

FDI MOOT 2011 BENCH BRIEF¹

Version for memorial judges²

Part I

This part of the bench brief will examine the issues of:

Whether the Tribunal has jurisdiction in respect of the claims and counterclaims submitted by the Claimant and Respondent, respectively, and/or whether the said claims and counterclaims are admissible, having regard to:

- (i) The Freedonian government's majority ownership of the Claimant, Freedonia Petroleum;
 - (ii) The recourse by the Claimant's wholly-owned subsidiary FPS to the Sylvaniaian Ministry of Energy prior to requesting ICC arbitration.
- (“d. Issues in Dispute” at p. 8-9 of the Problem)

A. Jurisdiction and admissibility in respect of the Claimant's claim

1. Before the Tribunal, the Claimant is claiming compensation for breach of the Freedonia-Sylvania BIT (Uncontested Facts, § 26) on the basis that the transfer of the wells to NPCS constituted a breach of the BIT (Uncontested Facts, § 25).
2. Under Article 11 of the BIT, the Respondent consents to the submission of investment disputes to the ICC arbitration subject to provisos set out in paragraph (3). The Investment Disputes include, *inter alia*, disputes involving an alleged breach of the BIT with respect to an Investment of an Investor of a Contracting Party (paragraph 1(c)). The Claimant's claim, which arises from an alleged breach of the Freedonia-Sylvania BIT, would concern an Investment Dispute if the Claimant is an “Investor.” By making the claim before the Tribunal, the Claimant has submitted to the jurisdiction of the Tribunal.

¹ The organizers would like to thank the drafting committee: Part I - Koji Takahashi, Part II - Sergey Usoskin and Part III - Kristian Maley.

² This version of the Bench Brief contains no summary of the facts. For assessment of the statements of facts in the teams' memorials please see the FDI Problem 2011 <http://fdimoot.org/2011/Problem2011-06-17CLEAN.pdf>.

3. It follows that the Tribunal has jurisdiction in respect of the Claimant's claim if the Claimant is an "Investor" and if the conditions contained in the provisos of Article 11(3) are satisfied. Those requirements will be examined in the course of the following discussion.

a) The Freedonian government's majority ownership of the Claimant

4. The Respondent calls upon the Freedonian State to resort to the State-to-State dispute resolutions mechanism, observing that the Claimant is exploiting the investor-state dispute resolution mechanism on behalf of the Freedonian State (Uncontested Facts, § 25). The Respondent would point out that a 60% interest in the Claimant is owned by the Freedonian government (Uncontested Facts, §1) and base its submission on the ground that the Claimant is not an "Investor" within the meaning of the Freedonia - Sylvania BIT as it pursues sovereign activities.³ The Claimant would argue that it is an "Investor" since the Government of Freedonia only pursues its interests in the Claimant as would any 60% shareholder under Freedonian company laws. The Claimant would cite such precedents as *CSOB v. Slovakia* and *Telenor v. Hungary* in support of the proposition that state-owned entities have access to investor-state arbitration if they act in a private commercial capacity.

b) The recourse by the Claimant's wholly-owned subsidiary FPS to the Sylvanian Ministry of Energy prior to requesting ICC arbitration

5. The Respondent maintains that FPS's claim with the Sylvanian Ministry of Energy has triggered the "fork-in-the-road" provision of the BIT, foreclosing the option of pursuing arbitration before the ICC (Problem, p. 8). It would rely on sub-paragraph (b), one of the provisos of Article 11(3), which makes the host state's consent to arbitration contingent on the Investor not to have brought the dispute before the courts having jurisdiction in the host state.

6. The Claimant might, noting that Article 11(3)(b) only mentions "courts," argue that the Ministry of Energy does not constitute a court. The Respondent might respond that the word "courts" should be understood broadly since the operation of the fork-in-the-road provision should not be affected by the niceties of the internal procedural arrangements of the host state.

³ See the proviso to Article 1(3)(b).

7. The Claimant might argue that sub-paragraph (b) is not applicable in the present case since the “Investor” did not bring “the dispute” before the local court. In concrete terms, it is not the Claimant (“Investor”) but its subsidiary FPS who has resorted to the local proceedings. Moreover, FPS did not seek resolution of “the dispute”, i.e. the dispute over the breach of the BIT, as it sought to resist payment of damages ordered by the Sylvania Government for breach of the License Agreement (Uncontested Facts, § 17). In support of the proposition that a fork in the road is not triggered unless the dispute and the parties are the same, the Claimant would cite such precedents as *CMS v. Argentina*, *Genin v. Estonia*, *Azurix v. Argentina*, *Enron v. Argentina*.
8. To surmount the lack of identity of parties, the Respondent might argue that, given the close relationship between FPS and Claimant, the Tribunal should pierce the corporate veil between them and treat them as parts of a single group of companies. The Claimant might counter by saying that the theories of piercing the corporate veil are private law doctrines with no bearing on the interpretation of a treaty provision governing jurisdiction.

B. Jurisdiction and admissibility as to the Respondent’s counterclaim

9. The Respondent is seeking by way of counterclaim to recover damages for the harm caused by the actions of the Claimant and FPS (Uncontested Facts, § 27).
 - a) Arbitration agreement with respect to the counterclaim
10. The Respondent might argue that if the Tribunal finds that both parties have submitted to its jurisdiction with respect to the Claimant’s claim, a separate submission is not necessary with respect to the Respondent’s counterclaim since a counter-claim should be treated like a claim for set-off, both being a defense to the primary claim. The Claimant might contend that a distinct arbitration agreement must exist for a counterclaim since, unlike a claim for set-off, it may lead to an award in excess of the award for the primary claim and since it remains alive even if the primary claim is withdrawn.
11. In that connection, the Claimant might argue that the Respondent’s consent to arbitration under the Freedomia - Sylvania BIT is unilateral since the Claimant, being an Investor, is not a party to the BIT. Even if the Claimant submits to the jurisdiction of the Tribunal with respect to its own claim by bringing the claim before the Tribunal, its submission does not extend to cover the Respondent’s

counterclaim since the BIT makes no mention of jurisdiction over a counterclaim.

12. The Claimant might in addition argue that while the agreement to arbitrate under the BIT is limited to an “Investment Dispute” as defined by Article 11(1), the Respondent’s counterclaim does not concern an Investment Dispute. The Respondent is seeking to recover damages for the harm caused by the actions of Freedomia Petroleum and FPS. The damages here relate to the damages caused by breach of the License Agreement under which FPS undertook to take all appropriate measures to prevent discharges of oil and to ensure an immediate and effective removal of oil. Sub-paragraphs (b) and (c) of Article 11(1) are, therefore, irrelevant. Since the License Agreement is concluded with FPS, the dispute is not concerned with “the interpretation or application of an Investment agreement between a Contracting Party and an Investor of the other Contracting Party” (sub-paragraph (a) of Article 11(1)), the “Investor” denoting in the present context the Claimant as a party to the counterclaim.
13. The Respondent might argue that the “Investor” in sub-paragraph (a) does not have to be construed as denoting a party to the dispute, noting that the Investment Dispute is defined under Article 11(1) as a dispute “involving” the issues set out in sub-paragraphs (a) to (c). Since FPS is owned by Freedomia Petroleum and is, therefore, capable of being treated as an Investor of Freedomia under Article 11(6), the Respondent’s counterclaim concerns, so might argue the Respondent, an “Investment Dispute” as defined by Article 11 (a) (i.e. a dispute involving the interpretation or application of an Investment agreement between a Contracting Party and an Investor of the other Contracting Party).
14. It is imaginable that some teams may cite *Saluka Investments BV v. The Czech Republic* and *Paushok v. The Government of Mongolia*, which examined jurisdiction over a counterclaim. But it must be noted that the language of the BIT featuring in those cases is different from the one used in the instant case; the BIT in *Saluka* speaks of “[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter” and the BIT in *Paushok* applies to “[d]isputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments.”
15. Even if the Tribunal does not find that the Freedomia - Sylvania BIT contains arbitration agreement covering the counterclaim, the Respondent might contend that both parties have indicated their agreement to arbitrate under the *lex arbitri*

to which they have submitted by selecting the seat of arbitration, Duddingston, Republic of Flatland. Flatland has adopted the UNCITRAL Model Law verbatim (1st Request for Clarifications, Responses). The Model Law simply states that where a provision of this Law, save a few exceptions, refers to a claim, it also applies to a counter-claim (Article 2(f)). The Claimant would interpret it as meaning that a distinct agreement to submit to arbitration is required for a counterclaim.

16. Alternatively, the Respondent might argue that the Claimant and Respondent have indicated their agreement to arbitrate with respect to the counterclaim through the selection of the arbitration rules, the ICC Rules of Arbitration (in force as from 1 January 1998). The ICC Rules simply allude to the procedural steps and the time limits required to be followed in order to bring a counterclaim (Article 5(1)(5) and Article 19). The Respondent might interpret them as implying the parties' agreement to arbitrate with respect to a counterclaim provided that those requirements are met. The Claimant would interpret them as simply adding those requirements to the requirement of a distinct arbitration agreement.
17. Even if the Tribunal finds a distinct arbitration agreement to exist over the counterclaim, the Claimant might argue that it is ousted by the forum selection clause specifying the Sylvania courts which is contained in the License Agreement (1st Request for Clarifications, Responses). The Respondent would respond that the clause only specifies forum for disputes arising under the License Agreement with FPS and, therefore, has no application to the Respondent's counterclaim against the Claimant.

b) Close connection of the counterclaim with the primary claim

18. Even if the Tribunal finds that there is an arbitration agreement covering the Respondent's counterclaim, the Claimant might argue that a counterclaim is not admissible unless it is closely connected with the primary claim since otherwise the hearing of the primary claim would become tangled. The Claimant might draw support for this proposition from the holdings of *Saluka Investments BV v. The Czech Republic* and *Paushok v. The Government of Mongolia* (though the latter seems to attribute this question to jurisdiction rather than admissibility, see paragraph 693). On that basis, the Claimant would maintain that the Respondent's counterclaim, which is based on the License Agreement, is not closely connected with the Claimant's claim (primary claim), which is based on

the Freedonia - Sylvania BIT. To counter that argument, the Respondent might point out that the Claimant's claim is based indirectly on the License Agreement to the extent it is based on Article 10 (umbrella clause) of the BIT.

Part II

This part of the bench brief will examine the issues of:

Whether NPCS's actions are attributable to Sylvania and whether Sylvania actions violate BIT standards:

A. Whether NPCS' actions are attributable to Sylvania

19. NPCS is a Sylvanian state-owned corporation which on 29 November 2010 took over management of FPS' damaged oil wells. Freedonia Petroleum argues that this action is attributable to Sylvania and is contrary to Sylvania's obligations under the BIT.
20. Customary international law governs attribution of conduct of private persons (such as NPCS) to State. It is widely accepted that most of the relevant provisions on attribution are accurately reflected in the Articles on Responsibility of States for the Internationally Wrongful Acts ("ARSIWA") prepared by the International Law Commission (though ARSIWA themselves are not binding).
21. Teams may rely on various potentially applicable grounds for attribution of NPCS' conduct:
 - i. *NPSC being instructed to take over the oil wells.* Under Article 8 of the ARSIWA Sylvania would be responsible for the NPSC' actions even it instructed NPCS to take them. Freedonia Petroleum may thus argue that the Executive Order was such instruction, while Sylvania may object that the order constituted an authorization rather than an instruction.⁴
 - ii. *NPSC exercising elements of governmental authority.* Under Article 6 of the ARSIWA the State is responsible for the conduct of a private entity which exercises elements of governmental authority. Freedonia Petroleum may argue that measures taken in response to the alleged emergency such

⁴ Teams may rely on judgments of International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. Reports and *Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* 2008 I.C.J. Reports.

as takeover of the property should be treated as exercise of governmental authority.⁵

- iii. *Sylvania generally responsible for the conduct of NPSC*. Some teams may argue that Sylvania is generally responsible for all of the actions of NPSC. They will argue that NPSC is a state-owned corporation and therefore apparently controlled by Sylvania. However, under the jurisprudence of investment treaty tribunals (e.g. *Maffezini v. Spain* and *Salini v. Morocco*) Freedonia Petroleum will need to establish not only that (i) NPSC was controlled by Sylvania but that it (ii) exercised public function. Given that few facts regarding NPSC's operations and functions are available it would be hard for Freedonia Petroleum to prove this.

22. In further alternative Freedonia Petroleum may argue that Sylvania is responsible not for the actions of NPSC, but for failure to prevent them,⁶ or for assisting NPSC in the takeover (by authorizing it).⁷

B. Whether Sylvania's actions or omissions amount to expropriation, violate Freedonia Petroleum's legitimate expectations are in breach of fair and equitable treatment or other standards

23. According to the facts, Sylvania took a number of measures which may either on a standalone basis or cumulatively be inconstant with its obligations. In addressing this issue teams need to identify which particular measure(s) violate Sylvania's obligations in their view. Among those measures may be:
 - i. Transfer of the management of oil wells' premises on 29 November 2010 (Uncontested Facts, §23, Executive Order, Section 2), which extended only to leaking wells (2nd Request for Clarification, Q56).
 - ii. Suspension of FP's non-exclusive license on 29 November 2010 (Executive Order, Section 1).

⁵ Teams may invoke *Hyatt v. Iran* award of the Iran-US Claims Tribunal where the conduct of a private foundation, which took over property expropriated by Iran was held to be attributable to Iran.

⁶ Relying on e.g. *Wena Hotels v. Egypt*, where Egypt was found responsible for failing to protect Wena Hotels from takeover of the hotel it operated by EGOTH, an Egyptian state-owned company.

⁷ Relying e.g. on *CME Czech Republic B.V. v. Czech Republic* where Czech Republic was found responsible for assisting a Czech businessmen in depriving investor of its interest in television station.

Both measures are introduced until such time as FPS “*presents a plan acceptable to the Sylvania Government to curtail and remedy the damage caused by the Medanos Field Oil Spill, including ongoing oil spill response, removal, assessment, and other cleanup efforts*” (Executive Order, Section 1).

- iii. Retrospective change of regulatory regime applicable to oil exploration, including increase of liability cap and extension of remedial obligation (Uncontested Facts, §§12-14, 1st Request for Clarification, Q13).
- iv. Requirement for FPS to pay SD 150’000’000 “liquidated damages” (Uncontested Facts, §17) or “fine” (Uncontested Facts, §18) for the alleged breach of the amended OPA.
- v. Dissemination of potentially harmful information about FPS claiming that they are responsible for the oil spill and failure to adequately address its consequences (Uncontested Facts, §20).

a. Expropriation

- 24. Teams may argue that suspension of the license and transfer of the oil wells management and potentially imposition of SD 150’000’000 fine amount (whether together or individually) to expropriation.
- 25. Expropriation under the BIT includes not only direct taking of property by the State but also “indirect expropriation” that is state measures which produce effect equivalent (tantamount to) taking. In order to be compatible with the BIT expropriation should be for public purpose, non-discriminatory, in compliance with all applicable rules and procedures and against full compensation (Article 4(2) of the BIT). As no compensation was offered by Sylvania its actions would be unlawful if Freedonia Petroleum succeeds in establishing taking.
- 26. Teams are likely to discuss the following issues.
 - i. Whether temporary restriction of property rights may constitute expropriation. On the facts, the measures taken by Sylvania are only temporary and would by the time of hearing have lasted for less than 1 year. Sylvania would accordingly argue that such measures may not constitute expropriation. However, Freedonia Petroleum may argue that even such

short period is sufficient⁸ and further the return of the wells and resumption of the license are conditioned on FPS presenting an “acceptable” plan which places FPS at the mercy of Sylvania.

- ii. Whether suspension of the license and temporary transfer of the management of the wells, if permitted by national law, may amount to taking. Sylvania may argue that the restrictions of FPS’ rights were provided by the Sylvanian law which granted to the President the right to suspend licenses and take other measures in times of emergency.⁹ Freedonia Petroleum may respond that such argument has no basis in the text of the BIT, the national law of Sylvania was not sufficiently specific to limit the rights of FPS and further that the License Agreement (which provides that FPS should enjoy all the rights under the agreement) in any event precludes unilateral suspension of FPS’ rights under it. Freedonia Petroleum may further argue that even measures pursuing legitimate policy objectives, such as protection of environment may still constitute expropriation.¹⁰
- iii. Taking of damaged oil wells. Sylvania may argue that the oil wells that were taken over by NPCS were damaged and therefore Freedonia Petroleum could not have any longer used them. It may argue that accordingly such conduct cannot amount to expropriation.¹¹ Freedonia Petroleum may argue in response that the oil wells still constituted FPS’ property and their value may affect amount of compensation, but not the finding of whether the actions amounted to expropriation.¹²

⁸ For example in *Wena Hotels v. Egypt* deprivation of the right to manage hotel for a period of one year was considered expropriation and in *Middle East Cement v. Egypt* an interference with investor’s rights lasting for 3 months was recognized as resulting in expropriation.

⁹ See *mutatis mutandis* *Azinian et al. v. United Mexican States*, ICSID AF, ARB(AF)/97/2, §§ 96 et seq.

¹⁰ *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, *Tecnicas Medioambientales Techmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, §121.

¹¹ See e.g. *Elettronica Sicula S.p.A. (United States of America v. Italy)*, 1989 I.C.J. Reports 15, 71 §119 (requisitioning of a plant which was already nearly insolvent was not a taking).

¹² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

b. Control of use (Article 4(1) of the BIT)

27. Some teams may argue that even if suspension of the license and transfer of the oil wells' management do not amount to expropriation, they violate Article 4(1) of the BIT which prohibits temporary interference with investor's rights to "*ownership, possession, control or enjoyment [of investment]*". However under the BIT such measures are not prohibited "*where specifically provided by law and by judgments or orders issued by any courts, administrative bodies, or tribunals having jurisdiction*".
28. Sylvania may argue that the President was authorized to suspend the license and "*take such steps as are necessary to address the emergency*" (Executive Order, Recital 6) and therefore those measures were taken by an administrative body (President) within their jurisdiction (under the Law S.C. 32:274).
29. Freedonia Petroleum may argue either that the President was not competent to issue the order (but there are no facts supporting this proposition) or that the "administrative body" notion in Article 4(1) of the BIT is limited to bodies exercising quasi-judicial functions and therefore does not include the President (a proposition requiring interpretation of the BIT). On the basis of the latter argument Freedonia Petroleum may argue that transfer of the oil wells' management is not expressly provided by law and even though a general power to suspend licenses is recognized by Sylvania law, it is precluded by the terms of the License Agreement (which has the force of law and precludes any modification of its terms other than by mutual consent).

c. Breach of fair and equitable treatment (FET) standard

30. Article 2(1) of the BIT provides that "[t]he Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment...". The FET standard is by its nature vague and teams will rely on substantial jurisprudence of previous tribunals to establish the content of this standard. However, the interpretation of the FET clause in the BIT raises two fundamental questions:
- i. Is the content of the FET standard determined by customary international law? The teams representing Sylvania are likely to argue that it is relying on the wording of the BIT and jurisprudence of tribunals under NAFTA. Teams representing FPS may argue that the BIT establishes an "autonomous" standard and rely on the fact that the BIT (unlike NAFTA)

was not clarified by a binding interpretation and rely on early NAFTA cases such as *Pope&Talbot*, which favored broader interpretation of the FET.

- ii. What conduct is contrary to FET standard under customary international law? Again teams representing Sylvania may argue that under customary international law only “egregious” conduct of State offending the sense of judicial propriety would be prohibited (the “Neer test” named after the 1927 arbitral award in *L.F.H. Neer and Pauline Neer v. United Mexican States*). Freedonia Petroleum may on the other hand argue that the customary international law evolved over time¹³ and would be violated by conduct which is “*arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*”.¹⁴

31. In addressing the substance of the FET argument the teams are likely to address the following issues:

- i. *Retrospective effect of the legislation.* Freedonia Petroleum may argue that retrospective change of the scope of its obligations under the OPA as well as liability cap violated its legitimate expectations and also Sylvania’s obligation to create a stable and predictable legal environment. Sylvania may respond that under its national law retrospective change of legislation is at least not expressly prohibited and Freedonia Petroleum could not have legitimately expected that the regulatory regime would remain unchanged. Sylvania may argue that the License Agreement did not guarantee that the OPA provisions would remain unchanged and consequently Freedonia Petroleum may not rely on it as the source of legitimate expectations.
- ii. *Sudden takeover of the wells and suspension of the license.* Freedonia Petroleum may argue that even if those measures do not amount to expropriation they were taken arbitrarily and without consultation with FPS and thus violate the FET standard.¹⁵

¹³ See e.g. *Mondev International v. United States of America*, ICSID Case No. ARB(AF)/99/2, §125.

¹⁴ *Waste Management Inc v. United Mexican States (Number 2)*, ICSID Case No. ARB(AF)/00/3, §98.

¹⁵ Referring to cases such as *Gemplus v. United Mexican States* and/or *Biwater v. Tanzania*.

- iii. *Politically motivated action.* Freedonia Petroleum may claim that deciding to suspend the license and order takeover of the oil wells Sylvania government was motivated not by objective reasons, but by political pressure (see e.g. Uncontested Facts, § 22). It may argue that such motivation proves arbitrariness of the action. Freedonia Petroleum may rely on *Techmed v. United Mexican States* where the tribunal found that the refusal to renew permit to operate a landfill, which was politically motivated, violated the FET standard.¹⁶ Sylvania may point out that *Techmed* decision was based on a different “autonomous” FET standard and in addition, the tribunal found that political motivation was the primary reason behind the decision of Mexican authorities, whereas Sylvania had objective reasons to take the measures in question.

C. Sylvania’s defenses: national law, essential security and public interest

32. This issue concerns various affirmative defenses advanced by Sylvania, which can be broken into two broad categories: (a) domestic law and (b) national security and public interest. Some teams may also invoke necessity and other defenses under general international law.

a. Domestic law

33. A State may not rely on its domestic law to justify non-compliance with international obligations (such as those provided by the BIT).¹⁷ However, some teams may argue that domestic law of Sylvania defines the extent of FPS’ rights and therefore their suspension in accordance with domestic law (e.g. temporary suspension of the license) cannot be incompatible with the BIT.

b. National Security and Public Interest

¹⁶ *Tecnicas Medioambientales Techmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, §166.

¹⁷ Vienna Convention on the Law of Treaties, Article 24. Note however that Article 42 of the ICSID permits application of national law in resolution of investment disputes and some tribunals have considered defenses based on emergency powers provided by national law and rejected them on the basis that conditions established by national law were not satisfied and not on the basis that domestic law provisions may not be invoked in principle (*Enron v. Argentina* (Award), §293).

34. Sylvania is likely to argue that the measures it took were necessary to protect its environment and business interests and possibly to comply with its international obligations. It will rely on Article IX which provides:

Nothing in this Agreement shall be construed <...> [2][t]o preclude a Party from applying measures **that it considers** necessary for ...the observance of its international law obligations, or the protection of its own essential security interests.

35. A somewhat similar clause was included in the US-Argentina BIT, which was considered by a number of tribunals in cases arising out of Argentina's financial crisis. Teams are likely to refer to this jurisprudence. However, many awards of arbitral tribunals were annulled precisely on the basis of improper construction of "essential security" clause and the teams should be careful not to rely on the holdings that have been reversed or explain why certain parts of such awards may still be relied on. In addition the clauses applicable in those arbitrations did not include the wording highlighted in bold in the text of Article IX reproduced above.

36. In addressing this argument the teams may raise the following issues:

- i. Whether essential security interest defense may be invoked in the circumstances of an environmental crisis. Here Sylvania will have strong argument based on the prior decisions recognizing economic crises as falling under this exception¹⁸ and noting that protection of economic and ecological interests may fall under it.¹⁹
- ii. Whether successful invocation of essential security precludes wrongfulness of the action which are otherwise incompatible with the BIT²⁰ or it merely permits Sylvania to take those actions (with obligation to compensate for the breach of other BIT provisions).
- iii. Whether the clause is "self-judging" (i.e. Sylvania is the sole judge of necessity of the measures taken) or the tribunal may fully review the factual reasons for invocation of this clause. The prevailing practice of arbitral tribunals in disputes based on US BITs was to hold the clause to be not

¹⁸ See e.g. *LG&E v. Argentina* (Decision on Liability), §238; *CMS v. Argentina* (Award), §359.

¹⁹ *Continental Casualty v. Argentina* (Award), §175.

²⁰ *CMS v. Argentina* (Annulment), §130, §133.

“self-judging”.²¹ However, unlike the BITs in those cases, the BIT in the present case applies to measures that “it [the State] considers necessary”.²² However, even if the clause is “self-judging” the State should nevertheless act in good faith. FPS may therefore argue that Sylvania acted in bad faith: (i) the law was changed retrospectively; (ii) the license was suspended and the oil wells taken “long [after]” the oil leak was sealed (2nd Request for Clarification, Q49).

- iv. Whether the conditions necessary for the invocation of Article IX of the BIT are the same as those required to invoke defense of “necessity” under customary international law (i.e. the measure being the “only way” to address the issue, no contribution to the situation from the invoking State)²³ or they are different and the level of “necessity” of the measures is lower²⁴ (such as for example the necessity of the measure is “determined through “a process of weighting and balancing of factors”” such as “relative importance of the interests...contribution of the measure to the interests pursued...”)²⁵
- v. Whether invocation of Article IX permits the State not to provide compensation to investors²⁶ or the State is obliged to provide such

²¹ *Sempra v. Argentina* (Award), §388 (supported by *Sempra v. Argentina* (Annulment), §170); *Enron v. Argentina* (Award), §§335-340; *LG&E v. Argentina* (Decision on Liability), §213; *Continental Casualty v. Argentina* (Award), §187.

²² In *CMS v. Argentina* (Award), the tribunal noted that such wording (in the US-Bahrain BIT) indicated “self-judging” nature of the provision (§370).

²³ Implicit in *CMS v. Argentina* (Award), also *Sempra v. Argentina* (Award), §376 (a conclusion held to be “excess of powers” by the Annulment Committee, *Sempra v. Argentina* (Annulment), §209), *Enron v. Argentina* (Award), §§333-334 (annulled on this ground)).

²⁴ *CMS v. Argentina* (Annulment), §130, §133; *Sempra v. Argentina* (Annulment) §197; *LG&E v. Argentina* (Decision on Liability), §245; *Continental Casualty v. Argentina* (Award), §§163-164 and §167.

²⁵ *Continental Casualty v. Argentina* (Award), §§193-194.

²⁶ *CMS v. Argentina* (Annulment) , §146; *LG&E v. Argentina* (Decision on Liability), §264.

compensation²⁷ and recommence performance of its obligations once the emergency ceased.²⁸

c. Necessity and other customary international law defenses

37. Some teams may argue that in alternative, that the wrongfulness of Sylvania's actions is precluded by necessity. In order to invoke necessity Sylvania must satisfy conditions established by customary international law, which are reflected in Article 25 of the ARSIWA.²⁹ In particular, Sylvania will need to demonstrate that the measures it took were "the only way" to address "a grave and imminent peril" and they do not "seriously impair" the interest of the party towards which the obligation exists. Given that the leaking wells were sealed at the time the measures were undertaken (2nd Request for Clarification, Q49) it would be hard for Sylvania to demonstrate continued existence of "imminent" threat. Further, Sylvania will need to explain why there were no other less restrictive alternatives to the measures it took.

Part III

This part of the bench brief will examine the issues of:

Confidentiality and *amicus curiae*:

A. Does Sylvania owe Freedonia Petroleum an obligation of confidentiality with respect to the arbitration?

38. On 5 September 2011, pursuant to a request from CSE, the Sylvanian Court of Administrative Matters ordered the release of "written pleadings concerning the arbitration proceedings to CSE in the public interest, especially having regard to the extraordinary impact the subject-matter of the proceedings had on the citizens of Sylvania. The transcripts of the proceedings were not part of the Court's order." (Uncontested Facts, §§ 31-33).

²⁷ *CMS v. Argentina* (Award) §390 (note that this conclusion was characterized as "manifest error of law" by the annulment committee); *Mitchell v. DRC* (Annulment), §57.

²⁸ *LG&E v. Argentina* (Decision on Liability), §265 (a contrary position was adopted by the committee in *Continental Casualty v. Argentina* (see *Continental Casualty v. Argentina* (Annulment), §126)).

²⁹ *Gabcikovo-Nagymaros (Hungary v. Slovakia)*, 1997 I.C.J. Reports §40

39. The parties have been requested to address Sylvania's obligation of confidentiality.

a. Applicable Law

40. The question of whether Sylvania owes a duty of confidentiality with respect to the arbitration is to be determined according to the procedural law of the arbitration.

41. As required by Article 14(1) of the ICC Rules, the tribunal has determined that the place of arbitration is Duddingston, Flatland (Terms of Reference, § f.). In the ICC Rules, the "place" of the arbitration is understood to mean the legal place of the arbitration (*situs*), rather than the venue of hearings. Flatland law therefore governs the procedure of the arbitration (*lex arbitri*).

42. Flatland has adopted the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) (1st Request for Clarification, Q7). The Model Law does not expressly impose an obligation of confidentiality on the parties, and therefore is not the source of any obligation of confidentiality on Sylvania.

43. In certain legal systems, parties may be considered to be under an obligation of confidentiality with respect to an arbitration even this is not provided in the arbitration agreement or the arbitration law. For example:

a. In England and Wales, parties are taken to be under an "implied obligation...not to disclose or use for any other purpose any documents prepared for and used in arbitration, or disclosed or produced in the course of arbitration, or transcripts or notes of evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court."³⁰

b. In France, the Cour d'Appel de Paris has held that obligation of confidentiality is considered to apply to all parties to arbitrations,³¹ although this decision has attracted criticism (and concerned an award made by a tribunal under English law).³²

³⁰ *Dolling Baker v. Merret* [1990] 1 WLR 1205 at 1213.

³¹ *Aita v. Ojeh* (1986) *Revue de l'Arbitrage* 583.

³² Paulsson and Rawding, "The Trouble with Confidentiality", (1994) *ICC International Court of Arbitration Bulletin* 48.

c. In Australia,³³ the United States,³⁴ and Sweden,³⁵ confidentiality is not an essential attribute of arbitration.

44. The problem does not disclose whether any of the relevant municipal legal systems impose obligations of confidentiality on parties to arbitration. Without this information, it may be difficult for teams to rely on the position under national laws in supporting or opposing an argument that the arbitration is confidential.

b. Procedural Rules

45. The ICC Rules, which apply to this arbitration, do not expressly require the parties to keep the award or the arbitration confidential.

46. The Statutes of the International Court of the ICC state:

The work of the court is of confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat.³⁶

47. It might be argued that the reference to the confidential nature of the work of the court implies that confidentiality is a value that the arbitral tribunal undertakes to observe. However, the statutes bind arbitrators, not parties, and therefore do not impose an obligation of confidentiality on the parties without an order of the tribunal to that effect.³⁷ This section of the Statute would be relevant to the question of whether to make orders for confidentiality; however this is not in issue here.

48. Article 20.7 of the ICC Rules allows the tribunal to “take measures for protecting trade secrets and confidential information.” The practice of the ICC is to use this

³³ *Esso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10, 34 per Mason CJ, 34 per Brennan J.

³⁴ *United States v. Panhandle Easter Corporation* 118 FRD 346 (D Del 1988).

³⁵ *Trade Finance Incorporated v. Bulgarian Foreign Trade Bulk Ltd* (1998) Stockholm City Court, Case no T-111-98.

³⁶ Article 6, Appendix I and Article I, Appendix II.

³⁷ *United States v. Panhandle Easter Corporation* 118 FRD 346 (D Del 1988); Smeureanu, “The Legal Basis of Confidentiality”, in Smeureanu (ed), *Confidentiality in International Commercial Arbitration*, International Arbitration Law Library, Volume 22 (Kluwer Law International 2011) pp. 9 – 25, 19.

provision to require the parties to keep the arbitration confidential,³⁸ however the problem does not indicate this has occurred here. It therefore appears unlikely that the ICC Rules impose an obligation of confidentiality on Sylvania.

c. Arbitral practice

49. As to investment arbitration generally, there is understood to be no general duty of confidentiality on the parties. In *Metalclad Corporation v. United Mexican States*, the tribunal said:

There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration.³⁹

50. Further, in *Amco v. Indonesia*, the tribunal refused to grant provisional measures restraining publication of the dispute, saying: “as to the spirit of confidentiality of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case”.⁴⁰

51. Similar statements have been made by the tribunals in *SD Myers, Inc v. Canada*⁴¹ and *The Loewen Group, Inc & Raymond L Loewen v. United States*.⁴²

52. In summary, it appears that investment arbitration law does not impose any duty of confidentiality on Sylvania with respect to the arbitration.

d. IBA Rules

53. Teams may also rely on Article 3.13 of the IBA Rules on the Taking of Evidence in International Arbitration, which states that parties will keep documents

³⁸ Expert Report of Stephen Bond in *Esso/BHP v. Plowman* (1995) 11 *Arbitration International* 3, 273.

³⁹ ICSID, ARB(AF)/97/1, determination of 27 October 1997.

⁴⁰ Decision on Provisional Measures, 9 December 1983.

⁴¹ UNCITRAL, Procedural Order No. 16, paras 8-9 (May 13, 2000).

⁴² ICSID, ARB(AF)/98/3, Decision on Hearing of Respondent’s Objections to Competence and Jurisdiction, para 26 (January 5, 2001).

submitted or produced in the arbitration confidential. However, as the parties have not agreed that the IBA Rules apply, this does not appear to be relevant.

B. Does Sylvania owe Freedonia Petroleum any other obligation of confidentiality?

54. On 24 July 2009, Sylvania issued a confidential report by a panel of experts constituted by the Ministry of Energy. FPS and its personnel provided testimony in closed sessions. The report was classified as confidential under Sylvanian Government regulations, to be made available internally only on a “need to know” basis (2nd Request for Clarification, Q43). It included the following text:

The Government of Sylvania requested that Freedonia Petroleum S.A. remedy the spill as soon as possible. The company has indicated that it might take up to six months to completely seal off the leaking oil well. Five new release points were discovered yesterday. The new release points could have been avoided had the company been better prepared and acted faster when the disaster first occurred. Once the oil spill reaches the Sylvanian coast a complete cleanup will be impossible. There is a high probability that the flow could become unchecked and result in higher released volumes than ever anticipated.

55. On 29 September 2009 the newspaper *La Reforma* printed that excerpt of the report (Uncontested Facts, § 9). The source of the leaked information is unknown (2nd Request for Clarification, Q64).

a. Express contractual obligation of confidentiality

56. The Medanos Licence Agreement contains no confidentiality provisions (2nd Request for Clarification, Q43). The problem does not disclose any other contract that may impose an obligation of confidentiality upon Sylvania.

57. Given the only limited information can be provided in the context of the moot, teams may choose to address only the legal consequences of a disclosure by Sylvania if it is proven, and not the factual question of whether the disclosure occurred.

b. Confidential testimony

58. Though not expressly stated in the problem, it appears from the wording of the report excerpt (particularly “The company has indicated...”) that the report was based on testimony provided by FPS and its personnel “in closed sessions” (2nd

Request for Clarification, Q43). It may be argued that this testimony was provided to Sylvania in circumstances which imposed upon Sylvania a duty to Freedonia Petroleum or FPS, or both, to keep the testimony confidential.

59. The problem does not state what protections are afforded to confidential information under any relevant municipal law. It therefore may not be of assistance to have reference to the protections afforded to confidentiality in particular national legal systems.
60. There are significant theoretical and practical differences in the law of confidentiality in different legal systems, e.g., in common law systems they are treated contractual, equitable or proprietary obligations,⁴³ and in some civil law systems through a tort of unfair competition.⁴⁴ This may make it difficult to argue that a particular formulation of the obligation of confidentiality arises as a result of accepted principles of international law.
61. Freedonia Petroleum may argue that Sylvania owes obligations of confidentiality under the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, to which Sylvania and Freedonia are both party, as members of the World Trade Organization.⁴⁵ A breach of the TRIPS Agreement may be rendered as a breach of the BIT by reason of Article 10 of the BIT (“Observance of Commitments”), and therefore within the scope of the arbitration clause.
62. Alternatively, Freedonia Petroleum may contend that Article 39(2) reflects an accepted principle of public or private international law, though as described above this may be difficult in light of the differences between legal systems.
63. Article 39 of the TRIPS Agreement states in part:

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2...

⁴³ *Seager Limited v. Copydex Limited* [1967] 2 All ER 415.

⁴⁴ See, e.g., the German Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), Article 4.

⁴⁵ Clarification 70. The TRIPS Agreement is Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, signed in Marrakesh, Morocco on 15 April 1994.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

64. The following considerations arise with respect to Article 39:

- i. A threshold question is whether the alleged disclosure that results in “unfair competition” within the meaning of Article 10bis of the *1967 Paris Convention for the Protection of Industrial Property*. Article 10bis(2) provides: “Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition”. Freedonia Petroleum may attempt to satisfy this criterion by arguing that the Sylvania made the disclosure for commercial reasons, i.e., so that it (through NPCS) could enter the petroleum market as a competitor to Freedonia Petroleum.
- ii. A footnote to the text states that “a manner contrary to honest commercial practices...includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.”
- iii. To have “commercial value because it is secret”, information “must convey an actual or potential commercial advantage, presumably measurable in dollar terms.”⁴⁶ Freedonia Petroleum “maintains that after the release of the confidential information...the share price dropped dramatically.” (1st Request for Clarification, Q37). It is questionable whether a drop in share price is a loss of commercial value by Freedonia

⁴⁶ *Religious Technology Centre v. Wollersheim*, 796 F.2d 1076, 1090 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987).

Petroleum (as opposed to a loss by its shareholders). Further, while release of the information may have been detrimental to Freedonia Petroleum's reputation, it is not immediately apparent how this would be commercially detrimental to it.

- iv. The requirement of secrecy appears to be satisfied, as the information was given in confidential testimony. This is also indicated by the nature of the information provided in the excerpt of the report.
- v. As to whether Freedonia Petroleum has taken reasonable steps to keep the information secret, Freedonia Petroleum might suggest that it is to be inferred that it insisted on giving testimony only in closed sessions, and that this constitutes "reasonable steps".

65. Freedonia Petroleum may also argue that Article 2.1.16 of the Unidroit Principles of International Contracts⁴⁷ provides an internationally applicable statement of the law of confidentiality. However, Article 2.1.16 may not be directly on point, as it contemplates a situation of "negotiations", and in its context appears to refer to pre-contractual negotiations:

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

c. Sylvanian confidentiality regulations

66. A duty of confidentiality may be said to arise from the Sylvanian municipal regulations under which the report was classified "confidential" (2nd Request for Clarification, Q43). However, as the problem provides very little information about this provision, there may not be a sufficient foundation for such an argument.

d. Public interest exception to confidentiality

⁴⁷ The Unidroit Principles are intended to be "a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied" (Introduction to the 1994 Edition).

67. Information that would otherwise be confidential may not be if it is of public importance, or it is contrary to the public interest to maintain the confidentiality of the information.⁴⁸ In *Commonwealth of Australia v. Cockatoo Dockyard*, the court held that otherwise confidential should be disclosed on the basis of the need to protect public health and restore the environment.⁴⁹
68. The existence of a public interest exception may be supported by the fact that Sylvania and Freedomia are parties to the International Covenant on Civil and Political Rights.⁵⁰ Article 25 states: Every citizen shall have the right and the opportunity...(a) to take part in the conduct of public affairs, directly or through freely chosen representatives.’
69. On the above basis, Sylvania may argue that the confidential testimony was so important to public affairs (the environment) that the public interest prevails over the obligation of confidentiality.

C. Amicus curiae brief

70. On 11 September 2011, the Tribunal invited the parties to submit their comments to CSE’s request in their memorials (Uncontested Facts, §34).
- a. Confidentiality distinguished from privacy
71. As described above, the arbitral proceedings are not confidential. However, confidentiality is generally understood to be distinct from privacy. Confidentiality is “connected to the information and materials circulated or used in the course of an arbitration”,⁵¹ while privacy is the principle that “strangers are generally not entitled to attend the hearing” in an arbitration.⁵²

⁴⁸ *Esso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10, 32, 37-38.

⁴⁹ [1995] NSWSC 97 at 64.

⁵⁰ Dec. 16, 1966, 999 UNTS 171, reprinted in 6 ILM 368. It was entered into force 23 March 1976.

⁵¹ Smeureanu, “The Legal Basis of Confidentiality”, in Smeureanu (ed), *Confidentiality in International Commercial Arbitration*, International Arbitration Law Library, Volume 22 (Kluwer Law International 2011) pp. 9 – 25, 15, FN 60.

⁵² *Esso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10, 34; see also *Bulgarian Foreign Trade Bank Ltd v. AI Trade Finance Inc*, 27 October 2000, Supreme Court of Sweden, Case No. T 1881-99; Smeureanu, “The Legal Basis of Confidentiality”, in Smeureanu (ed), *Confidentiality in International Commercial Arbitration*, International Arbitration Law Library, Volume 22 (Kluwer Law International 2011) pp. 9 – 25, 15, FN 60; *Dolling Baker v. Merret* [1990] 1 WLR 1205 at 1213.

72. This distinction has been recognized by state courts,⁵³ and in the ICC Rules⁵⁴ and other institutional rules.

b. Power to allow participation by CSE

73. In *Methanex*, an ICSID tribunal granted an NGO permission to make written submissions, an orders sought by the NGO for the hearings and documents to be public, stating that the issue being addressed:

...extend far beyond those raised by the usual transnational arbitration between commercial parties...the public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.⁵⁵

74. The tribunals in *Methanex*⁵⁶ and *UPS*⁵⁷ held that it was within the tribunal's power to accept amicus briefs due to Article 15(1) of the UNCITRAL Rules, which allows the tribunal to "conduct the arbitration in such a manner as it considers appropriate...". Article 15(1) of the ICC Rules is in similar words, so it is arguable that those cases are applicable.

75. However, the effect of Article 21.3 appears to be that, even if CSE is permitted to make a submission, the tribunal does not have the power to allow it to attend the hearing in this arbitration:

The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.

c. Whether to exercise the power

76. If the tribunal has the power to receive the CSE submissions, a further question arises as to whether it should do so. This invites a consideration of the general advantages and disadvantages of amicus curiae briefs in investment arbitration. The following may be relevant considerations.

⁵³ *Esso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10, 34.

⁵⁴ Articles 21.3 (privacy) and 20.7 (confidentiality).

⁵⁵ *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as "amici curiae", 15 January 2001, para 49.

⁵⁶ Para 47.

⁵⁷ *United Parcel Service of America, Inc. v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001), para 73.

77. The tribunal is more likely to be fully apprised of the facts and law if it is made aware of the perspective on those questions by a disinterested party. CSE will likely have specialist knowledge to bring to the tribunal. However, this may not be the case here, as the submissions of CSE indicate that it will be closely aligned with Sylvania's position.
78. The tribunal's decision will have a practical impact on matters in which the public has an interest, i.e., the environmental regulations that Sylvania has the power to implement. However, the public are already represented by Sylvania, and it is difficult to see what separate representation though CSE would add.
79. CSE's involvement will increase the volume of material to be considered by the tribunal. This would lead to increased costs and possibly delays. However, CSE has at this stage only requested the tribunal to consider a single brief, which it has already provided, so this may not be a significant factor.