BUSTAMANTE

IN THE ARBITRATION UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, AND THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA AND THE GOVERNMENT OF THE FEDERATED STATES OF GAUL ON THE PROMOTION AND PROTECTION OF INVESTMENT IN THE MATTER BETWEEN

VANGUARD INTERNATIONAL
(CLAIMANT/THE INVESTOR)
V.
THE GOVERNMENT OF CALPURNIA
(RESPONDENT)

ICSID CASE NO.ARB/X/X

THE GOVERNMENT OF CALPURNIA
(MEMORANDUM FOR THE RESPONDENT)

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Acronyms

- BIT Bilateral Investment Treaty
- ICSID International Convention on the Settlement of Investment Disputes
- MFN Most Favored Nations
- SFCDC State Fund for Commerce and Development in Calpurnia
- VCLT Vienna Convention on the Law of Treaties

List of Authorities

1. Andrew Newcombe, The boundaries of regulatory expropriation in international law (ICSID Review, Foreign Investment Law Journal, Volume 20 Number 1, Spring 2005)

2. C.Schreuer, Protection against arbitrary or discriminatory measures (Transnational-Dispute-Management) April 2008

3. Emmanuel Gaillard, Establishing jurisdiction through a Most Favored Nation clause (New York Law Journal, Volume 233 Number 105, June 2005)

4. M.Sornarajah, The international law on foreign investment, Cambridge University Press, 1994

List of legal sources

I. Treaties and Laws

1. The Convention On the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention)
2. The Bilateral Investment Treaty between the Government of the Republic of Calpurnia and the federated State of Gaul on the promotion and protection of investment (Calpurnia-Gaul BIT)
3. The Bilateral Investment Treaty between the Government of the Republic of Calpurnia and the Government of the State of Flatland on the promotion and protection of Investment (Calpurnia-Flatland BIT)
4. The Vienna Convention on the Law of Treaties 1969.

II. Cases

1. *Emilio Augustine Maffezini V. Kingdom of Spain,* ICSID case No. ARB/97/7, Award, 25 January 2000
2. *Enron Corporations and Ponderosa Assets LP V. Argentine,* ICSID case No. ARB/01/3, IIC 92(2004), Decision on Jurisdiction, 14 January 2004
3. *Plama Consortium Limited V. Bulgaria,* ICSID case No. ARB/03/24, IIC 189(2005) Decision on Jurisdiction, 08 February 2005
4. *Salini Construttori SPA and Italstrade SPA V Jordan,* ISCID case No, ARB /02/13, Decision on jurisdiction, 15 November 2004
5. *Sempra Energy International V. Argentine Republic,* ICSID case No.ARB/02/16, Award, 28 September 2007
6. *Too V. Greater Modesto Insurance associates,* 23 Iran- United States Claim Tribunal, Award, 29 December 1989

- Statement Of Facts

1. The Respondent (the state of Calpurnia) is a signatory of the International Convention on the Settlement of Investment Dispute between states and nationals of other states (ICSID Convention).
2. The Respondent has concluded two BITs. With the federated state of Gaul in 1995 and another with the government of the state of Flatland in 1992.
3. Both Gaul and Flatland were signatories of the ICSID Convention. However, Flatland denounced from ICSID on May 2, 2003.
4. On 14 June 2006, one of the claimant's representatives, Ms. Pescara, brought an application to the domestic commercial court of San Inocente de Irkoutsk.
5. The Claimant brought an application to the domestic Constitutional Court of Calpurnia concerning the December 2003, April 2004 and July 2004 searches of the private houses of Ms. Pescara and Mr. Kolowenko.
6. In the years December 2004 and December 2005 Calpurnian firms, banks and companies held 41%, foreign companies held 30% and natural persons held 29% of VanCal's issued shares.
7. A purchase /agency agreement was concluded between Calpurnia and individual farmers and workers who together owned 29% of VanCal's present account. The agreement was to transfer voting rights of the individual shareholders to SFCDC.
8. VanCal declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders including the claimant.
9. On 15 November 2004 VanCal board accepted Ms. Pescara's resignation as managing director after thanking her for her efforts during several years of service.
10. On 5 October 2005 proxies were issued for the October 11, 2005 meeting. However, the October 11 meeting was not conducted and was postponed for November 16 2005.
11. On 16, November 2005 by the majority vote of the shareholders meeting present at that meeting, Ms. Pescara was voted off from the board of directors after accepting the gratitude by the board for her service.
12. The claimant withdrew its representatives from the board of directors via e-mail on October 23, 2006 and declined to replace them by another person.

13. On 11 November 2006, Dr. Swift sent e-mail to Claimant suggesting that the resignation be withdrawn and new directors designated.
14. On 7 December 2003 and 3 June 2004 under suspicion of unlawful data collection and espionage Calpurnian security forces searched the private homes of Francesca Pescara and David Kolowenko. During the 7 December 2003 search unlicensed telecommunication devices were seized.
15. On June 15, 2004 Calpurnian security forces were called to seize stolen data hidden at the homes of Francesca Pescara and David Kolowenko.
16. The 7 December 2003, the 3 June 2003 and the 15 July 2004 police searches were conducted based on an anonymous tip from private individuals.

I. <u>Submissions on Jurisdiction</u>

17. Under the Calpurnia-Gaul BIT it was agreed that an investor from another contracting state should first try to resolve investment disputes amicably and wait for 18 months, which starts to be counted from the date of request to amicable settlement before submitting any of its claims to the competent arbitral tribunals.[1]To the contrary, the Claimant has never tried to resolve the dispute amicably and brought its claims to this tribunal without considering the obligation to comply with the 18 months consultation period.
18. The implication of this consultation period is that the arbitral tribunal will have no jurisdiction to decide up on the merits of the case before the expiry of this period. Therefore, it is clear that a failure to comply with a consultation period requirement is a bar to the jurisdiction of this tribunal. This same approach was followed in the *Enron corporation assets, LP V. Argentine republic* case whereby the tribunal stated that,

    . . . [s]uch requirement, in the view of the tribunal, is very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction . . . .[2]
19. Additionally, the Claimant has pursued its claims before the domestic courts of Calpurnia. One of the Claimant's personnel, Ms. Pescara has brought the matter to the attention of the Commercial Court of San Inocente de Irkoustk.[3] Hence it was up to the Claimant to pursue this claim to the end and according to Article 11(3) of the Calpurnia-Gaul BIT the Claimant shall no more have recourse to an international arbitral tribunal.
20. The Claimant is arguing that it should not be required to wait for the 18 months waiting period since there is a shorter consultation period under the Calpurnia-Flatland BIT based on the MFN provision found in the Calpurnia-Gaul BIT. But it is the respondent's submission that the MFN clause under Article 4 of the Calpurnia-Gaul BIT does not extend to dispute resolution mechanisms such as those referred to under Article 7 of the Calpurnia-Gaul BIT. The respondent for its submission relays on the Tribunals award in the case of *Maffezini V Spain* [4] in which the tribunal has stated: "a distinction has to be made between

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[1] Article 11(1) and (2) of the Calpurnia-Gaul BIT
[2] *Enron Corporation and Ponderosa Assets LP V. Argentina*, ICSID Case No. ARB/01/3, IIC 92(2004), Decision on Jurisdiction, 14 January 2004
[3] Calendar of Events-June 14, 2006
[4] *Emilio Augustine Maffezini V. Kingdom of Spain,* ICSID case No. ARB/97/7/, Award, 25 January 2000 Para. 63

the legitimate extension of rights and benefits by means of the operation of the [MFN] clause on the one hand, and disruptive treaty shopping that would play havoc with the policy objectives of the underlying specific treaty provisions, on the other hand." Therefore, even assuming that the MFN clause could, in theory, apply to dispute settlement provisions it is subject to overriding police considerations as recognized by the ICSID tribunal in the *Maffezini* case. In particular a Most- favored nation clause cannot override the clear intent of the parties with respect to jurisdiction as expressed under Article 11(2) of the Calpurnia Gaul BIT.

21. This Arbitral tribunal in the *Salini V Jordan* [5] case has also ruled that, the MFN clause did not apply to dispute settlement arrangements on the basis of the specific language of that clause. The tribunal observed that ". . . bilateral investment treaties carry varying provisions that address [the issues of MFN regarding dispute settlement.] Some of those treaties provide expressly that the Most-Favored-Nations treatment extends to the provisions relating to settlement of dispute . . . . In other treaties, the MFN clause does not contain such a provision but refers to 'all rights' contained in the agreement or 'all matters' subject to the agreement . . . ."
22. Article 4(1) of the Calpurnia-Gaul BIT does not contain any wording extending its scope of application to dispute settlements. It does not also envisage 'all rights' or 'all matters' in the agreement. Additionally, the Claimant has submitted nothing from which it might be argued that the common intention of the parties was to have the MFN clause apply to dispute settlement mechanisms.
23. All the above submissions show that the question as to the applicability of MFN clause to dispute settlement arrangements is chiefly determined by the language of the clause.[6]Due to the above stated reasons Article 4 (1) of the Calpurnia- Gaul BIT does not apply insofar as dispute settlement clauses are concerned.

[5] *Salini Construttori SPA and Italstrade SPA V Jordan,* ISCID case No, ARB /02/13, Decision on jurisdiction, 15 November 2004.

[6] Emmanuel Gaillard, Establishing Jurisdiction through a Most-Favored-Nation clause, 05 New York Law Journal 233(2005)

24. Similarly, in the *Plama V. Bulgaria*[7] case the tribunal in line with its award in the *Salini* case stated that ". . . MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty unless the MFN provision in the basic treaty leaves no doubt that the contracting parties intended to incorporate them" Therefore, since the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed and the contracting parties, Calpurnia and Gaul, did not intend to extend the dispute settlement provisions through MFN, the claimants argument is not tanable.
25. Alternatively, even if it is said that MFN provisions do extend to dispute settlement mechanisms, the interpretation of MFN clauses should also be in line with general treaty interpretation principles. Accordingly each MFN clause should be interpreted in accordance with the principles of treaty interpretations found in international law. In particular, applying the Vienna Convention on the Law of Treaties (VCLT) of 1969 should be a starting point. Article 31 of the treaty states that every provision of a treaty should 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 light of its object and purpose.
26. With the above guidance, the 18 months consultation period under Article11 (2) of the Calpurnia-Gaul BIT has its own purpose. If the contracting parties had the intention of incorporating a shorter consultation period, they could have done so. However, even if there were a shorter consultation period (2 months) that could be found in the BIT between respondent and Flatland, this should not be extended by way of MFN to the present dispute. This is because the 18 months consultation period is a deliberate one, which is clear from the fact that the Calpurnia-Flatland BIT was concluded in 1992. Whereas the Calpurnia-Gaul BIT was concluded in 1995. If the parties to the latter BIT have the intention of providing a shorter consultation period it was possible. But the 18-month requirement is an intentional one and it has its own purpose.
27. Therefore, trying to extend the two-month consultation period under Article 7of the Calpurnia-Flatland BIT by way of MFN clause to this dispute is to override the clear

[7] *Plama Consortium Limited V Bulgaria,* ICSID case No, ARB/03/24 IIC 189 2005, Decision on Jurisdiction, 08 February 2005

intention of the contracting parties to the Calpurnia-Gaul BIT, whom has taken the 18-month consultation period as one condition for the acceptance of the BIT.

28. Even if it could be said that the Claimant can make use of the shorter consultation period under Article 7of the Calpurnia-Flatland BIT, there was still no attempt to resolve the existing dispute within the two months, as required by the Article, before bringing the claim to the attention of this arbitral tribunal. More importantly, Flatland is no more a member of ICSID[8] at the time relevant for the jurisdiction of this arbitral tribunal. Therefore establishing the ICSID jurisdiction based on the BIT between Calpurnia and Flatland is not appropriate.
29. The other point worth mentioning is with respect to the inclusion of the fork-in-the-road provision in the Calpurnia-Gaul BIT. It has been stated that an investor who has already submitted its case to the competent domestic court of the other contracting party shall no more have recourse to an international arbitral tribunal.[9]
30. The Claimant is arguing that despite the fact that there is such a requirement under the Calpurnia-Gaul BIT it should be allowed to make use of a the Calpurnia-Flatland BIT which does not contain a fork-in-the-road provision. But it is clear and logical that MFN clause shall not override the express choice of dispute resolution procedure embodied under Article11 of the Calpurnia-Gaul BIT.
31. As it is stated before, the inclusion of the fork-in-the-road provision under the Calpurnia-Gaul BIT is intentional. Therefore, since the MFN clause should be read as referring only to matters of substantive investment protection and not to procedural or jurisdictional questions, the respondent strongly argues that the claimant should not be allowed to make use of the MFN clause beyond what was intended under the Calpurnia-Gaul BIT.
32. Alternatively the respondent herein below presents its submissions if this arbitral tribunal finds it has jurisdiction to decide on the merits of the case.

[8] In the Hypothetical case, Footnote No.1
[9] Article11 (3) of Calpurnia-Gaul BIT

II. Submission on the Merits

A. The respondent has not interfered in the claimant's investment

33. The claimant is arguing that the respondent has interfered in its investment through the instrumentality of the SFCDC. However, such argument is erroneous due to the fact that SFCDC is an individual shareholder investing in Vanguard by owning the majority share of the Company. The mere fact that the government owns SFCDC does not mean that the government will get involved in the claimant's investment in the sense the claimant is alleging. All of the actions of the SFCDC, which are alleged to be cases of interference by the government, were lawfully conducted in accordance with the rights that SFCDC has in the company as any other shareholder.
34. The decisions, which are alleged to be manifestation of the government's interference and are said to be made by SFCDC are decisions reached through the normal lawful path of decision making of the company. In addition the decisions were not made by SFCDC as alleged rather they were made by the shareholders and the board meetings as any other decision of the company.
35. As to the allegation of the claimant the other action that is said to be another manifestation of the respondent's involvement in to the claimant's investment is concerning the police searches conducted in the private homes of Ms. Pescara and Mr. Kolowenko. These searches, however, cannot be regarded as interference by the respondent in to the claimant's investment due since they were conducted based on the police power of the state following anonymous tips about unlawful data collection and espionage and; more importantly the searches were made against private individuals, not on the claimant's investment.
36. The other allegation by the claimant that, the respondent has interfered in the claimant's investment in the election of members to VanCal's board of directors is totally erroneous. The government of Calpurnia did not by any means involve itself in the elections. In addition "Ms. Pescara was voted off from the membership of the board by the majority vote of the shareholders present at the meeting"[10] Therefore, it was the company's affair made by the company itself. In addition the two proxies held by Mr. Rindler were found not to be formally valid by the shareholders since they were accepted for the 11 October

[10] Calendar of events November 16,2005

2005 meeting not for the 16 November 2005 meeting. In this decision too we cannot find any government involvement, which can be characterized as interference by the respondent state.

B. The respondent has by no means discriminated against the claimant's investment.

37. The alleged discriminatory acts were said to be done by SFCDC, a shareholder, and not the respondent as such. For the respondent to be held liable for discriminating against the claimant, it should be shown that the respondent has involved itself in all the alleged acts. The primary criterion for discrimination under a treaty clause protecting the investor against arbitrary or discriminatory treatment is whether the investor has, infact, been treated less favorably than other investors, especially on the basis of nationality.[11] Therefore, the claimant's contention that the respondent has involved itself indirectly through the SFCDC is a mere allegation that is not based up on the true facts of the story since SFCDC as a mere a shareholder could not be used as a means of interference.
38. The opinion forwarded by SFCDC representatives at the board meeting[12] is by no means attributable to the respondent. The SFCDC representatives were merely expressing their personal views, and the mere fact that such opinions were aired does not mean that the board reached at a decision which is not consistent with the claimant's expectation.
39. No discrimination was made regarding the payment of dividends. VanCal has declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders including the claimant. Secondly, the allegation by the claimant that crediting dividend at the claimant's account in VanCal's books amounts to discrimination should be unacceptable because VanCal's articles of association does not expressly prohibit this way of issuing dividends. Moreover the crediting was done based up on the request by the claimant itself.[13]
40. All the above claims by the claimant are mere dissatisfactions with other shareholders and the company itself. The claimant could not also show how the respondent is involved in the company's affairs and accordingly interfered in the claimant's investment. Therefore, there

[11] C.Schreuer, Protection against Arbitrary or Discriminatory Measures, TDM, April 2008 (To be published in: The Future of Investment Arbitration, R.P. Alford and C.A Rogers, eds.)
[12] Calendar of Events-March 10,2005
[13] Calendar of Events- May 21,2005

is no action on the part of the respondent that amounted to unlawful interference in the rights of the claimant as a shareholder.

41. The claimant has also alleged that the respondent has acted indirectly through the instrumentality of the SFCDC. The respondent wants this arbitral tribunal to note of the fact that SFCDC is merely an individual government entity that took part in the establishment of the joint venture as any other shareholder. The allegation is a mere dissatisfaction with the SFCDC for the later is exercising its legitimate management right as a shareholder.
42. Additionally, it was alleged by the claimant that SFCDC implemented a series of decisions that effectively deprived the claimant of the use and benefit of its 31% interest in VanCal. But, in the first place, these decisions were not made by SFCDC and the board made the decisions in a lawful manner. Therefore as far as this is not an investor-state dispute it should not be within the jurisdiction of this arbitral tribunal. The alleged dispute should be resolved through the company's dispute resolution mechanism.
43. The other allegation is regarding the police searches and the press releases that the claimant regards as being interference in its investment. The respondent wants to underline on the fact that these were done since it was the job of the police and more importantly it was within the police power of the state.
44. The police searches of the private homes of Ms. Pescara and Mr. Kolowenko[14] were conducted lawfully on legitimate grounds and for national security purposes. The respondent wants to emphasize on the fact that the searches were directed against private individuals and not against the respondent. The claimant therefore lacks the standing to bring such claim.
45. These searches, which were conducted based on credible tips, were also fruitful in their findings as it is shown below.

(i) The December 7, 2003 search, which was conducted based on suspicion of collection of unlawful data and espionage, resulted in a finding of unlicensed telecommunications devices and several storage media devices.[15]

(ii) The July 15, 2004 search which was conducted based on a call to seize stolen data

[14] Calendar of Events-December 8, 2003, June 4,2004 & July 17,2004

[15] Calendar of Events- December 8, 2003

hidden at the homes of Vanguard international employees, Francesca Pescara and David Kolowenko, resulted in a finding of the said data.[16]

46. The Calpurnia Security directorate press releases were based on the above lawful searches. These press releases show the reality on the ground and nothing untrue could be found in it. These factually accurate press releases were made for national security purposes and the respondent should not be accused for such an act. Additionally the respondent should not be held responsible for any misinterpretation of the releases by ordinary individuals.

C. The respondent has discharged its obligation of providing fair and equitable treatment and full protection and security to the claimant's investment

I. Provision of full protection and security.

47. The respondent strongly argues that there is no action or omission on its part that amounts to a failure to give protection and security to the claimant's investment. Rather the respondent has fulfilled its treaty commitment under Article 2(2) of the Calpurnia-Gaul BIT.

48. Under Article 11(2) of the Calpurnia-Gaul BIT, the claimant is entitled to initiate proceedings by itself before any of the arbitral tribunals, including an ICSID tribunal. The existence of such provision in the BIT is a major step that has been taken to ensure the protection of the foreign investor by enabling him to have direct access to a neutral forum for the settlement of disputes that could arise between the investor and the host state.[17] Therefore, a major step could be said to have been taken towards the protection of the claimant's investment.

49. The allegation that the climate of hostility toward Gaulois nationals, more particularly the 'unlawful' police searches forced the claimant's personnel to leave the country in untrue. This is because, first, the police searches that were called 'unlawful' were in fact lawful ones. The searches were based on credible anonymous tips whereby it seems that the tipster had an ample knowledge of what Vanguard was up to.[18] These searches also ended up by seizing some unlicensed and unauthorized materials and data at the homes of the claimant's

[16] Calendar of Events- July 17,2004

[17] M. Sornarajah, (1994), The international Law on foreign investment, Cambridge university press, p.265

[18] Clarification No. 1 on No. 20

personnel. Therefore the lawfully conducted police searches should not be taken as amounting to a failure to provide full protection and security to the claimant's investment.

50. The other allegation regarding the failure to protect the goodwill of the claimant as a result of the press releases could by no means be related with the respondent. It would have been a genuine allegation had the press releases been based on false information. Therefore, as far as the press releases were factually accurate, the respondent should not be held responsible for any other misinterpretation of such releases by ordinary individuals.
51. The respondents' refusal to take action with respect to the picketing has also no relation with the obligation of providing full protection and security. This is because the picketers were, among others, individuals who were exercising their constitutional right of freedom of speech on a public property. Therefore, the police had no any legal basis to stop the picketing and this does not amount to a breach of the treaty obligation.

II. Provision of fair and equitable treatment.

52. This arbitral tribunal applies the provision of the BIT concluded between the respondent and Gaul, where it is necessary. Article 2(12) of the Calpurnia-Gaul BIT establishes an obligation on the part of the respondent to treat investments of investors fairly and in an equitable manner. This tribunal should interpret the Article containing 'fair and equitable treatment' standard based on the normal cannons of treaty interpretation as contained in Article 31 and 32 of the Vienna Convention on the Law of Treaties, which is binding on the parties to the BIT. Hence the Article of fair and equitable treatment should be interpreted autonomously taking in to account its text, according to its ordinary meaning, object and purpose of the BIT and based on international law.
53. The phrases 'fair' and 'equitable' treatment indicates the standard set by international law for the treatment due by each state with regard to the property of foreign nationals. The standard required conforms, in effect, to the minimum standard that forms part of customary international law. Therefore, the obligation of the respondent as per the BIT is to treat the investor in the same way it treats foreign nationals and their property. However, the claimant could not show any act on the part of the respondent that falls short of the aforementioned requirement.
54. In their ordinary meaning the words 'fair' and 'equitable' as used under a=Article 2(2) of the Calpurnia-Gaul BIT mean 'just', 'even handed', 'unbiased', 'legitimate'. However, the

allegedly unlawful police searches, the press releases and the refusal to stop the picketing do not amount to unfair and inequitable treatment due to the above-mentioned reasons.

55. The claimant regarded the dismissal of Ms. Pescara's application by the Commercial Court of San Inocente de Irkoustk[19] and the active participation of SFCDC in the board of directors as amounting to a failure to accorded fair and equitable treatment to the claimant's investment. None of these allegations are tenable for the reason that Ms Pescara's application was dismissed since she lacks the standing to bring that claim. SFCDC was also a mere shareholder that was forwarding ideas to be taken in to account while the board make decisions.
56. When seen in light of the object and purpose of the BIT, the alleged acts by the claimant do not amount to a violation of article 2(2) of the BIT. The parties to the BIT concluded it with the desire to maintain fair and equitable conditions for investments by investors of one contracting party in the territory of the other contracting party.[20] Therefore, the respondent wants to underline on the fact that none of the alleged acts (the police searches, the press release and failure to stop the picketing) amount to a failure to maintain the fair and equitable conditions as envisaged in the BIT.

D. The respondent has not expropriated the claimants investment

57. There is no action on the part of the respondent that resulted either direct or indirect expropriation. As per international law and the two BITs concluded by the respondent state, expropriation results when there is either a direct taking through decrees / regulations or a series of measures by the respondent state which resulted in the loss of the claimant's investment. However, none of this could be shown in the claimant's allegation.
58. One of the allegations is concerning SFCDC which the claimant counts as being a means for the respondent to get involved in the joint venture. However as has been repeatedly stated the SFCDC is an individual government entity and it is not there to be a means for implementing government policies. Therefore, the allegation that counts SFCDC as "a means of interfering" in the claimant's investment is not tenable. All the acts alleged to have been done by SFCDC are as a result of SFCDC being a majority shareholder.

[19] Calendar of Events-June 14, 2006
[20] The preamble of the Calpurnia Gaul BIT

59. It is clear from the facts that there is no action on the part of the respondent that resulted in expropriation. Neither was there any action that could be taken as being equivalent to expropriation. Dividends were also declared in the years 2004, 2005, 2006 and 2007. The true facts of the story regarding the claimants management staff was also that, Ms. Pescara was voted off from the board of directors by the majority vote of the shareholders present at the meeting.[21] The two directors representing SFCDC were also elected by the unanimous vote of the shareholders present at the meeting that was conducted on the same day.
60. The allegedly 'unlawful police searches of the homes of MS Pescara and Mr. Kolowenko were conducted lawfully within the police power of the sate for national security purposes and it should not be construed as interference in the claimant's management. The notion that the exercise of the state's police power does not make the state responsible has been widely accepted in international law. In the *Too V. Greater Modesto insurance associations* case [22] the Iran-US Tribunal has decided that

   " . . . [A] state is not responsible for loss of property or for other economic disadvantage resulting from . . . [an] action that is commonly accepted as within the police power of the state . . . .
61. The police power concept refers to measures that justify a state action that would otherwise amount to a compensable deprivation or appropriation of property.[23] Exercise of police power allows the state to protect essential public interests from certain types of harms. Consequently, the lawfully conducted police searches are justified since they were conducted for national security purposes.
62. None of the acts that the claimant counts as amounting to expropriation are really equivalent to expropriation. For all the alleged acts to result in expropriation the investor should have been deprived of the essential elements of its investment. In the *Sempra energy International V. Argentine republic* case[24] the ICSID tribunal has reiterated that in order for a claim of indirect expropriation to be successful it is required that "the investor no longer

[21] Calendar of events- November 16
[22] *Too V. Greater Modesto Insurance Associations*, Award, December 29, 1989, Iran-United State Claim Tribunal
[23] Andrew Newcombe, The Boundaries of Regulatory Expropriation in International Law, 20 F.I.L.J. ICSID review 1(2005), at 26
[24] *Sempra Energy International V. Argentine Republic* ICSID case No. ARB/02/16,Awrd, 28 September 2007

be in control of its business operation or the value of the business has been virtually annihilated"

63. For the allegation concerning the crediting of dividends that the claimant counts it as amounting to expropriation, the respondent argues that as far as the claimant is entitled for such money and as far as it is not taken away it does not mount to expropriation. In the *Sea-land Service V. Iran* case, the Iran-US tribunal also rejected a similar allegation stating that the account claimed to be expropriated remains in existence and is available to the claimant.

III. Prayers for Relief

In accordance with all the submissions the respondent requests the tribunal the following

1. To decide that the respondent has not interfered in the claimant's investment
2. To declare that the respondent has not discriminated against the claimant in its investment.
3. To declare that the respondent has discharged its obligation of providing fair and equitable treatment and full protection and security to the claimants investment.
4. To declare that the respondent has not expropriated the claimant's investment
5. To order any other appropriate measure to be taken which in the eyes the tribunal would help to resolve the dissatisfaction created between the claimant and the respondent.