

INTERNATIONAL CENTER FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

TEAM: **ONYEAMA**

Memorandum for Respondent

VANGUARD INTERNATIONAL
[Claimant]

v.

THE GOUVERMENT OF THE REPUBLIC OF CALPURNIA
[Respondent]

(ICSID Case No. ARB/X/X)

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List of Authorities

1. Scheurer, C. (2001). *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press)
2. (2007). *Bilateral Investment Treaties 1995-2005: Trends in Investment Rulemaking* (New York and Geneva: United Nations), United Nations publication, Sales No. E.06.II.D.16.
3. Ian Brownlie. *Principles of Public International Law*, Oxford University Press, 1998
4. Emmanuel Decaux, *Droit international public*, Dalloz, 2006
5. Jean Combacau / Serge Sur, *Droit international public*, 2006
6. Giorgio Sacerdoti , *Bilateral treaties and multilateral instruments on investment protection*, *Recueil des Cours* (1997), volume 269 , p. p.251-460
7. Application of the MFN-clause in investment treaties: Replies to two questions, *Transnational Dispute Management*, Volume I, issue #02 - May 2004
8. Seidl-Hohenveldern, I., *International Economic Law*, 2nd ed., 1996, —, “Commercial Arbitration and State Immunity”, *International Trade Arbitration*, 1958, 87 *et seq.*

List of Legal Sources

1. *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 (1 ICSID Reports 394); Award, 20 November 1984.
2. *American Manufacturing & Trading v. Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (reprinted in 12, *International Arbitration Reporter*, 1997, No. 4, pp. A-1 to A-2).
3. *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003; Final Award, 14 July 2006.
4. *Case concerning East Timor*, International Court of Justice, 1995 *ICJ Reports*.
5. *Case concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), 5 February 1970 (1970) International Court of Justice 3, at 35-36 (9 *International Legal Materials* 227).
6. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003; Award, 12 May 2005.
7. *Compañía de Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award on the Merits, 17 February 2000.
8. *Enron and Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004.
9. *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004.
10. *Loewen Group, Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award on Jurisdiction, 5 January 2001; Award on Merits, 26 June 2003.
11. *Methanex v. United States*, UNCITRAL, Decision on *Amici Curiae*, 15 January 2001; Preliminary Award on Jurisdiction and Admissibility, 7 August 2002; Final Award, 3 August 2005.
12. *Tokoils Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004; Dissenting Opinion, 29 April 2004.
13. *Vacuum Salt Products Limited v. Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 (reprinted in *ICSID Review*, 1994, vol. 9, 1, pp. 71–101/1994).

14. *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000; Award, 13 November 2000; Rectification of Award, 31 January 2001.
15. *Compania de Aguas de Aconquija S.A. and Vivendi Universal v. Argentine Republic*(ICSID Case No. ARB/97/3) 16ICSID Rev.–FILJ 641(2001)
16. *Salini Costruttori S.p.A. v. Kingdom of Morocco*, (ICSID Case no. ARB/00/4), Decision on Jurisdiction, 23 July 2001, 129 *Journal de Droit International*(2002)
17. *Lanco International Inc. v. Argentine Republic*, Preliminary Decision on Jurisdiction, 8 December 1998, 5 ICSID Rep. 367
18. *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. Arb/87/3, Award of June 27, 1990, ICSID Reports, Vol. 4
19. *Anglo-Iranian Oil Company Case (Jurisdiction)*, International Court of Justice, Reports, 1952
20. *Case concerning the rights of nationals of the United States of America in Morocco*, International Court of Justice, Reports, 1952
21. *Ambatielos case*, International Court of Justice, Reports, 1953, p. 10
22. 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 March 18, 1965, <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>
23. Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155
24. *Case of Sporrang and Lönnroth v. Sweden* , 18 December 1984,
25. *Case of Mellacher and Others v. Austria*, Judgment, 19 December 1989

Statement of facts

1. In 1997, Vanguard International, a GSM company having Gaulois nationality, together with SFCDC and several Calpurnian natural and juridical persons established a joint venture company named VanCal, with the seat in Innocente de Irkoutsk, the capital of Calpurnia.
2. VanCal has a license to use the Vanguard International trademark. Vanguard International owns at present 30% of the shares and together with the 1% shares that Ms. Pescara owns, it controls 31% of the company shares. The fluctuation in the Claimant's shares was absolutely voluntary, decreasing from an 80% in the beginning.
3. Due to reasons that are out of our reach, Vanguard's representativity in the Board of Directors diminished starting late 2003. No member of Claimant's personnel has been expelled from management. For example, in the case of Ms. Pescara, after her leaving Calpurnia, by no means has she been prevented from keeping in contact. Furthermore, there were no irregularities in the procedure or in the conduct of the board meetings. Regarding Claimant's motivation related to alleged irregularities in denying the presence of Mr. Rindler at the shareholders meeting on 16th of November 2005, it is appreciated that the Board of Directors did correctly in ruling his proxy to be unacceptable. We support this argument by adding that Mr. Rindler's proxy had not been properly certified and most of all, had only been given for a specific meeting, the one scheduled for 11th of October 2005. Therefore, Mr. Rindler had no right to attend the Board Meeting, as the proxy was intended to ensure his attendance for a specific date and has not been prolonged, as Vanguard had the right to act accordingly.
4. Claimant received the same treatment as the other shareholders, neither preferential nor of inferior quality compared to the one offer to other shareholders. Such treatment was a result of the decisions taken by the Board of Directors, decision taken in accordance with the VanCal's statute and applicable law.

The International Center for the Settlement of Investment Disputes is competent to decide its own competence

5. Article 41 of the ICSID Convention provides that the Tribunal shall be the judge of its own competence, and any objection by a party to the dispute that the dispute is not within the jurisdiction of the Center, or for the other reasons is not within the competence of the tribunal, shall be considered by the Tribunal. Article 41 does not state the applicable law for the determination of the Tribunal's competence over the dispute as opposed to those applicable to the dispute itself.

6. As the parties have not chosen the applicable law to the dispute under art. 42(1) of the Convention, the law applicable to this dispute is international law because the BIT is itself the governing law as *lex specialis* between the parties. Sharing the conclusion reached in *Azurix*, we are of view that reaching a determination on jurisdiction requires the applicability of art. 25 of the ICSID Convention, as well as the terms provided for in the Treaty.

7. Therefore, in order to establish whether the ICSID has jurisdiction in arbitrating the matter at hand, we would have to examine the provisions of art. 25 of the Convention and the provisions of the Calpurnia - Gaul BIT.

8. Recent tribunal precedents have held that contractual jurisdiction clauses do not preclude the jurisdiction of international Tribunals under an international Treaty on the grounds that they fail to recognize the *pacta sunt servanda* principle, and ignore the contract terms the parties have agreed to as well as art. 26 of the ICSID Convention "which allow the agreement to the contrary regarding the presumption that all local remedies must be exhausted"¹. Art 26 ICSID states that: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to

¹ *Compania de Aguas de Aconquija S.A. and Vivendi Universal v. Argentine Republic*(ICSID Case No. ARB/97/3) 16 ICSID Rev.–FILJ 641(2001), *Salini Costruttori S.p.A. v. Kingdom of Morocco*, (ICSID Case no. ARB/00/4), Decision on Jurisdiction, 23 July 2001, 129 *Journal de Droit International*(2002), and *Lanco International Inc. v. Argentine Republic*, Preliminary Decision on Jurisdiction, 8 December 1998, 5 ICSID Rep. 367, paragraphs. 53 and ff of Argentina's Memorial on Jurisdiction.

arbitration under this convention.” As well will further mention, Calpurnia has not made any reserves to article 26 of the Convention, therefore, the exhaustion of local remedies is not a prior condition for arbitration, being on the contrary, an obstacle for pursuing settlement before this Tribunal.

9. As stated above, article 41 of the ICSID Convention provides that the Tribunal shall be the judge of its own competence, and any objection by a party to the dispute that the dispute is not within the jurisdiction of the Center, or for the other reasons is not within the competence of the tribunal, shall be considered by the Tribunal. There, we are of view that, after examining all the arguments, this Tribunal ought to declare the lack of jurisdiction in judging the matter at hand.

Objections to jurisdiction

10. The jurisdiction of the Center is to be determined by applying article 25 of the ICSID Convention. In addition, the competence of the Tribunal is governed by the terms of the instrument expressing the parties consent to ICSID arbitration, in our case the Calpurnia – Gaul BIT. Sharing the conclusion reached in *Azurix*, we are of view that reaching a determination on jurisdiction requires the applicability of article 25 of the ICSID Convention, as well as the terms of the Calpurnia - Gaul BIT Treaty. On the other hand, art. 42(1) of the Convention, which calls for the application of domestic legislation and international law, only applies to the merits of the dispute.

11. Therefore, in order to establish whether the ICSID has jurisdiction in arbitrating the matter at hand, we would have to examine the provisions of art. 25 of the Convention and those of art. 11 of the Calpurnia- Gaul BIT.

Art. 25 ICSID states that:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State(or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

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

12. For the purpose of demonstrating the lack of jurisdiction, we will also reproduce article 11 of the Calpurnia – Gaul BIT:

Article 11 - Disputes between an Investor and a Contracting Party

1. Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment in the territory of the latter Contracting Party shall, if possible, be settled amicably.

2. If the dispute cannot be settled amicably within 18 months from the date of request for amicable settlement, the investor concerned may submit the dispute to international arbitration. The investor has the choice of submitting the case either to:

(a) the competent courts of the Contracting Party in whose territory the investment is made;

(b) The International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the “Centre”), if the Centre is available, or

(c) The Additional Facility of the Centre, if only one of the Contracting Parties is a signatory to the Convention set out in subparagraph (b) of this Article, or

(d) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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

3. An investor who has already submitted the dispute to the competent courts of the Contracting Party shall no more have recourse to one of the arbitral tribunals mentioned in paragraph 2 of this Article.

4. Neither of the Contracting Parties, which is a party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is the opposing party of the dispute, had received an indemnification covering a part or the whole of its losses by virtue of an insurance.

5. Such award shall be final and binding for the parties to the dispute and shall be executed according to national law.

14. We will proceed to demonstrate that this Tribunal does not have jurisdiction, with the following arguments: the dispute is of contractual matter, Claimant only recurring to arbitration after the expiration of the prescription term, taking advantage of the rights provided by the Calpurnia – Gaul BIT; the dispute is hypothetical; it has already been submitted to the domestic courts of Calpurnia and Vanguard International has not made attempts to an amicable settlement of the dispute, nor has it made any attempts of conciliation. Moreover, we will demonstrate that the most favored nation clause does not apply and Vanguard International cannot benefit from the shorter term provided by the Calpurnia – Flatland BIT regarding amicable settlement of the dispute.

Legal dispute

15. The dispute shall be considered legal if there are claims of restitution or damages arisen out of the violation of a previous contract, national legislation or international law. The Claimant allegedly invokes a breach by Calpurnia of the obligations owed by it to Vanguard International under the Calpurnia- Gaul BIT. We are of view that the claims pursued by Vanguard International before this Tribunal are purely contractual. As we will further expatiate, the claims pursued by the Claimant are not based on the Calpurnia – Gaul BIT.

16. A legal dispute is, in the words of the Report of the Executive Directors of the World Bank on the Convention, one that concerns “ the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation, and is more than a mere ‘conflict of interest’”².

17. Furthermore, the Respondent recalls the definition given by Prof. Schreuer that provides that a dispute is legal if “ legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed.”³ Noting that the definitions of the term ‘legal’ are not uniform, the Claimant would like to point out the definition accepted by the Permanent Court of International

² Azuriz, p 31, para. 59

³ Ch. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, Cambridge University Press, 2001, p. 105

Justice in the Mavrommatis case (Greece v. Great Britain)⁴, where the court said that a “dispute is a disagreement on a point of law or fact, a conflict of legal views between two persons” The above mentioned definition was recently confirmed in the East Timor Case and it covers all types of disputes. In order for a dispute to qualify as legal, the dispute has to be a controversy in which the Parties are in disagreement over a right.

18. In order to determine if a dispute is legal pursuant to art. 25 of the Convention, the Tribunal has to determine whether the parties have justified their claims by relying on the law and whether legal remedies are being sought. In this case, the Claimant should have justified its claims by relying on the Calpurnia – Gaul BIT. In fact, we are of view that the Claimant is using arbitration as an escape, an umbrella clause that would entitle Vanguard International to be granted compensation and restitution of dividends. Admitting that the dispute is of legal nature, the Respondent further submits that it cannot be pursued before this Tribunal, as the real claims arise out of a conflict with the major shareholders (and not the State of Calpurnia), namely out of the contracts concluded among these two parties. Even if the Claimant would argue that the contractual part is only a small part of the dispute and it amount to a violation of the Obligations provided under the Treaty, we strongly doubt that this argument could stand in this Tribunal, as the Claimant merely takes advantage of its rights under the Treaty and exploits them.

First objection: The dispute does not arise directly out of an investment

19. In order for this Tribunal to have jurisdiction over a dispute, there must be a nexus between the dispute and the Claimant’s investment in the territory of the Contracting State. Article 25(1) of the ICSID Convention extends jurisdiction to disputes “arising directly out of an investment”. In order for the directness requirement to be satisfied, the dispute and the investment must be “reasonably closely connected”⁵. Article 11 states that the parties may submit any dispute concerning the investment to arbitration.

⁴ Judgment of August 30th 1924, PCJI, Series A, No.2

⁵ Schreuer, at 114

20. In accordance with the article 1.1 of the Calpurnia-Gaul BIT, the term investment has a broad definition:

1. The term “ Investment” means every kind of asset established or acquired by an investor of one Contracting Party in the territory of other Contracting Party in accordance with the laws and regulations of the Latter Contracting Party including, in particular:
(...) b) shares, stocks, debentures or other form of participation in a company ;(...)
d) Intellectual property rights, such as (...) trade marks (...) know –how and good will (...)”

21. As the Tribunal itself indicated in Azurix, broad definitions of this kind are intended to facilitate agreement between the parties as to prevent the corporate personality from interfering with the protection of the real interests associated with the investment. The definition of investment clearly includes majority shareholders, but also minority or indirect shareholders, whether or not the latter control the company. As explained in the Goetz case, the authority to bring action granted to shareholders by the BIT seeks protection for the real investors. A similar conclusion has been reached in CMS and Enron (Additional Claim). Vanguard International’s investment falls under the definition given by art. 1.1 of the Calpurnia.

22. Moreover, the Respondent does not dispute Vanguard International’s status of ‘investor’, in accordance with art. 1.3 of the BIT, that provides as follows in paragraph (b):’ any legal person such as company, corporation, firm, business association, institution or other entity constituted in accordance with the laws and regulation of the Contracting Party and having its seat within the territory of the Contracting Party.”

23. However, the purpose of the BITs is to provide protection for real investors, that may, in case of dispute related to such treaties, choose the avenue of arbitration before the Center. And investor should not take advantage and overuse these benefits. The plea originates in the violation of the provisions of the Treaty, independently from domestic law or from contractual obligations. Even if it were considered to be a violation of the contractual obligation arisen out of the joint venture and license contracts, these violations amount to an infringement of the guarantees of the treaty. Taking into consideration this criterion, the choice of a national/local forum for contractual claims is considered compatible with the election of arbitration for purposes of the treaty.

Therefore, even if the Claimant had pursued legal action before the domestic courts of Calpurnia, it would still have *jus standi* before ICSID, regarding matters related to the BIT. However, as we will further demonstrate, there has been no prior submission of the dispute to the domestic courts of Calpurnia.

Second objection: Both parties to the dispute have given their consent to arbitration for treaty related disputes

24. The BIT embodies the expression of consent for resorting to arbitration should a dispute arise between the investor and the State with respect to the guarantees ensured under the Treaty. The Treaty is self sufficient for this purpose and the option of resorting to arbitration is solely exercised by the Claimant by the simple fact of expressing its own consent.

25. The Convention requires consent in writing from both parties to the dispute. The ICSID Convention does not stipulate a specific form that written must take. It requires only the written form without specifying the exact form that the written consent must take or to whom it must be addressed to and sent to. Both the expression of the consent in a request for arbitration or in a separate form from the request itself⁶ can validly open the way to ICSID's arbitration.

26. Just as in the case of legislative provisions for the settlement of disputes by the ICSID, a provision on consent in the BIT Calpurnia Gaul can be no more than a simple offer that requires acceptance. The BIT provision cannot replace the investors consent. The requirements in this case are fulfilled, the BIT also being between the host country and the State of the Investor's nationality.

In AMT vs. Zaire, the Tribunal said:

“In the present case, it happens that AMT (...) has opted for a proceeding before ICSID. AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the treaty creates that consent necessary to validate this assumption to jurisdiction by the Centre.”

⁶ Tokios Tokeles v. Ukraine, Decision on Jurisdiction, Case No ARB/02/18, paragraph 97-98

27. Art. 11.3 of the Calpurnia – Gaul BIT embodies the consent of the parties to the BIT – Calpurnia and the Federal States of Gaul – to the submission of an investment dispute arisen out of the violation of the above mentioned BIT to binding arbitration in accordance with the choice of a national in question, and further provides that such consent satisfies the requirement for written consent for the purposes of Chapter II of the Convention.

28. Furthermore, the open invitation provided by the parties to the BIT to investors to settle their claims, inter alia, through arbitration before ICSID tribunals, has been taken up by the Claimant by its letter containing the request for arbitration, dated July 31st 2007 to the Secretary General of the Center consenting arbitration⁷. As shown above, the filing of the request for arbitration is by itself a sufficient proof of the Claimant’s consent. Therefore, we must conclude that both an offer to arbitration, contained in art. 11.3 of the Calpurnia- Gaul BIT, as well as a valid and unequivocal acceptance of such offer, namely the request for arbitration exist; for the above mentioned reasons, we must conclude that both parties to the dispute have consented to ICSID jurisdiction. The consent, once perfected, is binding for both parties, has an irrevocable character, which may not be object to a unilateral denunciation, as provided by articles 11 of the BIT and 25(2) ICSID Convention;

29. However, regardless of accepting the existence of such an agreement, the consent is given strictly for the settlement of treaty related disputes. Consent agreements are to be interpreted neither restrictively nor extensively but in accordance with good faith and with the object and purpose of the ICSID Convention, stated in Art. 31.1 of the Vienna Convention on the law of treaties. The relevant provision notes that “A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose”. The purpose of the Treaty is that of encouraging and protecting investments and the ICSID mechanism was designed to facilitate the settlement of disputes between States and

foreign investors.⁸ The benefit of arbitration and the rights conferred by the Treaty must not be exploited. There have been cases presented before arbitral Tribunals where investors have tried to disguise their claims under the protective wing of BITs.

Third objection: The dispute is hypothetical

30. The Treaty and the Convention require that a dispute exist at the time of notification for the purposes of arbitration. No such notification was ever made to the State of Calpurnia, except for the one made after the filing of the request for arbitration, on the 31st of July 2007. Calpurnia argues the fact that Vanguard International notified it of the existence of a dispute. In fact, the Claimant only notified the VanCal shareholders, on 15th of 2005.

Fourth objection: The dispute has never been notified to the State of Calpurnia

31. First of all, as already stated, there has been no actual notification made to the State of Calpurnia or its officials. The only notification that exists is the one made by Claimant to a one of the shareholders that happens to be also a representative of the SFCDC, entity owned by the State of Calpurnia. Calpurnia considers that Vanguard International has included claims going beyond those included in the notification to VanCal shareholders.

Fifth objection: The Claimant has not pursued amicable settlement of the dispute for the required period of time

32. Under article 11 paragraphs 1 and 2 of the Calpurnia – Gaul BIT the parties to the dispute should initially seek a resolution of the dispute through consultation and negotiation and the national concerned may have recourse to arbitration, inter alia, only after 18 months from the date that the dispute arose. In fact, the Claimant has not even notified the State of Calpurnia of the existence of a dispute. The only notification by the

⁸ Report of the Executive Directors, paragraph 9, p.40

Claimant was made to the VanCal shareholders. The fact that SFCDC is a shareholder itself does not imply that the notification was aimed directly at the State of Calpurnia. Until the Claimant filed a request for arbitration before the Center, and its Secretariat announced the State of the existence of such a dispute, the State of Calpurnia was completely unaware of the existent claims and dispute.

33. Even if Claimant's letter to Poe were to be considered as a valid notification, Claimant has still not respected the 18 months period of amicable settlement provided by the Calpurnia – Gaul BIT. The letter was sent on the 5th of February 2007 and until the filling of the request for arbitration on the 31st of July of the same year, only 5 months have passed. Except for the very same letter addressed to Mr. Poe, as a member of the Board of Directors and not as a representative of the Government, Claimant has made no further attempts to contact the State of Calpurnia, its Government or any other entity related to the Government in order to friendly resolve the dispute. Furthermore, the dispute was merely internal, among the VanCal's shareholders. SFCDC and its members acted as shareholders, not as government representatives. Had Claimant wanted to notify the competent authorities of the state, he should have done this directly, not through proxies that don't have the actual obligation of transmitting a information received in another context to its superiors, superiors that have no actual connection with the activity in VanCal.

34. Furthermore, even if MFN were applicable, and Claimant would only be required to seek friendly resolution of the dispute for a two months period, article 7 of the Calpurnia – Flatland BIT would not be applicable as Flatland denounced the ICSID Convention on the 2nd of May 2003. As article 7 makes reference, inter alia, to the submission of the dispute to the ICSID Tribunals, the denunciation renders effect less the application of the mentioned article.

Sixth objection: The dispute submitted by Vanguard International has already been submitted to the domestic courts of Calpurnia under article 11 of the Calpurnia – Gaul BIT

35. This Tribunal's jurisdiction is excluded because the Claimant, Vanguard International, has already submitted this dispute to the Calpurnian domestic courts, namely to the commercial courts of the State of Calpurnia and thus exercised the jurisdictional option under article 11. 4 of the Calpurnia – Gaul BIT. Article 11 of the BIT provides us with a fork-in-the-road argument, giving the parties to the dispute several choices of fora, *inter alia*, ICSID, domestic courts, UNCTAD etc.

36. Calpurnia bases its objection on the legal actions taken before the Commercial Courts filled by Vanguard International, as well as the one pursued before the Constitutional Court filled by Vanguards representatives, Ms. Pescara and Mr. Kolowenko. Also, Calpurnia is of view that all the issues relative to the dispute between the State (SFCDC) and Vanguard International have been already submitted to the two specified courts. To the commercial court, the issues related to compensation and expropriation, as well as obstruction of returns in the form of dividends; regarding the remaining claims pursued by the Claimant before this Tribunal, they were also filled before the Constitutional Court, when the latter was asked to pronounce a decision on the illegality of the house searches and picketing, claims that in our view strongly relate to the unlawful treatment and failure to offer protection to the investment made by foreign investors, namely Ms. Pescara and Vanguard International.

37. The commercial courts fall within the definition of domestic courts given by the BIT. Ms Pescara has filled an application to order VanCal to transfer to her account the Gaul dividends on 1% shareholding. In fact, Ms Pescara should have acted as representative of Vanguard International, and not as mere nominee.

38. Furthermore, the Respondent would like to submit the fact that the legal basis of the legal action pursued before the domestic courts of Calpurnia is identical to the one brought before this ICSID Tribunal⁹.

⁹ Azurix v. Argentine decision on jurisdiction ICSID case no. ARB/01/12/

Seventh objection: The most favored nation clause cannot be invoked

39. Respondent is of view that the MFN provision does not incorporate by reference dispute settlement provisions of other treaties.

40. In *Telenor*, the Tribunal decided that the ‘most favored nation clause’ cannot be invoked in matters such as extending the jurisdiction. The same Tribunal stated four reasons, on which its decision relating to the MFN clause was based and we fully embrace the Tribunal’s appreciation.

41. Firstly, as already mentioned, according to article 31 of the Vienna Convention on Treaties, a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

42. Therefore, in the absence of language or context that would suggest the contrary, the ordinary meaning of “Investments made by investors of one Contracting Party in the territory of the other Contracting Party [...] 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 stated in article 4.1 of the Calpurnia – Gaul BIT, refers to substantive rights in respect of investments, and not to procedural rights. The interpretation must be neither extensive nor restrictive, but in good faith and in accordance with the ordinary meaning of the terms at hand¹⁰. “In these circumstances, to invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish¹¹.”

43. There are examples where the MFN clause is clearly defined, as in NAFTA, article 1103:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-

¹⁰ Ian Brownlie, p. 634

¹¹ *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Norway/Hungary).

Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. There is precedent in international arbitration that limits the application of the MFN clause. There have been several cases brought before the International Centre for Settlement of Investment Disputes (ICSID) and the International Court of Justice (ICJ) that have addressed the application of MFN treatment¹². These cases have not – with few exceptions – examined the MFN clause beyond the scope of its application to post-establishment rights. A recent case however – *Emilio Agustín Maffezini v. the Kingdom of Spain (Maffezini)* – involved the application of the MFN clause to the BIT dispute settlement mechanism. The *Maffezini* Tribunal found that the MFN clause at issue did cover procedural protections relevant to dispute settlement. However – and mostly what we considered relevant for our case – is that the Tribunal also concluded that the MFN clause could not be interpreted to apply to terms that the parties understood to be fundamental conditions of their consent to be bound by the BIT¹³. In addressing the question of whether MFN treatment applied to the procedural rights of dispute resolution, the Tribunal examined all three of the following: (i) the Treaty language¹⁴; (ii) the

¹² *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. Arb/87/3, Award of June 27, 1990, *ICSID Reports*, Vol. 4, p. 246; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000, *ICSID Review—Foreign Investment Law Journal* Volume 16, No. 1 (2001) [hereinafter *Maffezini*]; *Anglo-Iranian Oil Company Case (Jurisdiction)*, International Court of Justice, *Reports*, 1952, p. 93; *Case concerning the rights of nationals of the United States of America in Morocco*, International Court of Justice, *Reports*, 1952, p. 176; *Ambatielos case*, International Court of Justice, *Reports*, 1953, p. 10

¹³ Application of the MFN-clause in investment treaties: Replies to two questions

¹⁴ *Maffezini* paragraphs. 52-53

policies that motivated the parties during the negotiation of the BIT¹⁵; and (iii) the practice of the respondent government in concluding its BITs¹⁶.

44. Secondly, we are of view that a wide interpretation of the MFN clauses leads to the inevitable exposure of the host state, meaning Calpurnia, to undesirable treaty – shopping by the investors. Thirdly, a wide interpretation of the most favored nation clause would undoubtedly generate both uncertainty and instability. The parties to such a BIT would no longer have the certainty of their rights and obligations. Fourthly, as in the present case, the parties to each Treaty that have restricted the reference to arbitration to either specific categories of disputes or to certain procedural terms or procedures, have entered in other BITs, some of which referred all disputes, no matter the category or other prior conditions, to arbitration, it could be fairly assumed that those two specific parties to the BIT shared a common interest or intention to limit the jurisdiction of the arbitral Tribunal.

45. Therefore, opposing the Tribunal’s jurisdiction, Calpurnia advances several related arguments concerning the scope of the MFN clause. First, it contends that each MFN clause has to be considered in its own context, and that “it is not possible ‘to determine *a priori* whether a certain clause of an international treaty is subject or not to the application of the [MFN clause] of another convention of equal nature. That shall depend on what the Parties had agreed upon in each case.’”¹⁷ Second, seeking to distinguish *Maffezini*, Calpurnia submits that the MFN clause in the Argentina-Spain BIT (which referred to “all matters subject to this agreement”) is “substantially different” and broader than Article 4 of the Calpurnia-Gaul BIT.

46. In our case, Calpurnia invokes the principles of *res inter alios acta* and *ejusdem generis*, and submits that the provisions of the Flatland-Calpurnia BIT could not create rights for Gaulois investors.¹⁸

47. As shown above, we rely on the textual arguments based on the wording of the MFN clause and its place in the treaty as a whole. We have submitted that the concept

¹⁵ *Maffezini*, paragraph 57

¹⁶ *Maffezini*, paragraphs 58-61

¹⁷ *Siemens*, Decision on Jurisdiction, *supra* note 5, paragraph. 33.

¹⁸ *Id.* para. 34

of most favorable “treatment” embraced only substantive investor protections and did not extend to procedures for settling investment disputes. As Calpurnia does not have a wide history of BITs with other States, except for Gaul and Flatland, one cannot establish a general practice. Calpurnia considers efficient to make a contrast between the Calpurnia-Gaul BIT and the Flatland – Calpurnia BIT, the other investment treaty Calpurnia had entered into. The Flatland – Calpurnia BIT, which expressly include a specific reference the categories the MFN clause applies to. The failure to explicitly mention dispute settlement in Article 4 of the Calpurnia-Gaul BIT compels us to draw the conclusion that the MFN clause does not reach dispute settlement procedures.

48. Moreover, as already mentioned, the MFN clause is to be interpreted in the light of the purpose of each BIT. We can clearly note a difference in the scope and purpose of the two BITs Calpurnia entered in. On one hand, in the Preamble of the Calpurnia – Gaul BIT we can read that the parties desire to “*intensify* economic co-operation to the mutual benefit of both parties and to *maintain* (emphasis added) fair and equitable conditions for investments [...]”. This denotes that between the two countries the economic relations were not incipient, that there is a certain tradition between the two states. On the other hand, in the Flatland – Calpurnia BIT, the purpose is manifestly changed, the two Contracting Parties desiring to “develop” the relations between the two.

The measures allegedly taken by the State of Calpurnia do not amount to an expropriation

49. The Respondent will further on demonstrate that has it by no means discriminated Vanguard International or interfered in the Claimant’s investment; furthermore, the State of Calpurnia has not obstructed the transfer of returns from Vanguard’s investment. .What is more, the State has complied with its obligations under the Calpurnia – Gaul BIT, offering full protection and security as provided for in the Treaty referred to above and international law. Respondent submits that there is no proof or motive for Claimant to invoke expropriation; nor could the measures allegedly taken by the State of Calpurnia amount to an expropriation. The Claimant itself indirectly admits this, given the fact that it has not made use of the right to prompt review by a

competent authority of the State of Calpurnia, in conformity with article 6.(4) of the Calpurnia – Gaul BIT. By renouncing to such a right that he could have claimed in the light of the BIT and arisen out of an expropriation, either direct or indirect, the Claimant clearly had no claims arisen out of the BIT. It uses the expropriation as a justification of pursuing action before this Tribunal, as the actions he could have pursued before the domestic courts of Calpurnia have prescribed. There is no actual proof, no document, and no legislative act of expropriation that would indicate an action of direct or indirect expropriation. We will proceed in making clear the fact that expropriation as noted in article 6.(1) does not exist. Moreover, we will show that the State cannot be held responsible for all the charges made by the Claimant when the Claimant should have made its claims against VanCal and the shareholders that have power of decision in the Board of Directors.

Calpurnia has not interfered in Claimant’s Investment and hasn’t discriminated

50. Claimant argued that the Respondent unlawfully interfered in the Claimant’s investment. We submit that the State of Calpurnia has respected all its Conventions and Bilateral Agreements, as bound by the respective Treaties. The fact that the CCC fraction gained political power in the state of Calpurnia doesn’t indicate that there has been a change of “climate” in the country. Even though the Calpurnia – Gaul BIT was signed under a different political regime, it was totally respected under the CCC political regime.

51. The Respondent has offered full protection and security as requested by article 2 of the Calpurnia – Gaul BIT to Vanguard investment in Calpurnia. The Respondent didn’t discriminate the Claimant and offered him and its investors’ full protection and security in accordance with Art. 2 of Calpurnia – Gaul BIT.

52. The searches of Ms. Francesca Pescara’s and Mr. Kolowenko’s houses were legally conducted in accordance with Calpurnian laws. Even if there were no warrants¹⁹ issued the house searches were preceded under a “periculum in mora” – that consist in

¹⁹ 1st Round of Clarifications

risks of serious and irreparable damages for the security of Calpurnia, having more of a preventive role. The house searches had as a goal the insurance of social and economical aspects, namely the VanCal Company.

53. The searches have been made in the interest of national security because VanCal is a telecommunication company holding private and personal information of Calpurnian citizens. Furthermore, both Ms. Pescara and Mr. Kolowenko had unrestricted access to personal information, and it was a matter of public order to make sure there were no illegalities in managing such information. Respondent would like to submit the fact that the searches were conducted as a result of a anonymous tip, and had the obligation of verifying the truthfulness of the information. The tip was credible, as it provided sufficient details of mobile telecommunications procedures in general and in particular those of VanCal²⁰. Most of all in cases related to public security, fundamental right, public order, each State has the obligation to verify and ensure a safe environment for its citizens and other people living within its territory.

54. In conclusion, in order to protect Calpurnian citizens, national integrity, economical life, those searches were conducted in conformity with Calpurnian law. What is more, in every country, foreign citizens must respect the national laws of the State at matter. In our case, the Calpurnian Security Forces followed the standard procedure in conducting the searches of the two houses owned by the representatives of Vanguard International. The same treatment would have been applied to a Calpurnian person because the Calpurnian law doesn't make any discrimination related to age, sex, nationality, religion and political affiliation.

55. Francesca Pescara's home picketing was not discriminatory as the Claimant argues. The Claimant argues that the picketing was purposely made by the new political party. The five picketing were spontaneously made by Calpurnian citizens. The police estimated that there were a maximum of 50 persons per picketing. Even if there was a group of supporters of the CCC party among remonstrates, they cannot be prevented from expressing their opinions or be the instigators of the picketing. Even though they are members of CCC Women's League first of all they are Calpurnian citizens and all of

²⁰ idem

them have the freedom of expression. In conformity with 19.1 of the ICCPR, “everyone shall have the right to hold opinions without interference”.

56. Furthermore, another proof of no discrimination is the very decision of the Constitutional Court of Calpurnia that has stated there was no discrimination in the case of Ms. Pescara and Mr. Kolowenko, whose houses had been searched. Vanguard International’s applications to declare the December 2003, April 2004 and July 2004 searches unlawful and grant compensation were dismissed by the Constitutional Courts.

Calpurnia has not obstructed the transfer of returns

57. Moreover the Claimant accused the Respondent for obstructing the transfer of returns. This claim refers to the dividends owned by Vanguard International and Ms. Francesca Pescara, as shareholders in VanCal.

58. The Claimant bases this fact upon the email send by Mr. Korchnoi on 27 May 2005. In the mentioned email, the Claimant was indeed informed by Mr. Korchnoi that VanCal could not make any payment to foreign shareholders. However, this was nothing more than a problem of misunderstanding, as Mr.Korchnoi`s email was not authorized by the Board of Directors and in consequence has not produced any effects. All payments to all shareholders have been made, including to Gaulois nationals. All payments have been made to all its shareholders because there wasn’t any economical crisis.²¹ This was a problem of misunderstanding for as Mr. Korchnoi’s email was unauthorized by the Board of Directors and all payments to all shareholders have been made including to Gaulois citizens. VanCal declared stock dividends in 2004, 2005, 2006 and 2007 and these were distributed to all shareholders, including Claimant.

59. Korchnoi wasn’t authorized to take this type of decision because he was just a managing director in VanCal and a decision can be taken only by the Board of Directors, in conformity with the pre established procedures and voting requisites. VanCal didn’t make any discrimination between national and foreign shareholders; the only problem was the lack of communication between the two contracting parties.

²¹ Moot problem p. 8, 21st of February 2007 - Poe’s letter to Claimant

Claimant's investment has not been expropriated

60. Majority share ownership by individual government entities does not essentially alter the private character of a company and must be distinguished from expropriation. In our case there is no proof of the claimed expropriation or that the measures allegedly taken by the State of Calpurnia amount to a expropriation, in whichever form or way. VanCal is without reasonable doubt an independent private corporation and the current dispute arises only from the minority shareholders' discontent with the legal decisions taken by the majority shareholders, while exercising their legitimate management rights. We are of view that this dispute is solely of the competence of the domestic courts of Calpurnia and should be brought before them.

61. We would like to stress once again the fact that VanCal is not by all means government controlled. Furthermore, SFCDC exercised its rights in the Board of Directors as a mere shareholder and not as a means to implement government policy. What is more, Claimant misunderstands the number of shares held by SFCDC. In clearing this situation, we would like to submit that at least one half of the shares that Claimant counts as SFCDC's are in fact held by individual shareholders, namely Calpurnian citizens. Natural persons, more exactly farmers and workers, hold 29 % of VanCal's issued shares. SFCDC only holds 41% of the shares. Therefore, SFCDC cannot take the decisions by itself; it would need at least another 10% worth of vote in order to adopt a decision. The decision made by VanCal's Board of Directors was lawfully made, with the respect of the statute and the law applicable to the joint venture company.

62. There has definitely been no interference with the Claimant's rights as a VanCal shareholder, or any expropriation of its interests in VanCal. A finding of expropriation would involve the existence of a specific decree or legislative act, neither of which is present.

63. To better demonstrate that there has been no expropriation in the case at hand, we will reproduce the text of article 6 of the BIT:

Article 6 - Expropriation

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

2. Such compensation shall amount to the fair market value of the expropriated investment at the time immediately before the expropriation was taken or became public knowledge, whichever is earlier.

3. Such fair market value shall be expressed in a freely convertible currency on the basis of the market rate of exchange existing for that currency at the moment referred to in paragraph 2 of this Article. Compensation shall also include interest at a commercial rate established on a market basis for the currency in question from the date of expropriation until the date of actual payment.

4. The investor whose investments are expropriated shall have the right to prompt review by a judicial or other competent authority of the host Contracting Party of its case and of valuation of its investments in accordance with the principles set out in this Article.

64. We consider that Claimant is conscious of the lack of sustainability of its claims regarding expropriation. If indeed the measures allegedly taken by the State of Calpurnia would amount to expropriation, Claimant should have used its right under article 6.4 of the Calpurnia – Gaul BIT and request the prompt review by a judicial or other competent authority of the State of Calpurnia of its case regarding the alleged measure of expropriation taken by the State.

65. If Claimant would have indeed considered his interests to have been expropriated, he would have undoubtedly pursued any possible means in order to contest and revoke such decision, if any existent. Vanguard International has not made any attempts to ask the revision of the alleged measures and is now using this claim to hide its real claims under the protection of the Calpurnia – Gaul BIT.

66. A state cannot be held responsible for economical disadvantages resulting from company actions. It is this Tribunals task to deliberate in the light of the facts at issued, whether indeed Calpurnia’s conduct has crossed the line and amounted to an expropriation.

67. As direct expropriation is easily excluded, we will focus on demonstrating that there has been no indirect expropriation. By expropriation is meant the coercive appropriation by the State of private property, usually by means of individual administrative measures. According to general international law a State is free to adopt measures of expropriation or nationalization of a foreign investment in its territory.

The European Court of Human Rights — in the *Mellacher and Others* judgment of 15 December 1989 — has held that “a formal expropriation” means a measure aimed at “transfer of the property”, while “a *de facto* expropriation” occurs when a State deprives the owner of his “right to use, let or sell (his) property”. In particular the Court has found that “the contested measures which, admittedly, deprived the applicants of part of their income from the property amounted in the circumstances merely to a control of the use of property. Accordingly, the second paragraph of Article 1 applies in this instance”²². Indeed, in the *Sporrong and Lönnroth* case of 23.9.1982 the Court denied that a *de facto* expropriation had occurred because the right of property, which had lost its substance, was still existent²³. According to Brownlie (*op. cit.*, 537) “expropriation for certain public purposes, e.g. exercise of police power and defense measures in wartime, is lawful even if no compensation is payable”. A few BITs, notably those of the United Kingdom, where they provide for compensation for losses other than expropriation, however, specify that the investors shall be accorded restitutions or adequate compensation for losses due to destruction of their property by forces or authorities of either contracting State if such losses are not caused in combat action or are not required by necessity of the situation.

68. The concept of creeping expropriation/nationalization²⁴ may be distinguished from that of *de facto* expropriation. Creeping expropriations are the so-called indirect expropriations, namely measures which, even if they are not aimed at transferring

²² ECHR, Series A, No. 169, para. 44

²³ ECHR, Series A, No. 88, para. 63, As regards the jurisprudence of the Court on this point see also : *Papamichalopoulos, and Others v. Greece* (first judgment of 24.6.1993) ; *Klaas v. Germany*

²⁴ According to I. Seidl-Hohenveldern it is “fairer to the host State to designate such measures by the more neutral term ‘constructive nationalization’ ” because such a State may have acted “for bona fide reasons of social reform”.

property rights, imply an interference with the exercise of such rights equivalent to that of a measure of expropriation²⁵.

69. There is no generally accepted and clear definition of the concept of indirect expropriation. While determination of a direct expropriation is relatively straightforward to make, determining whether a measure falls into the category of indirect expropriation has required tribunals to undertake a thorough case-by-case examination and a careful consideration of the specific wording of the treaty. The provisions of the Calpurnia-Gaul Bit do not contain explicit factors that create a presumption in favor of expropriation. The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and

(iii) the character of the government action.

While none of the above factors is determinative, each plays a role in laying down a general framework for indirect expropriation determinations.

For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources.

As a general rule of international law States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a nondiscriminatory manner bona fide regulations that are aimed at the general welfare. There are no clues in our case that the Respondent acted in a discriminatory manner regarding Claimant's investment. What is more, Claimant didn't present any proof of the Respondent's lack of good faith.

²⁵ Sacerdoti, at 381