

**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 CLAIMANT**

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## 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. Alex Genin, Eastern Credit Limited Inc and Baltoil v. The Republic of Estonia. (ICSID Case No. ARB/99/2). Award 25 June 2001, 6 ICSID Reports 241.
- 2.2. Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1). 1 ICSID Reports, 337.
- 2.3. 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>.
- 2.4. CME Czech Republic B.V. (The Netherlands) v. The Czech Republic. Partial Award, 13 September 2001. Available at <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf> CMS v. Argentina.
- 2.5. Compañía del Desarrollo Santa Elena, S.A. v. Republic of Costa Rica. (ICSID Case No. ARB/96/1). Award of 17 February 2000. 5 ICSID Reports 157 (2002).
- 2.6. Československa obchodní banka, a.s. (CSOB) v. Slovak Republic (ICSID Case No. ARB/97/4). Decision on Objections to Jurisdiction of May 24, 1999, 14 ICSID Rev.—FILJ 251 (1999).
- 2.7. Generation Ukraine Inc. v. Ukraine (ICSID Case No. ARB/00/9). Award of 16 September 2003. 44 ILM 404 (2005).

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- 2.13. Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8). Decision on Jurisdiction (August 03, 2004). Available at [http://www.asil.org/ilib/Siemens\\_Argentina.pdf](http://www.asil.org/ilib/Siemens_Argentina.pdf).
- 2.14. 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).
- 2.15. 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).
- 2.16. Waguilh Elie Georg Siag & Clorinda Vecchi v. Egypt (ICSID Case No. ARB/05/15). Decision on Jurisdiction, April 11, 2007. Available at [http://www.iisd.org/pdf/2007/itn\\_siag\\_vs\\_egypt.pdf](http://www.iisd.org/pdf/2007/itn_siag_vs_egypt.pdf).
- 2.17. 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>.

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)

## STATEMENT OF FACTS

<b>Date</b>	<b>Type</b>	<b>Content</b>
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	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. Dr. Swift observed that the SFCDC did not "regard VanCal as really being a private company." 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." 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
17 February 2005	VanCal board meeting at offices of SFCDC Mr. Poe of SFCDC presided at the meeting	

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 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 of	Notice Arbitral	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 HAS JURISDICTION TO HEAR THE CLAIM:*

According to article 25 of the ICSID Convention (hereinafter the Convention) for the Center to have jurisdiction certain requirements must be satisfied:

- 1.1. The State party to the dispute and the home State of the foreign national must be **member of ICSID**. In this case, Calpurnia and Gaul respectively, have signed the ICSID Convention and deposited their instruments of ratification and acceptance “well before the dispute arose”<sup>1</sup> and to date they remain as parties to the Convention.
- 1.2. The **consent** to submit the dispute to the ICSID needs to be granted by both parties in writing but they are “free to choose the manner in which to express their consent”.<sup>2</sup> Calpurnia and Gaul signed in 1995 a Bilateral Investment Treaty (BIT) **still in force**, and according to article 11(2) of such treaty, the contracting parties gave their irrevocable consent to submit all the disputes related to investments to any of the tribunals or arbitration procedures contained in that provision, at the option of the party initiating the proceedings. Article 11(2)(b) expressly provides for the option of submitting the dispute under the ICSID Convention. This does not amount to an open invitation provided by the parties to the BIT to investors to settle their claims through arbitration.<sup>3</sup> This is an expression of consent provided by the parties to investors to settle their claims through arbitration.<sup>4</sup> When this consent was later matched by the consent of the foreign investor, by its request for ICSID arbitration, dated 31 July, 2007, the required conditions for submitting the dispute to arbitration were met.<sup>5</sup> According to the *Azurix v. Argentina* decision, the filing of the request for arbitration is by itself sufficient evidence of the Claimant’s consent.<sup>6</sup>

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<sup>1</sup> FDI Moot 2nd Clarifications of Problem, # 38.

<sup>2</sup> *CSOB v. the Slovak Republik*, par. 33.

<sup>3</sup> Rudolph Dolzer and Cristoph Schreuer, *Principles of International Investment Law*, 42.

<sup>4</sup> Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L. J., 26 June 2007, 7.

<sup>5</sup> *Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt*, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, par. 64.

<sup>6</sup> *Azurix v. Argentina*, par. 57.

- 1.3. 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. In the case at hand, Vanguard has materialized its investment through a Joint Venture company, named Vancal where it owns a significant participation. It has also provided the company with the technical assistance, trademark license and the specific know-how required to the successful development of the business. The fact that Vanguard currently holds an equity share of 30% in the capital stock of the Joint Venture does not constitute a barrier for the ICSID jurisdiction since the Calpurnia-Gaul BIT says nothing indicating that the investor in the capital stock need to have control over the administration of the company, or a majority share. Therefore and in line with the reasoning of the tribunal in *CMS v. Argentina*, it must be concluded that Vanguard has a separate and direct cause of action under the Treaty.<sup>7</sup>
- 1.4. The investor in dispute needs to be a **national of another Contracting State**. In this case, Vanguard is incorporated in Gaul (party to the Convention), meaning that in one hand, their seat of incorporation is the State of Gaul, since its principal effective management decision-making (*siège social*) come from the headquarters in Nova Parigi, on the other, there's a significant economic relationship between the corporation and the country granting the nationality.<sup>8</sup>

This situation is manifested, taking into account the nationality of the members of the board who represent Vanguard and the importance attributed to the nationality of the company given by the host State. Both Ms. Pescara and Mr. Kolowenko are Gaulois nationals and were held to unlawful investigation because of their nationalities. The representatives of SFCDC on the board noted that, “due to the existing dispute between the governments of Calpurnia and Gaul, the payment of profits to the foreign

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<sup>7</sup> CMS v. Argentina, par. 68.

<sup>8</sup> 1992 Argentina-Netherlands BIT, Article 1(b)(ii), At: Andrew T. Guzman & Alan O. Sykes, Research Handbook in International Economic Law, 220 (2008).

shareholders has been suspended for the time being”. This was a clear manifestation that the dispute initiates, on the sole excuse of the nationalities of the investors. Vanguard, as the only foreign shareholder, manifests a clear desire to take their profits back to the entity that made the real financial investment. In addition, Vanguard falls perfectly within the definition of investor contained in Article 1(3)(b) since it is a legal person constituted in accordance to the laws and regulations of Gaul and its headquarters are located in the territory of that country.

1.5. The SFCDC must constitute a **State entity** and thus the acts and omissions undertaken by it must be attributable to the host State of the investment for the purpose of determining the jurisdiction of the Centre. In this case neither the Convention nor the Calpurnia-Gaul BIT establishes guiding principles for deciding this issue. In such a situation the tribunal should look to the applicable rules of international law.<sup>9</sup> In the *Maffezini* decision, the tribunal found that the fact that an entity is controlled, directly or indirectly by the State, gives rise to a rebuttable presumption that it is a State entity.<sup>10</sup> Moreover, the same tribunal following *Brownlie*<sup>11</sup> added that notwithstanding the fact that “*the State chooses to act through a private sector mechanism, such as a corporation or some other corporate structure... it will not necessarily escape responsibility for wrongful acts or omissions*”. Consequently, when the state of Calpurnia declares that SFCDC is just exercising its legitimate management rights as the major shareholder,<sup>12</sup> what it is actually doing is hiding the implementation of government policy “behind a private corporate veil”.<sup>13</sup> Moreover this is an open contradiction with what was registered in the official board meeting minute of November 15, 2004, where Dr. Swift observed that the SFCDC did not “*regard VanCal as really being a private company*”.<sup>14</sup>

1.6. This is supported by the application of the structure and functional test derived from the articles 4, 5 and 8 of International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts. Regarding the structure of this entity, we know

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<sup>9</sup> Maffezini v. Spain, par. 76.

<sup>10</sup> Ibid., par. 77.

<sup>11</sup> Brownlie, System of the Law of Nations. State Responsibility. Part I, 1983, 135-137.

<sup>12</sup> Abstract from Respondent’ Reply to Request for Arbitration, Paragraph 7.

<sup>13</sup> Ibid., par. 78.

<sup>14</sup> Evidence/Calendar of Events, Ex# 5.

that although SFCDC seems at first sight to be a private corporation, it is 100% owned by the state of Calpurnia. With respect of the functional test, it has been proved that SFCDC responds to the interest of the diverse branches of government that appoint the members of the board.<sup>15</sup> Also the name of this entity denotes the public function and the objectives for which this entity was established. Finally, it is important to recall the universal application of the ILC Articles is provided by article 2, which defines an internationally wrongful act. In light with the aforementioned considerations, SFCDC should be regarded as an organ of Calpurnia State and therefore it must trigger its responsibility.

1.7. Many authorities states that the relevant rules of attribution as found in general international law, are reflected in the ILC's Articles on State Responsibility.<sup>16</sup> However, frequently the respondent in investments arbitrations, indicate that the ILC Articles cannot be applied, since the ILC Articles are only applicable to state responsibility between states. The ILC Articles may be applicable to investment arbitration because the Article 1 "clarifies that the ILC Articles cover all international obligations of the state, including those owed not to states, but also to other parties"<sup>17</sup>. Thus, state responsibility extends to human rights violations and other breaches of international law, where the beneficiary of the obligation breached is not a state, but an individual, or a legal entity. Consequently, there is not doubt that ILC Articles may also be relevant with respect to non-state parties."<sup>18</sup>

1.8. The dispute must be of **legal nature**. As stated in the list of the facts provided, the following acts: 1) SFCDC control of Vancal's board of directors; 2) Denial to Vancal's profits rights; 3) Privation of the representation on the board of directors; 4) Police illegal searches of Vancal's former representatives private homes; 5) Ms. Pescara (Vancal's former representative) denial of working Visa and; 6) Vancal not fulfilling its obligation

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<sup>15</sup> FDI Moot Court 2<sup>nd</sup> Clarification of Problem, #17.

<sup>16</sup> Dolzer & Schreuer p. 200.

<sup>17</sup> James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (Cambridge, Cambridge University Press, 2002) 192-3, at HOBÉR Kaj "State Responsibility and Attribution" on *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* Edited by PETER Muchlinski, FEDERICO Ortino and CHRISTOPH Schreuer, Oxford University Press 2008 Great Britain, 552-553.

<sup>18</sup> HOBÉR Kaj "State Responsibility and Attribution" on *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* Edited by PETER Muchlinski, FEDERICO Ortino and CHRISTOPH Schreuer, Oxford University Press 2008 Great Britain P.552-553

to pay the license fees for the use of the Vanguard International trade mark and other sums due under the technical assistance agreement, clearly qualify the dispute as a legal one in the terms of article 25 of the Convention: discriminated against the Claimant, unlawfully interfered in the Claimant's investment, obstructed the transfer of returns from the Claimant's investment, and failed to provide the Claimant and its investment full protection and security.

**2. OBJECTIONS TO ICSID JURISDICTION CLAIMED BY THE STATE OF CALPURNIA SHOULD BE DISMISSED:**

2.1. Respondent argues that efforts towards an amicable settlement of the dispute between Vanguard and Calpurnia should have been pursued for 18 months as required by Article 11(2) of the Gaul-Calpurnia BIT.

2.2. However, Article 11(2) is not isolated from the rest of the provision and therefore it must be read in conjunction with the precedent paragraph which informs and guides its application. This contextual interpretation has been followed in several reasoning of ICSID Tribunals.<sup>19</sup> Article 11(1) provides that any dispute...shall, *if possible*, be settled amicably. Then, article 11(2) states that “*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.*” As we can see, the wording of these provisions does not oblige the investor to wait for 18 months until being entitled to submit its claim to international arbitration. To the contrary, what the article really states is that the parties must “if possible” settle their disputes amicably. The latter makes sense since it is this the usual and recommendable way to proceed in case of a controversy. Nevertheless, the same article expressly recognized that it is not always possible to reach a mutually accepted solution and therefore it allows the investor to submit its claim to international arbitration.

2.3. A different interpretation would not be compatible with the rules of interpretation contained in the 1969 Vienna Convention on the Law of the Treaties (hereinafter Vienna

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<sup>19</sup> Ole Kristian Fauchald, The Legal Reasoning of ICSID Tribunals. An Empirical Analysis, p. 319, European Journal of International Law 19, 319 (2008)

Convention or VCLT).<sup>20</sup> Article 31(1) of this Convention provides that 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.*” The purpose of this treaty is to maintain fair and equitable conditions for investments as expressed in the preamble and to protect such investments as a mean to stimulate business activities.<sup>21</sup> If article 11 is construed as an obligation for the investor to wait until the term has elapsed, the whole object and purpose of the treaty would be violated. We should have in mind that both Calpurnia and Gaul are State Parties to the Vienna Convention.<sup>22</sup>

2.4. Even if the argument above is not accepted, it must be concluded that article 11(2) does not apply since it has been override by the application of the most favorable provision – article 7 – contained in the Flatland-Gaul BIT. Article 4 of the Calpurnia-Gaul BIT, although entitled “Treatment of Investments,” it is in fact a most favored nation clause which provides that Calpurnia will not treat investments made by investors of one contracting party (i.e. Vanguard) in any way that is LESS favorable than any treatment that Calpurnia grants to the third states. By the application of this clause, Vanguard is entitled to any protection or benefit that Calpurnia gives to Flatland through the Calpurnia-Flatland BIT.

2.5. This must be complemented with Article 13 of Calpurnia-Gaul BIT which provides regarding application of other rules, that if the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to that Agreement contain a regulation, whether general or specific, entitling investments made by investors of the other Contracting Party to a treatment more favourable than is provided for by that BIT, such provisions shall, to the extent that they are more favourable to the investor, prevail over that Agreement.

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<sup>20</sup> Article 4 of the VCLT provides that the convention applies only to treaties concluded after its entry into force on 27 January 1980, and thus it does not apply directly to the ICSID Convention. Nevertheless, VCLT provisions constituted a codification of customary international law as it was stated in *Sembra Energy International v. The Argentina Republic*, Decision on Jurisdiction of 11 May 2005, par. 141.

<sup>21</sup> Calpurnia-Gaul BIT, Preamble.

<sup>22</sup> FDI Moot Court 2<sup>nd</sup> Clarification of Problem, #32.

2.6. In this case, article 11 of the Flatland-Gaul BIT provides a more favorable provision – requiring a mere two month commitment to attempt to settle the dispute amicably. This term has been completely fulfilled since in February 5<sup>th</sup> of 2007 Vanguard sent a letter to Mr. Poe, who at the time was chair of SFCDC and thus part of the Government, claiming *de facto* expropriation by Calpurnian State entities – in violation to international obligations – demanding compensation and asking Mr. Poe to transmits these information to his superiors, including the appropriate ministers.

2.7. This is remarkable since only on July 31, 2007 the claimant requested for arbitration proceedings in accordance to ICSID rules, exceeding widely the two months demanded for the amicable procedure in the already mentioned BIT. This letter has the quality to satisfy the required amicable settlement, since the Calpurnia-Flatland BIT doesn't requires for a formal or diplomatic kind of request to set up this arrangement. Finally, is also significant that when the controversy was beginning Mr. Poe and Mr. Swift were both directors of SFCDC and Vancal boards, respectively.

2.8. Furthermore, in this particular case we have an issue related to an expropriation made by *de facto* procedures, category specifically treated in articles 5 and 6 of the above mentioned BITs. In this distinctive clauses it is recognized the right of the investor to ask for a prompt review by a judicial or other competent authority of the host contracting party that expropriates, without reference to any kind of limit to an ex post jurisdiction of an international tribunal, so as a conclusion we shall say that were the law doesn't make distinctions or differences (the BITs respectively), it is forbidden to Calpurnia, in this case, to make them.

2.9. For the reasons explained above the first objection to ICSID jurisdiction raised by the respondent must be dismissed.

**3. CLAIMANT HAS NOT PURSUED ITS CLAIMS BEFORE THE DOMESTIC COURTS OF CALPURNIA AND ACCORDING TO ARTICLE 11(3) OF THE GAUL-CALPURNIA BIT, MAY ELECT AN ARBITRAL REMEDY:**

3.1. Respondent has stated that 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 elect an arbitral remedy. Normally this has been known as “fork-in-the-road” provision.<sup>23</sup>

3.2. This objection lacks merit because article 11(3) presupposes the existence of res judicata, for which the triple identity test must be satisfied.<sup>24</sup> *“It is not necessary for present purposes to explore the distinction between “substance” and “procedure”, which is not necessarily the same as the distinction between jurisdiction or admissibility on the one hand and the merits of a claim on the other. The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute res judicata as to those merits”*.<sup>25</sup>

3.3. Ms. Pescara’s dismissed application brought before the Commercial Court of San Inocente de Irkoutsk, does not satisfy the mentioned test because there is no identity of parties. It is true that Ms. Pescara is member of Vancal’s Board of Directors, but it does not follow from this that she is representing or acting on behalf of Vanguard in this situation. Vanguard constitutes a separate legal entity and did not make any submission to local court. She has acted personally without compromising Vanguard’s access to ICSID arbitration. Moreover, there is no identity of object since Ms. Pescara’s action was simply directed to protect her interests in VanCal by transferring to her the 1% registered in her name. Nor there is an identity of subject-matter.<sup>26</sup>

3.4. Furthermore, Vanguard’s application to have the December 2003, April 2004 and July 2004, police raids declared unlawful and seek compensation for it, does not satisfy the mentioned test since there is no identity of object and neither of cause of action. This is evident if we consider the *res ipsa loquitur* principle as a pertinent criteria to solve this issue of the dispute. In fact, the already mentioned application wasn’t linked to an investment topic (identity of facts), nor to obtain a compensation related to the discriminatory and illegal treatment supported by the State of Calpurnia (identity of the issue).

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<sup>23</sup> SGS v. Pakistan, Paragraph 121, PSEG v. Turkey, Paragraph 152.

<sup>24</sup> Azurix v. Argentina, par. 88.

<sup>25</sup> Waste Management, Inc. v. United Mexican States (ICSID Case N° ARB(AF)/00/3)

<sup>26</sup> Alex Genin, Eastern Credit Limited Inc and Baltoil v. The Republic of Estonia, Award 25 June 2001, 6 ICSID Reports 241.

3.5. Regarding to these mentioned facts, we are not in front of the same disputes already judged by the Calpurnian domestic Courts, because in this case we are trying to establish the discriminatory and illegal behavior carried by the State of Calpurnia, as a whole, and neither by the VanCal's private Company nor the Police as a public entity, with the only purpose of getting a fair compensation for the national investors of the State of Gaul that by the end of 2004 had a 30% of participation in VanCal directly, considering the unjust factors what will be appointed next.

3.6. In the event that the abovementioned argument is not accepted, it is worth noting that Article 11 (3) Calpurnia-Gaul BIT has been completely overridden, by virtue of the Most Favoured Nation Clause, because in Article 7 Calpurnia-Flatland BIT this *fork-in-the-road* provision was not established at all. Ergo, applying the doctrine of the "Most Favoured Nation Treatment" (article 4 of the Calpurnia-Gaul BIT) the fact that the Gaul investors attended firstly to the domestic Courts of Calpurnia should not be an obstacle to claim to the international jurisdiction in this case.

**4. ARTICLE 4 OF THE GAUL-CALPURNIA BIT DOES EXTEND TO DISPUTE RESOLUTION MECHANISMS, SUCH AS THOSE REFERRED TO IN THE CALPURNIA-FLATLAND BIT ARTICLE 7:**

4.1. Respondent has stated that 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.

4.2. However Article 4(1) of that treaty 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 favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors of any third State, whichever is the most favourable to the investor.*" As it was mentioned above, this provision although entitled "Treatment of Investments," is in fact a most favored nation clause.

4.3. As we can see although article 4(1) does not provide expressly that dispute settlement as such is covered by the clause, its wording is sufficiently wide to reach that conclusion. This is supported by the fact that when the parties meant to provide a limitation, they did

it by expressly agreeing on article 5, which states that the MFN clause does not apply in the context of customs or economic unions, free trade areas and multilateral investment treaties (article 5(a) and (b)), and to advantages granted in taxation-related agreements (Article 5(b)). As it was found in *Siemens v. Argentina*, if it was the parties' intention to limit the content of article 4 beneath the limit of those exceptions, the term "treatment" would have been qualified. The fact that this is not the case constitutes an indication of their intended wide scope.<sup>27</sup> A similar conclusion was reached by the tribunal in the *Maffezini* decision.<sup>28</sup> In addition, the requisite with respect of the relation between the treaties is also verified since both BITs relate to the same subject-matter, namely the protection of foreign investments and the promotion of trade.

4.4. On the other hand, the considerations of public policy do not seem affected by this reasoning. A very similar situation was already ruled by an ICSID tribunal in the *Siemens v. Argentina* case.<sup>29</sup> In *Maffezini* the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. In the Tribunal's view, the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain.<sup>30</sup>

4.5. It is also important to notice that this is not to say that the Flatland-Gaul BIT should be applied as a whole and not only the provisions convenient to the Claimant. In other words, the application of the MFN clause does not necessarily entail being subject to all provisions of the Flatland-Gaul BIT.

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<sup>27</sup> *Siemens v. Argentina* par. 85.

<sup>28</sup> *Maffezini v. Spain*, par. 56. "if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle."

<sup>29</sup> *Siemens v. Argentina* par. 121.

<sup>30</sup> *Maffezini v. Spain*, par. 64

4.6. As it was found in the *Siemens* decision, such a conclusion “would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favorable to another party”.<sup>31</sup> As its own name indicates, it relates only to more favorable treatment and therefore it applies only “to the extent that the benefits are perceived to be such”. The Tribunal concludes that the Claimant may limit the application of the Chile BIT to direct access to international arbitration. Therefore, there is no further need to consider the allegations of the parties on “the fork-in-the-road provision of the Chile BIT or the nature of the jurisdictions referred to in the Treaty and the Chile BIT”.<sup>32</sup>

4.7. In light of the above considerations, the Tribunal should uphold the application of article 7 of the Flatland-Calpurnia BIT by virtue of the MFN clause set forth in article 4.

**5. *FLATLAND HAS BEEN A CONTRACTING STATE AT THE TIMES RELEVANT FOR THE JURISDICTION OF THIS ARBITRAL TRIBUNAL:***

5.1. Respondent states that 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.

5.2. However, it is incorrect for Calpurnia to argue that the Flatland BIT does not apply simply because Flatland has denounced the ICSID Convention. In fact, Article 13 of the Flatland BIT lays out the **process** for termination as well as the duration of the BIT – stating that the agreement shall remain in force for “TEN years and, thereafter, shall remain in force EXCEPT the case the case of denunciation in writing by one of the Contracting Parties one year before the *expiry* date (emphasis added).” No evidence has been proffered by Respondent that shows that Flatland at any time denounced this BIT in writing. The Flatland BIT is still in force and the use of its more favorable provisions by Gaulois citizens is still viable. Therefore the obligations and debts that arise from the Calpurnia-Flatland BIT haven’t expired at all. Flatland still compelled to the jurisdiction of the ICSID arbitration court for a period of time equivalent to 10 years, since article 13 of the Calpurnia-Flatland BIT expressly recognized that obligation. Otherwise, this

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<sup>31</sup> Ibid., par. 120.

<sup>32</sup> Ibid.

international jurisdiction will be justifying the behavior of States that are evading their compromises without any consideration to other interests such as the security that a treaty must give to the parties involved.

5.3. However, Calpurnia has misunderstood the situation. The fact that Flatland has denounced the ICSID Convention does not affect the application of the most favorable provisions of the Flatland-Calpurnia BIT. It is necessary to recall that the Flatland-Calpurnia BIT as such, has not been denounced by the parties subject to the treaty. Article 13 of this treaty, expressly provides that the BIT "shall remain in force except the case of denunciation in writing by one of the Contracting Parties". No evidence has been proffered by Respondent that shows that Flatland at any time denounced this BIT in writing and thus, it must be concluded that all the rights and obligations contained in such treaty are fully enforceable. Moreover, Calpurnia and Gaul (Vanguard is a national of this country) are members of the ICSID Convention and this is the only relevant fact that should be taken into account in relation to the ICSID membership. As we can see, there is no impediment for Vanguard to opt for the most favorable provisions contained in the Flatland-Calpurnia BIT.

5.4. Without prejudice to the latter arguments, it must be concluded that the consent given by Flatland in the arbitration clause of the Flatland-Calpurnia BIT amounts to a binding and irrevocable legal declaration of submission to arbitration under the ICSID Convention. Calpurnia-Flatland BIT was celebrated in 1992, while the Calpurnia-Gaul BIT was signed in 1995. This is remarkable since the Calpurnia-Flatland BIT represents a starting point of negotiation for Gaul. That's why the clause related to the "Most Favoured Nation Treatment" is valid even though Flatland had denounced the ICSID Convention in 2003. The weight of the authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive warranties contained in third treaties.<sup>33</sup>

6. **STATE ATTRIBUTION:** There are several reasons why it is possible to consider that The State Fund for Commerce and Development of Calpurnia (SFDCD) can be considered as part of the State and not as private organization in this particular case, especially:

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<sup>33</sup> Dolzer & Schreuer, 190-191.

6.1. **The structure of this entity:** The SFCDC is 100% owned by the State of Calpurnia. We are able to affirm that the SFCDC is part of the Calpurnian State,<sup>34</sup> in consequence their staff, VanCal directors were not civil employees. The decisions that they took in the board of directors depriving Vanguard of its rights in the company were state or governments acts that will allow us to prove how the expropriation was form.

6.2. **The functional test:** it responds to the interest of the diverse branches of government that appoint the members of VanCal's board.<sup>35</sup> Also the name of this entity denotes the public function and the objectives for which this entity was established. Considering the facts of this case, we can affirm, "that the corporate veil must be pierced when the separateness is used to evade obligations, abuse rights, or other fraudulent purposes."<sup>36</sup>

6.3. As we have seen, the universal application of the ILC Articles is confined by article 2, which defines an internationally wrongful act. It is important to note that it covers "both treaty and non-treaty obligations". The breach of the BIT by the Calpurnian government can be considered as a breach of an international obligation of the State according to this article. "This applies to all international obligations of a state no matter if they are based on treaties or customary international".<sup>37</sup>

7. **CREEPING OR CONSTRUCTIVE EXPROPRIATION:** International arbitral practice and institutions give recognition and endorse the concept of creeping or constructive expropriation as a form of indirect expropriation, or as the Calpurnia-Gaul Bit, under article 6 describes as: "[m]easures having the effect, either directly or indirectly, equivalent to expropriation or nationalization"

7.1. Hence it is accepted that a series of actions can have the same effect than a formal decree by the State. It's the effect rather than the intention through a formal procedure that

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<sup>34</sup> Article 8 of the ILC Articles reads: Conduct direct or controlled by a State. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct.

<sup>35</sup> Article 5 of the ILC Articles which provide us the functional test reads: Conduct of persons or entities exercising elements of governmental authority. The conduct of a person or entity which is not an organ of the State under article 4 by which is empowered by the law of that State to exercise elements of 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.

<sup>36</sup> HOBÉR Kaj on THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW Edited by PETER Muchlisnky, FEDERICO Ortino and CHRISTOPH Schreuer, Oxford University Press 2008 Great Britain P.557

<sup>37</sup> Ibid. p. 553

characterizes this property right taking. But it is still necessary to establish that these measures can be attributable to the State, that is, the Contracting party in the agreement, over a period of time, such is the conclusion in the case: “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**”<sup>38</sup>.

7.2. On the other hand it is indispensable that through these series of action an interference with tangible or intangible property rights is configured, though no formal transfer of property titles are needed. Also we must highlight that it is not a single action that does effectively deprive an investor from pursuing his investment project, but rather a tendency towards a definite or significant prevention of these rights. Then, the intensity of the actions can only be measured after they increasingly develop over a period of time. On this matter an UNCTAD study on taking property declares that: “The term creeping expropriation may be defined as the **slow and incremental** encroachment on one or more of the ownership rights of a foreign investor that **diminishes the value of its investment**. The legal title to the property **remains vested in the foreign** investor but the investor’s rights of use of the property are diminished as a result of the interference by the State.”<sup>39</sup>

7.3. The intention of the host State, or the manifest actions towards a certain kind of regulation isn’t relevant to construct a creeping expropriation, thus we can acknowledge a wide scope of possibilities in which the wrongful effect might be manifested, therefore it is not our responsibility to prove whether there was a legitimate intention of the state to pursue a rightful act for its population and if that action gave a subsequent benefit to the State. It is clear that a State might express openly an intention that hides the real purpose of a certain policy. In this sense *Metalclad* case has stated: “Thus expropriation... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but

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<sup>38</sup> Generation Ukraine Inc. v. Ukraine. Award of 16 September 2003.

<sup>39</sup> AUGUST Reinisch, “Expropriation”, on THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW Edited by PETER Muchlisnki, FEDERICO Ortino and CHRISTOPH Schreuer, Oxford University Press 2008 Great Britain P.427

also **covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property** even if not necessarily to the obvious benefit of the host State.”<sup>40</sup>

- 7.4. As mentioned above, the magnitude or severity of the interference, can't be a mere lose of value or a temporarily obstruction of a certain right, it must be construed as being unable to make a use of the property, as being in the presence of an incompatibility with the peaceful enjoyment of the possessions. Moreover, to determine what should be the value or what is expected to be protected, not only the loss of control is needed to be considered but also the expectation reasonably created by the Claimant bearing in mind the conditions at the beginning of the investment.
- 7.5. The adverse economic value of the investment has to be directly connected with the series of actions taken into account by the State. However, the Claimant accepts that the Calpurnian State is not obliged to act like an insurance company but cannot be irresponsible of the direct effect that their actions bring about to the investment.<sup>41</sup>
- 7.6. Market based expectations is the standard where an investor should make the calculations to witch its profits might fluctuate, outside these expectations any alteration in the value of an investment, that comes from a State measure, should be compensated. An expropriation cannot be understood, simply by the fact of a property taking, but also by the real situation in witch is left the value of the assets or shares of a company. In this position an ad-hoc UNCITRAL tribunal stated: “What was touched an indeed destroyed was the Claimants and its predecessors investment as protected by the treaty. What was destroyed was the commercial value of the investment...”<sup>42</sup>
- 7.7. We must also consider that it isn't each single action that can constitute an expropriation but the sum of them and the effect that it has over a period of time to the whole investment. This is of great significance, considering that it is very likely that each action cannot be able to have a considerable amount of interference to constitute an

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<sup>40</sup> Metalclad Corp. v. United Mexican States. Paragraph. 103, Award of September 2, 2000.

<sup>41</sup> MTD v. Chile, Award 25 May 2004, 12 ICSID Reports 6.

<sup>42</sup> CME. v. The Czech Republic, partial award, 13 September 2001, above n. 48.

expropriation. In order to have a real notion of what has occurred, the analysis of the steps that unleashed into a corrosion of the property of the investment, we must take in mind the combination of decisions and omissions that a State realizes that render into a serious damage of the investment. In the case *Tradex Hellas S.A. v. Republic of Albania*, the tribunal in accordance with this analysis declares: "...the Tribunal, therefore, has to examine and evaluate hereafter whether the **combination of the decisions and the events can be qualified as expropriation** of Tradex foreign investment in a long step-by-step process by Albania."<sup>43</sup>

7.8. Following the same interpretation, it must be added that the mere sum of each element, that constitute the expropriation is not enough, there ought to be a correlation that gives certain logic to the combination of actions perpetrated by the State. Towards these actions, there has to be a reference of time and linkage between them and the investment to establish clearly that the damage was caused by act of a State. In this way, the tribunal of the case *Santa Elena v. Republic of Costa Rica* ruled: "...a creeping expropriation is compromised of a **number of elements, none of which can – separately - constitute the international wrong**. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth... A nationalization or expropriation – in particular a creeping expropriation compromised of numerous components – **must logically be more than the mere sum of its parts...**"<sup>44</sup>

7.9. We have established the need for a series of events in a period of time, but it is crucial to determine that the interference won't necessarily be found in a certain moment, meaning that it will occur when there is an effective interference rather than in a specific moment through the chain of events that shape the creeping expropriation. This is the reasoning that the Iran-US Claims Tribunal has reached, expressing that: "The conclusion that the Claimant was deprived of its property by conduct attributable to the Government of Iran, including NIOC, rest on a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimized the existing states of affairs... **in circumstances where the taking is through a chain of events, the taking will not**

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<sup>43</sup> *Tradex Hellas S.A. v. Republic of Albania*. Para. 191, Award of 29 April 1999.

<sup>44</sup> *Compañía del Desarrollo Santa Elena, S.A. v. Republic of Costa Rica*. Award of 17 February 2000.

**necessarily be found to have occurred at the time of either the first or the last of such events**, but rather when the interference has deprived the Claimant of fundamental rights of ownership and such deprivation is “not merely ephemeral”, or when it becomes irreversible deprivation”.<sup>45</sup>

7.10. What characterizes an indirect expropriation isn't the physical taking of the property, but rather an erosion of rights associated with the exercise of the rights of property. Then the erosion of the property rights over a period of time is the way to understand how the culminating effect of the State actions as the expropriation. This erosion must be measured against the full scope of the investor's property interests, in all of its dimensions. It is critical to constitute a deprivation considering a “pack of rights” that is shaped by the whole protection granted to the investment.

7.11. According to the ICSID tribunal for the case *Generation Ukraine, Inc v. Ukraine* there is: “a plea of creeping expropriation must proceed on the basis that...subsequent acts attributable to the state **which erode the investor's rights to it's investment to an extent that is violative of the relevant international standard of protection against expropriation**”<sup>46</sup>.

7.12. To close our description we must mention which are the rights that the investor is granted protection. These are the ones granted by the Calpurnia-Gaul BIT which creates the standard of protection beneath the scope of these property rights, defined under its Article 1, the term investment means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in according with the laws and regulations of the latter Contracting Party including, in particular, though not exclusively:

- a. Movable and immovable property or any property rights.
- b. Shares, stocks, debentures or other form of participation in a company.
- c. Titles or claims to money or rights to performance having an economic value.
- d. Intellectual property.

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<sup>45</sup> Phillips Petroleum Co. v. Iran, Paragraph 100. Award of 29 June 1989.

<sup>46</sup> *Generation Ukraine, Inc v. Ukraine*. Para. 20.26 Award of September 15, 2003.

- e. Concessions conferred by law, by administrative act or under a contract by a competent authority.
- 7.13. From the Calpurnia-Gaul BIT, we are able to determine the scope of the property rights that are protected or should be actively enforced by a host State. In addition, from the international jurisprudence, we can determine the standard that the parties are due to follow to respect the obligations that come from that BIT. Repeatedly the different international arbitral tribunals contained in all aforementioned cases have reached a consensus over certain elements that should constitute a creeping expropriation, which are:
- a. Series of acts attributable to the state over a period of time.
  - b. No formal transfer of property is needed.
  - c. The intention of the State is irrelevant; the effect on the investor is the main criterion.
  - d. There must be a severe or unreasonable interference of property rights.
  - e. Combined number of elements, none of which can be analyzed by itself, but should be analyzed as a series of acts, to constitute an international wrong.
  - f. Substantial loss of value or control, to a point of being useless the right of property.
  - g. To establish the exact moment of the expropriation, the time when the interference has deprived the claimant of the fundamental rights has to be found.
  - h. The erosion of rights characterizes the expropriation.

**8. *THE CLAIMANT'S INVESTMENT HAS BEEN EXPROPRIATED AND THE RESPONDENT FAILED TO TREAT SUCH INVESTMENT IN ACCORDANCE TO INTERNATIONAL LAW:*** The Claimant considers that the overall effects of these acts become expropriatory:

**8.1. The right to use and enjoy the dividends that the company distributed in 2005, 2006 and 2007:**

8.1.1. On March 10<sup>th</sup>, 2005, VanCal's board of directors, composed mainly by SFDCD directors decided to suspend the dividends payment to their foreign shareholders,

this is clearly a breach of article 8 of the Calpurnia-Gaul BIT. On the 21<sup>st</sup> of May 2005, Claimant wrote a letter to Mr. Korchnoi asking to deposit in a separate bank account the payable amount of the dividend. On May 27<sup>th</sup>, 2005 Mr. Korchnoi sent an email to the Claimant informing “...*due to decision and instruction of the board of directors, VanCal cannot pay any sums of money for any reason to foreign shareholders*”. It is important to consider that VanCal declared cash dividends in 2005, 2006 and 2007, paying those dividends to local shareholders, but refusing to pay them to the Claimant. The interference with the property rights is related only with the use and enjoyment of the dividends, It is uncertain also the date that the claimant will be able to use its dividend.

8.1.2. The decision of the board, to suspend the payment of dividends only to foreign shareholders, is a discrimination against Vanguard that is a breach of Article 4 (1) Calpurnia-Gaul BIT: “Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or returns related thereto, shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors of any third State, whichever is the most favourable to the investor.” As Article 1(2) of Calpurnia-Gaul BIT provides, the term “Returns” means the amounts yielded by investments and in particular, though not exclusively, shall include profits, dividends, interest, royalties, capital gains or any payments in kind related to an investment.

## **8.2. The right to participate in the day –by- day management of the company.**

8.2.1. The climate of hostility toward Gaulois citizens, forced Vanguard to expatriate its personnel, including Ms. Pescara (Vancal’s managing director) and Mr. Kolowenko (chief technical officer). Moreover, Dr. Swift VanCal’s director and SFCDC director, on the 26th of November 2005 stated that the “MAIN objective of the company is to protect the interests of the country”. Mr. Swift resolved in a bad way the conflict of interest that was affecting him at that time. This kind of declaration affects the commercial value of the company, since the main objective of any private company in the world is to make profits to their shareholders and not to serve political objectives.

8.2.2. Vanguard personnel had been investigated and harassed by the Calpurnian police on December 2003, June 2004, July 2004, they searched their houses accused them of espionage, seized their laptops, and several storage media, along with unlicensed telecommunication devices. These acts also constitute an open violation to full and constant protection and security, expressly recognized in Article 2 Calpurnia-Gaul BIT. This principle includes both protection against physical violence and harassment and legal protection.<sup>47</sup> When a public authority acts beyond the scope of the legal powers under domestic law, doesn't create immunity from legal consequences, moreover it constitutes a basis for international responsibility for the State. Arbitral jurisprudence and the majority of writers support the rule that states may be responsible for *ultra vires* acts of their officials committed within their apparent authority or general scope of authority. An act of a police officer, in fact carrying out a private policy of revenge, but seeming to act in the role of police officer to the average observer, would be within the category.<sup>48</sup>

8.2.3. On the 17th of February 2005, the VanCal board meeting took place at SFCDC offices, where Dr. Swift proposed, “the minimum amount of the legal dividends be paid to the shareholders and the balance be appropriated for purpose of creating a reserve fund for severance pay”. This uncovers public policy which is to redistribute the benefit of the company with the workers instead of the shareholders. Also it is irregular to celebrate a board of directors meeting in the controller's office and it should have taken place in the company's office.

8.2.4. On September 2004, Ms. Pescara's application for the renewal of her “three year business visa” was denied; the authorities only gave her a tourist visa. On the 23<sup>rd</sup> of October 2006, Claimants participation on the board ended completely when it withdrew its representatives, declining to replace them.<sup>49</sup>

8.2.5. As we have seen, due to the measures taken by the board, the police and customs, their representatives weren't allowed to participate in the company. It is impossible

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<sup>47</sup> Dolzer & Schreuer, 149.

<sup>48</sup> Ian Brownlie. Principles of Public International Law. Oxford University Press. (2002), 453.

<sup>49</sup> Evidence/Calendar of Events, Ex# 19.

to participate in the day-by-day management of a company, if the public authorities and the controller, use all of their resources to prevent the legitimate exercise of the other investor's rights.

8.2.6. Article 4 of Calpurnia-Flatland BIT provides that subject to its laws, regulations and policies relating to the entry of aliens, each Contracting Party *shall* grant temporary entry to citizens of the other Contracting Party, employed by a subsidiary or affiliate, in a capacity that is managerial or executive. That was the case of Ms. Pescara and Mr. Kolowenko.

8.2.7. The control and the management rights have a value in the market, it is easy to observe these when a company takes the control of another company, paying overprice for the shares. Now it is easy to understand why the SFCDC gave the withholding tax to those shareholders who yielded their political rights. Claimant lost these rights when the Calpurnian entities deprived them of the use of their legitimate shareholder rights.

### **8.3. The right to have information about the investment.**

8.3.1. On December 1<sup>st</sup> 2005, Dr. Jonathan Swift, the government-employed chairman of VanCal's board of director, instructed Mr. Korchnoi to cease sending accounts, financial statements or any other information about the company to Gaulois citizens or translating such material into Gaulois language, as had been the regular practice.

8.3.2. Financial information has a value in the market and the board of directors is depriving Vanguard of it. This kind of decision clearly harms Vanguard investment in terms that they are not able to evaluate the actual value of the company. These decisions don't allow Vanguard to sell their shares of the company, since they won't be able to know what a fair price is for them.

### **8.4. The right to have an equal taxation treatment.**

8.4.1. Calpurnian state agency SFCDC offered to individual shareholders a withholding tax of 20% of VanCal's dividends, in return of their 22% political rights in the Company, while the price of the shares remained unpaid. This allows the SFCDC to

control VanCal, with 52% of the votes. It is clear that the Calpurnian Government is buying shares using an undercover strategy to control the company. Trying of course to avoid the public appearance of these transactions.

8.4.2. The National stockholders increased their profit over the investment compared with the Claimant, only because of this benefit. This is also detrimental for the Claimant because it alters the market conditions to compete for the control of the Company.

8.4.3. These acts also constitute a clear violation to fair and equitable treatment, expressly recognized in Article 2 Calpurnia-Gaul BIT. As in *MTD v. Chile* defines, "...fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conduced to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement "to promote", "to create", "to stimulate" – rather than prescription for a passive behaviour of the State or avoidance of prejudicial conduct to the investors".<sup>50</sup>

## **8.5. The right over license and know-how**

8.5.1. It is proof of bad faith of the administration that VanCal declared cash dividends in 2004, 2005, 2006 and 2007, and failed to pay license fees for the use of the VANGUARD INTERNATIONAL trade mark and other sums due under technical assistance, considering that the Respondent is using the trademark right now.

8.5.2. It is important to remark that between 1997 and 2004 the Claimant played a major role in the management of VanCal, providing management skills and personnel. Since that date, SFCDC took control of the know-how.

## **8.6. The right to pursue a Project**

8.6.1. SFCDC used the legitimate rights that the Calpurnian corporate law grants as a shareholder nevertheless the Claimant affirms that the state is abusing of its rights, avoiding the claimant right to pursue his project. As in *AMCO v. Indonesia*<sup>51</sup> the

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<sup>50</sup> *MTD v. Chile*, Award 25 May 2004, 12 ICSID Reports 6

<sup>51</sup> *AMCO Asia v. Indonesia*, 1 ICSID Reports, 337 at 490 &493

Tribunal stated: “*has even determined that good faith is a principle upon which an investor could base its Claims. The Tribunal concluded that an investor should be entitled: “to realize the investment, to operate it with a reasonable expectation to make profit, and to have Benefits of the incentives provided by law” without suffering the arbitrary exercise of a right which would prevent such enjoyment*”.<sup>52</sup>

The Article 27 of the Vienna Convention on the Law of Treaties reads: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46”.

8.6.2. The *intensity* required for this acts to consider that a measure frustrate a project is described in PSEG v. Turkey “...*there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.*”<sup>53</sup>”

8.6.3. Considering that the Claimant has been deprived of the rights already described, we are able to affirm that Vanguard was unable to pursue the project that any reasonable investor deserves. The “standard” project for a 30% shareholder is the use and enjoyment of the dividends and the right to participate in the day-by-day operations as it was proved the Claimant was unable to pursue its original project. The conduct of the State as an investor using the rights that the corporate law grants has emptied value of its investment in VanCal.

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<sup>52</sup> WEILER Todd, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May, 2005 P. 720

<sup>53</sup> PSEG v. Turkey, ICSID 2007, para. 278.