INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION

In the Proceeding Between

Freedonia Petroleum,
(\textit{The Claimant})

and

The Republic of Sylvania,
(\textit{The Respondent})

MEMORIAL FOR RESPONDENT
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<td>Agreement</td>
<td>Medanos Licence Agreement</td>
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<tr>
<td><em>alter ego</em></td>
<td>Second self</td>
</tr>
<tr>
<td><em>amicus curiae</em></td>
<td>Non-disputing third party who volunteers to offer information to assist a court in deciding a matter before it</td>
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<td>Art./ Arts.</td>
<td>Article/ Articles</td>
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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td><em>bona fide</em></td>
<td>In good faith</td>
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<td>Clean Sylvanian Environment</td>
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<td><em>Amicus Curiae</em> Submission by Clean Sylvanian Environment</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>ed./ eds.</td>
<td>Editor/ Editors</td>
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<tr>
<td><em>effet utile</em></td>
<td>Principle of effectiveness</td>
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<tr>
<td>et al.</td>
<td><em>Et alia</em> (and others)</td>
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<td>et seq.</td>
<td><em>Et sequens</em> (and the following ones)</td>
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<td>FET</td>
<td>Fair and equitable treatment</td>
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<td>FP</td>
<td>Freedonia Petroleum LLC</td>
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<tr>
<td>FPS</td>
<td>Freedonia Petroleum SA</td>
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<td>Freedonia</td>
<td>The Republic of Freedonia</td>
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<td>FS-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>i.e.</td>
<td><em>Id est</em> (that is)</td>
</tr>
<tr>
<td>ibid.</td>
<td><em>Ibidem</em> (the same place)</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
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</table>
**inter alia**  
Among other things

**NGO**  
Non-governmental organisation

**no.**  
Number

**NPCS**  
National Petroleum Company of Sylvania

**OPA**  
Oil Pollution Act

**opinio juris**  
An opinion of law

**p./ pp.**  
Page/ Pages

**SCC**  
The Arbitration Institute of the Stockholm Chamber of Commerce

**SD**  
Sylvanian Dollars

**Sec.**  
Section

**U.K.**  
The United Kingdom of Great Britain and Northern Ireland

**U.S.**  
The United States of America

**USD**  
United States dollar

**v.**  
Versus

**vol.**  
Volume
STATEMENT OF FACTS

1. The Claimant, Freedonia Petroleum LLC, is an international energy company with 60% shareholding of the Freedonian government. The Respondent, the Republic of Sylvania, signed the Freedonia-Sylvania BIT (“FS-BIT”) with the Republic of Freedonia (“Freedonia”) on 13 June 1994.

2. On 1 February 2007, the Claimant incorporated Freedonia Petroleum SA (“FPS”), a wholly-owned subsidiary in Sylvania, to bid in a public tender for oil exploration permits in Sylvania. On 26 May 2007, the Respondent signed the Medanos Licence Agreement (“Agreement”) with FPS, granting it a 5-year non-exclusive oil exploration and drilling licence to operate in the Medanos Field off the coast of Sylvania.

3. On 9 June 2009, following a large explosion in the Medanos Field, oil wells operated by FPS began releasing oil at a rate of 35,000 - 60,000 gallons per day. Experts have not ruled out the possibility of FPS’s negligence in causing the explosion. The oil leak threatened protected areas in Sylvania and raised national concern on 16 June 2009.

4. FPS’s handling of the situation led to a public outcry for the Respondent to step in. On 29 September 2009, Sylvanian newspaper, La Reforma, reported that five new leak points were discovered and a complete clean-up will be impossible once the oil spill reached the Sylvanian coast.

5. On 21 November 2009, the Respondent amended its Freedom of Information Law. The amendment requires third-parties not involved directly in disputes before international tribunals involving the Respondent to apply to Sylvanian courts in order to gain access to details of such cases.

6. On 10 December 2009, the Respondent amended its Oil Pollution Act (“OPA”), setting out new safety obligations effective June 2009. On 29 January 2010, the Respondent granted FPS 60 days to comply with the amended OPA. FPS sought declaratory relief from the
Sylvanian courts for the Agreement to take precedence over the amended OPA on 12 February 2010.

7. On 26 February 2010, the Respondent ordered FPS to pay SD 150,000,000 liquidated damages for breach of the Agreement and the amended OPA. FPS commenced administrative proceedings before the Sylvanian Ministry of Energy to avoid complying with the order. The application was rejected on 10 June 2010 and FPS’s attempt to negotiate the payment with the Respondent failed on 15 June 2010.

8. On 10 August 2010, the Respondent adopted a new Hydrocarbon Law pursuant to which the National Petroleum Company of Sylvania (“NPCS”) was incorporated on 30 August 2010.

9. On 3 November 2010, the President of Sylvania declared FPS responsible for its incompetence and failure to remedy the oil-spill damage; agriculture, seafood and tourist industries were seriously damaged and thousands of individuals lost their jobs as a result of the situation. On 22 November 2010, the Clean Sylvanian Environment (“CSE”), an NGO, urged the Respondent to take action to remedy the damage and condemned FPS’s failure to remedy it.

10. On 29 November 2010, the President of Sylvania issued Executive Order No. 2010-1023 (“Executive Order”), declaring the oil spill as a state of emergency and an “Issue of National Concern”. The Executive Order suspended FPS’s licence until it presents a remedial plan acceptable to the Respondent. Meanwhile, NPCS was authorised, amongst other remedial activities, to secure control of the leaking oil wells in order to assist the Respondent in the clean-up.

11. On 10 December 2010, diplomatic negotiations commenced between Freedonia and Sylvania but were shortly suspended after two meetings.

12. On 23 December 2010, the Claimant sent written communication to the Respondent alleging violations of the FS-BIT and purported to commence arbitration if no amicable
settlement could be reached in three months; the Respondent asked the Claimant to observe the state-to-state dispute resolution mechanism.

13. On 23 March 2011, the Claimant filed a request for investor-state arbitration against the Respondent before the ICC. In turn, the Respondent objected to ICC jurisdiction on 29 April 2011.

14. On 26 August 2011, CSE applied to Sylvanian courts for the release of details of the aforementioned arbitral proceedings and the application was granted. On 10 September 2011, CSE filed a request to participate in the arbitral proceedings as a non-disputing party.
SUMMARY OF ARGUMENTS

15. **JURISDICTION.** The Respondent submits that the Tribunal lacks jurisdiction for two reasons. **Firstly,** the Tribunal is requested to lift the corporate veil and find that the Claimant does not meet the criteria of an investor under Art. 1(3) of the FS-BIT. The real party to the dispute is Freedonia, thus, the appropriate forum should be in accordance with Art. 12 of the FS-BIT. **Secondly,** the fork-in-the-road provision in Art. 11(3)(b) of the FS-BIT has been triggered as the Claimant has already brought its submissions through administrative proceedings in Sylvania. Therefore, the Claimant is barred from bringing its submissions to this Tribunal. Alternatively, if the Tribunal finds that it does have jurisdiction over the Claimant’s submissions, the Respondent submits that its counterclaim is intimately connected to the Claimant’s submissions and has been made pursuant to Art. 5(5) of the ICC Rules and is admissible. Moreover, the Respondent submits that the actions of NPCS are not attributable to it.

16. **MERITS OF THE CLAIM.** If the Tribunal finds that it has jurisdiction and is to rule on the merits of the case, the Respondent submits that the leaked report by the *La Reforma* newspaper took place before the commencement of arbitral proceedings and cannot be deemed to be a breach of confidentiality. Moreover, in the absence of an express confidentiality clause in either the Agreement or the FS-BIT, the Claimant fails to establish any obligation of confidentiality. In the event the Tribunal affirms the existence of a duty of confidentiality, the Respondent submits that this duty is overridden by public interest consideration. As regards the alleged treaty breaches, the Respondent submits that the self-judging exception clause in Art. 9(2) of the FS-BIT has been applied in good faith and excludes its treaty obligations during the oil spill crisis. Therefore, the Respondent could not possibly be in breach of any of its treaty obligations and requests the Tribunal to dismiss the Claimant’s submissions on the merits of the case.

17. However, if the Tribunal is to deny the application of Art. 9(2) of the FS-BIT, the Respondent submits that it did not in any case violate its treaty obligations specifically, the expropriation and FET provisions stipulated respectively in Art. 4 and Art. 2(2) of the FS-
BIT have not been violated. The measures implemented by the Respondent to address the oil spill crisis are to be regarded as non-compensable regulatory measures and would not breach the Claimant’s legitimate expectations under the discretion of the margin of appreciation doctrine. In the event the Tribunal decides that the Respondent has indeed breached its treaty obligations, the Respondent submits that by invoking the necessity defence codified in Art. 25 of the ILC Articles, it would nevertheless be exempted from liabilities of the alleged treaty breaches.
ARGUMENTS

PART ONE: JURISDICTION

18. The Respondent submits that the Tribunal does not have jurisdiction over the claims brought before it by the Claimant because the Claimant does not qualify as an investor under Art. 1(3) of the FS-BIT (I). Moreover, the Claimant has triggered the fork-in-the-road provision contained in Art. 11(3)(b) of the FS-BIT (II). However, the Respondent submits that the Tribunal has jurisdiction over the Respondent’s counterclaim in finding the Claimant and its wholly owned subsidiary, FPS, are liable for causing devastating harm to the Respondent (III). Furthermore, the actions of NPCS are not attributable to the Respondent (IV).

19. The investment dispute before this Tribunal is based on the FS-BIT, which provides for an international legal framework. The ICJ Statute permits the Tribunal to take into consideration all of the sources therein stated, namely international conventions applicable between the parties, international customs, international awards, principles commonly accepted and directly related to the Respondent’s legal issues at hand, general principles of law, judicial decisions and opinio juris.\(^1\) Additionally, the Respondent proposes the VCLT as the framework of interpretation of the FS-BIT.

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS BROUGHT BEFORE IT BY THE CLAIMANT BECAUSE THE CLAIMANT FAILS TO QUALIFY AS AN INVESTOR UNDER ART. 1(3) OF THE FS-BIT.

20. The Respondent submits that the Tribunal does not have jurisdiction over the claims brought before it by the Claimant as the Claimant is not an investor for the purposes of Art. 1(3) of the FS-BIT. The Respondent invites the Tribunal to interpret the FS-BIT in light of Art. 31 of the VCLT in good faith, and in accordance with the ordinary meaning of the terms of the treaty in its context and in the light of its object and purpose.

\(^1\) Art. 38(1), ICJ Statute.
21. The Preamble of the FS-BIT emphasises the importance of improvement of the economic co-operation between the Contracting States and provides for favourable conditions for the investments of their nationals.\(^2\) It follows that for the Claimant to bring a claim before this Tribunal while relying on the provisions of the FS-BIT, it must be an investor under Art. 1(3) of the same. The Respondent submits that in the present case, the underlying dispute is not between the Claimant and the Respondent but the Government of Freedonia and the Respondent. In essence, the Respondent contends that the real party to the dispute is the Government of Freedonia.

22. In order to ensure the application of the FS-BIT in accordance with its object and purpose, and for the sake of the avoidance of the misuse of the investor-state dispute resolution mechanism provided in Art. 11 of the FS-BIT, the Respondent invites the Tribunal to pierce the corporate veil and find that the real party to the dispute is the Government of Freedonia. Subsequently, the Government of Freedonia lacks standing before this Tribunal as it may not benefit from Art. 11 of the FS-BIT.

23. The Respondent invites the Tribunal to lift the corporate veil and disregard the separate legal personality of the Claimant in order to deny jurisdiction in the present case. In \textit{Barcelona Traction}, the ICJ accepted several instances when lifting of the corporate veil would be fully justified and equitable. The prevention of the evasion of legal requirements and obligations, prevention of misuse of the privileges of legal personality, prevention of fraud and malfeasance and protection of the rights of the creditors and purchasers were held to be instances where the corporate veil may be lifted.\(^3\) Although the ICJ asserted that piercing of corporate veil is chiefly a matter for the corporate law of each jurisdiction, it nevertheless held that the lifting of the corporate veil may also be applied in the context of international law.\(^4\) The approach of the \textit{Barcelona Traction} case has been reaffirmed by the ICJ in the \textit{Diallo} case,\(^5\) by ICSID tribunals in \textit{CMS Jurisdiction},\(^6\) \textit{Aguas del Tunari}\(^7\) and

\(^2\) The Preamble, FS-BIT, Record, p. 11.
\(^3\) \textit{Barcelona Traction} [56].
\(^4\) \textit{Barcelona Traction} [58].
\(^5\) \textit{Diallo} [64].
\(^6\) \textit{CMS Jurisdiction} [43-48].
also in the dissenting opinion of the chairman of the tribunal in *Tokios Tokelés*.\(^8\) The Respondent hereby submits that in the current dispute, the privileges of separate legal personality of the Claimant are being misused by the Government of Freedonia.

24. The Respondent submits that the Claimant is the *alter ego*\(^9\) of the Government of Freedonia and thus, does not qualify as an “investor” to invoke investor-state arbitration under Art. 11 of the FS-BIT. The strong connection\(^10\) between the Claimant and the Government of Freedonia is evidenced by the fact that on 10 December 2010, the President of Freedonia contacted the President of Sylvania to commence diplomatic negotiations concerning the dispute in the case at hand.\(^11\) This act demonstrates that the Claimant is the *alter ego* of the Freedonian Government. Further developments of events\(^12\) established that the real party to the dispute is the Government of Freedonia, not the Claimant. Moreover, officials of the Government of Freedonia released a statement to the press accusing the Respondent of putting forward unreasonable demands prior to the suspension of the diplomatic negotiations, the result of which is the failed endeavour to settle on behalf of the Claimant.\(^13\)

25. The Claimant, which is 60% owned by the Government of Freedonia,\(^14\) claims to be an investor under Art. 1(3) of the FS-BIT. According to Art. 1(3)(b) of the FS-BIT, any legal person established under the respective national legislation of either Contracting Party shall not be treated as an investor for the purposes of the FS-BIT if it is pursuing sovereign activities and is funded by the other Contracting Party.\(^15\) The Respondent relies on its argument that the Claimant is the *alter ego* of the Freedonian Government to submit that the Claimant is not meeting the criteria of Art. 1(3) of the FS-BIT by default.

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\(^7\) *Aguas del Tunari* [247 and 332].

\(^8\) *Tokios Tokelüs Dissenting opinion* [6].

\(^9\) *Bridas*, pp. 5-16.

\(^10\) Clarification no. 34.

\(^11\) Facts, Record, p. 5.

\(^12\) ibid.

\(^13\) ibid.

\(^14\) Facts, Record, p. 1.

\(^15\) Art. 1(3), FS-BIT, Record, p. 11.
26. In conclusion, the Respondent submits that the real party to this dispute is the Government of Freedonia and as a result, the Claimant fails to qualify as an investor for the purposes of the FS-BIT. In turn, this leaves the Claimant without the necessary standing to bring arbitral proceedings before this Tribunal.

II. THE CLAIMANT HAS TRIGGERED THE FORK-IN-THE-ROAD PROVISION CONTAINED IN ART. 11(3)(b) OF THE FS-BIT.

27. The Respondent submits that even if the Tribunal finds that the Claimant qualifies as an investor under Art. 1(3) of the FS-BIT, it still lacks jurisdiction to hear the case at hand pursuant to Art. 11(3)(b) of the FS-BIT. The Claimant has triggered the fork-in-the-road provision contained in Art. 11(3)(b) of the FS-BIT, therefore, it lacks standing before this Tribunal.

28. On 26 of February 2010, the Claimant, through FPS, its wholly owned and controlled subsidiary, commenced administrative proceedings before the Sylvanian Ministry of Energy to resist the request of the Sylvanian Government for payment of SD 150,000,000 in liquidated damages. Therefore, the Claimant had already made its choice of forum under Art. 11 of the FS-BIT.

29. Although the direct party of the administrative proceedings was FPS, the real party in interest was the Claimant, who fully owns and controls FPS. The latter has been incorporated in Sylvania by the Claimant solely to comply with the requirement to incorporate a local subsidiary in order to take part in the public tender for oil exploration permits in Sylvania. FPS is merely an investment vehicle of the Claimant as it is wholly owned and controlled by the Claimant and acts in accordance with the primary and independent interests of the Claimant. The Respondent hereby submits that these factors

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16 Art. 11(3)(b), FS-BIT, Record, p. 16.
17 Facts, Record, p. 1.
18 Facts, Record, p. 4.
19 Facts, Record, p. 1.
20 ibid.
relating to the ownership, purpose of incorporation and control of FPS indicate that FPS is the *alter ego* of the Claimant. Therefore, the conduct of FPS which triggered the fork-in-the-road provision should be considered as conduct of the Claimant.

30. The Respondent submits that in present dispute, the applicable legal test to adopt concerning the trigger of the fork-in-the-road provision is the one laid down in the *Pantechniki*\(^{21}\) case. In this dispute, as in the *Pantechniki* case, both tribunals are faced with the question of payment of damages. Furthermore, in both cases, the respondents allege that the choice under the fork-in-the-road provision was made by the claimants.

31. In the *Pantechniki* case, the investor was a Greek company which had entered into contracts with the Albanian Government for the construction of roads and bridges in Albania. Due to civil disturbances, risks of losses were allocated to the Albanian Government’s General Road Directorate. In March 1997, wide-scale ransacking, looting and rioting throughout Albania caused Pantechniki’s equipment to be stolen or destroyed, for which it claimed compensation from the Albanian Government of approximately USD 4.8 million. A special commission created by the General Road Directorate valued Pantechniki’s losses at USD 1.8 million but the Ministry of Finance refused to pay. As a result, Pantechniki commenced litigation in the Albanian courts to enforce its contractual right to compensation.

32. The Albanian district courts and the Court of Appeal dismissed Pantechniki’s claims on the basis that the contractual provisions allocating the risk of losses to the General Road Directorate were contrary to Albanian public policy. Pantechniki appealed to the Supreme Court of Albania but withdrew its appeal before the case was decided, choosing instead to commence ICSID arbitration in August 2007 alleging breaches of the Greece-Albania BIT.

33. Among other issues, the issue of choice under the fork-in-the-road provision was considered by the *Pantechniki* tribunal. The *Pantechniki* tribunal considered that the appropriate test, the one expressed by the Mixed Claims Commission of U.S.-Venezuela in  

\(^{21}\) *Pantechniki* [61].
the Woodruff\textsuperscript{22} case and followed by the Vivendi Annulment\textsuperscript{23} Committee, was whether or not the ‘fundamental basis of a claim’ sought to be brought before the international forum is autonomous of claims to be heard elsewhere.\textsuperscript{24}

34. The Respondent hereby submits that the fundamental basis of the claim before the Sylvanian Ministry of Energy and the Tribunal are congruent and not autonomous, because the claim concerning the payment of liquidated damages forms an integral part of the relief sought by the Claimant.\textsuperscript{25} The subject matter of the claims before the Sylvanian Ministry of Energy and the Tribunal are identical and arise from the same facts, in that, they both concern the payment of liquidated damages ordered under the amended OPA.\textsuperscript{26}

35. The Respondent further submits that the exceptional nature of the dispute at hand excludes the application of the approach taken by the tribunal in CMS Jurisdiction\textsuperscript{27} and followed by the tribunals in LG&E Jurisdiction\textsuperscript{28} and Pan American.\textsuperscript{29} According to the CMS Jurisdiction\textsuperscript{30} approach, the fork-in-the-road provision can only be triggered if the Claimant pursues the identical treaty claim before the court of the Respondent State. Although the Respondent acknowledges the need for treaty claims to be heard only before one forum, it submits to the Tribunal that the question on identity of a treaty claim should not be answered merely by examining its label.\textsuperscript{31}

36. The tribunal in Pantechniki acknowledged the impermissibility of mere labelling and reformulation of the claims in order to furnish them as treaty claims and distinguished from the congruent claims before local courts to avoid the effects of fork-in-the-road

\textsuperscript{22} Woodruff, p. 223.
\textsuperscript{23} Vivendi Annulment [100].
\textsuperscript{24} Pantechniki [61].
\textsuperscript{25} Issues in Dispute (D), Terms of Reference, Record, p. 9.
\textsuperscript{26} Facts, Record, pp. 2-4.
\textsuperscript{27} CMS Jurisdiction [77-82].
\textsuperscript{28} LG&E Jurisdiction [75-76].
\textsuperscript{29} Pan American [155-157].
\textsuperscript{30} CMS Jurisdiction [77-82].
\textsuperscript{31} Pantechniki [61].
provisions.\textsuperscript{32} Hence, in the present dispute, even if the Claimant argues that the claims before the Tribunal are different from the Sylvanian Ministry of Energy, the difference is a result of mere labelling.

37. In conclusion, to determine the trigger of the fork-in-the-road provision in the case at hand, the Respondent submits that the “fundamental-basis” test adopted in the \textit{Pantechniki} case is to be the preferable legal test, whereas the \\textit{CMS Jurisdiction}\textsuperscript{33} approach will deprive the fork-in-the-road provision of its \textit{effet utile}.	extsuperscript{34} As the Claimant had already made its choice of forum to be the Sylvanian Ministry of Energy, the Respondent submits that the fork-in-the-road provision contained in Art 11(3)(b) of the FS-BIT has been triggered. Thus, the Tribunal does not have jurisdiction over the Claimant’s submissions.

\textbf{III. THE TRIBUNAL HAS JURISDICTION OVER THE RESPONDENT’S COUNTERCLAIM.}

38. Alternatively, without prejudice to the aforementioned objections on the Tribunal’s jurisdiction, the Respondent submits that this Tribunal does have jurisdiction over the Respondent’s counterclaim. The Respondent asks the Tribunal to find the Claimant and its wholly owned subsidiary, FPS, to be liable for the devastating damage caused to the Respondent by its acts and omissions.

39. The Respondent invites the Tribunal to apply the test adopted in \textit{Saluka} to determine the admissibility of counterclaims in investment treaty arbitration. The \textit{Saluka} tribunal affirmed the right of a State to bring a counterclaim against the investor, where such counterclaim has a close nexus with the investment claim brought before the tribunal by the investor.\textsuperscript{35} The \textit{Klöckner} tribunal also acknowledged the admissibility of a respondent State’s counterclaim if the subject matter of the counterclaim was intimately connected

\textsuperscript{32} ibid.
\textsuperscript{33} \textit{CMS Jurisdiction [77-82]; LG&E Jurisdiction [75-76]; Pan American [155-157].}
\textsuperscript{34} \textit{Fisheries Jurisdiction [52].}
\textsuperscript{35} \textit{Saluka Jurisdiction [60-61].}
with the subject matter of the primary claim.\textsuperscript{36} There are also cases from the Iran-U.S. Claims Tribunal with the same effect.\textsuperscript{37} Art. II [1] of the Claims Settlement Declaration\textsuperscript{38} of the Iran-U.S. Claims Tribunal gives the tribunal jurisdiction over any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of the national’s claim.\textsuperscript{39}

40. The Respondent hereby submits the counterclaim in accordance with Art. 5(5) of the ICC Rules\textsuperscript{40} in a timely manner.\textsuperscript{41} The Respondent contends that its counterclaim is fully consistent with the wording of Art. 11 of the FS-BIT,\textsuperscript{42} which does not contain any provision precluding the Respondent to bring a counterclaim arising out of an investment dispute before the ICC Tribunal.

41. Moreover, the Respondent submits that in accordance with the ordinary meaning of Art. 11(1) of the FS-BIT,\textsuperscript{43} the Respondent’s counterclaim involves a dispute on interpretation or application of the investment authorisation granted to the Claimant by the Respondent and thus, qualifies as a dispute concerning the investment. In addition, the subject matter of the Claimant’s submissions and the subject matter of the counterclaim are intimately connected to each other. Thus, the Claimant’s claim and the Respondent’s counterclaim are to be deemed as an “indivisible whole”\textsuperscript{44} as they both arise from the same set of facts.

42. Furthermore, the Respondent submits that the exercise of the Tribunal’s jurisdiction over the counterclaim would be consistent with policy considerations such as the efficiency in

\textsuperscript{36} Klöckner [165].
\textsuperscript{37} American Bell International, pp. 74, 83-84; Westinghouse Electric, p. 104; Owens-Corning Fiberglass, pp. 322 and 324; Morrison-Knudsen Pacific, pp. 54, 82-84; Harris International Telecommunications, p. 31.
\textsuperscript{38} Art. II [1], Claims Settlement Declaration.
\textsuperscript{39} Saluka Jurisdiction [68].
\textsuperscript{40} Art. 5(5), ICC Rules.
\textsuperscript{41} Facts, Record, p. 5.
\textsuperscript{42} Art. 11, FS-BIT, Record, pp. 15-16.
\textsuperscript{43} Art. 31 [1] VCLT.
\textsuperscript{44} Klöckner [165].
international dispute resolution. In conclusion, in light of the aforementioned reasons, the Respondent invites the Tribunal to find the Respondent’s counterclaim admissible and that it has jurisdiction to hear it.

IV. THE ACTIONS OF NPCS ARE NOT ATTRIBUTABLE TO THE RESPONDENT.

43. NPCS was created on 10 August 2010 pursuant to the adoption of the new Sylvanian Hydrocarbon Law. On 29 November 2010, NPCS secured control over several leaking oil wells of FPS in order to perform the necessary remedial works. The Claimant alleged the actions of NPCS were attributable to the Respondent, which constituted a breach of the FS-BIT. The Respondent hereby contends that the Claimant’s submission on the attribution of NPCS’s actions to the Respondent is unfounded.

44. Matters of State Responsibility, including the issues on attribution, are regulated by customary international law. Customary international law concerning attribution is reflected in the ILC Articles on Responsibility of State for Internationally Wrongful Acts (ILC Articles). In the present dispute, the Respondent submits that NPCS’s actions cannot be attributed to it under the ILC Articles, particularly under Arts. 5 and 8 of the ILC Articles.

45. Issues of attribution on the conduct of state-owned entities to the State have been thoroughly dealt with by various international treaty tribunals. It is well established in customary international law that the actions of a state-owned entity, which is not an organ of the State, are not attributable to the State unless that entity is exercising elements of governmental authority or unless its conduct is directed or controlled by the State.

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45 Saluka Jurisdiction [24] and [27].
46 Facts, Record, p. 4.
47 Facts, Record, p. 5.
48 Issues in Dispute (B), Terms of Reference, Record, p. 9.
49 Maffezini [52]; Salini v. Morocco [31 et seq.]; Salini v. Jordan [157 et seq.]; Nykomb [4.2].
50 Art. 5, ILC Articles.
51 Art. 8, ILC Articles.
46. The Respondent submits that even if the Claimant contends that NPCS is fully controlled by the Government of Sylvania and its actions were directed by the Executive Order issued by the President of Sylvania, these facts alone do not suffice to attribute all actions of NPCS to the Respondent. The Tribunal is invited to adopt the approach of the ICJ in the *Nicaragua* case, where it was held that the issue of attribution should be decided upon the actual participation and the direction given by the State in individual instances.\(^52\)

47. The Respondent also contends that the mere fact a State may have established an entity through special legislation is not sufficient to attribute the actions of such an entity to the State.\(^53\) Moreover, the fact that an entity is owned by the State and in that sense is controlled by it, does not suffice to attribute its conduct to the State. The conduct of such an entity is not attributable to the State unless it is exercising elements of governmental authority.\(^54\) The Respondent submits that the nature of the remedial works carried out by NPCS is not such that can be construed as exercise of elements of governmental authority. Thus, NCPS’s actions cannot be attributable to the Respondent.

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\(^{52}\) *Nicaragua* [62, 64-65, 86, 109 and 115].

\(^{53}\) *Schering*, p. 361; *Otis Elevator*, p. 283; *Eastman Kodak*, p. 153.

\(^{54}\) Art. 5, ILC Articles.
CONCLUSION ON JURISDICTION

48. The Tribunal is respectfully requested to find that it does not have jurisdiction over the Claimant’s submissions. Firstly, the Claimant fails to qualify as an investor under Art. 1(3) of the FS-BIT because the real party to the dispute is the Government of Freedonia of which the Claimant is the alter ego. Secondly, the Claimant has triggered the fork-in-the-road provision of the Art. 11(3)(b) of the FS-BIT. Thirdly, NPCs’ actions are not attributable to the Respondent. Alternatively, if the Tribunal finds that it does have jurisdiction over the Claimant’s submissions, it is requested to find the Respondent’s counterclaim admissible.
PART TWO: MERITS OF THE CLAIM

49. The Respondent submits that it owes no duty or obligation of confidentiality towards the Claimant (I). As for the alleged treaty breaches arising out of the FS-BIT, the Respondent submits that it is entitled to rely on the exception clause provided in Art. 9(2) of the FS-BIT to exclude its substantive treaty obligations during a state of emergency, i.e. the oil spill crisis in the present dispute (II). If the Tribunal denies the Respondent’s reliance on Art. 9(2) of the FS-BIT, the Respondent further submits that it has not breached any of its treaty obligations or otherwise violated general international law and applicable treaties (III). Even if the Tribunal is to render Art. 9(2) of the FS-BIT inapplicable and find that there is a breach of treaty obligations, the Respondent submits that its liabilities would be exempted under the necessity clause codified in Art. 25 of the ILC Articles (IV).

50. The Respondent submits that the burden of proof in the present case rests wholly with the Claimant. In the Oil Platforms case, Judge Higgins noted that a preponderance of evidence is the standard in arbitration cases where she declared:

What is for the merits...is to determine what exactly the facts are, whether as finally determined they do sustain a violation of [the treaty] and if so, whether there is a defence to that violation...55

With this in mind, the Respondent asserts that the Claimant fails to show, on a preponderance of evidence, that the Respondent is in breach of any of its obligations under the FS-BIT, general international law and the Agreement.

I. THE RESPONDENT DID NOT BREACH ANY IMPLIED DUTY OR OBLIGATION OF CONFIDENTIALITY.

51. The Respondent submits that in the absence of an express confidentiality clause in the Agreement or the FS-BIT, no duty of confidentiality is owed to the Claimant. Furthermore,

55 Oil Platforms separate opinion [34].
since the Respondent labelled the report in question confidential for internal purposes,\(^{56}\) the Claimant cannot rely on this classification to establish any implied duty of confidentiality.

52. The Respondent submits that in majority of ICC, ICSID and ad-hoc tribunal cases, disputes arising out of confidentiality breaches hinge on the arbitral process\(^{57}\). However, the issue of confidentiality in this present case hinges on matters that occurred before the commencement of arbitral proceedings on 23 March 2011.\(^{58}\) As such, the dispute pertains to whether the classification of the report as confidential by the Respondent extends in application, to the Claimant.

53. Following the applicability of the sources of international law as noted in Art. 38(1)(c) of the ICJ Statute, the Respondent urges this Tribunal to apply the principle laid down in the 1953 U.S. Supreme Court case of United States v. Reynolds\(^{59}\) before establishing whether the Respondent was responsible to the Claimant for protecting the contents of the confidential report. According to the Reynolds case, a State has the sovereign privilege to classify information however it chooses, without any external influence. Information labelled as confidential is classified therein, to protect the national security interests of the State and not the interests of any entity, party to the information. Furthermore, once a document is classified as confidential, the merits of its classification and the use of information contained therein cannot be challenged by any party to the information other than the State.

54. Before the Respondent can be held responsible for the consequences of the leak of the confidential report, it must first be established that there is indeed, a duty of care owed towards the Claimant regarding the confidential material. However, in applying the principle laid down in Reynolds, any duty of care pertaining to the confidential report is owed to the Respondent and not the Claimant. In the absence of a duty of care towards the

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\(^{56}\) Clarification no. 43.
\(^{57}\) Brownlie, p. 473.
\(^{58}\) Facts, Record, p. 5.
\(^{59}\) U.S. v. Reynolds.
Claimant, the Respondent contends that it cannot be held liable for the consequences of the published report by the newspaper.

55. However, in the event that this Tribunal holds the Respondent responsible for the confidential information published by La Reforma, the Respondent submits that the alleged breach did not take place during the arbitral process (A). Furthermore, in the absence of a confidentiality agreement or appropriate clause in the FS-BIT, there is no obligation of confidentiality (B). However, the Respondent contends that in the event of an implied duty of confidentiality, particularly originating from the Agreement, matters of public concern override any implied duty of confidentiality (C).

A. The alleged breach did not take place during the arbitral process.

56. Any supposed duty of confidentiality that pertains to arbitration agreements covers the arbitral process and not the action of the parties before a request for arbitration is filed.\footnote{Esso Australia v. Plowman.} The Respondent submits that the classification of sensitive information pertinent to national security occurred on 24 July 2009\footnote{Facts, Record, p. 2.} and its subsequent leak occurred on 29 September 2009.\footnote{ibid.} However, arbitration proceedings were first initiated by the Claimant on 23 March 2011.\footnote{Facts, Record, p. 5.} The Respondent submits that the classification of confidential information and its subsequent leak and impact on the Claimant took place almost a year and a half before the commencement of arbitral proceedings and as such, can hardly be argued to be a breach of confidentiality.
B. **In the absence of a confidentiality agreement or a relevant clause in FS-BIT, there is no obligation of confidentiality**

57. There is no universal duty or obligation of confidentiality pertinent to parties in arbitration but a universally accepted right to privacy. The Respondent submits that the universally accepted right to privacy, inherent to arbitration, does not entail an implied obligation of confidentiality, unless expressly stated in the FS-BIT or agreed upon by way of a confidentiality agreement. This was discussed by an ICSID tribunal chaired by Berthold Goldman in *Amco Asia Corp. et al. v. Republic of Indonesia*, a case which holds similar facts to this present case. During the arbitral process of the *Amco* case, the majority shareholder of *Amco* released statements about the dispute to the press putting the confidentiality of the process into doubt. Despite the leak occurring during arbitration, the ICSID tribunal held, on the matter of confidentiality, that there is no rule that prevents a party from revealing matters of the case to those that are not party to it. In the absence of any such obligation, universal or inherent in the ICC confidential clause, which does not exist in this case, the Respondent submits that there is no breach of confidentiality.

58. The Respondent duly notes that “majority” of extractive industry agreements contain generic confidentiality clauses. However, this suggests that it is not uncommon for an extractive agreement to omit a confidentiality clause. As such, the Respondent would like to point out to the Tribunal the omission of a confidentiality clause from the Agreement and FS-BIT. The absence of a confidentiality clause in the Agreement suggests the true intentions of the parties to the Agreement – the intent not to incorporate any duty of confidentiality, implied or certain. The Tribunal is urged to apply the principles of *British Crane Hire Corporation v Ipswich Plant Hire Ltd*, an English Court of Appeals case which laid out the principle of common understanding of parties to a contract.

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64 Fortier, p. 138.
65 *Amco*, p. 161.
66 Rosenblum and Maples, p. 23.
67 Clarification no. 43.
68 *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd*. 

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59. The aforementioned case pertained to the mining industry and hung over terms of the contract that were not incorporated but suggestively implied. The Court of Appeals noted that for conditions to be implied into a contract, the conditions of the industry and the conduct of the parties must be taken into account. In his judgement, Lord Denning stated:

I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties...  

In consideration of the conduct of the parties in negotiating the Agreement and purposely omitting a confidentiality clause considered the norm within the industry, the Respondent submits that a duty of confidentiality cannot be suggested to be true intention of the parties. Therefore, the Respondent contends that no duty of confidentiality can be implied between the Respondent and the Claimant.

60. The Respondent submits that the public and transparent nature of the bidding process, coupled by the events surrounding the oil spill and the nationally-televised testimony of the scientific advisors make it much more plausible that public opinions pertaining the Claimant were formed before the publication of confidential material by La Reforma on 29 September 2009 or the subsequent declaration of the President of Sylvania. In fact, the Respondent would like to point out that the impact of the oil spill on 9 June 2009 and nationally-televised expert testimony on 16 June 2009 led to public outcry for help. Moreover, the nationally televised expert testimony by Sylvanian scientific advisors contained material facts pertaining to the case including the potential worsening of the oil spill and the mishandling of the clean-up by FPS, facts only explained in detail in the confidential leak. Furthermore, a nationally televised news conference involving an oil spill and expert testimony is much more likely to reach and thereby affect a larger audience compared to a newspaper article. As such, the Respondent submits that it is unfounded on

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69. British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd [311].
70. Clarification no. 43.
71. Facts, Record, p. 4
72. ibid.
73. ibid.
the part of the Claimant to suggest that only the confidential information published by the newspaper led to the eventual fall in share prices.\textsuperscript{74}

\textbf{C. Matters of public concern override any duty of confidentiality.}

61. The Respondent submits that if an implied duty of confidentiality does exist under the Agreement, then this duty is overridden by a higher duty of protecting public interests;\textsuperscript{75} under Article 9 of the FS-BIT, both States consented to the public interest exception.

62. In \textit{Commonwealth of Australia v Cockatoo Dockyard Pty Ltd},\textsuperscript{76} it was held that public interest demands transparency in government actions. As such, a private agreement on confidentiality was held not to exclude from the public matters of legitimate concern. In the American case of \textit{United States v. Panhandle Eastern Corp},\textsuperscript{77} the Court ruled that ICC arbitration rules contain no provision on confidentiality and even where these rules contain a provision on confidentiality, matters of public concern would override any such confidentiality clause or agreement. In this case, the grave nature of the oil spill followed by the devastating effect on the environment and the consequential loss of livelihood are alarming causes for public concern, particularly since the clean-up was not handled with absolute urgency.\textsuperscript{78} Due to the nature and consequence of the oil spill in this case, the Respondent asserts that in the presence of any duty of confidentiality, the public concern exception overrides any duty of confidentiality leaving the Respondent excused from any breach.

\textsuperscript{74} Clarification no. 37.
\textsuperscript{75} \textit{Esso Australia v. Plowman} [38].
\textsuperscript{76} \textit{Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd}.
\textsuperscript{77} \textit{U.S. v. Panhandle}.
\textsuperscript{78} Facts, Record, p. 4; CSE \textit{Amicus Curiae}, Record, p. 23.
II. THE RESPONDENT IS EXCLUDED FROM ITS SUBSTANTIVE TREATY OBLIGATIONS UNDER ART. 9(2) OF THE FS-BIT.

63. The Respondent invites the Tribunal to adopt the CMS Annulment approach that laid down the convincing order of applying exception clauses before necessity clauses, as defences against the alleged treaty breaches. In so doing, the Respondent submits that it is entitled to rely on the exception clause provided in Art. 9(2) of the FS-BIT. The exception clause excludes the Respondent’s substantive treaty obligations during the oil spill crisis, thus, there is no possibility for the Respondent to breach any of its treaty obligations in the case at hand. To determine the scope of applying the exception clause, attention is to be drawn to the self-judging nature of this exception clause (A) and the good faith obligation provided in Art. 26 of the VCLT (B).

A. Art. 9(2) of the FS-BIT is a self-judging clause.

64. Art. 31(3)(c) of the VCLT requires any relevant rules of international law to be taken into account when interpreting treaty provisions. This echoes Art. 38 of the ICJ Statute, which also requires awards to be rendered in accordance with sources of international law. In line with the principles of treaty interpretation deriving from sources of international law, by relying on the ICJ decision in the Nicaragua case, the Respondent hereby submits that the scope of exception, i.e. to what extent Art. 9(2) of the FS-BIT applies, is to be reviewed by the Respondent alone.

65. The argument for an exception clause being self-judging was put forward by the United States in the Nicaragua case but the ICJ denied the American assertion based on an absence of the explicit wording “it considers”, in the exception clause. Treaty tribunals have since followed the Nicaragua case approach and confirmed that the wording of an

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79 CMS Annulment [129].
80 Newcombe and Paradell, p. 483.
81 Nicaragua.
82 Nicaragua [222].
exception clause has to be very precise in order to determine a self-judging character.\textsuperscript{83} In the case at hand, the self-judging character of Art. 9(2) of the FS-BIT has been explicitly agreed upon by the Contracting Parties as evidenced by the precise term of “it considers”\textsuperscript{84}. Thus, the Respondent submits that it is the only party entitled to review the scope under which this exception clause can be applied.

66. Moreover, when compared to the wording of Art. XXI of GATT, which is also subjected to interpretation under the VCLT, the Respondent submits that the breadth of the self-judging nature of Art. 9(2) of the FS-BIT is further fortified. Art. XXI of GATT is a self-judging clause but provides an exhaustive list on what is to be defined as “essential security interests”.\textsuperscript{85} Without an exhaustive list in Art. 9(2) of the FS-BIT to define particular “essential security interests”, a wide variety of interests, including the safeguarding of environment, is acknowledged under customary international law.\textsuperscript{86} As a result, the Respondent identified its protected marshland area,\textsuperscript{87} its coastline\textsuperscript{88} and the overall ecological impact\textsuperscript{89} as its essential security interests being endangered by the oil spill crisis.

67. Together with the catastrophic damages created by the oil spill and the public outrage over FPS’s incompetence in dealing with the aftermaths,\textsuperscript{90} the Respondent considers the amendment of the OPA and issue of the Executive Order as measures necessary to protect its essential security interests and to maintain public order as acknowledged in Art. 9(2) of the FS-BIT. Therefore, in light of the self-judging nature of Art. 9(2) of the FS-BIT, the Respondent submits that it is entitled to rely on this exception clause and to be exempted from the alleged treaty breaches.

\textsuperscript{83} Enron [336]; LG&E [212]; Sempra [383].
\textsuperscript{84} Art. 9(2), FS-BIT, Record, p. 15.
\textsuperscript{85} GATT, Art. XXI (b)(i)(ii)(iii).
\textsuperscript{86} Bishop et al., p. 1210.
\textsuperscript{87} Facts, Record, p. 2.
\textsuperscript{88} ibid.
\textsuperscript{89} ibid.
\textsuperscript{90} Facts, Record, p. 4; CSE Amicus Curiae, Record, p. 23.
B. Application of Art. 9(2) of the FS-BIT has been performed in good faith.

68. In accordance with Art. 26 of the VCLT that gives effect to the interpretation of Art. 9(2) of the FS-BIT, the only criterion for the Tribunal to review a self-judging provision is whether it is being performed in good faith. The ICJ noted in Gabčíkovo-Nagymaros Project that the performance of good faith

obliges the parties to apply it [the Treaty] in a reasonable way and in such a manner that its purpose can be realised.\(^91\)

69. The Respondent submits that Art. 9(2) of the FS-BIT has been applied in a reasonable way (1) and with the intent to realise the purpose of the FS-BIT (2).

1. Art. 9(2) of the FS-BIT has been applied in a reasonable way.

70. The Respondent submits that Art. 9(2) of the FS-BIT has been applied in a reasonable way, including rendering retroactive effect to the amended OPA. The Respondent is not an exception in adopting legislation with retroactive effect when public purpose demands it. Retroactive legislation can be supported by State practice identified in customary international law.\(^92\) States have implemented retroactive legislation in different aspects of law. For example, the Swedish Parliament rendered retroactive effect to the exemption of inheritance tax to cover survivors of the Indian Ocean tsunami victims in 2004.\(^93\) In recent times, the Spanish government introduced retroactive legislation on tariffs covering solar photovoltaic projects in November and December 2010.\(^94\)

71. Mirroring the reaction of the Respondent in the present case,\(^95\) in more similar terms of State practice, the United States Congress passed the Oil Pollution Act of 1990 in response to the Exxon Valdez oil spill which contains a retroactive provision.\(^96\) Section 5007 of the

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\(^{91}\) Gabčíkovo-Nagymaros Project [142].

\(^{92}\) Art. 38(1)(b), ICJ Statute.

\(^{93}\) Bogdan, p. 25.

\(^{94}\) Allen & Overy on Spanish PV Tariff.

\(^{95}\) Facts, Record, p. 2.

\(^{96}\) Kim, p. 197.
U.S. Oil Pollution Act of 1990 is of retroactive effect as it prohibits vessels involved in the Exxon Valdez oil spill from operating again in the south coast of Alaska.\textsuperscript{97} Courts in America have since upheld this retroactive provision and barred 18 vessels from entering the affected area.\textsuperscript{98}

72. Moreover, when States have not explicitly prohibited retroactive legislation and clearly expressed retroactive effect for a particular statute, the courts are inclined to consider that particular statute with retroactive effect.\textsuperscript{99} The Supreme Court of Canada ruled in the \textit{British Columbia v. Imperial Tobacco Canada Ltd} case that retroactive effect should be granted accordingly as there was no room for an interpretation to the contrary.\textsuperscript{100} A comparable situation can be found in the case at hand. The amended OPA has been declared expressly to have retroactive effect,\textsuperscript{101} while retroactive legislation has not been explicitly prohibited in the Respondent’s legal system. This is evidenced by various provisions in the Respondent’s legislation having retroactive effect.\textsuperscript{102} Therefore, the Respondent submits that it has acted reasonably, in line with State practice and customary international law.

2. \textbf{Art. 9(2) of the FS-BIT has been applied to realise the purpose of the treaty.}

73. The Preamble of the FS-BIT provides that its purpose is to foster the prosperity of both the Respondent and Freedonia,

\begin{quote}
consistent with the protection of health, safety, environmental, and international labour standards and the \textit{goal of sustainability}.\textsuperscript{103}
\end{quote}

\textsuperscript{97} Section 5007, U.S. Oil Pollution Act of 1990.
\textsuperscript{98} NY Times on Exxon Valdez Aftermaths.
\textsuperscript{99} \textit{British Columbia v. Imperial Tobacco Canada Ltd}.
\textsuperscript{100} \textit{British Columbia v. Imperial Tobacco Canada Ltd} [69].
\textsuperscript{101} Facts, Record, p. 3.
\textsuperscript{102} Clarification no. 81.
\textsuperscript{103} The Preamble, FS-BIT, Record, p. 11.
The Respondent hereby submits that it is applying Art. 9(2) of the FS-BIT to realise the purpose of the FS-BIT so that it may regulate and implement measures pursuant to the goal of sustainability, while fostering prosperity through international economic cooperation.

74. The ability of States to regulate activities within their territory is recognised as important for the pursuit of the goal of sustainability.\textsuperscript{104} However, economic interests alone are not sufficient for the pursuit of sustainable development, where social and environmental interests are also counted in as the basic constituent elements of sustainable development.\textsuperscript{105} As the VCLT requires the interpretation of Art. 9(2) of the FS-BIT to take into account any relevant rules of international law applicable among the parties,\textsuperscript{106} it is necessary to bring in the applicable international environmental law and international human rights law when interpreting the FS-BIT’s “goal of sustainability”. The Respondent hereby submits that it has acted reasonably in response to the oil spill crisis pursuant to the goal of sustainability, namely taking into account its obligations in the applicable international environmental law and international human rights laws.

75. The Respondent and Freedonia are parties to the Convention on Biological Diversity.\textsuperscript{107} Biological diversity includes “diversity within species, between species and of ecosystems”,\textsuperscript{108} and such biological diversity within the Respondent’s territory has been threatened by the oil spill crisis.\textsuperscript{109} In response to such threats, Art. 11 of the Convention on Biological Diversity requires contracting States to take economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.\textsuperscript{110}

76. Retroactive effect would provide economic incentives for FPS and other players in the Sylvanian oil industry to revisit its safety obligations over oil wells that were operating

\textsuperscript{104} Cotula, p. 1.
\textsuperscript{105} Puvimanasinghe, p. 97.
\textsuperscript{106} Art. 31(3)(c), VCLT.
\textsuperscript{107} Clarification no. 41.
\textsuperscript{108} Art. 2, Convention on Biological Diversity.
\textsuperscript{109} Facts, Record, p. 2.
\textsuperscript{110} Art. 11, Convention on Biological Diversity.
before the OPA was amended. Since FPS could still be operating oil wells within the Respondent’s territory as its licence does not expire until 26 May 2012, it is important for the Respondent to implement these economically sound measures to raise FPS’s incentives in revisiting its overall safety obligations and prevent similar disastrous effect of oil spills in the future.

77. With regards to the continuing oil spill and to address the immediate concern arising out of this incident, FPS had indicated in September 2009 that it might not be able to seal off the leaking oil wells until March 2010 and with five avoidable new released points discovered just a day before this announcement, FPS was clearly inadequate in handling the oil spill situation. Therefore, the amended OPA implemented on 10 December 2009 which broadens liabilities of responsible parties and was made effective as of 1 June 2009 serves as an immediate incentive for FPS to improve its reaction to the continuing oil spill crisis. The Respondent thus submits that by implementing the amended OPA with retroactive effect, it is endeavouring to provide incentives for investors, including FPS, to pursue the goal of sustainability as stipulated in Art. 11 of the Convention on Biological Diversity.

78. Moreover, the Respondent and Freedonia are signatory parties to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Respondent owes international human rights obligations towards its nationals deriving from the aforementioned conventions. Art. 1(2) of the International Covenant on Economic, Social and Cultural Rights expressly requires a Contracting State to provide its nationals with the right to freely dispose their natural wealth and resources and “in no case may a people be deprived of its own means of subsistence”. The Sylvanian nationals, thus, enjoy the rights to provide for themselves through participation in agricultural, seafood and tourism industries, and the survival of these industries relies primarily upon the natural resources and marine environment in

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111 Facts, Record, p. 1.
112 Facts, Record, p. 2.
113 Clarification no. 9.
115 Facts, Record, p. 4.
Sylvania. The human rights of the Sylvanian nationals, which are to be protected, have now been threatened by the oil spill that has already done serious damage to the agricultural, seafood and tourism industries while degrading and devastating the environment of Sylvania as a whole.116

79. The Suez tribunal recognised human rights obligations and treaty obligations as “not inconsistent, contradictory, or mutually exclusive”.117 With the rise of international human rights standards, host States are to bring their domestic legal systems in line with evolving international standards especially when there is a change in circumstances.118 In the case at hand, the amendment of the OPA, especially with the introduction of the provision where persons who are using the national resources that have been affected by the oil spill are eligible to claim for compensation,119 is a reflection of how the Respondent had taken into account the improvements on its international human rights obligations. Therefore, with the economic incentives for FPS to improve its handling of the oil spill and to guarantee the viability of human rights protection on the vast amount of aggrieved persons,120 the liability cap of SD 75 million in compensation had to be eliminated consequentially.121

80. Since the measures adopted by the Respondent to address the oil spill crisis were reasonable and pursuant to the goal of sustainability to realise the purpose of the FS-BIT, the Respondent hereby submits that it is entitled to rely on Art. 9(2) of the FS-BIT on a self-judging basis. Until FPS submits an acceptable remedial plan,122 the Respondent continues to apply Art. 9(2) of the FS-BIT, in accordance with Art. 26 of the VCLT; this excludes operation of the substantive provisions in the FS-BIT. Therefore, the Claimant’s allegations hold no basis as the possibility of breach of treaty obligations did not exist during this time.

116 CSE Amicus Curiae, Record, p. 23.
117 Suez [262].
118 Cotula OECD, p. 10.
119 2nd Clarification, p. 4.
120 Facts, Record, p. 4.
121 Facts, Record, p. 3; 2nd Clarification, p. 5.
122 Executive Order, Record, p. 20.
III. IF THE TRIBUNAL FINDS ART. 9(2) OF THE FS-BIT INAPPLICABLE, THE RESPONDENT SUBMITS THAT IT HAS NOT BREACHED ANY OF ITS TREATY OBLIGATIONS OR OTHERWISE VIOLATED GENERAL INTERNATIONAL LAW AND APPLICABLE TREATIES.

81. If the Tribunal finds that the Respondent cannot be exempted from its treaty obligations under Art. 9(2) of the FS-BIT, the Respondent contends that the alleged treaty breaches do not exist in any case. The Respondent submits that it did not expropriate the Claimant’s investment (A), nor had it violated the FET obligation and breached the Claimant’s legitimate expectations (B).

A. The Respondent did not unlawfully expropriate the Claimant’s investment.

82. Without prejudice to the argument of exemption under Art. 9(2) of the FS-BIT, the Respondent submits that even with its treaty obligations in force, it did not violate Art. 4 of the FS-BIT by expropriating the Claimant’s investment (1). However, if the Tribunal is to find that an expropriation can be established, the Respondent submits in the alternative that this would be a lawful expropriation in compliance with Art. 4 of the FS-BIT (2).

1. The Respondent did not expropriate the Claimant’s investment.

83. The Respondent submits that a direct or indirect expropriation did not occur in the case at hand. A direct expropriation comes in the form of State measures affecting the legal title of the owner of the property. However, since FPS’s licence was only suspended, the transfer of the oil wells’ legal title remained unknown. NPCS secured control of only the damaged oil wells for the sole purpose of undertaking the necessary remedial works. A suspension of licence would not have taken away FPS’s legal title over the oil wells, thus no direct expropriation could have taken place.

123 Dolzer and Schreuer, p. 92.
124 Clarification no. 15.
125 Facts, Record, p. 5.
84. In terms of indirect expropriation, Schreuer emphasises “judicial practice indicates that the severity of the economic impact is the decisive criterion”\textsuperscript{126} in determining the occurrence of indirect expropriation. In other words, an indirect expropriation cannot be established if the investor did not suffer “substantial deprivation”,\textsuperscript{127} where the degree of substantiality is often conveyed as meaning that interference from the State must approach total impairment.\textsuperscript{128}

85. The “substantial deprivation” test triggered by governmental regulatory measures was first identified in the Pope & Talbot\textsuperscript{129} case to draw a distinction between non-compensable regulatory measures and measures that amount to expropriation. The Pope & Talbot tribunal found that an indirect expropriation cannot be established when the interference from the host State had affected only a portion of the investment, where the investor was able to continue to export softwood lumber despite a reduction in profit.\textsuperscript{130} This carved out the essential requirement on the loss of control over the investment before any loss of value is to be discussed regarding the standard of expropriation.\textsuperscript{131} This approach had received wide acceptance in determining expropriation and was expressly followed by the Feldman\textsuperscript{132} tribunal, the CMS\textsuperscript{133} tribunal, and the Chemtura\textsuperscript{134} tribunal.

86. In the case at hand, the Respondent is of the view that the loss of value need not be discussed because expropriation can already be denied pursuant to the requirement of total impairment on loss of control. NPCs had only secured control over the “relevant”\textsuperscript{135} “several”\textsuperscript{136} oil wells that were leaking as authorised under the Executive Order, and did

\textsuperscript{126} Schreuer, p. 28.
\textsuperscript{127} Pope & Talbot [96].
\textsuperscript{128} Coe Jr. and Rubins, p. 621.
\textsuperscript{129} Pope & Talbot [100].
\textsuperscript{130} Pope & Talbot [101].
\textsuperscript{131} Dugan et al., p. 456.
\textsuperscript{132} Feldman [152].
\textsuperscript{133} CMS [263].
\textsuperscript{134} Chemtura [245].
\textsuperscript{135} Executive Order, Record, p. 20.
\textsuperscript{136} Facts, Record, p. 2.
not take over all of Claimant’s oil wells.\textsuperscript{137} Therefore, the degree of interference provided by the Executive Order was only limited to the portion of the Claimant’s investment that was already damaged by the oil spill, thus there was no substantial deprivation of Claimant’s investment.

87. In addition to the “substantial deprivation” test, the Tecmed\textsuperscript{138} tribunal identified that only governmental measures that are “irreversible” would amount to an indirect expropriation. In the case at hand, the suspension of FPS’s licence is of a reversible nature. The suspension was imposed solely to cope with the emergency created by the oil spill\textsuperscript{139} and it will cease to effect once FPS presents an acceptable remedial plan.\textsuperscript{140}

88. Therefore, with only a portion of the Claimant’s investment being affected by the reversible measures, the Respondent submits that no form of expropriation can be established in the case at hand.

2. \textbf{Even if expropriation is established, it is lawful in accordance with the requirements of the FS-BIT.}

89. Art. 4 of the FS-BIT lists the conditions for lawful expropriation. As a preliminary matter, the suspension of FPS’s licence and taking control of the affected oil wells were authorised under the Sylvania President’s Executive Order. This met the requirement stipulated in Art. 4(1) of the FS-BIT, which allows expropriation measures to take place “save where specifically” provided by an order issued by administrative bodies, which is the Executive Order in the present case.\textsuperscript{141}

90. The specific conditions for lawful expropriation listed out in Art. 4(2) of the FS-BIT have also been met. Firstly, since the oil spill had already caused catastrophic damage to the

\textsuperscript{137} Clarification no. 56.
\textsuperscript{138} Tecmed [116].
\textsuperscript{139} Executive Order, Record, p. 19.
\textsuperscript{140} Executive Order, Record, p. 20.
\textsuperscript{141} Art. 4(1), FS-BIT, Record, p. 13.
environment and society of Sylvania and while the oil spill crisis continues to threaten Sylvanian territories, FPS was incompetent in addressing the damages as evidenced by public outrage.\textsuperscript{142} Therefore, the Respondent was compelled and supported by its nationals to take urgent actions for “public purposes” and to safeguard its “national interests”.\textsuperscript{143}

91. Secondly, the Respondent’s measures were “non-discriminatory”.\textsuperscript{144} The amended OPA was addressed not to FPS alone but to “any responsible party” that runs an oil-discharge facility.\textsuperscript{145}

92. Thirdly, the amendment of the OPA and issue of the Executive Order were both authorised under the laws of Sylvania.\textsuperscript{146} Thus, the measures implemented were “in conformity with all legal provisions and procedures”.\textsuperscript{147} Furthermore, the Claimant had not been denied due process as FPS was allowed 60 days to comply with the amended OPA\textsuperscript{148} and was able to claim before the Sylvanian courts and the Sylvanian Ministry of Energy.\textsuperscript{149}

93. Finally, although Art. 4(2) of 4(3) of the FS-BIT require compensation for cases of expropriation, the Respondent submits that under the specific circumstances of the case at hand, it is not liable to compensate the Claimant. The Respondent invites the Tribunal to adopt the approach taken by the \textit{Saluka}\textsuperscript{150} tribunal as the expropriation provision in both cases share identical conditions, including listing compensation as a condition of lawful expropriation. The \textit{Saluka} tribunal decided that

\begin{quote}
It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory
\end{quote}

\begin{flushright}
\textsuperscript{142} Facts, Record, p. 4. \\
\textsuperscript{143} Art. 4(2), FS-BIT, Record, p. 13. \\
\textsuperscript{144} ibid. \\
\textsuperscript{145} Facts, Record, p. 3. \\
\textsuperscript{146} Executive Order, Record, p. 19. \\
\textsuperscript{147} Art. 4(2), FS-BIT, Record, p. 13. \\
\textsuperscript{148} Facts, Record, p. 4. \\
\textsuperscript{149} ibid. \\
\textsuperscript{150} \textit{Saluka} [245].
\end{flushright}
powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.\(^{151}\)

The Respondent hereby submits that the measures, namely the amendment of the OPA and issue of the Executive Order, were adopted *bona fide* to resolve the oil spill crisis aimed at general welfare. The measures were non-discriminatory and fully authorised under Sylvanian law. Thus, they are deemed to be measures adopted in regular exercise of the Respondent’s police powers.

94. The Respondent further contends that it is unreasonable to compensate the Claimant for every loss caused by its regulations because this would “render public governance almost impossible as governments will be economically crippled by claims for compensation”.\(^ {152}\) This is particularly true when regulations seek to respond to the changing circumstances in the society and to public expectations,\(^ {153}\) which points to the catastrophic damage and public urge created by the unexpected oil spill in the case at hand.\(^ {154}\)

95. Therefore, since the Respondent had acted within its regulatory police powers, the *bona fide* measures implemented by the Respondent remained as non-compensable regulatory measures in accordance with Art. 4 of the FS-BIT.

B. **The Respondent has accorded the Claimant Fair and Equitable Treatment and did not breach its Legitimate Expectations.**

96. The Respondent submits that it has accorded fair and equitable treatment (FET) to the Claimant in accordance to the FS-BIT which requires the FET obligation to comply with the minimum standard in customary international law (1). The Respondent submits that it complied with the minimum standard and it did not violate the Claimant’s legitimate expectations (2).

\(^{151}\) *Saluka* [255].
\(^{152}\) Kolo and Waelde, p. 840.
\(^{153}\) ibid.
\(^{154}\) Facts, Record, p. 4.
1. **The standard of the FET obligation is the minimum standard of customary international law.**

97. Art. 2(2) of the FS-BIT explicitly states that the parties shall ensure treatment “in accordance with *customary international law*, including fair and equitable treatment”. In other words, the FET obligation provided in the FS-BIT should be the minimum standard recognised under customary international law.

98. The wording of Art. 2(2) of the FS-BIT is identical to Art. 1105(1) of NAFTA as both address FET obligations under customary international law. The NAFTA Free Trade Commission provided further clarification that it is the “minimum standard of treatment” in customary international law that is to be afforded to the investments of investors, and it is not necessary to go beyond this minimum standard. The Respondent thus submits that the application of Art. 2(2) of the FS-BIT is to follow the minimum standard in customary international law as the NAFTA clarification is an indication of general principles of law recognised by civilised nations.

99. As to the definition of the minimum standard, the *Glamis* tribunal pointed out recently that it is difficult to prove a change in custom in State practice for the minimum standard to evolve over time, thus the standard as defined originally in the *Neer* decision effectively freezes the protections provided for in this provision at the 1926 conception of egregiousness.

The *Glamis* tribunal did acknowledge that situations in the 21st century may be more varied and complicated than it would be at the time of the *Neer* decision but held that the level of scrutiny remains the same. The *Cargill* tribunal also followed the same approach.

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155 Art. 1105(1), NAFTA.
156 Art. 2, NAFTA FTC Notes.
157 Art. 38(1)(c), ICJ Statute.
158 *Glamis* [604].
159 *Glamis* [616].
100. As a result, the fundamentals of the *Neer*\(^{161}\) decision are still applicable today, where regulatory measures would not constitute a breach of FET obligation under customary international law unless the measures amount

...to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.\(^{162}\)

The Respondent submits that the measures it implemented do not meet this high threshold.

2. **The Respondent has acted in accordance with its FET obligation.**

101. The Respondent submits that the amended OPA, suspension of FPS licence and securing control of the relevant leaking oil wells would not amount to a violation of the FET obligation as set by the *Neer* standard. There was, instead, public outrage over how FPS had handled the oil spill situation\(^{163}\) and the Respondent implemented the aforementioned measures in good faith to accommodate the needs and interests threatened by the oil spill, contrary to a neglect of its duty or insufficiency of actions.

102. Even if the Tribunal should follow the approach of the minimum standard evolving over time, the Respondent submits that it has been acknowledged by the *National Grid* tribunal that

What would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis.\(^{164}\)

103. Specifically, the *Parkerings* tribunal confirmed that an investor’s expectation could not be frozen upon the legal framework at the time the investment was established and investors “must anticipate that the circumstances could change”.\(^{165}\) In light of an investor’s legitimate expectations in changing circumstances, the *Saluka* tribunal decided that

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\(^{160}\) *Cargill* [284].

\(^{161}\) *Neer* [4].

\(^{162}\) ibid.

\(^{163}\) Facts, Record, p. 4.

\(^{164}\) *National Grid* [180].

\(^{165}\) *Parkerings* [333].
...the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.\(^{166}\)

104. Taking into account the exceptional circumstances created by the oil spill crisis in the present case, the Respondent invites the Tribunal to adopt the margin of appreciation doctrine to balance the Claimant’s legitimate expectations with the Respondent’s legitimate regulatory interests when deciding on a breach of FET obligation.

105. The margin of appreciation doctrine was introduced into treaty arbitration by the *Continental Casualty*\(^{167}\) tribunal because the U.S.-Argentina BIT contained an exceptional clause addressing state of emergency as in Art. 9 of the FS-BIT. The *Continental Casualty* tribunal decided that

...objective assessment [of effective interpretation of treaty provisions] must contain a significant margin of appreciation for the State applying the particular measure...\(^{168}\)

Therefore, to determine a breach of the FET obligation specified in Art. 2(2) of the FS-BIT, a margin of appreciation is to be taken in account when the Respondent implemented measures to address a state of emergency.

106. The margin of appreciation doctrine was first introduced to international law by the ECHR, and was adopted in cases concerning state of emergency pursuant to Art. 15 of the ECHR Convention. This doctrine can be construed as customary international law applicable to the case at hand as indicated in Art. 38(1)(a) of the ICJ Statute. According to this doctrine, national authorities are granted a “better position rationale”\(^{169}\) by reason of their direct and continuous contact with the pressing needs of the moment to decide both on the presence of such an emergency and on the nature and the scope of derogations necessary to avert it, as

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\(^{166}\) *Saluka* [305].

\(^{167}\) *Continental Casualty* [181].

\(^{168}\) Ibid.

\(^{169}\) Greer, p. 8.
opposed to an international tribunal.\textsuperscript{170} An international tribunal on the other hand holds the yardstick to determine the limits of the margin of appreciation on the basis of proportionality, where the regulatory measures were not to go beyond the extent strictly required by the exigencies of the crisis,\textsuperscript{171} balancing the nature of the rights affected, the background circumstances, and the duration of the emergency.\textsuperscript{172}

107. The Respondent hereby submits that it has not gone beyond the proportionality test and the measures it adopted to address the oil spill crisis were within its margin of appreciation. When compared to FPS’s incompetent reaction to the oil spill evidenced by public outrage and the continuing threat the oil spill was posing to the Respondent,\textsuperscript{173} the background circumstances provided sufficient legitimate regulatory interests for the Respondent to amend the OPA and issue the Executive Order for the sake of public interests endangered by the oil spill.\textsuperscript{174}

108. Moreover, FPS’s rights to its investment were not deprived indefinitely nor substantially, and the measures adopted by the Respondent were aimed at shortening the duration of the emergency. Specifically, the suspension of FPS’s licence was a reversible measure not to hinder the remedial process of the oil spill,\textsuperscript{175} and only the several leaking oil wells of FPS’s were taken over solely for remedial purpose.\textsuperscript{176} Therefore, with the margin of appreciation in place, the Respondent submits that its measures were adopted in proportion to address the oil spill crisis and did not violate its FET obligation under the FS-BIT.

IV. THE RESPONDENT IS EXEMPTED FROM TREATY BREACH LIABILITIES UNDER ART. 25 OF THE ILC ARTICLES.

\textsuperscript{170} Ireland v. U.K. [207].
\textsuperscript{171} Aksoy v. Turkey [68].
\textsuperscript{172} Greer, p. 9.
\textsuperscript{173} Fact, Record, p. 4; CSE Amicus Curiae, Record, p. 23.
\textsuperscript{174} Facts, Record, p. 2; Executive Order, Record, p. 19.
\textsuperscript{175} Executive Order, Record, p. 19.
\textsuperscript{176} Clarification no. 49.
109. If the Tribunal is to find that the Respondent has indeed breached its treaty obligations, the Respondent submits that by invoking the necessity clause codified in Art. 25 of the ILC Articles provided in customary international law, it would nevertheless be exempted from liabilities of the alleged treaty breaches.

110. The oil spill crisis created a state of necessity and the President of Sylvania declared the crisis an “Issue of National Concern”. Sylvania’s environment, marine ecosystems, other natural resources, key industries and numerous individuals have all been adversely affected by the crisis. In light of this state of necessity, Art. 25 of the ILC Articles lists out four cumulative conditions to be fulfilled by the State in order to invoke the necessity defence. The Respondent hereby submits that it has fulfilled the four conditions accordingly.

111. Firstly, the measures taken were the only way to safeguard essential interests of the Respondent against a grave and imminent peril. It has been accepted by treaty tribunals that an “essential interest” stretches beyond security interests to include ecological and economic interests, and a grave and imminent “peril” has to be objectively established not merely apprehended as possible. It is uncontested that the rate of the oil release reached 35,000-60,000 gallons of oil per day and a complete clean-up would have been impossible once the oil spill reached the Sylvanian coasts. Moreover, numerous businesses and individuals have been adversely affected by the oil spill. Therefore, it is apparent that the oil spill and the catastrophic damages it caused have become a grave and imminent peril that seriously threatens the ecological and economic interests of the Respondent. Owing to the Claimant’s failure to remedy the destructive oil spill in a long

\[^{177}\text{Executive Order, Record, p. 19.}\]
\[^{178}\text{ibid.}\]
\[^{179}\text{Art. 25(1)(a), ILC Articles.}\]
\[^{180}\text{CMS [319]; Enron [315]; LG&E [251].}\]
\[^{181}\text{Bishop et al., p. 1211.}\]
\[^{182}\text{Facts, Record, p. 2.}\]
\[^{183}\text{ibid.}\]
\[^{184}\text{Facts, Record, p. 4.}\]
period of 17 months,\textsuperscript{185} the Respondent was compelled to step in to adopt remedial measures in order to safeguard its essential interests.

112. Secondly, the measures did not seriously impair an essential interest of Freedonia or the international community as a whole.\textsuperscript{186} In the case at hand, since the alleged treaty breaches would only be admissible if the Tribunal finds FPS qualified as an investor pursuing no sovereign activities,\textsuperscript{187} invoking Art. 25 of the ILC Articles would not be able to threaten the validity of the essential interests of Freedonia as a Sovereign. Moreover, there is no suggestion that essential interests of the international community have been seriously impaired by the measures taken by the Respondent as such measures were only implemented to address the oil spill within Sylvanian territory.\textsuperscript{188}

113. Thirdly, the FS-BIT does not exclude the possibility of invoking the necessity defence.\textsuperscript{189} Newcombe and Paradell have pointed out that when a BIT includes an express clause addressing essential security interests, it indicates the acceptance that a state of necessity may be invoked under that particular treaty dispute.\textsuperscript{190} Since, Art. 9 of the FS-BIT addresses essential security interests of the Contracting Parties, the Respondent is thereby, not precluded from invoking the necessity defence.

114. Finally, the Respondent has not contributed to the state of necessity.\textsuperscript{191} As noted by the \textit{Sempra} tribunal, this last condition listed in Art. 25 of the ILC Articles is a general principle of law which prevents a party from taking legal advantage of its own fault.\textsuperscript{192} The Respondent submits that in the present case, there is no suggestion that the Respondent contributed to the oil spill or its consequential damages. On the other hand, it has been

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{185} ibid.
\item \textsuperscript{186} Art. 25(1)(b), ILC Articles.
\item \textsuperscript{187} Art. 1(3), FS-BIT, Record, p. 12.
\item \textsuperscript{188} Executive Order, Record, p. 19.
\item \textsuperscript{189} Art. 25(2)(a), ILC Articles.
\item \textsuperscript{190} Newcombe and Paradell, p. 521.
\item \textsuperscript{191} Art. 25(2)(b), ILC Articles.
\item \textsuperscript{192} \textit{Sempra} [353].
\end{itemize}
\end{footnotesize}
suggested that FPS and its contractors or suppliers may be held liable to the explosion that caused the oil spill damages.\(^{193}\)

115. In conclusion, the Respondent submits that it has fulfilled the four conditions listed in Art. 25 of the ILC Articles. Therefore, the Respondent is entitled to invoke the necessity defence under customary international law to exempt its liabilities from the alleged treaty breaches.

\(^{193}\) Clarification no. 28.
CONCLUSION ON MERITS

116. The oil spill crisis has created catastrophic damage on the environment and the society of Sylvania. The Respondent was compelled to take appropriate measures to address the crisis as the Claimant had been incompetent in its remedial work. In light of these exceptional circumstances, the Respondent submits that by invoking the self-judging exception clause in Art. 9(2) of the FS-BIT, its conducts are to be precluded from its treaty obligations during a state of emergency created by the oil spill. The measures implemented by the Respondent during the oil spill are to be regarded as non-compensable regulatory measures and would be justified under the margin of appreciation doctrine in light of the exceptional circumstances.

117. Furthermore, the Respondent submits that in the absence of a confidentiality clause in either the Agreement or the FS-BIT, and since the Respondent labelled the report in question confidential for internal purposes, the Claimant cannot rely on this classification to establish any duty or obligation of confidentiality. In conclusion, there is no basis for the alleged breaches to arise and the Respondent respectfully asks the Tribunal to dismiss the Claimant’s merit submissions.
REQUEST FOR RELIEF

The Respondent respectfully asks the Tribunal to find that:

1. The Tribunal lacks jurisdiction as to the Claimant’s submissions at hand;
2. The Tribunal has jurisdiction over the Respondent’s counterclaim;
3. NPCS’s actions are not attributable to the Respondent.
4. The Respondent is excluded from its substantive treaty obligations during the self-judging application of Art. 9(2) of the FS-BIT;

Alternatively, if the Tribunal finds the exception effect of Art. 9(2) of the FS-BIT inapplicable, the Respondent asks the Tribunal to find that:

5. The Respondent did not materially breach any confidential obligation;
6. The Respondent actions do not amount to expropriation, violation of FET and breach of the Claimant’s legitimate expectations; and
7. The Respondent’s liability for the alleged treaty breaches would in any case be exempted under Art. 25 of the ILC Articles.

Respectfully submitted on 30 September 2011 by

MO

On behalf of the Respondent
GOVERNMENT OF THE REPUBLIC OF SYLVANIA