IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF
THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF
COMMERCE

- between -

FENOSCADIA LIMITED
Claimant

- and -

REPUBLIC OF KRONOS
Respondent

MEMORIAL FOR CLAIMANT

SCC Arbitration V2018/003858
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STATEMENT OF FACTS

1. Fenoscadia Limited (“Fenoscadia Limited” or “Claimant”) is a worldwide leading company specified in the field of exploration and exploitation of rare earth metals incorporated under the laws of Republic of Ticadia (“Ticadia”) in 1993. Claimant is a limited liability company with its current ownership divided between Ticadian private equity fund (65%) and three Kronian nationals (35%).

2. After discovery of a rare high value rare earth metal “lindoro” on the territory of Republic of Kronos (“Kronos” or “Respondent”) in 1997, Claimant won the auction for foreign companies for the concession of right to extract lindoro in Respondent’s territory on 20 April 2000 by offering the highest return.

3. Upon conclusion of the auction, Claimant and Respondent entered the Concession Agreement (“Agreement”) which prescribed the right and obligations of the parties with respect to the extraction of lindoro. The Agreement was concluded for 8 years, while actual exploitation started in August 2008. Moreover, Claimant acquired the title for the land of extraction site, while Respondent’s agents were obliged to carry biennial environmental inspections therein. Claimant effectively was the only company extracting lindoro in Respondent’s territory ever since its discovery. Moreover, since Respondent did not have comprehensive mining or environmental legislation, the Agreement was the only instrument governing extraction of lindoro.

4. Throughout these years up until 2015, Respondent strongly supported Claimant’s increasing presence in Kronos and publicly assured that lack of the legislative framework for mining poses no risk for its activity.

5. In October 2014 Mr. Bazings and his center-left political party with strong nationalist and environmentalist agenda (“Nationalist Party”) won the presidential and parliamentary election in Kronos, taking office for a 5-year term.

6. In March 2015 Mr. Bazings put forward a draft bill on environmental activities,
including mining. It was severely criticized by the long-supported **Liberal Party** for unduly affecting the mining activities in Respondent’s territory.

7. Later in June 2015 the Kronian House of Representatives (“**House**”) passed the “2015 Kronian Environmental Act” (“**KEA**”) verbatim across the draft bill. Provisions of KEA threatened miners with severe penalties up to the withdrawal of licenses in case of failure to protect waters in the regions of extraction from toxic mine waste. On the day of KEA’s passing, Respondent’s Government created the Ministry for Environmental Matters (“**MEM**”), in charge of formulating and enforcing Respondent’s environmental-related policies as well as strictly supervising Claimant’s activities. In September 2015, the Ministry conducted its first inspection where Claimant was found in full compliance with its environment-related obligations under the Agreement.

8. In October 2015, the MEM released data in evidence of a sharp increase of toxic waste concentration in Rhea river, largest in Kronos, which was mostly based on inspections carried out in 2011-2015 by the MEM. On 15 May 2016, the University of Kronos published a study which named exploitation of lindoro as the main source of contamination, although it failed to establish a link between the extraction and rising number of cardiovascular diseases among Kronian population.

9. In a couple months, on 7 September 2016, the President of Kronos issues Decree No. 2424 (“**Decree**”) which immediately prohibited the exploitation of lindoro over all Respondent’s territory, revoked Claimant’s license and terminated the Agreement. The Decree immediately rendered Claimant’s property in Respondent’s territory, notably its facilities for the exploitation of lindoro, nearly useless. 140 employees, including all 40 in charge of proper waste disposal, were dismissed within a week of the issuance of the Decree.

10. On 8 September 2016, Claimant applied to the Kronos federal court seeking to suspend the effects of the Decree pending negotiations with the Government. Claimant asserted several times in the press that the Decree made it impossible “to honor contractual obligations with purchasers and suppliers, accumulating unbearable losses” for Claimant. After government announcement on 22
February 2017 that the Decree would not be revoked, Claimant withdrew its appeal to Kronos’ Circuit Court.

11. On 27 April 2017, Claimant notified Respondent’s Ministry for Foreign Affairs of the dispute and of its intention to pursue legal remedies under the BIT if an agreement was not reached through negotiations. Respondent declined to negotiate and has not communicated with Claimant since. On 10 November 2017, Claimant filed its request for arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce.
ARGUMENTS
PART ONE: JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE, AS CLAIMANT QUALIFIES AS AN INVESTOR UNDER TICADIA-KRONOS BIT

1. Claimant submits that the Tribunal has jurisdiction over the dispute as Claimant qualifies as an investor of Ticadia under the Ticadia-Kronos BIT, since: (A) the Ticadia-Kronos BIT sets the test of incorporation for establishing jurisdiction rationae personae, which Claimant satisfies; (B) even if the Tribunal would find the additional tests of control and business activity applicable, these tests are also satisfied by Claimant; (C) in any event the tribunal has no reasons to pierce the corporate veil.

A. Claimant satisfies the test of incorporation provided in Ticadia-Kronos BIT

2. In defining the scope of BIT application ratione personae the tribunal should give primary regard to the BIT language. In order to determine whether Claimant qualifies as an investor under the BIT the Tribunal should apply the criterion of the place of incorporation, as it is the test provided by the Ticadia-Kronos BIT. Ticadia-Kronos BIT sets a rather low threshold and defines investor as any “enterprise of a Contracting Party”.

3. According to the ordinary meaning this definition should be interpreted as a place of incorporation. For instance, US Model BIT interprets “enterprise of a Party” as an enterprise constituted or organized under the law of a Party. The same interpretation can be found in a number of other BITs.

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1 Tercier, Tran Thang, ¶ 152
2 Record, line 1094
3 VCLT, Art. 31; Tokios Tokelés, ¶ 27
4 2004 Model US BIT, Art. 1
5 Canada-China BIT, Art. 1 ¶ 10(a); US-Uruguay BIT, Art. 1
Thus, Ticadia-Kronos BIT lays down solely an incorporation requirement to be satisfied for a legal entity to be qualified as an investor. Fenoscandia Ltd. is an enterprise incorporated under the laws of Ticadia\(^6\), therefore, satisfies this threshold to be qualified as an investor.

Accordingly, a tribunal is bound by the definitions contained in the BIT and it cannot impose the definition of an investor other than that, which the contracting parties to the BIT have agreed.\(^7\)

This view is widely upheld in the decisions of the investment arbitral tribunals\(^8\). In particular, in case *Aguas del Tunari v. Bolivia* the Tribunal meticulously adhered to the terms of the applicable BIT and refused to interpret the definition of investor extensively\(^9\). Similarly in Yukos cases the tribunals unambiguously found that:

\[
\text{“no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party”}\] (\(^10\)).

In a number of other arbitral decisions\(^11\) it was also underlined that where an applicable BIT adopts the incorporation as the criterion for nationality, the simple proof of incorporation should be sufficient.

Moreover, when the parties wish to exclude from the scope of the BIT entities of the other party that are controlled by the nationals of third countries or by the nationals of the host country, such exclusions are done expressly by including the Denial of Benefits clause into the BIT\(^12\). Such restricted approach also finds support in doctrine\(^13\).

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\(^6\) Record, line 895
\(^7\) Tokios Tokelės, ¶ 18, 36; Saluka, ¶ 241
\(^8\) AES, ¶¶ 75-80; Champion Trading Company, ¶3.4.2.
\(^9\) *Aguas del Tunari*, ¶ 278
\(^10\) Hulley Enterprises, p. 152, ¶ 415; Yukos Universal, p. 152, ¶ 415; Veteran Petroleum, p. 152, ¶ 415
\(^11\) Saluka, ¶ 241; ADC, ¶¶ 334-341, 350, 357-359; Rompetrol, ¶¶ 71-110; Charanne, ¶ 8
\(^12\) The Energy Charter Treaty, Art. 17(1); US-Argentine BIT, Art. 1(2); US-Ukraine BIT, Art. 1(2); Tokios Tokelės, ¶ 56
\(^13\) Schreuer, p. 554-555, ¶ 5
9. The Ticadia-Kronos BIT, by contrast, requires no additional standards for the definition of investor except for the place of incorporation and includes no “Denial of Benefits” provision. Thus, nothing in the Ticadia-Kronos BIT signifies the intent of the Contracting Parties to set any additional standards except for the place of incorporation, which is satisfied by Claimant.

B. Even if the Tribunal would find the additional tests of control and business activity

10. Should the tribunal nonetheless decide to apply additional criteria to defining the nationality of investor, they are also satisfied by Claimant. In particular, Claimant complies with (1) control and (2) substantial business activity tests.

1. Even if the control test is taken into consideration, Claimant is controlled by the Ticadian national

11. The controlling nationality is determined according to the nationality of the company’s majority shareholder. In particular, in Aucoven v. Venezuela\textsuperscript{14} the tribunal defined controlling interest as the investor’s majority shareholder. In a recent ICSID decision\textsuperscript{15} the tribunal defined “foreign control” as a control over more than 50\% shares of the company. Similarly in TSA Spectrum de Argentina S.A. v. the Argentina\textsuperscript{16} in order to determine foreign control the it was examined by the tribunal which shareholder held the majority shares starting with 51\%.

12. The majority shareholder of Fenoscandia holding 65\% of shares is a private equity fund incorporated in Ticadia\textsuperscript{17}. Thus, having legal entity of Ticadian nationality as its majority shareholder, Claimant satisfies the control test.

\textsuperscript{14} Aucoven, ¶¶ 83-87, 119
\textsuperscript{15} Romanetti, p. 250
\textsuperscript{16} TSA Spectrum, ¶¶ 160-162
\textsuperscript{17} Record, line 898
2. Claimant conducts substantial business activities in Ticadia

13. The presence of substantial business activity is established based on a number of factors including taxation and accounting activities of the company\textsuperscript{18}. In \textit{AMTO v. Ukraine} tribunal found evidence of substantial business activities on a showing that the company had regularly paid taxes in the territory\textsuperscript{19}. In another instance\textsuperscript{20} the tribunal recognized a resident director and annual auditing of the accounts within the territory as evidence of substantial business activities.

14. Thus, in order to determine substantial business activities tribunals should evaluate whether there is an authentic presence in the territory, such as regular accounting and auditing in the jurisdiction and permanent premises with director or staff.

15. Claimant complies with its tax obligations in Ticadia\textsuperscript{21} and Claimant’s CEO resides in Ticadia\textsuperscript{22} which satisfies the substantial business activity threshold in Ticadia. Therefore, Claimant satisfies substantial business activities test and should be regarded as an investor of Ticadia.

C. In any event, the tribunal has no reasons to pierce the corporate veil

16. Piercing the corporate veil and examining company’s ultimate shareholders takes place under the exceptional circumstances only\textsuperscript{23}. A number of investment tribunals\textsuperscript{24} held that veil piercing is permissible only in cases of fraud or malfeasance which involve a “misuse of the corporate personality” or “evasion of legal requirements”. In \textit{Barcelona Traction} the ICJ stated that

\begin{quote}
“the veil is lifted to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirement or of obligations”\textsuperscript{25}.
\end{quote}

17. Consequently, the corporate veil shall remain intact and the tribunal shall follow the

\textsuperscript{18}Thorn and Doucelf, p. 10
\textsuperscript{19}AMTO, ¶ 39-40
\textsuperscript{20}Yaung Chi Oo Trading, ¶¶ 9-10
\textsuperscript{21}Record, line 1519
\textsuperscript{22}Record, line 903
\textsuperscript{23}Schreuer in ICSID Review, p. 525
\textsuperscript{24}Tokios Tokelės, ¶ 55; Saluka, ¶ 230; ADC, ¶ 358; Rumeli ¶ 328
\textsuperscript{25}Barcelona Traction, ¶ 56
formalistic approach unless Respondent submits evidence of “abuse of rights” by the investor, such as abuse of legal personality or corporate form for treaty protection²⁶.

19. There is no evidence that Claimant used its formal legal nationality for the abuse of rights or any improper purpose. On the contrary, Claimant was established before the signing of the Ticadia-Kronos BIT²⁷ which indicates that it could not have been incorporated in a way to unlawfully benefit from BIT protection or “treaty shopping”.

20. As there is no evidence in the record that Claimant used its formal legal nationality for any improper purpose, Claimant submits that the piercing its corporate veil should not be applied by the Tribunal.

21. Therefore, Claimant qualifies as an investor under Ticadia-Kronos BIT and the tribunal has jurisdiction over the dispute.

²⁶ Aguas, ¶ 330; Autopista, ¶ 122; Phoenix, ¶ 113
²⁷ Record, lines 895, 870
II. Claimant’s Claims Are Admissible Before The
Arbitral Tribunal, Notwithstanding Claimant’s
Recourse To The Domestic Courts Of Respondent

22. On 8 September 2016, Claimant filed a motion in Respondent's courts seeking to suspend on a provisional basis the effects of the Decree terminating Claimant’s rights with respect to the investment. Claimant asserts that it has validly commenced arbitration proceedings before this Tribunal. The mere fact that there was a request for provisional measures filed before Kronian federal court does not prevent him from pursuing his claims under the BIT. The fork-in-the-road clause contained in Art. 11 of the BIT was not triggered as there was no selection of dispute resolution forum.

23. Claimant submits that: (I) investor did not waive its right to arbitration, as the dispute was not “submitted for resolution” to the national court within the meaning of Art. 11 of the BIT, and (II) alternatively, the recourse to the domestic court is not the same “dispute” as viewed by the arbitral tribunal, as the triple identity test is not satisfied.

A. Investor did not waive its right to arbitration, as the dispute was not “submitted for resolution” to the national court within the meaning of Art. 11 of the BIT

24. Claimant did not submit the dispute for resolution, as they applied only for provisional measures. The wording of Art. 11 of the BIT provides that only submission of a dispute for resolution would constitute selection of dispute resolution forum. Such notion entails seeking permanent relief and cannot be represented by a request for provisional measures. As applied in Alucoal v. NKAZ, request for provisional measures for the purposes of arbitration should be distinguished from a court action.

25. It has been agreed upon by scholars that provisional measures “are intended to regulate matters pending the decision on merits of the dispute” which means that request for

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28 Record, line 1015
29 Record, line 195
30 Record, line 1240
31 Alucoal v NKAZ, ¶ 38
32 Sztucky, p. 15; R. Wolfrum, p. 173
such measures cannot in any way be considered as initiation of proper dispute resolution procedure. As upheld by the ICJ in *Fisheries Jurisdiction* case, the main rationale of provisional measures is that a “party to a dispute before a court or tribunal is entitled to a reasonable assurance that the subject matter of the dispute will not be so altered as to make it impossible for it to enjoy the right or interest it is claiming.”

Additionally, as noted by the tribunal in *Lanco* case, only the actual submission of the dispute to local courts would have constituted a choice under the fork-in-the-road clause. Therefore, seeking to provisionally suspend and declare the Decree unconstitutional on the ground of due process violation, Claimant was aiming to ensure that Respondent would cease to take unlawful measures against him and that actual dispute would be resolved in a due process of law.

Moreover, even if the court finds that by applying for provisional measures to Kronos federal court Claimant indeed ‘submitted the dispute for resolution’, the request for suspension was withdrawn before it was considered by the court. After the announcement that the Decree would not be revoked Claimant realized that proceedings on this procedural issue are essentially futile and decided to “pursue legal remedies under the BIT”. In several BITs, such as the BITs executed by the Germany and Netherlands with China, as well as Costa Rica – Spain BIT, the fork-in-the-road clause is formulated in a way as to allow for investment arbitration after submission of dispute to a national court in case investor withdrew its application before the decision.

Therefore, even in cases of actual recourse to national courts seeking permanent relief in a dispute, investor is nonetheless entitled to initiate investment arbitration proceedings if the national lawsuit was withdrawn before the decision on merits.

Thus, Claimant has not waived its right to investment arbitration as there was no submission of dispute for resolution in domestic courts of Kronos within the meaning of the BIT.

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33 Fisheries Jurisdiction, ¶ 21
34 Lanco, ¶29
35 China - Netherlands BIT, Art. 10(2); China - Germany BIT, Art. 9(2); Costa Rica - Spain BIT 199, Art. 11(3)
36 Schreuer, 231, 239 (2004)
B. Alternatively, the recourse to the domestic court is not the same “dispute” as viewed by the arbitral tribunal

30. Request for provisional suspension filed by Claimant to Kronian federal court should not considered as the same “dispute” compared to the claims presented before the SCC in an investment dispute.

31. Not every recourse to court would be considered as a choice of dispute resolution forum, which resulted in development of a triple identity test which allows to establish whether the fork-in-the-road clause has indeed been triggered. Fork-in-the-road provision contained in Art. 11 of the BIT applies solely if the causes of action in the domestic proceedings and in the international dispute are identical.

32. It is essential that Claimant did not request Respondent's courts to rule on the breaches under the BIT performed by Respondent or on the damages caused, meaning that it was not an investment dispute submitted to determination and had different causes of action as well as relief sought. Conversely, to protect its rights before the end of amicable negotiations with Respondent, Claimant had to recourse to such interim measure.

33. The approach taken in *Occidental v. Ecuador* and *Genin v. Estonia* favors Claimant position on the admissibility of its claims before the Tribunal in an inevitable situation like the present one. Accordingly, Claimant submits that (1) causes of action in the domestic and arbitral proceedings commenced by Claimant differ, (2) relief sought by Claimant in both proceedings is different.

1. **Causes of action in the domestic and arbitral proceedings commenced by Claimant differ**

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37 Lauder, ¶¶161,163; Vivendi Award ¶¶ 40, 42, 53-55, 81, Vivendi Decision on Annulment, ¶¶36, 38, 42, 55, 113; CMS Gas Transmission v. Argentine; Azurix, ¶¶ 37-41, 86-92
38 Occidental, ¶52
39 Genin v. Estonia, ¶¶ 47, 58, 321, 333
In order to establish the difference between the causes of action it is necessary to examine the underlying legal basis for the claim made by the investor. The difference between contract-based claims and treaty-based claims has also been underlined by various international arbitral tribunals, as evidenced by the decisions in *Lauder*, *Genin, Aguas del Aconquija, CMS* and *Azurix*, and of the ad hoc Committee in *Vivendi*. The Tribunal held in *CMS*, referring to this line of decisions, that "as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claim to arbitration". As upheld in *Vivendi*: “treaty cause of action is not the same as a contractual cause of action”.

Although the objective of action in the domestic court and in the arbitration, was the same - to declare the Decree illegal - the causes of action were different, as request for suspension arose from the contract, while investment dispute alleges breach of the BIT by Respondent.

Request for suspension was filed pursuant to Art. 7 of the Concession Agreement which states that all disputes arising directly out of this Agreement, including its termination shall be submitted to the courts of the Republic of Kronos, which hold exclusive jurisdiction.

Given that the Decree immediately terminated the Concession Agreement Claimant was determined to honor contractual obligations with purchasers and suppliers and thus was seeking to provisionally suspend the Decree pending negotiations with the government of Kronos. In fact, Claimant's motion concerned the effect of the presidential Decree No. 2424 as an individual administrative act directed exclusively towards Fenoscadia Limited. Due to the contract exclusive dispute resolution clause, Claimant was obliged to file all issues directly stemming out of the contract to the domestic courts of Kronos.

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40 Ibid
41 Supra note 9
42 Ibid
43 Supra note 17
44 Record, line 1335
45 Record, line 1005
In a situation that arose in *Occidental v. Ecuador* the tribunal upheld Claimant’s argument that the investment treaty claim was founded upon the question of its rights under the BIT, while the local action was founded upon the question of the legality of the legislation under the local law. Similarly, it was reaffirmed in *Toto v. Costruzioni* case that “contractual claims arising out of the Contract do not have the same cause of action as Treaty claims”.

In the present case, the claim for provisional suspension of the Decree is connected with the Agreement and not the BIT as it deals with government measures and aims at temporary suspension of their effect. Since the request dealt with procedural matters and did not address contentious claims such as breach of contract, it should not be considered as similar to an investment dispute.

On the contrary, the claims presented by Claimant before this Tribunal are treaty-based. They concern Respondent’s breach of several BIT provisions towards Claimant, as opposed to the request for provisional suspension under the domestic law and arising out of the Concession agreement. The domestic proceedings were commenced by Claimant to appeal the legality of the Decree under the domestic law. None of those claims made by Fenoscadía Ltd invoked any treaty protection provisions or did it concern a breach of any right conferred or created by the BIT.

Moreover, the conduct of the state submitted to arbitration is not fully covered by the request to domestic court. The domestic proceedings concerned exclusively the Decree, which resulted in indirect expropriation of investment, whereas the arbitration claim of Claimant concerns both Decree and confiscation of lindoro, that entails both indirect and direct expropriation.

Thus, the causes of action in domestic and international proceedings are different as they have different legal nature.

2. **Relief sought by Claimant in both proceedings is different**

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46 Supra note 10
47 Toto, ¶214
43. The object of request for provisional suspension of the Decree was to declare such act adopted in violation of due process and infringed on constitutionally protected basic rights of Claimant. Moreover, such proceedings do not contemplate any order for compensation\(^48\), but the judgment may be relied on in separate civil proceedings seeking compensation for breach of contractual or non-contractual obligations. Consequently, the only type of relief sought by Claimant in Kronos federal court was to suspend provisionally the effect of the Decree pending the subsequent legal proceedings on the merits.

44. Conversely, in the arbitration proceedings Claimant requests to find Respondent in violation of the BIT, namely, Art. 7 dealing with expropriation, and demands compensation for unlawfully expropriated investment.\(^49\) Thus, the present proceedings are of compensatory nature, while the purpose of the domestic proceedings was to quash the effects of administrative Decree enacted by Respondent in violation of due process.

45. Therefore, as object and causes of action of the domestic proceedings and the international arbitration at hand differ, the fork in the road provision contained in Art. 11(2) of the BIT was not triggered and Claimant is entitled to assert its claims before this Tribunal.

\(^{48}\) Record, line 1635
\(^{49}\) Record, line 225
PART TWO: MERITS

III. ENACTMENT OF PRESIDENTIAL DECREE NO 2424, ITS IMPLEMENTATION AND OTHER RELATED ACTS OF RESPONDENT AMOUNT TO EXPROPRIATION OF CLAIMANT’S INVESTMENT IN VIOLATION OF THE BIT

Claimant contends that (A) the enactment of the Presidential Decree No. 2424 and other related acts of Respondent amount to an indirect and direct expropriation of Claimant’s investment. (B) These measures fail to meet the criteria for lawful expropriation set out in the BIT and obligates Respondent to pay compensation, since: (1) these were carried out with substantial procedural violations and (2) were not justified by the public purpose at stake.

A. Respondent’s enactment of the Presidential Decree and other related acts amount to the expropriation of the investment

On 7 September 2016 Respondent issued the Decree establishing a complete ban on exploitation of lindoro, revoking Claimant’s licenses, and terminating the Concession agreement with no compensation to Claimant. By doing so Respondent acted in violation of the BIT. Art. 7 of Ticadia-Kronos BIT provides:

“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…”.

Thus, the Ticadia-Kronos BIT clearly prohibits expropriation not only through the direct taking of a property (a direct expropriation), but also through measures having the effect equal to the direct taking of a property (an indirect expropriation).

General standard established under international customary law defines direct expropriation as open and deliberate seizure of property and the measures adopted by

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50 Record, line 1440
government which result in depriving investor of its property and rights as indirect expropriation\(^\text{51}\).

50. Claimant submits that the measures taken by Kronian government amount to both direct and indirect expropriation of the Claimant’s investment.

1. **The enactment of Presidential Decree No. 2424 and its implementation amount to the indirect expropriation of the investment**

51. In finding indirect expropriation both case law and academic sources indicate the need to assess whether the governmental measures deprived the investor of the investment, and whether they led to substantial interference with the property interests of the investor\(^\text{52}\). In its turn, customary international law\(^\text{53}\) and jurisprudence of the arbitral tribunals\(^\text{54}\) requires that such interference result from governmental actions and be substantial and lasting.\(^\text{55}\)

52. Thus, Claimant will demonstrate that (a) it was deprived of its investment and (b) that the deprivation is both substantial and lasting.

a. **Claimant was deprived of its investment**

53. Claimant was deprived of the investment as the effects of the Decree and its implementation deprived Claimant of its contractual rights under the concession agreement. Pursuant to the Agreement, Claimant was granted a concession for the rights to exploit the Site for eighty years.\(^\text{56}\) Claimant’s enjoyment of these rights relied on the licenses granted by the designated Ministry. The Decree terminated Claimant’s rights to exploit lindoro, since under Art. 1 of the Decree exploitation of lindoro in Kronian territory was completely prohibited, with the subsequent termination of all the contracts

\(^{51}\) Newcombe and Paradell, pp. 322-323
\(^{52}\) Paulsson and Douglas, p.148; UNCTAD, pp. 12, 63; Telenor, ¶70; CME v. Czech Republic, ¶150
\(^{53}\) Paulsson and Douglas, p.145; Pope & Talbot, ¶102.
\(^{54}\) Myers, ¶¶ 282-283, Eastern Sugar B.V. v. Czech Republic, ¶210; Metalclad ¶103, LG&E, ¶191.
\(^{55}\) Telenor, ¶65; LG&E, ¶¶188-191; Enron, ¶245.
\(^{56}\) Record, line 1325
and licenses for this activity. Additionally, subject to Art. 4 of the Decree the tons of already produced lindoro prepared for export were confiscated.

54. All this actions of Kronian government in fact drove Claimant out of Kronos, as it effectively deprived Claimant of its investment.

b. The deprivation of the investment is substantial and lasting

55. The adoption of the Decree led to substantial and lasting loss of Claimant’s assets as it affected Claimant’s ability to use, manage and obtain revenue from its investment in the territory of Kronos. Claimant engaged in costly construction of the one of a kind mining facility in Kronos. The Concession Agreement provided that Claimant’s investment duration would be no less than eighty years. Claimant relied on this duration when estimating the resources necessary to recover the investment, as investors did in other instances. This reliance is further confirmed by Claimant’s decision to transfer substantial part of its mining operations into Kronos. However, it turned out that Claimant had only eight years to enjoy its investment, until the Decree was passed. After the Decree was passed Claimant was deprived of the economic use of its investment and of the reasonably-to-be expected economic benefit of property.

56. Being a company specializing in exploitation of the rare earth metals Claimant was left with no other reasonable ways of either benefiting from its investment or using the facilities in some other way. The Decree made Claimant’s property, facilities and contractual rights in Kronos literally useless, thus meeting the standard of substantiality of taking.

57. The Decree provided for irrevocable termination of the concession and consequently “the rights related thereto ... had ceased to exist” making the results of Respondent’s

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57 Record, line 1440
58 Record, line 1325
59 Tecmed v. Mexico, ¶115
60 Record, line 925
61 Metalclad, ¶103
62 Record, line 1005
63 Starrett Housing v Iran, ¶ 154
64 Tecmed, ¶ 115
expropriatory measures lasting\textsuperscript{65}.

Therefore, adoption and implementation of the Decree amount to indirect expropriation.

2. **Respondent as well directly expropriated Claimant’s investment**

In addition to the indirect expropriation described above, the confiscation of Claimant’s stock of lindoro constituted a textbook example of a direct expropriation. Respondent directly ceased Claimant’s property and caused Claimant to default on its lindoro supply obligations\textsuperscript{66}. All the above actions led to severe economic losses for Claimant and ultimate shutting down of the facilities in 2018.

Thus, actions of Respondent amount to both direct and indirect expropriation of Claimant’s investment.

**B. The expropriation in question is unlawful and obliges Respondent to provide compensation to Claimant**

The above described Respondent’s measures fail to meet the criteria of lawful expropriation set out in the BIT, namely, (1) they were carried out with substantial procedural violations and (2) were not necessary to protect the public interest at stake. Respondent’s failure to satisfy these criteria therefore obligates Respondent to compensate the losses suffered by the investor.

1. **The expropriation was carried out with substantial procedural violations of the due process of law**

Art. 7 of the Ticadia-Kronos BIT requires that the due process of law should be observed with respect to the investor in the event of expropriation. This clause is interpreted as guaranteeing to the investor the observance of the legal procedure prescribed by domestic law and international minimum standard of due process\textsuperscript{67}.

\textsuperscript{65} Myers, ¶ 282 - 283
\textsuperscript{66} Record, lines 200-205
\textsuperscript{67} Newcombe and Paradell, p. 376,
63. This due legal procedure is further elaborated in Art. 8 of the BIT according to which Kronian government was obliged to publish in advance any measures that might affect the investment in order to provide interested entities with a reasonable opportunity to comment on that proposed measure prior to the entry into force of any measures that might affect the covered investment.

64. Claimant submits that Respondent did not comply with this requirement as Claimant was the affected party by the Decree, however, not only such measures were not made known to Claimant prior to the enactment of the Decree but Claimant was denied its right to comment on that measure.

65. The Decree radically affected Claimant, since Claimant was the only company entitled to exploit lindoro in Respondent’s territory. Nevertheless, neither prior notice, nor warning was given to the investor.

66. Additionally, the Decree is allegedly based on the Study conducted by the Kronian Federal University in May 2016, which implied only possible negative repercussions of lindoro extraction for people in the surrounding areas. Claimant was neither granted an opportunity to produce evidence contradicting the Study prior to the issuance of the Decree, nor such possibility to comment and negotiate the effects of the Decree was given to Claimant following the adoption of the Decree.

67. Expropriation took place immediately allowing Claimant for no “reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard”. The time which it took to adopt the Decree was obviously unreasonably expedited so as to prevent Claimant from challenging this law.

68. Under the banner of protecting health and environment the Decree implemented harsh and unsubstantiated measures such as confiscation of already extracted lindoro which even according to the questionable finding of the Study had no relation to the state of environment

68 Record, lines 925
69 Record, lines 1405
70 ADC ¶435.
of human health. Even Kronian Environmental Act was itself adopted with considerable procedural violations, since in the course of its adoption opposition parties were denied the constitutionally vested right to conduct public hearing to discuss the bill. Therefore, the adoption and enactment of the Presidential Decree which led to the expropriation of Claimant’s investment was performed in violation of the due process of law, making such an expropriation unlawful.

2. **Respondent’s actions are not justified by public purpose**

Respondent may argue that its actions fall within the regulatory power of the state, and thus, they did not constitute an expropriation. Claimant does not dispute that a state has the right to regulate its domestic affairs, but this right is not unlimited. General Exceptions clause (“GE”) contained in Art. 10 of the BIT sets forth specific guides as to what constitutes legitimate cases of public purpose referred to in Art. 7 of the BIT.

According to Art. 10 the State has the right “to adopt or enforce a measure necessary” (emphasis added) to protect human health and to conserve living or non-living exhaustible natural resources. Additionally, Art. 10 requires that such measures should not be arbitrary and discriminatory, or should not impose a disguised restriction on investment.

Claimant contends that Respondent’s measures are not justified by this Art. as (a) they were not necessary to protect the public interest at stake and (b) in any event were applied arbitrary. Noncompliance with these criteria result in recognizing regulation aimed at protecting the above public interests as compensable indirect expropriation.

a. **The measures were not necessary to protect the public interest at stake**

As prescribed by GE in Art. 10, the measures not only must be taken with the objective to protect human health and to conserve living or non-living exhaustible natural resources, but also must comply with requirement of necessity.

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71 Record, lines 965
72 *emphasis added*
74. Given that GE interpretation has been scarcely dealt with in the practice of investment tribunals this Tribunal should consider the interpretation attributed to Art. XX GATT, since Art. 10 of the BIT is modelled after it and follows its structure and wording. Assessment of the relevant WTO jurisprudence in interpreting GE clauses is also widely accepted among practitioners and scholars.

75. Following this practice, this requirement of necessity is characterized by “a genuine relationship of ends and means between the objective pursued and the measure at issue”.

76. Claimant contends that even if the measures taken by Government might fall within the range of objectives prescribed by GE in Art.10 of the BIT, Respondent nonetheless failed to satisfy the nexus requirement, and such measures had no subsequent relation to the objective of protecting human health and environment.

77. First, the complete prohibition of lindoro extraction was not proportionate to the need to protect environment and public health. At the time of initiation of the lindoro mining in Kronos the Government neither performed nor required environmental impact assessment. Furthermore, sustainability of production model was never a subject of any concern for Respondent, which at the time of conducting the public auction for the lindoro concession required from tenderees only technical expertise and financial return for Respondent, and the reason for choosing Claimant was that it offered the highest financial return to the Government.

78. Despite complete absence of the State purview of sustainability of mining industry Claimant took all measures to conduct mining as sustainable as possible. To that end almost quarter of Claimant’s staff in Kronos were responsible for advancing Claimant's sustainability goals, which included the measures of the correct disposal of waste originating from the exploitation of lindoro.

74 Brazil-Tyres, ¶210
75 PO2, ¶ 10
76 Record, line 890
77 ibid.
79. Had the legislative framework of environmental assessment in Kronos changed, the new measures could be similarly adopted in Claimants mining model had such requirement been posed by the Government. The complete ban and direct expropriation of Claimant’s property was neither necessary to protect the environment nor and proportionate step to protect the alleged public interest with respect to the complete and arbitrary deprivation of Claimant’s economic rights.

80. Second, when assessing the necessity standard, the contribution of the disputed measure must be material and clearly aimed at achieving the disputed objective\(^78\). One of such objectives was the protection of human health, which according to the Study conducted by Kronian national university was under threat due to lindoro exploitation\(^79\). The Study cited by respondent in the Decree fails to prove the conclusive link between lindoro production and coronary heart disease. As the Study itself concludes: “It is not yet possible to conclusively confirm a causal link between the exploitation of lindoro and the rising incidence of CVD”\(^80\). Since the issuance of the Decree there was no material improvement in the level of CVD and microcephaly among Kronian population\(^81\). This proves the absence of the relation between the objective sought and the measure taken by Kronian government.

81. Finally, the “necessity” criteria should be weighed against the restriction and the interests of the investor it affects\(^82\). When analyzing proportionality in Tecmed v. Mexico the tribunal highlighted that in order to be considered proportionate to the public interest at stake the regulation “must not specifically target” an investor.\(^83\) In fact, such disproportionate burden on a certain investor resulting from general regulations gives rise to the obligation of the State to compensate.\(^84\)

82. Similar conclusion as to disproportionality of making one investor “bear the consequences” of the public need is supported in the number of other awards and scholarly writings.\(^85\) However, only Claimant suffered from the above regulation which qualifies under the

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\(^{78}\) Brazil-Tyres, ¶ 210
\(^{79}\) Record, line ¶1425-1430
\(^{80}\) Record, line ¶1405
\(^{81}\) Record, line ¶ 1626
\(^{82}\) Schill, p.473-474
\(^{83}\) Tecmed, ¶ 122
\(^{84}\) Schill, p. 474
\(^{85}\) CMS, ¶390; Dolzer and Schreuer, p. 170, Waelde, Kolo, p. 811
disproportionality of burden referred to in *Tecmed* and therefore should be duly compensated by Respondent.

**b. The measures adopted were arbitrary, as they specifically targeted Claimant**

83. Despite their proclaimed focus at protecting human health and environment the measures undertaken by Respondent are arbitrary and constitute disguised restriction of Claimant’s activities. Arbitrariness and disguised targeting of the investor are prohibited in para.2 of Art. 10 of the BIT and result in unlawfulness of the actions which the State may invoke as a GE.

84. The regulation enforced by Kronian government specifically targeted Claimant as the Decree affected only lindoro exploitation, and did not restrict other harmful mining industries in Kronos. According to the Study on which Respondent relied in its prohibition the traces of graspel were proved to pollute the river, however this metal is not exclusively found in lindoro mine tailings.

85. It stands to reason that not only Claimant, the only company involved in lindoro extraction, should be held accountable for the pollution of the river as the same method of open pit mining is used by other mining operators in Kronos and graspel is similarly found in other mine tailings.

86. Nevertheless, the Decree exclusively targeted Claimant's enterprise, which offers reasonable justification of the disguised prohibition of this particular investor motivated more by political incentives rather than by the desire to protect public interest.

87. Claimant submits that there are conclusive reasons to question the public necessity of protecting human health and environment, and submits that Kronian government used these exceptions as the label of convenience to harass foreign capital and Claimant in particular. The study was supported and funded by the government and specifically focused only on

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86 Record, line 1425  
87 Record, line 1000  
88 PO2* 4  
89 ibid.
lindoro production.

Moreover, the Decree was issued after only four months following the publication of a study which is obviously an inadequate time frame either to study the data presented or to collect the contending report. Led by the incomplete and limited findings in the Study, Kronian government immediately imposed a complete ban on lindoro production and confiscated Claimant's lindoro stock, and only “required mining and manufacturing industries to take reasonable precautions to prevent harm”.

The reasons for such decisions of Kronian governments are exclusively political, since the crusade against foreign capital was a part of the political agenda of the Nationalist Party. The Study on which the above prohibition is based is a political sham aimed at knocking Claimant out of the site in order later to grant this right to other, government-backed enterprise. This intention of the Government is clear from the recent report indicating the establishment of the Kronian company to handle the exploitation of lindoro in Kronos. Moreover involvement of another foreign investor of the Republic of Ibi participating in the venture, which in its turn prove discriminatory nature of expropriation undertook by Kronian government.

With the view to the above considerations Claimant ask this Tribunal to find the measures adopted by Respondent as falling short to satisfy the standard of public necessity provided in Art. 10 of the BIT.

Thus, Respondent should be held liable for violating the BIT and expropriating Claimant’s investment and should be ordered to compensate Claimant for its unlawful actions.

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90 Record, line 1430
91 Record, lines 155, 945
92 Record, lines 1470-1475
93 Record, lines 1475-1480
IV. RESPONDENT’S COUNTERCLAIMS ARE NOT ADMISSIBLE BEFORE THE TRIBUNAL

92. Respondent attempts to bring to attention of Tribunal the alleged breach of environmental obligations on behalf of Claimant, thus expanding the subject matter of the present dispute. However, the inclusion of its counterclaims shall be rejected by the Tribunal for two reasons: (A) the counterclaims presented by Respondent lack both (1) factual and (2) legal connection with the primary claim, and, (B) Respondent failed to establish a violation of the BIT.

A. The counterclaims presented by Respondent lack connection with the primary claim.

93. Respondent's counterclaims shall be dismissed by the tribunal due to the absence of both (1) factual and (2) legal connection with the primary claim in the present proceedings.

1. There is no factual connection between the claims of Respondent and Claimant

94. Investor's claims and relevant counterclaims shall be “indivisible” and “interdependent” in order to be considered by a tribunal as valid. The practice of arbitral tribunals confirms that counterclaim must arise directly out of the subject-matter of the dispute. In a number of other cases the degree of factual connection has been a determining factor as well.

95. Both Respondent's Counterclaims and the investment dispute concern the same project related to the exploitation of lindoro. However, Respondent's Counterclaim is merely connected with the payment for alleged damages caused in the Site, which entails the examination of technological effects on the Rhea River, health costs for treating the local population and water supply issues.

94 Klockner, p.17, p. 65;
95 Metal-Tech, ¶407;
96 Amto, ¶ 118; Goetz, ¶¶ 282-285; Hamester, ¶ 356, Al-Warraq, ¶ 667;
97 Record, line 455;
To the contrary, Claimant recoursed to investment arbitration seeking relief for unlawful expropriation of its facilities referring to Art. 7 of the BIT, which requires analyzing the nature of Respondent's legislative steps and direct actions, particularly the study of the Decree.

A factual link between the two claims ensures procedural economy, helping to avoid duplication of effort by a tribunal examining the same evidence.\textsuperscript{98} However, as it may be seen from the foregoing, merging two claims with different prayers for relief, distinct legal nature and correspondingly opposite evidence base cannot justify the objective. Resolving each of the two issues requires analyzing different set of facts.

Therefore, there is no enough factual connection between the primary claim submitted by Claimant and Respondent’s counterclaim justifying their consideration within same proceedings.

\textit{2. There is no legal connection between the counterclaims of Respondent and primary claims raised by Claimant}

Claimant invites the attention of the Tribunal to the fact that Respondent's Counterclaim is based primarily on the provisions of the Concession Agreement, which establishes the terms for exploitation of lindoro. However, pursuant to Art. 6 of the said Agreement the obligations each Party undertakes therein are governed by the laws of the Republic of Kronos, not prescribing any specific obligations apart from those found in the national legislation.

Environmental regulation in the Republic of Kronos is based on the single instrument – Kronian Environmental Act, requiring mining and manufacturing industries to take all reasonable precautions to prevent harm to environment and human health. Therefore, the only obligations Claimant could have violated in the present case are contained in the public law of Respondent and fall outside the scope of the BIT.

The legal connection is also established to the extent the counterclaims are not alleged as a

\textsuperscript{98} Kjos, p. 148;
matter based on domestic law only.99 Respondent refers to violation of Art. 9.2 of the BIT, which establishes no specific obligations with respect to investors.100 In turn, matters governed by the internal public law do not create a reasonable nexus between the Claimants' claims and the counterclaims justifying their joint consideration by an arbitral tribunal.101 The same question of compliance with the national law arose in *Amco v. Indonesia*,102 which led to rejection of Respondent's counterclaim since it arose out of non-compliance with national law for which a special dispute resolution procedure was available.

Moreover, Art. 7 of the Concession Agreement indicates that any dispute arising directly out of the Agreement, including its termination, shall be submitted to the courts of the Republic of Kronos, which hold exclusive jurisdiction. Similarly, in *Saluka* the tribunal opined that it does not have jurisdiction to consider counterclaims based on breach of a contract that had its own mandatory dispute resolution clause.

Consequently, the disputes underlying the counterclaims in principle are to be decided through the appropriate procedures of the national law and not through the particular investment protection procedures of the BIT.103

Therefore, Respondent's counterclaims must be brought before national courts since they do not relate to the breaches of the BIT. Respondent's reference to general provisions of the BIT promoting sustainable development could not be raised to the level of obligations undertaken by investors. This is further proved by the asymmetrical nature of the BITs to which investors are not parties: investment treaties focus on investor rights and host state obligations, not vice versa.104

Thus, there is no legal connection between the counterclaims of Respondent and primary claims raised by Claimant.

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99 Urbaser ¶1151;
100 Record, line 455;
101 Paushok, ¶ 694;
102 Amco, ¶ 562-564;
103 Saluka, ¶79;
104 Kjos, p. 130;
B. Respondent failed to establish a violation of the BIT

106. Though there is no a universal definition of a counterclaim, still there are some notable features established. One of such features is that a counterclaim being an independent claim in its nature may be presented by way of separate application. However, the counterclaims presented by Respondent are defensive in their nature and do not establish a violation as such.

107. According to Respondent, its counterclaim is a direct consequence of Claimant’s breach of Art. 9.2 of the BIT. However, this Art. contains several obligations to be performed by the Contracting Parties, namely: 1) strive to minimize, in an economically efficient manner, harmful environmental impacts; 2) act in a cost-effective manner; 3) strive to take precautionary measures to prevent or minimize environmental degradation. At the same time, both Contracting Parties agreed 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.

108. Therefore, Art. 9.2 of the BIT obliges the state to observe compliance with the abovementioned environmental standards and in principle seek compensation for the harm caused by either Contracting Party. This is further supported in Art. 2.1 of the BIT, as its provisions shall apply to measures adopted or maintained by a Party relating to an investor of the other Contracting Party or a covered investment.

109. In general, BIT creates obligations solely for the Contracting Parties, and cannot create obligation for the private entities. For instance, in *Biloune and Marine Drive Complex Ltd v. Ghana* the tribunal found that BIT does not bound the investor with human rights obligations.

110. At the same time, Respondent asserts that Claimant’s refusal to recognize its liability and to compensate Respondent for the costs necessary to restore the equilibrium of the Kronian environment amounts to violation of the obligations it undertook itself upon signing the

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105 Antonopoulos, p. 50;
106 Record, line 1200;
107 Biloune p. 203
treaty. This essentially bars the admissibility of counterclaim before the present Tribunal.

III. All in all, Respondent failed to establish violation of BIT, its counterclaims lack factual and legal connection with primary claim, therefore, should not be admitted by the Tribunal in the present proceedings.
PRAYERS FOR RELIEF

88. In light of the above submissions, Claimant respectfully requests this Tribunal to find that:

(i) The tribunal has jurisdiction over the dispute;

(ii) Claimant’s claims are admissible before the arbitral tribunal, notwithstanding the lawsuit filed before the domestic courts of Respondent;

(iii) Enactment of Presidential Decree No. 2424, its implementation and other related acts of Respondent amount to expropriation of Claimant’s investment in violation of the BIT Respondent breached its obligations under Art. 3(3) BIT;

(iv) Respondent’s counterclaims are not admissible before the tribunal;

(v) Claimant is entitled to damages in the amount of USD 450,000,000 with interest as of the date of issuance of the Award;

(vi) Claimant is entitled to payment by Respondent of pre- and post-award interest at a rate to be fixed by the Tribunal.

Submitted on 17 September 2018

by TEAM Salam

On behalf of Claimant
FENOSCADIA LIMITED