FOREIGN DIRECT INVESTMENT INTERNATIONAL
MOOT COMPETITION
(FDI MOOT) 2018

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

FENOSCADIA LIMITED
(Claimant)

V.

REPUBLIC OF KRONOS
(Respondent)

SUBMISSION OF THE RESPONDENT
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>ii</td>
</tr>
<tr>
<td>LIST OF AUTHORITIES</td>
<td>iii</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>viii</td>
</tr>
<tr>
<td>STATEMENTS OF FACTS</td>
<td>1</td>
</tr>
<tr>
<td>SUMMARY OF ARGUMENTS</td>
<td>4</td>
</tr>
<tr>
<td>ARGUMENTS</td>
<td>5</td>
</tr>
<tr>
<td>I. The Tribunal lacks jurisdiction over the present dispute.</td>
<td>5</td>
</tr>
<tr>
<td>A. The Claimant is not an investor under Article 1(4) of</td>
<td>5</td>
</tr>
<tr>
<td>the Ticadia-Kronos BIT.</td>
<td></td>
</tr>
<tr>
<td>B. The Claimant's operations in the Respondent's territory</td>
<td>10</td>
</tr>
<tr>
<td>do not qualify as an investment within the meaning of</td>
<td></td>
</tr>
<tr>
<td>Article 1(1) of the BIT.</td>
<td></td>
</tr>
<tr>
<td>C. Fork in the road provision has been violated.</td>
<td>12</td>
</tr>
<tr>
<td>II. MERITS</td>
<td>16</td>
</tr>
<tr>
<td>A. The Respondent has not committed a compensable taking.</td>
<td>16</td>
</tr>
<tr>
<td>a. The PD and the KEA were aimed to protect the life and</td>
<td>18</td>
</tr>
<tr>
<td>health of Kronian citizens, animals and plants.</td>
<td></td>
</tr>
<tr>
<td>b. The Respondent’s measures were not applied in an</td>
<td>20</td>
</tr>
<tr>
<td>arbitrary manner.</td>
<td></td>
</tr>
<tr>
<td>c. The Respondent’s measures were not applied in a</td>
<td>22</td>
</tr>
<tr>
<td>discriminatory manner.</td>
<td></td>
</tr>
<tr>
<td>d. The Respondent’s measures are not a disguised</td>
<td>24</td>
</tr>
<tr>
<td>restriction on international trade or investment.</td>
<td></td>
</tr>
<tr>
<td>B. The Respondent actions did not breach the Fair and</td>
<td>24</td>
</tr>
<tr>
<td>Equitable Treatment (FET) standard.</td>
<td></td>
</tr>
<tr>
<td>a. The legitimate expectations does not constitute an</td>
<td>25</td>
</tr>
<tr>
<td>element of the FET standard.</td>
<td></td>
</tr>
<tr>
<td>b. The Respondent’s measures respected the due process</td>
<td>28</td>
</tr>
<tr>
<td>requirement.</td>
<td></td>
</tr>
<tr>
<td>C. In the event the Tribunal finds that the Respondent is</td>
<td>29</td>
</tr>
<tr>
<td>liable, it shall submit that its actions were taken</td>
<td></td>
</tr>
<tr>
<td>under a state of necessity.</td>
<td></td>
</tr>
<tr>
<td>PRAYERS FOR RELIEF</td>
<td>32</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Citation</td>
</tr>
<tr>
<td>--------------</td>
<td>----------</td>
</tr>
<tr>
<td><em>Tecmed v. Mexico</em></td>
<td><em>Técnicas Medioambientales Tecmed S.A. v. The United Mexican States</em>, (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003.</td>
</tr>
<tr>
<td><em>Methanex v. USA</em></td>
<td><em>Methanex Corporation v. United States of America</em>, UNCITRAL, final award 3 August 2005.</td>
</tr>
</tbody>
</table>
| *LG&E v. Argentine* | *LG&E Energy Corp., LG&E Capital Corp., and LG&E International*, Inc. v.
<table>
<thead>
<tr>
<th>Case</th>
<th>Decision/Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FDI MOOT 2018 MEMORIAL FOR RESPONDENT TEAM CRAWFORD</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Argentine Republic</strong></td>
<td>(ICSID Case No. ARB/02/1), Decision on liability 3 October 2006.</td>
</tr>
<tr>
<td><strong>Tokios Tokelês v. Ukraine</strong></td>
<td>(ICSID Case No. ARB/02/18), Decision on jurisdiction, 29 April 2004.</td>
</tr>
<tr>
<td><strong>Ronald S. Lauder v. The Czech Republic</strong></td>
<td>UNCITRAL, Final Award, 3 September 2001.</td>
</tr>
<tr>
<td><strong>Pope &amp; Talbot v. Canada</strong></td>
<td>UNCITRAL, Award on the merits, 10 April 2001.</td>
</tr>
<tr>
<td><strong>Loewen Group &amp; Raymond v. USA</strong></td>
<td>The Loewen Group, Inc. and Raymond L. Loewen v. United States of America,</td>
</tr>
<tr>
<td></td>
<td>(Case No. ARB(AF)/98/3), Award, 26 June 2003.</td>
</tr>
<tr>
<td><strong>Teco Guatemala v. Guatemala</strong></td>
<td>(ICSID Case No. ARB(AF)/10/17), Submission of the USA, 23 November 2012.</td>
</tr>
<tr>
<td><strong>Robert, Kenneth &amp; Ellen v. Mexico</strong></td>
<td>Robert Azinian, Kenneth Davitian &amp; Ellen Baca v. The United Mexican States,</td>
</tr>
<tr>
<td></td>
<td>(CASE No. ARB(AF)/97/2), Award, 1 November 1999.</td>
</tr>
<tr>
<td><strong>Pantechniki S.A. v. Albania</strong></td>
<td>(ICSID Case No. ARB/07/21), Award, 30 July 2009.</td>
</tr>
<tr>
<td><strong>Mondev v. USA</strong></td>
<td><strong>Mondev International Ltd. v. United States of America</strong>, (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002.</td>
</tr>
</tbody>
</table>

### BILATERAL INVESTMENT TREATIES

| **Singapore-USA, Free Trade Agreement** | Singapore–United States Free Trade Agreement, 2003. |
| **Model US BIT** | Model United States BIT (2012). |
| **Investment Agreement COMESA** | The Investment Agreement for the COMESA Common Investment Area (2007). |

### ARTICLES & BOOKS

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benson, Cyrus, Penny Madden</td>
<td><em>Covered</em></td>
</tr>
</tbody>
</table>
LIST OF ABBREVIATIONS

P. Page(s)
para. Paragraph(s)
BIT. Bilateral Investment Treaty
E. Exhibit
Facts. Uncontested facts
Case. Other facts and paragraphs
ICJ. International Court of Justice
FTC. Free Trade Commission
VCLT. Vienna Convention on the Law of Treaties
CIL. Customary International Law
ILC. International Law Commission
ICSID. International Centre for Settlement of Investment Disputes
CA. Concession Agreement
PD. Presidential Decree No. 2424
STATEMENTS OF FACTS

1. According to the Organisation for Economic Co-operation and Development ("OECD"), Kronos is an underdeveloped country. Kronos is not an OECD member.)

2. In March 1997, the Kronian Federal University ("The University") – a public, State funded institution– reported that a mineral reserve of a rare metal had been discovered in the Northern region of Respondent’s territory.

3. Given that there were no national companies in Kronos with the required expertise to extract the metal, in November 1998, Respondent invited foreign companies to participate in public auction for the concession of the rights to extract lindoro.

4. On 1 June 2000, upon the conclusion of the bidding, Claimant and Respondent entered into the Concession Agreement, which regulated the rights and obligations of each party in relation to the extraction of lindoro in The Site, the actual exploitation started in 2008.

5. The Claimant’s management is in the hands of a board of directors elected by its shareholders. For the past five years, the majority of the board has been comprised of Kronian nationals. The board also appoints the Chief Executive Officer of the company. The current CEO resides in Ticadia, but often travels to and stays in Kronos for long durations for Claimant’s business. The Kronian shareholders exert considerable influence over Claimant’s decision making specifically in relation to the operation and management of its mining activities in Kronos.
6. At the time of the execution of The Agreement, 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.

7. On 12 June 2015, The House passed the “2015 Kronian Environmental Act” (“KEA”). KEA was based on the obligations and definitions set forth at the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Among others things, KEA dictated miners to protect the waters of the regions where the extraction took place from toxic mine waste. Otherwise, they could be subject to severe penalties, fines, the immediate withdrawal of environmental licenses with the forfeiture of facilities, and the obligation to compensate for the environmental damage.

8. On the day of KEA’s passing, Respondent’s Government created the Ministry for Environmental Matters, in charge of formulating and enforcing Respondent's environmental-related policies – including KEA itself.

9. In October 2015, the Ministry for Environmental Matters in Kronos released data indicating that the concentration of toxic waste found in Respondent’s largest river, the Rhea River, had sharply increased since 2010. The data was largely based on the inspections carried out since 2011 by the Ministry for Agriculture, Forestry and Land (and most recently by the Ministry for Environmental Matters itself).

10. On 15 May 2016, The University published a comprehensive study (“The Study”), which concluded “the contamination of the Rhea River is undoubtedly a direct consequence of 995 the exploitation of lindoro”
also, the Study acknowledges the presence of graspel, a toxic component released during the 1000 exploitation of lindoro, in the Rhea River waters. At least 10 different studies conducted, over the last five years, by top-tier universities and independent researchers across the globe have demonstrated a connection between water contamination caused by graspel and an increase in CVD in the population of the surrounding areas, but said connection is not widely accepted.

11. On 7 September 2016, Mr. Bazings issued Presidential Decree No. 2424 which prohibited, with immediate effect, the exploitation of lindoro in all Respondent’s territory, revoked Claimant’s license, and terminated The Agreement.

12. On 8 September 2016, Claimant applied to the Kronos federal court seeking to suspend the effects of the Decree and On 22 February 2017 Claimant withdrew its appeal to Kronos’ Circuit Court.
SUMMARY OF ARGUMENTS

The Respondent’s submission is that this Tribunal lacks of jurisdiction over the present dispute since (i) the Claimant is not an investor under definition of the BIT, (ii) the Claimant have not made an investment in the Respondent's territory and (iii) the fork in the road clause has operated due to the fact that the Claimant initiated an identical judicial process in Respondent’s territory.

In the unlikely event that this Tribunal finds that it has jurisdiction the Respondent submission is that (i) a compensable expropriation has not been committed, as the measures taken fall within the Respondent’s legitimate police powers, and (ii) the Respondent did not breach the fair and equitable treatment standard since (a) legitimate expectations do not constitute a part of the FET standard, and in the unlikely case that the Tribunal finds that legitimate expectations constitute an element of the FET standard, the submission of the Respondent is that the vital elements necessary to establish the existence of the legitimate expectations are not found, and (b) the Respondent respected the due process to the Claimant.
ARGUMENTS

I. The Tribunal lacks jurisdiction over the present dispute.

1. The Respondent hereby address that the Tribunal has no jurisdiction over the present dispute. The claim is supported by three arguments: First, (A) the Claimant is not an investor under the definition of the BIT. Second, (B) the activity of the Claimant does not amount to the definition of investment, and Third, (C) the Claimant violates the obligations under the fork in the road provision.

A. The Claimant is not an investor under Article 1(4) of the Ticadia-Kronos BIT.

2. The Respondent argues that the Claimant is not a national of the Republic of Ticadia. Considering Article 1(4) of the Ticadia-Kronos BIT, under the light of the Vienna Convention of the Law of Treaties, specifically Article 31, the Respondent has applied the criteria of (i) incorporation, (ii) Siège social, and (iii) Effective control, after comparing them, and evaluate has given them same value, hence the Respondent has determined that the Claimant is a national of the Republic of Kronos.

3. The definition of investor is provided in Article 1(4) of the Ticadia-Kronos BIT, which that “A person or an Enterprise of a Contracting Party that seeks to make, is making, o has made an investment in the other Contracting Party´s territory. For greater certainty, it is understood that an investor seeks to make an investment only when the investor has taken concrete steps necessary to make the investment”.

5
4. Article 31 of the VCLT is relevant to determine the interpretation of the Ticadia-Kronos BIT, since it provides that “a treaty must be interpreted in good faith in accordance with the ordinary meaning of the given terms of the treaty in their context and in the light of its object and purpose”.

5. Bear in mind all the above, the ordinary meaning of the term “an enterprise of a Contracting Party” refers to nationality or the status of belonging to a certain nation.1 In the current dispute, Fenoscadia Limited “the Claimant” has no nationality of the Republic of Ticadia, and by contrast the Claimant belongs to the Republic of Kronos “the host-State”. Therefore, the due procedure on this subject matter must be presented before Kronian local courts instead of before the present procedure.

6. The Claimant is a limited company incorporated under the laws of the Republic of Ticadia.2 Despite of the relevance of this fact, it is not conclusive to determine the Claimant’s nationality. Incorporation is well known to be one of the two criteria most commonly provided by the BIT in order to determine corporate nationality along with the main seat of the business (Siège social).3 Nevertheless, the Ticadia-Kronos BIT neglected to provide either incorporation or the main seat of the business as criteria, thus it opens the possibility of using these criteria and others, namely, Company Control or effective management including a bond of economic relevance.

7. As a means to establish the Claimant’s nationality, seeking certainty and above all equity, the Respondent has interpreted the Claimant status or its nationality according to all three criteria (i) Incorporation, (ii) Siège social or

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1 Oxford Living Dictionaries.
2 Facts, para. 6.
3 Dolzer & Schreuer, Principles of International Law, P. 49.
the main seat of the business, and (iii) Control or effective management. Due to the fact that the BIT does not provide the applicable criterion in this matter, it is rational to take into account in a holistic manner all of this criteria equally, in other words, to evaluate all three giving them equal value through a systematic interpretation to determine the Claimant’s nationality.

8. Following the foregoing, the majority of BIT contained a criterion to determine jurisdiction, the Respondent opinion is solid supported by long practice and by numerous international instruments which confirm the criteria mentioned before as method used in Customary International Law in order to determine investor’s nationality,⁴ therefore the Tribunal should consider all three to decide this issue.

9. In regard to **Incorporation Criterion (i)**, the International Court of Justice has explained that “the traditional rule attributes the right of diplomatic protection of a corporate entity to the States under the laws of which it is incorporated and in whose territory it has its registered office”.⁵

10. In the present dispute, the Claimant was incorporated under the laws of the Republic of Ticadia in 1993 as a limited liability company.⁶ According to this criterion Fenoscadia limited is a national of Ticadia. However, most tribunals, for instance, in the *Saluka v. Czech Republic case* and in the *Tokios Tokelès v. Ukraine case*, both tribunals has refused to pierce the corporate veil and to look to other criteria. Instead, they has applied restrictively the Incorporation criterion, since the binding BIT on each of those cases

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⁴ *Tokios Tokelès v. Ukraine*, para. 70.
⁵ *Barcelona Traction case*, para. 70. Cited in: *Tokios Tokelès v. Ukraine* at footnote. 64.
⁶ Facts, para. 6.
expressed its intention to only use incorporation. In opposition to those BIT, the Ticadia-Kronos BIT has not express its intention to restrict the use of one criterion, therefore the Tribunal cannot introduce a unique criterion, and thus, exclude others as has been affirmed before by the Saluka v. Czech Republic tribunal.\(^7\)

11. Concerning to the **Siège social criteria (ii)**, International Law has used it as an equal complement to the Incorporation criterion, as it was expressed in the doctrine. As an example, in Oppenheim’s *International Law*, the author stated that “...is often added the need for the corporation’s head office, registered office, or its siège social to be in the same state”.\(^8\) According to the facts in the current dispute, in 2010, the Claimant decided to transfer and concentrate the main business or to constitute its siège social in the Republic of Kronos and effectively shut down the business in Ticadia.\(^9\)

12. In relation to the **effective management** or **control criterion (iii)** is the Respondent opinion that this application of this criterion, along with the two above, led to greater certainty about the investor nationality, hence it is the most adequate criteria to apply in this case. Such attitude is nothing new and was applied by investment tribunals. As an example, in the *Champion trading v Egypt*’s\(^10\) case the Tribunal applied Incorporation, Siège Social, and control or Effective management, as *Siège Social* can be taken as a complement to the Incorporation Criterion, *Effective management* may be taken as a complement to *Siège social*. Most states understand *the main seat*
of the business to be directly correlated with the place where a company has its board of directors or where the most important decisions are taken.

13. For the past five years, the Claimant's management has been in the hands of a board of directors with a majority comprised of Kronian nationals.\textsuperscript{11} This board has the duty to appoint the chief Executive Officer which along with the board of directors is the highest-ranking person in charge of the company's management.\textsuperscript{12} Furthermore most of the decisions adopted by the board of directors were implemented in Kronos, given the concentration of company's activities there.\textsuperscript{13} It is evident to the Respondent that the Claimant does not have a bond of economic substance with the Republic of Ticadia.

14. Both a large number of the BITs that states have entered into and the Customary International Law have established that in order to qualify as foreign investor, the Claimant, local company of the "host-state", might prove its foreign control.\textsuperscript{14} Notwithstanding, previously has been determined the Effective management or control of Fenoscadia Limited, it is held in the hands of Kronian Nationals. The Claimant is a local company of the Republic of Kronos, consequently was not able to make a real investment proceed from a foreign country, the Republic of Ticadia. This situation corroborated by the fact that the control of the Kronian shareholders exerts considerable influence due to their experience and expertise in the mining industry acquire in other countries.\textsuperscript{15}

\textsuperscript{11} Facts. 12.
\textsuperscript{12} Facts, para. 7, 12.
\textsuperscript{13} Ibidem, para. 12.
\textsuperscript{14} Dolzer & Schreuer Christoph, Principles of International Law, P. 52 - 54.
\textsuperscript{15} Facts, para. 7.
15. In conclusion, accordingly to the Respondent's arguments developed above the Claimant is not an investor under the definition of the Ticadia-Kronos BIT, since it has not a Ticadian Nationality, it has been proved that it is a National of the Republic of Kronos and could not make a real investment in “the host State” qualifying as a foreign investor. Furthermore, only the Incorporation Criterion indicates that the Claimant is a national of the Republic of Ticadia. On the other hand, Siège Social and effective management along with a bond of economic relevance criteria implied that the Claimant is not a Ticadian National, instead it is a Kronian National. All of the criteria must be evaluated equally, in other words, must be given equal value to each of them, through systematic interpretation. Through the Incorporation criterion it has been established that the Claimant has the Ticadian Nationality. However, through Siège Social and effective management it has been established that it has Kronian Nationality. Therefore, the latter two must prevail.

B. The Claimant’s operations in the Respondent’s territory do not qualify as an investment within the meaning of Article 1(1) of the BIT.

16. Following the guideline proposed at the beginning of this subject matter, the second argument concerning the jurisdiction of this Tribunal is that the Claimant did not make a covered investment according to the BIT, due to the fact that it did not make an investment complying with the requisites of the Article 1(3) of the Ticadia-Kronos BIT.

17. Article 1(3) of the Ticadia-Kronos BIT provides that “the term ‘covered investment’ means, with respect to a Contracting Party, an investment: (i) in its territory; (ii) by an investor of the other contracting Party; (iii) existing on the day of entry into force of this agreement, as well as an investment made
or acquired thereafter; and (iv) that has been admitted in accordance with the hosting Contracting Party’s laws and regulations”.

18. Scholars have well indicated that the definition of covered investment is a key element in determining the applicability of protection under international investment treaty to a covered investor.\(^{16}\)

19. As mentioned above, Article 31 of the VCLT applies to the interpretation of the Ticadia-Kronos BIT. The ordinary meaning of the given terms in Article 1(3) are: in the current dispute (i) in its territory, means the territory of the Republic of Kronos; (ii) by an investor of the other contracting party, means, by an investor of the Republic of Ticadia; (iii) existing on the day of entry into force of this agreement, as well as an investment made or acquired thereafter, means that the investment must have been made when the BIT was yet binding; (iv) that has been admitted in accordance with the hosting Contracting Party’s laws and regulations, means that the Claimant has strictly make its investment as foreigner with the acceptance of the laws and regulations of the Republic of Kronos.

20. The Claimant, prima facie, did make an investment in the territory of the Republic of Kronos, considering prerequisite (i) and in August 2008 initiated the actual exploitation of lindoro in the Respondent’s territory.\(^{17}\) However, according to the facts presented previously, the Claimant did not make an investment in Kronian territory in the capacity of foreign investor. Instead,

\(^{16}\) Benson, Madden & Knoebel, Covered Investment, P. 3.

\(^{17}\) Facts, para. 8.
the Respondent has proven the Claimant's Kronian nationality. Hence, the Claimant has failed to fulfil prerequisite (ii).

21. The Respondent submits that even if the Tribunal will find that the Claimant did make an investment in the territory of the Republic of Kronos in August 2008, it did it as a national of the Republic of Kronos, in other words fulfilled requisites (i). Furthermore, when the Claimant did make its investment, it was not a national of the Republic of Ticadia. Instead, it was a Kronian national, therefore, it did not comply with requisite (ii).

22. In conclusion, this Tribunal lacks jurisdiction in regard to the Article 1(3) of the Ticadia-Kronos BIT. Since the Claimant did not comply with the requisites established in this Article, especially the most relevant: (ii) The Claimant is not a national of the Republic of Ticadia, hence the Ticadia-Kronos BIT requires all the elements to be fulfilled. The Claimant did not make a converted investment under the BIT in the Respondent's territory.

C. Fork in the road provision has been violated.

23. The Respondent submits the present claim arguing that Claimant’s requests are not admissible, based on the fork in the road provision which precludes the Claimant from pursuing international arbitration proceedings.

24. It is commonly agreed by scholars that the fork in the road provision consist of an entitlement for the investor to freely and irrevocably select the

\^18 Facts, para. 7.
\^19 Christopher, Wallace, Rubins, Noah, and Borzu, Investor-State Arbitration.
forum before it pursues proceedings, in order to find a fair dispute settlement resolution. Nevertheless, decision might be final depending on the fork in the road clause provided in the BIT.

25. In the Ticadia-Kronos BIT Fork in the road provision is provided in article 11 as follows:

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
(a) to the domestic courts or administrative tribunals of the Contracting Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures.

26. Provided that the national or company concerned has not submitted the dispute for resolution under (a) or (b) of the second paragraph, and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce and in accordance with its Arbitration Rules.

27. The Claimant's claims that non-admissibility may be founded on the following arguments: (i) the Claimant initiated prior proceedings before local courts, (ii) the Claimant could not pursue arbitral proceeding in article 11(3) given that the jurisdiction clause in the BIT made the election of one forum or the other final, (iii) the Claimant's claims did not have an autonomous existence outside the prior contractual claims; (iv) owing to the
fact that the Claimant did not completely fulfil the dispute settlement procedure provided in Article 11(2) of the Ticadia-Kronos BIT.

28. First, the Claimant initiated prior proceedings before local courts as it has been proved in the following statement: “On 8 September 2016, Claimant applied to the Kronos federal court seeking to suspend the effects of the Decree”.20 The Claimant has chosen among its dispute resolution options on the BIT to submit the dispute for resolution before the domestic courts or administrative tribunals of the Republic of Kronos as exposed before.

29. Second, complementing last argument and given the fact that initiating proceeding before local courts is not enough to triggers fork in the road provision to precludes the Claimant to pursue further international arbitration proceedings, the Respondent argues that the dispute resolution options contained in the BIT exclude one to each other, indeed the election of one forum constitute a final decision in relation to the other forum.

30. The Claimant completed its election of domestic courts of the Republic of Kronos when decided to present claims before the Kronos Federal court as proved before.

31. As clarified by the Tribunal in the Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania case, the Claimant’s election of fora is final, therefore “it cannot now adopt the same fundamental basis as the foundation of a treaty claim”.21 Having made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before the arbitral tribunal.22

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20 Facts, at para. 25.
22 Ibidem.
32. Third, the Claimant’s claims did not have an autonomous existence outside the prior contractual claims. The Claimant has chosen to irrevocably initiate proceedings before the Kronos Federal court, thus this election here withstands as final. Shall also question the withdrawal to appeal before circuit court after the federal court denies its claims.\(^{23}\)

33. The Claimant should have completed and finished local proceedings according to its forum election in order to afterwards initiate international arbitral proceedings, based on the article 7 of the Kronos-Fenoscadia Limited Concession Agreement (CA).\(^{24}\)

34. According to previous statements, the present claims before this tribunal are not autonomous. Despite of its protection contained in the BIT, and the obligations contained in the CA, Article 7, the Claimant is obligated to resolve any dispute regarding the agreement before local courts.

35. The claim become autonomous only in the moment in which the Claimant fulfills its obligation on the CA. The Claimant had completed the proceedings before domestic courts. Notwithstanding, the Claimant withdrew its right to appeal before the circuit court on the dispute regarding Presidential Decree No. 2424 (PD) suspension, thus it breached its agreement proceeding obligation in Article 7.

36. The Claimant had the obligation to choose local forum in regard to the agreement termination, as was to complete local proceedings concerning the PD suspension instead of withdrawing.

\(^{21}\) Facts, para. 26.

\(^{24}\) Article 7 of the Concession Agreement between Kronos-Fenoscadia.
37. The Claimant did not completely fulfil dispute settlement procedure provide in Article 11(2) of the Ticadia-Kronos BIT.

38. The Claimant was permitted to initiate the procedure in Article 11(3) only if it has not submitted the dispute for resolution following another procedure option provided on previous lines. As it was submitted above the claimant pursued contractual claims before the federal court, in other terms, the claimant made a final forum election by selecting local courts.

39. Having chosen to pursue its option in Article 11(a) the Claimant was not permitted to initiate international arbitral proceedings. An a consequence, it did not abide by the dispute settlement procedure, namely avoid following the procedures which was obligated to fulfil.

II. MERITS

40. The Respondent’s submission related to the merits will be asserted in three main arguments: firstly (A), The Respondent will allege that is not liable regarding the Claimant’s taking claims, secondly (B), The Respondent have not breached the FET Standard and, finally (C), in the unlikely situation whether the Tribunal finds that the Respondent is liable regarding the Claimant claims, it argues that its actions were taken under a state of necessity.

A. The Respondent has not committed a compensable taking.

41. Regarding the first argument, the Respondent address that the measures taken by the State are within the police powers, since they: (a) were to
protect a public purpose, (b) were not arbitrary, (c) were taken in a non-discriminatory manner, and (d) were not with a disguised restriction to international trade or investment. Hence, they do not require compensation.

42. Primarily, the Respondent will examine the concept of police powers in order to clearly develop its arguments: Scholars have identified State’s police powers as any regulation which is bona fide, non-discriminatory and in the interests of public health, safety, morals or welfare taken by the state.

43. Further, in the Philip Morris v. Uruguay case, the Tribunal clarify that the principle of police powers. The State can exercise police powers in such matters as maintenance of public order, health or morality. It can refuse to pay compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory. The previous posture has been shared by tribunals in cases such as Methanex v. USA, and Tecmed v. Mexico.

44. It has been a tendency for the States to include in their BIT a police powers provision to clearly establish that regulatory measures as an exception to compensable takings. In the present case, Article 10 of the BIT is a display of that tendency.

45. Article 10 of the BIT clearly establish that:

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25 David Schneiderman, ‘NAFTA’s Takings Rule at 530.
26 Philip Morris Brands v. Uruguay, para. 295
27 Methanex v. USA, part IV. Chapter D, P. 4.
28 Tecmed v. Mexico, para. 119.
29 Singapore–USA Free Trade Agreement; Section 4(b) of Annex B Model US BIT; Article 20(8) of the Investment Agreement for the COMESA.
1. For the purpose of this Agreement, each of the Contracting Parties may adopt or enforce a measure necessary:
(a) to protect human, animal or plant life or health;
(b) to ensure compliance with domestic law that is not inconsistent with this Agreement nor with rules and principles of international law; or
(c) for the conservation of living or non-living exhaustible natural resources.

2. However, the measures undertaken pursuant to the preceding paragraph must not be:
(a) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors; or
(b) a disguised restriction on international trade or investment.

46. In accordance with the foregoing, the Respondent proceeds to explain that the measures were taken under its police power, since (a) they were taken to protect human, animal or plant life or health, (b) were not arbitrary, (c) have no intention to discriminate the Claimant, and (d) were not taken aiming to restrict neither the International trade or the investment.

   a. The PD and the KEA were aimed to protect the life and health of Kronian citizens, animals and plants.

47. In August 2008, the Claimant started the actual exploitation of lindoro. At that time, the Respondent had neither a regulatory framework of the mining industry, nor a comprehensive environmental regulation.

48. In October 2014, when Mr. Curat Bazings won the Presidential election, the Republic of Kronos started a nation-wide reform of its political and economic structure, and since then the economic policy has been

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30 Facts, para. 8.
31 Facts, para. 10.
restructures and reoriented\textsuperscript{32}. He had promised to implement a strong environmental and nationalist political agenda in his election campaign.

49. On 12 June 2015, The Kronian Parliament passed the Kronian Environmental Act (KEA), which dictated miners to protect the water from toxic mineral waste on the regions where the extraction took place.\textsuperscript{33} At the time, this regulatory framework was deemed necessary.

50. In October 2015, the Kronian Ministry for Environmental Matters release data indicating that the concentration of toxic waste found in Respondent’s largest river, Rhea River, had sharply increased since 2010.\textsuperscript{34}

51. Subsequently, on 15 May 2016, the Kronian Federal University published a comprehensive study, which conclude that the contamination of the Rhea River was undoubtedly a direct consequence of the exploitation of lindoro. \textsuperscript{35}

52. Moreover, the Study of the Kronian Federal University discovered the presence of graspel, a toxic component released during the exploitation of lindoro, in the Rhea River waters. At least 10 different studies conducted by top-tier universities and independent researchers across the globe over the last 5 years have demonstrated a connection between water contamination caused by graspel and an increase in CVD in the population of the surrounding areas. \textsuperscript{36}

53. Due to the seriousness of the situation, on 7 September 2016, President Bazings issued the PD, which prohibited, with immediate effect, the

\textsuperscript{32} Facts, para. 14.
\textsuperscript{33} Facts, para. 16.
\textsuperscript{34} Facts, para. 20.
\textsuperscript{35} E. 4.
\textsuperscript{36} Fact, para 22.
exploitation of lindoro in all Respondent's territory, revoked Claimant's license, and terminated the CA.\textsuperscript{37}

54. Undoubtedly, the Respondent’s expedition of the KEA and the PD were directed to protect human, the environment, and the life and health of its citizens. It main purpose sought to specially definitely the exploitation of lindoro in the site, since the Article 10(1) allows the Respondent to adopt or enforce a measure necessary (a) to protect human, animal, plant life and health.

55. In summary, it was necessary to immediately implement both measures, since, the study of the Kronian Federal University\textsuperscript{38} has displayed the undoubtedly causal link between the contamination of the Rhea River and the exploitation of lindoro. This study also has exhibited the increase of cardiovascular diseases in the population surrounding the Rhea River. Therefore, if the exploitation of lindoro had continued the citizens would live in a constant risk of disease caused by a polluted environment, and their lives would be hazard then meaning the essential interest would have been sacrificed.

b. The Respondent's measures were not applied in an arbitrary manner.

56. As the Ticadia-Kronos BIT does not define the term arbitrary, the Respondent applies the Vienna Convention on the Law of Treaties (VCLT) which is considered Customary International Law\textsuperscript{39}, binding for both Ticadia

\textsuperscript{37} Facts, para. 23.

\textsuperscript{38} E. 4.

\textsuperscript{39} Kasikili v. Sedudu Island, para. 18.
and Kronos\textsuperscript{40}. In Article 31, it contains guidelines for interpretation of the treaties according to the ordinary meaning of the given terms.\textsuperscript{41}

57. In the \textit{Siemens v. Argentina} case the Tribunal clarify that the ordinary meaning of \textit{arbitrary} means “derived from mere opinion”, “capricious”, “unrestrained”, “despotic” or “fixed or done capriciously or at pleasure; without adequate determining principle”, “depending on the will alone”, “without cause based upon the law.”\textsuperscript{42} The previous posture has been shared by tribunals in cases such as \textit{Lg&E v. Argentina}\textsuperscript{43} and \textit{Lauder v. Czech Republic}.\textsuperscript{44}

58. More specifically, the definition of arbitrary clarified by different tribunals as a “fixed or done capriciously or at pleasure; without adequate determining principle”.\textsuperscript{45} Is the Respondent’s opinion that the Kronian Federal University study, was an adequate determining principle to base upon its decision and later measure upon. The measures could not have been capricious, neither unrestrained nor despotic. In total, both the PD and the KEA were not arbitrary because they were reasonably justified by the study, owing to the fact that it displayed the causal link between, the result, that is, the contamination of the Rhea River and its cause, the exploitation of lindoro.\textsuperscript{46}

\textsuperscript{40} Facts, para 2.
\textsuperscript{41} Article 31 of the VCLT.
\textsuperscript{42} \textit{Siemens v. Argentina}, para. 318.
\textsuperscript{43} \textit{LG&E v. Argentina}, para 158.
\textsuperscript{44} \textit{Ronald S. Lauder v. The Czech Republic}, para. 221.
\textsuperscript{46} Facts, para 22.
59. Moreover, the measure cannot be interpreted as “derived from mere opinion”\textsuperscript{47} by the Respondent. In fact, the concentration of toxic waste had sharply increased since 2010 in the largest and most important river of Kronos, the Rhea river\textsuperscript{48}, and since the study acknowledges the presence of graspel, a toxic component released during the exploitation of lindoro in the Rhea River waters, the Respondent’s conduct cannot be qualified as “restrained”.

60. In conclusion, both measures taken by the Respondent were aimed to protect its human, animal, plant life and health, therefore they were not arbitrary due to the fact that they were reasonable justified over a solid base of proven facts.

\textbf{c. The Respondent’s measures were not applied in a discriminatory manner.}

61. Similarly to the term “arbitrary”, the Ticadia-Kronos BIT does not established the definition of discrimination. For that reason the Respondent proceed to apply the Article 31 (1) of the VCLT, that is, to interpret it in its ordinary meaning the given terms. Taking into account the literal definition of discrimination, it is valid to affirm that it is an unjustified differential treatment between investors in like circumstances.

62. Further, scholars have distinguished two elements to determine whether or not there is a discrimination: (i) The existence of a basis of comparison between the investors, and (ii) an intention to discriminate\textsuperscript{49}. In respect to

\textsuperscript{47} The Black’s Law dictionary in: Siemens v. Argentina, para. 318.; LG&E v. Argentine, para 158; Ronald S. Lauder v. The Czech Republic, para. 221.

\textsuperscript{48} Facts, para 20.

\textsuperscript{49} Dolzer & Shereuer. Principles of International Investment law, P. 178.
the (i) first element, in the *Pope Talbot v. Canada*\(^{50}\) case the Tribunal conclude the application of this element. First of all, by comparing the treatment accorded to the Claimant’s investment with the treatment accorded to domestic investments in the same business.

63. Seeking the ordinary meaning of the term, the Respondent followed the same application of the rule identified by the Tribunal in mention. The comparison between the treatment to the Claimant’s investment and the treatment to the domestic investments is not achievable since the Claimant effectively was the only company in the business of extracting lindoro\(^{51}\). There was not any other treatment either domestic or international investment in the business to compared the Claimant’s investment with. Therefore, the Respondent measures were not discriminatory towards the Claimant, it was not possible to treated in a discriminatory manner not having a basis of comparison.

64. In relation to the (ii) second element, the Respondent argues that the CA was unique. It had only contracted the Claimant for the exploitation of lindoro as explained previously. The Claimant’s has not proved that the PD “was adopted with the purpose of causing damage to its investment”\(^{52}\) and has not demonstrated any fact that sustained a viable comparison under the first element mentioned before. As a result, it is proved that the Respondent has not intention to discriminate the Claimant’s investment.

65. In summary, the Respondent’s measures were not discriminatory because there was not an unjustified differential treatment between the Claimant and investors in the same business.

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\(^{50}\) *Pope & Talbot v. Canada*, para. 78.

\(^{51}\) Facts, para. 11.

\(^{52}\) *LG&E v. Argentine*, para. 148.
d. The Respondent's measures are not a disguised restriction on international trade or investment.

66. The enactment of the PD and the KEA were not aimed to be a disguised restriction on international trade or investment, since the Respondent never prohibited the Claimant from carrying out its activities as an investor. On the contrary, it allowed the exploitation of lindoro exclusively\textsuperscript{53} without interruption, until a study discovered the contamination caused within the most important river in the country. Reason sufficient for the Respondent to decide to take necessary measures to protect the environment, health and life of its population.

67. In conclusion, the Respondent has not committed a compensable taking since the measure, the PD and the KEA (a) were aimed to protect a public purpose, (b) were not applied in an arbitrary manner, (c) were not discriminatory, and (d) were not a disguised restriction to international trade or investment as the Article 10 of the Ticadia-Kronos BIT commands.

B. The Respondent actions did not breach the Fair and Equitable Treatment (FET) standard.

68. The Respondent argues that its actions did not breach the FET Standard since: (a) the legitimate expectations are not a component of the FET standard, and even if they were, the Respondent did not violate the legitimate expectations of the Claimants, and (b) the Respondent has complied the due process FET prerequisite in its measures.

\textsuperscript{53} Facts, para. 11.
a. The legitimate expectations does not constitute an element of the FET standard.

69. Article 6 of the Ticadia-Kronos BIT established that “each Contracting Party shall accord to a covered investment treatment in accordance with the Customary International Law minimum standard of treatment of aliens, including FET and full protection and security”.

70. Even though there is no clear definition of this standard, Article 6 of the Ticadia-Kronos BIT seeks to limit the scope of the interpretation of FET, in accordance to the CIL minimum standard of treatment of aliens.

71. As the redaction of Article 6 of the Ticadia-Kronos BIT is similar to the redaction of Article 1105 of NAFTA, it can be used as a basis for interpretation in accordance with what the jurisprudence has said on the matter.

72. Therefore, Article 1105 of the NAFTA has been the subject of an official interpretation by the NAFTA Free Trade Commission (FTC), a body composed of representatives of the three States parties with the power to adopt binding interpretations. The interpretations states that Article 1105 reflects the CIL minimum standard and does not require treatment in addition to or beyond that which is required by CIL. This interpretation has been shared in tribunals as Pope Talbot v. Canada, Methanex v. USA and Loewen v. USA.

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54 Article 6 of the BIT.
55 Pope & Talbot v. Canada, para. 17-69.
57 Loewen Group & Raymond v. USA, para. 124-128
Moreover, in the *Loewen v. USA* case the Tribunal clarify that FET and Full protection are not free-standing obligations. They constitute obligations only in the extent they are recognized by CIL.\(^{58}\)

Even though, legitimate expectations were created by arbitral tribunals over the past decade, they are not part of the CIL. Owing to the fact that States do not fulfill the requirements in order to be so: (i) State practice, and (ii) *opinio iuris*. As an example of that, in the *Teco v. Guatemala United States* case a Contracting Party presented a submission in the following manner, “States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under CIL merely because such changes interfere with an investor's ‘expectations’ about the state of regulation in a particular sector.”\(^{59}\)

All things considered, the Respondent did not incur liability under CIL. Consequently, did not violate the standard of fair and equitable treatment, even if its measures interfere in investor's expectations, since, as it was previously proven, the Respondent always acted according to a legitimate objective aimed to protect of humans, animals, plant life and health.

In the unlikely case that the Tribunal finds that the legitimate expectations constituted an element of the FET standard, the submission of the Respondent is that the vital elements necessary to establish the existence of the legitimate expectations are not found.

In the *Thunderbird Gaming Corporation v. Mexico* case the Tribunal brought some criteria to determine a violation under legitimate expectations, which

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\(^{58}\) *Loewen Group & Raymond v. USA*, para. 128.

should be met cumulatively.\textsuperscript{60} Although it is not binding, it will be useful to clarify that the Respondent did not violated those criteria.

78. These criteria\textsuperscript{61} is divided into: (i) the creation of a reasonable and justified expectations of the investor by the host-State, (ii) investor`s confidence in the behavior of the host-State, and (iii) the inability of the host State to meet the expectations created.

79. It is worth noting that there is no violation of the legitimate expectation on the part of the Claimant, as it is sufficient to proof that one of the legitimate expectations requirements are not fulfilled. Therefore, the Respondent submits that firstly (i) the Respondent has not created a reasonable and justified expectations for the investor, since the investor always knew about the limited regulation that existed on the matter at the time of the investment. For this reason, the Respondent in Article 2 of the CA, informed the Claimant of the high possibility for the realisation of legislation on the subject. In the same Article, the Claimant was asked to be willing to adapt its activities in light of new regulations or laws, which is why the Claimant, was fully informed and willing to submit to changes in legislation that could be presented at the time of its investment in the Republic of Kronos. No facts indicate that the Respondent in any moment created the impression that the system would not be modified. Therefore, it is justified fot the Respondent to disregard the argument and the claim made by the Claimant regarding the alleged breach of the legitimate expectations.

80. However, even if the first argument is sufficient, the Respondent also raises additional arguments rebutting the claim that the legitimate expectations were violated. Therefore, secondly (ii), the investor did have confidence in

\textsuperscript{60} Thunderbird Gaming Corporation v. Mexico, para. 194.

\textsuperscript{61} Ibidem.
the State's behavior, however, it was not trust based on legitimate expectations, it was based under the obligations established in BIT between the Contracting Parties, which as has been demonstrated throughout the memorial the Claimant has complied clearly.

81. **Finally (iii),** there is not an inability of the Respondent to meet the expectations created, since, as stated before there was not an expectation created by the host-State, therefore the Respondent can not be in an inability to accomplish it. On the other hand, if the Tribunal finds that the legitimate expectations were created, the Respondent was always disposed to fulfil its obligations pursuant of the welfare of its population.

82. In summary, the Respondent has not violated the Claimant's legitimate expectations as the Respondent has never created an expectation to the investor, and even if the host-State has created they were always pursing a legitimate objective to protect human, animal and plant life.

**b. The Respondent's measures respected the due process requirement.**

83. Scholars has elucidated, that due process might be breached in a variety of ways, including failure to provide notice or a fair hearing, non-compliance with local law, or failure to provide a means for legal redress. 62

84. The Respondent has complied with its local legislation, since the Article 11 of the Ticadia-Kronos BIT and Article 6 of the CA., legislation which regulates the Contracting Parties relationship concerning any proceeding, has been taken into account and respect from the first moment.

85. Further, the local courts of the Republic of Kronos were always available to the Claimant in order to resolve any dispute arises from the development of the CA. Nonetheless the Claimant has recognised that when it went to file a petition ended with its dismissal.

86. Therefore, the measures taken by the Respondent respected the due process requirement, as there was not a denial of justice.

C. **In the event the Tribunal finds that the Respondent is liable, it shall submit that its actions were taken under a state of necessity.**

87. The International Law Commission has codified the notion of necessity it in the article 25 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts:

**Article 25. Necessity**

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(i) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(ii) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

88. The doctrine of “state of necessity” has been recognised in CIL, and applied “to protect a wide variety of interests, including safeguarding the

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63 Continental v. Argentine, para 160.
environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population”.

89. Bear all the above in mind, (i) the enactment of the PD and the KEA were the only ways in which the State could contribute, effectively, to protect its essential interest, in other words, human, animal, plant life and health. Otherwise, the State would have entered to experiment in a risky, senseless and reckless manner with the environment or the future of generations to come and even worse with the health of its inhabitants. There was no alternative measure that the Claimant could have proposed whereby it could have protected the essential interest of the environment and health more effectively than the expedition of the administrative resolution and the legislation mentioned before. (ii) Having taken into account the Claimant’s concern regarding its investment would have meant prioritising an individual interest over the general and essential interest of the Respondent. Hence the interest impaired with the measures were pursuing an essential interest of the Respondent. The Respondent's measures were the only way for the State to safeguard an essential interest against a serious and imminent danger. In addition, they did not seriously undermine an essential interest of the applicant in respect of which the obligation exists, since the Republic of Kronos always fulfilled the obligations arising from the development of the CA and the BIT until an imminent danger was created that justifies its actions.

90. In order to conclude the Respondent will summarise its arguments as follows: (A) the issued the PD and KEA did not constituted a compensable taking, since they were employed within the Respondent's police powers. (a) Owing to the fact that they were taken to protect human, animal, plant life and health. Further, (b) they were not applied in a non arbitrary manner (c)

64 ILC, Commentary, at Art. 25, para. 14.
not discriminatory manner or a (d) disguised restriction to international trade or investment.

91. Moreover, (B) the Respondent’s measures did not breach the FET standard, since (a) legitimate expectations do not constitute a part of the FET standard, and in the unlikely case that the Tribunal finds that legitimate expectations constitute an element of the FET standard, the submission of the Respondent is that the vital elements necessary to establish the existence of the legitimate expectations are not found. Therefore, the Respondent’s measures has comply with the (b) due process prerequisite in order to accomplish its obligations under the BIT.

92. Finally, (C) in the unlikely event that the Tribunal finds the Respondent liable, it argues that its actions were taken under state of necessity due to the environmental impact and the imminent risk to its population life and health, which precludes the wrongfulness of its acts.
PRAYERS FOR RELIEF

For the aforementioned reasons, the Respondent respectfully requests the Tribunal to:

1. Declare it lacks jurisdiction over the dispute on the grounds that Claimant is not an investor under the BIT;

2. Declare that the Claimant’s request are not admissible;

3. Declare that the Claimant’s expropriation claims are entirely rejected since the Respondent was within its police powers when take the relevant measures.

4. Declare the Claimant liable for the damages arising out of its operations in Kronos.

5. Order the Claimant to pay USD 150,000,000 to compensate the damage mentioned above.

6. Order the Claimant the pay the pre-award interest and post-award interest at a rate to be fixed by the Tribunal; and

7. Find that the Claimant is entitled to all costs associated with these proceedings, including all legal and other professional fees and disbursements;