

Team Registration Name: KLAESTAD

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

VANGUARD INTERNATIONAL [Claimant]

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA [Respondent]

MEMORANDUM
FOR
CLAIMANT

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STATEMENT OF FACTS

CLAIMANT

1 Claimant, Vanguard International (Vanguard), is a telecommunication company from Gaul. In 1997 Claimant established a joint venture company, VanCal, in Calpurnia. VanCal provides telecommunication services in Calpurnia under Claimant's trademark. From 1997 to 2004, Claimant was a major player in managing VanCal and having active representatives on VanCal's board of directors. By the end of 2004, Claimant directly owned 30% of VanCal's stocks, and an additional 1% in the name of Francesca Pescara. Starting in late 2003, the Calpurnian Government deprived Claimant of use and benefit of its 31% interest in VanCal and failed to pay license fees for the use of Claimant's trademark leading to a claim of expropriation without compensation.¹

2 Claimant's country, Gaul, is a party to the following international treaties:

1. Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention)
2. Calpurnia-Gaul Bilateral Investment Treaty (Calpurnia-Gaul BIT)²
3. 1969 Vienna Convention on the Law of Treaties³

RESPONDENT

3 Respondent is the Government of the Republic of Calpurnia (Calpurnia). In November of 2003, Respondent faced a political shift. The new political environment resulted in deterioration of relationships with Claimant's country, Gaul. The State Fund for Commerce and Development in Calpurnia (SFCDC), which is 100% owned by the State of Calpurnia, owns 30% of VanCal's stock directly. In addition to its direct ownership, SFCDC, the governmental entity, votes on behalf of another 22% of individual shareholders. Soon after the political shift in

¹ Abstract from Claimant's Request for Arbitration, Record, p. 2-4.

² The text of the Calpurnia-Gaul BIT is attached to the Record.

³ 2nd clarifications, number 32.

Calpurnia, SFCDC implemented decisions that effectively deprived Claimant of the use and benefit of its interest in VanCal.⁴

4 Respondent is a party to the following international treaties:

1. The ICSID Convention
2. Calpurnia-Gaul BIT
3. Calpurnia-Flatland Bilateral Investment Treaty (Calpurnia-Flatland BIT)⁵
4. 1969 Vienna Convention on the Law of Treaties

⁴ *Supra*, note 1.

⁵ The text of the Calpurnia-Flatland BIT is attached to the Record.

KEY PERSONNEL

CLAIMANT

Francesca Pescara	Claimant's representative on VanCal's board of directors. She was also VanCal's managing director before she resigned from that post.
Neil Shepherd	Claimant's representative on VanCal's board of directors.
Mr. Rindler	Shareholder proxy on behalf of Claimant.
Mr. Kolowenko	VanCal's chief technical officer, a national of Gaul.
Mr. Hunter	Claimant's representative on VanCal's board after both Ms. Pescara and Mr. Shepherd were eliminated from the board.
Mr. Fowler	Claimant's representative on VanCal's board after both Ms. Pescara and Mr. Shepherd were eliminated from the board.

RESPONDENT

Dr. Jonathan Swift:	Calpurnian government-employed chairman of VanCal's board of directors. He is also on the board of SFCDC. ⁶
Mr. Shelly:	Respondent's representative on VanCal's board of directors.
Mr. Poe	Respondent's representative on VanCal's board of directors and the Chair of the SFCDC.

⁶ 2nd clarifications number 52(b)

INDEPENDENT

Mr. Korchnoi:

The only Calpurnian neutral individual on VanCal's board of directors. He replaced Ms. Pescara as managing director after her forced resignation.

SUMMARY OF EVENTS⁷

7 December 2003	Calpurnian Security Forces searched the homes of Francesca Pescara and David Kowlowenko under suspicion of unlawful data collection and espionage.
January – October 2004	Ms. Pescara’s home was picketed on many occasions during this time. Calpurnian police declined Ms. Pescara’s request to remove the protestors.
3 June 2004	Calpurnian Security Forces searched the residence of Ms. Pescara and Mr. Kolowenko for the second time.
16 July 2004	Calpurnian Security Forces searched the homes of Ms. Pescara and Mr. Kolowenko for the third time and seized more of their belongings.
September 2004	Ms. Pescara’s application for renewal of her three-year business visa was denied. Ms. Pescara was advised orally that it would suffice for her to enter the country under Calpurnia’s visa waiver program for tourists which allows her a stay of maximum 30 days.
14 October 2004	Dr. Swift and Mr. Shelly, SFCDC’s representatives, were elected to the board of directors. Dr. Swift is also on the board of SFCDC.
15 November 2004	VanCal board of directors accepted Ms. Pescara’s resignation as managing director. At the same board meeting, Dr. Swift observed that the SFCDC did not “regard VanCal as really being a private company.”

⁷ Summary of the Evidence/Calendar of Events chart, Record, p. 6-9.

17 February 2005

An important board meeting to discuss the year's accounts and decide on the distribution of the company's profits was held at the SFCDC offices with Mr. Poe from SFCDC presiding. Mr. Rindler, who was serving as proxy for both Claimant directors, was absent from this important meeting.

10 March 2005

Another important board meeting held at the SFCDC office with Mr. Poe from SFCDC presiding. There is no dispute over the fact that Dr. Swift, the SFCDC representative, dominated the meeting. At this meeting which was dominated by Respondent representatives, the board decided to suspend payment of any profit to the foreign shareholders, i.e. Claimant.

27 May 2005

Upon Claimant's request from Mr. Korchnoi to open a bank account for Claimant's dividends, Mr. Korchnoi emailed Claimant back stating that he could not fulfill the request. Mr. Korchnoi's reason for refusing to comply with Claimant's request was the board of directors' decision, dominated by Respondent representatives, not to pay any sums of money for any reason to foreign shareholders.

16 November 2005

At a shareholders meeting, the two proxies held by Mr. Rindler on behalf of Claimant were found not to be formally valid for the purpose of the meeting. Also, Ms. Pescara was voted off the board of directors only by the majority of the votes of the present shareholders. Mr. Poe, and Mr. Korchnoi resigned from the board, and were replaced by two directors representing the SFCDC. At this point of time, Claimant held only one seat on the board, occupied by Mr. Rindler on proxy from Neil Shepherd.

15 April 2006 Neil Shepherd also resigned from the board, leaving Claimant without any representatives on VanCal's board of directors.

7 June 2006 At a shareholder's meeting Mr. Hunter and Mr. Fowler were elected as Claimant representatives. However, Mr. Hunter's role in the subsequent meetings was only in the capacity of a secretary, prepared the minutes. Mr. Fowler's presence and significance has not been worth mentioning in the record.

28 September 2006 An email from Mr. Swift to Claimant stated that the dividends had been credited on VanCal's books to Claimant's account.

23 October 2006 Realizing that its minor presence through its representatives was merely a futility, Claimant informed VanCal via email that it "no longer sees a reason to continue its presence at board of directors and shareholder meetings of VanCal." Thereafter, Claimant's two representatives on the board resigned.

5 February 2007 Claimant claimed expropriation by Calpurnian state entities and requested compensation through a letter to Mr. Poe.

31 July 2007 Claimant requests institution of arbitration proceedings in accordance with ICSID Rules of Procedure.

Arguments

I. THE ARBITRAL TRIBUNAL HAS JURISDICTION BECAUSE THE PROPER PEOPLE AND THE PROPER SUBJECT MATTER ARE BEFORE THE ARBITRAL TRIBUNAL AT THE PROPER TIME.

5 Any arbitral tribunal must assert its jurisdiction over the proper people, over the proper subject matter, and at the proper time.⁸ In the case at bar, (A) the Arbitral Tribunal has jurisdiction over the proper people; (B) the Arbitral Tribunal has jurisdiction over the subject matter of this case; and (C) the Arbitral Tribunal has jurisdiction at the proper time.

A. The Arbitral Tribunal has jurisdiction over the proper people because Gaul and Calpurnia are parties to the ICSID Convention and have consented to ICSID arbitration.

6 The Arbitral Tribunal has jurisdiction only over the proper parties.⁹ Under Art. 25 of the ICSID Convention, an arbitral tribunal has jurisdiction over the persons before it when two requirements are satisfied: (i) both the host country and the investor's country must be parties to ICSID Convention, and (ii) the investor must have consented to ICSID arbitration.

i. The Arbitral Tribunal has jurisdiction over the person of the parties because the dispute is between a contracting state, Calpurnia, and a national of another contracting state, Gaul.

7 The Arbitral Tribunal has jurisdiction according to Art. 25 of the ICSID Convention. In relevant part, Art. 25 states:

(1)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. When the parties have given their consent, no party may withdraw its consent unilaterally.”

(2) "National of another Contracting State" means:

⁸ See, Nathan, p. 100; ICSID Convention.

⁹ ICSID Convention, Article 25.

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

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

Both Gaul and Calpurnia are contracting parties to the ICSID Convention.¹⁰ Art. 25(2)(b) allows the Arbitral Tribunal to have jurisdiction over this dispute because Claimant, a Gaul corporation, is a juridical person which had the nationality other than the State party, Calpurnia. A juridical person is an entity other than a natural person created by law and recognized as a legal entity having distinct identity, duties, and rights.¹¹

ii. The Arbitral Tribunal has jurisdiction over the person of the parties because both parties have consented to ICSID arbitration.

8 Consent of the parties is the cornerstone of the jurisdiction of the Tribunal.¹² Consent must be clear, mutual, and in writing.¹³ Non-contractual ICSID arbitration arises where a BIT between the host State and the investor's home State exists.¹⁴ In non-contractual arbitration, the parties give their consent in two steps. First, the host State consents by including a standing offer to submit to ICSID jurisdiction in its national legislation or in a BIT.¹⁵ Second, the investor consents by accepting that offer, either in writing to the host State at any time or by filing a request to arbitrate with ICSID.¹⁶ The Arbitral Tribunal has jurisdiction over the present dispute because (a) Respondent has made a standing offer for ICSID arbitration; and (b) Claimant has accepted Respondent's standing offer for ICSID arbitration.

¹⁰ See, Claimant's Request for Arbitration, p. 3.

¹¹ Nathan, p. 101.

¹² ICSID Convention, Article 25.

¹³ Reed, Paulson, Blackaby, p. 177.

¹⁴ *Id.*

¹⁵ *Id.*; ICSID Convention, Article 25(1).

¹⁶ Reed, Paulson, Blackaby, p. 181.

a. Parties have consented to ICSID arbitration because there exists a standing offer from The Government of the Republic of Calpurnia for ICSID arbitration by means of the Calpurnia-Gaul BIT.

9 Consent from the State comes from a treaty.¹⁷ Namely, referral to ICSID arbitration in a BIT is a standing offer that ICSID arbitration is proper and that the Tribunal may have jurisdiction.¹⁸

10 In the instant case, consent is inextricably linked to the Calpurnia-Gaul BIT. Specifically, Calpurnia-Gaul BIT Art. 11(2) states that the parties to the Calpurnia-Gaul BIT:

“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.”

By way of the Calpurnia-Gaul BIT’s language, Respondent has clearly given its consent to ICSID arbitration and the jurisdiction of the Tribunal. Indeed, it is worth noting that according to the Calpurnia-Gaul BIT, such consent is irrevocable and, in fact, cannot be otherwise misconstrued to mean that the Tribunal’s jurisdiction is shakable.

b. Parties have consented to ICSID arbitration because Vanguard has accepted The Government of the Republic of Calpurnia’s standing offer for ICSID arbitration.

11 Consent from the investor comes from a request for arbitration or written consent to arbitration.¹⁹ This written consent or request operates as acceptance of the standing offer from the State for ICSID arbitration.²⁰

12 The initial issue to be addressed then is whether Claimant, Vanguard, can rely on Calpurnia-Gaul BIT as an offer to ICSID arbitration. Individuals or natural persons, companies, and other entities that are directly or indirectly controlled by investors of a State party to a BIT may rely on a BIT.²¹ The BIT that is present under these facts is the Calpurnia-Gaul BIT. The Calpurnia-Gaul BIT Art. 1(3)(b) defines an investor as:

¹⁷ See *LANCO v. Argentina*.

¹⁸ *Id.*; see also, *Salini v. Morocco*.

¹⁹ ICSID Convention, Article 25(1).

²⁰ Reed, Paulson, Blackaby, p. 133.

²¹ Reed, Paulson, Blackaby, p. 107; see ICSID Convention, Article 25.

“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.”

Claimant, Vanguard, is incorporated and maintains its seat in Gaul. Gaul is a contracting party to the Calpurnia-Gaul BIT by way of it being a signatory to the treaty. Therefore, Claimant is an investor as that term is defined according to the Calpurnia-Gaul BIT since it is a Gaul corporation. Because Claimant is an investor, it has standing to rely on the Calpurnia-Gaul BIT; therefore, the Tribunal’s jurisdiction over this dispute may be invoked by Claimant as requested.

13 The reason the Arbitral Tribunal is convened is because Claimant has made a request for arbitration pursuant to the Calpurnia-Gaul BIT Art. 11(2). As such, Claimant has accepted the offer to arbitrate under ICSID. Because Respondent and Gaul have established a BIT which provides for irrevocable consent to ICSID arbitration and because Claimant has accepted Respondent’s offer for ICSID arbitration, the Arbitral Tribunal fundamentally has jurisdiction to hear this dispute.

B. The Tribunal’s jurisdiction is proper because the subject matter of the dispute is proper.

14 The subject matter of the dispute, or its legality, must be within that which is covered by the BIT in order for the Arbitral Tribunal to have proper jurisdiction.²² For the Arbitral Tribunal to have jurisdiction over a dispute, not only should the dispute exist between a contracting state and a national of another contracting state, but the dispute should be a legal dispute and arise out of an investment. Accordingly, the dispute must (i) be a legal dispute; and (ii) arise directly out of an investment.

i. The Arbitral Tribunal has jurisdiction over the subject matter of the dispute because the dispute is a legal dispute.

15 A party can not be prevented from making a claim, but his legal right to the claim can only be settled by the arbitral tribunal after due process.²³ An arbitral tribunal must be obliged to assess the dominating character of a dispute before assuming jurisdiction.²⁴ If a claim is made without a legal basis and the claim is merely an expression of interest, the claim must be

²² ICSID Convention, Article 25(2)(b).

²³ Nathan, p. 99.

²⁴ *Id.*, at 105.

dismissed by the tribunal.²⁵ The standard of scrutiny required to determine a legal dispute from a mere expression of interest is not high because all the party needs is to show that the dispute is not manifestly outside the jurisdiction of the tribunal.²⁶ The purpose of the ICSID Convention is to concern itself with “legal rights, contractual rights, or property rights.”²⁷ So long as the dispute is not predominantly political, commercial, or environmental, the arbitral tribunal has jurisdiction because the dispute is a legal dispute.²⁸

16 Claimant has made a claim based on a legal dispute that is not manifestly outside the jurisdiction of the Arbitral Tribunal. The rights involved in this dispute include rights guaranteed to Claimant by the Calpurnia-Gaul BIT. Namely, the right to maintain fair and equitable investments with Respondent and the rights to promotion and protection of those investments, both of which Respondent has wholly disregarded. The legal dispute in this case concerns itself with legal rights granted to Claimant as a result of the Calpurnia-Gaul BIT. Accordingly, the Arbitral Tribunal has jurisdiction over this legal dispute.

ii. The Arbitral Tribunal has jurisdiction over the subject matter of the dispute because the dispute arises directly out of an investment.

17 The ICSID Convention is designed to protect investments by the foreign party which enters a state to invest as a result of inducements from the state provided directly under its investment laws and bilateral investment treaties.²⁹ Typically, the foreign investor is concerned with the security of its investments and the ICSID Convention provides resolution of any legal dispute arising directly out of an investment.³⁰

It is well accepted that foreign direct investment is usually meant to include:

“investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor’s purpose being to have an effective voice in the management of the enterprise.”³¹

²⁵ *Id.*

²⁶ ICSID Convention, Article 36(3).

²⁷ *History of the Convention*, Vol. II, Part 1, p. 54.

²⁸ Brown and Cheng, p. 97.

²⁹ Nathan, p. 106.

³⁰ *See*, ICSID Convention Article 25(1).

³¹ *The IMF Balance of Payments Manual (4th Ed. 1977)*.

Nonetheless, the ICSID Convention does not contain a definition for the term investment. Instead, the ICSID Convention points out that it is not necessary to define what is an investment because it is a matter for the individual contracting states to determine.³²

18 Similarly, the ICSID Convention has recognized that the notion of an investment should be viewed by an economic concept of investment that entails looking at the investment from the recipient's point of view; namely, from the host state's viewpoint.³³ From the state's standpoint, investment's that benefit the state's economy are vital investments.³⁴ For example, civil engineering contracts are considered investments under the economic concept approach to defining an investment.³⁵ In that case, the issues centered around the setting up of a company with equity participation paid in cash and in kind to engage in entrepreneurial civil engineering projects, which were held to be investments.

19 The Calpurnia-Gaul BIT Art. 11 deals generally with disputes "relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party." Art. 11 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Indeed, it is sufficient that the dispute relate to an investment made under the BIT.³⁶

20 The Calpurnia-Gaul BIT Art. 1(1) defines investment as "every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party." The definition provided in the Calpurnia-Gaul BIT further identifies that "shares, stocks, debentures or other form of participation in a company" constitutes an investment.³⁷

21 Here, Claimant invested in Respondent by entering into a joint venture company, VanCal, which is a Calpurnian corporation. Claimant initially owned a 50% equity interest in VanCal, but as of 2004 Claimant's interest had been reduced to 30%. Claimant's interest in VanCal is an asset acquired by Claimant, as an investor, in Respondent. Claimant made its investment in VanCal, and thus Respondent, because it intended to "acquire a lasting interest in an enterprise operating in an economy other than that of the investor." Indeed, Claimant made this investment by way of a joint venture, the nature of which was for the purpose of having

³² *Report of the Executive Directors of 10 September 1964*, para. 27.

³³ Delaume, p. 117.

³⁴ *Id.*

³⁵ See *Klockner v. United Republic of Cameroon*.

³⁶ *Mihaly International v. Sri Lanka*.

³⁷ Calpurnia-Gaul BIT, Art. 1(1)(b).

managerial control. Furthermore, from an economic standpoint, the essence of the dispute hereunder involves the construction, maintenance, and servicing of GSM/UMTS mobile telecommunication infrastructure. Respondent had a significant economic benefit from the underlying activity in this case and Claimant's investment unquestionably brought significant benefits to Respondent. Accordingly, the dispute at hand involves an investment and the Arbitral Tribunal's jurisdiction is proper.

C. The Arbitral Tribunal's jurisdiction is ripe because the dispute arose at the right time.

22 According to Art. 25(1) and (2)(a)-(b) of the ICSID Convention, the Arbitral Tribunal's jurisdiction extends to any legal dispute between a contracting state and a national of another contracting state. A national of another contracting state is:

“any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to...arbitration;” and

“any juridical person which had the nationality of Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to...arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

23 The ICSID Convention was in force at the time consent to arbitration was completed and the BIT was in force; therefore, the Arbitral Tribunal's jurisdiction is warranted. Gaul and Respondent are both signatories of the ICSID Convention, which was and is in force, at all times present during this dispute. Moreover, the Calpurnia-Gaul BIT has been in force since its inception on 1 August, 1995 between Calpurnia and Gaul. The dispute herein began in 2003, well after the Calpurnia-Gaul BIT came into effect. As such, the protections and obligations that flow from the Calpurnia-Gaul BIT control.

24 Altogether, the facts of this case compel the conclusion that this Arbitral Tribunal has jurisdiction over the present case because the proper parties are before the Tribunal, the subject matter is within that which is covered under the BIT, and the dispute occurred at the proper time.

II. THE ARBITRAL TRIBUNAL IS COMPETANT TO DETERMINE ITS OWN JURISDICTION AND IT SHOULD NOT DECLINE JURISIDCTION.

25 Not only does this tribunal have jurisdiction to hear this case, but this Arbitral Tribunal should not decline jurisdiction because (A) the Arbitral Tribunal determines its own jurisdiction; (B) Claimant’s claims before other courts is not a bar to arbitral proceedings; (C) the requirement of 18 months amicable settlement is a discriminatory treatment and should be reduced to 2 months; and (D) the policies behind the underlying purpose of arbitration overwhelming fall in favor of jurisdiction.

A. The Arbitral Tribunal should not decline jurisdiction because the Arbitral Tribunal shall be the judge of its own competence.

26 ICSID Art. 41 states that the tribunal “shall be the judge of its own competence.” The arbitration law of the place of arbitration has no bearing on ICSID because ICSID is self-contained and independent.³⁸ It is well established in international arbitration that the doctrine of Competence-Competence grants arbitral tribunals the power to determine their own jurisdiction.³⁹ This doctrine was developed to resolve the particular issue of whether the national courts or the arbitral tribunals decide the admissibility of arbitration when the parties’ agreement, or in this case a BIT, has not yet been evaluated.⁴⁰ Disputes over an arbitral tribunal’s jurisdiction are common because of the ambiguity of the interaction between the applicable laws and the express terms of the contract.⁴¹ Moreover, parties may challenge an arbitral tribunal’s jurisdiction as a tactic to delay proceedings.⁴² The principle of Competence-Competence resolves such disputes and prevents delays by assigning the determination of jurisdiction to the arbitral tribunal itself.⁴³

27 The doctrine of separability further supports the principle of Competence-Competence by authorizing an arbitral tribunal to determine its own jurisdiction even in the face of a challenge to the validity of the contract, or BIT, as a whole.⁴⁴ Separability means “that the arbitration clause

³⁸ Reed, Paulson, Blackaby, p. 110 .

³⁹ Poudret and Besson, para. 459.

⁴⁰ Lew, Mistelis, Kroll, para. 14-16.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*, at para. 14-19.

in a contract is considered to be separate from the main contract...and...survives the termination of the contract.”⁴⁵ As such, an arbitral tribunal can determine its own jurisdiction even where the main BIT is invalid or has yet been deemed valid.

28 In relevant part, the Calpurnia-Gaul BIT Art. 11(2) states “the investor has the choice of submitting the case to ICSID,” or pursuing other avenues of legal resolve. Here, Claimant has chosen to pursue ICSID arbitration; therefore, the Tribunal has the authority to judge its own competence in connection with the adjudication of this dispute. The validity, application, and protections the Calpurnia-Gaul BIT offers to both parties have yet to be evaluated. However, that is a task before the Arbitral Tribunal because the doctrine of separability holds that the arbitration clause stands separate from the Calpurnia-Gaul BIT as a whole. In the interests of fairness and efficiency, the Calpurnian-Calpurnia-Gaul BIT must be evaluated before this Arbitral Tribunal. The parties have chosen ICSID arbitration by way of the express language contained within the Calpurnia-Gaul BIT. The purpose of choosing ICSID arbitration was to ensure that the parties could enjoy the benefits of neutrality, party autonomy, flexibility, finality, confidentiality, and expedience. The Arbitral Tribunal must keep these underlying characteristics, which the parties intended, in mind and find that it has the ability and authority to determine its own jurisdiction.

B. The Arbitral Tribunal shall not decline jurisdiction in connection with Bilateral Investment Treaty claims because Vanguard’s claims before other courts is not a bar to the arbitral proceedings.

29 “Consent of the parties to arbitration under [ICSID] shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”⁴⁶ However, the Arbitral Tribunal may not decline jurisdiction over BIT claims on the ground that there is a selection of another forum with respect to contract disputes; a failure to do so amounts to an excess of powers and is a ground for annulment of the award.⁴⁷ The overwhelming majority of arbitral awards make clear that the tribunal has jurisdiction over BIT claims.⁴⁸ Thus, a tribunal is competent to hear claims based on the terms of a BIT.⁴⁹ Where violations of a BIT, including

⁴⁵ Redfern and Hunter, para. 3-60.

⁴⁶ ICSID Article 26.

⁴⁷ *SGS v. Philippines*.

⁴⁸ *Id.*; see also, *Azurix v. Argentina*; *SGS v. Pakistan*; *Salini v. Morocco*.

⁴⁹ *Salini v. Morocco*.

violations of the principle of fair and equitable treatment, the prohibition of unreasonable or discriminatory measures, or the prohibition of measures having effect equivalent to nationalization are involved, the tribunal's jurisdiction is warranted.⁵⁰

30 Furthermore, the Calpurnia-Gaul BIT Art. 11(3) states that “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.” The seemingly exclusive nature of this clause fails to oust the Tribunal's jurisdiction. Instead, a consistent line of authorities demonstrates that such an exclusive forum selection clause does not exclude tribunals' jurisdiction because the subject-matter before the domestic courts in question differs from the dispute before the ICSID tribunal.⁵¹ The critical question that arises in the application of clauses of this kind is whether any of the proceedings that may have been initiated are in respect of the same dispute. These types of clauses are based on the “fork in the road” principle.⁵² In order to trigger these clauses, courts and tribunals require that the domestic court and arbitral proceedings concern the same type of claims.⁵³ However, where claims are brought before a commercial court regarding a breach of contract or other similar causes of action not involving a BIT, the action fails to function as a waiver of the claimant's rights under the BIT and the ICSID Convention.⁵⁴

31 The facts of the instant case compel the conclusion that the Tribunal's jurisdiction is warranted. The Commercial Court of San Inocente de Irkoutsk considered claims by Ms. Pescara to transfer her account holdings to Gaul dividends on 1% shareholding status.⁵⁵ The Court held that Ms. Pescara did not have standing to bring that action, and the Court dismissed.⁵⁶ The claims brought by Ms. Pescara did not involve protections guaranteed by the Calpurnia-Gaul BIT for Claimant. Accordingly, Claimant has not waived any of its rights under the Calpurnia-Gaul BIT and the ICSID Convention and is therefore entitled to arbitrate through ICSID Arbitration. Furthermore, the violations of the Calpurnia-Gaul BIT that are before this Arbitral Tribunal include unreasonable or discriminatory measures and the prohibition of measures having effect equivalent to nationalization, all of which are merits that are generally held within the jurisdiction of arbitral tribunals.

⁵⁰ Vivendi I.

⁵¹ *LANCO v. Argentina*; see, Vivendi I.

⁵² Weiler, p. 302.

⁵³ *Id.*

⁵⁴ Vivendi I.

⁵⁵ Abstract from Respondent Record, p. 8.

⁵⁶ *Id.*

32 Additionally, parties often choose model language provided by an institution to prevent the arbitration agreement from being deemed invalid.⁵⁷ In doing so, the parties effectively choose an arbitration clause to govern the agreement that has previously been shown valid and operable. ICSID Model Clause 20 is similar to the portion in the Calpurnia-Gaul BIT which gives rise to the parties' right to choose ICSID Arbitration. Therefore, because the clause within the Calpurnia-Gaul BIT is in accordance with the ICSID Model Clauses, it is operable and binding upon the parties.

33 As already established in section I above, the parties have consented to ICSID arbitration. The consent flowing from the Calpurnia-Gaul BIT and Claimant's request for arbitration establish that arbitration was intended by the parties and, pursuant to ICSID Art. 26, such consent and intention operates to exclude any other remedy. For these reasons, the Arbitral Tribunal should not decline jurisdiction.

C. The Arbitral Tribunal should not decline jurisdiction because the requirement of 18 months of amicable settlement is discriminatory and not applicable; and, in the alternative, the requirement of 18 months has been met.

34 The respondent argues that the Arbitral Tribunal does not have jurisdiction yet because Claimant has failed to pursue amicable settlement for 18 months according to Art. 11(2) of the Calpurnia-Gaul BIT. This assertion fails because such treatment is discriminatory. Specifically, Art. 7 of the Calpurnia-Flatland BIT requires only seeking 2 months of amicable settlement. The Most Favored Nation Treatment, Art. 4 of the Calpurnia-Gaul BIT, requires that Claimant receive treatment that is identical to any other nation's treaty with Respondent. Accordingly, Claimant must only pursue amicable settlement for 2 months which is a more favourable treatment given to Flatland. The uncontested facts of this case indicate that Claimant has sought amicable settlement for at least a period of 2 months. Claimant's letter dated 21 May, 2005 and its email dated 5 June, 2005 signal attempts by Claimant to resolve this dispute with Respondent. These emails culminated in a final act of disregard by Respondent on 28 September, 2006 when Respondent rejected Claimant's attempts to seek amicable settlement and stated that dividends had been "credited on Vancal's books to Claimant's account," without

⁵⁷ Born, p. 37.

actually paying Claimant. Nevertheless, an amicable settlement failed and Claimant has sought its right to arbitrate pursuant to the Calpurnia-Gaul BIT.

35 Respondent argues further that the Most Favored Nation treatment found in Art. 4 of the Calpurnia-Gaul BIT does not apply to or include dispute resolution articles. This is a contention that is clearly unsupported and in contravention with the fundamental purpose of arbitration surrounding bilateral investment treaties.⁵⁸

36 The Arbitral Tribunal must not decline jurisdiction because, contrary to what Respondent may believe, the Calpurnia-Gaul BIT in fact ensures that Claimant receive the more favourable treatment that other nations, such as Flatland, receive from Respondent. Since Flatland is required to go through 2 months of amicable settlement, Gaul should be given the same favourable treatment as opposed to 18 months of amicable settlement required under the Calpurnia-Gaul BIT. Because amicable settlement has not been reached after 2 months, Claimant properly sought arbitration of its claims under the Calpurnia-Gaul BIT and this Arbitral Tribunal has the jurisdiction to hear such claims.

37 Even if this Tribunal should find that Respondent's treatment is not discriminatory based on the Most Favoured Nation doctrine, jurisdiction is warranted because Claimant has attempted to reach an amicable settlement for well over 18 months. Specifically, from Claimant's first email on the 21 May 2005 to Claimant's request for arbitration on 31 July 2007, Claimant wished to settle this dispute regarding its investment with Respondent. Despite Claimant's efforts, Respondent has continued to disregard the significance and consequences of its own actions towards Claimant.

D. The Arbitral Tribunal should not decline jurisdiction because the overwhelming policies underlying the purpose of ICSID fall heavily in favor of arbitration.

38 Arbitral tribunals have powers to invent a rule of law where it does not exist and that rule can be influenced by interests such as overwhelming public interest.⁵⁹ It is repeatedly emphasized that the *raison d'être*, or the reason for being, of ICSID is to encourage the flow of foreign private capital into the development of the economies of the poor nations of the world.⁶⁰ Additionally, arbitration under the ICSID Convention is mutually beneficial, serving the best

⁵⁸ See, Reed, Paulson, Blackaby, p. 177.

⁵⁹ Nathan, p. 100.

⁶⁰ *Towards a Greater Depoliticization of Investment Disputes, ICSID Rev.-FILJ (1986).*

interests of both parties. Namely, by relying on arbitration as a dispute resolution mechanism, international investors can bypass national prejudice and avoid involvement with national politics.⁶¹ Parties have full control over their dispute settlement because arbitration is based on the parties' choice and not bound by any civil rules.⁶² As a result, arbitration is more flexible and efficient. Furthermore, arbitration is beneficial because the award is final and binding and there are limited grounds for the award to be set aside.⁶³ The arbitral process also preserves confidentiality and ensures expedience because arbitration allows for party autonomy, it allows for the parties to select their own arbitrators, and there is no accumulation of pending cases before the tribunal to delay the proceedings.⁶⁴

39 Disregarding jurisdiction over the dispute between Claimant and Respondent undermines the pro-investment, cost-effective, speedy, efficient, and simplistic purposes of ICSID Arbitration. The Calpurnia-Gaul BIT contains an arbitration clause, which was accepted by both parties, and which both parties meant to enjoy the benefits that flow therefrom. Were this Arbitral Tribunal to refuse jurisdiction, it would undermine the principles of ICSID Arbitration which both parties have relied upon. Accordingly, jurisdiction over this dispute in connection with the Calpurnia-Gaul BIT is properly before this Arbitral Tribunal.

40 Ultimately, the Arbitral Tribunal is well within its own competence and authority to hear this dispute and must not decline jurisdiction. Both Gaul and Respondent are contracting parties to the ICSID Convention and both Claimant and Vancal are, by way of their respective countries signatures and their individual consent, parties to a BIT which requires ICSID Arbitration under the facts of this case. The fundamental characteristics underlying ICSID arbitration are meant precisely for occasions such as the present, where Respondent's discriminatory and unfavourable treatment has brought this Arbitral Tribunal together.

⁶¹ Lew, Mistelis, Kroll, para. 1-13.

⁶² *Id.*

⁶³ *Id.* at para. 1-20.

⁶⁴ *Id.* at para. 1-28.

III. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA DISCRIMINATED AGAINST VANGUARD BECAUSE THE GOVERNMENT TREATED VANGUARD LESS FAVORABLY THAN NATIONAL INVESTORS AND OTHER FOREIGN INVESTORS.

41 Under Art. 4 of the Calpurnia-Gaul BIT, Respondent is obligated to grant foreign investors the highest standard of treatment available to its own investors or investors of any third state. More specifically, Art. 4(2) states:

Investors of one Contracting Party shall be accorded by the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investment, 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.

In violation of this obligation, (A) Respondent discriminated against Claimant because Respondent treated Claimant less favourably than Calpurnian national investors; and (B) Respondent discriminated against Claimant because Respondent did not treat Claimant as required by the Calpurnia-Flatland BIT.

A. The Government of the Republic of Calpurnia discriminated against Vanguard because the Government treated national investors more favourably.

42 The Calpurnia-Gaul BIT requires the host state to treat foreign investors the same as national investors.⁶⁵ The reason for requiring such National Treatment in BITs is to put foreign investors in a less competitive disadvantage in comparison with national investors.⁶⁶ However, such treatment has not been without limitations in other BITs.⁶⁷ “Many treaties provide that such treatment will apply only where the foreign and the domestic investor find themselves in ‘identical’ or ‘similar’ situations.”⁶⁸ In short, the investors that are similarly situated in Calpurnia should be treated the same.

43 In the case at hand, national or domestic investors and Claimant, as the foreign investor, are in an identical situation. The Calpurnia-Gaul BIT does not express that the foreign and the domestic investors must be in the same or similar situations in order for foreign investors to receive national treatment. However, even if the Arbitral Tribunal enforces such requirement, in

⁶⁵ Calpurnia-Gaul BIT, Art. 4.

⁶⁶ Dolzer, p. 65.

⁶⁷ *Id.* at 63.

⁶⁸ *Id.*

the case at hand, the domestic and foreign investors are in an identical situation. Both Claimant and Calpurnian stockholders are investors in the same company. In other words, Calpurnian shareholders' investment and Claimant's investment are of the same kind because they both invested in the stocks of the same company, VanCal. Moreover, since there is only one class of VanCal stocks⁶⁹, all the stockholders, either national or foreign, are equally situated with respect to their investment.

44 Even though the situation is identical for both Claimant and national shareholders, Respondent treated Claimant less favorably than the national investors. On 10 March 2005, the board of directors, which was dominated by Calpurnian government representatives, suspended the payment of profits to foreign shareholders.⁷⁰ In other words, Respondent through its representatives in VanCal's board of directors discriminated between foreign shareholders, including Claimant, who were not going to receive any dividends, and national shareholders who continued to receive dividends.

45 Respondent not only discriminated against Claimant with respect to profit distribution, but also the transfer of information. Mr. Korchnoi's affidavit points out that Dr. Swift made it clear that no information about the company could be copied, translated, or taken away from the head office in Calpurnia.⁷¹ Dr. Swift's orders meant that Gaulian shareholders, including Claimant, had no access to information whatsoever, while Calpurnian shareholders could stop at the head office and receive as much information as they desired. Therefore, Respondent treated foreign investors less favourably than national investors with regards to access to information about their investment.

46 Respondent has violated its obligation under Art. 4 of the Calpurnia-Gaul BIT because Respondent discriminated against Claimant by depriving Claimant from profit and information about its investment in Calpurina while the profit and information was readily available to national shareholders. Even though Art. 4 of the Calpurnia-Gaul BIT provided for an even playing field for national and foreign investors, Respondent's actions through its representatives on VanCal's board of directors made the playing field uneven against foreign investors. Respondent interfered with Claimant's use and enjoyment of its investment while national investors' maintenance, use, and enjoyment went unaffected.

⁶⁹ FDI Moot 2nd Clarifications of Problem, number 11.

⁷⁰ Evidence/Calendar of Events, Record, p. 7.

⁷¹ *Id.* at 9.

B. The Government of the Republic of Calpurnia discriminated against Vanguard because the Government treated Vanguard less favourably than the treatment required under the Calpurnia-Flatland BIT.

47 Based on Art. 4 of the Calpurnia-Gaul BIT, the host nation cannot treat the foreign investors less favourably than investors from a third state. This Most Favored Nation treatment brings all foreign investors to the same level of competition, no matter which country they come from. Most Favored Nation treatment equalizes the playing field, independent of the nationality of the investors.

48 In simple terms, Art. 4 of the Calpurnia-Flatland BIT states that: (1) host country cannot require the senior management to be from a particular nationality; (2) host country may require the majority of the board of directors to be from a particular nationality, only if this requirement does not materially impair the investors control; (3) host country shall grant temporary entrance permission to foreign nationals that hold managerial positions or positions that require specialized knowledge.

49 In the case at hand, Respondent is required to give Claimant the same treatment mentioned under Art. 4 of the Calpurnia-Flatland BIT because Art. 4 of the Calpurnia-Gaul BIT requires Respondent to treat Claimant the same as other foreign investors. Accordingly, Art. 4 of the Calpurnia-Gaul BIT ensures that Gaul investors receive the same treatment provided in Art. 4 of the Calpurnia-Flatland BIT, even though Claimant is not an investor from Flatland.

50 Respondent violated Art. 4 of the Calpurnia-Flatland BIT on all three grounds mentioned above. First, Respondent employed the chairman of the board of directors who is Calpurnian. In other words, the government has indirectly required the senior managing director of the company to be a national of Calpurnia in violation of Art. 4 of the Calpurnia-Flatland BIT.

51 Second, Respondent required the majority of the board of directors to be Calpurnians to the extent that Claimant's control over the investment was lost. VanCal has six board members, three of which are Calpurnians, representing Respondent, and one of which is an independent investor from Calpurnia.⁷² The number of Claimant representatives on VanCal's board of directors varied over time. However, the maximum number of directors representing Claimant on VanCal's board of directors did not exceed two at any time. Therefore, Respondent through its board members required the majority of the board members to be Calpurnians.

⁷² 2nd Clarifications of Problem, number 1.

52 Moreover, by holding the majority seats at the board of directors, Respondent limited Claimant's control and voting power, in many incidents. For example, in November 2004, Dr. Swift personally admitted that he does not regard VanCal as a private company.⁷³ Dr. Swift's statement shows that even Respondent's representatives knew that Claimant's representatives on the board of directors did not have significant controlling power. One year later, in November 2005, Respondent's representatives ousted Ms. Pescara, one of Claimant's two representatives, from the board of directors, further reducing Claimant's control over its investment. At the same meeting, Respondent also rejected the two shareholder proxies held by Mr. Rindler on behalf of Claimant. Furthermore, in February 2005, an important board meeting was held without the presence of any of Claimant's representatives. These examples show that Respondent deprived Claimant from its voting and controlling power in many incidents. Based on Art. 4 of the Calpurnia-Flatland BIT, Respondent had the right to require the majority of VanCal's board of directors to be from Calpurnia *only if* Claimant's control over the investment was not materially impaired. As a result of the loss of voting power in the board of directors, Claimant's controlling power has been materially impaired. Therefore, Respondent violated its obligation under Art. 4 of the Calpurnia-Flatland BIT.

53 Third, Respondent expatriated Claimant's personnel in violation of Art. 4 of the Calpurnia-Flatland BIT which requires Respondent to grant at least temporary entrance to those that hold managerial positions. In September 2004, Ms. Pescara was still the managing director of the investment and therefore, held a managerial position. Under Art. 4 of the Calpurnia-Flatland BIT, Respondent was obligated to give Ms. Pescara at least a temporary entrance into the country. However, in September 2004 *before* Ms. Pescara's resignation from her managerial position, Respondent denied Ms. Pescara's application for renewal of her business visa in violation of Art. 4. Moreover, Mr. Kolowenko, the chief technical officer, was also forced to leave the country. As a chief technical officer, Mr. Kolowenko held a position at the investment with specialized knowledge and under Art. 4 of the Calpurnia-Flatland BIT, Respondent must have granted him a temporary entrance, but it did not.

54 Simply put, Respondent discriminated against Claimant because Respondent did not treat Claimant how it would have treated Flatland investors. More particularly, Respondent required the senior management to be from Calpurnia, and Respondent impaired Claimant's control over

⁷³ Evidence/Calendar of Events, Record, p. 9.

the investment by requiring the majority of the board of directors to be from Calpurnia, and Respondent did not grant temporary entrance permission to Ms. Pescara and Mr. Kolowenko in violation of the Calpurnia-Flatland BIT.

IV. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA EXPROPRIATED VANGUARD'S INVESTMENT BECAUSE THE GOVERNMENT UNLAWFULLY INTERFERED WITH CLAIMANT'S MANAGEMENT, USE, AND ENJOYMENT OF THE BENEFITS ARISING FROM THE INVESTMENT.

55 Art. 6(1) of the Calpurnia-Gaul BIT prevents the host nation from expropriating the investment. Generally, expropriation takes place when a Government takes over the investment. Expropriation could take place directly by physical take-over, or indirectly by setting rules and regulations that would deprive the investors from the benefits of their investment. Art 6(1) prevents Respondent from either direct or indirect expropriation.

56 Even though expropriation is generally not allowed, Art. 6(1) has exceptions. Art 6(1) of the BIT allows expropriation when done for a public interest, in a non-discriminatory manner and with due process of law and against prompt, adequate, and effective compensation. Respondent has (A) taken over Claimant's investment; (B) without a public interest; (C) in a discriminatory basis; (D) without due process of law; and (E) without fair compensation.

A. The Government of the Republic of Calpurnia expropriated Vanguard's investment because the Government took control of Vanguard's investment and blocked Vanguard's use and enjoyment of its investment.

57 Art. 6(1) of the Calpurnia-Gaul BIT states in part:

“Investment 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.”

This provision outlaws expropriation, nationalisation or any other measures having the same effect. However, the terms “expropriation” or “nationalization” are not defined anywhere in the Calpurnia-Gaul BIT.

58 In general, scholars agree that taking physical possession of an investment so that the business is run directly by the host government is considered expropriation of a direct kind.⁷⁴

⁷⁴ Folsom and Gordon, p. 1125; *See also*, Aldrich, p. 174.

However, Art. 6(1) particularly states that expropriation could still take place indirectly, when there is no direct taking of the property. In the case at hand, Respondent (i) directly and physically took over Claimant's investment; and even if Respondent's taking cannot be considered as a direct taking (ii) Respondent expropriated Claimant's investment by indirectly interfering with Claimant's enjoyment of the investment's benefits.

(i) Calpurnian Government unlawfully interfered and expropriated Vanguard's investment because it physically took over VanCal's management.

59 The Iran-U.S. Claims Tribunal has established a definition of direct expropriation. In a number of cases, the Iran-U.S. Claims Tribunal found that the Iranian Government directly took over American companies, when the Iranian Government appointed individuals or governmental agencies with some degree of managerial or supervisory control over the company.⁷⁵ Therefore, any direct physical control over the management or supervision of the company could be considered a direct expropriation. Art. 6(1) of the Calpurnia-Gaul BIT outlaws such direct expropriation.

60 In addition to Art. 6(1) of the Calpurnia-Gaul BIT, Art. 2(3) of the Calpurnia-Gaul BIT specifically prohibits government's intervention in the investment:

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.⁷⁶

61 In the case at hand, Respondent directly interfered with Claimant's investment by impairing Claimant's use of its investment and directly taking over the company. Under the Iran-U.S. Claims Tribunal's definition of direct expropriation, Respondent directly expropriated Claimant's investment by assigning Dr. Swift, a Calpurnian government employee, as the chairman of VanCal's board of directors.

62 In addition to Dr. Swift's assignment, a list of other events evidence the direct take over by Respondent. In late 2003, Respondent started to take control over VanCal, and before 23 October 2006, when Claimant completely withdrew from the board of directors, VanCal had become completely government controlled. More particularly, in September 2004, Respondent

⁷⁵ Aldrich, p. 174.

⁷⁶ Emphasis added.

denied Ms. Pescara's application for renewal of her business visa.⁷⁷ Only after her visa was denied, in November 2004, Ms. Pescara resigned from managing director.⁷⁸ Taking over the managerial position was Respondent's first step towards physically taking over VanCal. Moreover, the board meeting in February 2005 was held without any Claimant directors, and another board meeting in 10 March 2005 was held with only one of Claimant representatives present. In the 10 March 2005 meeting, Mr. Rindler was present as a proxy for both Claimant's representatives in order to decide how to divide the company's profits. Therefore, a very important decision about where the company's profits go was made with only one Claimant representative present.

63 Moreover, at a shareholder's meeting in 16 November 2005, both proxies held by Mr. Rindler were found invalid, and at a meeting where no Claimant representatives were present, Ms. Pescara was voted off the board of directors. At the same meeting, other Claimant representatives also resigned that were replaced by Respondent representatives. Even though later on 7 June 2006, two more directors from Claimant were elected, Respondent representatives assigned them to secretarial jobs, such as preparing the meeting minutes.

64 The incidents summarized above show that Claimant lost its controlling power over the investment to Calpurnian Government representatives. The State Fund for Commerce and Development in Calpurnia (SFCDC), which is an organization 100% owned by the government, dominated the board meetings and slowly eliminated any Claimant representative control over the investment. The government employed chair of the board, Dr. Swift was also a board member at SFCDC connecting the Respondent to VanCal. Furthermore, Dr. Swift's comment that he would not stay at a meeting with "Gaulois spies" shows the Respondent representatives' distaste for Claimant representatives and their intent to eliminate them all together.

65 Respondent removed Claimant's representatives from the board of directors, and took over the management of VanCal. Therefore, Claimant no longer ran the investment. In other words, actual property was taken away from Claimant, which means that Respondent directly expropriated Claimant's investment in violation of Art. 6(2) of the Calpurnia-Gaul BIT and general international law. Furthermore, Respondent discriminatorily impaired the management and maintenance of Claimant's investment in violation of Art. 2(3) of the Calpurnia-Gaul BIT.

⁷⁷ Abstract from Claimant's Request for Arbitration, Record, p. 4.

⁷⁸ Evidence/Calendar of Events, Record, p. 6.

(ii) Calpurnian Government obstructed the transfer of returns from Vanguard's investment and therefore, indirectly expropriated Vanguard's investment.

66 Even though taking physical possession of the facility is considered expropriation, there are other "indirect" ways for the government to expropriate foreign investment. "Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property. It is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation, and each case is therefore to be decided on the basis of its attending circumstances."⁷⁹ In other words, expropriation could take place if the investment is still run by the owners with the strict supervision of the government.⁸⁰

67 The Iran-U.S. Claims Tribunal defines indirect expropriation:

It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.⁸¹

68 As a subcategory of expropriation, nationalization might specifically require executive or legislative act, however, expropriation in general is determined on a case-by-case basis and anything could result in expropriation other than legislative act. "In general, *expropriation* means the coercive appropriation by the State of private property, usually by means of individual administrative measures. *Nationalization* involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain."⁸²

69 The Calpurnia-Gaul BIT not only outlaws expropriation, but also, guarantees free transfer of payments. Art. 8(1) of the Calpurnia-Gual BIT guarantees free transfer of payments in and out of the host country:

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: ...

⁷⁹ *Lauder v. Czech Republic*, para. 200 (citing to Dolzer, pp. 98-100).

⁸⁰ Folsom and Gordon, p. 1125.

⁸¹ *Starrett Housing v. Islamic Republic of Iran*.

⁸² *Lauder v. Czech Republic*, para 200.

(b) returns; (c) proceeds obtained from the total or partial sale or disposal of an investment; ...

70 Even if Respondent did not directly interfere with Claimant's management of its investment, it interfered indirectly with Claimant's enjoyment of the benefits of its investment. Respondent prevented free transfer of VanCal's profits to Claimant's shareholders in violation of Art. 8(1). Furthermore, Respondent failed to pay the royalties generated from Respondent's use of Claimant's trademark. As a result, Respondent blocked Claimant's enjoyment of the benefits generated by its investment. Therefore, Respondent not only violated Art. 8(1) of the Calpurnia-Gaul BIT by blocking the free transfer of the returns, but it also violated Art. 6(1) by indirectly expropriating Claimant's investment. Respondent expropriated Claimant's investment even though it did not engage in any legislative act that resulted in loss of Claimant's enjoyment of its investment. Claimant's loss of enjoyment of its investment caused by Respondent behavior is enough to constitute expropriation, and a legislative act is not necessarily required for expropriation to take place.

B. The Government of the Republic of Calpurnia's expropriation was not made with a public interest because Vanguard's presence in Calpurnia substantially improved the quality of life for Calpurnians.

71 The host state is excused from expropriating when it does so for a public purpose.⁸³ Determining what constitutes public interest "in any specific situation can only be effected by the State concerned, it is hardly conceivable that it can be reviewed or contested by another organ."⁸⁴ Despite of this limitation, almost all expropriation provisions have this term included in them.⁸⁵ Therefore, treaties seem to incorporate this broad standard to "effectively deter the host State from adopting measures which, on their face, are not for the collective good but for private or capricious purposes."⁸⁶ In other words, the public purpose must be directed towards "improving the quality of life" in the host nation.⁸⁷ Economic, social and political elements should be considered in determining nations development and quality of life.⁸⁸ In 1962, United Nation's General Assembly's Resolution on Permanent Sovereignty over Natural Resources states in part:

⁸³ Article 6(1) of the Calpurnia-Gaul BIT.

⁸⁴ Dolzer, p. 104.

⁸⁵ *Id.*

⁸⁶ *Id.* at 105.

⁸⁷ Folsom and Gordon, p. 1126.

⁸⁸ *Id.*

“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign.”⁸⁹

72 In the case at hand, Respondent did not expropriate with a public purpose. Foreign investment is inherently for public economic development, and by taking over foreign investment discriminatorily, the government acted for its own benefit and not the benefit of the public. The public would have benefited from the presence of foreign investors creating jobs and opportunities and bringing foreign currency which stimulates domestic economy and increases the quality of life. Furthermore, by taking over Claimant’s investment, the government is discouraging other investors from investing in the nation. Less foreign investment is directly related to economic isolation and lowering of the quality of life. Therefore, Respondent’s purpose for expropriation was not for the betterment of public life.

C. The Government of the Republic of Calpurnia expropriated in a discriminatory manner because the Government treated Vanguard less favourably than national and other foreign investors.

73 As was discussed above, Respondent discriminated against Claimant by treating it differently compared to its national investors or even compared to other foreign investors. Therefore, the expropriation was not in a non-discriminatory manner which could have excused Respondent’s expropriation.⁹⁰

D. The Government of the Republic of Calpurnia expropriated without due process of law because it did not provide Vanguard with advance notification of changed circumstances that resulted in expropriation of Vanguard’s investment.

74 When the term “due process of law” is used in an international treaty, its meaning is not necessarily the same as the meaning in domestic law.⁹¹ “In an international instrument, the requirement would suggest that the investor for example has the right to advance notification and a fair hearing before the expropriation takes place...”⁹² Furthermore, Art. 3 of the BIT speaks about transparency:

⁸⁹ *Id.* (citing to United Nation’s Resolution).

⁹⁰ Calpurnia-Gaul BIT, At. 6(1).

⁹¹ Dolzer, p. 106.

⁹² *Id.*

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.

75 In the present case, Respondent's expropriation was without due process of law. Claimant was faced with Calpurnia's unexpected change of governance to return to the traditional, self-sufficient society. Respondent's representatives at VanCal had an obligation under Art. 3 to be transparent, and advise Claimant of the consequences of such change of politics such as expropriation of their investment. Therefore, Respondent violated Claimant's right to advance notification, allowing Claimant to act accordingly given the new circumstances. In other words, Respondent's expropriation was without due process of law.

E. The Government of the Republic of Calpurnia expropriated without compensation.

76 Under Art. 6(1) of the Calpurnia-Gaul BIT, expropriation is excused if it is done with prompt, adequate, and effective compensation. In 28 September 2006, Mr. Swift's email to Claimant stated that dividends had been credited to Claimant's account "on VanCal's books."⁹³ However, no actual payment was made to Claimant. Respondent's representatives wrote in their accounting records that they had compensated Claimant, while they actually had not done so in reality. Indeed, Respondent did not compensate Claimant for taking over its investment at all. Therefore, expropriation cannot be excused because it was not done with any compensation to Claimant.

77 Because Respondent unlawfully interfered in Claimant's investment, and because Respondent blocked the free transfer of profits of Claimant's investment, Respondent has expropriated Claimant's investment. Respondent's expropriation cannot be excused because it was done for a not-public interest, discriminatorily, without due process of law and against no compensation. Therefore, Respondent has violated its obligation under Art. 6(1) for expropriation along with Art. 2(3) and 8(1) for unlawful impairment of management, and blocking free transfer of returns.

⁹³ Evidence/Calendar of Events, Record, p. 8.

V. THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA VIOLATED ITS OBLIGATION TO FULLY PROTECT AND SECURE VANGUARD'S INVESTMENT BECAUSE THE GOVERNMENT DID NOT EXERCISE DUE DILIGENCE IN PROTECTING VANGUARD'S PERSONNEL AGAINST BASELESS SEARCHES THAT RESULTED IN VANGUARD'S LOSS OF POPULARITY IN CALPURNIA.

78 Art. 2(2) of the Calpurnia-Gaul BIT states: "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*."⁹⁴ However, there is no clear definition of the term "full and constant protection and security." Scholars state that this standard provides an obligation for the host state to take appropriate measures and be vigilant and exercise due diligence in protecting the investment.⁹⁵ However, it is not a guarantee that the investors will never be damaged.⁹⁶ It is not a strict liability or an insurance policy.⁹⁷ Simply put, the standard obliges the parties to "exercise such due diligence in the protection of foreign investment as reasonable under the circumstances."⁹⁸ For example, when a foreign investor has a hotel that has been broken into, the government has not shown due diligence in protecting the foreign investment when they send the police 4 days after the incident to address the issue. Such unreasonably late reaction is in violation of protection and security clause of the BIT.⁹⁹

79 In the case at hand, Respondent failed to provide full protection and security to Claimant's investment. Respondent's police forces searched Claimant's managing directors' private homes three times. However, no charges were ever filed. Respondent released the information from the searches to the public and agitated public sentiment against Claimant. The searches resulted in picketing of Claimant's managing director's home and Respondent refused to remove the protesters. The negative publicity resulted in an unsafe environment for Ms. Pescara, and Mr. Kolowesnko in Calpurina. Since Claimant's personnel could not safely operate in Calpurina due to Respondent's public agitation, Claimant no longer could safely operate its investment and the value of the investment was hampered. Respondent's unreasonable behavior in releasing private information, in addition to its omission to take reasonable measures to

⁹⁴ Emphasis added.

⁹⁵ Dolzer, p. 61.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Lauder v. Czech Republic*, para. 308; *See also*, Dolzer, p. 61.

⁹⁹ *Wena Hotels v. Egypt*.

protect Claimant's personnel is contrary to showing due diligence in protecting Claimant's investment.

CONCLUSION

80 The Arbitral Tribunal is well within its own competence and authority to hear this dispute and must not decline jurisdiction. The Arbitral Tribunal has jurisdiction over the person of the parties because the dispute is between a contracting state, Calpurnia, and a national of another contracting state, Gaul. The requisite consent is present as between Vanguard and Calpurnia and the dispute focuses around an investment as defined by the Calpurnia-Gaul BIT. Furthermore, the Arbitral Tribunal is competent to determine its own jurisdiction and it should not decline jurisdiction. The fundamental, underlying principles of ICSID Arbitration were created for circumstances such as this dispute; therefore, the Arbitral Tribunal should find jurisdiction proper.

81 Furthermore, the Arbitral Tribunal should find that Respondent discriminated against Claimant by treating Claimant less favourably than the national shareholders and blocking the transfer of dividends and information to Claimant while allowing such transfers for national shareholders. The Arbitral Tribunal should also find that Respondent expropriated Claimant's investment by unlawfully interfering in Claimant's investment and taking over the control and management of VanCal. Respondent's expropriation of Claimant's investment is also rooted in Respondent's obstruction of transfer of returns from Claimant's investment. Lastly, the Arbitral Tribunal should find that Respondent failed to provide Claimant full protection and security because Respondent failed to exercise due diligence in preserving Claimant's interests during Respondent's search and seizures of Claimant's personnel's personal properties.

82 Accordingly, Claimant respectfully requests that this Arbitral Tribunal find in its favor.