MEMORANDUM FOR CLAIMANT

In a dispute between

CLAIMANT
Freedonia Petroleum LLC
123 Enterprise Park,
04567 Federal District, Freedonia

v.

RESPONDENT
Republic of Sylvania
Procurador del Tesoro,
Posadas 1461 – CP 2211 Vista
Clara, Republic of Sylvania

BADAWI
I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

A. Claimant has the right to pursue arbitration before the ICC

1. Both CLAIMANT and FPS have standing to pursue arbitration against RESPONDENT before the ICC

i. The FS-BIT identifies Claimant as the Investor

ii. The Sylvanian Congress also identifies CLAIMANT as the Investor

2. FPS is not a necessary party in these proceedings and CLAIMANT is within its full right when invoking the jurisdiction of the ICC

B. FPS’s claim before the Sylvanian ministry of energy does not trigger the fork-in-the-road provision of the FS-BIT

1. It was FPS, not CLAIMANT who commenced administrative proceedings

2. FPS sought relief from the Ministry of Energy not a competent court

3. The administrative proceedings pertained to the MLA not the FS-BIT

C. The ICC is the only forum for settling this investment dispute

II. THIS TRIBUNAL SHOULD DISMISS RESPONDENT’S COUNTERCLAIM

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STATEMENT OF FACTS

1. Freedonia Petroleum LLC (hereinafter “CLAIMANT”) is an international energy company incorporated in accordance with the laws of the Republic of Freedonia.


3. On 17 October 2006, the Government of Sylvania (hereinafter “RESPONDENT”) issued an international tender for deep sea exploration blocks in the Medanos Field situated in the territorial waters of the Republic of Sylvania. One of the requirements of the tender was the incorporation of a wholly-owned subsidiary in Sylvania by the potential investor.


5. On 9 June 2009 an explosion of unknown origin occurred in the Medanos Field causing several exploration wells to leak into the Gulf of Libertad.

6. On 29 September 2009 “La Reforma”, a leading Sylvanian newspaper, posted excerpts from a confidential Sylvanian Government report articulating the ramifications of the oil leak and accusing FPS of failing to take appropriate action to mitigate potential damage.

7. On 10 December 2009 the Sylvanian Oil Pollution Act (hereinafter the “OPA”) was amended, setting out new safety obligations, substantially increasing the obligations of CLAIMANT. The OPA came into force retroactively.

8. On 12 February 2010 FPS sought declaratory relief from the Sylvanian courts to the effect that the terms of the MLA took precedence over the amended OPA.

9. On 26 February 2010 RESPONDENT unilaterally ordered FPS to pay SD 150,000,000, under the amended OPA, for the alleged breach of its obligations under the MLA. To protect its rights, FPS resorted to the Sylvanian Ministry of Energy to resist this order. On 10 June the Sylvanian Ministry rejected FPS’s administrative claim.
10. On 10 August 2010 Sylvania adopted a new Hydrocarbon Law which, *inter alia*, created the National Petroleum Company of Sylvania (hereinafter “NPCS”), which was incorporated on 30 August 2010 by RESPONDENT. NPCS is also, a company fully owned by RESPONDENT.

11. On 29 November 2010 the President of Sylvania enacted the “Emergency Authorization Regarding the Medanos Oil Field” by which it suspended FPS’s licence and authorized NPCS to take any action necessary to cope with the oil spill problem. On the very same day, management and operating teams, sent by RESPONDENT, took over FPS’s premises of the oil wells.

12. On 23 March 2011 CLAIMANT filed a request for arbitration with the International Chamber of Commerce (hereinafter the “ICC”) against the Republic of Sylvania invoking the BIT dispute resolution clause. On 29 April 2011 RESPONDENT submitted its objections to the jurisdiction of the ICC and served notice of its counterclaim.

13. On 31 August 2011, Clean Sylvanian Environment (hereinafter “CSE”) submitted to the Sylvanian Court of Administrative Matters a request for the release of details concerning the initiated arbitration proceedings. Notwithstanding CLAIMANTS objections to CSE’s request, on 29 September 2011, the Sylvanian Court ordered the release of information concerning the proceedings.
PART ONE – PROCEDURAL ARGUMENTS

14. The case at hand revolves around unlawful, illegitimate and inappropriate actions taken by RESPONDENT in the midst of an environmental accident that stripped CLAIMANT of its investment. Pursing protection under FS-BIT Art. 11 CLAIMANT asserts that it has standing before the ICC and that the Tribunal has jurisdiction to hear the current dispute as the only appropriate forum. Furthermore, no procedural impediments exist with respect to the “fork-in-the-road” clause and CLAIMANT is confident that RESPONDENT’s counterclaim is inadmissible and therefore cannot be entertained by the Tribunal. With respect to CSE’s status as amicus curiae, CLAIMANT asserts that its participation is prohibited due to lack of consent of both parties to the proceedings and by virtue of applicable procedural rules.

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

15. CLAIMANT submits that contrary to RESPONDENT’s contentions, this Tribunal has jurisdiction to settle all claims arising out of the BIT. As an investor from the Republic of Freedonia, CLAIMANT has standing to pursue arbitration before the ICC (A). Furthermore, FPS’s claim with the Sylvania Ministry of Energy does not represent a choice under the BIT fork-in-the-road’ provision (B). Lastly, given the terms of the BIT, the ICC is the only appropriate forum for settling this investment dispute (C).

A. Claimant has the right to pursue arbitration before the ICC

16. As a matter of principle, virtually all BITs provide definitions of whom they consider to be investors.¹ The FS-BIT clearly delineates who has standing, in the capacity of an Investor, to pursue arbitration in accordance with the dispute settlement mechanism provided for in Art. 11.² In light of the definition of “Investor” contained in FS-BIT Art. 1(3)(b) and Art. 11(6), both

¹ Schlemmer, p.69
² FS-BIT Art. 1(3)(b)
CLAIMANT and FPS would have had standing to pursue arbitration before the ICC (1). Furthermore, contrary to RESPONDENT’s contentions in its objection to the jurisdiction of the ICC, CLAIMANT is not precluded from invoking the jurisdiction of the ICC arbitral process. CLAIMANT indeed qualifies as an investor, consequently rendering FPS an unnecessary party to these proceedings (2).

1. Both CLAIMANT and FPS have standing to pursue arbitration against RESPONDENT before the ICC

17. In light of the facts of this case and the relevant provisions of the FS-BIT the Tribunal is invited to find that both CLAIMANT and its subsidiary FPS would be able to rely on the FS-BIT dispute settlement mechanism. While CLAIMANT’s status as Investor is expressed through the FS-BIT’s definition of the term “Investor” in Art. 1(3)(b), FPS is granted with this capacity for the purpose of initiating arbitral proceedings under Art. 11(6).

18. Given that all of CLAIMANT’s claims arise out of RESPONDENT’s breach of treaty obligations, it is the treaty in question that will primarily define the concept of “Investor” (i). In addition, the Government of Sylvania itself considers CLAIMANT as the Investor in this dispute (ii).

i. The FS-BIT identifies Claimant as the Investor

19. The questions of jurisdiction and substance should be determined separately with regard to whether they arise out of a BIT or an investment contract. For this reason, because all of CLAIMANT’s claims are rooted in the FS-BIT, when assessing who has standing as investor, primary recourse must be given to the FS-BIT. Art. 1 which prescribes that:

“The term “Investor” shall be construed to mean, with regard to either Contracting Party :…( b) any legal person established in the territory of one of the Contracting Parties in accordance with the respective national legislation...”

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3 Speirman, p.110; Vivendi, ¶¶95,96
20. Given that CLAIMANT is a limited liability company incorporated in accordance with the respective laws of the Republic of Freedonia,\(^4\) it is within its full rights when invoking the dispute settlement mechanism contained within the FS-BIT to pursue and defend all rights accruing to it.

21. RESPONDENT argues that CLAIMANT cannot pursue arbitration before the ICC because it is a state owned entity.\(^5\) On the contrary, while CLAIMANT concedes that the Government of Freedonia owns 60% of its shares it also must highlight that the Government holds these shares as a private entity.

22. The question in the case at hand is whether or not the Republic of Freedonia engages in sovereign activities through CLAIMANT. It is not uncommon for States to become involved in various commercial activities through State-owned enterprises.\(^6\) However, CLAIMANT is a limited liability company which is by definition is a business organization of private law. Secondly, in this particular case, the Government of Freedonia pursues its interest in Freedonia Petroleum as would any other shareholder under Freedonian company laws.\(^7\)

23. Furthermore, it is worth mentioning that FS-BIT Art. 1(3)(b), when defining the notion of an Investor, envisages that the Investor might have the form of a public establishment, among others. Given that public establishments are by their nature state-owned, one has to conclude that state ownership (or better yet, private ownership) over the Investor, in whichever percentage it might be, is not decisive for ascertaining whether an entity is treated as Investor for the purposes of the FS-BIT.

\[\text{ii. The Sylvanian Congress also identifies CLAIMANT as the Investor}\]

24. In general, admissions of investments are a matter of sovereign trade policy. The State in question has the power to determine and regulate the entry of investments in its territory.\(^8\) Understandably, States also have the authority to prescribe the form which a transaction must

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\(^4\) Clarifications, ¶61
\(^5\) Uncontested facts, ¶27
\(^6\) Maniruzzman, p.1
\(^7\) Clarifications, ¶ 34
\(^8\) Gomez-Palacio/Muchlinski, p.228
take to be considered an investment. CLAIMANT submits that not only does it satisfy the FS-BIT definition of Investor, but also all the Sylvanian national requirements.

25. National investment laws contain various requirements that have to be met in order for a transaction to be considered an investment. In the event an investment fails to meet the national prerequisites, investment tribunals may be forced to reject jurisdiction on the grounds that a claim was not submitted by an investor as defined in the national laws of the host State. This was the situation in Yaung Chi case. This being said, CLAIMANT made sure to fulfil all the conditions set by RESPONDENT in order to secure the investment in Sylvania.

26. Namely, when authorizing the participation of foreign investors in the public tender process, the Sylvanian Congress set out certain requirements. Foreign investors were required to incorporate a wholly-owned subsidiary in Sylvania so as to participate in the bidding process for oil exploration permits. Consequently, two conclusions can be drawn: firstly, that the Sylvanian Congress itself distinguishes the foreign investor from the subsidiary the investor is obliged to set up in order to be considered a candidate for the tender process and, secondly, that the only way in which an investor could secure an investment, and enter the Sylvanian market, was through a subsidiary.

27. Directed by this requirement, CLAIMANT incorporated FPS as its wholly owned subsidiary in Sylvania, under Sylvanian laws and regulations, so as to participate in the tender. Moreover, the entire rationale behind the existence of FPS was to secure an investment of CLAIMANT in Sylvania.

28. CLAIMANT submits that the establishment of FPS was the initial step which it had to take in order to qualify for participation in the tender process. After that, FPS was the tool which with CLAIMANT, the investor, would manage and control its investment in the Republic of Sylvania.

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9 Schlemmer, p.52
10 Yaung Chi, ¶63
11 Uncontested Facts, ¶2
12 Uncontested Facts, ¶3
29. The incorporation of FPS should not, and cannot, lead to the loss of the right to rely on the FS-BIT dispute settlement mechanism. The only effect that the involvement of a subsidiary has is that, pursuant to FS-BIT Art. 11(6), FPS would also have *ius standi* to pursue arbitration before the ICC.

30. Bearing in mind all of the above stated, the Tribunal should hold both CLAIMANT and FPS to have full right to initiate the current arbitration proceedings.

**2. FPS is not a necessary party in these proceedings and CLAIMANT is within its full right when invoking the jurisdiction of the ICC**

31. With regard to the fact that both CLAIMANT and FPS are Investors pursuant to the FS-BIT and have full right to initiate and participate in the resolution of the disputes arising out of the FS-BIT (see above ¶¶ 19-23), this Tribunal should retain its jurisdiction.

32. Namely, FS-BIT Art. 11 stipulates that an Investment Dispute, arises between a Contracting Party and *an* Investor. Further, the Investment Dispute is to be settled by and between a Contracting Party and *an* Investor.\(^{13}\) Given the wording of the said Article, it is manifest that in this particular case, the dispute resolution mechanism may be initiated by either of the Investors (CLAIMANT or FPS), not necessarily by both or only by a specific one of them (FPS).

33. This is far from an uncommon practice in international investment. In the highly publicized *Vivendi* case\(^ {14}\), it was *both* the foreign investor and its subsidiary that brought their dispute against Argentina before an ICSID tribunal as claimants. Also in the landmark *Enron* case\(^ {15}\) the claimants not only submitted their claim jointly, stating breaches of relevant BIT\(^ {16}\) obligations, but both of their investments in Argentine were *secured through various subsidiaries established in the host state*.

34. In light of these facts, this Tribunal should find that it has the capacity to accommodate CLAIMANT’s claim since CLAIMANT, relying on FS-BIT Art. 1 (3)(b) has standing to pursue  

\(^{13}\) FS-BIT Art. 11(1) 

\(^{14}\) Vivendi 

\(^{15}\) Enron 

\(^{16}\) U.S. – Argentine BIT
arbitration before the ICC and that FPS consequently, is not a necessary party to this dispute and there is no need for including FPS in the current proceedings.

B. FPS’s claim before the Sylvanian ministry of energy does not trigger the fork-in-the-road provision of the FS-BIT

35. Chiefly, the purpose of fork-in-the-road provisions is to prevent the occurrence of parallel proceedings.\(^{17}\) In order for a fork-in-the-road provision to take effect there has to be an identity between the claims, demands and parties.\(^{18}\) Furthermore, the mere fact that a locally incorporated subsidiary started domestic court proceedings does not deprive the foreign investor of his right to have his dispute for BIT breaches heard by an international arbitral tribunal.\(^{19}\)

36. Therefore, contrary to \textsc{Respondent}’s assertion, FPS’s claim with the Sylvanian Ministry of Energy did not trigger the fork-in-the-road provision of the FS-BIT Art. 11(3)(b). \textsc{Respondent}’s contention fails for at least three reasons. Firstly, the claim was not submitted by \textsc{Claimant} (1). Secondly, the claim was submitted to the Sylvanian Ministry and not a competent judicial authority (2). Lastly, the demands arising out of the claim submitted before the Ministry pertain to the MLA, not the FS-BIT (3).

1. It was FPS, not \textsc{Claimant} who commenced administrative proceedings

37. Authorities endorse the view that a fork-in-the-road clause will prevent access to international arbitration only if it involves the \textit{same} parties. If the claimant before an international tribunal bases its claims on a BIT’s substantive provisions, the identity of the dispute will only exist if the \textit{same} claimant has relied on the BIT before a domestic court.\(^{20}\)

38. Case law upholds the same stance. In the CMS case, the tribunal rejected the respondent’s contentions that a choice under relevant BIT fork-in-the-road provision had been made. Namely,\(^{\textit{}}\)

\(^{17}\) Small, p.1026
\(^{18}\) Small, p.1013
\(^{19}\) Turner/Mangan/Baykitch, p.127
\(^{20}\) Schreuer, p.79
the tribunal found that actions had been taken by a local company, rather than the foreign investor (which held shares in the local company). 21

39. Tribunals in the Olguin 22, Vivendi 23, Genin 24, Middle East Cement 25, Champion Trading 26, Azurix 27, Continental Casualty 28 and Desert Line 29 cases confirmed this principle.

40. Since the claim to the Ministry of Energy was submitted by FPS, rather than by CLAIMANT 30, this Tribunal should find that there is no identity between “Claimants” and that therefore the fork-in-the-road provision has not been set in motion.

2. FPS sought relief from the Ministry of Energy not a competent court

41. The fork-in-the-road clause is a provision that gives investors the right to choose to either pursue a remedy in national courts or to pursue a remedy through arbitration. 31 So even under the assumption that there is an identity between the parties requesting relief, the clause still could not have been triggered because it was submitted with the Ministry not a competent court. 32 The fork-in-the-road provision would have only been triggered had FPS brought its claim before the courts, judicial or administrative, having jurisdiction in Sylvania.

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21 CMS, ¶80
22 Olguin, ¶20-23
23 Vivendi, ¶40, 42, 53-55, 81
24 Genin, ¶47, 58, 321, 333
25 Middle East Cement, ¶71, 72
26 Champion Trading, ¶3.4.3.
27 Azurix, ¶37-41, 86-92
28 Continental Casualty, ¶5
29 Desert Line, ¶124-138
30 Uncontested facts, ¶17
31 Lowe, p.116
32 Uncontested facts, ¶17
3. The administrative proceedings pertained to the MLA not the FS-BIT

42. Even if this Tribunal overlooks the fact that neither was there an identity of parties’ nor was relief sought before a competent court, the fork-in-the-road provision still would not have been activated. This is due to the fact that the administrative proceedings initiated pertained to the issues arising out of the MLA, not the FS-BIT. CLAIMANT emphasizes that the ICC is competent only to discuss the matters concerning the FS-BIT, whereas the MLA provides for other dispute resolution methods (see below ¶ 44).

43. The *Genin* tribunal found that the claims, lodged under relevant BIT, by the claimant did not constitute a choice under the BIT’s fork-in-the-road provision since they did not relate to the investment dispute which was the subject matter of the proceedings. In the *Lauder* case, the tribunal reached the same conclusion.

44. Furthermore, by commencing proceedings before the Sylvanian Ministry of Energy, FPS was attempting to resist payment ordered by RESPONDENT. It should be noted that RESPONDENT, contrary to the dispute settlement mechanism in the MLA, unilaterally ordered FPS to pay damages for an alleged breach of its obligations. Therefore in reaction to RESPONDENT’s acting as judge, jury and executioner, FPS attempted to protect its rights before the Ministry of Energy. Case law upholds the position that the fork-in-the-road provision cannot be triggered where the investor initiated proceedings in order to protect its rights.

45. In conclusion, not only was FPS’s relief sought from an administrative body (to protect its rights), not a competent court, but there is no parallelism between the claims, origin of claims or parties. If the Tribunal was to find that FPS’s submitted claim presents a hindrance to arbitration

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33 U.S. – Estonia BIT
34 Genin, ¶331-332
35 *Lauder*, ¶162-163
36 Clarifications, ¶4
37 Uncontested facts, ¶16
38 *Occidental Exploration*, ¶60, 61; *Enron*, ¶97-98
before the ICC then it would severely impede on CLAIMANT’s rights to pursue and protect its rights through the FS-BIT dispute settlement mechanism.

C. The ICC is the only forum for settling this investment dispute

46. In light of the presented facts, one can find that the ICC has the exclusive competence over settling this FS-BIT claim in accordance with FS-BIT Art. 11.

47. Given that all of CLAIMANT’s claims are rooted in treaty obligations and that CLAIMANT qualifies as an Investor, the dispute settlement mechanism provided for in the FS-BIT must be honoured, and consequently, this Tribunal should find that it has jurisdiction to hear this dispute.

II. THIS TRIBUNAL SHOULD DISMISS RESPONDENT’S COUNTERCLAIM

48. In view of the fact that RESPONDENTS counterclaim is based on questions regarding the interpretation and performance of the MLA, which has its separate dispute settlement mechanism, this Tribunal does not have jurisdiction to entertain it.

49. It is acknowledged by authorities, institutional rules and case law that there is a distinction between treaty and contract claims. It is acknowledged that it is possible for a state to be in breach of a treaty obligation without breaching a contractual obligation and vice versa.40

50. The provisions of the NAFTA41 and the Energy Treaty Charter42 vest investors with the power to bring international investment proceedings only in relation to claims in relation to claims based on substantive provisions of the relevant chapters of the treaties’.

51. Correspondingly, in the Vivendi case involving a concession contract, the distinction between treaty and contract claims was upheld. The Vivendi claimants invoked the dispute settlement mechanism prescribed by the BIT rather than the one provided in the contract. The tribunal held that its jurisdiction is not divested merely because of the fact that there is a separate dispute

39 Speirman, p.110
40 Vivendi Annulment, ¶¶95, 96
41 NAFTA Chapter 11 Arts. 1116, 1117
42 Chapter 3 Art. 26 (1)
settlement mechanism in the respective contract. The issue was that there were in fact claims arising from the treaty. The *Vivendi* tribunal held that whether there has been a breach of the BIT and whether there has been a breach of contract are two separate questions.\(^3\)

52. Similarly, in the *SGS v Pakistan* case, the tribunal rejected the respondent’s objections to jurisdiction and accepted the claimant’s treaty claims as separate from potential contractual claims.\(^4\) The tribunals in the *Salini*, *CMS*, and *Enron* also differentiated possible contract claims from treaty claims and retained jurisdiction in view of the latter.

53. In conclusion, while this Tribunal does not have jurisdiction with regard to the interpretation or performance of the MLA which has its own dispute settlement mechanism, it does have jurisdiction to hear claimant’s claims with regard to respondent’s violation of fair and equitable treatment, expropriation of claimant’s assets and breach of national treatment provision (see below ¶¶ 142-153).

### III. CSE SHOULD NOT BE PERMITTED TO PARTICIPATE IN THE ARBITRAL PROCEEDINGS AS AMICUS CURIE

54. This Tribunal should not heed CSE’s submission to participate in the arbitral proceedings as *amicus curiae* nor should it accommodate CSE’s request to be granted access to pleadings and evidence. First and foremost, in exercising its authority accruing from the applicable procedural rules, this Tribunal should find that CSE does not warrant *amicus curiae* status (A). If the Tribunal nevertheless finds otherwise, its activities should be restricted to filing an *amicus curiae* brief. By no means should CSE’s activities entail the ostentatious rights it requests in its submission (B).

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\(^3\) *Vivendi*, ¶81

\(^4\) *SGS*, ¶161, 165, 166

\(^5\) *Salini*, ¶62

\(^6\) *CMS*, ¶70-76

\(^7\) *Enron*, ¶89-94
A. CSE should not be granted *amicus curiae* status

55. CLAIMANT submits that the involvement of CSE in this arbitration would be an unwarranted encroachment on the privacy and confidentiality of the proceedings. The concept of confidentiality, although originating from the foundations of international commercial arbitration, has not been forsaken in international investment arbitration.\(^{48}\) Quite the contrary, investment arbitration, like commercial arbitration, is innately based on party autonomy and privacy. In contrast, the demarcation between arbitration and court proceedings (along with the attractiveness of ADR) would wane.\(^{49}\)

56. Furthermore, the applicable procedural rules to these proceedings are the ICC Rules. ICC arbitration is for the most part a private means of dispute resolution, even when the dispute arises from the breach of a BIT. It is not uncommon for States to refer in their BITs to the ICC arbitration.\(^{50}\) In the case at hand, it is essential to stress that had the Parties wanted a more public forum for settling their investment disputes, for example the ICSID, then they would have done so. Instead, the FS-BIT Contracting Parties - having in mind all of the particularities of the Rules, including a higher echelon of privacy - explicitly opted for ICC dispute settlement. This in itself constitutes a demarcation for the tribunal in assessing the possibility of *amicus curiae* status.

57. What is more, CLAIMANT is not disregarding the tendency of growing tolerance towards non-disputing party participation in investment arbitration but is insisting that in the present case, any participation has to be in accordance with the intention of the Parties,\(^{51}\) applicable procedural rules,\(^{52}\) and international standards.\(^{53}\)

58. Hence, CLAIMANT insists that this Tribunal should reject CSE’s *amicus curiae* submission for three reasons. Firstly, CSE’s participation lacks the necessary consent of the Parties’ (1).

\(^{48}\) Buys, p.130; Mistelis, p.224

\(^{49}\) Bühring-Uhle/Kirchhoff/ Scherer, p.70; Gaillard/Savage, p.452

\(^{50}\) U.S. – Haiti BIT; Algeria – Spain BIT; Serbia – Croatia

\(^{51}\) Ishikawa, p.194

\(^{52}\) ICC Rules Art. 21(3)

\(^{53}\) ICSID Art. 32(5), 37(2); UNCITRAL Rules Art. 25(4); NAFTA FTC Statement
Secondly, even if the Tribunal were to exercise its authority from ICC Art.15 it would still find that CSE’s position does not meet the general requirements of amici status (2).

1. Art. 21(3) of the ICC Rules requires the consent of both Parties for CSE’s participation.

59. The ICC Rules are admittedly silent with regard to a specific notion of *amicus curiae* participation. However, they do cover the matter of non/disputing parties participation on a general level in Art. 21(3), which stipulates:

“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.” (emph. added)

60. Art. 21(3) clearly provides that in order for a third party to be present at the proceedings the approval of *both parties* is paramount. Given that CLAIMANT explicitly denied consent to the release of information\(^54\) it should be held that the condition of Art. 21(3) has not been met.

61. The position that third party involvement is ruled out without the assent of both parties has also been upheld by authorities,\(^55\) international investment rules and case law.

62. For instance, the UNCITRAL Rules, which are frequently used in investment arbitration disputes, ensure the parties’ rights to privacy by guaranteeing in-camera proceedings without access of third parties unless the disputing parties consent otherwise.\(^56\) Furthermore, the ICSID Rules prohibit the attendance of third parties at hearings without the consent of the disputing parties.\(^57\) As one can deduce, even ICSID arbitration, the most prominent forum for settling investment disputes, gives sway to the will of the parties with regard to third party participation.

\(^54\) Uncontested facts, ¶33

\(^55\) Born, p.673; Blackaby/Richard, p.254; Teitelbaum, p.54

\(^56\) UNCITRAL Rules Art. 32 (5)

\(^57\) ICSID Rules Art. 32 (2)
63. The tribunal in the *Aguas del Tunari* case\(^58\) also endorsed this line of argument. The tribunal, which was operating under the auspices of ICSID, denied citizens and environmental groups standing at the arbitration due to the parties’ unwillingness to consent to their participation. Also, in the *Biwater* case,\(^59\) the tribunal did not permit open hearings because the investor had opposed.

64. The FS-BIT Contracting Parties deliberately selected ICC arbitration over all the other potential institutions. In doing so, they not only opted for the private nature of ICC proceedings but also the possibility that any award rendered may be reviewed in light of Art. 34 of the UNCITRAL Model Law and Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In other words, unlike awards rendered by an ICSID Tribunal which cannot be subject to judicial review, any award rendered by an ICC tribunal is firstly subject to scrutiny of the ICC Court\(^60\) and can also be challenged by national courts.\(^61\)

65. Therefore, if the Tribunal was to accommodate CSE’s request for participation it would be a departure from the agreed ICC Rules, which is in itself a violation of the arbitration agreement. Consequently, any resulting award would run a risk of annulment, or a risk of being denied recognition and enforcement.

2. **Even if the Tribunal relies on ICC Art.15, CSE’s request cannot be accommodated.**

66. Conversely, RESPONDENT might argue that this Tribunal should exercise the broad authority bestowed upon it by Art. 15 of the ICC Rules, namely, that where the ICC Rules are silent on a particular issue the tribunal may adopt certain procedures. It has been shown that the ICC Rules do not have a lacuna with respect to participation of the amicus curiae. However, ever if one were to entertain such possibility, and if the Tribunal were to consider the international standards for *amicus* participation it would find that CSE does not warrant this status.

67. The most systematic rules with regard to *amicus* participation are those laid down in ICSID Art. 37(2). This provision is usually referred to by tribunals when considering the admission of

\(^58\) *Aguas del Tunari*, ¶17

\(^59\) *Biwater Gauff*, ¶68, 71

\(^60\) ICC Rules Art.27

\(^61\) Herz, p.799
amicus briefs. In light of this, the Tribunal should consider ICSID Art. 37(2) when analyzing CSE’s request.

68. Taking into consideration the facts of this case in correlation with ICSID Rule 37(2), the Tribunal should find that CSE cannot assist the Tribunal in rendering its decision (i). Secondly, CSE’s seeks to address issues outside the scope of the dispute (ii). Finally, CSE cannot demonstrate a significant interest in this dispute (iii).

i. CSE cannot offer the Tribunal assistance in rendering a decision

69. Amicus participation is ordinarily justified on the basis that this “friend of the court” is in a position to provide the court or tribunal its special perspective or expertise in relation to the dispute different from those provided by the parties. The amicus’ role is to assist the court in deciding the dispute by providing a perspective different from that of the parties.

70. ICSID Art. 37(2) authorizes a tribunal to accept submissions of prospective amici if, inter alia, the non-disputing party submission could assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. Similarly, NAFTA FTA’s Statement on the Operation of Chapter 11 stipulates that whilst determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which the non-disputing party submission would assist the Tribunal.

71. The United States Supreme Court has stated its view that an amicus curiae brief that does not serve the purpose of calling to the attention of the court a matter not already brought to its attention burdens the court.

72. In light of CSE’s amicus curiae submission one can see that CSE can offer this Tribunal nothing more than its politicized opinion on the outcome of the case. Nowhere in its Submission did

\[\text{Bartholomeusz, p.211}\]
\[\text{Blackaby/ Richard, p.254}\]
\[\text{Graham, p.6}\]
\[\text{U.S. Supreme Court Rule 37(1)}\]
CSE allude that it is neither able to supply this Tribunal with different opinion nor different perspective, let alone expertise on the facts of this dispute. Moreover, it is highly unlikely that CSE would be able to produce any information that the Tribunal itself would be unable to find.

**ii. CSE is not addressing a matter within the scope of the dispute**

73. In the *amicus* Submission, the Tribunal can see that all of CSE’s interests lie within the performance of the MLA, more specifically CLAIMANTS alleged failure to observe its obligations under the said agreement.67

74. What should be noted is that this Tribunal has the authority to settle disputes arising out of the FS-BIT (see above ¶ 16-34), more specifically the questions of expropriation, material breach of confidentiality, violation of fair and equitable treatment and breach of CLAIMANT’s legitimate expectations. In conclusion, any interest of participation CSE might have should be sought in front of the Courts of Sylvania, not the ICC.

**iii. CSE has no significant interest in this dispute**

75. Although CLAIMANT perceives the importance of developments and understandable public interest in the case at hand, it also maintains that there is no particular, significant interest to warrant CPS’s *amicus curiae* status.

76. In jurisprudence, some authorities go so far as to suggest that credence should be given to the *nature of the legal interest* represented by *amicus curiae*.68 In other words, a general interest or opinion regarding the outcome of the case would not suffice. Instead, there must be a direct and genuine interest of a non-disputing party in order for it to be considered *amicus curiae*. For example, in the AES case before an ICSID tribunal, it was precisely the EU Commission’s direct, substantial and particular interest in the dispute that warranted *amici* status.69

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66 Amicus Submission, pp.22-24 of the Record
67 Amicus Submission, pp.21-24 of the Record
68 Levine, p.16
69 AES, ¶3.22
Finally, it should be noted that a potential *amicus curiae* must satisfy all three cumulative criterion before being granted *amici* status.

**B. If granted *amicus curiae* participation, CSE’s activities must be limited**

Even if the Tribunal were to decide that CSE for some reason warrants *amicus curiae* status, its activities in the proceedings should be limited to the already submitted *amicus* brief.\(^{70}\) When investment arbitrators grant *amicus* status to third parties, they entrust them with *very limited* mandates, which are exhausted with the submissions of amicus briefs.\(^{71}\) E.g., the NAFTA FTC Statement\(^{72}\) and the 2006 amendments to the ICSID Arbitration Rules\(^{73}\) permit *amici* to file briefs *solely*.

Authorities are virtually undivided in stating that third party participation as *amicus curiae* is an inherently *limited* type of involvement. The *amicus* is not and does not become a party to the proceedings nor does it have anything even vaguely approaching the rights enjoyed by a party.\(^{74}\) The *amicus curiae* device must attain its balance, retaining sufficient flexibility *without crossing the party threshold*.\(^{75}\)

In the *Methanex* case the tribunal rejected the petitioners' requests for access to the parties' pleadings and documentary records as well as permission to attend the hearings, noting that they did not have coequal status with the parties.\(^{76}\)

In the *Suez I* case, five non-governmental organizations filed a petition for participation as *amicus curiae* which presented three requests to the tribunal: that the petitioners be permitted to attend hearings, submit *amicus curiae* briefs and be granted unrestricted access to any documents relating to the case. The *Suez* tribunal, while allowing them to submit the *amicus* briefs,

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\(^{70}\) Amicus Submission, pp.21-24 of the Record

\(^{71}\) Levine, p.2

\(^{72}\) NAFTA FTC Statement

\(^{73}\) ICSID Rules Art. 37(2)

\(^{74}\) Bevilacqua, p.526

\(^{75}\) Lowman, p.1246

\(^{76}\) Methanex, ¶42
adamantly rejected the other requests citing that it had no authority to permit non-parties to attend hearings and to access documents.\textsuperscript{77}

82. Tribunals in the \textit{Biwater}\textsuperscript{78}, \textit{Glamis}\textsuperscript{79}, \textit{Piero Foresti}\textsuperscript{80} and \textit{AES}\textsuperscript{81} cases came to the same conclusion.

83. What CSE is requesting from the Tribunal is to be granted with all rights accruing to the Parties in dispute. If the Tribunal grants CSE acquiescence to participate in the proceedings, access to pleadings and evidence it would generate a precedent which radically departs from international tendencies and practice. Therefore, CLAIMANT urges the Tribunal to reject such a request.

\textsuperscript{77} Suez, §31, 33

\textsuperscript{78} Biwater Gauff, §§62-72

\textsuperscript{79} Glamis, §14

\textsuperscript{80} Piero Foresti Decision on Amicus Curiae

\textsuperscript{81} AES, §3.22
PART TWO – ARGUMENTS ON MERITS

84. In contravention to its obligations under the applicable provisions of FS-BIT, RESPONDENT failed to accord appropriate protection to CLAIMANT and its investment. CLAIMANT’s primary assertion in this regard is that NPCS’ actions are fully attributable to RESPONDENT. In line with the previous, RESPONDENT’s actions are reflected in both direct taking of CLAIMANT’s property as well as indirect expropriation, conducted unlawfully and requiring full and effective compensation in that regard. Furthermore, CLAIMANT’s investment was not accorded with fair and equitable treatment as established under FS-BIT Art. 2, applicable case law, international practice and doctrine. Additionally, CLAIMANT argues that it was treated less favorably than RESPONDENT’s nationals and that RESPONDENT is not entitled to invoke FS-BIT Art. 9 as defense of essential security, justifying RESPONDENT’s non-abidance by the applicable rules. Finally, CLAIMANT alleges that RESPONDENT breached the duty of confidentiality by its failure to prevent the leak of confidential governmental report in the newspapers, breaching the general duty of safeguarding foreign investments in its territory.

I. ALL ACTS OF NPCS ARE ATTRIBUTABLE TO RESPONDENT UNDER INTERNATIONAL LAW

85. CLAIMANT submits that this Tribunal should find that RESPONDENT violated its obligations and commitments towards CLAIMANT acting through NPCS. While establishing whether the acts of an entity are attributable to a particular State, this Tribunal should apply the ILC Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the “ILC Articles”). The relevance of the ILC Articles in cases involving investment disputes is confirmed both in arbitral practice and by various authorities. What is more, prominent authorities espouse the view that there is general consensus that ILC Articles accurately reflect customary international law on state responsibility.

82 Eureko, ¶128; Noble Ventures, ¶69; Maffezini, ¶78
83 Crawford/ Olleson, pp.455, 475; Shaw, pp.120–121.
84 Hober, p.6.
86. In the case at hand, the actions of NPCS are attributable to RESPONDENT, first and foremost, since NPCS was an organ of RESPONDENT (A). In addition, NPCS exercised governmental authority (B), and NPCS was acting under the control and/or instructions of RESPONDENT (C).

A. NPCs is an organ of Respondent

87. Pursuant to the ILC Art. 4, the act of an organ of the State will be an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function. In determining what constitutes an organ of the State for the purposes of responsibility, the internal law and practice of each State are of prime importance. In conclusion, the legislative authority in every country is empowered to determine whether an organ of the State will be created, what its purpose and organization and, finally, when it ceases to exist.

88. NPCS was established pursuant to the new Sylvanian Hydrocarbon Law and is fully owned by the RESPONDENT. Furthermore, NPCS was created with the sole purpose of curtailing and remedying the consequences of the oil spill. These three elements undoubtedly show that NPCS was created as a specialized State organ. Consequently its acts should be attributed to RESPONDENT.

89. RESPONDENT might allege that NPCS is an entity separate from the State because of the de facto or de iure autonomy of that organ and that therefore its acts could not be attributed to RESPONDENT. However, the Tribunal should dismiss such contentions since the autonomy of an organ, person or group of persons under municipal law is irrelevant for international law and a State cannot avoid responsibility for the conduct of the body which does, in truth, act as one of its organs, merely by denying it that status under its own law.

90. It is of crucial importance to emphasize that RESPONDENT never fenced itself from the actions of NPCS and thus tacitly recognized its actions as its own. On the contrary, the Government of

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85 Commentary, p.39
86 Uncontested facts, ¶19.
87 Hober, p.4.
88 Commentary, p.42
RESPONDENT was satisfied that the NPCS had capacity to adequately assist the Government’s response to the Emergency.  

B. NPCS exercised its governmental authority

91. RESPONDENT submits that since NPCS is an entity which solely pursued activities to seal the oil leaks, to curtail and remedy the consequences of such leaks, it is beyond any doubt that its conduct did not have a commercial character but rather represented a de iure imperii act of the State. However, even if RESPONDENT asserts that the nature of the NPCS’ conduct was commercial or de iure gestionis, the Tribunal should dismiss such assertions given that it is irrelevant for establishing attribution to a State whether or not the conduct of a State organ is de iure imperii or de iure gestionis.  

92. ILC Art. 5 provides that even if an entity is not an organ of the State its actions shall be considered as an act of the State if that entity is empowered to exercise the elements of governmental authority. Scholars advocate that for attribution under ILC Art. 5 the ultimate test is function carried out by the person or entity, irrespective of its organization or structural status. This ‘functional test’ will be met if an entity exercises elements of governmental authority.  

93. The actions of NPCS embraced the problem of the oil spill which is, consequentially, related to the exploitation of natural resources. It is recognized in international law that a State has sovereignty over natural resources. This is even considered as ius cogens. As a consequence, under international law, States have the obligation to prevent pollution and are liable for its

89 Emergency Authorization, pp.19-20 of the Record
90 Commentary, p.41
91 Hober, p.10
92 Malumfashi, p.24
93 Resolution 1803, Art. 1, 5, 8; Rio Declaration, principle 15; Draft Articles on the Prevention of Transboundary Harm, Art.3
94 Sornarajah,p.4
consequences irrespective of fault.\textsuperscript{95} From these facts, a conclusion inevitably emerges, that coping with the pollution of natural resources is an obligation of the State and, every conduct related thereto triggers the exercise of governmental authority.

94. Therefore, RESPONDENT also had a positive obligation to deal with any and all problems with its natural resources, \textit{including} the Medanos oil field spill. It is therefore not surprising that RESPONDENT created NPCS and entrusted it with the task of dealing with the environmental problems generated by the oil spill. NPCS acted on behalf of RESPONDENT and, furthermore, RESPONDENT fully endorsed its actions.

95. In conclusion, this Tribunal should find that NPCS exercised elements of government authority and that its actions and omissions should be attributed to RESPONDENT under ILC Art. 5. RESPONDENT should not be allowed to misuse its obligation as an excuse to deal with political problems its country and to unlawfully expropriate CLAIMANT’s property.

C. NPCS acted under the instructions and/or directions of Respondent

96. Actions of the NPCS are also attributable to RESPONDENT under ILC Art. 8. This provision stipulates that the conduct of a person or group of persons shall be considered as an act of a State if the person or group of persons are in fact acting on the \textit{instructions}, or under the \textit{direction or control} of the State in question.

97. The requirements of control were precisely established in the \textit{Maffezini} case which ruled that if an entity is created by the State and the State has capital ownership in it and it was created to perform activities of public nature, that entity is acting on the State’s behalf and its conduct is attributable to the State.\textsuperscript{96} Furthermore, as it was aptly stated by the ICJ in \textit{Nicaragua} case, the State is held responsible for the actions of private persons if it had \textit{planned, directed and supported} those persons\textsuperscript{97}.

\textsuperscript{95} Shaw, p.853.
\textsuperscript{96} Maffezini, ¶89
\textsuperscript{97} Nicaragua, ¶86
98. Conditions for attribution under ILC Art. 8 are set alternatively, so it is sufficient to establish that NPCS acted under Respondent’s direction or control. Namely, NPCS was founded by Respondent, it is fully owned by Respondent. What is more, Respondent exercises full control over the actions and decisions of NPCS since it appoints its Board of Directors. It is recognized that even if a State declares that a state-owned enterprise is a separate legal entity, actions of such entity will be attributable to the State where the ‘corporate veil’ is a device or a vehicle for fraud or evasion.

99. Respondent had actively supported the actions of NPCS. Namely, in his Order, the President of Sylvania, explicitly expressed his satisfaction that NPCS could help the Government with the oil spill. Furthermore, Respondent relied on NPCS to whom the oil wells operated by FPS will be transferred in order to permit its agencies to effectively respond to the crisis. However, the pivotal fact is that the management and operating teams who represented NPCS personnel were sent by the Government of Sylvania to take over the FPS oil wells. Therefore, Respondent cannot deny that it held both formal and effective control over NPCS’s work.

100. Notwithstanding the above mentioned, when the enterprise is owned by the State and it exercises public service (governmental authority) than this gives a rise to the rebuttable presumption of attributability.

101. In conclusion, this Tribunal should deem the actions of NPCS attributable to Respondent. This decision would be in line with the ILC Articles and moreover, the facts of this case.

98 Commentary, p.48
99 Clarifications, ¶11
100 Barcelona Traction, ¶56-58
101 Emergency Authorization, p.19 of the Record
102 Amicus Submission, p.23 of the Record
103 Clarification Request, ¶2
104 Uncontested facts, ¶23
105 Malumfashi, p.24
II. CLAIMANT’S INVESTMENT WAS UNLAWFULLY EXPROPRIATED BY RESPONDENT

102. Nowadays countries are fiercely competing for foreign direct investment, keeping up with the concepts of good governance and export led-growth, all of which characterizes this era as time where straightforward formal expropriation of alien property seems to have come to an end. However, RESPONDENT’s actions in the case at hand contravene the basic notions of peaceful enjoyment of one’s possessions and amount to a blatant disregard of FS-BIT Art.4, which explicitly provides that:

“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.”

103. By transferring the oil wells to NPCS, RESPONDENT expropriated CLAIMANT’s investment (A). Moreover, RESPONDENT’s actions do not in any way qualify as lawful expropriation under the FS-BIT (B). Finally, even if Tribunal finds that RESPONDENT executed a lawful expropriation, CLAIMANT is still entitled to full and effective compensation (C).

A. Respondent expropriated Claimant’s investment

104. It is well established in both doctrine and case law that expropriation represents a wealth deprivation, an outright taking of private property by the state, with the effect of depriving the owner, in whole or in significant part, of the use or reasonable and expected economic benefit of the property. On the other hand, FS-BIT Art. 4(1) clearly stipulates that “any measure which might limit permanently or temporarily the Investor’s ownership, possession, control or enjoyment” will result in violation of the terms of the FS-BIT. As to the facts of this case, management and operating teams sent by RESPONDENT took over CLAIMANT’s oil wells

106 Dolzer/Bloch, p.155
107 Weston, p.112; Oscar, ¶32; Amoco, p.223; Phillips, ¶99-101
108 FS-BIT Art. 4 (1)
Furthermore, on the very same day, RESPONDENT suspended CLAIMANT’s non-exclusive explore license.109

105. These actions, where an investor is directly deprived of its property, represents a text-book example of taking by the State that constitutes direct expropriation111 and that consequently deprived CLAIMANT of its property in a permanent manner.

106. What is more, certain actions on part of the host State, while not expropriatory on face value, can results in the deprivation of a foreign investor’s property, and thus be regarded as indirect expropriation.112 The array of actions that Governments have taken in the past resulted in an increasing concern that the concept of indirect expropriation is actually applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society.113 In this particular case, RESPONDENT’s actions were not aimed only at direct taking of CLAIMANT’s property but resulted in creeping expropriatory measures cloaked in legislative changes of the Sylvanian OPA. More specifically, the newly enacted OPA Section 1014 introduced responsibility of a party from its facility from which oil is discharged, or which poses a substantial threat of discharge of oil as well as a duty to fully compensate the damages resulting from any such incident, irrespective of the issue of actual liability for the leak or discharge.114 At the moment CLAIMANT established its presence as an investor in Sylvania this unreasonably broad array of responsibility coupled with an exuberant duty to compensate for any and all damages irrespective of the actual liability did not exist. What is more, in the situation where these legislative changes were introduced only after the discharge of oil happened, had effectively limited CLAIMANT’s investment. Coupled with a dramatic decrease in the market

109 Uncontested facts, ¶23
110 Emergency Order, p.20 of the Record
111 Newcombe, pp.8-10
112 Newcombe, p.9, Tippetts, p.226; Starrett, ¶154; Santa Elena, ¶76
113 OECD Working Paper, p.2
114 Clarifications, ¶13
value of FPS\textsuperscript{115} these limitations unambiguously form a severe impediment upon CLAIMANT’s property and its enjoyment thereto, thus resulting in indirect expropriation.

107. Whichever path this Tribunal decides to take, it should have no difficulties reaching a conclusion that the actions taken by RESPONDENT effectively deprived CLAIMANT of its investment - directly, indirectly or both – in evident contravention with RESPONDENT’s the duty under FS-BIT Art. 4(1)

**B. Respondent’s actions cannot qualify as lawful expropriation under the BIT**

108. As a matter of exception, FS-BIT Art. 4(2) provides that expropriation shall be deemed lawful if it is undertook 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.\textsuperscript{116}

109. Accordingly, the applicable FS-BIT sets out cumulative threshold of four prerequisites, none of which was met by RESPONDENT.

110. First and foremost, as delineated by RESPONDENT, the idea behind taking over the premises of the oil wells by NPCS was to “undertake the necessary remedial works”.\textsuperscript{117} However, as it had been clarified further on, “the damaged wells were sealed…..long before the government officially transferred management of the wells to NPCS”.\textsuperscript{118} As it has been established in practice and doctrine, in international law, acts of reprisal are not legitimate legal basis for expropriation, and certainly could not be regarded as a matter of public purpose.\textsuperscript{119}

111. Secondly, legitimate and legally framed conduct is the one freed from unpredictability and discrimination – as international law has very low tolerance for arbitrariness.\textsuperscript{120} Lack of legality in actions taken by the RESPONDENT – especially when CLAIMANT mobilized an emergency

\textsuperscript{115} Clarifications, ¶37
\textsuperscript{116} FS-BIT Art. 4(2)
\textsuperscript{117} Uncontested facts, ¶23
\textsuperscript{118} Clarifications , ¶49
\textsuperscript{119} BP, p.150; UNCTAD Taking of Property, p.25.
\textsuperscript{120} ELSI, ¶76
response team to work on plugging the wells and to address environmental damage – is mirrored in the lack of their actual necessity.

112. Moreover, reflecting on RESPONDENT’s legislation passed after the oil spill, its retroactive and discriminatory tone and limiting effect in terms of enjoyment of CLAIMANT’s property, this Tribunal will have to assess the nature, impact and proportionality of the legislative changes, as these factors have been detected as crucial\textsuperscript{121} for determining legality of expropriating actions on the side of the host State. Pursuant to the facts of the case, RESPONDENT’s amendments to OPA not only retroactively introduced unbearable weight on Claimant’s shoulders\textsuperscript{122} but discriminated against its rights as the Investor under the FS-BIT.

113. Finally, the test of whether RESPONDENT’s measures are lawful relates to reasonableness of the aim of the actions taken, the degree of deprivation of economic rights and the legitimate expectations of Claimant in the instant case – standards developed in international investment case law.\textsuperscript{123} Once again, facts point out to a single conclusion – after revoking Claimant’s exploration license, establishing a national petroleum company, taking over the wells after the leak was remedied and evidently rendering Claimant’s further ventures in Sylvania as redundant – RESPONDENT’ attempts are nothing short of an unlawful taking, prohibited under FS-BIT Art. 4(2).

C. In any event, Claimant is entitled to full and effective compensation

114. FS-BIT Art. 4(3) provides for a “full and effective compensation”, “which must be equivalent to the market value of the Investments prior to the time at the nationalization or expropriation is made public.”\textsuperscript{124} Compensation is due even if the government did not intend to deprive the investor of its property rights and even if the value of the property evaporated as a result of the measure, without any quantifiable benefit to the government itself.\textsuperscript{125} Additionally, as reinstated

\textsuperscript{121} Gazzini, p.42
\textsuperscript{122} Uncontested facts, ¶14
\textsuperscript{123} Azurix ¶276; LG&E ¶195
\textsuperscript{124} FS-BIT Art. 4(3)
\textsuperscript{125} Heiskanen, p.4
in jurisprudence of the Permanent Court of International Justice, if the government taking is unlawful, compensation is to reinstate CLAIMANT to a position where it would have been, had there been no taking at all.\footnote{Chorzow Factory ¶123-125}

115. Accordingly, the principle communicates that the compensation should equal the fair market value, immediately prior to the expropriatory measure.\footnote{Smutny, p.3} In terms of both direct and indirect taking and depravation of property executed by RESPONDENT, CLAIMANT is entitled to compensation that would cover the market value of its investment prior to the time at which RESPONDENT made its decision to transfer the wells to NPCs and enact amendments to OPA – including any and all direct and consequential losses suffered by the CLAIMANT in that regard.

116. In any event, despite the lawfulness and characterization of RESPONDENT’s actions, pursuant to established practice, doctrine and relevant provisions of the BIT, CLAIMANT is entitled to full and effective compensation.
III. RESPONDENT’S ACTIONS VIOLATED THE FAIR AND EQUITABLE TREATMENT STANDARD

117. CLAIMANT submits that RESPONDENT breached its duty under FS-BIT Art. 2(2) by failing to accord CLAIMANT’s investment fair and equitable treatment and full protection and security. Namely, RESPONDENT’s acts with respect to CLAIMANT’s investment frustrated CLAIMANT’s legitimate and reasonable expectations (A). Moreover, these acts were not performed in accordance with due process of law (B.).

A. Respondent’s acts frustrated Claimant’s legitimate and reasonable expectations

118. It is widely accepted in doctrine that the fair and equitable treatment (hereinafter “FET”) is an overarching principle that embraces the other standards.\textsuperscript{128} In the infamous Saluka case,\textsuperscript{129} on the side of the host State there is a duty of protection of the investor’s legitimate expectations, which is understood as a dominant element of the standard of FET. It is accepted that the breach of legitimate expectations amounts to a breach of FET.\textsuperscript{130}

119. When an investor makes a decision to invest it relies on the assessment of the state of law and totality of the business environment at the time of the investment, and expect that the conduct of the host State subsequent to the investment will be fair and equitable.\textsuperscript{131} It was also found in numerous cases that the fair and equitable treatment is inseparable from stability and predictability.\textsuperscript{132}

120. The root of investors legitimate expectations was thoroughly explained in the Tecmed:

\textit{“The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it

\textsuperscript{128} Shreuer2, p.6}

\textsuperscript{129} Saluka ¶302

\textsuperscript{130} Newcombe/Paradell, p.278

\textsuperscript{131} Saluka, ¶301

\textsuperscript{132} CMS ¶276 ; LG&E, ¶124; Sempra, ¶300
may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.\textsuperscript{133}

121. The principal basis for legitimate expectations lies in an explicit promise or guaranty from the State\textsuperscript{134}. The Parkerings-Compagniet tribunal reaffirmed this standpoint.\textsuperscript{135}

122. FPS, CLAIMANT’s wholly-owned subsidiary, and RESPONDENT signed the MLA which awarded FPS with a 5-year non-exclusive oil exploration and drilling license\textsuperscript{136}. The respectful explicit promise or guaranty was given in the MLA, to FPS, that it will be able to perform its commercial activity for the period of 5 years. RESPONDENT had by suspending the license prematurely breached the expectations of the CLAIMANT and thus violated the FET standard.

123. Furthermore, MLA Clause 18 states:

\begin{quote}
"Any modifications of the terms and conditions of this Agreement may only be made by mutual written consent of the parties."
\end{quote}

In addition, MLA Clause 22 provides:

\begin{quote}
"This Agreement shall have the force of law."
\end{quote}

124. MLA Clause 18 represents the stabilization clause\textsuperscript{137} which was supposed to prevent RESPONDENT from annulling the agreement or modifying its terms without CLAIMANT’s consent, either by legislation or by administrative measures. Stabilization clauses are not prohibited by international law.\textsuperscript{138} Furthermore, if such a clause exists then its breach is internationally unlawful.\textsuperscript{139}

\textsuperscript{133} Tecmed, ¶154
\textsuperscript{134} Small, p.126
\textsuperscript{135} Parkerings, ¶331
\textsuperscript{136} Uncontested facts, ¶4
\textsuperscript{137} Brownlie, p.526
\textsuperscript{138} Aminoil, ¶90-101
\textsuperscript{139} Texaco, ¶494-495
125. RESPONDENT had unilaterally changed the MLA by amending the OPA\(^{140}\) and applied it against CLAIMANT although any changes of the former had to be adopted by mutual written consent. Every unilateral alteration of the MLA is inacceptable. As a consequence, RESPONDENT breached CLAIMANT’s internationally conferred right to participate in amending the MLA and thus violated CLAIMANT’s legitimate expectation.

126. Furthermore, the President of Sylvania had suspended the MLA\(^{141}\) an enactment with the force of law, by an executive order without any participation and approval of the legislative branch of power of Sylvania. The actions had no ground in applicable international law and were aimed at RESPONDENT’s circumventing its obligations toward CLAIMANT.

127. It is accepted that important changes in domestic law that undermine the investors’ legitimate expectations or the stability of the investment’s legal environment are contrary to the FET standard.\(^{142}\) This Tribunal should therefore have no obstacles in finding that the changes made in Sylvania’s domestic law after CLAIMANT made its investment were so broad and unexpected that they amount to the frustration of CLAIMANT’s legitimate expectations and, consequently, to the breach of FET.

128. The RESPONDENT could invoke potential environmental risk as a defence, but CLAIMANT asserts that this cannot suffice as an explanation for such an egregious change of law and revocation the drilling license. Sylvania and Freedonia had freely entered the FS-BIT and therefore, their obligation was to fulfil the aims of FS-BIT. The aim of a BIT with regard to the protection of legitimate expectations was explained clearly in Pope & Talbot v Canada: ‘

“the aim of NAFTA is to offer investors the kind hospital climate that would insulate them from political risks or incidents of unfair treatment”\(^{143}\).

\(^{140}\) Uncontested facts, ¶11

\(^{141}\) Emergency Order, p.20

\(^{142}\) Schreuer3, p.22. ; PSEG, ¶250

\(^{143}\) Pope/Talbot, ¶116
129. RESPONDENT cannot find any justification for blatantly disregarding its contractual obligations towards CLAIMANT, not even by invoking its “sovereignty” because even the invocation of sovereignty cannot prevail over the concept of pacta sunt servanda.  

130. Mindful of the presented facts, theoretical and practical reviews, CLAIMANT has shown that RESPONDENT acted inconsistently with its obligations. Furthermore, RESPONDENT as a consequence of its own negligence insured that this Tribunal find that it breached CLAIMANT’s legitimate expectations and thus violated the FET standard.

B. Respondent failed to respect due process of law

131. Due process of law is unanimously considered to be a universally accepted principle of international law.  

145 It applies to all forms of government decision making in which the host state decisions affect the rights of the investor. Due process, inter alia, must be observed in order for a taking of property to be lawful both in domestic legal systems and international law which protects the basic rights of natural and legal persons. In order for due process of law to be respected, State actions must not be arbitrary or discriminatory.

132. In the ELSI judgment, the ICJ defines arbitrariness as a wilful disregard of due process of law, an act which shocks, or at least surprises the sense of judicial propriety. This standard of assessment of arbitrariness set by the ICJ was later confirmed by numerous ICSID tribunals.

133. In Waste Management the tribunal emphasized that there will be breach of fair and equitable treatment if the conduct of the State is arbitrary, grossly unfair, unjust or idiosyncratic,
discriminatory and if it involves lack of due process leading to an outcome which offends judicial propriety.\textsuperscript{151}

134. In absence of a treaty definition of the arbitrary measures, the tribunal in the \textit{Lauder} case concluded that a measure is arbitrary where it is not found on the reason or fact, nor on the law, but on a mere fear reflecting national preference.\textsuperscript{152}

135. Furthermore, the duty to accord due process of law shall also be deemed breached in case of procedural irregularities.\textsuperscript{153} Accordingly, in \textit{ADC} case, the tribunal ruled that the due process requires some basic legal mechanisms, such as reasonable advance notice, a fair hearing and unbiased and impartial adjudicator and if no legal procedure of such nature exists at all, the argument that the actions are taken under due process of law rings hollow.\textsuperscript{154}

136. The facts of the case at hand clearly show that \textsc{Respondent} did not meet its obligation to accord to \textsc{Claimant} due process of law.

137. Firstly, \textsc{Respondent} acted in a manner that was both arbitrary and discriminatory. Namely, \textsc{Respondent} unilaterally ordered FPS to pay SD 150,000,000 for liquidated damages for the breach of the Agreement and the amended OPA.\textsuperscript{155} \textsc{Claimant} acknowledges that the OPA contains a provision that requires \textsc{Claimant} to pay ‘fines’ in the cases involving breaches of the OPA or the license, including ‘liquidated damages’.\textsuperscript{156} However, these liquidated damages must be calculated on the basis of the volume of the spills. \textsc{Respondent} ordered FPS to pay a fine without previously establishing the volume of the damages caused by the oil spills and thus showed that the fine was determined under the conditions that were at least obscure and ambiguous.

\textsuperscript{151}Waste Management, ¶98
\textsuperscript{152}Lauder, ¶232
\textsuperscript{153}Genin, ¶371
\textsuperscript{154}ADC, ¶ 435
\textsuperscript{155}Uncontested facts, ¶17
\textsuperscript{156}Clarifications, ¶16
Furthermore, the Ministry of Energy of Sylvania failed to even consider CLAIMANT’s submissions that it had complied with all applicable safety obligations. RESPONDENT’s order was therefore grounded on its one-sided view of the situation. This Tribunal can infer that the essence of discrimination is that the newly created NPCS, a national of Sylvania and a Government-owned company, was given far better conditions for waging the oil spill situation. FPS was from the very beginning of its conduct to curtail and remedy the oil spill damage undermined from the RESPONDENT who preferred the actions NPCS, although nothing was speaking that the NPCS was more eligible to cope with the oil spills except its nationality.

Finally, CLAIMANT asserts that due process of law was also violated when CLAIMANT sought declaratory relief concerning the amended OPA (Clauses 18 and 22). When the President of Sylvania enacted the executive order on the suspension of the MLA, CLAIMANT had no chance to express its view thereof and obviously did not have the option of an internal remedy within the laws of Sylvania. In that executive order, CLAIMANT was labelled as an entity which prevents, hinders or delays any necessary action in coping with the emergency. What should be noted is that this order was brought on 29 November 2010, after the oil leaks were sealed by the teams, which included FPS’ experts, and after only remedial and cleanup works remained. It is obvious that this emergency authorization was grounded on misleading facts, without consideration to the fact that the FPS gave its inevitable contribution. Hence, it should be concluded that this decision violated the standard of due process.

CLAIMANT’s contentions that RESPONDENT violated the standard of due process in decision-making are grounded both in the facts and in applicable international law. Therefore, the Tribunal should find that both the standard of due process and the FET standard have been violated.

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157 Uncontested facts, ¶26
158 Emergency Order, p.19
159 Clarification, ¶49
IV. RESPONDENT DID NOT ACCORD CLAIMANT’S INVESTMENT NATIONAL TREATMENT

141. The FS-BIT provides that the Investors of each Contracting Party shall have the treatment not less favourable than the nationals of the host State relating to the investment\(^{160}\) and to the activities connected with the investment.\(^{161}\) Furthermore, national treatment according to Energy Charter Treaty applies to management, maintenance, use, enjoyment or disposal of the investment.\(^{162}\)

142. RESPONDENT has violated FS-BIT Art. 3 by giving CLAIMANT treatment which is less favourable than that given to NPCS in the activities connected with the investment. Given that the activities related to Medanos oil spill are directly connected to the investment, NPCS should not be granted more rights and authorities than CLAIMANT in dealing with this problem. While NPCS was given the authorization to undertake all and any measures regarding the oil wells, CLAIMANT’s assets were unlawfully expropriated. In other words, NPCS was both de iure and de facto, more favoured than FPS.

143. An essential step to ascertain whether there had been violation of the national treatment is to identify the appropriate domestic comparator, against which the treatment accorded the alleged injured investment should be measured (A), secondly, the identification of treatment less favourable than that given to the domestic comparator (B) and lastly, whether or not the host government had legitimate reasons to justify the difference in treatment (C).\(^{163}\)

144. Regarding the burden of proof, it is accepted both in practice\(^{164}\) and by authorities\(^{165}\) that the CLAIMANT must make clear that there were like circumstances with domestic entity with respect

\(^{160}\) FS-BIT Art. 3(1)

\(^{161}\) FS-BIT Art. 3(2)

\(^{162}\) Energy Charter Treaty Article 10(7)

\(^{163}\) McLahlan/Shore/Weiniger, pp.253-254.

\(^{164}\) Feldman, ¶181

\(^{165}\) Bjorklund, p.57
to the treatment at issue, and demonstrate that the foreign investor received less favourable treatment. On the other hand, the RESPONDENT must justify that such treatment was based on legitimate public policy consideration.

A. Claimant and NPCS were in like circumstances

145. Whether like-circumstance exists between NPCS and CLAIMANT depends from the facts of the case. The meaning of “like-circumstances” must be interpreted in a broad and flexible manner. According to the present situation and the facts of the case it is seeable that the CLAIMANT and the NPCS were both companies whose activities are concerned of the natural resources and its exploitation and therefore the comparison is only valid if the firms are operating in the same sector. The FPS and NPCS are operating in the same field of economic activities and thus are in “like-circumstances”.

146. In the present case there is only one appropriate comparator, NPCS, but that is sufficient to establish a violation of this standard if that entity receives more favourable treatment.

147. One of the functions of NPCS was to cope with the oil spill problem, which is precisely one of the tasks assumed by CLAIMANT in the MLA. The concept of “like-circumstances” can have a range of meanings, from “similar” all the way to “identical”. Furthermore, “like-circumstances” cannot be interpreted in a narrow sense. Such reasoning of “like-circumstances” concept is thus capable of absorbing eventual discrepancies between the NPCS and CLAIMANT that RESPONDENT might claim.

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166 UNCTAD series, National treatment, p.40
167 Kinnaer/Bjorklund/Hannaer, p.10
168 Ibid, p.5
169 Bjorklund, p.38
170 Pope/Talbot, ¶75
171 Occidental, ¶173
B. Respondent treated Claimant less favorably

148. For the NT provision to be violated, less favourable treatment does not necessarily have to be motivated because of nationality.172 What is important is whether or not the practical effect of the measure creates a disproportionate benefit for nationals over non-nationals.173

149. Since RESPONDENT was, under the terms of the non-exclusive MLA,174 authorized to have other companies in this sector, the incorporation of NPCS was legitimate. However, the treatment accorded to NPCS was not legitimate because it amounted to the discrimination of FPS.

150. In light of the facts of this case, it is evident that RESPONDENT favoured NPCS over FPS. Notwithstanding the ultimate expropriation of its property, FPS was not given the opportunity to carry on with its undertaking in the Medanos field, which included, inter alia, remedial actions.

151. RESPONDENT cannot prove that these measures had a legitimate justification, inter alia, because NPCS was a company created after FPS, and could not therefore, have substituted the vast knowledge and know-how, concerning oil exploration in the Medanos field, FPS had obtained prior to its existence.

152. In conclusion, CLAIMANT submits that since NPCS and FPS were in like-circumstances and that RESPONDENT treated FPS less favourably than the NPCS, this Tribunal should find the NT standard was violated.

172 Thunderbird, ¶175-176
173 S.D. Myers, ¶252
174 Clarification, ¶21
V. RESPONDENT IS NOT ENTITLED TO RELY ON FS-BIT ART. 9

153. RESPONDENT asserts that all of its actions that had impacted CLAIMANT’s investment were justified by public safety concerns. A provision which allows the invocation of such concerns as a defence is enshrined in FS-BIT Art. 9. This provision stipulates that:

“Nothing in that agreement shall be construed...(t)o 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.”

154. It is widely recognized that a clause containing the possibility of invoking essential security is a general exception from abiding the treaty obligations. The prevailing interpretation of these clauses entails that they mainly serve as a balance between the right of State to invoke a general exception and the duty of that same State to respect treaty rights of the investor. Moreover, the provision regarding essential security interest is not a self-containing and independent provision, but it reflects customary international law and represents a customary doctrine of necessity as it was affirmed in Enron and Sempra cases.

155. In the light of the aforementioned, grounds for invoking necessity emanate from ILC Art. 25, which stipulates that a State can invoke necessity if that is the only way for the State to safeguard an essential interest against a grave and imminent peril, and if it does not seriously impair an essential interest of the State or States towards which obligation exists. First and foremost, there are four conditions for necessity to be invoked successfully. Furthermore, the burden of

175 ToR, (c)(ii).
176 Newcombe, p.360
177 Ibid, p.364
178 Enron, ¶303
179 Sempra, ¶348.
180 ILC Art.25 (1)(a, b).
proving that all of them were met lies on the RESPONDENT.\textsuperscript{181} Secondly, if all of the conditions are not \textit{cumulatively} satisfied, the invocation of necessity will not be justified.\textsuperscript{182} Finally, even if RESPONDENT decides to rely on the provision of FS-BIT Art. 9, CLAIMANT will unambiguously demonstrate that RESPONDENT did not protect its essential interest (A); there was no grave and imminent peril (B); the actions that RESPONDENT conducted were not the only way to protect its essential interest (C); RESPONDENT did not comply with its obligation not to impair essential interest of other Contracting Party (D).

\textbf{A. Respondent did not protect its essential interest}

156. It has been held in international practice and doctrine that the essential security interest which allows a state to breach its international obligation must be a \textit{vital interest}, such as political and economical survival.\textsuperscript{183}

157. As it was stated in \textit{LG&E} \textsuperscript{184} and similarly expressed in \textit{CMS},\textsuperscript{185} economic crisis can amount to an essential interest. However, such interest cannot serve as a justification to invoke necessity if economic crisis did not compromise the very existence of the state.\textsuperscript{186} Accordingly, international community reached a consensus that essential security interest is to be regarded as a justifiable defence in cases where economic or political existence of a state is at hand.

158. It is true that, the economic situation was fraught in Sylvania after the oil spill. However, one should not perceive that it amounted to such a magnitude that could have shaken the entire country’s economy. Only some branches of economy were affected by the oil spill, like agriculture, seafood, tourism and related industries.\textsuperscript{187} Namely, despite the fact that oil industry is important and closely affiliated with certain other branches of industry, a temporary halt in oil

\textsuperscript{181} Newcombe, p.361  
\textsuperscript{182} Gabcikovo ¶51-52; CMS, ¶330; Enron, ¶313.  
\textsuperscript{183} R.Ago; LG&E, ¶246  
\textsuperscript{184} LG&E, ¶251.  
\textsuperscript{185} CMS, ¶359  
\textsuperscript{186} Enron, ¶306  
\textsuperscript{187} Uncontested facts, ¶21
production cannot in any way be perceived as a deep impact upon the country’s economy or an insurmountable impediment to economic growth. Any opposite assertion would amount to an exaggeration. As a consequence, RESPONDENT in the present situation has no grounds to allege that the Medanos fields oil spill could have threatened its essential interest.

B. Respondent was under no grave and imminent peril

159. The ILC Articles Commentary states that a peril justifying the invocation of necessity must be objectively established and not merely apprehended as possible.\textsuperscript{188}

160. For peril to be grave and imminent, in such range that it can be equal to that of military invasion, a State’s economic foundation must be under siege.\textsuperscript{189} Only under the operation of such conditions can a necessity be properly invoked. There are numerous ICSID cases related to issues of grave and imminent peril which establish clear guidelines in determining whether such peril exists. In \textit{LG&E}, where tribunal found that there were grounds for invoking necessity, grave and imminent peril existed because there were violent demonstrations and protests which brought economy to a halt.\textsuperscript{190} On the other hand \textit{Enron} and \textit{Sempra} tribunals found that in their cases no necessity existed because the respective events were not out of control and had become unmanageable.\textsuperscript{191} Furthermore, the \textit{CMS} tribunal found that there was no necessity because even though the economic crisis was severe it did not result in total economic and social collapse.\textsuperscript{192}

161. Although there had been an impact on Sylvania’s economy, the facts of the case prove that RESPONDENT could, and more importantly did, control the situation. The Government, the President and the Sylvanian courts all carried on with their activities as normal. The State’s ability to exercise its sovereign power uninterrupted was \textit{never} questioned. Furthermore, nobody in the Government, media, or even CSE, stated that there is, or will, be total collapse of the country’s economic or social system. Accordingly, the elements of grave and imminent peril

\textsuperscript{188} Commentary, p.83
\textsuperscript{189} LG&E, ¶238
\textsuperscript{190} LG&E, ¶235
\textsuperscript{191} Enron, ¶307; Sempra, ¶349
\textsuperscript{192} CMS, ¶355
cannot be found and this Tribunal should find that this condition for the invocation of BIT Art. 9 was not satisfied.

C. Respondent had other means to protect its essential interest

162. For a State to be allowed to successfully invoke necessity the course of action taken must be the ‘only way’ available to safeguard its essential interest. The plea of necessity is excluded if there were other means available, even if they may be more costly or less convenient.\textsuperscript{193} This ratio was verbatim confirmed in \textit{CMS}.\textsuperscript{194}

163. This standing expresses not only a general acceptance of the principle, that the necessity will rarely be available, but that as a concept it is subject to strict limitations against possible abuse.\textsuperscript{195}

164. The crux of RESPONDENT’s invocation of necessity was the unstable economic situation in Sylvania. To cope with this, RESPONDENT chose a way which led to a breach its international obligations. RESPONDENT might allege that its actions were the ‘only way’ to address problems from the oil spill, however, as it was aptly stated by tribunals in \textit{Sempra} and \textit{Enron}:

\begin{quote}
\textit{“handling economic crisis… [entails] many approaches to addressing and resolving such critical events”}.\textsuperscript{196}
\end{quote}

165. Referring to the reasoning in \textit{Sempra} once again, there would have been no necessity even if RESPONDENT was to invoke, as a defence, that it had to restore public order or to address social unrest, because they could have been handled under the constitutional arrangements in force.\textsuperscript{197} RESPONDENT did nothing to fight economical problems in the country but instead opted to assail CLAIMANT and usurp its property. The facts of the present case show that RESPONDENT could have coped with the oil spill situation with legislative solutions in force and, moreover, had to do so according to MLA clause 18. RESPONDENT did not honour its obligations and, although it

\begin{footnotes}
\item[193] Commentary, p.83
\item[194] CMS, ¶324
\item[195] Commentary, p.80
\item[196] Sempra, ¶350; Enron, ¶308.
\item[197] Sempra, ¶348
\end{footnotes}
had other means to fight the situation, it chose the least convenient solution for the CLAIMANT by expropriating CLAIMANT’s investment and thus violating international law.

D. Respondent failed to observe the obligation of non impairment of essential interest of other countries

166. For RESPONDENT to invoke necessity and not impair the interest of other countries, the uppermost condition is that the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on reasonable assessment of the competing interest, whether these are individual or collective.\(^\text{198}\)

167. Although the ILC Articles refer that the non-impairment obligation exists toward sovereign countries, the reasoning of tribunals in *Enron* and *Sempra* state that the interest of private entities also must be taken into consideration because they are the ultimate beneficiaries of treaty obligations.\(^\text{199}\)

168. In the present case, the interest of Freedonia was substituted by the interest of CLAIMANT because the BIT served as an overarching frame for the MLA. RESPONDENT had the FS-BIT obligation not to impair and alienate CLAIMANT’s interests. RESPONDENT had recklessly violated interests of CLAIMANT through amending the OPA, through denying fair and equitable treatment and, finally through the expropriation of its property. RESPONDENT conduct is unacceptable. Consequently, the condition of non-impairment remains unfulfilled.

169. Notwithstanding the fact that the burden of proof lies with RESPONDENT when it comes to admissibility of defence under Art. 9, CLAIMANT has unambiguously showed that none of the cumulative conditions delineated in practice have been fulfilled by RESPONDENT. Accordingly, which ever path this Tribunals decides to take it will, come to the same conclusion: that there are no conditions for RESPONDENT to invoke FS-BIT Art. 9.

\(^{198}\) Commentary, p.84

\(^{199}\) Enron, ¶342; Sempra, ¶391
VI. RESPONDENT BREACHED ITS OBLIGATION OF CONFIDENTIALITY

170. CLAIMANT acknowledges that neither the FS-BIT nor the MLA contain a confidentiality clause or an explicit obligation of non-disclosure that would bind RESPONDENT to secrecy of information communicated between the parties hereto. However, CLAIMANT submits that RESPONDENT was under the general obligation to, under all means necessary, safeguard CLAIMANT’s investment. This is an obligation mirrored in the very essence of BIT protection accorded to foreign investors, in this particular case, the FS-BIT Preamble.

171. The FS-BIT preamble endorses the idea of establishing bilateral cooperation, offering encouragement and mutual protection of foreign investments and stimulating business ventures that will eventually result in fostering prosperity of both Contracting Parties.\(^{200}\) The promotion of investments includes providing protection thereto, whereas protection in this particular case presupposes, inter alia, the duty of confidentiality. As to the Black’s Law Dictionary, confidentiality represents a “state of having the dissemination of certain information restricted.”\(^{201}\) The facts of the case show that this is precisely the understanding of the concept of confidentiality that RESPONDENT retains, as its government regulation restricted dissemination of particulars regarding the oil spill, rendering this as a confidential issue.\(^{202}\) Moreover, any dissemination of sensitive information related to the investor-state relationship in the present case that would essentially impede upon CLAIMANT’s investment or negatively affect its property would be a breach of RESPONDENT’s general duty to protect Freedonian investments. However, disregarding the implicit confidentiality duty under the FS-BIT and its own governmental regulations, on 29 September 2009 RESPONDENT failed to prevent the leak of sensitive confidential information to La Reforma, a leading Sylvanian newspaper.\(^{203}\) These actions triggered the avalanche of unsubstantiated claims related to CLAIMANT’s competence to remedy the oil leak, endangering CLAIMANT’s investment and jeopardizing its business reputation, prospective ventures and its future as a participant in the Sylvanian petroleum industry.

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\(^{200}\) FS-BIT Preamble

\(^{201}\) Black’s Law Dictionary, p.318

\(^{202}\) Clarifications, ¶43

\(^{203}\) Uncontested facts, ¶9
172. Even if this Tribunal entertains the possibility that RESPONDENT could have validated the breach of the confidentiality obligation with the notions of “public purpose” or “national interest”, the blatant disregard of CLAIMANT’s protected rights under the FS-BIT cannot in any way be construed as allowed, legitimate or forming part of what CLAIMANT as investor could have reasonably expected.

173. Finally, when investment climate – as the set of location-specific factors shaping the opportunities and incentives for companies to invest productively and expand\textsuperscript{204} - becomes turbulent, the host state has to do everything in its power to safeguard the expectations of foreign investors on its territory. RESPONDENT did the opposite by sacrificing CLAIMANT’s credibility as in investor, thus causing it severe reputational damage which further on reflected in drastic decrease of its investments’ value.

174. In conclusion, if the head of the coin is the promotion of investments, than the tale most certainly comes in the form of the duty of confidentiality. No matter how the coin is flipped, RESPONDENT’s defence, that it complied with its duties under the FS-BIT, falls flat of substantiated argument. Therefore, CLAIMANT urges this Tribunal to find that RESPONDENT breached its material obligation of confidentiality.

\textsuperscript{204} Smith/Driemeier, p.1
PRAYER FOR RELIEF

In the light of the foregoing, Claimant respectfully requests the Tribunal to adjudge and declare that:

- The Tribunal has jurisdiction over this dispute;
- CSE should not be granted amicus curiae status in these proceedings;
- Respondent’s counterclaim is not admissible;
- Respondent violated its obligations under Articles 2, 3 and 4 of the FS-BIT by expropriating Claimant’s investment, denying it full protection and security and national treatment;
- Respondent cannot rely on exceptions of national security and public interest;
- Respondent materially breached its confidentiality obligations by leaking information to Sylvanian press.

RESPECTFULLY SUBMITTED ON SEPTEMBER 30, 2011 BY

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Team BADAWI

On behalf of Claimant, Freedonia Petroleum LLC
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