ARBITRATION INSTITUTE OF THE
STOCKHOLM CHAMBER OF COMMERCE

FENOSCADIA LIMITED

Claimant

v

REPUBLIC OF KRONOS

Respondent

MEMORIAL FOR RESPONDENT

24 September 2018
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<td>The Republic of Ticadia and the Republic of Kronos</td>
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**PO 3** | Procedural Order No. 3  
**Preamble** | Preamble of BIT  
**Request** | CLAIMANT’s Request for Arbitration  
**Study** | A comprehensive study published by the Federal University on 15 May 2016  
**SCC** | Stockholm Chamber of Commerce  
**State** | The host state in a state-foreign investor relationship  
**Ticadia** | The Republic of Ticadia; Party to BIT concluded with the Republic of Kronos, Respondent in the matter at hand  
**Tribunal** | Arbitral tribunal in the present case  
**University** | The Kronian Federal University  
**v.** | against (versus)
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STATEMENT OF FACTS

Involved Entities

1. Claimant, Fenoscadia Limited, limited liability company incorporated under the laws of the Republic of Ticadia.¹

2. Respondent, the Republic of Kronos.²

Factual background of the business relationship between Claimant and Respondent

3. On 30 June 1995, the Republic of Ticadia and Respondent concluded BIT for the promotion and reciprocal protection of investments.³

4. In March 1997, a mineral reserve of a rare earth metal lindoro was found in Respondent’s territory and reported by the University.⁴ As Respondent was an underdeveloped country and did not have necessary expertise to carry out mining itself,⁵ it concluded the Agreement with Claimant, a foreign mining company.⁶ Claimant has a worldwide reputation for exploration and exploitation of rare earth metals.

5. Claimant and Respondent entered into the Agreement in 2000. Claimant was granted a concession for the exploration and exploitation of lindoro for eighty years. In return, Claimant agreed to pay Respondent 22% of the monthly gross revenue relating to the extraction and commercialization of lindoro.⁷

6. Actual exploitation of lindoro started in August 2008.⁸ Claimant was the only company extracting lindoro in Respondent’s territory ever since its discovery.⁹

¹ Request, para. 1.
² Ibid.
³ Facts, para. 1.
⁴ Facts, para. 3.
⁵ Facts, para. 4.
⁶ Facts, para. 8.
⁷ Ibid.
⁸ Facts, para. 8.
⁹ Facts, para. 11.
7. In 2010, Claimant eventually decided to transfer and concentrate almost all its mining activities and resources in Respondent’s territory and effectively shut down its mining operations in Ticadia.\(^{10}\)

Respondent’s measures and the recent development

8. Due to the development of the mining activities and industry at Respondent’s territory, Respondent faced the need to reinforce the protection of the environment. Thus, on 12 June 2015, The House passed the KEA, an environmental act which sets forth the obligations of miners to protect the national waters from the toxic waste.\(^{11}\)

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.\(^{12}\) Upon this finding, on 15 May 2016, the University published the Study, which concluded that the exploitation of lindoro was a direct cause of the contamination of the Rhea River and the rising incidence of specific diseases (e.g., cardiovascular disease and microcephaly) in the population of the surrounding areas.\(^{13}\)

10. Thus, on 7 September 2016, Respondent implemented the Decree which prohibited, with immediate effects, the exploitation of lindoro in all Respondent’s territory, revoked Claimant’s license, and terminated the Agreement.

11. On 8 September 2016, in order to seek the suspension of the effects of the Decree until negotiations with the Government took place, Claimant applied to Respondent’s court.\(^{14}\) However, few months later Claimant withdrew its appeal to Respondent’s Circuit Court.\(^{15}\)

12. On 14 September 2017, Respondent confiscated the part of Claimant’s lindoro which was stored at its facilities.

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\(^{10}\) Facts, para. 12. 
\(^{11}\) PO 2, para. 7. 
\(^{12}\) Facts, para. 20. 
\(^{13}\) Facts, para. 22. 
\(^{14}\) Facts, para. 25. 
\(^{15}\) Fact, para. 26.
13. Soon Claimant shut down its facilities in Respondent’s territory. On 10 November 2017, Claimant filed its request for arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce.¹⁶

Counterclaims

14. Claimant refused to recognize its liability for environmental damages and its compensation.¹⁷ Respondent demanded that Claimant acknowledged its responsibility for the environmental pollution and health consequences. These claims were used already as a pre-requisite for negotiations to re-instate the exploitation of lindoro¹⁸ between the issuance of the Decree and the filing for arbitration.¹⁹

15. After Claimant filed its Claims before the Tribunal, Respondent in filed its Counterclaims and requested the Tribunal to order Claimant to pay Respondent compensation for the damages caused to its environment, of no less than USD 150,000,000²⁰. Respondent specified that such sum would be necessary for decontamination of the Rhea River with high-technology treatments, costs for supplying with clean water the population that is dependent on the water from the Rhea River, the health costs for treating the population directly affected by the contamination of the Rhea River and additional costs compensating those whose health has been damaged (or their surviving dependants) for lost earning ability, pain and suffering.²¹

¹⁶ Facts, para. 29.
¹⁷ Answer, para. 22.
¹⁸ PO 2, para. 6.
¹⁹ PO 3, para. 3.
²⁰ Answer, para. 24.
²¹ Answer, para. 23.
SUMMARY OF ARGUMENTS

16. Claimant’s claims cannot be submitted to the Tribunal as Claimant is not an investor under the terms of BIT and thus, cannot enjoy the protection thereof. Claimant retained a merely factual and weak connection with Ticadia, its State of origin. Now, however, Claimant has been effectively transformed into Respondent’s entity. Claimant can be seen as Ticadian entity neither under the purpose and objective of BIT nor under the close connection link under customary law. Thus, Claimant is not even an investor under BIT. (I)

17. Claimant’s claims are also not admissible before the Tribunal since Claimant’s claims share the same fundamental basis as Claims in Motion. Claimant’s claims are therefore barred by application of the fork-in-the-road provision stipulated in Art. 11(3) BIT. Moreover, Parties to BIT have not intended the arbitration as an appellate process as well as they not limited the dispute-settlement part of BIT by concept of waiver. Also, the situation of denial of justice cannot occur since Claimant still may continue for seeking relief before the domestic courts. (II)

18. The Decree, its implementation and further steps of Respondent did not amount to an expropriation of Claimant’s investment in the breach of Art. 7 BIT. Respondent’s measures were not expropriatory as they fit squarely with its right to regulate under the police powers doctrine. Moreover, Respondent’s measures were fully within Claimant’s legitimate expectations. Finally, Claimant’s investment was not permanently and irreversibly affected. However, even if the Tribunal finds that Respondent’s measures were expropriatory, they were still in accordance with the requirements of Art. 7 BIT for the lawful expropriation. (III)

19. Finally, the Tribunal may adjudicate that the Counterclaim, set forth by Respondent in the Answer, is admissible. Firstly, the Tribunal has jurisdiction to adjudicate the Counterclaim as it meets the element of *ratione materiae* and with standing of Respondent for bringing the Counterclaim under BIT. Secondly, the Counterclaim is admissible as it is not only factually linked, but also legally linked to Claimant’s claims. Thus, the requirements of the connection test for admissibility are met. (IV)
ARGUMENTATION

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE DISPUTE

20. In 1995, Respondent concluded BIT[22] with Ticadia in which it undertook to promote investments and provide investors with effective means to protect their rights.[23] Following the conclusion of BIT, Claimant and Respondent entered into the Agreement[24] under which Claimant launched its mining activities and hired 200 employees, all of which were Respondent’s citizens.[25]

21. As for the Claimant’s structure, it was incorporated in 1993 under the laws of the Ticadia as a limited liability company and had five Ticadian nationals as its shareholders at that time.[26] In 1998, Claimant’s shareholding structure changed and 65 % of the shares with voting rights of Claimant were acquired by a private equity fund from Ticadia.[27]

22. Since the beginning of the partnership, Claimant was increasing its operations in Respondent’s territory and, at the same time, gradually transferring its decision-making processes there.[28]

23. Finally, in 2010, Claimant decided to transfer and concentrate almost all its mining activities and resources to Respondent’s territory and shut down its mining operations in Ticadia.[29] Moreover, in 2012, Respondent’s nationals acquired the remaining 35% of Claimant’s shares.[30] Since then Claimant has been operating as a mere shell company of Ticadia with the controlling rights and decision-making processes exclusively vested in Kronian nationals.

24. Followingly, at the present day, Claimant’s management is in the hands of a board of directors which, for the past five years, has been comprised of a majority of Kronian

[23] Preamble, lines 1045-52.
nationals exerting considerable influence over Claimant’s decisions.\footnote{Facts, para. 7.} Moreover, current CEO of Claimant, often travels and stays at Respondent’s for long durations for its business.\footnote{Facts, para. 7.}

25. Upon recent development of the relationship between Claimant and Respondent, especially in reaction to Respondent’s measures, Claimant submitted the Request by which it wrongfully seeks the protection under the above-mentioned BIT.\footnote{Facts, para. 29.} Nevertheless, according to BIT, to be entitled to its protection, the entity or an individual seeking it must meet the requirement of being an investor under its terms.\footnote{BIT, Art. 1(4), Art. 11.} That means that in our case Claimant would have to meet the requirement of being a Ticadian entity.

26. Additionally, for the Tribunal to have the jurisdiction over Claimant’s Claims, the relevant date when Claimant has to fulfil such requirement is the date of submission of the Request to the Tribunal.\footnote{DOLZER/SCHREUER, p. 41.}

27. However, at the time of the submission of the Request Claimant had already transformed into Respondent’s entity. Claimant was conducting most of its activities in Respondent’s territory, was controlled by Respondent’s nationals and its shareholders exercising significant control over its activities were Respondent’s nationals as well.

28. Thus, the Tribunal shall deny its jurisdiction to hear the case as in accordance with aforementioned (1.) Claimant did not fulfil the requirement of being an investor under the terms of BIT (2.) at the time of submission of the Request.

1. **Claimant is not an investor under the terms of BIT**

29. The IIAs’ aim is to protect investments by nationals and companies of one Party to IIA in the territory of another Party.\footnote{Preamble, line 1045-47.} Hence, the requirement which has to be fulfilled is foreignness of such investment. The foreignness of the investment is determined by the investor’s nationality.\footnote{DOLZER/SCHREUER, p. 46.}
30. In general, there are two most commonly used criteria for interpretation of the investor’s nationality under IIAs. The most widely used is the place of incorporation, alternatively, the effective seat can be taken into consideration.\(^{38}\) Many IIAs establish one or the other criterion, some address a combination of both.

31. Typical wording of the IIAs stressing the incorporation criterion is that “the term “investor” includes a company or other organization organized in accordance with the law applicable in that Contracting Party”.\(^{39}\) As regards the effective seat, most common formulation is that the investor “is having seat” or “the place of effective management” in the territory of one of the Contracting Parties.\(^{40}\)

32. The ICJ noted that in interpreting the IIAs provisions it is necessary to give effect to treaty provisions “in their natural and ordinary meaning”.\(^{41}\)

33. However, contrary to the aforementioned, in our case, BIT neither specifically addresses the criterion of incorporation of the investor nor the criterion of the effective seat.

34. The requirement of BIT concerning the term investor is established in its Art. 1(4) as follows:

“the term “investor of a Contracting Party” means a Contracting Party, or a person or any enterprise of a Contracting party, that seeks to make, is making or has made an investment in the other Contracting Party’s territory”.\(^{42}\)

35. No other specification regarding further definition of the term “investor of a Contracting Party” is provided.\(^{43}\) Thus, the Tribunal will not be able to follow the ordinary meaning of the wording of the provision in order to establish the Claimant’s status, as there is no indicator to show how to establish Claimant’s nationality.\(^{44}\)

\(^{38}\) DOLZER/SCHREUER, p. 49.

\(^{39}\) AUSTRALIA-CHINA BIT, Art. 9.1 (e); JAPAN-MONGOLIA BIT, Art. 1.2 (l); MAURITIUS-EGYPT BIT, Art. 1.3.(b).

\(^{40}\) HONG KONG-AUSTRALIA BIT, Art. 1 (f); ARGENTINA-GERMANY BIT, Art. 1. 3.(a); SAN MARINO-BOSNIA AND HERZEGOVINA, 2. a) (ii).

\(^{41}\) ADF, para. 147.

\(^{42}\) BIT, Art. 1(4).

\(^{43}\) For comparison JAPAN-COLOMBIA BIT, Chapter I, Art. 1, (b).

\(^{44}\) ADF, para. 147.
36. According to ICJ, in case where „the words [of IIAs provisions] in their natural and ordinary meaning are ambiguous [...] then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words“.45

37. Consequently, to fill in this lacuna in BIT, it is necessary to go beyond its wording. According to a well-established practice of investment tribunals, the interpretation rules provided by VCLT as well as general rules of international customary law are to be used in such situation.46

38. Therefore, Respondent will hereinafter prove that firstly, (1.1) Claimant is not an investor under the VCLT interpretation of the object and purpose of BIT. Secondly, if the interpretation of an object and purpose of BIT would not suffice, (1.2) Claimant cannot be deemed a Ticadian entity under the rules of international law.

1.1 Claimant is not an investor under object and purpose of BIT

39. In situations where it is necessary to fill in the gaps in IIAs’ provisions, the tribunals mostly use standard set forth by the VCLT.47 As both Respondent and Ticadia, the Parties to BIT, are also parties to VCLT48, any ambiguity of the wording of BIT must be interpreted in accordance with it.

40. Art. 31 VCLT reads that “a treaty shall be interpreted [...] in accordance with [its] context and in the light of its object and purpose”.49 The investment tribunals have frequently interpreted the IIAs in the light of their object and purpose often looking at their preambles.50

41. The Preamble of BIT states that its purpose is

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45 Guinea Bissau, para. 69-71.
46 DOLZER/SCHREUER, p. 31-32.
47 AAPL, para. 38-42, MTD, para. 112, Tokios Tokelés, para. 27.
48 Facts, para. 2.
49 VCTL, Art. 31(1).
50 MTD, para. 104-105, Siemens, para. 81.
“to promote greater economic cooperation between [the Contracting Parties], with respect to investment by nationals and companies of one Contracting Party in the territory of the other Contracting Party” ⁵¹

42. In other words, the protection under BIT is supposed to be given to the economic flow between Respondent and Ticadia.⁵² Thus, by no means the purpose of BIT is to give protection to the investor, which is only hiding in the foreign shell of the other Party to BIT, against the state of its origin.

43. In the matter at hand, Claimant became only formally tied to Ticadia retaining its Ticadian shell. However, this “foreign” shell was effectively filled, managed and controlled by the Respondent’s nationals.⁵³ Most the Claimant’s activities were exercised in Respondent’s territory, effective control was carried out by Respondent’s nationals, moreover, its shareholders exercising significant control over its activities were Respondent’s nationals as well. Consequently, from the point of view of BIT, Claimant cannot be deemed other than Respondent’s entity.

44. As for the fact that BIT’s object and purpose is to protect the foreign investments and economic flow, Claimant cannot seek the protection under BIT for it is not deemed a foreigner.

1.2 Even under customary international law Claimant is not a Ticadian entity

45. In case that the interpretation of the object and purpose of BIT would not suffice to establish properly the nationality of Claimant, then customary international law shall be considered.

46. To fill in the gaps of IIAs, a reference to general international law is relevant for its interpretation and application, even if treaty itself establishes a lex specialis regime.⁵⁴

47. In Amoco it was held that customary international law is relevant when it is needed “to ascertain the meaning of undefined terms in [IIAs] text or, more generally, to aid interpretation and implementation of its provisions”. ⁵⁵

⁵¹ Preamble, line 1045.
⁵² Tokios Tokelés dissent, para. 19.
⁵³ Facts, para. 6,7.
⁵⁴ GARDINER, p. 284, Amoco, para. 112.
48. Followingly, since wording of BIT does not provide with any test on determining the nationality of an investor, it is necessary to search for a solution in customary international law.

49. The test applicable in this case shall be the one of so called “genuine link”. The genuine link theory first appeared in Nottebohm case concerning nationality of individuals.\(^\text{56}\) In Barcelona traction the Court recognized the need for some “permanent and close connection” requirement in regarding the corporation-state connection.\(^\text{57}\)

50. In the general practice of investment tribunals such theory of a “genuine link” or a “close connection” was recognized by several tribunals, for example in Tokios Tokelés or Rompetrol.\(^\text{58}\) The necessity for such test was raised especially in connection to “mailbox” companies.

51. Concerning the application of the „genuine link” test in determining the nationality of the investor, all relevant factors should be considered. Especially the financial interest in the investment; ability to exercise substantive influence over the management and operation of the investment; and ability to exercise substantive influence over the selection of members of the board of directors or any other managing body.\(^\text{59}\)

52. In the case at hand, Claimant was slowly turning itself into Respondent’s entity. Since 2012, Claimant’s shareholders have been Respondent’s nationals and Ticadian PE fund composed of Ticadian and Respondent’s citizens.\(^\text{60}\) Shareholders possessing Respondent’s nationality carried out most of the control over decision making of Claimant.\(^\text{61}\) Moreover, for the past five years, the board of directors in charge of Claimant’s management has been comprised of a majority of Respondent’s nationals.\(^\text{62}\) The board also appoints the CEO of the company who often travels to and stays in Kronos for long durations to manage Claimant’s business.\(^\text{63}\)

\(^{55}\) Amoco, para. 112.
\(^{56}\) Nottebohm, p. 23.
\(^{57}\) Barcelona Traction, para. 71.
\(^{58}\) Tokios Tokelés, para. 56; Rompetrol, para. 115.
\(^{59}\) Vacuum, para. 43-44.
\(^{60}\) PO 2, lines 1520-21.
\(^{61}\) Facts, para. 7, 12.
\(^{62}\) Facts, para. 7.
\(^{63}\) Facts, para. 7.
53. Hence, Claimant cannot be deemed Ticadian entity in the view of the international customary law as in accordance with the applied genuine link test, Claimant is Respondent’s entity. That shows that Claimant only decided to deliberately use its weak and merely formal ties with Ticadia to challenge Respondent’s legitimate measures adopted against its unlawful behaviour.

54. Followingly, as Claimant is not a Ticadian company under the international customary law it cannot enjoy the protection under BIT.

2. **Claimant did not fulfil the requirement of being investor under BIT at the decisive moment**

55. For the Tribunal to have the jurisdiction over the Dispute, Claimant has not only to be an investor under the terms of BIT. Claimant also has to fulfil such requirement at the date of submission of the Request to the Tribunal.\(^6^4\)

56. According to the well-established practice of the investment tribunals, the relevant date for purposes of jurisdiction is the date of submission.\(^6^5\)

57. As was held in *Vivendi II*, for the purposes of jurisdiction to address the dispute between the parties, the reference is made to the date on which such proceedings are deemed to have been instituted\(^6^6\). The day of the institution of the proceedings is also decisive date for the status of Claimant.\(^6^7\)

58. Thus, the decisive date in our case is 10 November 2017.\(^6^8\) At this time Claimant was already fully transferred to Respondent’s entity keeping itself only a formal tie with Ticadia.

3. **Conclusion**

59. To enjoy the protection under BIT, Claimant would have to fulfil the requirement of being an investor under BIT. Claimant, however, does not fulfil such requirement as it is not a Ticadian entity. On the contrary, both the interpretation of BIT under Art. 31

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\(^{64}\) DOLZER/SCHREUER, p. 41.

\(^{65}\) DOLZER/SCHREUER, p. 41.

\(^{66}\) *Vivendi*, para. 60.

\(^{67}\) *El Paso*, para. 117-136.

\(^{68}\) Facts, para. 29.
VCLT and the international customary law show that Claimant is Respondent’s entity hiding behind its formal Ticadian shell.

60. Therefore, Respondent invites the Tribunal to find that it lacks jurisdiction over the Dispute.
II. THE REQUEST IS NOT ADMISSIBLE BEFORE THE TRIBUNAL

62. Claimant’s claims are barred by application of the fork-in-the-road provision stipulated in Art. 11(3) BIT that forbids litigation before two and more fora.

63. According to Art. 11 BIT, Parties should seek resolution of dispute arising out of or relating to an investment through consultation and negotiation. Only if the dispute cannot be settled amicably, Parties shall choose one of three ways to seek relief: (a) before domestic authorities; or (b) through previously agreed dispute-settlement procedures; or (c) before the Tribunal.\(^69\)

64. However, Art. 11(3) BIT contains a provision of a fork-in-the-road clause stating that only if Parties have not started a procedure of dispute-settlement through (a) or (b), they may submit the dispute to the Tribunal.\(^70\) Thus, it does not allow a second bite at the cherry.

65. The intention of Parties to BIT while drafting was to avoid duplication of procedures by stipulating the irrevocable option clause.\(^71\) Forasmuch as the so-called fork-in-the-road clause seeks to confine the foreign investor to one remedy by precluding resort to others if it is shown to have made a prior election.\(^72\) This clause helps to increase legal certainty that is enormously important between any contracting parties, and even more necessary in economic cooperation.\(^73\)

66. In the present case, Claimant tried to breach this rule by double submission of its claims. Firstly, Claimant filed a Motion in Respondent’s courts\(^74\) and, after its withdrawal\(^75\), submitted the Dispute before the Tribunal.\(^76\)

67. Respondent invites the Tribunal not to follow Claimant’s line of argumentation which would deny the purpose of BIT for the following reasons. Firstly, (A) claims submitted to local courts and to the Tribunal share the same fundamental basis, hence, CLAIMANT’S

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\(^{69}\) BIT, Art. 11(2).
\(^{70}\) BIT, Art. 11(3).
\(^{71}\) Supervisión, para. 294.
\(^{72}\) SORNARAJAH, p. 320.
\(^{73}\) Preamble, lines 1045-1050.
\(^{74}\) Facts, para. 25.
\(^{75}\) Facts, para. 26.
\(^{76}\) Facts, para. 29.
claims are not admissible due to the fork-in-the-road clause. Secondly, (B) BIT does not permit to waive domestic proceeding and submit the dispute again. Thirdly, (C) Claimant does not face the denial of justice.

1. **Claimant’s claims and the Claims in Motion share the same fundamental basis**

68. Claimant’s claims are barred by the fork-in-the-road provision since they share the same fundamental basis as the Claims in Motion submitted before domestic courts. By submitting the Dispute before another forum, Claimant is circumventing Art. 11 BIT.

69. Pursuant to Art. 11(3) BIT, Parties can only submit the dispute for settlement under the Tribunal if the Party satisfies the condition of not having submitted the dispute for resolution before domestic courts or through previously agreed dispute-settlement procedure.\(^{77}\)

70. For recognising whether the claims are essentially the same, it shall be considered whether the claims share the same fundamental basis, meaning on which normative source the claims are founded.

71. In order to find prove of the identity of normative source, the “*fundamental basis of the claim*” test, first set out by the American Venezuelan Mixed Commission in Woodruff, shall be used. It is common ground that this is the relevant test whether or not the fundamental basis of claim sought to be brought before the international forum is autonomous of claims to be heard elsewhere.\(^{78}\)

72. This test was later adopted in *Pantechniki*. *Pantechniki* was based on the GREECE-ALBANIA BIT that has the same wording with regard to the dispute-settlement as BIT in the matter at hand. The GREECE-ALBANIA BIT stated that a party may submit the dispute either to the domestic courts or to an international arbitration tribunal.\(^{79}\)

73. In that case, the Sole Arbitrator, Jan Paulsson, refused the investor’s assertion that claims based on treaty provisions are inherently different from those it pursued as a

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\(^{77}\) BIT, Art. 11(3).

\(^{78}\) *Pantechniki*, para. 61.

\(^{79}\) GREECE – ALBANIA BIT, Art. 10(2).
contractor and stated that it is not argument by analysis but labelling.\textsuperscript{80} Hence, he stated that even though the similarity of prayers for relief does not necessarily bespeak an identity of causes of action, it is necessary to determine whether claimed entitlements have the same normative sources.\textsuperscript{81} If they do, the claim shall not be admissible.

74. On 8 September 2016, Claimant applied to Respondent’s court seeking to suspend the effects of the Decree until negotiations with the Government took place.\textsuperscript{82} On 10 November 2010, Claimant filed its Request before the Tribunal.\textsuperscript{83}

75. Issuance of the Decree constituted a significant problem for Claimant. It meant immediate prohibition of exploration of lindoro,\textsuperscript{84} imminent liability for environmental damages\textsuperscript{85} and expropriation of extracted lindoro.\textsuperscript{86} Claimant was in hope for solution of such dispute by suspending the Decree\textsuperscript{87} and claiming the Decree unconstutional.\textsuperscript{88} Thus, Claimant’s action before Respondent’s courts was based on the existence of the Decree.

76. The effort to suspend the effect of the Decree is in reality based on Art. 11(2) BIT which stipulates that Parties may choose to submit the dispute for resolution to the domestic courts as one of the three options for dispute-settlement.\textsuperscript{89}

77. Claimant’s intention was to avoid the effects of the Decree, the same Decree due to which, as a consequence, BIT was violated according to Claimant. In the Request, Claimant was demanding that the Decree causes violation of BIT and to have Respondent pay damages caused as a consequence of that violation.\textsuperscript{90}

78. To the extent that Claimant’s claims were accepted, it would grant Claimant what was seeking before Respondent’s court: avoiding the effects of the Decree and the financial loses.

\textsuperscript{80} Pantechniki, para. 61.
\textsuperscript{81} Pantechniki, para. 62.
\textsuperscript{82} Facts, para. 25.
\textsuperscript{83} Facts, para. 29.
\textsuperscript{84} Ex. 5, Art. 1.
\textsuperscript{85} Ex. 5, Art. 3.
\textsuperscript{86} Ex. 5, Art. 4.
\textsuperscript{87} Facts, para. 23.
\textsuperscript{88} PO 2, para. 3.
\textsuperscript{89} BIT, Art. 11(2).
\textsuperscript{90} Request, para. 23.
79. Claimant considers itself to be outside the range of the Decree. Claimant is persuaded that the Decree shall not apply on itself. It is the same claim as attempt to suspend the Decree in Claims in Motion. Merely after affection of the Decree, Claimant requests the Tribunal to prove violation.

80. The Decree, therefore, presents the same normative source, which is necessary for consideration, whether the claims share the same fundamental basis. It made Claimant turn to the domestic courts of Respondent for seeking relief firstly and then, when the Decree came to the effect, turn to the Tribunal by submission of the Request.

81. The Dispute cannot be brought before the Tribunal while the dispute with the same fundamental basis has already been challenged before the local forum. The other way round, the provision of fork-in-the-road clause would be breached. Therefore, Claimant’s claims are inadmissible

2. BIT does not permit Claimant to waive domestic proceeding and submit the dispute again

82. Claimant’s claims are not admissible under Art. 11(2) and (3) BIT. Claimant failed to comply with the stipulations of the fork-in-the-road clause, which states that once a forum choice is made, the right for seeking relief before another forum is exhausted. Any other interpretation of Art. 11 BIT would be contrary to the intention of Parties to BIT.

83. In order to avoid misleading interpretation, wording of Art. 11 BIT used by Parties to BIT is explained in the following articles, as well as the distinction of concept of waiver that may be suggested by Claimant as the other option of interpretation of the Art. 11 BIT

2.1 Interpretation of Art. 11 BIT

84. The wording of BIT while drafting was chosen rigorously by Parties to BIT in order to avoid any misleading and purposeful interpretation. The focus shall be made on the verb “to submit” as well as on the parts that are not intentionally written.
85. It is necessary to always bear in mind that BIT shall be interpreted „[...] in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context [...]“.  

86. Pursuant to Art. 11(2) BIT, a Party may choose to seek resolution of a dispute before one of the three fora. Art. 11(3) BIT however stipulates that the Party may choose the third option, to submit the dispute before the Tribunal, only if “[the Party] has not submitted the dispute for resolution under (a) or (b) of the second paragraph...”  

87. According to the Black's Law Dictionary, the word “to submit” shall be understood as: “to place it before a tribunal for determination“ or “to end the presentation of further evidence in (a case) and tender a legal position for decision“. Therefore, Art. 11(3) BIT states that only if the selection of forum is not made, a Party may choose to submit a dispute before the Tribunal. However, after the first submission, the forum is selected and cannot be changed. In other words, no decision needs to be rendered.  

88. In addition, it is necessary to perceive that there is a distinction between “to submit” and “to issue a decision”. Art. 11(3) BIT uses the term “to submit” stipulating that only starting any dispute settlement before one of the authorities named in Art. 11(2) BIT is sufficient for eliminating the rest of the fora.  

89. Whereas, other investment treaties use also the term “a decision” to clearly stipulate that only after rending a decision, the other fora are excluded. This may be seen e.g. in Art. 11 AUSTRIA-SLOVENIA BIT setting down that investor may choose to submit the dispute for resolution before the arbitral tribunal only until there has been a decision concerning the same claim in the first instance in the proceedings before the competent court or administrative tribunal of the contracting party.  

90. To the contrary, there is the US-EGYPT BIT with similar wording to BIT stating that a party may choose to submit the dispute for settlement by arbitration only if (i) the dispute has not been settled through negotiation; or (ii) the dispute has not been

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91 VCLT, Art. 31(1).  
92 BIT, Art. 11(3).  
95 AUSTRIA-SLOVENIA BIT, Art. 11(2) (b).  
96 AUSTRIA-SLOVENIA BIT, Art. 11(4).
submitted for resolution by previously agreed procedures; or (iii) a party has not brought
the dispute before the domestic courts.\textsuperscript{97} The US-EGYPT BIT was applied in \textit{H&H}
where the tribunal considers interpretation of the US-EGYPT BIT as the fork-in-the-
road clause without any hesitation.\textsuperscript{98}

91. In \textit{H&H excerpt}, which interprets the US-EGYPT BIT further, the tribunal explains that
it is clear from the language of the treaty that parties to the treaty intended to provide
arbitration only to the extent the dispute had not been submitted to the procedure agreed
by parties or to the competent court. Thus, such a dispute-settlement provision cannot be
interpreted as an appellate process.\textsuperscript{99}

92. Described provision arises out of the largely accepted legal principle \textit{litis pendens}. This
principle must be applied along with the meaning of Art. 11(3) BIT, otherwise it would
derive Art. 11(3) BIT of any practical meaning.

93. Ad absurdum, the interpretation \textit{a contrario} would mean that Parties would be able to
submit dispute without any limitation. The possibility to submit, withdraw and submit
dispute again before different forum, would not be suitable for any Party since it would
decrease legal certainty that is, however, crucial for international relationships.
Considering that BIT, on the contrary, is supposed to increase such certainty,\textsuperscript{100} it would
have no sense to do otherwise.

94. From the grammatical point of view, the intention of Parties to BIT was to conclude a
fork-in-the-road provision in BIT that is triggered upon a submission of a claim. Parties
to BIT intended to distinguish between submission and decision, as is usually done in
investment treaties. Parties to BIT have not even intended the arbitration as an appellate
process. Any other interpretation would be contrary to VCLT. Claimant therefore failed
to comply with the fork-in-the-road rule and its claims are not admissible

\textsuperscript{97} US-EGYPT BIT, Art. 7(3).
\textsuperscript{98} \textit{H&H}, para. 79-80.
\textsuperscript{99} \textit{H&H excerpt}, para. 366.
\textsuperscript{100} Preamble, lines 1045-1050.
2.2 The distinction from concept of waiver

95. There are two methods in investments treaties for limiting the selection of a dispute-resolution which were established by the case law. The *fork-in-the-road* and the *concept of waiver*. Claimant may argue that in BIT the second limitation is used; however, such an interpretation of BIT would be false.

96. The distinction of the concept of waiver from the fork-in-the-road clause is in the strictness how to address parallel litigation. While the fork-in-the-road clause allows no other prior submission of the claim; the concept of waiver enables the investor to choose international arbitration despite prior initiation of the claim under the condition to waive the exercise of the claim before another dispute resolution mechanism. To distinguish between these concepts, the proper sounding of treaty is necessary.

97. The benefit for Parties to BIT that have chosen the fork-in-the-road clause can shall be the fact that it prevents parties from abusing the dispute-settlement procedure and cumulating costs of court proceedings by transferring the dispute from one forum to the other in order to improve its position.

98. In the matter at hand, Art. 11(2) BIT in connection with Art. 11(3) BIT contains the fork-in-the-road provision. Should Parties to BIT want the provision of concept of waiver, they would add such a rule to BIT.

99. For instance, the SPAIN–COSTA RICA BIT states that if the investor has submitted a dispute to the competent court of state, provided that the national court has not handed down a ruling, it may refer that dispute to the arbitral tribunals. The investor is then obliged to terminate the judicial proceeding under way."

100. The SPAIN–COSTA RICA BIT was examined by in *Supervisión*. The tribunal explained that such wording constitutes a forum selection clause corresponding to the method of the waiver clause, for limiting the selection of dispute resolution mechanisms. Further explaining that once an international arbitration is initiated, the investor is required to waive or withdraw from the actions it has initiated or could initiate before

101 *Supervisión*, para. 294.
103 SPAIN – COSTA RICA BIT, Art. 11(3).
national courts or an arbitral tribunal, in order to avoid conflicting decisions and eliminate the possibility of obtaining double recovery for the same acts.\textsuperscript{104}

101. To the contrary, in BIT no such provision was used, even though, Parties to BIT must have been aware of such possibility as the wording of BIT is common and similar to the others IIA. Thus, the intention of Parties to BIT was to use the fork-in-the-road clause instead of concept of waiver.

102. Since BIT does not contain the concept of waiver, submission of the Motion is already sufficient for activating the fork-in-the-road clause. Claimant therefore could not submit another claim before the Tribunal, regardless of withdrawal of the Motion before domestic courts.\textsuperscript{105} Therefore, Claimant’s claims are not admissible.

3. **Claimant does not face a denial of justice**

103. In spite of the fact that Claimant’s claims are not admissible, Claimant cannot argue against Respondent on the ground of denial of justice as there are no legal obstacles for seeking relief before Respondent’s courts again.

104. Since BIT clearly states that Parties “\textit{may choose to submit the dispute for resolution}” \textsuperscript{106} with using “\textit{or}” between each option, it shall be understood as the fork-in-the-road clause as explained above. However, BIT does not stipulate any rule that would prevent a Party from resubmitting the dispute for resolution before the domestic court after its withdrawal.

105. As Christopher Greenwood explains in \textit{Loewen}, the term denial of justice embraces a denial of access to the courts.\textsuperscript{107} He adds that a denial of justice arises only if the system as a whole produces a denial of justice.\textsuperscript{108}

106. It shall be noticed that withdrawing the lawsuit does not prevent Claimant from seeking justice or dispute resolution. BIT is only preventing Claimant from bringing the case to another forum or jurisdiction. Such limitation has the purpose of disallowing another submission of the Dispute before different authority in order to avoid the duplication of

\textsuperscript{104} \textit{Supervisión}, para. 297.
\textsuperscript{105} \textit{Facts}, para. 16.
\textsuperscript{106} BIT, Art. 11(2).
\textsuperscript{107} \textit{Loewen}, para. 22.
\textsuperscript{108} \textit{Loewen}, para. 24.
memorial forrespondent – team dillard

procedures and claims, and therefore to avoid contradictory decisions\textsuperscript{109} as already mentioned.

107. Moreover, it was clearly a choice of claimant to withdraw the motion from respondent’s courts before any decision that could have solved claimant’s issues was rendered.

108. Taking into account all abovementioned, claimant still may continue to seek relief before the domestic courts as once already did in compliance with respondent’s law. It is just that pursuant to BIT the change of selection of forum is not possible. Thus, claimant cannot find itself in the situation of denial of justice.

4. Conclusion

109. Claimant’s claims are not admissible as they share the same fundamental basis as claims in motion. By submitting the request, the provision of fork-in-the-road clause was breached. As a result, the tribunal is precluded from hearing claimant’s claims that the decree constituted a breach of BIT.

110. Moreover, parties to BIT have not intended the arbitration as an appellate process as well as they not limited the dispute-settlement part of BIT by concept of waiver. Also, the situation of denial of justice cannot occur since claimant still may continue for seeking relief before the domestic courts.

\textsuperscript{109} Supervisión, para. 294.
III. RESPONDENT DID NOT EXPROPRIATE CLAIMANT’S INVESTMENT IN VIOLATION OF BIT

111. Neither the enactment of the Decree nor its application or any following action taken by Respondent amounted to expropriation of Claimant’s investment.

112. In 1998, Respondent, an underdeveloped country, found at its territory a large area of lindoro, a high value rare earth metal, the exploitation of which could help its economic growth.110 Thus, on 1 June 2000, Respondent executed with Claimant the Agreement regulating the rights to exploit lindoro.111

113. The Agreement, among others, contained Claimant’s obligation to observe the laws in force at Respondent’s territory and make the adaptations necessary in light of new laws and regulations.112 Moreover, Claimant was also obliged to comply with good practices for the sustainable exploitation, including the disposal of waste resulting from such activities.113

114. With the advance of industry and mining activities the need for effectively set legal framework on environmental protection has emerged due to the growing detrimental impact of such activities on environment. Hence, Respondent became a party to the 1992 Convention in 2015.114

115. On these grounds, in June 2015, the House passed the KEA which dictated miners to protect the waters from toxic mine waste in the region where extraction took place.115 In case of non-compliance KEA set forth penalties, fines and even possibility of the immediate withdrawal of licences with the forfeiture of the facilities, and obligation to compensate caused damages.116

116. In 2015 it turned out that concentration of toxic waste in Rhea River had sharply increased since 2010.117 Followingly, the University carried out the Study which

110 Facts, para. 4.
111 Facts, para. 8.
112 Ex. 2, para. 2.1.
113 Ex. 2, para. 2.2.
114 Facts, para. 2.
115 Facts, para. 16.
116 Ibid.
117 Facts, para. 20.
affirmed the fact that contamination of Rhea River was a direct consequence of Claimant’s activities.\textsuperscript{118} Moreover, it suggested that Claimant’s activities could be a cause of newly emerged diseases (e.g. microcephaly and cardiovascular diseases) at Respondent’s territory.\textsuperscript{119}

117. Only after the Study affirmed such detrimental effect of exploitation of lindoro, Respondent issued the Decree to protect the environment and human life in its territory. The Decree prohibited, with immediate effect, the exploitation of lindoro as potentially harmful for the environment and human life. Following the implementation of the Decree, Respondent’s officials confiscated part of Claimant’s lindoro as financial security to ensure that Claimant will compensate for the environmental damage in accordance with PPP under BIT and KEA.\textsuperscript{120}

118. Thus, Respondent will prove that (1) its measures did not reach the threshold of expropriation regarding Claimant’s investment and, (2) even if its measures amounted to expropriation Respondent did not breach any provision of BIT.

1. \textbf{Acts of Respondent did not amount to expropriation of Claimant’s investment}

119. In its Request, Claimant asserted that Respondent’s measures amounted to expropriation of its investment.\textsuperscript{121} However, Claimant’s allegations lack both factual and legal grounds.

120. There was no direct transfer of a legal title of Claimant’s investment, hence Respondent’s measures cannot be seen as direct expropriation. Thus, Respondent will hereby only address indirect expropriation.

121. To establish indirect expropriation, State’s right to regulate must be taken into consideration as well as legitimate expectations of investor.\textsuperscript{122} Moreover, it is necessary to infer that the investment in question was substantially and permanently deprived of its value.

\begin{itemize}
\item \textsuperscript{118} Facts, para. 22.
\item \textsuperscript{119} Facts, para. 22; PO 2, line 1550.
\item \textsuperscript{120} Facts, para. 16; PO 2, lines 1560, 1575.
\item \textsuperscript{121} Request, para.1, 21.
\item \textsuperscript{122} UNCTAD pp.62-63.
\end{itemize}
Consequently, Respondent will submit that firstly, (1.1) Respondent’s measures fit squarely with its right to regulate as well as (1.2) with Claimant’s legitimate expectations. Secondly, (1.3) Claimant’s investment was not substantially and irreversibly affected.

1.1 Respondent’s measures fall under the scope of Respondent’s police powers

123. An exercise of State’s regulatory powers may manifest itself especially in adopting new regulations or enforcing existing regulations in relation to a particular investor. The police powers doctrine is a part of customary international law which establishes that State cannot commit an expropriation when it adopts general bona fide regulations.

124. Moreover, as was stated in Sedco, “State is not liable for economic injury which is a consequence of [such] bona fide ‘regulation’ within [its] accepted police power”. Additionally, if such regulations are adopted in reaction to a violation of domestic law by the investor and as a result investor’s property is confiscated this cannot constitute expropriation either.

125. Art. 10 BIT is basically an embodiment of the police powers doctrine. It specifically established that the Parties to BIT may adopt or enforce measures necessary to protect human, animal or plant life or health; or to ensure the compliance with domestic laws.

126. According to the generally established practice, the tribunals largely supported the view that governments must be free to act in the broader public interest through protection of the environment, human lives, health, and general welfare.

127. In Chemtura, an investor producing lindane-based pesticide challenged the ban on lindane issued by Canada. The arbitral tribunal held that Canada’s measures were a valid exercise of State’s police powers as they were motivated by the increasing
awareness of the dangers presented by lindane for human health and the environment.\textsuperscript{130} Thus, Canada’s measures did not constitute expropriation.

128. Similarly, in the case at hand Respondent was forced to issue the Decree in order to protect human lives, health, and environment from detrimental effect caused by significant amount of toxic graspel, a by-product of Claimant’s activities.\textsuperscript{131}

129. In 2015, upon becoming a party to the 1992 Convention, Respondent adopted KEA to, among others, reinforce the protection of waters from the toxic waste resulting from mining activities.\textsuperscript{132} By its neglectful behaviour Claimant, nevertheless, caused serious environmental damage and thus, breached its obligations of KEA.\textsuperscript{133} Those obligations, however, were not even newly established for Claimant as it was already obliged under Art. 2.2. of the Agreement to “comply with good practices for the sustainable exploitation of lindoro, including the disposal of any waste”.\textsuperscript{134} Nevertheless, Claimant has never adopted any corporate social responsibility standards and failed to ensure sustainability of its mining activities.\textsuperscript{135}

130. As a result, the main source of the drinking water in the area of lindoro extraction, the Rhea River, was hugely contaminated due to the toxic waste produced by Claimant. On average, for every ton of extracted lindoro, 79 tons of waste is removed including graspel, the toxic by-product of lindoro extraction.\textsuperscript{136} The Study showed that this was a cause the Rhea River contamination. Moreover, Claimant’s non-compliance with its obligations under Respondent’s domestic law and the Agreement, served as a trigger for a rising incidence of specific ailments – e.g., microcephaly and cardiovascular diseases.\textsuperscript{137}

131. Eventually, in reaction to Claimants enduring non-compliance with Respondents domestic laws and disrespect to the environmental protection, Respondent had to

\textsuperscript{130}Ibid.
\textsuperscript{131}Facts, para. 22.
\textsuperscript{132}Facts, para. 16.
\textsuperscript{133}Facts, para. 20, 22.
\textsuperscript{134}Ex. 2, para. 2.2.
\textsuperscript{135}PO 2, line 1585.
\textsuperscript{136}PO 2, line 1535.
\textsuperscript{137}Facts, para. 22.
implement the Decree. Upon the adoption of the Decree, in accordance with KEA provisions, Respondent confiscated part of Claimant’s lindoro as the security to ensure that Claimant will fulfil its obligation to compensate for the environmental damage it has caused. The utmost objective followed by those measures was the necessity to protect the Rhea River and people living in the surrounding areas from further detrimental effects of lindoro extraction.

132. Therefore, Respondent’s measures fall fully under its police powers as they were adopted in accordance with its domestic laws as a legitimate reaction to Claimant’s unlawful behaviour.

1.2 Claimant could have expected the measures taken by Respondent

133. Any measures Respondent has implemented fall under regular development of the legal framework which Claimant should have expected.

134. First of all, as noted in Continental or Charenne, any reliance by a foreign investor that the legislation will remain frozen would be misplaced.

135. Investor may derive its legitimate expectations that the regulation will remain stable with no fundamental changes. However, to this effect, a specific commitment by the regulating government has to be given to the investor. Such commitment can be made on the basis of stabilization clause or any kind of assurance giving rise to legitimate expectation of stability directed to investor.

136. Nevertheless, while by these commitments, investors may be given protection against unfair changes, the well-established practice maintains that States shall have a reasonable degree of regulatory flexibility to respond to developments within society.

137. Applying in casu, at the time of the investment Claimant knew that Respondent’s legal framework in the field of the mining activities and related environmental protection was

138 Facts, para. 23.
139 Facts, para. 16, 27.
140 Continental, para. 258; Charenne, para. 504.
142 Charanne, para. 490; Eiser, para. 362.
143 Novenergia, para 662; Electrabel, para. 7.78.; Charanne, para. 498.
Respondent never give to Claimant any commitments that the legal framework will remain the same. What is more, the Agreement itself specifically suggested that the legal framework may change.\textsuperscript{145} In its Art. 2.1, the Agreement established that Claimant „must observe [Respondent’s] laws in force […], with the adaptations that may be necessary in light of new laws and regulations“.\textsuperscript{145}

Additionally, the legal framework was not even drastically changed by Respondent’s measures. Claimant already had similar obligations under the Agreement itself.\textsuperscript{146} Moreover, concerning the licence under which Claimant was permitted to operate, Claimant was not automatically and irrevocably entitled to it. According to the Agreement, Claimant was under obligation to have its certificate approved every two years upon the inspection concerning its activities.\textsuperscript{147}

Finally, Claimant should have expected that the legal system will not remain unchanged and will be adjusted in reaction to the development of the industry and mining activities at Respondent’s territory. Such adjustment was adopted by means of implementation of KEA.\textsuperscript{148}

Nevertheless, Claimant did not comply with its obligations under the Agreement or domestic law and, thus, should have expected that Respondent would not leave such behaviour without any consequence.

Consequently, Respondent’s measures were legitimate and proportionate responses to the illicit behaviour of Claimant in relation to the mining activities, thus, Claimant should have expected such measures.

\textsuperscript{144} Facts, para. 10.\textsuperscript{145} Ex. 2, Art. 2.1.\textsuperscript{146} Facts, para. 16, Ex. 2, para. 2.2.\textsuperscript{147} Ex. 2, Art. 2.2.2.\textsuperscript{148} Facts, para. 16
1.3 Claimant’s investment was not substantially and permanently affected

142. The determinative factors in considering the gravity of measures taken by State are intensity and duration of the economic deprivation suffered by the investor. Additionally, these criteria must be fulfilled cumulatively.

143. Respondent maintains that Claimant failed to prove its investment was substantially and irreversibly affected by Respondent’s measures.

1.3.1 Claimant’s investment was not substantially deprived of its value

144. According to arbitral practice, in establishing indirect expropriation the standard applied is that of substantial deprivation of the economic value of the investment; when also, the destruction thereof must be total or near total.

145. Generally, expropriation cannot be found where the investor retains control over its investment, directed day-to-day operations, and is free from interferences into the pursuit of the company’s economic strategies and appointment of employees.

146. As was held in Feldman, there is no expropriation where

“the regulatory action [does] not deprive the claimant of control of his company, interfere directly in the internal operations of the company or displace the Claimant as the controlling shareholder”.

147. In the case at hand, Respondent implemented the Decree as a consequence of Claimants non-compliance with the Agreement and the domestic law. The Decree revoked Claimants licence under which it operated and prohibited the mining of lindoro at Respondent’s territory. Additionally, Respondent confiscated lindoro stored at the...

149 UNCTAD, p. 63.
150 Tecmed, para. 116; Telenor para.70; Telenor, para. 65; CME, para. 688; Metalclad, para. 103; Pope&Talbot, para. 96, 102; PhilipMorris para. 284; LG&E, para. 191; Quiborax para. 238
151 Pope&Talbot, para. 99-100; LG&E, para. 188; Sempra, para. 284.
152 Feldman, para. 83.
153 Facts, para. 23.
premises of Claimant in order to ensure that Claimant will fulfil its obligations under KEA to compensate for the environmental damages it has caused.\textsuperscript{155}

148. Claimant, however, was not deprived of the control of its investment. Respondent did not detain Claimant’s employees or supervise their work; Respondent neither interfered with management or shareholders’ activities nor it prevented the distribution of dividends to shareholders or interfered with the appointment of the directors or management.\textsuperscript{156} Not even Claimant’s premises or its accounts were affected.

149. Followingly, Claimant’s investment was not substantially deprived of its value as Claimant retained the control over its investment.

1.3.2 The test of permanent and irreversible impact was not fulfilled

150. According to \textit{Tecmed} the measures adopted by State are tantamount to an indirect expropriation if they are irreversible and permanent.\textsuperscript{157}

151. However, measure a priori adopted as temporary or provisional in order to cope with any unfortunate economic, political or other situation of State will not constitute a permanent and substantial deprivation.\textsuperscript{158}

152. In our case, Respondent’s measures were adopted as an emergency in reaction to environmental damage caused by the mining activities of Claimant.\textsuperscript{159} There were no indications that the effects of those measures could not be reversed in the future after the necessary steps towards better protection of the environment are made.

153. Nonetheless, even if Respondent’s measures were to be found irreversible and permanent, that would not change anything about the test. As was previously stated, the test of substantial and permanent impact of State’s measures on the investment in question is to be fulfilled cumulatively.\textsuperscript{160}

\textsuperscript{155} Facts, para. 16; PO 2, line 1575.
\textsuperscript{156} \textit{Pope&Talbot}, para. 100
\textsuperscript{157} \textit{Tecmed}, para 116
\textsuperscript{158} \textit{Suez}, para. 129; S.D.Myers, para. 278-9.
\textsuperscript{159} Facts, para. 22.
\textsuperscript{160} \textit{Tecmed}, para. 116; \textit{Telenor} para.70;
154. Thus, even if Respondent did not fulfil the second condition of the test and its measures are irreversible, that would not change anything about this situation.

155. In conclusion, Respondent’s measures did not amount to expropriation as they fit squarely with Respondent’s right to regulate as well as Claimant’s legitimate expectations and the measures did not substantially and irreversibly affect Claimant’s investment.

2. Even if there was expropriation of Claimant’s investment Respondent has not breached the provision of Art. 7 BIT

156. In case that the Tribunal finds that Claimant’s investment was expropriated, Respondent maintains that its measures were completely in compliance with the provisions of Art. 7 BIT.

157. Primarily, Art. 7 BIT states that “neither Contracting Party shall nationalize or expropriate a covered investment”. Nevertheless, it also reads that expropriation is possible under four cumulatively fulfilled conditions. The investment can be expropriated if it is “for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and on payment of due compensation”.\(^{161}\)

158. Thus, Respondent will prove that (2.1) Respondent’s measures were adopted for public purpose, (2.2) in accordance with due process, while being (2.3) non-discriminatory. Finally (2.4) Respondent was under no obligation to compensate.

2.1 Respondent’s measures were in public interest

159. The first condition set out in Art. 7 BIT, that the seizure of an investment must be motivated by the pursuance of a legitimate welfare objective, is a rule of international law and is recognized by most domestic legal systems.\(^{162}\) There is also a consistent arbitral practice on what are the general guidelines for establishing whether the measures were taken in public interest.\(^{163}\)

\(^{161}\) BIT, Art. 7.
\(^{162}\) UNCTAD, pp.28-29.
\(^{163}\) Ibid.
160. According to the Court in *James and others* it was stated that the Court shall respect State’s judgement as to what is for the public purpose.\(^{164}\)

161. For example, in *Siemens* the arbitral tribunal held that the measures taken by Argentina in the context of Argentina’s fiscal crisis would be sufficient to meet the public purpose requirement of expropriation.\(^{165}\)

162. In the case at hand, Respondent’s measures followed the protection of human lives, health as well as environment from the detrimental impact of Claimant’s mining activities.\(^{166}\) As the Study revealed, Claimant’s activities had adverse impact on the Rhea River, one of the main sources of drinking water in the area of the lindoro mining, which was imposed to severe contamination.\(^{167}\) Moreover, due to the concentration of toxic graspel in the waste material produced by the mining of lindoro, previously unknown diseases (e.g., microcephaly, cardiovascular diseases) emerged at Respondent’s territory.\(^{168}\)

163. Hence, Respondent’s measures were legitimate and adequate measures in reaction to Claimant’s detrimental impact on the environment. Respondent is primarily responsible to the population inhabiting its territory to ensure harmless environment and protection of their heath and lives. That was the exact purpose of Respondent’s measures which fits squarely with the requirement of the public purpose.

164. Thus, Respondent’s measures were without further doubt adopted in public interest and consequently the first requirement of Art. 7 BIT is fulfilled.

2.2 **Measures taken by Respondent were adopted in accordance with due process**

165. The due-process principle requires that the expropriation complies with procedures established in domestic legislation as well as fundamental internationally recognized rules in this regard.\(^{169}\)

\(^{164}\) *James*, para. 50.

\(^{165}\) *Siemens*, para. 273.

\(^{166}\) Facts, para. 22, 23.

\(^{167}\) Facts, para. 22; Ex. 4, lines 1390-1395.

\(^{168}\) Facts, para. 22; Ex. 4, lines 1400-05, 1410-15.

\(^{169}\) *ADC*, para. 435.
166. According to the arbitral practice, under the requirement of due-process State must make a reasonable advance notice towards the investor and the latter must be also provided with the reasonable opportunity to challenge State’s measures before the domestic courts.\textsuperscript{170}

167. However, the investment tribunals also held that in the state of imminent necessity or emergency concerning a proper public order, human lives and health or public safety, the prior notice requirement is not necessary.\textsuperscript{171}

168. In the case at hand, Respondent adopted KEA following its obligations under the 1992 Convention the party of which it became in 2015.\textsuperscript{172} The KEA is an act which dictates miners to protect waters from the toxic mine waste, otherwise they could be the subject to penalties, fines, immediate withdrawal of licences.\textsuperscript{173} As the Claimant caused severe contamination of the Rhea River due to improper disposal of the toxic waste it produced, it failed its obligations under KEA.\textsuperscript{174} Therefore, Respondent’s measures were in fact triggered by Claimant’s unlawful behaviour and were a legitimate reaction to Claimant’s breach of the domestic laws.

169. The Decree was implemented in accordance with KEA and the following steps taken by Respondent’s were also in accordance with this legal act.\textsuperscript{175} Moreover, Respondent had to take those steps in the state of necessity when any further delay would only mean intensification of the detrimental impacts on the environment and additional damage thereof.

170. As for the possibility to have the States’ measures reviewed before an independent authority, Claimant applied to Respondent’s federal court on 8 September 2016 and it was its own decision to withdraw its appeal later.\textsuperscript{176}

171. Followingly, Respondent’s measures were adopted in accordance with the due-process requirement.

\textsuperscript{170} \textit{Ibid}.
\textsuperscript{171} \textit{Continental}, para. 175; \textit{LG&E}, para. 204-5, 228.
\textsuperscript{172} Facts, para. 2.
\textsuperscript{173} Facts, para. 16.
\textsuperscript{174} Ex. 4, lines 1390-95, 1400-05, 1410-15.
\textsuperscript{175} Ex. 5, line 1424.
\textsuperscript{176} Facts, para. 25.
2.3 **Respondent’s measures were non-discriminatory**

172. According to *Saluka* state’s measures are discriminatory if “*similar cases are treated differently without reasonable justification*” which was also held in several other cases.\(^{177}\)

173. Arbitral tribunals have also found that the non-discrimination requirement is violated when State discriminates against investor specifically because of their foreign nationality.\(^{178}\)

174. In the case hand, Respondent’s measures were adopted upon the Study, which undoubtedly established a direct link between Claimant’s mining activities and the contamination of the Rhea River.\(^{179}\) The Decree was adopted as a generally binding legal act, which banned the activity (mining of lindoro) that was dangerous to the environment and human health.

175. As for the further steps taken by Respondent, they were not targeted at Claimant due to its foreignness. By then, Claimant was already mostly controlled by the Respondent’s nationals and, thus, in the view of Respondent, was a national company.\(^{180}\) The measures were a mere legitimate reaction to Claimant’s breach of Respondent’s laws.

176. Thus, Respondent did not act in a discriminatory manner.

2.4 **Respondent was under no obligation to compensate**

177. Last condition to be met under Art. 7 BIT is that the expropriation shall be for due compensation.

178. Generally, any seizure of investment must be compensated by State. However, there are exceptional situations established when compensation is not due. States are generally not liable to pay compensation when they adopt in a non-discriminatory manner in

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\(^{177}\) *Saluka*, para. 313; *ADC*, para. 442.

\(^{178}\) *Total S.A.*, para. 344.

\(^{179}\) Facts, para. 22.

\(^{180}\) Facts, para. 6,7.
accordance with due process of law a bona fide regulation for the general public welfare.\textsuperscript{181}

179. As was already established, Respondent’s measures were adopted in a non-discriminatory manner and for the genuine public interest.

180. Moreover, Respondent shall not be held liable for compensation for Claimant’s unlawful behaviour. It was the activity of Claimant which diversely affected Respondent’s environment, leaving many people without drinking water and putting their lives under danger by previously non-existent diseases on their territory.\textsuperscript{182}

181. Consequently, Respondent was not liable to compensate Claimant. Thus, Respondent’s measures fulfilled also the fourth and last condition under Art. 7 BIT for lawful expropriation.

3. Conclusion

182. By adopting its measures Respondent acted in full compliance with its rights to regulate and within legitimate expectations of Claimant. Moreover, Respondent’s measures did not substantially and permanently deprive Claimant’s investment of its economic value. To the contrary, Respondent undertook legitimate and adequate measures in order to protect the environment and human health and lives at its territory. Thus, Respondent’s measures did not amount to expropriation of Claimant’s investment.

183. Nevertheless, in case the Tribunal finds that Respondent in fact expropriated Claimant’s investment, Respondent invites the Tribunal to find that such expropriation was not in the breach of Art. 7 BIT.

\textsuperscript{181} Saluka, para. 255; Methanex, part IV, chapter D, para. 7.

\textsuperscript{182} Facts, para. 22.
IV. THE TRIBUNAL MAY ADJUDICATE THAT THE COUNTERCLAIM IS ADMISSIBLE

185. Upon conclusion of the Agreement under BIT, in 2000, Claimant started to carry out the exploitation of lindoro since 2008.\textsuperscript{183} Eventually, Claimant’s actions resulted in substantial pollution of Respondent’s territory, especially the Rhea River, which is a main source of drinking water in the area of lindoro extraction.\textsuperscript{184}

186. The direct link of Claimant's actions and contamination was confirmed by the Study which stated that “the contamination of the Rhea River is undoubtedly a direct consequence of the exploitation of lindoro.”\textsuperscript{185} The negative influence on the environment caused by Claimant’s activities has also affected health of the surrounding population.\textsuperscript{186} Moreover, the costs for decontamination and prevention of further damages have already reached the amount of no less than 150 mil. USD.\textsuperscript{187}

Regarding the above mentioned, Respondent hereby submits the Counterclaim for 150,000,000 USD. The Respondent will hereby prove that (1) the Tribunal has jurisdiction to address the Counterclaim and that (2) the Counterclaim is admissible.

1. The Tribunal has jurisdiction to address the Counterclaim

187. The jurisdiction of the Tribunal to decide on the Counterclaim depends on two aspects, the scope of the arbitrable disputes under BIT (\textit{ratione materiae}), and the standing to raise claims in arbitration proceedings (\textit{ratione personae}). Both of these conditions are met based on the dispute settlement clause in Art. 11 of BIT.

188. In line with Art. 11 of BIT, Respondent alleges that (1.1) the Tribunal has jurisdiction \textit{ratione materiae} over the Counterclaim; and (1.2) Respondent has standing to bring the Counterclaim under BIT.

\textsuperscript{183}Facts, para. 8.
\textsuperscript{184}Facts, para. 22.
\textsuperscript{185}Ex. 4, lines 1394-1395.
\textsuperscript{186}Facts, para. 22, Ex. 4, lines 1401-1418.
\textsuperscript{187}Answer, para. 24.
1.1 The Tribunal has jurisdiction *ratione materiae* over the Counterclaim

189. In The Tribunal has jurisdiction *rationae materiae* over the Counterclaim, as BIT allows introduction of counterclaims in general, and jurisdiction is conferred on the Tribunal via Art. 11(1)(c) and also 11(1)(a) of BIT.

190. Art. 11(1) of BIT defines for its purposes an investment dispute as a dispute arising out of or relating to: "(a) an investment agreement between that Contracting Party and such person or enterprise; (b) an investment authorization granted by that Contracting Party's foreign investment authority (if any such authorization exists) to such person or enterprise; or (c) an alleged breach of any right conferred or created by this Agreement with respect to an investment."

191. In *Goetz* under ICSID Arbitration Rules pursuant to Art. 8(1) of the BELGIUM-LUXEMBOURG-BURUNDI BIT, similarly to Art. 11(1) of BIT, there was wide formulation of arbitrable disputes listed to categories. The tribunal did not hesitate to acknowledge jurisdiction *ratione materiae* over the counterclaim arising out of breach of right to water. The counterclaim was subsumed under one of the categories in accordance with Art. 8(1) of the BELGIUM-LUXEMBOURG-BURUNDI BIT analogous to the one stated in Art. 11(1) of BIT.

192. In contrast to *Goetz*, in case *Spyridon*, the tribunal did not acknowledge to have jurisdiction over counterclaims due to wording of dispute settlement provisions, in concrete Art. 9(1) of the GREECE-ROMANIAN BIT laying down a limitation of tribunal’s jurisdiction only to disputes: “...*between an investor of a contracting party and the other contracting party concerning an obligation of the latter under this agreement...*” This GREECE-ROMANIAN BIT applies to disputes related only to breach of the IIA by host state and hence, the tribunal in that case did not allow counterclaims to be introduced.

193. Similarly to *Spyridon*, in *Oxus Gold*, the tribunal’s jurisdiction over counterclaims was rejected due to wording of Art. 8(1) of the UNITED KINGDOM-UZBEKISTAN BIT.

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188 BELGIUM-LUXEMBOURG-BURUNDI BIT
189 *Goetz*, para. 276-281.
190 *Spyridon*, para. 869.
limiting jurisdiction of arbitral tribunal and setting down exactly the same wording as Art. 9(1) of the GREECE-ROMANIAN BIT. The tribunal in that case took the same position as the tribunal in Spyridon and held that it had no jurisdiction over Respondent’s counterclaims.\textsuperscript{191} Hence, in both cases, counterclaims were rejected due to specific wordings of the respective IIAs.

194. Our wording of scope of the dispute under Art. 11 of BIT is wider as in Goetz and Spyridion mentioned above and counterclaims in general fall under jurisdiction of Tribunal.

195. The fact that BIT provides for counterclaims is also evidenced by Art. 11(5), which mentions counterclaims, when it specifically excludes submission of certain type of counterclaims.\textsuperscript{192}

196. Specific reference to counterclaims expresses itself as favourable for assertion of counterclaims. An example is offered by the US-URUGUAY BIT; in concrete Art. 28 (7) lays down that:

“A respondent may not assert as a defense, counterclaim...that the claimant has received or will receive indemnification or other compensation for all or part...pursuant to an insurance or guarantee contract.”\textsuperscript{193}

197. Art. 11 (5) of BIT contains similar wording as Art. 28 (7) of US-URUGUAY BIT. Therefore, Respondent concludes that this provision can mean an enhanced possibility for the Tribunal having jurisdiction over counterclaims.

198. Although this provision makes it impossible to assert these explicitly encompassed counterclaims\textsuperscript{194}, by argument to the contrary it results in recognition of counterclaims under specific IIA and thus falling within the jurisdiction ratione materiae.\textsuperscript{195}

199. The Counterclaim raised by Respondent falls under category contained in Art. 11(1)(c) and Art. 11(1)(a) of BIT.

\textsuperscript{191} Oxus Gold, para. 948.
\textsuperscript{192} ATANASOVA, p. 4-6
\textsuperscript{193} US-URUGUAY BIT
\textsuperscript{194} KJOS, p. 618
\textsuperscript{195} HAMIDA, p. 261, 269
200. First, the Counterclaim\(^\text{196}\) relates to breach of obligations of investors under Art. 9(2) of BIT. Claimant failed to fulfill its obligations according to BIT due to decontamination of the Rhea River connected with health costs for treating the population and additional compensation for further consequences of previous contamination without provision of any financial compensation for its actions definitely resulting in breach of Art. 9(2) of BIT.\(^\text{197}\) Hence, this alleged breach of right falls under the category of Art. 11(1)(c) of BIT.

201. Second, Claimant failed to follow statements of the Agreement about the disposal of any waste in connection to exploitation of lindoro pursuant to Art. 2.2. of the Agreement. Along with it, Claimant did not manage to observe the laws of Respondent such as the KEA according to Art. 2.1. of the Agreement. This Agreement should be taken into account due to fitting the category of Art. 11(1a) of BIT.

202. In conclusion, both BIT and the Agreement are covered in a dispute settlement clause and therefore, the Tribunal has jurisdiction *ratione materiae* over the Counterclaim.

### 1.2 Respondent has standing to bring the Counterclaim under BIT

203. The f Art. 11(3) of BIT stipulates that:

> “Provided that the national or company concerned has not submitted the dispute for resolution... 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 SCC and its Rules”.

204. In the light of the literal interpretation of Art. 11(3) of BIT permits only investors to initiate proceedings by binding arbitration under SCC Rules.

205. However, limited locus standi should not lead counterclaims to fall outside of the parties' consent, in other words depriving tribunals of jurisdiction over counterclaims. It would be too strict to avail the second party of possibility to defend itself with counterclaims.

\(^\text{196}\) Art. 9(2) BIT  
\(^\text{197}\) Answer, para. 22-24.
only through this not establishing jurisdiction *ratione personae* even though the definition of disputes for purpose of jurisdiction *ratione materiae* is wide.\(^{198}\)

206. Restriction of locus standi would not necessarily result in the lack of jurisdiction as opposed to limited jurisdictions *ratione materiae* and personae in an IIA jointly.\(^{199}\)

207. In *Goetz* the tribunal agreed with Dissenting opinion of prof. Reisman from *Spyridon* that it is not determinative if IIAs do not contain confirmatory provisions that counterclaims fall under jurisdiction of arbitral tribunals, explicitly providing confirmation of jurisdiction *ratione personae*.\(^{200}\)

208. What is more, in *Metal-Tech*, only investors were permitted to initiate proceedings according to Art. 8 of ISRAEL-UZBEKISTAN BIT. However, the tribunal was willing to accept jurisdiction over Respondent’s counterclaim due to broad definition of arbitrable disputes.\(^{201}\)

209. To sum up, although *ratione personae* is one of the necessary aspects for addressing jurisdiction, it should not be taken into account alone for determination of jurisdiction over the Counterclaim. Limited locus standi can be remedied by virtue of broadly defined jurisdiction *ratione materiae*.

210. For these reasons, the Tribunal may address the jurisdiction over the Counterclaim.

2. **The Counterclaim is admissible**

211. The Tribunal may decide on the merits of counterclaims, if such counterclaims are admissible, i.e. they are factually and legally connected to the main claim of a claimant.\(^{202}\) Cornerstones for factuality represent temporal and spatial parameters. Legal link requirement is fulfilled if claims and counterclaims relate to the same investment as in an IIA.\(^{203}\)

212. The Counterclaim is based on actions and conduct of Claimant. Exploitation of Lindoro and its further expansion did not respect Art. 9(2) of BIT and Respondent did not obtain

\(^{198}\)ATANASOVA, p. 8  
\(^{199}\)KJOS, p. 613-615  
\(^{200}\)Goetz, para. 276-281.  
\(^{201}\)Metal-Tech, paras. 410, 413.  
\(^{202}\)PRASAD, p. 10  
\(^{203}\)Urbasser, para. 1151.
any financial compensation from Claimant for damaging the Rhea River and its consequences.

213. What is more, Claimant also failed to follow the environmental-protective rules stipulated by the Agreement. Claimant not only failed to observe the laws of Respondent pursuant to Art. 2.1. of the Agreement, but also did not comply with good practices including the disposal of any waste in connection to exploitation of lindoro according to Art. 2.2. of the Agreement.

214. Hence, Claimant did not fulfil its obligations neither pursuant to BIT, nor pursuant to the Agreement.

215. Several investment tribunals built their decision concerning admissibility of counterclaims upon the reasoning in UNCITRAL case Saluka as a decision that should be followed and upheld for questions of counterclaims. However, Saluka is grounded especially on award Klöckner adjudicated by ad hoc Committee, which stated that counterclaims have to create an indivisible whole with claims, hence dispose of operational unity and relate to a single goal.\textsuperscript{204}

216. Reliance on Klöckner is misplaced and not appropriate due to the fact that arbitration in that case was based on a contract.\textsuperscript{205} In contrast with contractually based arbitrations, investment arbitrations are based on concept “arbitration without privity” introduced by Paulsson. This concept means that there does not have to be a direct contractual relationship between investor and state.\textsuperscript{206}

217. Furthermore, the criticism of Saluka is apparent for example by arbitrator Pierre Lalive who denounces findings of Saluka and Klöckner.\textsuperscript{207} The tribunal in Saluka should have focused on CZECH REPUBLIC-NETHERLANDS BIT instead of establishing a general principle of law according to Lalive predicating that: "...the fact that the counterclaims arose out of the same investment should have been sufficient."\textsuperscript{208}

\textsuperscript{204}Saluka Counterclaim, para. 65, 79-80.
\textsuperscript{205}ATANASOVA, p. 10-11
\textsuperscript{206}PAULSSON II, p. 232-257
\textsuperscript{207}LALIVE, p. 153
\textsuperscript{208}LALIVE, p. 153
218. The extreme attitude of Saluka in the matter of admissibility leads to inability to submit counterclaims on different grounds than international law. It would be nearly impossible to assert counterclaims, as IIAs mainly do not comprise obligations for investors. On the other hand in Goetz the emphasis is placed on factual connection of counterclaims to claims and to the subject matter of dispute.

219. Moreover, the principles of judicial economy and sound administration of justice overweigh the restrictive view and connection test of Saluka. Aspects of judicial economy and sound administration of justice mirror the factual connection of counterclaims with claims.

220. As for judicial economy, counterclaims as additional sources of information could enable tribunals to acquire more complete overview of facts and render one single decision. According to case law factual link seems to be more important for admissibility of counterclaims than legal link. In cases of better administration of justice, strong factual connection could overwhelm the legal criterion. As prof. Douglas stated, only factual link should be taken into consideration by exercising connection test.

221. In our case, contracting parties have a treaty-based investment dispute and consequently Saluka should not count as a support for adjudicating of this case.

222. Respondent relies on ICSID case Urbaser, in which factual link functions the same as in Saluka, whereas legal link differs.

223. In Urbaser, the dispute arose out of the agreement on concession for water and sewerage services concluded between Argentina and a Spanish investor. Argentina advanced a counterclaim alleging that Urbaser failed to realize necessary investment, violating its obligations related to the human right to water.

224. The tribunal in Urbaser explicitly noted that:

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209 ATANASOVA, p. 10
211 ATANASOVA, p. 11
212 KJOS, p. 622-627
213 DOUGLAS II, p. 430
214 Urbaser, para. 1156.
“the legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimant’s failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT”.

Therefore, in Urbaser, the tribunal sidelined the requirement of legal link in connection test and adopted a broader interpretation recognizing legal connection when there is a binding between counterclaims and investment itself.

Following Urbaser, tribunals with a broad jurisdictional clause should be entitled to hear counterclaims, even where they do not arise out of the same legal source as primary claims. According to Lalive and Halonen, such modification of the connection test from Saluka is indispensable in light of the lack of rights and obligations of investors, be they individuals or private entities, under IIAs, or international law in general.

Following all the necessary requirements, (2.1) The Counterclaim is factually linked; and (2.2) The Counterclaim is legally linked.

2.1 The Counterclaim is factually linked

On 15 May 2016, the University published the Study concerning consequences of the exploitation of lindoro to the environment. In particular: “whether the exploitation of lindoro is damaging the environment of the surrounding areas and/or causing health conditions in the population.” Water samples were collected and analyzed as well as eighty men, women and infants were examined.

Key findings of the Study revealed increased amount of specific toxic materials in the Rhea River in connection with the exploitation of lindoro and concluded that: “The
contamination of the Rhea River is undoubtedly a direct consequence of the exploitation of lindoro.”

230. On the other hand, Decontamination of the Rhea River is still possible with immediate intervention. Inasmuch as Claimant refused to be responsible for such recovering action and also increasing contamination, Respondent had to revoke Claimant’s license and render Claimant’s facilities.

231. Claimant’s claim is focused on alleged expropriation of its facilities carried out by Respondent. Claimant infers it from revocation of license for exploitation of lindoro on Respondent’s territory as a consequence of environmental damages inflicted by Claimant.

232. The Counterclaim pursues the same consequence of such exploitation including financial compensation for environmental damages. Hence, factual link is acknowledged.

2.2 The Counterclaim is legally linked

233. The Counterclaim arises out of two grounds, namely breach of BIT and breach of the Agreement. These two grounds are linked.

234. Firstly, Claimant breached Art. 9(2) of BIT imposing obligations on investors laying down minimization of harmful environmental impacts, of environmental degradation and binding polluter to pay costs of pollution with wording: “The Contracting Parties agree that the polluter should, in principle, bear the cost of pollution...”

235. According to approving opinion of prof. Douglas and Schwartz: “true content of PPP cannot be completely captured without the procedural and institutional framework within which the law and policies operate”. International treaties usually contain environmental law provisions rather than customary law. Those treaties that regulate the
activities of non-state actors generally presuppose the establishment of a domestic institutional framework for their operationalisation.\footnote{DOUGLAS II, p. 441}

236. Lacking law regulation of PPP according to law in force by Claimant’s state, the KEA, Respondent’s national environmental-protective document imposing obligation to remedy and/or compensate environmental damage based on PPP, should be taken into account as the framework for operationalisation relating to Art. 9(2) of BIT.

237. The word polluter should be interpreted in the whole wording of BIT as investor given the fact that BIT itself is about investors. Hence, PPP obligations relating to investors can be recognized pursuant to Art. 9(2) of BIT and the KEA.

238. Legal connection should be researched by investigation of the Counterclaim and the investment itself. The Counterclaim is bound with the subject-matter of the dispute; in other words, with the investment of Claimant into exploitation of lindoro. Respondent demands compensation for systematic pollution leading to damaging people’s lives and limiting conditions to orderly life caused by such exploitation. Hence, legal link should be confirmed.

239. Secondly, Claimant breached Art. 2.1. of the Agreement laying down obligation of respecting the laws in force on Respondent’s territory, together with Art. 2.2. stipulating obligation of compliance with good practices including the disposal of any waste resulting from exploitation of lindoro.\footnote{Ex. 2, lines 1300-1306.}

240. The Agreement fits the category of Art. 11(1)(a) of BIT as explained above. Hence, definition of dispute according to BIT encompasses also disputes arising out of the Agreement. The Contracting parties entered into the Agreement after concluding BIT and had to expect that dispute arising out of the Agreement could be resolved also through BIT as they did not exclude this possibility in the Agreement itself.

241. In June 2015, Respondent passed the KEA, a national law focusing on environmental protection and implementing PPP for financial compensations of environmental damage.\footnote{Po 2, lines 1560-1565.} Along with it, Respondent established new Ministry for Environmental...
Matters with an authority to supervise Claimant’s activities including inspections thereof.

242. Subsequently, in October 2015, the Ministry affirmed increase of concentration of toxic waste in the Rhea River since 2010.\textsuperscript{229} Hence, Claimant failed to abide by the KEA, the Respondent’s law in force, as connection between exploitation of lindoro and contamination of the Rhea River was confirmed by the Study.\textsuperscript{230}

243. Not only did Claimant not observe Respondent’s laws according to Art. 2.1. of the Agreement, but it also did not handle correctly with disposal of waste from exploitation of lindoro pursuant to Art. 2.2. due to increased contamination of the Rhea River.

244. What is more, pursuant to Art. 7 of the Agreement, it is necessary to settle all the disputes arising out of the Agreement before domestic courts of Respondent. However, this exclusive arbitral clause does not preclude the Tribunal from adjudication on the Counterclaim according to common practice of investment tribunals.

245. In accordance with ICSID case Aguas, there are two categories of instruments that entrust jurisdiction to other tribunals: “(1) a separate document that waives the right to invoke, or modifies the extent of...jurisdiction...and, (2) a separate document that contains an exclusive forum selection clause designating a forum other...”\textsuperscript{231}

246. Art. 7 of the Agreement falls under the latter category. The tribunal in Aguas stated that this category does not deprive tribunals of jurisdiction only due the existence of the exclusive forum selection clause. To the contrary, the tribunal has to exercise jurisdiction when there is no specific indication of the common intention of contracting parties that the exclusive forum selection clause should serve as a modification of existing grant of jurisdiction.\textsuperscript{232}

247. In addition, in ICSID case SGS, it was said by the tribunal that: “\textit{contractual forum selection would significantly cut back Article 9’s scope}” pursuant to PARAGUAY-SWITZERLAND BIT. This stance would deny jurisdiction according to Art. 9 of the

\textsuperscript{229}Facts, para. 16-20.  
\textsuperscript{230}Ex. 4, lines 1394-1395.  
\textsuperscript{231}Aguas, para. 115.  
\textsuperscript{232}Aguas, para. 119.
PARAGUAY-SWITZERLAND BIT limiting it only to disputes arising solely out of IIAs. Above that: “If that were the Treaty parties’ intent, they presumably could have said so.” The tribunal concluded that dispute resolution settlement provisions should not be easily ignored and acknowledged jurisdiction over counterclaims.233

248. Putting into practice to our case, there is no sign of any consent of the Contracting parties to restrict access to the investment tribunal established under the conditions in BIT. What is more, similarly to Art. 9 of the PARAGUAY-SWITZERLAND BIT, Art. 11 of BIT about dispute settlement should not be overlooked just due the existence of the exclusive forum selection clause. It would disrupt the practical utility of BIT.

249. For this reason, the Counterclaim for the breach of the Agreement by Claimant is admissible.

250. All of this requests tribunals that cases should be treated in more lenient way like in Urbaser rather than in Saluka. What is more, Respondent fulfilled conditions of close connection test by meeting the legal link too.

3. Conclusion

251. To conclude, the Tribunal has jurisdiction over the Counterclaim due to fulfilment of the criterion of ratione materiae and standing of Respondent for bringing the Counterclaim under BIT. Even the requirements for admissibility of the Counterclaim, namely factual and legal links, are met.

252. Hence, Claimant invites the Tribunal to adjudicate that the Counterclaim is admissible.

233 SGS, para. 183, 185.
PRAYERS FOR RELIEF

On the basis of the arguments and submitted proofs, RESPONDENT hereby respectfully requests the Tribunal to find that:

1. It lacks jurisdiction over the Dispute.

2. Claimant’s claims are not admissible before the Tribunal in the view of the Claims in Motion.

3. The enactment of the Decree, its implementation and further acts taken by Respondent did not amount to expropriation of Claimant’s investment in the breach of BIT.

4. The Counterclaims are admissible before the Tribunal.

Respectfully submitted on 24 September 2018 on behalf of

Republic of Kronos

RESPONDENT