.

**B. BY PREVENTING THE TRANSFER OF VANGUARD'S RETURNS, CALPURNIA HAS VIOLATED ITS OBLIGATIONS UNDER THE BIT.**

78.- The Calpurnia-Gaul BIT expressly creates two duties. First, there is a duty to ensure investors the free transfer of "payments in connection with an investment,"<sup>83</sup> which include returns.<sup>84</sup> Second, there is a duty to allow unrestricted, undelayed transfer of returns "in a freely convertible currency and at the prevailing market rate of exchange."<sup>85</sup> The only possible restrictions are those related to the application of tax laws.<sup>86</sup> Calpurnia has violated both duties.

**a. Against the BIT's Express Language, Calpurnia Obstructed the Transfer of Vanguard's Returns.**

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<sup>80</sup> Record, at 6.

<sup>81</sup> Record, at 6 (VanCal's board meeting minutes of March 10, 2005).

<sup>82</sup> *Id.*

<sup>83</sup> Art. 8(1) of the Calpurnia-Gaul BIT.

<sup>84</sup> Art. 1(2) of the Calpurnia-Gaul BIT (defining returns as "amounts yielded by investments," in particular dividends and royalties).

<sup>85</sup> Art. 8(2) of the Calpurnia-Gaul BIT.

<sup>86</sup> *Id.*

79.- Based on the express language of Articles 2 and 8 of the Calpurnia-Gaul BIT,<sup>87</sup> the actions taken by the Calpurnian government were against the language, intentions, and spirit of the agreement. As described, the agreement requires the unrestricted flow of capital.<sup>88</sup> If that flow is to be restricted it can be so for tax purposes, and only in a good faith, reasonable, non discriminatory manner.<sup>89</sup>

80.- However, in this case the SFCDC's actions were clearly discriminatory and this amounts to a violation of Calpurnia's obligations under the BIT. VanCal's board decided to discriminate between Calpurnian and Gaulois shareholders in the payment of dividends.<sup>90</sup> This measure is a *per se* violation of the BIT's free transfer scheme and does not satisfy its requirements for imposing restrictions.<sup>91</sup> The conclusion that necessarily follows is that by preventing the transfer of Vanguard's returns, Calpurnia has violated its international obligations under the BIT.

### **C. CALPURNIA VIOLATED SEVERAL ESTABLISHED INTERNATIONAL LAW STANDARDS.**

81.- As expressed in the introduction to this section, the BIT, as well as other relevant international accords, imposes on the Calpurnian and Gaulois governments different mandatory standards. Both the FET and the NT standards, among others, were violated.

#### **a. Calpurnia Violated the FET and the NT Standards *vis-à-vis* Vanguard.**

82.- The Calpurnia-Gaul BIT adopted the FET as well as the NT standards which impose on both signing parties a general duty of good faith towards the other party's investors. This includes treatment, at least, "reasonably, without abuse, arbitrariness or discrimination."<sup>92</sup>

83.- To analyze whether a breach of the standard has occurred several factors have been outlined coupled with "countervailing factors" which may indicate that the standard has not been

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<sup>87</sup> See Art. 2 & 8 of the Calpurnia-Gaul BIT.

<sup>88</sup> See Art. 8 of the Calpurnia-Gaul BIT.

<sup>89</sup> See Art. 8(3) of the Calpurnia-Gaul BIT.

<sup>90</sup> Record, at 2.

<sup>91</sup> See Art. 8(3) of the Calpurnia-Gaul BIT (Vanguard does not question the decision of creating a reserve fund for the severance pay of the company's workers).

<sup>92</sup> See *F.A. Mann*, at 526.

breached.<sup>93</sup> The factors which give rise to a violation of the standard are: (i) discrimination; (ii) breach of the investor's legitimate expectations; (iii) use of power for improper purposes, including coercion and harassment; and (iv) bad faith or inconsistency.<sup>94</sup> The "countervailing factors" are: (i) objective basis; (ii) no disproportionate impact; (iii) the investor's claim is not supported by any national or international recognized right; and (iv) "caveat investor."<sup>95</sup> The evidence in this case will show that Calpurnia violated these standards.

***(a) Calpurnia Discriminated Against Vanguard.***

84.- One of the most serious factors which show a breach of the standards is discrimination. Calpurnia, through the SFCDC, segregated the Gaulois shareholders depriving them of their rights in VanCal.

85.- The *Goetz* Tribunal, discussing actions taken by the Republic of Burundi, held that a measure is discriminatory if it results in a treatment of an investor different from that accorded to other investors in a similar or comparable situation.<sup>96</sup> In addition, the United States Supreme Court has numerous and significant decisions that considered classifications based on national origin as *per se* "suspect." This required courts to perform "strict scrutiny" on whether the measures taken are "invidious" discrimination, e.g. based on prejudice against a group or class.<sup>97</sup> To be "invidious" the differential treatment has to be intentional on the part of the government.<sup>98</sup>

86.- The *SD Myers* Tribunal, when analyzing discrimination, outlined two factors which, in addition to those applied by the U.S. Supreme Court, are relevant for determining the existence of purposeful discrimination. These factors are: (i) "whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;" and (ii) "whether the

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<sup>93</sup> See *McLachlan*, at 233-47 (analyzing the treatment of investors in the context of the international review of administrative actions).

<sup>94</sup> *McLachlan*, at 235-43; See also *Suarez*, at 253-54 (discussing how some of these factors have been addressed by different tribunals).

<sup>95</sup> *McLachlan*, at 243-47.

<sup>96</sup> *Goetz*, at 41, ¶ 121.

<sup>97</sup> See generally *Strauder v. West Virginia* (discussing whether a group constitutes a suspect class); See also *Bolling v. Sharpe* (explaining that racial classifications are fundamentally suspect and must be scrutinized with care); See also *Brown v. Board of Education* (discussing how segregation deprives the plaintiffs of their constitutional right to equal protection of the laws).

<sup>98</sup> See generally *Washington v. Davis* (discussing that a racially discriminatory purpose must be behind the state action in order to be considered invidiously discriminatory).

measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.”<sup>99</sup>

87.- In this case, SFCDC which controls VanCal discriminated by paying dividends to Calpurnian shareholders and denying that same treatment to Gaulois shareholders based on xenophobic ideologies. The evidence shows such purpose when the VanCal board decided that:

“[i]n order to *preserve the rights of the Calpurnian shareholders*, it seems essential that a reasonable percentage of the company’s profits be divided in the form of a cash or a stock dividend.”<sup>100</sup> (Emphasis added).

88.- Additionally, the *SD Myers* factors are satisfied by the “practical effect of the [SFCDC’s] measure”<sup>101</sup> to discriminate between national and foreign shareholders.<sup>102</sup> Such measure, “on its face, appears to [favor Calpurnian] nationals over non-nationals [Gauloises] who are protected by the relevant [Calpurnia-Gaul] treaty.”<sup>103</sup> In fact, the SFCDC’s measure is specifically designed to discriminate Gaulois shareholders. Thus, the evidence shows how Calpurnia willfully discriminated against VanCal’s Gaulois shareholders. The intent of favoring its own citizens is a violation of the standards, particularly NT.

***(b) Calpurnia Breached Vanguard’s Legitimate Expectations.***

89.- As expressed by the *Occidental* Tribunal, the FET standard requires, as an “essential element,” the host state to honor the investor’s legitimate expectations of legal and economical stability.<sup>104</sup> The *Metalclad* and *CMS Gas* cases support this position. Based on the analysis of a number of treaties, the *CMS Gas* Tribunal held that international law “unequivocally shows that [FET] is inseparable from stability and predictability.”<sup>105</sup> These are legitimate expectations of any investor.<sup>106</sup>

<sup>99</sup> *SD Myers*, at 27, ¶ 252.

<sup>100</sup> Record, at 6 (VanCal’s board meeting minutes of March 10, 2005).

<sup>101</sup> *SD Myers*, at 27, ¶ 252.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Occidental*, at 23, ¶ 183

<sup>105</sup> *CMS Gas*, at 1235, ¶ 276.

<sup>106</sup> *Redfern & Hunter*, at 490 (explaining that the “lack of a predictable framework for investment contrary to legitimate expectations of the investor and commitments made by the host state, are breaches of fair and equitable treatment standards.”); *See also Suarez*, at 254 (describing the CMS Gas tribunal’s conclusion that a stable legal environment is part of the fair and equitable treatment standard).

90.- Here, it is undeniable that the Calpurnian political environment changed after the CCC took over control of the government. These changes affected the country's legal system. The hostility towards its neighbors and the deterioration of diplomatic relations with several states, characterized as "liberal societies," reveals how the legal and business environment changed. This deterioration, coupled with accusations of espionage, destroyed the possibility of any favorable business oriented atmosphere. Moreover, the changes are reflected by the fact that SFCDC's representatives in VanCal refused to pay Vanguard its dividends as they should have under applicable law.<sup>107</sup>

91.- Therefore, the Calpurnia government violated the FET because they caused instability and unpredictability in their legal system which had negative affects on Vanguard's investment.

***(c) Calpurnia, in Bad Faith, used its Power for Improper Purposes and to Coerce and Harass Vanguard's Representatives.***

92.- The Calpurnian government, through the CSD and the police, exercised its powers to harass Vanguard's representatives and omitted to provide adequate protection. These acts are violations of international commitments assumed by Calpurnia under the Covenant. The Covenant provides specifically that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, ..., home ..., nor to unlawful attacks on his honour and reputation."<sup>108</sup> Additionally, the Covenant provides that "[a]ny advocacy of national, ... hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>109</sup>

93.- The Calpurnian police, without the necessary authority, search Vanguard representative's residences, removed personal property, laptop computers, telecom equipments and documents. Also, the Calpurnian media, led by the CSD, singling out Ms. Pescara and Mr. Kolowenko, published press releases inciting and encouraging public protests.<sup>110</sup> The protests took place in

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<sup>107</sup> Record, at 6 (VanCal's board meeting minutes of March 10, 2005).

<sup>108</sup> Art. 17 of the *Covenant*.

<sup>109</sup> Art 20 of the *Covenant*.

<sup>110</sup> Record, at 5.

front of Ms. Pescara's home.<sup>111</sup> These protests lasted fifteen (15) days.<sup>112</sup> During this time, the police refused to attend to repeated calls for help from Ms. Pescara which forced her to remain hostage to the constant screaming and protesting. Although accused of spying for Gaulois Security Forces they were never charged with any crime. Any attempt made by Vanguard to have the searches declared unlawful and seek compensation, were dismissed by the Calpurnian Constitutional Court.<sup>113</sup>

94.- Calpurnia made this Covenant not-self-executing, requiring legislation for its domestic application. However, that is irrelevant here because the discussion of whether a treaty is self-executing only pertains to its applicability in national courts, not in the international arena. The Restatement 3rd describes this concept:

“If an international agreement or one of its provisions is non-self-executing, the [country] is under an international obligation to adjust its laws ... as may be necessary to give effect to the agreement.”<sup>114</sup>

95.- Calpurnia is under the same obligation. If its laws have not been adjusted to the Covenant then the Tribunal should look at the intent of the drafters and interpret it in a manner that serves its “object and purpose.”<sup>115</sup> The Covenant's purpose is to protect all peoples' human rights and that necessarily includes resident aliens.<sup>116</sup> Furthermore, the Covenant “prescribes rules by which rights may be determined, and such rights are [directly] protected by the treaty.”<sup>117</sup>

96.- The nature of the commitment and the mandatory language of the texts make the Covenant fully applicable in the international arena as “indicative of the customs and usages of civilized nation[s],”<sup>118</sup> and also “a non-self-executing international agreement represents an ... obligation that courts are very much inclined to protect against encroachment by local law.”<sup>119</sup>

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<sup>111</sup> Record, at 3 (Abstract from Claimant's Request for Arbitration).

<sup>112</sup> *Id.*

<sup>113</sup> Record, at 3 (Abstract from Claimant's Request for Arbitration).

<sup>114</sup> *R3FR*, at § 111.

<sup>115</sup> *Paust I*, at 256.

<sup>116</sup> *Id.*

<sup>117</sup> *Paust II* at 1275 (citing *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809)).

<sup>118</sup> *Id.*

<sup>119</sup> *Kirgis*, at 2.

97.- Although a finding of bad faith is not necessary to sanction the breach of the FET, here the evidence shows that Calpurnia had bad intentions. Black's Law Dictionary defines bad faith as "[d]ishonesty of belief or purpose."<sup>120</sup> Considering the facts outlined previously, it is fair to conclude that Calpurnia harbored dishonest beliefs and purposes, willfully violating its obligations under the treaty.

98.- In sum, it does not matter that the Calpurnian government made the Covenant not self-executing because the Covenant is directly applicable and convincingly supports a finding of breach of the FET standard.

***(d) None of the "Countervailing Factors" is Applicable.***

99.- None of the countervailing factors are applicable in the case at bar.<sup>121</sup> There is no "objective basis" for the discriminatory decisions adopted by Calpurnian agencies and representatives. The protection of national shareholders<sup>122</sup> is not a valid basis, under international standards, to refuse dividend payments to foreign shareholders. The refusal to remove the protestors from Ms. Pescara's home vicinity has no basis. The exercise of free speech in an aggressive manner restricting the freedom of a foreign investor is not a lawful exercise of a right<sup>123</sup> but an irrational and violent xenophobic outburst, fueled by the CSD, who published the accusatory press releases.

100.- The impact of the measures on national and foreign investors is significantly different. The foreign investors are unable to collect their returns and are deprived of the ability to enjoy and administrate their investment. While nationals fully enjoy their investment. Also, Vanguard's claims are supported by internationally recognized rights arising from violations of the Convention, the Calpurnia-Gaul BIT and applicable international law.

101.- The *Caveat Investor* standard is not applicable either because there was a change of circumstances. Vanguard did not find Calpurnian law in its current state and even if the strictest

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<sup>120</sup> Black's Law Dictionary, at 149.

<sup>121</sup> See *McLachlan*, at 243-47.

<sup>122</sup> Record, at 6-7 (November 16, 2005, VanCal shareholder's meeting minutes).

<sup>123</sup> Record, at 5 (Abstract from Respondent's Reply to Request for Arbitration).

due diligence would have been performed nothing would have prepared Vanguard or its representatives for the level of arbitrariness, mistreatment, abuse and exploitation that the Calpurnian government subjected them to.

102.- In conclusion, Calpurnia violated many treaty and international law based standards, such as the FET and NT standards, *vis-à-vis* Vanguard.

**b. Calpurnia Willfully Failed to Provide Protection and Security to Vanguard's Representatives.**

103.- The FPS standard was included in the Calpurnia-Gaul BIT, using the “full and constant protection and security” formula.<sup>124</sup> Its primary concern is the exercise of the state’s police powers<sup>125</sup> and the state’s omission to exercise due diligence to adequately protect the investor’s property from “actual damages caused by either miscreant State officials, or by the actions of others.”<sup>126</sup>

104.- Case law outlines some important factors which show when a host state has breached the standard. In *Tecmed* the Tribunal concluded that as long as the authorities did not do any of the following, the standard was not breached:

“encouraged, fostered, or contributed their support to the people or groups that conducted the [protests] against the [investment or investors] or [did] not [react] reasonably, in accordance with the parameters inherent in a democratic state,”<sup>127</sup>

105.- In addition, in *American Manufacturing* and *Wena* the Tribunals concluded that the inaction of the authorities to prevent violent acts, regardless of the government’s participation, made the state liable. It was only required that the authorities were aware of the acts, had the capacity to prevent them (or at least minimize their effects) and completely failed to do so.

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<sup>124</sup> Art. 2(2) of the Calpurnia-Gaul BIT.

<sup>125</sup> *McLachlan*, at 247.

<sup>126</sup> *Id.*

<sup>127</sup> *Tecmed*, at 181, ¶ 176.

106.- Here all factors are satisfied. First, CSD encouraged and fostered the anti-Gaulois environment. Second, the police forces knowingly declined to provide Ms Pescara with minimum security to guarantee her safety.

***(a) Calpurnia Encouraged, Fostered, and Contributed to the Protests.***

107.- In *Tecmed* protestors from communities nearby the investment, a landfill, prevented the investor to use it and eventually made it close. The *Tecmed* Tribunal implied that, had there been enough evidence of the authorities' participation in the protests, a finding of a direct violation of the FPS standard would have been in order.<sup>128</sup>

108.- In *Wena* the situation was similar and the Tribunal reached the same result. Protestors took over a hotel and affected the investment for over a year. The Tribunal implied that if the claimant would have proved the authorities participated in any way in the protests, a finding of breach of the standard would have been justified.<sup>129</sup>

109.- Here the evidence is compelling. The CSD published press releases in December 2003, June and July 2004 accusing Vanguard's representatives of espionage and informing falsely that charges would be filed.<sup>130</sup> The publications stirred up hatred and resulted in the picketing of Ms. Pescara's residence by the CCCWL. This is encouragement and contribution to the protests.

110.- Such conclusion is supported by the surprising close coincidence between the publications and the protests. The December press release provoked the January and March blockades. The June publication provoked the June blockade. The July publication provoked the July blockade and probably the October blockade as well. This conclusion is reinforced by the fact that Ms. Pescara and Mr. Kolowenko found it impossible to return to Calpurnia due to

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<sup>128</sup> See *Tecmed*, at 182, ¶¶ 175-77.

<sup>129</sup> See *Wena*, at 114, ¶ 88 n.198.

<sup>130</sup> Record, at 5 (Calpurnian Security Directorate Press Releases of Dec. 8, 2003 and June 4 and July 17, 2004).

safety concerns.<sup>131</sup> To make matters worse the Calpurnian government did not renew Ms. Pescara's business visa.<sup>132</sup>

111.- Calpurnia's position of encouraging and fostering hate is also confirmed by the expressions of government officials. SFCDC representatives referred to Ms. Pescara as a Gaulois spy.<sup>133</sup> Representatives, during a VanCal board meeting, intending to promote their own agenda, claimed that there was a dispute between Calpurnia and Gaul.<sup>134</sup> However, there was no evidence of such conflict.<sup>135</sup>

112.- There may be few reported cases with more convincing evidence of encouraging, fostering and contributing to the up-rise of the population against an investor than the case at hand. Thus, the Tribunal should find a breach of the FPS standard.

***(b) Calpurnia's Government Failed to Fulfill its Minimum Obligation of Vigilance.***

113.- The FPS standard also imposes a duty on the host state to take precautionary measures to ensure the security of the investment and investors.<sup>136</sup> This is a duty to act reasonably under national law but not below the minimum international standard for the treatment of aliens. As the *American Manufacturing* Tribunal stated:

“[the] responsibility of the [host state] is incontestably engaged by the very fact of an omission by [the host state] to take every measure necessary to protect and ensure the security of the investment made by [the investor] in its territory.”<sup>137</sup>

114.- The Tribunal considered that it is not necessary to argue whether the obligation is one of conduct or result because the duty is breached by simply failing to act.<sup>138</sup> Although the ICJ in the *ELSI* case concluded that the standard “cannot be construed as the giving of a warranty”<sup>139</sup>

<sup>131</sup> Record, at 3 (Abstract from Claimant's Request for Arbitration).

<sup>132</sup> Record, at 3, 5 (Abstract from Claimant's Request for Arbitration and Abstract from Respondent's Reply to Request for Arbitration).

<sup>133</sup> Record, at 5, 7-8 (Mr. Korchnoi's affidavit dated 22 April 2007 recounting how, in the November 15, 2004 VanCal's board meeting, Dr. Swift referred to Ms. Pescara and Mr. Kolowenko as Gaulois spies).

<sup>134</sup> Record, at 6 (March 10, 2005 VanCal board meeting minutes).

<sup>135</sup> Record, at 2 (Abstract from Claimant's Request for Arbitration).

<sup>136</sup> See *American Manufacturing*, at 28-30, ¶¶ 6.04-.11. See also *McLachlan*, at 247.

<sup>137</sup> *American Manufacturing*, at 30, ¶ 6.11.

<sup>138</sup> *Id.*, at 29 ¶ 6.08.

<sup>139</sup> *ELSI*, at 65 ¶ 108.

that no disturbance will ever occur, the conclusion remains the same: when the disturbance occurs, the authorities must act reasonably within their powers to correct the situation and protect the investment and the investors.

115.- Here, Ms. Pescara and Mr. Kolowenko found it impossibly unsafe to stay in Calpurnia and continue managing VanCal. Ms. Pescara was also subjected to fifteen (15) days of illegal capture in her own house without the police doing anything to guarantee her freedom. This is an omission of the minimum standard of protection that Calpurnia should have provided.

116.- The Calpurnian government contends that the protests were conducted by “private citizens, exercising their freedom of speech” non-violently, on public property, thus, there was no basis for police intervention. There is no dispute that freedom of speech is an established human right. The Covenant recognized this right as well as the right of peaceful assembly.<sup>140</sup> However, these rights are subject to limitations. Among the limitations the Covenant includes the protection of the reputation of others, the public order<sup>141</sup> and the protection of rights and freedoms of others.<sup>142</sup>

117.- The Calpurnian police was under a duty to protect Ms. Pescara’s reputation, her right of transit and her freedom. However, the police willfully chose to not act and allowed the protestors to exceed every level of reasonableness. They remained in front of her house all day and night aggressively chanting and disturbing the peace.<sup>143</sup>

118.- These facts show a breach of the obligation of vigilance discussed in the *American Trading* and the *Tecmed* decisions. Calpurnia should be held accountable for such breach.

## **II. VANGUARD’S INVESTMENT WAS EXPROPRIATED BY CALPURNIA’S UNLAWFUL INTERFERENCE.**

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<sup>140</sup> See generally *Covenant*.

<sup>141</sup> Art. 19 of the *Covenant*.

<sup>142</sup> Art. 21 of the *Covenant*.

<sup>143</sup> Record, at 3 (Abstract from Claimant’s Request for Arbitration).

### A. THE CALPURNIA-GAUL BIT REGULATES THE STATE’S RIGHT TO EXPROPRIATE.

119.- A State has a sovereign right to expropriate for the public interest, in a non-discriminatory and proportionate manner.<sup>144</sup> Case law defines expropriation as follows:

“[I]nterference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”<sup>145</sup>

120.- The *Lauder* Tribunal further narrowed such definition to aim at state measures that without depriving “effectively neutralizes the enjoyment of the property.”<sup>146</sup> This is the “sole effect” doctrine, which “shift[s] the focus of the analysis away from the context and the purpose to the effect of the measures.”<sup>147</sup> This is considered as the prevailing doctrine.<sup>148</sup>

121.- The Calpurnia-Gaul BIT does not make any effort to define what expropriation is, but it prohibits it for purposes different than the public interest or when conducted in a discriminatory manner, against due process and without prompt, adequate, and effective compensation.<sup>149</sup>

122.- Calpurnia contends that a “finding of expropriation would require a specific decree or legislative act.”<sup>150</sup> However, such an interpretation would eliminate the possibility of a claim of indirect expropriation, which does not require obvious measures such as legislative acts.

123.- Thus, the BIT’s expropriation regulations should have been respected by the Calpurnian government in order to exercise its power over Vanguard’s investment and this was not so.

### B. VANGUARD’S EXPROPRIATED RIGHTS ARE PROTECTED BY THE CALPURNIA-GAUL BIT.

<sup>144</sup> Art. 1 of the *ECHR First Protocol*; See also *Litvinoff*, at 226; See also *Broches II*, at 208-209; See also *Appleton*, at 42.

<sup>145</sup> *Metalclad*, at 91-92, ¶¶ 103.

<sup>146</sup> *Lauder*, at 91-92, ¶ 200; See also *Appleton*, at 40 (explaining that expropriation requires an exercise of government authority to interfere with property).

<sup>147</sup> *Dolzer*, at 163.

<sup>148</sup> *Id.*

<sup>149</sup> Art. 6 of the Calpurnia-Gaul BIT.

<sup>150</sup> Record at 5.

124.- The Calpurnia-Gaul BIT provides that “[i]nvestments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised [sic] or subjected to any other measures having [that] effect.”<sup>151</sup> Vanguard’s expropriated rights fit the definition of investment, as included in Article 1 of the BIT, and are therefore entitled to protection against expropriation under the terms of the agreement.

**a. Vanguard’s Rights in VanCal’s Shares.**

125.- The express terms of the Calpurnia-Gaul BIT<sup>152</sup> make the shares and their returns a protected investment. Vanguard does not contend that SFCDC’s exercise of its majority shareholding rights to implement CCC’s policies within VanCal is an expropriatory measure.<sup>153</sup> Vanguard submits, however, that its shareholder rights “had been interfered with to such an extent as to give rise to a compensable claim.”<sup>154</sup> The expropriatory measures are the refusal to transfer “returns,”<sup>155</sup> the personal harassment of its representatives by SFCDC’s directives, the obstruction of participation in shareholder meetings by the rejection of usually accepted proxies and the refusal to transmit corporate information to Vanguard in Gaul.

**b. Vanguard’s Contract Rights in VanCal.**

126.- Vanguard provided technical assistance and licensed its trademark “Vanguard International” to VanCal. The following is an evaluation of why these rights are investments and thus entitled to the BIT’s protection against expropriation.

***(a) Vanguard’s Trademark License Contract.***

127.- The rights to the trademark licensing contract in exchange for a royalty payment are property rights.<sup>156</sup> The BIT protects “property rights” in general giving examples as mortgages,

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<sup>151</sup> Art. 6(1) of the Calpurnia-Gaul BIT.

<sup>152</sup> See Arts. 1(1)(b), 1(2), and 8 of the Calpurnia-Gaul BIT.

<sup>153</sup> See *Mouri*, at 140-42 (explaining why the exercise of majority shareholder rights by the government is not *per se* expropriatory); See *Garcia-Bolivar II*, at 76 (discussing how a change in policy is more unfair treatment than expropriation).

<sup>154</sup> *Mouri*, at 143 (citing the holding of the Iran-U.S. Claims Tribunal in the *Foremost Tehran, Inc.* case).

<sup>155</sup> As defined in Art. 1(2) of the Calpurnia-Gaul BIT.

<sup>156</sup> See *Mouri*, at 44-45.

leases and others.<sup>157</sup> Additionally the BIT specifically protects intellectual property (IP) rights.<sup>158</sup>

128.- As explained, the *Vienna Convention* requires a plain meaning interpretation of treaties, allowing the use of “supplementary means of interpretation”<sup>159</sup> only if any ambiguities remains.<sup>160</sup> Here an ordinary meaning interpretation would lead us to an ambiguity: whether the language used in Article 1(1)(a) of the BIT, in the context of the IP rights protected, would encompass a license agreement?

129.- Using the maxim of interpretation *ejusdem generis*, the licensing agreement shall be included as a property right.<sup>161</sup> The BIT has a list of contractual, mutually binding relations as mortgages, pledges, leases, etc., and one forced relation, a lien. In all these cases a party affected its property for the benefit of another. A trademark license contract is, in that sense, similar to all this contacts and most similar to a lease of IP rights. Therefore, it should be considered as a property right included in the BIT.

130.- It is worth noting that the maxim of interpretation *expressio unius est exclusio alterius*, is not applicable here because the BIT used the expansive words “similar rights,” which imply that the list is merely illustrative.<sup>162</sup>

***(b) Vanguard’s Technical Assistance Agreement.***

131.- The rights to the TAA are also property rights.<sup>163</sup> As explained before these are also contracting rights that would be covered by the BIT’s expression “any property rights.”<sup>164</sup> Also, rights derived from the TAA are “rights to performance having an economic value.”<sup>165</sup>

<sup>157</sup> Art. 1(1)(a) of the Calpurnia-Gaul BIT.

<sup>158</sup> Art. 1(1)(d) of the Calpurnia-Gaul BIT.

<sup>159</sup> See Art. 31 of the Vienna Convention.

<sup>160</sup> *Id.*, at Art. 32.

<sup>161</sup> See *Farnsworth*, at 457, § 7.11 (explaining that *Ejusdem generis* to ascertain the meaning of a word in a series when a list of specific descriptors is followed by more general descriptors, such as here “similar rights.” Then the meaning of the general descriptor (“similar rights”) must be restricted to the same class of the specific descriptors that precede it).

<sup>162</sup> *Id.* (explaining that *expressio unius est exclusio alterius* assumes that items not on the list are excluded from it).

<sup>163</sup> See *Mouri*, at 130.

<sup>164</sup> Art. 1(1)(a) of the Calpurnia-Gaul BIT.

<sup>165</sup> Art. 1(1)(c) of the Calpurnia-Gaul BIT.

Vanguard had the right and obligation to perform certain services to VanCal under the agreement and the right to charge a fee. Additionally, Vanguard derived value from the contract by assuring that VanCal kept reasonable technical standards of support and quality. This would increase Vanguard's share value. Based on the preceding arguments, the TAA should be considered as a property right included in the BIT.

**C. CALPURNIA'S UNLAWFUL INTERFERENCE WITH VANGUARD'S INVESTMENT CONSTITUTES INDIRECT EXPROPRIATION.**

**a. All the Elements of Indirect Expropriation are Present Here.**

*(a) The Degree of Interference with Vanguard's Investment was Significant.*

132.- To constitute indirect expropriation, the impact of the measures in the investment has to be "of a certain 'magnitude or severity'."<sup>166</sup> The "test is whether that interference is sufficiently restrictive to support the conclusion that the property has been 'taken' from the owner'."<sup>167</sup>

133.- An interference with the continuation of management tasks has been considered an indirect expropriation.<sup>168</sup> Authors regularly cite to the jurisprudence of the Iran-U.S. Claims Tribunal, where the appointment of government managers was "qualified as indirect expropriation either by itself, ... or in conjunction with other acts effectively depriving an investor" of its property.<sup>169</sup>

134.- Here, Calpurnia restricted Vanguard's effective exercise of its shareholder and board member rights for a period of about 3 years.<sup>170</sup> The appointed proxies were severely limited by the whims of SFCDC and were prevented from attending and voting in a shareholder's meeting, thus depriving Claimant of the representation to which the cumulative voting provision of the Calpurnian Commercial Code entitled it.<sup>171</sup>

<sup>166</sup> *Reinisch*, at 30 (citing *Pope & Talbot, Inc. v. Government of Canada*, (Interim Award) 7 ICSID Rep 43, 69).

<sup>167</sup> *McLachlan*, at 298 (citing *Pope & Talbot*).

<sup>168</sup> See generally *Mouri*; See also generally *Reinisch*.

<sup>169</sup> *Reinisch*, at 41 (citing *Phillips Petroleum Co. v. Iran*, 21 Iran-U.S. C.T.R. 79 (1989); See also *Mouri* at 51-52.

<sup>170</sup> Since the departure of Ms. Pescara from Calpurnia in November 2004.

<sup>171</sup> Record, at 6 (shareholders meeting of November 16, 2005).

135.- All these deprived Vanguard of the use and enjoyment of its investment. This is true particularly because Vanguard is, in effect, trapped in this investment. Calpurnia's capital market is not well developed and VanCal is not listed in the stock exchange, which makes it difficult for Vanguard to dispose of its 31% shareholding at market value all at once.<sup>172</sup>

***(b) The Effect of SFCDC's Actions was to Neutralize Vanguard's Investment.***

136.- The key element that reveals an indirect expropriation is the "purpose and circumstances" of a particular government action and its effects.<sup>173</sup> Here, the Tribunal should find that the cumulative effect of the actions taken by the Calpurnian government effectively deprived Vanguard of its rights in VanCal.

137.- Case law and doctrine have developed two tests to analyze the issue. The "sole effect" doctrine, discussed above, is the majority rule.<sup>174</sup> This doctrine analyses the "reality of the impact"<sup>175</sup> of the measures, giving less importance to their form.<sup>176</sup> The other test is a mixed analysis which evaluates purposes, context, as well as effect of the measures.<sup>177</sup>

138.- In *Foremost Teheran, Inc.*, a case almost identical to the one at hand, the Iranian government took the same actions as those taken by the Calpurnian government. Although in that case the Tribunal found no expropriation of shares, the Tribunal nevertheless found that the "level of interference established constitute[d] 'other measures affecting property rights,'" and thus was expropriatory.<sup>178</sup> This case is an example of either open or covert state conduct that had the effect of neutralizing and rendering the investment useless, and the Tribunal found state responsibility regardless of the government's intent.

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<sup>172</sup> Procedural Order No. 1, at ¶ 2.

<sup>173</sup> *Dolzer*, at 156.

<sup>174</sup> See *McLachlan*, at 296 (characterizing the rule as controversial); See *Redfern & Hunter*, at 494-96.

<sup>175</sup> *McLachlan*, at 295; See also *Appleton*, at 38 (explaining that the U.S. Supreme Court considered that "regulatory takings require the court to look to the impact of the regulation and to establish the existence of a substantial impact.").

<sup>176</sup> See generally *Phelps Dodge* (explaining that the Iranian government appointment of managers to the company was an expropriation because the investor's shares were rendered useless by the government interference); See also *Brunetti*, at 207 (discussing the importance of the *Phelps Dodge* holding).

<sup>177</sup> See *Dolzer*, at 158; See also *Reinisch*, at 33; See also *McLachlan*, at 296; See also *Appleton*, at 39-46.

<sup>178</sup> *Foremost Teheran*, at 251.

139.- The interference here was significant and the sole effect of the actions taken by the Calpurnian government was to effectively prevent Vanguard from exercising its rights in VanCal. Regardless of its purpose, the effect of the interference was to neutralize every attempt to meaningfully exercise those rights.

140.- Even if this Tribunal applied the mixed approach, the result would remain the same. By the context of the decisions taken by SFCDC, we conclude that they were all arbitrary. There was no law prohibiting the transfer of returns from Calpurnia to Gaul.<sup>179</sup> The Calpurnian Lira was still fully convertible to Gaulois Dollars.<sup>180</sup> The licensing contract was still in force and VanCal was still using the “Vanguard International” trademark.<sup>181</sup> Vanguard’s representatives were practically expelled from Calpurnia, their safety was not secured.<sup>182</sup> The appointed proxies were unable to exercise Vanguard’s rights and were subject to SFCDC’s whims to the point of not being allowed to access the shareholder’s meetings.<sup>183</sup> Finally, the evidence shows that SFCDC did not regard VanCal as a private company and aimed at turning it into what SFCDC expected it to be, a publicly owned company.<sup>184</sup>

141.- The factual background conclusively reveals that the capricious measures taken by the SFCDC (which constitute Calpurnia’s state action), effectively neutralized Vanguard’s capacity to exercise any rights in its investment, indirectly expropriating it.

***(c) The Calpurnian Government Spoiled Vanguard’s Reasonable Investment Expectations.***

142.- Vanguard’s expected returns from VanCal were not only dividends but also royalties from the trademark licensing agreement and the TAA. All these were obliterated by Calpurnian government’s actions.

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<sup>179</sup> Procedural Order No. 1, at ¶ 1.

<sup>180</sup> *Id.*

<sup>181</sup> See Procedural Order No. 2, at ¶ 31.

<sup>182</sup> See generally Record.

<sup>183</sup> Record, at 7.

<sup>184</sup> Record, at 5 (Dr. Swift’s statements at the November 15, 2004 VanCal board of director’s meeting).

143.- Here again, the investor's reasonable expectations play an important role. These "reasonably-to-be-expected" benefits are recognized by international law and require a case by case analysis.<sup>185</sup> The issue is whether the investor could reasonably foresee that its investment would depreciate and lose all its value, or a substantial part of it in a short period of time, due to government actions and measures.<sup>186</sup>

144.- Regarding the dividends, VanCal declared different amounts of dividends between 2004 and 2007. All those payments were denied to Vanguard because of its Gaulois nationality. This situation is almost identical to that in *Foremost Teheran* and we encourage this Tribunal to follow Judge Holtzmann's dissent in that case. Judge Holtzmann argued that "the bare refusal to permit Foremost [the investor] to share in Pak Dairy's [the investment] profits suffices to establish expropriation."<sup>187</sup> Next, Judge Holtzmann discussed the evidence presented to the Tribunal, which is almost identical to the evidence presented here,<sup>188</sup> and concluded that there was an expropriation. Moreover, Judge Holtzmann defended a very important and valid international policy oriented argument. He stated that:

"[T]he Tribunal's reliance on Foremost's continued participation [in Pak's meetings to support its finding of no expropriation] could discourage minority shareholders which find themselves in a similar situation from pursuing the course of action which would serve the best interests of the putatively expropriated company."<sup>189</sup>

145.- To that statement we could add that such reliance would encourage investors to run and hide in the international fora, without fighting to protect their investments. Here Vanguard did what any reasonable investor would have done. Vanguard "served [on the board] as long as [it] did in the hope[s] of preserving the [company's] value ... and thereby mitigating the effects of the expropriation."<sup>190</sup>

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<sup>185</sup> See *Reinisch*, at 36-37; See also *Schreuer II*, at 4-5; See also *Collins*, at 112.

<sup>186</sup> See *McLachlan*, at 303-04; See also *Appleton*, at 45 (explaining that only substantial deprivations are recognized as expropriations).

<sup>187</sup> *Foremost Teheran*, at 263 (Dissenting opinion of Judge Holtzmann).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*, at 266.

<sup>190</sup> *Id.*

146.- Given the present circumstances, the Tribunal should follow Judge Holtzmann's dissent and find a "blatant"<sup>191</sup> expropriation of Vanguard's interests in VanCal.

***(d) The Calpurnian Government's Actions were Discriminatory and Disproportionately Applied.***

147.- The Calpurnia-Gaul BIT contains non-discriminatory measures that the host has to grant to the other contracting party's investors.<sup>192</sup> These obligations have been violated by Calpurnia. Black's Law Dictionary defines discrimination as follows:

"The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of ..., nationality ... ."<sup>193</sup>

148.- The Calpurnian government prevented Vanguard from receiving payment (neither in cash nor in shares) of the dividends declared, while the Calpurnian shareholders were allowed to collect. This is, on its face, a discriminatory measure. The effects of such measure show a pattern of xenophobia that must be condemned by this Tribunal. In addition, the measure (the non-payment of dividends) had a disproportionate effect between national and foreign investors. Although the refusal to pay dividends in Gaulois dollars could be justified,<sup>194</sup> the total refusal to pay (not even in a bank account opened in Calpurnia<sup>195</sup>) and the dismissal of Ms. Pescara's application to the Calpurnian Commercial Court is unjustifiable.

149.- Calpurnia argues that Mr. Korchnoi's communications to Vanguard, which consummated the expropriation, have been superseded and it is willing to pay dividends and fees.<sup>196</sup> However, the damage has already been done and Vanguard's investment destroyed.<sup>197</sup>

150.- Based on these arguments, we request the Tribunal to find that Calpurnia, through the SFCDC, expropriated Vanguard's investment and violated specific international obligations provided for in the BIT.

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<sup>191</sup> *Id.*, at 264.

<sup>192</sup> See Art. 2 & 6 of the Calpurnia-Gaul BIT.

<sup>193</sup> Black's Law Dictionary, at 500.

<sup>194</sup> See *Litvinoff*, at 227-30 (explaining how state measures provided for inconvertibility of currency, although confiscatory, are not a violation of international law).

<sup>195</sup> Record, at 6 (letter of May 21, 2005 from Vanguard to Mr. Korchnoi).

<sup>196</sup> Record, at 4 (Abstract of Respondent's Reply to request for Arbitration).

<sup>197</sup> See *Garcia-Bolivar II*, at 75.

**D. IN THE ALTERNATIVE, BASED ON THE MFN CLAUSE, VANGUARD IS ENTITLED TO RELY ON THE PROVISION OF THE CALPURNIA-FLATLAND BIT.**

151.- In the alternative, Vanguard submits that the provisions in Article 5(2) of the Calpurnia-Flatland BIT are fully applicable here. Article 5(2) of the Calpurnia-Flatland BIT provides that if a company incorporated in the host state is expropriated, the other contracting state's shareholders have a right to fair, effective and prompt compensation. Flatland Nationals are treated like shareholders of any Calpurnian company. However, this same treatment is not accorded to Gaul nationals.

152.- The MFN clause's effect in the text of the BIT (it permeates it all), suggests that the Tribunal should conclude that Calpurnia must accord Vanguard "treatment which is not less favourable than [Calpurnia] accords its own investors or to investors of any third State,"<sup>198</sup> such as Flatland. This regulation as applied to Vanguard, by way of the MFN clause, would better protect its rights in VanCal, entitling it to demand adequate compensation from Calpurnia.

**III. CONCLUSIONS ON THE MERITS.**

153.- Calpurnia has discriminated against Vanguard, thus violating its obligations under the Calpurnia-Gaul BIT. Calpurnia imposed a xenophobic suspension on payment of dividends to VanCal's foreign shareholders, targeting Gauloises, and obstructed the free transfer of returns. In addition, by discriminating and applying a xenophobic policy against Vanguard, Calpurnia violated both the FET and the NT standards. Calpurnia also violated the FPS standard by allowing the use of its police power to harass Vanguard's agents disregarding their security.

154.- Moreover, Calpurnia expropriated Vanguard's investment by unlawfully interfering with Vanguard's legal rights in VanCal. Such interference caused a significant loss of control and value over the investment and effectively neutralized its benefits. Also, such interference spoiled Vanguard's reasonable investment expectations. Moreover, Calpurnia's actions were applied

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<sup>198</sup> Art. 4(2) of the Calpurnia-Gaul BIT.

