

INTERNATIONAL CENTRE FOR THE SETTLEMENT  
OF INVESTMENT DISPUTES

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In the matter of

VANGUARD INTERNATIONAL

Claimant

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA

Respondent

(ICSID Case No. ARB/X/X)

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MEMORANDUM FOR CLAIMANT

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## **PART I: STATEMENT OF THE FACTS.**

### **Section 1: Background.**

1. Vanguard International (hereinafter Claimant or Vanguard), is an entity incorporated in Gaul and with its headquarters in the latter.
2. Vanguard established a joint venture agreement with the State Fund for Commerce and Development in Calpurnia (hereinafter SFCDC) to provide mobile telecommunications services under the name of VanCal.
3. Claimant initially owned 50% equity interest which by the time of the dispute had been reduced to 31%.
4. Through separate agreements, Claimant was to provide technical assistance and trademark licensing.

### **Section 2: Harassment of Claimant's Personnel.**

5. In November 2003 the Conservative Conscience of Calpurnia (CCC) won the elections. The hostility towards the States that hold a viewpoint contrary to its own, *i.e.* Gaul, was quickly made evident by the deterioration of diplomatic relations between them, founded on unsubstantiated allegations of political and industrial espionage that would eventually put Claimant's personnel at grave risk and would ultimately lead to the indirect expropriation of its investment.
6. Just one month after elections Respondent began exercising a discriminatory and hostile policy against Claimant's representatives in Calpurnia. On 7 December 2003 Calpurnian Security forces searched the private residences of Claimant's representative and Managing Director of VanCal Pescara and of the chief technical officer, Kolowenko, under supposed suspicion of unlawful data collection and espionage. Apparently, the only lead they had was an anonymous tip. Some personal property and storage media was seized during the course of this search.
7. In spite of the fact that no incriminating evidence was found and that the search itself was not conducted under a warrant, following proper procedure, Calpurnian Security forces considered it appropriate to emit a press release the next day in which Claimant's expatriate personnel appeared as spies and

criminals before all of Calpurnia. It should come as no surprise that they were immediately targeted by the public eye. The press release clearly agitated public sentiment against Pescara, Kolowenko and Claimant.

8. After this appalling and overtly discriminatory incident Pescara and Kolowenko were advised to leave the country for fear of their personal and physical safety. However, it was the overall hostile environment that forced them to leave before the year 2003 was over.

9. Nevertheless, due to her position as managing director of VanCal, Pescara had to return to Calpurnia periodically after this incident, only to find that as early as 1-2 January of 2004 her residence was picketed by a group of protesters among which the CCC Women's League was to be found. They carried signs in which they accused her of being a spy, hence the connection with the press release is undeniable, and also chauvinistic remarks stating that her place as a woman is in the home, that she should return home. The picketers were screaming and yelling all sorts of threats through the night, they made vehicle access to the property impossible, anyone wishing to come inside could only do so on foot, an action that would put that person in grave danger. All this considered, Pescara requested the police to remove the protesters from her property, and the police simply denied her request.

10. These protests outside Pescara's property continued through the first half of the year 2004 whenever she returned to Calpurnia to conduct her official business in VanCal. Another picketing occurred through the 15 to 17 of March, this time it was longer and the police again denied Pescara's request that they remove the protesters.

11. This however did not prevent Calpurnian Security Forces from conducting further searches of the residences under the same unsubstantiated suspicions as the year continued, on 3 June and 15 July. Each search was followed by its respective incendiary press release one or two days after. It should also come as no surprise to the tribunal that more protests were assembled outside of Pescara's residence right after each one of the press releases. It is evident that the press releases were the detonating element for the hostility towards Claimants representatives. Shockingly though, the police denied its assistance to Pescara in each and every one of the incidents, including the last one that occurred from 25 to 28 October, being the longest one of them.

12. Even though in the press releases it was asserted that the authorities would file charges shortly, they never did. And thus, they did not allow Pescara or Kolowenko to exercise their right to be heard and to defend themselves against such ludicrous accusations. Time can be no excuse for this since the police searches were conducted within a time span of eight months, sometimes with up to six months between them. There was enough time to initiate the proper proceedings so that Claimant's personnel could have defended themselves.

13. After the three police searches, Vanguard attempted to activate the legal remedies provided by domestic law. Regretfully, the unsubstantiated dismissals awarded them no relief whatsoever. The court's findings were not based on solid legal grounds but only on mere formalities.

### **Section 3: Impossible for Claimant's Representatives to Remain in Calpurnia.**

14. Later on that year, Pescara made an application to renew her business visa but it was denied in September, no reasons were given for such denial; this has special relevance since she was still Managing Director of VanCal to that date. Immediately after, SFCDC through its government authorities started playing a leading role in VanCal's affairs. The tribunal must see that this is something more than mere coincidence. This act prevented Pescara from effectively performing her duties as Managing Director and added to the unsafe environment in Calpurnia, leading to her resignation in 15 November 2004.

### **Section 4: Interference and Discrimination through Corporate Vehicle SFCDC.**

15. State interference through SFCDC became evident immediately. In that sense Swift, who is a government employee, commented that he did not "regard VanCal as really being a private company" and when discussing Claimant's representation in the Board he abruptly left, declaring that he would not stay in a meeting with "Gaulois spies."<sup>1</sup>

16. Claimant's representatives were unable to assist to the February 17 meeting due to the sudden change of location. The illegitimate decisions from

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<sup>1</sup> Korchnoi Affidavit

that meeting were taken in their absence. Claimant was thus deprived of its right of representation in the board of directors as a shareholder.

17. In the 10 March 2005 meeting a decision to appropriate the dividends to set up a reserve fund for severance pay was taken, in the words of Poe, “to hold the amount paid to the foreigners to the minimum,” further evidence of SFCDC’s discriminatory motives in depriving Claimant of its dividends.

18. In the meeting SFCDC authorities decided to suspend indefinitely the payment of dividends to Claimant.

19. However, according to Poe, “in order to preserve the rights of the Calpurnian shareholders,” the board distributed 18% cash and 10% in stock.

20. On 21 May, after two months from the decision to suspend payments, Claimant wrote a letter to Korchnoi for an explanation, to which regrettably Korchnoi, under the direct orders of Swift, responded “VanCal cannot pay any sums of money for any reason to foreign shareholders,” On June 5 2005, Claimant sent an email to Korchnoi requesting information as to the legal basis of the decision to suspend payment, but received no response.

21. Later, the October shareholders’ meeting was scheduled for the 11<sup>th</sup>, but it was changed to the 16<sup>th</sup> of that same month. Consequently, the proxies issued for Claimant’s representatives were found to be not formally valid for that meeting. Surprising, especially because this was not even a board meeting. In the same meeting, and in the absence of Claimant’s representatives, at the suggestion of one of SFCDC’s representatives, Pescara was voted off the board.

22. Finally, SFCDC seized the opportunity of full control over the Board, and replaced Poe and Korchnoi, with two new SFCDC representatives.

23. It is not surprising that after ousting Pescara from the board a fervent nationalism would enter the equation and so immediately after, SFCDC, through Swift stated that “the main objective of the company is to protect the interests of the country” and to protect the interests of the shareholders “within the framework of the general interests of the country.” Especially after this incident, the tribunal will surely agree with his last statement, assuring that the board “has done all in its power to achieve this end.”

24. Just 14 days after taking absolute control over VanCal Swift ordered Korchnoi to provide information strictly in accordance with what Calpurnian law requires, something that was contrary to the practice of VanCal, this is

evident because the order opened with the word, “henceforth”.<sup>2</sup> Not pleased with this, on 1 December Swift issued a discriminatory and specifically targeted order to Korchnoi, to cease sending accounts, financial statements or other information to Claimant.

#### **Section 5: Claimant’s Presence in VanCal became a Futility.**

25. Based on the prevailing circumstances in Vancal’s interior irregular affairs, Mr Shepherd considered it best to resign from the board on 15 April 2006. Pescara and Shepherd were replaced by Fowler and Hunter respectively in the board on 7 June 2006.

26. Realizing that there was no possible way of getting VanCal to pay the dividends it owed to Claimant through negotiations, Pescara turned to the Commercial Court of San Inocente de Irkoutsk. Her application was summarily dismissed on mere formalities.

27. On 28 September 2006, more than one year after the decision to “appropriate” the profit dividends was taken, Swift as chairman of the board, sent an email to Claimant declaring for the first time that the dividends had been “credited on VanCal’s books to Claimant’s account.” An act that also shocked Claimant’s personnel, for there is no provision in VanCal’s Articles of Association that would allow this instead of paying the dividends. An arbitrary act indeed.

28. All the events prior to this day, e.g. the harassment of Claimant’s personnel, the constant and blatant disregard of Claimant’s interests, and the willful undermining of Claimant’s participation in the corporate dynamics of VanCal, as you might expect lead to the withdrawal of its representatives from the board and thus from the shareholders meetings by 23 October 2006. The Tribunal must understand that at this point their presence there was nothing more than a futility.

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<sup>2</sup> Korchnoi Affidavit

## **Section 6: The Dispute.**

29. As early as 5 February 2007, Claimant notified the SFCDC, by a letter addressed to Poe, chair of the said entity, that there had been an indirect expropriation of its investment and that compensation was due.

30. Poe's response, on 21 February 2007, expressed that VanCal was in better financial condition than when Claimant controlled it and simply said that there was nothing they could do in relation to the compensation claim.

31. To this date, Claimant is still waiting for Respondent to make the payments owed under the separate license fees and technical assistance agreements.

## **PART II: ARGUMENTS.**

32. Respondent has discriminated against Vanguard International and unlawfully interfered with its investment. Calpurnia has also failed to provide full protection and security and has obstructed the transfer of Claimant's returns. Through this conduct it has expropriated Claimant's investment.

### **A. JURISDICTION.**

33. This tribunal has jurisdiction over the present dispute for the following reasons.

#### **1. Governing Law**

##### **i. Applicable Law according to Article 42(1) of the ICSID Convention**

34. Article 42(1) of the ICSID Convention establishes that in absence of agreement between the parties to a dispute the tribunal shall apply domestic law and international law "as may be applicable."

##### **ii. BIT is *Lex Specialis* between Claimant and Respondent**

35. The Calpurnia-Gaul BIT is currently enforceable according to its terms and therefore fully applicable to the present case.<sup>3</sup>

36. Calpurnia and Gaul remain parties to the ICSID Convention.<sup>4</sup>

37. The Calpurnia-Gaul BIT, is a *lex specialis* because it governs the relations between an investor and the host State. As such, it must reign over any other applicable *lex generalis*, such as domestic and customary international law.<sup>5</sup>

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<sup>3</sup> 1st Clarifications # 14

<sup>4</sup> 1st Clarifications # 14

<sup>5</sup> Amoco Int'l Fin, para 112

38. Generally speaking, a BIT would be an instrument of international law that has been explicitly or implicitly accepted by the investor and to which arbitrators are obliged to turn along with the rules of general international law.<sup>6</sup>

39. Thus, the primary applicable law for this case must be the Calpurnia-Gaul BIT.

### **iii. Customary International Law**

40. International law includes mainly, though not exclusively customary international law.<sup>7</sup> As *lex generalis*, customary international law must be applicable so as to fill possible lacunae of the BIT.<sup>8</sup>

### **iv. Domestic Law.**

41. Domestic law as part of the *lex generalis* must be of subsidiary application.<sup>9</sup> Therefore, the application of municipal law must be applied in accordance to international law. In case of inconsistency between two bodies of law, the rules of public international law are to prevail over domestic law.<sup>10</sup> International law must serve a corrective and supplementary role when applying domestic law<sup>11</sup> otherwise the purpose of the ICSID Convention could be easily frustrated.<sup>12</sup>

## **2. Jurisdiction *Ratione Personae*.**

### **i. Parties.**

42. The requirement *ratione personae* is complied with as the Claimant to this dispute, Vanguard International, is a company that has been incorporated in accordance with the laws and regulations of Gaul, and has its headquarters in the

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<sup>6</sup> Parra, para 1-5

<sup>7</sup> Bishop, pag 837

<sup>8</sup> Bishop, pag 837

<sup>9</sup> Wena Hotels, para 41

<sup>10</sup> Santa Elena, para 39.

<sup>11</sup> Reisman, *The Regime for Lacunae...* in *id.* Bishop, pages 645-650.

<sup>12</sup> *Id.*, para 39

capital city of Gaul.<sup>13</sup> Thus, Vanguard has Gaulois nationality and qualifies as an investor under the “Calpurnia-Gaul BIT”, article 1(3)(b).

43. The host State and Respondent to this dispute is the Republic of Calpurnia because the investment was located in its territory, San Inocente de Irkoutsk, in accordance with article 1(4)(a) of the “Calpurnia-Gaul BIT.”<sup>14</sup>

44. The State of the investor’s nationality, Gaul, and the respondent State are both Contracting Parties to the ICSID convention, currently enforceable in both States, and more importantly, they were parties when the consent to arbitration was perfected. Thus, the requirements for jurisdiction *ratione personae* under article 25 of the ICSID Convention are also met.

**a. Consent to ICSID Jurisdiction.**

45. Respondent’s irrevocable consent for arbitration is found in the Calpurnia-Gaul BIT, article 11(2), and in particular for arbitration before ICSID, in article 11(2)(b).

46. Claimant’s consent is contained in the request for the institution of arbitration proceedings of 31 July 2007.

47. This, along with Calpurnia’s consent in the Calpurnia-Gaul BIT, “creates the consent necessary to validate the assumption of jurisdiction by the Centre.”<sup>15</sup>

**b. Claimant’s standing as Minority Shareholder.**

48. The notion that Claimant, as a minority shareholder in VanCal is entitled to seek protection independently from VanCal itself has been maintained since the *ELSI* case.<sup>16</sup> Further support of the notion that shareholders have an independent right were the suggestions to consider the ownership of shares as investments during the negotiation of the ICSID Convention.<sup>17</sup>

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<sup>13</sup> FDI Moot Problem.

<sup>14</sup> Id. article 1(4)(a).

<sup>15</sup> AMT, sec. 5.23

<sup>16</sup> Alexandrov. Authorities # 2

<sup>17</sup> ICSID, pag 661.

49. Recently the *Siemens* Tribunal concluded that in ICSID case law, “the decisions of arbitral tribunals have been consistent in deciding in favor of such right of shareholders”<sup>18</sup>.

50. In addition, Vanguard must not be required to prove that it held the majority of shares or that it controlled the investment. The Annulment Commission in the *Vivendi* case clearly established that the fact that the investor held control over the investment was irrelevant for the purpose of determining their standing. “*Whatever the extent of its investment may have been it was entitled to invoke the BIT.*”<sup>19</sup>

51. Simply put, Claimant is an investor in respect of its own shareholding. It is because of this shareholding that Vanguard must be afforded the protection contained in the Calpurnia-Gaul BIT.<sup>20</sup>

52. Besides, there is no requirement in the Calpurnia-Gaul BIT for Vanguard to hold control or be a majority shareholder. Actually, in light of the very broad definition of investment in this instrument the tribunal should consider Vanguard’s shares as investments and Vanguard as an investor which can benefit from the rights of the BIT and that holds its own *ius standi* under this instrument.<sup>21</sup>

53. Furthermore, as a shareholder, Claimant’s cause of action is not limited to direct damages, instead it goes beyond it.<sup>22</sup>

### **3. Jurisdiction *Ratione Materiae*.**

54. The requirement *ratione materiae* is also met as the present dispute is legal and arises directly out of an investment in accordance with article 25 of the ICSID Convention.

55. The “investments” in this dispute are the VanCal shares registered in the name of Claimant and the additional 1% registered in the name of Francesca Pescara, but held in trust for Claimant. The contractual rights from licence fees

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<sup>18</sup> Siemens, Para.142.

<sup>19</sup> Annulment decision Vivendi, Para.50.

<sup>20</sup> AAP, para. 95.

<sup>21</sup> *Lanco*, Decision on Jurisdiction. paras. 10,11.

<sup>22</sup> GAMI, para.30 and in case like CMS, para.59,66-69; Azurix Argentina, para. 69.73; Enron, para 35; and Siemens, Para 125, 136-150.

and technical assistance agreements are also investments under the Calpurnia-Gaul BIT.

i. **Definition of Investment by the Parties.**

56. The tribunal must uphold the notion that the parties may decide and agree as to what they consider to be an investment for the purposes of establishing ICSID jurisdiction between them.<sup>23</sup>

57. In this particular case, Calpurnia's consent to arbitration extends to disputes that may arise from any one of the protected investments under the BIT. In particular, article 1(1) of the Calpurnia-Gaul BIT defines investment as "every kind of asset" and in particular, (b) shares, stocks, or other form of participation in a company; (c) claims to money having an economic value and (d) intellectual property rights such as trademarks. Moreover, the Calpurnia-Gaul BIT equally protects the returns or the amounts yielded by those investments such as profits, dividends or capital gains, article 1(2).

58. The 31% shares through which claimant had a right to receive dividends must be considered as forms of investment under this BIT. On that Regard Prof. Schreuer, has affirmed that "*the participation in the locally incorporated company becomes the investment.*"<sup>24</sup> The claim to money that Claimant has for the debt resulting from the license fees and technical assistance agreements must also be considered as investments for they have an economic value.

59. Furthermore, the "transactions" from which the present dispute arises are manifest investments in the sense that they are not mere commercial transactions. In this context, the tribunal must interpret the concept "investment" broadly so that an investment is presumed to exist unless proven otherwise.<sup>25</sup>

60. An approach that would require the fulfillment of certain exclusive criteria might allow States to contradict their own consent.<sup>26</sup> Also, this approach only comprehends foreign direct investment and today's financial world deals in great part with what has become known as portfolio investment, in which the

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<sup>23</sup> *Tokios Tokeles*, Dissenting Opinion Jurisdiction; *Azurix*, Jurisdiction paras. 59–65; *IBM*, Jurisdiction paras. 11-18; *Lanco*, Jurisdiction, paras. 10–16; *Generation Ukraine*, 8.1–9.3.

<sup>24</sup> Schreuer. Authorities # 25.

<sup>25</sup> Krishan, page 6.

<sup>26</sup> *Id.* page, 12-14.

investor does not intend to have the direction or control of a particular enterprise.<sup>27</sup>

61. Such an approach would freeze the concept of investment and restrict it to certain criteria. Freezing this concept is undesirable because it is a fluid concept.<sup>28</sup>

62. Many investments would not be considered as such for ICSID jurisdictional purposes solely on the grounds of this unsubstantiated approach<sup>29</sup>, and this can not be allowed to happen.

63. Therefore, this tribunal must allow the parties to the BIT define what investment is for jurisdictional purposes.

#### **4. Jurisdiction *Ratione Temporis*.**

##### **i. “Cooling off” period need not be of 18 months.**

64. Respondent alleges that this tribunal lacks jurisdiction because Claimant has not pursued amicable settlement for the period of time required in the Calpurnia-Gaul BIT, article 11(2) which is of 18 months.

65. However, the Calpurnia-Flatland BIT establishes a “cooling off” period of only 2 months in its article 7. Now, the Calpurnia-Gaul BIT contains a broad Most Favoured Nation (MFN) clause<sup>30</sup> in article 4(1). So, if Calpurnia is according investments from Flatland a more favorable treatment, then such treatment must also be accorded to Gaulois investors. As, consequence Claimant should not be obliged to pursue amicable settlement for more than two months.

66. The tribunal in *Maffezini* has been very clear in stating that broad MFN clauses<sup>31</sup> may apply to procedural matters as well<sup>32</sup> because they may be considered as being part of the overall treatment of protection of foreign investment offered by such clause.<sup>33</sup>

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<sup>27</sup> Id. page, 12-14.

<sup>28</sup> Krishan. Page 9.

<sup>29</sup> See generally. Krishan.

<sup>30</sup> Acconci, Authorities # 1, pag 19.

<sup>31</sup> Id, page. 24.

<sup>32</sup> Maffezini, jurisdiction, paras. 54, 56, 64.

<sup>33</sup> Id, para 50.

67. Also, the tribunal in *Siemens*, dealing with a broad MFN clause that extended only over the “treatment” of foreign investments “without specifying anything with respect to dispute settlement”,<sup>34</sup> decided that dispute settlement mechanisms should be considered as part of that treatment.<sup>35</sup> The rationale was that such interpretation would be in accordance with the object and purpose of the applicable treaty in that case.<sup>36</sup> Apropos, the object and purpose of the Calpurnia-Gaul BIT is also to promote and protect foreign investments.<sup>37</sup>

## **5. Alleged “Fork in the Road.”**

68. Respondent contends that this tribunal has no jurisdiction because Claimant has pursued its claims before the domestic courts of Calpurnia and therefore the “fork in the road” clause of the BIT, article 11(3) operates to preclude the tribunal’s jurisdiction over this matter.

69. However, this clause is inoperable in the present case because Claimant has not invoked any of the standards of protection to which it is entitled under the BIT before the local courts.<sup>38</sup> If the standards of the applicable BIT are not invoked before the domestic courts, recourse to an international tribunal to consider those standards of protection from the BIT would not be precluded.<sup>39</sup>

70. Thus, the jurisdiction that emanates from the Calpurnia-Gaul BIT remains untouched.

## **6. State Responsibility and Attribution.**

### **i. Responsibility.**

71. Calpurnia is responsible for the conduct of its Security Forces and Courts as well as for the conduct of the SFCDC.

#### **a. Draft Articles on State Responsibility.**

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<sup>34</sup> Acconci, page 23.

<sup>35</sup> *Siemens*, jurisdiction. Paras. 86, 102.

<sup>36</sup> *Id.*, paras 86, 102.

<sup>37</sup> *Id.*, paras. 82-86

<sup>38</sup> FDI Moot 2nd Clarifications.

<sup>39</sup> Aconquija, Annulment. Paras. 60, 96, 101, 102.

72. As pointed out by Prof. Crawford in its general commentary, the articles are not limited to the violation of legal obligations between States exclusively. In fact, these articles also apply to obligations from Bilateral Treaties that are owed to individuals and groups as well.<sup>40</sup>

**b. Customary International Law.**

73. The tribunal must note that Calpurnia has obligations concerning the protection of foreign investment not only under the Calpurnia-Gaul BIT but also under customary international law. Breach of these obligations will result in State responsibility, regardless of their origin or character.<sup>41</sup>

74. Along these lines lies the well-established principle that a State is responsible not only for its actions, but also for its omissions.<sup>42</sup>

75. Additionally, customary international law may serve as a supplement to BITs when it comes to establishing the attribution of certain conduct to a State.<sup>43</sup>

76. The tribunal must also keep in mind that even if a certain act is lawful under municipal law it may very well constitute a violation of an international obligation because the characterization of an act as being internationally wrongful is made by international law.<sup>44</sup>

77. Furthermore, it is not necessary for Claimant to prove that there have been damages resulting from the breaches of Calpurnia's international obligations, the actual breach and the attribution are the only requirements.<sup>45</sup>

78. The tribunal will find that Calpurnia is responsible for the conduct of the following entities because they constitute breaches of several international obligations and they are also attributable to Calpurnia under international law.<sup>46</sup>

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<sup>40</sup> Crawford. Pag. 32.

<sup>41</sup> . ILC Draft Articles, article 12.

<sup>42</sup> Crawford. Pag 32. Also, Hober, Kaj. Page 551.

<sup>43</sup> Noble Ventures. para. 69

<sup>44</sup> ILC Draft Articles, article 3.

<sup>45</sup> Total S.A. Legal Sources # 58

<sup>46</sup> ILC Draft Articles, articles 1, 2.

**ii. Attribution.**

79. It is an indisputable general rule in customary international law that the conduct of State organs is attributable to that State.<sup>47</sup> In this section it will be demonstrated that the conduct of the following State entities is attributable to the State of Calpurnia; in the merits phase we will demonstrate the existence and extent of the breaches of the international obligations in which Respondent has incurred.

**a. SFCDC**

80. SFCDC's conduct must be attributed to the State of Calpurnia.

81. In order to determine if a particular entity is a State organ and if its conduct may be attributed to the State, some tribunals have conducted "structural" and "functional" tests, in which factors like "ownership, control, the nature, purposes and objectives of the entity" are taken into consideration,<sup>48</sup> independently of how internal law may qualify that organ.<sup>49</sup>

**i. Structural Test.**

82. In making a structural test of the SFCDC some aspects must be duly considered. First of all, the fact that it is completely owned by the State of Calpurnia will at least lead to a "rebuttable assumption that it is a State entity."<sup>50</sup> In a similar case, the *Salini* tribunal found that the conduct of a separate legal entity was attributable to the State in light of the fact that other state organs held 89% of its shares and most of the seats in its board, the same that had far-reaching powers to control and direct the activities of that entity.<sup>51</sup> The tribunal must take into consideration that in the present case the state holds 100% of the

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<sup>47</sup> Olleson, Simon. *Authorities* # 18

<sup>48</sup> Maffezini, jurisdiction. Para. 76.

<sup>49</sup> Crawford. Pag. 39.

<sup>50</sup> *Id.* Maffezini. Para. 77.

<sup>51</sup> Salini, Jurisdiction para. 25.

shares of SFCDC and all the seats in the board, which in turn are appointed by other State organs, as will be explained below.

83. The fact that other State organs control the entity makes its public nature even more evident.<sup>52</sup> The board of the SFCDC is appointed predominantly by the Ministry of Economy, and also by the Department of Labor and Social Services, the Environmental Protection Agency and the National Security Council.<sup>53</sup>

84. The influence of these organs over the SFCDC was palpable; in fact the events that generate Claimant's cause of action were evidently motivated by the objectives of each of those organs. For example, the decision to make a reserve fund for severance pay is clearly a political stunt from the Department of Labour and Social Services. And it would not be to farfetched to believe that the "anonymous" tip that had sufficient inside knowledge of VanCal's affairs and that set all the police searches on Claimant's representatives' residences in motion was the guile work of the National Security Council. Finally, the nationalist statements, the politically driven decision to not prejudice Calpurnian shareholders by only suspending the payment of dividends to Gaulois shareholders, as well as the masterful planning that was taken up in order to effectively deprive Vanguard of the value of its investment had to be the work of the Ministry of Economy.

85. This of course bears some relation to the functional test, which assesses the State organs' objectives to determine if, as it has happened in this case, those objectives are public policies, and if they were being implemented to the detriment of the foreign investor.

## **ii. Functional Test.**

86. Upon considering the functions and objectives of the SFCDC under this test the tribunal must come to the conclusion that they are governmental in nature and definitely among those normally reserved to the State.<sup>54</sup> As its name unequivocally indicates, it is the State's fund to stimulate commerce and development in Calpurnia. This being its mandate, it cannot be deemed a private

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<sup>52</sup> Salini, Jurisdiction, para. 33.

<sup>53</sup> 2nd FDI Moot Clarifications, # 17.

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

entity because this is something that would not usually be carried out by private businesses<sup>55</sup> it is in fact the State's business.<sup>56</sup>

87. Further evidence of SFCDC's public nature are the statements made by their directors in that regard, they will be mentioned later.

88. The tribunal must make out that SFCDC is an entity created by the State of Calpurnia to serve as vehicle for the implementation of government policy to accomplish public objectives, in particular the promotion of Commerce and Development in Calpurnia. Public entities under similar circumstances have been considered as State organs by arbitral tribunals upon considering the public nature of their functions.<sup>57</sup>

89. The tribunal cannot allow the Republic of Calpurnia to hide behind this "corporate veil...as a mere device or a vehicle for fraud or evasion"<sup>58</sup> to escape its responsibility.

90. Claimant has made a *prima facie* case that the SFCDC is an entity acting on behalf of the Republic of Calpurnia.

#### **b. Calpurnian Security Forces and Judiciary.**

91. The conduct of the Calpurnian Security Forces and Security Directorate, as well as that of the Constitutional and Commercial Court must be attributed to the State of Calpurnia. To this effect, Article 4 of the ILC Draft Articles, is clear in establishing that there is an act of a State in actions performed by any entity or State organ, regardless of the function that that organ exercises or the position it holds in the internal organization of the State.

92. This article also requires any such organs to exercise public authority.<sup>59</sup> The tribunal will surely find the State entities involved have exercised governmental authority when conducting the police searches or adjudicating over Vanguard's claims.

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

<sup>56</sup> Salini, Jurisdiction, para. 33.

<sup>57</sup> Maffezzini, Jurisdiction. Para.83-86

<sup>58</sup> Barcelona Traction. Para.56-58.

<sup>59</sup> Crawford, Pag. 39.

93. States are also responsible for the omissions of its organs. When Pescara's residence was being picketed, Calpurnian Security Forces repeatedly denied her request of their assistance. All the consequences of these denials must be attributed to the State of Calpurnia. Here, State responsibility arises because of the inaction of the public authorities, "which failed to take appropriate steps, in circumstances where such steps were...called for."<sup>60</sup>

94. For the reasons stated above Claimant maintains that this tribunal has jurisdiction over the present dispute.

## **B. MERITS.**

### **1. FULL PROTECTION AND SECURITY.**

95. Respondent has the obligation to accord Gaulois investments in its territory "full and constant protection and security" in accordance with article 2(2) of the BIT between Calpurnia and Gaul.

#### **i. Scope and content of the Full and Constant Protection and Security Standard.**

##### **a. An obligation of due diligence.**

96. The obligation to provide full protection and security has been considered by tribunals as an obligation upon host States of vigilance and due diligence.<sup>61</sup> Failure to act in such manner would constitute a violation of international law entailing the State's responsibility.<sup>62</sup>

97. The tribunal must make due notice of the fact that a breach of this standard may be constituted by the "mere lack or want of diligence" without

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<sup>60</sup> Crawford. Pag. 39.

<sup>61</sup> AAP, para. 50, 53. Kreindler, Page 4.

<sup>62</sup> AAP, para. 69.

there being any need to establish malice or negligence.<sup>63</sup> The burden of Calpurnia is thus enhanced to insure that Gaulois investments are fully protected and secured.

98. Accordingly, in order for there to be a finding of a breach of this standard it is not necessary for the State to take action in such a manner that would leave Gaulois investments unprotected and unsecured, a lack of action may suffice.

99. The host State has the obligation to take any precautionary measures necessary<sup>64</sup> to protect Gaulois investments and the inability to do so would constitute a breach of the standard.<sup>65</sup>

#### **b. Wording of the BIT.**

100. The tribunal must consider the wording of the Calpurnia-Gaul BIT in relation to this standard. Apropos, this standard of protection is required to a “full” and “constant” extent, making of it a priority for Calpurnia to consider. Calpurnia’s obligation under this standard is, as the tribunal will surely agree, to say the least, ever present.

#### **c. Legal Security.**

101. Moreover, this obligation does not only encompass the physical protection and security of the investment, but also the legal security thereof, i.e. “the stability afforded by a secure investment environment.”<sup>66</sup> In this sense, the State must see to it that its administrative bodies do not have the “agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued” by any means.<sup>67</sup>

102. Even more so, due to the fact that the Calpurnia-Gaul BIT also covers investments constituted by intangible assets, and that intangible assets cannot be afforded “physical” security, this tribunal must arrive at the conclusion that the security to be afforded therefore is “legal security.” This in turn would be the

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<sup>63</sup> AAP, para. 77 and later upheld Azurix, para. 394.

<sup>64</sup> AAP, para. 85(B).

<sup>65</sup> AMT, para. 6.08 and later upheld by Azurix, para. 394.

<sup>66</sup> Azurix para, 394.

<sup>67</sup> CME, legal sources # 9

requirement of a legal system to imply certainty in its norms and their foreseeable application.<sup>68</sup>

103. The tribunal must also keep in mind that this standard of protection has been dealt with by Human Rights tribunals. Since they are a part of international law, Claimant will use some of the jurisprudence issued by those tribunals to the extent that they provide a framework within which this standard may be considered.

**ii. Respondent's Breach of the Full and Constant Protection and Security Standard.**

104. Respondent has breached this obligation repeatedly by conducting unlawful police searches, by the emission of incendiary press releases, by the refusal to provide police assistance during protests and by impeding one of Claimant's representatives to be in control of its investment.

**a. Police Searches.**

105. Regarding the police searches, the tribunal will have no problem finding that they constitute breaches of the full and constant protection and security standard by themselves. First of all, we must stress the fact that they were conducted unlawfully. No warrants were ever issued; this fact by itself is a serious violation of the right to due process. The arbitrariness to which Claimant's representatives were subjected under these searches can not be said to be in compliance with full protection and security. Moreover, the searches were supposedly conducted under "*periculum in mora*"<sup>69</sup> but this is simply not possible because the searches occurred within a time span of about eight months.

106. Also, the fact that they were alerted by an anonymous tipster leaves us with some disconcerting conclusions. How can it be that a police department would rely only on anonymous tips to initiate police searches of such magnitude,

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<sup>68</sup> Siemens, para. 303.

<sup>69</sup> FDI Clarifications # 17.

especially in the political context of the time, and worse yet, give out press releases that were sure to heighten the political unrest and ignite the public sentiment against Claimant and its representatives? Even if the tip was sufficiently credible, the police department should have taken all the necessary measures to look into the matter and figure out beyond reasonable doubt what was really going on. If they had done that, they would have probably realized that the tip was so credible because the tipster was someone from inside VanCal and that the underlying intentions were not to contribute to Calpurnia's national security but rather to make it possible for a specific group to assume total control of a joint venture and start implementing government policy against some foreign shareholders. If the police would have done some investigation on the matter they would probably have been aware of this. But rather, the police department acted with utmost negligence.

107. The tribunal must also take into account the fact that there was nothing Pescara or Kolowenko could possibly have done to prevent or resist the searches; the authorities were endowed with vast powers. This, along with the absence of a court warrant could be enough for this tribunal to regard the searches as unlawful and arbitrary.<sup>70</sup>

108. The decision to initiate the searches was not only reckless but was also evidently driven by discriminatory motives. The same must be said about the manner in which the press releases were issued for they induced the people into believing that Claimant's personnel were actual spies. Pescara was not a public figure and yet she was subjected to the public scrutiny, allowing for a blatant intrusion in her private life. She was exposed to sectional prejudice, on account of her nationality.

109. The conduct of the police and other authorities was specifically "targeted to remove the security and legal protection from the Claimant's investment."<sup>71</sup>

110. After finding absolutely no incriminating evidence of espionage activities in the private residences that were searched the police should have brought the searches to an end, especially after realizing that the tip was obviously deceitful.

111. However, the searches were not stopped, which leads to the inevitable conclusion that they continued to rely solely on that tip and on no hard evidence. It was absolutely necessary if they wanted to continue with further searches that

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<sup>70</sup> EHRC. Legal sources # 52, Stés Colas Est. para.49.

<sup>71</sup> CME, Legal # 9

they find at least one reliable source. If they would have conducted the investigations properly they would have understood that there was no reason to continue harassing Claimant's personnel.

112. In any case, authorities should have presented the respective charges on Claimant's personnel so as to allow them to exercise their right of defense. But since this never happened, they were unclear as to their legal status at that time, and because of that they did not know what legal remedy was available to them. They had no recourse to any form of relief and therefore they continued to bear with the subsequent searches.

113. How can it be possible that the police conducted unlawful searches on their private residences for almost a year, having found absolutely no evidence and what is worse, having filed no charges against them? It is simply unacceptable.

114. If the public authorities would have acted in a slightly diligent manner and with a bare minimum of good faith, they would have ended the searches and issued a public apology or at least filed charges to allow them to defend themselves. Yet they did nothing, there was no public agency that would prevent these outrages from reoccurring and so, Claimant's employees were forced to turn to the courts.

115. The disappointment of having their claims dismissed on elusive legal grounds and being unable to obtain any form of relief from the courts is also a breach of the full protection and security standard on itself.<sup>72</sup>

#### **b. Press Releases.**

116. In relation to the press releases, Claimant understands the overall need of a State to have information on its actions circulated among its citizens, but under no circumstances can States escape from their correlative responsibilities.

117. Respondent should have known that manifestations were likely to break out from those press releases. It was easily foreseeable because it was a hot political issue at the time and diplomatic relations with Gaul had deteriorated because of those matters precisely.

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<sup>72</sup> Lauder, para. 314.

**c. Inaction of public authorities in relation to protests.**

118. Some specific sectors of the public were sure to react to the press releases and knowing that, Public authorities should have been ready to intervene and protect Pescara and Kolowenko. Protests must be allowed, this is not contended, but they must be peaceful and other rights such as the safety of others cannot be sacrificed to allow such protests.

119. The police could have set up a security line to at least guarantee a safe access to their residences. Simply put, Calpurnia was obliged to take any measure necessary for the protection of their residence and their private life,<sup>73</sup> let alone their safety and physical integrity.

120. The Security Directorate could have called upon the people to remain calm, instead of being silent about it and to some extent even encouraging them to assemble outside those residences. Accusations of espionage in that political environment can easily be interpreted as an encouragement to the people to take matters into their own hands.

121. Even though Respondent has the obligation to prevent third parties from attacking Gaulois investors, and that inaction in that sense would render it liable, Calpurnia's police did absolutely nothing when their assistance was repeatedly requested by Pescara.

122. The truth is that the public authorities of Calpurnia took absolutely no precautionary measures to safeguard the rights of Claimant's representatives. Due to the fact they were being constantly harassed by authorities that violated their fundamental rights such as the privacy of their residence,<sup>74</sup> they could not exercise their respective functions as employees of Claimant, which eventually lead to SFCDC obtaining control over VanCal.

123. In short, public authorities were completely careless as to the safety of Pescara and Kolowenko. This is also unacceptable.

**d. Denial of Business Visa as Deprivation of Legal Security.**

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<sup>73</sup> EHRC. Legal sources # 79, para 59.

<sup>74</sup> EHRC. Legal sources # 85, para. 45-47.

124. The denial of Pescara's application to have her visa renewed also deprived Claimant's personnel from the legal security that they had been accustomed to when managing the investment.

125. She was subjected to excessive discretionary power because the immigration guidelines were not legally binding. Such uncertainty resulted in her being no longer able to stay in direct contact with VanCal. After all discrimination had driven public authorities to commit hostile actions towards Gaulois citizens before, what stopped them from eventually deporting her?

126. As a direct consequence, Claimant's participation in the joint venture started to decline precipitously shortly after. It is only one month after this that the SFCDC "began to exercise a leading role in VanCal's affairs."<sup>75</sup>

**iii. The Breach of the "Full Protection and Security" Standard Results in a Breach of the "Fair and Equitable Treatment" Standard.**

127. Respondent has the obligation to accord Gaulois investments in its territory "fair and equitable treatment" in accordance with article 2(2) of the BIT between Calpurnia and Gaul. The interrelation between this standard and the "full protection and security standard" is evidenced by the fact that they are both contained under a single provision of the "Calpurnia-Gaul BIT." Furthermore, this relationship has been upheld by several tribunals.<sup>76</sup>

128. In the present case, several breaches of the full protection and security standard constitute breaches of the fair and equitable treatment standard as well.

129. However, before concentrating on these breaches some preliminary considerations regarding the scope of the standard must be addressed.

**a. Fair and Equitable Treatment as an Independent Standard.**

**i. Treaty provision.**

130. There are several reasons for why the tribunal must take this approach; first of all, we must make emphasis on the wording of the relevant treaty

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<sup>75</sup> FDI Moot Problem

<sup>76</sup> *Azurix*, legal sources # 3; *Siemens*, legal sources # 36.

provision, according to Schreuer, the answer to this debate “ultimately” depends on the wording of each provision.<sup>77</sup> The wording of article 2(2) does not make any reference whatsoever to customary international law.

131. It follows that the treaty provision must be interpreted in accordance with the Vienna Convention on the Law of Treaties, hereinafter VCLT, for it reflects customary international law on the matter. In particular, article 31 (1) states that a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms and in the light of its object and purpose.

132. The ordinary meaning of the terms must be established. In that sense, the tribunal in *MTD*<sup>78</sup> stated that “fair” and “equitable” mean “just”, “even-handed”, “unbiased” and “legitimate”. It is within these benchmarks that the tribunal will have to consider the standard.

133. As for the object and purpose, the preamble of the treaty announces the parties’ desire to maintain “fair and equitable” conditions in their territories for investments of investors of the other Contracting Party; and their express recognition that the treaty will serve as a basis for the promotion and protection of investments to stimulate business activities. The tribunal will thus have to assess Respondent’s conduct in light of the objectives of the treaty set out by the preamble.

## **ii. Difference with NAFTA.**

134. An important distinction must be established with the NAFTA article 1105. The FTC interpretation, in the sense that fair and equitable treatment does not require treatment in addition to the international minimum standard, was based on the wording of the article itself. The wording of this provision expressly acknowledges a relation between fair and equitable treatment and customary international law and goes as far as establishing that the former is contained within the latter. In fact, when it comes to establishing the extent of this standard within this particular article, the limiting words are “in accordance with international law.”<sup>79</sup> Thus it must be understood that if such limiting words are not present in the wording of a specific treaty provision then the standard can

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<sup>77</sup> Schreuer, pag 26

<sup>78</sup> *MTD Equity*, para. 113.

<sup>79</sup> Sornarajah, page. 335.

not be considered as being limited by, or equated to, customary international law.

135. Furthermore, even if the wording of other treaties were similar to that of the NAFTA, the FTC can only issue binding interpretations upon NAFTA tribunals and no other arbitral tribunal established under a different BIT is legally obliged to accept that interpretation.

136. As a result, all the jurisprudence from NAFTA tribunals, when it comes to determining the scope of the fair and equitable treatment in relation to customary international law, is not applicable to this case because the wording of the relevant provisions are completely different between them.

### **iii. Guidelines for determining what is “fair and equitable.”**

137. Other guidelines to determine the boundaries of what is fair and equitable treatment may be found in the harmony established by State practice in their domestic legal systems by determining what conduct may be considered unfair and inequitable. This extrapolation would leave the tribunal with some parameters to determine a breach of the standard such as: fraudulent conduct by the State, bad faith, capricious or willful discrimination against the foreign investor, or the deprivation of the investor’s acquired rights so as to allow the unjust enrichment of the State.<sup>80</sup>

138. The tribunal must make a determination of the extent of the standard on the basis of the wording of the treaty provision and eventually make a straightforward assessment of Calpurnia’s conduct to determine if in all circumstances and in relation to the specific facts it has been fair and equitable,<sup>81</sup> instead of concerning itself with a minimum, maximum or average standard,<sup>82</sup> after all, it is an absolute standard.

### **b. The standard cannot be considered as being limited by, or equated to, the international minimum standard.**

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<sup>80</sup> UNCTAD. Authorities # 29.

<sup>81</sup> F.A. Mann; in Bishop, pages 1014-1015.

<sup>82</sup> Vascianne, authorities # 30

139. First of all, this restrictive view of the fair and equitable treatment standard has only been established within NAFTA, and for specific reasons. All the other BITs, including this one, must have the extent of the fair and equitable treatment suitably established in light of their specific circumstances.

140. Secondly, there is no consensus among States as to whether a minimum standard of treatment even exists, let alone that it is part of customary international law.<sup>83</sup> Therefore, it cannot be readily argued that a reference to fair and equitable treatment is a reference to this controversial minimum standard. In fact, the occasions in which States have manifested or implied that both standards are the same “are relatively sparse.”<sup>84</sup> Consequently, a reference to fair and equitable treatment can easily be interpreted as an intention to “broaden the scope of the standards beyond what is required in the international minimum standard”<sup>85</sup> and not the other way around.

141. Third, there is no evidence that the intention of the parties to the BIT was to equate fair and equitable treatment with the minimum standard, either in the text of the Agreement or in the *travaux préparatoires*. If that would have been the intention of the parties, they would have established that link expressly. It would be illogical to think that they meant to incorporate the international law minimum standard to the Agreement by referring to it as “fair and equitable treatment.” The sensible interpretation would be that they meant to have a different, higher, standard of protection for foreign investors; this would also be in accordance with the treaty’s preamble.

142. The *Genin* case is sometimes used as argument for establishing equivalence between the two elements because it states that fair and equitable treatment is an international minimum standard, separate from domestic law, but a minimum standard indeed.<sup>86</sup>

143. However the tribunal must bear in mind that this rationale was accurately interpreted by the *Saluka* Tribunal, in which it was made clear that the reference to a minimum standard was far from equating the fair and equitable treatment to the minimum standard of international law. Instead, it concluded that fair and

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<sup>83</sup> Dolzer and Schreuer, Pages 11-17.

<sup>84</sup> UNCTAD. Authorities # 29.

<sup>85</sup> Sornarajah, page 337.

<sup>86</sup> *Genin*, para 367.

equitable treatment is detached from domestic law, and that it provides a higher standard of protection than that of domestic law.<sup>87</sup>

144. Thus, this case cannot be used to argue that fair and equitable treatment is the same as the minimum standard of treatment under customary international law.

### **c. Preliminary Considerations**

145. After having established the reasons for why the tribunal must consider the fair and equitable treatment as an independent standard some preliminary considerations are due.

146. First of all, the tribunal must understand that this standard of protection is of vital importance to the object and purpose of this bilateral investment treaty, not only is it situated among the first articles,<sup>88</sup> but it is also expressly mentioned in the preamble. Also, it is accompanied by the words “at all times”, reiterating the general necessity of such treatment for the promotion and protection of foreign investment.

147. Furthermore, this standard has been interpreted as a manifestation of the good faith principle, and yet jurisprudence is consistent in pointing out that a finding of bad faith from the State is not necessary for there to be a breach of this standard.<sup>89</sup> Some tribunals have juxtaposed good faith with a conduct of a State through which it deliberately sets out to destroy or frustrate the investment by improper means.<sup>90</sup>

148. Accordingly, SFCDC was obliged to consider the consequences that its actions would bear upon Claimant to come to reasonable solutions and outcomes. It could not specifically consider such negative consequences on Claimant’s interests as incentives to make decisions from the board. This is contrary to the fair and equitable treatment because they were specifically set out to undermine their investment, any impartial observer would agree.

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<sup>87</sup> *Saluka* Partial Award, para 295.

<sup>88</sup> Dolzer, Stevens; in Bishop, page 1013.

<sup>89</sup> *Occidental*, legal sources # 74; *Tecmed*; *Middle East Cement Shipping; Lauder, MTD*,. Schill, Stephan. Page 5.

<sup>90</sup> *Waste Management*, Award 2004. para. 138.

149. Some tribunals have established that in order to consider State conduct as being in line with *bona fide*, it would have to satisfy the requirements of legality nondiscrimination.<sup>91</sup>

150. Also, some have conceived this standard as a wide concept, some form of overriding duty that “is likely to be almost sufficient to cover all conceivable cases.”<sup>92</sup> Some have considered it as an overarching principle, a quasi-constitutional provision that may be considered as an embodiment of the concept of the rule of law.<sup>93</sup>

151. It is within this framework that Claimant argues that this standard of treatment imposes further duties upon Calpurnia as elements that are contained within it such as “legality,” “legitimate expectations,” “denial of justice” and “proportionality.” These subsidiary duties have also been breached by Respondent but they will be analyzed only to the extent that they hold a relation to the other substantive elements of this claim.

**d. Breaches of “fair and equitable treatment” in relation to “full protection and security.”**

152. In this section the subsidiary duties that are related to the “full protection and security standard” will be analyzed.

**i. Fair and Equitable treatment requires Legality in State Conduct.**

153. The notion that host States are obliged to apply domestic law as a manifestation of the concept of the rule of law and that as such it forms an integral part of the fair and equitable treatment standard has been upheld by jurisprudence<sup>94</sup> and doctrine.<sup>95</sup>

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<sup>91</sup> Id. Paras. 262,263.

<sup>92</sup> Id. F.A. Mann, in Bishop, page 1014.

<sup>93</sup> Id. Schill, *generally*.

<sup>94</sup> *Tecmed*, paras 152-157.

<sup>95</sup> Schill, Stephan. *Authorities # 22. see generally*.

## **1. The Police Searches were illegal.**

154. Some tribunals have considered whether domestic actors have acted in accordance with domestic legal provisions to determine if, as a consequence, there has been or not a breach of the fair and equitable treatment standard. Simply put, “a violation of domestic law can constitute a violation of fair and equitable treatment.”<sup>96</sup>

155. The ADF tribunal concluded that something more than simple illegality is necessary to render an act inconsistent with fair and equitable treatment.<sup>97</sup>

156. The possibility that a breach of domestic law constitutes a breach of the fair and equitable treatment standard is therefore indisputable and a much greater one when applying an independent standard, considering its elements autonomously.

157. The police searches were not conducted in accordance with proper procedure. No warrants were ever issued and yet they were carried out in a period of about eight months.

## **ii. Fair and Equitable Treatment protects Foreign Investors from Denial of Justice.**

158. The requirement of due process and the protection from denial of justice, as a fundamental standard, has long been considered an integral element of fair and equitable treatment. This requirement imposes obligations upon the judicial system so that a foreign investor may have quick recourse to legal remedies for the protection of his rights.

### **1. What is the bar for finding a denial of justice?**

159. Some NAFTA tribunals have established that if the relevant courts refuse to entertain a suit, if they subject it to undue delay, administer justice in a seriously inadequate way, if the foreign investor is not given a fair hearing on all essential questions or if decisions are reached on unexpected legal grounds, there

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<sup>96</sup> Id. Schill. Page 13.

<sup>97</sup> ADF. Para 90.

could be a denial of justice.<sup>98</sup> The tribunal must note that these parameters were considered when applying the fair and equitable treatment standard under a limited scope. On the other hand, an independent standard provides a higher degree of protection for foreign investors and their investments, hence the bar that is set for there to be a breach is considerably lower than the one applied by NAFTA tribunals.

160. Moreover, it has been submitted that fair and equitable treatment “grants a right to access to a court for foreign investors.”<sup>99</sup> This requirement would acquire a much more imperative nature if the ordinary domestic legal remedies do not provide an efficient access to justice.

161. Additionally, fair and equitable treatment serves as a standard “against which the domestic legal order is measured.”<sup>100</sup> This would allow a tribunal to find a breach of fair and equitable treatment even when the conduct in question is legal under domestic law, but is still unfair and inequitable;<sup>101</sup> or even when a legal provision, or the absence of such, renders the very legal system unfair or inequitable in light of the circumstances.

162. Such a special measure of protection was conceived so that investors could have quick recourse to reasonable legal remedies for the protection of their rights. In this case, Respondent has failed to provide Claimant with such protection.

## **2. Denial of Justice.**

163. The Calpurnian Courts dismissed the claims presented by Claimant or its representatives on unexpected legal grounds. They refused to safeguard Claimant’s rights because of mere formalities.

164. This incident is more relevant than it would seem because Claimant and its representatives were targeted by the public and were constantly harassed. Some degree of legal support by impartial courts of the judiciary would have been a great relief in those hostile circumstances. Sadly, the courts were tainted

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<sup>98</sup> Id. Schill. Page 27.

<sup>99</sup> Id. Page 26.

<sup>100</sup> Id. Page 15.

<sup>101</sup> Id. Mann in Bishop, page 1015.

by the public discriminatory accusations against Claimant and its representatives and so they opted for materially refusing to entertain the claims.

165. Moreover, all the police searches that were conducted on Pescara and Kolowenko's residences were not followed by the filing of charges against them. Therefore, not only did the courts refuse to grant relief, they were also deprived of a fair hearing in which they could have defended themselves against the accusations of espionage.

166. The truth is that those searches were ordered on the basis of an anonymous tip. The police department, knowing that they had only unreliable information could not risk initiating the proper proceedings. So in order to keep them quiet no charges were filed but the searches continued, driven by the political and social pressure against everything "Gaulois" in Calpurnia at the time.

167. This manner of carrying out the judicial and police departments is simply unacceptable; a breach of fair and equitable treatment is the least a tribunal could find under these circumstances seeing that there were simply no legal remedies reasonably available for Claimant.

168. Additionally, considering that the fair and equitable treatment standard is one against which the domestic legal system can be measured, and that it grants foreign investors the right to access a special court for foreign investors, the tribunal must find a breach of this standard because "there is no special domestic remedy available for foreign investors."<sup>102</sup>

169. Especially under these circumstances, taking into account the fact that the local courts were refusing to safeguard the rights of Claimant, probably because of the political pressure at the moment, a special domestic remedy for foreign investors became crucial to Claimant's interests. Not being able to access justice in an impartial and expedite way amounted to a denial of justice.

## **2. UNLAWFUL INTERFERENCE.**

170. Calpurnia has unlawfully interfered in Claimant's investment by impeding key personnel to remain in Calpurnia, by consequently and otherwise

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<sup>102</sup> 1st FDI Clarifications, # 27.

divesting Claimant of the control it had over its investment, and by acting inconsistently in its relations with Claimant.

171. Interference was present outside VanCal and inside it as well. The level of interference continued to rise through a period of several years to the point of completely depriving Claimant of its fundamental rights as shareholder and eventually indirectly expropriating the investment.

172. The political backdrop at the time of the events that give Claimant its cause of action must be taken into account. Calpurnia's political agenda infiltrated VanCal and directly affected Claimant's rights to its investment. It is no coincidence that these incidents began to occur only one month after the CCC's electoral victory. After those elections, State practice concerning Vanguard became dangerously unpredictable; the unexpected and radical change in government policy would eventually be detrimental to Claimant's interests.

173. Additionally, the fact that this interference was generally motivated by "extraneous political reasons" renders such intrusion unlawful under customary international law.<sup>103</sup>

**i. Interference outside of VanCal.**

**a. Police Searches and Press Releases.**

174. The police searches and subsequent press releases were clear manifestations of unlawful interference. They were motivated by political reasons and in some way; they were a means to implement government policy.

**b. Denial of Visa.**

175. The denial of Pescara's Visa renewal application was a form of interference by Calpurnia for it prevented key personnel from maintaining sufficient contact with the investment.

176. Calpurnia has an obligation under the "Calpurnia-Gaul BIT" article 2(5) to give a "sympathetic consideration" to these applications because they directly affect the possibility of "engaging" managers of the investor's choice.

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<sup>103</sup> *British Petroleum*, Legal # 8

177. This obligation was ignored by denying the renewal of the business visa. This exposed Pescara to a great deal of legal insecurity which impeded her from returning to Calpurnia, even though she was Managing Director of VanCal at that time.

178. This incident was central for Respondent's underlying intentions because through its agencies it succeeded in effectively assuming control over the investment. With Claimant's manager out of the way, the SFCDC set in motion cunning strategies to control VanCal's corporate arena.

**c. Impossible to remain in country.**

179. Respondent has prevented some of Claimant's key personnel to remain in its territory because through different acts and omissions it has fabricated an unsafe environment for them.

180. The expulsion of investors' key personnel has been recognized as a form of interference that can eventually lead to an expropriation of the investment.<sup>104</sup> Such action would be especially relevant if the representatives in question held a central role in managing the investment.

181. In the present case, Pescara, who was Managing Director of VanCal was forced to leave the country repeatedly for several reasons; something that has been recognized as a form of interference attributable to the host State.<sup>105</sup>

**ii. Interference inside VanCal.**

182. The various statements made by SFCDC's representatives even though they are not measures, are useful for demonstrating the level of interference and implementation of government policy inside VanCal.

183. Interference was present in the following spheres.

**a. Ousting key personnel from board.**

184. The incident in which Pescara was voted off the board, is a clear demonstration of interference through the expulsion of Claimant's key personnel

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<sup>104</sup> *Biloune*. Legal # 7

<sup>105</sup> *Eastman Kodak*, Para. 61

through an outright action. Especially because Shelly seized the opportunity that Mr. Rindler's proxies were invalidated to suggest it.

185. These actions lead to Claimant's loss of, and Respondent's consequential gain of control over VanCal.

186. Furthermore, at one point the managing director Korchnoi was replaced by an SFCDC representative, even though he did not have any affiliation to the state entity.

**b. Severance pay.**

187. The board's decision to set up a reserve fund for severance pay is another clear manifestation of the level of interference that came about VanCal. As we know, one of the members of the Board of the SFCDC is placed by the Department of Labor and Social Services. This is a clear intention to apply government policy related to this sector inside VanCal.

**c. Dividends and crediting.**

188. The decision to suspend the payment of dividends to Gaulois shareholders is further proof that government policy was being implemented inside VanCal. When this decision was taken, the fact that relations between Calpurnia and Gaul were not in pristine condition was expressly mentioned by the board.<sup>106</sup> There is no reason for why Claimant should suffer the consequences of a disagreement between two States, and yet it was adversely affected by it.

**d. Loss of control.**

189. Interference of Calpurnia's public authorities was also evident within the corporate level of VanCal. All the strategies taken by SFCDC's representatives to minimize Claimant's participation in the board resulted in the illegitimate transfer of control over the investment. All the encroachment upon the board came to an appalling state when Korchnoi who was not affiliated in any way to the SFCDC was replaced by a representative of that entity.

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<sup>106</sup> FDI Moot Problem

**iii. Interference has Resulted in a Breach of “Fair and Equitable Treatment.”**

190. The interference suffered by Claimant has also amounted to a breach of the fair and equitable because it has destroyed Vanguard’s legitimate expectations of a consistent and transparent business and legal framework, because it has been illegal, and because it has been disproportionate.

**a. Interference has Frustrated Investor’s Legitimate Expectations of a Consistent and Transparent Business and legal Framework.**

191. The relation between this element and fair and equitable treatment has been under constant development, legitimate expectations have started to play an increasingly significant role in the protection of foreign investment, to the point of becoming a “self-standing subcategory and independent basis for a claim under the fair and equitable treatment standard.”<sup>107</sup>

192. In relation with the general principle of good faith, State entities should bear in mind the consequences of their actions to foreign investors, and in no case make decisions with the sole purpose of undermining the Claimant’s investment.<sup>108</sup> The tribunal must identify the SFCDC’s intentions as the latter.

**i. Stability.**

193. The relevance of the investor’s legitimate expectations and their protection thereof as a requirement under the fair and equitable treatment standard has been consistently recognized by several tribunals and it has been directly related to the States’ obligation to provide a stable and consistent business and legal framework and to direct themselves in a transparent manner in relation to the investments of foreign investors.<sup>109</sup>

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<sup>107</sup> *Thunderbird*. Para. 37.

<sup>108</sup> *CME*, Authorities # 9

<sup>109</sup> *Tecmed*, para 160.

194. The actions leading to the ousting of Claimant's personnel from the board cannot be considered as providing for a stable business framework. Also, the denial of the application for Pescara's business visa renewal was an inconsistent application of domestic law that deprived claimant of the legal framework to which it was accustomed.

195. The investor's reasonable expectations that the business and legal framework will be stable, consistent and predictable is a fundamental criterion upon which the investor decides to make his investment. Radical, detrimental and unexpected changes in the policy of the host State have been considered to constitute a breach of fair and equitable treatment<sup>110</sup> when the legitimate expectations were frustrated.

196. The unexpected decision to set up a reserve fund for severance pay was clearly a consequence of the radical change in government policy that frustrated the Claimants legitimate expectations to manage its dividends freely.

## **ii. Transparency**

197. Tribunals have acknowledged the obligation imposed upon State entities to state and make available the reasons for their actions or omissions. They have to justify their conduct by, and only by, legal grounds<sup>111</sup> in advance, so that those affected by such conduct may have recourse to legal remedies in a timely fashion.<sup>112</sup> Actually, failure to show the legal basis for administrative proceedings has been taken into account as a form of violation of the fair and equitable treatment standard.<sup>113</sup>

198. It cannot be argued that the SFCDC acted in compliance with this requirement.

199. The SFCDC kept Claimant from knowing about the matters that specifically concerned him. Evidence of this is that after making the request on 5 June 2005 to have them explain the legal basis for the denial of the payment of dividends, there was simply no response from the SFCDC, no legal justifications for their actions were ever given to Claimant. For this reason Claimant was not

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<sup>110</sup> Costamagna, *Authorities # 4. also in Tecmed, MTD, Occidental.*

<sup>111</sup> *Metalclad*, para. 93.

<sup>112</sup> *Tecmed*, para. 123.

<sup>113</sup> *Id.* Schill, Page 14.

sure if it was necessary to turn to the courts, the state of ignorance to which Claimant and its representatives were forced made it impossible to make an accurate assessment of the situation and to decide a course of action on the matter in a timely fashion.

200. The actions taken on 30 November and 1 December 2005 regarding the financial information of VanCal is also a clear frustration of Claimant's expectations of a transparent business framework. SFCDC simply intended to keep Claimant in the dark as to VanCal's financial and legal affairs by hampering the access to information and by refusing to translate the documents.

**b. Interference has been illegal.**

201. In this section it will be proven that State interference inside VanCal was illegal as well.

202. State interference that is illegal and that is detrimental to an investor's rights is also a breach of the fair and equitable treatment.<sup>114</sup>

203. The tribunal in *GAMI* established that failure of a government to abide by its own law may lead to a violation of fair and equitable treatment, but not necessarily, "much depends on context."<sup>115</sup>

204. Incidentally, it provided a parameter against which State conduct could be measured to determine if there was a qualified violation of domestic law, so as to constitute a breach of the standard. Thus if a State act appears on a blank slate it may be viewed quite differently than if it is an arbitrary repudiation of a pre-existing regime.<sup>116</sup>

205. The decision to suspend the payment of dividends to Gaulois shareholders is clearly an arbitrary repudiation of a pre-existing regime.

206. It is also a qualified violation of domestic law because it only affected Gaulois shareholders, i.e. Claimant. This is in direct contradiction with several legal provisions of Calpurnian law, especially because the payment of such dividends continued as normal to Calpurnian shareholders. There is a specific provision in Calpurnian law that states that the board's responsibility is to the corporation and all individual shareholders collectively, "and not to any

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<sup>114</sup> *PSEG* para. 249.

<sup>115</sup> *GAMI*, para. 97

<sup>116</sup> *GAMI*, legal # 55.

individual shareholders or class of shareholders.”<sup>117</sup> Swift as chairman of the board has openly violated this provision by suspending the payment of dividends to Gaulois shareholders exclusively.

207. Furthermore, the Calpurnian Constitution contains a general non discrimination clause<sup>118</sup> which would render any decision like the one adopted by the board on that date illegal. Due to the fact that such breaches of domestic law are clearly discriminatory, they can easily be found by the tribunal to be qualified violations of the domestic legal system, the context of those incidents would certainly add to that finding.

208. There was another breach of domestic law for which Respondent is accountable, the crediting of Claimant’s dividends on VanCal’s books on 28 September 2006. This is an act that is contrary to the Articles of Association of VanCal for there is no provision that would authorize such action. Companies are obliged to abide by their articles of association and by plainly deciding not to do so, SFCDC, through Swift, has willfully breached domestic law, and consequently, the fair and equitable treatment standard.

209. Also, the tribunal in the *Lauder* case implied that a violation of the fair and equitable treatment was possible through the inconsistent application of domestic legislation.<sup>119</sup>

210. The sudden decisions to restrict Claimant’s access to information are manifest violations of the duty of transparency. Even though one of them was in strict conformity with Calpurnian law, it was an inconsistent application of it. Swift decided to apply it only when relations with Claimant were not in their best condition, in contradiction with what had been VanCal’s practice.

### **c. Interference resulting in Disproportionate treatment.**

211. Proportionality has been considered as an element of fair and equitable treatment, for being a fundamental standard in itself.<sup>120</sup> When host States are obliged to accord foreign investments fair and equitable treatment, they must ensure that their conduct regarding those investments is carried out with due

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<sup>117</sup> 1st. Clarifications, #30.

<sup>118</sup> 1st Clarifications, # 29.

<sup>119</sup> *Lauder*, para. 296.

<sup>120</sup> Schwebel Opinion in *MTD*. para. 109.

proportionality, that is to not subject them to unreasonable or excessively detrimental consequences because of unimportant or trivial incidents or mere formalities.

**i. Outside of VanCal.**

212. The police searches were disproportionate because they were only based on a false and anonymous tip. Even though this was the only evidence they had, the authorities conducted three searches. Even more appalling is the fact that they were done in a time span of about eight months, without a warrant for any occasion, and filing no charges.

213. The press releases were also disproportionate because even though no evidence was found they publicly framed Claimant's representatives as spies. They ignited public sentiment against them that immediately materialized in the form of violent manifestations outside their residences.

**ii. Inside VanCal.**

214. In the meeting of 16 November the two proxies held by Rindler, and consequently the only seats on the board representing Claimant, were declared to be not formally valid for that meeting. First of all, the proxies were issued in the same form as had been issued in the past.

215. This time the meeting had been legally postponed but more importantly, this minor inconvenience could have been easily solved that same day. But it was much more favorable for SFCDC's interests to have those proxies declared invalid so that their representatives could exercise complete control over the meeting.

216. This was a disproportionate measure, based on mere formalities and even contrary to logic and reason. If Claimant is a shareholder of a company, it should have been given an opportunity to resolve the situation. Such consequence was undoubtedly brought upon Claimant so that the SFCDC could seize control over that meeting in particular and advance its plans to further control VanCal entirely.

217. With all this considered State interference in Claimant's investment is simply undeniable.

### **3. DISCRIMINATION AND ARBITRARINESS.**

218. Calpurnia has the obligation not to impair the management, use or enjoyment of investments of foreign investors in its territory by arbitrary or discriminatory measures in accordance with article 2(3) of the of the Calpurnia-Gaul BIT.

219. This obligation also originates from general international customary practice as it has been consistently upheld by judicial decisions, general international law, and treaty law as well as by the majority of jurists on the subject.<sup>121</sup>

#### **i. Scope of the Standard.**

220. Using the rules of treaty interpretation from the "VCLT" mentioned above, the Tribunal will come to the conclusion that discriminatory conduct and arbitrariness are interrelated. The relevant treaty provision considers both elements jointly when establishing the conduct that Parties must observe when dealing with foreign investors. Thus Claimant alleges that Respondent is also responsible for its arbitrary conduct.

221. Furthermore, Gaulois investors and their investments are protected from discrimination under the "Calpurnia-Gaul BIT," article 4(1) and (2) which contains general National Treatment and Most Favoured Nation clauses.

#### **a. Arbitrariness.**

222. The notion of "arbitrariness" that the tribunal must apply is that it is not only conduct that defies the rule of law; regular illegality may be sufficient.<sup>122</sup>

This is an evolving standard and the bar set in the *Neer* case has certainly been

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<sup>121</sup> Maniruzzaman, *pag* 57-59.

<sup>122</sup> *Lauder*, para. 232.

overcome. Actually, to find that any conduct has been arbitrary it is not necessary for an observer to be shocked or outraged by such conduct, being surprised will suffice.<sup>123</sup>

223. Using the rules of treaty interpretation from the “VCLT” mentioned above, this tribunal will agree with the one in *Azurix* in the sense that arbitrary means “despotic,” “unrestrained,” “done capriciously or at pleasure” or as “depending on the will alone.”<sup>124</sup>

224. Other tribunals<sup>125</sup> have found conduct to be arbitrary when there are clear intentions to deprive the foreign investor of its contractual rights.<sup>126</sup>

#### **b. Discrimination.**

225. On the other hand, discriminatory conduct is that which establishes a preference of one over another based on nationality. Any differential treatment between a national investor and a foreign one “must not be based on unreasonable distinctions or demands”, additionally it must be “justified by showing that it bears a reasonable relationship to rational policies”<sup>127</sup> and that it is not motivated by capricious preferences in favor of the national investor. Differential treatment between Gaulois shareholders and national shareholders based exclusively on nationality is consequently blatantly discriminatory.

226. The requirement that a conduct must be driven by subjective bad faith<sup>128</sup> in order for there to be a finding of arbitrariness or discrimination has not been accepted by other tribunals and even if this tribunal upholds it, Claimant will prove that Respondent has acted in bad faith.

#### **ii. Respondent’s Arbitrary and Discriminatory Measures.**

227. Calpurnia has impaired Claimant’s management, use and enjoyment of the investment through arbitrary and discriminatory conduct.

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<sup>123</sup> *Pope & Talbot*, para. 64.

<sup>124</sup> *Azurix*, para. 392.

<sup>125</sup> *CME*, legal # 9

<sup>126</sup> *Id.* Dolzer and Schreuer, page. 174.

<sup>127</sup> *Saluka*, para. 307

<sup>128</sup> *Genin*, para.367

**a. Police searches and press releases.**

228. As it was demonstrated in the full protection and security section, the police searches that were conducted on the private residences of Pescara and Kolowenko were unlawful under international law. This blatant disregard of the right to due process alone renders the searches arbitrary.

229. Notwithstanding their arbitrariness, they were also obviously discriminatory because they were initiated solely on the grounds of their nationality. Government policy was generally unfriendly to Gaul to the point that rumors about Gaulois spies had been circulating around official circles. These rumors were based solely on unsubstantiated and discriminatory allegations.

230. They were specifically targeted<sup>129</sup> to Claimant's representatives for their condition as Gaulois citizens.

**b. Suspension of payment of dividends.**

231. The decision to suspend the payment of dividends to Claimant was also arbitrary and discriminatory. Arbitrariness is unarguably present because such decision was in clear violation of several provisions of Calpurnian law and it was made on the basis of irrelevant considerations,<sup>130</sup> such as their nationality and underlying political issues.

232. Arbitrariness is also evident because the intention behind it was clearly to deprive the investor from enjoying the benefit of the investment to which it was entitled under the joint venture contract, just because of its nationality. Anyone reasonably expects to receive the dividends from its shares; the decision to suspend such payments was capricious and despotic, with the sole purpose of preventing Claimant from enjoying the benefits of its shares.

233. This decision was also undeniably discriminatory because an express mention was made about the concern that Caplurnian shareholders should not be

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<sup>129</sup> *Genin*, para. 369, 371.

<sup>130</sup> Laird, Ian. *Recent Developments in F&E*. page. 5.

adversely affected by any decision.<sup>131</sup> Consequently, Calpurnian shareholders continued to receive their dividends while Gaulois shareholders did not even receive a satisfactory explanation as to why the payment of their dividends had been suspended.

234. This differential treatment between like persons<sup>132</sup> was clearly motivated by a preference for Calpurnian shareholders over Gaulois shareholders and it was evidently based on unreasonable distinctions, *i.e.* nationality, with no relation whatsoever to rational policies. This capricious action is outrageous and unacceptable.

235. The tribunal will have no trouble finding that this decision constitutes a direct violation of the National Treatment provision in the Calpurnia-Gaul BIT under which Gaulois investors are protected. Calpurnian shareholders were openly afforded better treatment than Gaulois shareholders.<sup>133</sup> Bad faith at this point is simply indisputable.

236. Discriminatory intent is present because the decision was wholly motivated by the fact that Vanguard was a Gaulois company and that there was a dispute between the governments of Gaul and Calpurnia, this was expressly stated in the meetings repeatedly. Respondent sat by as discriminatory government policy was being implemented inside VanCal by SFCDC, a public agency, to the detriment of Gaulois investors. Even if the tribunal would decide that there is no discriminatory intent, the presence of a discriminatory effect would be enough to find that Claimant has been subjected to discriminatory treatment.<sup>134</sup> The presence of a discriminatory effect is incontrovertible because the only ones not receiving their dividends are the Gaulois shareholders.

237. These were arbitrary and discriminatory measures that when executed impaired the management, use and enjoyment of the Claimant's investment, in violation of the treaty provision and international law.<sup>135</sup>

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<sup>131</sup> FDI Moot Problem.

<sup>132</sup> Maniruzzaman, 57-59,

<sup>133</sup> *Lauder*, para. 231.

<sup>134</sup> *LG&E*, Liability, para. 146

<sup>135</sup> *British Petroleum*, para 53.

**iii. Breach of the Fair and Equitable Treatment Standard.**

238. Treatment that is discriminatory and arbitrary is also a breach of the fair and equitable treatment standard when it involves discriminatory contraventions of domestic law.

**a. Illegality through Discriminatory Violations of the Law.**

239. The tribunal must pay special attention to arbitrary breaches of domestic law that are committed for discriminatory motives, for they are in themselves qualified violations of the domestic legal system.<sup>136</sup> So, if there is a finding that the State's conduct has been discriminatory and arbitrary, then that would be sufficient for establishing the qualified breach of municipal law, and having committed something more than a "simple illegality",<sup>137</sup> the tribunal would have to find that there has been a breach of the fair and equitable treatment standard.

240. Through the police searches and the decision to suspend the payment of dividends, Respondent has committed qualified breaches of domestic law because they were evidently fuelled by discriminatory motives.

**4.OBSTRUCTED TRANSFER OF RETURNS.**

**i. Introduction.**

241. Calpurnia has an obligation to ensure Gaulois investors the free transfer of payments, i.e. returns, related to an investment under the Calpurnia-Gaul BIT, article 8(1).

242. This obligation also extends to any payments that are owed in connection with contracts, article 8(1)(h), royalties and license fees, article 8(1)(d).

243. Additionally, article 8(2) establishes that such payments must be made without any restriction or delay and in a freely convertible currency.

244. Article 8(3) contains an exception that would allow a delay in the making of these payments but the tribunal must be aware of the fact that this would only be allowed insofar as it is equitable, non-discriminatory, through the *bona fide*

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<sup>136</sup> Id. Schill, page 20.

<sup>137</sup> See supra para 154. Section: *Police Searches were Illegal*.

application of Calpurnian law and as long as it does not unreasonably impair the free and undelayed transfer of those returns to which Vanguard has right.

**ii. Breach.**

**a. Dividends**

245. The dividends yielded by the shares registered in Claimant's name were not paid and instead they were credited to an account in VanCal's books. This was an act that surprised Claimant because there is no provision to allow for such arbitrary action. Especially because receiving dividends is a fundamental right of shareholder.

246. An obstruction of returns was found in *Foremost vs. Iran* where a Government owned entity effectively deprived the investor of its legitimate right to receive the respective dividends from a Joint Venture agreement.<sup>138</sup> In this case, the company was obliged to pay the declared dividends to all its shareholders.<sup>139</sup> By failing to do so, and effectively obstructing the transfer of returns, there was a finding of State interference.<sup>140</sup>

247. Identical facts are found in the present case, where the transfer of the declared dividends was arbitrarily prevented in a clearly discriminatory way. Consequently the tribunal must find that Calpurnia has breached its obligation to secure the transfer of returns to the investor.

**b. Payments from Contracts.**

248. There has also been a transfer of returns by repudiating other contractual rights held by Claimant from separate license fees and technical assistance agreements.

249. The payments owed under the separate agreements simply have not been paid up to this date. In clear contravention of the relevant treaty provisions.

250. Additionally, as mentioned earlier, intellectual property rights, in particular the VANGUARD INTERNATIONAL trademark, is protected under the Calpurnia-Gaul BIT as a form of investment, and also under customary

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<sup>138</sup> *Foremost*,. para 228, 246, 250-253

<sup>139</sup> Bishop, pag 762

<sup>140</sup> *Foremost*, para 228,246, 250-253

international law. Jurisprudence has pointed out that compensation may rise from actions that adversely affect both tangible and intangible property, for they are also assets that have to be protected.<sup>141</sup>

251. In this case, the refusal to pay the amounts owed due to the license fees agreements is in itself a breach of this obligation.

### **iii. Breach of Fair and Equitable Treatment.**

252. The obstruction of the transfer of Claimant's returns is breach of the fair and equitable treatment because it destroys the investor' legitimate expectations that originated from law and contractual provisions such from the Joint Venture Agreement and the separate agreements.

#### **a. Legitimate expectations of economic benefit.**

253. There is an interrelation between fair and equitable treatment and investor's legitimate expectations originating from solemn legal and contractual commitments, actually this link can be considered as a form of customary international law.<sup>142</sup>

254. It can be reasonably argued that there is a legitimate expectation that the investor's acquired rights, either through legal or contractual provisions will be honored by the host State.

#### **i. Origins of the legitimate expectations.**

255. Traditionally, the "legitimate expectations" principle would protect expectations from informal representations made by State entities. Today it is correctly accepted that legitimate expectations may originate from express provisions from the regulatory framework, provided that they are sufficiently specific,<sup>143</sup> or from contractual provisions.<sup>144</sup>

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<sup>141</sup> *Amoco Finance Corp*, 201,228

<sup>142</sup> *CMS*. para. 284.

<sup>143</sup> *Gami*,. para. 91.

<sup>144</sup> *Id.* Schreuer, Page 18-26.

256. The reason behind this protection is that breaching the contractual undertakings upon which the investor legitimately relied to make his investment cannot be considered as being fair or equitable.<sup>145</sup>

257. Especial relevance must be attributed to the fact that these are formal sources and as such, they add to the “legitimacy” and “strength” of the expectations.<sup>146</sup>

258. Jurisprudence has repeatedly recognized that fair and equitable treatment provides protection for contractual rights. Tribunals have considered that “a governmental prerogative to violate investment contracts,”<sup>147</sup> or “an outright or unjustified repudiation of a transaction,”<sup>148</sup> as well as avoiding the payment of compensation that is due under contractual provisions<sup>149</sup> should be inconsistent with fair and equitable treatment or that the standard encompasses the “obligation to observe contractual obligations towards the investor.”<sup>150</sup>

## **ii. This is no umbrella clause.**

259. An important distinction must be drawn between the protection of legitimate expectations arising from contracts and an umbrella clause, not present in the Calpurnia-Gaul BIT. Traditional interpretation of an umbrella clause would render it useful for protecting the rights from contracts that deal with governmental activities<sup>151</sup>, but the fair and equitable treatment extends such protection over breaches of contract that frustrate investors’ legitimate expectations.<sup>152</sup> Certainly, not all contractual breaches can be protected by this standard as if it were another form of umbrella clause,<sup>153</sup> it is necessary for the investor to have relied on those contractual rights and to have expected them to be upheld.

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<sup>145</sup> Id. Pages 9-10.

<sup>146</sup> Id. Costamagna. Authorities #4 page 8 and *Thunderbird* Dissent. para. 31.

<sup>147</sup> *Mondev* in id. Costamagna.

<sup>148</sup> *Waste Management* in id. Costamagna.

<sup>149</sup> *Bogdanov v. Moldova* in id. Costamagna.

<sup>150</sup> *Noble Ventures* in id. Costamagna.

<sup>151</sup> Id. Costamagna. Generally.

<sup>152</sup> Id. See generally.

<sup>153</sup> Id. Schreuer. Pages 18-19, 25-26.

### iii. Frustration of Claimant's Legitimate Expectations.

260. Claimant will demonstrate that its legitimate expectations were “reasonable and justifiable” and were created by Respondent’s conduct, that the investor relied upon them to make its investment, that Respondent failed to honor those expectations, and that as a result Claimant suffered damages to its investment.<sup>154</sup>

261. Claimant, to say the least had a reasonable expectation that its investment would not be completely affected by the ideological shift underwent by Calpurnia, especially because the establishment of a joint venture and the celebration of separate agreements promised some stability thereto. Such stability was relied upon by Claimant to decide the establishment of the joint venture in the first place and to allow another company to use the VANGUARD INTERNATIONAL trademark.

262. Claimant had the legitimate expectation that its contractual rights under the joint venture agreement and the separate license fees and technical assistance agreements would be honored by Respondent, but they simply were not. The payment of dividends and therefore receiving profits from Claimant’s shares was a fundamental expectation from the joint venture agreement. The decision to suspend the payment of dividends only to Claimant is clearly an outright repudiation of a pre-existing regime on which Vanguard reasonably relied.

263. Also, the idea that Vanguard would receive payments for the license fees through which VanCal was allowed to use its trademark was also reasonably expected, and yet to this day those payments have not been made. This is also an unjustified refusal to uphold Claimant’s contractual rights. Claimant had the expectation that his rights as shareholder were to be protected; this is why it decided to establish a joint venture with Respondent in the first place. However this did not prevent SFCDC from deliberately disregarding those rights.

264. The tribunal must also take into consideration that these expectations were based on solemn legal commitments such as contracts; the strength of such expectations is hence irreducible.

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<sup>154</sup> Fietta, S. Pages 6-7; *Thunderbird*. Award para. 147.

265. It is thus proven that Calpurnia has obstructed the transfer of Claimant's returns and by doing so has breached the "fair and equitable treatment" standard.

## 5. CREEPING EXPROPRIATION.

266. Through a cumulative series of incidents of malfeasance and omissions that occurred over a prolonged period of time -failing to provide full protection and security, unlawful interference, arbitrary and discriminatory treatment and obstructing the transfer of returns- Calpurnia has indirectly expropriated Vanguard's investment.<sup>155</sup>

267. The fact that there has been no physical invasion of property in the present case or a specific decree or legislative act is completely irrelevant because a finding that there has been creeping expropriation does not require such formal or outright transfers of property or, depending on the case, of the enjoyment capabilities. Rather, the requirement that has to be satisfied is that there has been an erosion of the rights associated with ownership as a consequence of State interference.<sup>156</sup>

268. To this effect, some tribunals have established that even in the absence of a formal taking of property, indirect actions that deprive the investment of its economic value may constitute creeping expropriation and can therefore be considered as a taking as well.<sup>157</sup> Another tribunal established that a concept of expropriation must be broad enough to cover all types of expropriation.<sup>158</sup>

269. The Harvard Draft<sup>159</sup> points out that "taking of property" includes, apart from outright takings, any unreasonable form of interference with the use, enjoyment, or disposal of property that hampers the owner's exercise of any related property rights over a period of time.<sup>160</sup>

270. After considering the arguments submitted by Claimant, the tribunal will find more evidence of a taking through creeping expropriation upon realizing that the relevant facts are part of a "deliberate strategy on the part of the

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<sup>155</sup> Sloane, Authorities # 28.

<sup>156</sup> UNCTAD, pag 12,

<sup>157</sup> Mobile Telenor, para 60. Also Occidental v. Ecuador. para 85

<sup>158</sup> Waste Management, para. 145

<sup>159</sup> Harvard Draft Convention, Art. 10

<sup>160</sup> Id, Art. 10(1)

State”<sup>161</sup> that aimed at the consecution of specific and “disguised”<sup>162</sup> goals. This strategy implied a “negative moral judgment,”<sup>163</sup> which was the intention to destroy the investment and Claimant’s rights thereof. Certainly, and the tribunal must agree, it cannot be said that all the hardships undergone by Claimant were mere coincidences.

**i. Effects doctrine.**

271. This tribunal must acknowledge that under international law there is ample authority to assert that the intention of the government plays no role when it comes to determining the existence of expropriation, actually, such a finding must be based on the effects that the conduct attributed to Calpurnia has had on Claimant’s rights.<sup>164</sup> In fact, the very taking of property may be an indirect effect of the relevant conduct.<sup>165</sup>

272. This taking, does not even need to benefit the State directly because the harm and deprivation of the benefits to the investor have being deprived and therefore this must be compensated.<sup>166</sup>

273. The jurisprudence from the Iran-US Claims Tribunal has consistently held that the intent of the government is less important than the effects on the owner’s rights, and that the form of those measures is less important than the reality of their impact.<sup>167</sup>

**ii. How other breaches confabulate to amount to a creeping expropriation.**

274. After demonstrating the breaches of several standards of protection, these breaches will be presented as elements that when taken together constitute a taking of property by means of a creeping expropriation of Vanguard’s investment.

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<sup>161</sup>Dolzer, para 41-59 at 44

<sup>162</sup>Heiskanen, pg 16

<sup>163</sup>Dolzer, par 41-59 at 44

<sup>164</sup> Generally, Heiskanen. Authority # 12

<sup>165</sup>Heiskanen, pg 17

<sup>166</sup> Metalclad, para 103

<sup>167</sup> Tippetts, Abbett, McCarthy, Stratton v. TAMS at 225-226, similar effect *Starrett Housing Corp.* legal sources # 38.

**a. Full Protection and Security.**

275. Tribunals have considered the harassment of investors' representatives to be equivalent to expropriation to the extent that it caused a loss of control over its investment.<sup>168</sup>

276. It has been demonstrated that the lack of protection and security resulted in the loss of control over the investment because Claimant's representatives were persecuted to the point that they were forced to leave the country.

**b. Unlawful Interference.**

277. Generally, State interference has been deemed to result in expropriation if there has been a deprivation of property rights, even when property is not seized and the legal title to the property is not affected.<sup>169</sup> Such interference does not need to imply an enjoyment of the economic benefits by the State.<sup>170</sup>

278. Additionally, State actions that impair claimants' access to the benefit and economic use of the investment have also been considered as a form of expropriation.<sup>171</sup> This would be further confirmed if such interference would have rendered those rights useless.<sup>172</sup>

279. Accordingly, under international law, State responsibility arises not only from the outright annulment of a concession, but also from interference with the underlying investment through indirect actions.<sup>173</sup>

280. Furthermore, the imposition of State representatives on management positions has also been recognized as a form of indirect expropriation in so far as it had a detrimental effect on the ability to manage or control the investment.<sup>174</sup>

281. It has been proven that Calpurnia's interference has impaired the access to Claimant's property rights, leading to a deprivation of them, to the point of

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<sup>168</sup> Benvenuti and Bonfant, Legal # 45

<sup>169</sup> *Tippetts*, 134-151

<sup>170</sup> Tokios Tokeles, legal sources # 88. para 92

<sup>171</sup> Santa Elena, legal sources # 49. para. 77

<sup>172</sup> Starret Housing, 134-151

<sup>173</sup> Higgins, pg 259-324

<sup>174</sup> *Tippetts*, 134-151

rendering them useless. Also, the imposition of State representatives in VanCal's board has led to a loss of control over the investment. These representatives started to implement government policy beyond what the legitimate exercise of a majority shareholders' right to manage a company would allow.<sup>175</sup>

**c. Discrimination and arbitrariness.**

282. Discriminatory and arbitrary treatment has been considered as a form of expropriation when an overall discriminatory environment was present<sup>176</sup> that made it impossible for the investor to maintain the operations of the investment under effective control.<sup>177</sup>

**d. Obstruction of transfer of returns.**

283. An obstruction of transfer of returns can constitute a type of indirect expropriation, if it is done by government acts performed with the sole intention of depriving Claimant of its legitimate rights and mainly of the enjoyment of its investment.<sup>178</sup>

284. Incidental interference through which the use of property has had the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State<sup>179</sup> has also been considered as a form of indirect expropriation.

285. Breaches of contractual obligations that completely destroy the investor's expectations have also been considered as indirect expropriations.<sup>180</sup>

286. By suspending the payment of dividends and by refusing to pay the sums owed under the separate agreements, Respondent has obstructed the transfer of those returns and consequently expropriated Claimant's investment.

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<sup>175</sup>Foremost Teheran, para 228-248

<sup>176</sup> Bishop, see pg 865

<sup>177</sup> Bishop, see pg 865

<sup>178</sup> Abdala & Spiller, pag 448

<sup>179</sup> Metalclad, para. 103

<sup>180</sup> Swhebel, pg 401, 409

287. For all the reasons stated above, Calpurnia has managed to indirectly expropriate Claimant's investment.

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