

FDI MOOT 2011 PROBLEM*

UNCONTESTED FACTS**

1. Claimant, Freedonia Petroleum LLC (“**Freedonia Petroleum**”), is an international energy company. Freedonia Petroleum is active in various regions of the world in the exploration and production of crude oil. The Freedonia government owns a 60% interest in Freedonia Petroleum. The remaining 40% stake in Freedonia Petroleum is owned by a consortium of privately-held and publicly-traded Freedonian enterprises with expertise in various phases of oil exploration and production.
2. On 17 October 2006, the Sylvanian Congress authorized the participation of foreign investors in a public tender process in order to bid for oil exploration permits off the coast of Sylvania. To participate in the bidding process, foreign investors were required to incorporate a wholly-owned subsidiary in Sylvania.
3. On 31 January 2007, the Republic of Sylvania issued an international tender for deep sea exploration blocks in the Medanos field in the Libertad Gulf situated in the territorial waters of the Republic of Sylvania. On 1 February 2007, Freedonia Petroleum incorporated Freedonia Petroleum S.A. (“**FPS**”), a wholly-owned subsidiary in Sylvania, to participate in the bidding process. FPS was the sole bidder in the tender process.
4. On 28 February 2007, the Government of Sylvania announced that it intended to award FPS a 5-year non-exclusive oil exploration and drilling license in respect of blocks off the Medanos Field. On 24 March 2007, the Sylvanian Congress authorized the Government to enter into a License Agreement with FPS by Law No. A-4575. On 26 May 2007, the Sylvanian Government and FPS entered into the Medanos License Agreement (the “**Agreement**”).
5. Among other things, FPS undertook to pay a 12% royalty and to observe certain safety obligations. The safety obligations included a requirement to take all appropriate measures to prevent discharges of oil on navigable water; and, in the event of a discharge, to ensure an immediate and effective removal of oil on navigable waters.
6. The Agreement also included the following clause (Clause 18) which provided that: “*The Republic of Sylvania undertakes to take all the necessary measures to ensure that FPS enjoys all the rights conferred upon it by this Agreement. Any modifications of the terms*”

* The organisers would like to thank the drafting committee: Ms. Sophie Nappert (Chair), Mr. John Gaffney, Ms. Natacha Gedwillo, Ms. Otylia Babiak.

** Do not assume any facts beyond those stated in this problem, even if there is resemblance to well-publicised events in 2009. **17 June 2011: PLEASE SEE THE RED-LINE VERSION FOR CORRECTIONS.**

and conditions of this Agreement may only be made by mutual written consent of the parties.” Clause 22 provides “This Agreement shall have the force of law.”

7. On 9 June 2009, a large explosion occurred in the Medanos Field causing several oil explorations wells operated by FPS to leak. The origin of the explosion was unknown. The damaged wells released 35,000 - 60,000 gallons of oil a day into the Gulf of Libertad Sylvania.

8. On 16 June 2009, in a nationally-televised press conference, scientific advisors to the Sylvania Government stated that the Gulf oil spill could get into a “Loop Current” within a day, eventually carrying oil southward along the Sylvania coast and into the Sylvania Keys, a protected marshland area characterized by high levels of biodiversity. There were several indications that the disaster in the Gulf could worsen. The ecological impact of the oil spill and FPS’s handling of the situation led to a public outcry for the State to step in.

9. On 24 July 2009, a confidential report by the Sylvania Government on the oil spill in the Gulf noted the Coast Guard’s concerns that the damaged well would “*become an unchecked gusher shooting millions of gallons of oil per day into the Gulf*”. On 29 September 2009, the leading Sylvania newspaper (“*La Reforma*”) posted the following excerpts from the report: “*The Government of Sylvania requested that Freedomia 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 Sylvania 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.*”

10. On 21 November 2009, an amendment to the Sylvania freedom of information law (the “**FoI Law**”) limited “third-party” access to information concerning cases before international tribunals involving the Republic of Sylvania. Prior to the amendment, the FoI Law stipulated that all information in cases involving the Republic of Sylvania remained public, except for information related to commercial and professional secrets, criminal cases and covert operations. The effect of the amendment is that any third party not directly involved in an international case must apply to a Sylvania court for the release of details about the case. The fact that a case is pending before an international tribunal remains accessible.

11. On 10 December 2009, coming under considerable public pressure, the Sylvania Congress amended the Oil Pollution Act (the “**OPA**”) to revise limitations on liability for damages resulting from oil pollution and to establish a fund for the payment of compensation for such damages. Several sections of the OPA were amended. The new

Section 703 read “*any responsible party for a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into waters or adjoining shorelines or the exclusive economic zone shall be wholly liable for the removal costs and resulting damage from such incident.*” The new Section 704 in its relevant part read “*Removal costs include (A) all removal costs incurred by The Republic of Sylvania or any of its political subdivisions to remedy the damage resulting from the incident [...]*”.

12. One of the most important amendments was that under new OPA the scope of the term ‘damages’ was broadened. In connection with the meaning of damages, the relevant part of new Section 705 provided that “*The term “damages” refers to damages for: (A) Injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage; (B) Injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property; (C) Loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources; (D) Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of The Republic of Sylvania, or its political subdivisions; (E) Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant; (F) Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by The Republic of Sylvania, or its political subdivisions.*” There were a number of “excluded discharges”, which are not relevant for the present purposes.

13. The amended OPA also set out several new safety obligations. Section 1014 in its relevant part read “*Any responsible party for a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into waters or adjoining shorelines shall take any appropriate measure to prevent the risks or difficulties associated with accidents, oil spills, and the containment and cleanup of such spills; and fully compensate the damages resulting from any incident.*”

14. A further amendment to the OPA eliminated the OPA’s SD75 million cap on liability for spills from offshore facilities. This change retrospectively applied to “any claim arising from an event occurring before the date of enactment, if the claim is brought within the limitations period applicable to the claim.”

15. All of these measures (as described in paragraphs 11-14) were made effective as of 1st June 2009. On 29 January 2010, the Sylvanian Government sent a written communication

to FPS granting it a 60-day period to take all appropriate measures to comply with the obligations under the OPA as amended.

16. On 12 February 2010, after one month of fruitless discussions between the company and the Government, FPS sought declaratory relief from the Sylvania courts to the effect that the terms of the Agreement, and more specifically Clauses 18 and 22 thereof, took precedence over the amendments to the OPA.

17. On 26 February 2010, the Sylvanian Government ordered FPS to pay SD 150,000,000 liquidated damages for the breach of its obligations under the Agreement and the OPA, as amended. FPS commenced administrative proceedings before the Sylvanian Ministry of Energy to resist the request for payment, alleging that it had complied with all applicable safety obligations.

18. On 10 June 2010, the Ministry of Energy rejected FPS's administrative claim and requested that it pay a fine for breach of its safety obligation in the amount of SD 150,000,000 within 15 days. On 15 June 2010, FPS met Government officials to try to reach an agreement regarding the payment for the breach of the safety obligations under the Agreement and the liability cap. These negotiations failed.

19. On 10 August 2010, Sylvania adopted a new Hydrocarbon Law that introduced several changes to the Sylvanian oil industry. The new Law created the National Petroleum Company of Sylvania (the "NPCS"), a company fully owned by the Government of Sylvania. NPCS was incorporated on 30 August 2010.

20. On 3 November 2010, the President of Sylvania declared to the press that: "the oil spill in the Gulf of Libertad caused catastrophic damage. This has been aggravated by FPS' abject incompetence and failure to remedy it."

21. The political and social climate in Sylvania had by that stage become fraught. Hundreds of businesses in Sylvania were adversely affected by the oil spill, with thousands of individuals losing their jobs. Important business activities in Sylvania – such as agriculture, seafood, tourism and related industries- were seriously damaged.

22. On 22 November 2010, Clean Sylvanian Environment ("CSE"), a non-profit NGO established in 2002, which supported Sylvania's actions to protect the environment, demanded that the Government "*take urgent action to remedy the catastrophic damage done by the oil spill and Freedonia Petroleum S.A.'s abject failure and incompetence to remedy it.*" CSE aims to promote practical research into the current and future state of water resources and the environment in Sylvania and across the region. According to its website, CSE is funded by several Sylvanian nationals and domestic agricultural and seafood companies.

23. On 29 November 2010, management and operating teams sent by the Government took over the premises of the oil wells in order to undertake the necessary remedial works.

24. On 10 December 2010, the President of Freedonia contacted the President of Sylvania to commence diplomatic negotiations intended to address these latest developments. After two meetings held on 14 and 17 December 2010, diplomatic negotiations were suspended. On 20 December 2010, several Freedonian high Government officials who participated in those negotiations declared to the press that “*the Republic of Sylvania unreasonable demands made any settlement impossible.*” For its part, Sylvanian officials condemned the failure of the Freedonian State to ensure the observance by FPS of its legal obligations.

25. On 23 December 2010, Freedonia Petroleum and FPS sent a written communication to The Republic of Sylvania claiming that the transfer of the wells to NPCCS was a breach of the Freedonia-Sylvania BIT. The written note further explained that the companies were willing to resort to arbitration if no amicable settlement was reached in the term of three months as provided for in the BIT. The Sylvanian Government responded by refuting the entitlement of the Freedonian State to “exploit” the investor-state dispute resolution provisions of the BIT, calling upon it to observe the requirements of the State-to-State dispute resolutions mechanism.

26. On 23 March 2011, Freedonia Petroleum filed a request for arbitration before the International Chamber of Commerce (“**ICC**”) against the Republic of Sylvania invoking the dispute resolution clause contained in the Freedonia-Sylvania BIT and claiming compensation for breach of the BIT, including unfair and inequitable treatment, violation of legitimate expectations, and expropriation. At this stage, FPS’ claim for declaratory relief before the Sylvanian courts was still pending, much to the exasperation of FPS and its parent company, Freedonia Petroleum.

27. On 29 April 2011, the Government of Sylvania submitted its objections to the Jurisdiction of the ICC on two grounds while at the same time serving notice of its counterclaim against the Claimant alleging:

(a) Abuse of process by Claimant, in particular:

- (i) As a State-owned Claimant, it is precluded from invoking the jurisdiction of the ICC arbitral process;
- (ii) Without prejudice to (i), the Claimant has failed to observe the cooling-off period provided for in the BIT.

(b) Without prejudice / in the alternative, damages – yet to be quantified but expected to amount to hundreds of billions of Sylvanian Dollars – for the devastating harm caused by the actions of Fredonia Petroleum and its wholly-owned subsidiary FPS.

28. On 30 May 2011, the Claimant answered the objections to jurisdiction.

29. Each side appointed an arbitrator following which the ICC Court appointed a chair. The Tribunal was constituted on 20 May 2011.

30. On 28 July 2011 the Parties and the Tribunal signed the Terms of Reference. They agreed on several procedural details including that the Tribunal would render a decision on the jurisdiction objections in its final award.

31. On 26 August 2011, the CSE NGO submitted to the Sylvaniaian Court of Administrative Matters a request for release of details of the arbitration proceedings between the Sylvaniaian Government and Freedonia Petroleum. before the ICC tribunal, including pleadings and transcripts of the proceedings, if any.

32. On 31 August 2011, the Sylvaniaian Court on Administrative Matters notified the Government of Sylvania and Freedonia Petroleum of CSE's request and invited them to submit their comments by no later than 5 September 2011.

33. On 5 September 2011, Freedonia Petroleum objected to CSEs Request. For its part, the Republic of Sylvania contended that the information requested should be released. On 29 September 2011, the Sylvaniaian Court ordered the release of the 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.

34. On 10 September 2011, CSE filed with the Arbitral Tribunal a request to be present at the hearings, to submit documents and to be heard as a non-disputing party in the ICC proceedings between Freedonia Petroleum and The Republic of Sylvania regarding "*the Libertad Gulf environmental and economic disaster caused by the oil spill, which was aggravated by FPS' abject failure and incompetence to remedy it.*" On 11 September 2011, the Tribunal invited the parties to submit their comments to CSE's request in their memorials.

TERMS OF REFERENCE

In accordance with Article 18 of the ICC Rules, and based on the submissions of the parties, the following terms of reference have been agreed:

a. Parties

- i. Claimant: Freedonia Petroleum LLC (an international energy company).
- ii. Respondent: Republic of Sylvania (a sovereign State).

b. Parties' Addresses for Notifications

- i. Claimant: 123 Enterprise Park, 04567 Federal District, Freedonia
- ii. Respondent: Procurador del Tesoro, Posadas 1461 - CP 2211 Vista Clara, Republic of Sylvania

c. Summary of the Parties' Contentions

The Parties and the Tribunal have agreed on the following summary of the parties' respective positions.

i. The Claimant:

Freedonia Petroleum contends that it has standing to pursue arbitration before the ICC despite FPS' filing of a claim with the Sylvanian Ministry of Energy. It also maintains that FPS is not a necessary party to this proceeding, and that the ICC is a proper forum for an investment dispute between an investor and a host State.

The Claimant also insists that the Sylvanian NGO, CSE, should not be permitted to participate in any way in the confidential ICC arbitral proceedings. The Claimant also asserts that the Respondent is liable for the actions and statements of the NPCCS. Lastly, the Claimant contends that the Respondent violated its rights under the BIT, specifically, by expropriating its wells without prompt and adequate compensation, by subverting its legitimate expectations, and by generally failing to take appropriate actions to protect Freedonia Petroleum's investment in Sylvania.

The Claimant further asserts that the Respondent's Counterclaim is unfounded, in breach of the terms of the applicable treaties between Freedonia and Sylvania, and amounts to an abuse of the

arbitral process on the part of the Respondent. The Claimant further asserts that any claims against it for liability arising out of the facts of this case must be pursued in accordance with the contractual agreements in place, and that this tribunal has no jurisdiction to entertain the Counterclaim.

ii. The Respondent:

Respondent, the Republic of Sylvania, contends that the Tribunal lacks jurisdiction and that Claimant's claims are insufficient. Specifically, the Respondent asserts that FPS is a necessary party to this dispute, and its involvement precludes ICC jurisdiction. Respondent also maintains that in this case, Freedonia Petroleum failed to observe the cooling-off period pursuant to the BIT and that its claim with the Sylvanian Ministry of Energy triggered the "fork-in-the-road" provision of the BIT, both elements preventing the Claimant from pursuing arbitration before the ICC. Furthermore, the Respondent insists that it is not liable for the actions of the NPCCS, and that it fully upheld its responsibilities under the BIT and applicable domestic and international law. It also asserts that any actions the Republic of Sylvania may have taken that impacted the Claimant's investment were justified by public safety concerns and necessary for the preservation of the environment and the public good.

The Respondent further asserts, by way of Counterclaim, that it is entitled to request the Tribunal to find that the actions of Freedonia Petroleum and its wholly-owned subsidiary FPS caused devastating harm to the Respondent, and to seek damages accordingly.

iii. Relief Sought

At this time, the Parties seek only findings in accordance with their contentions and the issues in dispute (set out below). The Tribunal is not called upon to make any findings or decision with respect to damages.

d. Issues in Dispute

The Tribunal shall only address the following issues:

(A) 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 Sylvania Ministry of Energy prior to requesting ICC arbitration;
- (B) Whether NPCCS' actions are attributable to the Respondent;
- (C) Whether the Respondent materially breached its confidentiality obligations, inter alia, by allegedly leaking a confidential report to *La Reforma*;
- (D) Whether the Respondent's actions or omissions amount to expropriation, a violation of fair and equitable treatment, a breach of Claimant's legitimate expectations, or otherwise violate general international law and applicable treaties; and
- (E) Whether the Respondent is entitled to rely on its domestic law and international legal notions of national security and public interest as defences;
- (F) The Respondent's counterclaim for declaratory relief.

Should the Tribunal confirm its jurisdiction and find the Claimant and/or Respondent to be liable, separate proceedings will follow to determine remedies and damages, if any.

e. Arbitrators¹

i. Avv. Dtta Giuletta Capuletti (President), ii. Prof. Dr. Rajib Mullah, iii. Ms. Portia Austin

f. Place of Arbitration

The place of arbitration shall be Duddingston, Republic of Flatland. In accordance with Article 14.2 of the ICC Rules, oral hearings shall be held at the premises of King's College London.

g. Special Procedural Considerations

- i. In accordance with Article 16 of the ICC Rules, the language of the arbitration shall be English.
- ii. For the purposes of the Competition, the FDI Moot Rules 2011 shall supersede other conflicting provisions.

¹ For purposes of the Competition, these fictitious arbitrators will be substituted in the oral hearings.

iii. The Tribunal's fact-finding (Article 20 of the ICC Rules) will be based exclusively on the facts and evidence provided by the FDI Moot organizers. Pleadings should not be accompanied by the documentation or by signed statements of the witnesses and experts; references to the evidence provided by the organizers will suffice. Further relevant facts may come forward in the course of clarifications issued by the Competition organizers in response to Requests for Clarification.

iv. It was agreed that there would be only one simultaneous submission of written pleadings: a memorial by the Claimant and a counter-memorial by the Respondent. The written pleadings are to be submitted by 30 September 2011.

Signed: [Ditta Giuletta Capuletti] [Prof. Dr. Rajib Mullah] [Ms. Portia Austin] [Counsel for Claimant]
[Counsel for Respondent]

TREATY BETWEEN
THE REPUBLIC OF FREEDONIA
AND
THE REPUBLIC OF
SYLVANIA
CONCERNING THE ENCOURAGEMENT AND
RECIPROCAL PROTECTION OF INVESTMENTS

The Republic of Freedonia and the Republic of Sylvania (hereinafter referred to as the **“Contracting Parties”**);

Desiring to establish favourable conditions for improved economic co-operation between the two countries, including investment by nationals of one Contracting Party in the territory of the other Contracting Party; and

Acknowledging that offering encouragement and mutual protection to such investments based on international agreements will contribute to stimulating business ventures that will foster the prosperity of both Contracting Parties, consistent with the protection of health, safety, environmental, and international labour standards and the goal of sustainability;

Hereby agree as follows:

Article 1

DEFINITIONS

For the purposes of this Agreement:

1. The term "Investment" shall be construed to mean every asset that an Investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk in conformity with the laws and regulations of the Territory in which the investment is made.
2. The term "Investment" includes, in particular, but not exclusively:
 - a. movable and immovable property and any other right " in rem" including, in so far as they may be used for investment purposes, real guarantees on others' property;
 - b. shares, debentures, equity holdings and any other negotiable instrument or document of credit, as well as Government and public securities;
 - c. credit for sums of money or any right for pledges or performance of services having an economic value connected with investments;

- d. copyright, commercial trademarks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill;
 - e. any right of a financial nature accruing by law or by contract and any license, concession or franchise issued in accordance with current provisions governing the exercise of business activities, including prospecting for cultivating, extracting and exploiting natural resources.
 3. The term "Investor" shall be construed to mean, with regard to either Contracting Party:
 - a. any natural person holding the legal nationality of a Contracting Party;
 - b. any legal person established in the Territory of one of the Contracting Party in accordance with the respective national legislation such as public establishments, joint-stock corporations or partnerships, foundations or associations, regardless of whether their liability is limited or otherwise;
 - c. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (a) or by legal persons as defined in (b) above;provided in all cases that the above defined natural and legal persons do not pursue sovereign activities and are not funded by the other Contracting Party.
 4. The term "Income" shall be construed to mean the money that has yielded or is still to yield by an Investment, including in particular, profits, interest income, income from capital investment, dividends, royalties, returns for assistance and technical services and miscellaneous other considerations, including reinvested income and capital gains.
 5. The term "Territory" shall be construed to mean in addition to the areas lying within the land boundaries, the territorial waters (including the air space above and sea bed below) over which the Contracting Parties have sovereignty, or exercise sovereign or jurisdictional rights, according to international law.
 6. The term "Third Party" shall be construed to mean a natural or legal person that is not an Investor of either Contracting Party.
 7. The term "Third State" shall be construed to mean a country that is not one of the Contracting Parties.

Article 2

PROMOTION AND PROTECTION OF INVESTMENTS

1. The Contracting Parties shall encourage Investors of the other Contracting Party to invest in their Territory, and shall authorize these Investments in accordance with their laws and pursuant to the terms of this Treaty.
2. The Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security, of the Investments of Investors of the other Contracting Party.
3. The Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of Investments effected in their Territory by Investors of the other Contracting Party, as well as the companies and firms in which these Investments have been made, shall in no way be subject to unjustified or discriminatory measures.

Article 3

NATIONAL TREATMENT AND THE MOST FAVOURED NATION CLAUSE

1. The Contracting Parties, within the bounds of their respective Territories, shall offer Investments effected by, and the Income accruing to, Investors of the other Contracting Party treatment no less favourable than that accorded to Investments effected by, and Income accruing to, its own nationals or Investors of Third States.
2. The treatment accorded by a Contracting Party to the activities connected with the Investments of Investors of the other Contracting Party shall be no less favourable than that accorded to similar activities connected with Investments made by their own Investors or by Investors of a Third State.
3. Paragraphs (1) and (2) of this Article do not apply to the advantages or privileges which one Contracting Party grants or may grant in future to a Third State by virtue of membership in customs or economic unions, common market associations, free trade areas, regional or sub-regional agreements, international multilateral economic agreements, or agreements entered into in order to prevent double taxation or to facilitate cross-border trade.

Article 4

NATIONALIZATION OR EXPROPRIATION

1. The Investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily the Investor's ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by any courts, administrative bodies, or tribunals having jurisdiction.
2. Investments of Investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measure having similar effect in the Territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.
3. Full and effective compensation shall be equivalent to the market value of the Investment immediately prior to the time at which the decision to nationalize or expropriate is announced or made public, and shall be calculated according to internationally acknowledged evaluation standards. Should difficulties arise in ascertaining the market value, compensation shall be calculated on the basis of a fair appraisal of the Investment's constitutive and distinctive elements as well as of the Investor's activities, components and results. Compensation shall include interest calculated on a six-month LIBOR basis accruing from the date of nationalization or expropriation to the date of payment. In the event of failure by the Investor and the Contracting Party having liability to reach agreement on compensation, the amount of the compensation shall be assessed in accordance with the dispute settlement procedure at Article 11 of this Agreement. Once compensation has been determined it shall be paid promptly and authorization for its repatriation in convertible currency issued.

4. Paragraph 1 of this Article shall also apply to Income from an Investment, and, in the event of winding-up, to the proceeds of liquidation.

Article 5

COMPENSATION FOR DAMAGES OR LOSSES

Should Investors of a Contracting Party incur losses in respect of their Investments in the Territory of the other Contracting Party, due to war or other forms of armed conflict, states of emergency, environmental catastrophes, or other similar events, the Contracting Party in which the affected Investment has been made shall offer adequate compensation. Compensation payments shall be freely transferable in convertible currency without undue delay.

The Investors concerned shall receive the same treatment as the nationals of the Contracting Party having liability, and, in any event shall be treated no less favourably than Investors of Third States.

Article 6

REPATRIATION OF CAPITAL, PROFITS AND INCOME

1. The Contracting Parties shall guarantee that, after Investors have complied with all their fiscal obligations, as well as all relevant administrative procedures, they may transfer the following abroad, without undue delay, in any convertible currency:
 - a. capital and additional capital amounts used to maintain and increase Investments;
 - b. net income, dividends, royalties, payments for assistance and technical services, interest and any other profits;
 - c. the proceeds of the total or partial sale or liquidation of an Investment;
 - d. funds to repay loans relating to an Investment and interest due thereon;
 - e. remuneration and allowances paid to nationals of the other Contracting Party in respect of subordinate work and services performed in relation to an Investment effected in its Territory, in the amount and manner prescribed by current national legislation and regulations.
2. Without prejudice to the provisions of Article 3 of this Agreement, the Contracting Parties undertake to apply to the transfers mentioned in paragraph 1 of this Article, the same treatment that is accorded to Investments effected by Investors of Third States, if this is more favourable.
3. The Contracting Parties may adopt provisions governing the manner of complying with the fiscal obligations referred to at paragraph 1 above.

Article 7

SUBROGATION

In the event that a Contracting Party or any of its institutions has provided an insurance guarantee in respect of non-commercial risks for Investments effected by its Investors in the Territory of the other Contracting Party, and has made payments on the basis of that guarantee, the other Contracting Party shall recognize the assignment of the rights of the insured Investor to the

Contracting Party guarantor and its subrogation shall not exceed the original rights. In relation to the transfer of payments to the Contracting Party or its institution by virtue of such subrogation, the provisions of Articles 4, 5 and 6 of this Agreement shall apply.

Article 8

TRANSFER PROCEDURES

The transfers referred to in Articles 4, 5, 6 and 7 shall be effected without undue delay, provided that all fiscal obligations have been met. Transfers shall be made in a convertible currency at the prevailing exchange rate applicable on the date of the transfer.

Article 9

ESSENTIAL SECURITY

Nothing in this Agreement shall be construed:

1. To require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
2. To preclude a Party from applying measures that it considers necessary for the maintenance or restoration of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, the observance of its international law obligations, or the protection of its own essential security interests.

Article 10

OBSERVANCE OF COMMITMENTS

Each Contracting Party shall constantly guarantee the observance of any obligation it has assumed with regard to Investments in its Territory by Investors of the other Contracting Party.

Article 11

SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND

THE CONTRACTING PARTIES

1. For purposes of this Article, an Investment Dispute is defined as a dispute involving (a) the interpretation or application of an Investment agreement between a Contracting Party and an Investor of the other Contracting Party; (b) the interpretation or application of any Investment authorization granted by a Contracting Party's Investment authority to such Investor; or (c) an alleged breach of any right conferred or created by this Agreement with respect to an Investor or an Investment of an Investor of a Contracting Party.
2. In the event of an Investment Dispute between a Contracting Party and an Investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute in good faith by consultation and negotiation. If the dispute cannot be so resolved after 3 (three) months from the date the Investment Dispute arose, then the Investment Dispute

shall be submitted for settlement in accordance with the applicable dispute settlement procedures upon which they have previously agreed. With respect to claims of expropriation by the Investor, the dispute settlement procedure specified in any applicable Investment agreement between the Investor and the Contracting Party shall remain binding and shall be enforceable in accordance with the terms of the Investment agreement and relevant provisions of domestic laws of such Contracting Party and treaties and other international agreements regarding the enforcement of arbitral awards to which the Contracting Party has subscribed.

3. The Contracting Parties hereby consent to the submission in good faith of Investment Disputes to the International Chamber of Commerce (ICC) for settlement and resolution by binding arbitration in accordance with the provisions of the ICC Arbitration Rules in force at the date of the submission of the dispute, at any time after three months from the date upon which the dispute arose, provided that:
 - a. the Investment Dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute; and
 - b. the Investor has not brought the dispute before the courts having jurisdiction within the territory of the Contracting Party that is a party to the dispute.
4. In case of arbitration between a Contracting Party and an Investor of the other Contracting Party pursuant to paragraph (3) above, the ICC, consistent with its Rules, shall determine the venue for arbitration. The venue for arbitration shall be in a country which is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Moreover, each Contracting Party shall provide for the enforcement within its Territory of ICC arbitral awards.
5. In any proceeding, judicial, arbitral or otherwise, concerning an Investment Dispute, a Contracting Party shall not assert, as a defense, counter-claim, right of set-off or otherwise, that the Investor concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any source whatsoever, including such other Party and its political subdivisions, agencies and instrumentalities.
6. For the purpose of any proceedings initiated in accordance with this Article, any company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Contracting Party or a political subdivision thereof that, before the occurrence of the event or events giving rise to the dispute, was owned or controlled by nationals or companies of the other Contracting Party, shall be treated as an Investor of such other Contracting Party.
7. The provisions of this Article shall not apply to a dispute arising under official credit, guarantee or insurance arrangements pursuant to which the Contracting Parties have agreed to other means of settling disputes.

Article 12

SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

1. Any disputes which may arise between the Contracting Parties relating to the interpretation and application of this Agreement shall, as far as possible, be settled amicably through diplomatic channels.

2. In the event that the dispute cannot be settled within three months from the date on which one of the Contracting Parties notifies, in writing, the other Contracting Party, the dispute shall, at the request of one of them, be settled in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, as in effect on the date of this Agreement.
3. The place of the arbitration proceedings shall be The Hague, The Netherlands.
4. The language to be used in the arbitral proceedings shall be determined by the Contracting Parties.
5. The appointing authority shall be the Secretary General of the Permanent Court of Arbitration.
6. Nothing in this Article impairs the right of the Contracting Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Agreement by any peaceful means of their own choice.

Article 13

RELATIONS BETWEEN GOVERNMENTS

The provisions of this Agreement shall be enforced irrespective of whether or not diplomatic or consular relations exist between the Contracting Parties.

Article 14

APPLICATION OF OTHER PROVISIONS

1. Whenever any issue is governed both by this Agreement and by another international agreement to which both the Contracting Parties are parties, or whenever it is governed otherwise by general international law, the most favourable provisions, case by case, shall be applied to the Contracting Parties and to their Investors.
2. Whenever, as a result of laws, regulations, provisions or specific contracts, one of the Contracting Parties has adopted a more advantageous treatment for the Investors of the other Contracting Party than that provided in this Agreement, they shall be accorded that more favourable treatment.

Article 15

ENTRY INTO FORCE

This Agreement shall become effective on the date on which both Contracting Parties have notified the other of the notification of this Agreement in accordance with their respective constitutional procedures.

Article 16

DURATION AND EXPIRY DATE

1. This agreement shall remain effective for 10 (ten) years as from the date on which the notification procedures indicated in Article 15 have been affected and it shall be tacitly renewed for further periods of 5 (five) years, unless either Party terminates it by giving prior written notice thereof one year before any expiry date.
2. In the case of Investments effected prior to the expiry dates of the present agreement, as provided in Article 16, the provisions of Articles 1 to 14 shall remain effective for a further 5 (five) years after the aforementioned dates.

IN WITNESS WHEREOF, the undersigned being duly authorized thereto by their respective Governments, have signed the present Agreement.

DONE AT City Q, this thirtieth day of June, in the year one thousand nine hundred ninety four, in English.

FOR THE GOVERNMENT OF THE
REPUBLIC OF FREEDONIA

FOR THE GOVERNMENT OF THE
REPUBLIC OF SYLVANIA

REPUBLIC OF SYLVANIA

OFFICE OF THE PRESIDENT

Executive Order No. 2010 – 1023

November 29th, 2010

EMERGENCY AUTHORIZATION REGARDING THE MEDANOS OIL FIELD

- WHEREAS,** On 9 June 2009, an explosion of unknown origin occurred in the Medanos Field, resulting in several oil exploration wells leaking thousands of gallons of oil daily into the Gulf of Libertad bordering Sylvania (“**Medanos Field Oil Spill**”);
- WHEREAS,** Pursuant to the Sylvania Hydrocarbon Law and the Sylvania Oil Pollution Act, S.C. 25:843, et seq., a state of emergency (“**Emergency**”) was declared through Executive Proclamation No. 52-2010 in respect of the Medanos Field Oil Spill;
- WHEREAS,** the Emergency has been declared an Issue of National Concern (“**INC**”) and has significantly impacted Sylvania’s environment, marine ecosystems, other natural resources, numerous industries, and the health and safety of individuals living and working in Sylvania’s coastal areas;
- WHEREAS,** Freedonia Petroleum S.A. has been requested to submit a plan acceptable to the Government to curtail and remedy the damage caused by the Medanos Field Oil Spill. Pending receipt of the said document, the Sylvania Government has no choice but to immediately intervene in relation to the Emergency;
- WHEREAS,** The Government is satisfied that the National Petroleum Company of Sylvania (NPCS) has the capacity to adequately assist in the Government’s response to the Emergency;
- WHEREAS,** Sylvania’s S.C. 32:274 authorizes the President during a declared state of emergency to suspend the license of any entity conducting business within the territory of the Republic which would in any way prevent, hinder, or delay necessary action in coping with the emergency and to take such steps as are necessary to address the emergency;

NOW THEREFORE I, JACQUE MOORLAND, President of the Republic of Sylvania,

by virtue of the authority vested in me by the laws of the Republic of Sylvania, do hereby order and direct as follows:

SECTION 1: Freedonia Petroleum S.A.'s non-exclusive license to explore the Medanos Field in the Gulf of Libertad, authorized by the Sylvanian Congress on 24 March 2007, is hereby suspended until Freedonia Petroleum S.A. presents a plan acceptable to the Sylvanian 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.

SECTION 2: NPCS is hereby authorized to assist the Sylvanian Government by securing control of the relevant oil wells and coordinating the ongoing oil spill response, removal, assessment, and other cleanup efforts at the Medanos Field, and taking any action necessary in furtherance thereof, until such time as Freedonia Petroleum S.A. has complied with the requirements of Section 1 hereof.

SECTION 3: This Order is effective upon signature and shall be made applicable this day, November 29, 2010, and will continue in effect until amended, modified, terminated, or rescinded by the President, or terminated by operation of law.

IN WITNESS WHEREOF, I have set my hand officially and caused to be affixed the Great Seal of Sylvania, at the Capitol, in the City of New Rouge, on this 29th day of November, 2010.

/S/Jacque Moorland _____
PRESIDENT OF SYLVANIA

/S/Darnell James _____
SECRETARY OF STATE

In the Arbitration under the Rules of Arbitration
of the International Chamber of Commerce

between

Freedonia Petroleum,

Claimant/ Investor

and

The Republic of Sylvania,

Respondent/ Party

***AMICUS CURIAE* SUBMISSION**

BY

CLEAN SYLVANIAN ENVIRONMENT

September 10, 2010

Submitted by

Clean Sylvanian Environment

345 East Windsor Ave.

6th Floor

Milisiana, Sylvania J5Y 135

Freedonia Petroleum,

Claimant/ Investor

and

The Republic of Sylvania,

Respondent/ Party

***AMICUS CURIAE* SUBMISSION**

BY

CLEAN SYLVANIAN ENVIRONMENT

INTRODUCTION

1. Clean Sylvanian Environment (“**CSE**”) respectfully submits this amicus curiae brief to the Tribunal in the present arbitration before the International Chamber of Commerce (“**ICC**”) between Freedonia Petroleum and the Republic of Sylvania, in accordance with the ruling of the Sylvanian Court for Administrative Matters. The brief urges the Tribunal constituted under the Rules of Arbitration of the ICC to find in favor of the Respondent, the Republic of Sylvania. CSE supports the Republic of

Sylvania's position, against the Claimant, Freedonia Petroleum, in the investment dispute arising out of the June 2009 oil spill from the Claimant's Medanos Field wells in the Gulf of Libertad.

INTEREST OF THE *AMICUS CURIAE*

2. CSE is a non-profit non-governmental organization established in 2002 in the Republic of Sylvania. The organization is funded by Sylvanian citizens and the domestic agricultural and seafood industry. CSE organizes and administers programs and initiatives to educate both private and public citizens about environmental awareness and protection. CSE engages in environmental advocacy in fora at international and national levels. In addition it monitors environmental health and reports on the state of natural resources in Sylvania and across the region. The aim of the organization is to promote practical research into the current status and future outlook of the environment and its impact on Sylvania.
3. The ongoing environmental catastrophe in the Libertad Gulf is of such magnitude as to have an indelible impact on one of the most important bodies of water on the planet. In addition, it is of great immediate concern to the thousands of citizens who have suffered economic and personal losses as a result of Freedonia Petroleum's negligence. CSE stands in solidarity with the people of Sylvania in their efforts to recover from this situation and see justice served.
4. Hence, CSE submits this *amicus curiae* brief with the Tribunal and requests that it be permitted to participate in the arbitral proceedings as a non-party and granted access to the pleadings and evidence presented to the Tribunal.

STATEMENT OF THE CASE

5. The Republic of Sylvania has a right and responsibility to protect its environment and the health, safety and livelihood of its citizens. While development of oil resources is an important economic activity that may be protected by legislation and investment treaties, such protection should not come at any cost. The government cannot stand idly by if the exploitation of its country's resources results in the destruction of its environment.
6. Freedonia Petroleum would have been fully aware of its environmental protection obligations upon entering into the Medanos License Agreement with the Sylvanian Government on 26 May 2007. The safety obligations which Freedonia undertook to protect under the agreement included the requirement to prevent discharges of oil on navigable water, and, in the event of a discharge, to immediately and effectively remove any oil from the navigable waters.
7. On 9 June 2009, an explosion of unknown origin occurred in the Libertad Gulf causing several oil explorations wells operated by Freedonia Petroleum to leak and release more than 100,000 gallons of oil into the Gulf of Libertad each day. Freedonia Petroleum was unprepared for this catastrophe and unable to stop the gushing oil from wreaking havoc on Gulf waters and the Sylvanian coast.

8. In the weeks following the explosion, the Sylvanian Government demanded that Freedonia Petroleum take immediate action to seal off the damaged wells and remove the oil accumulating in the Gulf. Freedonia Petroleum failed to take immediate and effective action and thus failed in its environmental obligations outlined in the Medanos License Agreement. In so failing, Freedonia Petroleum forced the Sylvanian Government to take necessary action to remedy these failures and do everything required to appropriately protect its waters, air and coastal lands from further devastation.
9. On 22 November 2009, CSE again urged the Government of the Republic of Sylvania *“take urgent action to remedy the catastrophic damage done by the oil spill and Freedonia Petroleum S.A.’s abject failure and incompetence to remedy it.”* The Government heeded the call of its citizens and in its sovereign authority sought to hold Freedonia Petroleum accountable for its egregious mishandling of the oil spill in the Libertad Gulf.
10. In this respect, the revision of the Oil Pollution Act (“OPA”) in December 2010 was an essential government action taken in the public interest. Through its legislative and with the support of its citizens, the Sylvanian Government rightfully eliminated unwarranted limitations on liability for damages caused by oil spills, broadened the scope of damages, increased safety obligations, and demanded that companies like Freedonia Petroleum compensate the victims of its negligence.
11. Subsequent discussions between Freedonia Petroleum and the Republic of Sylvania were clearly futile. The government took the vital measures of creating of the National Petroleum Company of Sylvania (“NPCS”) and transferring to it several oil wells operated by Freedonia Petroleum in order to permit its agencies to effectively respond to the crisis created by Freedonia Petroleum.
12. Hundreds of businesses in Sylvania were adversely affected by the oil spill. Thousands of citizens lost their jobs. Key Sylvanian businesses, including agriculture, seafood, tourism and related industries, are facing a bleak future. Our environment has been degraded and indeed devastated.
13. Freedonia Petroleum’s claims for compensation and allegations of unfair and inequitable treatment, violation of legitimate expectations, and expropriation are egregious and insupportable. The Government of the Republic of Sylvania gave Freedonia Petroleum numerous opportunities to remedy the environmental catastrophe caused by its erupting oil wells and Freedonia Petroleum did not live up to its obligations under its license agreement with the Government or its obligations to the people of Sylvania.
14. The Republic of Sylvania has a sovereign right and duty under national and international law to protect its environment and the health and safety of its citizens. This right is preserved, and thus unaffected, by Sylvania’s obligations under, the Freedonia-Sylvania bilateral investment treaty or by its observance of international law.
15. Mindful of Freedonia Petroleum’s destructive impact on Sylvania’s environment, CSE sincerely urges this Tribunal to enable its participation as an amicus curiae so

that its views may be taken into account in determining the liability and future obligations of the disputing parties.

All of which is respectfully submitted by Clean Sylvania Environment, this 10th day of September, 2011, by counsel for Clean Sylvania Environment.