IN THE ARBITRATION UNDER THE RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE

BETWEEN

FREDONIAN PETROLEUM

CLAIMANT

V.

REPUBLIC OF SYLVANIA

RESPONDENT

MEMORIAL FOR CLAIMANT
**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>List of Authorities</td>
<td>vi - vii</td>
</tr>
<tr>
<td>List of Legal Sources</td>
<td>vii</td>
</tr>
<tr>
<td>List of Abbreviation</td>
<td>x</td>
</tr>
<tr>
<td>Issues Presented</td>
<td>xi</td>
</tr>
<tr>
<td>Statement of Facts</td>
<td>1</td>
</tr>
<tr>
<td>Summary of Arguments</td>
<td>7</td>
</tr>
<tr>
<td>Arguments Advanced</td>
<td>9</td>
</tr>
<tr>
<td>Prayer</td>
<td>46</td>
</tr>
</tbody>
</table>
PART I:

ARGUMENTS ON JURISDICTION...........................................................................................................10

I. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE.........................................................10

A. The Tribunal Has Personal Jurisdiction Over The Dispute. .......................................................10
   ▪ Republic of Sylvania is a state entity for the purpose of establishing personal
     jurisdiction.......................................................................................................................................10

B. Freedonia Petroleum has standing to pursue arbitration before the ICC...............................11

C. The Tribunal Has Subject Matter Jurisdiction Over This Dispute. .........................................12
   ▪ The dispute meets the requirements of a legal dispute. ..............................................................13
   ▪ The dispute arises directly from a qualifying investment..........................................................13

II. THE TRIBUNAL HAS JURISDICTION REGARDLESS OF CLAUSE 19 OF MEDANOS
    LICENSE AGREEMENT.................................................................................................................15

A. Freedonia Petroleum’s Claims Are Contractual and are Required to be Brought Under Clause
   of the Medanos License Agreement.................................................................................................15
   ▪ Freedonia Petroleum’s Claims are treaty-based.........................................................................16
   ▪ Article 19 of the Medanos License Agreement does not precludes Freedonia Petroleum
     from bringing the claim under the BIT..........................................................................................17
   ▪ The location of the Umbrella clause does not prevent its application......................................18

III. THE CLAIMANT’S TREATY-BASED CLAIMS ARE UNDER THE TRIBUNAL’S
     JURISDICTION PURSUANT TO ARTICLE 10 OF THE BIT......................................................18

A. The Umbrella Clause applies to this dispute..............................................................................19

B. The Medanos License Agreement Provision Does Not Preclude Bit Jurisdiction...............20

IV. RESPONDENT’S COUNTER-CLAIM IS UNFOUNDED ON ANY APPLICABLE
    TREATIES AS SIGNED AND RATIFIED BETWEEN FREEDONIA AND
    SYLVANIA.......................................................................................................................................21

V. CLAIMANT’S COMMENTS WITH RESPECT TO CSE’s REQUEST........................................21

VI. CONCLUSION ON JURISDICTION. ..............................................................................................22
PART II:

ARGUMENTS ON THE MERITS ........................................................................................................22

I. RESPONDENT MATERIALLY BREACHED THE MEDANOS LICENSE AGREEMENT

A. Respondent Unilaterally amended the Contract For its Own Gain. ................................. 23
B. Respondent is Bound by a Duty of Good Faith and Fair Dealing. ................................. 23

II. SYLVANIA REPUBLIC DISCRIMINATED AGAINST FREEDONIA PETROLEUM IN VIOLATION OF ITS INTERNATIONAL DUTIES. ........................................................................ 23

A. NPCS and its Representatives are the Sylvanian Government......................................... 24
   1. Against the BIT’s Express Language, Sylvania Improperly Disturbed Claimant’s Investment without Due Process of Law.............................................................. 24

B. Sylvania Violated Established International Law Standards of Fair and Equitable Treatment and National Treatment................................................................. 25
   1. Sylvania Violated the FET and the NT Standards \textit{vis-à-vis} Freedonia Petroleum. .......... 25
      ▪ Sylvania Discriminated Against Freedonia Petroleum .................................................. 26
      ▪ Respondent Breached Freedonia Petroleum’s Legitimate Expectations...................... 27
      ▪ Sylvania, in Bad Faith, used its Power for Improper Purposes and to Coerce and Intimidate Freedonia Petroleum’s Representatives. ........................................... 28
      ▪ Not one “Countervailing Factor” Applies ......................................................................... 29

III. FREEDONIA PETROLEUM’S INVESTMENT WAS EXPROPRIATED BY SYLVANIA REPUBLIC UNLAWFUL INTERFERENCE ........................................................................ 30

A. The Freedonia-Sylvania BIT Regulates the State’s Right to Expropriate.......................... 30
B. Freedonia Petroleum’s Expropriated Rights are Protected by the Freedonia-Sylvania BIT. ......................................................................................................................... 31
   ▪ Freedonia Petroleum’s Rights in Medanos Oilfield Project were Disturbed ................. 31

C. Sylvania’s Unlawful Interference with Freedonia Petroleum’s Investment Constitutes Indirect Expropriation ........................................................................................................... 32
   1. All the Elements of Indirect Expropriation are Present Here. ........................................ 32
      (a) Sylvania’s Interference with Freedonia Petroleum’s Investment was Significant .... 33
      (b) The Effect of NPCS’s Actions was to Neutralize Freedonia Petroleum’s Investment ... 34
      (c) Respondent Spoiled Freedonia Petroleum’s Reasonable Investment Expectations .... 34

D. In the Alternative, Based on the MFN Clause, Freedonia Petroleum is Entitled to Rely on the Provision of the Freedonia-Sylvania BIT ......................................................... 35

E. RESPONDENT’S EXPROPRIATION OF CLAIMANTS INVESTMENTS WAS ILLEGAL ........................................................................................................................................... 35
• Respondent’s Invocation of National Security as a Public Purpose is Insufficient to Legalize Expropriating Claimant’s Investment..................................................................................................................36
• Respondent’s Action Were Not in Conformity With National Laws..................................................................................................................36
• Respondent’s Failed to Provide Claimant Full Immediate and Effective Compensation..................................................................................................................37

IV. RESPONDENT FAILED TO PROVIDE CLAIMANT’S INVESTMENT FAIR AND EQUITABLE TREATMENT IN VIOLATION OF ARTICLE 2(2) OF THE BIT..........................................................................................37
• Respondent Failed to Act in Good Faith..................................................................................................................38
• Respondent Failed to Provide Claimant with Due Process ..........................................................................................39

V. SYLVANIA IS NOT ENTITLED TO INVOKE THE DEFENSE OF ESSENTIAL SECURITY..................................................................................................................39
• The Alleged Leak of Information did Not Constitut an Emergency..................................................................................................................41
• Respondent’s Actions Were Disproportionate to the Threat Respondent Perceived..................................................................................................................42

VI. THE ALLEGATION OF LEAKAGE IN CONFIDENTIALITY REPORT IS CONSISTENT WITH PUBLIC POLICY, PUBLIC ORDER AND SYLVANIAN’S CITIZEN’S RIGHT TO BE INFORMED..................................................................................................................44

VII. CONCLUSION ON THE MERITS.................................................................................................................45

REQUEST FOR RELIEF ........................................................................................................................................46
LIST OF AUTHORITIES

BOOKS AND TREATISES


SCHOLARLY WORKS AND ARTICLES


Broches, Aron (Cited as: Broches II) Settlement of Disputes Arising out of Investment in Developing Countries, in INTERNATIONAL BUSINESS LAWYER, Vol. 11, 206 (1983).


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ARBITRATION AWARDS

ICSID


Sempra Energy International v. Argentine Republic (Cited as: Sempra)


Ad Hoc Arbitration Tribunals


OTHER AUTHORITATIVE MATERIALS


All references to “Record” are to the FDI Moot Problem as published by the Organization on its web site. The problem has been assigned page numbers. Including all materials, the problem has 24 pages.

All references to “First Clarification” and “Second Clarification” refer to the subsequent rounds of clarifications held in June (First Clarification) and August (Second Clarification), 2011.
**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>LIST OF ABBREVIATION</th>
<th>DESCRIPTION ABBREVIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedonia-Sylvania BIT -</td>
<td>Treaty between the Republic of Freedonia and the Republic of Sylvania concerning the Encouragement and Reciprocal Protection of Investments</td>
</tr>
<tr>
<td>BIT or BITs</td>
<td>Bilateral Investment Treaty(ies)</td>
</tr>
<tr>
<td>CBD -</td>
<td>Convention on Biological Diversity</td>
</tr>
<tr>
<td>ICSID Convention -</td>
<td>Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington Convention or the Convention</td>
</tr>
<tr>
<td>ICCPR -</td>
<td>International Convention on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESR -</td>
<td>International Covenant on Economic and Social Rights</td>
</tr>
<tr>
<td>FET -</td>
<td>Fair and Equitable Treatment Standard</td>
</tr>
<tr>
<td>FPS -</td>
<td>Full Protection and Security Standard</td>
</tr>
<tr>
<td>ICC -</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICSID or the Centre -</td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>ICJ -</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>MFN -</td>
<td>Most Favoured Nation Standard</td>
</tr>
<tr>
<td>NT -</td>
<td>National Treatment Standard</td>
</tr>
<tr>
<td>SMJ-</td>
<td>Subject Matter Jurisdictions</td>
</tr>
<tr>
<td>UNIDROIT -</td>
<td>International Institute for the Unification of Private Laws</td>
</tr>
<tr>
<td>Tribunal -</td>
<td>International Chamber of Commerce Tribunal</td>
</tr>
</tbody>
</table>
ISSUES PRESENTED

1. 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:

   a) The Freedonian government’s majority ownership of the Claimant, Freedonia Petroleum
   b) The recourse by the Claimant's wholly-owned subsidiary FPS to the Sylvanian Ministry of Energy prior to requesting ICC arbitration

2. Whether NPCS' actions are attributable to the Respondent;

3. Whether the Respondent materially breached the provision of the Sylvania- Freedonia BIT obligations, inter alia, by allegedly leaking a confidential report to La Reforma;

4. 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

5. Whether the Respondent is entitled to rely on its domestic law and international legal notions of national security and public interest as defences

6. The Respondent's counterclaim for declaratory relief.
STATEMENT OF 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 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 Sylvanian Government stated that the Gulf oil spill could get into a “Loop Current” within a day, eventually carrying oil southward along the Sylvanian 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 Sylvanian 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 Sylvanian newspaper (“La Reforma”).

10. On 21 November 2009, an amendment to the Sylvanian 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 Sylvanian 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 Sylvanian 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. 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 Sylvanian 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 NPCS 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
(a), 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 Sylvanian Court of Administrative Matters a request for release of details of the arbitration proceedings between the Sylvanian Government and Freedonia Petroleum. before the ICC tribunal, including pleadings and transcripts of the proceedings, if any.

32. On 31 August 2011, the Sylvanian 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 Sylvanian 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.”
SUMMARY OF THE ARGUMENT

1. The Tribunal has jurisdiction over the dispute pursuant to Article 25 of the Convention. The parties to this dispute have clearly consented to the Tribunal’s jurisdiction. The Tribunal has both subject matter jurisdiction (SMJ) and personal jurisdiction in this dispute. All timing requirements have been satisfied and the jurisdictional limitations of the Freedonia-Sylvania BIT do not apply.

2. Based on the Freedonia-Sylvania BIT, Sylvania has irrevocably consented to the Tribunal’s jurisdiction. The Tribunal has SMJ because this dispute is legal in nature and arises directly out of an investment. The Tribunal also has personal jurisdiction because this dispute arose between a contracting state (Sylvania) and a national of another contracting state (Freedonia Petroleum).

3. Sylvania has violated its international obligations by discriminating against Claimant. This discrimination is abundantly proved. The evidence shows that on 29 November 2010, management and operating teams of the NPCS sent by the Government took over the premises of the oil wells. The actions of Sylvanian government through NPCS deprived Claimant of a fair opportunity to perform its contractual duties by permitting the take-over of the oil wells. Respondent violated several established international law standards. The evidence shows that Sylvania violated the Fair and Equitable Treatment standard (FET) as well as the National Treatment standard (NT).

4. The evidence also shows that Respondent failed to comply with the Full Protection and Security standard (FPS) vis-à-vis Freedonia Petroleum and its investors. Respondent did not exercise the proper due diligence to adequately protect Freedonia Petroleum’s property and investment. Sylvania failed to protect the claimant’s investments is therefore fully liable for the damages sustained by Claimant.

5. Finally, Claimant’s investment was expropriated by Sylvania’s unlawful interference in using NPCS to take-over Claimant’s oil wells from the Medanos Oilfields. As a result,
Claimant lost significant value and control over its investment. Such interference effectively neutralized the benefit of Claimant’s investments and its reasonable investment expectations were ruined. Moreover, Respondent’s actions were discriminatory and applied disproportionately.
ARGUMENTS ADVANCED
PART I: ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE.

6. In order to retain jurisdiction, the Tribunal must have personal jurisdiction over the parties, subject matter jurisdiction over the dispute, and the timing requirements must be satisfied. Pursuant to Article 25 of the Convention, the Tribunal has jurisdiction over the dispute between the parties. Article 25 provides that the Centre shall have jurisdiction over “any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”\(^1\) Article 25 further provides that “once the parties have given their consent, no party may withdraw its consent unilaterally.”\(^2\) Additionally, consent of the parties “is the cornerstone of the jurisdiction of the Centre.”\(^3\) Here, all three elements satisfied and therefore the Tribunal has the authority to exercise jurisdiction.

A. THE PARTIES HAVE MANIFESTED CONSENT TO ICC JURISDICTION.

7. The parties manifested their consent in writing. Both Sylvania and Freedonia are Contracting States under the ICSID Convention and have both ratified the Convention.\(^4\) Further, Articles 11(2) & (3) of the Freedonia-Sylvania BIT provides that the Contracting Parties consent to the submission of disputes to binding arbitration under the specified choice of the complaining party. Further, the Contracting Parties agreed that “such consent, together with the written submission of the investor … shall satisfy the requirement for … written consent of the parties to the dispute for purposes of Chapter II of the ICSID convention.”\(^5\) Therefore, Sylvania has consented to and, pursuant to the Convention, cannot unilaterally revoke this consent.

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\(^1\) Article 25(1) of the ICSID Convention; Both parties are signatories to the ICSID Convention
\(^2\) ibid
\(^3\) Report, at ¶ 23.
\(^4\) Uncontested Facts ¶ 6.
\(^5\) Article 11(2) & (3) of the Freedonia-Sylvania BIT.
B. THE TRIBUNAL HAS PERSONAL JURISDICTION OVER THE DISPUTE.

8. The Tribunal has personal jurisdiction (ratione personae) over this dispute and thus is able to assert its competence and adjudicate the matter. For personal jurisdiction, the Convention requires that the dispute must arise between “between a Contracting State … and a national of another Contracting State.” The Convention further defines who is considered a national of another contracting state. This definition includes “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration.” Here, Sylvania and Freedonia are contracting states to the Freedonia-Sylvania BIT and it is undisputed that Freedonia Petroleum is a national of Freedonia.

1. NPCS is a state entity for the purpose of establishing personal jurisdiction.

9. NPCS is a state-owned company performing functions on behalf of the state. Regardless of Sylvania’s attempts to disguise its wholly owned and controlled company (NPCS) as a private entity, NPCS is clearly a state entity under well-recognized principles of international law.

10. The conduct of an entity whose structure and function flows from the government and which “is empowered by the law of that State to exercise elements” of authority “shall be considered an act of the State under international law.” In order to determine if an entity is a state body, the Tribunal in *Emilio Augustín Maffezini v. the Kingdom of Spain* used a structural test that examined factor such as “ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken.” The *Maffezini* Tribunal also found that the structural test alone might not be sufficient for determining whether an entity is an organ of the state or if the entity’s actions are imputable to the state. The

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6 Article 25(1) of the ICSID Convention
7 Article 25(2)(b) of the ICSID Convention.
8 Uncontested facts, Para 4
9 Article 5 of the Articles on State Responsibility.
10 *Maffezini* at 28, ¶ 76.
11 Ibid
Tribunal used a second test, the functional test, in which it looked “to the functions of or role to be performed by the entity.”

11. In applying the structural test, the Maffezini Tribunal found that the Ministry of Industry authorized a national State agency to establish SODIGA and that even though SODIGA was formed as a private commercial corporation, the government was to own no less than 51% of the corporation. Here, the Sylvania government established NPCS, a state-owned company, and maintained 100% ownership of the company. Further, NPCS was established as an Oil corporation to carry out remedial works on the Medanos Oil Wells for the country of Sylvania and the Sylvania Government appoints all members of the board of directors.

12. Under these facts and application of the structural test, it is clear that NPCS is a state entity. NPCS is an entity created, owned, and controlled by Sylvania. Under the Maffezini tests, there is a presumption that NPCS is a state entity and acted on behalf of the Sylvania government. Thus, personal jurisdiction is satisfied.

C. THE TRIBUNAL HAS SUBJECT MATTER JURISDICTION OVER THIS DISPUTE.

13. In order for the tribunal to have subject matter jurisdiction (ratione materiae) over the dispute, three requirements must be satisfied. Article 25(1) of the Convention requires that there be 1) a legal dispute, 2) arising directly out of an underlying transaction, and 3) a qualifying investment. Freedonia Petroleum satisfies all these requirements and thus, the Tribunal has subject matter jurisdiction.

12 Maffezini at 29, ¶ 79.
13 Maffezini at 415, ¶ 83.
14 Uncontested Facts ¶ 19.
15 First Clarification Q11
16 Articled 25(1) of the ICSID Convention.
1. The dispute meets the requirements of a legal dispute.

14. Freedonia Petroleum has a legal dispute against Sylvania. The requirement that there be a legal dispute is “an absolute requirement for ICC’s jurisdiction.”\(^1\) The Report of the Executive Directors explains that disputes “must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”\(^2\) Additionally, it has been found that a “dispute must relate to clearly identified issues between the parties … and must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”\(^3\)

15. The nature of the dispute between Freedonia Petroleum and Sylvania meets this definition. Under the Freedonia-Sylvania BIT, Freedonia Petroleum has the right to “fair and equitable treatment, full protection and security of their investments.”\(^4\) Further, the BIT provides for Freedonia Petroleum to be treated no less favorably than Sylvania nationals or investors of Third States under the National Treatment and Most Favored Nation Clause of Article 3.\(^5\) Finally, Freedonia Petroleum has the right to demand the real market value of its investment in the event of the expropriation of its investment by the Contracting State.\(^6\)

16. Here, all these issues are in contention. Therefore, under the definition of a legal dispute, Freedonia Petroleum has presented concrete claims against Sylvania that create a cognizable legal dispute between the parties.

2. The dispute arises directly from a qualifying investment.

17. While Article 25 of the Convention provides no definition of what constitutes an investment for purposes of jurisdiction, several tribunals have identified elements and factors for determining whether or not there is an investment. The Tribunal in *Phoenix Action, Ltd. v. The Czech*

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\(^1\) UN Dispute Settlement, 9.
\(^2\) *Report*, at ¶26.
\(^3\) *Maffezini*, at ¶94 (quoting Schreuer at 337).
\(^4\) Article 2(2) of the Freedonia-Sylvania BIT.
\(^5\) See Article 3 of the Freedonia-Sylvania BIT.
\(^6\) See Article 4 of the Freedonia-Sylvania BIT.
Republic identified the following elements as being pertinent to an investment: “(1) a contribution in money or other assets; (2) a certain duration; (3) an element of risk; (4) an operation made in order to develop an economic activity in the host State; (5) assets invested in accordance with the laws of the host State; and (6) assets invested bona fide.” The tribunal further identified factors for determining whether there is a bona fide investment that qualifies for protection under the BIT. These factors include the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction, and the true nature of the operation. Also, Article 1 of the Freedonia-Sylvania BIT defines investment 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'.

18. Here, Freedonia Petroleum meets these requirements for a qualifying investment. Additionally, Freedonia Petroleum and Sylvania signed the Medanos License Agreement in March 24, 2007, and it can be inferred from the conduct of the parties and the purpose of Medanos Oilfield Project is that both parties, at least initially, intended for the operations of Oil Field Project to continue upon subsequent renewals of the oil exploration license. It was not until two years later that this dispute arose. Also, risk is an inherent element of the creation of any joint venture. Here, it cannot be argued Freedonia Petroleum did not take a risk by signing the Medanos License Agreement and contributing both monetary investments and labor into the Oil field project that had no guarantees of success. Likewise, the Medanos License Agreement established that the Medanos Oil field would be located in Libertad Gulf situated in the territorial waters of the Republic of Sylvania and the finished product would provide economic development for Sylvania. Further, there is no evidence presented that the investment was not made in accordance with the law of Sylvania. In consideration of these facts, it can also be

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23 Phoenix Action, at 45, ¶114.
24 Id., at 52, ¶135
25 Id., at 52, ¶135-140.
26 Uncontested Facts ¶ 3.
decided that the investment was bona fide. Therefore, Freedonia Petroleum’s investment satisfies all factors for determining a qualified investment.

19. This dispute clearly arises directly from Freedonia Petroleum’s investment. The core of the dispute is the expropriation of Freedonia Petroleum’s investment and the failure of the Sylvania government to compensate Freedonia Petroleum in accordance with the obligations set for the in the Freedonia-Sylvania BIT. All elements of the Convention’s requirements on subject matter jurisdiction are met. Consequently, the Tribunal has subject matter jurisdiction over Freedonia Petroleum’s claims against Sylvania.

II. THE TRIBUNAL HAS JURISDICTION OVER FREEDONIA PETROLEUM’S CONTRACTBASED CLAIMS UNDER ARTICLE 10 OF THE BIT.

A. THE UMBRELLA CLAUSE APPLIES TO THIS DISPUTE.

20. Article 10 of the Freedonia-Sylvania BIT applies to this dispute and Freedonia Petroleum’s contractual claims. Article 10 (the “umbrella clause”) requires that the Contracting Parties observe their obligations “with regard to investments in its territory by investors of the other Contracting Party.”27 Two ICSID cases dealing with the application of umbrella clauses are SGS v. Pakistan and SGS v. Philippines. In those cases, both Tribunals looked at the text of the umbrella clause, the intent of the parties in light of the purpose and objective of the BIT, and the location of the clause within the framework of the BIT.28 While the Tribunal in SGS v. Pakistan found that the umbrella clause could not be interpreted to cover contractual claims, the Tribunal in SGS v. Philippines found that the umbrella clause “makes it a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.”29 The facts in this case are more similar to SGS v. Philippines and it should follow that the umbrella clause applies.

27 Article 10 of the Freedonia-Sylvania BIT.
28 See SGS v. Pakistan; SGS v. Philippines.
29 SGS v. Philippines, at ¶128.
1. The Text of the Umbrella Clause is Clear.

21. With regard to the text of the clause, the Tribunal in *SGS v. Philippines* noted that the Contracting Parties used the term “shall” in the same manner as used in the other substantive Articles. Additionally, the Tribunal found that the term “any obligation” is “capable of applying to obligations arising under national law, e.g. those arising from contract.” Overall, the Tribunal found that the actual language of the clause was less expansive than the one in question in *SGS v. Pakistan* and therefore was intended to cover the type of dispute in question.

22. The language of the Freedonia-Sylvania BIT umbrella clause closely resembles the BIT in *SGS v. Philippines* and thus, should be interpreted to include contractual obligations. Article 10 of the Freedonia-Sylvania BIT uses the term “shall” along with “any obligation it has assumed.” In applying the rationale from the *SGS v. Philippines* Tribunal, this clause should be interpreted to mean that it imposes a mandatory obligation on the Contracting Parties that could include contract-based claims.

23. Further, the clause is not so vague as to raise the same concerns found in *SGS v. Pakistan*. That Tribunal found that the vague language of the clause, “while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion.” Here the difference can be found in the language “with regard to investments in its territory” as opposed to “commitments entered.” The Tribunal in *SGS v. Philippines* found the language to be vague and “less clear and categorical” than the language used in the Swiss-Philippines BIT. The Tribunal subsequently reasoned that the difference in language supported their finding of the existence of a treaty-based obligation for contract disputes.

30 Ibid, 115
31 Ibid
32 Ibid, 119
33 Article 10 of the Freedonia-Sylvania BIT.
34 *SGS v. Pakistan*, at ¶ 166.
35 Article 10 of the Beristan-Opulentia BIT; *SGS v. Pakistan*, at ¶53.
36 *SGS v. Philippines*, at ¶119 (comparing the language of the Swiss-Philippines BIT to say “any obligations assumed with respect to specific investments.”); See also Myrsalieva 447-48 (discussing the comparisons of the language used).
24. Following the rationale of the *SGS v. Philippines* Tribunal, the language of the Freedonia-Sylvania umbrella clause is narrowly tailored and supports the interpretation that by failing to observe the binding commitments made the State, there is a breach of treaty and dispute that can be brought under the BIT.

2. The BIT should be interpreted in favor of protecting investments.

25. In light of the purpose and objective of the Freedonia-Sylvania BIT, the umbrella clause should be interpreted in favour of protecting investments. The Preamble of the Freedonia-Sylvania BIT provides that the Contracting Parties “desire to establish favourable conditions for improved economic co-operation between the two countries … especially for investment by nationals of one Contracting Party in the territory of the other Contracting Party.”

37 It additionally discusses the “encourage and mutual protection to such investments.”

26. The *SGS v. Philippines* Tribunal found that – in light of the language in the Swiss-Philippines BIT preamble – the “object and purpose of the BIT supports an effective interpretation of [the umbrella clause]” and that “it is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.” The court further reasoned that it is “consistent with the object and purpose of the BIT” to find that obligations and commitments made by the State be “incorporated and brought within the framework of the BIT by [the umbrella clause].”

27. In this case, the umbrella clause should be interpreted in a light most favourable for the protection of investments and the investors from the other Contracting Party. The intent and purpose of the Freedonia-Sylvania BIT is clear – to promote, encourage, and protect the investments made by nationals of one Contracting Party in the territory of the other Contracting Party. Interpreting the umbrella clause in a manner that restricts the protection and encouragement of investments is contradictory to the BIT’s purpose.

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37 Preamble of the Freedonia-Sylvania BIT.
38 Ibid
40 Ibid, 117
3. The location of the Umbrella clause does not prevent its application.

28. While not located within the substantive framework of the Freedonia-Sylvania BIT, the location is not decisive and does not bar its application. The SGS v. Pakistan Tribunal supported its conclusion by reasoning that if the parties had intended for the umbrella clause to impose substantive obligations “they would logically have placed [it] among the substantive ‘first order’ obligations.”\(^{41}\) It was concluded that subrogation clause and dispute settlement provisions marked the separation of the substantive “first order” obligations from the other provisions and because the umbrella clause was placed after those provisions it could not be seen as being a substantive “first order” obligation.\(^{42}\) However, the Tribunal in SGS v. Philippines noted that the location of the provision is not decisive.\(^{43}\)

29. Here, the Freedonia-Sylvania BIT places the umbrella clause subsequent to the substantive obligation provisions and the Articles concerning subrogation, transfer procedures, and essential security, but before the dispute settlement provisions. However, in view of the intent of the Contracting Parties and the language used, the location of this provision is not dispositive of its applicability. Following the SGS v. Philippines Tribunal’s reasoning regarding location, the umbrella clause in the Freedonia-Sylvania BIT is applicable regardless of its location within the BIT.

III. THE TRIBUNAL HAS JURISDICTION REGARDLESS OF CLAUSE 19 OF THE MEDANOS LICENSE AGREEMENT.

30. While Clause 19 of the Medanos License Agreement provides for a forum selection for disputes arising under the contract, the provision does not act as a bar precluding other dispute settlement forums. Freedonia Petroleum has claims that are treaty based and which arise from Sylvania’s violations of substantive treaty provision. Thus, the Tribunal has jurisdiction over this dispute arising from the BIT and as such, the Medanos License Agreement cannot override this jurisdiction.

\(^{41}\) SGS v. Pakistan, at 365, ¶170.
\(^{42}\) Id., at 364, ¶169.
\(^{43}\) SGS v. Philippines at ¶124.
A. FREEDONIA PETROLEUM’S CLAIMS ARE TREATY-BASED.

31. Because Freedonia Petroleum’s claims are based on Sylvania’s violation of relevant treaty provisions, the Tribunal has jurisdiction over such claims, as well as jurisdiction concerning any ancillary claims that arise under the Medanos License Agreement. Restrictions on the Tribunal’s jurisdiction apply only to claims that are purely contractual.\textsuperscript{44} Additionally, Tribunals “retain jurisdiction in relation to breaches of contract that would constitute, at the same time, a violation of the Bilateral Treaty by the State.”\textsuperscript{45}

32. When dealing with the differences between contractual claims and treaty claims, the Tribunal in \textit{SGS v. Philippines} discerned that “the purpose of the BIT is to promote and protect foreign investments” and that “allowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim.”\textsuperscript{46} The Tribunal further noted that distinguishing between claims arising under BITs and those arising under investment agreements could give rise to “overlapping proceedings and jurisdictional uncertainty” and that such distinction “should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum.”\textsuperscript{47} Additionally, the Tribunal reasoned that because investments are entered into by means of contracts and other agreements, the language “disputes with respect to investments” found in BITs and the phrase “legal dispute arising directly out of an investment” in Article 25(1) “naturally includes contractual disputes.”\textsuperscript{48}

33. In addition to the compelling policy reasons asserted in \textit{SGS v. Philippines}, Article 42 of the Convention specifically states that ICSID and ICC tribunals have the authority to apply either domestic or international law depending on which is applicable to the dispute.\textsuperscript{49}

\textsuperscript{44} \textit{Salini v. Morocco}, at ¶62.
\textsuperscript{45} Ibid
\textsuperscript{46} Ibid
\textsuperscript{47} \textit{SGS v. Philippines}, at ¶132.
\textsuperscript{48} Ibid
\textsuperscript{49} Ibid
34. The evidence presented shows that Freedonia Petroleum’s claims arose from the actions of Sylvania, which are clear violations of the Freedonia-Sylvania BIT. Specifically, Sylvania’s actions, made through its agent NPCS, amount to expropriation, discrimination, and violations of fair and equitable treatment. All violations of obligations of the BIT. Sylvania’s egregious conduct is the basis of Freedonia Petroleum’s claims and accordingly constitutes treaty-based claims.

35. Additionally, NPCS violated several provisions of the Medanos License Agreement when they took over the Oil wells of Freedonia Petroleum out of the Medanos Oil field, especially when one considers the fact that FPS and its personnel were not given a choice to surrender the oil wells.\(^{50}\) This Tribunal retains jurisdiction over this contract-based claims and has the authority to decide such issues under the domestic law of Sylvania.

36. Thus, pursuant to applicable law and international principles, the Tribunal has jurisdiction over Freedonia Petroleum’s claims.

B. THE MEDANOS LICENSE AGREEMENT PROVISION DOES NOT PRECLUDE BIT JURISDICTION.

37. The Freedonia-Sylvania BIT expressly provides for the settlement of “disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party.”\(^{51}\) This Article provides for no limitation or differentiation of the types of disputes to be submitted.

38. The \textit{Vivendi annulment} tribunal addressed the issue of competing jurisdictional claims by finding that where the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state cannot operate as a bar to the application of the treaty standard.\(^{52}\) In the notable \textit{Vivendi} case, the Claimants brought their claim pursuant to the France-Argentina BIT claiming that the Republic of Argentine,

\(^{50}\) First Clarification, No. 32
\(^{51}\) Article 11 of the Freedonia-Sylvania BIT.
\(^{52}\) Article 11 of the Freedonia-Sylvania BIT.
through the actions of the Province of Tucumán, violated substantial treaty obligations.\textsuperscript{53} However, in addition to the BIT, the Claimants had entered into a Concessions Contract with the Province of Tucumán that provided for exclusive jurisdiction of disputes arising from the Concessions Contract.\textsuperscript{54} The problem for the Vivendi Tribunal arose at the merits stage when the Tribunal believed that in order to determine if there had been a violation of the treaty, it would have to be decided if there was a breach of the contract. Such decision though needing to be made under the jurisdiction of the contract.\textsuperscript{55}

\textbf{IV. RESPONDENT’S COUNTER-CLAIM IS UNFOUNDED ON ANY APPLICABLE TREATIES AS SIGNED AND RATIFIED BETWEEN FREEDONIA AND SYLVANIA}

39. The Claimant respectfully submits 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 pursuant to the Clause 18 of Medanos License Agreement.

\textbf{V. CLAIMANTS COMMENTS WITH RESPECT TO CSE’s REQUEST}

40. The FOI Amendment Law of Sylvania stipulated that the fact that a case is pending before an international tribunal is the only information that can be volunteered when a third party applies pursuant to its law.\textsuperscript{56} Thus, the claimant submits with respect that Sylvania violated its own law by furnishing CSE with details of written pleadings concerning the arbitration proceedings.\textsuperscript{57}

\textsuperscript{53} Vivendi annulment, at ¶101.
\textsuperscript{54} See Vivendi; see also Cremades.
\textsuperscript{55} Ibid
\textsuperscript{56} Uncontested facts, para 10
\textsuperscript{57} Uncontested facts, para 33
VI. CONCLUSION ON JURISDICTION.

41. The Tribunal has jurisdiction over Freedonia Petroleum’s claim because all requirements of the Article 25 of the Convention are satisfied. The parties have manifestation irrevocable consent to ICC jurisdiction through the BIT and ratification of the Convention.

42. Additionally, Freedonia Petroleum has shown that the Tribunal has subject matter jurisdiction over this dispute. The facts show that Freedonia Petroleum’s investment in Sylvania meets the requirements of a “qualifying investment” for purposes of subject matter jurisdiction. Further, the dispute at issue arises directly from this qualifying investment.

43. Freedonia Petroleum’s claims are treaty-based and can be brought under the Freedonia-Sylvania BIT. Further, Freedonia Petroleum’s claims can be brought under the BIT by virtue of Article 10. The umbrella clause should be interpreted in favour of protecting investments and the unambiguous language of the provision found in the Freedonia-Sylvania BIT support this conclusion.

44. Finally, the Tribunal has jurisdiction over Freedonia Petroleum’s entire claim, even claims that are contractually based.

PART II: ARGUMENTS ON THE MERITS

I. RESPONDENT MATERIALLY BREACHED THE AGREEMENT.

45. Respondent summarily declared a material breach of the confidentiality clause of the joint venture agreement as a pretext to seize the interest of Claimant in the Medanos Oil field project. To determine material breach, this Tribunal should not confine itself to a strict reading of this joint venture contract because the approach is inappropriate for long-term investment contracts. The purpose of the Agreement was the creation of long-term, cooperative venture whereby the parties became bound by the duty of good faith and fair dealing. Respondent violated this duty by
taking over the oil well from Claimant thus preventing Claimant from fulfilling its contractual
duties and denying Claimant a fair opportunity to perform.

**A. RESPONDENT UNILATERALLY TERMINATED THE CONTRACT FOR ITS OWN GAIN.**

46. Respondent declared a material breach of the Agreement for leakage in the oil well in
Medanos with a scintilla of credible evidence, especially when one considers that FPS
independently mobilised an emergency response team to work on plugging the wells and to
address environmental damage.58

**B. RESPONDENT IS BOUND BY A DUTY OF GOOD FAITH AND FAIR DEALING.**

47. Respondent is bound by the duty of good faith and fair dealing in its relationship with
Claimant as specified in the Agreement. This duty recognized in international law. For
international commercial contracts, UNIDROIT Article 1(7) recognizes the duty of good faith
and fair dealing.59 Furthermore, the duty of good faith and fair dealing is a principle of
UNIDROIT that cannot be waived.60

**II. SYLVANIA DISCRIMINATED AGAINST FREEDONIA PETROLEUM IN VIOLATION OF ITS INTERNATIONAL DUTIES.**

48. By entering into the Freedonia-Petroleum BIT, both contracting states memorialized their
desire and consent to encourage and protect investments by nationals of one nation in the territory
of the other. The Freedonia-Petroleum BIT provides that both governments “shall constantly
guarantee the observance of any obligation is has assumed with regard to investments in its
territory by investors of the other Contracting Party.”61 The BIT also states the two parties will

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58 Second clarification, No. 50
59 See Article 1.7 of UNIDROIT.
60 UNIDROIT
61 Article 10 of the Freedonia-Sylvania BIT.
accord investments “fair and equitable treatment”\(^{62}\) and will not “subject to unjustified or discriminatory measures”\(^{63}\) the companies in which investments by the other contracting party’s nationals have been made.\(^{64}\) In short, Sylvania is under the obligation to afford Claimant, at a minimum, “no less favourable treatment than that accorded to investments effected by…its own nationals”.\(^{65}\) Claimant respectfully submits that Sylvania violated these treaty based duties and standards.

A. NPCS AND ITS REPRESENTATIVES ARE THE SYLVANIAN GOVERNMENT.

49. As shown above, NPCS is an agency of the Sylvania government acting under colour of law. The Sylvania government contributed hundred percent (100\%) of the equity capital of NPCS\(^{66}\). Therefore, Respondent was not only under the obligation to perform as required by the Medanos License agreement, but also under the obligation to guarantee the obligations it assumed with regards to protection of the investment of the Claimant.\(^{67}\)

1. Against the BIT’s Express Language, Sylvania Improperly Disturbed Claimant’s Investment without Due Process of Law.

50. Based on the express language of Articles 2 and 4 of the Freedonia-Sylvania BIT,\(^{68}\) the actions taken by Respondent were against the language, intentions, and spirit of the agreement. As described, the agreement requires the Respondent to ensure the management, maintenance and enjoyment of Claimant’s investment in Medanos Oil field project.\(^{69}\) If that investment is to be disturbed, it can be so for a public purpose or national interest, and only in a non-discriminatory manner in conformity with legal due process.\(^{70}\)

\(^{62}\) Article 2 (2) of the Freedonia-Sylvania BIT.  
\(^{63}\) Article 2(3) of the Freedonia-Sylvania BIT.  
\(^{64}\) ibid  
\(^{65}\) Article 3(1) of the Freedonia-Sylvania BIT.  
\(^{66}\) Uncontested facts, para 19  
\(^{67}\) See Article 10 of Freedonia-Sylvania BIT.  
\(^{68}\) See Article 2 & 8 of the Freedonia-Sylvania BIT.  
\(^{69}\) See Article 2 of the Freedonia-Sylvania BIT.  
\(^{70}\) See Article 4(2) of the Freedonia-Sylvania BIT.
51. However, Sylvania’s actions were clearly discriminatory and thus a violation of Sylvania’s obligations under the BIT. This measure is a *per se* violation of the BIT’s requirement to ensure Claimant’s quiet enjoyment of its investment and does not satisfy its requirements for a valid expropriation.\(^{71}\) The conclusion that necessarily follows is that by allowing the operating and management team of NPCS to expel Claimant from their oil wells in Medanos Oil field, Sylvania has violated its international obligations under the BIT.

**B. SYLVANIA VIOLATED ESTABLISHED INTERNATIONAL LAW STANDARDS OF FAIR AND EQUITABLE TREATMENT AND NATIONAL TREATMENT.**

52. As expressed in the introduction to this section, the BIT, as well as other relevant international accords, imposes on the Sylvania and Freedonia government’s different mandatory standards. *Both* the FET and the NT standards, among others, were violated.

**1. Sylvania Violated the FET and the NT Standards vis-à-vis Freedonia Petroleum.**

53. The Freedonia-Sylvania BIT adopted the FET as well as the NT standards that impose on both signing parties a general duty of good faith towards the other party’s investors. This includes ensuring that investments “shall in no way be subject to unjustified or discriminatory measures.”\(^{72}\) As stated in *EDF (Services) Limited*, “the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.”\(^{73}\)

54. To analyze whether Respondent has breached the standard, the Tribunal must consider several factors giving rise to a violation against “countervailing factors” which may indicate that the standard has not been breached.\(^{74}\) Factors giving rise to a violation of the standard are: (i) discrimination; (ii) breach of the investor’s legitimate expectations; (iii) use of power for

\(^{71}\) See Article 4 of the Freedonia-Sylvania BIT.

\(^{72}\) Article 4(3) of Freedonia-Sylvania BIT.

\(^{73}\) *EDF (Services) Limited v. Romania*, at 63 (citing *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/91, at ¶ 254).

\(^{74}\) See *McLachlan*, at 233-47 (analyzing the treatment of investors in the context of the international review of administrative actions).
improper purposes, including coercion and harassment; and (iv) bad faith or inconsistency.\textsuperscript{75} The “countervailing factors” are: (i) objective basis; (ii) no disproportionate impact; (iii) the investor’s claim is not supported by any national or international recognized right; and (iv) “\textit{caveat investor.}”\textsuperscript{76} The evidence shows that Sylvania violated these standards.

\textit{(a) Sylvania Discriminated Against Freedonia Petroleum.}

55. At the core of the FET standard is the condition of transparency.\textsuperscript{77} One of the most serious factors which show a breach of the FET and NT standards is discrimination. Sylvania, through the unjustified use of military force, impermissibly deprived Claimant of its rights in the Medanos Oil field project. The \textit{Plama} Tribunal, discussing actions taken by the Republic of Bulgaria, held that a discriminatory measure entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.\textsuperscript{78} It defines unreasonable or arbitrary measures as “those not founded in reason or fact but on caprice, prejudice or personal preference.”\textsuperscript{79} For a state’s measure to be “reasonable,” the conduct must bear a reasonable relationship to some rational policy; “non-discrimination” calls for the rational justification of any differential treatment of a foreign investor.\textsuperscript{80}

56. The \textit{SD Myers} Tribunal also set out two relevant factors to determine whether purposeful discrimination exists: (i) “whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;” and (ii) “whether the measure, on its face, appears to favour its nationals over non–nationals who are protected by the relevant treaty.”\textsuperscript{81}

\textsuperscript{75} \textit{Id.}, at 235-43; \textit{See also Suarez}, at 253-54 (discussing how some of these factors have been addressed by different tribunals).
\textsuperscript{76} \textit{Id.}, at 243-47.
\textsuperscript{77} \textit{Plama Consortium Limited v. Republic of Bulgaria}, ICSID Case No. ARB/03/24, at 55 (stating that “transparency appears to be a significant element for the protection of both the legitimate expectations of the investor and the stability of the legal framework.”).
\textsuperscript{78} \textit{Plama}, at 57, ¶ 184.
\textsuperscript{79} \textit{Ibid}
\textsuperscript{80} \textit{Id.}, at 56-57, ¶ 183.
\textsuperscript{81} \textit{SD Myers}, at 27, ¶ 252.
57. Here, NPCS discriminated against Claimant by improperly invoking the executive order, which the President of Sylvania does not have the right under the BIT to change unilaterally, which has the force of law, without the mutual consent of both parties. Clearly, the amendment of Oil Pollution Act of Sylvania to include unreasonable damages and retroactive provisions was an arbitrary measure and a clear violation of clause 18 of Medanos License Agreement. It was capricious and prejudicial because the entire procedure was never transparent from the outset. The take-over of the oil well is the direct consequence of the “practical effect of the Sylvania’s measure” to discriminate between national and foreign investors. Clearly, the take-over of the oil well by the management of the operating teams to expel Claimants from the oil field “appears to [favour Sylvanian] nationals over non–nationals [Claimant] who are protected by the relevant [Freedonia-Sylvania] treaty.” All of Claimant’s interest and intellectual property was seized by Respondent. In fact, the NPCS’s arrival on the premises was specifically designed to intimidate and discriminate against the claimant. Thus, the evidence shows how Sylvania willfully discriminated against Claimant. The intent of favouring its own citizens by permitting an unlawful seizure of Claimant’s property without due process and justification is a violation of the standards, particularly NT.

(b) Respondent Breached Freedonia Petroleum’s Legitimate Expectations.

58. As expressed by the Plama Tribunal, transparency is a “significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework” in meeting the standard for FET. FET requires the host state to honour the investor’s legitimate expectations and provide a stable legal framework. Upon analyzing numerous treaties, the CMS Gas Tribunal held that international law “unequivocally shows that FET is inseparable from stability and predictability.” Indeed, a foreign investor’s legitimate expectations include “reasonable and justifiable” expectations that the investor took into account when making the

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82 Clause 18 of Medanos License Agreement; See also Uncontested facts, Para 6
83 96 SD Myers, at 27, ¶ 252.
84 ibid
85 ibid
86 Plama, at 55, ¶ 178.
87 Id., at 53, ¶ 175
88 CMS Gas, at 1235, ¶ 276.
investment, including the conditions that were specifically offered by the host state and relied upon by the investor. Inextricably linked are the standards of good faith, due process, and non-discrimination.

59. Here, Freedonia Petroleum entered Medanos License Agreement in order to carry out oil exploration and drilling for the economic development of Sylvania. Claimant relied on Respondent’s backing of the Medanos Oilfield project, given the treaty executed between Freedonia and Sylvania for the purpose of the Medanos Oilfield project. Claimant never would have contributed such a high investment or its intellectual property if at any moment it lacked confidence in the host state’s legal and business environment. After two years of good working relations, oil exploration expertise, and such a significant investment, the minimum Claimant would expect from its host state would in fact be a good-faith course of dealing, due process under the law, and non-discrimination.

60. Therefore, Respondent violated the FET because it deprived Claimant due process of law when it deployed staff from the NPCS to take-over the Medanos Oil wells.

(c) Sylvania, in Bad Faith, used its Power for Improper Purposes and to Coerce and Intimidate Freedonia Petroleum’s Representatives.

61. Respondent, through NPCS, exercised its powers to expel Freedonia Petroleum from the Medanos Oil wells and omitted to provide adequate and immediate compensation upon seizure of the oil wells. These acts are violations of international commitments assumed by Sylvania under the Medanos.

62. NPCS, without justification, took over the Oil wells of the Claimant without any notice nor where they given choice to surrender their oil wells. The NPCS’s entry and seizure of the oil wells constituted an abuse of right on the part of both NPCS and Respondent.

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89 Plama, at 54, ¶ 176.
90 See id.
91 First Clarification, No. 32
63. The evidence abundantly proves that Respondent, through NPCS, acted in bad faith. Black’s Law Dictionary defines bad faith as “dishonesty of belief or purpose.”92 Given the Medanos Oilfield Project ownership structure, NPCS’s Board of Director’s composition, and NPCS’s links to Respondent, the Tribunal may fairly conclude that Respondent acted with dishonest beliefs and purposes, thereby violating its treaty obligations. Despite the Agreement not being self-executing, it nevertheless applies directly to the case at bar, convincingly supporting a finding of a FET violation.

(d) Not one “Countervailing Factor” Applies.

64. Not one, single countervailing factor is applicable in this dispute. There is no “objective basis” for the discriminatory decisions adopted by Respondent’s agencies and representatives. Protecting national shareholders93 is not a valid basis, under international standards, to permit an expropriation of an investment without due process of law. Resorting to NPCS management and operating teams to remove Claimant from the Oil wells has no basis.

64. The impact of the measures on national and foreign investors is markedly different. Claimant’s investors are unable to collect their returns, are deprived of their intellectual property, and of the ability to enjoy and administrate their investment. Meanwhile, NPCS— all having close ties to Respondent-- fully enjoy their investment. Also, Freedonia Petroleum’s claims are supported by internationally recognized rights arising from violations of the Convention, the Freedonia-Sylvania BIT and applicable international law.

65. The Caveat Investor standard is not applicable to Claimant because after two years of good working relations, there was a change of circumstances. Freedonia Petroleum did not find any cause for concern in Respondent’s legal system at the time of the Medanos Oilfield Project’s creation. Even if Claimant had performed the strictest due diligence, nothing would have prepared it or its representatives for the level of arbitrariness, mistreatment, and abuse that Respondent inflicted.

93 Black’s Law Dictionary, at 149.
66. In conclusion, Sylvania violated several treaty- and international law-based standards, especially the FET and NT standards, vis-à-vis Freedonia Petroleum.

III. FREEDONIA PETROLEUM’S INVESTMENT WAS EXPROPRIATED BY SYLVANIA’S UNLAWFUL INTERFERENCE.

A. THE FREEDONIA-Sylvania BIT REGULATES THE STATE’S RIGHT TO EXPROPRIATE.

67. A State may expropriate for the public interest so long as it does so in a non-discriminatory, proportionate manner. Expropriation is not just an outright seizure, but also the interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”

68. The Lauder Tribunal signals that “there is heightened protection against deprivations resulting from regulatory actions when the acquired rights have obtained legal approval on which investors justifiably rely.” The intent to deprive Claimant of its property is not required. In general, expropriation involves the “coercive appropriation by the State of private property”.

69. While the Freedonia-Sylvania BIT does not define “expropriation,” it does prohibit it for purposes different than the public interest or when conducted in a discriminatory manner, against due process and without immediate, full and effective compensation.

70. Sylvania contends that a “finding of expropriation would require a specific decree or legislative act.” However, such an interpretation would eliminate the possibility of a claim of

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94 Article 1 of the ECHR First Protocol; See also Litvinoff, at 226; See also Broches II, at 208-209; See also Appleton, at 42.
95 *Metalclad*, at 91-92, ¶ 103.
96 *Lauder*, at 41, ¶ 197.
97 ibid
98 ibid., at 42, ¶ 200.
indirect expropriation, which does not require obvious measures. Indirect expropriation does not involve an overt taking, but instead effectively neutralizes the enjoyment of the property\textsuperscript{100}, thereby depriving the investor of its value. Because a wide variety of measures are susceptible to lead to indirect expropriation, each case should therefore be decided on the basis of its own attending circumstances.\textsuperscript{101}

71. The BIT’s expropriation regulations should have been respected by Respondent in exercising power over Freedonia Petroleum’s investment. Respondent breached the BIT’s expropriation provisions by failing to afford Claimant due process of law prior to resorting to NPCS action in taking-over the oil wells, and by failing to immediately and adequately compensate Claimant for the loss of value of its investment.

B. FREEDONIA PETROLEUM’S EXPROPRIATED RIGHTS ARE PROTECTED BY THE FREEDONIA-SYLVANIA BIT.

72. The Freedonia-Sylvania BIT provides that “investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party.”\textsuperscript{102} Freedonia Petroleum’s expropriated rights fit the definition of an “investment”, as specified in Article 1 of the BIT, and are therefore entitled to protection against expropriation.

- Freedonia Petroleum’s Rights in Medanos Oilfield Project were Disturbed.

73. The express terms of the Freedonia-Sylvania BIT\textsuperscript{103} make Claimant’s ownership interest and capital contributions a protected investment. Freedonia Petroleum does not contend that NPCS’s exercise of its take-over of the Oil wells constituted expropriation.\textsuperscript{104} Instead, Freedonia Petroleum respectfully submits that its ownership interest “had been interfered with to such a

\textsuperscript{99} Article 4(2) of the Freedonia-Sylvania BIT.
\textsuperscript{100} Uncontested facts, Para 23
\textsuperscript{101} Lauder, at 43, ¶ 200.
\textsuperscript{102} Ibid
\textsuperscript{103} Article 4(2) of the Freedonia-Sylvania BIT.
\textsuperscript{104} See Arts. 1(a), 1(b), 1(d), 1(e), 1(2), and 4 of the Freedonia-Sylvania BIT.
holistic extent as to give rise to a compensable claim.”\textsuperscript{105} The expropriatory measures are the taking-over of Claimant’s physical and intellectual property.\textsuperscript{106}

C. SYLVANIA’S UNLAWFUL INTERFERENCE WITH FREEDONIA PETROLEUM’S INVESTMENT CONSTITUTES INDIRECT EXPROPRIATION.

1. All the Elements of Indirect Expropriation are Present Here.

\textit{(a) Sylvania’s Interference with Freedonia Petroleum’s Investment was Significant.}

74. To constitute indirect expropriation, the measures must impact the investment in a manner of a certain magnitude or severity. The “‘test is whether that interference is sufficiently restrictive to support the conclusion that the property has been ‘taken’ from the owner’.\textsuperscript{107}

75. Interference with the continuation of management tasks has been considered an indirect expropriation.\textsuperscript{108} The Iran-U.S. Claims Tribunal has held that the appointment of government managers “qualified as indirect expropriation either by itself, … or in conjunction with other acts effectively depriving an investor” of its property.\textsuperscript{109}

76. Clearly, Sylvania through NPCS, seized the oil wells of the claimant and thus refrained them from quiet enjoyment of their intellectual cum property rights.

\textsuperscript{105} See Mouri, at 140-42 (explaining why the exercise of majority shareholder rights by the government is not \textit{per se} expropriatory); See Garcia-Bolivar II, at 76 (discussing how a change in policy is more unfair treatment than expropriation).

\textsuperscript{106} Mouri, at 143 (citing the holding of the Iran-U.S. Claims Tribunal in the Foremost Tehran, Inc. case).

\textsuperscript{107} Reinisch, at 30 (citing Pope & Talbot, Inc. v. Government of Canada, (Interim Award) 7 ICSID Rep 43, 69).

\textsuperscript{108} McLachlan, at 298 (citing Pope & Talbot).

\textsuperscript{109} See generally Mouri; See also generally Reinisch.
(b) The Effect of NPCS’s Actions was to Neutralize Freedonia Petroleum’s Investment.

77. The key element that reveals an indirect expropriation is the “purpose and circumstances” of a particular government action and its effects.\textsuperscript{110} Here, the Tribunal should find that the cumulative effect of the actions taken by Respondent unlawfully deprived Freedonia Petroleum of its rights in Medanos Oilfield Project.

78. Case law and doctrine have developed two lines of analysis. The “sole effect” doctrine, the majority rule,\textsuperscript{111} analyses the “reality of the impact”\textsuperscript{112} of the measures, giving less importance to their form.\textsuperscript{113} The other test is a hybrid analysis which evaluates purposes, context, as well as effect of the measures.\textsuperscript{114}

79. In Foremost Teheran, Inc., a case almost identical to the one at hand, the Iranian government took the same actions as those taken by Respondent. Although in that case the Tribunal found no expropriation, it nevertheless found that the “level of interference established constituted ‘other measures affecting property rights’,,” and thus was expropriatory.\textsuperscript{115} This case is an example of either open or covert state conduct that neutralized and rendered the investment useless, and the Tribunal found Iran liable regardless of the government’s intent.

80. The interference here was significant and the sole effect of the actions taken by the Sylvanian government was to effectively prevent Freedonia petroleum from exercising its ownership rights in Medanos Oilfield.

\textsuperscript{110} ibid
\textsuperscript{111} Dolzer, at 156.
\textsuperscript{112} See McLachlan, at 296 (characterizing the rule as controversial); See Redfern & Hunter, at 494-96.
\textsuperscript{113} McLachlan, at 295; See also Appleton, at 38 (explaining that the U.S. Supreme Court considered that “regulatory takings require the court to look to the impact of the regulation and to establish the existence of a substantial impact.”).
\textsuperscript{114} See generally Phelps Dodge (explaining that the Iranian government appointment of managers to the company was an expropriation because the investor’s shares were rendered useless by the government interference); See also Brunetti, at 207 (discussing the importance of the Phelps Dodge holding).
\textsuperscript{115} See Dolzer, at 158; See also Reinisch, at 33; See also McLachlan, at 296; See also Appleton, at 39-46.
81. Even if this Tribunal applied the hybrid analysis, the same outcome would result. By the context of Sylvania’s decision to compel NPCS’s management and operating teams to expel the claimant from the Oil wells were all arbitrary, disproportionate, and unreasonable. The intellectual and physical property was still in use.\textsuperscript{116}

82. The factual background conclusively reveals that the capricious measures taken by the NPCS (which constitute Sylvania’s state action), effectively neutralized Freedonia Petroleum’s capacity to exercise any rights in its investment and therefore indirectly expropriated it.

\textbf{(c) Respondent Spoiled Freedonia Petroleum’s Reasonable Investment Expectations.}

83. Freedonia Petroleum’s expected returns from Medanos Oilfield Project included dividends royalties from the intellectual and physical property transfers and technical assistance services. All these were obliterated by Respondent’s actions.

84. Undoubtedly, Claimant’s reasonable expectations play a critical role. These “reasonably to-be-expected” benefits call for a case-by-case analysis.\textsuperscript{117} The issue is whether the investor could reasonably foresee that its investment would depreciate and lose all its value or a substantial part of it in a short period of time, due to government actions and measures.\textsuperscript{118} Freedonia Petroleum’s investment consists largely of intellectual and physical property which has high monetary value. Clearly, Freedonia Petroleum could and did in fact foresee that its investment might depreciate and lose all its value as a result of Sylvania government’s breach.\textsuperscript{119} Therefore, the Medanos License Agreement reflects that Freedonia Petroleum’s expectations of Sylvania’s maintaining of all of its intellectual cum physical property and technology transfers were the essence of the investment project.

\textsuperscript{116} Foremost Tehran, at 251.
\textsuperscript{117} See generally Record, at 17-18.
\textsuperscript{118} See Reinisch, at 36-37; See also Schreuer II, at 4-5; See also Collins, at 112.
\textsuperscript{119} See McLachlan, at 303-04; See also Appleton, at 45 (explaining that only substantial deprivations are recognized as expropriations).
85. Given the present circumstances, the Tribunal should find that the take-over of the Oil wells constituting a “blatant”\(^{120}\) expropriation of Freedonia Petroleum’s interests in Medanos Oilfield Project.

**D. IN THE ALTERNATIVE, BASED ON THE MFN CLAUSE, FREEDONIA PETROLEUM IS ENTITLED TO RELY ON THE PROVISION OF THE FREEDONIA-SYLVANIA BIT.**

86. In the alternative, Freedonia Petroleum submits that the provisions in Article 4(2) of the Freedonia-Sylvania BIT are fully applicable here. Article 4(2) of the Freedonia-Sylvania BIT provides that if a company incorporated in the host state is expropriated, the other contracting state’s shareholders have a right to fair, effective and prompt compensation. Freedonia shareholders are to be treated like shareholders of any Sylvanian company\(^{121}\). However, this same treatment was not accorded to Claimant.

87. The MFN clause’s over-arching effect in the text of the BIT should lead the Tribunal to conclude that Sylvanian must accord Freedonia Petroleum “treatment which is not less favourable than Sylvanian accords its own investors or to investors of any third State.”\(^ {122}\) This regulation as applied to Freedonia Petroleum, by way of the MFN clause, would better protect its rights in Medanos Oilfield Project, entitling it to demand just compensation from Respondent.

**E. RESPONDENT’S EXPROPRIATION OF CLAIMANTS INVESTMENTS WAS ILLEGAL**

88. Respondent’s actions do not fall under the limited exception to the prohibition on expropriation and nationalization under the Freedonia-Sylvania BIT. The BIT allows an expropriation to occur only if the government conducts its taking of an investor’s assets in a non-discriminatory manner, for a public purpose and in accordance with national law. Additionally, the BIT requires the expropriating government to provide the investor “immediate, full and

\(^{120}\) See Clause 18 of Excerpt from Medanos Licensee Agreement  
\(^{121}\) Article 3(2) of the Freedonia-Sylvania BIT.  
\(^{122}\) See Article 3(1) and 3(2) of the Freedonia-Sylvania BIT.
effective compensation” for the loss of its investment. Similarly, the BIT prohibits a State from permanently depriving an investor of joined rights of ownership without a judgment or order issued by a tribunal or court with jurisdiction.

89. These exceptions are consistent with those allowed under international law in recognition of a sovereign’s right to control the activities of investors in its territory. Under international law, an expropriation that does not meet all of these requirements is illegal.

- **Respondent’s Invocation of National Security as a Public Purpose is Insufficient to Legalize Expropriating Claimant’s Investment**

90. While Respondent has invoked the public purpose of national safety as a justification for its legal and physical seizure of Claimant’s investment, this statement of purpose alone does not render the expropriation lawful. A determination of expropriation turns on the effect of a government measure rather than its intent, so tribunals do not find the question of public purpose to be dispositive to the inquiry.

- **Respondent’s Action Were Not in Conformity With National Laws**

91. The Freedonia-Sylvania BIT requires any government taking to be conducted in accordance “with all legal provisions and procedures. Respondent’s seizure of claimant’s assets without compensation blatantly disregarded the Sylvanian laws, which prohibits government taking of private property without “just compensation and due process.” The Executive Order authorizing the actions of the NPCS failed to satisfy the due process requirement because it did not afford Claimant an opportunity to be heard before Respondent seized Claimant’s investment.

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123 *Dolzer*, at 101.
124 See *e.g.* *Restatement* § 217.
125 *Kinsella*, at 174
126 *Muchlinksi*, at 438.
127 *First Clarifications*, no. 32
• **Respondent’s Failed to Provide Claimant Full Immediate and Effective Compensation**

92. Failure to fully compensate an investor for a government taking renders an expropriation unlawful even if the action was non-discriminatory and served a public purpose. Compensation at a minimum must include that fair market value of an asset. In a case involving a concession or other State contract, compensation should cover not only the loss of tangible property, but also the loss of contractual rights.  

93. The lack of compensation, violation of domestic law and discriminatory nature of Respondent’s actions constitute an illegal expropriation. In the case of an illegal expropriation, damages should “as far as possible, restore the situation that would have existed had the illegal act not been committed.”  

To fully compensate claimant for an “unlawful expropriation, the host state also owes compensation for reasonably ascertainable lost profits.” These profits can be calculated based on expected earnings even if the business venture is not fully operational. Respondent, in order to satisfy the principle of full, effective, and immediate compensation, is therefore required to pay Claimant the value of Claimant’s initial investment, intellectual and physical property, and lost profits from the operation and income of the Medanos Oilfield project.

**IV. RESPONDENT FAILED TO PROVIDE CLAIMANT’S INVESTMENT FAIR AND EQUITABLE TREATMENT IN VIOLATION OF ARTICLE 2(2)**

94. Respondent’s taking-over of the claimant’s interest in the oil wells unfairly deprived Claimant of future profits from subsequent exploration, while effectively enriching Sylvania investors at Claimant’s expense. These actions represent a violation of the standard of fair and equitable treatment espoused in Article 2 of the Freedonia-Sylvania BIT.

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128 *Kinsella*, at 178.  
129 *Schreur*, at 92.  
130 *Reisman*, at note 103
Article 2(2) of the Freedonia-Sylvania BIT states that “both contracting parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment.”

95. The fair and equitable treatment standard is nowhere defined but encompasses several general standards of treatment for foreign investors. Specifically, the standard recognizes the host state’s obligation to protect an investor’s legitimate expectations, to act in accordance with international principles of good faith, and to afford the invest due process. Respondent has failed to treat Claimant in accordance with these standards and Respondent has thereby breached its obligations under Article 2 of the Freedonia-Sylvania BIT.

- **Respondent Failed to Act in Good Faith**

96. The obligation to act in conformity with the principles of good faith and fair dealing is internationally recognized. It encompasses duties of transparency and consistency in action on behalf of the state. The UNIDROIT Principles recognize the principle of good faith as fundamental to the international system of contracts and trade. Beristian domestic law incorporates the UNIDROIT Principles and recognizes this duty of good faith.

97. Tribunal’s have also recognized the necessity of requiring states to observe the principle of good faith and fair dealing. In Thunderbird v. Mexico, the concurring decision explained that in the context of investment arbitration this observation is necessary to “keep a government from abusing its role as sovereign and regulator after having made commitments of a more formal character.” In this sense the imposition of a standard of fair and equitable treatment may be seen as “a confirmation of the duty to act in good faith.”

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131 Freedonia-Sylvania BIT, art. 4.
132 Freedonia-Sylvania, art. 2(2).
133 While the Freedonia-Sylvania BIT does not elaborate on the meaning of fair and equitable treatment, several of these standards are explicitly recognized in specific articles of the BIT.
134 See Tecmed ¶ 154.
135 See Tecmed ¶ 154.
136 See Dugan, at 510
137 See Tecmed, at 154
98. Respondent disregarded this duty. The uncompensated future value of the expropriated intellectual property alone is runs into millions of Sylvanian dollars. Nothing in the record assists us in determining whether those who decided on this extreme response were stirred to nationalistic hysteria by the leakages, or simply using the leakages which has been duly taken care of by FPS experts as a pretext for the more base and calculating purpose of acquiring one million dollars' worth of Freedonia Petroleum's property for nothing. Given the manifest disproportionality of Sylvania’s response, Claimant cannot help but speculate as to the real motives which might have prompted this action.

- **Respondent Failed to Provide Claimant with Due Process**

99. International law establishes a basic requirement of due process, which affords a party to a dispute the right to be heard and a forum for redress. A lack of due process results in a denial of justice. Though this idea is principally associated with the judicial branch, “administrative organs can also engage the State's international responsibility by denying justice.”\(^\text{138}\)

100. The Executive Order issued by respondent effected just such an administrative denial of justice. Respondent’s authorization of the executive order did not afford Claimant an opportunity to present its case and resulted in the seizure of Claimant’s property without a trial or proceeding in front of a competent court.

**V. SYLVANIA IS NOT ENTITLED TO INVOKE THE DEFENSE OF ESSENTIAL SECURITY**

101. Respondent essentially argues that Article 9 of the BIT gives them thorough cover to breach any provision of the BIT without consequences, based on the essential security clause that states "nothing in this Treaty shall be construed... to preclude a Party from applying measures that it considers necessary... for the protection of its own essential security interests."\(^\text{139}\)

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\(^{138}\) UNDROIT Principle art 1.7

\(^{139}\) Freedonia-Sylvania, art. 9.2.
102. Such subjective language in an essential security clause is rare. At the time of a 2007 OECD survey, only two model BITs contained such language.\textsuperscript{140}

103. It is not surprising then that the \textit{Enron} tribunal concluded that, “any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.”\textsuperscript{141} Therefore, addressing more specifically the issue at hand, that tribunal said that “truly exceptional and extraordinary clauses such as a self-judging provision normally must be expressly drafted to reflect that intent, as otherwise there can well be a presumption about not having that meaning in view of its exceptional nature.”\textsuperscript{142}

104. Respondent argues that their decision to intervene is rendered unreviewable by the wording of the essential security clause, which allows Respondent to take any measures "it considers necessary" for the protection of its essential security interests. The question is whether this language validly renders the article ‘self-judging.’

105. If the standard were to be found truly self-judging, then Respondent would, in the very document by which it purported to guarantee protections to investors on its territory, have granted itself an unreviewable loophole out of any its obligations. In other words, it could simply chant "essential security" as magic words to dismiss any complaint at all. The assumption that all parties have negotiated in good faith is alone sufficient to dismiss such an absurd construction.

106. In the absence of such an extraordinary self-judging clause, this tribunal must examine the validity of Respondent’s claimed essential security exemption.

\textsuperscript{140} International Investment Perspectives, 2007
\textsuperscript{141} Enron \textsuperscript{¶} 331
\textsuperscript{142} Enron, at \textsuperscript{¶} 335
The Alleged Leakages in the Medanos Oil Fields did Not Constitute an Emergency

107. In order for an essential security defense to be valid, the challenged action must be in defense of truly essential security interests.

108. Three recent ICSID cases analyzing this issue, CMS v. Argentina, Enron v. Argentina, and LG&É v. Argentina, all took place in the context of a singular moment of real national peril. The government took the challenged measures in response to the nation's worst economic crisis in a century, which caused unemployment to rise to 25 percent. Even still, only one of these three cases found that the exemption from liability was valid, since essential security exemptions are "appropriate only in emergency situations."  

109. The CMS and Enron tribunals found against the State. LG&É ruled that the State's national security exemption was valid, only for the period which the tribunal considered to constitute the extreme phase of the crisis. This decision was based on the LG&É tribunal's finding that the crisis threatened "total collapse of the Government and the Argentine State."  None of Respondent’s complained-of actions occurred during any crisis at all, and they should not be excused from liability.

110. We remind the tribunal that nothing adverse ever happened in connection with the Oil Field Project that the alleged threat was by no means disastrous, especially when one considers that FPS independently mobilised an emergency response team to work on plugging the wells and to address environmental damage. Respondents would have had time to safely make a legitimate preservation of their security interests with an opportunity for Freedonia Petroleum to respond, if that had been their goal. 

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143 LG&É, ¶ 229.
144 Cooke, p. 771.
145 Second Clarification, No. 50
146 See also Working Together
Respondent’s Actions Were Disproportionate to the Threat Respondent Perceived

111. The Organization for Economic Co-operation and Development, which articulates economic policy of industrialized countries with sovereign wealth funds, has developed guidelines "to ensure that host countries do not disguise protectionism as measures taken to safeguard national security."\(^{147}\)

112. One of the foci of these guidelines is regulatory proportionality: "the principle that recipient countries should not impose restrictions or conditions on investments that are greater than necessary to protect national security."\(^{148}\) These guidelines call for countries not to take protective measures if a less intrusive measure would be an adequate and appropriate response to the security threat.\(^{149}\)

113. The principle of proportionality is present throughout international law. The European Court of Human Rights found, in the Case of James and Others, that "not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest,' but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized... The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto."\(^{150}\)

114. This principle of proportionality has been incorporated into ICC case law. The above passage from ECHR was quoted approvingly by a prior tribunal, which added that "such statements of the Strasbourg Court apply to the actions of the State in its capacity as administrator, not only to its capacity as law-making body."\(^{151}\)

\(^{147}\) *Case of James and Others* pp.19-20  
\(^{148}\) *Tecmed*, p. 47.  
\(^{149}\) Ibid  
\(^{150}\) Ibid, page 47  
\(^{151}\) Ibid, page 47
115. Acknowledging that States are allowed a certain amount of deference when defining and acting on their own interests, the Tribunal nevertheless held that that a Tribunal has the authority "to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized."\textsuperscript{153}

116. This guarantee of proportionate treatment was found all the more important in the case of a foreign investor, since foreign investors have "a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to nationals of the State."\textsuperscript{154}

117. In TecMed, the Claimant was deprived of rights due to "social or political circumstances and the pressure exerted on municipal and state authorities" by a series of newspaper articles and other public responses. The Tribunal asked whether the situation and the resulting community pressure which gave rise to the government action was "so great as to lead to a serious emergency situation." The Tribunal found that the threatening situation was not that grave, and struck down the Government’s defense based on public interest.

118. As in TecMed, an irresponsible media outcry can be assumed to have put political pressure on the Sylvanian government here. However, Sylvania ignored many less extreme measures it could have taken. It could have investigated further to determine whether there was any substance whatsoever to the illegitimate discontents. If it still believed in the existence of any kind of threat, it could have requested assurances from the Freedonian government.

119. The BIT itself clearly contemplates that a Government which feels itself threatened, whether this belief is justifiable or not, can respond by enacting whatever legislation it feels is necessary to protect its information-security interests. Article 9 of the BIT provides that Respondent is not required to "allow access to any information the disclosure of which it determines to be contrary

\textsuperscript{152} ibid
\textsuperscript{153} Ibid, at page 60
\textsuperscript{154} ibid
to its essential security interests." They could have simply patched the perceived legislative hole themselves by forbidding disclosure. Instead, Respondent reacted by incontinently storming Medanos Oilfield wells and ejecting all claimant personnel by force without giving them any choice whatsoever to surrender their oil wells.\textsuperscript{155}.

120. The Freedonia-Sylvania BIT protects each country's right to take measures it feels consistent with its essential security interests. It does not, however, afford either country any right to engage in forceful expulsion of the other's investors.

121. The speculative future threat was neither urgent, nor grave, nor certain to ever have the slightest effect on Respondent’s security considering that FPS deployed emergency team to clear all environmental damages. The expropriation of Freedonia Petroleum's intellectual, real, physical and industrial property is, in light of this disproportionate response, not justified by the Respondents' attempted national security pretext.

\textbf{VI. THE ALLEGATION OF LEAKAGE IN CONFIDENTIALITY REPORT IS CONSISTENT WITH PUBLIC POLICY, PUBLIC ORDER AND SYLVANIAN'S CITIZEN'S RIGHT TO BE INFORMED}

122. The Respondent respectfully submits that the alleged leakage in confidential report to La Reforma is a clear violation of Freedonia-Sylvania BIT.

123. With regards to the confidential report released to La Reforma, a panel of experts constituted by the Ministry of Energy prepared the confidential report of which FPS and its personnel provided testimony in closed sessions. The report was classified as confidential under Sylvanian Government regulations, to be made available internally only on a “need to know” basis. The evidence before this Tribunal clearly shows that there was absolutely no need for the confidential Report to be made available to La Reforma.\textsuperscript{156} Clearly, the Respondent has breached the express provision of Article 9(1) of Freedonia-Sylvania BIT since no ‘need to know’ circumstance arose.

\textsuperscript{155} First Clarification, No. 32
\textsuperscript{156} See Uncontested fact, para 20
124. Thus, the Respondent humbly submits that the leakage in confidential report to La Reforma is clearly unjustified and tantamount to a breach of the express terms of the BIT.

VII. CONCLUSIONS ON THE MERITS

125. Sylvania has discriminated against Freedonia Petroleum, thus violating its obligations under the Freedonia-Sylvania BIT. Sylvania, through NPCS, seized and expelled claimant from the Medanos Oil Wells and damaged the value of Claimant’s investment. In addition, by discriminating and appropriating Claimant’s interest without due process of law, Sylvania violated both the FET and the NT standards. Sylvania also violated the FPS standard by leaving Freedonia Petroleum with no choice of leaving the Oil wells.

126. Moreover, Sylvania expropriated Freedonia Petroleum’s investment by unlawfully interfering with Freedonia Petroleum’s legal rights in Medanos Oilfield Project. Consequently, the NPCS intervention caused Freedonia Petroleum to significantly lose the control and value over its investment. Respondent’s actions effectively neutralized its benefits. As a result, Freedonia Petroleum’s reasonable investment expectations were spoiled. Moreover, Sylvania’s actions were applied discriminatorily and disproportionately, in violation of express provisions contained in the treaty. These acts amount to nothing short of expropriation.
REQUEST FOR RELIEF

In light of the foregoing submissions Freedonia Petroleum, Claimant in these proceedings, respectfully requests the Tribunal to find that the Tribunal has jurisdiction over these claims and that the Government of the Republic of Sylvania, Respondent:

1. Discriminated against Freedonia Petroleum in violation of the Agreement between the Government of the Republic of Sylvania and the Government of Freedonia on the Promotion and Protection of Investments, and in doing so:
   a. Violated, established standards of international law, particularly the Fair and Equitable Treatment standard and the National Treatment standard; and,
   b. Failed to provide Freedonia Petroleum, its investment and investors, with full protection and security.

2. Unlawfully interfered with Freedonia Petroleum’s investment, in violation of the Agreement between the Government of the Republic of Sylvania and the Government of Freedonia on the Promotion and Protection of Investments, so as to constitute expropriation, mainly by seizing the Medanos Oil Field Project and Freedonia Petroleum capital contributions through NPCS’s taking-over of Freedonia Petroleum’s Oil wells

Respectfully submitted on September 30th, 2011 by

/s/
Team Khan