



## TABLE OF CONTENTS

CONTENTS.....	ii
INDEX OF AUTHORITIES.....	iv
INDEX OF ABBREVIATIONS.....	vi
STATEMENT OF FACTS .....	1
ARGUMENT.....	5
I. ICSID HAS NO JURISDICTION TO HEAR THE DISPUTE.....	5
A. <i>ICSID Jurisdiction Does Not Reach the Parties Involved</i> .....	5
1. The SFCDC was not designated to ICSID.....	6
2. VanCal was not controlled by the Calpurnian government.....	7
B. <i>The Claimant Has Not Observed the Dispute Resolution Provision of the         Calpurnia-Gaul BIT</i> .....	9
1. The specified waiting period did not expire, nor did the Claimant initiate formal amicable settlement processes.....	9
2. The Claimant’s trustee has pursued local remedies.....	10
3. Local remedies are sufficient.....	11
C. <i>The Claimant Cannot Gain ICSID Jurisdiction Through the Dispute Resolution         Provisions of a Third-Party Treaty That Has Denounced Participation in the ICSID         Convention</i> .....	13
II. RESPONDENT HAS TREATED CLAIMANT’S INVESTMENT IN ACCORDANCE WITH INTERNATIONAL LAW. ....	14
A. <i>VanCal Was Not Government Controlled, And SFCDC Has Not Exercised Its Rights         As Shareholder Or Depository To Implement A Government Policy of Expropriation.</i> 15	15
1. VanCal is not government controlled; the “piercing the corporate veil” theory is inapplicable.....	15
2. VanCal is not government controlled; the “group of companies” theory is inapplicable.....	17
3. VanCal is not government controlled; the “third party beneficiary” theory is inapplicable.....	18

4. Calpurnia has engaged in no action that constitutes expropriation.....	19
<i>B. VanCal Maintains A Private Entity Status, and Calpurnia has Adequately Protected the Rights of Gaulois Investors.</i> .....	21
1. Calpurnia has maintained its rights as a sovereign while sufficiently creating favorable conditions for Gaulois nationals as agreed to in the Calpurnia-Gaul BIT. .	21
CONCLUSION .....	22
EXHIBITS .....	23

## INDEX OF AUTHORITIES

### LIST OF AUTHORITIES

#### Periodicals

Andrea Vincze, *Jurisdiction Ratione Personae in ICSID Arbitration*, 1 European Integration Studies 111 (2004)

Annie Leeks, *The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law*, 65 U.T. Fac. L. Rev. 1 (Spring 2007)

James. M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 Pepp. Disp. Resol. L. J. 469 (2004)

OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, (Sept. 2004), <http://www.oecd.org/dataoecd/22/54/33776546.pdf>.

Ralph H. Folsom & Michael W. Gordon, *International Business Transactions* 606 (1995)

#### Treaties

Daniel D. Barlow & Alfred Escher, eds., *Legal Aspects of Foreign Direct Investment* (1999)

Georges R. Delaume, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1 International Lawyer (1966)

Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005)

Margaret L. Moses, *International Commercial Arbitration* (Cambridge University Press 2008)

Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965)

Third Restatement of the Law of Foreign Relations

World Bank Guidelines on the Treatment of Foreign Direct Investment

#### Conventions

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966

United Nations Charter of Economic Rights and Duties of States

## **International Treaties**

Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments (Aug. 1, 1995)

Agreement between the Government of the Republic of Calpurnia and the Government of the State of Flatland on the Mutual Promotion and Protection of Investments (Feb. 8, 1992)

## **LIST OF LEGAL RULINGS**

### **ICSID Arbitration Rulings**

*Am. Mfg. & Trading, Inc. v. Republic of Zaire*, (ICSID Case No. ARB/93/1)

*Emilio Agustin Maffezini v. Kingdom of Spain*, (ICSID Case No. 97/9)

*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, (ICSID Case No. ARB/00/4)

*Wena Hotels Ltd. v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4)

### **Other Legal Rulings**

*Gardemal v. Westin Hotel Co.*, 186 F.3d 588 (5th Cir. 1999)

*Bridas S.A.P.I.C. v. Turkmenistan*, 446 F.3d 411 (5th Cir. 2006)

*Bridas S.A.P.I.C. v. Turkmenistan*, 345 F.3d 347 (5th Cir. 2003)

*Kaplan v. First Options of Chicago Inc.*, 19 F.3d 1503 (3d Cir. 1994)

*McPheeters v. McGinn, Smith & Co.*, 953 F.2d 771 (2d Cir. 1992)

*Westmoreland v. Sadoux*, 299 F.3d 462 (5th Cir. 2002)

## INDEX OF ABBREVIATIONS

**“Claimant”** .....Abstract from Claimant’s Request for Arbitration

**“Calendar”** .....Evidence/Calendar of Events

**“Minutes”** .....Minutes of the First Session of the Arbitral Tribunal

**“Respondent”** .....Abstract from Respondent’s Request for Arbitration

## **STATEMENT OF FACTS**

**Claimant:** The Claimant Vanguard International (“Vanguard”) is a mobile telecommunications company. The Claimant is headquartered in Nova Parigi, Gaul. The Claimant’s ownership share of VanCal fluctuated over a period of seven years. The ownership interest spanned from its initial share of 50%, to a peak of 86%, and then, as the result of a number of voluntary share sales, to 30% direct ownership; there was an additional 1% registered in the name of former VanCal Managing Director Francesca Pescara (“Pescara”) (held in trust for the Claimant) by 2004.

**Respondent:** The Respondent is the Republic of Calpurnia (“Calpurnia”).

**Early 1997** The Claimant participated in the establishment of VanCal, a joint venture formed as a Calpurnia corporation operating under the Claimant’s trademark.

**December 2003** Calpurnian Security Forces, responding to a tip that VanCal was engaged in illegal data collection for Gaulois Security Services, searched the homes of Pescara and David Kolowenko (“Kolowenko”), VanCal’s chief technical officer.

**December 2003**

Kolowenko left Calpurnia, never to return.

**June 2004**

Calpurnian Security Forces searched the home of Pescara and former home of Kolowenko a second time in an ongoing counter-espionage investigation.

**July 2004**

The espionage investigation continued with a third search of the Pescara and former Kolowenko residences.

**September 2004**

In September 2004, Pescara's business visa was denied by Calpurnian immigration services. She was advised to enter Calpurnia through a visa waiver program.

**October 2004**

Dr. Jonathan Swift ("Swift") and Mr. Shelley ("Shelley"), representatives of the State Fund for Commerce and Development in Calpurnia ("SFCDC"), were elected to the VanCal Board of Directors.

**November 2004**

Pescara left Calpurnia.

**November 2004**

Pescara resigned as managing director of VanCal but remained on the Board of Directors. Neil Shepherd ("Shepherd") was assigned as her replacement, and he also served on the Board. The Claimant maintained two representatives on the Board of Directors.

**February 2005**

In response to an audit of VanCal, Swift proposed to minimize shareholder payouts and to place the balance in an account for severance pay to cover the company's workers.

**March 2005**

The VanCal Board of Directors agreed that due to an existing dispute between the governments of Calpurnia and Gaul, the payment of profits to foreign shareholders had to be temporarily suspended.

**April 2005**

VanCal declared dividends: 18% of the profit in cash and 10% in stock.

**November 2005**

The Board rejected two deficient proxies held by the Claimant's representative Mr. Rindler ("Rindler") on behalf of Pescara and Shepherd. Pescara was voted off the VanCal Board.

**April 2006**

Shepherd resigned from the VanCal Board.

**June 2006**

Mr. Hunter and Mr. Fowler were assigned to replace Shepherd and Pescara.

**June 2006**

Pescara's application to claim a dividend in her 1% equity interest was summarily dismissed by the Commercial Court of San Inocente de Irkoutsk. Her time for appeal expired.

**October 2006**

Hunter and Fowler resigned. The Claimant declined to replace the two representatives, effectively ending its participation on the VanCal Board.

**February 2007**

The Claimant sent a letter to Mr. Poe at the SFCDC claiming de facto expropriation by Calpurnian state entities and demanding compensation.

**February 2007**

Mr. Poe sent a letter to the Claimant disclaiming government involvement or authority in the matter.

**July 2007**

The Claimant requested ICSID arbitration.

## ARGUMENT

### I. ICSID HAS NO JURISDICTION TO HEAR THE DISPUTE

1. The Claimant relies on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”), and the Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments (“Calpurnia-Gaul BIT”) for relief of alleged investment expropriation. In truth, the Claimant may gain audience with this Tribunal only if the plain language of both the Convention and the Calpurnia-Gaul BIT is ignored. This dispute lies manifestly outside the bounds of ICSID jurisdiction. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 41-42, Oct. 14, 1966 [hereinafter *Convention*].

#### A. ICSID Jurisdiction Does Not Reach the Parties Involved

2. The International Centre for the Settlement of Investment Disputes (ICSID) is designed to facilitate disputes between foreign investors and a host state. *See Convention* at pmb1. Although the Claimant Vanguard constitutes a foreign investor under the Convention, this dispute does not involve the nation of Calpurnia or its political agencies. It is instead a shareholder dispute between Vanguard (a Gaulois corporation), and VanCal (a private joint venture telecommunications firm operating in Calpurnia). *See* Respondent; *see also* Daniel D. Barlow & Alfred Escher, eds., *Legal Aspects of Foreign Direct Investment* 45 (1999) (restating the rule that disputes between a foreign investor and his private joint venture partner in a host state cannot be referred to ICSID). Therefore, ICSID jurisdiction does not exist under the Convention.

3. Article 25 of the Convention grants ICSID jurisdiction only under specific circumstances:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State *designated to the Centre by that State*) and a national of another Contracting State, which

the parties to the dispute consent in writing to submit to the Centre.

*Convention* at art. 25(1) (italics added); *see also* Ralph H. Folsom & Michael W. Gordon, *International Business Transactions* 606 (1995).

1. The SFCDC was not designated to ICSID

4. The Claimant's complaint contains a fatal flaw that should decide the jurisdictional question from the gate. Under Convention Article 25, ICSID jurisdiction extends only to political agencies of contracting states that have been designated to the Centre by the state party. *Convention* at art. 25. Even assuming, *arguendo*, that the SFCDC acted on behalf of Calpurnia in the management of VanCal, ICSID jurisdiction does not cover the activities of the SFCDC because the SFCDC has not been designated to the Centre as a political agency of Calpurnia under Article 25. *See* Claimant; Respondent; Calendar. Therefore, the ultimate questions of the Claimant's complaint cannot be resolved by the Tribunal because they address the conduct of an entity that does not contract under the Convention. *See Convention* at art. 25(3).

5. Designation for purposes of ICSID jurisdiction must be formal. Andrea Vincze, *Jurisdiction Ratione Personae in ICSID Arbitration*, 1 *European Integration Studies* 111, 113 (2004). An acknowledgement of the agency in an investment instrument, involvement in the investment by the agency at issue, or an agreement between the host state and the agency does not amount to designation under the Convention. *Id.*

6. The latest point in time at which a designation of a political agency under Article 25 can be made is the filing of the request to arbitrate. *Id.* If designation has not occurred by then, as is the present case, the Secretary-General must refuse to register the request for arbitration under Convention Article 36(3), or he must find after registration that the jurisdictional requirements have not been met and refuse to hear the matter. *Id.* at 113-14; *see Convention* art. 36(3). The fact that the request has been registered does not prevent the Tribunal from examining the competence of ICSID. *See Am. Mfg. & Trading, Inc. v. Republic of Zaire*, (ICSID Case No. ARB/93/1).

7. Here, Calpurnia has never designated the SFCDC as a political agency for purposes of ICSID jurisdiction under Article 25, and the time for designation has elapsed. *See Vincze supra*, at 113; Claimant; Respondent; Calendar. Therefore, this Tribunal may not entertain the Claimant’s allegations concerning SFCDC management of VanCal and other related charges. *See Convention* at art. 25.

8. Consent of the parties is the cornerstone of ICSID jurisdiction. Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965) [hereinafter *Report*].

Jurisdiction of the Centre rests upon a strictly voluntary basis . . . . Any Contracting State is entirely free to decide in the light of all relevant circumstance whether to consent to the submission of existing or future investment disputes to the jurisdiction of the Centre.

*Wena Hotels Ltd. v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4) (citing Georges R. Delaume, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1 *International Lawyer* (1966)). To find for ICSID jurisdiction in this case would be to overlook the plain language of Article 25, which binds only parties who agree in advance to use ICSID for arbitration of disputes. *See Convention* at art. 25. Non-designation of the SFCDC demonstrates Calpurnia’s opposition to allowing disputes involving the SFCDC to be heard by the Tribunal. To neglect the non-designation of the SFCDC would abrogate the treaty that the nations of Gaul and Calpurnia have signed in respect to the promotion of foreign direct investment (“FDI”), and damage the relationship for purposes of future interaction.

2. VanCal was not controlled by the Calpurnian government

9. The parties have contracted through the Calpurnia-Gaul BIT to allow disputes involving foreign investors and contracting states to be submitted for ICSID arbitration, but this dispute is not covered by the treaty. *See Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments*, Aug. 1, 1995 [hereinafter *Calpurnia-Gaul*

*BIT*]. The SFCDC cannot be considered an arm of the Calpurnian government for purposes of deciding ICSID jurisdiction.

10. The SFCDC is an organization designed primarily to help individual Calpurnian citizens manage their investment portfolios. *See* Respondent. More than one-half of the VanCal shares that the Claimant counts as the SFCDC's are registered in the names of Calpurnian individuals. *Id.* The SFCDC is nothing more than a custodian of Calpurnian investments, and nothing—including national laws and policies—compels Calpurnian citizens to place their holdings on deposit with the SFCDC. Clarifications I: 13.

Individual Calpurnian shareholders who elect to use the SFCDC as an investment manager, including the shareholders who constitute the 22% interest in VanCal, retain ownership rights in the shares, including: (1) proportionate ownership in the assets of VanCal; (2) the right to transfer shares; (3) the right to inspection; (4) the right to file suit against VanCal; and (5) a stake in the liquidation of VanCal assets. Clarifications II: 10,

11. These shareholders are subject to a purchase/agency agreement, but the only requirement for vesting of these shareholder rights is that the shareholder pays the purchase price of the stock. Clarifications II: 12. The real ownership and control of VanCal stock lies with the numerous individual Calpurnians who bought and paid for it, can dispose of it, and who reap the returns from it regardless of SFCDC custodianship.

12. Calpurnia does not deny that various government ministries appointed the SFCDC board, nor does Calpurnia deny that Mr. Poe at one time simultaneously chaired the SFCDC and sat on the VanCal board. Clarifications II: 17, 52(b). However, these relationships do not dictate that VanCal was under Calpurnian control. Nor, do these facts establish that the SFCDC attempted to freeze out Vanguard. Vanguard's ownership in VanCal fluctuated from 86% to 31% over a term of seven years. Claimant. Yet, all Vanguard divestitures of VanCal stock were voluntary. Clarifications II: 2. At no time did Calpurnia nationalize VanCal or otherwise exert pressure on Vanguard to dispose of its shares through the SFCDC. In short, Vanguard share ownership and the elements of control that accompany the ownership have not changed since 2004.

13. The decisive factor for determining whether or not a government-controlled corporation is a political agency of the state is whether the corporation acts on behalf of the state. *Vincze supra*, at 113. Moreover, mere governmental ownership of shares is not enough to prove government control of VanCal. *See id.* Accordingly, the SFCDC's management of VanCal shares, largely in trust for individual Calpurnian investors, takes nothing away from the private, corporate character of VanCal. Disputes between foreign investors and private Calpurnian corporations must be settled in Calpurnian courts, and may not be resolved through international arbitration. *See Respondent.*

**B. The Claimant Has Not Observed the Dispute Resolution Provisions of the Calpurnia-Gaul BIT**

14. There is another dimension to the jurisdiction question in this case: whether the Claimant qualifies for ICSID jurisdiction under the Calpurnia-Gaul BIT. The Calpurnia-Gaul BIT contains provisions concerning dispute resolution that must be followed in order to grant the Claimant's request for ICSID arbitration. *See Calpurnia-Gaul BIT* at art. 11. However, the Claimant has failed to abide by the terms of the Calpurnia-Gaul BIT in three ways.

1. The specified waiting period did not expire, nor did the Claimant initiate formal amicable settlement processes

15. Article 11(2) of the Calpurnia-Gaul BIT states that any investment dispute must be settled amicably within eighteen months from the date of request for amicable settlement before an investor may submit the dispute to international arbitration. *Calpurnia-Gaul BIT* at art. 11(2). The Claimant has failed to comply with this portion of the treaty because it did not wait eighteen months before requesting international arbitration, nor did it formally initiate amicable settlement. *See Calendar.*

16. The Calendar shows that the Claimant requested ICSID arbitration on July 31, 2007. *Calendar.* However, at no time beforehand did the Claimant request amicable settlement. *See id.* An attempt to amicably settle an investment dispute need not be complete or detailed, but it must be constituted of documents that include the existence of grounds for the complaint and an actual request to settle the dispute outside of court.

*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, (ICSID Case No. ARB/00/4). That did not happen here. The Claimant sent one combative letter to Director Poe claiming de facto expropriation and demanding compensation, but that letter was sent on February 5, 2007; this was only five months before the request for arbitration. *Id.* Even if the letter is held to be a request for amicable settlement under Article 11(2) of the Calpurnia-Gaul BIT, the Claimant would have to wait at least thirteen more months before invoking the arbitration clause. *See Calpurnia-Gaul BIT* at art. 11. Nothing the Claimant did prior to sending that letter can meet the amicable settlement standards established by this Tribunal in former arbitrations.

17. The interim promotes settlement by consultation or negotiation, and it is provided to attempt to avoid ICSID arbitration. Cooling-off periods like the one provided for in the treaty are encouraged by most BITs and the World Bank Guidelines on the Treatment of Foreign Direct Investment (Guidelines). *See World Bank Guidelines on the Treatment of Foreign Direct Investment* art. V, § 1 [hereinafter *Guidelines*]; *see also* Barlow & Escher at 120.

18. Article V, section 1 of the Guidelines advises that disputes between private investors and a host state should be settled first through negotiation between them, then through national courts, and finally, as a last resort, through independent arbitration. *Guidelines* at art. V, § 1. The Claimant reversed this order, violating not only the thrust of model international law, but the text of the very treaty under which it seeks relief from this Tribunal. *See* Barlow & Escher at 43 (explaining that parties frequently agree to binding arbitration only when soft procedures like conciliation and mediation fail). Unfortunately, the Claimant rushed to international arbitration here and must therefore be denied jurisdiction under the Calpurnia-Gaul BIT while other avenues of dispute resolution are pursued.

## 2. The Claimant's trustee has pursued local remedies

19. Furthermore, the Claimant's trustee, Ms. Pescara, has already pursued local remedies through the Commercial Court of San Inocente de Irkoutsk. Calendar. Having pursued local remedies, any claims relating to Pescara's shareholdings cannot be heard

by the ICSID Tribunal because the Calpurnia-Gaul BIT specifies that investors who have already submitted disputes to competent courts of the host state shall have no more recourse to international arbitration. *Calpurnia-Gaul BIT* at art. 11(3).

20. Calpurnia does not assert that the Claimant must pursue local remedies before submitting a dispute to ICSID under the Calpurnia-Gaul BIT although similar arguments have a pedigree in international law.

21. The Report, for instance, recognizes the right of a State to require the prior exhaustion of local remedies before arbitration can be triggered. *Report* ¶ 32. In fact, if negotiations fail, the courts of the host state will normally have jurisdiction over disputes arising out of investments made in the country. Barlow & Escher at 103. Usually, as in this case, the investors must choose one of the procedures provided for in the BIT to the exclusion of other procedures. *Id.* at 121. Most BITs prohibit investors from submitting a dispute to ICSID arbitration if the investor has sought recourse in the host country's domestic courts or administrative agencies. *Id.*

22. In spite of the authority suggesting that the Calpurnia-Gaul BIT could have mandated prior exhaustion of local remedies, the treaty simply does not do so. *See Calpurnia-Gaul BIT* at art. 11. However, the treaty does determine that when local remedies are pursued, other remedies under the treaty are foreclosed. *See id.* at art. 11(3); *see also Emilio Agustin Maffezini v. Kingdom of Spain*, (ICSID Case No. 97/9). Since Pescara's claims were summarily dismissed by the Commercial Court, and since her time for appeal has expired, any claims concerning her shareholdings have already been adjudicated and may not come before this Tribunal under the Calpurnia-Gaul BIT. *See Calendar; Clarifications II: 6.*

### 3. Local remedies are sufficient

23. Although economies are globalizing, the law governing FDI is primarily domestic. Barlow & Escher at 27. It would be a mistake to believe that all FDI disputes can be referred to international arbitration. *Id.* at 42. Under most BITs, the regulation of investor obligations is left to local legislation. *Id.* at 108. Furthermore, under customary

international law, sovereign states are free to expropriate and nationalize foreign-owned property as an incident of national sovereignty. *Id.* at 63.

24. States retain full sovereignty to make regulations concerning foreign investment. *See Guidelines* at art. II, § 3. While it may seem that international law ought to apply to takings of foreign property, this notion has been challenged. Folsom & Gordon at 660. The United Nations Charter of Economic Rights and Duties of States affirms the right of nations to expropriate property and provides that compensation issues are to be settled by the domestic courts of the nationalization state. *Id.* (citing United Nations Charter of Economic Rights and Duties of States). Under American law as well, courts will generally refrain from examining the validity of a taking by a foreign state within its own territory or from sitting in judgment of other acts of a governmental character accomplished by a foreign state within its own territory and applicable there. *Id.* at 686 (citing Third Restatement of the Law of Foreign Relations § 443).

25. Such support is not cited to oppose the notion that compensation is due upon expropriation of foreign holdings, but rather to demonstrate that domestic jurisdiction is still preferred in FDI and that local remedies are available to investors. Additionally, the burden of proof in this case is on the Claimant to prove that Calpurnian agencies or courts are insufficient. *See Folsom & Gordon* at 667. Such proof “ought to illustrate deficiencies with the court system,” “the [in]ability of the country to pay settled claims,” or the “[in]appropriateness of the form of any payment the taking nation could afford.” *Id.* The Claimant has not shown any shortcomings in the Calpurnian system.

26. Even when treaties are considered waivers of sovereign immunity, jurisdiction does not default to ICSID arbitration. *See Convention* at art. 25. Instead, agreements to promote FDI under treaties simply limit the affirmative defenses that a state party can assert to nationalization of property. A treaty that allows for settlement of disputes through local administrative or judicial procedures does not per se favor international arbitration.

**C. The Claimant Cannot Gain ICSID Jurisdiction Through the Dispute Resolution Provisions of a Third-Party Treaty That Has Denounced Participation in the ICSID Convention**

27. When faced with treaty language that worked against it, the Claimant opted for protection under a third-party treaty that had formerly denounced the ICSID Convention. *See* Respondent ¶ 1. The Claimant cannot gain jurisdiction in this Tribunal through such means.

28. A treaty between the nations of Calpurnia and Flatland for the promotion of FDI remains in force. Clarifications I: 14. The Claimant relies on a theory of equal treatment to assert that the variant dispute resolution provisions of the Calpurnia-Flatland treaty apply to it in this case since those provisions are more favorable, in the Claimant's opinion, to the investor party to the dispute. *See Calpurnia-Gaul BIT* at art. 4. However, only Calpurnia and Gaul (and not Flatland) remain parties to the ICSID Convention. Clarifications I: 14.

29. Under Convention Article 71, any contracting state may denounce the Convention by written notice, and such denunciation will be effective six months after receipt of notice. *Convention* at art. 71. The nation of Flatland has done just that: The Convention entered into force for Flatland in 1997, but the Centre received Flatland's denunciation on May 2, 2003. Respondent ¶ 1. According to Article 71, the effective date of Flatland's denunciation (the date of expiration) was November 2, 2003 (six months after May 2, 2003). *See Convention* at art. 71. Therefore, Flatland's denunciation of the Convention was finalized a full month before the first searches of Pescara and Kolowenko's residences took place, and years before any request for relief was made to the ICSID Tribunal. Calendar.

30. The Claimant cannot gain jurisdiction to this Tribunal by reliance on the dispute resolution provisions of a treaty that applies to a nation that has no access to ICSID. *See Agreement between the Government of the Republic of Calpurnia and the Government of*

the State of Flatland on the Mutual Promotion and Protection of Investments (Feb. 8, 1992).

31. The jurisdiction of the Tribunal does not extend to this dispute under the Convention, the Calpurnia-Gaul BIT, or the treaty between Calpurnia and Flatland. The SFCDC has not been designated to the Centre. The dispute resolution provisions of the BIT have not been satisfied. Local remedies have already been pursued to the exclusion of others. Additionally, the treaty on which the Claimant relies for equal treatment has expired. The ICSID Tribunal should therefore refuse to hear the Claimant's complaint.

## **II. RESPONDENT HAS TREATED CLAIMANT'S INVESTMENT IN ACCORDANCE WITH INTERNATIONAL LAW.**

32. Customary international law does not preclude signatories of bilateral investment treaties from expropriating foreign investments provided that the following conditions are met: (1) the taking of the investment is for a public purpose as provided by law, (2) the taking is made in a non-discriminatory manner, and (3) and the taking is made with just compensation. OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, 3 (Sept. 2004), <http://www.oecd.org/dataoecd/22/54/33776546.pdf>. The language of the Calpurnia-Gaul BIT reflects this custom. *See Calpurnia-Gaul BIT* at art. 6. Furthermore, not all state actions interfering with property amount to expropriation. OECD, *supra* at 4. Non-discriminatory takings related to anti-trust, consumer protection, securities, environmental protection, and land planning are often viewed as non-compensable takings which are essential to the functioning of a sovereign nation. *Id.* at 5. However for there to be a viable claim for direct or indirect expropriation, there must be both evidence that SFCDC affiliated VanCal board members were actual state actors of Calpurnia and that their respective state actions constituted expropriation. *See id;* *Calpurnia-Gaul BIT* at art. 6.

33. Claimant can neither establish that VanCal was a state actor nor that any action of VanCal exceeded a lawful private corporate action. Accordingly, there is no viable claim for Calpurnian expropriation of Gaulois citizens' assets or state supported discrimination targeting such nationals.

**A. VanCal Was Not Government Controlled, And SFCDC Has Not Exercised Its Right As Shareholder Or Depository To Implement A Government Policy of Expropriation.**

34. As discussed in Part I, SFCDC is a non-signatory of the Calpurnia-Gaul BIT and therefore cannot be bound to the parameters of the treaty. *See* Argument Part I [hereinafter Part I]. Moreover, common law principles of contract and agency law, which certain nation-states and tribunals have used to bind a non-signatory of a BIT, are inapplicable to establish the government control necessary to show expropriation. *See* James. M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 Pepp. Disp. Resol. L. J. 469, 482 (2004). Not only is there no contractual relationship to establish Calpurnian control of VanCal, the following common law and agency laws theories which have been used to establish a parent-subsidary relationship in order to bind a BIT non-signatory are also inapplicable: (1) piercing the corporate veil, (2) group of companies doctrine, and (3) third party beneficiary doctrine. *See* Part I, ¶ 9-12.

1. VanCal is not government controlled; the “piercing the corporate veil” theory is inapplicable.

35. As a general rule, the corporate relationship of parent-subsidary or central government-agency is insufficient to bind a non-signatory to an arbitration agreement. Margaret L. Moses, *International Commercial Arbitration* 36 (Cambridge University Press 2008). However, some courts and international tribunals for purposes of assigning damages based on violations of a treaty have determined that one entity is the “alter ego” of the parent entity when the following conditions are met: (1) “the owner [parent] exercised complete control over the [subsidiary] corporation with respect to the transaction at issue, and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the corporate veil.” Moses, *supra* at 36; *see* *Bridas S.A.P.I.C. v. Turkmenistan*, 345 F.3d 347 (5th Cir. 2003) (citing *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002)).

36. In the case of *Bridas S.A.P.I.C. v. Turkmenistan*, 446 F.3d 411 (5th Cir. 2006), federal courts of the United States evaluated the following factors to determine whether a joint venture entity with some governmental involvement was the alter ego of the parent government. 447 F.3d at 418. When evaluating this claim, the Appellate Court considered the following private law factors expanding on the general rule listed above:

(1) whether the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors and officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are kept separate; (12) the subsidiary does not corporate formalities; (13) the directors of the subsidiary act in the primary and independent interest of the parent; (14) others pay or guarantee debts of the dominated corporation; and (15) the alleged dominator deals with the dominated corporation at arm's length.

*Bridas S.A.P.I.C.*, 447 F.3d at 418.

37. Additionally in *Bridas S.A.P.I.C. v. Turkmenistan*, because the parties in question were government entities, the Court also considered the following factors when determining whether the subsidiary agency was the alter ego of the state for purposes of evaluating sovereign immunity:

(1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use the property.

*Bridas S.A.P.I.C.*, 447 F.3d at 418.

38. The Court in *Bridas S.A.P.I.C.* acknowledged that this was one of the rare instances in both American and international law where the preponderance of evidence supported the notion that a private joint venture acted as the "alter ego" of a Government. *Id.* The court determined that of the twenty-one factors considered the undercapitalization was the pinnacle concern for establishing the alter ego relationship.

*Id.* at 420 (citing *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 594 (5th Cir. 1999)). Because the joint venture (1) maintained a “zero balance;” (2) relied on another entity to service its debts; and (3) the Government “exercised its power as a parent entity to deprive Bidas [the contracting party] of a contractual remedy;” the joint venture was in fact deemed an alter ego of the parent Government. *Bidas S.A.P.I.C.*, 447 F.3d at 420.

39. Unlike the situation in *Bidas S.A.P.I.C.*, there is no indication that Calpurnia has passed any legislation or public ordinance that would direct the respective contractual responsibilities of VanCal. *See* Claimant; *see also* Respondent. Therefore, there is no direct action to find a non-signatory bound to the respective treaty as found in *Bidas S.A.P.I.C.*. Additionally, there is no indication that the government of Calpurnia has taken any responsibility for the debts of VanCal, which would support a theory of alter ego. *See* Claimant; Respondent; Calendar. Finally, there is no indication that there is an undercapitalization of VanCal much less an undercapitalization as a result of the actions of the Calpurnian government raising what the *Bidas S.A.P.I.C.* court characterized a glaring concern. 447 F.3d at 418. Accordingly, unlike *Bidas S.A.P.I.C.*, the rare instance when the theory of piercing the corporate veil/alter ego can be used to establish Government control of a joint venture is not present here; the theory of alter ego will not allow for Calpurnia to be deemed a state-actor for the purposes of an expropriation claim.

2. VanCal is not government controlled; the “group of companies” theory is inapplicable.

40. The “group of companies theory” is similarly inadequate to establish Calpurnian control of VanCal. The group of companies doctrine has been highly criticized due its lack of grounding in legal theory. *Moses, supra* at 34. It finds however that a non-signatory to an arbitration agreement can be bound to the treaty simply based on its association with a signatory of the respective agreement. *Id.* However, a limited number of courts and tribunals have used this doctrine to bind a BIT non-signatory simply based on affiliation to one of the respective sovereign signatories. *Id.* In those rare instances where the tribunal has found a relationship based on association so compelling to bind a non-signatory to the agreement, there was a showing that the respective signatory

companies had near *complete* managerial and financial control of the related companies. *Id.*; Hosking, *supra* at 483-84.

41. As discussed in Part I, neither the government of Calpurnia nor its agency SFCDC has either complete financial or managerial control of VanCal. *See* Part I at ¶ 9-12. Instead, the financial and managerial relationship is as follows: (1) more than one-half of the VanCal shares that the Claimant counts as the SFCDC's are registered in the names of Calpurnian individuals, *see* Respondent; and (2) Mr. Poe at one time simultaneously chaired the SFCDC and sat on the VanCal board. Clarifications II: 17, 52(b).

42. Although there is some association, it is not substantial enough to establish direct government control much less indirect government control under the group of companies doctrine. Accordingly, the showing of complete financial and managerial control of VanCal by Calpurnia is not present here, and the group of companies doctrine cannot be relied on to deem VanCal a state actor for the purposes of an expropriation claim.

3. VanCal is not government controlled; the “third party beneficiary” theory is inapplicable.

43. Although courts in the United States, United Kingdom, and France have applied the theory of third party beneficiary to bind a non-signatory party to an arbitration clause, the rationale behind such decisions is more difficult to apply to the BIT scenario. *See* Hosking, *supra* at 519. Based in general common law contract jurisprudence, for a third party to be the beneficiary of the contract, the party need not always be the intended beneficiary at the time of the contract commencement. *Kaplan v. First Options of Chicago Inc.*, 19 F.3d 1503 (3d Cir. 1994). However, when courts have made a respective arbitration clause applicable to a non-signatory third party based on third-party beneficiary, the court has required there to be an expression of intent to arbitrate the claims made between the third-party non-signatories and a signatory party. *See McPheeters v. McGinn, Smith & Co.*, 953 F.2d 771, 772-73 (2d Cir. 1992). Such expression between a non-signatory and sovereign would be inconsistently applied to a BIT scenario simply based on the longevity of the treaty balanced against the ever

fluctuating control of new business; it would be impractical to expect such expressions between a private entity domiciled in a signatory host state. *See Hosking, supra* at 519-523. Furthermore, this extension of intent to be bound by the treaty becomes even more difficult to assign when the non-signatory party is charged with working on behalf of a signatory sovereign. *Id.*

44. Accordingly, as discussed above, there has been no form of direct expression of intent to be bound by the Calpurnia-Gaul BIT for the purposes of Calpurnia or VanCal's benefit under a third-party beneficiary theory. The third-party beneficiary doctrine accordingly could not be used to establish that VanCal was bound by the Calpurnia-Gaul BIT to act in a particular manner; without such indicia of a state action there is no basis for expropriation.

4. Calpurnia has engaged in no action that constitutes expropriation.

45. In order to establish direct or indirect expropriation, there must be both a state actor and an action which limits the respective control of property warranting a designation of expropriation. OECD, *supra* at 3. As discussed above, there is no basis for establishing that any party has been a "state actor" whether under a theory of direct control, piercing the corporate veil, group of companies doctrine or third party beneficiary. Accordingly, the very acts that Claimant points to as constituting expropriation are merely the lawful actions of either a private company or a sovereign nation.

46. Claimant has two claims for expropriation. The first, asserts that VanCal refused to pay Claimant's dividends as a result of board decision made on November 2005 with an anti-foreign investors agenda; thus, such refusal amounted to Calpurnian expropriation. Claimant ¶ 14-15. Furthermore, Claimant also asserts that because VanCal failed to pay license fees for the use of the VANGUARD INTERNATIONAL trademark and other sums pursuant to a technical agreement, which in itself was outside of the Calpurnia-Gaul BIT, there are additional grounds for an expropriation claim against Calpurnia. Claimant ¶ 19.

47. Although Respondent has renounced the May 2005 e-mail that Claimant has based its claim as an unauthorized and superseded company statement, even if the Claimant has correctly characterized that dividends to foreign shareholders were barred, such a decision of the majority shareholders even if prompted by “anti-foreigners” sentiments was valid. *See* Respondent ¶ 16. While the SFCDC does vote at least one half of the VanCal shares that Claimant counts as the SFCDC controlled, SFCDC does this pursuant to a purchase/agency agreement with the individual investors. Respondent ¶ 8. This underscores the private nature of the decisions. Furthermore, the fact that there are no irregularities in the conduct of board meetings coupled with the reality that all shareholders were treated alike in regards to dissemination of corporate materials etc., there is no indication that the vote was the result of fraud or misconduct; a decision made by the board in those circumstances without further evidence would be deemed valid. Respondent ¶ 12, 15. Because Claimant has failed to establish any Calpurnian governmental interference with VanCal or the respective purchase/agreement between SFCDC and Calpurnian citizens, any disputes arising from minority shareholders dissatisfaction with dividend payments must be heard within the Calpurnian courts. Respondent ¶ 11.

48. Similarly, any dissatisfaction with the allocation of trademarks rights must be heard within Calpurnian courts. The international law that is governing that commercial agreement is a contract that is not encompassed by the Calpurnia-Gaul BIT. *See Calprunia-Gaul BIT*. Therefore, because there has been no government interference with that respective dealing that would violate the public provisions of the Calpurnian-Gaul BIT, this dispute must also be heard within the Calpurnian courts. *See Annie Leeks, The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law*, 65 U.T. Fac. L. Rev. 1, 1 (Spring 2007).

49. Accordingly, because Calpurnia has not taken any actions that would constitute state interference with the management of VanCal, there is no basis for any expropriation claims against Calpurnia. *Id.*

**B. VanCal Maintains A Private Entity Status, and Calpurnia has Adequately Protected the Rights of Gaulois Investors.**

50. "Whatever the rosy rhetoric about the equality of treatment of nationals and foreigners, the very fact of being foreign creates an inequality. The foreigner's obvious handicap--his lack of citizenship--is usually compounded by vulnerabilities with respect to many types of influence: political, social, cultural." Jan Paulsson, *Denial of Justice in International Law* 149 (Cambridge University Press 2005). It is for this very truism that BITs in general have evolved to textually account for fair and equitable treatment of foreign investors. Nicholas DiMascio and Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treatment Treaties: Worlds Apart or Two Sides of the Same Coin?* 102 A.J.I.L. 48, 56 (January 2008); see *Calpurnia-Gaul BIT* at art. 2, 3. However, if there have been any forms of discrimination directed towards Gaulois citizens, it has only been those discriminations as a result of vulnerabilities inherent to simply being a foreign investor as contrasted with any violation of the Calpurnia-Gaul BIT or other international law. *See Id.*

1. Calpurnia has maintained its rights as a sovereign while sufficiently creating favorable conditions for Gaulois nationals as agreed to in the Calpurnia-Gaul BIT.

51. As discussed above, there has been no Calpurnia driven deprivation of Claimant's use and benefit of its 31% interest in VanCal. Furthermore, Claimant's enumeration of treatment of Gaulois nationals to assert some form of discrimination towards Gaulois national investors is inconsequential to the responsibilities set forth in the Calpurnia-Gaul BIT.

52. Claimant has identified the following factors as evidence of discrimination towards Gaulois nationals and state-sponsored deprivation of Claimant's use and benefit of its VanCal shares: (1) the fact that the private homes of Ms. Pescara and Mr. Kolowenko were invaded by Calpurnian authorities on December 7, 2003, June 3, 2004, and July 14, 2004; (2) public agitation towards Ms. Pescara and Mr. Kolowenko after Calpurnian Security Directorate issued press releases associated with the above mentioned searches; (3) public picketing of Ms. Pescara's home by members of the CCC

Women's League brandishing signs reading, "(a) A woman's place is in the home- go home! and (b) Spy in your Own Backyard;" (4) the lack of response by Calpurnian authorities to remove picketers at Ms. Pescara's request; (5) the denial of Ms. Pescara's application for renewal of a three year business visa; (6) a November 2005 vote of the VanCal board to dismiss Pescara from her board duties; (7) rejection of the validity of two shareholder proxies held by Vanguard representative Rindler on behalf of Vanguard thus destabiling a Vanguard favorable vote of Pescara's replacement; (8) the fact that materials sent to Gaulois citizens were no longer translated into Gaulois as had been the previous custom; and (9) the fact that after Vanguard did place two new representatives on the board of directors they resigned only when they were unable to gain favorable outcomes due to its minority status. *See* Calendar; *see also* Claimant.

53. Although Respondent does not deny the factual underpinnings of each of these characterizations, the evidence itself underscores that there has been no inappropriate systematic discrimination towards Gaulois nationals. Instead, each one of the previous factors can be explained as either (1) an exercise of VanCal's status as a private entity with majority share-holders having differing views than many Gaulois nationals who sit in the minority status; (2) a dispute that arose out of a privilege of a foreign visitor that arguably is not provided for by Calpurnian law; or (3) Calpurnia's lawful exercise of its right as a sovereign. Accordingly, there is no relief for these potential personal injuries from the bounds of the Calpurnia-Gaul BIT. *See* DiMascio, *supra* at 57. Accordingly, remedies for shareholders disputes must be raised in Calpurnian courts and be governed by Calpurnian law. *Id.*

## **CONCLUSION**

54. For the foregoing reasons, this Tribunal does not have jurisdiction to hear these claims, and Respondent requests that all claims be dropped as it has only acted in compliance with its obligations under international law.

## **EXHIBITS**

**AGREEMENT  
BETWEEN  
THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA AND  
THE GOVERNMENT OF THE STATE OF FLATLAND  
ON THE MUTUAL PROMOTION AND PROTECTION OF INVESTMENTS**

The Government of the Republic of Calpurnia and the Government of the State of Flatland, hereinafter referred to as "the Contracting parties", desiring to develop the relations of economic cooperation existing between the two countries and to create favorable conditions for investors of one Contracting party in the territory of the other Contracting Party, Recognizing the need to protect investments of the two Contracting Parties and to stimulate the flow of capital and individual initiatives in business with view to the economic prosperity of both states.

Have agreed as follows:

**Article 1**

**Definitions**

For the purpose of this agreement:

- 1- The term "Investment" means every kind of assets and more particularly though not exclusively:
  - A Movable and immovable property rights as well as any other rights in rem; such as mortgages, lines and pledges and guarantees.
  - B Shares, stocks and debentures and other kinds of interests in companies.
  - C Titles to money or to any performance having an economic value.
  - D Intellectual and industrial property rights, including rights with respect to copy rights patents, trademarks, trade names, industrial designs, trade secrets, technological processes, know-how and goodwill;
  - E Business concessions conferred by law or by virtue of a contract, including concessions to search for, develop, extract or exploit natural resources.  
Any alteration of the form in which assets are invested or reinvested or shall not affect their character as investment. Provided that such alteration shall be in accordance with the effective laws in the territory of the party in which the investments established.
- 2- The term "returns" means amounts yielded by an investment and in particular, though not exclusively, includes profits, interests, dividends, capital gains, royalties and fees.

3- The term "Investor" means

any physical person holding nationality or permanent residency of Contracting Party according to the laws of that party; or any company with legal personality or partnership firms, joint ventures, organization, association or enterprise established or incorporated under the laws of a Contracting Party.

4- The term "territory" means.

A In respect of The Republic of Calpurnia : all territories of The Republic of Calpurnia in which Calpurnia has authority is underneath the ground what surface in which it has sovereign rights and jurisdiction according to the international law.

B In respect of the State of Flatland : the State of Flatland soil, territorial waters and along the sea and the seabed of the waters adjacent to the shores of the State of Flatland available beyond the territorial water and the special economic zone on which Flatland has sovereign rights according to its law and the international law for the purpose of exploring and exploiting natural resources (The Continental Shelf)

## **Article 2**

### **Promotion and Protection of Investments**

- 1- Each Contracting Party shall encourage and create favorable conditions for investments made in its territory by investors of the other Contracting party, and accepts such investment according to its laws and national policies.
- 2- Investments of investors from any of the two Contracting Parties shall be treated at all times with fair equitable treatment and enjoy complete and adequate protection and security in the territory of the other Contracting Party.
- 3- The investments returns which re-invested in accordance with laws and regulations of the host contracting party enjoy the same protection and concessions granted to the original investments.

## **Article 3**

### **Most Favoured Nation Treatment**

- 1- Each Contracting Party shall accord to the investments made in its territory by investors of the other Contracting Party a treatment not less favourable than that which in accords in like situation to investments of investors of any third State .
- 2- Each Contracting Party shall accord to the investors of the other Contracting

Party , as regard management , maintenance , use or disposal of their investments , a treatment not less favourable than that which it accords to investors of any third State .

3- The provisions of this Agreement relating to the granting of the most favoured nation treatment , shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the advantages Party the advantages resulting from :

A any economic or custom union , a free trade area or region economic organization , to which either of the Contracting Party is or may become a Party.

B any international or regional agreement or other arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation .

#### **Article 4**

##### Management, Directors and Entry of Personnel

A Contracting Party may not require that an enterprise of that Contracting Party that is an investment under this Agreement, appoint to senior management positions individuals of any particular nationality.

A Contracting Party may require that a majority of the board of directors, or any committee thereof, of an enterprise that is an investment under this Agreement be of a particular nationality, or resident in the territory of the

Contracting Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Subject to its laws, regulations and policies relating to the entry of aliens each Contracting Party shall grant temporary entry to citizens of the other Contracting Party

employed by an enterprise who seeks to render services to that enterprise or a subsidiary

or affiliate thereof, in a capacity that is managerial or executive or requires specialized knowledge.

#### **Article 5**

##### **Expropriation**

1- Investments made by investors of one contracting party in the territory of the other contracting party shall not be expropriated, nationalized or subjected to

other measures having similar effect (hereinafter referred to as "expropriation"), unless such measure is adopted in the public & interest and on non-discriminatory basis and for fair and effective compensation paid immediately provided that such compensation shall cover the true value of the investments immediately prior to nationalization or before the announcement of nationalization (whichever is first) and that compensation includes interests determined at the ordinary commercial interest rate from the date of nationalization until the payment date.

Such compensation shall be paid without delay and to grant the beneficiary investor the right to freely transfer it.

And the investors who suffered as a result to such action have the right to refer it to the national courts or any other independent authority of the contracting party in the territory in which the nationalization has been made to consider the nationalization issue and to assess the effected investments according to the principles mentioned in this paragraph.

- 2- Where a contracting party nationalize assets of a company incorporated in accordance with the laws applicable in any party of his territory, and the investors of the other contracting party have shares in that company, then the contracting party who conducted the nationalization shall undertake to apply the provisions of paragraph (1) of this article to the extent required to guarantee granting immediate and fair compensation for the investors of the other contracting party who own the mentioned shares.

## **Article 6**

### **Free Transfer**

- 1- Each Contracting party shall allow in accordance with its laws, regulations and national policies without undue delay the free transfer in any freely convertible currency:
  - A Net profits, dividends, returns, technical assistance, technical fees and interest and other current income resulted form the investments of the investors of the other Contracting Party.
  - B The proceeds accruing from total or partial sale or liquidation of an investment of the investors of the other Contracting Party.
  - C Funds allocated for settlement of debts and loans provided by investors of one Contracting Party to the investors of the other Contracting Party of what the two parties consider investment.
  - D Income and earnings of employees of either Contracting Party allowed to work in connection of investment in the territory of the other Contracting Party.
- 2- The rates of exchange applied on transfers mentioned in paragraph (1) of this

article are the same rates of exchange in force at the date of the transfer and in accordance with the rates of exchange in the host state.

- 3- The Contracting Party which the investment are invested in its territories undertakes to accord the transfers mentioned in paragraph (1) of this article a treatment not less favorable than that which it accords to investors of any third party.

## **Article 7**

### **Settlement of dispute between the Investor and the Host State.**

All disputes related to investments between any of the two contracting parties and an investor from the other contracting party concerning his investment, if the dispute can not be settled friendly within two months of the dispute notification date by either party it may 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 disputes settlement of the consolidated agreement for agrarian capital investment in semi-arid countries for 1983.
- C The international center for the settlement of investment dispute according to procedure provided for in the convention on settlement of investment disputes between states and nationals of other states, opened for signature at Washington on 18 March 1965.
- D Or to the local judicial authorities for of the other contracting party hosting the investment.

## **Article 8**

- 1- Disputes as to interpretation or application of provisions of this agreement shall be settled through diplomatic channels.
- 2- If such a dispute cannot thus be settled in accordance with item (1) above within six months after the commencement of the negotiations, it shall, upon the request of either Contracting Party, be submitted to a special arbitral tribunal.
- 3- The arbitral tribunal formed for each case as follows: each Contracting Party shall appoint one arbitrator and these two arbitrators shall nominate a chairman

who shall be a national of a third state. The chairman to be appointed within 2 months maximum from the date of receiving the arbitration notification.

- 4- If which any of the periods specified in paragraph (3) the necessary appointments of the arbitral tribunal members have not been made, either contracting party may invite the president of the international court of justice to make any necessary appointments, unless he is a national of either contracting party or if he is otherwise prevented from discharging this function, the Vice-president of the international court of justice shall be invited to make the necessary appointments, if he is not national of either contracting party, or if he is otherwise prevented from discharging this function, the most senior member of the international court of justice, who is not a member of either contracting party, shall be invited to make the appointments.
- 5- The arbitral tribunal takes its decision by majority votes and its decision shall be binding. Each contracting party shall bear the cost of the arbitrator it has appointed and of its representation. The cost of the chairman and the remaining costs shall be borne equally by the contracting parties, and the arbitral tribunal determines its procedures.

## **Article 9**

### **Principle of subrogation**

- 1- Where one Contracting Party has granted any financial security against non-commercial risks in respect of an investment in the territory of the other Contracting Party, the other contracting party shall recognize the rights of the first Contracting Party legal assignee by virtue of a legal document and it includes all rights and claims of the party who received the compensation and recognizes the right of the first party or its assignee to practice such right principle of subrogation to the rights of its nationals to the extent and limits practiced by the party guaranteed or compensated.
- 2- Any payments received by the first contracting party or its assignee in non-convertible currency according to gained rights and claims, shall be available for free disposal by the first contracting party for the purpose to cover any expenses that occur in the territory of the other contracting party.

## **Article 10**

### **Application of other Provisions**

If the provisions of the applicable laws in the territory of either contracting party, or the liabilities according to the international law applied at the time being or will come into force at a later date after signing of this agreement in addition to the provisions of this agreement that include general or specific provisions authorize the investment of the investors of the other contracting party to be granted more favorable treatment than the one provided by the

present agreement, such provisions shall over ride the provisions of the present agreement to the extent of its more favorable treatment.

## **Article 11**

### **Application scope on Investments**

This Agreement apply to investments established prior and after the effective date of this Agreement shall have no effect on disputes occurred prior to the date of its entry into force.

## **Article 12**

This Agreement shall enter into force thirty days after the receipt of the later of notifications showing the completion of both parties the constitutional requirements required for the entry into force of this Agreement.

## **Article 13**

### **Entry into Force , Duration and Termination**

The Agreement shall remain in force for a period of ten years and thereafter shall remain in force except the case of denunciation in writing by one of the Contracting Parties one year before the expiry date . After the expiry of the initial period , the Agreement may denounced any time with not less than one year written notice .

In respect of investments made whilst the Agreement is in force , its provisions shall continue to be effective for a further period of ten years from the date of termination according to the provisions of the general international law.

In witness thereof, the undersigned duly authorized y their governments signed this agreement.

Done at Llano, Flatland on Feb. 8<sup>th</sup>, 1992 in two original copies, in the Esperanto and English languages .

**FOR THE GOVERNMENT OF THE  
REPUBLIC OF CALPURNIA**

**FOR THE GOVERNMENT  
OF FLATLAND**

Note: This is based on an actual BIT from the UNCTAD website. Typos, strange formulations, etc. are found in the ORIGINAL

***Agreement between***  
***the Government of the Republic of Calpurnia***  
***and***  
***the Government of the Federated States of Gaul***  
***on the Promotion and Protection of Investments***

The Government of the Republic of Calpurnia and the Government of the Federated States of Gaul, hereinafter referred to as the “Contracting Parties”,

DESIRING to intensify economic co-operation to the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

RECOGNISING that the promotion and protection of investments on the basis of this Agreement will stimulate business initiatives,

HAVE AGREED AS FOLLOWS:

**Article 1**  
**Definitions**

For the purpose of this Agreement:

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:
  - (a) movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct and similar rights;
  - (b) shares, stocks, debentures or other form of participation in a company;
  - (c) titles or claims to money or rights to performance having an economic value;

- (d) intellectual property rights, such as patents, copyrights, technical processes, trade marks, industrial designs, business names, know-how and goodwill; and
- (e) concessions conferred by law, by administrative act or under a contract by a competent authority, including concessions to search for, develop, extract or exploit natural resources.

Any alteration of the form in which assets are invested or reinvested does not affect their character as investments.

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.

3. The term "Investor" means:

- (a) any natural person who is a national of either Contracting Party in accordance with its laws; or
- (b) any legal person such as company, corporation, firm, business association, institution or other entity constituted in accordance with the laws and regulations of the Contracting Party and having its seat within the territory of that Contracting Party.

4. The term "Territory" means in respect to:

- (a) the Republic of Calpurnia, the territory of the Republic of Calpurnia, including the respective Calpurnian Gulf sector, over which the Republic of Calpurnia exercises, in accordance with its national law and international law, sovereign rights or jurisdiction,
- (b) Federated States of Gaul, the territory, internal waters and territorial sea over which the Federated States of Gaul exercise, in accordance with its national law and international law, sovereign rights or jurisdiction.

## **Article 2**

### **Promotion and Protection of Investments**

1. Each Contracting Party shall encourage and create favourable conditions in its territory for investments by investors of the other Contracting Party and in exercise of powers conferred by its laws shall admit such investments.
2. Each Contracting Party shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.

3. Each Contracting Party shall not impair by unreasonable, arbitrary or discriminatory measures the management, maintenance, use, enjoyment, acquisition or disposal of investments in its territory of investors of the other Contracting Party.
4. Each Contracting Party shall not impose mandatory measures on investments by investors of the other Contracting Party concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having unreasonable or discriminatory effects.
5. Each Contracting Party shall, within the framework of its legislation, give a sympathetic consideration to applications for necessary permits in connection with the investments in its territory, including authorisations for engaging executives, managers, specialists and technical personnel of the investor's choice.

### **Article 3 Transparency**

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

### **Article 4 Treatment of Investments**

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

### **Article 5 Exceptions**

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of:

- (a) any existing or future free trade area, customs union, common market or regional labour market agreement to which one of the Contracting Parties is or may become a party,
- (b) any international agreement or arrangement relating wholly or mainly to taxation, or any domestic legislation relating to taxation, or
- (c) any multilateral convention or treaty relating to investments, of which one of the Contracting Parties is or may become a party.

## **Article 6 Expropriation**

1. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalisation (hereinafter referred to as “expropriation”) except for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation.
2. Such compensation shall amount to the fair market value of the expropriated investment at the time immediately before the expropriation was taken or became public knowledge, whichever is earlier.
3. Such fair market value shall be expressed in a freely convertible currency on the basis of the market rate of exchange existing for that currency at the moment referred to in paragraph 2 of this Article. Compensation shall also include interest at a commercial rate established on a market basis for the currency in question from the date of expropriation until the date of actual payment.
4. The investor whose investments are expropriated, shall have the right to prompt review by a judicial or other competent authority of the host Contracting Party of its case and of valuation of its investments in accordance with the principles set out in this Article.

## **Article 7 Compensation for Losses**

1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement no less favourable than that which the latter Contracting Party accords to its own investors or investors of any third State, whichever is the most favourable to the investor. Resulting payments shall be effectively realisable, freely convertible and immediately transferable.
2. Without prejudice to paragraph 1 of this Article, an investor of one Contracting Party who, in any of the situations referred to in that paragraph, suffers a loss in the territory of the other Contracting Party resulting from:
  - (a) requisitioning of its investment or a part thereof by the latter's armed forces or authorities, or
  - (b) destruction of its investment or a part thereof by the latter's armed forces or authorities, which was not required by the necessity of situation,shall be accorded prompt, adequate and effective restitution or compensation.

## **Article 8**

### **Free Transfer**

1. Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of payments in connection with an investment. Such payments shall include in particular, though not exclusively:
  - (a) the principal and additional amounts to maintain, develop or increase the investment;
  - (b) returns;
  - (c) proceeds obtained from the total or partial sale or disposal of an investment;
  - (d) the amounts required for payment of expenses which arise from the operation of the investment, such as payment of royalties and licence fees or other similar expenses;
  - (e) compensation payable pursuant to Articles 6 and 7;
  - (f) payments in respect of management fees;
  - (g) payments arising out of the settlement of a dispute;
  - (h) payments in connection with contracts, including loan agreements;

- (i) net earnings and other remuneration of personnel engaged from abroad working in connection with an investment.
2. Transfers referred to in paragraph 1 of this Article shall be made without any restriction or delay, in a freely convertible currency and at the prevailing market rate of exchange applicable on the date of transfer in the currency to be transferred. If a market rate is unavailable the applicable rate of exchange shall be the most recent rate of exchange for conversion of currencies into Special Drawing Rights.
3. Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay a transfer through the equitable, non-discriminatory and good faith application of measures ensuring investors' compliance with the host Contracting Party's laws and regulations relating to the payment of taxes and dues, provided that such measures and their application shall not unreasonably impair the free and undelayed transfer ensured by this Agreement.

### **Article 9 Subrogation**

Where a Contracting Party or its designated agency (guarantor) makes a payment under a guarantee it has accorded in respect of non-commercial risks of an investment in the territory if the other Contracting Party, the host Contracting Party shall recognise the assignment to the guarantor of all the rights and claims resulting from such an investment, and shall recognise that the guarantor is entitled to exercise such rights and enforce such claims to the same extent as the original investor.

### **Article 10 Consultations**

The Contracting Parties agree to consult promptly, on the request of either, to resolve any dispute in connection with this Agreement, or to review any matter relating to the implementation or application of this Agreement or to study any other issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties at a place and at a time agreed upon by the Contracting Parties through diplomatic channels.

### **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.
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.

## **Article 12**

### **Disputes between the Contracting Parties**

1. Disputes between the Contracting Parties concerning the interpretation and

application of this Agreement shall, as far as possible, be settled through diplomatic channels.

2. If the dispute cannot thus be settled within six (6) months, following the date on which such negotiations were requested by either Contracting Party, it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.
3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way. Within two (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within four (4) months from the date of appointment of the other two members.
4. If within the periods specified in paragraph 3 of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party or is not otherwise prevented from discharging the said function, shall be invited to make the necessary appointments.
5. The Arbitral Tribunal shall reach its decision by a majority of votes. The decisions of the Tribunal shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of the member appointed by that Contracting Party and of its representation at the arbitral proceedings. Both Contracting Parties shall assume an equal share of the cost of the Chairman, as well as other common costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.

### **Article 13** **Application of other Rules**

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a regulation, whether general or specific, entitling investments made by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provisions shall, to the extent that they are more favourable to the investor, prevail over this Agreement.

### **Article 14** **Application of the Agreement**

This Agreement shall apply to investments existing at the time of entry into force of this Agreement as well as to those established or acquired thereafter, but shall not apply to disputes concerning an investment, which arose before its entry into force.

**Article 15**  
**Entry into Force, Duration and Termination**

1. The Contracting Parties shall notify each other when the internal procedures necessary for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the thirtieth day following the date of receipt of the last notification.
2. This Agreement shall remain in force for a period of ten (10) years and shall thereafter remain in force on the same terms until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months.
3. In respect of investment made prior to the date of termination of this Agreement the provisions of Articles 1 to 14 shall remain in force for a further period of fifteen (15) years from the date of termination of this Agreement.

IN WITNESS WHEREOF, the undersigned representatives, duly authorised thereto, have signed the present Agreement.

Done at Nova Parigi, Gaul on 1 August 1995 in three originals in the Calpurnian, Gaulois and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Government of  
the Republic of Calpurnia

For the Government of  
the Federated States of Gaul

Note: This is also based on an actual BIT from the UNCTAD website. Typos, strange formulations, etc. are found in the ORIGINAL