
International Center for the Settlement of Investment Disputes

Vanguard International,)
a Gaul corporation,)
)
Claimant,)
)
vs.)
)
Republic of Calpurnia,)
an ICSID contracting state, and)
bilateral investment treaty signatory,)
)
Respondent.)
)
)
_____)

MEMORANDUM FOR CLAIMANT

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INDEX OF ABBREVIATIONS

“Claimant”	Abstract from Claimant’s Request for Arbitration
“Calendar”	Evidence/Calendar of Events
“Minutes”	Minutes of the First Session of the Arbitral Tribunal

STATEMENT OF FACTS

CLAIMANT:

Vanguard International (“Vanguard”) is a mobile telecommunications company that serves a market of over 360 million people. Claimant is headquartered in Nova Parigi, the capital city of Gaul. Claimant’s ownership share of VanCal fluctuated over a period of seven years; from its initial interest of 50%, up to a peak of 86%, and then, as the result of a number of share sales, to 30% direct ownership with an additional 1% registered in the name of Francesca Pescara held in trust for Claimant by 2004. Ms. Francesca Pescara was VanCal’s managing director until November 2004.

RESPONDENT:

Calpurnia is a State and the sole owner of the State Fund for Commerce and Development in Calpurnia (“SFCDC”). VanCal is incorporated in San Inocente De Irkoustk, the capital City of Calpurnia. The SFCDC owns 30% of VanCal’s stock directly and holds on deposit and votes a further 22% of VanCal stock registered in the names of several hundred individual shareholders. Other Calpurnian nationals directly hold the remaining 17% of VanCal’s stock.

Early 1997

Claimant participated in the establishment of VanCal, a joint venture formed as a Calpurnia corporation, which operates under Claimant’s trademark. From VanCal’s inception, Claimant was integral in managing the corporation, and furnished the Board of Directors with personnel.

November 2003

The Conservative Conscience of Calpurnia won an absolute majority in both chambers of the Calpurnian Parliament and advocated a platform that was hostile towards liberal, individualist, consumption- and leisure-oriented societies. Gaul is one of the societies condemned by the new regime, and relations between the two states have since been strained by accusations of political and industrial espionage and destabilization.

December 2003

Calpurnian Security Forces raided the private homes of Ms. Pescara and David Kolowenko, the chief technical officer, prompted by anonymous tips that VanCal was engaged in illegal data collection for Gaulois Security Services.

December 2003

Mr. Kolowenko left Calpurnia, never to return.

June 2004

Calpurnian Security Forces raided the private homes of Ms. Pescara and Mr. Kolowenko a second time on the grounds of an ongoing counter-espionage investigation.

July 2004

Calpurnian Security Forces raided the private homes of Ms. Pescara and Mr. Kolowenko a third time on the grounds of an ongoing counter-espionage investigation.

September 2004

In September 2004, Ms. Pescara's application for renewal of a three-year business visa was denied.

October 2004

SFCDC's Dr. Swift and Mr. Shelley were elected to the Board of Directors, increasing SFCDC's leading role in VanCal.

November 2004 Francesca Pescara found it too unsafe to remain in Calpurnia.

November 2004 Francesca Pescara resigned as managing director. Mr. Neil Shepherd was assigned as her replacement. Claimant maintained two representatives on the Board of Directors.

March 2005 The VanCal Board, headed by the SFCDC's Dr. Swift, decided not to make any payments for any reason to foreign shareholders for the time being.

April 2005 Dividends were declared: 18% of the profit in cash and 10% in stock.

November 2005 The State of Calpurnia's representatives and the VanCal Board of Directors voted to oust Ms. Pescara from the VanCal Board altogether. The Board then rejected the two shareholder proxies held by the sole Claimant representative, Mr. Rindler, thus preventing Claimant from electing a replacement to Ms. Pescara.

December 2005 Dr. Jonathan Swift, the government-employed chairman of VanCal's Board of Directors, instructed Mr. Korchnoi, Ms. Pescara's replacement as managing director, to cease sending accounts, financial statements, or other information to Gaulois citizens or translating such material into Gaulois as had been the company's practice.

April 2006 Mr. Shepherd resigned.

June 2006 Mr. Hunter and Mr. Fowler were assigned to replace Mr. Shepherd and Ms. Pescara.

June 2006 Ms. Pescara's application to claim her 1% interest in VanCal stock was summarily dismissed by the Commercial Court of San Inocente de Irkoutsk.

October 2006 The futility of its representation was made evident to Claimant, and the two representatives resigned. Claimant ultimately declined to replace them, effectively ending its participation on the Board.

February 2007 Claimant sent a letter to the SFCDC claiming de facto expropriation by Calpurnian state entities and demanding compensation

February 2007 The SFCDC sent a letter to Claimant declining government involvement and stating that the government had no authority in the matter.

July 2007 Claimant requested ICSID arbitration.

ARGUMENT

I. THE ICSID ARBITRAL TRIBUNAL HAS JURISDICTION IN THIS DISPUTE

1. Multiple sources of international authority establish the Tribunal's jurisdiction in this dispute, including the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention"); the Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments ("Calpurnia-Gaul BIT") and the World Bank Guidelines on the Treatment of Foreign Direct Investment ("Guidelines"). At the outset, it is instructive to briefly account for the rationale favoring ICSID jurisdiction in this case.

2. National investment regimes are liberalizing worldwide. Daniel D. Barlow & Alfred Escher, eds., *Legal Aspects of Foreign Direct Investment* 6 (1999). Nation-states and foreign investors have been steadily growing in their affinity for foreign direct investment ("FDI"), which empowers the economic paradigm of comparative advantage and contributes to the global interconnection of economies. *Id.* at 62; *see e.g.*, Gary Wolfram, *Towards a Free Society: An Introduction to Markets and the Political System* 93-96 (3d ed. 2000). Host countries are disposed to favor FDI for the benefits derived from it: an increased pool of capital available for investment; increased revenue for the host government and community; increased employment; and the introduction of new skills and technologies. Alex Easson, *Taxation of Foreign Direct Investment: An Introduction* 7-9 (1999).

3. FDI constitutes an investment for the purpose of acquiring a lasting interest in an enterprise operating in an economy foreign to the investor. Barlow & Escher at 20 (citing International Monetary Fund Balance of Payments Manual, ¶ 408 (1980)). It occurs when an investor based in one country acquires an asset in another country with the intent to manage the asset. Barlow & Escher at 3 (citing World Trade Organization Secretariat, *Trade and Foreign Direct Investment*, PRESS/57 6 (Oct. 9, 1996)). FDI takes a number of forms, including the creation of joint ventures, such as the joint venture between

Vanguard and the SFCDC. See Rudolph S. Houck III & Nancy L. Caywood, eds., *Legal Environment for Foreign Direct Investment in the United States* 26 (2d ed. 1981); Easson at 85; Claimant ¶ 4. The most common method of establishing a joint venture is by forming a new company, the shares of which are held by two or more participants. Easson at 85-86. The emphasis on investor control and the underlying presumption that the foreign investor is mainly interested in using his ownership rights to effectively influence the management of the company should not be overlooked, especially in the context of expropriation by a host government. See Barlow & Escher at 21.

4. Problems arise when host states do not act in good faith and begin to undertake a course of creeping expropriation. See *id.* at 94. Despite the sovereignty of host nations, expropriations can violate international law. Ralph H. Folsom & Michael W. Gordon, *International Business Transactions* 662 (1995) (citing Martin Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 Am. J. Int'l L. 585 (1961)). Such expropriations demand compensation and have led to arbitral awards in the past. Barlow & Escher at 40 (citing Martin Schafer, *Standard of Compensation and Valuation Method for Expropriation According to International Law* 68-71, 86-95, 234-38 (1997); *but see* Minutes ¶ 14 (excluding from this Tribunal the issues of valuation and compensation)).

5. The necessity of using a specialized and independent third party, such as the ICSID Tribunal, to resolve FDI disputes arises out of the *international* nature of FDI. Fortunately, this Tribunal recognizes that while such disputes would usually be subject to national legal processes, international methods of settlement are appropriate here. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States pmbl, Oct. 14, 1966 [hereinafter *Convention*]. The present dispute fulfills the jurisdictional criteria of ICSID to provide facilities for arbitration. See *Convention* at art. 1(2).

A. ICSID Is the Proper Forum in Which to Settle This Dispute Pursuant to the Convention

1. The parties are a state and a foreign national

6. ICSID is a widely accepted forum for handling disputes between a host state and a foreign investor, and the Convention governing submissions for arbitration lends itself amenable to the facts of this case. *See Barlow & Escher at 53; but see Convention at art. 64.*

7. The term “jurisdiction” as used in the Convention means the limits within which the provisions of the Convention will apply and the facilities will be available for arbitration. Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 22 (Mar. 18, 1965) [hereinafter *Report*]. As a matter of jurisdiction, Article 25 of the Convention establishes:

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.

8. *Convention at art. 25(1).* The Convention provides that the term “State” covers not only the nation involved in the dispute, but its political agencies; and the term “national” applies to both natural and juridical persons. *Barlow & Escher at 93 (citing Convention at art. 25).*

9. Here, Respondent Calpurnia is a state under the Convention, and its political agency, the SFCDC, acts on its behalf. *See generally Calendar.* Likewise, Claimant Vanguard is a juridical person as a corporation formed under the laws of Gaul and headquartered in Nova Parigi. *See Claimant ¶ 3.*

10. Although the SFCDC is not expressly designated as a political agency of Calpurnia under Article 25, a number of factors augur for the extension of ICSID jurisdiction here. First, Article 11 of the Calpurnia-Gaul BIT acts effectively as an umbrella clause. *See* Agreement between the Government of the Republic of Calpurnia and the Government of the Federated States of Gaul on the Promotion and Protection of Investments art. 11, Aug. 1, 1995 [hereinafter *Calpurnia-Gaul BIT*]. Umbrella clauses, which typically provide that contracting parties must abide by all obligations entered into with respect to investments, can transform contract claims into treaty claims under BITs and trigger international arbitration. Axel Weissenfels, *Umbrella Clauses* 9 (2006), http://forschungsnewsletter.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/weissenfels.pdf. Similarly, BIT clauses that provide for the settlement of “all disputes relating to investments” can give rise to the competence of an international tribunal to hear the claim, irrespective of forum selection clauses in other contracts between the parties. *Id.* at 10 (citing *Compania de Aguas del Aconquija, S.A. and Vivendi Universal v. Argentine Republic* 296 (ICSID Case No. ARB/97/3)). There are no investment contracts to address in this case, however, the Calpurnia-Gaul BIT contains the necessary language to invoke ICSID arbitration by providing the investor the choice of national courts, the ICSID Tribunal, or ad hoc arbitration in the case of *all* disputes relating to investments. *See Calpurnia-Gaul BIT* at art. 11.

11. Second, the Report comments that a contracting party’s adherence to the Convention evidences an expectation that the party will give favorable consideration to investor requests for ICSID arbitration. *Report* at ¶ 31.

12. Finally, the Tribunal must recognize that to deny jurisdiction based on the uncertainty of SFCDC designation would inadvisably elevate form over substance. In truth, the SFCDC is indistinguishable from the Calpurnian government. It is a “state fund” owned 100% by the Republic of Calpurnia. Claimant ¶ 6. It is subject to the control of the government and acts on the government’s behalf. *See id.* at ¶ 11. Consequently, Director Swift, chairman of VanCal’s board of directors, takes his order directly from the Calpurnian capital. *See id.* at ¶ 12. The Tribunal is well within its

mandate to assert jurisdiction over this matter because the purpose of the Convention is to provide a framework for the resolution of disputes between foreign investors and host governments, including the agencies that represent them.

13. The alternatives to ICSID arbitration in this case would work injustice on the Claimant. The dispute cannot be submitted to the International Court of Justice because it does not involve two governments; instead, Calpurnia would have to consent to arbitration before another tribunal, though the likelier outcome would see Claimant languishing in a Calpurnian court system heavily influenced by a recent regime change that has animated substantial resentment toward Gaulois nationals. *See* Barlow and Escher at 43, 53; Claimant ¶ 8.

2. The parties consented in writing to ICSID arbitration

14. There is a second element beyond the requirement that the dispute must involve a state and a foreign national: In order for jurisdiction to extend to the parties' dispute, each party must consent in writing to the submission of the dispute to ICSID. Folsom & Gordon at 606-07.

15. The Convention does not specify the time or manner by which parties must consent. Consent may be given, for example, in a clause of an investment agreement providing for the submission to ICSID of future disputes arising out of that agreement. *Report* at ¶ 24.

16. Whereas Article 25 makes consent to arbitration irrevocable, Article 26 makes it exclusive:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.

Convention at art. 26. For purposes of this dispute, the Calpurnia-Gaul BIT establishes Calpurnia's irrevocable consent to ICSID arbitration, to the exclusion of any other remedy. *See Calpurnia-Gaul BIT* at art. 11.

17. Furthermore, jurisdictional disputes will only be settled in favor of the party disputing jurisdiction if the dispute is “manifestly outside the jurisdiction” of ICSID. *Convention* at art. 36. The Tribunal, however, is the judge of its own competence, meaning that the jurisdictional decision rests with ICSID. *Id.* at art. 41.

18. The application of the Convention to this dispute militates for the conclusion that the parties understand the Tribunal is specially qualified to arbitrate this matter, and therefore should assert its expertise to resolve this dispute. However, Vanguard recognizes that the suitability of the Tribunal does not grant jurisdiction prior to an examination of the instrument that binds Calpurnia to ICSID arbitration — the bilateral investment treaty.

B. The Calpurnia-Gaul BIT Establishes ICSID as the Decided Forum for Dispute Resolution

19. BITs ensure security to investors by providing for nondiscrimination, rights regarding transfers, dispute resolution, and compensation for expropriations. Folsom & Gordon at 606, 656. Although states have the authority to regulate the entry of foreigners into their markets, they subordinate this authority to the rights of investors when they enter BITs. Barlow & Escher at 27 (citing U.N. Friendly Relations Declaration, G.A. Res. 2625 (1970); U.N. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (1975)). Thus, BITs allow sovereigns and foreign entities to freely contract for the resolution of investment disputes as they so choose, and provide that investors have recourse to the rights granted by the BIT when such disputes occur.

20. Capricious governments might ignore BITs, including their contractual duty to pay prompt, adequate, and effective compensation for expropriations. Folsom & Gordon at 661. Yet, the fact remains that a BIT is a voluntary and consensual limit on national sovereignty, and simply disregarding a BIT does not dissolve the rights of the parties asserting protection under it. Barlow & Escher at 30. That is why the Calpurnia-Gaul

BIT is the most important document the Tribunal must consider in determining the jurisdictional issue: The treaty is a manifestation of the intent of the parties.

21. Lest the Calpurnia-Gaul BIT be rendered null by Calpurnia's refusal to comply with its terms, this Tribunal should consider the purpose of the treaty and enforce it against Calpurnia. The Preamble of the treaty declares that the goal of the document is to "maintain fair and equitable conditions" for FDI between Gaul and Calpurnia, and their nationals. *Calpurnia-Gaul BIT* at pmbl. Such recitals are not merely hortatory — preamble provisions in BITs serve as interpretive tools. Barlow & Escher at 110 (citing Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF/39-27 art. 31, 8 I.L.M. 769 (1969)) (providing that a treaty must be interpreted in accordance with the ordinary meaning of its object and purpose).

1. The Calpurnia-Gaul BIT defines the parties

22. The scope of a BIT is determined by the breadth with which the treaty defines "investment" and "investors." Barlow & Escher at 110. As previously denoted, Vanguard is a juridical person under the terms of the Convention. The parties maintain the same status under the Calpurnia-Gaul BIT. *Calpurnia-Gaul BIT* at art. 1.

23. The treaty also covers the nature of the interest at issue here, defining investments as "shares, stocks, debentures or other form of participation in a company." *Id.* The record indicates that Vanguard is lawfully incorporated in the contracting state of Gaul, and that the interest involved for both Vanguard and its shareholders relates to the investment of capital, equity ownership of VanCal, and participation in its board of directors. *See generally* Claimant; *see also* *Liberian E. Timber Co. v. Republic of Liberia* (ICSID Case No. ARB/83/2); *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Societe Camerounaise des Engrais* (ICSID Case No. ARB/81/2) (ruling that the existence of an ICSID arbitration clause indicates an implicit acceptance of the investor's foreign nationality).

24. It is common for BITs to contain provisions extending their application to the political agencies of the contracting states. Barlow & Escher at 112. That would include the SFCDC, which corroborates director Swift's description of VanCal as not a "private company" due to the SFCDC's involvement in its management. Calendar, Nov. 15, 2004; see Andrea Vincze, *Jurisdiction Rationae Personae in ICSID Arbitration* 1 European Integration Studies 111, 111-22 (2004). Both parties to the present proceedings are encompassed within the scope of the Calpurnia-Gaul BIT.

2. The Calpurnia-Gaul BIT makes dispute resolution the investor's choice

25. In the present case, the Calpurnia-Gaul BIT creates certain rights, privileges, and immunities upon which Vanguard relies. It establishes that Calpurnia is subject to the dispute resolution provisions of the treaty, including submission of disputes to ICSID arbitration. See *Calpurnia-Gaul BIT* at art. 11.

26. Article 11 dictates that attempts to amicably settle a dispute must extend beyond eighteen months before alternative dispute resolution mechanisms are triggered. *Id.* Such attempts have been made here and have been unsuccessful over a term of at least twenty-eight months. Respondent's behavior rose to the level of expropriation on May 27, 2005, when Korchnoi sent an e-mail to the Claimant informing it of the board's decision to make no payment to foreign shareholders. Claimant ¶ 16. But negotiations had already been ongoing from March 10, 2005, when extensive discussions regarding the proper treatment of Gaulois investors took place at a VanCal board meeting, up to July 31, 2007, the date the Claimant requested arbitration and notified Calpurnia. See Calendar, Mar. 10, 2005; Calendar, July 31, 2007; see also *Calpurnia-Gaul BIT* at art. 10.

27. When negotiations fail, the treaty lists alternative forums for the resolution of disputes, explicitly including ICSID, and grants the power to choose *to the investor*. *Calpurnia-Gaul BIT* at art. 11. Consent to such terms by a signatory is expressly irrevocable under the treaty. *Id.*

28. Additionally, the clause that precludes alternative remedies after the submission of disputes to national courts does not apply to the circumstances of this dispute because Claimant has not pursued such local remedies. Although shareholder Pescara — who is *not* a named Claimant — applied to the Commercial Court of San Inocente de Irkoutsk and was dismissed for lack of standing, Claimant Vanguard did not do the same. Calendar, June 14, 2006. Having undertaken unfruitful efforts to settle upon compensation with the Respondent over more than two years, and having avoided the courts and administrative bodies of Calpurnia, Claimant may assert that it has complied with the Calpurnia-Gaul BIT and is entitled to ICSID arbitration.

3. The Calpurnia-Gaul BIT provides for favorable treatment to investors

29. The treaty provides that the most favorable treatment afforded to the host government's own investors or investors of any third state shall extend to the contracting parties. *Calpurnia-Gaul BIT* at art. 4. The exception to this rule, found in Article 5, conspicuously excludes a prohibition against like treatment of contracting parties in respect to third party states. *Id.* at art. 5. In other words, investors under the Calpurnia-Gaul BIT may rightfully expect to be treated as fairly as investors under other BITs that Calpurnia has signed. The absence of an exception prohibiting favorable treatment to the contracting parties of the Calpurnia-Gaul BIT suggests that the Claimant can reasonably rely on fair and equitable treatment like that provided to other nations. *See Barlow & Escher* at 97.

30. One example is the BIT between Calpurnia and the nation of Flatland. Flatland's status as a third state with which Calpurnia contracts through a BIT is relevant because it opens the door to treaty comparison. Since Vanguard has the right to expect fair and equitable treatment from Calpurnia vis-à-vis other BITs, it is worthwhile to indicate two provisions of the Flatland – Calpurnia BIT that favor investors: (1) Instead of eighteen months, parties have to wait only two months before an investor can refer his complaint to the dispute resolution forum of his choice; (2) instead of a waiver of independent arbitration when an investor pursues local remedies, there is no waiver and ICSID remains available. 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 art. 7, Feb. 8, 1992.

31. The Calpurnia-Gaul BIT's promise of equal treatment must extend to the dispute resolution provisions applied in this case. The Claimant has abided by the terms of the Calpurnia-Gaul BIT in selecting ICSID arbitration in a timely manner. Calpurnia must respect this choice under the terms of the Calpurnia-Gaul BIT, and in accordance with benefits conferred by third party BITs, in order to give Vanguard equal footing and to fulfill its expectations under the treaty.

32. The Claimant meets the jurisdictional requirements of the Calpurnia-Gaul BIT. The treaty was bargained for with the understanding that its provisions would control in the case that a dispute arose. Now that such a situation is upon the parties, the terms of the treaty must be followed, which means that Vanguard's selection of ICSID arbitration controls.

C. The World Bank Guidelines Favor ICSID Arbitration

33. Extraneous to the jurisdictional rules of the Tribunal or the text of the Calpurnia-Gaul BIT are the Guidelines, which favor independent third party arbitration for the resolution of FDI disputes. The Guidelines flow from general principles of international law, such as the Universal Declaration of Human Rights (setting forth the right of every person to own property alone and in association with others), and augment the particular provisions of individual treaties. *See* Universal Declaration of Human Rights art. 17, G.A. Res. 217 (1948); Barlow & Escher at 65.

34. The Guidelines are not binding on governments, but they are relied upon to form new laws and treaties, acting essentially like a model code for international investment relations. *See* Barlow & Escher at 88. But they do more than reflect accepted standards; they seek to develop emerging and contemporary standards for the benefit of FDI, and to complement BITs. *Id.* at 92.

35. In representing a desirable overall framework which embodies essential principles meant to promote FDI in the common interest of all members, the Guidelines advance flexibility. World Bank Guidelines on the Treatment of Foreign Direct Investment pmb. [hereinafter *Guidelines*]. For example, under the Guidelines sovereign states are allowed to deny entry to FDI, but they are not allowed to take measures which amount to direct expropriation without compensation. *Guidelines* at art. IV, § 1.

36. For purposes of jurisdiction, the Guidelines recommend that disputes should first be settled through negotiations between private foreign investors and the host government. If that fails, then independent arbitration is advised, and each state is encouraged to accept settlement of disputes through ICSID.

37. Model international law endorses ICSID arbitration for the resolution of the present dispute. There are no jurisdictional roadblocks that should prevent the Tribunal from following the Guidelines and hearing this case.

D. Claimant Was Not Required to Exhaust Local Remedies

1. It is not necessary to exhaust local administrative or judicial remedies if the parties have contracted for ICSID arbitration

38. The Report recognizes the right of a state to require the exhaustion of local remedies. *Report* at ¶ 32. Most BITs prohibit investors from submitting a dispute to ICSID arbitration if the investor has sought recourse in the host country's courts or administrative agencies. Barlow & Escher at 121. Other BITs require investors to exhaust local remedies before resorting to international dispute settlement. *Id.* Often, settlement through negotiation or consultation will be contemplated before ICSID arbitration is allowed. *Id.* at 120. If negotiation fails, the courts of the host state will normally have jurisdiction over disputes arising out of investments in the country. Folsom & Gordon at 679. Likewise, American precedent holds that the courts will not examine the validity of a taking of property within a foreign state's own territory, even if the taking violates customary international law, *unless* there is a treaty or unambiguous

agreement setting out the controlling legal principles in such a circumstance. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

39. Treaties serve the legislative purpose of providing an agreed upon course of action for dispute resolution. Agreements to arbitrate constitute an express or implied waiver of sovereign immunity of the host government. Folsom & Gordon at 679. Here, the parties have provided for immediate ICSID arbitration. *Calpurnia-Gaul BIT* at art. 11.

40. The Convention recognizes that alternatives to ICSID arbitration exist and that parties are free to pursue them, however, such alternatives are not mentioned in the Guidelines and are rarely pursued in practice. *Id*; see Barlow & Escher at 104 (citing I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA* (1992)). Nor were alternatives to ICSID made exclusive under the Calpurnia-Gaul BIT; rather, the investor chooses the forum.

41. It is important to remember that BITs are contracts, and therefore enforceable as law. See Barlow & Escher at 107. As such, FDI host countries, e.g., Calpurnia, who have consented in writing to ICSID jurisdiction have put the decision to arbitrate into the hands of the Claimant. See *id.* at 122; *Convention* at art. 25; *Calpurnia-Gaul BIT* at art. 11. Calpurnia must honor its commitment and pursue this matter before the ICSID Tribunal. See Barlow & Escher at 121 (citing U.S.–Argentina BIT; Venezuela–Brazil BIT; Chile–Norway BIT).

2. It is not necessary to exhaust local administrative or judicial remedies if doing so would be futile

42. Forcing an investor to present his case before prejudiced or unequipped agencies or courts does not do substantial justice to the investor's claim for expropriation. A problem is born when the host nation expresses a willingness to hear such claims, but circumstances suggest that the willingness is illusory. Folsom & Gordon at 667 (citing

Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 Am. J. Int'l L. 474 (1991)).

The experience with taking nations where the taking is part of a major economic, political and social revolution clearly suggests that local remedies are likely unsatisfactory to the expropriated property owners, and that they will have to seek assistance outside the taking nation.

43. Folsom & Gordon at 667. Foreign investors often want to avoid domestic courts of host states because they do not fully trust their competence, speed and impartiality. Barlow & Escher at 43. Arbitration clauses, like the one contained in the Calpurnia-Gaul BIT, are therefore indispensable. *See id.* Disputes are turned over to ICSID determination because it is the only form of arbitration that does not subject awards to subsequent judicial review in ICSID member countries. *Id.* at 104; *see Convention* at art. 54.

44. The evidence demonstrates that Calpurnian remedies will not suffice, and that ICSID is the best forum in which to settle this dispute. (1) The new Calpurnian government has launched criminal espionage investigations against Gaulois shareholders and board members. *See generally* Calendar. (2) The Calpurnian government, through SFCDC, has a financial, political, and economic interest in gaining full control of VanCal. *See id.* (3) Following the Calpurnian regime change, there is a tense international dispute between the nations of Gaul and Calpurnia. *See id.* Calpurnian agencies and courts are unlikely to hear the case against expropriation with impartiality.

45. The ICSID Tribunal is an independent arbitrator competent to hear this claim. The parties have agreed to use it. International law recommends it. The unreliability of a just outcome from local remedies demands it.

II. CALPURNIA HAS VIOLATED THE PROVISIONS SET FORTH IN THE CALPURNIA-GAUL BIT AND THEREFORE MUST PROVIDE RELIEF

46. Not only is the Calpurnia-Gaul BIT the controlling doctrine for determining jurisdiction, it is also the governing law for evaluating Claimant Vanguard's request for legal relief. Accordingly, because both parties have consented to arbitrate pursuant to ICSID rules, the standards set forth in the Calpurnia-Gaul BIT must be referenced in order to provide equitable remedies for (1) Calpurnia's discrimination of the foreign investor Vanguard; (2) Calpurnia's unlawful interference with Vanguard's investment in VanCal; (3) Calpurnia's obstruction of the transfer of dividends to Vanguard investors; and (4) Calpurnia's failure to provide Vanguard full protection and security as guaranteed by the BIT. *See* Margaret L. Moses, *International Commercial Arbitration* 222 (2008); Claimant ¶ 6.

47. As BITs, like the Calpurnia-Gaul BIT, straddle the line between public and private law, they bind states to the specifics set forth by the treaties as well as the previous decisions of the ICSID. Annie Leeks, *The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach*, 65 *U.T. Fac. L. Rev.* 1, 3 (Spring 2007). It is the uniformity of the language used throughout BITs that allows ICSID decisions in relation to one BIT to become precedent for determining the responsibilities of other signatory states. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *Harv. Int'l L.J.* 67, 70 (2005) (asserting that formal international law and treaties offer greater protection to investors than customary international law).

48. Specifically, the precedent of the ICSID creates general treatment standards that can be characterized as either "absolute" or "relative" standards for host state conduct. Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?* 22 *Am. U. Int'l L. Rev.* 237, 245 (2007) (citing UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, at 54-65, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998)) [hereinafter *Gottwald*].

Absolute standards generally compare the host country's actions against a minimal standard set by international law. *Gottwald* at 245. Absolute provisions protect against unlawful expropriation and require of parties to the treaty (1) "fair and equitable treatment;" (2) "full protection and security;" and (3) "treatment in accordance with customary international law." *Id.* at 246. Relative standards evaluate the host state's conduct in reference to how the state treats similarly situated investors. *Id.* These standards are measured in relation to a host state's conduct to its own people (national treatment reference) and the host state's treatment towards the most favored nation ("MFN"). *Id.* An analysis of MFN treatment evaluates whether a host state offers a party to a BIT the highest level of treatment offered to foreign investors of a third state. *Id.*

49. Furthermore, to advance FDI in general, many BITs contain an "umbrella clause," which requires each host state to "observe any obligations it may have entered into with regards to investments of nationals or companies" of the other contracting party. Leeks at 6. In some situations, the umbrella clause has been held to elevate all breaches of contract between host state and foreign investors to breaches of the BIT. *Id.*

50. Finally, Article 42 of the ICSID Convention addresses the substantive law, which is to be applied to ICSID Tribunals. Article 42(1) reads:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

51. *Convention* at art. 42. The first sentence of Article 42(1) is applicable when there is agreement as to which law is to be applied to the substance of a dispute; the agreement is normally memorialized in the BIT. Leeks at 12. The second sentence of Article 42(1) distinguishes the ICSID convention from other governing conventions; it is the only convention which accounts for when international law is applicable. *See Convention* at art. 42(1); *see also* Leeks at 12.

52. The second sentence of Article 42(1) has been applicable in ICSID disputes when the parties do not make an implicit or an express choice of law, and the tribunal identifies and then applies applicable international law. Leeks at 17. The applicability of international law under sentence two of Article 42(1) is different for BIT arbitrations than other international legal disputes. *Id.* at 19. As illustrated by case law of the ICSID, often the disputes that are resolved via BIT arbitration first are resolved by applying the language of the BIT without mention of external international law and referencing of sentence two. *Id.* In circumstances where a Tribunal must look outside the agreements set forth in a BIT in order to determine a substantive issue under the BIT, tribunals have coupled the other provisions of the BIT with the second sentence of Article 42, and they have then determined which international law should be applicable to substantive issues that arise under the BIT. *Id.* at 20-40.

A. Calpurnia Has Discriminated Against Vanguard and Has Unlawfully Expropriated Vanguard Funds

53. Calpurnia has directly expropriated Vanguard's funds and has therefore violated the basic underpinning of the Calpurnia-Gaul BIT. It is well established international law that property of aliens in a host state cannot be confiscated and utilized for public purposes without just compensation. *See* Organization for Economic Cooperation and Development, Indirect Expropriation and the Right to Regulate in International Investment Law, <http://www.oecd.org/dataoecd/22/54/33776546.pdf>. Historically, BITs were created to specifically provide a medium to seek relief for such expropriation whether direct or indirect. Leeks at 7. In circumstances where a nation has blatantly expropriated a foreign investment, as in the present case, the BIT, as contrasted with other forms of international law, is the primary source utilized to determine fault and relief.

54. The Calpurnia-Gaul BIT provides that Calpurnia has directly expropriated Vanguard's funds when there is a showing that any foreign investment has been nationalized by the host-state without adequate compensation; such an action violates the

basic underpinnings of the Calpurnia-Gaul BIT. *Calpurnia-Gaul BIT* at art. 6(1). In this case, the expropriation occurred when in the years 2004-2007, state controlled VanCal declared cash dividends but failed to pay dividends to foreign investors, specifically Vanguard. Claimant ¶ 16. From 2004 -2007, Vanguard owned 30% of VanCal shares, and an additional 1% of VanCal was held in trust for Vanguard in the name of Francesca Pescara. *Id.* at ¶ 9. The explanation for Calpurnia’s decision to expropriate Vanguard’s funds was given when in March 2005 the Board determined “not to pay any money for any reason to foreign shareholders.” *Id.* at ¶ 14. However, such a rationalization goes against the plain meaning of the BIT. When a plain meaning violation of the expropriation clause occurs, there is no need to look to further international law. *See Vivendi*, (ICSID Case No. ARB/97/3); *Emilio Agustin Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7). Instead, the BIT governs. *See* Leeks at 20.

55. Calpurnia has violated the Calpurnia-Gaul BIT because it has expropriated Vanguard funds in an attempt to further an anti-foreign discriminatory agenda while failing to pay just compensation for such expropriation. *See Calpurnia-Gaul BIT* at art. 6(1). Furthermore, this expropriation falls directly within the language of the BIT. *See id.* at art. 6(4). Because the BIT is the primary international law used to find expropriation, this case is similar to the ICSID decision in the case of *Wena Hotels Ltd. v. Arab Republic of Egypt*. *Wena Hotels Ltd. v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4).

56. In *Wena Hotels*, the ICSID determined that the threshold for determining whether there has been actual “expropriation” is when a foreign investor has undergone total and permanent deprivation of the parties’ rights of ownership. As in *Wena Hotels*, Vanguard has been barred from the fundamental right of ownership of the dividends associated with its 31% ownership. Calpurnia has not advanced a justification for this deprivation or passed any formal resolution that would suggest there is a legitimate public policy concern directly related to the interests of blocking the payment of such dividends. Where the ICSID has found no valid public purpose even when there has been a resolution passed, the lack of a non-discriminatory rationale for the denial of payment of

dividends underscores that Calpurnia has wrongfully broken the agreement of the BIT and expropriated Vanguard's dividends. Tyson Wanjura, *Azurix Corp. v. Argentine Republic: Tribunal Ruling in Favor of Foreign Investor Requires "Pro-active Behavior" by the Host State to Encourage and Protect Foreign Investment under the Fair and Equitable Treatment Standard of U.S.-Argentina BIT*, 13 Law & Bus. Rev. Am. 983, 983 (Fall 2007) [hereinafter *Wanjura*]. As the BIT is the governing international law for evaluating other substantive claims, the BIT must be used to determine whether Calpurnia upheld its bargain and provided (1) "fair and equitable treatment;" (2) "full protection and security;" and (3) "treatment in accordance with customary international law." *Gottwald* at 246.

1. Calpurnia has violated the BIT because it has failed to provide "fair and equitable treatment to Vanguard investments"

57. Article 2(2) of the Calpurnia-Gaul BIT provides that "each contracting party shall at times in accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment." *Calpurnia-Gaul BIT* at art. 2(2). This language is common to many BITs. *See Wanjura* at 983. Accordingly, in *Azurix Corp. v. Argentine Republic* where similar language was used, the Tribunal "broadly defined the fair and equitable treatment standard to require 'pro-active behavior' by the host State to encourage and protect investment." *Id.* at 991.

58. Calpurnia has never acted "pro-actively" to protect Vanguard's investments. This is evidenced by the facts that (1) foreign investors have been barred from receiving dividends, Claimant ¶14; (2) the Calpurnia-employed Chairman of the Board, Dr. Swift, conceded at a VanCal board meeting that "shareholders have the right thereto in proportion to their investment," yet later stated that citizens of Gaul (Vanguard shareholders) would have their profits suspended, Calendar, March 10, 2005; and (3) each of these actions was carried out by Calpurnia despite the fact that Claimant had properly challenged the decision to suspend payments requesting greater clarification. Calendar, June 5, 2005, (stating by e-mail that Claimant was "requesting that the board of directors communicate their decision in this matter We are not aware of any

Calpurnian regulation or decree which permits the unequal treatment of shareholders of a Calpurnian company”).

59. Instead, the Claimant was forced to navigate the legal waters of Calpurnia without the pro-active assistance of the Calpurnian government. Such realities do not amount to fair and equitable treatment and are therefore grounds for relief under the Calpurnia-Gaul BIT.

2. Calpurnia has violated the BIT because it has failed to provide “full protection and security” to Vanguard investments

60. Article 2(2) of the Calpurnia-Gaul BIT provides that “each contracting party shall at times in accord in its territory to investments of investors of the other Contracting Party . . . full and constant protection and security.” *Calpurnia- Gaul BIT* at art. 2(2). Historically clauses similarly worded have been interpreted to protect a foreign investor from any physical destruction of property or serious threat of physical destruction. Moses at 230. However, this right is not limited to host-state responsibility to protect from any physical interference, but it also includes the right to be free from any act or measure that constitutes inequitable treatment. *See Vivendi* at ¶ 7.4.15-7.4.15 (finding that the obligation to provide full protection and security was not limited to acts or measures” which threaten physical possession for the legally protected terms of operation of the investment”). As delineated above, Calpurnia failed to take pro-active steps to protect the integrity of Vanguard’s investment. Under the standard set forth in *Vivendi*, this would be sufficient to establish inequitable treatment evidencing Calpurnia’s failure to provide full protection and security under the Calpurnia-Gaul BIT. Furthermore, although no foreign visitor is above the Calpurnian law, the fact that two of Vanguard’s representatives felt that the climate of hostility towards Gaulois nationals forced them to leave Calpurnia, intimates at least the appearance of further inequitable treatment towards Vanguard investments. Claimant ¶ 17.

3. Calpurnia has violated the BIT because it has failed to provide “treatment customary to international law” of Vanguard investments

61. Calpurnia deprived Vanguard access to the respective dividends that were owed to the Vanguard shareholders. *Id.* at ¶ 6. In *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1), the governing tribunal referenced only the BIT as contrasted with Article 42 to determine the dispute. The majority found that because the host state of Zaire failed to take measures to protect the investment of AMT, Zaire had failed to meet the minimum standard of treatment referred to in the BIT.

62. As illustrated above, Calpurnia has failed to take measures to protect the investment of Vanguard. Furthermore, tribunals have found that when there is a better treatment towards the host-state's investors as contrasted with foreign investors then this is evidence that the host state has failed to provide "treatment customary to international law." Such preference for Calpurnian citizens is evidenced throughout the proceedings.

B. Calpurnia's Failure to Pay Licensing Fees for Use of the Vanguard Trademark Must be Considered Unlawful Expropriation Under the BIT

63. Although the agreement between VanCal and Vanguard for licensing fees for the use of the Vanguard trademark was governed by a technical assistance agreement independent of the Calpurnia-Gaul BIT, VanCal's refusal to pay licensing fees must be governed by the BIT because the actions of Calpurnia violate the Calpurnia-Gaul umbrella clause. Claimant ¶ 19; *See Calpurnia-Gaul BIT* at art. 13.

64. In *Noble Venture, Inc. v. Romania Award*, the Tribunal found that "where the acts of a governmental agency are to be attributed to the State for the purposes of applying an umbrella clause . . . breaches of a contract into which the State has entered are capable of constituting a breach of international law *by virtue of the breach of the umbrella clause.*" *Noble Venture, Inc. v. Romania Award*, (ICSID Case No. ARB/01/11). The Tribunal's decision in *Noble* is directly governing because both the BIT language found in the *Noble* case as well as the level of discrimination towards foreign investors that made the umbrella clause relevant to contractual relations in *Noble* are present here. Accordingly, under the umbrella clause of the Calpurnia-Gaul BIT,

Vanguard has a basis for relief in this tribunal for the failure to act faithfully and further promote foreign investments in Calpurnia.

65. Calpurnia has violated both the letter and the spirit of the Calpurnia-Gaul BIT. As jurisdiction sits squarely with the ICSID and precedent suggests that only the BIT is the governing international law, this tribunal must apply a plain meaning analysis of the BIT and find that relief is warranted for all of Claimant's demands.

CONCLUSION

66. For the foregoing reasons, Claimant requests that this Tribunal exercise jurisdiction over the current dispute and award fair, adequate, and just compensation as relief for Calpurnia's expropriation of Vanguard's foreign direct investment.

EXHIBIT A

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

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

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

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

HAVE AGREED AS FOLLOWS:

Article 1
Definitions

For the purpose of this Agreement:

1. The term “Investment” means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party including, in particular, though not exclusively:
 - (a) movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct and similar rights;
 - (b) shares, stocks, debentures or other form of participation in a company;
 - (c) titles or claims to money or rights to performance having an economic value;

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

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

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

Returns shall enjoy the same treatment as the original investment.

3. The term "Investor" means:

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

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

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

Article 2

Promotion and Protection of Investments

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

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

Article 3 Transparency

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

Article 4 Treatment of Investments

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

Article 5 Exceptions

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

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

Article 6 Expropriation

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

Article 7 Compensation for Losses

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

Article 8

Free Transfer

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

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

Article 9 Subrogation

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

Article 10 Consultations

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

Article 11 Disputes between an Investor and a Contracting Party

1. Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment in the territory of the latter Contracting Party shall, if possible, be settled amicably.
2. If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration. The investor has the choice of submitting the case either to:
 - (a) the competent courts of the Contracting Party in whose territory the investment is made;
 - (b) The International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the “Centre”), if the Centre is available, or
 - (c) The Additional Facility of the Centre, if only one of the Contracting Parties is a signatory to the Convention set out in subparagraph (b) of this Article , or
 - (d) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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

3. An investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article.
4. Neither of the Contracting Parties, which is a party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is the opposing party of the dispute, had received an indemnification covering a part or the whole of its losses by virtue of an insurance.
5. Such award shall be final and binding for the parties to the dispute and shall be executed according to national law.

Article 12

Disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation and

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

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

Article 13 **Application of other Rules**

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

Article 14 **Application of the Agreement**

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

Article 15
Entry into Force, Duration and Termination

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

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

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

For the Government of
the Republic of Calpurnia

For the Government of
the Federated States of Gaul

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