IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE
STOCKHOLM CHAMBER OF COMMERCE (2017)

BETWEEN:

FENOSCADIA LIMITED

(CLAIMANT)

AND

THE REPUBLIC OF KRONOS

(RESPONDENT)

SCC ARBITRATION V2018/003858

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PRELIMINARY STATEMENT

“Lawless are they that make their wills their law”

William Shakespeare

1. This is a case of brazen, calculated, and unapologetic theft. Claimant is the victim of a convoluted ploy to take its business, masqueraded as a regulatory action supposedly to protect public health. A classic excuse of sovereigns’ intent on taking for themselves and their own cronies the assets and the values produced by others.

2. This is the kind of abuse of law and power that the world has become less and less prepared to tolerate. Claimant’s business has been destroyed, with no regard to international law, Claimant’s binding agreements with its clients, and the well-being of Claimant’s hundreds of employees. No doubt, the profitable business Respondent so blithely destroyed will soon be “resuscitated” in the hands of the new administration and its political supporters. This savage conduct should not remain uncompensated.
STATEMENT OF FACTS

Claimant’s activities in Kronos

3. Claimant, Fenoscadia Limited is a limited liability company incorporated under the laws of Ticadia in 1993. It has a worldwide reputation for exploration and exploitation of rare earth metals.\(^1\) Respondent is the Republic of Kronos.

4. In March 1997, the Kronian Federal University reported the discovery of a reserve of a rare earth metal called lindoro in the northern region of Kronos.\(^2\) In November 1998, Respondent held a public auction to search for a foreign investor that had the financial capacity and technical expertise to extract lindoro from the Site.\(^3\) The only criteria analyzed during the tender process were the technical expertise of the interested companies and the financial return for Respondent.\(^4\)

5. Only three competitors participated in the bidding process.\(^5\) All of them demonstrated almost identical technical expertise, but Claimant’s bid offered the highest financial return for Respondent. Consequently, Claimant won the public auction on April 20, 2000.\(^6\)

6. On June 1, 2000, Claimant and Respondent signed the Agreement, which granted Claimant a concession to exploit the Site for eighty years.\(^7\) In return, Claimant agreed to pay Respondent 22% of the monthly gross revenue relating to the commercialization of the lindoro extracted from the Site.\(^8\) Since the Site was the only lindoro reserve in all Respondent’s territory,

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\(^1\) SUF, p. 32, ¶6.
\(^2\) *Id.*, p.32, ¶3.
\(^3\) *Id.*, p. 32, ¶4.
\(^4\) *Ibid*.
\(^5\) SUF, p. 32, ¶5.
\(^6\) *Ibid*.
\(^7\) SUF, p. 33, ¶8.
\(^8\) *Ibid*. 
Claimant was the only authorized company to extract lindoro in Kronos. The Agreement also gave Respondent the right to inspect Claimant’s disposal activities in the Site.

7. It took Claimant eight years to start operations in the Site. During this period, Claimant invested millions in order to set up exploitation and directly employed two hundred of Respondent’s citizens. Forty of them were in charge of proper waste disposal.

8. Once Claimant begun its operations at the Site, the exploitation of lindoro became a key element in the development of Respondent’s economy, and Respondent’s returns under the Agreement increased every year. The importance of Claimant’s investment was further recognized during the 2010 Presidential Annual Speech, where the President stated that it was one of “the pillars of Kronos’ growing economy”.

9. Due to the need of having stronger presence in Kronos, Claimant transferred part of its business to Kronos in 2010. Nevertheless, the company did not change its place of incorporation. In fact, most of its business management are still conducted in Ticadia. Such transfer had strong support from Respondent’s government.

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9 SUF, p. 33, ¶11.
10 SUF, p. 33, ¶9.
11 SUF, p. 33, ¶8.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 SUF, pp. 33/34, ¶12.
17 Ibid.
18 RA, p. 5, ¶7; SUF, p. 34, ¶13.
**Respondent’s conducts during the execution of the Agreement**

10. The Agreement was the sole applicable instrument regulating the exploitation of lindoro in the Site.\(^{19}\) Further, Respondent repeatedly assured in official declarations that this legal vacuum would in no way risk Claimant’s activities.\(^{20}\)

11. Since August 2008 until the issuance of the Decree in September 2016, the Agreement was performed pursuant to its terms. Accordingly, Respondent conducted the relevant inspections to the Site and found Claimant in full compliance with its obligations.\(^{21}\)

**The dispute’s background: the Nationalist Party took office in January 2015**

12. In October 2014, the Nationalist Party won the elections. As a result, on January 1, 2015, the new President and House Representatives took office for a five-year period.\(^{22}\) Their governmental plan included a strong nationalist agenda.\(^{23}\)

13. In March 2015, the President sent to the congress a draft bill which sought to regulate environmentally sensitive activities, including mining.\(^{24}\) The bill was heavily criticized because it “negatively impact[ed] [on] the national economy”.\(^{25}\)

14. In June 2015, the House passed the KEA, which was verbatim across the draft bill crafted by the President.\(^{26}\) KEA was passed at a highly unusual speed since the Speaker of the House of Representatives decided not to hold to a public hearing as required by Article 59 of the Kronian Constitution in cases were a draft bill “may directly affect the national industry of Kronos”.\(^{27}\) The opposing party claimed that this course of action was a clear signal that the Government

\(^{19}\) SUF, p. 33, ¶10.

\(^{20}\) SUF, p. 34, ¶13.

\(^{21}\) SUF, p. 35, ¶19.

\(^{22}\) SUF, p. 34, ¶14.

\(^{23}\) Ibid.

\(^{24}\) SUF, p. 34, ¶15.

\(^{25}\) Ibid.

\(^{26}\) SUF, p. 35, ¶16.

\(^{27}\) Id., p. 34, ¶17.
had put in motion a scheme to take over Claimant’s investment and replace it with a domestic enterprise.\textsuperscript{28}

15. The very same day of the passing of KEA, Respondent created the MEM. The MEM was in charge of formulating and enforcing Respondent’s environment-related policies,\textsuperscript{29} including the “strict [...] supervision of Claimant’s activities”.\textsuperscript{30}

16. In September 2015 the MEM conducted its first inspection to Claimant’s facilities,\textsuperscript{31} which once again, was successfully passed by Claimant, who was granted with a new environmental license for the exploitation of lindoro for two more years.\textsuperscript{32}

17. Nevertheless, in October 2015, MEM released information from the inspections suggesting an increase of pollution in the Rhea River.\textsuperscript{33} Further, in a clear campaign to affect Claimant’s image as a responsible concessionaire, on May 2016 Respondent funded a Study which indicated that the exploitation of lindoro was the cause of the Rhea River’s contamination.\textsuperscript{34} The Study allegedly found graspel in the river.\textsuperscript{35} However, the Study failed to establish a causal link between the rising incidence of specific diseases and its conclusions were not supported by any evidence.\textsuperscript{36}

18. In September 2016, Respondent issued the Decree, which prohibited the mining of lindoro. Under the Decree, Respondent arbitrarily revoked Claimant’s license, and immediately and irrevocably terminated the Agreement without legal basis.\textsuperscript{37} Two hundred of Claimant’s employees were dismissed within a week of the issuance of the Decree.\textsuperscript{38} As if this was not

\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid. Graspel is a type of heavy metal found in different mining tailings (\textit{See} PO No. 2, p.56, §4).
\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid.
enough, Respondent confiscated the lindoro stored in Claimant’s facilities, rendering Claimant’s property in Kronos “nearly useless”.

19. In September 2016, Claimant applied to the Court to challenge the constitutionality of the Decree and to request its precautionary suspension. However, in February 2017, Respondent announced that the Decree would not be revoked and, accordingly, Claimant withdrew its appeal to the Court before any final decision was rendered.

20. Pursuant to the above, in April 2017, Claimant notified Respondent of the dispute and of its intentions to pursue legal remedies under the KT-BIT.

21. In August 2017, the prestigious magazine Global Mining, quoting the local media, published an article revealing Respondent’s real intentions, i.e. to reinstate the exploitation of lindoro in Kronos through a new joint-venture between a state-owned company and an enterprise from the Republic of Ibi. The Republic of Ibi is known to be sympathetic with the Nationalist Party ideology.

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39 PO No. 2, p. 56, ¶9.
40 SUF, p. 35, ¶23.
41 SUF, p. 36, ¶25.
42 PO No. 2, p. 56, ¶3.
43 SUF, p. 36, ¶26.
44 Ibid.
45 SUF, p. 36, ¶27.
46 Exhibit 7, p. 54.
SUMMARY OF ARGUMENTS

Jurisdiction
22. The Tribunal has jurisdiction over the dispute since Claimant qualifies as a protected investor under the KT-BIT. Further, Claimant is a Ticadian investor irrespective of the test that the Tribunal decides to apply in order to establish its nationality.

Admissibility
23. The claim is admissible since Claimant’s lawsuit before Respondent’s local courts did not trigger the FITR provision contained in dispute settlement clause of the KT-BIT. Indeed, the local proceedings and the present claim are not identical pursuant to the “triple identity” test. Additionally, the two claims are different following the “same fundamental basis” standard.

Counterclaim
24. Respondent’s counterclaim based on the environment-related clause of the KT-BIT is inadmissible since it is based on a provision that does not create an obligation enforceable upon private investors. Alternatively, pursuant to Article 2 of the KT-BIT, the environment-related clause is only applicable to the Contracting States. Finally, Respondent’s counterclaim is inadmissible since it lacks close connection with Claimant’s claim, as required by customary international law.

Merits
25. Respondent indirectly expropriated Claimant’s investment in breach of Article 7 of the KT-BIT. The Decree is tantamount to expropriation since it had a substantial effect on Claimant’s investment, Claimant lost the control over the investment, and its effects are permanent. Further, the Decree cannot be justified as a use of Respondent’s police powers, and does not fall within the general exceptions clause of the KT-BIT.
I) **THE TRIBUNAL HAS JURISDICTION RATIONE PERSONAE**

26. Respondent objects to the Tribunal’s jurisdiction by alleging that Claimant is not a protected investor under the KT-BIT.\(^{47}\) According to Respondent, Claimant lacks Ticadian nationality and thus, does not qualify as an investor under the KT-BIT.\(^{48}\)

27. However, the Tribunal’s jurisdiction *ratione personae* derives from Article 1(4) of the KT-BIT, which defines “*investor of a Contracting Party*” as:

   “[A] Contracting Party, or a person or an enterprise of a Contracting Party, that seeks to make, is making, or has made an investment in the other Contracting Party’s territory”. [Emphasis added]\(^{49}\)

28. The Tribunal has jurisdiction because, [A] Claimant is a Ticadian enterprise under the KT-BIT; and in any event, [B] Claimant is a Ticadian investor irrespective of the test used to determine its nationality.

A. **Claimant is a Ticadian investor under the KT-BIT**

29. The KT-BIT defines juridical persons that can avail from it as any “*enterprise of a Contracting Party*”.\(^{50}\) However, since the treaty does not provide a specific criterion to be applied in order to determine whether an enterprise is “of” a Contracting Party, in order to determine Claimant’s nationality the Tribunal needs to interpret the provisions of the treaty according to the VCLT, which provides in its Article 31:

   “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.\(^{51}\)

30. Therefore, a sound reading of Article 1(4) of the KT-BIT in accordance with its ordinary meaning under the VCLT, leads to the conclusion that Claimant is a protected investor since it is incorporated in Ticadia. There is abundant authority in order to conclude that, unless a BIT

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\(^{47}\) ARA, p. 13, ¶¶2/4.

\(^{48}\) Ibid.

\(^{49}\) KT-BIT, Article 1(4).

\(^{50}\) KT-BIT, Article 1(4).

\(^{51}\) VCLT, Article 31.
expressly provides otherwise (and that is not the case of this particular BIT), the Tribunal should apply the generally accepted rule to determine the nationality of corporations, *i.e.*, that an entity has the nationality of the State of its “place of incorporation” or “registered office”.

31. The most reasonable way to read “ordinary meaning” into the expression “an enterprise of a Contracting Party” [emphasis added] is to ascribe nationality under the generally accepted rule of place of incorporation or registered office. In fact, the place of incorporation and the registered office tests are the most widely applied criteria to ascribe nationality to legal persons.

Respondent’s suggestions that this rule should not be followed must be rejected because it is unmeritorious.

32. This principle has been endorsed by the tribunals in *Kaiser, Amco, LETCO, SOABI and Tokios Tokelés*. For example, in *Kaiser*, the tribunal held that the claimant was a national of one of the Contracting States on the basis of the finding that “*Kaiser [was] a private corporation organized under the laws of the State of Nevada in the United States of America*” and that such condition was enough to consider it as a protected investor. The same approach was followed by the tribunals in *Amco* and *LETCO*.

33. *SOABI* is not an exception. In that case, the tribunal acknowledged that the general rule was to apply the “incorporation” or “registered office” criteria to determine the nationality of corporations. However, the tribunal applied the “control test” because there was an agreement between the parties in such regard, which constituted an express and explicit departure from the general rule. No such agreement exists in this case.

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52 *Schreuer II*, p. 279, ¶694; *Tokios Tokelés*, ¶42; *Delaume*, p. 784; *Hirsch*, p. 85.


54 *Autopista*, ¶107; *Tokios Tokelés*, ¶42; *Schreuer II*, pp. 281/282, ¶699/700, 703 (citing *Kaiser, SOABI, Amco, LETCO*).

55 *Kaiser*, ¶19; *Amco*, ¶14; *LETCO* (as cited by *Schreuer II*, p.298, ¶765); *SOABI*, ¶29; *Tokios Tokelés*, ¶31.

56 *Schreuer II*, ¶19.

57 *Amco*, ¶14; *LETCO* (as cited by *Schreuer II*, p.298 ¶765).

58 *SOABI*, ¶29.

59 *SOABI*, ¶30/31.
34. In *Tokios Tokelés*, the tribunal likewise held that the “standard rule” of “incorporation” had to be applied because:

> “the Convention permits deviation from the general rule for defining the nationality of juridical entities, but only if there is an agreement between the Contracting Parties to do so. Here, there is no such agreement providing for deviation”.

35. The same was held in *Rompetrol* and *ADC*. In the case at hand, there are no “deviations” or specific criterions agreed by the Parties. Therefore, the standard rule of incorporation should be applied.

36. Furthermore, the “place of incorporation” and “registered office” criteria are a well-established method for determining corporate nationality under customary international law.

37. In the *Barcelona Traction* case, the ICJ held that:

> “[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the States under the laws of which it is incorporated and in whose territory it has its registered office. The two criteria have been confirmed by long practice and by numerous international instruments.”

38. According to Oppenheim’s International Law,

> “[i]t is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation’s head office, registered office, or its siège social to be in the same state”.

39. Moreover, the “object and purpose” of the KT-BIT as expressed in its preamble, is to “promote greater economic cooperation between [the parties]” while recognizing that such investments “will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation.” The tribunals in *Tokios Tokelés* and *SGS Philippines* have

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60 *Tokios Tokelés*, ¶69.
61 *Rompetrol*, ¶82; *ADC*, ¶360.
62 *Tokios Tokelés*, ¶70.
63 *Barcelona Traction*, ¶70.
64 OPPENHEIM, pp. 859/60.
65 KT-BIT, Preamble, p.38.
66 *Tokios Tokelés*, ¶31.
67 *SGS Philippines*, ¶116.
examined similar preambular language and concluded that this evidenced an intention to provide “broad protection of investors and their investments”, 68 and, therefore, eschewed reading a treaty narrowly as inconsistent with the breadth of intended protections. 69

40. In the case at hand, to apply any criteria other than the “place of incorporation” and/or “registered office” would narrow the scope of protected investors, contrary to the purpose of the KT-BIT as expressed in its preamble.

41. Consequently, Claimant qualifies as an investor protected by the KT-BIT since it is incorporated under the laws of Ticadia. 70

42. As to Claimant’s “registered office”, Respondent has acknowledged that “Claimant’s corporate documents still refer to Ticadia”, 71 Moreover, the Concession Agreement states that Claimant’s business address is in Ticadia, 72 and it is also uncontested that “all of [Claimant’s] business management formalities”[emphasis added] remain in Ticadia. 73 These facts are sufficient to confirm that Claimant’s registered office is in Ticadia.

43. Indeed, the location of the registered office follows the place of incorporation, as suggested by Tokios Tokelés 74 and Tenaris. 75 The tribunal in Tokio Tokelés held that “a nationality test of siège social leads to the same result as one based on state of incorporation”. 76 Moreover, in the Tenaris case, the tribunal concluded that “the establishment of a registered office is central to the act of incorporation” 77 and therefore the registered office would always match the place of incorporation. Accordingly, as it is uncontested that Claimant’s place of incorporation is in Ticadia, its registered office would also be in Ticadia.

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68 Tokios Tokelés, ¶31; SGS Philippines, ¶116.
69 Tokios Tokelés, ¶32.
70 SUF, p. 32, ¶6.
71 ARA, p. 13, ¶4.
72 Exhibit 2, p.47.
73 SUF, pp. 33/34, ¶12.
74 Tokios Tokelés, ¶43.
75 Tenaris, ¶117.
76 Tokios Tokelés, ¶43.
77 Tenaris, ¶117.
44. Therefore, in the case at hand, under international customary law the standard rule of “incorporation” or “registered office” should be applied. Simply put, Claimant’s Ticadian nationality follows from the criteria of incorporation and registered office; thus, the Tribunal should conclude that it has *ratione personae* jurisdiction.

B. **Irrespective of the test applied, Claimant is still a Ticadian investor**

45. Respondent argues that, in order to determine whether Claimant is a protected investor under the KT-BIT, the Tribunal should depart from a consistent line of cases and customary international law and resort to other tests to determine Claimant’s nationality. Such tests as the “effective control test” or the “substantial business activity test” are not contained in the KT-BIT and are alternatives to the general rule discussed in the previous section.\(^{78}\) However, in this section, Claimant will analyze its nationality under the other possible applicable criterions and demonstrate that, irrespective of which test the Tribunal decides to follow, it still is a Ticadian investor.

i. **Claimant is a Ticadian investor under the “legal control” test**

46. Respondent argues that Kronian shareholders control Claimant and that this would bar Claimant from invoking the KT-BIT.\(^{79}\) Even assuming arguendo that “control” is the applicable standard, Claimant would still qualify as a national of Ticadia.

47. Ownership is plainly the strongest form of control.\(^{80}\) Consequently, in cases where this standard has been applied (due to the fact that it was expressly required by the applicable BIT), the relevant analysis focused on the number of shares\(^{81}\) or the voting rights held,\(^{82}\) which are the hallmark of corporate control.

48. Particularly, the tribunal in *AdT* held that the word “controlled” was not an alternative to ownership and, instead, referred to a quality that accompanied ownership.\(^{83}\) The tribunal further

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\(^{78}\) RA, p. 13, ¶¶3/4.

\(^{79}\) RA, p. 13, ¶3.

\(^{80}\) DOUGLAS, p. 300 (note 50).

\(^{81}\) *Vivendi I*, ¶24 (note 6); *Annulment I*, ¶48; *AdT*, ¶264; S. D. Myers, ¶227; Mobil, ¶160.

\(^{82}\) *AIG*, ¶¶43/44; *AdT*, ¶264.

\(^{83}\) *AdT*, ¶¶242/245.
stated that an entity may be said to control another entity if it possesses the “legal capacity” to control such other entity, typically through ownership rights.84

49. In the present case, Claimant is controlled by a Ticadian private equity fund holding 65% of its shares.85 This private equity fund is composed of nationals from multiple countries, including Kronos and Ticadia, among others.86 Since voting rights are in proportion to the shares held,87 control presumably lies in a private equity fund with Ticadian nationality.

50. There are three Kronian shareholders that hold 35% of Claimant’s shares. There is no evidence whatsoever that these three holders -individually or collectively- have the power to control Claimant.88 They plainly do not have the majority of shares to exercise control, nor is there any evidence of alternative corporate mechanisms that would vest control in each of these shareholders or in all of them collectively.

51. In view of the above, the Kronian shareholders do not have legal control over Claimant and instead, Claimant is controlled by Ticadian nationals.

ii. **Claimant is a Ticadian investor applying the “effective control” test**

52. Respondent further argues that the test to be applied is one of “effective control”, as opposed to “legal control”. Nevertheless, since there is no evidence of “effective” control by any non-Ticadian shareholder, the issue is moot.

53. Several tribunals have found that the application of the effective control test would engender uncertainty to the purpose of investment promotion and protection treaties89 and that effective control must be “established beyond any reasonable doubt”.90 Following the test proposed by the tribunal in *Thunderbird*, in order to prove effective control beyond any reasonable doubt, it must be demonstrated that “the alleged controllers’ ‘key involvement and decision-making’

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84 *Id.*, ¶264.
85 SUF, p. 36, ¶6.
86 PO No. 2, p. 56, ¶2.
87 *Ibid*.
88 SUF, p.33, ¶1.
89 *AdT*, ¶247.
90 *Thunderbird*, ¶106.
caused the entity they controlled to engage in conduct it ‘could not have been pursued’ otherwise”.

54. In our case, Claimant’s business was already well established before the arrival of the Kronian minority shareholders in 2012. Its mining operations started in 2008 and the only “key decision” – the transfer and concentration of almost all its mining activities and resources in Kronos– was made in 2010, two years before the arrival of the minority shareholders. It follows that although the Kronian shareholders may exert some influence over Claimant’s decisions on mining activities, their influence falls far short of constituting “effective” control established beyond any reasonable doubt. They are significant holders, to be sure; but not controlling shareholders by any stretch of the evidence.

55. In light of the above, the Kronian shareholders do not have effective control over Claimant, that is undeniably a Ticadian investor.

iii. Claimant is also a Ticadian investor applying the “substantial business activities” test

56. Respondent argues that Claimant does not undertake substantial activities in Ticadia, and thus, it has lost its Ticadian nationality. The substantial business activity test should not be considered applicable when assessing Claimant’s nationality, as it is generally related to denial of benefits clauses, which the KT-BIT does not contain. However, even applying such test, Claimant would still be a Ticadian enterprise as it performs substantial activities in Ticadia.

57. Whether an activity is “substantial” depends on “the materiality not the magnitude of the business activity is the decisive question”. Therefore, if no real presence whatsoever existed in Ticadia, the State where it is incorporated, the Claimant may be held to have lost its Ticadian nationality – but that is not the case here by a long shot.

58. In the present case, Claimant cannot be deemed as a shell company with no substantial activities in Ticadia due to four main facts. First, Claimant’s business management, from the time of its

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91 Id., ¶109.
92 SUF, p.33, ¶7.
93 AR, p.13, ¶4.
94 Pac Rim, ¶4.78; Plama, ¶22; Pan American, ¶221; Amto, ¶26.
95 SUF, p.32, ¶6; SUF, p.33, ¶12; SUF, p.34, ¶13.
96 Amto, ¶69.
incorporation, has always remained in Ticadia, where its board of directors carried out its
meetings.\(^{97}\) Second, Claimant necessarily has access to a place such as an office, to carry out its
meetings in Ticadia.\(^ {98}\) Third, Claimant complies with its tax obligations in Ticadia.\(^ {99}\) Finally,
Claimant’s CEO also resides in Ticadia.\(^ {100}\)

59. Therefore, even under the substantial business activities test, Claimant is an investor of Ticadia.

60. For all the foregoing reasons, and independently of the criterion applied, Claimant is a protected
Ticadian investor and, consequently, the Tribunal has jurisdiction over the dispute.

II) Claimant’s claim is admissible since the FITR provision was not triggered

61. Respondent argues that because Claimant filed a complaint before Respondent’s courts,\(^ {101}\) it has
triggered the FITR provision of Articles 11.2 and 11.3 of the KT-BIT and the Tribunal would
be precluded from deciding the present dispute.\(^ {102}\) However, Claimant’s claim is admissible as
it complies with the requirements in the KT-BIT and the FITR provision has not been triggered.

62. Article 11 of the KT-BIT contains a FITR provision:

> “2. In the event of an investment dispute, […] the national or company concerned
may choose to submit the dispute for resolution: a) to the domestic courts or
administrative tribunals of the Contracting Party that is a party to the dispute; or
b) in accordance with any applicable, previously agreed dispute-settlement
procedures; or c) in accordance with the terms of the third paragraph below

3. Provided that the national or company concerned has not submitted the dispute
for resolution under (a) or (b) of the second paragraph […] the national or
company concerned may choose to consent in writing to the submission of the
dispute for settlement by binding arbitration under the Arbitration Institute of the
Stockholm Chamber of Commerce and in accordance with its Arbitration
Rules”.\(^ {103}\)

\(^{97}\) SUF, p. 34, ¶1.

\(^{98}\) Pac Rim, ¶4.8; Petrobart, p. 63.

\(^{99}\) PO No.2, p. 56, ¶2; Pac Rim, ¶4.8.

\(^{100}\) SUF, p. 33, ¶7.

\(^{101}\) ARA, pp.13/14, ¶5.

\(^{102}\) ARA, p.14, ¶7.

\(^{103}\) KT-BIT, Article 11.
63. Therefore, under such clause, these are the choices available to an investor: 1) litigation in
domestic courts or administrative tribunals of the host State, 2) resort to any applicable and
previously agreed dispute-settlement procedures, or 3) SCC Arbitration under its Arbitration
Rules. Item (3) -this arbitration- is available only if the dispute has not been submitted to any
other of the options identified above.

64. Respondent’s objection fails because: [A] Claimant’s claim before Respondent’s Federal Court
could not have triggered the application of the FITR provision of the KT-BIT since it does not
share a common identity of parties, objects and causes of action (triple identity test) with the
claim filed before the Tribunal; and [B] in any event, the claims are not the same.

A. **Claimant’s claim before Respondent’s Federal Court and this arbitration do not
share a common identity of parties, objects or causes of action**

65. The FITR provision precludes the submission of the “same” dispute to international arbitration
tribunals and state courts. To establish whether two disputes are the “same”, the triple identity
test looks to the same parties, object and cause of action; if they are identical, then the two claims
are the “same”, but not otherwise. The lack of identity among these three elements would
render the claims not identical and avoid the application of the FITR clause.

66. Many tribunals have relied on the “triple identity” test to determine whether the claims filed
before the host states’ courts and before an arbitration forum are the same. In the present case
there is no FITR preclusion because the two disputes at issue relate to: [i] different causes of
action and [ii] different objects. The identity of the parties need not to be discussed because
failure to meet any of the three requirements of the “triple identity” test places the claims on
different roads.

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104 SUF, p. 44, ¶2.
105 *Occidental Jurisdiction*, ¶52.
106 *Pey Casado*, ¶486.
107 *Pey Casado*, ¶483; *Vivendi I*, ¶53; *Vivendi II*, ¶55; *Olguín*, ¶30; *Middle East Cement*, ¶71; *Azurix Jurisdiction*, ¶88;
*Enron Jurisdiction*, ¶97; *Occidental Jurisdiction*, ¶52; *Champion Trading*, §3.4.3; *Toto*, ¶211.
108 *Pey Casado*, ¶ 486.
i. The disputes relate to different causes of action

67. When an investor has asserted a claim before a local court, a FITR provision does not preclude it from bringing another claim based on a different cause of action before an arbitral tribunal.\(^\text{109}\) Here, in short, the lawsuit at issue sought the nullity of the Decree under local law; the arbitration seeks compensation under the KT-BIT for the effective expropriation of Claimant’s business. Therefore, the two claims involve different causes of action.

68. In the *Occidental* case, the plaintiff was denied certain tax refunds and initiated four lawsuits requesting such refunds under local Ecuadorian law without making any assertion or claims concerning its rights under the treaty.\(^\text{110}\) The tribunal observed that “*non-contractual domestic law questions [had] been and [were] being dealt with by local courts in Ecuador*” and “*treaty-based issues [came] to arbitration*”, and it held that to the extent that the nature of the dispute submitted to arbitration is principally treaty-based, the claim is correctly submitted.\(^\text{111}\) The same tribunal further stated that, far from creating a situation of incompatibility, both causes of action can have cumulative effects and interact reciprocally yet be separate and the nature of the disputes different.\(^\text{112}\)

69. Similar to the present case, in *Genin*, it was held that the claims were not identical as they did not have the same cause of action and therefore, did not trigger the choice of forum bar.\(^\text{113}\) In that case, the claim before the local courts challenged the revocation of a license under local law while the arbitral claim sought compensation for losses due to alleged breaches of the BIT.\(^\text{114}\)

70. In the case at hand, on 8 September 2016, Claimant applied to Respondent’s Federal Court seeking to suspend the effects of the Decree and to challenge its constitutionality.\(^\text{115}\) Both motions in the local lawsuit were based on Kronos’ local law. The breach of Claimant’s rights

\(^{109}\) CMS, ¶68; Toto, ¶211; Genin, ¶331; Occidental Jurisdiction, ¶ 52.

\(^{110}\) Occidental Jurisdiction, ¶¶38/46.

\(^{111}\) Id., ¶57.

\(^{112}\) Id., ¶58.

\(^{113}\) Genin, ¶331/332.

\(^{114}\) Ibid.

\(^{115}\) SUF, p. 36, ¶25; PO No.2, p. 56, ¶3; PO No.3, p. 59, ¶2.
contained in the KT-BIT was not litigated before Respondent’s court. In contrast, the present claim concerns Respondent’s breach of the KT-BIT and Claimant’s rights to compensation due to such wrongful act.

71. Therefore, the “triple identity” test fails here on the foregoing ground along. The FITR provision has not been triggered and Claimant’s claim is admissible.

ii. The claims relate to different objects

72. Wholly apart from the foregoing, the disputes are not the same because the objects in both claims are not identical. When the claims do not seek the same object (petitum) or relief, they also fail to fulfill the triple identity test.

73. The relief sought by Claimant in the local proceedings was the suspension of the effects of the Decree and to set the Decree aside. Claimant did not request any recovery or compensation for damages. On the other hand, the relief that Claimant is currently seeking before this Tribunal is, precisely, compensation for the breaches of the KT-BIT. There is no overlap between both objects.

74. On this ground alone, and wholly apart from the difference in causes of action, the two claims fail the “triple identity” test since they do not share the same object. Thus, the FITR provision has not been triggered and Claimant’s claim is admissible.

B. Additionally, even applying the same fundamental basis test, the claims are still on different roads

75. Additionally, the “same fundamental basis” test bars the preclusive effect of the FITR provision.

76. The “same fundamental basis” test proposes that when the claims have the “same normative source” and “seek the same effects”, they might be considered the same claim. The lack of identity between any of the two requirements (i.e., normative source or relief sought) would

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117 RA, p. 8, ¶23.
118 *Occidental Jurisdiction*, ¶52.
119 PO No.2, p. 56, ¶3.
120 RA, p. 8, ¶23.
prevent the triggering of the FITR clause. In short, this test may be regarded as another joint formulation of the “cause of action” and “object” criteria. Thus, since the claims have [i] different normative source and [ii] the effects sought are different, Claimant’s claim is admissible.

i. The normative source of the present claim is different from the one of the lawsuit filed before Respondent’s courts

77. When the normative source is the same, a claim cannot be submitted before two different forums. However, the facts of the cases in which the “same fundamental basis” test was deemed to be operative are not the facts here. In all those cases, the local and the arbitral claim shared the same normative source, thus the FITR provision barred the plaintiff from asserting the same claim.

78. In *Supervision*, *Pantechniki*, *H&H Enterprises*, both the claim before the local courts and the claim before the arbitral tribunal were based on breaches of the same contract. Only because both claims arose out of the same normative source, the tribunal, held that the claims could be deemed as the same. Thus, the forum selection clause barred the claim.

79. However, in the case at hand, the “normative source” on which the local lawsuit was based is Kronos’ Constitution and its local legislation, while the normative source from which this claim arises is the expropriation provision set forth in the KT-BIT.

80. Thus, the normative sources are different and, even applying the “same fundamental basis” test, the claims are still not the same.

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122 *Id.*, ¶67.
123 *Supervision*, ¶315.
124 *Pantechniki*, ¶67.
125 *H&H Enterprises*, ¶374/376.
126 *RA*, p. 8, ¶21.
ii. The present claim and the local lawsuit filed before Respondent’s courts seek different effects

81. According to the second requirement of the “same fundamental basis” test, in order to trigger the FITR provision the effects or relief sought in different claims must be the same.\footnote{Pantechniki, ¶67.}

82. In \textit{Pantechniki}, the claim before the arbitral tribunal was barred because both the claim before the Albanian courts and the claim submitted to arbitration concerned compensation. The tribunal stated that if the prayer before the Albanian courts was accepted, it would have granted exactly what the claimant was seeking before the arbitral tribunal.\footnote{Ibid.} Similarly, in \textit{H&H Enterprises} and \textit{Supervision}, the arbitral claims were dismissed because the plaintiffs had already sought compensation before local courts.\footnote{\textit{H&H Enterprises}, ¶¶374/376; \textit{Supervision}, ¶315.}

83. On the contrary, in the case at hand, the relief Claimant sought through the local claim was to suspend or to set aside the Decree,\footnote{PO No.2, p. 56, ¶3.} while the relief that this claim seeks is to obtain compensation for the damages already caused to its investment.\footnote{SUF, p. 36, ¶27; RA, p. 8, ¶23.}

84. Since both claims do not share the same normative source [§II B)(i), \textit{supra}] nor the relief sought, they fail the “same fundamental basis” test and cannot be deemed to be the same.

85. Again, on this ground alone, the FITR provision cannot be applied and the present claim is admissible.

III) \textbf{RESPONDENT’S COUNTERCLAIM IS INADMISSIBLE}

86. Respondent submitted a counterclaim alleging that Claimant has breached Article 9(2) of the KT-BIT.\footnote{ARA, pp. 16/17.} Article 9(2) of the KT-BIT provides:

\begin{quote}
\textit{The Contracting Parties agree that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting investment or international trade}.
\end{quote}
87. However, the counterclaim is inadmissible because: [A] Article 9(2) of the KT-BIT does not create an obligation upon private investors; [B] Separately, Article 9(2) does not create an obligation upon Claimant because, in light of the scope of the KT-BIT, it applies only to contracting States. Further, [C] the counterclaim would also be precluded due to the absence of close connection with the primary claim.

A. **Article 9(2) does not create an obligation enforceable against private investors**

88. Respondent contends that Claimant breached Article 9(2) of the KT-BIT.\(^1\) However, the absence of a legal obligation enforceable against Claimant under the KT-BIT renders the counterclaim inadmissible even if the facts as asserted by Respondent were assumed to be true.\(^2\) The non-binding language of this article evidences that the purpose of this provision is to establish policy goals and not to render private parties liable under the KT-BIT.

89. The ICJ has described admissibility objections as follows:

> “Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.”\(^3\)

90. In the *Methanex* case, for example, the challenges to admissibility assumed all the facts alleged by the claimant to be true. Nonetheless, there existed no breach of the individual provisions pleaded by the plaintiff.\(^4\)

91. In the present case, assuming arguendo that Claimant damaged the environment, Respondent could not seek compensation from Claimant under Article 9(2) of the KT-BIT since this provision creates no enforceable obligation upon Claimant.

92. Article 9(2) uses the “polluter pays” formula as a guideline “in principle” between the two parties of the KT-BIT, *i.e.*, the two sovereigns. This provision should be interpreted in

\(^1\) *Ibid.*

\(^2\) *Oil Platforms*, ¶29.

\(^3\) *Ibid.*

\(^4\) *Methanex*, ¶172.
accordance with Article 31 of the VCLT, i.e., in “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.137

93. The words “should” and “in principle”, evidence that the purpose of this provision is to establish the policy goals and aims at the Contracting Parties. It does not create any immediate obligations on investors -at best, it outlines goals of future possible domestic legislation. Indeed, the Rio Declaration also incorporates the “polluter pays” formula in one of its guiding principles,138 and because it is not expressed in mandatory terms, it has been considered that it “simply lacks the normative character of a rule of law”.139

94. In other words, taking into account its context, Article 9 of the KT-BIT could only be referring to the understandings and aspirations of the parties of the KT-BIT. Indeed, every paragraph of Article 9 of the KT-BIT uses non-binding language and only refer to the Contracting States as the subjects of those provisions.140 Section 1 states “[t]he contracting Parties recognize....”141 Section 2 provides “[e]ach contracting party shall strive to....”142 Section 3 provides “[e]ach contracting party should encourage....” 143

95. Whatever the underlying facts, Article 9(2) offers Respondent no basis to seek compensation from Claimant by way of a counterclaim because it does not create an enforceable obligation upon private investors. Thus, the counterclaim is inadmissible.144

B. Separately, Article 9(2) does not create an obligation upon Claimant because in light of the scope of the KT-BIT, it applies only to contracting States

96. Analyzing Article 9(2) of the KT-BIT together with the article that delimits the scope of the treaty, the Tribunal should conclude that the KT-BIT does not create obligations upon Claimant. Thus, the counterclaim is inadmissible on that separate ground alone.

137 VCLT, Article 31(1).
138 RIO DECLARATION, Principle 16.
139 BIRNIE, BOYLE & REDGWell, p. 322.
140 KT-BIT, Article 9, p. 43.
141 KT-BIT, Article 9(1), p. 43.
142 KT-BIT, Article 9(2), p. 43.
143 KT-BIT, Article 9(3), p. 43.
144 KT-BIT, Article 9(2), p. 43.
97. If an obligation were intended to arise under the KT-BIT, it should be within the scope of its Article 2, which establishes that:

“I. This Treaty shall apply to measures adopted or maintained by a Party relating to an investor of the other Contracting Party or a covered investment.

2. The obligations in Articles 4 to 9 apply to a person of a Contracting Party when it exercises a regulatory, administrative or other governmental authority delegated to it by that Contracting Party.” 145

98. Neither section provides even the possibility of establishing obligations upon investors. The first section provides that the KT-BIT only applies to measures adopted or maintained by a Party to the KT-BIT, i.e., Kronos or Ticadia.

99. In the present case, Claimant is not a party to the KT-BIT, therefore, liability for the alleged pollution falls outside the scope of the first section.

100. Furthermore, Article 2, Section 2 only creates an obligation upon a person when the Contracting Party has delegated some authority to that person. In this case, Respondent has never alleged that it has delegated authority of any sort upon Claimant. Nothing in the record is to the contrary. Simply put, there can be no obligation imposed upon Claimant within the scope of the second section.

101. Nothing in the text or the scope of the KT-BIT evidences any intention to impose an obligation enforceable directly against an investor. Accordingly, this Tribunal should conclude that the KT-BIT does not impose any obligation upon Claimant.

102. Even assuming that the facts stated by Respondent were true, there is no enforceable claim under the KT-BIT against Claimant. As a result, the counterclaim is inadmissible.

C. **The absence of close connection with the primary claim also precludes the counterclaim**

103. Respondent’s counterclaim lacks close connection with Claimant’s claim since it is not a valid counterclaim based on the KT-BIT.

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145 KT-BIT, Article 9, p. 43.
104. Investment tribunals have widely accepted that a counterclaim must have a close connection to the primary claim to be admissible.\textsuperscript{146} This requirement derives from international custom since it has been included in several investment treaties.\textsuperscript{147} This understanding was shared by the tribunal in the \textit{Saluka} case:

\textit{“In relation specifically to counterclaims, it is necessary that they must also satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response. In particular, a legitimate counterclaim must have a close connection with the primary claim to which it is a response”.}\textsuperscript{148}[Emphasis added]

105. Tribunals have consistently endorsed the requirement of close connection between the original claim and the counterclaim claim.\textsuperscript{149} Particularly, the \textit{Klöckner} tribunal held that to establish a close connection, both claims had to be \textit{“indivisible”} and \textit{“interdependent”}.\textsuperscript{150} The close connection test has been described as the requirement for the counterclaim to stem from the same legal instrument as the primary claim.\textsuperscript{151} As a result, counterclaims have been dismissed when they arose out of legal sources different than the ones underlying the primary claim.\textsuperscript{152}

106. The \textit{Amco} tribunal dismissed a counterclaim since it was \textit{“clearly [about] a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment”}.\textsuperscript{153} Similarly, in \textit{Harris}, the tribunal also dismissed the host state’s counterclaim because it did not arise out of an obligation within the contract on which the primary claim was based, and therefore, the tribunal concluded that such obligation could only stem from an application of the host state’s local law.\textsuperscript{154}

\begin{itemize}
  \item \textsuperscript{146} \textit{Amco}, ¶\textsuperscript{125}; \textit{Paushok}, ¶\textsuperscript{695/696}; \textit{Saluka}, ¶\textsuperscript{74}; \textit{American Bell}, (as cited in \textit{Kjos}, p. \textsuperscript{151}); \textit{MetalTech}, ¶\textsuperscript{407}; \textit{Morrison}, pp. 54, 82-84; \textit{Amto}, ¶\textsuperscript{118}; \textit{Oxus}, ¶\textsuperscript{956}.
  \item \textsuperscript{147} \textit{UNCITRAL RULES}, Article 19.3; \textit{ICSID CONVENTION}, Articles 25(1), 46; \textit{CLAIMS SETTLEMENT DECLARATION}, Article II (1).
  \item \textsuperscript{148} \textit{Saluka}, ¶\textsuperscript{61}.
  \item \textsuperscript{149} \textit{Amco}, ¶\textsuperscript{125}; \textit{Paushok}, ¶\textsuperscript{695/696}; \textit{Saluka}, ¶\textsuperscript{74}; \textit{Harris}, ¶\textsuperscript{176}; \textit{ALDRICH}, p. 166.
  \item \textsuperscript{150} \textit{Klöckner} (as cited in \textit{Saluka}, ¶\textsuperscript{65}).
  \item \textsuperscript{151} \textit{Amco}, ¶\textsuperscript{125}; \textit{Paushok}, ¶\textsuperscript{695/696}; \textit{Saluka}, ¶\textsuperscript{74}; \textit{Harris}, ¶\textsuperscript{176}.
  \item \textsuperscript{152} \textit{Amto}, ¶\textsuperscript{118}; \textit{Oxus}, ¶\textsuperscript{956}; \textit{Amco}, ¶\textsuperscript{125}; \textit{Paushok}, ¶\textsuperscript{695/696}; \textit{Saluka}, ¶\textsuperscript{74}; \textit{Harris}, ¶\textsuperscript{176}.
  \item \textsuperscript{153} \textit{Amco}, ¶\textsuperscript{125}.
  \item \textsuperscript{154} \textit{Harris}, ¶\textsuperscript{176}.
\end{itemize}
107. In this case, Respondent’s counterclaim likewise lacks such close connection, since it does not arise out of the same legal instrument as Claimant’s primary claim, *i.e.*, the KT-BIT.

108. As was shown above, [§§III (A) & III (B), *supra*] there can be no obligation on Claimant under the KT-BIT. Since such obligation does not arise out of the KT-BIT, it can only stem from Kronian local law, which is not even invoked here.

109. Claimant’s primary claim arises out of the KT-BIT. Respondent’s counterclaim does not arise under that treaty. Accordingly, there is no “close connection” between both claims and the counterclaim should be dismissed on that basis alone.
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110. Claimant hereby submits its claim on the merits. Due to Respondent’s measure, Claimant lost control of its investment, which was also rendered useless and deprived of any value.\(^{155}\) Therefore, [I)] the Decree issued by Respondent is an indirect expropriation of Claimant’s investment and [II)] cannot be justified as a legitimate use of its police powers. Finally, [III)] Respondent measure cannot be framed within the General Exceptions clause.

I) Respondent Expropriated Claimant’s Investment

111. Respondent breached Article 7 of the KT-BIT, which reads:

\[\text{“Neither Contracting Party shall nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalization or expropriation except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of due compensation”}.\(^{156}\)

112. Respondent’s measure, as described in ¶18 above, constitutes a breach of the expropriation standard of the treaty. Especially, Respondent failed to implement its measure for a “public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of due compensation” as prescribed by the treaty.\(^{157}\)

113. Accordingly, Claimant contends that [A] the Decree amounted to an indirect expropriation of Claimant’s investment; and [B] it does not fall within the exceptions of Article 7 of the KT-BIT.

A. The Decree amounted to an indirect expropriation pursuant to the KT-BIT

114. The Decree was equivalent to an expropriation. It destroyed Claimant’s business on one day. Nothing has been left.

115. The BIT prohibits indirect expropriation, but, it provides no express standard regarding what will be considered an indirect expropriation. This, however, is a text-book example, if any existed, of an indirect expropriation – i.e., an expropriation not explicitly term as such by the expropriator.

\(^{155}\) SUF, p. 36, ¶23.

\(^{156}\) KT-BIT, Article 7 (1), p. 42.

\(^{157}\) Ibid.
116. To determine whether a measure could be considered as an indirect expropriation, three different and non-cumulative\(^\text{158}\) elements have been acknowledged in several cases: [i] the measure must substantially affect the value of the investment; [ii] the investor must have been deprived of the control of its property; and [iii], the effects of the measure must not be temporary.\(^\text{159}\) The Decree complies with this test, as will be shown in the following sections.

i. **The Decree substantially affected Claimant’s investment**

117. The Decree had a substantial effect on Claimant’s investment – i.e. it wiped it out, it destroyed it, it put Claimant out of business. No more is necessary to satisfy this condition on the undisputed facts here.

118. Both jurisprudence\(^\text{160}\) and scholars\(^\text{161}\) recognize that in a case of indirect expropriation, it does not really matter whether “title” has shifted – indeed, title is irrelevant in an indirect expropriation. What matters is whether the measure taken by the State deprived the investor of the benefits of its investment.\(^\text{162}\) In that vein, as stated by Professors FORTIER & DRYMER, an expropriation occurs when the rights of the investor are rendered “so useless that they must be deemed to have been expropriated”.\(^\text{163}\) This is precisely what happened here on the undisputed facts in the record.

119. In the *Metalclad* case, the tribunal ruled in favor of the investor as it held that the term “expropriation” includes any “incidental interference with the use of property which has the effect of depriving the owner ... of the use or reasonably-to-be-expected economic benefit of property ... ”.\(^\text{164}\) In that case, the plaintiff was authorized to construct and operate a transfer

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\(^\text{158}\) Nikiema, p. 13; Dolzer, p. 65; Newcombe I, pp. 392/449; Tippetts, pp. 225/226; Tidewater, ¶138; Metalclad, ¶111; Biloune, ¶209; Azurix, ¶309; Tecmed, ¶116; Phelps, ¶121; Starrett, ¶154; Vivendi I, ¶7.5.11; Glamis, ¶536; Total, ¶196.

\(^\text{159}\) Schreuer & Dolzer, p. 112.

\(^\text{160}\) Goetz, ¶124; CME, ¶591; Tecmed, ¶114; Waste Management, ¶114; Sporrong, ¶63; Suez, ¶132.

\(^\text{161}\) Reisman & Sloane, pp. 115/150; UNCTAD, p. 20; Schreuer I, p. 3, ¶4.

\(^\text{162}\) Ibid.

\(^\text{163}\) Fortier & Drymer, p. 305.

\(^\text{164}\) Metalclad, ¶¶106/107.
station of hazardous waste in Mexico and claimed, *inter alia*, that the withdrawal of the authorization constituted an indirect expropriation.\(^{165}\) This is exactly what occurs in our case.

120. In the *Telenor* case, the tribunal likewise held that a measure is expropriatory when “*the investment has suffered substantial erosion of value*”.\(^{166}\) Moreover, the tribunals in *Norwegian* and *Middle East Cement* have found, following Professors DOLZER and SCHREUER that, when a measure has had a substantial effect and lasted for a significant period, a taking has occurred.\(^{167}\)

121. In addition, Professors DOLZER and SCHREUER have likewise stated that the issue of control becomes clear when the investor is deprived of the value of its investment and is left with nothing but an “*entity that does not amount to much more than the shell of the former investment*”.\(^{168}\) Those words can be perfectly applied to this case.

122. In this case, Respondent issued the Decree and, as consequence, Claimant’s property became useless, it effectively ceased to exist when viewed as an ongoing business.\(^{169}\)

123. Claimant’s activities in Kronos started on 20 April 2000, when it won a public auction conducted by Respondent’s Government for the exploitation of lindoro.\(^{170}\) It took Claimant eight years to install all its facilities before it could actually start the exploitation.\(^{171}\) Claimant had a worldwide reputation for exploration and exploitation of rare earth metals at the time the concession was granted,\(^{172}\) and lindoro was then a promising prospect and an uncertain possibility.\(^{173}\) It took years of effort for Claimant to bring that possibility to fruition.

124. The endeavor, when it finally came on line, had such an auspicious future that even the President of Kronos joined in the inauguration of Claimant’s facilities on 1 September 2008.\(^{174}\) The

\(^{165}\) *Id.*, ¶103.

\(^{166}\) *Telenor*, ¶79.

\(^{167}\) SCHREUER & DOLZER, p. 101; *Norwegian*, p. 324; *Middle East Cement*, ¶107.

\(^{168}\) SCHREUER & DOLZER, p. 107.

\(^{169}\) SUF, p. 36, ¶23.

\(^{170}\) RA, p. 4, ¶4.

\(^{171}\) SUF, p.33, ¶8.

\(^{172}\) *Id.*, p. 32, ¶6.

\(^{173}\) Exhibit 1, p. 46.

\(^{174}\) Exhibit 3, p. 49.
President had high hopes in the partnership between Claimant and Kronos and considered it of
great importance for the development of the Respondent. He even stated that “Fenoscadia has
our full support to increase the efficiency of its activities – the better their results, the better for
Kronos”.175

125. This would not be the last time Claimant would receive such encouraging words. As the record
states, the President highlighted on 2 January 2010 and on 2 January 2013 the fruits of the
partnership between Claimant and Kronos.176

126. In 2010 Claimant transferred its main operations to Kronos, relying on the good relationship
between both parties.177 After the transfer, Claimant was one of the five largest foreign
companies in Kronos.178 Claimant was in fact the sole company exploiting the mineral in
Kronos.179 During all its history there, Claimant had always been found in full compliance with
its environmental obligations.180

127. After a new government took office, Respondent forced Claimant to shut down all its
operations.181 The new President issued the Decree, which declared the exploitation of lindoro
prohibited in all Kronian territory182 and terminated Claimant’s business with “immediate
effect”.183

128. This Decree rendered useless Claimant’s state-of-the-art mining facilities, which required eight
years to be finished184 and employed 200 Kronian citizens.185 It also terminated the Agreement,
which Claimant won in the public auction held by Respondent.186 Finally, it also ordered the

175 Ibid.
176 Ibid.
177 SUF, p. 33, ¶12.
178 RA, p. 6, ¶9.
179 SUF, p. 33, ¶11.
180 Id., p. 35, ¶19.
181 Id., p. 36, ¶23.
182 Exhibit 5, p. 52, Article 1.
183 Ibid.
184 SUF, p.33, ¶8.
185 Id., p. 33, ¶11.
186 Id., p. 32, ¶5.
seizure of a ton of Claimant’s stored lindoro,\(^{187}\) when part of it was already prepared to be exported,\(^{188}\) a material that had already been processed and could therefore not have even arguably contributed to any of the conveniently discovered pollution.

129. Due to the cessation of revenue, Claimant was unable to honor its contractual obligations\(^{189}\) to its customers and was left with no other choice than to shut down its facilities and let go all its employees.\(^{190}\)

130. The Decree rendered Claimant’s investment so useless that there is no doubt that an expropriation occurred. Though Claimant still formally owns its property, Respondent’s actions have deprived Claimant of any benefit and rendered such property worthless.

ii. **Claimant lost the control of its investment**

131. The Decree also affected Claimant’s control of its investment.

132. After the Decree, there was simply nothing to “control” because the investment itself disappeared as an ongoing concern. What was left perhaps was an inert mining facility locked in place at a Site in which a prohibited rare metal had been historically extracted. Claimant, in effect, had no further control of any concrete business left over.

133. As was held by the tribunal in the *Pope & Talbot* case, an expropriation may happen if the interference with the investor’s property is restrictively enough to assume that it has been taken from it.\(^{191}\) Similarly, the tribunal in the *LG&E* case concluded that where an expropriation occurred the “enjoyment can be said to be ‘neutralized’ where a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment”.\(^{192}\) It also stated that the rule is met when the “impact [on the investment] is substantial”.\(^{193}\)

\(^{187}\) PO No.2, p. 56, ¶9.

\(^{188}\) RA, p. 7, ¶17.

\(^{189}\) SUF, p. 36, ¶24.

\(^{190}\) SUF, p. 36, ¶27.

\(^{191}\) *Pope & Talbot*, ¶102.

\(^{192}\) *LG&E*, ¶188.

\(^{193}\) Id., ¶191.
134. In the *Sempra* case, the tribunal likewise held that an indirect expropriation requires “*that the investor be no longer in control of its business operations*”.\(^{194}\) The tribunal in the *Revere* case also followed the same approach and analyzed whether the management of the investor had been affected.\(^{195}\) It found that in large companies the enjoyment of control is through a “*stream of decisions*”.\(^{196}\) The *Harvard Draft* within its definition of taking of property also included “*unreasonable interference with the use or enjoyment of property*”.\(^{197}\)

135. In the present case, Claimant’s activities ceased completely due to Respondent’s Decree.\(^{198}\) Profits were not just diminished: they were transformed into losses. Moreover, not only Respondent prohibited the exploitation of lindoro ending with any possible revenue for Claimant’s investment, but also directly confiscated Claimant’s storage of it.

136. Therefore, this is a text book case of loss of control. Surely, there cannot be greater “loss of control” that the control remaining over an investment rendered a nullity, useless, non-existent.

iii. **The effects of the Decree are permanent**

137. Finally, Respondent’s measure is expropriatory because its effects are permanent. The feature of “permanence” requires here no substantial discussion. Claimant’s business is *permanently* over. It is not a business anymore, it *was* a business until the Decree destroyed it.

138. The duration of the challenged measure is a relevant aspect to determine if an expropriation took place.\(^{199}\) To this regard, the *Tippetts* tribunal stated that, in order to constitute an expropriation, a measure must not be ephemeral.\(^{200}\) This element was also noted by the tribunal in the *LG&E* case, where it found that expropriations generally cannot have a temporary nature.\(^{201}\)

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\(^{194}\) *Sempra*, ¶285.

\(^{195}\) *Revere*, ¶¶291/292.

\(^{196}\) *Id.*, ¶292.

\(^{197}\) *Harvard Draft*, Article 10.3. (b).

\(^{198}\) SUF, p. 36, ¶27.

\(^{199}\) *Schreuer & Dölzer*, p. 112; *Christie*, p. 307; *Wagner*, p. 465; *Reisman & Sloane*, p. 115; *Middle East Cement*, ¶107.

\(^{200}\) *Tippetts*, ¶¶219/225.

\(^{201}\) *LG&E*, ¶193.
139. The tribunal in the *Wena I* case, when deciding whether the inference by the State Host amounted to an expropriation, stated that “to seize and illegally possess ... for nearly a year is more than an ephemeral interference”.\(^{202}\) In addition, the *ad hoc* committee in *Wena II* confirmed that the taking suffered by the plaintiff was significant enough to affirm that the “expropriation was indeed a total and permanent one”.\(^{203}\)

140. The Decree was issued and remains in force since September 7, 2016, and there is no reference to its duration in its wording.\(^{204}\) Claimant requested Respondent to suspend the effects of the measure,\(^{205}\) but, on February 22, 2017, Respondent announced that the Decree would not be revoked.\(^{206}\) Moreover, the President of Kronos declared in the Presidential Annual Speech that “there will be no more lindoro in Kronos”.\(^{207}\) “No more” sounds as permanent as it gets – at least, from what the record suggest, no more lindoro in the hands of the anyone other than the current government and its political allies.\(^{208}\)

141. Therefore, the measure was permanent and clear: no more lindoro in Kronos, forever.

142. For all the aforementioned reasons, Respondent indirectly expropriated Claimant’s investment in breach of Article 7 of the KT-BIT and thus, Claimant is entitled to compensation.

**B. The Decree does not fall within the exceptions of the expropriation clause of the KT-BIT**

143. The Decree entails an illegal expropriation, since it does not comply with the exceptions set forth in Article 7 of the BIT.

144. In accordance to the KT-BIT, a measure adopted by the Contracting Parties shall not be considered expropriatory if it is for a public purpose, in accordance with due process of law,

\(^{202}\) *Wena I*, ¶99.

\(^{203}\) *Wena II*, ¶120.

\(^{204}\) SUF, p. 36, ¶23.

\(^{205}\) *Id.*, p. 36, ¶24/25.

\(^{206}\) *Id.*, p. 36, ¶26.

\(^{207}\) Exhibit, p. 53.

\(^{208}\) SUF, 35, ¶17; Exhibit 7, p. 54.
effected in a non-discriminatory manner and upon payment of due compensation. This is almost elemental as a matter of international law.

145. For example, in the LG&E case, the tribunal held that “expropriation in any of its modalities requires due process and compensation under international law”.209

146. The Decree issued by Respondent [i] fails to comply with the due process of law requirement, and [ii] no compensation was payed to Claimant.

i. The issuance of the Decree was in breach of the due process of law requirement

147. Due process of law in the expropriation context requires compliance with “the law of the host state”.210 Likewise, in the AIG case, the tribunal stated that an expropriation would be in accordance to international law if it was “based on the application of duly adopted laws”.211 This is elemental under international law, as documented in Oppenheim’s International Law.212

148. Further, the tribunal in the ADC case stated that although it is recognized in international law that while a sovereign State has the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited.213 That boundary is found in the rule of law which “includes treaty law”.214

149. The transparency clause in Article 8 of the KT-BIT provides that:

“... the concerned Contracting Party shall endeavour its best efforts to provide interested persons and enterprises a fair opportunity to discuss the proposed measure prior to its entry into force”.215

150. Therefore, when a contracting Party is considering the adoption of a measure which may affect a covered investment, that Contracting Party shall provide interested enterprises a fair opportunity to discuss the proposed measure “prior to its entry into force”.216 Furthermore, it

209 LG&E, ¶186.
210 NEWCOMBE & PARADELL, p. 376.
211 AIG, ¶10.5.1.
212 JENNINGS & WATTS, pp. 919/920.
213 ADC, ¶423.
214 Ibid.
215 KT-BIT, Article. 8, p. 42.
216 Ibid.
establishes that such proposed measure should be published before its adoption.\textsuperscript{217} None of that happened here, as the uncontested record shows.

151. In particular, four months elapsed between the publication of the Study alleging contamination due to the exploitation of lindoro on May 15, 2016\textsuperscript{218} and the issuance of the Decree on September 7, 2016.\textsuperscript{219} Enough time for Respondent to give Claimant a “fair opportunity” to discuss the proposed measure. Nevertheless, Respondent never gave Claimant any such opportunity.

152. Hence, Respondent violated its own due process requirement, thus violating Article 8 of the KT-BIT. It is fair to say that Claimant was offered no process at all – much less process that was “due”.

ii. Claimant was not compensated for the expropriation of its investment

153. In addition, Respondent did not pay any compensation to Claimant.

154. Payment of due compensation is a “consideration relevant to the lawfulness of a taking under customary international law”.\textsuperscript{220} In the \textit{ADC} case, the tribunal also analyzed the lack of compensation as relevant to expropriation.\textsuperscript{221}

155. The tribunal in \textit{Vivendi I}, stated that, although the host state may say that the measure was taken for a public purpose and in a non-discriminatory manner, it would still breach the terms of the treaty if no compensation was paid to the investor.\textsuperscript{222} It held commonsensically that if “public purpose” were sufficient to render a measure “non expropriatory”, “\textit{then there would never be a compensable taking for a public purpose}”.\textsuperscript{223}

156. Likewise, in the case at hand, Respondent failed to compensate Claimant “\textit{without delay}” and, thus, it breached Article 7 of the KT-BIT.

\textsuperscript{217} \textit{Ibid.}
\textsuperscript{218} SUF, p. 35, ¶22.
\textsuperscript{219} \textit{Id.}, p. 36, ¶23.
\textsuperscript{220} \textit{BROWER & BRUESCHKE}, p. 499.
\textsuperscript{221} \textit{ADC}, ¶444.
\textsuperscript{222} \textit{Vivendi I}, ¶7.5.21.
\textsuperscript{223} \textit{Ibid.}
II) **Respondent’s actions cannot be justified as a legitimate use of its police powers**

157. The Decree is not a lawful exercise of police powers, as Respondent may claim. Claimant acknowledges the State to have legitimate police powers, in this case allegedly over public health. However, such exercise is not unchecked or not beyond review for abuse.

158. Two factors have been identified to determine entitlement of compensation: first, the character; and second, the practical impact of the regulatory measure.\(^\text{224}\) Likewise, the tribunal in the *S.D. Myers* case stated that “international law makes it appropriate for tribunals to examine the purpose and effect of government measures”.\(^\text{225}\)

159. For that reason, Claimant submits that the issuance of the Decree is not a lawful exercise of police powers because [A] it lacks a *bona fide* purpose, and [B] it is disproportionate. Separately, Claimant submits that [C] even in the face of a *bona fide* purpose and proportionality, due compensation must be paid.

A. **The Decree lacks a *bona fide* purpose**

160. Respondent may allege that the Decree was intended to serve Kronos’ public interest. That is not so. The Decree was intended to close down Claimant’s business eventually to place it in the hands of the government and its political allies.

161. In the *Invesmart* case, the tribunal had to determine whether the measure taken by the host state had a *bona fide* purpose. It analyzed whether it was a “non-discriminatory regulation and aimed at the general welfare”.\(^\text{226}\) The tribunal in the *Bear Creek* case, analyzed the circumstances under which the host state issued the disputed measure and stated that the respondent “arbitrarily decided to deprive Claimant of its investment”,\(^\text{227}\) and therefore could not be

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\(^{224}\) *Fortier & Drymer*, p. 326.

\(^{225}\) *S. D. Myers*, ¶281.

\(^{226}\) *Invesmart*, ¶497.

\(^{227}\) *Bear Creek*, ¶455.
deemed a “bona fide non-discriminatory regulation aimed at general welfare”. This conclusion was reinforced by statements made by ranking government authorities.

162. In the case at hand, the facts are similar. Respondent’s newly elected Government had a highly nationalist agenda. Two measures were implanted to that end by congressional majority. First, the sanctioning of KEA. Second, the creation of a new Ministry tasked expressly with enforcing the KEA, and to “strictly supervise Claimant’s activities” – as strictness that had no support in any previous regulatory or health violation by Claimant. Expropriation was “in the air as soon as the new government took power”.

163. Inspection, however “strict”, did not accomplish the result desired by Respondent’s Government. Even a “strict” inspection by the new inspector found Claimant once again in full compliance with its environmental obligations. Nonetheless, this would not prevent Respondent to continue with its purpose.

164. To further pursue its goal, Respondent granted the University the necessary funds to conduct a research regarding the exploitation of lindoro. Predictably, the Study found that the contamination of the Rhea River was a consequence of the exploitation of lindoro, but could not even establish a causal link between the exploitation of lindoro and the incidence of specific diseases. Furthermore, after the issuance of the Decree the levels of diseases allegedly caused by the exploitation of lindoro did not significantly decrease. Even worse, Claimant was not

228 Ibid.
229 Ibid.
230 SUF, p. 34, ¶14.
231 Id., p. 35, ¶17.
232 Id., p. 34, ¶16.
233 Id., p. 35, ¶18.
234 Id., p. 35, ¶19.
235 Id., p. 35, ¶21.
236 Id., p. 35, ¶22.
237 Ibid.
238 PO No.3, p. 59, ¶1.
granted an opportunity to produce any evidence, nor does the record show any involvement from the scientific community.

165. Indeed, the contaminants allegedly traced to lindoro were not even unique to it but were present in the exploitation of numerous rare earth metals.

166. Based on the Study, Respondent issued the Decree “against Claimant’s intolerable activities”. This would finally be the conclusion of a convoluted scheme, as denounced by the opposing party on the day KEA was sanctioned, which sought to “replace Claimant for a domestic enterprise”. Furthermore, the prestigious magazine Global Mining published an article stating that by 2019, Respondent will reintroduce the exploitation of lindoro by a “domestic company”.

167. Therefore, the circumstances under which Claimant was deprived of its investment suggest nothing but a nefarious purpose, not an interest in the public good.

B. The Decree is disproportionate

168. According to the tribunal in the Occidental II case, the “principle of proportionality is applicable as a matter of general international law”. In the Tecmed case, the tribunal stated that there must be a justifiable proportionality between the regulatory measure and the goal it sought to be accomplished for the measure to pass muster. Similarly, in cases such as LG&E and Deutsche Bank, the tribunals concluded that the measure must be proportionate to its ends.

169. Likewise, the tribunal in the Azurix case discussed that proportionality would not be achieved if the investor endures an “excessive burden”. Moreover, Professor RATNER also recognized

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240 PO No.2, p. 56, ¶4.
241 ARA, p. 16, ¶20.
242 SUF, p. 35, ¶17.
243 Exhibit 7, p. 54.
244 Occidental II, ¶427.
245 Tecmed, ¶122.
246 LG&E, ¶195; Deutsche Bank, ¶522.
247 Azurix, ¶311.
that to determine whether a regulatory measure amounted to an expropriation, proportionality between the damage made to the investor and the benefit to the public should be considered.  

Furthermore, in the Occidental II case, to determine proportionality the tribunal analyzed if the host state had other options at its disposal. The tribunal stated that the overarching principle of proportionality balances the plaintiff interests against the “true nature and effect of the conduct being censored.” It concluded that the total loss inflicted on the plaintiff was out of proportion to the wrong allegedly sought to be remedied.

As stated in [§I]A supra, Claimant suffered the brunt of Respondent’s measure. Respondent turned to the business “death penalty” and not only prohibited the sole activity of Claimant in Kronos, but seized of all its extracted minerals.

Respondent showed no intention of resorting to lesser or different regulatory tools which would have been proportionate to the harm allegedly triggering the regulatory action. It simply used the pretext of public interest to destroy Claimant’s business.

Respondent had the right and power under the Agreement to conduct inspections “at any given moment” and eventually call for any necessary measures if the results demanded it. By acting this way, Respondent could have suspended all the exploitation of lindoro in its territory since Claimant was the sole company exploiting the mineral.

Respondent could have suspended the license temporarily and issued a fine to deal with the remediation work and given the opportunity to Claimant to propose a plan to make the exploitation of lindoro sustainable. Fines have been routinely used in the mining industry in cases of demonstrable pollution.

It is common in the mining industry to suspend licenses and issue fines when environmental concerns arise. For instance, in October 2010, the Government of Ghana imposed Newmont

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248 RATNER, pp. 482/83.
249 Occidental II, ¶450.
250 Ibid.
251 Exhibit 5, p.52.
252 Ibid.
253 Exhibit 2, p. 48, Article 2.2.3.
Mining a USD 5,000,000 fine for the spill of cyanide which resulted in water contamination and fish mortality.\textsuperscript{254}

176. Moreover, on 17 May 2013, the Chilean government paralyzed Barrick Gold’s mining project “Pascua Lama” and imposed a USD 16,000,000 fine.\textsuperscript{255} Furthermore, due to a cyanide spill in April 2015, Barrick Gold’s concession to exploit the Veladero mine in Argentina was suspended and was fined for USD 9,800,000.\textsuperscript{256} In that case, the company was given an opportunity to present a plan which included a USD 500,000,000 five-year investment which sought to repair the damages.\textsuperscript{257}

177. Also, in 2015 after a tailings dam failed in Brazil, the exploitation of the mine was suspended\textsuperscript{258} and Samarco, a joint venture created by Vale S.A. and BHP Billiton Ltd., was fined for USD 2,300,000,000 to address the restoration work and compensation.\textsuperscript{259} The government had also sued the three companies and a settlement is being negotiated.\textsuperscript{260}

178. It is of course unsurprising that no other “lesser” measures were proposed – the sole purpose was to deprived Claimant of its investment, which plainly could not be accomplished by any lesser measure than total an immediate destruction of its business.

179. Therefore, Respondent deliberately resorted to an openly disproportionate measure in total disregard of Claimant’s investment, when less harmful measure could have been taken if the genuine purpose of Respondent regulatory efforts had been the protection of public health.

\textsuperscript{254} ENS.  
\textsuperscript{255} FORBES.  
\textsuperscript{256} REUTERS I.  
\textsuperscript{257} Ibid.  
\textsuperscript{258} REUTERS II.  
\textsuperscript{259} ABC.  
\textsuperscript{260} BLOOMBERG.
C. **Even if the Tribunal concludes that the Decree was proportional and taken in good faith Claimant must be compensated**

180. Proportionality and good faith do not justify a lack of payment. Non-payment would still breach the exclusion established in Article 7 of the KT-BIT, even if the regulatory measure had been proportional and taken in good faith, not the case here.

181. In the *Compañía Santa Elena* case, the tribunal stated that purpose of a taking is irrelevant: when a taking occurs, a compensation is due.\(^{261}\) Professors PAULSSON & DOUGLAS reached the same conclusion when the value of an investment was completely destroyed.\(^{262}\) Finally, Judge Higgins also stated that according to customary international law, compensation is due in case of takings.\(^{263}\)

182. As is proven by the record, Claimant did not receive any compensation for the loss it suffered due to the measure implemented by Respondent.

183. Hence, the Tribunal should follow the findings of the vast majority of cases and declared that the Decree was an abusive exercise of the police powers by Respondent, and that Claimant is entitled to compensation.

**III) **THE DECREE DOES NOT FALL WITHIN THE EXCEPTIONS CLAUSE OF THE KT-BIT

184. Finally, Claimant submits that the action taken by Respondent does not fall within the General Exceptions clause of the KT-BIT, which provides that:

> “... [the Contracting Parties] may adopt or enforce a measure necessary ...

> However, the measures undertaken pursuant to the preceding paragraph must not be: ... a disguised restriction on international trade or investment”\(^{264}\)

185. Therefore, the Contracting Parties may take measures which are “necessary” and not be held liable for any breach of the standards contained within the Treaty – what are known as “precluded measures”. It also provides that the measures taken under this article must not be a

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\(^{261}\) *Compañía Santa Elena*, ¶72.

\(^{262}\) PAULSSON & DOUGLAS, p. 158.

\(^{263}\) HIGGINS, p. 324.

\(^{264}\) KT-BIT, Article 10, 2 (a), pp. 43/44.
“disguised restriction on international ... investment”.265 Professor NEWCOMBE stated that though the use of general exceptions is uncommon, there are at least 20 international investment agreements which contain GATT-like general exceptions.266

186. Since the wording of Article 10 of the KT-BIT is similar to that of Article XX of the GATT,267 the Tribunal should follow the standards set by the WTO jurisprudence in order to determine the necessity and the exceptions contained in the BIT.

187. For that reason, [A] the Decree does not comply with the standard of necessity; and additionally [B] the Decree is a disguised restriction on international investment. It does not, therefore, constitute a “non-precluded” measure absolving Respondent of any liability under the KT-BIT.

A. **The Decree does not comply with the standard of necessity**

188. The Decree is not a necessary measure under the standards laid down by WTO jurisprudence.

189. Professor HUDEC stated that when general exclusion clauses are invoked, tribunals have consistently interpreted them in a narrow way.268 The same criterion was held by the Canfor tribunal, where it stated that exceptions are to be interpreted narrowly.269 Similarly, the panel in the Canada-Ice Cream case held that exceptions are to be construed narrowly.270 This conclusion was also shared by the panel in the Canada-Tariffs case, where it stated that “exceptions to obligations of trade liberalization must perforce be viewed with caution”.271

190. The relevant criterion here regarding “necessity” is the “least trade restrictive” test used by the WTO, which establishes that, when a party is designing a measure to achieve a particular goal, it should not be more restrictive than necessary to achieve the legitimate purpose.272 A measure


266 NEWCOMBE II, p. 3.

267 GATT, Article XX.


269 *Canfor*, ¶187.

270 *Canada-Ice Cream*, ¶59.

271 *Canada-Tariffs*, ¶122.

272 ALCARAZ, p. 82.
is more restrictive than necessary “when the objective pursued can be achieved through alternative measures”.  

191. A measure could thus be considered “necessary” by comparing it with its possible alternatives, which may be less trade restrictive if they achieve the pursued goal.  

274 Professor SYKES has stated that least restrictive measures “play an essential role in the law of the World Trade Organization”.  

192. In the US-Tariffs case, the panel held that a measure taken by a party which was contrary to another GATT provision could not be justified as “necessary” if a different measure that could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. The panel in the Thailand-Cigarettes case used the same criterion and concluded that the measure taken by Thailand would be considered “necessary” if “there were no alternative measure”.  

193. The Korean-Measures case is to the same effect. There, the appellate body held that Korea did not prove that there were no other alternative means. Similarly, the appellate body in the Brazil-Measures case held that a measure would be regarded as necessary by comparing it with its other alternatives “which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued”.  

194. In other words, the Tribunal should consider whether Respondent could have taken a different measure to avoid breaching the provisions contained within the BIT.  

195. Claimant has already shown in [§II) B)(i) supra] that Respondent could have taken a different measure, such as the temporarily suspension of the activity at the Site together possible with a fine. These options would have not breached the standards set in the BIT and would have secured the same result.

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273 TBT.  
274 FONTANELLI, p. 38.  
275 SYKES, p. 403.  
277 Thailand-Cigarettes, ¶75.  
278 Korean-Measures, ¶182.  
279 Brazil-Measures, ¶156.
Therefore, the conduct of Respondent cannot be considered “necessary”, and therefore falls outside the General Exceptions clause of the KT-BIT.

B. **The Decree is a disguised restriction on international investments**

The Decree also falls outside Article 10 of the KT-BIT since it is a restriction on international investment.

The appellate body in the *US-Gasoline* case stated that this exception within Article XX of the GATT – which has similar wording with Article 10.2.2 of the KT-BIT – should be interpreted in a “broad in scope and reach”. Article XX of the GATT is applicable to measures for which an apparent legitimate purpose is just a “disguise” for an “improper purpose”; that is to say, an “abuse of the right to adopt measures for legitimate reasons”.

Likewise, the panel in *EC-Measures* case considered that a measure that formally met the requirements contained within Article XX will amount to “an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives”.

In the present case, Respondent may attempt to conceal the true purpose of the Decree, under the guise of an exception within the General Exception clause. Respondent stated that the Decree was issued for the “utmost importance of the protection of the environment” However, the real intentions were entirely different and have nothing to do with the “environment” as Claimant showed previously.

As further proof of this, the President of Kronos in its Presidential Annual Speech of 22 January 2017 declared that “it is about time for this country to regain the power over the fate of its own people”, and denounced that the Kronians had been exposed to the careless conduct of foreigners.

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281 BARTELS, p. 123, LO, p. 119.
282 *EC-Measures*, ¶8.236.
283 Exhibit 5, p. 52.
284 Exhibit 6, p. 53.
202. The prestigious magazine Global Mining, in fact, reported that negotiations were being held between Kronos and Ibi for a joint venture to exploit lindoro\textsuperscript{286} – to take over the business Claimant build up with no regard, of course to the supposed concerns about lindoro and its effects on public health. This new agreement will undoubtedly result in a more profitable deal for Respondent, since it will no longer be limited by the 22\% of the gross monthly revenue agreed in the Agreement.\textsuperscript{287}

203. Respondent’s Decree does not fall within the General Exceptions clause of the KT-BIT, since it is a disguise restriction on international investment.

\textsuperscript{286} Exhibit 7, p. 54.

\textsuperscript{287} Exhibit 2, Article 3, p. 48.
PRAYER FOR RELIEF

204. For the ongoing reasons, Claimant respectfully requests this Tribunal to find that:

a) It has jurisdiction over the submitted claim;

b) Claimant’s claim is admissible;

c) Respondent’s counterclaim is inadmissible;

d) Respondent expropriated Claimant’s investment;

e) The Decree falls outside the scope of the General Exception Clause of the applicable BIT;

f) Claimant is entitled to damages in the amount of USD 450,000,000 plus interests as of the date of the issuance of the award; and

g) Respondent should bear the costs of the proceedings, including Claimant’s legal fees, the Tribunal’s and expert’s fees and expenses; and the institutional administrative fees.

Respectfully submitted on September 17, 2018

by

Team Fortier

On behalf of Fenoscadia Limited