

**NOTICE OF INTENT TO COMMENCE  
ARBITRATION**

**PURSUANT TO CHAPTER XI  
OF THE NORTH AMERICAN FREE TRADE  
AGREEMENT**

*CALMARK COMMERCIAL DEVELOPMENT, INC.  
A CORPORATION OF THE UNITED STATES OF AMERICA*

*VS.*

*THE UNITED MEXICAN STATES*

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## **I. BREACHED NAFTA PROVISIONS**

- A. It is respectfully submitted that certain measures of the Seventh Criminal Court, the Third Civil Court, both located in the City of Tijuana, Baja California, Mexico; and of the Second and Third Chambers of the Superior Court of Justice for the State of Baja California, Mexico; and of the Second Tribunal of the Fifteenth Federal Circuit ( jointly, "The Mexican Judiciary "), were in breach of various provisions of the North American Free Trade Agreement (NAFTA) concerning the protection of investments, namely articles 1105, 1109, and 1110 of said treaty.
- B. It is respectfully submitted that the conduct of the Mexican Judiciary are attributable to the United Mexican States, hence the United Mexican States should bear international responsibility vis-à-vis CALMARK.
- C. It is respectfully submitted that the measures taken by the Mexican Judiciary constituted procedural and substantial denial of justice, as well as violations of CALMARK's property and economic rights in accordance with international law principles, and a failure to provide full protection and security, all of which fall within the scope of article 1105 of the NAFTA.
- D. It is respectfully submitted that the measures taken by the Mexican Judiciary , and thus of the United Mexican States, did not permit the transfers relating to an investment derived from the sale of an investment under article 1109 of the NAFTA.
- E. In the alternative, it is respectfully submitted that the measures taken by the Mexican Judiciary constitute a measure tantamount to expropriation under article 1110 of the NAFTA.

## **II. FACTUAL BASIS FOR THE CLAIM**

### **A. CALMARK Commercial Development's Investment In Mexico**

- 1. CALMARK Commercial Development, Inc. ("hereinafter CALMARK") is an entity organized under the laws of the State of Delaware, with its domicile located at 1801 Century Park East, Suite 1225, Los Angeles, 90067, in the State of California, United States of America. All of the shareholders in CALMARK are citizens of the United States of America.
- 2. At some time before April 1988, Robert Bisbee offered to CALMARK that they enter into a joint venture to develop a Tourist Attraction that would consist of a hotel and condominiums that would be marketed as a time-share on a piece of land then owned

by Bibiana Betina Bacon, a Mexican Citizen. The Tourist Attraction would be located on a certain piece of property ("The Property"), located in Cabo San Lucas, Baja California Sur, (between Club Cascadas and Pueblo Bonito) and consisted of approximately 6.9 acres located adjacent to the Sea of Cortez.

3. On 16 September 1988, CALMARK signed a memorandum of intent with Mr. Robert Bisbee. Said memorandum of intent contained an outline of the steps that would be taken in order to commence the development of the Tourist Attraction, among which was the obligation to incorporate a new business, which would be the vehicle through which the Tourist Attraction would be developed.
4. On 19 October 1988, Miss Betina Bacon, Robert Bisbee and CALMARK entered into a Joint Venture Contract, providing that the three contracting parties would contribute into said project.
5. Because Betina Bacon was more interested in selling the Property than in taking part in the Joint Venture, the parties renegotiated and agreed that CALMARK would develop the project, and that Mr. Robert Bisbee would receive a share of the earnings. Consequently, CALMARK paid on 19 April 1989, and 27 April 1989, the amounts of \$30,000 and \$15,000 U.S. Dollars to Mr. Robert Bisbee so that Miss Betina Bacon would transfer the property to CALMARK.
6. On 9 May, 1989 Miss Betina Bacon, Robert Bisbee and CALMARK reached the following understandings:
  - a. Betina Bacon would convey the land into a trust to CALMARK, or to the person that CALMARK would appoint, pursuant to a Promissory Trust Contract;
  - b. Betina Bacon notified CALMARK and Mr. Robert Bisbee that it was deeming the Joint Venture Contract, as rescinded, since under the new circumstances the Contract served no further purposes;
  - c. On that same date, CALMARK delivered the amount of \$25,000.00 U.S. Dollars to Betina Bacon, thus sealing the deal concerning the sale of the property and making it clear that CALMARK would be in charge of developing the Tourist Attraction, but with a percentage that would be received by Robert Bisbee pursuant to a Joint Venture Contract that would be signed at a future date;
7. On that same date 9 May 1989, the amount of \$266, 201, 687.00 Mexican Pesos (two hundred and sixty six million two hundred and one thousand six hundred and eighty-seven Pesos) was paid by CALMARK to Banco Mexicano Somex, in payment of certain amounts owed to said bank by Miss Betina Bacon, and in exchange the bank would remove certain liens it had placed on the property. It was understood that said amounts were to be considered part of the price for the property. Said amounts, along

with those mentioned in the paragraph above in sum amounted to \$180,000.00 (one-hundred and eighty thousand) U.S. Dollars.

8. On 30 March 1990, CALMARK learned that Betina Bacon had transferred The Property to Robert Bisbee, settling it into a trust where Bancomer, Sociedad Nacional de Crédito acted as Trustee ("The Betina-Bisbee Trust"), as evidenced in public deed number 56,180, Volume 930, signed in witness of Notary Public Number 3 in Tijuana, Baja California, Mexico, attorney Xavier Ibáñez Herrera.

#### **B. PARTICIPATION OF THE LAW FIRM KRASOVKY, GALLARDO Y OGARRIO (KGO)**

9. On 5 October 1990 CALMARK retained the services of the Mexican law firm "Krasovsky, Gallardo y Ogarrío"<sup>1</sup> (KGO) for purposes of filing a claim in an attempt to recoup the amounts it had invested in Mexico. Pursuant to the agreement entered into by CALMARK and KGO, KGO would take all legal action to either obtain the land bought under the contract and/or recover the investment made in Mexico. As payment KGO would receive one-third of any amounts, goods and/or rights actually recovered.
10. CALMARK's President Uri Sheinbaum granted a power of attorney for lawsuits and collections among others, to Luis Krasovsky, Luis Gallardo, Javier Ogarrío and Joaquin Oseguera for purposes of representing CALMARK in any proceeding they would inchoate in Mexico. All of the attorneys mentioned were then part of KGO.
11. On 21 January 1991, the law firm KGO filed a claim on behalf of CALMARK with the Fourth Civil Court in Tijuana, Baja California, Mexico, against Bibiana Betina, Robert J. Bisbee, and BANCOMER, hoping to obtain the annulment of the contract that created "Betina Bisbee Trust."
12. For purposes of warning any potential buyers of the litigation that had commenced with regard to the land, attorneys for CALMARK requested that the claim be recorded with the Public Records office in the City of Los Cabos, State of Baja

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<sup>1</sup> KGO is used for purposes of this Notice of an Intent to Commence Arbitration, but the contract was signed by KRASOVSKY, GALLARDO Y ZORRIVAS and CALMARK COMMERCIAL DEVELOPMENT, INC. on 5 October, 1990. The firm KGO was first incorporated as KRASOVSKY, GALLARDO Y GOMEZ-MONT, S.C. on 2 May, 1990. In 1992 its articles of incorporation were amended and the name was changed to KRASOVSKY, GALLARDO Y OGARRIO, S.C. On 8 June, 1994, the partners of KRASOVSKY, GALLARDO Y OGARRIO held a meeting whereby Luis Gallardo and Javier Ogarrío agreed to leave the corporation, but to finish the CALMARK matter jointly.

California Sur. This would put all potential buyers on notice of the pending litigation and would prove a valuable strategy later on when the claim was settled.

13. On 9 February 1994, the Fourth Civil Court in Tijuana, and after analyzing all evidence submitted and hearing all parties involved in the proceedings, rendered a judgment annulling "The Betina-Bisbee Trust".
14. On 14 March 1994, Robert Bisbee, Betina Bacon and Bancomer lodged an appeal before the Superior Court of the State of Baja California, seeking to reverse the award that had previously been rendered by the Fourth Civil Court.
15. On 8 June 1994, the partners of the law firm KGO entered into a Separation Agreement (The Separation Agreement),<sup>2</sup> whereby among other matters it was agreed that partners Luis Gallardo and Javier Ogarrio, and then associate Joaquin Oseguera would leave KGO,<sup>3</sup> but that they would conclude the CALMARK case jointly, and that prior to taking any decisions concerning that particular case it would be consulted amongst them. The separation would become effective as of 10 June 1994.
16. On 10 August 1994, the Superior Court of Baja California handed a judgment confirming the Fourth Civil Court's decision, thus confirming the annulment of the Betina-Bisbee Trust.

### **C. THE SETTLEMENT OF THE LITIGATION AGAINST BISBEE, BACON AND BANCOMER. THE COMMISSION OF CERTAIN CRIMINAL ACTS AGAINST CALMARK COMMERCIAL DEVELOPMENT, INC.**

17. On 7 September 1994, while purportedly acting on behalf of CALMARK, former KGO partner Luis Gallardo "settled" the claim with Robert Bisbee, Betina Bacon and Bancomer by entering into an Assignment Agreement (the Assignment Agreement) in which CALMARK assigned its litigious rights to SABALO CABO, a third party that had purchased the land and that was interested in having the claim's registration with the public records office cancelled. The assignment price was the amount of

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<sup>2</sup> The separation agreement was formalized in Public Deed Number 130,305 dated October 28, 1994, before notary public number 2, Licenciado Gabriel Moreno Mafud. It was agreed that the Name of KGO would change to that of KRASOVSKY-ASOCIADOS, S.C. When Luis Gallardo and Javier Ogarrio left KGO, they retrieved all information concerning CALMARK such as files, letters, communications and copies of court documents, including contact information from KGO's office. This made it necessary for the undersigned Luis Krasovsky, to engage the legal services of Grossman, Heller & Logan, LLP to locate CALMARK and Richard Elliot in the United States of America.

<sup>3</sup> In fact, after Luis Gallardo, and Javier Ogarrio and Joaquin Oseguera left KGO, they would form a legal services entity called Gallardo, Ogarrio y Oseguera, S.C.

\$400,000.00 (Four Hundred Thousand) U.S. Dollars, and thus all claims and disputes between CALMARK, Robert Bisbee, Betina Bacon, and Bancomer were concluded by selling all interest in the investment under dispute to SABALO CABO. This Agreement was signed in the presence of the Judge and was made part of the official file. The Assignment Agreement however, was concluded without ever advising Luis Krasovsky (KGO) or even CALMARK that the litigation was being settled. In fact, as discussed hereunder in Part II(E), almost two years would transpire before CALMARK would acquire knowledge of the Assignment Agreement.

18. On 21 September 1994, Luis Krasovsky of KGO learned that Luis Gallardo, his former partner, had signed The Assignment Agreement purporting to act on behalf of CALMARK thus receiving in exchange the amount of \$400,000.00 U.S. Dollars. The failure by Luis Gallardo to disclose the signing of the Assignment Agreement to Luis Krasovsky constituted not only a breach of the Separation Agreement, but a breach of the confidence entrusted by CALMARK when it granted all of the KGO attorneys, including Luis Gallardo, ample powers for claims and collections.
19. On 22 September 1994, Luis Krasovsky made a formal notarized request that Luis Gallardo deliver a copy of the Assignment Agreement and that he turn over one-third of the Assignment Amount (\$133,333.33 U.S. Dollars), as legal fees owed to KGO by CALMARK. It was then believed by Luis Krasovsky that the moneys received from the Assignment Agreement had been delivered to CALMARK, and that Luis Gallardo had wrongfully collected the legal fees owed to KGO.

#### **D. KGO FILES CRIMINAL INFORMATION AGAINST GALLARDO**

20. On 22 December 1994, Luis Krasvosky, acting on behalf of his law firm KGO filed information with the State Attorney's Office concerning the possible commission of a crime by Luis Gallardo against KGO for wrongfully collecting attorney fees owed to KGO by CALMARK under the legal services agreement.<sup>4</sup>
21. The Prosecutor of the State Attorney's Office believed there was sufficient evidence to indict Luis Gallardo, and filed the case with the Sixth Criminal Judge on 14 March 1995 and filed as case number 190/95.
22. On 23 May 1995, the Sixth Criminal Judge issued a warrant for the arrest against Gallardo, but refused to grant it against Javier Ogarrio and Joaquin Oseguera.
23. On 30 May 1995, Richard Elliot, a U.S. citizen who had been the original contact between CALMARK and the law firm KGO, sent a letter purportedly signed in the

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<sup>4</sup> This investigation was registered by the State Attorneys Office as A.P. 20586/94.

United States and alleging to act on behalf of CALMARK where he stated that no money had been paid to Luis Gallardo. In fact, not even CALMARK'S board of directors had knowledge that this letter had been sent by Richard Elliot making these statements exonerating Luis Gallardo.

24. On June 1 1995, two days after Richard Elliot submitted the letter, the Sixth Criminal Judge issued a decree ordering that Gallardo walk free for lack of sufficient elements to proceed with the case without prejudice.
25. On 5 October 1995, the Prosecutor lodged an appeal against the Sixth Criminal Judge's order with the Fourth Chamber of the Superior Court of Justice for the State of Baja California.
26. On 16 February 1996, the Magistrates of the Fourth Chamber confirmed the Sixth Criminal Judge's order, providing that Gallardo could not be tried for lack of evidence. Prosecution would be required to gather more evidence to prepare a stronger case against Gallardo *et al.* This however would prove to be a difficult task. KGO requested the Prosecutor that he obtain certified copies of the checks involved in the transactions from the National Banking and Securities Commission, and to carry out further inquiries to obtain the evidence proving the wrongful conduct.
27. On July 1999 KGO, after CALMARK and Luis Krasovsky learned about the conversion presented evidence consisting of copies of various cashed checks proving that there were received by Luis Gallardo, but made to Javier Ogarrio in the amount of \$133,000.00 Dollars. He also presented the prosecutor with declarations by CALMARK's Directors Mr. Uri Sheinbaum and Mr. John L. Scott, where they stated that they never received any money from the settlement under the Assignment Agreement made by Gallardo.
28. On 23 September 1999, the District Attorney decided not to pursue a criminal action against Gallardo, because of a local statute that provide that if the Prosecutor failed to obtain evidence within six months following a Judge's decree to free a suspect, — sufficient as to warrant a criminal Judge's issuance of a new decree of formal arrest pending trial—, the Prosecution's right to a criminal indictment would preclude.

#### **E. CALMARK'S DISCOVERY OF THE ASSIGNMENT CONTRACT AND OF THE WRONGFUL CONVERSION OF ITS INVESTMENT BY LUIS GALLARDO, ET AL.**

29. On 24 August 1996, Luis Krasovsky on behalf of KGO sent letters addressed to Richard Elliot, and a second letter addressed directly to Uri Sheinbaum, a director of CALMARK. At this time, KGO had filed a lawsuit against CALMARK for purposes of collecting the legal fees due to it, but had been unable to locate them for purposes

of service of process.<sup>5</sup> KGO would then hire the U.S. law firm Grossman, Heller & Logan, LLP to locate CALMARK and Richard Elliot in the United States of America.

30. Upon receipt of said letter by Richard Elliot, the former CALMARK employee responded in a letter dated 23 September 1996, that he did not understand the contents of KGO's letter dated 24 August 1996; that in any event KGO should contact Luis Gallardo, and that if Krasovsky insisted in his attempt to request information, Elliot would seek legal action against him in Mexico.
31. When CALMARK received the KGO letter, John Scott a Director for CALMARK made a phone call to Luis Krasovsky on 27 August 1996 where he indicated that the directors of CALMARK were surprised with KGO's demand for payment of its legal fees since both Luis Gallardo and Richard Elliot had informed CALMARK that the matter was still tied up in the Mexican Courts. It was upon receipt of this letter when CALMARK became aware of the Assignment Agreement entered into by Luis Gallardo and that the amount of \$400,000.00 Dollars had been paid but that it had never entered its coffers. It was also until said time when Luis Krasovsky of KGO learned that the money had not been received by CALMARK.
32. As a consequence of this discovery, John Scott, one of CALMARK's Directors, accepted Luis Krasovsky's suggestion to pursue any and all legal action against former associate Mr. Luis Gallardo, and against former CALMARK employee Mr. Richard Elliot, including the filing of a Criminal Complaint, with a view to recouping any and all amounts owed to it from the Assignment Contract.
33. On 11 November 1996, a letter of request was delivered by Luis Krasovsky on behalf of CALMARK to Mr. Luis Gallardo, whereby CALMARK demanded that Luis Gallardo immediately deliver the \$400,000.00 U.S. Dollars he had received while purporting to act on behalf of CALMARK on 7 September 1994, as well as any other amount he might have received as a result of the Assignment Contract.

#### **F. KGO FILES CIVIL CLAIM AGAINST LUIS GALLARDO**

34. On 6 September 1996, KGO commenced a civil action against Luis Gallardo claiming the amount of \$400,000.00 received from the Assignment Agreement; \$133,000.00 Dollars for legal fees collected by Luis Gallardo; any other amount received under said Assignment Agreement; accrued interests; and damages resulting from Luis Gallardo's failure to deliver the monies. Said Claim was filed under docket number 2006/96 with the Third Civil Judge. The claim was also part of the new

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<sup>5</sup> See footnote 2, above.

agreement between CALMARK and KGO to pursue all legal action against Luis Gallardo *et al* to recover its investment.

35. In their response to the claim dated 4 November 1996, respondent Luis Gallardo et al responded that the court lacked territorial jurisdiction, and that KGO had no standing since it had suffered no grievance requiring court intervention.
36. During the month of May 1997, respondent Gallardo managed to suspend the procedure pending a resolution on the issue concerning jurisdiction but was declared unfounded in the first instance and on appeal with the Superior Court of Baja California. Gallardo later filed for a Federal Injunction (*amparo*). The procedure was suspended for almost a year, and it was not until 8 April 1998 when the Civil Judge fixed a date for the presentation of evidence.
37. Between the months of April 1998 and June 2001, the hearings to depose witnesses, and to take testimony and declarations for the respondents were delayed by procedural formalities, concerning notices, respondents failure to appear at hearings, and/or to present their witnesses.
38. On 8 June 2000, notwithstanding the fact that respondent Gallardo had failed to raise the issue in his response, (four years after commencement of litigation), Luis Gallardo filed a motion asking the judge to disregard the claim arguing that Luis Krasovksy had no authority to represent KGO, since a similar ruling had been made in a separate arbitration procedure commenced by KGO against Luis Gallardo.<sup>6</sup>
39. On 2 November 2000, the Civil Judge issued an interlocutory award dismissing Gallardo's motion concerning Luis Krasovsky's lack of authority as unfounded.
40. On 14 November 2000, Gallardo appeals before the Second Chamber of the Superior Tribunal for the State of Baja California. On 18 May 2001, the Second Chamber of the Baja California Superior Court declared the Gallardo appeal as well founded, and dismissed the claim filed by KGO five years earlier.

#### **G. CALMARK FILES INFORMATION AGAINST GALLARDO, OGARRIO AND ELLIOT FOR CERTAIN CRIMINAL ACTS COMMITTED AGAINST IT**

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<sup>6</sup> In said arbitral proceeding Luis Gallardo responded with a counterclaim against KGO and obtained an award which was found to be unenforceable, since Luis Krasovsky's authority to represent KGO was not acknowledged during the arbitral proceedings, thus KGO was not even allowed to present evidence or arguments in violation of both the California Arbitration Act, and the New York Convention on the Enforcement of International Arbitral Awards.

41. On 25 November 1996, Luis Krasovsky but know acting on behalf of CALMARK and with the recently acquired knowledge that Luis Gallardo had wrongfully collected monies owed to it, filed a brief with the State Attorney's Office in Tijuana, Baja California, Mexico concerning the possible commission of the crime known as a Breach of Trust (*abuso de confianza*),<sup>7</sup> Constructive Breach of Trust (*abuso de confianza equipardo*);<sup>8</sup> Breach of Trust by Conversion (*abuso por retención*)<sup>9</sup> committed by Luis Gallardo, Javier Ogarrio and Richard Elliot against CALMARK.
42. Throughout the case attorney for Luis Gallardo et al. defended raising various frivolous issues, among them, that the relevant period mentioned in the statute of limitations had lapsed, since Luis Krasovsky had actual knowledge of the Assignment Contract since September 1994. Other defenses raised were based on other legal technicalities that sought to delay the procedures. Respondents at one point even argued that CALMARK had ceased to exist because it had failed to pay the State of California's Corporate Franchise Tax, and even submitted a certificate that CALMARK was not in good standing.
43. On 29 April 1999, the local Prosecutor was persuaded by the defense into concluding that the statute of limitations had lapsed, and remitted the file to the Director of Criminal Investigations.
44. On 23 November 1999, the Director of Criminal Investigations remanded the file to the local Prosecutor ordering that he conduct an exhaustive investigation so that he would have elements to prepare a strong case. He also pointed out that the statute of limitations had not lapsed. Attorneys for CALMARK obtained and submitted

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<sup>7</sup> Article 214 of the State of Baja California's Penal Code (the BCPC). Breach of Trust. Type and Punishment. He who to the detriment of a person converts for his own or for a third party's benefit the control but not the ownership of a thing that was given to that person in trust, shall be sanctioned with prison ranging from three months to four years, and with of a fine of up to two thousand days of minimum wage, when the value of the item does not exceed two thousand days wages. If it exceeds two thousand times the minimum wage, prison time shall range from four to eight years and a fine of up to four hundred days of minimum wages.

<sup>8</sup> Article 215. of the BCPC: Constructive Breach of Trust. It shall be deemed as a constructive breach of trust, for purposes of sentencing:

- I. If the agent disposes or retrieves a thing, its design, if it has been attached by a court and if such person has been appointed as a court trustee.
- II. If the agent disposes of a thing given in trust, or if the court appointed trustee retrieves the thing, or when such person has been appointed by administrative, or labor authorities;
- III. The fact that a person holds out unto other that a thing is his own, a deposit of money that has been made as a bond to warrant the provisional freedom of a person subject to a proceeding, and is not owned by such person.

<sup>9</sup> Article 216. of the BCPC: Breach by Wrongful Conversion. It is reputed as a breach of a trust, when a person wrongfully retains a thing if the holder of such thing does not return it in fact, after it has been given to an authority for it to hold.

additional evidence with a view to preempt any future attempt at having the statute of limitations become an issue if and when the case was brought before the criminal Judge.

45. On 2 August 2000, and after providing the State Attorney charged with the case with evidence, the State Attorney's office decided to take the case to a criminal court against Luis Gallardo, Javier Ogarrio and Richard Elliot, since it believed they were guilty of committing the crime known as BREACH OF TRUST, and indicted them with the Seventh Criminal Court. The H. Judge Miriam Niebla was in charge of said court.
46. On 15 September 2000, the Judge Niebla issued a warrant for the arrest of Luis Gallardo, but refused the warrant against Javier Ogarrio and Richard Elliot. The Prosecutor appealed this resolution before the Third Chamber of the Superior Court of Baja California. Fearing arrest, Luis Gallardo would remain in San Diego, California in the United States of America for a period close to six months, during which he would not even go to his office located in Tijuana, Mexico. Gallardo even attempted to obtain a Federal Injunction against his detention, but this endeavor failed when he did not appear before the Federal Judge for a hearing, the purpose of which was to determine a bond he would have been required to post to warrant CALMARK's investment.
47. On 11 October 2000, Joaquin Oseguera appeared before Judge Niebla and sought to grant a pardon to Luis Gallardo using the Power of Attorney to him, Luis Gallardo, Javier Ogarrio and Luis Krasovsky, when they were hired as part of KGO to represent CALMARK against Bisbee, Bacon and BANCOMER.
48. On 15 December, the Third Chamber of the Superior Court of Baja California issued an order concerning the appeal lodged by the Prosecution, and confirmed Judge Niebla's refusal to grant the warrants for the arrest of Javier Ogarrio, and Richard Elliot. The Third Chamber's order was based on a technicality, since it considered that the Prosecutor had not adequately drafted his memorandum of appeal.
49. On 26 March 2001, Luis Gallardo submitted a brief to the Seventh Criminal Court's Judge Miriam Niebla arguing *inter alia* that the time under the relevant limitation period had lapsed; hence, the criminal trial could not be pursued against him. Attorneys for CALMARK were advised of the presentation of said brief, but under the applicable procedural rules a prosecutor would have insufficient time to prepare an adequate opposition to said motion, much less to make any sort of oral argument, since the procedures in Mexico are written. The Judge issued a decree on that same day, granting the dismissal of the case because of the lapsing of the statute of limitations. At best, the conduct of the Seventh Criminal Court was inconsistent with her previous conduct. It is surprising how that same Judge issued a warrant for a person's arrest, and six months later decides that the statute of limitations had lapse.

At best it was a gross example of inefficiency; at worst, corruption or influence peddling were a factor in the Judge's Decision. It is worth noting that

50. The Seventh Criminal Judge concluded that attorney Luis Krasovsky's discovery of the Assignment Agreement entered into by Luis Gallardo, purportedly acting on behalf of CALMARK was equivalent to CALMARK's actual knowledge of the Settlement Agreement. All of the evidence supported the allegation that Luis Krasovsky believed that CALMARK had received the money from the Assignment Agreement and that Luis Gallardo had wrongfully collected the attorney fees owed to KGO. Further, all of the evidence submitted on behalf of CALMARK, the victim of Gallardo and possibly the other suspect's, criminal conduct, made it clear that CALMARK was unaware of the Assignment Agreement until Luis Krasovsky sought to collect the legal fees owed to KGO.
51. The relevant "error" that made the Judge reach this conclusion was her "confusion" of the moment on which Luis Krasovsky—as an "empowered" agent of CALMARK—learned of the Assignment Agreement of 21 September 1994, with the time on which both Luis Krasovsky and CALMARK learned of the actual conversion of the moneys, a discovery that did not occur until 27 August 1996, the date on which CALMARK received a letter demanding payment of the fees claimed owing to the law firm KGO followed by John Scott's phone call to Luis Krasovsky. This fact was supported by thirty-five elements of evidence on file in said criminal complaint,<sup>10</sup> but they were blatantly disregarded the Seventh Criminal Judge.
52. CALMARK now believes that as a consequence of the above measures taken by the Mexican Judiciary, in a process that took almost five years, it has suffered procedural and substantive denial of justice because of the length of time involved in pursuing the criminal and civil cases and appeals derived there from; the failure of the criminal judge to give notice of the brief filed by defendant; the disregarded evidence; the absurd appeals filed by defendants, and because of the blatantly wrongful and unjust conclusion at which the Mexican Judiciary arrived. Said measures of the Mexican Judiciary have for all practical matters, cancelled CALMARK's hope to recoup the amounts invested in the purchase and liquidation of the real estate described herein.

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<sup>10</sup> The decree declaring that the Statute of Limitations had lapsed and thus that there was no further criminal action to be pursued against Luis Gallardo, describes a total of thirty-five items of evidence, which include documents, affidavits, testimony, letters, the preponderance of which made it clear the date on which CALMARK obtained knowledge of when it learned of the Assignment Agreement. The fact that Gallardo converted the monies practically went undisputed, but the Judge reached no final conclusion on that particular fact.

### **III. Discussion on the Breach of Certain NAFTA Provisions**

#### **A. CALMARK MADE AN INVESTMENT IN MEXICO UNDER ARTICLE 1139 OF THE NORTH AMERICAN FREE TRADE AGREEMENT**

53. When CALMARK entered reached their understandings outlining the general business plan paying various amounts of money to acquire the property in Mexico for purposes of developing a tourist attraction, it made an investment as provided for under article 1138(g) of the NAFTA. Said Article provides:

Article 1138: Definitions

For purposes of this Chapter [Eleven, an investment means]:

(g) real estate or other property (tangible and intangible) acquired in the expectation or used for the purpose of economic benefit or other business purposes;

54. The property had been acquired for purposes of developing a tourist attraction, an activity that clearly falls within the scope of business purpose, even under Mexico's Foreign Investments Law.

#### **B. THE MEASURE CAUSING INJURY UNDER ARTICLE 1101(1) OF THE NAFTA**

55. Article 1101(1) of the NAFTA provides that Chapter XI applies to measures adopted by a Party relating to:

- a) Investors of another Party;
- b) Investments of investors of another Party in the territory of the Party

56. A measure under article 201 is “any law, regulation, procedure, requirement or practice”. As stated in a recent ICSID case which also involves the application of Chapter Eleven:

“ The breadth of this inclusive definition [of measure], notable the references to law, procedure, requirement or practice, is inconsistent with the notion that judicial action is an exclusion from the generality of the expression measures. Law comprehends judge-made as well as statute-based rules. Procedure is apt to include judicial as well as legislative procedure. Requirement is capable of covering a court order which requires a party to do an act or to pay a sum of money, while practice is capable of denoting the practice of courts as well as the practice of other bodies.”<sup>11</sup>

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<sup>11</sup> See *The Loewen Group, Inc. and Raymond L Loewen v. United States of America* (ICSID Case No. ARB (AF)/98/3), ¶ 40.

57. Therefore, in light of the relevant facts previously discussed it is evident that the acts of the Mexican Judiciary constitute measures well within the scope of the NAFTA's Chapter Eleven.

### C. VIOLATION OF NAFTA ARTICLE 1105

58. We respectfully submit that the United Mexican States by means of the Mexican Judiciary, particularly by means of the actions of the Seventh Penal Court in Tijuana has violated international law by incurring in procedural and substantial denial of justice. It is settled law that denial of justice is a violation of international law, a standard of treatment provided for under article 1105 of the NAFTA. It is also alleged that the United Mexican States failed to abide by its obligation to provide fair and equitable treatment, and failed to provide full protection and security, and in doing so, caused an economic loss to CALMARK. Article 1105(1) reads as follows:

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. [...]

59. It is hereby alleged that the Mexican Government through the acts of the Mexican Judiciary failed to provide CALMARK with treatment according to the standards set forth in the transcribed proviso, as discussed herein below.

#### 1. Denial of Justice by the United Mexican States

60. Denial of justice has long been considered a violation of international law.<sup>12</sup> Numerous decisions support denial of Justice as a cause of action, even in criminal cases. In *UNITED STATES (LAURA JANES) v. MEXICO (Opinions of Commissioners 108, 1927, General Claims Commission 1926)*, (hereinafter, *The Janes Case*), it was stated that:

“non punishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.”<sup>13</sup>

61. In the instant case, the judiciary allowed the accused parties to walk away from justice, in other words, it failed to repress the commission of a crime.<sup>14</sup>

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<sup>12</sup> See Restatement Third of International Law, §102, Reporters Note 1.

<sup>13</sup> *The Janes Case*, ¶ 19.

<sup>14</sup> *Id.* ¶ 20:

"A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. (Underline added).

62. Previous decisions rendered by Chapter XI Arbitration Panels also support the contention that a State is responsible for the breaches of International Law committed by its tribunals. In *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), the arbitration panel restated this basic principle.
63. In what is considered the authoritative treatise on the matter, ALWYN VERNON FREEMAN wrote: “a private claimant, through his government, may demand substantial damages for any failure on the part of a respondent State to comply with its international duty of repressing a crime or crimes that may have been committed against him.”<sup>15</sup>
64. Pursuant to the International Law Dictionary, a denial of justice “should be understood as any defect in the organization of courts or in the exercise of justice which entails a violation of the international legal duties of States with respect to the judicial protection of aliens.”<sup>16</sup>
65. Pursuant to the Restatement of the Law Third, The Foreign Relations Law of the United States,<sup>17</sup> under Section 712(3): “[a] state is responsible under international law for injury resulting from: [...] other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.”<sup>18</sup>  
Comment (j) to §712:  
“Economic injury to foreign nationals is often intertwined with a denial of domestic remedies.” Comment (j) to §712 further provides that if no effective administrative or judicial remedy is available to the alien to review the legality under international law of an action causing economic injury, the state may be liable for a denial of justice, as well as for the violation of economic rights.”<sup>19</sup>
66. By failing to effectively prosecute defendants in the criminal case discussed in this Notice, the United Mexican States has failed to abide by this obligation to act according to well established principles of international law, to provide an effective

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<sup>15</sup> THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970) [1<sup>st</sup> publ. 1938].

<sup>16</sup> See Denial of Justice, INTERNATIONAL LAW DICTIONARY, p. 1007.

<sup>17</sup> See RESTATEMENT OF THE LAW THIRD; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, as Adopted and Promulgated by The American Law Institute at Washington D.C. May 14, 1986. (Hereinafter RESTATEMENT THIRD).

<sup>18</sup> *Id.* §712.

<sup>19</sup> *Id.* §712, Comment (j).

administration of justice. Even if the Mexican argument were to argue that it acted pursuant to its domestic notions and standards of justice, these would not measure up to international standards. As discussed in the U.S. Mexican Claims Commission:

"the propriety of governmental acts should be put to the test of international standards, and ... the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."<sup>20</sup>

Hence, even if the Mexican Government acted pursuant to its own standards of domestic justice these actions were insufficient to international law standards.

## **2. The Mexican Government's Failure to Provide Fair and Equitable Treatment to CALMARK**

67. The Seventh Criminal Judge's regard for Luis Gallardo's memorandum received on the 26 March 2001 was unwarranted. Not only did the Prosecution have insufficient notice to oppose defendant's motion, but even if said time would have been available, it is unlikely that the prosecution would have discharged its duties with the quality and sufficiency required. State prosecutors are badly paid, and do not have adequate preparation or experience. It is therefore commonplace to have accused criminals wander free because of procedural or tactical mistakes made by the Prosecution.<sup>21</sup> Under these circumstances CALMARK sought but continuously failed to obtain justice using the Mexican institutions charged with prosecuting crimes. The current system is inadequate. Moreover, when the Judge issued her decree solely on the merits of Gallardo's not even CALMARK, the victim of the crime, would have the opportunity to present opposing arguments. The judge decreed that the statute of limitations had lapsed not only ignoring substantial evidence that would support otherwise, but without hearing a single argument that would oppose Gallardo's brief. Though it could be argued that the Seventh Criminal Judge was not required under statute to give notice to the prosecution and victim, this domestic standard of justice is inconsistent with the requirements of the international business community. Both the treatment and the result are blatantly unfair under any standard of justice, be it domestic or international.

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<sup>20</sup> *J. Brierly*, citing the *Neers* case in CARTER, TRIMBLE, INTERNATIONAL LAW, Second Edition. p. 852.

<sup>21</sup> In a highly publicized case, a District Judge in Tijuana allowed suspected members of a criminal organization free due to the Federal Prosecutor's omission of copies of documents. The alleged criminals were believed to be members of an extremely dangerous band of kidnappers.

### **3. The Mexican Government's Failure to Provide Full Protection and Security to CALMARK**

68. The United Mexican States failed to provide full protection and security to CALMARK's investment. As a consequence of the Mexican courts' procedural and substantive denial of justice, which concluded with the failure to adequately prosecute Luis Gallardo *et al.*, the Mexican Government failed to provide protection to CALMARK'S investment. Luis Gallardo diverted amounts from CALMARK'S liquidation of its investment for his personal use, or for other purposes. The Mexican Judiciary's wrongful interpretation of the facts has left CALMARK with no further legal remedy to pursue a criminal complaint in Mexico. By its actions, the Mexican Government has acquiesced to the looting of an investor by failing to adequately prosecute a crime.

#### **D. BREACH OF DUTY TO REFRAIN FROM HINDERING THE TRANSFER OF FUNDS TO PARTY STATE OF THE INVESTOR UNDER NAFTA ARTICLE 1109**

69. Because of Mexico's denial of justice to CALMARK, Mexico effectively failed to permit a transfer relating to CALMARK's sale of its interest in its investment.

Article 1109(1) of the NAFTA provides that:

Each party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include: [...] (b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment[...]

70. We submit that the Assignment Agreement entered into by and between Luis Gallardo on behalf of CALMARK, and SABALO CABO, on 7 September 1994 constituted the sale of the investment under NAFTA article 1109, and that the actions of the Mexican Courts constituted an impediment to the transfer of the investment. Said Assignment not only ended the legal dispute among CALMARK and Robert Bisbee and Betina Bacon, but as a consequence —albeit unknowingly— CALMARK sold its interest in the investment, the proceeds from which were wrongfully diverted by Luis Gallardo. But for the Mexican authorities failure to provide adequate justice to CALMARK, the moneys from said sale would have been recovered from Luis Gallardo and thus, said amounts could have been repatriated to the investor's State.

#### **E. IN THE ALTERNATIVE, THE MEASURES BY THE MEXICAN JUDICIARY CONSTITUTED A MEASURE TANTAMOUNT TO EXPROPRIATION UNDER NAFTA ARTICLE 1110**

71. It is respectfully submitted that certain acts of the Mexican Judiciary constitute a measure tantamount to expropriation. By thwarting the possibility to prosecute Mr. Luis Gallardo, the court has additionally cancelled CALMARK's possibility to seek

reparation by means of the Civil Procedure that is appended to criminal complaints in order to obtain civil redress for grievances stemming from criminal conduct.<sup>22</sup> NAFTA Article 1110 provides that:

“No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

72. When Mexico’s Judiciary systematically denied Justice to CALMARK, it in effect took a measure tantamount to expropriation by depriving it of its expectation to recoup the amounts wrongfully diverted by Luis Gallardo. Said measure was done for a private purpose (for the sole benefit of Luis Gallardo); in clear violation of basic notions of due process of law, justice and equity. Further, said measures occurred with no payment of compensation. Though it could be argued that the actions involved the participation of private litigants, and that the Mexican Government sought simply to resolve this matter according to its principles of justice, these standards do not measure up to the needs and expectations of the international business community. The argument could also be made that the United Mexican States never intended to directly or indirectly expropriate CALMARK's investment. In the case at hand, intent is not relevant. It does not matter what the State has in effect sought or intended to do through its acts or missions, but what the final effect has been: the deprivation of an investor of the proceeds from the unauthorized and covert sale of its investment.

#### **IV. DAMAGES SOUGHT UNDER THIS CLAIM**

73. We respectfully request that the Government of the United Mexican States pay CALMARK the amount of \$400,000.00 U.S. Dollars as damages for the wrongful intervention in the repatriation of proceeds from the sale of an investment under article 1109.
74. In the alternative, CALMARK respectfully requests the amount of \$400,000.00 from the measure tantamount to expropriation taken by the Mexican Judiciary of the State of Baja California, in clear violation of NAFTA article 1110.
75. The interest accrued on the principal amount, estimated as of 7 September 1994, the date on which the Assignment Agreement was signed, the proceeds from which were wrongfully diverted by the defendants in the criminal cases in Mexico.

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<sup>22</sup> See The State of Baja California's Criminal Procedures Code, article 394, which provides that the judge that hears the criminal procedure shall have jurisdiction to hear of the civil claim concerning the payment of an indemnity [damages].

76. Other damages as may be appropriate under established principles of international law.
77. Reasonable attorney fees and other related expenses incurred with regard to the handling of the CALMARK civil and criminal case in Mexico, including the legal fees incurred in the filing of this notice of intent to submit to arbitration, as may be estimated at a future date.

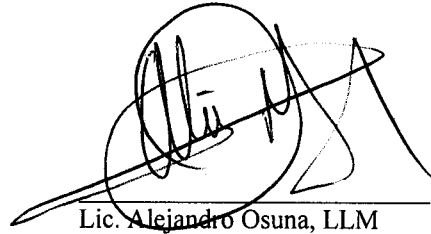
Respectfully submitted,

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