

TARAZI 

ICSID CASE No. ARB/X/X

IN THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES

VANGUARD INTERNATIONAL ,
Claimant,

-against-

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA ,
Respondent,

MEMORIAL FOR RESPONDENT

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Preliminary Statement

This is a case in which an integral part of a State's infrastructure, on which every citizen relies and without it corrupts the legitimacy of the State, was threatened by greed and unilateral considerations. Additionally, this is a case that should not be in front of this Tribunal as this case involves matters between shareholders and the board of directors of a private corporation. As such, the Government of the Republic of Calpurnia duly refutes the claims brought against it by Vanguard International. Calpurnia abided by its obligations set forth in 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 to not discriminate against Vanguard International; to fully protect Vanguard International's investment; to not obstruct the transfer of funds; and to not unlawfully interfere with Vanguard International's investment. Further, in no way do any actions claimed to be attributable to Calpurnia amount to expropriation or remotely resemble expropriation.

First, Vanguard International's claims take aim at the actions of the board of directors of VanCal, the joint venture to which Vanguard International and the State Fund for Commerce and Development in Calpurnia took part. The board of directors has no relation to the Government of Calpurnia and the State Fund for Commerce and Development in Calpurnia is not a government body that creates liability on behalf of the State with regards to investments made. Secondly, the VanCal board of directors abided by the proper corporate governance procedures for the given situation. Thirdly, Vanguard International made a conscious effort to abandon their investment despite a plea from the VanCal board of directors not to. And lastly, this action has already been brought before another tribunal, the Commercial Court of San Inocente de Irkoutsk, which summarily dismissed the case.

As it stands, Calpurnia did not violate 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. All claims brought by Vanguard International before this Tribunal should be dismissed.

Statement of the Facts

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

Initially, Vanguard owned a 50% equity interest in VanCal. Through separate agreements, Vanguard provides technical assistance and trademark licensing to VanCal. From 1997 the equity interest held by Vanguard has fluctuated, with its highest percentage being 86%. By 1994, Vanguard held 30% directly, and an additional 1% registered in the name of Francesca Pescara, which was held in trust for Vanguard.

The SFCDC owns 30% of VanCal’s stock directly. The SFCDC also holds on deposit and votes another 22% of VanCal stock registered in the names of several hundred individuals. The other 17% of VanCal stock is directly held by Calpurnian nationals. Specifically in 2004 and 2005, VanCal’s shares were held by Calpurnian firms, banks and companies (41%), foreign companies (30%), and individuals (29%). Calpurnia owns no stock in VanCal.

In November 2003 the Conservative Conscience of Calpurnia (“CCC”) won an absolute majority in both chambers of the Calpurnian Parliament. While Claimant makes unfounded assertions that the CCC is hostile to foreign countries, the CCC’s main political goal is to protect the Calpurnian infrastructure and to encourage nationalism. Further, the Calpurnian Government made no laws forbidding Calpurnian corporations to pay foreign shareholders dividends. Thus in 2004, 2005, 2006, and 2007 the dividends that were supposedly not paid to Vanguard is a shareholder issue to be dealt with VanCal – and not Calpurnia.

On 21 May 2005, Vanguard wrote a letter to Mr. Korchnoi, a representative of Vanguard on VanCal’s board of directors (“Board”), requesting that the amount of the dividend payable be placed in a separate bank account in Vanguard’s name. On 27 May 2005, Mr. Korchnoi sent an unauthorized e-mail to Vanguard claiming that VanCal cannot pay any sums of money for any reason to foreign shareholders. In response to this e-mail, on 5 June 2005 Vanguard wrote to Mr. Swift, the SFCDC’s representative to the Board, and Mr. Korchnoi requesting further

information regarding the decision of 10 March 2005 referred to in Mr. Krochnoi's e-mail of 27 May 2005. However, no communication was ever made at this time to the Respondent – only to VanCal.

In December 2003, June and July 2004 the Calpurnian Security Forces searched the homes of Ms. Pescara and Mr. Kolowenko, two representatives for Vanguard, in a lawful search. Their homes were searched due to national security requirements. The press releases issued by the Calpurnian Security Directorate about the searches were factually accurate. Any misinterpretation by the Calpurnian public cannot be considered the fault of the Calpurnian Government.

In November 2004, Ms. Pescara voluntarily resigned as managing director of VanCal but remained one of Claimant's representatives on the Board. In November of 2005, two proxies were denied for a board meeting, because the proxies had only been given for the 11 October 2005 board meeting. During this board meeting, Ms. Pescara was voted off the Board by a majority vote of the shareholders, and Mr. Poe, a representative of the SFCDC, and Mr. Korchnoi resigned. Two of the opened Board seats were then replaced by two representatives of the SFCDC, by a unanimous vote of the shareholders. The other seat was then occupied by Mr. Rindler, a representative of Vanguard.

During this time, Ms. Pescara, as a representative of Vanguard, sued in the Commercial Court of San Inocente de Irkoutsk ("Commercial Court"). The Commercial Court summarily dismissed Ms. Pescara's request that the 1% shareholding interest that she held in trust for Vanguard be paid to her account in Gaul. The court held on 14 June 2006 that Ms. Pescara had no standing to bring the action.

In an e-mail of 28 September 2006 from Mr. Swift, on behalf of the VanCal board, Vanguard was told of the Board's decision to credit the dividends payable to VanCal's books to the Claimant's accounts. While, the Articles of Association do not contain a provision authorizing the company to credit dividends to a shareholder's account, the Articles similarly do not forbid this action. In October 2006, Vanguard removed all its representatives from the Board. VanCal sent Claimant an e-mail on 11 November 2006 suggesting that new directors be designated, but the Claimant never responded to the e-mail.

Vanguard sent a letter dated 5 February 2007 to Mr. Poe, a representative of the SFCDC who was no longer on the Board, stating that a de facto expropriation had occurred through

Calpurnian state entities and demanded that Mr. Poe transmit this issue to his superiors including the appropriate Ministers of the Calpurnian Government. Mr. Poe in a letter dated 21 February 2007, informed Claimant that there was no need to involve the government in a dispute between shareholders. The letter explained that VanCal was in no worse of a condition than when Vanguard controlled the Board. Then, with no response from Vanguard, and no attempt to contact Calpurnia, Vanguard filed a request of arbitration on 31 July 2007.

I. THIS ESTEEMED TRIBUNAL DOES NOT HAVE JURISDICTION OVER VANGUARD INTERNATIONAL'S CLAIM AGAINST THE RESPONDENT.

This Tribunal does not have jurisdiction over Vanguard's claims. First, the SFCDC is not a representative of Calpurnia; therefore, the SFCDC cannot create liability on behalf of Calpurnia under the Calpurnia-Gaul Bilateral Investment Treaty ("Calpurnia-Gaul BIT"). Second, Vanguard has refused to make a good faith effort at an amicable settlement for eighteen months as required by Article 11(2) of the Calpurnia-Gaul BIT. Next, Article 4 of the Calpurnia-Gaul BIT does not include expansive enough language to permit the adjudicative articles of the Calpurnia-Flatland Bilateral Investment Treaty ("Calpurnia-Flatland BIT") to apply to any agreements between Vanguard and Calpurnia. Fourth, even if the Tribunal believes that the Calpurnia-Flatland BIT does apply, when Flatland denounced the ICSID Convention on 2 May 2003, the Flatland-Calpurnia BIT could no longer apply to the Calpurnia-Gaul BIT. Since the Calpurnia-Flatland BIT no longer allows for ICSID arbitration, the Calpurnia-Flatland BIT can no longer be applied to any ICSID arbitrations. Finally, the Claimant is simply attempting to re-adjudicate a claim that it has already lost in the domestic courts of Calpurnia. Therefore, Vanguard forfeited its right to seek arbitration under Article 11 of the Calpurnia-Gaul BIT.

A. THE STATE FUND FOR COMMERCE AND DEVELOPMENT IN CALPURNIA IS NOT A REPRESENTATIVE OF THE CALPURNIA-GAUL BILATERAL INVESTMENT TREATY AND DOES NOT CREATE LIABILITY ON BEHALF OF CALPURNIA.

The Claimant argues that the actions of the SFCDC create liability on behalf of Calpurnia, for which Calpurnia must compensate Vanguard. This is incorrect. A review of the Calpurnia-Gaul BIT, applicable case law, and the facts demonstrates that the SFCDC is a private investment corporation, thereby turning liability, if any, away from the Respondent.

The Calpurnia-Gaul BIT begins by establishing the parties which it governs.¹ While the SFCDC was a contracting party to the VanCal joint venture, it is not a contracting party as established by the Calpurnia-Gaul BIT. The SFCDC is not a party to this case and no designation has been made or consent been given by the Respondent to this effect. Lastly, the Claimant does not attribute any part of the Calpurnia-Gaul BIT to creating a relationship of liability between the SFCDC and the Respondent, therefore this Tribunal has no capacity to make a judgment directly impacting the SFCDC.

The Claimant erroneously made claims against the SFCDC which could be supported by an incorrect interpretation of the *Maffezini* case.² According to that tribunal:

Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State. Just as the Centre has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State.³

The Claimant gives the impression that, while attempting to place onus on the Respondent, the members of the SFCDC, and the SFCDC itself, have tainted their investment. As such, the Claimant makes this out to be a dispute between two private entities, Vanguard and the SFCDC, and this Tribunal is an inappropriate forum for such an action.

The Claimant incorrectly applies the structural and functional tests established in the *Maffezini* case. Respectively, these tests focus on a private entity's structure containing elements of a governmental authority and the ability to discharge an essentially governmental function.⁴ In that case, SODIGA, the private entity in question, had over 88% of its capital owned by the government.⁵ Further, the Ministry of Industry, Ministry of Finance, and Council of Ministers were the governmental bodies involved in creating SODIGA, which "points to the

¹ See Calpurnia-Gaul BIT Preamble ("The Government of the Republic of Calpurnia and the Government of the Federated States of Gaul, hereinafter referred to as the 'Contracting Parties'").

² *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000), 124 I.L.R. 9 (2003).

³ *Id.* at para. 74 (quoting ICSID Convention art. 25(1); Aron Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Colum. J. Transnat'l L. 263, 265 (1966)).

⁴ *Id.* at para. 89 ("the structural test of State creation and capital ownership and the functional test of performing activities of a public nature").

⁵ *Id.* at para. 83 ("the percentage of governmentally owned capital of SODIGA had increased to over 88%").

fact that it was established to carry out governmental functions.”⁶ For SODIGA, its “objectives and functions [were] by their very nature typically governmental tasks, not usually carried out by private entities, and, therefore, [could not] normally be considered to have a commercial nature.”⁷

Although the Claimant may quote the dual *Maffezini* tests, the Claimant would ignore the factual findings of that tribunal. The facts are as important, if not more, than the case law and they support the Respondent.⁸ Regarding the structure of the SFCDC:

[a]t least one-half of the VanCal shares which the Claimant counts as the SFCDC’s are in fact registered in the names of individual farmers and workers. While the SFCDC votes these shares, it does so only pursuant to a purchase/agency agreement which places ownership in the hands of the individuals, but leaves voting rights on the hands of the SFCDC while the purchase price of the shares remains unpaid.⁹

The SFCDC’s capital is principally owned by entities other than Respondent.¹⁰ Thus, the SFCDC is nothing like SODIGA and does not pass the structural test.

Regarding the function of the SFCDC, the SFCDC behaves as any private corporation which chooses to establish a joint venture.¹¹ Unlike SODIGA, investing in a joint venture is an activity normally considered to have a commercial nature. As the majority vote holder, the SFCDC had a legitimate right to act as it did. Controlling a board of directors does not create liability on behalf of Respondent. Consequently, the SFCDC does not pass the functional test. Therefore, the SFCDC is not representative of the Respondent and does not create liability on behalf of Respondent.

⁶ *Id.* at para. 85.

⁷ *Id.* at para. 86.

⁸ *Id.* at para. 82 (“Whether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principle of international law.”).

⁹ Respondent’s Reply to Request for Arbitration at para. 8, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

¹⁰ *Id.* at para. 9 (“In the years ending December 2004 and 2005, Calpurnian firms, banks and companies held 41%, foreign companies held 30% and natural persons, including farmers and workers, held 29% of VanCal’s issued shares.”).

¹¹ *Id.* at para. 11 (Majority share ownership by individual government entities does not essentially alter the private character of the company and must be distinguished from expropriation. VanCal remains an independent private corporation and the current dispute arises solely from minority shareholders’ dissatisfaction with the majority shareholders’ exercise of their legitimate management rights.”).

B. VANGUARD DID NOT SEEK AN AMICABLE SETTLEMENT FOR EIGHTEEN MONTHS AS REQUIRED BY ARTICLE 11(2) OF THE GAUL – CALPURNIA BILATERAL INVESTMENT TREATY.

The Calpurnia-Gaul BIT requires, under Article 11, section 2, that the investor can only seek international arbitration “if the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement.”¹² Thus, from the plain language of treaty, Vanguard is required to seek an amicable settlement for eighteen months. Vanguard did not make a request for amicable settlement till 5 February 2007, and then requested arbitration on 31 July 2007.¹³ Thus, Vanguard only waited five months, and not the required eighteen months. Therefore, this Tribunal should deny jurisdiction until the full eighteen months has passed.

In interpreting treaties the Vienna Convention on the Law of Treaties, Article 31 requires that the treaty is interpreted “according to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁴ Therefore, there can be no argument that eighteen months of negotiations between Vanguard and the Respondent is required before Vanguard can seek arbitration. However, Vanguard has completely ignored this ordinary meaning of the treaty. Instead, Vanguard is attempting to seek arbitration before seeking an amicable settlement with the Respondent.

In *Tradex Hellas, v. Republic of Albania*, the ICSID tribunal found that an investor must make a “good faith effort” in attempting to find an amicable settlement before seeking arbitration.¹⁵ In *Tradex*, the bilateral investment treaty (“BIT”) between Greece and Albania required an attempt to settle any disputes amicably before seeking arbitration.¹⁶ The tribunal found that the investor, Tradex, had made a good faith effort to find a settlement before seeking arbitration.¹⁷ Tradex sent five letters to the Ministry of Agriculture to seek an amicable settlement; however the Ministry never answered the five letters.¹⁸

Even if this esteemed Tribunal finds that the Claimant began to seek an amicable settlement on 5 June 2005, Vanguard still failed to make a good faith effort as required by

¹² Calpurnia-Gaul BIT at art. XI, ¶. 2, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

¹³ Evidence / Calendar of Events at 5 Feb. 2007 and 31 July 2007, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

¹⁴ Vienna Convention on the Law of Treaties Article 31 (1) (1969)

¹⁵ Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award (29 April 1999).

¹⁶ *Id.* at 182 – 184.

¹⁷ *Id.*

¹⁸ *Id.*

Tradex. After an unauthorized e-mail from Mr. Korchnoi dated 27 May 2005, Vanguard sent an e-mail dated 5 June 2005 to VanCal, specifically Mr. Korchnoi and Mr. Swift.¹⁹ In this e-mail, Vanguard only requested information from the Board, and requested no information from Calpurnia.²⁰ Further, this e-mail was not sent to any minister within the state of Calpurnia. The e-mail was only sent to Mr. Korchnoi, the Claimant’s own representative, and Mr. Swift, who simply sits on the boards of both VanCal and the SFCDC. Neither of these gentlemen are ministers of Calpurnia; therefore Vanguard never attempted to amicably settle anything with the Respondent. Vanguard only attempted to amicably settle a simple shareholder disagreement between Vanguard and VanCal.

C. THE CALPURNIA – FLATLAND BILATERAL INVESTMENT TREATY HAS NO BEARING ON ANY AGREEMENTS BETWEEN VANGUARD AND CALPURNIA.

The Calpurnia-Gaul BIT does not permit the application of Article 3 of the Calpurnia-Flatland BIT because the most favored status of investments does not extend to adjudication. There is no expansive language within Article 4 of the Calpurnia-Gaul BIT, rather the BIT fully and specifically defines exactly what the most favored status extends to within the BIT. Furthermore, even if the Calpurnia–Flatland BIT applies, Vanguard still has the requirement to make a good faith effort in seeking an amicable settlement. Therefore, the Calpurnia-Flatland BIT cannot apply to adjudicative matters in the Calpurnia-Gaul BIT.

Moreover, since Flatland has denounced ICSID arbitration, the Calpurnia-Flatland BIT cannot extend to Vanguard’s investment. ICSID tribunals have held that even if a party later denounces ICSID, this denouncement does not change the terms of the investment treaty. However all of these cases have only applied to investments made directly under the denounced BIT. Thus, there is no requirement that the, now denounced, Calpurnia-Flatland BIT still continues to affect other bilateral investment treaties.

1. ARTICLE 4 OF THE CALPURNIA-GAUL BILATERAL INVESTMENT TREATY DOES NOT PERMIT THE APPLICATION OF ANY SECTION OF THE CALPURNIA – FLATLAND BILATERAL INVESTMENT TREATY.

The Calpurnia-Gaul BIT Article 4, section 2 requires only that Gaulois investors are treated equal to other investors regarding the “management, maintenance, use, enjoyment or

¹⁹ Evidence / Calendar of Events at 27 May 2005 and 5 June 2005, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

²⁰ *Id.* at 5 June 2005.

disposal of their investments.”²¹ Since seeking an amicable settlement and seeking arbitration has nothing to do with the use or enjoyment of investments, the Calpurnia-Flatland BIT does not apply to this case. Therefore, Vanguard needed to attempt an amicable settlement for eighteen months and not the two months permitted in the Calpurnia-Flatland BIT.²²

The first step in interpreting treaties is deciding “the ordinary meaning to be given to the terms of the treaty.”²³ The ordinary meaning of the Calpurnia-Gaul BIT is that in order for most favorable treatment to be given to the investor, the issue must first regard use, enjoyment, or disposal of the investment. Arbitration does not apply to the use, enjoyment, or disposal of investments. Arbitration is an adjudication of rights under a BIT – not a decision of contractual issues between shareholders. Since Vanguard requested arbitration on 31 July 2007,²⁴ Vanguard needed to begin seeking an amicable settlement eighteen months earlier. However, Vanguard only sought an amicable settlement by 5 February 2007 – a mere five months before seeking arbitration.²⁵

The current case is dissimilar to *Maffezini v. Spain*, in which the tribunal held that the Most Favored Nation clause was applicable towards the “administration of justice” because the BIT in question mentioned “all rights” as applicable to most favored treatment.²⁶ Article 4 of the Calpurnia-Gaul BIT names very specific issues which permit the investor to seek the most favorable treatment to the investor. The Calpurnia – Gaul BIT does not use the expansive language that was used in *Maffezini*. A similar decision was found in *Ambatielos, Merits, Judgment*, because of the expansive language in the Most Favored Nation clause which, again, used the term “all rights.”²⁷

Since, the word “all” was specifically not used in the Calpurnia – Gaul BIT, the expansive holdings of *Maffezini* and *Ambatielos* cannot be applied in this case. In order for

²¹ Calpurnia-Gaul BIT at art. IV, ¶ 2, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

²² Calpurnia-Flatland Bilateral Investment Treaty, Article 3, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

²³ Vienna Convention on the Law of Treaties art. 31(1), 23 May 1969.

²⁴ Evidence / Calendar of Events at 31 July 2007, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

²⁵ Evidence / Calendar of Events at 5 Feb. 2007, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

²⁶ *Maffezini v. Kingdom of Spain*, ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000), 124 I.L.R. 9 (2003).

²⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 at ¶¶ 118 – 119, Award (31 Jan. 2006), 44 I.L.M. 569 (2005) (quoting *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*).

Vanguard to receive its full use, enjoyment, or disposal of its investments, it is not necessary to shorten the required negotiation of amicable settlement from eighteen months to two months.

The situation between Vanguard and Calpurnia is similar to *Salini Costruttori et al. v. Hashemite Kingdom of Jordan*, in which the ICSID tribunal found that the Most Favored Nation clause could not be invoked by Salini Costruttori S.p.A. and Italstrade S.p.A.²⁸ In that case, there was no all-encompassing language in the Most Favored Nation clause, like in the Calpurnia-Gaul BIT.²⁹ Ultimately, the case was decided based on a specific clause in the BIT in the *Salini* case that explicitly denied ICSID arbitration between an investor and an entity of a state party, thus ICSID arbitration would have been explicitly against the policy of the treaty. However, the holding that the Most Favored Nation clause would not apply is still valid, especially when the Calpurnia-Gaul BIT is similar to the BIT in the *Salini* case.

Even if the Tribunal finds that the Calpurnia-Flatland BIT applies to the current case, Vanguard still did not make a good faith effort at an amicable settlement for two months, as required by *Tradex*. On 23 October 2006 Vanguard, with no warning, removed all of its representatives from the Board and declined to replace the representatives.³⁰ Then VanCal, in an attempt to amicably settle the disagreement between itself and Vanguard, sent an e-mail on 11 November 2006 which suggested that new directors should be designated by Vanguard.³¹ Three months later, Vanguard finally sent a letter on 5 February 2007 to Mr. Poe, the Chair of the SFCDC, in which it claimed de facto expropriation and demanded compensation.³² Further in that e-mail, Vanguard requested that Mr. Poe transmit this information to his superiors, including the appropriate ministers.³³ Mr. Poe, who was no longer even a board member of VanCal, replied to the letter in which he declined to involve the government in a purely internal shareholder dispute, and, further, the Respondent has no authority over the issue at hand.³⁴ Therefore, Vanguard never attempted to contact VanCal with its claims of expropriation. After the letter from Mr. Poe, Vanguard did nothing until 31 July 2007 when Vanguard requested

²⁸ *Id.*

²⁹ *Id.*

³⁰ Evidence / Calendar of Events at 23 Oct. 2006, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

³¹ *Id.* at 11 Nov. 2006.

³² *Id.* at 5 Feb. 2007.

³³ *Id.*

³⁴ *Id.* at 21 Feb. 2007.

arbitration. There were no attempts at all to seek an amicable settlement – let alone a good faith effort.

2. SINCE FLATLAND DENOUNCED THE ICSID CONVENTION ON 2 MAY 2003, THE FLATLAND – CALPURNIA BILATERAL INVESTMENT TREATY CANNOT APPLY TO THE CALPURNIA – GAUL BILATERAL INVESTMENT TREATY.

Flatland denounced the ICSID Convention on 2 May 2003; thereby not permitting any ICSID arbitration under the Calpurnia-Flatland BIT. The Calpurnia-Flatland BIT in Article 13, explains that for investments made while the BIT is still applicable, the provisions of the BIT shall remain in force for a further period of ten years from the date of termination.³⁵ However, this only applies for investments made directly under the Calpurnia-Flatland BIT – not investments made under a different BIT now attempting to use the Calpurnia – Flatland BIT. As such, the BIT is not in force for the agreement made by Vanguard with Calpurnia because the Calpurnia-Flatland BIT is no longer in force.

While, ICSID tribunals have held that because a party later denounces ICSID, this denouncement does not change the terms of the investment treaty, these cases have only been in terms of investments made directly under the denounced BIT. For example, in *Kaiser Bauxite Co. v. Jamaica*, Jamaica notified ICSID that it no longer consented to arbitration on 8 May 1974.³⁶ The Jamaican government and Kaiser Bauxite Co., however, had made an agreement in 1969 and 1972 which required ICSID arbitration of disputes.³⁷ The tribunal ruled that it had jurisdiction over the case because Jamaica’s notification on 8 May 1974 did not affect the prior agreement to arbitrate, which was contained in the 1969 and 1972 Agreements.³⁸ As such, the Calpurnia-Flatland BIT which was created in 1992, does not prohibit Flatland from choosing in 2003 to rescind its consent to ICSID arbitration, but for any investments that were created directly under the Calpurnia-Flatland BIT, Flatland will still be able to request ICSID arbitration. However, for investments made under other bilateral investment treaties (such as the Calpurnia-Gaul BIT), the Calpurnia-Flatland BIT cannot apply. Thus, the most favored nation clause in Article 4, section 2 of the Calpurnia-Gaul BIT cannot apply to the case at hand.

³⁵ 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 at art. XIII, Calpurnia-Flatland, 8 Feb 1992.

³⁶ *Kaiser Bauxite Co. v. Jamaica*, ICSID Case No. 74/3, Decision on Jurisdiction of 6 July 1975, 114 I.L.R. 144 (1999).

³⁷ *Id.*

³⁸ *Id.*

D. CLAIMANT ALREADY ATTEMPTED TO ADJUDICATE THIS CASE IN THE DOMESTIC COURTS OF CALPURNIA; THEREBY FORFEITING VANGUARD’S RIGHT TO SEEK ARBITRATION IN THIS TRIBUNAL.

Ms. Pescara’s case before the Commercial Court forfeited Vanguard’s right to pursue its own case before an ICSID Tribunal. The Calpurnia-Gaul BIT in Article 11 provides that once an investor chooses a forum, all other forums are precluded.³⁹ Thus as soon as Ms. Pescara, as a representative of Vanguard, sued in the Commercial Court, Vanguard made its choice of forum.

In *Waste Management Inc. v. United Mexican States*, the tribunal correctly found that Waste Management had violated Article 1121 of NAFTA, which requires a party to abstain from initiating or continuing legal proceedings in any administrative or judicial tribunal or other dispute settlement procedures.⁴⁰ Waste Management proceeded to file cases in other courts after it had initiated ICSID arbitration, plainly ignoring the requirements of NAFTA. This is similar to Vanguard’s actions. Vanguard is plainly ignoring the requirements of the Calpurnia – Gaul BIT by choosing to adjudicate first in the Commercial Court, and then after losing, attempting to adjudicate in front of this Tribunal. In all of the *Waste Management* cases, similar relief was sought in each case. Similarly, Vanguard and Ms. Pescara, as Vanguard’s representative, are seeking similar relief. Ms. Pescara, representing Vanguard, sought to have the 1% shareholding which she held in trust for Vanguard transferred to her account in Gaul.⁴¹ In the current case before this Tribunal, Vanguard seeks full compensation for its shareholdings in VanCal.⁴² Both cases are seeking similar relief – just as each case in *Waste Management* sought similar relief. Therefore, since Vanguard is ignoring the Calpurnia-Gaul BIT by attempting to re-litigate a claim seeking similar relief, jurisdiction cannot be found.

Claimant’s case is dissimilar to *CMS Gas Transmission Company v. The Republic of Argentina* in which the tribunal found that the “fork in the road” provision, similar to the provision in the Calpurnia – Gaul BIT in this case, was not triggered.⁴³ In *CMS*, TGN, a third party, submitted non-treaty based claims to the domestic courts of Argentina. The tribunal held

³⁹ Calpurnia-Gaul BIT, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

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

⁴¹ Claimant’s Request for Arbitration at para. 9, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁴² *Id.* at para. 9.

⁴³ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 at para. 80-81, Award (12 May 2005), 44 I.L.M. 1205 (2005).

that since CMS, the investor, did not make the choice of forum, it could not forfeit its right to bring a claim before ICSID. Since TGN's claims in the domestic courts did not involve the BIT, the claims were entirely different and therefore did not forfeit CMS's right to bring a claim in arbitration. However, it is important that TGN was a completely separate party from CMS, and Ms. Pescara is not a completely separate party from Vanguard. Ms. Pescara is an employee of Vanguard who holds 1% shares of VanCal in trust for Vanguard. She was not representing her own interests in her suit in the Commercial Court; rather she was representing the shares that she held in trust for the Claimant.

In *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, the tribunal held that SGS did not make any claims under the Swiss-Pakistan BIT in domestic courts. The tribunal, taking into consideration the purpose of ICSID and the BIT, was hesitant to deny jurisdiction over claims that had not actually been alleged in another forum.⁴⁴ However, this is not the case here. Ms. Pescara made a claim in the Commercial Court for the shares she held in trust for Vanguard.

The general purpose of ICSID, to ensure a fair and equitable forum to foreign investors, as well as the purpose of the Calpurnia-Gaul BIT, has been met by the Claimant's choice of forum. Therefore, this Tribunal should deny jurisdiction over claims that have already been adjudicated in another forum.

II. THE STATE OF CALPURNIA DID NOT DISCRIMINATE AGAINST VANGUARD INTERNATIONAL.

The Respondent did not discriminate against the Claimant in the management of VanCal. The only basis for an act of discrimination by the Respondent would have to violate Article 4 of the Calpurnia-Gaul BIT. Article 4, section 1 states:

Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors by any third state, whichever is the most favourable to the investor.⁴⁵

⁴⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 at para. 177, Decision of the Tribunal on objections to Jurisdiction (6 Aug. 2003), 42 I.L.M. 1290 (2003).

⁴⁵ Calpurnia-Gaul BIT at art. 4, para. 1, *Vanguard Int'l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

This treaty provision establishes the elements which must be established to constitute discrimination by one party to the treaty. Concerning a similar discrimination provision in *Feldman v. Mexican States*, the ICSID tribunal stated that there are four elements in a discrimination claim. It must be shown:

- (i) which domestic investors, if any, are in “like circumstances” with the foreign investor;
- (ii) whether there has been discrimination against foreign investors, either *de jure* or *de facto*;
- (iii) the extent to which differential treatment must be demonstrated to be *a result of* the foreign investor’s nationality;
- and (iv) whether a foreign investor must receive the most favorable treatment given to *any* domestic investor or to just some of them.⁴⁶

The Respondent has not violated any of the elements.

The first *Metalclad* element in the discrimination test is not met because the diverse assortment of Calpurnian investors is not in “like circumstances” with the Claimant. The characteristics of the individuals and entities owning stock in VanCal are diverse. “In the years ending December 2004 and December 2005, Calpurnian firms, banks and companies held 41%, foreign companies held 30%, and natural persons, including farmers and workers, held 29% of Vancal’s issued shares.”⁴⁷ The foreign company which held 30% of VanCal stock is Vanguard.⁴⁸ Additionally, it held another 1% of the stock through a trust with Ms. Pescara.⁴⁹ There are a variety of VanCal investors, each with distinct and different circumstances. If one were to attempt to create categories of investors, he would have to include separate classes for each group of Calpurnian firms, Calpurnian banks, Calpurnian companies, Vanguard, individual farmers, and individual workers. Ms. Pescara and her 1% trust ownership would be an individual worker. Even if the argument were to be made that the VanCal stockholders could be grouped into Calpurnian investors and foreign investors, the distinctions are nonsensical because of the drastically different types of Calpurnian entities under a single overreaching heading. The financial interests of a Calpurnian bank have nothing in common with those of a farmer from the same country. A bank would want to maximize growth for larger future returns and vote to have

⁴⁶ *Feldman v. Mexico*, ICSID Case No. ARB(AF)99/1 at para. 166, Award (16 Dec. 2002), 42 I.L.M. 625 (2003).

⁴⁷ Respondent’s Reply to Request for Arbitration at para. 9, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁴⁸ Claimant’s Request for Arbitration at para. 9, *Vanguard Int’l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁴⁹ *Id.*

profit re-invested in VanCal. A farmer would simply want his dividend check to come regularly and be as large as possible. Contrasting institutional investors, like a bank, and individual investors, like a farmer, is not a coherent comparison. The domestic investors are not in “like circumstances” with the foreign investor because they are not even a rational group themselves. Also, the individual Calpurnian investors, being farmers and workers, have even less in common and are not at all in “like circumstances” with Vanguard which is an institutional investor from a foreign country.

The second *Metalclad* element in the discrimination test is whether there has been any *de jure* or *de facto* discrimination against the Claimant. There has not been discrimination, of any type, by Calpurnia against Vanguard. The Claimant argues that the cessation of dividend payments was an act of discrimination. The Claimant’s facts are incorrect. Vanguard says that in 2004, 2005, 2006, and 2007 it did not receive payment when VanCal had declared dividends.⁵⁰ In all of these years when a dividend was declared, Vanguard was fully paid.⁵¹ The dividend was paid in Calpurnian Libras and credited to the Claimant’s account. All of the investors of VanCal were fully paid in Calpurnian Libras. The e-mail by Mr. Korchnoi which stated that payment would not be made to foreign shareholders was superseded by the later actions of the Respondent which paid dividends from all of the VanCal distributions to the Claimant from, at least, 28 September 2006.⁵² “In the investment context, the concept of discrimination has been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances.”⁵³ If this Tribunal decides that there was some difference in treatment between the various types of Calpurnian investors and the Claimant, then the action must be “unreasonable” to be discriminatory.

The creation and maintenance of Calpurnia’s telecommunications industry is essential to the welfare of its citizens. The telecommunications services provided by VanCal are a vital part of Calpurnia’s national infrastructure and are relied upon by all of the citizens of the country. The commercial dissatisfaction of a disgruntled foreign investor must be weighed against the general welfare of the people of Calpurnia when evaluating whether any of the Respondent’s

⁵⁰ *Id.* at para. 14.

⁵¹ Respondent’s Reply to Request for Arbitration at para. 16, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁵² *Id.*

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

actions were “unreasonable.” Furthermore, in the dissemination of corporate reports and notices the Claimant was treated the same as every other investor and received these materials.⁵⁴

The third *Metalclad* element in the discrimination test is whether any differential treatment is a result of the foreign investor’s nationality. While there has not been any different treatment, because Vanguard was credited with the dividend payments, if one assumes *arguendo* that there was different treatment, it was not based on nationality but instead on the viability of the telecommunications infrastructure of Calpurnia. VanCal is interested in the viability of the telecommunications infrastructure because that affects its profits. Additionally, it also affects the national safety of Calpurnia. The central reason for the Board’s deliberations concerning dividend payments was “the existing dispute between the governments of Calpurnia and Gaul.”⁵⁵ Any actions which were considered by the Board in these deliberations on 10 March 2005 were merely for the national safety of Calpurnia because of the reliance on Calpurnia’s citizens upon the telecommunications infrastructure supported by VanCal. In a dispute between two countries, it is against a country’s national security to fund the aggressor’s acts against your own people. Vanguard received payments which were credited to its account. This allowed the Claimant to receive its dividends but protect the national security of Calpurnia by making it difficult for those funds to be used in the aggression of Gaul against Calpurnia. If there was any differential treatment among investors, it was solely on the basis of national safety and not on any investor’s nationality.

The final *Metalclad* element is whether the foreign investor must receive the most favorable treatment given to all investors or just to some of them. The Calpurnia-Gaul BIT states that the Contracting Parties must accord treatment to the other contracting party’s investments that is “not less favourable than the host Contracting Party accords to the investments and returns made by its own investors”⁵⁶ The treatment given to the Calpurnian farmers, workers, banks, and institutions investing in VanCal was as favorable as the treatment given to the Claimant. Both parties received dividend payments. VanCal’s treatment of the Claimant was as favorable as that of any other investor.

⁵⁴ Respondent’s Reply to Request for Arbitration at para. 15, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁵⁵ Evidence / Calendar of Events at 10 Mar. 2005, Vanguard Int’l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁵⁶ See *supra* note 45.

Azurix v. Argentine Republic is distinguishable from the present case. In *Azurix*, the tribunal found that the host country discriminated against the foreign investor mainly by failing to pay its bills owed to the investor and by imposing unreasonable compliance measures which other companies were exempted from.⁵⁷ In the present case, the payments which are in dispute are not bills but dividends. A bill is fundamentally different from a dividend. A bill is an obligation to pay for a past service rendered.⁵⁸ A dividend is a voluntary payment which comes from the profit generated by a company.⁵⁹ With a dividend, there is not a prior service. A shareholder gets a right to collect a dividend payment by purchasing stock in a company but that right can only be exercised if the company decides to pay a dividend. Unlike *Azurix*, the present case does not involve inconsistency in the regulation of an industry. There is only a single company involved in the, supposed, inconsistency in the treatment of investors. The Respondent did not discriminate against any of its investors and Vanguard's claims are invalid.

⁵⁷ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 at para. 393, Award (14 July 2006).

⁵⁸ *Ballentine's Law Dictionary* (3d ed. 1969).

⁵⁹ *Id.*

III. THE STATE OF CALPURNIA FULLY PROTECTED VANGUARD INTERNATIONAL'S INVESTMENTS.

The Respondent did not breach its duty to provide full protection and security to the Claimant's investment. Article 2, section 2 of the Calpurnia-Gaul BIT states:

Each Contracting Party shall accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.⁶⁰

The Calpurnia-Gaul BIT establishes two different, but interrelated, standards that Calpurnia is to act in accordance with towards the investment of the Claimant. The first standard is fair and equitable treatment. The second standard is full and constant protection and security ("full protection"). The actions of the Respondent do not violate either of these standards but, even if they are found to do so, the measures taken by Calpurnia are justified as necessary for the public good.

Fair and equitable treatment is a standard which is satisfied by Calpurnia's reasonable actions. In examining the meaning of the fair and equitable treatment standard, the tribunal in *Azurix v. Argentine Republic* considered that the standard is "measured with the highest degree of deference towards domestic authorities." Thus, "[o]nly the reasonableness of the measure claimed to be grievous must be measured, and this, with deference."⁶¹ Fair and equitable treatment is not a standard which is easily or absently violated. It is a minimum standard and "acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."⁶² The Respondent has not committed any actions which could be deemed as willful neglect of duty, far below international standards, or of bad faith.

Vanguard's claims that the Respondent acted in any way to violate the standard of fair and equitable treatment are incorrect. Vanguard claims that the Board's ousting of its representatives and the inaccurate assertion that VanCal ceased to pay dividends violated fair and equitable treatment.⁶³ The Claimant's personnel were not expelled or denied contact or access to

⁶⁰ Calpurnia-Gaul BIT at art. 2, para. 2, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁶¹ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 at para. 333, Award (14 July 2006).

⁶² *Genin, Eastern Credit Ltd., Inc. v. Republic of Estonia*, ICSID Case No. ARB/99/2 at para. 367, Award (25 June 2001).

⁶³ Claimant's Request for Arbitration at para. 15, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

VanCal. The Claimant continued to receive the dissemination of corporate reports, notices, and information until 2006 September, shortly before Vanguard withdrew all its representatives from VanCal.⁶⁴ Furthermore, the form of proxy provided by Mr. Rindler was properly rejected for the shareholder's meeting on 16 November 2005 when the shareholders voted Ms. Pescara off the Board.⁶⁵ It is impossible to characterize any of these actions as a willful neglect of duty or as performed in bad faith. Providing information to all of its shareholders and a shareholder vote on the composition of the company's directors are not actions by VanCal which can be deemed to even come close to violating the fair and equitable treatment standard.

Intertwined with fair and equitable treatment is the standard of full protection. This standard refers more to the physical protection of an investment by the host country's police forces.⁶⁶ Full protection and fair and equitable treatment are inextricably related because the combination of the two is interpreted to refer to a requirement that the obligated country provide both physical police protection as well as a minimum, reasonable treatment for the investment. Full protection refers more to the physical protection of the investment. Full protection focuses on the physical police protection of the investment.

Vanguard has not claimed that its investment was given inadequate police security. The only assertions by the Claimant concerning the police refer to the searches of the homes of Ms. Pescara and Mr. Kolowenko.⁶⁷ These actions were within the authority of Calpurnia and did not breach either the full protection standard or the fair and equitable treatment standard. "Parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State."⁶⁸ Calpurnia can act for the public good and welfare of its people without violating the Calpurnia-Gaul BIT. The police searches of the homes of Ms. Pescara and Mr. Kolowenko on 8 December 2003 and 17 July 2004 were conducted in response to potential espionage. It is the duty and within the right of Calpurnia to protect its people from harm. "There may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals."⁶⁹ The protection of a country's

⁶⁴ Respondent's Reply to Request for Arbitration at para. 15, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁶⁵ *Id.* at para. 13.

⁶⁶ Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 at para. 408, Award (14 July 2006).

⁶⁷ Claimant's Request for Arbitration at para. 17, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁶⁸ Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 at para. 310, Award (14 July 2006).

⁶⁹ *Id.* at para. 311.

public safety is a legitimate reason. The potential illegal acts of espionage of Vanguard employees are clear justification for the police searches. The safety of one's country and citizens unequivocally overrides and does not violate the full protection and fair and equitable treatment obligations of the Calpurnia-Gaul BIT.

The rejection of Ms. Pescara's business visa renewal also does not violate fair and equitable treatment. In September 2004 Ms. Pescara's renewal application for a "three-year business visa" was denied and she was allowed to enter Calpurnia through an alternative visa waiver program. To constitute a violation of the fair and equitable treatment standard, the denial of a permit must be arbitrary and discriminatory, with the majority of the emphasis on any discriminatory nature of the action.⁷⁰ Calpurnia did not ban Ms. Pescara from entering the country; she merely had to fill out a different visa application. For the action to be discriminatory, there would have to be a complete denial of entry into Calpurnia. The Claimant argues that the denial of Ms. Pescara's business visa was connected to her dismissal from the Board. This assertion is incorrect. Ms. Pescara's business visa renewal was declined in September 2004 and Ms. Pescara was on the Board for more than a year before leaving on 16 November 2005. It is absurd to create a connection between two actions more than a year apart from each other, committed by different, unconnected parties. The immigration officials of the Calpurnian government and the directors of VanCal are unconnected entities and the actions of each are separate and distinct. The rejection of Ms. Pescara's business visa renewal does not violate fair and equitable treatment because it did not bar her from Calpurnia and it was not discriminatory.

Genin v. Estonia is similar to the present case. In *Genin*, the branch of a bank was sold and there were, arguably, liabilities which should have been included on the balance sheet at the time of the sale. The government of Estonia revoked the bank's license while the dispute was going on. In challenging the revocation of the bank's license, Genin argued that the action was unlawful. The tribunal responded that the action was not arbitrary or discriminatory; therefore the actions taken by the government of Estonia were valid and lawful. This is similar to the Respondent's decision not to renew Ms. Pescara's business visa. While in *Genin*, the banking permit revocation rendered the bank unable to do business, Ms. Pescara's business-visa renewal

⁷⁰ *Genin, Eastern Credit Ltd., Inc. v. Republic of Estonia*, ICSID Case No. ARB/99/2 at para. 370, Award (25 June 2001).

denial did not affect the ability of Vanguard to manage its investment or even to be represented by Ms. Pescara on the Board. She merely needed to utilize a different visa program. The fact that there was no explanation given to Ms. Pescara for the reason she was denied the renewal of the business-visa is unimportant. In *Genin*, there was no formal notice given or opportunity to dispute the banking permit revocation and the action was not a violation of any fair and equitable treatment or full protection treaty obligation.⁷¹ In the present case, the denial of Ms. Pescara's business-visa renewal does not violate any of Calpurnia's treaty obligations.

Metalclad v. United Mexican States is distinguishable from the present case. In *Metalclad*, a permit to operate a landfill was promised and, when the landfill construction was nearly complete, the permit was denied. In the present case, the rejection of Ms. Pescara's business-visa renewal did not deny the Claimant's management of its investment. Ms. Pescara remained on the Board and in Calpurnia for over a year after the business-visa renewal was denied. Also, in *Metalclad*, after the landfill was almost fully constructed, the claimant was fully denied its right to operate the facility. Besides Ms. Pescara, Vanguard had other members on the Board which granted the company its ability to influence the business decisions of VanCal. The complete removal of management rights convinced the tribunal in *Metalclad* to rule that there had been a violation of the full protection treaty obligation. There has not been the denial of the Claimant's management rights and, if there is any hindrance of those rights, it is clearly less than the complete removal of Vanguard's management rights. There is not any violation of Calpurnia's treaty obligations toward the Claimant's investment.

IV. CALPURNIA DID NOT OBSTRUCT THE TRANSFER OF FUNDS TO VANGUARD BECAUSE DOING SO WOULD HAVE CAUSED AN UNDUE BURDEN ON VANCAL AND CONSEQUENTLY CALPURNIA DURING A TIME OF INSTABILITY.

VanCal, as Calpurnia's largest mobile telecommunications service provider during a time of political instability, had to ensure its operational stability. Even though VanCal is a private entity with a core focus of profitability, it recognizes the importance of its operations and services to Calpurnia. The Calpurnia-Gaul BIT provides for a delay of transfer of returns if certain conditions are met.⁷² In order to best protect Calpurnia's telecommunications

⁷¹ *Id.* at para. 364.

⁷² Calpurnia-Gaul BIT art. 8 para. 3 (“[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

infrastructure, it was necessary to separate domestic and foreign shareholders in means of treatment. As such, treating all foreign shareholders identically is an equitable and non-discriminatory application of measures in a time of crisis. Additionally, VanCal complied with all Calpurnian laws in good faith. However, the Claimant ignores the well-being of VanCal and its importance to Calpurnia and uses the Calpurnia-Gaul BIT as a sword. In this instance, the Respondent uses the Calpurnia-Gaul BIT as a shield to sustain its viability of sovereign identity and to sustain all other foreign direct investments within the State.

There was no obstruction of transfer. VanCal declared its dividends annually.⁷³ Vanguard was able to account for this declaration of dividends on its books. In fact, the dividends were accounted for on VanCal's books⁷⁴ similarly to what was requested by the Claimant.⁷⁵ As such, the Claimant received payment, albeit a temporarily illiquid payment.⁷⁶ While "VanCal was obliged to pay dividends in Calpurnian Libras ... there was no requirement to convert the dividend payments into Gaul Dollars."⁷⁷ However, the issue of currency conversion is immaterial because the transfer was achieved in the accounting for the dividends. Lastly, "[t]he e-mail set by Mr. Korchnoi on 27 May 2005, stating that no further payments could be made to foreign shareholders, was unauthorized and had been superseded by statements by VanCal of its willingness to make any license fee and dividend payments it owed."⁷⁸ Therefore, the Respondent did not obstruct any transfer of returns to Claimant.

V. CALPURNIA DID NOT UNLAWFULLY INTERFERE WITH VANGUARD'S INVESTMENT BECAUSE THE RIGHT TO REPRESENTATION WAS FRUSTRATED BY VANGUARD'S OWN DOING AND VANGUARD'S EQUAL INTEREST IN DIVIDEND PAYMENTS WAS NOT ALTERED.

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." *Id.*)

⁷³ Respondent's Reply to Request for Arbitration at para. 16, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) (VanCal declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders, including Claimant.").

⁷⁴ Evidence / Calendar of Events at 28 Sept. 2006, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁷⁵ *Id.* at 21 May 2005 ("Claimant wrote a letter to Mr. Korchnoi requesting that the amount of the dividend payable be placed in a separate bank account to be opened in the name of Claimant.").

⁷⁶ Claimant's entire investment in VanCal was illiquid because VanCal was a private corporation and did not have publicly traded stocks. To make any profits, Claimant would have had to sell its interest in whole to another entity, with which that other entity would receive the credited dividend payments that were still holding the same value.

⁷⁷ Respondent's Reply to Request for Arbitration at para. 16, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁷⁸ *Id.*

VanCal made the necessary choice to protect Calpurnia's infrastructure because telecommunications is an essential part of a viable sovereignty. VanCal made these choices because it recognizes, as a private for-profit corporate entity, that its operations and services are essential to the viability of a State and without a viable State, it cannot continue to generate revenues. As stated in the Calpurnia-Gaul BIT, "[e]ach Contracting Party shall not impair by unreasonable, arbitrary or discriminatory measures the management ... [or] use ... of investments in its territory of investors of the other Contracting Party."⁷⁹ In reality, Vanguard attempted to impair the management and use of its investment in VanCal by not following protocol and withdrawing its representatives to the Board. Both the Respondent and the SFCDC did not hinder the operations of VanCal, but rather followed the rules and procedures set forth in VanCal's corporate documents that all parties relied upon.⁸⁰ With respect to the interest in dividend payments, VanCal used its judgment in allocating funds between dividend payments and retained earnings for the payment into pension plans and the dividend payments were declared and credited to Claimant every year.

The *Foremost Tehran* case cripples the Claimant's claim that the Respondent unlawfully interfered in its investment.⁸¹ While factually similar to the present case, the impact of the withdrawal of Foremost's representatives to Pak Dairy's board and the lack of any statutory restrictions on transferring ownership are glaring similarities and facts which that tribunal found to be pivotal in its decision.⁸² The same facts are present in this case and should carry the same weight. The test for interference with investment as dictated by that tribunal was loss of enjoyment of property,⁸³ that case differs greatly from the present case. In that case, the dividend certificates were not delivered.⁸⁴ However, in the present case, the dividends were accounted for on VanCal's books and eventually credited to an account for Claimant. In the full

⁷⁹ Calpurnia-Gaul BIT art. 2 para. 3.

⁸⁰ This includes the declaration of annual dividends, keeping records available to shareholders at headquarters, and the voting of proxies.

⁸¹ *Foremost Tehran, Inc. V. Iran*, Award No. 220-37/231-1 of 11 Apr. 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987).

⁸² *Id.* ("it is significant that after Foremost withdrew its two directors in October 1981, Pak Dairy replied with a telex of 11 November 1981 suggesting that the resignation be withdrawn and new directors designated. It should also be noted that Foremost has not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares, and the report of Standard Research Consultants does not indicate any such restrictions.").

⁸³ *Id.* ("While this contributed to the diminution of the enjoyment of Foremost's rights, it did not affect their fundamental nature ... resulted in a serious impairment of the enjoyment and disposition of the Claimant's property which, however, fell short of affecting legal title.").

⁸⁴ *Id.* ("Foremost's enjoyment of its shareholding was further infringed by Pak Dairy's failure to deliver the certificate representing the stock dividend declared in 1980.").

light of the *Foremost Tehran* case, it fails to support the Claimant's claims, but rather bolsters the Respondent's position that it did not unlawfully interfere in the Claimant's investment.

In addition to a specific decree or legislative act missing, thus leading to a conclusion that there was no interference with the investment, the Claimant's rights to the profits earned were not interfered with in principle.⁸⁵ As stated in the shareholders meeting held on 16 November 2005, "the main objective [of the company] is ... to protect the interests of the country as well as to preserve the industry and the interests of all shareholders including the minor ones within the framework of the general interests of the country."⁸⁶ There was no interference in the declaration of the dividend or the accounting of the dividend payment and the Board acted in such a fashion to consciously represent and be mindful of all the shareholders. The principle of declaring dividends and accounting for them on the books remained intact and, if the Claimant ever wished to do so, it could liquidate its ownership position in VanCal and the value of its position would reflect these dividend payments.

Regarding the alleged interference in the right to representation on the Board, no such interference occurred because the Board followed the rules and procedures set forth in VanCal's corporate documents and, in the slight instance of erroneous decision-making, the Board corrected the action. Thus, there is no need for this Tribunal to hear this claim. The Board followed proper procedure and Ms. Pescara was relieved of her duties in adherence with the appropriate procedures. Shareholders are allowed, by law or otherwise, to dismiss a member of the board without cause. This case is a matter between the VanCal shareholders and the VanCal Board. The shareholder proxies, while improperly rejected, were acknowledged to have been an improper action which was already addressed by the appropriate parties and, as such, there is no need for anybody beyond the Board and the shareholders to address the issue, especially the

⁸⁵ See Respondent's Reply to Request for Arbitration at para. 10, *Vanguard Int'l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) ("There has been no interference with the rights of Claimant as a shareholder, or any expropriation of its interest. A finding of expropriation would require a specific decree or legislative act, neither of which is present."); Evidence / Calendar of Events at 28 Sept. 2006, *Vanguard Int'l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) ("the profits made by the company under current laws and regulations belong to the company and, the shareholders have a right thereto in proportion to their capital investment, therefore, whether there is a distribution in cash, or a stock dividend, or a reservation of a portion as undivided profit, it will not in principle change the rights of the shareholders to the profits earned; especially because due to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign shareholders has been suspended for the time being.").

⁸⁶ Evidence / Calendar of Events at 16 Nov. 2005, *Vanguard Int'l v. The Government of the Republic of Calpurnia*, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

Respondent. Further, both Mr. Poe and Mr. Korchnoi resigned; it is likely that they did so due to the mishandling of this situation with the Claimant. Any loss in right to representation and participation in the VanCal Board is attributable to Vanguard because Vanguard did not follow the appropriate procedures; it does not involve the Respondent.

VI. RESPONDENT DID NOT EXPROPRIATE VANGUARD’S INVESTMENT IN VANCAL BECAUSE THERE WAS NO STATUTE OR DECREE TO EFFECT EXPROPRIATION.

The Claimant proffers a form of expropriation which, if followed, would undermine a sovereign State’s ability to act in its own interest during times of instability or crisis. While the Claimant alleges indirect expropriation, it presents many problems to this Tribunal in trying to balance a favorable atmosphere for foreign direct investment and avoiding the potential collapse of a vulnerable state. The Calpurnia-Gaul BIT provides for indirect expropriation,⁸⁷ but the test proffered by the Claimant is too specious. Direct expropriation is a more tangible concept. It is a concept that tribunals are more familiar with. It is also a concept that creates predictability and reliance, thus propelling direct expropriation in the direction of customary international law.

The most important clause of the expropriation article in the Calpurnia-Gaul BIT concerns the exception: “except for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation.”⁸⁸ This case clearly falls into the category of public interest because of the essential nature to the state of the infrastructure provided by mobile telecommunications. Merely promulgating a theory of indirect expropriation without consideration of the effects on the State should not be followed.

The Respondent urges this Tribunal to use a two part test to further establish that the Respondent did not expropriate the Claimant’s investment in VanCal. First, “[f]or an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property.”⁸⁹ Second, “there is always a second condition to such a taking to

⁸⁷ Calpurnia-Gaul BIT art. 6 para. 1 (“Investments be investors ... shall not be expropriated ... either directly or indirectly”).

⁸⁸ Calpurnia-Gaul BIT art. 6 para. 1.

⁸⁹ *Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5 at para. 84, Award (26 Jul. 2001). Note that this test mentions the word indirect, but it is in a different context than which Claimant wishes to use it as in indirect expropriation. That tribunal used indirect to speak to the many ways which a State can take property.

qualify as an expropriation: the attributability to the State.”⁹⁰ In applying the facts to this test, the Tribunal must be mindful that “not every business problem experienced by a foreign investor is an expropriation”⁹¹ and that “control of the corporate vehicle for the investment remained in the hands of the claimant, with the ‘apparent right’ to pursue its activities.”⁹²

A focus on the effects of expropriation provides only a one-sided analysis. If the party claiming expropriation experiences the effects, or burdens, of expropriation then the State should experience some effects, or benefits, as well. The Respondent does not benefit or experience the effects of what the Claimant alleges. Moreover, if the Claimant succeeds in this action, then the Respondent will feel the effects of a crippled infrastructure. Creeping expropriation, as defined by the *Generation Ukraine* tribunal, is far too specious.⁹³ To examine this problem under that definition poses an unmanageable scope of subjectivity which would only perpetuate the turmoil in Calpurnia and would be counterproductive to bolstering a healthy environment for foreign direct investment.

Upon examination of the aforementioned criteria, the Respondent strongly urges this Tribunal to find that the Respondent did not expropriate, by any means, the Claimant’s investment in VanCal by (i) discriminating against Vanguard, (ii) unlawfully interfering in Vanguard’s investment, (iii) obstructing the transfer of returns to Vanguard, or (iv) failing to provide Vanguard and its investment full protection and security.

A. RESPONDENT DID NOT DISCRIMINATE AGAINST VANGUARD.

The Respondent did not expropriate the Vanguard’s investment because it did not discriminate against the Claimant. Discrimination is the differential treatment of investors in like circumstances based on an investor’s nationality.⁹⁴ The Claimant states that it was treated differently than Calpurnian investors because it, incorrectly, alleges that VanCal did not make dividend payments to Vanguard when these payments were distributed to all of the other

⁹⁰ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2 at para. 135, Award (29 Apr. 1999),

⁹¹ *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 at para. 111, Award (16 Dec. 2002), 42 I.L.M. 625 (2003).

⁹² *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9 at para. 20.34, Award (16 Sept. 2003), 44 I.L.M. 404 (2005).

⁹³ *Id.* at 20.22 (“Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.”)

⁹⁴ *See supra* note 45.

investors.⁹⁵ The Claimant's allegation is factually inaccurate because the dividend was credited to Vanguard's account.⁹⁶ Furthermore, Vanguard is not in like circumstances with the other investors. Besides the Claimant and a small shareholding by Ms. Pescara, the investors in VanCal are an unclassifiable assortment of workers, companies, banks, and farmers. The common distinction of being Calpurnian is not a valid category from which the Claimant alleges that all of these investors are in *like circumstances* and that it has been treated differently. If this Tribunal decides to accept the Claimant's arguments concerning some sort of differential treatment, in order to constitute discrimination it must also weigh that against Calpurnia's right to national security. It cannot be disputed that there was a conflict occurring between Calpurnia and Gaul at the time of this dispute.⁹⁷ By crediting the dividends distributed to the Claimant to its books, Calpurnia fulfilled its obligation to make payments but it also prevented this money from being used to fund aggression against its people. Vanguard is a Gaulois company and Calpurnia was in direct conflict with Gaul. It would violate Calpurnia's sovereign duty to protect its citizens if it thoughtlessly gave money to the country pursuing aggression against its people. The Respondent did not discriminate against Vanguard.

Genin v. Estonia is similar to the present case. In that case, there was a dispute over the valuation involved in the sale of a bank. The tribunal found that there had not been an expropriation because none of the actions of Estonia were discriminatory. Estonia did not treat the claimant any less favorably than banks owned by Estonian nationals. This is similar to the treatment that the Respondent provided for the Claimant. The dividends of VanCal were credited to its account. Also, the diversity of investors does not allow the Claimant to argue that it was treated less fairly than a single class of shareholders. The Respondent did not discriminate against Vanguard and did not expropriate its investment.

B. UNLAWFUL INTERFERENCE IS NOT EXPROPRIATION.

The Respondent did not expropriate the Claimant's investment because, even if this Tribunal finds that the Respondent unlawfully interfered in Claimant's investment, mere

⁹⁵ Claimant's Request for Arbitration at para. 14, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁹⁶ Respondent's Reply to Request for Arbitration at para. 16, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008).

⁹⁷ See *supra* note 55.

interference does not amount to expropriation. The Claimant was not deprived of its fundamental rights because its right to representation on the Board was still intact.⁹⁸ Further, Vanguard's right to receive dividend payments was not expropriated because VanCal still declared dividends and accounted for the dividends in an account for the Claimant. Additionally, to claim that interference with investment amounts to expropriation does a disservice to the investment made by the Claimant by focusing on too narrow a set of rights. As per the substantial deprivation standard of expropriation, a partial taking of an investment could not support a finding of expropriation.⁹⁹

The *Eastman Kodak* case is similar to the present case.¹⁰⁰ In that case, although the right to representation and the interest in access to money was implicated,¹⁰¹ the tribunal did not find an expropriation because the deprivation of ownership rights did not meet the appropriate standard of substantial deprivation.¹⁰² The fact which influenced the tribunal in favor of this disposition was that Kodak's representation was large enough that, despite the interference with the associated ownership rights, the effect did not lead to an expropriation.¹⁰³ In the present case, the Claimant's representation is substantially large due to its minority shareholder status and the effects of cumulative voting, which gives the minority representation more input and power in corporate governance. Moreover, it was the Claimant who extinguished its rights. The Respondent's actions, in this regard, cannot be considered reasonably appropriate to produce the effect of depriving the Claimant of its right to representation on the Board or of its interest in dividend payments in such a way that the Respondent acquires the fruits of the representation or interest in the dividend payments. Lastly, the actions alleged by the Claimant to be the source of expropriation are not attributable to the Respondent; if anything, they could potentially be attributable to the SFCDC, but the Respondent declines to make such an allegation to an entity

⁹⁸ Evidence / Calendar of Events at 11 Nov. 2006, Vanguard Int'l v. The Government of the Republic of Calpurnia, ICSID Case No. ARB/X/X, First Session of the Arbitral Tribunal (18 Mar. 2008) ("VanCal e-mail to Claimant suggesting that the resignation be withdrawn and new directors designated.").

⁹⁹ *See infra*.

¹⁰⁰ Eastman Kodak Co. v. Iran, Award No. 329-22-3 of 11 Nov. 1987, 17 Iran-U.S. Cl. Trib. Rep. 153, 168-9.

¹⁰¹ *Id.* at para. 9, 10 (discussing a management committee of Kodak representatives which was interfered with and the freezing of bank accounts).

¹⁰² *Id.* at para. 58 ("The Tribunal further finds that the facts in this Case do not warrant a finding that Eastman Kodak was deprived of its ownership rights.").

¹⁰³ *Id.* at para. 58 ("In reaching this decision the Tribunal has attached particular importance to the fact that the Claimant, as majority shareholder, was able effectively to decide to liquidate and to declare Rangiran bankrupt at points in time significantly later than the occurrence of the events which the Claimant contends caused the loss of its shareholding interest.").

which is not party to this action. The Claimant's contentions are a matter best resolved between shareholders and the board of directors and need not include the Respondent.

C. THE OBSTRUCTION OF THE TRANSFER OF FUNDS DOES NOT AMOUNT TO EXPROPRIATION.

Contrary to the Claimant's argument, the obstruction of the transfer of returns alone cannot amount to expropriation in this instance because the fundamental right of receiving dividend payments as a shareholder still existed and was never denied. The fundamental right lies in the claim to the actual money declared as VanCal's dividends, not the transfer across borders and through exchange rates. Further, the Claimant cannot reasonably argue that an obstruction of the transfer of returns in addition to any or all of the other claims would equate to a taking because indirect expropriation is too specious and no specific decree or statute exists to serve as evidence to bolster a claim of expropriation. The Claimant's right was not "rendered so useless that [it] must be deemed to have been expropriated"¹⁰⁴ because the dividend payments still existed on the Respondent's books and in the Claimant's account.

The *Foremost Tehran* case is similar to the present case and provides this Tribunal with guidance as to its current decision.¹⁰⁵ In that case, the facts are very much like the present dispute¹⁰⁶ and the tribunal did not find that there was expropriation. As one of the principal reasons for its disposition, the tribunal states that "Foremost has not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares."¹⁰⁷ As such, in the present case, the Respondent's actions cannot be considered reasonably appropriate to produce the effect of depriving the Claimant of their right to the transferability of returns in such a way that the Respondent acquires the fruits of the returns themselves. Lastly, as previously explained, the actions alleged by the Claimant to be the source of expropriation are not attributable to the Respondent. This is instead a private matter of corporate governance which does not involve the Respondent.

¹⁰⁴ *Starrett Housing Corp. v. Iran*, award No. 314-24-1 of 14 Aug. 1987, 9 Iran-U.S. Cl. Trib. Rep. 122, 154-57.

¹⁰⁵ *Foremost Tehran, Inc. V. Iran*, Award No. 220-37/231-1 of 11 Apr. 1986, 10 Iran-U.S. Cl. Trib. Rep. 228, 246, 250-53 (1987).

¹⁰⁶ *Id.* (describing that Foremost, a family of U.S. companies, owned a minority stake in Pak Dairy amounting to between 30 and 31 percent and entities controlled by the Iranian government controlled a majority interest in Pak Dairy and that one of the principal issues was whether the Pak Dairy board's decision not to pay Foremost its share of the cash dividend deprived Foremost of a sufficient amount of its ownership rights to amount to an expropriation.).

¹⁰⁷ *Id.*

D. RESPONDENT PROVIDED VANGUARD'S INVESTMENT WITH FULL PROTECTION AND SECURITY.

The Respondent provided the Claimant's investment with full protection and security. To satisfy its treaty obligation the Respondent must provide fair and equitable treatment and sufficient police protection for Vanguard's investment. Fair and equitable treatment requires that Calpurnia refrain from any willful neglect of its duty to protect the investment and to avoid any acts of bad faith toward the investment.¹⁰⁸ Vanguard claims that the Respondent did not distribute dividends the Claimant and unfairly manipulated the Board, which violate fair and equitable treatment. As previously stated, the account Vanguard continued to receive dividend payments and the Claimant received corporate reports, notices, and information until September 2006.¹⁰⁹ The shareholder vote when Ms. Pescara was removed from the Board was appropriately conducted.¹¹⁰ Throughout the dispute resolution process, Vanguard has not claimed that the Respondent did not provide adequate police protection for its investment. The Claimant does not have a valid argument concerning the full protection of its investment. The Respondent faithfully upheld its treaty obligation and provided Vanguard's investment with full protection and security.¹¹¹

Metalclad v. United Mexican States is distinguishable from the present case. In that case the Mexican government completely removed the claimant's ability to manage its investment in a landfill constructed in Mexico. In the present case, Vanguard had members on the Board and continuously received the appropriate corporate documents. As a minority shareholder, it had its representation and input on the operation of VanCal. The Claimant's management rights were not removed and there has not been any expropriation by the Respondent.

Conclusion

In conclusions, Calpurnia did not violate any provisions of the Calpurnia-Gaul BIT. Unfortunately, the investment by Vanguard became frustrated because of private shareholder matters and Vanguard's voluntary decisions which by no means involved Calpurnia. This Tribunal should dismiss this action and find in favor of Respondent.

¹⁰⁸ See *supra* note 62.

¹⁰⁹ See *supra* note 64.

¹¹⁰ See *supra*. note 65.

¹¹¹ Calpurnia-Gaul BIT art. 2 para. 2.

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