

TARAZI TEAM 

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ICSID CASE NO. ARB/X/X

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IN THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES

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VANGUARD INTERNATIONAL ,  
*Claimant,*

-against-

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA ,  
*Respondent,*

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MEMORIAL FOR CLAIMANT

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## **Preliminary Statement**

After using Vanguard International's expertise and capital to build Calpurnia's telecommunications industry, Calpurnia abandoned Vanguard International and destroyed its investments. Over the span of three years, Calpurnia expropriated Vanguard International's investment by the commission four distinct yet related acts. Calpurnia (i) discriminated against Vanguard International; (ii) unlawfully interfered in Vanguard International's investment; (iii) obstructed the transfer of returns from the investment; and (iv) failed to provide full protection and security for the investment. Collectively these acts warrant compensation for expropriation; however, each act individually stands on its own to warrant compensation.

Since the political party named the Conservative Conscience of Calpurnia took over the Calpurnian Parliament in November 2003, the maintenance of Gaulois foreign direct investment in Calpurnia has been all but possible. The Calpurnian government, acting through the State Fund for Commerce and Development in Calpurnia, created such a hostile atmosphere and consistently meddled with Vanguard International that Vanguard International's investment in the joint venture, VanCal, was expropriated. Calpurnian police repeatedly ransacked the homes of two of Vanguard's representatives to the VanCal board of directors and the climate of hostility prevented the representatives from returning to Calpurnia. Additionally, the Calpurnian government, through its control of the VanCal board of directors, stopped the payment of dividends to Vanguard International for the past three years and prevented Vanguard International from exercising its right to representation on the board of directors by ousting one Vanguard International's representatives and improperly rejecting shareholder proxies. Further, Calpurnia failed to provide any protection or security to Vanguard International's investment, but rather hindered Vanguard International's operations.

Consequently, Calpurnia violated the Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments. Calpurnia violated Article 2 on the Promotion and Protection of Investments; Article 4 on the Treatment of Investments; Article 6 on Expropriation; and Article 8 on Free Transfer. Under the standards espoused by prior International Centre for Settlement of Investment Dispute Tribunals, Calpurnia ultimately expropriated Vanguard International's

investment in the joint-venture, VanCal, by means of indirect, creeping expropriation. Therefore, it is necessary that this Tribunal find Calpurnia in violation of these international treaties and obligations and award just compensation to Vanguard International.

## **Statement of the Facts**

The Claimant, Vanguard International (“Vanguard”), is incorporated and has its headquarters in Nova Parigi, the capital of Gaul, and is a leading mobile telecommunication company. The Respondent, The State of Calpurnia (“Calpurnia”), owns 100% of The State Fund for Commerce and Development in Calpurnia (“SFCDC”). In early 1997, Vanguard and Calpurnia, through its agent SFCDC, created a joint venture company named VanCal. VanCal is incorporated and has its headquarters in San Inocente de Irkoustsk, the capital of Calpurnia. VanCal provides GSM/UMTS (3GPP) services in Calpurnia under the “Vanguard International” trademark.

Initially, Vanguard owned a 50% equity interest in VanCal. Furthermore, through separate agreements, Vanguard provided technical assistance and trademark licensing to VanCal. The equity interest held by Vanguard has fluctuated; its highest percentage was 86%. By 1994, Vanguard held 30% directly and an additional 1% registered in the name of Frecesca Pescara, which was held in trust for Vanguard.

The SFCDC owns 30% of VanCal’s stock directly. The SFCDC also holds on deposit and votes another 22% of VanCal stock registered in the names of several hundred individuals. The other 17% of VanCal stock is directly held by Calpurnian nationals.

From 1997 until 2003, the relationship between Vanguard and Calpurnia was friendly. However in November 2003, the relationship changed between Vanguard and Calpurnia. The Conservative Conscience of Calpurnia (“CCC”) won an absolute majority in both chambers of the Calpurnian Parliament. The CCC’s rhetoric is very hostile toward societies similar to Gaul’s society. This hostility has even led to CCC claiming that the Gaulois government is working toward political and industrial espionage and destabilization. Due to this unsubstantiated fear, Calpurnia, through the SFCDC, began to refuse to pay foreign shareholders the dividends due to them from VanCal’s shares. Thus in 2004, 2005, 2006, and 2007 VanCal declared dividends but only paid the dividends to Calpurnian shareholders.

On 21 May 2005, Vanguard wrote a letter to Mr. Korchnoi, a representative of Vanguard on VanCal’s Board of Directors (“Board”), requesting that the amount of the dividend payable be placed in a separate bank account in Vanguard’s name. On 27 May 2005, Mr. Korchnoi was forced to inform Vanguard of the Board’s decision, that VanCal cannot pay any sums of money for any reason to foreign shareholders. In response to this e-mail, on 5 June 2005 Vanguard

wrote to Mr. Swift, SFCDC's representative to the Board, and Mr. Korchnoi requesting further information regarding the decision of 10 March 2005 referred to in Mr. Krochnoi's e-mail of 27 May 2005. While the Respondent claims that Mr. Korchnoi's e-mail of 27 May 2005 was unauthorized, Respondent had an opportunity to respond to the allegations set forth in Mr. Korchnoi's e-mail after receiving the e-mail of 5 June 2005. However, the Respondent never bothered to respond nor dispute the e-mail until arbitration was requested by the Claimant.

After the Respondent deliberately ignored the Claimant's request for more information, the Claimant was forced to attempt an amicable settlement through VanCal's Board. However, at every step along the way, Vanguard was thwarted by the Respondent discriminating against Vanguard's representatives. The discrimination had begun in December 2003 through the actions of Calpurnian Security Forces searching the homes of Ms. Pescara and Mr. Kolowenko, two representatives for Vanguard. Not only were their homes searched, but the story was published in the paper to further humiliate the two representatives. Then in June 2004, the Calpurnian Security Forces searched the homes of Ms. Pescara and Mr. Kolowenko and published newspaper stories again, and finally in July 2004 the Calpurnian Security Forces seized the personal property of the two representatives. After these scare tactics and humiliating experiences for the two representatives, Ms. Pescara was forced to resign as managing director of VanCal.

Despite these actions, Vanguard continued to attempt to find an amicable settlement for the situation through the Board. However, in November of 2005, two valid proxies were denied for a Board meeting. During this Board meeting, Ms. Pescara was voted off the Board and Mr. Poe and Mr. Korchnoi resigned. During the same meeting in which the valid proxies were denied, two of the opened Board seats were replaced by two representatives of the wholly owned governmental agent SFCDC. The other seat was then occupied by Mr. Rindler – the only seat Vanguard still held.

In an email of 28 September 2006 from Mr. Swift, on behalf of the VanCal Board, to Claimant, Vanguard was first told of the Board's decision to credit the dividends payable to VanCal's books to the Claimant's accounts. Thus, instead of paying the dividends directly to Vanguard, Vanguard would simply be given credit in the amount the dividends should be in. This decision goes directly against what the Articles of Association, which require that dividends

be paid directly to shareholders.<sup>1</sup> Thus, in October 2006, Vanguard removed all representatives from the Board and declined to replace them because of the utter futility their presence had become.<sup>2</sup>

In one last attempt to amicably settle the issues between Calpurnia and Vanguard, Vanguard sent a letter to Mr. Poe stating that a de facto expropriation had occurred through Calpurnian state entities, and requesting that Mr. Poe transmit this issue to his superiors including the appropriate Ministers. Mr. Poe, as had become the custom of Calpurnia in regard to this issue, refused to involve the government and refused to address the problems. Thus, with this final affirmation that Calpurnia will refuse to amicably settle these issues, Vanguard respectively submits these issues to arbitration before the International Centre for Settlement of Investment Disputes (“ICSID”).

**I. THE TRIBUNAL DULY FORMED UNDER THE ICSID CONVENTION DOES HAVE JURISDICTION OVER THE DISPUTE BETWEEN VANGUARD INTERNATIONAL AND THE CALPURNIAN GOVERNMENT.**

This Tribunal, formulated under the Calpurnia-Gaul Bilateral Investment Treaty (“Calpurnia-Gaul BIT”) and ICSID, has jurisdiction over the claims made by Claimant, Vanguard, against Respondent, The Government of Calpurnia. Vanguard sought an amicable settlement for more than eighteen months prior to seeking ICSID arbitration. Further, even if this tribunal holds that Vanguard did not seek an amicable settlement within the requisite time of the Calpurnia-Gaul BIT, it has sought an amicable settlement for at least two months, which is applicable under the Calpurnia- Flatland BIT and Article 4(2) of the Calpurnia-Gaul BIT. Moreover, even though Flatland denounced ICSID jurisdiction in May 2003, the Calpurnia-Flatland BIT still can be applied to this case at hand. The case brought before the domestic court of Calpurnia by Ms. Pescara, an employee of Vanguard, does not forfeit Vanguard’s right to seek ICSID arbitration.

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<sup>1</sup> Evidence / Calendar of Events at 28 Sept. 2007, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>2</sup> *Id.* at 23 Oct. 2006.

A. VANGUARD INTERNATIONAL DID SEEK AN AMICABLE SETTLEMENT FOR AT LEAST EIGHTEEN MONTHS.

Vanguard sought to amicably settle the dispute with VanCal and the Calpurnian government for at least eighteen months before seeking ICSID arbitration. Article 11(2) of the Calpurnia-Gaul BIT requires that each party pursue an amicable settlement, but if an amicable settlement cannot be found within eighteen months then the investor may seek arbitration. Claimant began seeking an amicable settlement as early as 5 June 2005 when Claimant wrote a letter to Mr. Korchnoi – more than 24 months before Vanguard sought ICSID arbitration. As such, Vanguard followed the requirements of the Calpurnia-Gaul BIT.

Vanguard's patience with the Respondent is similar to the steps Tradex Hellas S.A. took in attempting to reach an amicable settlement with the Republic of Albania.<sup>3</sup> In the bilateral investment treaty ("BIT") between Greece and Albania, there was a requirement to attempt to settle any disputes amicably before seeking arbitration. In that case, the tribunal found that Tradex had made a good faith effort to find a settlement before seeking arbitration.<sup>4</sup> Tradex had sent five letters to the Ministry of Agriculture to seek an amicable settlement; however, the Ministry never responded to the letters.<sup>5</sup> While Vanguard may not have sent five separate letters, it still sent letters to the appropriate authorities, more than once, and each time it received no answer. As such, much like it was not the fault of Tradex that Albania refused to answer the letters, it is not the fault of Vanguard that Calpurnia has refused to pursue an amicable settlement by not responding to Vanguard's letters.

The 21 May email to Mr. Korchnoi requested that the dividend be placed in a separate bank account in the name of the Claimant. On 27 May, Mr. Korchnoi informed the Claimant that due to a decision of the Board, VanCal would not pay any sums of money for any reason to foreign shareholders.<sup>6</sup> In response to this information, the Claimant sent an email to Mr. Korchnoi and Mr. Swift on 5 June 2005.<sup>7</sup> In this email, the Claimant requested information from the Board regarding the decision to not pay any sums of money to foreign shareholders. The

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<sup>3</sup> Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award (29 April 1999).

<sup>4</sup> *Id.* at 182 – 184.

<sup>5</sup> *Id.*

<sup>6</sup> Evidence / Calendar of Events at 27 May 2005, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>7</sup> *Id.* at 5 June 2005.

Claimant sought an answer as to why the Respondent was discriminating against foreign shareholders.<sup>8</sup> This email went unanswered.

Mr. Swift, as a representative of the SFCDC and thereby a representative of the Calpurnian Government, had every opportunity to fully answer the email of 5 June 2005. He chose not to answer the email and, as such, sent a signal to Vanguard that the Calpurnian Government and VanCal would not work amicably with Vanguard to settle the disputes. The fact that the Respondent now claims the email from Mr. Korchnoi was unauthorized is unconvincing. Mr. Swift had the opportunity to inform the Claimant that Mr. Korchnoi's email was unauthorized in June of 2005, but failed to do so.

After this unanswered email, the Claimant attempted to work through the Board to settle the dispute. Mr. Swift and other representatives of the Calpurnian Government thwarted all attempts made by Vanguard to represent its interests at board meetings. By 16 November 2005, the Claimant's three representatives had been forced to resign. Two of the members were then replaced by the SFCDC's representatives, thereby reducing the Claimant's representation on the Board to one member.

On 28 September 2006, the Board informed the Claimant that the dividends would be credited to VanCal's books to Claimant's accounts – in direct opposition to VanCal's own Articles of Association. It was this email that made the Claimant finally realize that attempting to reach an amicable agreement through the Board would be impossible. As such, after more than fifteen months of attempting to reach an amicable settlement through the Board, the Claimant sent an email to VanCal in which Vanguard withdrew all representatives from the Board.<sup>9</sup>

After this extensive process, the Claimant sent a letter on 5 February 2007 to Mr. Poe, the Chair of the SFCDC, claiming expropriation by Calpurnian state entities and requested that Mr. Poe inform the appropriate ministers and superiors of Vanguard's claims. However, once again, the Calpurnian government refused to answer or be involved in an amicable settlement. On 21 February 2007, Mr. Poe sent a letter to Claimant declaring that the Calpurnian Government did not consider that Vanguard's investment had been expropriated.<sup>10</sup> After twenty-five months of

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<sup>8</sup> *Id.*

<sup>9</sup> Evidence / Calendar of Events at 21 Feb. 2007, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>10</sup> *Id.*

attempting to reach an amicable settlement, Vanguard seeks relief before this Tribunal.

Vanguard waited much longer than the requisite eighteen months.

B. EVEN IF THE TRIBUNAL FINDS THAT VANGUARD DID NOT SEEK AN AMICABLE SETTLEMENT FOR EIGHTEEN MONTHS, THE CALPURNIA-FLATLAND BIT ALLOWS VANGUARD TO PURSUE ARBITRATION AFTER ONLY TWO MONTHS OF ATTEMPTING TO FIND AN AMICABLE SETTLEMENT.

Due to Article 4, section 2 of The Calpurnia-Gaul BIT which requires that Gaulois investors to be treated equal to other investors, the Calpurnia-Flatland BIT applies in the current case. Therefore, Vanguard only needed to attempt an amicable settlement for two months prior to filing with this esteemed tribunal. The Calpurnia-Gaul BIT states in Article 4, section 2:

Investors of one Contracting Party shall be accorded by the other Contracting Party as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favorable than the latter Contracting Party accords to its own investors or to investors of any third State, whichever is most favorable to the investor.<sup>11</sup>

As such, the Calpurnia-Gaul BIT requires that the host nation (Calpurnia) afford the same exact treatment as regards use, enjoyment, or disposal of the investment to the investors of Gaul as it affords to the investors of Flatland. Therefore, since the Calpurnia-Flatland BIT only requires the investor to attempt an amicable settlement for two months in Article 3,<sup>12</sup> Vanguard was only required to seek an amicable settlement for two months prior to seeking arbitration.

In interpreting treaties, the Vienna Convention on the Law of Treaties Article 31 requires first and foremost that the treaty is interpreted “according to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>13</sup> Thus, the plain meaning of the Calpurnia-Gaul BIT is clearly that whichever BIT is most favorable as regards use, enjoyment, or disposal to the investor must be followed – in this case that means that Vanguard only needed to seek an amicable settlement for two months. Arbitration often plays a role in deciding the full use, enjoyment, or disposal of an investment. Thus, arbitration and the steps that lead up to arbitration must be included in the plain meaning of the clause.

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<sup>11</sup> Calpurnia-Gaul BIT at art. IV, para. 2, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>12</sup> Calpurnia-Flatland BIT at art. 3, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>13</sup> Vienna Convention on the Law of Treaties art. 31(1), 23 May 1969.

Since Vanguard requested arbitration on 31 July 2007,<sup>14</sup> Vanguard only needed to begin seeking an amicable settlement by 31 May 2007. However, Vanguard sought an amicable settlement by 5 February 2007 – at the very latest.<sup>15</sup>

This is similar to *Maffezini v. Spain*, in which the tribunal agreed that the Most Favored Nation clause could be used towards the “administration of justice” because it mentioned “all rights” as applicable to most favored treatment.<sup>16</sup> Article 4, section 2 of the Calpurnia-Gaul BIT envisions favored treatment for anything regarding the use, enjoyment, or disposal of the investments. Just as the tribunal found in *Ambatielos, Merits, Judgment*, that the Most Favored Nation clause could be invoked in the administration of justice because the clause mentioned “all rights.”<sup>17</sup> While the specific word “all” may not have been used, the implication is in the clause. In order for Vanguard to receive its full use, enjoyment, or disposal of its investments, it must be able to apply for ICSID arbitration as quickly as possible – in this case, two months. An eighteen month waiting period will force Vanguard to lose millions of dollars attempting to settle with a hostile government. Vanguard cannot enjoy its investment while losing millions of dollars because of being forced to wait eighteen months – especially when Article 4, section 2 permits Vanguard to seek arbitration after two months.

*Maffezini v. Kingdom of Spain* is in direct opposition to the ICSID tribunal which found that the Most Favored Nation clause could not be invoked by Salini Costruttori S.p.A. and Italstrade S.p.A in the *Salini Costruttori v. Hashemite Kingdom of Jordan* case.<sup>18</sup> In that case, there was no all-encompassing language in the Most Favored Nation clause, unlike in the Calpurnia-Gaul BIT.<sup>19</sup> Further, there was a specific clause in the treaty in the *Salini* case that explicitly denied ICSID arbitration between an investor and an entity of a state party, thus ICSID arbitration would have been explicitly against the policy of the treaty. Whereas, in the case at hand – either through the Calpurnia-Flatland BIT or the Calpurnia-Gaul BIT – there will be

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<sup>14</sup> Evidence / Calendar of Events at 31 July 2007, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>15</sup> Evidence / Calendar of Events at 5 Feb. 2007, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>16</sup> *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000), 124 I.L.R. 9 (2003).

<sup>17</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 at para. 118 – 119, Award (31 Jan. 2006), 44 I.L.M. 569 (2005) (quoting *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

ICSID arbitration. Nothing as to the policy of either BIT would change – the forum of choice would still stand.

C. WHILE FLATLAND HAS DENOUNCED THE ICSID CONVENTION ON 2 MAY 2003, THE FLATLAND – CALPURNIA BILATERAL INVESTMENT TREATY STILL APPLIES.

The Calpurnia-Flatland BIT is still applicable to Calpurnia. The Calpurnia-Flatland BIT in Article 13 explains that for investments made while the BIT is still applicable, the provisions of the BIT shall remain in force for a further period of ten years from the date of termination.<sup>20</sup> Assuming that Flatland also terminated its BIT with Calpurnia when Flatland denounced the ICSID Convention, the BIT will remain in force until 2 May 2013 – ten years after the denunciation. As such, the BIT is still in force for the agreement made by Vanguard with the Calpurnian government because the agreement was made early in 1997 – while the Calpurnia-Flatland BIT was still in force.

Further, ICSID tribunals have also held that simply because a party later pulls out of ICSID, it does not change the terms of the investment treaty. In *Kaiser Bauxite Co. v. Jamaica*, Jamaica notified ICSID that it no longer consented to arbitration on 8 May 1974.<sup>21</sup> The Jamaican government and Kaiser Bauxite Co., however, had made an agreement in 1969 and 1972 which required ICSID arbitration of disputes.<sup>22</sup> The tribunal ruled that it had jurisdiction over the case because Jamaica’s notification on 8 May 1974 did not affect the prior agreement to arbitrate, which was contained in the 1969 and 1972 Agreements.<sup>23</sup> As such, the Flatland BIT created in 1992 does not affect Flatland’s later decision to rescind its consent to ICSID arbitration in 2003. The BIT is still valid for use under the Most Favored Nation clause in Article 4, section 2 of the Calpurnia-Gaul BIT.

D. MS. PESCARA’S CASE BEFORE THE DOMESTIC COURT OF CALPURNIA DOES NOT FORFEIT VANGUARD’S RIGHT TO SEEK ICSID ARBITRATION.

Ms. Pescara’s case before the Commercial Court of San Innocente de Irkoutsk (“Commercial Court”) does not forfeit Vanguard’s right to pursue its own case before this Tribunal. The Calpurnia–Gaul BIT in Article 11 provides that all other forums are precluded

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<sup>20</sup> Calpurnia-Flatland BIT at art. 13, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>21</sup> *Kaiser Bauxite Co. v. Jamaica*, ICSID Case No. 74/3, Decision on Jurisdiction of 6 July 1975, 114 I.L.R. 144 (1999).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

once an investor chooses a forum.<sup>24</sup> The Claimant does not claim that the Article is void or should not be followed; rather, it is clear that the only investor represented in Ms. Pescara's case was Ms. Pescara herself. Therefore, the only proceedings Vanguard began against the Government of Calpurnia are the current ones before this ICSID tribunal. Further, in the vast majority of cases that deny jurisdiction based on a claimant's previous choice of forum, the claimant in the first case and the claimant before an ICSID tribunal are the exact same claimant.<sup>25</sup> This simple difference in facts is crucial. With two different claimants seeking two different types of relief, it is clear that Ms. Pescara's case before the Commercial Court and Vanguard's case before ICSID are not the same case.

In *Waste Management Inc. v. United Mexican States*, the tribunal correctly found that Waste Management had violated Article 1121 of NAFTA, which requires a party to abstain from initiating or continuing legal proceedings in any administrative or judicial tribunal or other dispute settlement procedures.<sup>26</sup> Waste Management proceeded to file cases in other courts after it had initiated ICSID arbitration, plainly ignoring the requirements of NAFTA. However, in all of these cases, Waste Management was the claimant and the company sought similar relief in each case. This is in stark contrast to the two cases the Respondent claims are one in the same. Ms. Pescara, representing herself, sought to have her own personal 1% shareholding transferred to her personal account in Gaul.<sup>27</sup> However, in the current case before this Tribunal, the Claimant seeks full compensation for the expropriation of VanCal.<sup>28</sup> If the case before the Commercial Court had been brought by Vanguard, the company would have sought the full 30%, not only the 1% held personally by Ms. Pescara.

Claimant's case is similar to *CMS Gas Transmission Company v. The Republic of Argentina* in which the tribunal found that the "fork in the road" provision, similar to the provision in the Calpurnia – Gaul BIT in this case, was not triggered.<sup>29</sup> In that case, TGN, a third party, submitted non-treaty based claims to the domestic courts of Argentina. The tribunal

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<sup>24</sup> Calpurnia-Gaul BIT, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>25</sup> See generally Kaiser Bauxite Co.; and Salini Costruttori.

<sup>26</sup> Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Award at 239 (2 June 2000), 40 I.L.M. 56 (2001).

<sup>27</sup> Claimant's Request for Arbitration at para. 9, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>28</sup> *Id.* at para. 9.

<sup>29</sup> CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8 at para. 80-81, Award (12 May 2005), 44 I.L.M. 1205 (2005).

held that since CMS, the investor, did not make the choice of forum, it could not forfeit its right to bring a claim before ICSID. Since TGN's claims in the domestic courts did not involve the BIT, the claims were entirely different and therefore did not forfeit CMS's right to bring a claim in arbitration. Thus, just as TGN was a completely separate party from CMS, so is Ms. Pescara from Vanguard. TGN's claims were not under the BIT, and neither are Ms. Pescara's claims.

Ms. Pescara's claim never tried to exercise any rights that she may have under the BIT; therefore, she did not trigger the provision in Article 11 of the Calpurnia-Gaul BIT. Ms. Pescara simply made a contract claim against VanCal as a shareholder of VanCal to receive her dividends. Similarly, in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, SGS had made no claims under the Swiss-Pakistan BIT in domestic courts.<sup>30</sup> The tribunal, taking into consideration the purpose of ICSID and the BIT, was hesitant to deny jurisdiction over claims that had not actually been alleged in another forum.<sup>31</sup> Since Ms. Pescara only made a contract claim to preserve her own personal rights as a shareholder of VanCal, no claims were actually made under the BIT. Due to the general purpose of ICSID to ensure a fair and equitable forum to foreign investors, as well as the purpose of the Calpurnia-Gaul BIT, this Tribunal should also not deny jurisdiction over claims that have not yet been alleged.

Further, even if the Tribunal deems the cases to be sufficiently similar, since Ms. Pescara's case was never decided on the merits, this Tribunal still has the ability to decide the case on the merits. The Commercial Court dismissed Ms. Pescara's claims because "as mere nominee" she lacked standing.<sup>32</sup> In *SGS*, the Swiss proceedings did not decide the merits of the claim and the dispute was not actually resolved.<sup>33</sup> The tribunal intimated that even if there had been a "fork in the road provision" in the BIT, it would not have been triggered.<sup>34</sup> As such, a "fork in the road provision" would not be triggered in this case either. This Tribunal has the jurisdiction to decide the case on the merits because Ms. Pescara's case was never fully resolved by the Commercial Court.

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<sup>30</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on objections to Jurisdiction (6 Aug. 2003), 42 I.L.M. 1290 (2003).

<sup>31</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 at para. 177, Decision of the Tribunal on objections to Jurisdiction (6 Aug. 2003), 42 I.L.M. 1290 (2003).

<sup>32</sup> *Id.* at para. 8.

<sup>33</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on objections to Jurisdiction (6 Aug. 2003), 42 I.L.M. 1290 (2003).

<sup>34</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 at para. 121 n. 140, Decision of the Tribunal on objections to Jurisdiction (6 Aug. 2003), 42 I.L.M. 1290 (2003).

While the two claims may arise from the same facts, that does not mean that the cases are the same. Ms. Pescara, acting as a single shareholder, brought the claim by herself and for herself under the domestic laws of Calpurnia; whereas, Vanguard is bringing a claim to protect its own interests under the Calpurnia-Gaul BIT. It may come from the same facts, but that does not preclude both claimants from seeking compensation separately. Each party can act in a way in which they feel that their interests are being best represented. Ms. Pescara felt that her interests would be best represented in the Commercial Court. Vanguard knows that this tribunal will best represent its interests in this matter.

## **II. THE GOVERNMENT OF CALPURNIA DISCRIMINATED AGAINST VANGUARD INTERNATIONAL THROUGH THE ACTIONS OF ITS AGENT, THE SFCDC, BY REFUSING TO PAY LEGAL DIVIDENDS TO VANGUARD, AND ILLEGITIMATELY REMOVING VANGUARD’S OWN BOARD MEMBERS.**

Calpurnia discriminated against Vanguard in violation of Article 4, section 1 and Article 2, section 3 of the Calpurnia-Gaul BIT, which provide for the reciprocity of treatment between investors and impose an obligation not to impair the investment respectively. However, to establish that Calpurnia is liable to Vanguard, it must be established that (i) the SFCDC represents and acts on behalf of Calpurnia; and (ii) the SFCDC controls the VanCal Board.

The SFCDC is a state entity, thus creating liability on behalf of Calpurnia. This is proven by the combined structural test and the functional test, as established in *Maffezini v. Kingdom of Spain*.<sup>35</sup> The structural test states:

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

The functional test states that “a mixed economy company or government-owned corporation should not be disqualified as a ‘national of another Contracting State’ unless it is acting as an agent for the government or is discharging an essential government function.”<sup>37</sup> These two tests however do not necessarily hold equal weight in the determination: “It is difficult to determine, a

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<sup>35</sup> See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000), 124 I.L.R. 9 (2003).

<sup>36</sup> *Id.* at para. 78 (citing *Draft Articles on State Responsibility*, International Law Commission, art. 7, para. 2).

<sup>37</sup> *Id.* at para. 79.

*priori*, whether these various tests and standards need necessarily be cumulative. It is likely that there are circumstances when they need not be.”<sup>38</sup> This Tribunal will find that in the present case, both of these tests are easily met.

The SFCDC is 100% owned by Calpurnia.<sup>39</sup> The moneys used by the SFCDC are that of Calpurnia and the employees are government employees.<sup>40</sup> The purpose of the SFCDC is to invest these moneys in the interest of Calpurnia and, in cases such as this, to make decisions and vote on behalf of Calpurnian citizens.<sup>41</sup> In the *Maffezini* case, which determined SODIGA to be a state enterprise passing the structural test and creating liability on behalf of Spain, the percentage of governmentally owned capital was over 88%.<sup>42</sup> Because the SFCDC is 100% owned by Calpurnia, and a slightly lower percentage of governmentally owned capital establishes the passing of the structural test, the SFCDC passes the structural test.

The functional test focuses on “performing activities of a public nature.”<sup>43</sup> The minutes of the 10 March 2005 Board meeting held at Dr. Swift’s SFCDC office demonstrate a heavy inclination to acting in the interest of the Calpurnian citizens.<sup>44</sup> Additionally, the record provides that the SFCDC invested in VanCal and made decisions and voted on behalf of Calpurnian citizens.<sup>45</sup> In the *Maffezini* case, SODIGA passed the functional test by, among other things, “investing in new enterprises.”<sup>46</sup> By such standards, the SFCDC surely passes the functional test as well. As such, the SFCDC passes both the structural test and functional tests, therefore creating liability on behalf of Calpurnia.

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<sup>38</sup> *Id.* at para. 81.

<sup>39</sup> Claimant’s Request for Arbitration at para. 10, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>40</sup> Claimant’s Request for Arbitration at para. 16, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>41</sup> Claimant’s Request for Arbitration at para. 10, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>42</sup> *See Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction at para. 83 (25 Jan. 2000), 124 I.L.R. 9 (2003) (“Furthermore, in spite of the fact that the government chose to create SODIGA in the form of a private commercial corporation ... the percentage of governmentally owned capital of SODIGA had increased to over 88%”).

<sup>43</sup> *Id.* at para. 89.

<sup>44</sup> Evidence / Calendar of Events at 10 Mar. 2005, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) (“[i]n order to preserve the rights of the Calpurnian shareholders ...”).

<sup>45</sup> Claimant’s Request for Arbitration at para. 10, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>46</sup> *See Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction at para. 86 (25 Jan. 2000), 124 I.L.R. 9 (2003).

The SFCDC effectively controlled the VanCal Board. The SFCDC owns 30% of VanCal's stock directly and holds on deposit and votes 22% of VanCal's stock on behalf of several hundred individual shareholders.<sup>47</sup> This gives the effect of a 52% majority vote. Furthermore, the SFCDC eventually held four of the Board seats, in violation of the cumulative voting provision of the Calpurnian Commercial Code.<sup>48</sup> However, before this occurred in November 2005, the VanCal shareholder meeting minutes establish that the "SFCDC began to exercise a leading role in VanCal's affairs" during October 2004.<sup>49</sup> As such, it is not difficult to ascertain that SFCDC has a tight grip on the Board and, moreover, the operations of VanCal.

The stated purpose of the Calpurnia-Gaul BIT is to develop economic "co-operation to the mutual benefit of both countries and to maintain fair and equitable conditions for the investments by investors" of one country in the territory of the other country.<sup>50</sup> The discriminatory actions of Calpurnia violate the legally binding agreements expressed in the Calpurnia-Gaul BIT and contradict any promise of economic cooperation or fair conditions.

A. THROUGH VANCAL'S BOARD OF DIRECTORS' DECISION TO NOT PAY CASH DIVIDENDS TO FOREIGNERS, CALPURNIA DISCRIMINATED AGAINST VANGUARD.

From 2004 to 2007, the Respondent discriminated against Vanguard by engineering a series of decisions by the Board which forbade the payment of cash dividends to the Claimant, even though Calpurnian stockholders received these payments. This action by the Respondent violates Article 4 of the Calpurnia-Gaul BIT. Article 4, section 1 states:

Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors by any third state, whichever is the most favourable to the investor.<sup>51</sup>

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<sup>47</sup> Claimant's Request for Arbitration at para. 10, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>48</sup> Claimant's Request for Arbitration at para. 15, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>49</sup> Evidence / Calendar of Events at 14 Oct. 2004, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>50</sup> Calpurnia-Gaul BIT, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>51</sup> Calpurnia-Gaul BIT at art. 4, para. 1, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

The payment of cash dividends to Calpurnian stockholders but not to anyone else who holds shares in VanCal is clearly “treatment less favourable” than the Respondent provides for its nationals. On 10 March 2005 the Board decided that “due to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign shareholders has been suspended for the time being.”<sup>52</sup> Calpurnian nationals holding VanCal stock were continuously compensated, but VanCal stopped receiving dividends on 10 March 2005. “In the investment context, the concept of discrimination has been defined to imply unreasonable distinctions between foreign and domestic investors in like circumstances.”<sup>53</sup> There was no change in the circumstances of the investors. The VanCal Board distinctly changed its dividend payment practices and started to exclude the company’s foreign investor, the Claimant. The difference in dividend payment constitutes discrimination against the Claimant.

The action to stop payments to Vanguard was illegitimately passed by the Board. The only representative of the Claimant present at the Board meeting was Mr. Rindler and his opinion was rejected and ignored. Subsequent letters between the Claimant and Mr. Korchnoi, who was specifically selected by the Respondent to replace the Claimant’s illegitimately ousted representative, Ms. Pescara, show the cordial but absolute disregard of the Claimant’s interests and rights in VanCal.

The Respondent intentionally established a discriminatory system of making dividend payments to itself and Calpurnian nationals while refusing to make the same payments to the Claimant. This discriminatory practice is in violation of Article 4 of the Calpurnia-Gaul BIT because the treatment of the Claimant is “less favourable” than the treatment of the Calpurnian stockholders. The Respondent and the Claimant each have the same interest in VanCal, although in different proportions, but one party receives cash dividends and the other does not. There can be no clearer discrimination than that which was committed by the Respondent.

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<sup>52</sup> Evidence / Calendar of Events at 10 Mar. 2005, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>53</sup> Feldman v. Mexico, ICSID Case No. ARB(AF)99/1 at para. 170, Award (16 Dec. 2002), 42 I.L.M. 625 (2003).

B. CALPURNIA, THROUGH ITS STATE OWNED MINISTRY, SFCDC, FURTHER DISCRIMINATED AGAINST VANGUARD BY ILLEGITIMATELY CHANGING THE COMPOSITION OF THE BOARD OF DIRECTORS OF VANCAL.

The Respondent illegitimately changed the composition of the Board in an attempt to legitimize the difference in payments of cash dividends to Calpurnian stockholders and to the Claimant. This action violates Article 2, section 3 of the Calpurnia-Gaul BIT:

Each Contracting Party shall not impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, acquisition or disposal of investments in its territory of investors of the other Contracting Party.

The Claimant is entitled to two representatives on the Board.<sup>54</sup> Until November 2005, the Claimant's representatives were Ms. Pescara and Mr. Rindler. On 16 November 2005, Ms. Pescara was voted off the Board. At the same meeting where Ms. Pescara was ousted, the vote of the Claimant's other representative, Mr. Rindler, was silenced because his proxies were found to not be formally valid for the purpose of the meeting. So, for a meeting where the purpose was to remove the influence and representatives of Vanguard from the Board, the Claimant was not allowed to protest, make an argument in its defense, or even make its objection known. By ousting Ms. Pescara and further negating the vote of Mr. Rindler, the Respondent violated Article 2 of the Calpurnia-Gaul BIT by unreasonably, arbitrarily, and discriminatorily impairing and negating the Claimant's management, maintenance, and enjoyment of its stock in VanCal. The Respondent discriminated against Vanguard by through its manipulation of the Board and by harassing Vanguard's representatives.

The Respondent contends that there was no interference of the rights of the Claimant because there was not a specific decree by the Calpurnian Government which removed these rights. This argument is used as a justification for the Respondent's illegal manipulation of the Board. Regardless of an official pronouncement, like a governmental decree, the effect of the Respondent's actions was to remove any power which the Claimant was entitled to from the decisions of the Board. *Azurix Corp. v. Argentine Republic* states:

The question for the Tribunal is whether the measures taken...can be considered to be arbitrary and have impaired the management,

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<sup>54</sup> Claimant's Request for Arbitration at para. 15, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

operation, maintenance, use, enjoyment, acquisition, expansion or the disposal of the investment by [the Claimant].<sup>55</sup>

The removal of the Claimant's representatives impaired its management, maintenance, and enjoyment of its investment in VanCal and amounts to discrimination.

The Respondent also claims that there were not any irregularities in the conduct of the 16 November 2005 Board meeting when one of the Claimant's representatives was ousted and the other was neutered of his influence and voting ability. Not only is the technical explanation of the Respondent that Mr. Rindler did not submit the proper paperwork to get his proxies certified unpersuasive, its actions are in violation of Calpurnia's own laws. The Respondent deprived the Claimant of representation on the Board which violates the cumulative voting provision of the Calpurnian Commercial Code.<sup>56</sup> The reason provided by the Respondent for its removal of the Claimant's representatives from the Board, for the decisions regarding the ousting of Ms. Pescara, and for the cessation of making cash dividend payments to the Claimant is both discriminatory and a violation of Calpurnia's own law. The Respondent violated Article 2 of the Calpurnia-Gaul BIT by illegally altering the composition and voting power on the Board through unreasonable, arbitrary, and discriminatory practices.

The Respondent not only used illegal practices in manipulating the Board, it used its power to disrupt, intimidate, and harass the Claimant's representatives to the Board in their personal capacities. In September 2004, Ms. Pescara was denied the renewal of her "three-year business visa." At this time, Ms. Pescara was the Managing Director of the Board. Two months later, she was removed from this position. The Calpurnian government wanted to remove Ms. Pescara from the Board, which is evidenced by her loss of the position of Managing Director on 15 November 2004 and her full dismissal on 16 November 2005. The Calpurnian government is also responsible for the administration of the country's visa program. The Calpurnian government rejected Ms. Pescara's visa renewal application to constrain her ability to influence the Board and to harass her.

In *Genin v. Estonia*, the ICSID tribunal states that the withdrawal of a license with the intent to harm the foreign company constitutes a discriminatory action.<sup>57</sup> The actions of

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<sup>55</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 at para. 393, Award (14 July 2006).

<sup>56</sup> Claimant's Request for Arbitration at para. 15, *Vanguard Int'l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>57</sup> *Genin, Eastern Credit Ltd., Inc. v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001).

Calpurnia, in denying Ms. Pescara's visa, demonstrate the Respondent's intent to harm Vanguard's management, maintenance, and enjoyment of VanCal. The Respondent also executed three intimidating and harassing search and seizures of the homes of the Claimant's representative to the Board within an eight month period. These raids were supposedly in response to an ongoing espionage mission of Ms. Pescara and Mr. Kolowenko (the Claimant's Chief Technical Officer), however no charges were ever filed. The systematic and repeated harassment of the Claimant's representatives by the Respondent violates Article 2, Section 3 of the Calpurnia-Gaul BIT by unreasonably and discriminatorily impairing their ability to manage the VanCal interests of the Claimant.

In *Azurix v. Argentine Republic*, an ICSID tribunal stated that some of the factors which are considered in evaluating a discrimination claim include (i) the non-payment of bills; (ii) threatening members of the company; and (iii) denying foreign officials access to proper documentation. Calpurnia committed all of these discriminatory acts. From 10 March 2005, the Respondent did not make the required dividend payments to the Claimant. This is similar to the denial of paying a bill because once VanCal decided to pay any dividend, it is obligated to make that payment to the Claimant. The harassment of Ms. Pescara and Mr. Kolowenko constitutes a threat to officials of Vanguard. Calpurnia also denied the renewal of Ms. Pescara's business visa in September 2004. The police searches of the homes of the officers representing Vanguard or the denial of Ms. Pescara's business visa might, singularly, be attributable to coincidence. However, Calpurnia's manipulation of the Board and harassment of Vanguard's representatives, when viewed with the refusal to pay dividends and other acts of the Claimant, depict a clear example of discrimination against Vanguard.

### **III. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA OBSTRUCTED THE TRANSFER OF RETURNS TO VANGUARD INTERNATIONAL**

The Republic of Calpurnia, through the SFCDC, obstructed the transfer of returns in the form of dividend payments from VanCal to Vanguard in violation of the Calpurnia-Gaul BIT. As such, Vanguard requests immediate compensation.

The non-payment of the declared cash dividend violates the Calpurnia-Gaul BIT. According to Article 8:

1. Each Contracting Party shall ensure to investors of the other Contracting Party the **free transfer**, into and out of its territory, of

payments in connection with an investment. Such payments shall include in particular, though not exclusively:

(b) **returns;**

2. Transfers referred to in paragraph 1 of this Article shall be made **without any restriction or delay**, in a freely convertible currency and at the prevailing market rate of exchange applicable on the date of transfer in the currency to be transferred.

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3. ... a Contracting Party may delay a transfer ... provided that such measures and their application **shall not unreasonably impair the free and undelayed transfer** ensured by this Agreement.<sup>58</sup>

Vanguard urges this tribunal to interpret the Calpurnia-Gaul BIT in accordance with the Vienna Convention by not reading it either for or against Vanguard, but rather within “the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>59</sup>

The obstruction stems from VanCal’s refusal to pay declared cash dividends. On 10 March 2005, VanCal held a Board meeting dominated by the chairman of the board, Dr. Swift, during which the Board decided to not pay any money for any reason to foreign shareholders.<sup>60</sup> Vanguard was informed of this decision on 27 May 2005.<sup>61</sup> After more than a year without the payment of the declared cash dividends to Vanguard, Dr. Swift notified Vanguard that the dividends had been “credited on VanCal’s books” to Vanguard.<sup>62</sup> However, Vanguard received no actual payment.

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<sup>58</sup> Calpurnia-Gaul BIT art. 8.

<sup>59</sup> Vienna Convention on the Law of Treaties art. 31(1), 23 May 1969; *see also* *Azurix Corp. v. Argentine Republic*, ARB/01/12, Award at para. 307 (14 July 2006) (“The Tribunal does not consider that the BIT should be interpreted in favor or against the investor. The BIT is an international treaty and should be interpreted in accordance with the interpretation norms set forth by the Vienna Convention on the Law of Treaties ...”).

<sup>60</sup> Evidence / Calendar of Events at 10 Mar. 2005, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) (“due to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign shareholders has been suspended for the time being.”).

<sup>61</sup> Evidence / Calendar of Events at 27 May 2005, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) (“due to decision and instruction of the board of directors, VanCal cannot pay any sums of money for any reason to foreign shareholders.”).

<sup>62</sup> Evidence / Calendar of Events at 28 Sept. 2006, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

Given that Calpurnian Libras and Gaul Dollars were freely convertible at the times relevant for this case, it does not stand to reason how the SFCDC-controlled VanCal halted the payment of dividends to Vanguard without violating this Calpurnia-Gaul BIT provision. The dividends were declared and paid to Calpurnian citizens, but not to Vanguard or any other foreign shareholder. This policy of non-payment lasted for over three years. Despite VanCal's unauthorized and *ultra vires* assertion,<sup>63</sup> the effect was a deprivation of dividend payments, an obstruction to say the least. Calpurnia, by the hands of the SFCDC-controlled VanCal, obstructed the transfer of returns to Vanguard.

#### **IV. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA UNLAWFULLY INTERFERED IN VANGUARD'S INVESTMENT.**

Calpurnia interfered with Vanguard's rights and interests in VanCal by disrupting Vanguard's right to representation on the Board and Vanguard's equal interest in the payment of dividends. Both Vanguard's right to representation on the Board and the interest in the payment of dividends being equal to that of all shareholders of the same class, regardless of nationality, are investments as established by the Calpurnia-Gaul BIT:

1. The term "Investment" means every kind of asset established or acquired by an investor of one Contracting Party in accordance with the laws and regulations of the latter Contracting Party including, in particular, though not exclusively:

(b) shares, stocks, debentures or **other form of participation in a company**;

(c) titles or **claims to money** or rights to performance having an economic value;<sup>64</sup>

As such, the facts and applicable case law support this contention and compensation to Vanguard is warranted.

Vanguard's right to representation on VanCal's Board is rooted in their ownership of VanCal and the two Board seats belonging to Vanguard.<sup>65</sup> As stated in Claimant's Request for

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<sup>63</sup> Evidence / Calendar of Events at 10 Mar. 2005, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (28 Sept. 2006) ("dividends had been 'credited on VanCal's books to Claimant's account.' ... VanCal's Articles of Association contain no provision authorizing the company to credit dividends to a shareholder's account on the company's books instead of paying them.").

<sup>64</sup> Calpurnia-Gaul BIT art. 1.

Arbitration, the interference with the investment, namely the two Board seats held by Vanguard as a form of participation in VanCal, began in November 2005.<sup>66</sup> Such interference in investment frustrates the Calpurnia-Gaul BIT:

3. Each Contracting Party **shall not impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, acquisition or disposal of investments** in its territory of investors of the other Contracting Party.<sup>67</sup>

Further, the emphasis in determining the extent of interference with this form of participation is not Calpurnia's intent, but moreover the effect.<sup>68</sup>

Vanguard's interest in the payment of dividends is equal to all shareholders in the same class, regardless of nationality. The test to determine whether Calpurnia interfered with Vanguard's claim to money, amounting to interference with investment, examines the diminution of the enjoyment of rights and the enjoyment and disposition of Vanguard's property as a result of Calpurnia's actions.<sup>69</sup> Vanguard's claim to money is a right created by its ownership in VanCal.<sup>70</sup> As per a comparison to the *Foremost Tehran* case<sup>71</sup> and the *Sporrong and Lonroth* case,<sup>72</sup> the Tribunal shall find an interference of investment in violation of the Calpurnia-Gaul BIT.

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<sup>65</sup> See Claimant's Request for Arbitration at para. 9, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008); *Id.* at para. 15.

<sup>66</sup> Claimant's Request for Arbitration at para. 15, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) ("government representatives ousted Ms. Pescara, one of Claimant's two representatives, from the VanCal board of directors. At the same time, by improperly rejecting the two shareholder proxies held by Mr. Rindler, on behalf of Claimant, Calpurnian government representatives also prevented Claimant from electing a replacement to Ms. Pescara, thus depriving Claimant of the representation to which the cumulative voting provision of the Calpurnian Commercial Code entitled it.").

<sup>67</sup> Calpurnia-Gaul BIT art. 2.

<sup>68</sup> *Generation Ukraine Inc. v. Republic of Ukraine*, ICSID Case No. ARB/00/9, Award at para. 20.23 (15 Sept. 2003), 44 I.L.M. 404 (2005) ("The intent of the government is less important than the effects of the measures of the owner, and the form of the measures of control or interference is less important than the reality of their impact." (quoting Tippetts, Abbett, McCarthy, Stratton v. TAMSARFA Consulting Engineers on Iran, et al., 4 Iran-U.S. C.T.R. 122, Award No. ITL 32-24-1 at 225, 226 (19 Dec. 1983))).

<sup>69</sup> *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 of 11 Apr. 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987) ("While this contributed to the diminution of the enjoyment of Foremost's rights, it did not affect their fundamental nature. ... a serious impairment of the enjoyment and disposition of the Claimant's property which, however, fell short of affecting legal title.").

<sup>70</sup> Claimant's Request for Arbitration at para. 9, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>71</sup> *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 of 11 Apr. 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987).

<sup>72</sup> *Sporrong and Lonroth*, European Court of Human Rights, Judgment of 23 Sept. 1982, Series A no. 52.

The *Foremost Tehran* case is factually similar in that the Claimant, a family of U.S. companies, owned approximately the same amount in the company in question and that company's board of directors, which was controlled by the Iranian government, decided that "especially because due to the existing dispute between the governments of Iran and the United States, the payment of profits to the foreign shareholders has been suspended for the time being."<sup>73</sup> The *Foremost Tehran* tribunal ruled that an interference with investment had occurred and compensation to the Claimant was warranted.<sup>74</sup> Under the same scenario in the *Foremost Tehran* case, Calpurnia has in fact interfered with Vanguard's investment.

The *Sporrong and Lonroth* case concerns a slightly different set of facts, but the general effect of the measures taken by the Respondent are similar. There, limitations were imposed on the right of property such that the right had become precarious.<sup>75</sup> That tribunal found that interference by the Respondent on the Claimant's investment "resulted in a serious impairment of the enjoyment and disposition of the Claimant's property."<sup>76</sup> In the present case, Calpurnia limited Vanguard's claim to money, namely the dividends. The claim to money became precarious because Calpurnia had the control over when and how Vanguard would exercise its right to claim the dividends since the formal cessation of payments to foreign shareholders, especially those in Gaul.<sup>77</sup> As such, this Tribunal should also find that Calpurnia seriously impaired the enjoyment and disposition of Vanguard's claim to dividend, thus interfering in Vanguard's investment in VanCal.

By ousting one of Vanguard's Board members, then improperly rejecting two shareholder proxies, essentially debilitating Vanguard's interest and participation in VanCal's Board through the deprivation of representation and all the privileges associated with representation, Calpurnia

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<sup>73</sup> *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 of 11 April 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987).

<sup>74</sup> *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 of 11 April 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987) ("Such interference, attributable to the Iranian Government or other state organs of Iran ... gives rise to a right to compensation for the loss of enjoyment of the property in question. The tribunal is also satisfied in that Formost's claim for expropriation must be taken to include a claim for a lesser degree of interference with its rights.").

<sup>75</sup> *Sporrong and Lonroth*, European Court of Human Rights, Judgment of 23 Sept. 1982, Series A no. 52 ("In the Court's opinion, all the effects complained of ... stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right has become precarious, and from the consequences of those limitations on the value of the premises.").

<sup>76</sup> *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 of 11 April 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987) (commenting on the *Sporrong* case.).

<sup>77</sup> Evidence / Calendar of Events at 10 Mar. 2005, *Vanguard Int'l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (28 Sept. 2006).

stands in violation of the Calpurnia-Gaul BIT.<sup>78</sup> The effect was a loss in participation because although Vanguard held a minority position in the Board, the Calpurnian Commercial Code provided for a cumulative voting structure, thereby permitting Vanguard to exercise an important managerial role in its investment. Therefore, Calpurnia has unlawfully interfered with Vanguard's investment in VanCal.

#### **V. CALPURNIA DID NOT GIVE FULL PROTECTION AND SECURITY TO VANGUARD'S INVESTMENTS.**

The Respondent failed its duty to provide the Claimant's investment with full protection and security. This duty is established in Article 2, section 2 of the Calpurnia-Gaul BIT:

Each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.<sup>79</sup>

Former ICSID Tribunals have ruled on disputes where the specific meaning of "full protection and security" has been clarified. In *ADF Group v. United States of America*, the respondent party stated that "the term 'full protection and security' refers to the 'minimum level of police protection against criminal conduct' required as a matter of customary international law."<sup>80</sup> Furthermore, *Tecmed v. the United Mexican States* says that "the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it."<sup>81</sup> These definitions provide a baseline for the minimum that is required by the full protection and security standard. A certain level of protection must be accorded to the investment, but the state is not responsible for all the possible damages sustained by a foreign investor. Conversely, the tribunal in *ADF Group v. United States of America* emphasized that "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."<sup>82</sup> The logic of this pronouncement indicates that if a state acts in bad faith, it violates its pact in the BIT to provide full protection and security.

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<sup>78</sup> See Calpurnia-Gaul BIT art. 2, para. 3; see also Claimant's Request for Arbitration at para. 15, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>79</sup> Calpurnia-Gaul BIT at art. 2, para. 2, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>80</sup> ADF Group Inc. United States of America, ICSID Case No. ARB(AF)/00/1 at para. 110, Award (9 Jan. 2003).

<sup>81</sup> Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 at para. 177, Award (29 May 2003), 43 I.L.M. 133 (2004).

<sup>82</sup> ADF Group Inc. United States of America, ICSID Case No. ARB(AF)/00/1 at para. 180, Award (9 Jan. 2003).

The two ends of the spectrum involving the meaning of full protection and security are that which is required by customary international law and an act of bad faith. Between these boundaries, the tribunal in *ADF Group v. United States of America* discusses various elements which would be considered in deciding upon a full protection and security claim. The tribunal declares that (i) the arbitrary rejection of a permit by the state hosting the investment; (ii) the state's imposition of extraordinary costs or burdens on the investor; or (iii) the different treatment of other investors in like circumstances would each, on its own, constitute a violation of the treaty obligation of full protection and security.<sup>83</sup> The government of Calpurnia has violated all of the elements set forth in *ADF Group*.

In violation of the first element of the *ADF Group* criteria, the Respondent arbitrarily rejected the business visa of Ms. Pescara, an officer of the Claimant. *Azurix v. Argentine Republic* states that any arbitrary action alone is sufficient to violate treaty law. The case states that “a measure needs only to be arbitrary to constitute a breach of the BIT.”<sup>84</sup> In September 2004, Ms. Pescara's application for the renewal of a three-year business visa was denied. She was informed orally that she would be forced to use Calpurnia's visa waiver program for tourists. The Calpurnian government is responsible for operating the country's visa program. There was not any explanation given for the denial of her visa application, but two months later she was forced from the Board of VanCal. Ballentine's Law Dictionary defines *arbitrary* as “according to notion or whim rather than according to law. Despotism; without reason.”<sup>85</sup> There was not any reason given by the Calpurnian government to explain the denial of Ms. Pescara's business visa. This is an arbitrary action by the Respondent. By arbitrarily denying Ms. Pescara's visa, Calpurnia violated the Calpurnia-Gaul BIT.

In violation of the second element of the *ADF Group* criteria, the Respondent imposed extraordinary burdens on the Claimant by removing Vanguard's representatives from the Board and by refusing to pay cash dividends to the Claimant. The Respondent ousted Ms. Pescara from the Board on 16 November 2005 in a vote that disregarded the opinion of Vanguard's other representative, Mr. Rindler. On 10 March 2005, the Board ceased to distribute cash dividends to the Claimant while continuing to make payments to Calpurnian nationals. The Board stated that “due to the existing dispute between the governments of Calpurnia and Gaul, the payment of

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<sup>83</sup> See generally *ADF Group*, ICSID Case No. ARB(AF)/00/1.

<sup>84</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 at para. 391, Award (14 July 2006).

<sup>85</sup> Ballentine's Law Dictionary (3d ed. 1969).

profits to the foreign shareholders has been suspended for the time being.”<sup>86</sup> VanCal did not make any payments to the Claimant after this decision. The Respondent eliminated the Claimant’s voice and voting power in the Board and Vanguard could not participate in the management of its investment. The Board’s refusal to pay dividends to Vanguard eliminated the Claimant’s ability to benefit from its financial interest in VanCal. The Claimant had no input in the managerial decisions of VanCal and was denied the benefits of the investment it made in the company. These are extraordinary burdens imposed by the actions of the Respondent which denied the Claimant any interest or benefit in its investment. Such obstructions to the Claimant’s investment violate the treaty obligation of the Respondent to provide full protection and security.

In violation of the second element of the *ADF Group* criteria, the Respondent imposed different treatment on the Claimant than on its Calpurnian domestic investors. After 10 March 2005, the Respondent refused to pay cash dividends to the Claimant while continuing to compensate the stockholders who were Calpurnian nationals. In addition to violating one of the elements of the full protection and security obligation, this unjust payment system violates the Most Favored Nation clause of the Calpurnia-Gaul BIT:

Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors by any third state, whichever is the most favourable to the investor.<sup>87</sup>

The payment of dividends to nationals of Calpurnia, the “host Contracting Party,” and not to the Claimant which is a company of Gaul the other Contracting Party, violates this clause of the treaty. The treatment that Calpurnia is providing for the Claimant is clearly “less favourable” than the Respondent is according to its citizens. As a violation of the Calpurnia-Gaul BIT and a failure to meet an element of the *ADF Group* criteria, the Respondent failed to provide the Claimant’s investment with full protection and security.

In *Metalclad v. United Mexican States*, the tribunal ruled that Mexico had violated its full protection and security obligation by providing a volatile investment structure: “Mexico failed to ensure a transparent and predictable framework for Metalclad’s business planning and

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<sup>86</sup> Evidence / Calendar of Events at 10 Mar. 2005, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>87</sup> Calpurnia-Gaul BIT at art. 4, para. 1, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

investment.”<sup>88</sup> Thus, the tribunal held that the Metalclad’s investment was not afforded the full protection and security that it legally required. Calpurnia’s actions were more egregious than merely neglecting to provide Vanguard’s investment with a “transparent and predictable framework.” The Respondent specifically acted hostile to the investment of the Claimant. The Respondent removed the representatives of Vanguard from the Board and refused to make dividend payments. These actions are more severe burdens on a foreign investor than those that the ICSID tribunal ruled were violations of the full protection and security obligation in *Metalclad*. The Respondent violated its full protection and security treaty obligation by failing to provide the Claimant with a predictable investment framework and by actively obstructing and burdening Vanguard’s management and dividend payments of its investment.

The Respondent failed to accord the investment of the Claimant with full protection and security. The Respondent fails to comply with any of the *ADF* elements. The failure to meet one of the criteria establishes the violation of a full protection and security obligation. The Respondent neglected its duty to provide the Claimant’s investment with full protection and security and violated its obligation under the Calpurnia-Gaul BIT.

**VI. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA HAS EXPROPRIATED VANGUARD INTERNATIONAL’S INVESTMENT IN VANCAL THROUGH A COMBINATION OF FOUR DISTINCT BUT RELATED ACTS, ALL OF WHICH CAN STAND ON THEIR OWN AS SUFFICIENT GROUNDS FOR COMPENSATION, BUT TOGETHER, IN LIGHT OF THEIR COMBINED EFFECT, EQUATE TO SUCH A SERIOUS OFFENSE AND NULLIFICATION OF RIGHTS AND INTERESTS THAT IT REQUIRES SUBSTANTIAL COMPENSATION.**

Calpurnia indirectly expropriated Vanguard’s investment in VanCal in violation of the Calpurnia-Gaul BIT and in violation of customary international law. The Calpurnia-Gaul BIT expressly prohibits such forms of expropriation:

1. **Investments** by investors of a Contracting Party in the territory of the other Contracting Party **shall not be expropriated, nationalised or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalisation ... except for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation.**<sup>89</sup>

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<sup>88</sup> Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 at para. 99, Award (30 Aug. 2000). 119 I.L.R. 618 (2002).

<sup>89</sup> Calpurnia-Gaul BIT art. 6, para. 1.

A thorough examination of the relevant case law reveals that, in light of the totality of the circumstances, Calpurnia has indirectly expropriated Vanguard's investment in VanCal and, accordingly, compensation is warranted.

Expropriation is a broad concept which spans a multiplicity of formulations, yet it is often difficult to conclude because it is such an extreme violation. However, in the present case, indirect, or creeping, expropriation is present and Vanguard should receive compensation for the *de facto* expropriation by Calpurnia. The tribunal in *Starrett Housing Corp.* stated that:

[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.<sup>90</sup>

Indirect expropriation is often called creeping expropriation which takes into account many different circumstances and, by nature, is “more than the mere sum of its parts.”<sup>91</sup> Typically, the expropriation must not be ephemeral.<sup>92</sup> However, creeping, or indirect, expropriation does not present this issue because of a distinctive temporal quality.<sup>93</sup> As such, the scope of events which accumulate to creeping expropriation is broad. Upon examination of such events, “partial destruction of value may be tantamount to expropriation.”<sup>94</sup>

In light of the aforementioned description of creeping expropriations, the appropriate test urged by Vanguard consists of two parts. First, it must be determined whether “events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that

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<sup>90</sup> *Starrett Housing Corp. v. Iran*, Award No. 314-24-1 of 14 Aug. 1987, 9 Iran-U.S. Cl. Trib. Rep. 122, 154-57.

<sup>91</sup> *Waste Mgmt. Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award at para. 17, 18 (2 June 2000), 40 I.L.M. 56 (2001) ([A] “creeping expropriation” is comprised of a number of elements, none of which can – separately – constitute the international wrong. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth.”).

<sup>92</sup> *Wena Hotels Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award at para. 98 (8 Dec. 2000), 41 I.L.M. 896 (2002) (“while assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, this requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.” (quoting *Tippets, Abbet, McCarthy, Stratton v. TAMS-AFFA Consenting Engineers of Iran et al.*, Iran-U.S. Claims Tribunal, Award No. 141-7-2)).

<sup>93</sup> *Generation Ukraine Inc. v. Republic of Ukraine*, ICSID Case No. ARB/00/9, Award at para. 20.22 (15 Sept. 2003) (“Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.”).

<sup>94</sup> *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award at para. 131 (15 Nov. 2004).

this deprivation is not merely ephemeral.”<sup>95</sup> Second, it must be determined whether the deprivation of fundamental rights is attributable to Calpurnia.<sup>96</sup> However, the focus of this tribunal in determining expropriation should be on the effect of Calpurnia’s actions; the intent of Calpurnia is of very little importance in this determination.<sup>97</sup> The outcome urged by Vanguard is a judgment based on the specific facts and scenarios of this case, and making such a judgment is not entirely formulaic, but rather a careful evaluation of the effects of Calpurnia’s costly actions against Vanguard.<sup>98</sup>

Upon examination of these criteria, Vanguard strongly urges this Tribunal to find that Calpurnia expropriated, by means of a creeping expropriation, Vanguard’s investment in VanCal through, either in combination with each other or by exclusive escalation, (i) the discrimination against Vanguard, (ii) the unlawful interference of investment, (iii) the obstruction of the transfer of returns, and (iv) the failure to provide Vanguard and its investment full protection and security.

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<sup>95</sup> *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award at para. 131 (15 Nov. 2004) (citing *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ARB/96/1, award of 17 February 2000 (citing *Tippets, Abbet, McCarthy, Stratton v. TAMS-AFFA Consenting Engineers of Iran et al., Iran-U.S. Claims Tribunal*, Award No. 141-7-2)).

<sup>96</sup> *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award at para. 137 (29 Apr. 1999) (“Thus, the Tribunal now has to examine each of the incidents alleged by Tradex as expropriations with regard to two questions: 1) Is there a taking of rights acquired by Tradex as part of its investment? 2) If so, is that taking attributable to the Republic of Albania?”).

<sup>97</sup> *Compañia del Desarrollo se Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award at para. 77 (17 Feb. 2000), 39 I.L.M. 317 (2000):

There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property: “A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”

<sup>98</sup> *Generation Ukraine Inc. v. Republic of Ukraine*, ICSID Case No. ARB/00/9, Award at para. 20.29 (15 Sept. 2003) (“The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, i.e. the product of discernment, and not the printout of a computer programme.”).

The Respondent discriminated against the Claimant by depriving Vanguard of its fundamental right of ownership of its investment. The deprivation of both dividend payments and the ability to manage its investment effectively removed the Claimant's ownership rights to VanCal. The Respondent established a system of dividend payments which treated similarly situated investors differently and eliminated the Claimant's input into the management of VanCal. Calpurnian investors received dividends and the foreign investor, Vanguard, did not. Through harassment and intimidation, arbitrary activities, and manipulation of the Board, the Respondent discriminated against the Claimant and impaired Vanguard's management of its investment. All of these actions are attributable to the Respondent by its control of SFCDC and by Calpurnia's secondary actions to assist in the discrimination.

The Respondent eliminated the fundamental ownership rights of the Claimant's investment and neutralized Vanguard's participation in the management of its investment. Creeping expropriation must affect "fundamental rights of ownership."<sup>99</sup> The management of VanCal and the expectation to receive dividend payments are the Claimant's fundamental rights of ownership. On 10 March 2005, VanCal ceased making dividend payments to the Claimant but continued to compensate its Calpurnian investors. The only difference between the investors getting paid and those that were not was that the investors receiving dividends were nationals of Calpurnia and the investor that was not receiving dividends was a foreign entity.

Vanguard was entitled to two representatives on the Board. Vanguard's representatives were harassed through illegitimate police searches of their homes. One of Vanguard's Board members, Ms. Pescara, had her business visa renewal arbitrarily declined and on 16 November 2005 was voted off the Board in a fraudulent action because the proxy of Mr. Rindler, Vanguard's other representative, was improperly rejected. These acts by the Respondent disallowed the Claimant from having meaningful involvement in the management decisions of its investment. The cessation of dividend payments and elimination of management ability constitute a deprivation of the Claimant's fundamental right of ownership because of the actions of the Respondent.

*CMS Gas Transmission v. Argentina* is distinguishable from the present case. In the CMS Gas Transmission case, CMS entered into a contract with Argentina where it would receive

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<sup>99</sup> CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8 at para. 262, Award (12 May 2005), 44 I.L.M. 1205 (2005).

tariffs for the transportation of gas. Due to political crises, Argentina had to freeze its payments to CMS. During the various crises, Argentina renegotiated its contracts with the companies of many industries but this did not occur with CMS's gas contracts.<sup>100</sup> The ICSID tribunal ruled that there was no discrimination because the entire sector of the gas industry was affected and not just Argentina's contract with CMS. This is different than the present case because it does not concern an entire industry sector.<sup>101</sup> Calpurnia's only known discrimination is against Vanguard. It is not a consistent practice of the Respondent across the entire mobile telecommunications industry. Furthermore, Calpurnia is not a country in crisis being forced to renegotiate its contracts. The only change in Calpurnia is that the CCC had gained political control of the country. A change in leadership is not comparable to a failed economy.

*Genin v. Estonia* is distinguishable from the present case. In *Genin*, the branch of a bank was sold with fraudulent items on its balance sheet to alter the value of the bank. The Claimant stated that Estonia expropriated the payment for the bank branch by taking the payment itself as opposed to receiving compensation through an agreement with the parent Bank of Estonia. The ICSID tribunal did not find expropriation because it was not shown that any of the actions of Estonia were discriminatory. Estonia did not treat the claimant any less favorably than banks owned by Estonian nationals. This is clearly different than Calpurnia's treatment of Vanguard. Calpurnian nationals were paid dividends and the foreign investor, Vanguard was not. "In the investment context, the concept of discrimination has been defined to imply unreasonable distinctions between foreign and domestic investors in like circumstances."<sup>102</sup> The actions of the Respondent adhere to the exact definition of discrimination in *Genin*. Vanguard, a foreign entity, was not paid dividends when the Calpurnian investors received dividends. In the words of the *Genin* tribunal, Calpurnia discriminated against Vanguard and such discrimination amounts to expropriation. In *Genin*, discrimination was not present. In this case, because discrimination affected the fundamental right of ownership, this amounts to expropriation.

The unlawful interference by Calpurnia with Vanguard's investment in VanCal escalates to creeping expropriation both exclusively with regards to the right to representation on the Board and in combination of the interference with the interest in receipt of dividend payments

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<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

<sup>102</sup> *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award at para. 152 (16 Dec. 2002), 42 I.L.M. 625 (2003).

and the obstruction of the transfer of returns of such payments. Vanguard was deprived of its fundamental rights of ownership in terms of its right to representation on the Board and its interest in the receipt of dividend payments. In both, the right and interest respectively meet the substantial deprivation standard,<sup>103</sup> thus leading to the conclusion that the right and interest have been “rendered so useless that they must be deemed to have been expropriated.”<sup>104</sup> Further, such deprivation is attributable to Calpurnia because but for the SFCDC’s involvement and control of the Board, these events would not have occurred.<sup>105</sup>

Calpurnia substantially deprived Vanguard of the right to representation on the VanCal Board by ousting one of Vanguard’s Board members and them improperly rejecting two shareholder proxies.<sup>106</sup> The effect was a nullification of Vanguard’s minority representation which allowed them input in the management of VanCal. The right to representation in this case focuses on the minority representation. As a result, this right to representation was extinguished and Vanguard withdrew its remaining representatives and declined to replace them because the presence of its representatives at the Board meetings was a “futility.”<sup>107</sup>

Additionally, Calpurnia substantially deprived Vanguard of its interest in the payments of dividends by eliminating the payment of dividends to foreign shareholders.<sup>108</sup> The crediting of the dividend to an account in Vanguard’s name does not sustain Vanguard’s interest in dividend payments because the establishment of this account is not rooted in any agreement and is not authorized by the VanCal Articles of Association,<sup>109</sup> therefore making it illusory. Vanguard’s interest has been rendered useless because it has nothing to claim due to the cessation of payments and an illusory account which the Board can freely eliminate just as it has done with the dividend payments.

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<sup>103</sup> CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8 at para. 262, Award (12 May 2005), 44 I.L.M. 1205 (2005) (“The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation”).

<sup>104</sup> Starrett Housing Corp. v. Iran, Award No. 314-24-1 of 14 August 1987, 9 Iran-U.S. Cl. Trib. Rep. 122, 154-57.

<sup>105</sup> See *supra* Section II (discussing how the SFCDC creates liability on behalf of Calpurnia, thus making Calpurnia responsible for this expropriation).

<sup>106</sup> Claimant’s Request for Arbitration at para. 15, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>107</sup> Evidence / Calendar of Events at 23 Oct. 2006, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>108</sup> Evidence / Calendar of Events at 10 Mar. 2005, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>109</sup> Evidence / Calendar of Events at 28 Sept. 2007, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

The *Eastman Kodak* case is distinguishable from the present case.<sup>110</sup> In that case, although the right to representation and the interest in access to money was implicated,<sup>111</sup> that tribunal did not find for expropriation because the deprivation of ownership rights did not meet the appropriate standard of substantial deprivation.<sup>112</sup> The fact which influenced the Tribunal in favor of this disposition was that Kodak's representation was large enough that, despite the interference with the associated ownership rights, the effect did not lead to an expropriation.<sup>113</sup> However, in the present case, Vanguard's minority shareholder interest was extinguished by Calpurnia's interference. The effect of the interference with shareholder rights, if the same with respect to the amount of interference in both cases, will have a much more substantial impact on a minority shareholder than a majority shareholder. As such, this Tribunal should find that because of Calpurnia's interference with Vanguard's right to representation and interest in dividend payments, in combination with the entirety of the circumstances, Calpurnia expropriated Vanguard's investment in VanCal.

The obstruction of transfer of returns by Calpurnia escalates the gravitas to expropriation when viewed in conjunction with Calpurnia's interference with Vanguard's interest in the receipt of dividend payments. Vanguard was deprived of its fundamental rights of ownership in terms of its right to the actual dividend payment money, the return, and the liquidity it provides. The deprivation of the dividend payments, especially in light of the length of time such payments were withheld, meets the substantial deprivation standard,<sup>114</sup> leading to the conclusion that the right has been "rendered so useless that [it] must be deemed to have been expropriated."<sup>115</sup> Further, such deprivation is attributable to Calpurnia because but for the SFCDC's involvement and control of the VanCal Board, these events would not have occurred.<sup>116</sup>

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<sup>110</sup> *Eastman Kodak Co. v. Iran*, Award No. 329-22-3 of 11 November 1987, 17 Iran-U.S. Cl. Trib. Rep. 153, 168-69.

<sup>111</sup> *Id.* at para. 9, 10 (discussing a management committee of Kodak representatives which was interfered with and the freezing of bank accounts).

<sup>112</sup> *Id.* at para. 58 ("The Tribunal further finds that the facts in this Case do not warrant a finding that Eastman Kodak was deprived of its ownership rights.").

<sup>113</sup> *Id.* at para. 58 ("In reaching this decision the Tribunal has attached particular importance to the fact that the Claimant, as majority shareholder, was able effectively to decide to liquidate and to declare Rangiran bankrupt at points in time significantly later than the occurrence of the events which the Claimant contends caused the loss of its shareholding interest.").

<sup>114</sup> *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 at para. 262, Award (12 May 2005), 44 I.L.M. 1205 (2005) ("The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation").

<sup>115</sup> *Starrett Housing Corp. v. Iran*, Award No. 314-24-1 of 14 August 1987, 9 Iran-U.S. Cl. Trib. Rep. 122, 154-57.

<sup>116</sup> *See supra* Section II (discussing how the SFCDC creates liability on behalf of Calpurnia, thus making Calpurnia responsible for this expropriation).

Calpurnia substantially deprived Vanguard of the right to access the actual money, thus rendering this right useless, by the refusal to pay the declared cash dividends to foreign shareholders. On 10 March 2005, VanCal held a Board meeting dominated by Swift during which the Board decided to not pay any money for any reason to foreign shareholders.<sup>117</sup> Vanguard was informed of this decision on 27 May 2005.<sup>118</sup> VanCal declared cash dividends for 2004, 2005, 2006, and 2007, but did not distribute the moneys to foreign shareholders.<sup>119</sup> On 28 September 2006, Dr. Swift notified Vanguard that the dividends had been “credited on VanCal’s books” to Vanguard.<sup>120</sup> However, Vanguard received no actual payments of any of these declared cash dividends.

This case is distinguishable from the *Foremost Tehran* case.<sup>121</sup> In that case, although the facts are mostly similar in part,<sup>122</sup> the tribunal did not find that there was expropriation. As one of the principal reasons for its disposition, the tribunal states that “Foremost has not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares.”<sup>123</sup> However, in the present case, the legal title to the dividend payments has been affected by both the interference with the interest in receipt of dividend payments and the obstruction of the transfer of such payments to Vanguard. As a consequence, there is no liquidity to the dividend payments. Investors in these types of securities look to the dividend payments as an important source of capital generation and they no longer exist because of Calpurnia’s involvement. The combination of the interference and obstruction has rendered the dividends useless, thus deeming them to have been expropriated.

The Respondent failed to provide full protection and security for the Claimant’s investment. Such a failure amounts to creeping expropriation when assessed in conjunction with

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<sup>117</sup> Evidence / Calendar of Events at 10 Mar. 2005, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>118</sup> Evidence / Calendar of Events at 27 May 2005, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>119</sup> Claimant’s Request for Arbitration at para. 14, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>120</sup> Evidence / Calendar of Events at 28 Sept. 2006, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

<sup>121</sup> *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 of 11 April 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987).

<sup>122</sup> *Id.* (describing that Foremost, a family of U.S. companies, owned a minority stake in Pak Dairy amounting to between 30 and 31 percent and entities controlled by the Iranian government controlled a majority interest in Pak Dairy and that one of the principal issues was whether the Pak Dairy board’s decision not to pay Foremost its share of the cash dividend deprived Foremost of a sufficient amount of its ownership rights to amount to an expropriation.).

<sup>123</sup> *Id.*

Calpurnia's other actions towards Vanguard. Failing to satisfy one of the *ADF Group* elements establishes a failure to provide full protection and security. Calpurnia failed all three *ADF Group* elements, thus magnifying their impact against Vanguard and amounting, in conjunction with Calpurnia's other actions towards Vanguard, to creeping expropriation. Calpurnia arbitrarily rejected Ms. Pescara's visa renewal application, imposed extraordinary burdens on Vanguard's management and financial interest in its investment, and refused to distribute dividends to Vanguard when Calpurnian nationals were fully compensated. Each action constitutes a violation of the Respondent's full protection and security treaty obligation and, cumulatively, establish creeping expropriation of the investment by Calpurnia.

*Metalclad v. Mexican States* is similar to the present case. In *Metalclad*, the claimant contracted with Mexico to build a landfill. Metalclad received assurances from the Mexican government that all the necessary permits would be granted to complete the landfill project. Just before Metalclad finished building the landfill, it was told to stop working because it did not have all the proper permits. The Mexican government's order to stop construction "taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation [or creeping expropriation]."<sup>124</sup> In the present case, Vanguard relied on Calpurnia's full protection and security for its investment in VanCal. The Respondent denied Ms. Pescara's business visa without giving any substantive reason. This is akin to Mexico's denial of Metalclad's local construction permit. Also, taken in conjunction with the Respondent's other actions to alienate the Claimant from the management and enjoyment of its investment, Calpurnia's actions unequivocally amount to creeping expropriation.

### **Conclusion**

In conclusion, Calpurnia expropriated Vanguard International's investment in the joint venture VanCal by the means of creeping expropriation. As shown, Calpurnia has orchestrated multiple events for over three years which has deprived the investment of substantial value to Vanguard. Because of this, this Tribunal should find Calpurnia in violation of the Calpurnia-Gaul BIT and order Calpurnia to pay damages to Vanguard International.

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<sup>124</sup> *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 at para. 99, Award at para. 107 (30 Aug. 2000), 119 I.L.R. 618 (2002).

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