

# **MEMORANDUM FOR CLAIMANT**

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**VANGUARD INTERNATIONAL**

CLAIMANT

v.

**GOVERNMENT OF THE REPUBLIC OF CALPURNIA**

RESPONDENT

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ICSID Case No. ARB/X/X

**Winiarski**

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## **ABBREVIATIONS**

<b>§</b>	Paragraph
<b>ALI</b>	American Law Institute
<b>Art.</b>	Article
<b>Calpurnia- Gaul BIT</b>	Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investment
<b>CCC</b>	Conservative Conscience of Calpurnia
<b>CLAIMANT</b>	Vanguard International
<b>Contracting Parties</b>	Government of the Republic of Calpurnia and the Government of the Federated States of Gaul
<b>CP1</b>	First Clarifications of Problem
<b>CP2</b>	Second Clarifications of Problem
<b>CRA</b>	Claimant’s Request for Arbitration
<b>Ed</b>	Edition
<b>e.g.</b>	exempli gratia
<b>emph. add.</b>	Emphasis added
<b>Et al.</b>	And other authors
<b>Evidence</b>	Evidence/ Calendar of Events
<b>FDI</b>	Foreign Direct Investment
<b>HLR</b>	Harvard Law Review
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>MFN</b>	Most Favoured Nation
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OPIC</b>	Overseas Private Investment Corporation
<b>OUP</b>	Oxford University Press
<b>P./pp.</b>	Page / pages
<b>Parties</b>	Vanguard International and the Government of the Republic of Calpurnia
<b>RESPONDENT</b>	Government of the Republic of Calpurnia
<b>RRA</b>	Respondent’s Reply to Request for Arbitration
<b>SFDCD</b>	State Fund for Commerce and Development in Calpurnia

**Treaty**

California- Gaul BIT

**v.**

versus

**UNCTAD**

United Nations Conference on Trade and Development

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Memorandum of Determinations

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*Cited as: Harvard Draft Convention*

Art. 10

**1968**

Vienna Convention on the Law of Treaties

*Cited as: Law of Treaties*

Art. 11

Art. 26

**2001**

United Nations International Law Commission Draft Articles on State Responsibility. Annex to General Assembly Resolution 56/83 and corrected by document A/56/49(Vol. I)/Corr.4.

*Cited as: ILC on State Responsibility*

Art. 1

Art. 4

Art. 5

## **STATEMENT OF FACTS**

**CLAIMANT** Vanguard International is a leading mobile telecommunications company with GSM operations in seven emerging markets in Latin America, the Middle East, Africa and South Asia.

**RESPONDENT** Calpurnia is a Contracting State of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) as are the Federated States of Gaul, where Claimant is incorporated and has its headquarters.

**1997** Claimant participated in the establishment of a joint venture company, VanCal, incorporated and with its headquarters in San Inocente de Irkoutsk, the capital of Calpurnia. VanCal provides GSM/UMTS services in Calpurnia under the “VANGUARD INTERNATIONAL” trademark.

**8 Dec 2003** Calpurnian Security forces searches the homes of two Gaulois nationals and Vanguard employees, Francesca Pescara and David Kolowenko, seizing storage media under the suspicion of unlawfull data collection and espionage.

**4 June 2004** Counter-espionage actions against Francesca Pescara and David Kolowenko continue with another search of their residences. Prosecutors expect to file charges shortly.

**14 Oct 2004** Dr. Swift and Mr. Shelly, two SFCDC representatives are elected to the board of directors of VanCal.

**17 Feb 2005** Dr. Swift, on behalf of SFCDC, proposes a minimum amount of dividend to be paid to the shareholders with the purpose of creating a reserve fund.

- 10 Mar 2005** Decision taken by representatives of SFCDC, Mr. Poe and Dr. Swift, to set up the reserve fund. It is agreed that the minimum dividend is to be divided among shareholders and profits to be credited to the reserve fund, issuing no stock dividend. Under allegation of the dispute of both countries it is agreed that the payment of profits to foreign shareholders will be suspended.
- 21 May 2005** CLAIMANT writes a letter to Mr. Korchnoi, requesting for the amount of dividend payable to be placed in a separate account opened in CLAIMANT'S NAME, to which he replies via email, in 27 May 2005, that it is a decision of the board of directors, and there is no action for him to take. CLAIMANT sends another email, in 5 June 2005, requesting the legal basis of this denial, to which no answer was given.
- 16 Nov 2006** Mr. Shelly and Ms. Pescara are voted of the board of directors by a majority vote of the present shareholders. Mr. Poe and Mr. Korchnoi also resign.
- 5 Feb 2007** CLAIMANT sends letter to Mr. Poe, claiming an expropriation the facto by Calpurnian State Entities, violating international obligations. On the same letter, CLAIMANT, demands compensation and the issue to be transferred to the appropriate Ministers. Mr. Poe answers with a denial to involve government in what he calls a mere internal shareholder dispute in which no governmental authority is involved.
- 31 July 2007** CLAIMANT requests the institution of arbitration proceedings in accordance to the ICSD's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings. Notifies the State of Calpurnia.

## **ARGUMENTS TO THE PROCEDURAL ISSUES**

1. For the purpose of establishing the Tribunal's jurisdiction regarding the present conflict between CLAIMANT and RESPONDENT, this part of the Memorandum will be dedicated to the relevant arguments regarding the procedural aspects of the case.

2. The widely accepted principle of *Kompetenz-Kompetenz* grants this Arbitral Tribunal the ability to rule on the question of whether it has jurisdiction on this particular case.

3. CLAIMANT fulfills the requirements of nationality according to article 25 2(b) of the ICSID Convention.

4. Written consent to Arbitration under the jurisdiction of ICSID is expressed through the Calpurnia-Gaul BIT.

5. The exhaustion of the amicable settlement period to which arbitration is conditioned. Here, the application of the MFN clause estipulated in the Calpurnia-Gaul BIT applied to provisions contained in a treaty contracted by RESPONDENT and a third party (Republic of Flatland) resulting in a most favoured Treatment allow us to conclude that the amicable settlement period has indeed been exhausted.

6. Claimant has chosen the International Centre for Settlement of Investment Disputes as forum to the present Dispute as a direct result of the exercise of attributions granted by the Treaty, which allows claimant to choose a forum.

7. Finally, the controversy of whether this is in fact a dispute arising from a legal investment and not a mere dispute among shareholders will be brought to attention in order to clarify why this case is in fact a true foreign investment dispute within the scope of the Calpurnia-Gaul BIT.

### **ISSUE 1: PRINCIPLE OF KOMPETENZ- KOMPETENZ**

8. The principle of Competence-Competence grants arbitral tribunals such as this the ability to rule on the question of whether it has jurisdiction<sup>1</sup>. This Tribunal, in direct application of this virtually uncontroversial principle, should determine it has

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<sup>1</sup> Barceló III, at p.2

jurisdiction given that the case fulfills all due conditions established both in the agreements mentioned (Calpurnia-Gaul BIT and Calpurnia-Flatland BIT), and the Convention for the Settlement of Disputes between States and Nationals of Other States (ICSID Convention).

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### **RESULT OF ISSUE 1:**

9. The Arbitral Tribunal specifically constituted for this arising dispute on January 31, 2008, has competence to decide on its own jurisdiction.

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### **ISSUE 2: NATIONALITY OF CLAIMANT (RATIONE PERSONAE)**

10. Article 25 2b of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States estipulates that the parties to a dispute submitted to its jurisdiction must be a Contracting State and a national of another contracting State. Then, in its second paragraph it gives a more detailed explanation regarding nationals of another Contracting State:

(2) “*Nationals of another Contracting State*” means:

(b) *Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date which the paties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date on which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*”<sup>2</sup>

11. In this case, a distinction between Vanguard International (Claimant) and Vancal, a company incorporated in the Host State (Respondant) has to be made in order to demonstrate jurisdiction *ratione personae*:

12. Vanguard International is a leading telecommunications company with GSM operations in seven emerging markets. CLAIMANT’s headquarters are located in Nova

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<sup>2</sup> Article 25 2(b), ICSID Convention.

Parigi, the capital city of Gaul, and is, therefore, recognized as a Gaulois national by the law of the Federated States of Gaul. Vancal on the other hand, is a company created as a result of the joint venture between both parties to the dispute and is incorporated in Calpurnia as a national of this Republic. In this case, Vancal is not a party to this investment dispute, but rather an instrumental company in this investment.

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**RESULT OF ISSUE 2:**

13. Vanguard is attributed the status of foreign investor and, as CLAIMANT, in this investment arbitration meets all standards with respect to the nationality required by article 25 of the ICSID Convention.

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**ISSUE 3: WRITTEN CONSENT ON BEHALF OF RESPONDENT**

14. Underlying the enormous number of new cases against governments filed by companies and individuals is the prior consent of the impleaded governments<sup>3</sup>; consent remains a critical factor when it comes to International Arbitration. Therefore, we address the issue of consent:

15. In order to recognize a party's submission to the Centre's jurisdiction, article 25 of the ICSID Convention defines as only requirement that such a consent must be in writing. As a direct result of this, consents may be found in contracts, bilateral or multilateral treaties or in domestic foreign investment laws. In this case, consent to jurisdiction of this arbitral tribunal is established in virtue of the BIT between Calpurnia and Gaul.

16. Article 11 of the Treaty explains the agreement reached between the parties in regards to any arising disputes between any Contracting Party and an Investor:

“Article 11

Disputes between an Investor and a Contracting Party:

1. Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment in the territory of the latter Contracting Party shall, if possible, be settled amicably.

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<sup>3</sup> Bishop et al. at, p. 1.

2. If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration. The investor has the choice of submitting the case either to:

(a) the competent courts of the Contracting Party in whose territory the investment is made;

(b) The International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the “Centre”), if the Centre is available, or

(c) The Additional Facility of the Centre, if only one of the Contracting Parties is a signatory to the Convention set out in subparagraph (b) of this Article , or

(d) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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

3. An investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article.

4. Neither of the Contracting Parties, which is a party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is the opposing party of the dispute, had received an indemnification covering a part or the whole of its losses by virtue of an insurance.

5. Such award shall be final and binding for the parties to the dispute and shall be executed according to national law.”<sup>4</sup>

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<sup>4</sup> Calpurnia-Gaul BIT, Art. 11.

17. The previous clause not only contains the necessary consent on behalf of both parties to the Treaty, but also describes the conditions under which such consent is granted and the different options where investors can submit their claim. Concerns about whether those conditions have been accomplished, and whether this is a fork in road clause will be dealt with in the following paragraphs. For now, it has been well established that Art. 11 constitutes the express manifestation of consent on behalf of the RESPONDENT to submit any dispute concerning an investment within its territory to international arbitration.

18. Furthermore, paragraph 3 of the same article specifies that this consent cannot be withdrawn or denied by the contracting party; it is an irrevocable right attributed to the investor of any Contracting party.

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**RESULT OF ISSUE 3:**

19. Irrevocable compliance to International Arbitration is granted by Contracting States through the Treaty ratified between them. Consequently, the dispute between CLAIMANT and RESPONDENT carries out with the requirements stipulated in Art. 25 of the ICSID regarding the issue of consent to jurisdiction by the parties involved in the quarrel.

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**ISSUE 4: EXHAUSTION OF THE WAITING PERIOD PREVIOUS TO ARBITRATION:**

20. Art. 11 (quoted above) not only introduces consent to international arbitration, but also sets a previous condition that must be exhausted before turning to arbitration as a dispute settlement mechanism. The article states that a dispute shall “if possible, be settled amicably”. It latter goes to say that the investor may submit the case to International Arbitration, 18 months from the date of the request for amicable settlement, if this last one is unsuccessful.

21. Although this is the provision of the basic treaty which regulates CLAIMANT’s relationship with the State of Calpurnia directly, there is a more favourable treatment found in a third-party State which should be applied in this case.

22. The Agreement between RESPONDENT and the Government of the State of Flatland on the Mutual Promotion and Protection of investment, ratified in 1992, contains a similar provision regarding the Settlement of Disputes between the Investor and the Host State as that found in the Calpurnia-Gaul BIT. The Calpurnia-Flatland Agreement states in its article 7 that:

“All disputes related to investments between any of the two contracting parties and an investor of the other contracting party concerning his investment, if the dispute cannot be settled friendly within two months of the dispute notification date by either party it may be submitted by the investor request either to:

- A. Either according to arbitration rules of the U.N commission for arbitration of the international trade law (UNCITRAL) for 1976 and its amendment or any other arbitration rules established by the committee.
- B. Or according to the provisions of the chapter related to the disputes settlement of the consolidated agreement for agrarian capital investment in semi=arid countries for 1983.
- C. The international centre for the settlement of investment disputes between States and Nationals of Other States, opened for signature of Washington on 18 March 1965.
- D. Or to the local judicial authorities of the other contracting party hosting the investment.”

23. The Calpurnia-Flatland BIT clearly conditions arbitration to a shorter period of time for amicable settlement of quarrels between investors and Host States representing a greater benefit than the one provided by the basic treaty. Since the purpose of the MFN standard is to prevent discrimination against nationals of different countries and ascertain equality of treatment regardless of nationality<sup>5</sup>, this is clearly a typical case where CLAIMANT has the right to benefit from a more favorable treatment accorded by the Host State (RESPONDENT) to nationals of a third State (nationals of Flatland).

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<sup>5</sup> Gaillard, p. 1.

*Applicability of the MFN:*

24. First, we will address the applicability of the MFN clause to the particular case and then, we will address the wider issue of the MFN-s applicability to dispute settlement mechanisms.

25. The legal basis of a most favoured nation treatment is the obligation towards the Beneficiary State undertaken by the Granting State<sup>6</sup>. Likewise, the right of the Beneficiary State arises only from the MFN clause<sup>7</sup>. In the present case, CLAIMANT's right as beneficiary state arises from the MFN clause contained in article 4 of the Basic Treaty:

“Treatment of Investments.

1. Investments made by investors of one contracting party, or returns related thereto, shall be accorded treatment which is not less favorable the the Host Contracting Party accords to the investments and returns made by its own investors or by investors of any third State, whichever is the most favorable to the investor.
2. Investors of one contracting party shall be accorded by the other contracting party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is not less favorable than the latter contracting party accords its own investors or to investors of any third State, whichever is the most favorable to the investor.”<sup>8</sup>

26. Now that the legal source of MFN treatment has been identified, we will discuss the criteria for the application of the MFN in this particular case:

27. The MFN standard is intended to protect beneficiaries in similar situations, because of that, the object of the basic treaty and the third-party treaty must not be different in nature. In this particular matter, both agreements, the BIT between Calpurnia and Gaul (basic treaty) and the one between Calpurnia and Flatland (third-party treaty) have the same nature and purpose: they both pursue “the mutual promotion and protection of

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<sup>6</sup> Draft articles on MFN clause, Art. 7.

<sup>7</sup> Idem, Art. 8.

<sup>8</sup> Calpurnia-Flatland BIT, Art. 4.

Investments”<sup>9</sup>. This serves as evidence that the rule of *ejusdem generis* has been accomplished.

*Application of the MFN clause to Dispute Settlement Mechanisms:*

28. The applicability of MFN clauses to all provisions of a treaty, specially those regarding dispute settlement mechanisms generates great discussion in the theoretical studies of International Arbitration, yet, there is abundant cases that allow us to affirm that MFN clauses can be applied to issues regarding jurisdiction. The issue was first addressed in the context of investment arbitration in *Maffezini v. Spain* where the Tribunal held that:

“...there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors...”<sup>10</sup>

29. In a likely manner, the *National Grid v. Argentina* award follows the same reasoning as the one made in the *Maffezini v. Spain* case:

“...a MFN clause which is silent as to whether it applies to dispute settlement can be assumed to apply to dispute settlement, thus permitting the claimant to access less time-consuming arbitration options available in other investment treaties...”<sup>11</sup>”

This affirmation takes into consideration an argument often used to deny application of the MFN clause to jurisdictional issues. It is often said that dispute settlement mechanisms do not represent a more or less favored condition, but merely different resolution mechanisms. Nevertheless, as pointed out by the latter quote, a particular dispute mechanisms can represent a less time-consuming process for the investor to protect its investment. This is true in this case, given that since the measures tantamount or equivalent to expropriation were implemented by Respondent, including the hostility that resulted in the absence of Vanguard personnel, Claimant has lost its ability to preserve the value of its investment. Under these circumstances, a longer period for

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<sup>9</sup> Calpurnia-Gaul BIT, motivation. / Calpurnia-Flatland BIT, motivation.

<sup>10</sup> *Maffezini v. Spain*, par. 54.

<sup>11</sup> *Grid v. Argentina*

amicable settlement represents a disadvantage for Vanguard: the longer the time, the bigger the damage to their investment value.

30. Furthermore, all the different cases with variations in the result show that the question of applicability of an MFN clause to dispute settlement mechanisms is chiefly determined by the language of the clause. Accordingly, we must analyze the text of the Basic treaty:

31. Paragraph 2 of article 4 of the basic treaty is characterized by a restrictive language. Even so, there is no express prohibition towards the application of this provision to dispute settlement mechanisms. On the other hand, paragraph 1 of the same article presents a wider language regarding the “treatment” that should be granted to investments and returns. According to this paragraph, the MFN clause can be used regarding any more favorable “treatment” given to investments or returns of a third party national. Since the word treatment is a wide concept, we can consider that the protection given to investments is included in such concept, and given that dispute settlement mechanisms are essentially protective measures, we can assert that these last ones are also included in the term “treatment”. The *Siemens v. Argentina* Tribunal expressed a similar opinion: it decided that the basic BIT had...

“...as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered to under the Treaty. It is part of the treatment for foreign investors and investments and of the advantages accessible through an MFN clause...”<sup>12</sup>, it further held that: “the term –treatment- is sufficiently wide to include settlement disputes”<sup>13</sup>.

*Exhaustion of the amicable settlement period prior to International Arbitration:*

32. Now that we have determined that through the MFN clause, the amicable settlement period must be the one held in the Calpurnia-Flatland BIT, that is two months, we can proceed to the exhaustion of such a period. The request for

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<sup>12</sup> *Siemens v. Argentina*, par. 102.

<sup>13</sup> *Idem*, par. 103.

arbitration was filed July 31<sup>st</sup>, 2007 by Claimant; before that, we can trace the first piece of correspondence regarding the present dispute to February 5<sup>th</sup>, 2007, when Claimant sent a letter to Mr. Poe, Chairman of the SFCDC<sup>14</sup>. The letter addressed the issues of expropriation and its rightful compensation. This marked the beginning of the negotiating or waiting period. Needless to say, during those five months, after Poe's response rejecting CLAIMANT's letter<sup>15</sup>, the parties failed to settle the dispute amicably. Given that there was no amicable settlement achieved, and a period exceeding two months passed, Claimant is now able to request for International Arbitration.

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#### **RESULT OF ISSUE 4:**

33. This case allows for a valid application of the MFN clause for the purpose of being a beneficiary of a provision that has a shorter period (two months) for amicable settlement prior to International Arbitration. Under this provision, Claimant has clearly exhausted such condition and is now facilitated to submit the controversy to International Arbitration.

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#### **ISSUE 5: ALTERNATIVE SOLUTION TO THE EXHAUSTION OF THE AMICABLE SETTLEMENT PERIOD**

34. Even though enough arguments have been provided to justify the application of the MFN clause in the matter of dispute settlement mechanisms, there are more reasons to consider that the waiting period that conditions International Arbitration should not be interpreted as an obstacle to this tribunal's jurisdiction.

35. Article 31 of the Vienna Convention on the law of Treaties provides the general rule of interpretation of treaties by which

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<sup>14</sup> Evidence, P. 8.

<sup>15</sup> Idem, p.8.

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”<sup>16</sup>.

36. As we have established above, the purpose of the Calpurnia-Gaul BIT was to promote and protect investments and it is under that purpose that its provisions should be interpreted. As a result, we must interpret the amicable settlement period according to the purpose of the article.

37. The main purpose of article 4 of the Treaty is to guarantee systematic protection for investors and not to create a bureaucratic-like process that distances investors from International Arbitration. Under this premise, it is reasonable to consider that these stage could be omitted altogether when it becomes an obstacle for investors rather than a means to protect their investment. In the Ethyl v. Canada case, the Tribunal emphasizes on the existence of a principle which allows claimant to pursue Arbitration without exhausting negotiations when these procedures are impossible to be applied<sup>17</sup>.

38. Mr. Poe`s letter of February 27<sup>th</sup>, 2007 , the lack of communication and publicity regarding decisions and their motivation, and the general hostility towards Gaulois nationals is evidence of the reluctant attitude of Calpurnia towards any kind of cooperation among the parties. It is then justifiable to omit the waiting period entirely as the lack of will on behalf of respondent can be considered an unavoidable obstacle to negotiations.

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**RESULTS ON ISSUE 5:**

39. Even if this Tribunal dismisses the application of the MFN clause to dispute settlement mechanisms, there is sufficient evidence to conclude that the negotiation process was impossible to carry out given the Respondent`s lack of cooperation regarding the opening of communication channels. In the presence of such circumstances, the exhaustion of the amicable settlement period can not be considered a condition prior to International Arbitration, leaving that option available to Claimant.

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<sup>16</sup> Vienna Convention, article 31, par. 1.

<sup>17</sup> Ethyl v. Canada.

## ISSUE 6: THE CURRENT DISPUTE IS A CONFLICT ARISING DIRECTLY FROM AN INVESTMENT

40. According to Article 25 of the ICSID Convention, the ICSID has jurisdiction over “any legal dispute arising directly out of an investment”. So, in order to confirm the Tribunal’s jurisdiction, we must address the *Ratione materiae* of the case. In order to do so, we will approach the concept and scope of the term “investment” and afterwards whether the case complies with the term as conceived in the Treaty.

41. Article 1 of the Treaty defines the relevant terminology for the purpose of the agreement. The term includes:

“1. The term investment means every kind of asset established or acquired by an investor of one contracting party in the territory of the other 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;

D Intellectual property rights, such as patents, copyrights, technical processes, trade marks, industrial designs, business names, know-how and goodwill; and...

2 The term “Returns” means the amounts yielded by investments and in particular, though not exclusively, shall include profits, dividends, interest, royalties, capital gains or any payments in kind related to an investment.

Returns shall enjoy the same treatment as the original investment.

42. For the effects of this Treaty, returns are given equivalent treatment as to investments (*strictu sensu*). Meanwhile, the term “investment” must be even more widely understood in the context of the ICSID Convention, in light of the negotiating history of the Convention. It is precisely because the term “investment has been broadly understood in the ICSID practice and decisions, as well as in scholarly writings<sup>18</sup>, it will not be considered a point of contention.

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<sup>18</sup> Bishop and all, P. 1236

43. Since the current dispute derives from retention of returns, expropriation and actions tantamount to expropriation, and discrimination<sup>19</sup>, it is clear that the case presented by CLAIMANT is a legal dispute directly arising from an Investment.

44. It is important for the assertion of this case as a true foreign investment dispute to distinguish this case from a mere dispute among shareholders.

45. In B&B v. Congo, the Tribunal is presented with this controversy, for this reason, it held that a way to determine if the case is an investment dispute or an internal dispute among shareholders was to analyze the accusations made by Claimant. If the alleged violations originated from an international law or treaty violations then, it is a foreign investment dispute; if the accusations referred to a breach in the company's social pact, then it is an internal dispute<sup>20</sup>. Since CLAIMANT's claim consists on discrimination, indirect expropriation and other violations to the Treaty, it is evident that the controversy is without doubt a foreign investment dispute.

46. CLAIMANT's quality as minority shareholder does not deprive him of the right to International Arbitration. CLAIMANT's shares are considered "investment" for the effects of the Treaty without any other provision that indicates there should be any distinction between controlling or minority shareholders.

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#### **RESULTS OF ISSUE 5:**

47. The controversy at hand constitutes a legal dispute which arises directly from an investment, and this constitutes the *ratione materiae* of the Tribunal's jurisdiction.

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#### **ISSUE 6: VANGUARD'S QUALITY AS MINORITY SHAREHOLDER**

48. When Vancal was first created, claimant initially owned 50 per cent of equity interest. After several fluctuations, Claimant owns 30 per cent of equity shares, plus an

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<sup>19</sup> CRA, p. 3.

<sup>20</sup> BB v. Congo.

additional 1 per cent registered in the name of Francesca Pescara. This makes him a minority shareholder at the time of the controversy. Regardless, any shareholder can pursue a claim in his own name since by virtue of article 1 of the Calpurnia-Gaul BIT, shares and other kinds of participations in the locally incorporated company become investments.<sup>21</sup> Several cases serve to establish that in practice, minority shareholders are accepted as claimants if they have been granted protection under their respective: In AAPL v. Sri Lanka the Tribunal held that acquiring shares in a locally incorporated company is “an undisputed form of investment”<sup>22</sup>. Foremost, there is no other restriction within the Treaty concerning the amount of control a particular investor must have over and company to have access to protection over such investment. There is no legal distinction derived from the Treaty between controlling and minority shareholders, being both entitled to equal protection of their investment.

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#### **RESULTS OF ISSUE 6:**

49. CLAIMANT’s quality as minority shareholder does not deprive him of the right to International Arbitration. CLAIMANT’s shares are considered “investment” for the effects of the Treaty without any other provision that indicates there should be any distinction between controlling or minority shareholders.

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<sup>21</sup> Schreuer, Shareholders Protection, p. 6.

<sup>22</sup> AAPL v. Sri Lanka, par.39.

## **ARGUMENTS TO THE SUBSTANTIVE ISSUES**

50. According to certain OECD reports, trade and FDI are important vehicles for growth in, especially, developing countries,<sup>23</sup> such as Gaul and Calpurnia. FDI is an ownership of assets in one country by residents of another for purposes of controlling the use of those assets. These investments have been protected by BITs, which are intended to encourage investment in a way that protects the basic interests of both capital-importing and capital-exporting States<sup>24</sup>. When States sign these Treaties, they ensure that no change or shift in policy, regime or government in the host country would affect the investment made<sup>25</sup>. Calpurnia and Gaul signed a BIT. This means that any act or omission of the Contracting Parties that violates the obligations included in that Treaty must be imputable to the State responsible, and the losses or damages resulting from that act or omission must be repaired.

51. These consequences have been made clear by International Law, when establishing that *every internationally wrongful act of a State entails the international responsibility of that State*<sup>26</sup>. This responsibility has been reiterated also in the case-law such as the *Spanish Zone of Morocco* claims, which emphasized that *Responsibility results in the duty to make reparation if the obligation in question is not met*, and in the *Chorzów Factory* case, when it was sustained that *any breach of an engagement involves an obligation to make reparation*<sup>27</sup>.

52. When the Contracting Parties signed the Treaty, they not only obliged themselves to fulfill its fifteen articles, but also to act according to General International Law Principles, such as Good Faith. Even in the absence of special provisions in the Treaty about Principles, the Contracting parties' behavior throughout the life of the Treaty, must conform to good faith.

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<sup>23</sup> Eliassov, at p. 5.

<sup>24</sup> Shaw, at p. 747.

<sup>25</sup> Raghunathan, at p. 2.

<sup>26</sup> ILC on State Responsibility, Art. 1

<sup>27</sup> Shaw, at p. 697.

53. The Contracting Parties signed the Treaty desiring to intensify economic co-operation to the mutual benefit of both countries<sup>28</sup>, committing to maintain fair and equitable conditions for investments by investors of their States, and basing this co-operation in good faith.

54. CLAIMANT, being a capital-importing company to the Republic of Calpurnia from the Federated States of Gaul, has been discriminated, has suffered indirect expropriation, and has not gotten any compensation for it. Therefore, RESPONDENT has breached the Treaty, and consequently, must be held responsible for its acts and omissions, and must make the proper reparation to CLAIMANT.

## **ISSUE 1: SFCDC's CONDUCTS CAN BE ATTRIBUTED TO THE RESPONDENT**

### **A. VANCAL WAS A GOVERNMENT CONTROLLED COMPANY**

55. State Responsibility is a fundamental principle of international law, arising out of State Sovereignty. The States, as abstract legal entities, acts through persons, but they are not held responsible for any person's conduct or omission. A State is only responsible for acts of its servants that are imputable or attributable to it. Therefore, it becomes necessary to primarily examine whether the conducts of SFCDC render RESPONDENT liable for the consequences arising from those conducts, and to establish the governmental nature of those conducts.

56. Under International Law, State responsibility is recognized to the main Organs of a State, whether they exercise legislative, executive or judicial functions, in accordance with the internal law of the State<sup>29</sup>, but it is also recognized that certain acts of individuals or entities which do not have the status of main Organs of the State can be attributable to it.

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<sup>28</sup> Calpurnia-Gaul BIT

<sup>29</sup> ILC on State Responsibility, Art. 4

57. These conducts can be of a person empowered by the law of that State to exercise elements of the governmental authority<sup>30</sup>, person or group of persons if acting on the instructions of, or under the direction or control of, that State<sup>31</sup> or even authorities of any political subdivision of the state, or any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority<sup>32</sup>. Also, under the principle of the unity of the State, the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility.

58. It is sustained that a Government can also be responsible for acts or omissions in Enterprises in which it participates. The control that a State has over a company can be determined by the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets<sup>33</sup>. SFCDC is an entity 100% owned by the State of California<sup>34</sup>, and the Ministry of Economy, the Department of Labour and Social Services, the Environmental Protection Agency and the National Security Council appoint the SFCDC board<sup>35</sup>. The SFCDC owns VanCal's stock directly and also holds on deposit and votes further stock registered in the names of other shareholders. As a result, SFCDC votes for the 52% of the total stock. It can be concluded that SFCDC, as a Fund managed by governmental authorities, has the control over the decisions of VanCal, and that even though part of its votes is for other shareholders, it has a *de facto* control over it. SFCDC operates as an arm or agent of the Government of California in respect of the decisions and votes in VanCal.

59. Similarly, case-law records the *Wintershall v. Qatar Case*, where the Claimants and the Respondent entered negotiations relating to the utilization of non-associated natural gas in the contract area or an adjacent area where petroleum rights were held by the Qatar General Petroleum Corporation (QGPC), a corporation wholly-owned by the

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<sup>30</sup> *Idem*, Art. 5

<sup>31</sup> *Idem*, Art. 8

<sup>32</sup> ALI § 207

<sup>33</sup> Bishop et al, at chapter 7, II

<sup>34</sup> CRA § 10

<sup>35</sup> CP, 17

Respondent. The Tribunal recognized that QGPC was created as a separate independent legal personality under Qatari law, however, the Board of Directors of QGPC consisted of 7 to 11 members, the majority of whom were officials of the Department of Petroleum Affairs of the Government. As a conclusion, the Tribunal is declared that in this case QGPC was acting as an agent of the Government of Qatar and all actions attributed to QGPC were attributed to the Government<sup>36</sup>.

60. It is also important to determine that acts or omissions of SFCDC as part of the Government have governmental nature.

“[...] In dealing with these questions, the Tribunal must again rely on the functional test, that is, it must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed<sup>37</sup>.”

61. The RESPONDENT declares that the SFCDC votes the shares registered in the name of other individuals, pursuant to a purchase/agency agreement<sup>38</sup>. The SFCDC, as part of the Government, has the main obligation to act upon law and internal legislation. BITs, once signed by a State, become part of its internal legal system. For this reason, even though the mere act of voting is not part of its attributions as a Government's Fund, and SFCDC had this voting by virtue of a private contract, it maintained its quality of Government controlled Enterprise, and the Ministry of Economy, the Department of Labour and Social Services, the Environmental Protection Agency and the National Security Council that appointed the SFCDC board had to act as Governmental authorities who fulfill Art. 2 of the Treaty, by voting for the creation of favourable conditions for CLAIMANT's investments.

62. Consequently, based on the case-law and principles presented, it can be affirmed that SFCDC was Government controlled, and as SFCDC controlled VanCal, VanCal was controlled by the Government of Calpurnia.

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<sup>36</sup> Bishop et al, at Chapter 7, II, B.2

<sup>37</sup> Maffezini v. Spain, § 52

<sup>38</sup> RRA, § 8

## B. CHANGES IN GOVERNMENT AND RESPONSIBILITY OF RESPONDENT

63. SFCDC had the control over VanCal, but as a Government controlled entity, was accountable to make decisions based on the fulfillment of the Treaty, even when a change in Government's Administration had occurred.

64. The Government of Calpurnia signed the Treaty expressing its consent to be bound by it<sup>39</sup>. According to the "*Pacta sunt servanda*" principle, every Treaty in force is binding upon the parties to it and must be performed by them in good faith<sup>40</sup>.

65. States are recognized as "legal persons" being subject to carry out every Treaty, including those signed by other political administration dictate. Changes in government do not affect the continuity of the State. The Government of Calpurnia is then liable to the fulfillment of the Treaty as a Contracting Party.

66. Case-Law supports this principle as recorded in the *RC&B Inc. v. OPIC* Case, in which the Government of Jamaica signed an Agreement with Revere Jamaica Alumina Limited. The Agreement provided tax stability to the company. Seven years later, a new Prime Minister was elected, and declared that the Government of Jamaica was not going to be bound by that Agreement and initiated different acts ignoring that contractual prohibition. It was stated that:

“[...] Under International Law, the commitments made in favor of foreign nationals are binding notwithstanding the power of Parliament and other governmental organs under the domestic Constitution to override or nullify such commitments. Therefore, by virtue of International Law, the Government of Jamaica is declared bound by its commitments<sup>41</sup>”.

67. The Calpurnia-Gaul BIT entered into force on 1995, and the Contracting Parties agreed to remain that force for a period of ten years, and thereafter maintain it until one notifies the other its intention to terminate it<sup>42</sup>. Therefore, by the time the

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<sup>39</sup> Law of Treaties, Art. 11

<sup>40</sup> *Idem*, Art. 26

<sup>41</sup> Bishop et al

<sup>42</sup> Calpurnia-Gaul BIT, Art. 15

discrimination to CLAIMANT took place, the Treaty was in force, as a binding document to the parties.

68. Hence, SFCDC, as a Government controlled entity, is obligated to the Treaty, and was liable to the fulfillment of its rules when the discriminated conducts against CLAIMANT took place. The change of Government is not a valid legal justification of the Government to breach it.

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### **RESULTS OF ISSUE 1:**

69. VanCal was a Government controlled company by the time the discriminatory conducts against CLAIMANT occurred. Therefore, RESPONDENT is liable for those conducts and the losses and damages consequently suffered by CLAIMANT.

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## **ISSUE 2: RESPONDENT DISCRIMINATED AGAINST CLAIMANT**

### **A. RESPONDENT VIOLATED ART. 2.2 OF THE TREATY**

70. Contracting Parties accorded fair and equitable treatment to investments of investors of the other Contracting Party, when they established it in Art. 2.2 of the Treaty. According to International Law, this fair and equitable treatment can be interpreted in two ways: the plain meaning approach and the international minimum standard one.

71. In the Plain Meaning Approach, the term is interpreted literally. Hence, where a foreign investor has an assurance of treatment under this standard, a straightforward assessment needs to be made as to whether a particular treatment meted out to that investor is both “fair” and equitable”<sup>43</sup>. The problem with this interpretation is that International Law does not have any record on a technical or uniform understanding of the meaning of “fair and equitable treatment”.

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<sup>43</sup> Bishop et al.

72. This problem is solved by integrating the International Law Principles of Equity and Good faith. For instance, if a State acts fraudulently or in bad faith, or capriciously and willfully discriminates against a foreign investor, or deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State, then there is at least a prima facie case for arguing that the fair and equitable standard has been violated<sup>44</sup>.

73. On the other hand, the International Minimum Standard suggests that foreign nationals or investment from foreign investors must be protected in the same way the State treats its own nationals. This standard is a synonym of the National Treatment Standard.

74. Regardless of the approach chosen to interpret the clause, this term has to be adapted to each case in particular. Generally, when the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are fair and equitable to a foreign investor and a national one.

75. Case-law defends that discrimination is widely prohibited if not based in reasonable and legal purposes. The Arbitral Tribunal in the *Amoco v. Iran* Case, declared that

“[...] article IV obliges each party to refrain from applying unreasonable or discriminatory measures that *would impair the legally acquired rights and interests of the nationals and companies of the other party*” [emph. add.]

76. In the *Lauder v. The Czech Republic* Case, it was also determined that

“A discriminatory measure is one that fails to provide the foreign investment with treatment at least as favorable as the treatment of domestic investment. For a measure to be discriminatory, it does not need to violate domestic law, since domestic law can contain a provision that is discriminatory towards foreign investment, or can lack a provision prohibiting the discrimination of foreign investment. [...] The measure was discriminatory because it provided the foreign investment with a treatment less favorable than domestic investment. [...] Discrimination can only occur when the measure against foreign investment and the measure against domestic investment are of a different nature, and the former is less favourable than the latter”.

77. Some have even considered it a matter of *jus cogens*. The concept of discrimination entails two elements: first, the measures directed against a particular party must be for

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<sup>44</sup> Idem

reasons unrelated to the substance of the matter, for example, the company's nationality. Second, discrimination entails like persons being treated in an inequivalent manner<sup>45</sup>.

78. RESPONDENT discriminated against CLAIMANT by implementing political-economic strategies based on hostile conducts towards liberal, individualist, consumption- and leisure-oriented societies<sup>46</sup>. RESPONDENT applied those strategies based on the company's nationality, considered that the Federated States of Gaul had all the detailed characteristics, and consequently caused CLAIMANT, as a Gaul national, injuries that arose from those conservative strategies.

79. Doctrine supports these principles, as in *Dolzer and Stevens*:

“For an act to constitute discrimination in the sense that is prohibited by international law, the measure must result in actual injury to the alien. Hence, discrimination may have taken place if for example the measure is directed against an alien or a group of aliens *on account of their nationality and if this results in prejudice to their interest*<sup>47</sup>”. [emph. add.]

80. This fair and equitable treatment was included by the Contracting Parties in the Treaty, Art. 2.2. This Article serves not only as a point of reference of the treatment the Investments of investors of the Contracting Parties get in the other party's State, but also serves, as a great majority of jurists have supported, as a yardstick of the legality of various state actions<sup>48</sup>. This means that, even though States have sovereign authority, it is limited by the laws, and laws' principles, such as the fair and equitable treatment. In Sir Fitzmaurice's words:

“The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily or capriciously”.

81. The violation to this principle is reflected on the indirect expropriation by RESPONDENT to CLAIMANT.

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<sup>45</sup> Maniruzzaman in Bishop et al. at Chapter 8, II, B

<sup>46</sup> CRA § 12

<sup>47</sup> Dolzer and Stevens in Bishop et al. at

<sup>48</sup> Maniruzzaman in Bishop et al. at Chapter 8, II, B

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**RESULTS OF ISSUE 2:**

82. RESPONDENT, under the Administration of the CCC, implemented political and economic strategies on the basis of the nationality of the companies. This reflects discrimination against CLAIMANT, who suffered the consequences of these strategies for being a Gaul national, breaching RESPONDENT Art. 2.2 of the Treaty.

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**ISSUE 3: RESPONDENT, THROUGH A SERIES OF ACTS AND OMISSIONS, HAS EXPROPRIATED CLAIMANT'S INVESTMENT****A. RESPONDENT'S CONDUCTS TRASCENDED ITS RIGHT TO REGULATE**

83. Contracting Parties agreed to create favourable conditions in its territory for investments by investors of the other Contracting Party<sup>49</sup>. When granting these favourable conditions, Governments have to deal with two important issues: assuring the capital-exporting countries some measure of protection and security before they invest in their country, and protecting the capital-importing country from possible abuses from the new investors.

84. States do have Sovereignty, and the need to acquire control over some foreign investments is felt by many states to be an essential requirement in the interests of economic and social reforms. There are several regulatory measures a Government can take over private property, such as expropriation, nationalisation. An act of expropriation, pure and simple, constitutes a lawful act of the State, consequently, does not per se give rise to any international responsibility. The problem arises where foreign property is involved<sup>50</sup>.

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<sup>49</sup> Calpurnia- Gaul BIT, Art. 2.1

<sup>50</sup> Shaw, at p. 738.

85. The difficulty arises when determining at what extent a Government may affect the value of property by regulation, or how can it interfere in private foreign investment and the rights of the investors, without effecting an illegal expropriation.

86. When Governments are part of public-private partnerships, being joint ventures between the Government and one or more private sector entities one type of those partnerships, private companies must perceive benefits to the partnership, Government actors must be motivated to protect the Government's financial stake, and Government interests must align with those of consumers<sup>51</sup>. Traditionally the right of a Government to expropriate has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory, or in the so-called right of "self-preservation", which allows it, *inter alia*, to further the welfare and economic progress of its population<sup>52</sup>. But regulation or Governmental intervention on the economy lead to undesirable inefficiencies and a reduction of liberty, and if it exceeds to the point of expropriation, it becomes illegal.

87. The Treaty refers to Expropriation, specifically in Art. 6.1 which determines that "investments 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*" [emph. add].

88. Customary law does not preclude host states from expropriating foreign investments when the legal conditions are met: a public purpose, non-discriminatory basis and compensation. RESPONDENT did expropriate CLAIMANT and did not express any public purpose, and did it based on discriminatory basis<sup>53</sup>.

89. Expropriation involves a taking of property, but it has been widely accepted that there is a type of expropriation that does not involve material taking of property. Some determine that taking of property is *not only an, outright taking of property, but also*

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<sup>51</sup> HLR, at p. 1368

<sup>52</sup> Bishop et al. At Chapter 8. I.

<sup>53</sup> See Supra, Issue 2. A

*any such unreasonable interference with the use, enjoyment or the disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference*<sup>54</sup>.

90. In the *Starrett Housing Corp. v. Iran* case, the Tribunal emphasized 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”

91. So did the Tribunal in the *Tippets v. TAMS-AFFA* case,

“[...] 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 has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral”.

92. These indirect takings were made by RESPONDENT when interfering in the CLAIMANT’s investment, obstructing the transfer of returns from the CLAIMANT’s investment, and controlling CLAIMANT’s management.

93. International Law has made clear that this kind of indirect expropriation is not part of the Government’s so called “police power”, or regulatory power. A taking of private property requires, as the Hull Formula states, “prompt, adequate and effective compensation”, whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather in the purposes of the taking<sup>55</sup>.

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<sup>54</sup> Harvard Draft Convention, Art. 10

<sup>55</sup> Higgins, at 331.

94. Consequently, a mere conservative policy of the political party in a State's Government, such as CCC in Calpurnia, is not a legal valid justification to expropriate CLAIMANT.

**B. RESPONDENT UNLAWFULLY INTERFERED IN THE CLAIMANT'S INVESTMENT**

**i. CLAIMANT did not receive dividends that were declared**

95. A State can interfere in an alien's investment, in a variety of ways. The use and enjoy its property may even go to the extent of the State's forcing the alien to dispose of his property in a way the alien has not agreed to. Other measures a State might employ are the blocking of company's entrances on the pretext of maintaining public order, and the denial of visas for foreign technical personnel<sup>56</sup>.

96. RESPONDENT, by representatives of the SFCDC, decided that the minimum dividend should be divided among the shareholders, and that the payment of profits to the foreign shareholders had to be suspended for the time being<sup>57</sup>. This is a clear interference that deprives CLAIMANT of its fundamental rights.

97. OPIC's brief to an arbitral tribunal asserted that fundamental shareholder rights include “*the right to designate directors of the corporation, the right to receive dividends that are declared, the right to approve or disapprove a transfer of substantially all of the assets of a corporation [...]*”.

98. Therefore, as dividends were declared but RESPONDENT denied to CLAIMANT's request of placing the amount of money in a separate bank account, because VanCal could not pay any sum of money for any reason to foreign shareholders, RESPONDENT interfered in CLAIMANT's fundamental right of receiving dividends that are declared.

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<sup>56</sup> Christie in Bishop et al

<sup>57</sup> Evidence, 10 March 2005

99. This was an expropriation, even without a decree or law that expressly declared it as one. This absence is irrelevant as case-law demonstrates that expropriations have been declared without them, as the Tribunal in the *Starrett Housing Corp. v. Iran* case, declared an expropriation in the absence of them:

“It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated”.

## **ii. CLAIMANT failed to fulfill Art. 2.3 of the Treaty**

100. Contracting Parties agreed on not impairing unreasonably the management of the foreign investment, nevertheless, RESPONDENT failed to accomplish it because it did not create the favourable conditions for CLAIMANT’s Gaulois personnel.

101. In November 2005, Government representatives ousted Ms. Pescara from the VanCal Board of Directors, and prevented CLAIMANT from electing her replacement<sup>58</sup>. Besides, in September 2004, Ms. Pescara got a denial to her application for renewal of her business visa<sup>59</sup>.

102. It has been established that an act is going to be expropriation even if the legal title to the property formally remains with the original owner. Even though CLAIMANT had representatives in VanCal, their right to vote was not respected, as SFCDC representatives did not include their votes in decision-making on important issues, such as the creation of the reserve fund. They decided the distribution of the company’s profits in a meeting from which Mr. Rindler was absent<sup>60</sup>. Mr. Rindler had the formal title of voting by being proxy for both CLAIMANT directors, but did not have the factual possibility to do it.

103. The interference in the management of a company is another way of doing an indirect expropriation and case-law stated so in the *Starrett Housing Corp. v. Iran* case, when it was held that a taking had occurred by the end of January 1980, when the

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<sup>58</sup> CRA, §15

<sup>59</sup> *Idem*, § 18

<sup>60</sup> Evidence, 17 February 2005

Iranian Housing Ministry deprived the claimants of the right to manage, control and use of their investments.

104. Ms. Francesca Pescara and Mr. David Kolowenko, Gaulois nationals, suffered Calpurnian Security Forces' investigations in their homes, picketing led by CCC's Women's League, press releases disquieting the public against Vanguard, and did not receive any effective protection from RESPONDENT. This lack of protection from RESPONDENT to CLAIMANT's personnel, forced Ms. Pescara and Mr. Kolowenko, to leave the country. The forced absence of CLAIMANT's personnel severely hampered its ability to preserve the value of its investments.

105. RESPONDENT is liable for this acts that are considered indirect expropriation, as established in the *Otis Elevator Co. Case*,

“Ordinarily, the acts of private individuals and organizations are not attributable to a government. However, the anti-Western violence and harassment which took place in Iran were actively encouraged by Khomeini's clique as part of a general anti-Western policy. Clearly, *these actions maintained an unsafe environment for Americans, thereby causing the departure from, and preventing the return to, Iran of Otis personnel*”. [emph. Add.]

106. Consequently, the forced absence of CLAIMANT's personnel prevented it from having an effective control and management of its investment. As a consequence, neither CLAIMANT's investment, nor its personnel get the full and constant protection and security stated in Art. 2. 2 of the Treaty.

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**RESULTS OF ISSUE 3:**

107. RESPONDENT permitted several acts and omissions which derived in indirect expropriation. CLAIMANT lost the control over its dividends, its management of the company, its Gaulois technical and experienced personnel and was not compensated. RESPONDENT must, therefore, be held responsible for all those breaches to the Treaty.

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***CERTIFICATE OF AUTHENTICITY***

12 SEPTEMBER 2008. We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who Signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

(Signed)\_\_\_\_\_

JULIO AGUILAR

(Signed)\_\_\_\_\_

FRANCISCO BENEKE

(Signed)\_\_\_\_\_

MARIA JOSÉ BENITEZ

(Signed)\_\_\_\_\_

LEONOR SELVA