

KOJEVNIKOV

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDINGS BETWEEN

VANGUARD INTERNATIONAL

(Claimant)

AND

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA

(Respondent)

ICSID Case No. ARB/X/X

MEMORANDUM FOR RESPONDENT

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1. DOLZER Rudolph and SCHREUER Cristoph, Principles of International Investment Law, Oxford University Press (2008)
2. SCHREUER Christoph, The ICSID Convention: A Commentary, Cambridge University Press (2001).
3. SCHREUER, Christoph. Travelling the BIT route of Waiting Periods, Umbrella and Forks in the Road. The journal of world investment & Trade. April 2004, Vol. 5 No 2.
4. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD/ITE/IIT/30) Dispute Settlement: Investor-State, UNCTAD Series on issues in international investment agreements.
5. VAN AAKEN, Anne, Perils of Success? The Case of International Investment Protection, 9 European Business Organization Law Review 1 (2008).

LIST OF LEGAL SOURCES

1. *TREATIES*

- 1.1. 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention or the Convention)
- 1.2. 1969 Vienna Convention of The Laws of The Treaties
- 1.3. Calpurnia-Gaul BIT
- 1.4. Calpurnia-Flatland BIT

2. *CASES*

- 2.1. Azurix Corp. v. The Argentine Republic. ICSID CASE No. ARB/01/12, Award of 14 July 2006. Available at <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>.
- 2.2. Generation Ukraine Inc. v. Ukraine (ICSID Case No. ARB/00/9). Award of 16 September 2003. 44 ILM 404 (2005).
- 2.3. Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7). Award of the Tribunal of November 13, 2000, 16 ICSID Rev.—FILJ 248 (2001).
- 2.4. MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7). Award 25 May 2004. Available at <http://www.asil.org/ilib/MTDvChile.pdf>.
- 2.5. PSEG Global Inc. And Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (ICSID Case No. ARB/02/5). 11 ICSID Reports 432 (2006).
- 2.6. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13). Decision on Objections to Jurisdiction of August 6, 2003; 18 ICSID Rev.—FILJ 301 (2003).
- 2.7. Tradex Hellas S.A. v. Republic of Albania (ICSID Case No. ARB/94/2). Award of 29 April 1999. 14 ICSID Rev.—FILJ 197 (1999).
- 2.8. Waste Management, Inc. v. United Mexican States (ICSID Case N° ARB (AF)/00/3). Available at <http://www.economia-snci.gob.mx/l23al.php?s=18&p=1&l=2>.

- 2.9. Enron Corp. And Ponderosa Assets v. Argentina, Decision on Jurisdiction, January 2004
- 2.10. Técnicas Medioambientales Tecmed, S.A. v. Mexico ARB(AF)/00/2, 2003
- 2.11. Salini Costruttori S.p.A. And Italstrade S.p.A. v. The Hashemite Kingdom of Jordan.
- 2.12. Noble Ventures v. Romania, Award, 12 October 2005
- 2.13. LG&E v. Argentina, Decision on Liability, 3 October 2006, 46 ILM (2007)
- 2.14. Starrett Housing Corp. v. Government of the Islamic Republic of Iran, Iran. US Claims Tribunal, 1983
- 2.15. Plama Consortium Limited v. Republic of Bulgaria. ICSID Case N°. ARB/03/24 Decision on Jurisdiction dated February 8 2005.
- 2.16. Benvenuti and Bonfant v. Congo, Award, 15 August 1980, 1 ICSID reports 330, at 340.
- 2.17. Amco Asia Corporation and others v. Republic of Indonesia, Decision of jurisdiction, 25 September 1983, 1 ICSID Reports 389, at 409 (1993).

3. *LAW*

- 3.1. International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001(hereinafter ILC Draft Articles)
- 3.2. ICSID Arbitration Rules (hereinafter Arbitration Rules)
- 3.3. 1969 Vienna Convention of The Laws of The Treaties

STATEMENT OF FACTS

Date	Type	Content
8 December 2003	Calpurnian Security Directorate Press Release	Yesterday, Calpurnian Security Forces searched the homes of two Gaulois nationals and Vanguard International employees, Francesca Pescara and David Kolowenko, under suspicion of unlawful data collection and espionage. Two laptops and several storage media were seized along with unlicensed telecommunications devices.
4 June 2004	Calpurnian Security Directorate Press Release	Yesterday, as part of their continuing counter-espionage operations, Calpurnian Security Forces searched the residences of Francesca Pescara and David Kolowenko. Both are the subjects of an ongoing investigation of unlawful data collection and espionage. Prosecutors expect to file charges shortly.
17 July 2004	Calpurnian Security Directorate Press Release	Two days ago, Calpurnian Security Forces were called to seize stolen data hidden at the homes of Vanguard International employees Francesca Pescara and David Kolowenko. The seized items are being evaluated and prosecutors are considering charges against Mr. Kolowenko, Ms. Pescara and any Gaulois agents who may be apprehended in connection with espionage activities.

14 October 2004	VanCal shareholders meeting minutes	SFCDC began to exercise a leading role in VanCal's affairs. Its two representatives, Dr. Swift and Mr. Shelly, elected to the board of directors
15 November 2004	VanCal board meeting minutes	<p>Accepted Ms. Pescara's resignation as managing director "after thanking her for her efforts during several years in office." Claimant maintained its two places on the board in the person of Ms. Pescara, who appointed a proxy, and Mr. Neil Shepherd.</p> <p>Dr. Swift observed that the SFCDC did not "regard VanCal as really being a private company."</p> <p>An affidavit dated 22 April 2007 (see below) recounts how Dr. Swift walked out of a discussion of Claimant's representation on VanCal's board of directors, declaring that he would not stay at a meeting with "Gaulois spies."</p>
17 February 2005	<p>VanCal board meeting at offices of SFCDC</p> <p>Mr. Poe of SFCDC presided at the meeting</p>	<p>The object of the meeting was to discuss the year's accounts and decide on the distribution of the company's profits. On behalf of the SFCDC, Dr. Swift proposed that "the minimum amount of the legal dividend be paid to the shareholders and the balance be appropriated for the purpose of creating a reserve fund for severance pay" for the company's workers. The proposal as to severance pay was based on the</p>

recommendation of VanCal's auditor, and it was extensively debated at the meeting. Mr. Rindler, who by now was serving as proxy for both Claimant VanCal's board of directors, declaring that he would not stay at a meeting with "Gaulois spies." On 23 May 2005, Dr. Swift told me, "As far as Vanguard's demand for dividends is concerned, don't do anything until the board determines the best way to handle this."

On 30 November 2005, Dr. Swift said to me, "Henceforth, information will be provided to shareholders and board members strictly in accordance with the requirements of Calpurnian law. As you know, this means originals available for inspection at the head office."

31 July 2007	Claimant Arbitration	Requests	Claimant requests institution of arbitration proceedings in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) Notifies State of Calpurnia
31 January 2008	ICSID Constitution of Tribunal	SG	Notice
			ICSID Secretary-General notifies the parties that all arbitrators have accepted their appointments (Arbitration Rules, Rule 6). Forwards Standard Draft Agenda for First Session
18 March 2008	First Session		
28 March 2008	Minutes of First Session Circulated		

ARGUMENTS

1. *ICSID ARBITRAL TRIBUNAL DOES NOT HAS JURISDICTION TO HEAR THE CLAIM:*

- 1.1. According to article 25 of the ICSID Convention (hereinafter the Convention) for the Center to have jurisdiction certain requirements must be satisfied. As we will see, very important preconditions have not been fulfilled.
- 1.2. The dispute needs to **arise directly out of an investment**. According to article 1 of the Calpurnia-Gaul BIT, the term investment means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party, including shares, stocks, or other form of participation in a company and intellectual property rights, such as patents, copyrights, technical processes, trade marks, industrial designs, business names, know-how and goodwill. However, in the case at hand, Vanguard has materialized its investment through a Joint Venture company, named VanCal where it owns a minor participation. Vanguard currently holds an equity share of just 30% in the capital stock of the Joint Venture. Therefore VanCal as such cannot be considered as a complete foreign investment company.
- 1.3. The dispute must be of **legal nature**. The state of Calpurnia cannot be the passive party of this dispute. Regarding that the ICSID arbitral remedy is a valid way of solution for disputes between a foreign investor and a contracting party of the convention (article 11 of the Calpurnia-Gaul BIT), we shall say that for this time the ICSID convention lacks jurisdiction to solve this controversy. This is supported by the fact that the state of Calpurnia has never been related to the VanCal's property in any sense, and moreover, it doesn't have any relation to the following facts which are also mentioned in the claim as a proof of the breach of duties taken by the host state of the investment against the Gaul investors.

2. VANGUARD HAS NOT PURSUED PREVIOUS AMICABLE SETTLEMENT REQUIRED TO SUBMIT AN ARBITRAL COMPLAINT:

- 2.1. The State of Calpurnia has not given its consent to arbitration as required under Article 25 of the ICSID Convention, because its consent to arbitration in Article 11 of the BIT is conditioned on prior attempt by the investor to settle the dispute amicably within 18 months.
- 2.2. Claimant has initiated arbitration, on the basis of the Flatland-Calpurnia BIT before the 18th month period required by the Calpurnia-Gaul BIT has expired. Efforts towards an amicable settlement of the dispute between Vanguard and Calpurnia should have been pursued for eighteen months as required by Article 11(2) of the Gaul-Calpurnia BIT,
- 2.3. Article 11 of the Gaul-Calpurnia BIT states that “Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment in the territory of the latter Contracting Party shall, if possible, be settled amicably” and only “*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*”.
- 2.4. In the case at hand, the claimant has not attempted to reach an amicable settlement as required by the abovementioned article as a condition for the institution of proceedings before ICSID. Moreover, the claimant has not even initiated consultations or negotiations before resorting to the Centre. The international doctrine has recognized that the use of arbitration should only be available where bilateral measures have failed to achieve a negotiated result.¹ The reason behind this requirement lays down on the fact that consultations and negotiations help to defuse tensions and also because it is consequent with the amicable spirit which must guide the conduct of the parties in their investment relations². In addition, negotiations and consultations must be conducted in good faith as required by the general principles of international

¹UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD/ITE/IIT/30) Dispute Settlement: Investor-State, UNCTAD Series on issues in international investment agreements P.12.

² Ibid. p. 24

law³. No one can said that in the present case, the claimant acted in conformity with this principle.

- 2.5. The letter sent by Vanguard to Mr. Poe in February 5th 2007, doesn't have the diplomatic form required for a demand of this kind. It is extremely necessary that the notification from the investor to the host state of the investment, towards an amicable settlement, satisfy this formality considering the nature of the procedure, and obviously, the reinforcement of the confidence between the parties, as a main principle in international law, in order to establish their reciprocal rights and obligations that arise from this date.
- 2.6. According to the record, the claimant limited himself to send a letter to Mr. Poe in February 5th 2007. This action is clearly not enough to be regarded as a "good faith effort to settle the dispute amicable"⁴. Moreover, it is a fact of the case, which was not even directed to the competent authorities since Mr. Poe was just the chair of The State Fund for Commerce and Development of Calpurnia (SFDCD), in VanCal a private joint venture company that neither represents, nor acts on behalf of the state of Calpurnia⁵.
- 2.7. The notification from the investor to the host state of the investment, towards an amicable settlement, is extremely important to establish their reciprocal rights and obligations that arise from this date under the BIT. It is therefore, that it needs to be filed properly, otherwise it must be concluded that it does not have any legal relevance.
- 2.8. Furthermore, the claimant based it arguments on the fact that article 11 of the Flatland-Calpurnia BIT provides a supposed more favorable provision requiring a mere two month commitment to attempt to settle the dispute amicably, while the Calpurnia-Gaul BIT obligates for a 18 months term for that purpose. This idea is per se completely out of any logic, since for the investors reasonably, a longer term of this procedure, guarantees a better understanding and relation with the host state authorities, with consequently

³ The Preamble of the Vienna Convention on the Law of Treaties of 1969 notes that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized". In addition, Article 26 sets forth a general duty of acting in good faith.

⁴ Tradex Hellas S.A. v. Republic of Albania. P.184 in ICSID REVIEW—FOREIGN INVESTMENT LAW JOURNAL. In this case, Tradex sent five letters in different times, addressed to the Ministry of Agriculture containing references to the pertinent Investment Law, explaining the problems that it had suffered and suggesting a meeting to find a solution.

⁵ FDI Moot 2 Clarification, Answer to Question 18.

better chances of arranging the dispute amicably. It cannot be sustained that is a more favorable treatment to have less time to settle amicably a dispute.

2.9. Even if we assume that the Letter sent by the claimant to Mr. Poe qualifies as a proper request for amicable settlement, the claimant should have attempted to reach a negotiated solution for at least 18 months before being entitled to resort to international arbitration. Article 11(2) of the Calpurnia-Gaul BIT is very clear on this issue, only “*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*”. This is an obligation that must be honored. The abovementioned letter was sent on 5 February 2007 and the claimant requested the institutions of arbitrations proceeding on 31 July 2007, after just 5 months from that date. Consequently, the claimant has not fulfilled the requirement set forth in article 11(2) and therefore, it must be concluded that the tribunal lacks jurisdiction to hear the claim.

2.10. This conclusion is supported by the decision on jurisdiction in *Enron v. Argentina* case: “*The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction. In the present case, as noted, the requirement was complied with in view of the identical nature and scope of the dispute with the Argentine Provinces; the same holds true if a dispute is ruled to be ancillary or additional to an earlier claim*”⁶

2.11. For the reasons explained above the objection to ICSID jurisdiction raised by the respondent must be accepted.

⁶ Enron Corp. And Ponderosa Assets v. Argentina, Decision on Jurisdiction, January 2004, Paragraph 88.

3. CLAIMANT HAS PURSUED ITS CLAIMS BEFORE THE DOMESTIC COURTS OF CALPURNIA AND FULL PROTECTION AND FAIR AND EQUITABLE TREATMENT WERE PROVIDED

- 3.1. As we will analyze hereunder Claimant has pursued its claims before the domestic courts of Calpurnia and according to Article 11(3) of the Gaul-Calpurnia BIT, the Claimant may therefore no longer choose an arbitral remedy. This has been known as “fork-in-the-road” provision.⁷
- 3.2. While the 2003 rise of the Conservative Conscience of Calpurnia (CCC) in Calpurnian Parliament may have *changed* the political climate of the country, there is no way that the Calpurnian state can be held liable for this. Specifically, the CCC is in no way funded or run by the State of Calpurnia nor can its actions be attributable to Calpurnia at all. Any party-change or shift in public sentiment is not something that the host state should be expected to control. Despite these changes in the political climate, Calpurnia remained committed to the standard of fair and equitable treatment encompassed in the Gaul BIT.
- 3.3. As far as the full protection and fair and equitable treatment is concerned, it is important to address four of the incidents unfairly mentioned by the Claimant as examples of violations by Calpurnia of Article 2(2) of the Gaul BIT.
- 3.4. Claimants argue that the **police searches** of two Vanguard employees and the subsequent failure to file formal charges against them was evidence that Calpurnia did not afford them full protection granted under the BIT. The police of the state of Calpurnia have a great deal of discretion in investigating cases, particularly those that deal with Calpurnia’s national security – and the State of Calpurnia has total confidence that these searches were conducted with the utmost integrity.
- 3.5. No conclusion can be drawn from the fact that formal charges were never filed against Ms. Pescara or Mr. Kolowenko. It goes without saying that the Calpurnian police force does not have the time neither the funding to bring formal charges for every crime they investigate. Nor could the courts handle it if every single investigation/search was followed by a formal charge. For reasons of Calpurnian national security and public policy, the state of

⁷ SGS v. Pakistan, Paragraph 121, PSEG v. Turkey, Paragraph 152.

Calpurnia may not – nor should it be expected to – disclose the specific reasoning behind these searches. It is enough to say that the tips received by the police were regarded at the time to be worth of an investigation.

- 3.6. Concerning **press releases**, these types of formal releases related to searches are commonplace in Calpurnian society. No evidence has been submitted by the Claimant to show that there was any direct connection between the press release and the subsequent so-called negative public sentiment towards Vanguard. In addition, Calpurnia cannot be found reliable for not having foreseen the reactions of the Calpurnian public caused by the news.
- 3.7. The state of Calpurnia is not liable for the **picketing of Ms. Pescara's home**. The state's labor laws grant the free expression and free speech rights, particularly the right to engage in non-violent demonstrations. Consequently, the police are not to stop or remove such demonstrations. In addition, it is important to notice, that the CCC and specifically the CCC women's League does not represent the State of Calpurnia.
- 3.8. Immigration officials of the state of Calpurnia have wide discretion to determine the **type of visa issued to foreign nationals** who wish to enter the country. On the other hand, the majority of Ms. Pescara's "work" can be done without a business visa, as her main reasons for coming to Calpurnia are to take part in meetings. Finally, no evidence has been offered by Claimants to show that, at the time, Ms. Pescara felt that this was an unfair denial of a business visa. There is no evidence of any effort to appeal this decision nor any record of any further communication on the subject between Ms. Pescara and the Calpurnian immigration agency.
- 3.9. Most of the situations that the claimant presents as violations of a fair and equitable treatment after SFCDC became the major shareholder in VanCal cannot be attributable to the actions of SFCDC. For example:
 - a) Ms. Pescara resigned on her own account, as did Mr. Poe and Mr. Korchnoi.
 - b) When the two latter Vanguard members resigned there was an election to replace them in which two directors representing the public company SFCDC were chosen by UNANIMOUS vote. This means that the Vanguard representative of the board – Mr. Rindler

who voted on a proxy from Neil Shepard – voted with the other Calpurnian members of the board.

3.10. The ICSID Tribunal lacks jurisdiction because the Claimant has made various judicial claims before the courts of Calpurnia.

3.11. According to article 11(3) “An investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article”. The reference is made to the different international arbitration options set forth in that article, among which ICSID arbitration is contemplated. This type of clause is commonly referred to as “fork in the road” provision. The operation of such fork in the road provision requires the identity of the parties and identity of the cause of action in the respective proceedings⁸. In addition, the domestic proceedings must have been instituted before the choice of international arbitration⁹.

3.12. In the present case, the claimant has made a final and definitive choice to pursue its claims before the domestic courts of Calpurnia and in accordance to article 11(3) it has therefore lost the option to resort to ICSID arbitration. Consequently, it must be concluded that the basic conditions that trigger the “fork in the road” met have been met.

3.13. In this case, it is remarkable that Ms. Pescara’s dismissed application brought before the Commercial Court of San Inocente de Irkoutsk, does satisfy the above mentioned identity requirements, since Ms. Pescara was member of the VanCal’s Board of Directors, on behalf of Vanguard, at the time, and moreover, she auctioned in order to protect its interests (identity of object).

3.14. The condition related to the cause of action of the claim is also fulfilled, since in this dispute, the subject-matter of the action is also referring to the supposed discriminatory treatment of the state of Calpurnia to a foreign investor, represented in this case, by Ms. Pescara on behalf of Vanguard.

⁸ ICSID tribunals have dealt with similar issues in the context of an invocation of a lis pendens before domestic courts; *Benvenuti and Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID reports 330, at 340; *Amco Asia Corporation and others v. Republic of Indonesia*, Decision of jurisdiction, 25 September 1983, 1 ICSID Reports 389, at 409 (1993).

⁹ SCHREUER, Christoph. Travelling the BIT route of Waiting Periods, Umbrella and Forks in the Road. *The journal of world investment & Trade*. April 2004, Vol. 5 No 2. Page 248

3.15. Furthermore, Vanguard's application to have the December 2003, April 2004 and July 2004 police raids declared unlawful and seek compensation for it, did also triggered the "fork in the road" clause. This application is interposed by the same claimant of this dispute, linked to an investment topic, which is not only restricted to a money transfer issue, but also related to the conditions that would endorse that asset. So, following that reasoning we can properly argue that the mentioned application was based in the idea of taking the police raids as part of a secret plan of the government in order to remove this foreign investment from the country, which is indeed an example of discriminatory treatment, the same criterion that is supporting the claim in this case.

3.16. As we have seen, it's clear that Vanguard International had already introduced its claims to the domestic Courts of Calpurnia, and consequently to that, this arbitral Tribunal doesn't have the jurisdiction to solve this dispute. To support this argument we have article 11(3) of the Calpurnia-Gaul BIT: "An investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article".

3.17. It is worth noticing that the Tribunal in *Maffezini v. Spain*¹⁰ found that the "fork in the road" clause reflects the host State's public policy and therefore cannot be overridden by the application of MFN clause.

4. ARTICLE 4 OF THE GAUL-CALPURNIA BIT DOES NOT EXTEND TO DISPUTE RESOLUTION MECHANISMS, SUCH AS THOSE REFERRED TO IN THE CALPURNIA-FLATLAND BIT ARTICLE 7:

4.1. First of all, it is necessary to mention that according to the *ejusdem generis* principle, a Most Favored Nation (MFN) clause "*can only attract matters belonging to the same category of subjects as that to which the clause itself relates*"¹¹. In the present case, the MFN clause cannot be applied to procedural obligations because it only refers to matters of substantive investment protection. In particular, the concept of most favorable

¹⁰ *Maffezini v. Spain* para. 50

¹¹ Commission of Arbitration in the *Ambatielos* case, United Nations, Reports of International Arbitral Awards, 1963, p.107.

“treatment” embraced only substantive investor protections and do not extend to procedures for settling investment disputes. In addition, the dispute resolution provisions of a BIT must be treated with special precaution since they are specially negotiated with a particular consideration of the singular circumstances surrounding the conclusion of the agreement¹². As it was found in the *Plama* decision, “Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.”¹³

4.2. Article 4 of the Calpurnia-Gaul BIT provides that “*Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favorable than the host Contracting Party accords to the investments and returns made by its own investors or by investors of any third State, whichever is the most favorable to the investor*”. As we can see, the wording of this article is rather clear, it does not extend to dispute settlement provisions, and otherwise it would have explicitly referred to those matters. Besides, the context of this provision supports this conclusion.

4.3. Paragraph 2 of the same Article 4 qualifies and limits the scope of the MFN clause by providing that the treatment “*shall be accorded... as regards the management, maintenance, use, enjoyment or disposal*” of the investment, all of them matter of substantive nature. On the other hand, the exceptions contained in article 5 of the Calpurnia-Gaul BIT relating to customs or economic unions, free trade areas and multilateral investment treaties cannot be considered as supporting the view that all other matters, including dispute settlement, fall under the MFN provision of Article 4. The purpose and meaning of these exceptions is simply to make clear that the application of the MFN clause does not reach such special situations. In this sense, the decision of the *Plama* Tribunal is very illustrative.

4.4. In that case the tribunal found that “an MFN provision in a basic [investment] treaty does not incorporate by reference dispute settlement provisions in

¹² *TECMED v THE UNITED MEXICAN STATES*, para. 69. The tribunal emphasized the importance of specifically negotiated provisions as an argument against letting them be bypassed by the operation of the MFN clause.

¹³ *Plama v. Bulgaria*. Para. 207.

whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”¹⁴ The Tribunal went on to mention article 3(3) of the U.K. Model BIT as an example of a clear and unambiguous expression of intent in order to incorporate dispute settlement provision within the scope of an MFN clause. That article provides that “*For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.*”

4.5. As we can see, there is a presumption that MFN clauses do not extend to dispute resolution matters, subject to an exception where there is some clear expression of the contracting states’ intent to the contrary. In the present case, there is no evidence that supports the claimants’ position in order to apply the MFN clause to dispute settlement procedures and in the absence of a “clear and unambiguous statement of consent”¹⁵, dispute resolution provisions, consistent with the *ejusdem generis* principle, must be deemed to fall outside of the scope of the MFN clause.

4.6. It is also important to distinguish the present case from the situation in the *Maffezini v. Kingdom of Spain* decision. In that case, the MFN clause referred to “all matters subject to this agreement”. By contrast, article 4 of the Calpurnia-Gaul BIT only refers to “treatment” and limited in its scope by paragraph 2 of the same provision as it was explained above. It is clear that the wording of the MFN clause here is substantially different, evidently narrower and more restricted than the one in *Maffezini*. Moreover, the *Maffezini* decision gave to the State practice and legal policy subsequent to the conclusion of the BIT between Argentina and Spain a preponderant role.¹⁶ In this case however, the Claimant has submitted nothing from which it might be established that the common intention of the Parties was to have the MFN clause apply to dispute settlement. MFN clauses were originally only supposed to apply to substantive issues.¹⁷

¹⁴ PLAMA CONSORTIUM LIMITED v. REPUBLIC of BULGARIA. Paragraph 223.

¹⁵ Ibid. Para. 198. The tribunal found that “It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous”.

¹⁶ *Maffezini v. Kingdom of Spain*. Para. 57 to 64.

¹⁷ Anne Van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 *European Business Organization Law Review* 1, 21 (2008).

- 4.7. The Claimant has not cited any state practice in Calpurnia or Gaul in support of their claims. In contrary, 3 years before the conclusion of the Calpurnia-Gaul BIT, the Respondent entered into a BIT with Flatland. The fact that 3 years later Calpurnia negotiated and concluded its BIT with Gaul which contains rather different dispute settlement provisions from the one it had signed with Flatland shows that it was obviously important for the respondent to change their prior legal policy and reach more restricted dispute settlement provisions, otherwise it would have stipulated the same or similar clauses to the Flatland-Calpurnia BIT. Furthermore, after the conclusion of the BIT with Gaul, the respondent has not entered into another BIT. This reflects the subsequent State practice of Calpurnia, increasingly cautious when it comes to resorting to international arbitration.
- 4.8. Based on the arguments above mentioned, the Tribunal must conclude that Article 4 of the BIT does not apply insofar as dispute settlement clauses are concerned.¹⁸

5. *FLATLAND HAS NOT BEEN A CONTRACTING STATE AT THE TIMES RELEVANT FOR THE JURISDICTION OF THIS ARBITRAL TRIBUNAL:*

- 5.1. Even if Article 7 of the Calpurnia-Flatland BIT were applicable, Flatland has not been a Contracting State at the times relevant for the jurisdiction of this Arbitral Tribunal. That because the State of Flatland denounced the ICSID Convention four years prior to Vanguard's initiation of arbitration proceedings, meaning not only that the Flatland BIT is no longer in force but that Claimant violated the Calpurnia BIT's time requirement.
- 5.2. Claimant would like Article 4 of the Calpurnia-Gaul BIT – entitled “Treatment of Investments” – to be interpreted as a most favored nation clause as a way to apply all benefits conferred upon Flatland in the Flatland-Calpurnia BIT to their present case. However, again as explained above, this Flatland-Calpurnia BIT is no longer in force meaning that Vanguard may not use it.

¹⁸ Salini Costruttori S.p.A. And Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, para. 119. A similar conclusion was reached in this case based on comparable facts.

- 5.3. Even if we assume that article 7 of the Calpurnia-Flatland BIT were applicable, Flatland denounced the ICSID Convention on 2 May 2003 and thus, the respondent can no longer rely on article 7 neither to bypassed the 18 months waiting period of article 11(2) of the Calpurnia-Gaul BIT nor to avoid the fork in the road provision of article 11(3) of the same treaty. The basic reasoning behind these arguments lays down on the fact that as a consequence of Flatland's denunciation, the recourse to ICSID jurisdiction is no longer available for the Flatland investors in Calpurnia. Nor can it be available for the investors of Gaul in Calpurnia by the operation of the MFN clause.
- 5.4. The fact that the Flatland-Calpurnia BIT as such has not been denounced by the parties, and thus, it remains effective does not affect the abovementioned conclusion. Although the substantive rights and obligations contained in that treaty remain in force, the recourse to ICSID arbitration is subject to requirement set forth in article 25(1), namely that both, Flatland and Calpurnia must be members of the Centre. In the present case, Flatland has denounced the Convention and thus, the Flatland-Calpurnia BIT cannot effectively provide for ICSID arbitration. Consequently, the Claimant cannot invoke the dispute settlement provisions contained in that BIT to resort to the Centre, through the operation of the MFN clause contained in article 4 of the Calpurnia-Gaul BIT, simply because those provision no longer provide for ICSID arbitration.
- 5.5. However, article 72 contains an exception according to which once there is "*consent to the jurisdiction of the center*", a Contracting State denunciation "*shall not affect the rights or obligations under this Convention of the Centre given by one of them before such notice was received by the depositary*". First of all, for jurisdiction to be found to exist there must have been between the parties to the dispute a written agreement to arbitrate¹⁹. It has been widely recognized by the doctrine and jurisprudence that a provision on consent in a BIT such as article 7 of the Flatland-Calpurnia BIT, amounts only to an

¹⁹ Christoph H. Schreuer, *The ICSID Convention: A Commentary* 1285 (2001); and *Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions*, Investment Treaty News, May 9, 2007.

standing offer to arbitrate which must be later accepted in writing by the investor to bind the offerer.²⁰

5.6. Once this offer is accepted, consent is perfected and the agreement to ICSID arbitration is formed²¹. Only from this moment on, there is an irrevocable “*consent to the jurisdiction of the Centre*” in the terms of article 72 and article 25(1) and an eventual denunciation cannot affect the rights of the parties under the ICSID Convention. Nevertheless, before being accepted, the offer can always be withdrawn.²² In this sense, a denunciation of the Convention operates as a withdrawal of the offer with respect to any investor who had not previously accepted the offer, for example, by the initiations of proceedings before the Centre²³. Without such an acceptance, there cannot be any satisfaction of consent as expressed in article 25(1) and article 72 and thus the jurisdictions of the ICSID Tribunal cannot be established.

5.7. It follows from above, that Flatland’s denunciation of the Convention received by the Centre on 2 May 2003 is to be regarded as a withdrawal of the prior offer to resort to ICISID arbitration. As a consequence, the recourse to ICSID jurisdiction is no longer available for the Flatland investors in Calpurnia. In accordance to this, it is not possible to affirm that the investments made in Calpurnia by nationals of Gaul, are granted with **third party rights that do not exist anymore**, by the operation of the MFN clause under article 4 of the Calpurnia-Gaul BIT.

5.8. Even if we read article 72 in conjunction with article 71 of the ICISD Convention, according to which the investor may still accept the consent given in article 7 of the Flatland-Gaul BIT until the denunciation becomes effective, Flatland has not been a Contracting State at the times relevant for the jurisdiction of this Arbitral Tribunal. Under article 71, denunciation becomes effective after 6 months from the day the notification of the denunciation was receipt by the depositary. This means that after the 2nd of November of 2003, the Flatland-Calpurnia BIT was no longer capable of providing for ICSID jurisdiction and thus the Claimant cannot effectively

²⁰ *Generation Ukraine Inc. v. Ukraine*, para. 13.5. Also in Christopher Schreuer, Consent to arbitration, TDM at p.7.

²¹ Christoph H. Schreuer, *The ICSID Convention: A Commentary* 218-219 (2001)

²² Christoph H. Schreuer, *The ICSID Convention: A Commentary* 253 (2001)

²³ *Azurix v. Argentina*, par. 57.

invoke the dispute settlement provisions of that treaty by the operation of the MFN clause to resort to the Centre.

5.9. Due to the aforementioned, the ICSID tribunal does not have jurisdiction to hear this case yet and the State of Calpurnia requests that and welcomes Vanguard to continue to try to reach an amicable solution to this controversy.

6. VANCAL IS A PRIVATE ENTITY AND IS NOT PART OF THE STATE OF CALPURNIA:

6.1. In principle, state entities are separate and their acts will not be attributable to the State.²⁴ Accordingly, several tribunals have refused to find that actions by private persons were attributable to the State.²⁵ This makes clear that to outline the liability of a State under international law for the acts of one of its entities; their acts must accordingly concern governmental activity and not a private or commercial activity. To act with governmental authority an entity must be empowered by the law of that State and also it must actively exercise those powers. From an objective point of view, the ILC outlines certain requirements that an entity must comply with, in order to be conceived as a part of the State. More precisely the relevant rules for State attribution under general international law are found in the ILC's Articles on State Responsibility²⁶, especially under article 5, which indicates that:

“The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”²⁷

6.2. Many authorities states that the relevant rules of attribution as found in general international law, are reflected in the ILC's Articles on State

²⁴ DOLZER Rudolph and SCHREUER Cristoph, Principles of International Investment Law, Oxford University Press (2008) P. 198.

²⁵ *Tradex vs. Albania*, Award, 29 April 1999, 5 ICSID Reports, paras 136, 147, 165, 169, 175, and 198.

²⁶ *Noble Ventures v. Romania*, Award, 12 October 2005, para 69. In: DOLZER Rudolph and SCHREUER Cristoph, Principles of International Investment Law, Oxford University Press (2008) P.200.

²⁷ Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session in 2001.

Responsibility.²⁸ However, ILC Articles cannot be applied, since those articles are only applicable to state responsibility between states.

- 6.3. There we find two particular requirements that an entity must cope with to be considered an act of the State: the empowerment by the law and that the action must be carried out in that capacity in a particular instance. This is known as the *functional test*. It must be concluded that to find the private or public role of an entity, we must seek for the reason behind its creation or establishment and the way in which it acts. Then it is perfectly acceptable to have a public funded entity that acts like any other private investor. In doing so, a branch of government subtracts its authority when acting in the same condition as any other investor, when submitting itself to commercial or private regulations and acting toward regular investor based decisions. This particular competence is perfectly legitimate when the economic and commercial rules are clear and respected by the entity.
- 6.4. In this case, The State Fund for Commerce and Development of Calpurnia (SFDCD) doesn't act as the Government of Calpurnia; it cannot pass out legislation or regulations that can have some effect on the administration of a corporation. It can only select members of a board of directors like any other shareholder. Consequently, these board directors are VanCal's employees, thus VanCal is the only one who can be held accountable for their actions. On the other hand, SFCDC as a shareholder has elected directors who are interested in developing an administration strategy that copes with the reasonable standard that any shareholder would be seeking for in a company, this being reflected on the company's positive financial results.
- 6.5. From that election, SFCDC is not seeking to perform a Governmental function of regulating a private corporation, nor does it want to use its legitimate participation to enact a regulatory taking of the title of property of a foreign investment. Like any shareholder it seeks to get the most profits from its investment, and it only has the property according to the shares that it owns, which reflects the risk and involvement that it has in the company.
- 6.6. Furthermore, there is not a disproportionate participation of SFCDC, meaning that the role that it plays in the election of the board of directors only reflects

²⁸ Dolzer & Schreuer p. 200.

the rights that it has in the company. Even though SFCDC has a significant participation, several hundred individual shareholders, mainly farmers and workers, hold almost one half of the shares that it can rightfully vote for. This doesn't alter the private character of the company.

- 6.7. In determining the state attribution for the acts of an entity in *Maffezini v. Spain*, the Tribunal made some remarks about the principles that should be applied, especially in the sense of the nature of the acts. The Tribunal said:
*“In dealing with these questions, the Tribunal must again rely on the functional test, that is, it must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be attributed.”*²⁹
- 6.8. Establishing a joint venture and exercising voting rights as a shareholder of a company are commercial acts in nature, which only have commercial purposes. SFCDC doesn't try to alter the nature of these acts as a means to implement government policy, since these acts can only have a commercial effect. Voting rights can only be exercised by shareholders who are accounted for in a company to elect members of the board of directors.
- 6.9. On the other hand, establishing a joint venture, just means that SFCDC is willing to take a shared risk and profit of a particular investment. This pre-established limitation in the actions that SFCDC can be accounted for, gives us a clear perspective towards the intentions and real framework in which it can act to maintain a commercial nature. Under no circumstances has SFCDC acted outside these boundaries, nor has intended other than grant a secure profits for the shares for which it holds voting rights.
- 6.10. In this sense, at the March 10th 2005 board meeting, an SFCDC representative; Dr. Swift, noted: *“the profits made by the company under current laws and regulations belong to the company and, the shareholders have a right thereto in proportion to their capital investment, therefore, whether there is a distribution in cash, or a stock dividend, or a reservation of a portion as undivided profit, it will not in principle change the rights to*

²⁹ ” *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 para 52.

the shareholders to the profits earned; especially because due to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign shareholders has been suspended for the time being”.

- 6.11. Even though a political fact is recognized; the tension between two governments cannot be left unattended in an economic or financial analysis, more so if the shareholders of a company are nationals of these States. This doesn't alter the willingness of the board of directors of VanCal to grant the rights towards the profits that each shareholder has earned. But as we manifested before, it is the board and not SFCDC the one who is making these decisions.
- 6.12. If there is a particular claim against the decision then the board members should be accounted for them individually. This is why an email sent by Mr. Korchnoi on 27 may 2005, stating that no further payments could be made to foreign shareholders, was unauthorized and had been superseded by statements by VanCal of its willingness to make any license fee and dividend payment it owed. The essence of a private corporation is that a board of directors holds the administration and not directly the shareholders, consequently that is why these cannot be liable for the wrongful acts made by the board directors.
- 6.13. In such matters, the State of Calpurnia cannot be held responsible the actions of the directors of a private company. Also there is no connection between the policy of the State of Calpurnia and the decisions to grant profits to the nationals of another country. There is no exercise of public power by VanCal and it isn't government owned. This means that not only in the structure nor in its functions does VanCal represent in any way the State of Calpurnia. Decisions or commitments made by a private company will not be considered as amounting to jurisdictional consent on the part of the State. If the rules and regulations of Calpurnia are not complied with, then these problems should be taken to our national Courts, hence the State is not a part that can influence the resolutions adopted by the board of directors of a private corporation.
- 6.14. Since VanCal remains an independent private corporation, the disputes that are misinterpreted as an expropriation, are only a manifestation of the

minority shareholders dissatisfaction with the management decisions coming from the directors elected by the majority shareholders.

7. CLAIMANT HAS BEEN NEGLIGENT IN ASSESSING RISKS OF ITS INVESTMENT AS A JOINT VENTURE:

- 7.1. Calpurnia is committed to supporting and encouraging investment within its borders and has, in the present case, obligated itself to abide by Article 2 of the Gaul BIT entitled, “Promotion and Protection of Investments.” Through this article Calpurnia has agreed to, and the evidence overwhelmingly shows it has followed through with, treating Gaul investors fairly and equitably and with full and constant protection.
- 7.2. In fact, from 1997-2004 – 8 years – Vanguard, a GAULOIS company – played a “major role” in managing VanCal in addition to owning a 50% equity interest in VanCal for a number of years, never going below 30% through 2004. It is notable that the power shift in VanCal’s management is a more recent occurrence, happening only during the last 3-4 years over a slow process.
- 7.3. Foreign investors have a duty to make proper inquiries into the viability of the potential investment, which includes a study of the states in which they wish to invest. While there is not one definition of due diligence, it is clear through case law that proper due diligence on behalf of the investor encompasses any inquiries that a “reasonable” investor would make before investing time and money into a project.
- 7.4. A key aspect of investing in a foreign country MUST be the understanding that there will be a certain level of risk – inherent risk –, which may be unavoidable. And that if the events that produce those risks take place the investor will lose part of its investment, and normally it will have to support that loss.
- 7.5. As it was explained, the host country’s job is not to ensure the success or even the viability of an investment; normally the country’s obligation is satisfied treating the foreign investor in the same way that it treats their nationals, and respecting the BIT’S subscribed. The host country is not an insurance company. In the same direction the tribunal in *MTD v. Chile* stated:

“The BITs are not an insurance against business risk³⁰ and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile’s actions.³¹”

- 7.6. To consider that an insurance contract exist it is important to analyze the obligation between the parts, one necessarily have to pay a fee for the asset that want to assure, and the other one have to compromise to assure the asset. In this way it is important to remark that the Respondent doesn’t have any obligation related to protect the investor from the regular business risks, which were voluntarily assumed by Vanguard. If the investor considers that the BIT is an insurance contract, then it would be one without consideration.
- 7.7. There are different international mechanisms to avoid loss of value in an foreign investment, such as MIGA (Multilateral Investment Guarantee Agency from the World Bank) or equivalent to OPIC (Overseas Private Investment Corporation, an "independent" US Government agency) none of which were used by the Claimant.
- 7.8. There are many advantages and disadvantages to creating a joint venture contract, and mainly that parties have a lot of freedom including extra perks such as, at times, the ability to avoid the double taxation, and to share the business risk if it fails. In the other hand with this freedom and flexibility, also comes a great amount of responsibility. Individual parties to a Joint Venture have more responsibility if the Joint Venture fails because the parties share both in the revenues AND in the expenses, hence the use of the term JOINT. Had the Claimant performed proper due diligence in researching their options and in forming the joint venture contract they would have created some sort of exit strategy. However, this is not the fault of the state of Calpurnia nor does it reflect anything about its treatment of Vanguard.

³⁰ “... The Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments.” *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 para. 69.

³¹ MTD Equity v. Chile para 178.

7.9. Furthermore, in the same way that Vanguard's signing of this joint venture contract included the assumption of risks so did that of the state of Calpurnia. Losses could just as easily have been incurred on the part of Calpurnia, something that the state was well aware of before committing itself to this joint venture. Therefore, when signing the joint venture contract to create VanCal, Vanguard agreed to have the headquarters set in Calpurnia – thereby assuming all of the risks involved with having a headquarters in that State.

7.10. Considering that from the beginning the Claimant has been sharing with the Respondent the ownership of VanCal, it is important to mention that its participation varied because Vanguard voluntarily sold part of its shares in VanCal, losing the controller quality. When somebody doesn't have the control of a company it is probable and reasonable that someone can take its position. It is part of the risk of being a minority shareholder as it was Vanguard in this case. That risk includes that majority shareholders can take decisions with those that the minority disagrees, but the majority principle forces them to accept those decisions. Vanguard has to accept its minority condition and thus the decisions made by the board.

7.11. It is a common business practice, that over a period of time the controller of a company may change, that doesn't affect the minority shareholders rights over the company. In this particular case the Claimant maintains its right to elect directors:

- **15 November 2004**, Ms. Pescara and Mr. Neil Shepherd appointed proxies and were designed by Vanguard as directors.
- **16 November 2005**, the proxies held by Mr. Rindler were found no to be formally valid for the purpose of that meeting. The examination of those proxies was based in objective proxies' requirements.
- **15 April 2006**, Mr. Shepherd voluntarily resigns from VanCal Board of directors.
- **23 October 2006** Claimant's participation ended completely when it withdrew its representatives by email and declined to replace them. It was Vanguard's decision not to use its rights to elect directors. There is not doubt that the Claimant still has its rights to participate in the board.

7.12. The risk that gave the bases for Vanguard's claim in this particular case was to share the property and management of a company. The problems for the Claimants began when they sold an important numbers of shares becoming a minority shareholder and thus losing the control of the company. As it was explained, it is illogical to assume that the Respondent have to compensate the Claimant for its bad business decision. It is reasonable that Vanguard have to support the costs and loss of its lack of diligence. It is clear that Vanguard had the possibility to avoid all the disadvantages or the problems that the loss of the control produces on its equity.

7.13. "What matters for the investor's expectations is the State of Law of the host country at the time of the investment."³² There is no evidence of a change in the Calpurnian corporate law that affects or modifies the investor's rights. Hence the legitimate expectations of Vanguard varied because the company sold its shares decreasing its participation. When it had 51% of the shares it was the controller, now it has only the rights of a 31% shareholder, consequently have to accept the decisions made by the board.

8. THE CLAIMANT'S INVESTMENT HAS NOT BEEN EXPROPRIATED AND THE RESPONDENT HAS TREATED SUCH INVESTMENT IN ACCORDANCE TO INTERNATIONAL LAW:

8.1. As for Claimant's arguments that VanCal was expropriated, this is clearly a misunderstanding on Vanguard's behalf of the definition of expropriation. Just because a majority of VanCal shares are owned by a public company (SFCDC) does not ipso facto mean that VanCal is no longer a private company.

8.2. Article 6 (1) of the Calpurnia-Gaul BIT states that:

"Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures having the effect, either directly or indirectly, equivalent to expropriation or nationalization (hereinafter referred to as "expropriation")"

³² Dolzer & Schreuer p. 105

except for a public interest, on a non-discriminatory basis, under due process of law and against prompt, adequate and effective compensation.”

- 8.3. A direct expropriation supposes an official act by the host State that takes the title of a foreign investor’s property, on the other hand an indirect or an act equivalent to an expropriation leaves the investor’s title of property untouched but deprives him of the possibility to utilize the investment in a meaningful way³³. In both cases a significant act by the government is required to outline the expropriation. If no act can be found to be attributable to a host State, then a plea for expropriation is meaningless.
- 8.4. An expropriation is the most severe form of interference with property, since it supposes that the investment is totally deprived from the investor’s patrimony. In this sense, tribunals have interpreted the concept of indirect expropriation narrowly and have preferred to find a violation of the standard of fair and equitable treatment.³⁴
- 8.5. Although some of the rights over the investment can lose substance because of a political contingency, meaning that an alien investor cannot exercise its rights of use and enjoyment of the payment of the profits over a short period of time, these measures don’t constitute an act of the State of California as an expropriatory measure. The effects of the measures involved are not such that they can be assimilated to a deprivation of possession. More so they cannot be attributable to the State, since that was the recognition of a certain political situation, by the board for a delimited period of time.
- 8.6. It must be emphasized that the power to dispose the dividends subsisted and was guaranteed by the State. Also it must be mentioned that the right to distribute profits or utilities is a corporate decision, but the right to transfer funds is properly assured by the State. In no means has the government or its organ obstructed these transfers since there was no formal or informal action that can demonstrate a real intention to act in such matter.
- 8.7. Vanguard still has its rights over the dividends:
 - **10 March 2005**, Due to the existing dispute between the governments of California and Gaul, the payment of profits to the

³³ -citar bien starret house corp.v iran

³⁴ Y. Fortier and SL Drymer, “Indirect Expropriation in the Law of International Investment: I know it when I see it, or caveat investor” (2004) 19 ICSID Review-FILJ p.106.

foreign shareholders has been suspended for a time being. This is a temporary measure, that the board decided to enact, but it doesn't suppose a complete interference with a property right. A temporary suspension of payments is not an act intended to take the property of the investment.

- **27 May 2005**, Mr. Korchnoi: The decision of the board that doesn't allow VanCal to pay any sum of money for any reason to foreign shareholders. This is a decision of the Board and not of the government of Calpurnia; hence there is a corporate problem between shareholders. On the other hand this communication was later unauthorized and superseded by VanCal's statements of its willingness to make any license fees and dividend payments it owed.
- **28 September 2006**, VanCal Board of Directors sent an email to the Claimant communicating that the dividends had been "credited on VanCal's books to Claimant's account". Vanguard's still have its rights over those dividends, so it is not possible to argue that had been expropriated.

8.8. If this Tribunal considers that the measures taken by the board were State decisions, then it is imperative to evaluate the period of time where the measures had a relevant impact over the investment. Then to determine when a measure may become expropriatory, it is important to analyze the period of time in which it has a real effect.

8.9. In the LG&E v. Argentina case, the tribunal found that only an interference that is permanent will lead to an expropriation:

*"Similarly, one must consider the duration of the measure as it relates to the degree or interference with the investor's ownership rights. Generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations."*³⁵

³⁵ LG&E v. Argentina, Decision on Liability, 3 October 2006, 46 ILM (2007) para. 193

- 8.10. None of the measures that may affect Vanguard's interest satisfy the requirements demanded by the Tribunal in *LG&E v. Argentina*. VanCal declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders including claimants.
- 8.11. Vanguard is trying to construct a supposed expropriation to hold the control over a company, which doesn't have the majority of the shares, because of internal problems with the current administration. The change in property and the subsequent lost of control over was a decision taken by Vanguard when they decided to sell their shares. A financial or corporate decision is not a matter that concerns the State of California.
- 8.12. On the other hand, the use and benefit over the 31% interest that Vanguard had in VanCal, meant that it had the right to receive its parts of the profits made by the company, in no way it can be understood that with that percentage of the property it could remain in control of the whole company. Since 2003 and until present time the rights over the profits and shares of Vanguard in VanCal remain untouched.
- 8.13. To consider that there is a creeping expropriation it is necessary to consider the criteria that the Tribunal gave in *Generation Ukraine v. Ukraine*:
- “Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the state over a period of time culminate in the expropriatory taking of such property.*
- [...] A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation”³⁶*
- 8.14. The only participation attributable to the State in this case is the election of directors for the board. Once the directors are elected, they are company employees, thus any violation to the internal law, or the decision that harms minority shareholders is attributable to the person of the director and not the shareholder that voted him. Hence considering that all the decisions that

³⁶ *Generation Ukraine v. Ukraine*, Award, 16 September 2003, 44 ILM (2005) 404.

were alleged by the Claimant were voted on board, there is no State attribution on those acts and it cannot be any kind of expropriation. The basis for an expropriation is that there is an act attributable to a State.

8.15. The police searches of the homes of Ms. Pescara and Mr. Kolowenko were conducted routinely and lawfully, in support of national security requirements. Only Ms. Pescara and Mr. Kolowenko respectively had standing to challenge the lawfulness of the searches of their private residences. The press releases issued by the Calpurnian security directorate in connection with the searches were factually accurate, and the Respondent bears no responsibility for any misinterpretation by isolated members of the public. The protestors near Ms. Pescara's home were private citizens lawfully exercising their freedom of speech on public property on a non-violent manner, and there were no bases for the police to intervene on the occasions when they were requested to do so by Ms. Pescara.³⁷

8.16. The immigration authorities enjoy wide discretion in issuing visas. Since she was no longer managing director of VanCal, Ms. Pescara's continued presence was not necessary. She could adequately perform her reduced VanCal board function and pursue the interests of Claimant through occasional visits on the Calpurnian visas waiver program or even via teleconference³⁸.

8.17. The decision in *Tradex v. Albania*³⁹ emphasized the cumulative effect of the measures in question. In these cases it is important to consider that the act of the police forces and the immigration authorities, were completely isolated from the decision made by the board of directors that may affect Vanguard's interest in VanCal.

For all the above reasons, we reject Claimant's arguments.

³⁷ Abstract from the Respondent.

³⁸ *Ibid.*

³⁹ *Tradex v. Albania*, Award, 29 April 1999, 14 ICSID Review-FILJ (1999) 197.