

SPIROPOULOS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding Between

**GOVERNMENT OF THE FEDERATED STATES OF GAUL
(CLAIMANT)**

AND

**GOVERNMENT OF THE REPUBLIC OF CALPURNIA
(RESPONDENT)**

MEMORANDUM FOR CLAIMANT

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3. ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (2003) (“ICSID Convention”).
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I. STATEMENT OF FACTS

The involved parties

1. The Claimant, Vanguard International (hereinafter, “Vanguard”), is a mobile telecommunications company with GSM operations incorporated in the Federated States of Gaul (hereinafter, “Gaul”). Its headquarters are in the capital city of Gaul, Nova Parigi. Vanguard operates in seven emerging markets and provides licenses to a population of approximately 360 million worldwide.
2. In 1997, Vanguard helped to establish VanCal, a joint venture company incorporated and headquartered in San Inocente de Irkoutsk, the capital of Calpurnia. VanCal provides GSM/UMTS (3GPP) services throughout Calpurnia using the “Vanguard International” trademark. Vanguard’s initial investment consisted of a fifty percent equity interest in VanCal. Over time, this equity interest has shifted, reaching as much as eighty-six percent. By the end of 2004, Vanguard held thirty percent of VanCal stock directly. Vanguard employee and VanCal board member Francesca Pescara owned an additional one percent held in trust under her own name.
3. The State Fund for Commerce and Development in Calpurnia (“SFCDC”), as well as individual investors, constitute the remaining participants in the VanCal joint venture. The SFCDC is an entity owned one hundred percent by the State of Calpurnia. The SFCDC holds thirty percent of VanCal’s stock directly, and another twenty-two percent registered in the names of individual shareholders. Calpurnian nationals hold the remaining seventeen percent equity interest in VanCal.
4. Vanguard served an instrumental role in VanCal’s management and direction between 1997 and 2004. Specifically, Vanguard provided skilled management and other personnel. Several Vanguard employees served on the Board of Directors of VanCal. In addition, Vanguard provided technical support and trademark licensing. These services were established under separate contracts.
5. However, Vanguard’s role in VanCal changed drastically following the Calpurnian elections in 2003. The victory of the Conservative Conscience of Calpurnia (“CCC”), winning an absolute majority in both chambers of the Calpurnian Parliament, drastically altered the climate and circumstances surrounding Vanguard’s investment in VanCal. In contrast to the prior liberal regime, the CCC advocates a return to a traditional society with

conservative values. The CCC is particularly hostile to market-driven societies. The regime shift in Calpurnia caused not only a shift in the domestic climate, but also the deterioration of relations between Calpurnia and other states. This is especially true for the relationship between Calpurnia and Gaul. In particular, the decline in relations between Calpurnia and Gaul is characterized by claims of political and industrial espionage, as well as destabilization.

The illegal actions of the SFCDC

6. The hostile climate created by the CCC for Gaulois investors in Calpurnia quickly became evident after the 2003 elections. On December 7, 2003, Calpurnian Security Forces searched the homes of Ms. Francesca Pescara and Mr. David Kolowenko, both Vanguard employees and Gaulois nationals. The two were wrongfully accused of unlawful data collection and espionage. The Calpurnian Security Forces seized their laptops, certain media storage devices and telecommunications devices. This search was only the beginning, however. The Calpurnian Security Forces returned on June 3, 2004, to search the homes of Ms. Pescara and Mr. Kolowenko once more. At the time of the searches, no charges had been filed against either individual. Then, on July 15, 2004, Calpurnian Security Forces seized items yet again from the homes of Ms. Pescara and Mr. Kolowenko. Even at this time, no charges were filed against either Ms. Pescara or Mr. Kolowenko. Further, the Calpurnian Constitutional Court dismissed the Claimant's applications to have the three searches declared illegal and meriting compensation.
7. The searches were only the beginning of hostility directed at Vanguard's Gaulois personnel operating in Calpurnia. Ms. Pescara's home was picketed five times in 2004, from January 1 to 2, March 15 to 17, June 5 to 7, July 15 to 19, and October 25 to 28. Members of the CCC led the pickets and carried signs that read "A woman's place is in the home – go home!" and "Spy in your own backyard!" Rather than aid Ms. Pescara, Calpurnian police forces refused to remove the picketers from her property. Then, in September 2004, Ms. Pescara's application to renew her three-year business visa was denied. She was informed, verbally rather than in writing, that she might reenter Calpurnia using a visa waiver program for tourists. As the facts will demonstrate below, this combination of invasive and hostile behavior would render her job as a director of VanCal difficult.

8. After the wave of invasive home searches and property seizures, the SFCDC began to assert a more dominant role in the operation of VanCal. In fact, the illegal actions that form the basis of the Claimant's arguments can be traced largely to the gradual change in control that was about to occur at VanCal during this time. On October 14, 2004, the SFCDC maneuvered the election of two of its representatives, Dr. Swift and Mr. Shelly, to VanCal's board of directors. In the minutes of a VanCal board of directors meeting on November 15, 2004, Dr. Swift was quoted as stating that the SFCDC no longer regarded VanCal as a private company, implying that SFCDC's increasing control rendered it a state entity.
9. While the SFCDC was maneuvering a stronger role in VanCal, the deteriorating relationship between Calpurnia and Gaul intensified the growing conflict between the parties. An April 22, 2007 affidavit describes how Dr. Swift left the November 14, 2004, board meeting on grounds that he refused to sit in a meeting with "Gaulois spies." At this same board meeting, Dr. Swift declared that the SFCDC no longer considered VanCal a private entity. The rise of anti-Gaulois sentiment forced the Claimant to repatriate its Gaulois personnel working in Calpurnia, namely Ms. Pescara and Mr. Kolowenko. Mr. Kolowenko had to leave Calpurnia at the end of 2003 and was unable to return. Ms. Pescara was forced to leave her position as managing director on the VanCal board in November 2004 after being able to enter the country only intermittently, largely attributable to the denial of her business visa. Despite these forced repatriations, the Claimant continued to maintain its two places on the board of directors through Ms. Pescara, via an appointed proxy, and Mr. Neil Shepherd.
10. Furthermore, the VanCal board refused to pay dividends to foreign investors. Although the joint venture declared cash dividends from 2004 through 2007, each based on earnings from the prior year, it distributed these payments only to Calpurnian investors. On February 15, 2005, the VanCal board discussed minimizing the dividend payments in order to establish a reserve fund for employee severance pay. In the March 10, 2005, board meeting, the VanCal board of directors approved the creation of the reserve fund. However, the board voted to accomplish this goal by refusing to pay dividends to foreign investors. The board attributed its decision largely to the existing dispute between the governments of Calpurnia and Gaul. While Mr. Rindler was present at the meeting to represent the Claimant, his

voice was diluted by the overwhelming number of SFCDC representatives and the dominating presence of Dr. Swift, now Chairman of VanCal's board of directors.

11. Indeed, on April 10, 2005, when the dividend was declared, Gaulois investors did not receive any dividend payments. On May 21, 2005, the Claimant wrote to Mr. Korchnoi, who replaced Ms. Pescara as managing director, to place the dividend amounts due to Vanguard investors in a separate bank account opened in Vanguard's name. Mr. Korchnoi responded in an email dated May 27, 2005, denying the Claimant's request and reiterating VanCal's refusal to pay dividends to Gaulois investors. On June 5, 2005, the Claimant attempted once again to obtain its rightful dividends and sent an email to Mr. Korchnoi and Dr. Swift. The email requested that VanCal's board of directors communicate its decision to deny dividends to foreigners directly to the Claimant. Further, the Claimant reinforced the fact that Calpurnian law does not contain regulations allowing for the unequal treatment of investors.
12. Also, in or around May, 2005, VanCal failed to pay the licensing fees for use of the Vanguard International trademark. Contrary to the contract, VanCal also failed to pay amounts due under the technical assistance agreement.
13. The composition of the VanCal board of directors was manipulated to enable the SFCDC to take even more control. On October 5, 2005, proxies were issued for the October 11 shareholder meeting. At the meeting, Ms. Pescara was voted off of VanCal's board. Directors Mr. Poe and Mr. Korchnoi resigned, only to be replaced by SFCDC representatives. These replacements continued to reinforce the SFCDC's control of the VanCal board of directors. In addition, under the guise of a technical error, SFCDC representatives on VanCal's board incorrectly rejected the two proxies Mr. Rindler held on behalf of the Claimant. In doing so, the Claimant was unable to elect a replacement for Ms. Pescara and was thereby deprived of the representation to which it was entitled under the Calpurnian Commercial Code. Hostilities caused Mr. Shepherd to resign from the board on April 15, 2006. The Claimant would not receive representation on the VanCal board again until June, 2006, when Mr. Hunter and Mr. Fowler were elected to finally replace Ms. Pescara and Mr. Shepherd.
14. In addition to the changes in board composition that occurred during 2005, Dr. Swift also ordered Mr. Korchnoi to stop providing Gaulois investors with account information,

financial statements and other related documents as of December 1, 2005. Further, Dr. Swift prohibited Mr. Korchnoi from providing Gaulois investors with translations of any similar financial materials from Calpurnian into Gaulois. This marked a significant shift in corporate policy, since Gaulois investors had previously been entitled to translations into their native language.

15. Efforts in 2006 to access dividends owed to Gaulois investors proved futile. In June, 2006, Ms. Pescara brought a lawsuit in the Commercial Court of San Inocente de Irkoutsk to force VanCal to pay her the dividends on her one percent equity interest in VanCal. However, the court dismissed her suit for lack of standing, claiming she had no beneficial interest in the shareholding. VanCal credited dividends to the Claimant on September 28, 2006, yet VanCal's Articles of Association do not contain any provision authorizing the crediting of dividends.
16. The Claimant's participation on the VanCal board of directors concluded on October 23, 2006, when it was forced to remove its directors from their positions and choose not to replace them. Given the dominant SFCDC presence on the board of directors, the Claimant recognized the futility of maintaining its two directors on the board. As a result, the Claimant informed VanCal via email of its decision.
17. Following the end of its participation on VanCal's board, the Claimant informed Mr. Poe, chairman of the SFCDC, that it considered VanCal's actions de facto expropriation by Calpurnia in violation of its international obligations under the Calpurnia-Gaul BIT. The Claimant also communicated its desire to obtain compensation for the expropriation of its investment in VanCal. Finally, the Claimant filed a request for arbitration with the International Centre for Settlement of Investment Disputes ("ICSID") on July 31, 2007, seeking compensation for the expropriation of its investment.

II. JURISDICTION

18. The tribunal has jurisdiction to hear Vanguard's claims. Vanguard meets both the jurisdictional requirements of the ICSID Convention and those of the Calpurnia-Gaul BIT.

A. JURISDICTION UNDER THE ICSID CONVENTION

19. Article 25 of the ICSID Convention requires a tribunal find that the parties satisfy requirements of nationality, scope and consent. Vanguard can establish that the parties are contracting states to the ICSID Convention, that the parties have consented to ICSID

jurisdiction, and that its investment falls within the definition set forth in the ICSID Convention.

1. NATIONALITY

The parties are contracting states to the ICSID Convention and therefore satisfy the nationality requirements of ICSID jurisdiction.

20. Article 25 of the ICSID Convention requires that the parties be members of contracting states in order to submit a claim to ICSID arbitration. Both Gaul and Calpurnia are contracting states to the ICSID Convention.¹ Vanguard is a corporate national of Gaul, and the SFCDC is an arm of the Calpurnian state. As a result, the parties satisfy the nationality requirements of Article 25.

21. Article 25(2) acknowledges that a corporate entity may be considered a national of a contracting state for purposes of ICSID jurisdiction.² Specifically, Article 25(2) defines a “National of another Contracting State” to include

“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...”³

A corporate entity is a national of a contracting state when it is incorporated in the contracting state. Vanguard has Gaulois nationality since the company is incorporated in Gaul. As a result, Vanguard meets the requirements for a corporate national under Article 25(2).

22. An entity may be considered an arm of the state, whereby its actions take on the character of the contracting state, for purposes of ICSID jurisdiction.⁴ This includes even a private entity, when its actions are or become increasingly governmental in nature.⁵ In *Emilio Augustín Maffezini v. The Kingdom of Spain*, the tribunal devised both structural and functional tests to determine whether a private organization constituted a state entity.⁶ The structural test looks at who created the entity, and under what law. Where the structural test

¹ ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (*hereinafter*, “ICSID Convention”), Article 25 (2003).

² ICSID Convention, Article 25.

³ ICSID Convention, Article 25(2)(b).

⁴ *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000.

⁵ *Id.* ¶ 85.

⁶ *Id.* ¶¶ 75-89.

does not yield a clear answer, as in the present fact pattern, it is appropriate to consider the functional test. The functional test examines whether the acts of the entity are “essentially commercial rather than governmental in nature.”⁷ The tribunal relied on these tests to designate the Spanish regional development entity, the Sociedad para el Desarrollo Industrial de Galicia (“SODIGA”), as an arm of the state.⁸

23. The *Maffezini* tests clearly designates the State Fund for Commerce and Development in Calpurnia (hereinafter “SFCDC”) as an arm of the state. Under the structural test, the SFCDC qualifies as a state entity and leaves no ambiguity as to its existence as such. The SFCDC employs the terms “State” and “Calpurnia” in its title, pointing to the close link between the government and the SFCDC and its existence as a state-sponsored (if not state-run) entity. As a result, the state of Calpurnia, a contracting state to the ICSID Convention, should be held responsible for the actions of the SFCDC.

2. CONSENT

Calpurnia and Gaul both consented in writing to submit investment disputes to ICSID and therefore satisfy the consent requirements of ICSID jurisdiction.

24. Article 25(1) of the ICSID Convention requires the consent of both contracting states in order to initiate arbitration. Specifically, Article 25(1) states:

“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.”

Calpurnia and Gaul consented to ICSID arbitration when they provided an option for ICSID arbitration in the Calpurnia-Gaul BIT.

25. Article 11 of the BIT provides four options for dispute resolution. Under Article 11(b), the parties may submit a dispute to

“[t]he 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

⁷ *Id.* ¶ 80 (citing *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction of May 24, 1999).

⁸ *Id.* ¶ 89.

States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the “Centre”), if the Centre is available.”

Because the form and timing of consent are not specified in the ICSID Convention, the inclusion of a BIT provision allowing for ICSID jurisdiction has been recognized as a valid means of consenting to ICSID.⁹ Specifically, in its “Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,” the International Bank for Reconstruction and Development clarified that consent may be given

“in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement,”

such as a BIT.¹⁰

26. Arbitral tribunals have emphasized the importance of states being able to bind themselves and make decisions.¹¹ Both Calpurnia and Gaul made the decision to bind themselves to the provisions of the Calpurnia-Gaul BIT. In doing so, the parties not only established the procedures for dispute resolution, but also consented to ICSID jurisdiction when they agreed to include ICSID arbitration as an option for aggrieved investors. As a result, both Calpurnia and Gaul have given their “irrevocable consent” with respect to ICSID arbitration and satisfy the requirements of Article 25(1).

3. SCOPE

Vanguard’s investment in VanCal falls within the definition set forth in the ICSID Convention.

27. Article 25(1) of the ICSID Convention creates scope requirements for a tribunal when determining whether jurisdiction exists. Specifically, Article 25(1) states:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”¹²

⁹ ICSID Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Bank for Reconstruction and Development (*hereinafter*, “ICSID Report”), March 18, 1965, ¶ 24.

¹⁰ *Id.*

¹¹ *Company Z v. State Organization ABC*, 8 YCA 94-117 (1982).

¹² ICSID Convention, Article 25(1).

The present dispute falls within the scope of the ICSID Convention since there is a legal dispute that arose out of an investment between the contracting states of Calpurnia and Gaul.

1. There is a legal dispute between the Government of Calpurnia and Vanguard.

28. A legal dispute must be more than a “mere conflict of interest.”¹³ The present fact pattern demonstrates the existence of much more than a mere conflict between Calpurnia and Gaul. The relationship between Vanguard and Calpurnia has deteriorated to the point where there have been disagreements over finances, the expulsion of Vanguard’s employees from the country, visa denials, and police invasions. Moreover, Vanguard and Calpurnia have both invoked the Calpurnia-Gaul BIT in their arguments. Such a reliance on a legal document underlines the legal nature of the dispute. Finally, the dispute involves the legal rights of Vanguard as a shareholder of VanCal. These reasons underline the existence of a legal dispute between the parties.

2. Vanguard has an investment in Calpurnia.

29. Arbitral tribunals have provided significant persuasive authority on what constitutes an investment under the ICSID Convention. In *Fedax N.V. v. Republic of Venezuela*, when determining whether Fedax’s investment in Venezuela was an investment under the ICSID Convention, the tribunal stated that the basic features of an investment include

“ . . . a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development.”¹⁴

In *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, the tribunal found that AAPL’s acquisition of shares of the Serendib Company, a joint venture, was “undisputed ‘investments.’”¹⁵ Consistent with these commonly cited holdings, Vanguard invested in Calpurnia when it established an equity interest in a joint venture located in Calpurnia.

30. The trajectory of Vanguard’s role in the VanCal joint venture demonstrates the depth of Vanguard’s investment in Calpurnia. Specifically, Vanguard invested in Calpurnia in early 1997 by establishing the joint venture company, VanCal, of which Vanguard initially

¹³ ICSID Report, ¶ 26.

¹⁴ *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction of July 11, 1997, ¶ 43.

¹⁵ *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of June 27, 1990, ¶ 95.

owned a fifty percent equity interest. Vanguard has continuously owned VanCal stock from 1997 to the present, and has received dividends from VanCal. This eleven-year duration exemplifies Vanguard's commitment to the joint venture and underlines VanCal's significant role in the development of the telecommunications industry in Calpurnia. The SFCDC, which is directly vested in commerce and development in Calpurnia, owns fifty-two percent of VanCal's shares. In addition, Calpurnians benefit from the GSM/UMTS services that VanCal provides under the Vanguard International trademark. Also, VanCal contributes to Calpurnia's economy by creating jobs and paying out dividends to Calpurnian shareholders. Therefore, Vanguard has an investment in Calpurnia through both its equity interest and associated economic contribution in VanCal under the ICSID Convention.

3. The legal dispute arises directly from the investment.

31. The legal dispute between Vanguard and Calpurnia arises directly out of Vanguard's investment in VanCal and therefore meets the requirements of Article 25(1) of the ICSID Convention. According to *Ceskoslovenska Obchodni Banka, AS v. the Slovak Republic*, the legal dispute must arise of an investment within the meaning of the Convention and the legal dispute must relate to an investment as defined in the Calpurnia-Gaul BIT.¹⁶ The tribunal in *Fedax N.V. v. Republic of Venezuela* explained that the term "directly" has been recognized as modifying "dispute," rather than "investment."¹⁷ Thus, jurisdiction exists as long as the "legal dispute [arises] directly from the transaction."¹⁸
32. The legal dispute between Vanguard and Calpurnia arises directly from the investment within the meaning of the Convention, as there is a direct link between Vanguard's role as an investor in VanCal and Calpurnia's actions in creating the dispute via the SFCDC. The grievances suffered by Vanguard, such as the denial of dividend payments, the expulsion of key personnel from Calpurnia, and the loss of control over its investment, stem directly from actions taken by the SFCDC. Further, the legal dispute relates to the investment as defined in the Calpurnia-Gaul BIT, as the dispute between Vanguard and Calpurnia concerns the diminution of Vanguard's market share of VanCal. These examples reinforce the fact that the dispute arises from Vanguard's investment in VanCal.

¹⁶ *Ceskoslovenska Obchodni Banka, AS v. the Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction of May 24, 1999, ¶ 68.

¹⁷ *Fedax N.V.*, ICSID Case No. ARB/96/3, ¶¶ 26-28.

¹⁸ ICSID Convention, Article 25(1).

B. JURISDICTION UNDER THE CALPURNIA-GAUL BIT

33. In addition to meeting the requirements for jurisdiction under the ICSID Convention, Vanguard also meets the requirements for jurisdiction under the Calpurnia-Gaul BIT. Vanguard can demonstrate that there was an investment as defined by the BIT, and that neither the fork-in-the-road provision nor the eighteen-month waiting period bar an arbitration claim.

1. DEFINITION OF INVESTMENT

34. In addition to the standards for investments established by the ICSID Convention, Vanguard also meets the definition of investment set forth in the Calpurnia-Gaul BIT. Article 1 of the BIT 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”¹⁹
...

This definition includes “shares, stocks, debentures or [another] form of participation in a company.”²⁰ Vanguard’s ownership of VanCal stock clearly meets this definition. Moreover, it is of no relevance that Vanguard is a minority shareholder in VanCal. In *CMS Gas Transmission Company v. Republic of Argentina*, the tribunal stated that

“there is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares.”²¹

As a result, Vanguard once again demonstrates that it meets the requirements of an investment for purposes of arbitration.

2. THE FORK-IN-THE-ROAD PROVISION

The fork-in-the road provision does not bar the pursuit of ICSID arbitration.

35. Article 11 of the Calpurnia-Gaul BIT contains a fork-in-the-road provision, which allows the investor to select and submit a claim to one of four bodies of dispute resolution. Under Article 11, the aggrieved investor may submit the case to local courts, ICSID, an additional facility of ICSID, or an ad hoc arbitration tribunal.²² However, a fork-in-the-road provision

¹⁹ Calpurnia-Gaul BIT, Article 1.

²⁰ Calpurnia-Gaul BIT, Article 1(b).

²¹ *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005, ¶ 51.

²² Calpurnia-Gaul BIT, Article 11(2).

precludes the pursuit of an additional dispute resolution mechanism only when the following elements are identical in both suits: (1) parties, (2) subject matter and (3) cause of action.²³ Vanguard is not precluded from pursuing ICSID arbitration since the above three elements are not identical in the suit filed by Ms. Pescara in Calpurnian courts and the present request for arbitration.

36. First, the parties are different in both cases. Ms. Pescara was the claimant in previous case, while Gaul is the claimant in the present case. According to the Calendar of Events, Ms. Pescara brought suit in Calpurnia, asking the local court to order VanCal to pay dividends on her one percent equity interest in VanCal. Ms. Pescara's claim was dismissed by the court on grounds that she had no beneficial interest in the shareholding and therefore lacked standing. The court's language bolsters Vanguard's argument that the suit brought by Pescara under her own name, was not affiliated with Vanguard or representative of Vanguard's actions. When the court dismissed Pescara's claim on June 14, 2006, Ms. Pescara was no longer serving as Vanguard's managing director, nor was she acting as a fiduciary of Vanguard's shareholders. The court recognized that the one percent in shares, though registered under Pescara's name was held in trust for Vanguard, and Pescara lacked standing to bring suit. To the present date, Vanguard has not filed claims in local courts to recover the thirty percent of shares it directly holds. Thus, Vanguard should not be precluded from electing an arbitral remedy through ICSID as the parties are different and the existing claims have yet to be adjudicated.
37. Second, the subject matter differs significantly in the two suits. Ms. Pescara sought a court order forcing VanCal to transfer dividends on her one percent equity interest to her account in Gaul. Her claim was both individual and discrete. By contrast, Vanguard makes a much broader assertion, seeking compensation for the myriad of ways in which Calpurnia has harmed it. Specifically, Vanguard argues that Calpurnia has discriminated against them, unlawfully interfered in their investment, obstructed the transfer of returns from their investment, and failed to provide them and their investments full protection and security. As such, the claims pursued by Ms. Pescara and Vanguard are clearly separate and distinct from one another.

²³ CAMPBELL McLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION 130 (2007).

38. Third, the causes of action differ as well. Pescara pursued a claim similar to a breach of contract where she sought to recover the dividends on her one percent shareholding. On the other hand, Vanguard is claiming a breach of treaty by Calpurnia according to the claims listed above. Thus, the nature of the claims differs significantly.
39. Even if the tribunal finds that Vanguard's claims have been brought before Calpurnian courts, Vanguard should still be allowed to seek remedy through the arbitral tribunal because it was deprived of any real choice as to which legal recourse to pursue. According to *Occidental Exploration & Production Company (OEPC) v. Republic of Ecuador*, the fork-in-the-road analysis is fact-specific and requires an analysis of both the nature of the dispute and its specific circumstances.²⁴ The *OEPC* tribunal strongly advocated allowing an aggrieved investor to pursue arbitration after attempts to obtain a decision in the host state's court system, when the investor did not have a real choice as to which legal avenue to pursue. In *OEPC*, the claimant clearly violated the fork-in-the road provision by submitting four separate lawsuits to Ecuadorian courts. The arbitral tribunal in *OEPC* ignored the clear procedural violation, choosing instead to find jurisdiction over the claim. The crucial element is the amount of choice the investor had when selecting a remedy.²⁵
40. In the present case, the investor was deprived of any real choice to elect the preferred remedy due to (1) the eighteen-month waiting period provision and (2) the dismissal for lack of standing by the Calpurnian court system. The eighteen-month waiting period made it impractical for Vanguard to resolve the investment disputes in a timely manner, frustrating both the purpose and the objective of the ICSID Convention. Furthermore, when the Calpurnian court dismissed Ms. Pescara's claims for lack of standing, it barred Ms. Pescara from a remedy and created a situation in which the fork-in-the road provision frustrated the purpose of the treaty, which goal is to provide access to legal review of an investor-host state dispute. Based on equitable principles, the tribunal should find jurisdiction despite the fork-in-the-road clause and allow Vanguard's claims against Calpurnia to proceed.

²⁴ *Occidental Exploration & Production Company v. Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467, July 1, 2004, ¶ 57.

²⁵ *Id.* ¶ 60.

3. WAITING PERIOD

Vanguard did not violate the eighteen-month waiting period, and even if it did, such violation should be excused.

41. Article 11(2) of the Calpurnia-Gaul BIT establishes an eighteen-month waiting period between the time of the dispute and the commencement of legal redress.²⁶ Specifically, Article 11(2) states:

“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.”²⁷

Vanguard adhered to this waiting period. Even if Vanguard had violated the waiting period, such violation should be excused.

42. Vanguard did not violate the eighteen-month waiting period when it filed for ICSID arbitration on January 31, 2007 since the dispute crystallized well in advance of the filing date. The dispute revolves around the nonpayment of dividends, the debate over which emerged as early as 2005. In March 2005, Vanguard’s new board of directors, with strong ties to the SFCDC, voted to deny foreign, especially Gaulois, investors the return on their investments. This decision was reiterated in an email on May 27, 2005, in which it became clear that Vanguard would not see its dividends. Eighteen months from either of these dates in 2005 falls well before the January 2007 filing for arbitration with ICSID. Vanguard thus complied with the waiting period requirements as established in Article 11(2). As a result, no procedural violation occurred.

43. Even if Vanguard had violated the eighteen-month waiting period, such violation should be excused in favor of upholding the intent of the treaty. The tribunal in *Ethyl Corporation v. Government of Canada* reinforced this concept when it ignored a procedural violation in order to uphold the intent of the treaty in question.²⁸ Ethyl filed its notice of intent to arbitrate well in advance of the six-month waiting period outlined in NAFTA.²⁹ Rather than dismiss the case on this procedural violation, the tribunal chose to uphold the “object and

²⁶ Calpurnia-Gaul BIT, Article 11(2).

²⁷ *Id.*

²⁸ *Ethyl Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, June 24, 1998, 38 ILM 708 (1999), ¶¶ 85-88.

²⁹ *Id.*

purpose” of a treaty rather than frustrate it with technicalities.³⁰ In addition to emphasizing the importance of a treaty’s purpose, the tribunal noted that the waiting period had passed anyway. Thus, the *Ethyl* tribunal provides two justifications for excusing the violation of a waiting period.

44. The rationale from *Ethyl* supports the excusal of any procedural violation in the present fact pattern as well. The purpose of the Calpurnia-Gaul BIT is to protect a foreign investor’s investment, and, when this fails, to provide the aggrieved investor with a form of legal recourse. To bar Vanguard’s ICSID claim on a procedural violation would be to deny Vanguard access to a fair forum for redress due to a technicality. Additionally, the eighteen-month period has already passed between the time the dispute crystallized and the commencement of arbitration. Even if the dispute was deemed to have commenced after January 31, 2006 (the date exactly eighteen months prior to Vanguard’s July 31, 2007 filing with ICSID), the first arbitration session did not begin until March 2008. Thus, it would still be possible for the eighteen months to have run.

III. VANGUARD’S CLAIMS UNDER THE CALPURNIA-GAUL BIT

45. Vanguard will establish the myriad of ways in which Calpurnia violated the Calpurnia-Gaul BIT. Specifically, Vanguard will assert the following substantive claims:
- i. Violations of fair and equitable treatment
 - ii. Violations of the full protection and security obligation
 - iii. Use of unreasonable, arbitrary and discriminatory measures
 - iv. Denial of sympathetic consideration
 - v. Discrimination
 - vi. Violations of the most favored nation provision
 - vii. Indirect expropriation

Through violations on each of these claims, Calpurnia served to deny Vanguard of its investment.

A. FAIR & EQUITABLE TREATMENT

Calpurnia violated Article 2(2) of the Calpurnia-Gaul BIT when it treated Vanguard’s investment unfairly and inequitably.

46. The fair and equitable treatment clause, located in Article 2 of the Calpurnia-Gaul BIT, guarantees “fair and equitable treatment” of investors’ investments “at all times.”³¹ The

³⁰ *Id.* ¶ 85.

³¹ Calpurnia-Gaul BIT, Article 2(2).

present facts demonstrate that Calpurnia has repeatedly violated Article 2 through the actions of government officials in the SFCDC and by treating Vanguard's investment unfairly in a Calpurnian court.

1. The fair and equitable standard elevates Vanguard's contractual claims to treaty claims.

47. A state's failure to comply with its contractual obligations constitutes a violation of the "fair and equitable treatment" standard.³² The SFCDC breached its contractual obligations on two occasions. First, the SFCDC violated its obligations when it refused to pay dividends to Gaulois investors. Second, the SFCDC violated its contractual obligations when it refused to pay licensing fees to Vanguard. Each of these violations demonstrates a failure by the SFCDC to uphold the "fair and equitable treatment" standard promised to Gaulois investors in the Calpurnia-Gaul BIT.
48. First, the SFCDC violated the "fair and equitable treatment" standard by not paying out dividends to Gaulois shareholders. In fact, SFCDC deliberately acted to keep the amount paid to foreign investors at a minimum. This deliberate act violated the Calpurnia-Gaul BIT by creating a discriminatory effect, depriving Gaulois investors their returns while still paying them to Calpurnian investors.
49. Second, the government violated its contractual obligations when SFCDC failed to pay Vanguard the license fees for the use of the Vanguard International trademark and other sums due under the technical assistance agreement. Vanguard legitimately expected SFCDC, an arm of the host state, to carry out its contractual undertakings, or the *pacta sunt servanda* obligation.³³ Taking into account Vanguard's legitimate expectations, the fair and equitable treatment clause operates to elevate Vanguard's contractual claims to treaty claims.³⁴ Thus, the government's breach of its contractual obligations constitutes a violation of the Calpurnia-Gaul BIT.

2. Government officials treated Vanguard's personnel unfairly and inequitably.

50. Persuasive authority advocates a broad interpretation of the fair and equitable treatment language. Established principles in international law dictate that a state's

³² IOANA TUDOR, THE FAIR & EQUITABLE TREATMENT STANDARD IN INTERNATIONAL LAW OF FOREIGN INVESTMENT 196 (2008).

³³ *Id.*

³⁴ *Id.*

“conduct should not be arbitrary, grossly unfair, unjust or idiosyncratic, ... discriminatory and [expose] the claimant to sectional or racial prejudice, or [involve] a lack of due process.”³⁵

Further, the tribunal in *LG&E v. Argentine Republic* held that there is no need to show that the government acted in bad faith to prove an unfair and inequitable treatment claim.³⁶ The tribunal found the Argentine government’s failure to fulfill its promise to the investor constituted a breach of the investor’s reasonable expectations.³⁷ The tribunal looked to uphold the investor’s “fair expectations,” which it claimed were founded in the conditions offered at the time of investment.³⁸

51. Moreover, investment conditions

“may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host State, a duty to compensate the investor arises except for those caused by the state of necessity....”³⁹

Further, the

“foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations...”⁴⁰

Certainly, SFCDC’s actions do not represent an effort by Calpurnia to act “in a consistent manner.”⁴¹ Before the CCC came into power, the investment environment was more liberal and Vanguard played a central role in managing VanCal. However, the CCC changed this environment through a series of actions that effectively deprived Vanguard of its investment.

52. In addition, Article 2(1) of the BIT states that the host state

“shall encourage and create favourable conditions in its territory for investments.”⁴²

³⁵ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004, ¶ 98.

³⁶ *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of October 3, 2006, ¶ 129.

³⁷ *Id.* ¶ 130

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States (“Tecmed”)*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, ¶ 154.

⁴¹ *Id.* ¶ 154.

⁴² Calpurnia-Gaul BIT, Article 2(1).

Therefore, the Calpurnian government promised an ongoing favorable investment environment when Vanguard invested in VanCal. Yet when the CCC came into power, there was a marked shift in the government's policy in regard to foreign investors. Through the SFCDC and police, the government replaced the original investment environment with a hostile environment. SFCDC denied dividends to Gaulois shareholders, ceased the distribution and translation of financial documents to Gaulois shareholders, and ousted Ms. Pescara from the Board of Directors. These government decisions were counter to the "fair expectations" Vanguard had when it contracted with SFCDC in early 1997.

53. Essentially, Calpurnia "completely [dismantled] the very legal framework constructed to attract investors."⁴³ There was no economic crisis that warranted such a drastic change in economic policy. Thus, SFCDC's actions do not fall within the narrow exception laid out by the *LG&E* tribunal.

3. The Calpurnian court system denied justice to Vanguard's trustee.

54. A court's refusal to entertain a suit constitutes a denial of justice, and therefore, a violation of the fair and equitable treatment standard.⁴⁴ The test is whether

"a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."⁴⁵

55. Applying this test to the facts in this case, it is clear that the Calpurnian court, a direct arm of the Calpurnian state, subjected Vanguard's investment to unfair and inequitable treatment. Ms. Pescara, a Gaulois employee of Vanguard, held one percent of VanCal's shares in trust for Vanguard. Ms. Pescara brought suit in a Calpurnian court to order VanCal to transfer Gaul dividends to her account on her one per cent shareholding. The court dismissed her suit asserting she lacked standing to bring it. Even though the stock was held in Ms. Pescara's name, the court refused to entertain the suit under the guise that Ms. Pescara was a mere nominee, and so she had no beneficial interest in the suit. The decision was improper because legally, Ms. Pescara held the shares, and therefore, she had

⁴³ *LG&E*, ICSID Case No. ARB/02/1, ¶ 139.

⁴⁴ *Azinian, Davitian & Baca v United Mexican States*, NAFTA, Award of November 1, 1999, ¶ 102.

⁴⁵ *Mondev International Ltd. v. United States of America*, NAFTA, Award of October 11, 2002, ¶ 127.

standing to bring forth the suit. As a result, Ms. Pescara was denied her rightful opportunity to receive adjudication on the merits.

56. Further, the Calpurnian Constitutional Court dismissed Vanguard's application to declare the December 2003, April 2004, and July 2004 searches unlawful and seek compensation. This denial of relief amounts to a breach of Calpurnia's obligation to accord fair and equitable treatment to Vanguard under Article 2(2) of the Calpurnia-Gaul BIT.

B. FULL PROTECTION & SECURITY

Calpurnia violated Article 2(2) of the Calpurnia-Gaul BIT when it failed to provide full protection and security to Vanguard's investment.

57. The full protection and security clause, found in Article 2(2) of the Calpurnia-Gaul BIT, creates an obligation for the Calpurnian government to protect the investments of Gaulois investors. Specifically, Article 2(2) guarantees "full and constant protection and security" for investors' investments "at all times."⁴⁶ The obligation to accord full protection and security requires the host state to exercise due diligence in the protection of foreign investments.⁴⁷ The host state has an "obligation of vigilance", meaning the state must provide the degree of protection and security that should be legitimately expected by the investor from a host state.⁴⁸ Moreover, the full protection and security provision creates an

"obligation on the part of the host State to exercise... reasonable care to protect foreign investment against injury, including injury by private citizens."⁴⁹

Calpurnia violated this standard when it denied Vanguard the protection of its investment in VanCal.

58. In *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, the tribunal held that full protection and security implicates the customary international law standard of diligence.⁵⁰ As a result, the government must take measures to prevent property destruction and can be liable for any such destruction it caused.⁵¹ The full protection and security

⁴⁶ Calpurnia-Gaul BIT, Article 2(2).

⁴⁷ *AAPL*, ICSID Case No. ARB/87/3, ¶¶ 67-69.

⁴⁸ *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award of February 21, 1997, 30.

⁴⁹ *Investment Provisions in Economic Integration Agreements*, UN Conference on Trade and Development, UNCTAD/ITE/IIT/2005/10 (2006), available at http://www.unctad.org/en/docs/iteiit200510ch4_en.pdf.

⁵⁰ *AAPL*, ICSID Case No. ARB/87/3, ¶¶ 67-69.

⁵¹ *Id.*

doctrine should not be limited to only physical destruction of property, and should be extended to intangible losses. The host state should be responsible for causing a decline in Vanguard's investment through the harassment of Vanguard officials and failing to fulfill its obligation of vigilance. The government's acts and failure to act severely affected Vanguard's ability to preserve its investment's value.

59. The present fact pattern differs from arbitral decisions limiting the scope of "full protection and security" to physical destruction due to a difference in the level of threat that existed in each situation. In *AAPL*, the tribunal declined to extend the full protection and security clause beyond the physical destruction of property caused to a shrimp farm during a counter-insurgency operation by Sri Lankan government security forces, as it was worried about creating a strict liability standard for the government.⁵² Such a standard would make the government liable for any harm to the investment even if the destruction happened under circumstances beyond the State's control.⁵³ However, Vanguard's case is distinguishable, as the government deliberately harmed Vanguard's investment without any compelling causes. Additionally, the Calpurnian government failed to step in when government employees harassed Vanguard officials who were integral to the maintenance of Vanguard's investment. In fact, a VanCal board member from the SFCDC stated that, due to the dispute between Calpurnia and Gaul, VanCal would no longer pay dividends to foreign investors. Clearly, Vanguard's need for government to protect its investment was only heightened when the relationship between Calpurnia and Gaul deteriorated.
60. Essentially, the government not only failed to protect Vanguard's investment, but also directly caused harm to it by affecting Vanguard's management personnel involved in VanCal. Based on an anonymous and unsubstantiated tip, the Calpurnian police searched Ms. Pescara's home on three different occasions, thereby, invading her privacy and defaming her in public by drawing negative media attention. As a result of the negative publicity, the CCC Women's League picketed Ms. Pescara's home for 15 days in total. Despite Ms. Pescara's demands to remove the protestors, the police declined to protect her. The government failed to act. Also, government officers from SFCDC ousted Ms. Pescara, a key representative of Vanguard at VanCal. Additionally, the government refused to

⁵² *Id.* ¶ 50.

⁵³ *Id.* ¶ 45.

renew her business visa even though she had legitimate business affairs to conduct on behalf of Vanguard in Calpurnia. Thus, the facts demonstrate a clear and undeniable failure to provide full protection and security. As a result, Calpurnia should be held liable to Vanguard for both its actions and failure to act, and should compensate the investor accordingly.

C. UNREASONABLE, ARBITRARY AND DISCRIMINATORY MEASURES

Calpurnia interfered with Vanguard’s investment by enacting an unreasonable, arbitrary and discriminatory measure in violation of Article 2(3).

61. Article 2(3) of the Calpurnia-Gaul BIT states that a host state

“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.”⁵⁴

Calpurnia violated this provision by enacting a measure, the denial of dividends to foreign investors, that was unreasonable, arbitrary *and* discriminatory. This measure denied Gaulois investors of the use, enjoyment and disposal of their investment.

62. First, the measures passed by Calpurnia are unreasonable. Since the BIT does not define the term “unreasonable” or provide examples as to when it might apply, the term should be interpreted using plain meaning. This approach has been adopted by previous tribunals when a term has been left undefined in a treaty.⁵⁵ Under a plain meaning interpretation, the word “unreasonable” implies that a measure was taken without sound reason or justification. Indeed, Calpurnia demonstrates no plausible justification for denying foreigners the dividends earned on their investments. There was no state of emergency, nor was there any indication by political, social or economic factors that the Calpurnia might be on the verge of a national emergency. Additionally, there was no state of war or actual controversy between Calpurnia and Gaul. The existence of political tensions should not be a sufficient reason to excuse harmful measures taken towards foreigners. To allow this violation by Calpurnia would be to place all BIT signatories on a slippery slope, where violations can be justified for only the slightest of reasons.

⁵⁴ Calpurnia-Gaul BIT, Article 2(3).

⁵⁵ See *LG&E*, ICSID Case No. ARB/02/1, ¶ 156.

63. Second, the measures passed by Calpurnia are arbitrary. The term “arbitrary” is also undefined in the BIT, leaving plain meaning and international law standards as the best guidance available. Under international law, the term “arbitrary” has been defined as

“a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”⁵⁶

The tribunal in *Ronald S. Lauder v. The Czech Republic* further expounded on the term “arbitrary” by stating it is something “founded on prejudice or preference rather than on reason or fact.”⁵⁷ In *Lauder*, the tribunal found an act to be arbitrary when it forced a private investor to change its method of participation out of fear of foreign influence in politics.⁵⁸

64. Similar to the fact pattern in *Lauder*, Vanguard’s method of participation in VanCal was changed by Calpurnia’s decision to deny dividend payments to foreign investors. More specifically, the denial and subsequent crediting of the dividend payments to Vanguard’s account inherently alters the way in which Vanguard invested in VanCal. In addition to violating the VanCal’s Articles of Association, this action created a new business method that differs considerably from the method that Vanguard expected and agreed to as an investor in VanCal. Additionally, the tensions that arose out of the dividend denial forced Vanguard to cease its participation on the board of directors since Vanguard’s directors were being entirely overridden by Calpurnian directors. Calpurnia’s decision to deny dividends completed a change of control of VanCal and denied Vanguard the opportunity to have any say in the direction of the company. This loss of control reinforces the change in Vanguard’s method of investment, since Vanguard went from being an active voice on the board of directors to being unable to participate. Like the *Lauder* fact pattern, this action was taken out of political fears. Calpurnia’s justification for the denial of dividends to foreigners rests on worry over political tensions between Calpurnia and Gaul. These facts reinforce the arbitrariness of Calpurnia’s actions.

65. Third, the measures passed by Calpurnia are discriminatory. Like the other terms in Article 2(3), the term “discriminatory” is left undefined in the BIT. With respect to the particular

⁵⁶ *Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of July 20, 1989, 28 ILM 1109 (1989), ¶ 128.

⁵⁷ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of September 3, 2001, ¶ 221.

⁵⁸ *Id.*

language of Article 2(3), tribunals have established a standard for what constitutes a discriminatory measure. In *Elettronica Sicula S.p.A. (ELSI)*, also referred to as *United States of America v. Italy*, the tribunal created a framework for determining when a measure is discriminatory and in violation of investment protection language of a BIT.⁵⁹ The tribunal in *LG&E v. Argentine Republic* summarized and applied the *ELSI* rule as requiring:

“(i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.”⁶⁰

66. Applying the *ELSI* standard to the present facts, it is clear that Calpurnia enacted discriminatory measures against Gaulois investors. First, the decision to deny dividends to foreign investors was a deliberate and intentional act by the Calpurnian government. The facts demonstrate the progression of this decision, with the idea emerging in March 2005 and culminating in a decision in May 2005. This two month period reflects the deliberation and intentionality that went into the passage of this measure. Second, the decision favored Calpurnian nationals, since they continued to receive dividend payments on their investments. Third, the decision harmed Gaulois investors since they did not receive the dividend they were due on their investments. Finally, this decision created disparate treatment of the two groups, since under similar circumstances this action was not taken against other nationals. Stated quite simply, Calpurnian investors received their dividend payments while Gaulois investors did not. As a result, the current facts demonstrate that Calpurnia’s actions clearly meet the test of a discriminatory measure as established by international law.

67. Finally, the decision to deny Gaulois investors their dividends from the VanCal investment impaired their use, enjoyment and disposal of the investments. The dividends constitute an investment under the BIT since Article 1 defines “investment” as

“every kind of asset established or acquired by an investor” in the host state.⁶¹

The broad definition of investment found in Article 1 extends to cover the dividend. The fact that Article 2(3) does not specifically mention returns on investments should not bar a

⁵⁹ *Elettronica Sicula S.p.A. (ELSI)*, 28 ILM 1109.

⁶⁰ *LG&E*, ICSID Case No. ARB/02/1, ¶ 146.

⁶¹ Calpurnia-Gaul BIT, Article 1.

claim under this provision. To do so otherwise would violate both the purpose of the treaty and of Article 2, since each seeks to protect the investment of the foreign investor in the host state. Calpurnia's decision to deny dividend payments to Gaulois investors prevented them from using or accessing the amount, and therefore denied them the ability to enjoy or dispose of their returns as they desired.

68. Thus, Calpurnia violated Article 2(3) one not one, but three separate and equally egregious, grounds. Calpurnia's decision to deny dividend payments to Gaulois investors was unreasonable, arbitrary *and* discriminatory. The Claimant requests that the tribunal recognize such blatant violations of the BIT.

D. SYMPATHETIC CONSIDERATION

Calpurnia violated Article 2(5) when it denied visa renewals to Gaulois citizens.

69. Article 2(5) of the Calpurnia-Gaul BIT requires the host state to

“give a sympathetic consideration to applications for necessary permits in connection with the investments in its territory, including authorizations for engaging executives, managers, specialists and technical personnel of the investor's choice.”⁶²

Calpurnia violated Article 2(5) when it refused to renew visas for certain Vanguard employees involved in the VanCal joint venture.

70. Prior to being forced out of her position, Ms. Francesca Pescara served as a Vanguard representative on VanCal's board of directors. In September 2004, her application to renew her business visa was denied. Ms. Pescara went through the appropriate channels and made the appropriate efforts to comply with Calpurnian law to renew her visa, and yet was denied. This denial makes her role as a director of VanCal entirely impossible, since the job requires her physical presence in Calpurnia. This denial, without any reason provided, violates the “sympathetic consideration” requirement of Article 2(5).

E. DISCRIMINATION

Calpurnia discriminated against Gaulois investors and their investments when it denied returns to foreigners, violating the standard of treatment established under Article 4 of the Calpurnia-Gaul BIT.

71. Article 4 of the Calpurnia-Gaul BIT states that both investments and investors must be accorded the same standard of treatment as that received by the host state or investors of a

⁶² Calpurnia-Gaul BIT, Article 2(5).

third state, “whichever is the most favourable to the investor.”⁶³ In the present situation, the most favorable standard of treatment is that accorded to Calpurnian investors, since they were the only investors to receive dividends on their investment. Thus, Gaulois investors in the VanCal joint venture were entitled to the same standard of treatment as Calpurnian investors under Article 4. Calpurnia therefore violated Article 4(1) in discriminating against Gaulois investments when it refused to issue dividends to foreigners. Further, Calpurnia violated Article 4(2) by discriminating against Gaulois investors when it denied them the maintenance, use and enjoyment of their investment.

72. In *Pope & Talbot, Inc. v. Government of Canada*, the tribunal created a three-prong test to identify discriminatory treatment under national treatment language of a treaty.⁶⁴ First, the tribunal identified a group of others in similar circumstances.⁶⁵ This group may be investors or investments.⁶⁶ The tribunal used the claimant as one comparator and domestic investors as a second comparator.⁶⁷ Second, the tribunal considered whether the identified group of comparators received like treatment.⁶⁸ Third, the tribunal considered the existence of any factors which might justify any differences in standards of treatment between the two groups.⁶⁹ The *Pope & Talbot* test mirrors decisions by other recent tribunals,⁷⁰ and, given the similarity between the language in NAFTA 1102 and Article 4 of the Calpurnia-Gaul BIT, provides a framework that highlights the discriminatory actions of Calpurnia.
73. The *Pope & Talbot* test demonstrates the way in which Calpurnia discriminated against Gaulois investments in violation of Article 4(1). Applying the first prong of the test, the group of comparators would be (i) Gaulois investments in VanCal and (ii) Calpurnian investments in VanCal. Under the second prong of the test, Gaulois investments received significantly less favorable treatment than Calpurnian investments. Article 4(1) requires “investments... or returns related thereto” to be provided with the most favorable treatment

⁶³ Calpurnia-Gaul BIT, Article 4(1)-(2).

⁶⁴ *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Interim Award on Merits – Phase Two, April 10, 2001, ¶¶ 78-104.

⁶⁵ *Id.* ¶ 78.

⁶⁶ *Id.*

⁶⁷ *Id.* ¶¶ 83-104.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on Damages, 21 October 2002, ¶ 251; *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, 6 February 2001, ¶ 247.

available (emphasis added).⁷¹ Calpurnian investors received a dividend while Gaulois investors did not. This difference in treatment is discriminatory and in violation of the standard of treatment established in Article 4(1). Finally, under the third prong of the test, there are no factors which excuse the disparate and discriminatory treatment of Gaulois investments. Specifically, no clear link exists between paying dividends on Calpurnian investments while simultaneously denying them to Gaulois investments. By refusing to pay dividends on Gaulois investments, Calpurnia violated Article 4(1).

74. This test also demonstrates the way in which Calpurnia discriminated against Gaulois investors in violation of Article 4(2). Under the first prong of the test, the group of comparators would be (i) Gaulois investors in VanCal and (ii) Calpurnian investors in VanCal. Under the second prong of the test, Gaulois investors received less favorable treatment than Calpurnian investors. Article 4(2) requires Gaulois investors to receive the same rights of

“management, maintenance, use, enjoyment or disposal of their investments”

as the most favored nation.⁷² The payment of dividends to Calpurnian investors, yet not to Gaulois investors demonstrates a strikingly different standard of treatment between the two comparators, one that violates both Article 4(2). Calpurnian investors possessed the right to manage, maintain, use, enjoy *and* dispose of their dividend payments as they pleased. Gaulois investors did not possess such rights, due to the denial of the dividend. Such disparate protection of rights violates Article 4(2). Finally, under the third prong of the test, there are no factors which might justify such disparate treatment. Calpurnia demonstrates no plausible link between the denial of dividends to Gaulois investors and the larger political tensions between the two states. As a result, Calpurnia violated both Articles 4(1) and 4(2) of the BIT.

⁷¹ Calpurnia-Gaul BIT, Article 4(1).

⁷² *Id.*

F. THE MOST FAVORED NATION PROVISION

The most favored nation language of Article 4 extends to dispute resolution provisions, similar to the Calpurnia-Flatland BIT and irrespective of whether Flatland was a contracting state to ICSID at the time of this dispute.

1. The most favored nation language of Article 4 calls for the extension of the shortened waiting period found in the Calpurnia-Flatland BIT to the Calpurnia-Gaul BIT.

75. Article 4 of the Calpurnia-Gaul BIT contains broad most favored nation language which should be extended to apply to procedural elements such as dispute resolution. Specifically, Article 4(2) guarantees investors

“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.”⁷³

According to this language, the presence of a more favorable dispute resolution provision the Calpurnia-Flatland BIT should be extended to Gaulois investors.

76. The tribunal in *Emilio Augustín Maffezini v. The Kingdom of Spain* articulated a standard expanding the scope of most favored nation language which has been followed by subsequent tribunals, such as *Siemens A.G. v. Argentine Republic*.⁷⁴ In the *Maffezini* case, the tribunal extended the most favored nation clause of a BIT to cover dispute resolution provisions, despite the absence of any specific language indicating its applicability to procedural elements of the treaty.⁷⁵ Specifically, the tribunal extended the provision to waive a waiting period to arbitration.⁷⁶ To reach this decision, the tribunal looked to the purpose of the treaty, finding that the purpose was to provide foreign investors with rights.⁷⁷ In order to protect these rights, the tribunal was willing to extend the most favored nation clause beyond substantive treaty rights. The tribunal overlooked the lack of specific language referencing dispute resolution and instead decided on policy grounds that

⁷³ Calpurnia-Gaul BIT, Article 4(2).

⁷⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction of August 3, 2004, ¶¶ 102-03.

⁷⁵ *Maffezini*, ICSID Case No. ARB/97/7, ¶ 52.

⁷⁶ *Id.* ¶ 64.

⁷⁷ *Id.* ¶¶ 52-57.

“there are good reasons to conclude that today dispute settlement arrangements are inextricably linked to the protection of foreign investors.”⁷⁸

The tribunal therefore concluded that it could apply treaty language from a more favorable BIT when the subject matter is the same and there are no public policy exceptions. These public policy exceptions included an exhaustion of local remedies rule, a fork-in-the-road provision, the place of arbitration, and specific rules governing the institution of arbitration.⁷⁹

77. The present fact pattern merits similar consideration. Similar to *Maffezini* and *Siemens*, the present dispute involves the extension of most favored nation language to a procedural, dispute resolution provision. Just as in *Maffezini*, the absence of specific language in the most favored nation clause should not preclude its extension to dispute resolution. The fairness concern that existed in *Maffezini* and its subsequent similar cases exists in the current situation as well. Calpurnia grants a two-month waiting period to investors from Flatland in the event of an investor-host state dispute, yet requires an eighteen-month waiting period for Gaulois investors.⁸⁰ Failure to extend the standard found in the Calpurnia-Flatland BIT to Gaulois investors creates a significant hurdle for them and undermines the goal of the treaty, which is to provide foreign investors with certain rights in the event they are aggrieved.⁸¹
78. Additionally, the Calpurnia-Flatland provisions treat the same subject matter as the Calpurnia-Gaul provisions in question, satisfying the “compatibil[ity] with the *ejusdem generis* principle” required by the *Maffezini* standard.⁸² Each provision addresses the length of a waiting period prior to seeking legal redress.
79. Finally, the extension of the Calpurnia-Flatland waiting period to Gaulois investors does not violate any of the public policy exceptions outlined by the *Maffezini* tribunal. The language in question involves a waiting period, not an exhaustion of local remedies, fork-in-the-road, forum, or institutional arbitration question. If anything, public policy speaks in favor of extending the Flatland waiting period to Gaulois investors. The legitimacy of the ICSID

⁷⁸ *Id.* ¶ 54.

⁷⁹ *Id.* ¶ 63.

⁸⁰ Calpurnia-Gaul BIT, Article 11(2); Calpurnia-Flatland BIT, Article 7.

⁸¹ See *Maffezini*, ICSID Case No. ARB/97/7, ¶ 54.

⁸² *Id.* ¶ 56.

arbitration structure depends on the ability of investors to access it. An arbitration system which allows varied standards of national treatment while simultaneously denying rights to the investor undermines the legitimacy of ICSID. The *Maffezini* tribunal serves to remind participants in the international investment framework of the importance of fairness.

2. Flatland’s status as a contracting state to the ICSID Convention is irrelevant to the extension of the waiting period provision.

80. Flatland’s status as a contracting state to ICSID is irrelevant because it does not change the core of the most favored nation language issue. While Flatland may no longer be a contracting state to ICSID as of November 2, 2003 (six months after ICSID received its notice of denunciation), its BIT still remains in force. Article 72 of the ICSID Convention states that a state must honor any consent given to arbitration prior to denunciation.⁸³ Listing ICSID as a dispute resolution option in a treaty is a recognized means of consenting to ICSID arbitration.⁸⁴ The provisions permitting ICSID arbitration in the Calpurnia-Flatland BIT should constitute consent given prior to denunciation, and should therefore remain in force as a dispute resolution option for Flatland investors. By extension, since the BIT option for ICSID arbitration should remain in force, the fact that Flatland denounced is irrelevant for purposes of most favored nation analysis. Since the dispute resolution provision remains intact for Flatland investors, there is no barrier to their extension to Gaulois investors via a most favored nation provision.
81. Policy considerations support this reasoning. A purpose of BITs is to encourage, if not require, host states to honor the commitments they make to investors. The preambles of both the Calpurnia-Flatland and Calpurnia-Gaul BITs cite the protection of investments as a treaty objective. BIT provisions on the promotion of investments and standards of treatment further reinforce this policy goal. To allow a contracting state to withdraw from its prior commitments upon the denunciation of the ICSID Convention would undermine the entire purpose of a BIT. For these reasons, Flatland’s denunciation of the ICSID Convention should not bar the extension of the dispute resolutions found in the Calpurnia-Flatland BIT to Gaulois investors.

⁸³ ICSID Convention, Article 72.

⁸⁴ ICSID Report, ¶ 24.

G. EXPROPRIATION

Calpurnia indirectly expropriated Vanguard's investment in VanCal in violation of Article 6 of the Calpurnia-Gaul BIT.

82. Article 6 of the Calpurnia-Gaul BIT states that investors' investments

“shall not be expropriated, nationalized, or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalization” without “prompt, adequate and effective compensation.”⁸⁵

The clause creates an exception for expropriation in the “public interest,” but requires there be a non-discriminatory basis, which clearly does not exist in the present case.⁸⁶ Calpurnia violated Article 6 when it expropriated Vanguard's investment in VanCal.

83. The SFCDC is an entity owned one hundred percent by the State of Calpurnia. As an arm of the State, the SFCDC's actions constitute indirect expropriation by Calpurnia. The tribunal in *Metalclad Corporation v. Mexico* defined indirect expropriation as an interference which

“has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.”⁸⁷

Though VanCal declared cash dividends and distributed them to Calpurnian shareholders in 2004, 2005, 2006 and 2007, the company refused to pay any dividends that rightfully belong to Vanguard and other foreign shareholders. VanCal also failed to pay license fees for the use of the Vanguard International trademark and other sums due under the technical assistance agreement. Finally, deprivation of Vanguard's economic benefit in its shares is also reflected in their present equity interest in VanCal. Vanguard's equity interest in VanCal that was at one point eighty-six percent is now a mere thirty-one percent, as a result of a number of share sales. Consequently, Vanguard was deprived of its reasonably expected economic benefit as a result of the SFCDC and VanCal board of directors' actions.

84. In *LG&E v. Argentine Republic*, the tribunal further defines indirect expropriation as government measures that

⁸⁵ Calpurnia-Gaul BIT, Article 6(1).

⁸⁶ *Id.*

⁸⁷ *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2001), ¶ 103.

“effectively neutralize[d] the benefit of property of the foreign owner.”⁸⁸

Such neutralized benefit occurs through loss of control of the investment, or inability to direct the day-to-day control of the investment, and can occur gradually over time.⁸⁹ In considering the loss of control, the *LG&E* tribunal looked to the impact of the measures on control of the investment, plus the duration of the measure.

85. Since the Conservative Conscience of Calpurnia (“CCC”) gained a majority in both chambers of the Calpurnian Parliament, Gaulois nationals representing Vanguard nationals on VanCal’s Board of Directors have been plagued with hostility and harassment by different branches of the Calpurnian government. Calpurnian government representatives ousted Ms. Pescara from VanCal’s board of directors and rejected the two shareholder proxies held by Mr. Rindler. Calpurnian government representatives also prevented Vanguard from electing a replacement for Ms. Pescara, consequently depriving them of representation they are entitled to. Ms. Pescara and Mr. Kolowenko faced harassment and searches within the privacy of their Calpurnian homes by Calpurnian Security Forces on three different dates. Additionally, the Calpurnian government denied Ms. Pescara’s renewal application for a business visa, thereby altering the ease with which she could legally continue employment in Calpurnia.
86. Vanguard lost control of its investment when its top personnel were forced out through various actions described above by the Calpurnian government, and when Gaulois shareholders no longer received dividends or financial information. The removal of board members and the loss of returns on shares limited the degree to which Gaulois shareholders could actively participate in the direction of VanCal, thereby gradually depriving it of its investment. The capital invested in the company no longer attached any rights to have a voice within the company. These measures passed by Calpurnia are not for the purpose of social or general welfare and therefore do not fit into the exceptions outlined by the *LG&E* tribunal.⁹⁰ Instead, these measures simply serve to antagonize foreign investors and hamper Vanguard’s rights to the economic benefits of their investments. As a result,

⁸⁸ *LG&E*, ICSID Case No. ARB/02/1, ¶ 188.

⁸⁹ *Id.*

⁹⁰ *See LG&E*, ICSID Case No. ARB/02/1, ¶ 195.

Vanguard's investment in VanCal was expropriated through the series of actions taken by Calpurnia and merits compensation.

IV. CONCLUSION

87. For the foregoing reasons, the Claimant requests that the Tribunal find the jurisdiction to hear these claims and find for the Claimant on the merits.

Respectfully submitted,

Spiropoulos