INTERNATIONAL COURT OF ARBITRATION OF THE
INTERNATIONAL CHAMBER OF COMMERCE

In the Proceeding Between

FREEDONIA PETROLEUM
(CLAIMANT)

AND

THE REPUBLIC OF SYLVANIA
(RESPONDENT)

MEMORIAL FOR RESPONDENT
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STATEMENT OF FACTS

1. The Republic of Sylvania (“Respondent” or “Sylvania”) issued an international tender for deep sea exploration blocks in its territorial waters. There was a requirement to incorporate a local subsidiary in Sylvania in order to participate in this tender. After winning the tender, Freedonia Petroleum S. A. (“FPS”) a subsidiary incorporated in Sylvania by Freedonia Petroleum LLC (“Claimant”) was granted a 5-year non-exclusive oil exploration and drilling license.

2. Claimant is an international energy company engaged in exploration and production of crude oil. The Government of Freedonia holds a 60% interest in Claimant and, other 40% are owned by a consortium of privately-held and publicly-traded Freedonian enterprises.

3. FPS and Respondent entered into the Medanos License Agreement (“MLA”). The MLA provides for certain safety obligations - to take all appropriate measures to prevent discharge of oil on navigable waters and in the event of such a discharge ensure an immediate and effective removal of oil from navigable waters. Clause 18 of the MLA provides that the MLA may be modified and amended only by mutual consent of the parties. Clause 22 of the MLA provides that it should have the force of law.

4. An outrageous explosion at the exploration site and a consequential leakage of oil took place on 9 June 2009. The origin of the explosion remains unknown. As FPS was managing the oil wells and the exploration activity, Respondent accused it of causing the explosion and grave damage to the state’s ecosystem. The damaged wells were reported to release 35,000 - 60,000 gallons of oil a day into the Gulf of Libertad Sylvania.

5. On 16 June 2009 the scientific advisors to the Sylvanian Government reported that the Gulf oil spill could get into a “Loop Current” within a day, carrying oil southward along the Sylvanian coast and into the Sylvania Keys, a protected marshland area characterized by high levels of biodiversity.

6. The horrifying ecological situation following the explosion and its enormous negative impact on Sylvanian environment forced Respondent to amend its national legislation. Freedom of Information Law (“FoI Law”) was amended to provide for an obligation of any third party not directly involved in an international case to apply to Sylvanian courts for an approval to obtain the details of the case. The Oil Pollution Act (“OPA”) was amended to impose new obligations on any party responsible for discharge of oil to be wholly liable for removal costs and resulting damages. The terms “damages” and “safety obligations” were broadened due to necessity to re-establish the stable ecological situation in Sylvania.
7. Such amendments were adopted during November-December 2009. The amendments to the OPA were made effective as of 1 June 2009. FPS was duly notified about them in writing.

8. On 26 February 2010, Sylvanian government ordered FPS to pay SD 150,000,000 liquidated damages for breach of its obligations under the MLA and the amended OPA. FPS sought a declaratory relief before the Sylvanian courts to prove that provisions of the MLA took precedence over the amendments to the OPA and an administrative claim challenging the order for payment of these damages arguing that its actions fully complied with the safety obligations.

9. The National Petroleum Company of Sylvania (“NPSC”) created by the new Hydrocarbon Law of Sylvania was incorporated on 30 August 2010.

10. On 3 November 2010 the President of Sylvania unilaterally declared FPS as the entity liable for causing devastating harm to the state. Management and operating teams sent by the Government took over the premises of the leaking wells only on 29 November 2010 in order to take the necessary remedial works.

11. Diplomatic negotiations between Fredonia and Sylvania failed. Respondent stated that this dispute should be solved by means of a state-to-state dispute resolution mechanism without “exploiting” of the dispute resolution mechanism provided for in the BIT.


13. The arbitral tribunal ("Tribunal") was constituted on 20 May 2011. The Terms of Reference were signed on 28 July 2011.

14. Clean Sylvanian Environment ("CSE"), a Sylvanian non-profit NGO, submitted to the Sylvanian court of Administrative Matters a request for information about the arbitration proceedings including pleadings and transcripts of the proceedings. Claimant objected to this request on 5 September 2011 and the court ordered the release of written pleadings concerning the arbitration proceedings to CSE. On 10 September 2011, CSE filed a request to be present at the hearings, to submit documents and to be heard as a non-disputing party in the arbitral proceedings. On 11 September 2011, the Tribunal invited the parties to submit their comments to CSE’s request in their memorials.
ARGUMENTS

PART ONE: JURISDICTION

A. THIS TRIBUNAL HAS NO JURISDICTION OVER CLAIMANT’S CLAIMS IN THIS DISPUTE

I. The Tribunal has no jurisdiction in respect of the claims submitted by Claimant having regard to the Freedonian government’s majority ownership of Claimant.

15. Article 1 (3) of the Freedonia-Sylvania BIT provides “the term “Investor” shall be construed to mean” among other things “any legal person established in the Territory of one of the Contracting Party in accordance with the respective national legislation” with restriction “that the above defined natural and legal persons do not pursue sovereign activities and are not funded by the other Contracting Party” [emphasis added].

16. The Government of Freedonia owns a 60% interest in Freedonia Petroleum. The Government of Freedonia pursues its interests in Freedonia Petroleum LLC as would any 60% shareholder under Freedonian company laws. This makes Freedonia Petroleum a state-controlled entity as the state acts as a majority shareholder. Other shares belong to a consortium of privately-held and publicly-traded Freedonian enterprises.

17. Freedonia Petroleum, being a private company incorporated under the laws of Freedonia and being engaged in commercial activity, is nevertheless managed and funded by the state. As a majority shareholder, the state inevitably funds Claimant’s activity and profits from it.

18. One cannot restrict the meaning of the term “funded” used in Article 1 (3) only to allocation of financing. While there is no direct evidence of the state’s involvement in funding and cash injections into the Claimant’s business, assuming that a majority shareholder has contributed to the registered capital of the company and allocated certain funds or resources to establish and maintain Claimant’s business is justified.

19. The provision of Article 1 (3) of the Freedonia-Sylvania BIT introducing restrictions as to the funding of the investor is not common for BITs. The definition of an investor in the majority of BITs does not include such a restriction with respect to funding of the investor.

20. The US Model BIT (2004) explicitly names a state enterprise as a possible investor under the BIT.

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1 Uncontested facts, para. 1.
2 Clarification, 34.
3 China Model BIT (1997, art. 1 (2)), France Model BIT (2006, art. 1 (2), (3)), German Model BIT (2008, art. 1 (3)), United Kingdom Model BIT (2005, art. 1 (d)).
21. Evidently, Freedonia and Sylvania in the process of negotiations preceding the signing of the Freedonia-Sylvania BIT explicitly excluded the entities that are funded by the state by introducing a specific wording into the definition of an investor that is entitled to rely on the BIT provisions.

22. Moreover, the MLA has been negotiated by Claimant’s subsidiary FPS and the Sylvanian Government in order to govern the parties’ relations with respect to this particular investment.

23. Such exclusion doesn’t mean that Freedonia Petroleum cannot resort to other mechanisms of investment protection. Freedonia and Sylvania are both parties to the Energy Charter Treaty\(^5\) that provide for respective dispute resolution mechanism. Both Freedonia and Sylvania are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States\(^6\), so Article 26 (4) (a) (i) of the Energy Charter Treaty may be used. Under this Article “the Investor shall further provide its consent in writing for the dispute to be submitted to the International Centre for Settlement of Investment Disputes.”\(^7\) Applying provisions of the Energy Charter Treaty is even more suitable in the very case since environmental issues were a primary point of contention during the drafting stage.\(^8\) Such submission is admissible without the need for a prior arbitral agreement.\(^9\)

24. Moreover, the MLA has been negotiated by Claimant’s subsidiary FPS and the Sylvanian Government in order to govern the parties’ relations with respect to this particular investment. The MLA contains a standard forum selection clause specifying the jurisdiction of the Sylvanian courts for disputes arising under the Agreement.\(^10\). So Claimant is also entitled to seek protection in the national courts of the Republic of Sylvania.

25. Freedonia Petroleum is not entitled to submit the present dispute for settlement in accordance with the provisions prescribed by Article 11 of the BIT as it does not qualify as an investor under this BIT. Respondent urges this Tribunal to decline jurisdiction in respect of the claims submitted by Claimant.

\(^4\) Section A, Article 1 of the US Model BIT (2004).
\(^5\) Clarification, 41.
\(^6\) Clarification, 40.
\(^10\) Clarification, 4.
II. The Tribunal has no jurisdiction over Claimant’s claims because of the prior recourse by FPS to the Sylvanian Ministry of Energy

26. Respondent asserts that FPS’ claim with the Sylvanian Ministry of Energy triggered the "fork-in-the-road" provision of the BIT (1). The Claims submitted to the Ministry of Energy and to the Tribunal are the same. (2).

1. FPS’ claim with the Sylvanian Ministry of Energy triggered the "fork-in-the-road" provision of the BIT.

27. Article 11(3) of Freedonia-Sylvania BIT stipulates the following:

“The Contracting Parties hereby consent to the submission in good faith of Investment Disputes to the International Chamber of Commerce (ICC) for settlement and resolution(...), provided that: the Investment Dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute; and the Investor has not brought the dispute before the courts having jurisdiction within the territory of the Contracting Party that is a party to the dispute”.

28. The use of the words “provided that” makes it clear that the dispute settlement options are mutually exclusive. Consequently, Claimant settling its dispute can take a “fork” in the road. If Claimant chooses national legal remedies stipulated in the BIT the investment arbitration proceedings are excluded\(^\text{11}\). The aim of fork-in-the-road clause is to exclude situations in which the investor exercises unreasonable pressure on the host state through initiating multiple procedures and to prevent the host state from being ordered to pay damages in multiple proceedings for the same conduct\(^\text{12}\).

29. On 26 February 2010, the Sylvanian Government ordered FPS, fully-owned by Claimant, to pay SD 150,000,000 liquidated damages for the breach of its safety obligations. 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\(^\text{13}\). On 23 March 2011, Freedonia Petroleum filed a request for arbitration before the ICC against the Republic of Sylvania claiming compensation for breach of the BIT, including unfair and

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\(^{11}\) Gerhard Wegen; Lars Markert. Investment Arbitration - Food for Thought on Fork-in-the-Road – A Clause Awakens from its Hibernation, p. 272.

\(^{12}\) Peter Turner, The Fork in the Road Revisited, in Investment Law – Current Issues Vol. I 177, 178

\(^{13}\) Uncontested Facts, para.17.
inequitable treatment, violation of legitimate expectations and expropriation. Therefore, FPS’ claim with the Sylvanian Ministry of Energy triggered the "fork-in-the-road" provision of the BIT, preventing Claimant from pursuing arbitration before the ICC.

2. The Claims submitted to the Ministry of Energy and to the Tribunal are the same.

30. The most important issue dealing with the fork-in-the-road clause is that the disputes submitted to national court and arbitration tribunal are the same. The wording of fork-in-the-road provision of Article 11(3) of Freedonia-Sylvania BIT refers to “the dispute”. The use of the definite article “the” as well as the use of the singular “dispute” provides for that one and the same dispute is at issue and it cannot be resolved by means of various dispute settlement alternatives.

31. The “fundamental basis” test should be used in determination whether the same dispute was submitted to both national and international fora. For instance, it was used in Pantechniki v. Albania where the investor, initiating proceedings in domestic courts claiming compensation for his losses and being unsuccessful in Albanian courts, filed a claim to ICSID under the BIT. The Tribunal held that the claimant's earlier court proceedings precluded it from recourse to arbitration before the ICSID.

32. In Pantechniki v. Albania the tribunal stated that for a fork-in-the-road clause to apply, there is a need to assess whether “the same dispute has been submitted to both national and international fora” by applying the “fundamental basis” test established by the Mexican-Venezuela Mixed Claims Commission in the Woodruff case. The tribunal determined that the relevant test, as taken from the Woodruff case and the Vivendi Annullment decision, was whether the fundamental basis of a claim brought before the international tribunal is autonomous of claims to be heard in any other procedures. The tribunal found that it is necessary to determine if claims have the same normative source and truly have an autonomous existence outside the contract.

33. While applying the “fundamental basis” test the tribunal rejected to use an “essential basis” test which Host State proposed to apply. The “essential basis” test is grounded on the criteria of the “same factual predicates” and “request the same relief”. The tribunal held these
criteria to be too general to decide individual cases and turned to the facts of the case to examine whether the dispute in the domestic courts and the investment arbitration claim had the same “fundamental basis”.\(^{19}\) It is required from parties to look at the subject-matter of the claims rather than simply indentify their legal.\(^{20}\)

34. Applying the facts at hand, the ICC dispute in this case arose out of the same safety obligation provided for in the MLA that the investor had brought before the Ministry of Energy of Sylvania. Claimant could not submit its claims for the same subject-matter before ICC, because it had already elected to bring such claims before the Ministry of Energy of Sylvania. The previous proceedings in this case demonstrate a waiver of the right to ICC arbitration.

35. In the given factual matrix, the BIT claims do not have an autonomous existence outside the prior contractual claims, and therefore ruled that the claimant could not pursue its treaty remedy given that the jurisdiction clause in the BIT made an election of one forum or the other final.

\(^{19}\) Pantechniki v. Albania, supra note 8, paras. 61, 62

\(^{20}\) Anthony Sinclair. Fork-in-the-road provisions in investment treaties
B. NPCs' ACTIONS ARE NOT ATTRIBUTABLE TO RESPONDENT

36. The ILC Articles on Responsibility of States contains the main rules of international law for the attribution of conduct of an entity to a State. The tribunal's determination of the attribution should be decided on the basis of the ILC Articles, as there are no specific treaty provisions on this issue and it is recognised that ILC’s Articles reflect customary international law.

37. The Articles are permanently used by international investment tribunals, for example, in Maffezini v Spain\textsuperscript{21}, Eureko v Poland\textsuperscript{22}. Respective tribunals determined in accordance with the ILC Articles whether the act of a state organ or of a state-owned entity is attributed to the state.

38. According to the ILC Articles attribution can take place in three different ways: in accordance with Article 4, relating the attribution of the conduct of state organs, in accordance with Article 5, relating the attribution of conduct of entities exercising elements of governmental authority; or in accordance with Article 8, relating the attribution of conduct directed or controlled by the state. None of requirements of those Articles are satisfied in the case at hand.

39. NPCs is not a State organ (1). It does not exercise elements of governmental authority (2) and its conduct is not directed or controlled by Respondent (3).

I. NPCs' actions are not attributable to the Respondent in accordance with Article 4 of ILC Articles

40. Article 4 prescribes the first principle of attribution of State responsibility in international law and stipulates that the conduct of all state organs is attributable to that state. NPCs was incorporated as a private enterprise and has a distinct legal personality. Article 4 cannot be applicable in the case at hand, and NPCs cannot be regarded as a State organ for the purposes of Article 4 of the ILC Articles.

41. The fact that there may be links between NPCs and some sections of the Government of Sylvania does not mean that the two are not distinct. NPSC was never a structural part of Government of Sylvania and it cannot be regarded as State organ. The entities may have links with different authorities as well as with the government, but this does not mean that they are organs of the State.

\textsuperscript{21} Mafezzini v. Spain, Decision on Jurisdiction, para. 75
\textsuperscript{22} Eureko v. Poland, paras. 33-34.
II. NPCS' actions are not attributable to Respondent in accordance with Article 5 of ILC Articles

42. As for Article 5 of the ILC Articles, NPCS was not an instrumentality exercising any governmental powers. International law acknowledges the general separation of corporate entities at the national level, except in the cases where the “corporate veil” is a pure device or a vehicle for tax evasion or fraud\(^23\).

43. The conduct of a state-owned private law company not acting with delegated public law authority presumptively is private conduct. NPCS is a separate private entity and did not exercise any governmental powers, therefore its conduct cannot be attributed to Respondent.

III. NPCS' actions are not attributable to Respondent in accordance with Article 8 of ILC Articles

44. Article 8 of the ILC Articles as well does not apply in the case at hand. The fact that the State initially establishes any corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity\(^24\).

45. Respondent relies on a structural test claiming that NPCS was a financial company created as a private corporation and was therefore not part of the Sylvania public administration. The conduct of NPCS was purely commercial and there was no basis for its attribution to Sylvania. For instance, in *Amco v. Indonesia* the Tribunal considered a much more direct and active involvement by the state in a private taking by army and police still not as sufficient for an attribution to the state\(^25\).

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\(^{23}\) Barcelona Traction, p. 39, paras. 56–58


\(^{25}\) Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1) ICSID Reports 1, p. 377.
PART TWO: MERITS

C. RESPONDENT DID NOT BREACH ANY CONFIDENTIAL INFORMATION.

46. Respondent asserts that it did not violate its confidentiality obligations under the national law of Sylvania (I). Even if the publication of a confidential report by a private newspaper may be attributed to Respondent it does not amount the breach of obligations before Claimant (II).

I. Respondent did not violate its confidentiality obligations under host state law.

47. A panel of experts constituted by the Ministry of Energy prepared the confidential report. The report was classified as confidential under the regulations of the Sylvanian government, to be made available internally only on a “need to know” basis.26 The leading Sylvanian newspaper “La Reforma” posted some extracts from the report, but the source of the leak of information remains unknown27.

48. Respondent did not breach any confidentiality obligations. A privately-held newspapers since it was the newspaper “La Reforma” that published the confidential report. The Respondent cannot be liable for the illegal actions of a private newspaper.

49. As the source of leakage remains unknown it may be deemed that it was due to the negligence of FPS that confidential information was appeared in newspaper. A employer of the Claimant may submit such information to the newspaper “La Reforma”.

50. The accusation of breaching confidentiality obligations cannot be made on simple assumption without any evidence.

II. Even if the publication of confidentiality report by private newspaper is attributed to Respondent it is not the breach of any obligations before Claimant.

51. The recognised principle in international law is that the host state's domestic law is relevant only with respect to factual issues before an international tribunal, and not as applicable law.28 Thus, the domestic law is regarded in general sense as a fact on which rules of international law are to be applied. When the International Court of Justice is asked to express an

26 Clarification 43
27 Clarification 64
opinion on the effect of relevant provisions of domestic law, it treats the matter as a question of fact to be established as such rather than as a question of law to be decided by the court.\textsuperscript{29}

52. Arbitral tribunals as well are not paying sufficient attention to the rule of domestic law when faced with disputed issues as to the nature of the host state measures.\textsuperscript{30}

53. For instance, in \textit{Wena v. Egypt}, the tribunal stated that the seizure of two hotels by an Egyptian governmental entity constituted the expropriation and breaches of relevant provisions of BIT. Neither the tribunal nor the ICSID annulment committee found out the fact that the termination of two hotel leases by the Egyptian state entity was valid under Egyptian law in arbitration proceedings.\textsuperscript{31} So in practice the domestic law is no applicable to determination the character of state measures.

54. The publishing of some information in “La Reforma” can not be considered as violation under any provisions of BIT, as neither BIT nor MLA stipulates the obligation of confidentiality. Moreover, the article in “La Reforma” does not contain any confidential information\textsuperscript{32}. All published information was public and accessible before, and general information was described in the newspaper without disclosing any specific data. It was done for the purpose of informing the population of Sylvania about current state and potentially dangerous consequences of a terrible ecological catastrophe which occurred in the Medanos Field in the Libertad Gulf.

\textsuperscript{29}Newcomb 95
\textsuperscript{30}Douglas, supra note 44 at 197-211.
\textsuperscript{31}Newcombe 96
\textsuperscript{32}As it is seen from para. 9 of Uncontested files.
D. RESPONDENT’S ACTIONS DO NOT AMOUNT TO EXPROPRIATION, A VIOLATION OF FAIR AND EQUITABLE TREATMENT AND A BREACH OF CLAIMANT’S LEGITIMATE EXPECTATIONS.

I. Even if the transfer of well committed by NPCS is attributable to Sylvania and constitutes an expropriation, the expropriation was lawful

55. Article 4(2) of the Freedonia-Sylvania BIT contains four conditions for a lawful expropriation: the expropriation must be for public purposes or national interest (1), against immediate full and effective compensation (2), on a non-discriminatory basis (3) and in conformity with all legal provisions and procedures (4). The transfer of Claimant’s investment fulfils all of these requirements.

1. Any expropriation was executed for public purposes

56. The transfer of oil wells was done under the “public purpose” exceptions of Article 4(2) of the BIT. The “public purpose” requirement can be interpreted as some genuine interest of the public. The environmental and economic disaster in Sylvania was caused by large explosion and leaking of several oil explorations wells operated by FPS. Claimant did nothing for a long time to remedy its failure and incompetence.

57. The transfer of wells in the Medanos Field was motivated essentially by concerns for safety and security – the preservation of the environment and the public good. Article 9(2) in fact treats the protection of essential security interests as a public purpose. Moreover, management of only the leaking wells was transferred to NPCS, so the rest wells were still operated by FPS.

2. Respondent should not grant any compensation in this case

58. In many cases it was determined that State has the right to protect, without discriminatory measures, *inter alia*, the environment without providing compensation for any deprivation of foreign property. Such measures related to environmental protection are non-compensable takings because they are recognized as essential to the functioning of the state.

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33 *ADC v. Hungary*, 432
34 Clarification 56.
35 M. Sornarajah, *op. cit. n.9.*
59. As above mentioned management of only the leaking wells was transferred to NPCS. The compensation for expropriation should be evaluated on context-specific basis\(^{36}\). In situation at hand there are no predictions about future profitability of leaking oil wells. Actually, there is no value for the leaking wells because they can not be considered economically evaluated. In addition the premises were taken in order to undertake the necessary remedial work which can not constitute expropriation.

3. Any expropriation was executed on a non-discriminatory basis

60. Respondent asserts that Claimant was not discriminated. Any other company in Claimant’s position, whether foreign or domestic, would not be allowed to breach its safety obligations under the MLA. A breach of these obligations by any company would cause the same measures taken by Respondent. Furthermore, the FPS was the only company exploring oil on the coast of Sylvania. The discrimination is therefore impossible in the case at hand.

4. Any expropriation was in conformity with all legal provisions and procedures

61. Under relevant international principles there is a high standard for finding a denial of due process of lawful expropriation. Not every ordinary error but only gross miscarriages of justice constitute a violation of the “due process” guarantee\(^{37}\).

62. In addition to that the BIT provides the possibility for Respondent to take measures concerning the investment, if it is specifically provided by law and by judgments or orders issued by any courts, administrative bodies, or tribunals having jurisdiction\(^{38}\).

63. The actions of NCPS were prescribed by the Executive Order No. 2010 – 1023 of the president of Sylvania which is fully consistent with the Article 4.1 of the Freedonia-Sylvania BIT. From the legal analysis of this document it is seen that it can be terminated by operation of law and Claimant had all possibilities to contest the Order judicially.

II. Respondent has provided fair and equitable treatment to Claimant

64. Respondent recognizes its obligation to ensure fair and equitable treatment for Claimant in accordance with Article 2(2) of Freedonia-Sylvania BIT and Article 10 (1) of Energy Charter

\(^{36}\) Newcombe and Paradell, p.377
\(^{37}\) Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, p.165
\(^{38}\) Freedonia-Sylvania BIT, Article 4.1.
Treaty. It insists on its primary compliance with this obligation and that Claimant has obtained fair and equitable treatment.

65. Meanwhile it submits that neither of its actions breached this obligation and all of them are in accordance with it.

66. Fair and equitable treatment standard is widely construed in practice of international arbitration. It usually depends on circumstances of every concrete case.\(^{39}\)

67. For instance, tribunal in *Glamis v. USA* noted that violation of fair and equitable treatment should be “*sufficiently egregious and shocking: gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or manifest lack of reason*”.\(^{40}\)

68. Respondent notes that none of the descriptions described in *Glamis v. USA* apply to its own conduct.

69. Claimant’s investment has never been treated unfairly, unreasonably or with discrimination. But if the Tribunal decides differently, Respondent is entitled to refer to the enormous explosion in Medanos Field, further leakage of oil and enormous ecological consequences of them being the threat to Respondent’s national security, public order and normal existence as an additional reason to justify its actions as fair and non-discriminatory.

70. In case Claimant accuses Respondent of unpredictability of its actions Respondent intends to refer to force majeure which could not be foreseen under any circumstances and is characterised by externality, unpredictability and irresistibility. These conditions make impossible any previous warning of happening of dangerous situations. After accident Respondent notified Claimant by means of written communication about consequences of this accident and size of damages needed to be repaired. This information was transparent.

71. In addition to this discharge of oil and further removal was noted in the MLA, so such situation should not be considered as totally unexpected for Claimant.

72. If the Tribunal decides Respondent’s actions as violating fair and equitable treatment standard, Respondent submits to rely on para 3 of the Preamble to Freedonia-Sylvania BIT.

73. Para 3 of Preamble of Freedonia-Sylvania BIT provides the provision of consistency of investment’s protection with the protection of…safety, environmental…standards.\(^{41}\) The situation happened on 9 June 2009 in Medanos Field seriously affected maintenance of safety

\(^{39}\) Mondev, supra, footnote 40, para.118
\(^{40}\) Glamis, para. 627
\(^{41}\) The Freedonia-Sylvania BIT, preamble, para.3
and environmental standards. Claimant’s fault in explosion and leakage of oil exists without bias in accordance with oil exploration and drilling license and factual work in Medanos field. Its work had seriously damaged Respondent’s ecosystem and due to abovementioned para 3 Respondent cannot protect investment of such company.

74. Respondent further submits that Claimant has never been discriminated (1) and that Respondent at any event did not unlawfully interfered with Claimant’s legitimate expectations (2).

1. Claimant has never been subject to discrimination

75. Respondent submits that all its actions are in accordance with international law and not discriminatory.

76. Usage of unjustified and discriminatory measures referred to in Article 2(3) of Freedonia-Sylvania BIT should be proved by Claimant properly. For instance it should provide a situation where Claimant and other foreign investor under the same conditions were treated differently and other foreign investor has obtained more favourable treatment or give the example of Respondent’s internal legislation discriminatory for it.

77. There is no evidence of existing internal legislation providing different treatment according to different citizenship.

78. According to Uncontested facts FPS was a sole bidder in international tender process,\(^{42}\) so it’s impossible to compare its status with status of other foreign investors for the purposes of present arbitration.

79. Claimant’s inability to compare its situation with other foreign investors should be dismissed by the Tribunal as discriminatory basis and violation of fair and equitable treatment.

80. Such a conclusion was confirmed by Tribunal in \textit{Parkerings v. Lithuania},\(^{43}\) which submitted that discriminatory grounds are internal legislation providing different treatments due to different citizenship and more favourable treatment of other foreign investors under similar circumstances.

\(^{42}\) Uncontested facts, para. 3

\(^{43}\) Parkerings v. Lithuania, para.368
81. Respondent’s obligation to ensure fair and equitable treatment is not absolute. Respondent submits that all actions provided by it correlate with general obligation referred to in Article 2(2) of Freedonia-Sylvania BIT and Article 10 (1) of Energy Charter Treaty.

2. Respondent at any event did not unlawfully interfered with Claimant’s legitimate expectations

82. Article 2 (2) of the Freedonia-Sylvania BIT states that the Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security, of the Investments of Investors of the other Contracting Party. The protection of investor’s legitimate expectations is an integral part of the fair and equitable treatment. It means the protection of the investor’s legitimate expectations can be guaranteed only as part of customary international law.

83. Legitimate expectations are thus held to be breached by “evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.” A number of Tribunals have stated that protected expectations must rest on the conditions as they exist at the time of the investment.

84. At the present case on 1 February 2007, Freedonia Petroleum incorporated FPS to participate in the bidding process. FPS was the sole bidder in the tender process. So decision to invest was taken long before the MLA was signed on 26 May 2007.

85. Legitimate expectations arise from foreign investor’s reliance on specific host state conduct, e.g. written representations or commitments made by the host State with respect to the investment. Consequently, the respondent didn’t create any legitimate expectations for the claimant.

86. Even if tribunal finds that the claimant had legitimate expectations, the respondent had not violated it. Just like not every breach of a contract between a state and a foreign investor constitutes a breach of customary international law, the frustration of the investor’s expectations may have to rise to a level which is shocking or at least surprising in order to trigger the

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44 Tecmed v. Mexico, Award, para 177
46 CME v. Czech Republic, para. 155.
48 Uncontested facts, point 3.
international customary law protection. The Sylvanian Congress amended the OPA to revise the limitations on liability for damages resulting from oil pollution and to establish a fund for the payment of compensation for such damages. The amended OPA also set out several new safety obligations. These changes cannot be called neither shocking nor surprising. The foreign investor could not legitimately expect that the host state’s legal framework would not evolve in order to adapt to changing environmental concerns.

87. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host state’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.

88. Under Article 9 of Freedonia-Sylvania BIT nothing in this Agreement shall be construed to preclude a Party from applying measures that it considers necessary for the protection of its own essential security interests. Freedonia-Sylvania BIT Preamble also states that offering encouragement and mutual protection to investments shall be consistent with the protection of environmental standards. Consequently, changes to the OPA are justified.

89. The determination of a breach of claimant’s legitimate expectations therefore requires weighing them against the Respondent’s legitimate regulatory interests. This method was used in Saluka case.

90. The Sylvanian Congress amended the OPA under considerable public pressure. The Gulf oil spill could get into a “Loop Current”, eventually carrying oil southward along the Sylvanian coast and into the Sylvania Keys, a protected marshland area characterised by high levels of biodiversity. There were several indications that the disaster in the Gulf could worsen.

91. The ecological impact of the oil spill and FPS’s handling of the situation led to a public outcry for the State to intervene. Five new release points were discovered 43 days after a large explosion occurred. It proves Respondent’s legitimate regulatory interests were more important than claimant’s legitimate expectations.

92. The investor never had an “investment-backed expectation” that the regulations applicable to his investment would remain unchanged. Bona fide general regulations don’t

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51 Saluka case, para. 305.
52 Uncontested Facts, para. 8.
constitute a breach Claimant's legitimate expectations. The OPA as amended is obliged not only for FPS but also for NPCS with no exclusions.

93. Consequently, the Respondent did not at any event unlawfully interfere with Claimant’s legitimate expectations.
E. RESPONDENT SUBMITS THAT IT IS ENTITLED TO RELY ON ITS DOMESTIC LAW AND INTERNATIONAL LEGAL NOTIONS OF NATIONAL SECURITY AND PUBLIC INTEREST AS DEFENCES.

94. The explosion and further leakage of oil effected Respondent enormously and dangerously. This led to amendments of internal legislation and general usage of it as means of defence and preservation of an environment, social order, national security and public interests. Any action by the Respondent having impact on Claimant’s investment should be justified by the needs of security of its vital interests necessary for survival and normal functioning.

95. In case of ecological catastrophe or other situation obtaining significantly dangerous character in accordance with Article 9(2) of Freedonia-Sylvania BIT Respondent is entitled to apply measures that it considers necessary for the maintenance or restoration of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, the observance of its international law obligations, or the protection of its own essential security interests. 53

96. All Respondent’s actions taking place after 9 June 2009 should additionally be justified on the basis of necessity. For this purpose Draft Articles on State responsibility containing provisions about necessity are also applicable as source of customary international law.

97. Respondent submits that it may rely on its domestic law and international legal notions in accordance with essential security clause mentioned in Article 9(2) of BIT (I). Even if Tribunal decides that this provision is inapplicable in the present case, Article 25 of Draft Articles on State Responsibility shall be applied as customary international law (II).

I. It may rely on its domestic law and international legal notions in accordance with essential security clause mentioned in Article 9(2) of BIT.

98. Such essential security clause, in accordance with investment disputes’ resolution practice, is understood as a means to exclude responsibility under BIT. The evidence of such exclusion is proved in CMS v. Argentina, where the tribunal defined the “essential security” clause as “a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply.” 54

99. The phrase it considers necessary mentioned in Article 9(2) of Freedonia-Sylvania BIT entitles Respondent to take all appropriate steps and measures for maintenance of public order

53 Freedonia-Sylvania BIT, Article 9(2)
54 CMS v. Argentina, Annulment Decision, para. 129
and national security. Such approach was recognised by the International Court of Justice in *Nicaragua v. United States*.

100. A large explosion in the Medanos Field being the reason of leakage of oil had an enormous ecological impact on Sylvanian territory touching almost all its natural resources (“*Once the oil spill reaches the Sylvanian coast a complete cleanup will be impossible*”), fraught of its political and social climate, losing hundreds jobs, damaging important business activities – agriculture, tourism, seafood, tourism and related industries.

101. According to the President of Sylvania: “*the oil spill in the Gulf of Libertad caused catastrophic damage. This has been aggravated by FPS’ abject incompetence and failure to remedy it.*”

102. Respondent makes clear that compensation of damages will be impossible without Claimant’s participation. All further amendments to acts of domestic legislation are aimed to restore the stable environment of Sylvania, which is impossible without compensating damages.

103. Claimant’s fault in explosion happened in the Medanos field is without bias, because it had been working there on the basis of oil exploration and drilling license. In addition to this it didn’t comply with safety obligations under MLA neither concerning preventing discharge of oil nor concerning removal of oil in case of its discharge.

104. For the purposes of present case MLA becomes relevant due to ecological catastrophe caused *inter alia* by breach of its provisions.

105. As the situation which took place on 9 June 2009 is of extreme importance to normal existence of Respondent, it constitutes an “essential security” interest. In addition to this, such ecological damage as happened in Sylvania may become a threat to normal existence of other countries in case of its extension.

106. As a conclusion, it may become a threat to international security. So the usage of domestic law and international legal notions is justified by the scope of ecological threat to national security, public order and even the possibility to threaten international security.

II. Even if Tribunal decides that this provision is inapplicable in the present case, Article 25 of Draft Articles on State Responsibility shall be applied as customary international law

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55 *Nicaragua v. United States of America*, para. 222
56 Uncontested facts, para. 9
57 Ibid, para. 20
107. Respondent reminds that according to dangerous consequences of explosion and leakage of oil all its further actions may be justified on the basis of necessity, when no other means except those which had already been fulfilled were applicable and effective.

108. The tribunal in CMS v. Argentina confirmed that in situations connected with protecting essential security and public order Article 25 of Draft Articles on State Responsibility called “Necessity” may be used.\(^58\)

109. The doctrine of state of necessity is an example of customary international law, what was proved by International Court of Justice in Gabcikovo-Nagymaros\(^59\) and by ICSID Tribunals in Sempra v. Argentina\(^60\) and Enron v. Argentina.\(^61\) Draft Articles on State Responsibility reflect the commonly recognized approach of International Court of Justice.

110. According to provisions of Article 25(1) (a) of Draft Articles on State Responsibility necessity is strongly connected with protection of essential interests of the state. These provisions reflect current situation in Republic of Sylvania.

111. Article 25 (1) (a) should be applicable in the present case. Article 25 (1) (b) is not connected and that’s why it does not apply in the present arbitration. The same situation is with Article 25 (2) – these provisions shall not apply in present case due to lack of situation to which they may concern.

112. Concerning Article 25(a) – safeguard an essential interest against a grave and imminent peril\(^62\) - International Law Commission’s commentary says that necessity is intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests.\(^63\)

113. The large explosion, leakage of oil and further damage to environment, natural resources, political and social climate, and main business branches should be construed as grave and imminent peril caused by Claimant’s incompetence and failure to remedy it. And, of course, such ecological disaster is abnormal situation.

114. The idea of state’s protection of its essential interests, prevention of worsening such situations and proving that the events are out of control or unmanageable was confirmed in Sempra Energy v. Argentina\(^64\) and Enron v. Argentina.\(^65\)

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\(^58\) CMS v. Argentina, Annulment Decision, para 131  
\(^59\) Gabcikovo-Nagymaros, para 40  
\(^60\) Sempra Energy v. Argentina, Award, para 344  
\(^61\) Enron v. Argentina, Award, para 303  
\(^62\) ICL Articles, Art.25 (1) (a)  
\(^63\) Ibid, Art.25 (1) (a), ILC commentary, para 19  
\(^64\) Sempra Energy v. Argentina, Award, para 349  
\(^65\) Enron v. Argentina, Award, para 307
115. Unless Respondent failed to provide amendments to its domestic law, try to negotiate with Claimant or to create NPCs to undertake the necessary remedial works, the situation would become worse and constitute a bigger threat to national security, public order and international peace and security. Respondent didn’t perform any actions except those as it considered necessary.

116. Therefore Respondent submits that it is fully entitled to rely on its domestic law and international legal notions of national security and public interest as defences in accordance with essential security clause of Freedonia-Sylvania BIT and customary rule of state of necessity.
F. THE TRIBUNAL SHOULD CONSIDER THE COUNTERCLAIM FILED BY THE RESPONDENT

117. Respondent submits that it is entitled to file a counterclaim in the present arbitration because Respondent’s counterclaim is based on the BIT provisions (I) and resolving all claims and counterclaims within one arbitration is reasonable for both parties (II).

I. Respondent’s counterclaim is a legitimate treaty-based claim and is provided for in the BIT

1. Investment arbitration practice as to the admissibility of counterclaims in investment arbitration

118. Notwithstanding the fact that the practice of investment tribunals with respect to counterclaims remains really limited, most legal commentators agree that the counterclaims by the host state can be entertained by investment arbitration tribunals provided that such counterclaims meet certain requirements.6667

119. A good illustration of this may be an ICSID case Spyridon Roussalis v. Romania where the state of Romania is pursuing a counterclaim to recover the investor’s interest in a privatized company and the tribunal in this case has rendered a provisional measures decision blocking the investor’s assets pending the completion of the case.68

120. In the case of investment treaty arbitration the terms of the consent given in the BIT must be carefully scrutinized to determine whether they are intended to cover counterclaims as well. If this is the case, the investor’s consent must be interpreted to also extend to such counterclaims.69

121. The Tribunal in AMTO v. Ukraine believed that the jurisdiction of the tribunal over a state party counterclaim under an investment treaty depends upon the terms of the dispute resolution provision of the treaty, the nature of the counterclaim and the relation of the counterclaim with the claims in arbitration.70 Respondent submits that all these requirements are fulfilled in the present case.

68 Spyridon Roussalis v. Romania, Original Arbitration Proceeding
70 AMTO LLC v. Ukraine, Final Award, para. 118
2. Right to submit a counterclaim under the BIT

122. Even though the BIT does not explicitly provide for the host state’s right to submit a counterclaim, Article 11 (3) of the BIT provides that the Contracting Parties have consented to arbitration “...in accordance with the provisions of the ICC Arbitration Rules...”.

123. The ICC Rules, in turn, explicitly provide that the Respondent is entitled to submit counterclaims.\(^{71}\) It is widely accepted that the reference to respective Rules in the arbitration agreement should be deemed as an incorporation of such Rules by reference into the arbitration agreement. In the case at hand the arbitration agreement is laid down in the Article 11(3) of the BIT and it explicitly provides that arbitration should be in accordance with the ICC Rules.

124. Moreover, Article 11 (1)(c) of the Freedonia-Sylvania BIT provides that an investment dispute is, \textit{inter alia}, a dispute involving “alleged breach of any right conferred or created by… Agreement”.\(^{72}\) This wording should be construed broadly and have an ample scope of application.

125. In accordance with decisions in \textit{Saluka v. Czech Republic} and \textit{AMTO v. Ukraine}, if the relevant BIT dispute provision is broad enough, it is possible to assert counterclaims against investors.\(^{73}\)

126. Therefore, it is Respondent’s submission that the BIT provides for the right of the host state to launch a counterclaim by way of reference to the ICC Rules and by way of a broad definition of an investment dispute. Claimant has expressed his consent to arbitration in accordance with the provisions of the BIT at the time investment arbitration proceedings were initiated.

3. Nature of the counterclaim and its relation to the initial claim submitted by Claimant

127. In \textit{Terms of Reference} Claimant exclusively submits that all claims against it must be pursued in accordance with the contractual agreements in place\(^{74}\), i.e. MLA. Such an argument of Claimant is unfounded considering that Claimant is not a party to the MLA. FPS, Claimant’s subsidiary in Sylvania, is a party to the MLA. Therefore, Respondent has not previously agreed on any other dispute resolution mechanism and is entitled to put forward a counterclaim in the present proceedings.

\(^{71}\) ICC Rules, Art.5
\(^{72}\) Freedonia-Sylvania BIT, Article 11 (1)
\(^{73}\) Kryvoi Ya. Counterclaim in Investor-State Arbitration, p. 11
\(^{74}\) Terms of reference, para. c (i)

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128. As suggested by the tribunal in *AMTO v. Ukraine* above, the Tribunal should look into the nature of the counterclaim and the relation of the counterclaim with the claims in arbitration.

129. Claimant, being an investor, participated in the oil exploration project from the outset and has only incorporated a subsidiary in Sylvania as a vehicle company that would manage the project on-site.

130. Respondents counterclaim arises out of Claimant’s and FPS’s negligence following the explosion in the Medanos Fields and Claimant’s failure to comply with the national legislation of Sylvania with respect to safety obligations and elimination of grave consequences of the catastrophe, as required by the BIT.

131. The BIT contains a requirement that Claimant should make its investment “...*in conformity with the laws and regulations of the Territory in which the investment is made.*” Claimant has failed to comply with this important requirement that led to disastrous consequences for Sylvania.

132. For these purposes, the tribunal should consider the enormous environmental and ecological damage that resulted out of Claimants investment. The explosion and the leaking oil wells in the Medanos Fields entailed severe damage to all spheres being vital for the safety, economy and normal functioning of the state of Sylvania.\(^\text{75}\) This damage cannot be characterized as devastating harm to the whole state and its population, especially considering that the consequences of these events will impact the life in Sylvania for years to come.

133. The preamble of the BIT contains the following wording: “*Acknowledging that offering encouragement and mutual protection to such investments based on international agreements will contribute to stimulating business ventures that will foster the prosperity of both Contracting Parties, consistent with the protection of health, safety, environmental, and international labour standards and the goal of sustainability*” [emphasis added]

134. The Respondent never consented to grant protection to investments that will cause severe ecological damage to the state of Sylvania. This is one of the reasons behind the counterclaim of the Respondent.

135. Respondent’s counterclaim is connected and intertwined with Claimant’s investment protection claim and arises out of Claimant’s investment into Sylvania. The connection of the initial claim with the counterclaim appears to be evident, as the alleged breaches of the BIT by the Respondent will not be considered by this Tribunal in the event it will find that Claimant’s

\(^{75}\) Uncontested facts, para. 21
investment was not in conformity with the laws of the host state and, for this reason, Claimant will not be entitled to any protection offered by the BIT. Conformity with the laws of the host state is a pre-requisite for investment protection under the BIT.

136. It can be concluded, that the Respondent’s counterclaim in the present dispute is not a mere contractual claim under MLA, but it is a treaty-based claim that arises out of Claimant’s failure to comply with the requirements of the BIT and the national legislation.

137. FPS’s request for declaratory relief in the courts of Sylvania concerning precedence of MLA provisions over amendments to OPA is pending independently and without any connection to the present arbitration.

138. Considering the abovementioned analysis, the Respondent requests the Tribunal to accept the counterclaim for declaratory relief and consider it on a preliminary stage.

II. Resolving all claims and counterclaims within one arbitration is reasonable for both parties

139. Legal scholars and practitioners note, that “… the investor may at all times choose to consent to the admissibility of the host State’s counterclaim; which it may be advised to do, considering the time and money that can be saved by consolidating the parties’ claims in one set of proceedings.”

140. Respondent should have a chance to deter frivolous claims brought by Claimant. In the event Claimant’s claim and Respondent’s counterclaim will be considered by this Tribunal, it will be able to examine them simultaneously. This will help prevent numerous parallel proceedings that are likely to contribute to the substantial increase of arbitration costs.

141. In line with this approach, legal commentators have noted that resolving all disputes in one set of proceedings is preferable and less-time consuming.

142. Considering both primary claim and Respondent’s counterclaim within present arbitration should be suitable for Claimant as the main goal of the BIT is to protect foreign investors from the wrongdoings of the host state. Impartiality and neutrality of the current arbitral tribunal makes this arbitration forum suitable for investors.

76 Uncontested facts, para.26
77 Lalive and Hege Elisabeth Veenstra-Kjos, Counterclaims by Host States in Investment Treaty Arbitration
78 Kryvoi Ya. Counterclaim in Investor-State Arbitration, p. 4
79 Kryvoi Ya. Counterclaim in Investor-State Arbitration, p.3
80 G. Laborde. The Case for Host State Claims in Investment Arbitration, p. 110
143. Therefore, the Respondent requests this Tribunal to consider its counterclaim within the present arbitration.
COMMENTS TO CSE’S REQUEST TO BE PRESENT AT THE HEARINGS, TO SUBMIT DOCUMENTS AND TO BE HEARD AS A NON-DISPUTING PARTY

125. On 10 September 2011, CSE filed a request to be present at the hearings, to submit documents and to be heard as a non-disputing party in the proceedings. On 11 September 2011, the Tribunal invited the parties to submit their comments to CSE’s request in their memorials.\textsuperscript{81}

126. CSE is a non-profit NGO established in 2002. CSE supports Sylvania’s actions to protect the environment. CSE aims to promote practical research into the current and future state of water resources as well as the environment in Sylvania and across the region. CSE is funded by several Sylvanian nationals and domestic agricultural and seafood companies.\textsuperscript{82} CSE, as a non-profit NGO, is independent from the Republic of Sylvania and can serve as an impartial \textit{amicus curiae}.

127. The ICC Rules do not specifically authorize or prohibit the submission of \textit{amicus curiae} briefs or other documents by those who are not parties to the dispute. Since there are no previously agreed rules between the parties concerning admitting \textit{amicus curiae} briefs, the Tribunal should have discretion to accept or reject such briefs.

128. Based on a review of \textit{amicus curiae} practices in other jurisdictions and fora, the tribunal in \textit{Aguas Argentinas, S.A and others v. The Argentine Republic} has defined three basic criteria to accept \textit{amicus curiae} submissions: a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as \textit{amicus curiae} in the case, and c) the procedure by which the \textit{amicus curiae} submission is made and considered.\textsuperscript{83}

129. The subject matter of the case is appropriate. In this case interests of the population are involved as the subsequent arbitral award will affect a huge number of people in the Republic of Sylvania and the region. The ongoing environmental catastrophe in the Gulf of Libertad is of such magnitude as to have an indelible impact on one of the most important bodies of water on the planet. Thousands of Sylvanian citizens lost their jobs. Important business activities in Sylvania – such as agriculture, seafood, tourism and related industries- were seriously damaged.\textsuperscript{84} The political and social climate in Sylvania had become fraught. Environmental protection is an extremely important issue for the Republic of Sylvania that is demonstrated by reference to the environment in the Preamble of the Freedonia-Sylvania BIT.

\textsuperscript{81} Uncontested Facts, para. 34.
\textsuperscript{82} Ibid, para. 22.
\textsuperscript{84} Uncontested Facts, para. 21.
130. CSE is suitable to act as *amicus curiae* in this case. CSE is an NGO with 9 years of experience which specializes in environmental protection. CSE organizes and administers programs and initiatives to educate both private and public citizens about environmental awareness and protection. CSE engages in environmental advocacy *in fora* at international and national levels. It also monitors environmental health and reports on the state of natural resources in Sylvania and across the region. The aim of the organization is to promote practical research into the current status and future outlook of the environment and its impact on Sylvania. All this demonstrates that the proceedings will benefit from CSE’s involvement.

131. On 29 September 2011, the Sylvanian Court ordered the release of the written pleadings concerning the arbitration proceedings to CSE considering the interests of the public, especially having regard to the extraordinary impact of the subject-matter of the proceedings had on citizens of Sylvania.\(^{85}\) So CSE is, therefore, able to share its expertise assist to the Tribunal.

132. It can be concluded, that CSE fulfills all the above mentioned criteria to be recognized as *amicus curiae* by the Tribunal. That is why the Respondent hereby requests the Tribunal to grant the CSE’s request.

\(^{85}\) Uncontested Facts, para. 33.
REQUEST FOR RELIEF

Taking into consideration the above submissions, Respondent respectfully asks this Tribunal to find:

(a) that the Tribunal has no jurisdiction over Claimant’s claims due to the Freedonian government’s majority ownership of Freedonia Petroleum;

(b) that the Tribunal has no jurisdiction over Claimant’s claims due to the prior recourse by the Claimant's wholly-owned subsidiary FPS to the Sylvanian Ministry of Energy;

(c) that NPCS' actions are not attributable to Respondent;

(d) that Respondent did not materially breach its confidentiality obligations;

(e) that Respondent's actions did not amount to expropriation, a violation of fair and equitable treatment and a breach of Claimant's legitimate expectations;

(f) that Respondent is entitled to rely on its domestic law and international legal notions of national security and public interest as defences;

(g) that the Tribunal should consider the counterclaim filed by the Respondent

RESPECTFULLY SUBMITTED ON SEPTEMBER 30, 2011 BY

Team Waldock
On behalf of Respondent,
THE REPUBLIC OF SYLVANIA