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**International Centre for Settlement of Investment Disputes**

**VANGUARD INTERNATIONAL**

[Claimant]

**and**

**THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA**

[Respondent]

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**MEMORANDUM FOR CLAIMANT**

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## LIST OF ABBREVIATIONS

ALI	American Law Institute
BITs	Bilateral Investment Treaties
BYIL	British Yearbook of International Law
Calpurnia-Gaul BIT	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 Flatland BIT	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
CCC	Conservative Conscience of Calpurnia
EECC	Eritrea-Ethiopia Claims Commission
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID Rep	ICSID Reports
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Iran-US CTR	Iran-United States Claims Tribunal Reports
MFN	Most Favoured Nation
OECD	Organization for Economic Co-operation and Development
SFCDC	State Fund for Commerce and Development in Calpurnia

UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
Vanguard	Vanguard International
VCTL	Vienna Convention on the Law of Treaties

## STATEMENT OF FACTS

1. This dispute arises out of a bilateral investment treaty for the protection of foreign investment. The Claimant, Vanguard International (hereinafter Vanguard), is a leading mobile telecommunications company incorporated in Nova Parigi, the capital city of the Federated States of Gaul (hereinafter Gaul). The Respondent is the Republic of Calpurnia (hereinafter Calpurnia). In 1997, Vanguard participated in the establishment of a joint venture company, VanCal, which is located in Calpurnia.
2. Since the establishment of VanCal, the percentages of equity interest held by Vanguard have varied over time. By the end of 2004, Vanguard held 30% directly, and an additional 1% was held in trust and registered in the name of Francesca Pescara. Yet, throughout 1997 to 2004, Vanguard played a major role in the management of VanCal by providing management skills, personnel and participation on the board of directors.
3. Prior to November 2003, relations between Calpurnia and Gaul were harmonious. However, when The Conservative Conscience of Calpurnia (hereinafter CCC) won an absolute majority in the Calpurnian Parliament, Calpurnia's diplomatic relations with Gaul began to deteriorate. This climate of hostility toward Gaulois nationals in Calpurnia have forced the expatriate personnel of Gaul to leave the country by the end of 2003, among them, Ms Pescara, VanCal's managing director and Mr Kolowenko, its chief technical officer. As a result of the involuntary absence of personnel, Vanguard was prevented from preserving the value of its investments.
4. This hostile political atmosphere has also caused the State Fund for Commerce and Development in Calpurnia (hereinafter SFCDC), a 100% state-owned entity, to implement a series of decisions that have deprived Vanguard of the use and benefit of Vanguard's 31% interest in VanCal. This was achieved through SFCDC's indirect control over the remaining 69% shares of VanCal. In addition, dividends declared by VanCal in 2004, 2005, 2006 and 2007 were not paid to Vanguard pursuant to a March 2005 decision by the VanCal board of directors. No reasons were given for the failure to pay its foreign shareholders.

5. Prompted by “anonymous tips” that Ms Pescara and Mr Kolowenko were spies for the Gaulois Security Services, the Calpurnian police searched the homes of these two individuals three times. The Calpurnian Constitutional Court dismissed Vanguard’s applications to have searches declared unlawful and seek compensation. The subsequent press releases on the searches issued by the Calpurnian Security Directorate have aroused negative public sentiment against Vanguard, Ms Pescara and Mr Kolowenko. In addition, members of the CCC Women’s League picketed Ms Pescara’s home on five occasions, yet the police had declined Ms Pescara’s demand to remove the protesters. Subsequently, in September 2004, Ms Pescara’s application for renewal of a “three-year business visa” was also rejected.
6. In November 2005, Ms Pescara, one of Vanguard’s two representatives, was ousted from the VanCal board of directors by Calpurnian government representatives. Furthermore, Vanguard was prevented from electing a replacement for Ms Pescara. Consequently, Vanguard had been deprived of the representation to which the cumulative voting provision<sup>1</sup> of the Calpurnian Commercial Code had entitled it. The two shareholder proxies held by Mr. Rindler, on behalf of Vanguard, were also rejected by Calpurnia government representatives.
7. Starting from 1 December 2005, Mr Korchnoi, Ms Pescara’s replacement as managing director, was instructed by Dr Jonathan Swift, Chairman of VanCal’s board of directors and employed by the Calpurnian government, to cease sending accounts, financial statements or other information to Gaulois citizens or translating such material into Gaulois, as had been the practice.
8. All the above acts are attributable to Calpurnia and have resulted in numerous breaches of the Calpurnia-Gaul BIT.

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<sup>1</sup> Abstract from Claimant’s Request for Arbitration, at para 15.

## **1 LEGAL BASIS OF THE CLAIM**

1. Vanguard International (hereinafter Vanguard) brings this claim against the Government of the Republic of Calpurnia under the Agreement between Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments (hereinafter Calpurnia-Gaul BIT). Article 11(2)(b) of the Calpurnia-Gaul BIT confers jurisdiction on this Tribunal to resolve disputes between the Calpurnia and Vanguard.
2. The purpose of the Calpurnia-Gaul BIT is to intensify economic co-operation to the mutual benefit of both countries and to protect investors, such as Vanguard, a national of one Contracting Party that makes an investment in the territory of the other Contracting Party.
3. In violation of its international obligations under the Calpurnia-Gaul BIT, Calpurnia, acting through its organs, agents, persons and entities exercising elements of governmental authority, has not provided Vanguard national treatment, has failed to provide Vanguard and its investment full protection and security, has not upheld the minimum requirement of transparency, has discriminated against Vanguard, has interfered with Vanguard's investments, and has failed to provide fair and equitable treatment to Vanguard.
4. The Calpurnia-Gaul BIT remains in force pursuant to Article 15 of that BIT and has not been terminated by either Contracting Party.

## 2 PRELIMINARY ISSUES

### 2.1 The Applicable Law

5. Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention), to which both Calpurnia and Gaul are parties, provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>2</sup>

6. There is no express agreement between Calpurnia and Vanguard as to the law under which the dispute should be decided. Nonetheless, only rules of international law are applicable in this case because Calpurnia's responsibility is based on the international law protections contained in the Calpurnia-Gaul BIT.

7. Article 38(1) of the Statute of the International Court of Justice<sup>3</sup> (hereinafter ICJ Statute) sets out the sources of international law on which Vanguard relies. The ICJ Statute is "widely recognized as the most authoritative statement as to the sources of international law."<sup>4</sup> This Article states:

the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations:

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<sup>2</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). [Adopted on 18 March 1965; Entered into force on 14 October 1966.]

<sup>3</sup> The Statute of the International Court of Justice (ICJ statute). [26 June 1945, 59 Stat. 1055, UNTS, 993.]

<sup>4</sup> Ian Brownlie, *Principles of International Law* (Oxford University Press 6<sup>th</sup> ed. 2003) at 3; Sir Robert Y. Jennings & Arthur Watts (eds.), *Oppenheim's International Law: Peace* (Longman 9<sup>th</sup> ed. London 1992) 1, at 24; Manley O. Hudson, *The Permanent Court of International Justice* (The Macmillan Company 1934) at 601; Malcolm N. Shaw, *International Law* (Cambridge University Press 5<sup>th</sup> ed. 2003) at 66.

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

8. Consistent with Article 38(1)(a) of the ICJ Statute, the Calpurnia-Gaul BIT is the primary source of substantive international law applicable in this dispute. Where necessary, reliance will be placed on customary international law. This consists of wide-spread state practice coupled with *opinio juris*, meaning, respectively, the actual behaviour of the states and states' belief that they are bound by these customary rules.<sup>5</sup> International arbitral awards of relevance in addition to the writings of well-known jurists will also be relied on in support of Vanguard's arguments.
  
9. In relation to international arbitral awards, it should be noted that no doctrine of precedents exists in international arbitration.<sup>6</sup> However, to maintain stability and consistency of international investment law, earlier arbitral awards need to be taken into account when a tribunal makes a decision.<sup>7</sup> The tribunal in *Saipem v Bangladesh*, for example, stated that although there is no binding precedent rule in international arbitration, a tribunal has a duty "to adopt solutions established in a series of consistent cases".<sup>8</sup> Additionally, that tribunal stated that arbitral tribunals also have a duty to ensure that they "contribute to the harmonious development of investment law".<sup>9</sup>

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<sup>5</sup> *North Sea Continental Shelf* cases, ICJ Rep 3 (1969), at para. 77 (*Germany v Denmark/ Germany v Netherland*).

<sup>6</sup> *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, at para. 97.

<sup>7</sup> *Saipem v Bangladesh*, Decision on Jurisdiction, 21 March 2007, at para. 67; Thomas W. Wälde, "Investment Arbitration under the Energy Charter Treaty: An overview of Key Issues", 1 *Transnational Dispute Management* (2004) 1. [Noting that much care must be taken to maintain the rule of law and to provide a degree of certainty to the future of international investments arbitration, and thus contradictory awards should be avoided due to the given pressure to establish a well respected system in international investments arbitration.]

<sup>8</sup> *Saipem v Bangladesh*, Decision on Jurisdiction, 21 March 2007, at para. 67.

<sup>9</sup> *Id.*

## 2.2 Treaty Interpretation

10. Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>10</sup> (hereinafter VCLT) will be applied where any treaty provision is required to be interpreted in this memorandum. These provisions of the VCLT are binding on Calpurnia and Gaul, as they are parties to that Convention. Moreover, Articles 31 and 32 of the VCLT are considered to express rules of customary international law.<sup>11</sup> According to Article 31(1), treaties should be interpreted:

in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>12</sup>

11. Article 32 provides that supplementary means of interpretation may be used as an aid to interpret the treaty if the application of Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to result which is manifestly absurd or unreasonable.

12. In relation to the object and purpose of the Calpurnia-Gaul BIT, its preamble declares that it is intended

to intensify economic co-operation to the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors.<sup>13</sup>

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<sup>10</sup> Vienna Convention on the Law of Treaties. [Done at Vienna on 23 May 1969; Entered into force on 27 January 1980.]

<sup>11</sup> *Railway Arbitration (Belgium v Netherlands)*, 24 May 2005, at para. 45. [Observing that since the adoption of the VCLT in 1969, the ICJ has never fail to apply rules of customary international law as formulated in Articles 31 and 32]; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment, ICJ Reports (1992), at 582-583, at para.373, and 586, at para. 380; *Territorial Dispute (Libyan Arab Jamhiriya v Chad)*, Judgment, ICJ Rep (1994), at 21-22, at para. 41; *Maritim Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility, Judgement, ICJ Rep (1995), at 18, at para. 33.

<sup>12</sup> *Supra* note 10, Article 31(1).

<sup>13</sup> Calpurnia-Gaul BIT: Preamble.

13. Further, the preamble recognises that such “promotion and protection of investments” resulting from this BIT will provide for more business opportunities.<sup>14</sup> It is important to keep in mind the clearly stated object and purpose of the Calpurnia-Gaul BIT, whenever interpretation of it is required.

14. As the tribunal in *SGS v Philippines* stated (referring to the BIT there at issue):

[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.<sup>15</sup>

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<sup>14</sup> *Supra* note 13.

<sup>15</sup> *Supra* note 6, at para. 116.

### 3 JURISDICTION

#### 3.1 Article 25 of the ICSID Convention

15. Article 25(1) of the ICSID Convention provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

16. The following section of this Memorial will demonstrate that Vanguard has satisfied all the jurisdictional elements contained in Article 25(1) of the ICSID Convention.

##### 3.1.1 Legal Dispute Arising Directly out of an Investment

17. The requirement that the dispute be “legal” is satisfied because the disagreement is concerned with the legal rights and obligations that stem directly from the BIT itself. In this regard, Professor Schreuer observed:

Tribunals have at times mentioned in passing that the dispute before them is legal since it concerned the legal rights and obligations under an agreement between the parties.<sup>16</sup>

18. The promotion of investments is a cornerstone of the ICSID Convention. However, the Convention provides no definition as to what constitutes an “investment”. As the Executive Directors of the World Bank (then known as the International Bank for Reconstruction and Development) noted when they submitted the ICSID Convention to governments for signature in 1965,<sup>17</sup> the term “investment” was left undecided so that the contracting parties can decide the classes of disputes to be submitted to the

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<sup>16</sup> Schreuer, ‘The ICSID Convention: A Commentary’ (Cambridge University Press 2001), at 106.

<sup>17</sup> The Report of the Executive Directors to the Convention, 1 ICSID Reports, at para. 2, [Noting that the Executive Directors of the World Bank approved the Convention’s text on 18 March 1965 for submission to member governments of the Bank.]

International Centre for Settlement of Investment Disputes (hereinafter ICSID).<sup>18</sup> The Calpurnia-Gaul BIT provides a comprehensive, but non-exhaustive list of the activities, which Calpurnia and Gaul have agreed to define as investments.<sup>19</sup> Vanguard's establishment of telecommunications operations within Calpurnia falls squarely within the definition of investment provided under Article 1(1) of the Calpurnia-Gaul BIT: "every kind of asset established or acquired by an investor".<sup>20</sup> Moreover, Vanguard's investment in telecommunications operations in Calpurnia falls within all five features of typical investments identified by Professor Schreuer: (a) there was an expectation of a long-term relationship; (b) there was an expectation of regularity of profit and return; (c) the assumption of risk; (d) a substantial commitment was made; and (e) the investment was significant for Calpurnia's development.<sup>21</sup>

### **3.1.2 Dispute between a Contracting State and a National of another Contracting State**

19. In accordance with Article 25(2)(b), a national of another Contracting State means:

any juridical person which had the nationality of a Contracting State other than the State Party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration[...].

20. Vanguard is a foreign juridical entity which possesses the nationality of another Contracting State other than that of Calpurnia. It is a juridical person of Gaulois nationality. It was incorporated in Gaul and its headquarters are based in Nova Parigi, the capital city of Gaul.<sup>22</sup>

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<sup>18</sup> *Supra* note 17, at para 27.

<sup>19</sup> *Supra* note 13, Article 1.

<sup>20</sup> *Id.*, Article 1(1).

<sup>21</sup> *Supra* note 16, at 140.

<sup>22</sup> *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Rev-FILJ 205 (2004, Weil P Bernardi & Price). [Stating that in interpreting the ICSID Convention on Jurisdictional requirements, the tribunal found that corporate form was the correct focus].

### 3.1.3 Consent in Writing to Submit the Dispute to ICSID

21. Vanguard and Calpurnia, the parties to the dispute, must consent in writing to submit the dispute to ICSID<sup>23</sup>. The requirement of written consent may be satisfied on the part of Calpurnia by the inclusion of a provision within an investment treaty that provides for the submission of future disputes by Gaulois investors under the ICSID Convention<sup>24</sup>. In this regard, Article 11(2) of the Calpurnia-Gaul BIT specifically provides that:

The Contracting Parties give their irrevocable consent in respect of the fact that all disputes relating to investments are submitted to the above mentioned court, tribunal or alternative arbitration procedures.<sup>25</sup>

Reference in this sub-paragraph to an “above mentioned” tribunal includes an express choice provided to investors, such as Vanguard, to submit claims against Calpurnia with ICSID.<sup>26</sup>

22. For its part, Vanguard gave consent by filing this claim with ICSID. As Professor Schreuer has commented:

It is established practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings.<sup>27</sup>

The requisite consensual bond between Vanguard and Calpurnia has thus been satisfied. In other words, Calpurnia made an offer in the Calpurnia-Gaul BIT and Vanguard accepted this offer by submitting this claim to ICSID.

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<sup>23</sup> ICSID Convention: Article 25 (1).

<sup>24</sup> *Supra* note 17, Rule 24. “[...] [Consent 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...]”

<sup>25</sup> *Supra* note 13, Article 11(2).

<sup>26</sup> *Supra* note 23, Preamble, *supra* note 13, Article 11(2)(b).

<sup>27</sup> *Supra* note 16, at 218.

### 3.2 Vanguard is an “Investor” under the Calpurnia-Gaul BIT

23. According to Article 1(3)(b) of the Calpurnia-Gaul BIT, an “investor” refers to:

any legal person such as company, corporation, firm, business association, institution or other entity constituted in accordance with the laws and regulations of the Contracting Party and having its seat within the territory of that Contracting Party.

24. Vanguard was constituted under the laws of Gaul<sup>28</sup> and consequently falls within the definition of “investor” in Article 1(3) of the Calpurnia-Gaul BIT.

### 3.3 “Fork in the Road” Provision

25. In theory, the fork in the road provision provides that an “investor must choose between the resolution of its claims in the Host State’s domestic courts or international arbitration and that, once made, the choice is final”.<sup>29</sup>

26. In Article 11(2) of the Calpurnia-Gaul BIT, Vanguard has the choice to submit its dispute to (a) the competent courts of Calpurnia; (b) the ICSID; (c) the Additional Facility of ICSID; or (d) an *ad hoc* arbitration tribunal. Consequently, Vanguard has the option to bring the claim either before a domestic court or an international tribunal. Pursuant to Article 11(2), access to international arbitration will only be lost if the *same party* with the *same claim* is submitted to a domestic court.<sup>30</sup>

27. This raises the issue whether the fork in the road provision can be invoked by Calpurnia to argue that Ms Pescara, whose acts (Calpurnia would say) are imputable to Vanguard, brought this dispute before a court in Calpurnia. As a result, Calpurnia would assert that Vanguard is precluded by the Article 11(2) fork in the road provision from bringing an international arbitration claim against Calpurnia. This

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<sup>28</sup> Abstract from Claimant’s Request for Arbitration, at para 5.

<sup>29</sup> Schreuer, “Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road”, *Journal of World Investment & Trade* 5 (2004), at 239-240.

<sup>30</sup> *Id.*, at 240-241.

argument cannot succeed because, as discussed below, different claims and different parties are involved.

### 3.3.1 Different Claims

28. In the cases of *Compañía de Aguas del Aconquija*<sup>31</sup>, *Genin*<sup>32</sup> and *Oulguin*<sup>33</sup>, all tribunals concerned held that the breach of contractual rights and the breach of treaty rights will always have similar negative effects. However, the application to local courts for breach of contractual rights is not the same as an international claim concerning the breach of treaty rights. The application to local courts for breach of contractual rights does not prevent the parties from going to ICSID for breach of treaty rights.

29. In the present case, Ms Pescara applied to the Commercial Court of San Inocente de Irkoutsk to order VanCal to transfer to her account in Gaul the dividend on her 1% shareholding. Such application concerns the non-payment of dividends which is also what Vanguard claims. The application is to exercise one's right as a shareholder. The non-payment of dividends is a breach of a shareholder's right. The application made by Ms Pescara did not invoke any treaty rights. Similarly, the claim made by Vanguard at the Calpurnian Constitutional Court to declare the searches unlawful and to seek compensation is not based on treaty rights. According to the cases mentioned above, even though the negative effects are similar, the claims are based on different rights. Consequently the claims are two different claims. The fork in the road provision thus has not been invoked because the claims made were not the same.

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<sup>31</sup> *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Challenge to the President, 3 October 2001, 6 ICSID Rep 330.

<sup>32</sup> *Genin (Alex) & Ors v Republic of Estonia*, 25 June 2001, 17 ICSID Rev 395; 6 ICSID Rep 304.

<sup>33</sup> *Eudoro A Olgún v Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000.

### **3.3.2 Different Parties**

30. Alternatively, even if the claims are considered to be the same, it is submitted that application made to the local courts was made by Ms Pescara who is a distinctly different party to Vanguard.
31. In the facts in question here, the local court application made was by Ms Pescara against VanCal. Neither Vanguard nor Calpurnia were ever parties to this court proceeding. Additionally, Ms Pescara and VanCal are not parties to this ICSID proceeding. Since the parties to the claims are different, the fork in the road provision has no effect.
32. Even if this Tribunal determines that Calpurnia was a party in both the ICSID claim and the domestic court claim, it is submitted that the application to the domestic court was not made by Vanguard. The domestic court application made by Ms Pescara represented the 1% shareholding of VanCal. Vanguard's current claim before this tribunal is based on its 30% shareholding of VanCal. It is submitted that the application made to the local court was by a person other than Vanguard.
33. It is submitted that the fork in the road provision in the Calpurnia-Gaul BIT is not applicable in the present dispute. The claims submitted to the local courts and ICSID are different. Alternatively or in combination, the parties to the proceedings in the local courts and ICSID are different.

## **3.4 Prerequisites to Institution of Claim**

### **3.4.1 Settlement Requirement**

34. Article 11(1) of the Calpurnia-Gaul BIT requires the present dispute, “if possible, [to] be settled amicably”.
35. Vanguard tried to settle the dispute amicably. In the case of *Salini v Morocco*, the tribunal observed that:

[...]the attempt to reach an amicable settlement should essentially include the existence of grounds for complaint and the desire to resolve these matters out-of-court. It need not be complete or detailed.<sup>34</sup>

Various documents in the case made reference to the grounds of complaint. Those documents constitute “written request aimed toward the amicable settlement of the dispute”<sup>35</sup> to show the desire to resolve the matter out of court.

36. In our present case, Vanguard wrote a letter to Mr Korchnoi requesting the dividends be paid to an account to be opened in the name of Vanguard on 21 May 2005. On 5 June 2005, Vanguard wrote to Dr Swift and Mr Korchnoi requesting the board of directors telling them the reason for the unequal treatment. On 5 February 2007, Vanguard wrote to Mr Poe, the chairman of SFCDC claiming expropriation and asked Mr Poe to pass the letter to appropriate Ministers. These various documents made reference to the grounds of complaint, namely, the refusal of dividends payment. From the first letter to the last letter, more than a year lapsed. Vanguard was willing to wait for an answer and settle the matters outside court.

37. The above shows that the two requirements stated in the *Salini* case, that is, (a) the existence of grounds for complaint, and (b) the desire to resolve these matters out-of-court is satisfied.

### **3.4.2 Waiting Period Requirement**

#### *Calpurnia-Gaul BIT*

38. All three tribunals in *Bayindir*<sup>36</sup>, *Conorzio Groupment L.E.S.I. v Algeria*<sup>37</sup> and *SGS v Pakistan*, took the view that the extra months needed after the actual filing of a

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<sup>34</sup> *Salini Costuttori SpA et Italstrade SpA v Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, 42 ILM 609 (2003), 6 ICSID Rep 400, at para. 20.

<sup>35</sup> *Supra* note 34, at para 21.

<sup>36</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005.

claim and the expiry of the waiting period was only a procedural delay. As observed by the *Bayindir* tribunal, preventing the commencement of arbitration until the expiration date would amount “to an unnecessary overly formalistic approach which would not serve to protect any legitimate interests of the Parties”.<sup>38</sup> With no hope of settlement, the extra waiting months were held to be “overly formalistic”. Strict adherence to the waiting period will only delay the case and prolong its resolution. As held by the tribunal in *Consorzio*:

[a six month period] is not absolute and that it should be waived when it is obvious that any conciliation attempt would be doomed given the clearly demonstrated attitude of the other party.<sup>39</sup>

Consequently, all three tribunals accepted that non-compliance with a waiting period in a BIT was not “absolute and that it should be waived” especially in the circumstances when Calpurnia has showed no intention to settle the dispute amicably.

39. In the present case, it is submitted that no settlement could be reached. Within the 5 months that the letter has been sent, Calpurnia had no interest in negotiation at all. Waiting a further year will be an overly formalistic requirement. It would only become a procedural delay. The case will simply be brought again when the 18 months required expire in one year’s time. This will cost more for both parties without making any progress. Vanguard has tried to settle amicably and given time for Calpurnia to respond. Calpurnia’s failure to respond shows that there is no prospect of any settlement. A further year of waiting will not result in a settlement. Calpurnia has demonstrated its lack of willingness to settle. Article 11(2) of the Calpurnia-Gaul should be waived.

#### Under MFN Treatment

40. MFN treatment is provided to Vanguard and its investments because: (a) Calpurnia promised to do so for Gaulois investors, and (b) Vanguard is an investor from Gaul.

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<sup>37</sup> *Consorzio Groupement LESI v Algeria*, ICSID Case No ARB/03/8, Award, 10 January 2005.

<sup>38</sup> *Supra* note 36, at para. 102.

<sup>39</sup> *Supra* note 37.

41. Calpurnia undertook to provide MFN treatment to Vanguard by signing the Calpurnia-Gaul BIT and in particular by the inclusion of Articles 4(1) and 4(2):

1. Investments [...] or returns [...] shall be accorded treatment which is not less favourable than [that accorded to] investments and returns made by [...] investors of any third State, whichever is the most favourable to the investor.
2. Investors [...] shall be accorded [...] as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favourable than [...] [that accorded to] investors of any third State, whichever is the most favourable to the investor.

Vanguard, an investor of Gaul, and its investments in the territory of Calpurnia, should therefore be accorded MFN treatment respectively under Articles 4(2) and 4(1). Consequently, whenever a more favourable treatment is given to investors of a “third state”, the same treatment, or, at least, a “not less favourable treatment” should be accorded to Vanguard and its investments.

#### *The Calpurnia-Gaul BIT Applies to Dispute Resolution*

42. An important question raised in international investment law is whether MFN clauses apply to dispute resolution provisions contained in BITs. Decisions have been made by tribunals on a case-by-case basis – while ICSID cases like *Maffezini v Spain*<sup>40</sup> and *Siemens v Argentina*<sup>41</sup> determined that MFN clauses would apply to dispute resolution mechanisms, other ICSID cases such as *Salini v Jordan*<sup>42</sup> and *Plama v Bulgaria*<sup>43</sup> are of the view that they do not.<sup>44</sup>

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<sup>40</sup> *Maffezini v Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, ICSID Rev-FILJ 212 (2001).

<sup>41</sup> *Siemens v Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005).

<sup>42</sup> *Supra* note 34.

<sup>43</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, 20 ICSID Rev 262.

43. It is submitted that decisions regarding MFN clauses should be made on the particular facts of each case.<sup>45</sup> Therefore the effect of the MFN clause should be interpreted in light of the specific text of the relevant MFN clause, as well as the object and purpose<sup>46</sup> of the BIT and the context<sup>47</sup> of the MFN clause. This interpretation is consistent with the rules of interpretation set out in Article 31(1) of the VCLT and is an approach that should be adopted in interpreting Article 4 of the Calpurnia-Gaul BIT.

44. In this regard, the approach taken *Salini v Jordan*<sup>48</sup> and *Plama v Bulgaria*<sup>49</sup> are unhelpful to the present case before this Tribunal. This is because these decisions involved MFN clauses in BITs that strongly suggested intent on the part of the parties to exclude from the scope of the MFN clause (a) dispute resolution in general, or (b) the substitution of an entirely different dispute resolution system.<sup>50</sup>

45. In the present case, there is simply no such intent to exclude dispute resolution either in express terms or by implication. Article 5 of the Calpurnia-Gaul BIT contains 3 exclusions, but there is no mention of the exclusion of dispute resolution mechanisms in that provision, or anything similar to that effect. (The three exceptions ,contained in Article 5 – Exceptions, Calpurnia-Gaul BIT) are:

(a) any existing or future free trade area, customs union, common market or regional labour market agreement to which one of the Contracting Parties is or may become a party,

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<sup>44</sup> Jarrod Wong, “*The Application of Most-Favoured-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties*”, Asian Journal of WTO & International Health Law and Policy 3(1) (2008).

<sup>45</sup> “*Expanding the scope of the Most Favoured Nation clause*”, Herbert Smith LLP (UK), 8 February 2008 at [http://www.herbertsmith.com/NR/rdonlyres/B2A52C78-5B29-43BD-95D5-FCCA7F505F4B/5579/investment\\_protection08Feb08.html](http://www.herbertsmith.com/NR/rdonlyres/B2A52C78-5B29-43BD-95D5-FCCA7F505F4B/5579/investment_protection08Feb08.html).

<sup>46</sup> Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law, at 32.

<sup>47</sup> Freyer and Herlihy, “*Most-Favoured-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How ‘Favoured’ is ‘Most-Favoured’?*”, ICSID Review – Foreign Investment Law Journal.

<sup>48</sup> *Supra* note 34.

<sup>49</sup> *Supra* note 43.

<sup>50</sup> *Supra* note 44.

- (b) any international agreement or arrangement relating wholly or mainly to taxation, or any domestic legislation relating to taxation, or
- (c) any multilateral convention or treaty relating to investments, of which one of the Contracting Parties is or may become a party.<sup>51</sup>

46. The relevant facts in the decision in *RosInvest v Russian Federation*<sup>52</sup> are extremely similar to the present case. The BIT in *RosInvest v Russian Federation* involved very similar MFN provisions to the MFN provisions contained in the Calpurnia-Gaul BIT. Therefore the *RosInvest* tribunal's interpretation of the MFN clause should be of great persuasive authority in the present case. In *RosInvest*, the UK-Soviet BIT was the primary BIT in which the MFN clause was contained. That MFN clause (Article 3) provides:

1. Neither Contracting Party shall [...] subject investments or returns [...] to treatment less favourable than that which it accords to investments or returns of investors of any third State.
2. Neither Contracting Party shall [...] subject investors [...] as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.”

47. As is evident from the above wording, it is very similar to the MFN clause in the present case. The tribunal in *RosInvest* reasoned that since “the 1<sup>st</sup> paragraph [of the UK-Soviet BIT MFN clause] deals with *investments* and the 2<sup>nd</sup> paragraph [of that MFN clause] deals with the *investors*”<sup>53</sup>, the tribunal considered the two paragraphs of the UK-Soviet BIT MFN clause were best dealt with separately. The tribunal then went on and explained:

that arbitration matters [...] form a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his ‘use’ and ‘enjoyment’, procedural options of obvious and great significance.<sup>54</sup>

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<sup>51</sup> *Supra* note 13

<sup>52</sup> *RosInvest v Russian Federation*, SCC Case Number: Arbitration V 079/2005, Award on Jurisdiction, October 2007.

<sup>53</sup> *Id.*, at para. 127.

<sup>54</sup> *Id.*, at para. 130.

48. The tribunal decided that the failure to include arbitration within the exceptions to MFN protection was “further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties”. It can be seen that the material facts in our present case are very similar. First, the MFN treatment provisions are very similar, and second, the parties to the Calpurnia-Gaul BIT failed to include arbitration within the exceptions to MFN protection. Therefore this Tribunal should follow the reasoned decision made in the *RosInvest* case. Accordingly, the MFN clause in the Calpurnia-Gaul BIT should apply to dispute resolution clauses.

*Dispute Resolution under the Calpurnia-Flatland BIT*

49. Under the 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 (hereinafter Calpurnia-Flatland BIT), Calpurnia has given investors from Flatland more favourable treatment than investors from Gaul. In particular, Calpurnia has given investors from Flatland (a third State) more favourable treatment in respect of the waiting time required for parties to attempt to settle disputes. Under Article 7 of the Calpurnia-Flatland BIT, the waiting period is 2 months, which commences on the date of “dispute notification”. In contrast, the Calpurnia- Gaul BIT’s waiting period is 18 months.

50. In light of the previously discussed reasoning, it is submitted that MFN treatment should be given to Vanguard with the effect that it may choose the more favourable 2-month<sup>55</sup> waiting period under the Calpurnia-Flatland BIT rather than the 18-month<sup>56</sup> period under the Calpurnia-Gaul BIT.

51. As discussed above, from the first letter dated 21 May 2005 sent by Vanguard to the last letter dated 5 February 2007, Vanguard was requesting amicable settlement. These letters constitute “dispute notification” within the scope of Article 7 of the

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<sup>55</sup> Calpurnia-Flatland BIT, Article 7.

<sup>56</sup> *Supra* note 13, Article 11(2).

Calpurnia-Flatland BIT. Vanguard's request for ICSID arbitration on 31 July 2007 therefore satisfies the 2-month waiting period requirement in that BIT. That period can be imported by virtue of MFN treatment as discussed above. Consequently, this claim has been submitted in accordance with Article 7 and is valid.

52. Based on the above, it is submitted that Vanguard has tried to take the route of amicable settlement but this has not been and never will be a fruitful path to take. Vanguard fulfilled the waiting period either by importing the Calpurnia-Flatland BIT waiting period or that the further waiting of one year would be pointless and thus should be waived.

## **4 BIT Violations by Calpurnia**

### **4.1 Breach of Article 4(1) and 4(2) – National Treatment**

53. Calpurnia has accorded national treatment to foreign investors from Gaul. Article 4 of the Calpurnia-Gaul BIT states:

1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors of any third State, whichever is the most favourable to the investor.
2. Investors of one Contracting Party shall be accorded by the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favourable than the latter Contracting Party accords its own investors or to investors of any third State, whichever is the most favourable to the investor.

54. Therefore Calpurnia is required to treat Vanguard in a way that is no less favourable than the manner it treats its own nationals. Calpurnia's failure to provide such treatment to Vanguard is a breach of the Calpurnia-Gaul BIT.

55. For the purpose of this section, the acts of VanCal are attributable to Calpurnia as demonstrated in paragraph 132 of this memorial concerning state responsibility.

#### **4.1.1 VanCal Paid Calpurnian Shareholders but not Vanguard**

56. VanCal declared cash dividends in 2004, 2005, 2006 and 2007, and in each case, it was calculated on profits earned in the previous year. VanCal paid those dividends to Calpurnian stockholders. However, VanCal refused payment to Vanguard pursuant to a March 2005 decision by the VanCal board of directors.<sup>57</sup> The decision

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<sup>57</sup> VanCal board meeting minutes, 10 March 2005. The table of "Evidence/Calendar of Events" in regard to the Meeting Minutes of VanCal (2003-2008).

prohibited the payment of any money to foreign shareholders, regardless of the reason.<sup>58</sup>

57. In the present case, VanCal prevented dividends to be paid to Vanguard. This was, however, not due to a lack of funds as Calpurnian shareholders were paid. It is evident that Gaulois investors received less favourable treatment than Calpurnian shareholders when they were denied the right to be paid

58. Differentiation in treatment between nationals and foreigners are often accepted if justifiable and rational grounds are shown.<sup>59</sup> In the present case, VanCal gave no justification. Their instruction was not to distribute any dividend to any foreign shareholders, including Vanguard, for any reason.

59. Calpurnia's government representatives and VanCal's conduct, in refusing to accord equal treatment to Vanguard and Calpurnian investors, constitute a breach of the national standard treatment as stated in Article 4(1) of the Calpurnia-Gaul BIT.

#### **4.1.2 VanCal Denied the Claimant Proper Representation on the Board**

60. Calpurnia must allow Vanguard managerial treatment to its investment that is no less favourable than any domestic investor.<sup>60</sup> In the present case, Vanguard was denied this right. Calpurnian government representatives held three of the six seats on the board of directors of VanCal on the day Ms Pescara was ousted from the board.<sup>61</sup> The Vanguard representatives on the board, held by two proxies on that day, were improperly rejected by VanCal.<sup>62</sup> In denying the proxies held on behalf of Vanguard, Vanguard could not exercise its management rights as directors. The government representatives, as investors of the host state, could freely exercise its right as directors to manage VanCal.

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<sup>58</sup> *Supra* note 28, at para.14.

<sup>59</sup> *Supra* note 56.

<sup>60</sup> *Supra* note 13, Article 4(2).

<sup>61</sup> FDI Moot 2<sup>nd</sup> Clarifications of Problems, Number 1.

<sup>62</sup> *Supra* note 57, VanCal board meeting minutes, 16 November 2005.

61. This differential treatment created a more favourable managerial treatment to Calpurnian investors. Calpurnia is therefore in breach of Article 4(2) of the Calpurnia-Gaul BIT.

#### **4.1.3 VanCal Refused to Send Relevant Information to Vanguard**

62. The government-employed chairman, Dr. Jonathan Swift, instructed the newly replaced managing director of VanCal, Mr. Korchnoi, not to send any accounts, financial statements or any another information to Gaulois citizens.<sup>63</sup> However, this information was freely available to Calpurnian shareholders because it is situated in VanCal's office which is located in San Inocente de Irkoustsk in Calpurnia.<sup>64</sup> However, such arrangements made it difficult for foreign shareholders, such as Gaulois nationals, to obtain this information. This is due to the climate of hostility towards Gaulois citizens, which forced its expatriate personnel out of Calpurnia and prevented many from re-entering because of the intimidating circumstances.<sup>65</sup>

63. Calpurnia gave no justification as to their differentiation in treatment when Vanguard was denied more convenient access to VanCal's financial information. Article 4(2) of the Calpurnia-Gaul BIT has therefore been violated because of the difference in managerial treatment.

#### **4.2 Breach of Article 2(2) - Full and Constant Protection and Security**

64. Article 2(2) of Calpurnia-Gaul BIT provides:

Each Contracting party shall at all times accord in its territory to investments of investors of the other Contracting Party [...] and full and constant protection and security.

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<sup>63</sup> *Supra* note 28, at para.16.

<sup>64</sup> *Supra* note 61, Number 22.

<sup>65</sup> *Supra* note 28, at para. 17.

The “full and constant protection and security” treatment as stipulated in Article 2(2), was interpreted by the *AAPL v Sri Lanka* tribunal to mean that a host state must (1) exercise due diligence and (2) take such measures to protect a foreign investor’s property as are reasonable under the circumstances.<sup>66</sup> If an investor’s property is protected under the full and constant protection clause, there is no reason why it should not extend to the investor’s personnel such as Ms Pescara.

65. For the purpose of the current section, the acts of the Calpurnian police are attributable to Calpurnia, as is demonstrated in paragraph 122 below.

#### **4.2.1 Police Searches**

66. As a foreign investor in Calpurnia, Vanguard and its personnel are entitled to be protected by the Calpurnian police. Ms Pescara and Mr Kolowenko’s homes were searched thoroughly three times by the police due to an “anonymous tip” alleging espionage activities. Ultimately, no charges were ever filed against Vanguard, its employees or VanCal. The Calpurnian Constitutional Court, a state organ, refused to declare the police searches unlawful and denied a right to compensation<sup>67</sup> even though no search warrant was issued in respect of the police searches.<sup>68</sup> That said the Court failed to provide adequate protection to the investor’s investments under Article 2(2) of the BIT.

#### **4.2.2 Seizure of Computers**

67. The searches of Ms Pescara’s and Mr Kolowenko’s homes by the Calpurnian police resulted in the seizure of their computers.<sup>69</sup> These computers belonging to employees of Vanguard, which contains company correspondence, form part of Vanguard’s overall “investment”<sup>70</sup> in Calpurnia. The searches involving the seizure

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<sup>66</sup> *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 21, 1990, para 85(b).

<sup>67</sup> *Supra* note 28, at para 17.

<sup>68</sup> FDI Moot 1<sup>st</sup> Clarifications of Problem, Number 17.

<sup>69</sup> *Supra* note 57, Calpurnian Security Directorate Press Release, 8 December 2003.

<sup>70</sup> *Supra* note 13, Article (1).

of the computers were failures on the part of the Calpurnian police, to provide full and constant protection and security to Vanguard's investments.

#### **4.2.3 Press Releases**

68. In various occasions, the Calpurnian Security Directorate issued several press releases in connection with the home searches. Agitated public sentiment against Vanguard took place as a result of the press releases.<sup>71</sup> The press releases coupled with the hostile environment created by the Conservative Conscience of Calpurnian (hereinafter CCC) prevent Gaulois citizens from remaining in Calpurnia, causing Vanguard difficulties in preserving the value of its investments and thus again breaching the protection standard in Article 2(2) of the Calpurnia-Gaul BIT.<sup>72</sup> The Calpurnian Security Directorate is also an organ of the state. CCC is the party that has majority control over the Calpurnian Parliament and thus, its acts are also acts of the state.

#### **4.2.4 Picketing**

69. The tribunal in the case of *Azurix v Argentina* confirmed that

full protection and security may be breached even if no physical violence or damage occurs<sup>73</sup>

Presently, Ms Pescara, a representative of Vanguard, was threatened by protestors who picketed her home on 1-2 January, 15-17 March, 5-7 June, 17-19 July, and 25-28 October 2004,<sup>74</sup> but no physical violence or damage was present. These protestors were members of the CCC Women's League. The picketing were conducted in an aggressive manner – access to and from the property was obstructed, protestors were brandishing signs telling her to “go home” and “spy in [her] own backyard.” The

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<sup>71</sup> *Supra* note 57, Calpurnian Security Directorate Press Release, 8 December 2003, 4 June 2004, 17 July 2004.

<sup>72</sup> *Supra* note 28, at para 17.

<sup>73</sup> *Azurix Corp. v The Argentine Republic*, Award, 14 July 2006, at para 406.

<sup>74</sup> *Supra* note 28, at para 17.

protestors' chants were audible within the home, and also during the night.<sup>75</sup> Ms Pescara was thus threatened both physically and psychologically by the protestors.

70. However, despite the fact that Ms Pescara demanded<sup>76</sup> the police to remove the protestors, the police declined<sup>77</sup> to do so. The police did nothing – nothing to prevent the picketing, nothing to protect Ms Pescara from being threatened, nothing to prevent and stop the protestors' chants, nothing to sanction the picketers and nothing to prevent or to clear up the obstruction of vehicle access to and from Ms Pescara's home.

71. It is submitted that, in relation to the above acts, Calpurnia failed to provide “full and constant protection and security” to Vanguard. As a result, Calpurnia has and thus breached Article 2(2) of the Calpurnia-Gaul BIT.

### **4.3 Breach of Article 3 - Transparency**

#### **4.3.1 Article 3 of the Calpurnia-Gaul BIT**

72. Article 3 of the Calpurnia-Gaul BIT provides:

Each Contracting party shall ensure that, its laws, regulations, procedures, administrative rulings and judicial decisions of general application, as well as international agreements after their entry into force, which may affect the investments of investors of the other Contracting Party in its territory, are promptly published, or otherwise made publicly available.

73. It is necessary for VanCal to disclose information in relation to the investments, including:

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<sup>75</sup> *Supra* note 68, Number 19.

<sup>76</sup> *Supra* note 28, at para 17.

<sup>77</sup> *Id.*

all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the agreement.<sup>78</sup>

74. The Article 3 transparency provision requires the Host State to make known all laws and other rules which can affect the decisions an investor takes in relation to his investments.<sup>79</sup> Failure of a state to conduct itself in this way is also caught a fair and equitable treatment provisions.<sup>80</sup>

75. For the purpose of this section, the acts of VanCal are attributable to Calpurnia, as demonstrated paragraph 132 of this Memorial.

#### **4.3.2 Decision-Making Process of VanCal**

76. In the present case, the decision-making process of VanCal's board of directors was contrary to reasonable company practice, resulting in lack of transparency. Vanguard was prevented from electing a replacement for its representative on the board of directors, thus depriving it of the representation to which the cumulative voting provision<sup>81</sup> of the Calpurnia Commercial Code entitled it. Furthermore, there was no notice of change in forms of proxies accepted; as a result, the proxy holder was unable to vote at the meeting<sup>82</sup> at which Ms. Pescara was ousted as a director. The reason was that the proxies held were not found to be formally valid for the meeting, completely depriving Vanguard from representation at the meeting. Furthermore, it is unknown as to whether meeting times and places were disclosed to the proxy holder as this knowledge is vital to a proxy holder. A failure to do so would also constitute a lack of transparency and reduces Vanguard's voting rights and powers.

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<sup>78</sup> *Metalclad v Mexico*, Award, 30 August 2000, 5 ICSID Rep 209.

<sup>79</sup> UNCTAD Series on Issues in International Investment Agreements, *Fair and Equitable Treatment* (1999) 51.

<sup>80</sup> *Maffezini v Spain*, ICSID Case No ARB/97/7, Award on the Merits, 13 November 2000, 16 ICSID Review-FILJ (2001) 248.; *MTD v Chile*, Award, 25 May 2004, 12 ICSID Rep 6; *Occidental v Ecuador*, Award, 1 July 2004, 12 ICSID Rep 59.

<sup>81</sup> *Supra* note 28, at para 15.

<sup>82</sup> *Supra* note 57, Shareholders meeting of VanCal, 16 November 2005

### 4.3.3 VanCal Company Information

77. VanCal, has also violated the obligation to maintain the required degree of transparency when it decided to withhold accounts, financial statements and other information by refusing to send these documents to Gaulois citizens. This breach of transparency arises from:

procedures [...] after they enter into force, which may affect the investments of investors of the other Contracting Party in its territory.<sup>83</sup>

This procedural change in not sending such documents as compared to past practices of sending these documents translated into Gaulois, does not comply with the transparency provision. The decision to adopt this new procedure as of 1 December 2005 was not published. Such information, without being sent to Gaulois citizens and translated into Gaulois, is only available at the VanCal's office in Calpurnia, untranslated. This prevents Gaulois citizens abroad, including Vanguard, from reading such documents because of the inconvenience of such documents being in Calpurnia and the fear Gaulois now have in entering Calpurnia.

78. Alternatively, though there is no requirement to translate these documents into Gaulois, but because the past practice was that translations were made, Vanguard has a legitimate expectation to have them translated. Failure to do so also constitute a lack of transparency as some Gaulois citizens may not understand these documents even if it is accessible to them in Calpurnia.

### 4.3.4 FET under Article 2(2) of the BIT

79. Failure to act in a transparent manner, as demonstrated above, is another consideration to take into account when deciding whether the fair and equitable treatment standard<sup>84</sup> has been breached.<sup>85</sup>

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<sup>83</sup> *Supra* note 57, Shareholders meeting of VanCal, 16 November 2005.

<sup>84</sup> *Supra* note 13, Article 2(2).

#### 4.4 Breach of Article 2(3) - Discrimination

80. Article 2(3) of the Calpurnia-Gaul BIT states that investors and their investments shall not be impaired by “unreasonable, arbitrary or discriminatory measures”. According to the definition to these three terms addressed separately below, Calpurnia has breached this provision.

##### 4.4.1 “Unreasonable”

81. There is no clear definition to determine whether an act is reasonable or not. Wälde has commented that unreasonableness depends on each unique situation:

[...]what is unreasonable should be determined in the same way as what is not ‘fair and equitable’, i.e. by reference to objective, authoritative, preferable legal standards applicable to the country and the region in question.<sup>86</sup>

Furthermore, unreasonableness is usually incorporated with the definitions of arbitrary and discrimination, which are discussed the subsequent paragraphs.

##### 4.4.2 “Arbitrary”

82. In *Lauder v The Czech Republic*, the tribunal defined “arbitrary”, according to the *Black’s Law Dictionary*, as “depending on individual discretion; [...] founded on

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<sup>85</sup> *Supra* note 40 [Observing that lack of transparency associated with a loan transaction was incompatible with fair and equitable treatment.]; *Waste Management v Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967. [Stating that fair and equitable treatment standard would be infringed by a complete lack of transparency and candour in an administrative process.]; *LG&E v Argentina*, Decision on Liability, 3 October 2006.

[Acknowledging that fair and equitable standard consists of the host State’s consistent and transparent behavior...to fulfill the justified expectations of the foreign investor]; *Saluka v Czech Republic*, Partial Award, 17 March 2006. [Remarking that violation of fair and equitable treatment standard by host state’s lack of consistency and lack of transparency played decisive roles.]

<sup>86</sup> Thomas W. Wälde, “Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues based on Recent Litigation Experience”, quoted in Norbert Horn (ed.), *Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects*, Studies in Transnational Economic Law, 19, at 213.

prejudice or preference rather than on reason or fact.”<sup>87</sup> Similar to unreasonableness, “an arbitrary act” is also be defined as “an act that is unfair and unreasonable”<sup>88</sup>. In addition, the tribunal in *LG&E v Argentina* also stated that arbitrary measures:

[...]affect the investments of nationals of the other party without engaging in a rational decision-making process. Such process would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments.<sup>89</sup>

#### **4.4.3 “Discriminatory”**

83. As for defining discriminatory conduct, three criteria have been developed, namely, (a) unreasonableness, which can be described by reasons unrelated to the substance of the matter<sup>90</sup>, (b) like persons being treated in an inequivalent manner<sup>91</sup>, and (c) the concerned State must not have acted good faith<sup>92</sup>.

#### **4.4.4 Breach by Calpurnia**

84. Since the conjunction used in Article 2(3) is “or” instead of “and”, an act of VanCal which is either unreasonable, arbitrary or discriminatory would constitute a breach of that provision. In the present case, the acts of VanCal are considered as unreasonable, arbitrary or discriminatory for the following reasons.

85. First, as explained in paragraphs 53-63 on national treatment, no dividends were paid to Gaulois citizens. Second, as mentioned in paragraphs 72-78 on transparency, Vanguard was prejudiced by the unclear decision-making process and acquirement of

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<sup>87</sup> *Lauder v Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, at para. 221.

<sup>88</sup> American Law Institute (ALI), Restatement (Third) of the Law, The Foreign Relations Law of the United States (St Paul, Minn.: ALI Publishers, 1986), at para. 712.

<sup>89</sup> *LG&E v Argentina*, Decision on Liability, 3 October 2006, at para. 158.

<sup>90</sup> Abul F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J Transnat’L. & Pol’y at 57-59, 67-70 (1998).

<sup>91</sup> *Supra* note 73, at para. 391.

<sup>92</sup> *Supra* note 90.

company information. Third, referring to paragraph 116 on fair and equitable treatment, Vanguard and its investments were being treated in an unfair and inequitable manner. Finally, regarding paragraph 90 on expropriation, Calpurnia has indirectly expropriated Vanguard's investments.

86. For the purpose of this section, the acts of VanCal are attributable to Calpurnia, as demonstrated in paragraph 132 below. On the basis of the above mentioned violations on the part of VanCal, Calpurnia is additionally responsible for the breach of Article 2(3) of the Calpurnia-Gaul BIT.

#### **4.5 Breach of Article 6(1) - Expropriation**

87. The Calpurnia-Gaul BIT provides in Article 6(1) that:

Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised, or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation") except for a public interest, on a non-discriminatory basis, under due process of law, and against prompt, adequate and effective compensation.

This provision is reflective of customary international law.<sup>93</sup>

##### **4.5.1 Lawful Expropriation Requirements**

###### **Public Interest**

88. Calpurnia did not expropriate Vanguard's investments for reasons of public interest or policy reasons and thus does not fulfil the requirement of "public interest".

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<sup>93</sup> Campell McLachlan QC, Laurence Shore, Matthew Weiniger, International Investment Arbitration – Substantive Principles, at para 1.42.

### Non-discrimination

89. In the field of expropriation, “discrimination is widely held as prohibited by customary international law”.<sup>94</sup> Calpurnia has indirectly expropriated Vanguard’s investments through the deprivation of Vanguard’s right to exercise managerial power over VanCal and its assets. Thus, Vanguard’s right to the enjoyment and disposal of the company’s property has been affected.
90. This expropriation was done on a discriminatory basis since Vanguard received differential treatment as it was prevented from electing a replacement for Ms. Pescara. Consequently, Vanguard was denied of its right to representation to which the cumulative voting provision of the Calpurnian Commercial Code had entitled it, a right which other entities of the company would have enjoyed. Also, Calpurnia has not acted in good faith to ensure that its actions were reasonable and equally exercised; the allegations of political and industrial espionage, and destabilization were unsubstantiated.
91. Accordingly, Calpurnia has expropriated Vanguard’s interest in a discriminatory manner. It failed to provide justifiable grounds for its actions and neglected to pay any compensation to Vanguard.

### Prompt, Adequate and Effective Compensation

92. The expropriation has been conducted wrongfully<sup>95</sup>, and no compensation has been paid. In accordance with customary international law, Calpurnia must provide full<sup>96</sup>

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<sup>94</sup> Michael W. Reisman & Ors, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International 2005).at 1087.

<sup>95</sup> *Mendaro v World Bank*, 717 F.2d 610 (D.C. Cir. 1983); Schreuer, *Principles of International Law*, at 91; Peter Malanczuk, “International Law Provisions for the Protection of Foreign Investment, International Conference on ‘Foreign Direct Investment – Relevance for Poverty Alleviation, Economic Growth and Legal Culture’”, organized by the Konrad Adenauer Foundation, St Petersburg (Königswinter), Germany, 21-22 (2005), at 96.

<sup>96</sup> ILC Articles on Responsibility of States for Internationally Wrongful Acts.

compensation<sup>97</sup>. In the instant case, the investment of Vanguard has been expropriated because Vanguard has been deprived of the use and enjoyment of its investment to such a degree that this action has significantly affected the economic benefit of the investment.<sup>98</sup> Calpurnia has not provided any compensation whatsoever for its expropriation of the investment of Vanguard. This is a breach of Calpurnia's obligations under Article 6 (1) of the Calpurnia-Gaul BIT.

#### 4.5.2 Direct and Indirect Expropriation

93. Direct expropriation is becoming increasingly rare as the outright taking of title often generates negative publicity to the expropriating party. On the other hand, it has long been accepted that an expropriation may occur "outright or in stages"<sup>99</sup>. More recently, it has become an established principle of international investment law that an expropriation may occur from a series of acts that together had the combined effect of a "taking" of property.<sup>100</sup> It was decided in *Siemens v Argentina*<sup>101</sup> that a

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<sup>97</sup> *Wena Hotels v Egypt* (Merits), ICSID Case No ARB/98/4, Award of Dec.8, 2000, at para. 96 [Commenting that compensation was due following an expropriation of investors from hotels], *Compania del Desarrollo de Santa Helena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, at para.78. [Noting that even though the expropriation was for the benefit of the environment, compensation was still due]; *SD Myers Inc v Canada*, at paras.301-317. [Finding that full compensation for all economic losses proved by the claimant must be paid by the respondent.]

<sup>98</sup> *Supra* note 78. [Observing that expropriation also includes the covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.]

<sup>99</sup> *Supra* note 88. [Stating that this is a particularly influential codification, often used by International Tribunals in relation to the meaning of expropriation particularly Section 712 which defines creeping & indirect expropriation.]; G.C. Christie, 'What constitutes a Taking of Property under International Law?' 38 *British Yearbook of International Law* 307 (1962). [Stating that creeping expropriation' describes a taking through a series of acts.]

<sup>100</sup> UNCTAD, Series on Issues in International Investment Agreements 'Taking of Property' (2000), at 11-12. 'Slow and incremental encroachment of ownership rights of a foreign investor that diminishes the value of its investment'. *Generation Ukraine v Ukraine*, Award, 16 September 2003, 44 ILM. (2005) 404. [Holding that a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.]; *Tradex v Albania*, Award, 29 April 1999, 14 ICSID Rev-FILJ (1999) 197. [This decision emphasized the cumulative effect of the measures in question.]

<sup>101</sup> *Supra* note 41, at para. 263.

“creeping” expropriation has occurred if the end result would be the same; it is not the moment but the process. It has been explained by Professor Reisman that a “creeping” expropriation must sometimes be seen in retrospective and that:

Only, in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor’s property rights.<sup>102</sup>

94. Calpurnia has “taken” the investment from Vanguard by executing a series of acts which have gradually progressed into an expropriation. The Eritrea Ethiopia Claims Commission has held that a “cumulative effect” may result in the “despoliation of non-residents’ properties”<sup>103</sup> and thus, amount to expropriation. According to the Commission, although each act in isolation may not amount to an expropriation, the culmination of events may result in a “taking”. Expropriation will be deemed to have taken place upon the completion of the composite act, or the cumulative events mentioned above. This is often when the last act or omission occurs.<sup>104</sup> By looking at the acts in retrospect, it is evident that Calpurnia has indeed carried out each act which has had the aggregate affect of a deprivation of the property rights of.
95. The cumulative acts of Calpurnia amount to an expropriation and in accordance with the obligations of the Calpurnia-Gaul BIT where “prompt, adequate and effective” compensation is due.<sup>105</sup>

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<sup>102</sup> Michael W. Reisman and R.D. Sloane, ‘Indirect Expropriation and its Valuation in the BIT Generation’ 74 *British Yearbook of International Law* 115 (2003), at 123-125.

<sup>103</sup> *Eritrea v Ethiopia*, Partial Award, Loss of Property in Ethiopia Owned by Non-Residents Eritrea’s Claim 24, Eritrea-Ethiopia Claims Commission (2004).

<sup>104</sup> *Supra* note 95. See J Crawford, *The International Law Commission’s Draft Articles on State Responsibility* (2002) 141.

<sup>105</sup> *Supra* note 13, Article 6(1).

### 4.5.3 Other Criteria that Demonstrate an Expropriation has Occurred

#### Structural change

96. There has been a significant structural change in the equity interest of the investment. Vanguard is no longer able to exert any degree of decision making and VanCal has become a State controlled entity. The tribunal in *LG&E v Argentina*<sup>106</sup> decided that:

Ownership or enjoyment can be said to be ‘neutralized’ where a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment.

At the end 2004, Calpurnia transformed the business from a private company to a state-owned entity. The change has been forced upon Vanguard and it is no longer able to exert any degree of decision making.

#### Substantial interference

97. There has been a substantial interference with the management of the investment which has adversely affected the investment.
98. It has been accepted by tribunals considering international investment agreement disputes that an expropriation may have occurred whenever the property rights of Vanguard had been deprived.<sup>107</sup> It was decided by the tribunal in *Azurix v Argentina*<sup>108</sup> that

the management of the company must be sufficiently affected for the tribunal to find that an investment was expropriated.

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<sup>106</sup>*Supra* note 89, at para.188.

<sup>107</sup> *Starrett Housing Corp. v Iran* (Iran-US Claims Tribunal, 1983), para. 155. [Appointing a ‘temporary’ manager was considered to be a direct interference with the property rights of the claimant which rendered those rights ‘so useless that they must have been deemed to have been taken’.]

<sup>108</sup> *Supra* note 73, at para. 322.

The unjustified removal of Ms Pescara from the board of directors on 16 November 2005 resulted in a substantial interference with the daily control and decision making of the investment. Calpurnia has specifically targeted the removal of Ms Pescara, to extinguish the decision making capacity of Vanguard. In the instant case, there has been a clear interference with the management of the investment, attributable to Calpurnia, which has directly caused Vanguard's investment to depreciate in value.

### Acquisition of control

99. Calpurnia has acquired full control of VanCal by denying Vanguard any opportunity to participate in the "fundamental" decision making of the investment. This is an act that has the effect of an expropriation. There is a duty to compensate when the rights of shareholders are taken away.<sup>109</sup> It was also decided by the tribunal in *Telnor v Hungary* that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investments. A series of decisions and unwarranted interferences with the rights of the shareholders to participate in the company decision-making denied Vanguard of exerting any control over the investment.<sup>110</sup> The denial of control is an expropriation of the investment.

### Denial of access to information

100. There has been a denial of access to important company information essential to the daily management and operation of the company which has deprived Vanguard of control of the investment. In accordance with the principles of legitimate expectations:

actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and

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<sup>109</sup> *Phillips Petroleum Co v Iran*, Award No 425-39-221, 29 June 1989, Iran-USCTR 79.

<sup>110</sup> *Pope & Talbot Inc v Government of Canada*, Interim Award, 7 ICSID Rep 69, at para. 86. [Checklist of points to guide an assessment of government interference when expropriation is alleged. It reflects some of the issues that the tribunal may wish to consider further in conducting its enquiry.]

assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.<sup>111</sup>

101. Until November 2005, Vanguard was regularly provided with accounts, financial information and other company information, duly translated into Gaulois, in accordance with regular practice. On 1 December 2005, Dr Swift instructed Mr Korchnoi to cease sending accounts, financial statements or other information to Gaulois citizens or translating such materials as had been the practice. This action had the effect of a deprivation of control. Furthermore, the actions of the State are diametrically opposed to the legitimate expectations of the investors. Vanguard entered into the investment in good faith and reasonably expected the continuance of such financial information to be provided in accordance with agreed practice. Such a withdrawal of information is a breach of good faith. Furthermore, Vanguard is not able to manage the business effectively in the absence of such information. The action has a significant economic deprivation to the value of the investment.

#### Direct interference

102. Imposition of government measures directly interfere with the economic rights to the investment, this is tantamount to an abusive taking. The decision to refuse to pay dividends to foreign shareholders can be attributed to the State. The “proportionality test” is the appropriate test to ascertain whether the State retains the right to regulate on a specific issue. According to the *Tecmed*<sup>112</sup> tribunal, the proportionality test assesses:

whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality.

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<sup>111</sup> *Revere Copper v OPIC*, Award, 24 August 1978, 56 ILR (1980) 258, at 271.

<sup>112</sup> *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004), at para. 14.

In this case, there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>113</sup> The State's obligation to pay compensation remains following an expropriation<sup>114</sup>. The measure is not proportionate to public interest and compensation is due.

#### Deprivation of contractual rights

103. In *Amoco IFC v Iran*<sup>115</sup>, the tribunal considered that “any right that can be the object of a commercial transaction” may not be wrongfully expropriated. Failure to pay the licence fee for the use of the VANGUARD INTERNATIONAL Trade Mark constitutes a breach of contractual obligations. Please refer to paragraph 114 on fair and equitable treatment.

#### **4.6 Breach of Article 2(2) - Fair and Equitable Treatment**

104. For the purpose of this section, the acts of VanCal are attributable to Calpurnia, as demonstrated in paragraph 132 of this Memorial.

105. The fair and equitable treatment provision is set out in Article 2(2) of the Calpurnia-Gaul BIT, which provides:

Each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment [...].

106. The standard of fair and equitable treatment has a long standing history in international treaties. In the past decade, tribunals have started to apply fair and

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<sup>113</sup> *Supra* note 73, at para 311.

<sup>114</sup> *Santa Elena v Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153, at para 72; *LG&E v Argentina* [Confirming *Tecmed*, Award. The proportionality test to be used when making use of this right was recognized in *Tecmed*.]

<sup>115</sup> *Amoco International Finance Corp v Government of the Islamic Republic of Iran*, Partial Award No. 310-56-3, 14 July 1987, 15 Iran-USCTR 189.

equitable treatment and its definition in a broad sense, covering various circumstances.<sup>116</sup> The treatment would generally include:

acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.<sup>117</sup>

107. Furthermore, terms of fair and equitable treatment are often drafted in a proactive voice, such as “each Contracting Party shall at all times accord [...] fair and equitable treatment”<sup>118</sup>. This is so that Host States will have to do positive acts to ensure this standard is met:

rather than prescriptions for a passive behaviour of the State or avoidance of prejudicial conduct to the investors.<sup>119</sup>

108. The threshold of fair and equitable treatment for the investor to satisfy is lower than that required under customary international law. It is considered “that fair and equitable treatment constitutes an independent treaty standard that goes beyond a mere restatement of customary international law”<sup>120</sup>. The standard is not the minimum requirement of international law, but rather, it provides protection at a higher level, to allow a more objective view of fair and equitable treatment to be taken.<sup>121</sup> This higher standard of international law is “to set the floor, not a ceiling”<sup>122</sup> to ensure that nothing is permitted under the standard. International

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<sup>116</sup> *Supra* note 78; *Maffezini v Spain*, Award on the Merits, 13 November 2000, 16 ICSID Review-FILJ (2001) 248.

<sup>117</sup> *Genin v Estonia*, Award 25 June 2001, 17 ICSID Rev-FILJ (2002) 395.

<sup>118</sup> *Supra* note 13, Article 2(2).

<sup>119</sup> *MTD v Chile*, Award 25 May 2004, 12 ICSID Reports 6 [An ad hoc committee upheld the decision]. See Decision on Annulment, 21 March 2007.

<sup>120</sup> R. Dolzer & M. Stevens, *Bilateral investment Treaties* (1995) 60; Peter T. Muchlinski, *Multinational Enterprises and the Law* (1999) at 626; Series on Issues in International Investment Agreements, *Fair and Equitable Treatment*, UNCTAD/ITE/IIT/11(3), 1 June 1999, 13, 17, 37-40, 53, 61; S. Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’ *70 British Year Book of International Law* 99. 104-105, 139-144 (1999).

<sup>121</sup> F.A. Mann, “British Treaties for the Promotion and Protection of Investments” (1981) 52 *British Year Book of International Law* 241, 244; *Occidental v Ecuador*, Award, 1 July 2004, 12 ICSID Reports 59, at paras.189-190.

<sup>122</sup> *Supra* note 73, at para. 361.

investment law is developing toward greater protection of investors by increasing the fair and equitable treatment standard. The standard covers a vast range of circumstances to ensure that investors do not suffer detriment by actions or inactions by the Host State and to promote future investment in a harmonious and predictable business environment.

109. Numerous criteria are now acknowledged, individually or in combination, to constitute fair and equitable treatment. These criteria are discussed below:

#### **4.6.1 Denial of Justice**

##### *Procedural failures and lack of due process*

110. The lack of due process is a violation of the fair and equitable treatment standard in a number of different ways, namely, the right to be heard in court proceedings.<sup>123</sup> In accordance to general international law of investment arbitration, it is Calpurnia's responsibility to provide Vanguard a fair trial, as it is Calpurnia's responsibility to ensure that Vanguard does not suffer from discrimination or any prejudice by its courts.<sup>124</sup> Moreover, under customary law standards, it is not necessary to show bad faith or malicious intention for lack of due procedure, but simply that a "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough...".<sup>125</sup> Thus, the dismissal of Vanguard's applications in the Calpurnian Constitutional Court and the Commercial Court of San

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<sup>123</sup> *Supra* note 78. [Holding that refusal to grant a construction permit constitutes lack of procedural propriety due its failure to hear the investor]; *Middle East Cement v Egypt*, Award, 12 April 2002, 18 ISCID Review-FILJ (2003) 602; *TECMED v Mexico*, Award, 29 May 2003, 43 ILM (2004) 133. [Deciding that standard violated because authority failed to notify Claimant of intention, depriving it of its opportunity to express its position.]; *Loewen v USA*, Award, 26 June 2003, 42 ILM (2003) 811. [Observing that conduct of trial was so flawed that it constituted a miscarriage of justice]; *Waste Management v Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967.

<sup>124</sup> *Loewen Group Inc & anor v United States of America* (Award) 7 ICSID Rep 421 NAFTA (2003), 465.

<sup>125</sup> *Id.* [Adopting the formula in *Mondev International Ltd v United States of America*, Award, 6 ICSID Rep 181, 220 (NAFTA/ISCID (AF), 2002, Stephen P, Crawford & Schwebel)].

Inocente de Irkoutsk constitutes a denial of justice.<sup>126</sup> In the first instance, no warrant was issued prior to the search constituting it unlawful,<sup>127</sup> yet Vanguard was not given a right of hearing to contest this. In the second instance, Ms Pescara was refused a hearing in her status as a trustee for Vanguard. The domestic courts have not provided remedies at any time. This is a clear denial of justice, in breach of Article 2(2) of the Calpurnia-Gaul BIT.<sup>128</sup>

#### 4.6.2 Legitimate Expectations

##### State of the law at the time of investment

111. *TECMED v Mexico* takes into account legitimate expectations in relation to fair and equitable treatment in foreign investment law and stated that the agreement requires that basic expectations that a foreign investor takes into account when making the investment must not be affected. The case states:

The foreign investor expects the Host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor. The foreign investor also expect the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>129</sup>

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<sup>126</sup> The United States Model BIT (2004): Article 5(2)(a) [providing that: "... 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world...".]

<sup>127</sup> *Supra* note 68, Number 17.

<sup>128</sup> *Supra* note 13, Article 2(2).

<sup>129</sup> *Supra* note 111; *Occidental Exploration and Production Co v Republic of Ecuador* ; *CMS Gas Transmission Co v Argentine Republic*, Award, 2005, 44 ILM 1205, 1235 (ICSID, 2005, Orrego Vicuña P, Lalonde & Rezek). [Noting that guarantees given under the legal framework and its various components were crucial for the investment decision and must be followed.]

112. VanCal has failed to maintain the legitimate expectations of Vanguard in relation to payment of cash dividends despite profits earned and the past practice of paying Vanguard. Having taken into account the cash dividends that may be earned if the company profits before making such investments, Vanguard was refused expected payments. Accordingly, Calpurnia breached the fair and equitable treatment standard.

### Specific representations

113. When making the original investment, Vanguard was sent a number of documents, which were translated into Gaulois. Such practice was ceased when the relations of the two states' diplomatic relations have deteriorated. Vanguard initially relied on these specific representations, which was a factor which induced him to invest. Such a breach of representation may also amount to a failure to meet the fair and equitable treatment standard.<sup>130</sup> Moreover, proxies in the same form which have previously been accepted in the past have been rejected at a crucial meeting. This again, is inconsistent with prior practice and such inconsistency may also constitute a breach in the fair and equitable standard.<sup>131</sup>

### **4.6.3 Contractual Obligations**

114. Complying with contractual obligations is a fundamental aspect of keeping a legal system stable and predictable. Therefore, adhering to contractual obligations, or *pacta sunt servanda*, is vital. General international law provides that violation of investment contracts would be inconsistent with principles of the fair and equitable treatment standard as well as with standards of national and international law

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<sup>130</sup> *Waste Management Inc v United Mexican States*, Award, 2004, 43 ILM 967, 986 (NAFTA/ICSID (AF), 2004, Crawford P, Civiletti & Gómez). [Observing that it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the Claimant]; *Metalcald Corp v United Mexican States*; *MTD v Chile* [Deciding that approval of an investment for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably.]

<sup>131</sup> *Supra* note 89. [Remarking that the fair and equitable standard consists of the host State's consistent and transparent behavior...to fulfill the justified expectations of the foreign investor.]

concerning liability for contractual performance.<sup>132</sup> In the current case, the failure to pay license fees under agreement is a clear breach of contractual obligations, especially in the case of an unjustifiable breach, causing a breach of this standard.<sup>133</sup>

#### 4.6.4 Discrimination

115. The tribunal in *CMS v Argentina* stated that”

“the standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment”.<sup>134</sup>

It is also noted that:

...if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated. This follows from the idea that fair and equitable treatment inherently precluded arbitrary and capricious actions against investors.<sup>135</sup>

116. In its action to pay dividends to local shareholders and refusal to pay foreign shareholders, VanCal has breached the standard of fair and equitable treatment as these actions are discriminatory and arbitrary against non-nationals, namely, Vanguard.<sup>136</sup>

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<sup>132</sup> *Mondev v USA*, Award, 12 October 2002, 42 ILM (2003) 85. [Acknowledging that fair and equitable treatment extends to contractual obligations.]

<sup>133</sup> *Supra* note 6. [Commenting that an unjustified refusal to pay sums admittedly payable under a contract at least raises arguable issues under Article IV (a fair and equitable treatment provision)]; *Noble Ventures v Romania*, Award, 12 October 2005. [Considering that FET standard covers the obligation to abide by contracts.]

<sup>134</sup> *CMS Gas Transmission Co v Argentine Republic*, Award, 2005, 44 ILM 1205, 1235 (ICSID, 2005, Orrego Vicuña P, Lalonde & Rezek), at para. 290.

<sup>135</sup> S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 *The British Yearbook of International Law* (1999), at 133.

<sup>136</sup> *Supra* note 56. [Observing that the export ban was arbitrary and discriminatory against non-nationals]; *Saluka Investments BV v Czech Republic*, at para. 291.

#### 4.6.5 Coercion and Harassment by State Authorities

117. A number of coercive and harassing acts can constitute an even more serious mistreatment to the investor. In the case of *Pope & Talbot*, the tribunal drew attention to examples such as :

assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the Investment's conduct.<sup>137</sup>

118. A number of acts by VanCal as well as by Calpurnia can be said to constitute acts of coercion and harassment. First, VanCal refused to pay dividends to foreign shareholders. Even if VanCal had dividends "credited on VanCal's books"<sup>138</sup> to Vanguard's account, as it claimed, the payment was unduly delayed. Second, the unwarranted searches of the Gaulois citizens' homes were unlawful. Third, the press releases by the Calpurnian Security Directorate created an additional feeling of hostility towards Gaulois nationals involved and Vanguard, suggesting that they are involved in criminal conducts. These allegations proved fruitless when no charges were ever filed. Fourth, the picketing outside of Ms Pescara's home was "coercive" and is a form of "harassment" to make her return home. Fifth, information previously provided was withheld. Finally, Ms Pescara's application for renewal of visa was refused. The refusal without a doubt hindered Vanguard's ability to preserve the value of their investments. The above actions were coercive and harassing acts which when read together clearly shows that Calpurnia have intentions to drive Vanguard out of the country without paying compensation that is due to them.<sup>139</sup>

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<sup>137</sup> *Supra* note 109. [Noting that relationship between the parties changed from one of cooperation in to one of threats and misrepresentation.]

<sup>138</sup> *Supra* note 57, VanCal Board (Swift) email to Claimant, 28 September 2006.

<sup>139</sup> *Supra* note 111. [Determining that decision to not renew the permit was in reality a device to coerce the investor to relocate without compensation.]

#### 4.6.6 Bad Faith

119. It is clear that bad faith in itself is not a requirement in a claim for a breach of fair and equitable treatment to be achieved.<sup>140</sup> According to *Waste Management v Mexico*<sup>141</sup> it is the basic obligation of the State, in relation to a fair and equitable treatment clause, to act in good faith and not deliberately set out to destroy or frustrate the investment by improper means. Though bad faith and malicious intent may not be requirements for breach of this standard, it is clearly an aggravating factor.<sup>142</sup> Acts such as dismissal of domestic court applications to hear a case or for applications of visa, as well as the VanCal's failure to comply with the Calpurnian Commercial Code are just a few examples of how Calpurnia has acted in bad faith. The bad faith element can be taken into consideration when deciding whether the fair and equitable treatment standard has been breached.<sup>143</sup>

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<sup>140</sup> *Supra* note 131. [Concluding that bad faith from the State is not required for its violation]; *Loewen v USA* [Holding that neither bad faith nor malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice]; *Occidental Exploration and Production Co v Republic of Ecuador*; *CMS Gas Transmission Co v Argentine Republic* [Remarking that bad faith can aggravate the situation but are not an essential element of the standard]; *Azurix Corp v The Argentine Republic* [Commenting that failure to treat an investment fairly and equitably does not require bad faith or malicious intentions of the recipient State as a necessary element.]

<sup>141</sup> *Supra* note 129. [Holding that no doubt that a deliberate conspiracy, would constitute a breach of fair and equitable treatment.]

<sup>142</sup> *Supra* note 133. [Deciding that bad faith can aggravate the situation but are not an essential element of the standard.]

<sup>143</sup> *Id.*

## 5 STATE RESPONSIBILITY

### 5.1 Conduct of a State Organ

120. According to the ILC Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ICL Articles), a state shall be responsible for all of its respective organs. Commentators agree that this is currently the most authoritative document on the law of state responsibility.<sup>144</sup> In other words, if acts of a state organ caused damage to a foreigner, the state may be responsible to provide reparations for the injury caused.

121. Article 4(1) of the ILC Articles provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government of a territorial unit of the State.

122. It is well-established that police forces are an organ of the state because they exercise an essential government function.<sup>145</sup> Accordingly, all the acts or omissions of the Calpurnian police, including the failure to protect Ms Pescara in breach of the Calpurnia-Gaul BIT as discussed in paragraph 67 and 70 above, are attributable to Calpurnia.

123. Similarly, the Calpurnian Constitutional Court is a judicial branch of the government. As such it is an organ of Calpurnia under Article 4(1) of the ILC Articles. Accordingly, the failure of the court to declare the searches unlawful as discussed in paragraph 66 above is attributable to Calpurnia.

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<sup>144</sup> *Supra* note 46, at 550.

<sup>145</sup> J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington D.C., U.S. Government Printing Office, 1898) 3, at 3129. [The Moses tribunal of the Mexico-United States Mixed Claims Commission observed that “An officer or person in authority represent pro tanto his government...”]

## 5.2 Conduct of Other State Entities

### 5.2.1 VanCal

124. In relation to whether VanCal's acts are attributable to the State, the structural test and the functional test must be applied.

#### The Structural Test

125. The *Maffezini* tribunal referred to the structural test as follows:

Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly.<sup>146</sup>

126. In *Salini v Morocco*<sup>147</sup>, the company ADM was incorporated as a limited company with its own legal personality. However, Morocco held 89% of ADM's stock directly and through other natural persons. Additionally, its board of directors included government officials. The tribunal held that:

ADM, a company mostly held by the State which, considering the size of its participation (over 80%), directs and manages it. All these factors resolutely imprint a public nature on the said company.<sup>148</sup>

Applying the above criteria, the control of VanCal by majority shareholding of VanCal and the control of the board by government officials satisfy the structural test.

#### The Functional Test

127. In the *Maffezini* case, the tribunal observed that the functional test required an examination as to whether the entity at issue carried out functions which were

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<sup>146</sup> *Supra* note 80.

<sup>147</sup> *Supra* note 34.

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

governmental in nature or which were reserved for the state but were now performed by private companies or individuals. In that case, the corporation SODIGA which was established to promote regional industrial development was considered to satisfy this test.

### Nature of SFCDC

128. VanCal is under the control of SFCDC. It is important to look at the nature of SFCDC first to determine VanCal's status. In the present case, the SFCDC took control of VanCal and made decisions which sufficiently impaired Vanguard's enjoyment of rights as an investor and shareholder. The SFCDC is an entity 100% owned by Calpurnia. Accordingly, it passes the structural test. At the same time, SFCDC is responsible for commercial development of the nation. Therefore, it exercises public function. SFCDC's role is similar to SODIGA in the *Maffezini* case. Both entities exercise the public function of developing the nation. It is submitted that the SFCDC passes the structural as well as the functional test. Consequently, SFCDC is a State entity.

### Application of Structural Test to VanCal

129. The SFCDC eventually held a 70% shareholding in VanCal. Even though SFCDC claims that its shareholding is registered under the names of natural persons<sup>149</sup>, the voting rights are still vested with SFCDC.

130. The chairman of VanCal, Dr Swift was a member of SFCDC. The two directors representing Vanguard were replaced by two representatives of SFCDC. Similar to the *Salini* case, Calpurnia held the majority of shares in VanCal and the majority of the directors were government representatives. For these reasons, the control by Calpurnia of VanCal satisfies the structural test.

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<sup>149</sup> *Supra note 28*, at para 10.

### Application of Functional Test to VanCal

131. In the present case, VanCal was the pioneer in the field of telecommunications. It provided technical assistance and significantly helped Calpurnia to develop its telecommunications system. As the *Maffezini* tribunal stated:

a private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State.

Even though VanCal makes profits, it also is entrusted with improving telecommunications technology for Calpurnia and its people. VanCal was helping to develop Calpurnia in the same way that SODIGA did in *Maffezini*, by providing services in improving Galicia's infrastructure. Accordingly, VanCal's function can be classified as governmental and it is submitted that VanCal also passes the functional test.

132. Based on the foregoing, VanCal satisfies both the structural and functional tests. Consequently, all acts or omissions by VanCal should be attributable to Calpurnia.

#### **5.2.2 SFCDC**

133. Alternatively, should this Tribunal choose not to accept that VanCal is a state organ, the acts carried out by SFCDC in relation to Vanguard is still attributable to Calpurnia.

134. Although SFCDC is a private entity, it is still considered as a state organ as discussed in paragraph 128 above.

#### **5.2.3 Dr. Swift**

135. Article 5 of the ILC Articles states:

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered

an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

136. The non-payment of dividends was ordered by Dr Swift, the representative from SFCDC. At a board meeting<sup>150</sup>, Dr Swift explicitly mentioned that he proposed to use the profit from the SFCDC's perspective. According to Article 5 of the ILC Articles, Dr Swift is acting under the instruction of Calpurnia and therefore his acts are attributable to the state. Dr Swift's proposal on how to distribute profits (including not distributing any to Vanguard) reflects the position of the SFCDC, and thus, Calpurnia.

#### **5.2.4 Shares not Registered under SFCDC's Name**

137. Article 8 of the ILC Articles states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

138. The shareholders ousted Ms Pescara from properly representing the board of VanCal. Such a voting was done by the majority shareholder, the SFCDC. The SFCDC claimed that the shares were held by natural persons. However, the voting right was vested with the SFCDC.

139. In the present case, even though natural persons held the shares, the SFCDC is the true entity controlling the right. It is submitted that through Article 8 of the ILC Articles, the prevention of Vanguard's proper representation by the shareholders is also an act attributable to Calpurnia.

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<sup>150</sup> *Supra* note 57, VanCal Board Meeting at Offices of SFCDC, 17 February 2005.

## **6 PRAYER FOR RELIEF**

140. For the foregoing reasons set out in this Memorial, VANGUARD INTERNATIONAL respectfully requests the Tribunal to find:

1. That Calpurnia has breached national treatment.
2. That Calpurnia has breached the standard of full and constant protection and security.
3. That Calpurnia has breached the requirement of transparency.
4. That Calpurnia has breached the standard of non-discrimination.
5. That Calpurnia has unlawfully expropriated.
6. That Calpurnia has breached the standard of fair and equitable treatment.
7. That Calpurnia is responsible to pay compensation for any related damage incurred by VANGUARD INTERNATIONAL.
8. That VANGUARD INTERNATIONAL is entitled to such other and further relief as the Tribunal deems it just and proper.