ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE
UNDER THE SCC ARBITRATION RULES 2017

FENOSCADIA LIMITED
(CLAIMANT)

V.

THE REPUBLIC OF KRONOS
(RESPONDENT)

SCC ARBITRATION V2018/003858

MEMORIAL FOR CLAIMANT
17TH SEPTEMBER 2018
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STATEMENT OF FACTS

Parties to the dispute

1. The Claimant, Fenoscadia Limited, is an enterprise of Ticadia and was incorporated under the laws of Ticadia since 1993. The Claimant invested in the Republic of Kronos after the issuance of the license to exploit the lindoro given by the Respondent in August 2008. In 1998, 65% of the shares with voting rights of Claimant were acquired by a private equity fund organized under the law of Ticadia.

2. The Respondent is the Republic of Kronos.

Historical background

3. Republic of Kronos is an underdeveloped country, rich in rare earth metals, called the lindoro. The lindoro was discovered in March 1997 situated in the Respondent’s inner territory, called “The Site”.

4. In November 1998, as the Respondent does not have any notable expertise to exploit the lindoro, they invited foreign companies to participate in a public auction for the concession rights to exploit the lindoro. The criteria to be analysed were: technical expertise and financial return for Respondent, based on the net revenue received from the activity.

5. Fenoscadia Limited, the Claimant offered the highest financial return out of the three competitors who participated in the bidding, thus won the public auction on 20 April 2000.

6. On 1 June 2000, the Claimant and the Respondent entered into the Concession Agreement. The Concession Agreement grants the Claimant rights to exploit lindoro in the Site for eighty years. In return, the Claimant had to pay the Respondent 22% of the monthly gross revenue relating to the extraction and commercialization of lindoro. The actual exploitation of lindoro started in August 2008.

7. At the time of the execution of the Concession Agreement, the Respondent had neither a regulatory framework for the mining industry nor a comprehensive environmental regulation, except for internal
rules of the Ministry for Agriculture, Forestry and Land for the inspections. Therefore, the Concession Agreement was the only instrument regulating the exploitation of lindoro in the Site.

 Origins of the dispute

8. In October 2014, Mr. Curat Bazings from the Nationalist Party – a center-left political party with a strong environmentalist and nationalist political agenda – won the Presidential election in Kronos.

9. In March 2015, Mr. Bazings sent to the House a draft bill to regulate environment-sensitive activities in Respondent’s territory, including mining.

10. On 12 June 2015, the House passed the “2015 Kronian Environmental Act” (“KEA”) which among others, KEA dictated miners to protect the waters of the regions where the extraction took place from toxic mine waste and could be subjected to severe penalties, fines, immediate withdrawal of environmental licences with the forfeiture of facilities and obligation to compensate for the environmental damage.

11. The Ministry of Environmental Matters conducted its first inspection under the KEA in September 2015 and the Claimant was found in full compliance of its environmental related obligations.

12. A month later, the Ministry of Environmental Matters in Kronos released data illustrating that the concentration of toxic waste found in the Rhea River had sharply increased since 2010.

13. To support the data, on 15 May 2016, the Study conducted by Kronos Federal University concluded that the contamination of the Rhea River is undoubtedly a direct consequence of the contamination of lindoro. However, the Study does not conclusively establish a causal link between the exploitation of lindoro and the rising of specific incidence of specific diseases.

14. The dispute went for the worst on 7 September 2016, whereby Mr Bazings issued the PD No 2424 which prohibited with immediate effects, the exploitation of lindoro in all Respondent’s territory, revoked the Claimant’s license and subsequently, terminated the Agreement. The Decree had
immediately rendered the Claimant’s property in the Respondent’s territory, notably its facilities for
the exploitation of lindoro, nearly useless.

15. In its media press conference, the Claimant stated that if the Decree were ever sustained, it would
inevitably “become unable to honour contractual obligations with purchasers and suppliers,
accumulating unbearable losses”. Nonetheless, the Claimant would not file for bankruptcy, since the
Claimant remained confident in reaching a negotiated solution with the Respondent’s government.

16. On 8 September 2016, the Claimant applied to the Kronos federal court seeking to suspend the effects
of the Decree until negotiations with the Government took place.

17. However, on 22 February 2017, the Government spokesperson announced that the Decree would not
be revoked. As a result, the Claimant withdrew its appeal to Kronos Circuit Court.

18. On 27 April 2017, the Claimant notified the Respondent’s Ministry for Foreign Affairs of the dispute
and of its intention to pursue legal remedies under the BIT if an agreement would not be reached
through negotiations. However, the Respondent declined to negotiate and has not communicated with
the Claimant since. The Claimant suffered sudden cessation of revenues which led to the dismissal of
the remaining 60 employees.

19. In August 2017, a well-known mining sector magazine published a rumour about the creation of a
new joint venture company between Kronian state owned company and the Republic of Ibi by 2019.
According to cited rumours, Kronos Government would be willing to revoke the Decree should the
negotiations to establish the joint-venture succeed.

Arbitration

20. On 10 November 2017, the Claimant relied on TK-BIT to file a request before the Arbitration Institute
of Stockholm Chamber of Commerce.

21. Therefore, the Claimant respectfully requests this Tribunal to find that Kronos had expropriated the
Claimant’s business due to the implementation and the issuance of Presidential Decree No. 2424, and
ordered the Respondent to pay compensation in value no less than USD 450,000,000.
SUMMARY OF ARGUMENTS

JURISDICTION  Firstly, the Claimant is indeed an investor and an enterprise of Ticadia. Further, the Claimant was incorporated under the laws of Ticadia since 1993. The Claimant had also fulfilled the corporate nationality test which consists of (i) incorporation, (ii) siege social and (iii) control test. Secondly, the Claimant did not trigger the fork in the road clause as recourse to Kronos national court is not mandatory. Furthermore, under the triple identity test, the objects and causes of action in both fora are different.

MERITS  Firstly, the enactment of the PD No 2424, its implementation and other related acts of the Respondent amounts to an indirect expropriation in violation of the TK-BIT. Further, the Respondent had blatantly ignored the legality requirements under Article 7 of the TK-BIT. Therefore, the Respondent’s actions do not fall within the police powers or Article 10 of the TK-BIT. Secondly, the Respondent’s counterclaim is inadmissible because it does not fulfil the test of admissibility of counterclaims. Alternatively, if it is admissible, it is without merits.
ARGUMENTS

I. THE CLAIMANT IS AN INVESTOR PURSUANT TO ARTICLE 1(4) OF THE TK-BIT.

1. This Tribunal has jurisdiction over the case at hand as the Claimant, has a locus standi to file claims in international arbitration. This is because [A] the Claimant has the nationality of Ticadia as it is through the incorporation test and the *siege social* test. Further, [B] the Claimant has invested in the territory of Kronos.

A. THE CLAIMANT HAS THE NATIONALITY OF TICADIA.


   1. Fenoscadia Limited is incorporated under the laws of Ticadia.

3. The Respondent may argue that Fenoscadia Limited is a Kronian enterprise since 35% of shares owned by Kronians who exert considerable influence over the decision-making of the Claimant’s company.

4. However, the Claimant contends that it has the nationality of Ticadia regardless of the influence given by Kronians because the Ticadian laws are sufficient to identify the Claimant’s nationality.

5. Under Article 1(4) of the TK-BIT, the term “*investor of a Contracting Party*” means “an enterprise of a Contracting Party, that has made an investment in the other Contracting Party’s territory.”

6. It is a well-recognized rule that “… a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence.”

7. The rule of incorporation and the “*siege social*” test was also recognized by the International Commission in the 2006 Draft Articles on Diplomatic Protection under Article 9 whereby;

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1 Record, §39  
2 Oppenheim, §380.
“For purpose of diplomatic protection of a corporation, State of nationality means the State under whose law the corporation was incorporated.”

8. In *Barcelona Traction*, the ICJ further stated that “the traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and, in whose territory, it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.”

9. Furthermore, the tribunal in *AMCO* stated that, “the concept of nationality is a classical one based on the law under the said juridical person has been incorporated, place of incorporation and the place of the social seat.”

10. The test of incorporation has been applied in the case of *Tokios Tokeles*, whereby the tribunal decided that the claimant is a Lithuanian investor although the company was 99% owned by the Ukrainian, since the company was established in the territory of the Republic of Lithuania in conformity with its laws and regulations.

11. Hence, the under the incorporation test, the enterprise obtained its nationality under the laws of which it is incorporated. Fenoscadia Limited is a limited liability company that was incorporated under the laws of Republic of Ticadia since 1993.

12. Thus, the Claimant is indeed constituted under the laws of Ticadia and is a Ticadian enterprise who is investing in the territory of the Republic of Kronos.

2. The Claimant has its siege social in the Republic of Ticadia

13. Some states require that in order to qualify as an investor, a legal person should not only be constituted or incorporated in the host country but also have its seat and/or effective management

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3 Article 9 of Draft Articles on Diplomatic Protection
4 Barcelona Traction, ¶55.
5 AMCO, ¶396
6 Records, §32 ¶6.
there,\textsuperscript{7} which [i] does not require “genuine economic activity”, as “the nationality test of siege social leads to the same result as one based on state of incorporation.”\textsuperscript{8}

14. The siege social theory determines nationality by looking for the place where the seat of its effective management is located.\textsuperscript{9} Further, to prove the ‘business seat’ requirement, it requires an effective centre of administration of business operations and the place where the board of directors regularly meets or where the shareholder’s meetings are held.\textsuperscript{10}

15. Furthermore, in \textit{Barcelona Traction}, the tribunal ruled that it has been the practice of some states to incorporate a company under its laws and regulations solely because “it has its seat (siege social) or management or centre of control in their territory.”\textsuperscript{11}

16. In our present dispute, the Claimant submits that most of the Claimant’s formal management formalities (including most of its board of directors’ meetings) were carried out in Ticadia.\textsuperscript{12} Hence, by applying the effective management test, the Claimant’s effective management is indeed in Ticadia.

\textit{i. The siege social test does not require proof of genuine economic activity.}

17. It is a trite principle under investment law that the protection of the BIT is only limited to investors who truly meets the definition of an investor under the BIT. As elaborated above, the Claimant is indeed a protected investor as the Claimant was incorporated under the laws of Ticadia and have its business management formalities in Ticadia.

18. Nevertheless, the Respondent may argue that the tribunal should look beyond the text of the TK-BIT, which is to look into the existence of a “genuine connection” between the Claimant and its home State or to look into the object and purpose of the BIT whereby in order to determine its corporate nationality, the Claimant must prove its “genuine economic activity”.

\begin{itemize}
  \item \textsuperscript{7} OECD, §22.
  \item \textsuperscript{8} Tokios Tokoles, ¶43.
  \item \textsuperscript{9} Sornarajah, §324
  \item \textsuperscript{10} Alps Finance, ¶217.
  \item \textsuperscript{11} Barcelona Traction, ¶70.
  \item \textsuperscript{12} Records, §34 ¶12.
\end{itemize}
19. However, the requirement of a seat is a “formal requirement” that does not require “genuine economic activity.” The ICJ noted that it is sufficient to establish a company seat when it has its registered office, maintained its accounts and share registers and held its board meetings in the home State. The company was held to have a close and permanent connection with the home State irrespective of its commercial activities outside the home State.

20. Furthermore, under the siege social theory, establishing an administrative office within a State’s territory is a condition of incorporation, which creates a more effective link with the country of incorporation. Numerous authorities stated that the siege social theory “determines nationality by looking for the place where the seat of its effective management is located, and that “a juridical person may be considered a national of the State where it has its effective headquarters.”

21. Therefore, as the requirement of a siege social is a formal requirement, this tribunal should neither look beyond the siege social test nor apply the genuine economic activity requirement. This is because the Claimant submits that the hub of the Claimant’s company is in Ticadia.

3. The Ticadians’ control over the Claimant’s company.

22. The Claimant submits that even if the Respondent may contend that the Kronians control the management of the Claimant’s company with 35% of shares and therefore exert considerable influence over the Claimant’s decision making specifically in relation to the operation and management of its mining activities in Kronos, the Claimant submits that it is a trite principle under the company law that the shareholders elect its own board of directors and have majority of the voting rights.

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13 Schruer, §522.
14 Barcelona Traction, ¶71.
15 Muchlinski, §.
16 Sornarajah, §324
17 Rubins, §409.
18 Records, §33 ¶6.
19 Records, §33¶7.
23. In our present dispute, 65% of the shares with voting rights of the Claimant were acquired by a private equity fund organized under the laws of Ticadia in 1998. Furthermore, the Claimant’s management is in the hands of a board of directors elected by its shareholders which Ticadians hold majority ownership of shares.

24. Although the Respondent may suggest to this arbitral tribunal to pierce the corporate veil in order to look into who is the true controller of the Claimant’s company, it should be highlighted before the tribunal that rule of piercing the corporate veil can only be applied in order to prevent the misuse of the privileges of legal personality, in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. Further, it can also be used to deny jurisdiction against the shareholders, but only in exceptional circumstances.

25. However, none of the circumstances can give rise to the lifting of the veil since the Claimant did not abuse its legal personality because the Respondent was aware of the fact that 65% of the Claimant’s shares belong to Ticadians who were also responsible to elect the Claimant’s board of directors.

26. Furthermore, Fenoscadia Limited was established in 1993, which was two years before the execution of the TK-BIT. Hence, it cannot be said that the Claimant is a shell company that was established so that it can be used as a vehicle in order to seek protection under the BIT through fraud or malfeasance.

27. In AdT, the Bolivian government argued that the Dutch companies that owned 55% of AdT shares were merely shell companies and lacked ultimate control. The AdT tribunal disagreed with the Respondent and concluded that “where an entity has both majority shareholdings and ownership of a majority of the voting rights,” control exists.

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20 Records, §32 ¶6
21 Barcelona Traction, ¶56.
22 Barcelona Traction, ¶57.
23 AdT, ¶264
28. Furthermore, in *Saluka*, the Respondent argued that Saluka is not an investor as it does not have a real and continuous links to the Netherlands because the Claimant is just a mere shell company controlled by another company which is not constituted under the laws of that State.²⁴

29. However, the *Saluka* tribunal disagreed as the terms which both parties had agreed upon under Article 1 of the Czech Republic – Netherlands BIT is that the investor should be constituted under the laws of the Netherlands, and it is not open to the tribunal to add other requirements which parties could themselves have added which they omitted to add.²⁵

30. In the present dispute, as the TK-BIT is vague to determine corporate nationality, it is common to for tribunals to attribute nationality through its state of incorporation which subsequently refers to the incorporation in accordance with the laws. Therefore, Fenoscadia Limited was incorporated under the laws of Ticadia since 1993, and, consequently the Claimant is not a shell company as alleged by the Respondent.

31. Thus, as the Ticadians truly controls the Claimant’s company by way of majority ownership of shares, this Tribunal should not pierce the corporate veil, hence, should find that the Kronians were not controlling the Claimant’s company.

**B. THE CLAIMANT HAS MADE AN INVESTMENT IN TICADIA**

32. Article 11(1) of the BIT stipulates that this arbitral tribunal has jurisdiction over a dispute “arising out of an investment” between an investor of Ticadia and the Respondent. The Claimant submits that the Concession Agreement qualifies as an investment under the BIT as [1] the preamble of the BIT is to protect investment of foreign investors, [2] the BIT provides broad definition of investment, and [3] Claimant’s investment fulfils requirements provided under the *Salini* test.

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²⁴ *Saluka*, ¶239
²⁵ *Ibid*, ¶240
²⁶ *Ibid*, ¶241
²⁷ Oppenheim, §380
1. The preamble of the BIT is to protect foreign investors.

33. The preamble of the TK-BIT provides that the purpose of the BIT is to “promote greater economic cooperation” and recognizes that “protection of investment of investors” is conducive to the “development of economic cooperation.”

34. The Claimant submits that the purpose of the BIT shall be interpreted according to Article 31(1) of VCLT, which is according to its literal meaning and in accordance with its object and purpose.

35. Hence, by looking into its literal and ordinary meaning and in light of its object and purpose, the tribunal should find that the interpretation of the TK-BIT is to provide protection to foreign investors and their investments. In addition, according to Article 1(4) of the TK-BIT, the Claimant, is an investor who has made an investment in the territory of the Republic of Kronos.

36. Furthermore, the purpose of the BIT is to ‘promote greater economic cooperation.’

37. Kronos is an underdeveloped country. In 1997, the Kronian Federal University published a report on the discovery of lindoro in the northern region of the Respondent’s territory, which was qualified as a high value rare earth metal.

38. As there were no national companies in Kronos with expertise to extract the metal, the Respondent made a public auction in November 1998 which the criteria to be analysed were: technical expertise and financial return for Respondent, based on the net revenue received from the activity. As the Claimant provides the highest financial return to the Respondent and has a worldwide reputation for exploration and exploitation of rare earth metals, the Claimant was given a right to exploit the lindoro under the Concession Agreement, which in consideration, the Claimant is to pay 22% of the monthly gross revenue to the Respondent.

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28 Vienna’s Convention on the Law of Treaties
29 Records, §32 ¶2.
30 Records, §32 ¶3.
31 Records, §32 ¶4.
32 Records, §33 ¶8.
39. Moreover, as ruled by the tribunal in *Malaysian Historical Salvors*, “the term ‘investment’ should be interpreted as an activity which promotes some form of positive economic development of the host State.”  

Thus, the Claimant submits that the Claimant’s investment contributes to the economy of the Republic of Kronos.

2. The BIT provides broad definition of investment

40. Firstly, the Claimant submits that the Claimant’s facilities for the exploitation of lindoro is an investment as stipulated under Article 1.1(a) of the TK-BIT.

41. Secondly, as provided under Article 1.1(f) of the TK-BIT, the Claimant submits that the Claimant’s concession right to exploit the lindoro is an investment since the prerequisite is for the Claimant to own a property in Kronos and thirdly, as embedded under Article 1.1(h) of the TK-BIT, Claimant’s extraction of lindoro is an investment as lindoro itself falls within the category of tangible property which eventually benefitted the Respondent’s economy.

42. Moreover, under Article 1.3 of the TK-BIT, the Claimant’s investment is a “covered investment”, namely because (i) Claimant is a Ticadian enterprise that has made an investment in the Respondent’s territory, (ii) the Claimant’s company was established 2 years before the signing of the BIT, and (iii) the Respondent granted to the Claimant the necessary license, in which the Claimant has been admitted under the Respondent’s laws and regulations.

3. The Claimant fulfils the Salini test requirements

43. The Claimant contends that although the Salini test is not required under the TK-BIT, Fenoscadia’s activities in Kronos qualifies as an investment because it fulfils the Salini test if such test was implemented. The five Salini factors includes (1) financial contribution on the part of the investor,

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33 *Malaysian Historical Salvors, ¶68*
(2) duration, (3) some risk taking, (4) regularity of profit and return, and (5) a contribution to the
development of the host state.\textsuperscript{34}

44. Firstly, the exploitation of lindoro constituted as a financial contribution on the part of the
Claimant, as the investor, as in consideration to exploit, the Claimant has to pay the Respondent
22\% of monthly gross revenue.

45. Secondly, the Concession Agreement granted the Claimant to exploit the lindoro for a period of
80 years.\textsuperscript{35}

46. Further, the tribunal in \textit{Salini} ruled that assumption of risk includes “any unforeseeable incident
that could not be considered as \textit{force majeure} and which, therefore, would not give rise to a right
to compensation,”\textsuperscript{36} was part of the risk taken by the Claimant.

47. On 14 September 2017, tons of lindoro stored in the Claimant’s facilities were confiscated by
Respondent’s officials, including those that were already prepared for export. Due to the sudden
cessation of revenues, Claimant had no other option but to shut down its facilities opened in August
2008.\textsuperscript{37} The Claimant contends that this event is completely an unforeseeable incident and the fact
that the Respondent does not want to compensate the Claimant due to the issuance of the Decree,
is indeed the risk that has to be taken by the Claimant.

48. The Claimant’s investment satisfies the fourth criterion - regularity of profit and return – and the
five criterion – contribution to the development of the host state – as the Claimant is obliged to
pay the Respondent 22\% of monthly gross revenue. Thus, the profit benefitted to the Republic of
Kronos and ultimately to the development of Kronos since Kronos is an underdeveloped country.

49. In conclusion, the Claimant submits that even if this tribunal is to apply the \textit{Salini} test, the tribunal
should conclude that the Claimant’s activity in Kronos and the Concession Agreement qualify as
an investment.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} Toto, ¶69 (citing \textit{Salini} v. Morocco).
\item \textsuperscript{35} Records, §33 ¶8.
\item \textsuperscript{36} \textit{Salini}, ¶56
\item \textsuperscript{37} Record, §7, ¶17
\end{itemize}
\end{footnotesize}
II. THE CLAIMANT DID NOT BREACH ARTICLE 11(3) OF THE BIT.

50. The tribunal has jurisdiction to hear the case because Fenoscadia is not obliged to comply with the pre-arbitral steps provided under Article 11(2) and Article 11(3) of the TK-BIT.

51. Firstly, [A] the Claimant has made a good faith attempt to negotiate with Kronos. Secondly, [B] the recourse to the Kronos national courts are not binding to the Claimant. Furthermore, [C] the recourse to the Kronos national courts did not trigger the fork-in-the-road clause as it did not satisfy the triple identity test.

A. THE CLAIMANT FULFILLED THE REQUIREMENTS OF NEGOTIATION.

52. Article 11(1) of the TK-BIT stipulates that all disputes between investors and Contracting Parties in relations to investment shall be settled amicably. 38 The standard of fulfilment of this requirement is a good faith attempt to negotiate 39 as stated under Article 11(2). The Claimant submit that the Claimant had attempted to negotiate on 8 September 2016 40 and on 27 April 2017 with the Ministry for Foreign Affairs, 41 which the attempt failed. Six months later, the Claimant filed the Request for Arbitration on 10 November 2017. 42

53. Hence, the Claimant submits that the Claimant complied with the negotiation requirement.

B. THE OBLIGATIONS FOR THE CLAIMANT TO PURSUE IN THE LOCAL COURTS WAS NOT BINDING.

54. Further, Article 11(2) of the TK-BIT states that the dispute may be submitted to competent Kronos judicial or administrative tribunals, or in accordance with any applicable, previously agreed dispute-settlement procedures. Article 11(2) of the TK-BIT provides for 6 months gap before the investor gets access to international arbitration if the said negotiation fails. Therefore, the Claimant

38 Records, §44.
39 Sornarajah, §320.
40 Records, §36 ¶25.
41 Records, §36 ¶27.
42 Records, §2.
submits that this requirement represents the domestic litigation requirement and not the exhaustion of local remedies requirement.\textsuperscript{43}

55. Furthermore, the act of the Claimant withdrawing its application before the Kronos Federal Court does not bar the Tribunal’s jurisdiction.\textsuperscript{44}

56. The Claimant submits that the requirement under Article 11(2) of the TK-BIT is merely a procedural one. The requirements set out in clause (2) are only sequential steps for the Claimant to follow prior to bring its claim before international arbitration, rather than prerequisites of Kronos’ consent to arbitration.\textsuperscript{45} Therefore, failure to pursue the steps does not preclude the Claimant of its access to international arbitration as a consequence.\textsuperscript{46}

57. Even if clause (2) is to be regarded as a prerequisite to arbitration, parties’ interest analysis shows that the requirements to pursue for local remedy was not obligatory in the present case. The aim is for the Claimant to be compensated for the illegal act committed by Government of Kronos.\textsuperscript{47} The Claimant contends that Kronos could not “adequately address the present dispute within the framework of its domestic legal system”\textsuperscript{48} as the Government spokesperson announced that the Decree would not be revoked,\textsuperscript{49} which was one of the grounds that was brought by the Claimant before Kronos Federal Court, which is to suspend the effects of the Decree while negotiations with the Government still pending and to declare that the Decree was unconstitutional on grounds of violation of legislative due process.\textsuperscript{50}

58. Hence, the Claimant contends that the Respondent’s failure to settle the disputes at the national level cannot be the only reason “to deprive the Claimant of the right to the right to resort to arbitration.”\textsuperscript{51}

\textsuperscript{43} Schreuer, §3
\textsuperscript{44} Record, §7, ¶16
\textsuperscript{45} US-Korea FTA, Article 11.18; NAFTA Articles 1121-1122.
\textsuperscript{46} BG Group, ¶14.
\textsuperscript{47} Records, §8 ¶20.
\textsuperscript{48} Abaclat, ¶588.
\textsuperscript{49} Records, §36 ¶26.
\textsuperscript{50} PO2, §56 ¶3.
\textsuperscript{51} Abaclat, ¶588.
59. The Claimant submits that the express wording of the BIT does not indicate application to Kronos Court as mandatory, therefore the tribunal should exercise jurisdiction over the present case.\textsuperscript{52}

C. THE RECOURSE TO THE KRONOS COURT DOES NOT TRIGGER THE FORK IN THE ROAD CLAUSE AS IT DID NOT SATISFY THE TRIPLE IDENTITY TEST.

60. Article 11(2) of the TK-BIT contains a fork-in-the-road clause which the investor may choose to settle their dispute in: 1) courts, 2) any applicable dispute settlement procedure previously agreed to by the parties, or 3) the SCC arbitration, provided that the dispute has not been submitted to the courts, or any agreed-dispute settlement.

61. The Respondent may argue that the Claimant’s initiation before the courts had triggered the fork-in-the-road clause, hence barred the Claimant to initiate an investor-state arbitration. However, the Claimant submits that Respondent’s argument is baseless because the claims before the courts and this arbitration does not share a common identity of parties, objects or causes of action by applying the triple identity test.

62. Under the triple identity test, the fork in the road clause would preclude the submission to international arbitration tribunals when the dispute involves the same parties, objects and cause of action.\textsuperscript{53}

63. Therefore, the Claimant submits that the triple identity test should be applied strictly as stated by the tribunal in Pan American:

“if the tribunal assumed lightly that choices of forum have been made...in favour of the host State’s juridical system [then] there [is] little use in setting up arbitral procedures for investment disputes.”\textsuperscript{54}

64. It should be highlighted before the tribunal that not every submission before the host State’s tribunal constitute as a choice under the fork in the road clause. Although the dispute before

\textsuperscript{52} Muhammet, ¶280.

\textsuperscript{53} Occidental, ¶52

\textsuperscript{54} Pan American, ¶¶ 155-156
national tribunals may in some way relate to investment, they are not necessarily “the same dispute” referred to in the BIT’s provisions in regards to the investor-state dispute settlement.  

65. Moreover, the tribunal in *Toto* ruled that in order for a fork in the road clause to preclude claims from being considered by the tribunal, the tribunal has to consider whether the same claim is “on a different road,” i.e., that a claim with the same object parties and cause of action, is already brought before a different judicial forum.  

66. Therefore, the Claimant submits that the tribunal has jurisdiction over Fenosadia’s claim because the dispute before the national tribunal and this arbitration did not share the same identity of [i] parties, [ii] objects, and [iii] cause of action.

   i. *Identity of Parties*

67. The dispute before a national tribunal and arbitration may be considered the same if the parties to both proceeding are the same.  

68. In the case at hand, the parties before the national courts are the Claimant and the executive body of the Republic of Kronos, which refers to the President of Kronos. Meanwhile, the parties before this arbitral tribunal are the Claimant and the Government of Kronos.

69. The Claimant is seeking for a judicial review before the Kronos courts in respect of the issuance of the PD No 2424 and to declare that the decree was unconstitutional on grounds of violations with due process. By contrast, the Claimant is seeking before this arbitral tribunal is to find that the Respondent had breached its international obligations provided in the TK-BIT. Therefore, it is clear that the objects and causes of action are different in both fora.

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55 Dolzer and Schreuer, §216  
56 *Toto*, ¶211  
57 *Azurix Corp.*, ¶ 92
70. All executive actions, like any other government action, is subject to challenge as violating individual constitutional rights,\textsuperscript{58} and, the question of whether an executive action is consistent with legislative policy is decided by the courts as a matter of statutory interpretation.\textsuperscript{59}

71. Hence, in reviewing presidential actions, court must consider not only the constitutional requirements but also the nature of governmental decision-making.\textsuperscript{60}

72. The Claimant submit that the question that need to be looked into by the court is whether the Decree was not made arbitrarily and within the due process of law. Therefore, the parties before the courts are Fenoscadia and the executive body of Kronos, or precisely, the President. Meanwhile, the parties before this arbitration are Fenoscadia and the Government of Kronos.

73. Therefore, the parties before both fora are not similar.

\begin{enumerate}
\item \textit{ii. Identity of Objects}
\end{enumerate}

74. The objects before both fora are different.

75. In \textit{Occidental}, Ecuador argued that the USA-Ecuador BIT contained a fork in the road provision which consequently prevented the Claimant from bringing treaty claims before investment arbitration as the Claimant had already challenged the controversial legislation before the local courts. However, the Tribunal objected that argument and stated that the investment treaty claims founded on the question of its rights under the BIT; and the local action was on the question of the legality of the legislation under local law.\textsuperscript{61}

76. In our present dispute, the Claimant seeks to suspend the effects of the PD before the Kronos Federal Courts while negotiations with the Respondent still pending. In addition, the Claimant also seeks to challenge the constitutionality of the Decree on grounds of violations with due process of law.

\begin{flushright}
\textsuperscript{58} Kaden, §1537
\textsuperscript{59} \textit{Ibid}, §1539
\textsuperscript{60} \textit{Ibid}, §1549
\textsuperscript{61} \textit{Occidental}, ¶58
\end{flushright}
77. By contrast, the objects before this tribunal is to obtain compensation for the interference made by the Respondent’s government in regards to the Claimant’s investment in its territory, specifically, for this arbitral tribunal to declare that the Respondent had violated its rights under the BIT by expropriating Claimant’s business without adequate compensation. Thus, the present proceedings are of compensatory in nature, while before the Kronos court is in relations to the PD No 2424 by referring to the Kronos Constitutional Law.

78. Therefore, as the objects before both fora are different, the fork in the road provision may not have been triggered by the Claimant. 62

iii. Identity of Causes of action

79. A cause of action concerns the grounds or set of facts alleged that constitutes a basis of the claim. 63 The Committee in Vivendi II emphasized that “[a] treaty cause of action is not the same as a contractual cause of action.” 64 The Committee further elaborated that contract and treaty claims can be distinguished on the fundamental basis of the claim. If it is a treaty claims, the basis is a treaty in reference to the specific treaty both parties are relying to whereas, in the case of judicial review of the PD No 2424, it is according to the proper Constitutional Law of Kronos. 65

80. The distinction between contract and treaty claims is similar if both parties based their claims on the difference between treaty claims and claims based on municipal law. In regards to the fork in the road clause, numerous arbitral tribunals had unanimously found that the restrictive division between those two bases of the claims and has been confirmed by case law 66 and authorities. 67 Another test, such as the “fundamental basis of a claim” test relied by the tribunal in the case of Pantechniki, 68 are considered to be not clear and reliable test for the arbitral tribunals who deals with the fork in the road clause to follow. 69

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62 Occidental, ¶52, Genin ¶¶331-332
63 Cremades/Madalena, §509
64 Vivendi II, ¶113. See e.g., Azurix Jurisdiction, ¶89; Occidental, ¶51; CMS. Jurisdiction, ¶¶72-76
65 Ibid, ¶98-101
66 Ibid, ¶95; SGS ¶¶147-148; Bayindir, ¶167; BIVAC, ¶127
67 Schreuer, §288
68 Pantechniki, ¶62
69 CF. Toto Construzioni. Although the Tribunal did not discuss the Pantechniki award, it directly contradicted it
81. Hence, the cause of action before the courts concerns the constitutionality of the PD itself while the cause of action in arbitration is a treaty claim concerning Kronos’ breached the BIT provisions. It cannot be said that the Claimant had triggered the fork in the road clause based on the causes of action in both fora.

III. THE ENACTMENT OF THE PRESIDENTIAL DECREE NO 2424, ITS IMPLEMENTATION AND OTHER RELATED ACTS OF THE RESPONDENT AMOUNTS TO AN EXPROPRIATION IN VIOLATION OF THE TK-BIT.

82. The Respondent had [A] indirectly expropriated the Claimant’s investment; [B] the expropriation made by the Respondent was unlawful; [C] it does not constitute a valid exercise of police powers of the State and [D] it does not fall within Article 10 of the TK-BIT.

A. THE RESPONDENT HAD INDIRECTLY EXPROPRIATED THE CLAIMANT’S INVESTMENT.

83. The Respondent indirectly expropriated the Claimant’s investment in violation of Article 7(1) of the TK-BIT.

84. Expropriation may be defined as the taking or deprivation of the property of the foreign investor by a host state. In the present dispute, despite of absence of any physical taking of property, indirect expropriation had occurred as the economic value of the Claimant’s property was rendered essentially useless.\(^70\)

85. Indirect expropriation is present when [1] the cost of investment is devaluated\(^71\) and [2] the measure is sufficiently lasting.\(^72\)

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\(^70\) Records, ¶23.
\(^71\) Feldman, ¶366; SD Myers, ¶281; Pezold, ¶470.
\(^72\) Expropriation UNCTAD, §67.
1. Fenoscadia’s shares devaluated.

86. Substantial devaluation of Fenoscadia’s shares resulted in an indirect expropriation, regardless of the degree of retained control.

87. Expropriation is present when there is a “major adverse impact on economic value of the investment”\textsuperscript{73} and which the “measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless.”\textsuperscript{74} The destruction of the economic value should be total or close to total.\textsuperscript{75}

88. In Tecmed,\textsuperscript{76} Metalclad,\textsuperscript{77} and CME\textsuperscript{52} cases, the Tribunals found that the loss of the asset values due to governmental actions to be expropriatory.

89. The Respondent’s actions are the main reason Fenoscadia “become unable to honor contractual obligations with purchasers and suppliers accumulating unbearable losses.”\textsuperscript{78} Thus the PD No 2424 has effectively destroyed the value of the investment and resulted in expropriation.

2. The effect of the Decree was lasting

90. The Respondent may argue its measures are temporal in nature.\textsuperscript{79}

91. While the temporal restrictions should not generally be considered as expropriatory in the present case, the deprivation is “not merely ephemeral”\textsuperscript{80} but a permanent one.

92. To be expropriatory, a period of measure application should be permanent or equivalent to permanent. If there is no indicator of stopping the measure, it should be considered permanent. The Respondent may argue, that even the 18\textsuperscript{th} month export ban was not considered expropriatory in

\textsuperscript{73} Telenor, ¶64; Bear Creek, ¶342.
\textsuperscript{74} Starett Housing, ¶154; CME, ¶604; Feldman, ¶100; Metalclad, ¶103.
\textsuperscript{75} Vivendi, ¶7.5.11; LG&E, ¶191.
\textsuperscript{76} Tecmed, ¶116
\textsuperscript{77} Metalclad, ¶104 \textsuperscript{52} CME, ¶604
\textsuperscript{78} Records, ¶24.
\textsuperscript{79} Records, ¶28.
\textsuperscript{80} Metalclad, ¶109; LG&E, ¶193.
SD Myers case. Yet, it is not only the length of measures but the Tribunal should assess its impact on the “ability of an owner to make use of its economic rights.” The measures in essence was just “delaying an opportunity” in SD Myers case, while in the present case Fenoscadia’s business was effectively destroyed.

93. Thus, the PD No 2424 lasted sufficiently to be expropriatory.

94. In any event, the Claimant submits that the PD No 2424 should be considered permanent and thus, expropriatory. The possibility of revocation itself by the Respondent does not change permanent nature of the measure. Such possibility is present in many law systems. Yet, it is not recognized as an additional step for the investor to have recourse to the arbitration.

95. Further, it was decided in the Wena Hotels case that one-year interference is sufficient to constitute that the effect was lasting.\footnote{Wena Hotels, ¶82; Records, ¶23-29.}

96. The PD No 2424 provides permanent block of Fenoscadia’s investments in Kronos, therefore it is expropriatory.

B. THE EXPROPRIATION MADE BY THE RESPONDENT WAS UNLAWFUL.

97. In order to constitute a lawful expropriation, four requirements need to be fulfilled by the Respondent as provided under Article 7(1) of the TK-BIT. These requirements must be fulfilled cumulatively.\footnote{Dolzer&Schurer, §91.}

Article 7

“1. Neither Contracting Party shall nationalize or expropriate a covered investment either directly or indirectly through measures having effect equivalent to nationalization or expropriation except for a public purpose, in accordance with the due process of law, in a non-discriminatory manner
and on payment of due compensation in accordance with paragraph 2 and 3 below…… [emphasis added]”

98. The Respondent had clearly violated the legality requirements provided under Article 7 of the TK-BIT when they failed to fulfill [1] the requirements of due process and [2] to compensate the Claimant for the expropriation that they had caused.

1. The Respondent violated the requirements of due process.

99. The due process of law principle requires an expropriation process to be free from arbitrariness. The International Court of Justice defined arbitrariness as “a willful disregard of due process of law, an act which shocks or at least surprises, a sense of juridical property.”

100. In addition, the tribunal in the case of ADC ruled that the most minimum requirements of due process under international law includes a fair hearing, a reasonable notice and an impartial adjudicator to assess the actions in dispute. This is to ensure that the foreign investor is given a reasonable chance within an ample of time to claim for its legitimate rights and have its claim heard.

101. Although the Respondent may argue that they have the inherent rights to regulate its own domestic laws, it should be highlighted that the exercise of such rights has its boundaries which includes obligations under the BIT.

102. Therefore, the Claimant contends that even if the legal framework of Kronos’ mining industry evolved, the Respondent should honour its investment-protection obligations provided under Article 8 of the TK-BIT.

Article 8

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83 Expropriation UNCTAD, §36.
84 ELSI, ¶128.
85 ADC, ¶435
86 Koch Minerals, ¶7.23
“2. To the extent possible, each Contracting Party shall (a) publish in advance any measure referred to in the preceding paragraph that it proposes to adopt, and (b) provide interested persons and enterprises and the other Contracting Party a reasonable opportunity to comment on that proposed measure, with due regard to the domestic laws of the concerned Contracting Party.... [emphasis added]”

103. This can be seen in the case of Middle East where the tribunal ruled that the seizure of the vessel by the Respondent which belongs to the foreign investor did not meet the requirements of due process in violation of Article 4 of the respected BIT, given the irregularities identified with respect to the notification process. The tribunal notes that,

“…. a matter as important as the seizure and auctioning of the ship of the Claimant should have been notified by direct communication for which the Law No. 308 provided under the 1st paragraph of Art. 7…. [emphasis added]”\(^{87}\)

104. In the case at hand, the Respondent had clearly violated the requirements of due process by failing to provide notice for the expropriation measures before it took place.

105. The Claimant entered into the Concession Agreement with the Respondent on 1\(^{st}\) August 2008. During that time, the Respondent had neither a regulatory framework or mining regulation for the Claimant to abide with.\(^{88}\) Nevertheless, the Respondent did emphasize through its presidential speeches that the lack of regulatory framework will not be a risk to the Claimant’s activities. Yet, 7 years later, after the Nationalist Party took office, the Respondent had abruptly changed the regulatory framework for mining activities in the Respondent’s territory.\(^{89}\)

106. The Claimant contends that both the enactment of KEA and the PD No 2424 was unexpected. Further, the gap between the Study and the expropriation measure was five months.\(^{90}\)

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\(^{87}\) Middle East, ¶143.
\(^{88}\) Records, §33 ¶10.
\(^{89}\) Records, §34 ¶15.
\(^{90}\) Records, §36 ¶23.
Nevertheless, no effort was ever afforded by the Respondent to notify the Claimant of the expropriation measure beforehand.

107. Thus, this constitutes a clear violation of the requirements of due process.91

2. No compensation was ever paid to Fenoscadia Limited.

108. Under Article 7(1) of the TK-BIT, the expropriation should be accompanied by provisions for the payment of compensation equivalent to the fair market value of the expropriated investment.

109. In the present case, the Claimant did not receive any compensation. Thus, the expropriation is illegal.

110. According to Article 7 of the TK-BIT, regardless of whether it is done for a public purpose or not, a compensation must always be made whenever there is expropriation. The tribunal in Metalclad held that when an expropriation is not accompanied by any compensation, then it would constitute as an unlawful expropriation.92

111. In the case of Santa Elena, the tribunal stated that an expropriation or taking for environmental reasons or public purpose “does not alter the legal character of the taking for which adequate compensation must be paid...”93

112. Therefore, since Article 10 of the TK-BIT which is the general exception clause provides no waiver of compensation, the Respondent cannot escape liability to pay compensation and damages as obligated under Article 7(1) of the TK-BIT.94

91 Bear Creek, ¶436.
92 Metalclad, ¶111-112.
93 Santa Elena, ¶171.
94 Bear Creek, ¶477.
C. THE RESPONDENT’S MEASURES ARE BEYOND THE SCOPE OF POLICE POWERS.

113. The Respondent’s actions cannot be qualified as a regulatory measure not amounting to expropriation.

114. It is also a well-established rule under international law that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner and is a bona fide regulation that are aimed at the general welfare.95

115. Further, in the case of Methanex, the tribunal ruled that “as a matter of general international law, a non-discriminatory manner regulation for a public purpose, which is enacted in accordance with due process, and, which affects a foreign investor or investment is not deemed to be expropriatory and compensable unless specific commitments had been given to the putative foreign investor...”96

116. In addition, the tribunal in the case of Koch Minerals ruled that the EO in that case was for a legitimate public purpose that is adopted by the Respondent in good faith, in accordance with Venezuelan law and within the boundaries of rationality.97 The tribunal ruled that “as indicated by earlier investment treaty decisions, a State’s action in exercise of regulatory powers does not constitute indirect expropriation, actions taken has to comply bona fide regulations for public purpose and must be non-discriminatory and proportionate.”

117. In any event, measures are not regulatory if they are disproportionate.

118. The principle of proportionality is satisfied when there is a fair balance between the aim sought to be realized by the State and the burden imposed to the owner. If the aim of the measure is not proportional to its effects, state should pay compensation.

95 Saluka, ¶255; Bear Creek, ¶451.
96 Methanex, ¶7.
97 Koch Minerals, ¶7.17.
119. The Claimant submits that it is necessary to act in three steps of proportionality; necessity – suitability – proportionality *stricto sensu*. 98

120. When there are no circumstances of emergency, nor any urgency related to such situations, and other variants are possible than the measure is unnecessary; consequently, it is disproportionate. 99

If the measure, in general, does not cope with “unusual threat”, then it is unsuitable, and, consequently, disproportionate. 100

121. There was no situation of urgency; the PD No 2424 was enacted five months after the Study was released (on 15 May 2016) 101 and although it is said to be a connection between water contamination by graspel and increase in CVD, the said connection is not widely accepted. 102 The Respondent was also not able to adduce evidence of other mining operators that may contribute to the contamination of the Rhea River. 103 In addition, the Study also failed to conclusively establish a causal link between the exploitation of lindoro and the rising incidence of specific diseases. 104

122. The Claimant argues that the situation in the Respondent’s territory was quite stable, thus, the measure was not that urgent. Further, the Respondent’s actions were also disproportionate because the economic burden imposed onto the Claimant outweighed the benefits derived, and less restrictive measures were available to the Respondent to achieve the same results. 105

123. Therefore, measures imposed via the PD No 2424 is disproportionate and unreasonable.

124. Hence, the Respondent’s actions are compensable because it does not constitute a valid exercise of police powers of the State.

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98 El Paso, ¶241; Ranjan, ¶865
99 Tecmed, ¶147
100 Tecmed, ¶122.
101 Records, §§36, ¶23.
102 Records, §§35-36, ¶22.
103 PO2, §§56 ¶4.
104 Records, §§35 ¶22.
105 Records, §34 ¶16.
D. IN ANY EVENT, THE RESPONDENT CANNOT JUSTIFY ITS WRONGFUL CONDUCT TO FALL WITHIN ARTICLE 10 OF THE TK-BIT.

125. According to Article 10(2)(a) of the TK-BIT, the Respondent’s actions do not fall within the general exceptions clause when the action was done arbitrarily.

126. The Claimant submits that “arbitrary” as noted in the 1982 Panel Report on US-Prohibition of Import of Tuna and Tuna Products from Canada, “…action of 31 August 1979 had been taken exclusively against imports of tuna and tuna products from Canada, but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru and the for similar reasons. The Panel felt that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable…”

127. The Claimant contends that the Respondent discriminated against the Claimant by justifying the revocation of the Claimant’s license on the basis of alleged health and environmental concerns, while engaging a Kronian state-owned company to resume the exploitation of lindoro despite of these concerns.

128. Therefore, the Respondent’s action is arbitrary and constitutes a violation of Article 10 of the TK-BIT.

IV. THE RESPONDENT’S COUNTERCLAIM SHALL NOT BE ADMISSIBLE BEFORE THIS ARBITRAL TRIBUNAL.

106 Records, §43.
107 Article XX: Commentaries, §564.
108 Records, §37 ¶28.
A. **The Respondent’s Counterclaims Failed to Fulfill the Test of Admissibility of Counterclaims.**

129. In order for a counterclaim to be admissible, it must fulfil the two-prong test of admissibility of counterclaims, namely [1] it must bear close nexus between the primary claim and [2] subject matter of the counterclaim is closely connected to the primary claim.\(^{109}\)

1. **There is lack of nexus between the counterclaim and the primary claim.**

130. There is no close legal connection when the claims are based on different legal instruments.\(^{110}\)

131. The counterclaims advanced by the Respondent derived from the domestic law of Kronos specifically Article 3 of the PD No. 2424\(^ {111}\) whereas the primary claims submitted by the Claimant is concerning the liability of the Respondent to fully compensate the Claimant for breach of an international obligation specifically Article 7 of the TK-BIT.

132. The Claimant submits that the counterclaim also lacks factual connection. There is no close factual connection when the primary claim relates to the conduct of the State whereas the counterclaim relates to the conduct of an investor, even if they concern the same investment.\(^ {112}\)

133. In our present dispute, the Fenoscadia’s claims is concerning to the expropriatory conduct of the Respondent\(^ {113}\) whereas the Respondent’s counterclaim relates to the alleged environmental damage caused by the Claimant’s activities.\(^ {114}\)

134. Therefore, the Respondent’s counterclaim is inadmissible because it lacks of factual and legal connection with the primary claim.

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\(^{109}\) *Saluka*, ¶67.

\(^{110}\) *Paushok*, ¶678.

\(^{111}\) *Records*, §52.

\(^{112}\) *Oxus Gold*, ¶953.

\(^{113}\) *Records*, §8 ¶21.

\(^{114}\) *Records*, §16, ¶22.
2. The subject matter of the counterclaim is not closely connected to the primary claim.

135. The Claimant submits that the subject matter of the counterclaim does not respond to the issues of interpretation of an investment dispute as laid out under the TK-BIT. Hence, the meaning of an investment itself estop the Respondent’s counterclaim.

B. ALTERNATIVELY, THE RESPONDENT’S COUNTERCLAIM IS WITHOUT MERITS.

136. If the counterclaim is admissible, the Claimant submits that it is without merits, namely because [1] the Claimant is not a polluter and [2] there is lack of causal link in the Study provided by the Respondent.

1. The Claimant is not a polluter in our present dispute.

137. The Claimant was found in full compliance of all its environmental-related obligations under the Concession Agreement and under the KEA.115

138. Further, the Claimant contends that if the Claimant is indeed contributing to the pollution of the Rhea River, the Respondent should have taken actions under the KEA that is by imposing fines, penalties, withdrawal of environmental licenses with the forfeiture of facilities, and the obligations to compensate for environmental damage116 which the Respondent did not do so in our present dispute.117

139. Therefore, this is a clear evidence that Respondent failed to establish that the Claimant is a polluter.

115 Records, §35, ¶19.
116 Records, §35, ¶16.
117 Records, §35-36 ¶22-23.
2. The Study lacks of causal link between the exploitation of lindoro and the contamination of the Rhea River.

140. The Claimant submits that the Study provided by the Respondent was baseless and unproven because it lacks of causal link between the exploitation of lindoro and the contamination of the Rhea River.

141. Although the Study concluded that the contamination of the Rhea River is undoubtedly a direct consequence of the exploitation of lindoro, it should be highlighted that a correlation does not amount to a causation.

142. A correlation is a measure of how closely related two things are, however it may be also caused by other confounding factors.

143. As illustrated in the case of Abengoa\textsuperscript{118} and later affirmed in the recent case of Bear Creek,\textsuperscript{119} the tribunal ruled that “for the international responsibility of a State to be excluded or reduced based on the investor’s omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [omission or fault] and the harm suffered.”

144. In our present dispute, the Respondent concluded the Study despite failing to examine other confounding factors that may contribute to the contamination of the Rhea River, namely; [i] graspel is not only found in the lindoro mine tailings, [ii] other mining operators may also release graspel and [iii] lindoro is not the only mining industry in the Respondent’s territory\textsuperscript{120}.

145. Further, the Respondent was also unable to conclusively confirm the causal link between [i] cardiovascular disease and exploitation of lindoro and [ii] microcephaly and exploitation of lindoro. It was highlighted in the Study that both diseases need a longer sampling window to confirm such connection\textsuperscript{121}.

\textsuperscript{118} Abengoa, ¶66-67.
\textsuperscript{119} Bear Creek, ¶410.
\textsuperscript{120} PO2, §56 ¶4.
\textsuperscript{121} Records, §51
146. In addition, although there is said to be connection between the exploitation of lindoro and the rising incidence of the cardiovascular diseases, however, said connection is not widely accepted by independent researchers and top tier universities around the world\textsuperscript{122}.

147. Hence, the Claimant submits that the Respondent had failed to prove a causal link between the Claimant’s activities and the harm suffered in effect of the Claimant’s activities.

148. Therefore, the counterclaims advanced by the Respondent is without merits.

\textsuperscript{122} Records, §36 ¶22.
PRAYERS FOR RELIEF

The Claimant respectfully request this arbitral tribunal to:

1. Declare that the Republic of Kronos is liable for violation of the TK-BIT;
2. Order the Republic of Kronos to pay damages to Fenoscadia Limited for the losses caused as a consequence of the violation valued at no less than USD 450,000,000;
3. Find that Fenoscadia Limited is entitled to all costs associated with these proceedings, including all legal and other professional fees and disbursements;
4. Order payment of pre-award interest and post-award interest at a rate fixed by this arbitral tribunal; and
5. Grant such further relief as the counsel may advise and that the tribunal deems appropriate.

Respectfully submitted on September 17, 2018

Team Lipton

On behalf of Fenoscadia Limited.