SPIROPOULOS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding Between

VANGUARD INTERNATIONAL
(CLAIMANT)

AND

GOVERNMENT OF THE REPUBLIC OF CALPURNIA
(RESPONDENT)

MEMORANDUM FOR RESPONDENT

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I. STATEMENT OF FACTS

The Joint Venture

1. The Respondent, Calpurnia is a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), as are the federated states of Gaul, of which the Claimant is a national. Since November 2003, the majority of the Calpurnian Parliament has consisted of members of the Conservative Conscience of Calpurnia (CCC), the state's conservative party. The Claimant, Vanguard International (hereinafter, "Vanguard"), is a mobile telecommunications company with GSM operations incorporated in the Federated States of Gaul (hereinafter, "Gaul"). Vanguard is headquartered in Nova Parigi, the capital of Gaul.
2. In 1997, the Claimant participated in the establishment of VanCal, a joint venture company, in Calpurnia. VanCal is 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. Through separate agreements, the Claimant provided technical assistance and trademark licensing to VanCal.
3. The Claimant initially owned a fifty percent equity interest in VanCal, which at one point, rose to eighty-six percent. Francesca Pescara, the Claimant's representative and VanCal's managing director at the time, held an additional one percent of VanCal's stock in trust on behalf of the Claimant. Calpurnian firms, banks, companies, and natural persons, including farmers and workers, constitute the remaining shareholders.
4. The State Fund for Commerce and Development in Calpurnia ("SFCDC") serves a custodial role, as it holds on deposit and votes on twenty-two percent of VanCal stock that is registered in the names of several hundred individual shareholders. The SFCDC directly holds thirty percent of VanCal's stock.

Calpurnia's Response to National Security Concerns

5. In late 2003, the Calpurnian Security Forces received anonymous tips from reliable sources that the Claimant was involved in illegal data collection for Gaulois Security Services. These reports alarmed the national security and threatened the safety of all

residents in Calpurnia. These allegations pertaining to the safety of Calpurnian citizens were taken very seriously, and warranted further investigation. On December 8, 2003, the Security Forces searched the homes of Francesca Pescara and David Kolowenko, who were both under suspicion for unlawful data collection and espionage.

6. The Security Forces conducted another search of the representatives' homes as part of the continuing counter-espionage operations on June 4, 2007, approximately six months after the initial investigation. At this time, the prosecutors expressed that they expected to file charges shortly. On July 17, 2004, stolen data hidden in the homes of Ms. Pescara and Mr. Kolowenko was seized. Prosecutors were still considering pressing charges based on investigations and the items collected and evaluated from both individuals.
7. Between January and October of 2004, concerned independent groups and individuals fearful and worried of the espionage activities reported, gathered to exercise their right to free speech by protesting Ms. Pescara's alleged illegal activities outside her home.
8. Given the mounting suspicions of espionage and pending investigations against Ms. Pescara, immigration authorities declined to renew her three-year business visa. The authorities enjoy a broad discretion in granting visas, and they are responsible for protecting the country. Despite the pending investigation relating to national security, Ms. Pescara was orally advised that she could still continue entering Calpurnia using the visa waiver program, which would suffice for her reduced VanCal board functions.

SFCDC's Efforts to Cooperate with the Claimant

9. Although investigative searches and citizen picketing had ceased in October 2004, Ms. Pescara left her position as VanCal's managing director in November 2004. The Board thanked her for her efforts over the years. Incidentally, this resignation came one month after VanCal welcomed Dr. Swift (the new Chairman of the Board) and Mr. Kelly, two SFCDC members, to the Board of Directors in October, 2004. After her departure, Ms. Pescara continued to remain in contact with VanCal.

10. Ms. Pescara's departure did not impact the Claimant's representation on the Board, as Mr. Hunter and Mr. Fowler subsequently replaced the positions Ms. Pescara and Mr. Shepherd held. Both Mr. Hunter and Mr. Fowler were elected to represent the claimant's at the June 7, 2006 shareholders meeting by the board of directors. The Claimant ended its participation on the Board when it withdrew its representatives by email and declined to replace them. The board's effort to elect and fill the Claimant's positions on the board was frustrated as both individuals who were recently elected resigned on October 23, 2006, based upon orders by the Claimant. The representatives resigned just a month after VanCal had already credited dividend payments to VanCal's account. In an effort to remedy the impact the resignation of Claimant's representatives had on VanCal, Dr. Swift wrote an email to the Claimant suggesting that the resignations be withdrawn and new directors be designated. VanCal did not want the Board deficient in representation from the company's minority shareholder.
11. In May 2005, the Claimant sent an email requesting the amount of the dividend payable be placed in a separate bank account in the Claimant's name. Absent any authorization by the board, Mr. Korchnoi responded, stating that VanCal could not comply with the request. The email by Mr. Korchnoi was unauthorized and consequently superseded by VanCal's statements of its utmost willingness to make any license fee payments and dividend payments owed to Claimant.
12. Correspondence that ensued on February 15, 2007 includes Claimant's unfounded accusations that Calpurnian State entities committed *de facto* expropriation and demanded for compensation. Mr. Poe responded to the Claimant on February 21, 2007, declining to involve the Government in what is merely an internal shareholder dispute, and stating that the Government has no authority in any event. Also, the board was surprised at the expropriation claim, since the "company ha[d] in no way been in a worse condition in the two or three recent fiscal periods" than during the period when the Claimant controlled VanCal's management.
13. In another effort to cooperate with the Claimant, on November 30, 2005, Dr. Swift conveyed his desire to have information provided to shareholders and board members by having originals available for inspection at the head office.

The Claimant's Court and Arbitration Proceedings

14. Although the investigations were performed in accordance with Calpurnian law, the Claimant sought to have the home searches declared unlawful and to demanded compensation. The Calpurnian Constitutional Court dismissed the suit because the Claimant lacked standing to bring causes of action relating to the private rights of residences of its employees, namely, Ms. Pescara and Mr. Kolowenko.
15. In another action, Ms. Pescara applied to the Commercial Court of San Inocente de Irkoutsk to transfer to her account in Gaul dividends on the one percent shareholding she held in trust for the Claimant. However, on June 14, 2006, the Court summarily dismissed the suit, because as a mere nominee of the stock, she lacked standing to bring the suit.
16. Finally, despite all of the SFCDC's efforts to work with the Claimant to resolve and settle any existing problems, the Claimant requested arbitration proceedings at the International Centre for Settlement of Investment Disputes (ICSID) on July 31, 2007, only a few months after communicating its grievances relating to the Board's decisions.

II. JURISDICTION

17. The tribunal does not have jurisdiction to hear Vanguard's claims. Vanguard neither meets the jurisdictional requirements of the ICSID Convention nor those of the Calpurnia-Gaul BIT.

A. JURISDICTION UNDER THE ICSID CONVENTION

18. Article 25 of the ICSID Convention requires a tribunal find that the parties satisfy requirements of nationality, scope and consent. The parties fail to meet the elements of nationality, have not consented to ICSID jurisdiction, and do not have a dispute within the scope of the ICSID Convention.

1. NATIONALITY

The parties do not meet the nationality requirement of ICSID jurisdiction since the SFCDC is not an arm of the state.

19. Article 25 of the ICSID Convention requires that the parties be members of contracting states in order to submit a claim to ICSID jurisdiction. Although Gaul

and Calpurnia are both contracting states to the ICSID Convention, the SFCDC is not an arm of the Calpurnian state for jurisdiction purposes. As a result, the parties do not satisfy the nationality requirements of Article 25.

20. The fact that an entity is state-created does not automatically mean that this entity is an arm of the state for jurisdiction purposes. In *Emilio Augustín Maffezini v. The Kingdom of Spain*, the tribunal devised both structural and functional tests to determine when an organization constitutes a state entity.[1] The structural test looks at who created the entity, under what law, and the functions the entity is intended to carry out.[2] The structural test is accompanied by a functional test, which examines the degree of state control over the entity and whether the actions of the entity are "essentially commercial rather than governmental in nature."[3] Elements of both the structural and functional tests must be present for an entity to be classified as an arm of the state.[4] Relying on these tests, the tribunal found that a private corporation was in fact a regional development agency.[5]

21. The SFCDC fails the structural test of *Maffezini* since it is not established as a state entity or controlled by the state. The intent of the state to create a state-owned entity is not enough to raise the presumption that the entity is a state organ.[6] Calpurnian law does not designate the SFCDC as a state entity. Further, unlike in *Maffezini*, where the state-created entity invested at the direction of a state ministry, the SFCDC operates on its own command. Thus, the SFCDC does not meet the structural test for a state entity.

22. The SFCDC also fails the functional test of *Maffezini* since its operations are purely commercial in nature. As the *Maffezini* tribunal held, "commercial acts cannot be attributed to the… State."[7] Unlike in *Maffezini*, where the state-created entity operated to benefit the state, the SFCDC invests in the private sector on behalf of

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[1] *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000.
[2] *Id.*
[3] *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).
[4] *Id.* ¶¶ 77-80.
[5] *Id.* ¶¶ 83-86.
[6] *Id.* ¶ 84.
[7] *Id.* ¶ 52.

Calpurnian investors. The SFCDC's role is no different than that of any other private sector fund manager seeking to attain maximum returns on behalf of its investors. Because its actions are purely commercial and possess no link to the government, the SFCDC fails to meet the functional test of *Maffezini* and therefore cannot be considered a state entity for the purposes of ICSID jurisdiction.

2. CONSENT

Calpurnia's consent to ICSID does not extend to a dispute between the SFCDC and a contracting state.

23. 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."

24. The Calpurnia-Gaul BIT exists between the Government of the Federated States of Gaul and the Government of the Republic of Calpurnia. While arbitral tribunals have emphasized the importance of states being able to bind themselves and make decisions, SFCDC is not an arm of the state as Claimant has alleged, and should not be subject to ICSID jurisdiction. The fact that the SFCDC is state-owned does not mean that it acts in the capacity of a Calpurnian constituent subdivision or agency. As a result, the record offers insufficient evidence for Claimant to justifiably allege that Calpurnia "irrevocably consented" to ICSID jurisdiction.

3. SCOPE

Vanguard's investment in VanCal does not fall within the definition set forth in the ICSID Convention.

25. 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."[8]

26. The present dispute does not fall within the scope of the ICSID Convention since there is no legal dispute between Calpurnia and the Claimant. Moreover, even if the tribunal finds there is a legal dispute between the parties, the dispute does not arise directly out of the investment, and therefore, the jurisdictional requirements of ICSID are not met.

i. The Claimant has an investment in Calpurnia.

27. 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."[9]

The Calpurnian government agrees that the Claimant has an investment in Calpurnia, as the Claimant made a substantial commitment in setting up a joint-venture in Calpurnia, which was significant in developing the host state's telecommunications industry. Also, the Claimant made a long-term investment in order to generate profit and return, and by investing, the Claimant naturally assumed risks associated with foreign direct investment. Therefore, the joint-venture, VanCal, meets definition of an investment has been met.

ii. There is no legal dispute between the Government of Calpurnia and the Claimant.

28. Although the Claimant has an investment in Calpurnia, there is no legal dispute between the government and the Claimant. A legal dispute must be more than a "mere conflict of interest".[10] Under one view, there is a conflict of interest between these parties. While the government of Calpurnia wanted to secure the nation from infiltration by foreign spies by investigating Ms. Pescara and Mr. Kolowenko further, the two representatives wanted to resist the investigation by the police.

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[8] ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (*hereinafter*, "ICSID Convention"), Article 25(1).
[9] *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction of July 11, 1997, ¶ 43.
[10] 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, ¶ 26.

However, in the event the tribunal finds that the government is represented in the actions of the SFCDC, then there is arguably a conflict of interest between SFCDC and the Claimant. While the SFCDC wants to act in the best interest of VanCal and its management, the Claimant seems to be largely concerned over the size of its stock. Overall, however, any differences between these two parties constitute a mere conflict of interest and nothing more.

iii. The dispute does not arise out of the investment.

29. Even if the tribunal finds that there is a dispute between the parties, and that it is of a legal nature, the jurisdictional requirements are still lacking, as the dispute does not arise directly out of the investment. Contrary to the situation in *Ceskoslovenska Obchodni Banka, AS v. the Slovak Republic*, the legal dispute does not arise out of an investment within the meaning of the Convention and, as will be discussed in the next section, it does not relate to an investment as defined in the Calpurnia-Gaul BIT.[11]

30. Under the ICSID Convention, the "legal dispute [must arise] directly out of an investment."[12] The statutory construction makes it clear that directly modifies investment. Calpurnia's investigations of the Claimant's representatives are in no way related to the representatives' roles in VanCal or their ownership of stock. Also, the conflict of interests between the SFCDC and the Claimant arise over the desire for greater control in managing the company. The dispute did not directly stem from the investment itself; rather, it stemmed from differences in management style and divergent goals.

B. JURISDICTION UNDER THE CALPURNIA-GAUL BIT

31. In addition to not meeting the requirements for jurisdiction under the ICSID Convention, the Claimant does not meet the jurisdictional requirements under the Calpurnia-Gaul BIT. The dispute does not relate to an investment as defined under the BIT. Even if it did, the fork-in-the-road provision and eighteen-month waiting period bar an arbitration claim.

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[11] *Ceskoslovenska Obchodni Banka, AS v. the Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction of May 24, 1999, ¶ 68.
[12] ICSID Convention, Article 25(1).

1. DEFINITION OF INVESTMENT

While there may be an investment, its existence is minimal since the dispute revolves around returns.

32. Calpurnia acknowledges that the stock the Claimant acquired in VanCal qualifies as an investment under Article 1(1) of the BIT since it is a

> " . . . kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party …"[13]

and because this definition includes "shares, stocks, debentures or [another] form of participation in a company."[14] However, contrary to the Claimant's contention, the dispute does not arise out of the investment under the Calpurnia-Gaul BIT, as it does not relate to the market share or stocks. Instead, the current dispute centers on returns, which are a separately defined item in the BIT. Article 1(2) distinguishes returns from investments, defining returns as "amounts yielded by investments," including dividends. Thus, similar to the analysis for ICSID Convention jurisdiction, the pertinent threshold question should be whether the Claimant was entitled to returns, rather than whether it had an investment.

2. THE FORK-IN-THE-ROAD PROVISION

Vanguard violated the fork-in-the-road provision of Article 11 when it filed for ICSID arbitration after pursuing remedies in the Calpurnian courts, and should be barred from arbitration.

33. 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.[15] However, a fork-in-the-road provision 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.[16] Vanguard precluded from pursuing ICSID arbitration since the above three elements are the same in the suit filed by Ms. Pescara in Calpurnian courts and the present request for arbitration.

[13] Calpurnia-Gaul BIT, Article 1.
[14] Calpurnia-Gaul BIT, Article 1(b).

34. First, the parties seeking relief in both cases are the same. While the suit was brought under Ms. Pescara's name in the previous case, it effectively represented the action of Gaul that is the claimant in the present case. Though Ms. Pescara was voted off the VanCal board of directors on November 16, 2005, it is not dispositive that she was no longer affiliated with Vanguard. In fact, the lawsuit seeking to order VanCal to transfer to her account in Gaul dividends on the one percent shareholding held in trust for Gaul is evidence of her continued involvement and representation of Vanguard.

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

> "the competent courts of the Contracting Party in whose territory the investment is made"

Ms. Pescara's suit seeking the dividends on behalf of Gaul effectively constitutes a fiduciary of Gaul bringing suit to recover the dividends that she holds in trust on behalf of a contracting party. Therefore, Vanguard should be precluded form electing an arbitral remedy through ICSID as the parties are the same and a competent Calpurnian court has adjudicated the existing claims.

36. Second, the subject matter in both cases is the same. Ms. Pescara sought a Calpurnian court order forcing VanCal to transfer dividends on the one percent equity interest held in trust for Gaul. The lawsuit filed by Ms. Pescara as a fiduciary of Gaul and the arbitral remedy presently sought by Gaul are both seeking to transfer the returns of their Gaul's investment in VanCal. As such, the claims pursued by Ms. Pescara and Vanguard are clearly identical. As evidenced by the BIT, Gaul was aware of the choice of remedies available for dispute resolution at the time the lawsuit was brought in Calpurnian court. Gaul had selected the Commercial Court of San Inocente de Irkoutsk in Calpurnia as the venue of dispute resolution as provided in Article 11(a) of the Calpurnia-Gaul BIT. ICSID arbitral remedy should be precluded as a remedy to Gaul as it has elected Calpurnia courts as its preferred choice of forum of dispute resolution provided by the BIT. If Gaul is unsatisfied with the adjudication of the Calpurnian court, it should follow the appropriate channels to appeal the court's decision. Allowing Gaul to pursue another form of

dispute resolution because their first selection failed to rule in their favor is unequivocally unfair and inequitable to Calpurnia.

37. Third, the causes of action are identical as well. The first lawsuit by Ms. Pescara on behalf of Gaul is similar to a breach of contract where she sought to recover the dividends on the one percent shareholding she held in trust for Gaul. The present claim is also seeking to transfer the returns of Gaul's investment in VanCal under the Calpurnia-Gaul BIT, which serves as a contract between the two contracting parties. Though the percent of equity interest differs in the previous case from the present claim, the nature of both causes of actions in the form of contract claims are identical.

38. An aggrieved party may be allowed to seek remedy through the arbitral tribunal if it was deprived of any real choice as to which legal recourse to pursue. According to *Occidental Exploration & Production Co. (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.[17] The present case may be distinguished from *OEPC* as the claimant knew of and had a real choice as to which of the four remedies under Article 11 of the BIT to pursue. Calpurnia may assert that it was impractical to invoke the ICSID arbitral remedy due to the eighteen-month waiting period. Calpurnia was clearly aware of the eighteen-month waiting period provision, which is meant to encourage nation-states to resolve disputes on their own if possible, instead of bringing it to a tribunal for adjudication. Calpurnia is a contracting party to the BIT that lays out the four legal courses of remedy as well as the provision discussed above. Based on equitable principles, the tribunal should not find jurisdiction in the present case, as doing so would undermine the fork-in-the-road clause and frustrate the purpose of the eighteen-month waiting period provision.

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

3. WAITING PERIOD

Vanguard violated the eighteen-month waiting period and the violation should not be excused on policy grounds.

39. 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. 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."[18]

Vanguard violated this waiting period. Further, Vanguard's violation should not be excused on policy grounds.

40. Vanguard violated the eighteen-month waiting period when it filed for ICSID arbitration on January 31, 2007 since the dispute crystallized well within the waiting period. Tensions intensified but a dispute did not crystallize until Ms. Pescara filed suit in Calpurnian court in June 2006. The next major action in the dispute was on October 23, 2006, when Vanguard withdrew from participation on VanCal's board. Prior to these events, Vanguard had expressed dissatisfaction with the actions of VanCal's board, but continued its involvement. The dispute cannot be deemed to have commenced until Vanguard took decisive action. Both the lawsuit and withdrawal from participation mark the actualization of the dispute, and both fall well within the eighteen month waiting period. As a result, Vanguard committed a procedural violation.

41. Vanguard's violation of the eighteen-month waiting period should not be excused on policy grounds since states must honor their commitments. The theme of commitment runs throughout the ICSID Convention. For example, Article 72 embodies this theme by stating that denunciation does not impact prior commitments.[19] Additionally, Article 52(1) conditions annulment proceedings on procedural violations by a tribunal.[20] If a tribunal should be held liable for its

[18] Calpurnia-Gaul BIT, Article 11(2).
[19] ICSID Convention, Article 72.
[20] ICSID Convention, Article 52(1).

procedural violations, then parties should also face a form of accountability for their procedural violations. To allow Vanguard's violation would be to undermine the ICSID Convention, and thereby undermine a key pillar of the international investment law framework.

42. Also, the conditions present in disputes where tribunals have excused procedural violations are not present here. In *Ethyl Corporation v. Government of Canada*, the tribunal excused the procedural violation only because the passage of the bill was inevitable.[21] By contrast, in the present fact pattern, there was no inevitability to any of the actions taken by VanCal's board. Major actions were subject to open debate and a vote by the board. In fact, the decision to temporarily suspend dividends to foreign investors occurred over a period of three months. The debate over treatment of dividends emerged in February 17, 2005 and actions related thereto continued through May 27, 2005, when Mr. Korchnoi reiterated that VanCal could not act on Vanguard's request for dividend payments.

43. Further, the decision by the *Ethyl* tribunal to excuse a procedural violation when the waiting period had already passed by the time the parties reached arbitration once again undermines the theme of commitment. This aspect of the *Ethyl* holding should not be perpetuated, since it enables a party to gamble by ignoring procedural rules and hoping that delays in the arbitral process will excuse the violation. Such action directly undermines commitment to international obligations and creates legal uncertainty in an already uncertain domain.

44. Vanguard violated the eighteen month waiting period of Article 11(2) when it filed for arbitration prematurely. Excusing this violation will undermine a key principle of the ICSID Convention and create uncertainty in international investment law. For these reasons, Vanguard's violation should not be excused.

III. CLAIMS UNDER THE CALPURNIA-GAUL BIT

45. Calpurnia will establish myriad of ways in which the SFCDC complied with the Calpurnia-Gaul BIT in its efforts to accommodate the Claimant. Specifically, Calpurnia will assert the following responses to the Claimant's claims:

[21] *Ethyl Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, June 24, 1998, 38 ILM 708 (1999).

i. Inability to attribute SFCDC actions to Calpurnia
ii. Compliance with fair and equitable treatment provision
iii. Compliance with the full protection and security provision
iv. Enactment and upholding of reasonable, unarbitrary and non-discriminatory measures
v. Compliance with the sympathetic consideration provision
vi. Lack of discrimination
vii. Lack of expropriation

Through these responses, Calpurnia will demonstrate that it met, and possibly exceeded, its obligations towards the Claimant.

A. ATTRIBUTION OF ACTIONS TO THE STATE

The actions of the SFCDC are not attributable to Calpurnia.

46. Actions taken by a state cannot always be attributed to a state. The International Law Commission's *Articles on State Responsibility ("Articles")* provide the international law standard on when actions are attributable to a state. Under the *Articles*, actions are attributable to the state only if made by a state organ.[22] Since the SFCDC is not a state organ, its actions are not attributable to Calpurnia.

47. The *Articles* do not define the term "state organ." Instead, the commentary indicates that the term

> "covers all the individual or collective entities which make up the organization of the State and act on its behalf."[23]

This analysis should consist of a substance over form inquiry.[24] Thus, outward signs of state involvement, such as creation by the state, are not determinative of an entity's character as a state organ. The SFCDC is not part of the state infrastructure, nor does it act on the state's behalf. Rather, the SFCDC operates under its own direction in the private sector, on behalf of investors rather than the state as a whole. Thus, the SFCDC should not be considered a state organ for purposes of attribution.

48. A similar situation can be found in *Tradex Hellas S.A. v. Republic of Albania*, where villagers occupied a farm owned by a joint-venture in which the foreign investor

[22] International Law Commission, *Articles on State Responsibility*, Article 4(1) (2001).
[23] *Id.*, Article 4(1), Comment 1.
[24] INTERNATIONAL INVESTMENT LAW & ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES & CUSTOMARY INTERNATIONAL LAW 30 (Todd Weiler ed. 2005).

participated.[25] The tribunal found that the villagers' actions could not be attributed to the state since the villagers were not acting on the direction of the Albanian government.[26] The villagers merely acted in their own interest.[27] The tribunal further added that, even if the villagers had been encouraged by the government to occupy the farm, this would not suffice to demonstrate that the government ordered the occupation.[28] Similarly, the SFCDC's increased participation in the VanCal joint venture on behalf of its investors occurred as a result of decisions by the SFCDC, not the Calpurnian government. The SFCDC acted on its own initiative, as its own entity, to further its goal of protecting investors' investments. Under the *Tradex* analysis, the SFCDC's actions are not attributable to Calpurnia, even if the Calpurnian government offered encouragement, which it did not.

49. Further, the case of *AMCO Asia Corporation v. Republic of Indonesia* demonstrates much stronger set of facts for attribution than the present fact pattern, and yet the tribunal refused to attribute the acts to the state.[29] In *Amco Asia*, the tribunal held that seizure of a hotel by the state army and police could not be attributable to the Indonesian government.[30] In contrast with the strong link between Indonesia and its army and police in *Amco Asia*, the link between the SFCDC and Calpurnia is virtually nonexistent. Military and police take their orders from the state, and yet the SFCDC does not. The present fact pattern falls far below the threshold established by the *Amco Asia* tribunal. Thus, under the *Amco Asia* standard, the SFCDC's actions are not attributable to Calpurnia due to the lack of link between the state and the entity.

50. Both the *Articles* and past tribunal decisions demonstrate that the SFCDC's actions fall outside the scope of a state organ. As a result, the SFCDC's actions should not be attributed to Calpurnia.

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[25] *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award of April 29, 1999.
[26] *Id.* ¶¶ 158-170.
[27] *Id*.
[28] *Id.* ¶¶ 165, 169-170.
[29] *AMCO Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983.
[30] *Id.*

B. FAIR & EQUITABLE TREATMENT

Calpurnia treated Vanguard's investment fairly and equitably, and therefore, did not violate Article 2(2) of the Calpurnia-Gaul BIT.

51. The fair and equitable treatment clause, located in Article 2(2) of the Calpurnia-Gaul BIT, guarantees "fair and equitable treatment" of investors' investments "at all times."[31] The Claimant has the burden of proof to show that Calpurnia violated Article 2(2).

52. The burden falls on the Claimant to prove that the host state's acts or omissions "had a direct negative impact" on its investments, as well as establishing a clear link of causation between the two.[32] In addition, the Claimant must establish that the host state's actions were

> "willfully wrong, actually malicious, or so far beyond the pale that [the State] cannot be defended among reasonable members of the international community."[33]

Finally, as the host state stated in *Ronald S. Lauder v. Czech Republic*, there is no exact definition of the fair and equitable treatment obligation.[34] Because the obligation is concerned with the state's conduct rather than the result of the investment, the fact that the investor loses money does not indicate a breach of obligation.[35]

53. Applying this framework to the facts of the case, it becomes clear that the Claimant has failed to carry its burden of proof of showing causality between the state's action or omission and the harm to its investment, as well as showing that the state's actions were unreasonable. Therefore, the tribunal should dismiss its claims under Article 2(2) of the Calpurnia-Gaul BIT against Calpurnia.

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[31] Calpurnia-Gaul BIT, Article 2(2).
[32] IOANA TUDOR, THE FAIR & EQUITABLE TREATMENT STANDARD IN INTERNATIONAL LAW OF FOREIGN INVESTMENT 138 (2008).
[33] *Saluka Investments BV (The Netherlands) v. Czech Republic* UNCITRAL, Partial Award of March 17, 2006, ¶ 290.
[34] *Ronald S. Lauder v. Czech Republic* UNCITRAL, Award of September 3, 2001, ¶ 291.
[35] *Id.*

2. The Claimant's Contractual Claims are Inappropriate under the Calpurnia-Gaul BIT.

54. The Claimant inappropriately manipulates the fair and equitable clause of Article 2(2) to bring its contract claims under the treaty. The fair and equitable treatment obligation may not be interpreted as

> "imposing on the State the observance, on the basis of the treaty, of all the contractual obligations, when the investment has a contractual nature."[36]

Contractual claims are distinct from treaty claims, and Article 2(2) of the BIT should not be manipulated as an umbrella clause to advance non-treaty claims.

55. While some tribunals have deviated from the custom by allowing use of the fair and equitable treatment standard to bring contractual claims under the treaty,[37] the Claimant should be precluded from doing so here. A contract between the investor and host state must exist in order to allow a claim for violation of contractual rights.[38] Calpurnia did not enter into a contract with the Claimant. Therefore, the tribunal should dismiss the Claimant's contractual claims against Calpurnia.

3. Government officials treated the Claimant's investment fairly and equitably and did not act contrary to the Claimant's legitimate expectations.

56. Contrary to the Claimant's assertions, Calpurnia did not act arbitrarily, grossly unfairly, unjustly, in a discriminatory manner, expose the Claimant "to sectional or racial prejudice, or deny the Claimant due process."[39] Any actions involving the Claimant's personnel were taken in the interest of the state's security.

The equitable treatment clause in the BIT provides

> "a means by which an appropriate balance [to] be stuck between the protection of the investor and the public

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[36] In the original: "comme imposant à l'Etat le respect, au titre du Traité, de l'ensemble des obligations qui pèsent sue le cocontractant, lorsque l'investissement est de nature contractuelle. (Translation supplied by IOANA TUDOR, THE FAIR & EQUITABLE TREATMENT STANDARD IN INTERNATIONAL LAW OF FOREIGN INVESTMENT). *Consortium RFCC v. Kingdom of Morocco*, ICSID, ARB/00/6, Award of December 22, 2003, ¶ 51.

[37] TUDOR, *supra* note 31, at 196.

[38] TUDOR, *supra* note 31, at 197.

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

> interest which the host state may properly seek to protect in the light of the particular circumstances then prevailing."[40]

57. As observed in the award in *Saluka*, this process involves balancing the investors "legitimate and reasonable expectations" with the host state's "legitimate regulatory interests."[41] As for what constitutes a reasonable expectation, the *Saluka* tribunal indicated that it is not reasonable to expect circumstances "prevailing at the time the investment is made remain totally unchanged" and to not take into account the host states' legitimate right to regulate domestic matters.[42] In addition, it is not reasonable to ignore parameters such as risks of business or industry patterns.[43]

58. Applying this standard, the Calpurnian Security Forces had a legitimate regulatory interest in searching the homes of Ms. Pescara and Mr. Kolowenko. The Calpurnian police received reliable, anonymous tips that they were engaging in unlawful data collection and espionage for Gaulois Security Services. Clearly, such a tip would require a sincere effort by the government to protect the country, especially in a time, as the Claimant frames it, of "mutual . . . allegations of political and industrial espionage."

59. Furthermore, the investor expects the host state to act consistently.[44] Contrary to the Claimant's assertions, the Calpurnian government has not acted inconsistently over the term of the investment. There had been no change in Calpurnia's economic policy or laws that affected the investment environment or the Claimant's investment. People's attitudes toward the Claimants may have changed, but this is unrelated to Calpurnia's economic policy and laws. The Claimant assumed the risk that the business environment might change when it created the joint venture in Calpurnia. The Claimant's expectations fall into the narrow exception to fair and

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[40] CAMPBELL MCLACHLAN QC, LAURENCE SHORE &MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION 206 (2007).
[41] *Saluka Investments BV (The Netherlands) v. Czech Republic* UNCITRAL, Partial Award of March 17, 2006, ¶ 306.
[42] *Id.*
[43] *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of October 3, 2006, ¶ 130.
[44] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States ("Tecmed")*, ICSID Case No. ARB(AF)/00/2,
Award of May 29, 2003, ¶ 154.

equitable treatment identified by the *LG&E* tribunal – failure to "consider parameters such as business risk or industry's regular patterns."[45]

60. Further, the Claimant argues that government officials harassed the Claimant's personnel. In *Eureko BV v. Republic of Poland*, the tribunal maintained that for the harassment of investors to be sufficient to render the host state liable, it had to be "repeated and sustained."[46] Applying the facts to this rule, it is apparent that even under a loose standard, if there was any harassment of the investors by the police, it was not repeated or sustained. The police only searched the homes of Ms. Pescara and Mr. Kolowenko when necessary for the investigation, and if the SFCDC is to be considered an organ of the state, even then, the Board Members did not harass the Claimant's representatives. The few differences they had with the Claimant's representatives can be attributed to different goals regarding the company. In fact, Ms. Pescara resigned from her role as Managing Director voluntarily, and was later voted off the Board of Directors in a democratic fashion. Mr. Kolowenko chose not to return to Calpurnia, and Ms. Pescara was granted a tourist visa instead of a business visa, as this was more appropriate given the decreased frequency of her visits to Calpurnia for business matters.

61. Also, the Calpurnian government was not responsible for any negative attention any members of the Claimant received as a result of the police's investigations. The searches were conducted routinely and lawfully. Also, the press releases issued by the Calpurnian Security Directorate about the searches were factually accurate. The government cannot be held liable for the public's reaction to the press releases or other media coverage.

62. Furthermore, the Claimant wrongly alleges that VanCal intentionally did not pay dividends to Gaulois shareholders. VanCal declared stock dividends in 2004, 2005, 2006, and 2007, which were distributed to all shareholders, including the Claimant. Incidentally, there was no requirement to convert the dividend payments into Gaul Dollars. The email Mr. Korchnoi sent on May 27, 2005, which stated no further payments could be made to foreign shareholders, was unauthorized and had been

[45] *LG&E*, ICSID Case No. ARB/02/1, ¶ 130.
[46] *Eureko BV v. Republic of Poland*, Ad-hoc Tribunal, Partial Award of August 19, 2005, ¶ 237.

superseded by statements by VanCal of its willingness to make any license fee and dividend payments owed.

63. Also, the Claimant is mistaken regarding Dr. Swift's supposed instruction on December 1, 2005, to cease sending accounts, financial statements or other information to Gaulois citizens or translating materials into Gaulois. Only a month before this supposed instruction, in November, 2005, Dr. Swift had stated that the main objective of the company was to protect the interests of the company and also "preserve the industry and the interests of all shareholders including the minor ones." In fact, shareholders were treated alike in the dissemination of corporate reports and notices, and the Claimant was not entitled to any special privileges in this regard. Information was being made available to Claimant as late as September, 2006.

64. Although there may have been some changes in the policy of SFCDC in running VanCal, these changes coupled with the investigation of the Claimant's personnel did not "completely [dismantle] the very legal framework constructed to attract investors."[47] Therefore, the tribunal should find that the Claimant has not met its burden of proof for its claim that Calpurnia's administrative decisions have breached the fair and equitable treatment standard.

65. Finally, Calpurnia's actions were consistent with Article 2(1) of the BIT rather than contrary to it. Calpurnia continues to "encourage and create favourable conditions" for investments within its territory.[48] Arguably, the searches of the homes of Ms. Pescara and Mr. Kolowenko were done for national security reasons, thereby, in an attempt to make the country safer for others, including foreign investors. Therefore, for all of the reasons above, the tribunal should dismiss the Claimant's claims relating to the breach of the fair and equitable treatment standard based on the government's administrative and regulatory decisions.

[47] *LG&E*, ICSID Case No. ARB/02/1, ¶ 139.
[48] Calpurnia-Gaul BIT, Article 2(1).

4. The Calpurnian Court did not deny justice to the Claimant's representative.

66. The Claimant states that a court's refusal to entertain a suit may constitute a denial of justice, and therefore, a violation of the fair and equitable treatment standard.[49] The Claimant puts forth the test outlined in *Mondev International Ltd. v. United States of America*:

> ". . . the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, 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."[50]

67. An examination of all the available facts quickly shows that the Court's decision was proper and creditable. A representative of the Claimant, Ms. Pescara, held one percent of VanCal's shares in trust for Vanguard. The representative brought suit in the Commercial Court of San Inocente de Irkoutsk to demand that VanCal transfer Gaul dividends to her account on her one per cent shareholding. Rightly so, the court dismissed her suit because she lacked standing as a mere nominee, and thus, had no beneficial interest in the suit.

68. Therefore, at an international level, it is a "generally accepted standard[ ] of the administration of justice" that a case will be dismissed if the threshold jurisdictional requirements are not met. Therefore, the Court properly dismissed the suit. The one per cent stock was not subjected to unfair and inequitable treatment; rather, the investment was subjected to standard laws. Moreover,

> "a governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level."[51]

Therefore, Calpurnia did not breach Article 2(2).

69. Furthermore, the Calpurnian Constitutional Court properly dismissed the Claimant's application to declare the December 2003, April 2004, and July 2004 searches unlawful and to seek compensation. The Claimant lacked standing to bring the suit.

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[49] *Mondev International Ltd. v. United States of America*, NAFTA, Award of October 11, 2002, ¶ 127.
[50] *Id.*
[51] *Azinian, Davitian & Baca v. United States of Mexican States*, 5 ICSID Rep 269, Award of November 1, 1999, ¶ 97.

Since the police searched the private residences of Ms. Pescara and Mr. Kolowenko, only these individuals had standing to bring the lawsuit. The Claimant's assertion that Calpurnia breached its obligation under Article 2(2) also falls flat because the searches were unrelated to the investments of Ms. Pescara and Mr. Kolowenko or their roles as investors.

70. Again, the Claimant has failed to satisfy its burden of proof regarding its claim of a supposed denial of justice. Therefore, the tribunal should find that Calpurnia did not breach the fair and equitable treatment standard, as

> "it is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints . . . [A Treaty is] not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides."[52]

C. FULL PROTECTION & SECURITY

Calpurnia did not violate Article 2(2) of the Calpurnia-Gaul BIT as it acted reasonably under the circumstances.

71. The full protection and security clause, found in Article 2(2) of the Calpurnia-Gaul BIT expects the Calpurnian government to provide "full and constant protection and security" for investors' investments. The Claimant claims that

> "the state must provide the degree of protection and security that should be legitimately expected by the investor from a host state."[53]

The Claimant also asserts 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."[54]

72. Essentially, the Claimant argues that the standard for measuring whether the government satisfied its obligation under Article 2(2) of the Calpurnia-Gaul BIT is a

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[52] *Id.* ¶ 83.
[53] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award of February 21, 1997, 30.
[54] *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.

reasonable care standard and the crux of the analysis lies within the investors' legitimate expectations. Applying this test to the facts of the case, it is clear that the Calpurnian government has met this standard of care.

73. For one, the harm to the foreign investment is limited to the physical destruction of property. According to *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, the government must take measures to prevent property destruction and can be liable for any such destruction the government caused to the investment.[55] The Claimant attempts to argue that the tribunal should extend the full protection and security doctrine to intangible losses. However, this argument is contrary to public policy in addition to the persuasive authority of previous arbitral awards.

74. It would be unsound to compensate the Claimant for any losses they *may* have incurred as a result of circumstances out of the government's control. First of all, it is impossible to determine the amount of loss, if any, that is attributable to the lawful searches of Ms. Pescara and Mr. Kolowenko's home. Determining such an amount would warrant a great deal of speculation, and result in an inefficient use of the tribunal's time. Also, it would violate due process to hold the government accountable for loss in investment value when it had no notice that the Claimant's investment was being affected.

75. Furthermore, allowing such a claim for subjective losses in investment value would create a strict liability standard for governments. The tribunal in *AAPL v. Sri Lanka* declined to extend the full protection and security clause beyond the physical destruction of property because it did not want to create a strict liability standard. Such a standard would make the government liable for any harm to the investment even if it occurred under circumstances beyond the state's control.[56]

76. In addition, allowing the implementation of a strict liability standard would open the flood gates to arbitration, and investors worldwide may try to impugn governments for losses in investment value. It is a well-known principle that there are inherent risks that the investor takes in the arena of foreign direct investment. If investors are not pleased with the results of their risks, they may try to hold governments

[55] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of June 27, 1990, ¶¶ 67-69.
[56] *Id.* ¶ 45.

accountable for changes in the investment environment. If governments were held liable for losses in investment value, they would likely change their policies to deter foreign direct investment. This could have a disastrous effect on the economies of the host state and investors' states. This would run counter to the goals of achieving cooperation and peace between countries.

77. Calpurnian government exercised reasonable care in carrying out its "obligation of vigilance."[57] When tips were received regarding espionage and unlawful data collection, the police stepped in to investigate further. Further, the government continued its obligation of vigilance by advancing the investigation against the individuals until suspicions were cleared.

78. Once again, the tribunal should examine the investors' legitimate expectations. Given customary standards in international law, the Claimant cannot viably argue it expected the government to step in because of decisions the joint venture's Board of Directors was making. That would amount to government intervention or interference in private business affairs.

79. Also, the Claimant's argument that the government deliberately harmed Vanguard's investment without any compelling causes is flawed. Given the facts, it appears that the Claimant's market share declined because the Claimant's joint venture decided to sell more shares to the public, not because of the government's interaction with the Claimant. Also, the government cannot be held accountable if the market price declined as a result of negative media attention the company received.

80. Although SFCDC is owned by the state, it is not the government's voice. It acts independently as an investor and management, thereby, furthering commerce and development in Calpurnia as a result. Hurting a significant shareholder such as the Claimant would clearly run counter to this objective. Essentially, VanCal needs the Claimant to be a part of the venture to ensure the joint venture's success.

81. Finally, the Claimant contends that the government failed to protect its personnel. The reasonable standard test provided above creates an obligation for the

[57] *American Manufacturing & Trading, Inc.*, ICSID Case No. ARB/93/1, 30.

government to protect the investment from injury by private citizens also.[58] However, as stated above, persuasive authority deems that the obligation is limited to the physical destruction of property. Therefore, when the Women's League picketed Ms. Pescara's home, the police had no reason to intervene, as it was a peaceful protest, and the picketers were exercising their freedom of speech that Calpurnia guarantees to its citizens.

82. Thus, for all the reasons stated, the tribunal should dismiss the Claimant's claims alleging that Calpurnia denied it justice in court. In every aspect, the Claimant has not met its burden of proving that Calpurnia did not provide the Claimant or its representatives with fair and equitable treatment and full protection and security.

D. UNREASONABLE, ARBITRARY & DISCRIMINATORY MEASURES

Calpurnia did not subject Vanguard to unreasonable, arbitrary, or discriminatory treatment.

83. 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."[59]

Calpurnia adhered to and met its obligations under Article 2(3) by providing reasonable, egalitarian and non-arbitrary treatment to Gaulois investors.

84. First, the measures enacted by the SFCDC were reasonable. 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.[60] Under a plain meaning interpretation, the word "unreasonable" implies that a measure was taken without sound reason or justification. By contrast, the SFCDC can demonstrate sound policy justifications for suspending and ultimately crediting dividend payments to foreign investors. Between the political and social climate in Calpurnia, and the growing tensions between Calpurnia and Gaul, the Calpurnian government

[58] *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.
[59] Calpurnia-Gaul BIT, Article 2(3).
[60] *See LG&E*, ICSID Case No. ARB/02/1, ¶ 156.

was on the verge of a state of emergency. Tribunals have recognized the necessity of action in times of emergency and provide the state latitude in its actions. The latitude that has been allowed to states in cases such as *LG&E v. Argentine Republic*, where Argentina was not held liable for measures taken during an economic crisis, [61] should extend to private entities whose actions are inextricably linked to the success of the economy. The SFCDC acted to protect its investors and continue activity vital to the Calpurnian economy in a time of crisis. As a result, the SFCDC's decision to suspend and credit Gaulois dividends is reasonable.

85. Second, the measures passed by were not 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."[62]

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."[63]

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.[64]

86. The SFCDC did not enact arbitrary measures, nor did it force Vanguard to change its method of participation. First, the SFCDC's actions were reasonable for the reasons discussed above. At the brink of a national emergency, the SFCDC acted to protect investors and sustain the Calpurnian economy by altering its dividend policy. Second, the SFCDC did not force Vanguard to change its means of participation in VanCal. Vanguard alone chose to decrease its participation on the VanCal board and ultimately withdraw from participation altogether. These actions were entirely voluntary, and Vanguard's personnel were not expelled or forced out in any manner.

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[61] *See id.*
[62] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of July 20, 1989, 28 ILM 1109 (1989), ¶ 128.
[63] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of September 3, 2001, ¶ 221.
[64] *Id*.

By extension, since Vanguard's change in participation was voluntary, no fear of Gaulois influence in politics played any role. The SFCDC falls well below the standard established by the *Lauder* tribunal and therefore did not enact arbitrary measures.

87. Third, the measures enacted by the SFCDC are egalitarian and supported by sound policy justifications. Like the other key terms in Article 2(3), the term "discriminatory" is undefined in the BIT. However, decisions of past tribunals provide 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.[65] The tribunal in *LG&E v. Argentine Republic* summarized and applied the *ELSI* rule as requiring:

> "(i) 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."[66]

88. Applying the *ELSI* standard to the present facts, it is clear that the SFCDC did not enact discriminatory measures against Gaulois investors. First, the decision to deny dividends to foreign investors was not an intentional action. Instead, this action was the result of back and forth discussions and negotiations by the VanCal board over a period of two months. The prolonged period of deliberation demonstrates that this decision was not taken lightly. Second, the decision did not favor Calpurnian nationals over Gaulois investors. Each received their dividends. Gaulois investors received their most recent dividend payment in the form of a credit. Third, the decision did not harm Gaulois investors. Although they received their payment in an alternative form, Gaulois investors still received a benefit. Finally, this decision did not create disparate treatment of the two groups. Each group received a benefit, although the form of that benefit differed in the most recent dividend payout. These facts demonstrate that the Calpurnia did not take discriminatory measures against Vanguard.

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[65] *Elettronica Sicula S.p.A. (ELSI)*, 28 ILM 1109.
[66] *LG&E*, ICSID Case No. ARB/02/1, ¶ 146.

89. Finally, dividend payments are not covered by Article 2(3). The language of the provision does not explicitly mention returns on investments. The scope of Article 2(3) is limited to "investments."[67] Article 1 of the BIT defines investment as

> "every kind of asset established or acquired by an investor"

and does not cover dividends.[68] Instead, dividends are separately defined under the term "returns."[69] Given the separate definitions in Article 1, it follows that if the parties had wanted Article 2(3) to extend to returns, they would have explicitly stated this.

90. Even if dividends qualified as investments under Article 2(3), Calpurnia did not impair Gaulois investors of the use, enjoyment or disposal of their investments. Gaulois investors received dividend payments up until the most recent dividend payment, which they received as a credit. Gaulois investors still received the same amount of their dividend, but in an alternative form. Similar to money, a credit is an element which can be exchanged, traded, or used in a variety of manners. Thus, Gaulois investors were free to use, enjoy or dispose of their dividends as they desired. Therefore, the change in method of dividend payment did not violate Article 2(3).

E. SYMPATHETIC CONSIDERATION

Calpurnia did not violate Article 2(5) of the Calpurnia-Gaul BIT when it declined visa renewals to Gaulois citizens.

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

> "give a sympathetic consideration to applications for necessary permits in connections with the investments in its territory, including authorizations for engaging executives, managers, specialists and technical personnel of the investor's choice."[70]

Calpurnia exercised its ability to make decisions as a sovereign entity, all while meeting and possibly exceeding its obligation of sympathetic consideration under Article 2(5).

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[67] Calpurnia-Gaul BIT, Article 2(3).
[68] Calpurnia-Gaul BIT, Article 1(1).
[69] Calpurnia-Gaul BIT, Article 1(2).
[70] Calpurnia-Gaul BIT, Article 2(5).

92. A state must be able to maintain its right to sovereignty, especially with respect to control of its borders. The ICSID Convention upholds the concept of state sovereignty in an international regime. The basic unit of ICSID is the state, and the ICSID Convention protects the rights of states to make decisions. Under Article 25(3), states must approve arbitration requests by state entities.[71] Under Article 25(4), states can control what types of disputes it will submit to ICSID arbitration.[72] Under Article 26, states can create conditions to arbitration, such as the exhaustion of local remedies.[73] Each of these provisions underlines the importance of state sovereignty. By extension, Calpurnia should be allowed to control who enters and exits its borders.

93. Article 2(5) does not create a blanket admission of all Gaulois nationals. Instead, it only requires "sympathetic consideration," a term which is not defined in the Calpurnia-Gaul BIT. Calpurnia met, and possibly exceeded, the standard of sympathetic consideration by identifying a type of visa which better suited Ms. Pescara's needs. Ms. Pescara was not denied the ability to enter and exit Calpurnia; rather, she was provided with an alternative means of doing so. Since Ms. Pescara's time spent in Calpurnia would likely diminish due to the fact she stepped down as managing director of VanCal, Calpurnian immigration officials determined that the tourist visa waiver program would better suit her needs. Thus, Calpurnia met its obligation of "sympathetic consideration" towards Ms. Pescara. To require anything further would trample Calpurnia's right to sovereignty, restricting the state's discretion to determine who enters and exits its borders.

F. DISCRIMINATION

Calpurnia did not violate Article 4 of the Calpurnia-Gaul BIT when the SFCDC altered the procedure for dividend payments.

94. 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 third state, "whichever is the most favourable to the investor."[74] In the

[71] ICSID Convention, Article 25(3).
[72] ICSID Convention, Article 25(4).
[73] ICSID Convention, Article 26.
[74] Calpurnia-Gaul BIT, Article 4(1)-(2).

present situation, since both Calpurnian and Gaulois investors received their dividend payments, Calpurnia did not violate Article 4.

95. 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.[75] First, the tribunal identified a group of others in similar circumstances.[76] Second, the tribunal considered whether the identified group of comparators received like treatment.[77] Third, the tribunal considered the existence of any factors which might justify differences in standards of treatment between the two groups.[78] The *Pope & Talbot* established a standard which has been mirrored by other tribunals.[79] An application of this standard demonstrates that Calpurnia did not discriminate against Gaulois investors.

96. Calpurnia fails to meet the level of discrimination required under the *Pope & Talbot* test and therefore did not discriminate against Gaulois investments in violation of Article 4(1). First, Calpurnian and Gaulois investments do not constitute adequate groups for comparison since each group received dividends in some form. Second, Gaulois investments were not subject to a different standard of treatment. Each group of investments experienced returns, demonstrating that no discrimination was involved. Finally, even if there was disparate treatment, there are policy factors which justify a difference in treatment. As discussed earlier, the SFCDC acted to benefit the Calpurnian economy in a time of uncertainty and risk of national emergency. By crediting Gaulois dividends, the SFCDC kept Calpurnian libras in circulation within Calpurnia and minimized the risk that the currency would be converted and put to use outside the country. Such outflow of currency would harm the economy, a risk that the SFCDC could not take given the uncertain climate at the time. For these reasons, Calpurnia did not violate Article 4(1).

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[75] *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Interim Award on Merits – Phase Two, April 10, 2001, ¶¶ 78-104.
[76] *Id.* ¶ 78.
[77] *Id.* ¶¶ 83-104.
[78] *Id.*
[79] *See S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on Damages, October 21, 2002, ¶ 251; *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, February 6, 2001, ¶ 247.

97. Calpurnia could not have violated Article 4(2) since this provision does not apply to returns. The language of Article 4(2) limits the scope of this provision to "investments."[80] Article 1 of the Calpurnia-BIT defines "investments" and "returns" as separate entities. Given the explicit reference to "returns" in Article 4(1), it follows that if the parties had wanted Article 4(2) to apply to returns, they would have stated so. The absence of the term "returns" in Article 4(2) renders it inapplicable to the current fact pattern.

98. Even if Article 4(2) applied to this particular situation, Calpurnia did not violate it since it did not discriminate against Gaulois investors. First, as in the above analysis, Calpurnian and Gaulois investors do not constitute adequate groups for comparison since each received dividends. Second, the effect of the measure did not result in a loss for Gaulois investors. The *Pope & Talbot* test requires a loss by the claimant. In the present fact pattern, Gaulois investors received a credit for their dividend payments, and were therefore just as well off as Calpurnian investors. This alternative payment method did not deprive Gaulois investors of their rights of "management, maintenance, use, enjoyment or disposal of their investments," Rather than a loss, Gaulois investors merely received their dividends in a different form than usual.

99. Recent decisions have demonstrated a trend by tribunals toward finding discriminatory behavior only when the claimant experienced a loss. In *S.D. Myers, Inc. v. Canada*, the claimant was denied access to the Canadian market for PCBs for fourteen months.[81] In *US-Trucking – In the Matter of Cross-Border Trucking Services*, Mexican trucking firms were prevented from applying for permits, thereby barring them from access to the United States markets.[82] In each of these cases, the measure resulted in loss since the firm or firms in question were unable to do business in particular markets.

100. By contrast, tribunals have rejected claims of discrimination when there is no loss. In *ADF Group Inc. v. United States of America,* the measure precluded the claimant

[80] Calpurnia-Gaul BIT, Article 4(2).
[81] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on Damages, October 21, 2002.
[82] *United States – In the Matter of Cross-Border Trucking Services*, NAFTA Panel Report (2001).

from participating in a discrete construction project.[83] The tribunal rejected the discrimination claim since there was no clear evidence of a loss.[84] ADF was barred from one project, not all projects, and therefore was not operating at a loss. Similarly, Gaulois investors were not denied their dividends, but were merely provided them in the alternative form of a credit. This credit is not a loss, and therefore Vanguard does not have a valid argument for discrimination.

101. Finally, the SFCDC's actions fall into the "like circumstances exception" of the *Pope & Talbot* test since they are backed by a justifiable policy. As discussed above, the SFCDC acted to protect the Calpurnian economy in a time of uncertainty and possible national emergency by preventing an outflow of Calpurnian libras.

102. Calpurnia did not discriminate against Gaulois investments or investors since it failed to meet the threshold inquiries of the *Pope & Talbot* test. As a result, Calpurnia did not violate Article 4(1) or 4(2).

G. THE MOST FAVORED NATION PROVISION

The most favored nation language of Article 4 does not extend to dispute resolution provisions, and even if they did, Flatland's denunciation of the ICSID Convention renders this point of comparison invalid.

1. The most favored national language of Article 4 contains no evidence that it was intended to extend to dispute resolution provisions.

103. Article 4 of the Calpurnia-Gaul BIT contains a narrow most favored nation language that does not extend to dispute resolution provisions. 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."[85]

The recent trend of tribunals towards narrow interpretation of most favored nation clauses, combined with policy reasons, advocate against the extension of this language to dispute resolution provisions.

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[83] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award of January 9, 2003.
[84] *Id.*
[85] Calpurnia-Gaul BIT, Article 4(2).

104. Recent tribunals have initiated a trend toward a narrow interpretation of most favored nation clauses. These cases demonstrate a move away from the broad reading found in cases such as *Maffezini.* In *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, the tribunal refused to extend the most favored nation clause to dispute resolution provisions for three distinct reasons.[86] First, the BIT did not expressly indicate that it should apply to dispute resolution.[87] Second, the clause was narrower than in *Maffezini* since it did not contain explicitly language such as "in all matters."[88] Third, there was no indication the parties intended the clause to extend to dispute resolution.[89] Finally, there was no evidence of any domestic provision which would allow extension.[90] In *Plama Consortium Limited v. Republic of Bulgaria*, the tribunal also refused to extend the most favored nation clause to dispute resolution provisions, stating that intent to incorporate a provision must be clearly expressed.[91] The *Plama* tribunal rejected the policy reason for extension in *Maffezini*, indicating that protection of the investor is an insufficient justification for rewriting a treaty.[92]

105. Both the *Salini* and *Plama* analyses, when applied to the present facts, demonstrate that the most favored nation provision of Article 4 should not be extended to dispute resolution provisions. Applying the *Salini* analysis, the BIT does not expressly indicate that it should apply to dispute resolution. In fact, Article 4 fails to even reference dispute resolution. Second, the clause is narrower than in *Maffezini* since it does not contain broad catchall phrases such as "in all matters." Third, there is no indication that the parties intended Article 4 to extend to dispute resolution since no legislative history was preserved. Finally, there is no evidence of any similar domestic provisions, in either Calpurnian or Gaulois law, which would allow the extension of Article 4 to dispute resolution provisions. Under the *Plama* analysis,

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[86] *Salini v. Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, November 29, 2004.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005.
[92] *Id.*

there is no clear expression of intent to incorporate dispute resolution provisions. Thus, both *Salini* and *Plama* reinforce a narrow interpretation of Article 4 and preclude its extension to dispute resolution provisions.

106. Policy reasons also advocate a narrow reading of Article 4. Expansive readings of most favored nation clauses erode legal certainty by allowing a tribunal to extend provisions to areas of the BIT that the parties may not have intended. This action substitutes the judgment of the tribunal for that of the parties and diminishes the power of the language of the BIT. In doing so, expansive readings of most favored nation clauses enhance uncertainty in international investment law. Given that the purpose of BITs is to add a degree of certainty to the investment framework, expansive readings should be rejected in favor of narrow interpretations. Article 4 should be read as restrictively as possible to uphold the parties' intentions and enhance certainty.

2. Even if Article 4 did extend to dispute resolution provisions, Flatland's denunciation of the ICSID Convention bars the usage of the Calpurnia-Flatland BIT provisions.

107. Flatland's denunciation of the ICSID Convention bars the extension of dispute resolution provisions in the Calpurnia-Flatland BIT to the Calpurnia-Gaul BIT. Flatland is no longer a contracting state to ICSID as of November 2, 2003. Therefore, any BIT provisions related to ICSID arbitration are void and cannot be extended to the present fact pattern.

108. ICSID consent provisions should not be considered consent given prior to denunciation under Article 72. Article 25(1) of the ICSID Convention requires consent of both parties to establish jurisdiction and, according to the ICSID Report, prohibits unilateral consent.[93] To interpret dispute resolution provisions as consent under Article 72 would create unilateral consent, allowing one state to force the hand of another state. In addition to violating Article 25(1), this would render the concept of denunciation useless. While prior commitments are important, they should not be read into provisions in such a way that violate existing ICSID provisions, nor should

[93] ICSID Convention, Article 25(1); Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 23.

they be allowed to override decisions made by a state with respect to its role in the international regime. For these reasons, Flatland's denunciation should bar the extension of dispute resolution provisions fond in the Calpurnia-Flatland BIT to Gaulois investors.

H. EXPROPRIATION

109. 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."[94]

Calpurnia has not violated Article 6 as the SFCDC is not an arm of the state and it has not directly or indirectly expropriated Vanguard's investment in VanCal.

110. 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."[95]

Even though the SFCDC is an entity owned by the Calpurnian government, it does not implicitly mean that it functions as a constituent subdivision or agency of Calpurnian government. VanCal was not government controlled and the SFCDC did not exercise its rights as a shareholder or depository as a means to implement government policy. Further, at least one-half of the VanCal shares which the Claimant counts as the SFCDC's are in fact registered in the names of individual farmers and workers. While the SFCDC votes these VanCal shares on behalf of the investors, the ownership and control of the shares remain in the stockholders' hands. Majority share ownership by individual government entities does not alter the private character of a company and must be distinguished from expropriation. Contrary to the Claimant's accusations, Calpurnia has promptly and sufficiently addressed the miscommunication made by Mr. Korchnoi regarding the distribution of dividends, and has since declared stock dividends in 2004, 2005, 2006 and 2007,

[94] Calpurnia-Gaul BIT, Article 6.
[95] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2001), ¶ 103.

which were distributed to all shareholders, including the Claimant. VanCal has also made statements expressing its willingness to make any license fee and dividend payments it owed. Accordingly, the Claimant had failed to set forth sufficient evidence showing that the SFCDC is an arm of the state and that its actions constitute indirect expropriation by Calpurnia.

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

> "effectively neutralize[d] the benefit of property of the foreign owner."[96]

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.[97] 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.[98]

112. There has been no interference with Vanguard's personnel and rights as a shareholder. Ms. Pescara was voted off by a majority vote of the shareholders present at the VanCal board meeting. This was a democratic process where votes of the shareholders were cast, and there were no irregularities in the conduct of the board meetings where this decision was made. As Ms. Pescara was no longer serving as managing director of VanCal, her continued physical presence in Calpurnia was no longer necessary. Her reduced board functions could still be successfully accomplished through teleconference or the Calpurnian visa waiver program that exists for situations including the present case. Ms. Pescara remained in contact with VanCal after her departure in November 2004. Mr. Shepherd, Mr. Fowler and Mr. Hunter all resigned from the board of directors on their own accord, which further supports the position that Vanguard's personnel were not expelled from management, nor did VanCal compromise Gaul's rights as a shareholder.

113. There has been no interference with Vanguard's control of its investment. Fluctuation in Vanguard's equity interest in VanCal between thirty and eighty-six percent should not be attributed to indirect expropriation, because all divestitures

[96] *LG&E*, ICSID Case No. ARB/02/1, ¶ 188.
[97] *Id.*
[98] *Id.*

were voluntary and are the sole result of Vanguard's actions and decision-making. Even though VanCal had previously converted the dividend payments for Gaulois investors into Gaul Dollar, there is no requirement to do so. Contrary to Claimant's allegations that dividends were withheld from foreign investors, VanCal had declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders, including the Claimant. VanCal has also made statements expressing its willingness to make any license fee and dividend payments it owed. As such, Vanguard's investment in VanCal has not been directly or indirectly expropriated by any actions taken by Calpurnia.

IV. CONCLUSION

114. For the foregoing reasons, the Respondent requests that the tribunal deny jurisdiction to hear these claims and, if not, find for the Respondent on the merits.

Respectfully submitted,

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Spiropoulos