TEAM KHAN

FOREIGN DIRECT INVESTMENT MOOT COMPETITION
Stockholm, 8-11 November 2018

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

- between -

FENOSCADIA LIMITED
Claimant

- and -

THE REPUBLIC OF KRONOS
Respondent

MEMORIAL FOR RESPONDENT

SCC Arbitration V2018/003858

Registry
Arbitration Institute of Stockholm Chamber of Commerce
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Too v Greater Modesto Insurance Associates, Award (29 December 1989), 23 Iran-United States Cl Trib Rep 378

**Urbaser**

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| BIT | Agreement Between the Republic of Ticadia and the Republic of Kronos for the Promotion and Reciprocal Protection Investment, 1995 |
| ILC Articles on Diplomatic Protection | ILC Articles on Diplomatic Protection, 2006. |
| PUTWIL | Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992 |
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STATEMENT OF FACTS


3. Claimant, Fenoscadia Limited LLC, is a company duly incorporated under the laws of the Republic of Ticadia in 1993.² By the time of its incorporation, Claimant had five Ticadian nationals as its shareholders. However, in 1998, 65% of the shares with voting rights of Claimant were acquired by a private equity fund also organized under the law of Ticadia. Further, in 2012, three Kronian nationals acquired the remaining 35% of Claimant’s shares.

4. Claimant’s management is in the hands of a board of directors elected by its shareholders. For the past five years, the board has comprised of a majority of Kronian nationals. The board also appoints the Chief Executive Officer of the company. The current CEO resides in Ticadia, but often travels to and stays in Kronos for long durations for Claimant’s business. The Kronian shareholders exert considerable influence over Claimant’s decision making specifically in relation to the operation and management of its mining activities in Kronos, due to their experience and expertise in the mining industry acquired in other countries.

5. Respondent, the Republic of Kronos, conducted a public auction for the concession of the rights to extract lindoro from an area of 1,071,000 m² nestled in Respondent’s inner territory³.

6. On 20 April 2000 Fenoscadia Limited won the public auction⁴. Respondent then awarded Fenoscadia Limited concession rights to exploit lindoro for eighty years by entering into a concession agreement with the latter⁵. According to the agreement, Fenoscadia Limited

¹ Uncontested Facts, para. 2
² Uncontested Facts, para. 6
³ Ibid, para. 4
⁴ Ibid, para. 5
⁵ Ibid, Para. 8
shall pay Respondent 22% of the monthly gross revenue relating to the extraction and commercialization of lindoro.6

7. The Agreement also provided, on the other hand, that Claimant owned property in Respondent’s territory and, on the other hand that every two years agents of Respondent’s Ministry for Agriculture, Forestry and Land would carry out inspections7.

8. In 2010, Claimant decided to transfer and concentrate almost all its mining activities and resources in Kronos and effectively shut down its mining operations in Ticadia. There was a growing trend in the company that the decisions of the board of directors were favoring its interests in Kronos. Most of these decisions were implemented in Kronos, given the concentration of company’s activities there.

9. On 12 June 2015, “Kronian Environmental Act” (“KEA”) was passed containing the obligations and definitions set forth at the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Among others, KEA dictated miners to protect the waters of the regions where the extraction took place from toxic mine waste. Otherwise, they could be subject to severe penalties, fines, the immediate withdrawal of environmental licenses with the forfeiture of facilities, and the obligation to compensate for the environmental damage 8.

10. 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 2010.9

11. Subsequently, the Federal University submitted a funding request to further investigate the data published by the Ministry for Environmental Matters. The request was granted in November 2015, and the University was awarded USD 250,000 to conduct research on whether the exploitation of lindoro had contaminated the Rhea River waters.10

12. On 15 May 2016, The University published a comprehensive study, which concluded “the contamination of the Rhea River is undoubtedly a direct consequence of the exploitation of lindoro”. According to the study, graspel, a toxic component was released during the exploitation of lindoro, in the Rhea River waters. At least 10 different studies conducted by top-tier universities and independent researchers across the globe over the last 5 years.

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6 Ibid. para.8
7 Ibid, para.9
8 Ibid, para.16
9 Ibid, para.20
10 Ibid, para.21
have demonstrated a connection between water contamination by graspe and an increase in CVD in the population of the surrounding areas.\textsuperscript{11}

13. On 7 September 2016, Mr. Bazings issued the Presidential Decree No. 2424 ("The Decree") which prohibited, with immediate effects, the exploitation of lindoro in all Respondent’s territory.\textsuperscript{12}

14. On 8 September 2016, Claimant applied to the Kronos federal court seeking to suspend the effects of the Decree until negotiations with the Government.\textsuperscript{13} However, on 22 February 2017 Claimant withdrew its appeal to Kronos’ Circuit Court.\textsuperscript{14}

15. On 10 November 2017, Claimant filed its request for arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce.\textsuperscript{15}

\textsuperscript{11} Ibid, para.22
\textsuperscript{12} Ibid, para.23
\textsuperscript{13} Ibid, para.25
\textsuperscript{14} Ibid, para.26
\textsuperscript{15} Ibid, para.29
SUMMARY OF ARGUMENTS

Jurisdiction

17. This Tribunal does not have jurisdiction power over the dispute since Claimant’s claims relate to investor nationality not meet the requirements as investor pursuant to Article 1 of BIT. The BIT must be reviewed in accordance with the principles of international public law since there is no requirement or test for the nationality of the investor in the BIT. The place of incorporation or establishment of the company or place of companies’ management does not substantiate Claimant’s nationality as Ticadian and Claimant is not an ‘Investor’ under the BIT and ILC due to its Kronian shareholders and lack of control. (I)

18. Claimant is precluded from pursuing arbitration since the fork-in-the-road provision of the Kronos-Ticadia BIT includes both contractual and treaty claims resulting out of an investment and that the claims submitted by Claimant have the same fundamental basis. (II)

Merits

19. Issuing KEA and Presidential Decree No.2424 Respondent acted within its police powers and took the necessary acts as a regulatory measure so it did not expropriate the investment of the Claimant. Even if the Tribunal does not accept the act as a regulatory measure, the acts were taken for public purpose, in a non-discriminative manner and compliant with due process of law therefore not tantamounting to expropriation. In addition to that due to the harm given to in the territory of the Respondent, Claimant has the obligation to pay compensation. (III)

Admissibility

20. Claimant clearly did not fulfill its obligations arising from the KEA and the international conventions such as 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Claimant caused immense damages to the environment(Rhea River) and to the society of the Respondent. Because of these situations
Respondent had the rights given by the KEA and the Decree to revoke all licenses of lindoro exploitation in its land and requests Arbitral Tribunal to order Claimant to compensate all damages caused by its actions. (IV)

ARGUMENTS

JURISDICTION

ISSUE 1: I. THE TRIBUNAL DOES NOT HAVE JURISDICTION

RATIONAE PERSONA IN THE DISPUTE

21. Considering the dispute between Parties, Respondent claims that the Arbitral Tribunal lacks jurisdiction. Respondent’s objection is primarily based on the revealing the real nationality of the Claimant.

22. The nationality of the claimant determines, as a preliminary matter, whether it is entitled to take the benefit of treaty protections; this, in turn, determines the jurisdiction rationae personae of the investor-State arbitral tribunal.16

23. Article 1 of BIT defines an investor with “investor of a Contracting Party” by stating “an investor seeks to make an investment”. There are no certain nationality test or kind in BIT, in other words, BIT cannot be used for determining for nationality as a result public international law should be considered as applicable law as both Republic of Ticadia and Republic of Kronos are contracting states of Vienna Convention.17 According to the Vienna Convention on the Law of Treaties18 “any relevant rules of international law applicable in the relations between the parties” shall be considered together with the context.

24. It presented that the Tribunal does not have jurisdiction rationae personae to hear the dispute due to the fact that investor requirement under the BIT has not been fulfilled for Claimant. Because of the fact that the shares of the company consist of the majority of the Republic of Kronos national, nationality requirement of investor is not met in accordance with the BIT.

16 McLachlan/Shore/Weiniger p. 156.
17 Facts P32:¶ 875.
18 Article 31(3)(c) VCLT.
A. The place of incorporation or establishment of the company or place of companies’ management do not substantiate Claimant’s nationality as Ticadian

25. The Claimant believes that solely the place of incorporation or establishment of the company or place of companies’ management determines the Claimant’s nationality as Ticadian. In the BIT\textsuperscript{19}, “investor of a Contracting Party” defined with very broad words and it is necessary to investigate international law practices and cases.

26. In the past, being incorporated in the other contracting party’s territory was sufficient to be considered as an investor. However, in the contemporary international investment practice, incorporation place is not sufficient for testing nationality due to lack of effective connection\textsuperscript{20}. In other words, this test cannot prove the effective connection between with State and corporation because it is based on just formality that the act of incorporation.\textsuperscript{21} Some treaties are combining the place of incorporation with a place of effective management as it seen as an example in Article I(2) of the ASEAN Agreement.\textsuperscript{22} Furthermore, another example of changing trend on testing nationality is the \textit{Yaung Chi Oo v Myanmar Case}.\textsuperscript{23} In this case, Tribunal examined additionally effective management over the place of incorporation in order to determine the nationality.

27. Additionally, a genuine connection test shown in \textit{Nottebohm case} is really significant with regards to the nationality issue. According to that test in order to fulfill the nationality, a person must have the “genuine connection” with Home State. The Claimant does not carry out its main activities in Ticadia, besides, there is no proximity between the company and the country. There are ongoing examples of genuine connection test can also be seen in \textit{Champion Trading v. Egypt case}.\textsuperscript{24} As Brownlie states that this genuine connection test can be applied for legal persons as well.\textsuperscript{25} When genuine connection applied to corporations it is believed that the economic nature of the connection should take into account\textsuperscript{26}.

28. When Claimant’s position considered in the light of the findings above, it is evident that they moved their all operations to the Kronos and they only have formal ties left with the

\textsuperscript{19} Article I(4) of BIT.
\textsuperscript{20} Badia, p. 136
\textsuperscript{21} Brownlie, PP482-483.
\textsuperscript{22} Dolzer/Schreuer P49.
\textsuperscript{23} \textit{Yaung Chi Oo v Myanmar}, ¶¶ 46-52.
\textsuperscript{24} \textit{Champion Trading v. Egypt} p.16
\textsuperscript{25} Brownlie, PP513-518.
\textsuperscript{26} Harris, PP95-96.
Republic of Ticadia. Claimant does not have “genuine connection” due to lack of economic tie with Ticadia.27

29. It is useful to examine the ruling in Abaclat and Others v Argentina Case28 to illuminate these terms mentioned. In accordance with BIT in the Abaclat case29, the juridical person must be an Italian “corporation” and an entity incorporated in compliance with the legislation of Italy having its office in the territory of Italy and being recognized thereby. Also, they further reiterate its objection as to the quality of investors of Claimants due to the allegedly remote connection between the security entitlements and the bonds according to the case. However, Fenoscadia nationality factually became Kronian and Claimant transferred and concentrated all its operations to Kronos in 2010. In other words, Claimant dominantly manages its business from Kronos, not Ticadia.

30. Consequently, Claimant transferred all main commercial and management activities in Kronos in 2010 and only kept merely formal ties with the Republic of Ticadia and under the light of this information, Claimant should not be considered as an “investor” under the BIT. Therefore, Claimant’s assertions are shall not be considered admissible before the Tribunal.

B. Claimant is not an ‘Investor’ under the BIT and ILC due to its Kronian shareholders and lack of control.

31. Kronian shareholders are the substantial part of the Claimant’s operation and they exercise effective control by holding the majority in Claimant’s board for the past five years. The scope of BIT has shown as “a Party relating to an investor of the other Contracting Party or a covered investment”.30 Therefore, as BIT mentioned, Claimant does not meet those requirements.

32. Moreover, “investor of a Contracting Party” has defined as the other party of the contract that takes the necessary steps for the investment.31

33. There are other indicators like the place of headquarters of the company, which is where the center of the administrative and economic control of the company is and another indicator is the factual business connection between the company and the geographical area over which the industrial or commercial activities are deployed.32 If these indicators

27 Facts P13,§355.
28 Abaclat and Others v Argentina, §413.
29 Article 1(2)(b) of BIT made by Argentina and Italy.
30 Article 2 BIT.
31 Article 2 of BIT.
32 Badia, p. 137
read together with the place of incorporation, it will give better results in the search of an effective corporate nationality.\textsuperscript{33} These indicators have been started to use cumulatively as criteria in the practice and in modern treaties such as ILC Draft Articles on Diplomatic Protection.\textsuperscript{34}

34. According to Article 9 of ILC Draft, when the corporation has no substantial business connection in the place of incorporation, being controlled by nationals of another State, and the financial control and the seat of management of the company are located in another state, then that State will be considered as the state of nationality.\textsuperscript{35}

35. When the Article 9 of ILC Draft and Claimant’s position are taken into consideration, it can be asserted that Claimant has no business connection in the Republic of Ticadia as they have moved all of their operations into the Republic of Kronos. Also, it is evident that the CEO of Claimant often stays in Kronos and furthermore board of Fenoscadia Limited compromised of a majority of Kronian nationals and Kronian shareholders exercise considerable influence over Claimant’s decision making.\textsuperscript{36} It is wrong to give exclusive diplomatic protection when the corporation has a weak connection with its state of incorporation\textsuperscript{37}. Companies that have a weak relationship with the Home State under which is subject to investment protection, need to be evaluated likely diplomatic protection. When all these factors are taken in to account and under the light of Article 9 of ILC, it can be clearly argued that Claimant is not of Ticadian nationality, it should be considered as a Kronian.

36. Also, Claimant is not an investor over the dispute because according to BIT\textsuperscript{38} “\textit{associated activities}” defined as all the necessary facilities, companies, factories agencies, offices, branches that to be needed for operating, maintenance, and disposal of the organization. Control and maintenance test is failed as Claimant’s shares are divided between a group of Kronian nationals and a private equity fund from Ticadia, which holds the majority of the voting shares but has delegated the business judgment of the company to the group of Kronian shareholders.

37. Consequently, it is obvious that the Claimant’s investor requirement for the BIT and ILC have not been fulfilled.

\textsuperscript{33} Badia, p. 136.
\textsuperscript{34} Article 9 of ILC Draft.
\textsuperscript{35} See footnote 20.
\textsuperscript{36} Facts P:33\textsuperscript{905}.
\textsuperscript{37} ILC Commentary P38.
\textsuperscript{38} Article 1(7)(a) of BIT.
ISSUE 2: CLAIMANT IS PRECLUDED FROM PURSUING ARBITRATION PURSUANT TO THE “FORK-IN-THE-ROAD” PROVISION IN THE KRONOS-TICADIA BIT.

38. Respondent submits that the Claimant’s resort to the Kronian Federal Court-triggered the fork-in-the-road provision set out in Article 11(3) of the BIT, preventing it from pursuing arbitration.

39. Fork-in-the-road provisions determine that once a party has chosen a particular dispute resolution forum, such a choice should be final and no other options can be used later on. Prof. Schreuer has rightly put it, ‘[o]nce the investor chooses to settle the dispute in the host State’s courts and submits the dispute to those courts, it loses the option to resort to arbitration.’ In the words of McLachlan, through fork-in-the-road clause, a party loses “the ability to avail itself of such jurisdiction by choosing another forum for the resolution of its dispute”.

40. The major purpose of a fork-in-the-road provision associated with the waiver provisions in a BIT is to preclude an investor from commencing other dispute resolution proceedings if it has already made a choice among various dispute settlement options.

41. Article 31 of Vienna Convention on the Law of Treaties dictates that treaties must be interpreted, so far as possible, to give an effective meaning to all their provisions.

42. The choice that the dispute settlement clause enshrined in Art.11 (3) BIT offer to the investor must be interpreted as being between real alternatives of forums. Therefore, Respondent shall hereby prove that Claimant is precluded from pursuing arbitration since the fork-in-the-road provision of the Kronos-Ticadia BIT includes both contractual and treaty claims resulting out of an investment and that the claims submitted by Claimant have the same fundamental basis.

39 Uncontested facts, para.195
40 1995 Ticadia-Kronos BIT
41 Wei Shen, p. 408
42 Schreuer, p.231
43 McLachlan, p.90
44 Wei Shen, p. 409
A. The Kronos-Ticadia BIT’s definition of “investment dispute” includes both contractual and treaty claims

43. The fork-in-the-road clause enshrined in Article 11 (3) BIT between Kronos and Ticadia applies to investment disputes arising out of contract and treaty claims. In a case with similar facts, the Annulment Committee in Vivendi v Argentina determined that "a claim by CAA against the Province of Tucumán for breach of the Concession Contract, brought before the contentious administrative courts of Tucumán, would prima facie fall within the Article 8(2) and constitute a “final” choice of forum and jurisdiction, if that claim was coextensive with a dispute relating to investments made under the BIT”45. The specific language of the ‘fork-in-the-road’ clause in the France-Argentina BIT would allow it to have been triggered by a domestic court claim ‘if that claim was coextensive with a dispute relating to investments made under the BIT’45. In the present case, since the BIT encompasses ‘an investment agreement between that Contracting Party and such person or enterprise’, the Tribunal should determine that Claimant’s motion in the Kronos federal court constitutes a final choice of forum.

44. Likewise, the Tribunal in Middle East Cement v. Egypt46 has taken into account the specific wording of the Greece-Egypt BIT and determined that disputes within the meaning of the fork-in-the-road provision were those disputes —between an investor of a Contracting Party and the Other Contracting Party concerning an obligation of the latter under this Agreement. Even if the tribunal decided that the fork-in-the-road provision had not been triggered, it only deemed the provision inapplicable because the definition of investment disputes did not extend to contract claims. If the Tribunal found that it encompasses contract claims as well, it would have decided that the fork-in-the-road clause was triggered.

45. Therefore, if a claim lodged before a national court involved a dispute relating to an investment made under the BIT47 within the meaning of ‘the dispute’ specified in the BIT48, then the fork-in-the-road clause would be triggered.49 Hence, fork-in-the-road clause precludes any submission before an investment treaty tribunal, even if based on a different cause of action.50

45 Vivendi Annulment, para.55
46 MEC v. Egypt, para. 71, 72
47 Kronos-Ticadia BIT Art.11
48 Schreuer, pag. 243
49 Vivendi Annulment, para.60
50 Douglas 2, G.
46. On 8 September 2016, Claimant submitted its claim related to investment dispute before the Kronian national court. Subsequently, in the present case, the Tribunal should determine that since Claimant’s claim involved an investment dispute, the proceedings pursued by Claimant did amount to a choice under the fork-in-the-road provision contained in the Kronos-Ticadia BIT and therefore Claimant is precluded from submitting the same dispute before this Arbitral Tribunal.

47. Even if Claimant has chosen to file a motion in the local court due to an exclusive jurisdiction clause in the concession agreement, that clause encompasses purely direct breaches arising out of the contract. As claimant’s allegations encompass the BIT violations, then the relevant dispute-settlement clause contained in the treaty. This conclusion is supported by SGS v Pakistan case where the tribunal noted that the dispute ‘appears to be a more complex one’ and that ‘it was not to be characterized as a merely contractual dispute’. Moreover, it stated that ‘It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT.’ Accordingly, Claimant’s allegations in the local court were not related to direct breaches of the concession agreement. Since the exclusive jurisdiction clause encompasses purely contractual breaches, it is not relevant in the present case. Therefore, Claimant cannot rely on the contractual clause to defend its appearance before the local court. Respondent submits that Claimant’s choice of the local court triggered the fork-in-the-road provision under the BIT.

48. Equally, seeking administrative remedies are sufficient to trigger the fork-in-the-road provision under BIT and Claimant’s motion before the Kronian national court should not be analysed in isolation. The present Tribunal respectfully requests the Tribunal to take into account the fact that after choosing the path of domestic court Claimant withdrew the motion and lodged a claim in the arbitration. It has been suggested that a party which has chosen to seek interim relief from a national court, and failed, is estopped from seeking the same relief from the tribunal. Therefore, even though Claimant indeed withdrew the lawsuit prior to a judgment on its merits, it is still cannot be pursued before arbitration.

49. Both Contracting Parties of the BIT have manifested their consent to arbitration pursuant to the Arbitration Rules of the Arbitration Court of the Stockholm Chamber. If there is a need for a prompt interim decision, a party may apply for an Emergency Arbitrator and

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51 Article 7 of the Concession Agreement
52 SGS v. Pakistan, para.158
53 Born § 17.02 [6]
54 Kronos-Ticadia BIT, Art.(3)
receive a decision within five days pursuant to Article 32 of the SCC Rules. These terms plainly include injunctive relief of the type sought by the Claimant in the Kronian federal court. Nevertheless, Claimant chose to seek interim measures in Kronian federal court, by doing so it exhausted its right to choose another forum.

50. According to Professor Born, a party who has requested provisional measures from a national court, should be subject to preclusive effects, ‘a party should not be permitted to seek multiple bites at the same apple, even if it is only a provisional apple, in both judicial and arbitral proceedings.’

B. The claims pursued by Claimant share the same fundamental basis

51. Respondent submits that Claimant has triggered the fork-in-the-road provision of the BIT and is prevented from pursuing claims before this Tribunal because the proceedings initiated in Kronos federal court and in the present arbitration share the same fundamental basis. *The Pantechniki v. Albania* decision advocates this conclusion where the sole arbitrator, Professor Jan Paulsson determined that “The Claimant chose to take this matter to the Albanian courts” and that “it cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.”

52. In the present case, Claimant sought interim measure from the Kronian courts. Both claims, the one pursued in the present proceedings and before the federal court are based on Claimant’s expectations pursuant to the concession agreement as well as treaty. As in *Pantechniki*, in the present case, the claims pursued by Claimant in the different fora share the same fundamental basis.

53. As a conclusion, since the Kronos-Ticadia BIT definition of ‘investment dispute’ expressly encompasses both contract and treaty claims and since the claims pursued by Claimant domestically and internationally share the same fundamental basis, Claimant’s resort to Kronian courts has triggered the fork-in-the-road provision contained in the Article 11(3) of BIT, preventing Claimant from pursuing this arbitration.

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55 Born P.3790
56 Pantechniki v Albania, para.67
57 Kronos-Ticadia BIT, Art.11 (1)
MERITS

ISSUE 3: ACTS OF THE RESPONDENT ARE NOT AMOUNTING TO EXPROPRIATION

A. The respondent did not expropriate claimant’s investment

55. On contrary to the claims of the Claimant, Respondent submits that there is no violation of Article 7 of the Ticadia-Kronos BIT. The claim of governmental acts amounting to expropriation is not facts based and lacks a legal basis.

56. The exploitation of lindoro was exclusively regulated by the Agreement and in the light of the inspections made until 2015, the Claimant was found to be in full compliance with its environmental-related obligations.58

57. However with the results of the obtained Study on May 2016 proved that exploitation of lindoro was having adverse effects on human health and environment in the Respondent's population since 2009.59 Therefore, revocation of the licenses of the Claimant and termination of the Agreement was the inevitable result of the pollution caused by the Claimant on the Respondent’s territory.

58. As the preamble of the BIT states that ‘development of economic cooperation between the Contracting Parties, and to the promotion of Sustainable development’ which is one the main regimes of the BIT.’ Article 31 of the VCLT reflects the customary international law related to treaty interpretation. According to this article, a treaty shall be interpreted in good faith in accordance with the ordinary meaning in the lights of its object and purpose.60 In addition to the Preamble, Article 9 and 10 allows the Host State to take the necessary measures to protect and conserve human health and environment by stating ‘In pursuit of sustainable development, each Contracting Party shall strive to minimize, in an economically efficient manner, harmful environmental impacts in Article 9/2 and ‘Parties may adopt or enforce a measure necessary to protect human, animal or health.’ in the Article 10(a).

59. Necessary alterations that are required by the Government are needed to be carried out even if it causes unfavorable conditions and even make the investor to outrage on their business to continue however not always result in expropriation.61

58 Uncontested Facts, P.35, ¶¶ 981-983
59 Request for arbitration, ¶¶175-178
60 Article 31(1) of the VCLT.
61 Azinian v. Mexico, ¶ 83
60. After the Nationalist Party came to the power, the general policy of the government has become environment centered. The sole act made by the Respondent was passing the bill named as Kronian Environmental Act (KEA) requiring the miners to fully protect the water of the region where the extraction of lindoro takes place from the toxic mine waste, warning the investors if the result is disjunctive the result will be severe penalties.62

61. Therefore after detecting sharp increases in the volume of toxic wastes in the Respondent's river, the Decree was issued for sweeping imminent threat towards human health in the long term and derogated environment for the future generations. For that reason, Respondent acted using its sovereign powers as a regulatory measure and issued the Decree to protect the public health and environment.

62. Thus, the actions by the Respondent were taken under its sovereign powers which do not correspond to ‘having an effect equivalent to nationalization or expropriation’ since the sole measure was the cancellation the Decree and confiscating the extracted lindoro until the harm caused to the Republic of Kronos is compensated.63 For this reason, Respondent directly or indirectly did not expropriate the investment of the Claimant but acted within police powers of the State due to its sovereign powers which are ‘an essential element of the permanent sovereignty’.64

63. According to the jurisprudence of international investment law, a State is not responsible for the economic injury which is a consequence non-discriminatory65 bona fide regulation within the accepted police power of States.66 Only the regulatory measure for tax, crime and the maintenance of public order can be accepted for it to be within the police power.67 Therefore, the State measures may affect foreign interests considerably without amounting to expropriation which can be subjected to restriction of licenses.68 As in the case at hand Respondent revoked Claimant’s operating licenses and terminated the Agreement through Presidential Decree.69

64. Correspond to the data released by the Ministry of Environmental Matters in October 2015, there is a sharp increase in the volume of toxic water since 2010.70 This data was based on the inspections carried out by the Ministry of Agriculture, Forestry, and Land.

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62 The answer to request for arbitration, ¶¶ 409-414
63 Article 4 of the Presidential Decree, P52
64 Lowe, P 4
65 Methanex 44 ILM para 1456
66 Sedco Iran-US CTR ¶248, see: Newcombe
67 Baughen, P207
68 Brownlie, P532
69 Answer to arbitration to request, ¶430-433.
70 Ibid, ¶420
After these inspections, in May 2016 the University published a comprehensive Study which was indicating that there was a direct correlation between the extraction of lindoro and the contamination.\textsuperscript{71} The Study results of the studies are obtained through the data collected since 2010 through the Ministry of Environmental Matters.\textsuperscript{72} The Study itself and the inspections by the Ministries are clear shreds of evidence for the Claimant to be in violation of the obligation of protecting the environment and making it impossible for the Respondent to continue to encourage the investment of the investor.

In addition to these assertions, it can be argued that the issuing of the Decree and canceling of the license of exploitation of lindoro was a ‘valid exercise’\textsuperscript{73} of Kronos' police powers to protect public health and the environment. Thus, the present situation makes the claims of the Claimant baseless as the facts of the case at hand is not leading to direct or indirect expropriation. Although the Claimant asserts that ‘substantial deprivation' is the reason for indirect expropriation it is a baseless claim for the reasons of the KEA was not exclusively for the Claimant but for all of the investors in the territory of the Respondent. And secondly, since Kronos never controlled Claimant's investment, directed its operations, intervened in management or shareholders activities or any other actions that are tantamounting to indirect expropriation, there is no substantial deprivation.

The measures were taken by the Respondent for public purpose, non-discriminatively and due process of law which does not amount to expropriation and do not give a rise to a right of compensation\textsuperscript{74}. Therefore, the actions taken by the government are not articulating to indirect expropriation.

To conclude, the Claimant violated its environmental obligations which resulted in inevitable harm to the Republic of Kronos. In return, Respondent issued Presidential Decree acting within its police powers for the protection of environment and health its people.

\textsuperscript{71} Uncontested facts, ¶¶ 984-996
\textsuperscript{72} Ibid, ¶986
\textsuperscript{73} Chemtura, ¶ 97
\textsuperscript{74} Methanex pt IV, Ch D, ¶15, Feldman ¶ 103, TECMED, ¶ 119.
B. There is no unlawful expropriation

68. Unlawful expropriation is not present in this case at hand and even if the Tribunal were to find that there is an expropriation, it is not unlawful expropriation because the Respondent acted pursuant to public purpose (a), non-discriminatively (b) and complied with due process of law (c) in which the Claimant is liable for the damage that it has caused and the Respondent has no obligation to pay compensation. Therefore, any measure which is bona fide, non-discriminatory and in the interest of the public interest is considered to lawful expropriation\textsuperscript{75} which does not require payment of the compensation to the Claimant.

i. The respondent issued the Presidential Decree No. 2424 for the public purpose

69. Concurrent to the Nationalist Party to come into power, the environmentally protective policy has been evolved due to its strong environmentalist political agenda\textsuperscript{76} Additionally, there was no denial on the fact that at the time of the execution of the Agreement there was no regulatory framework for mining industry nor a comprehensive environmental regulation\textsuperscript{77} except for basic obligations.

70. For this reason, on June 2015 Kronian Environmental Act was passed mainly consisting of the obligations and definitions on the recently signed agreement 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes having an effect of a warning for all of the miners to protect the water of the regions where the extraction took place, or else, severe penalties would be taken.\textsuperscript{78}

71. According to the results of the Study, the effects of the exploitation of lindoro was adverse and absolute not only polluting the river but also creating possible long-term health issues which had to be stopped by the sovereign powers.\textsuperscript{79} For this reason, the Decree about the revocation of the license of exploitation had to be issued.

72. Related to the claims of the Claimant about the Presidential Decree lacking public purpose due to the failure of conclusively establishing a causal link between the exploitation of the lindoro and the increase in the coronary heart disease in the Respondent’s territory\textsuperscript{80}, Article 5 of the Protocol of PUTWIL Convention brings a regulation on the matter of lacking causal ling by stating ‘disease shall not be postponed on the ground that scientific

\textsuperscript{75} Azurix ¶ 278, Feldman ¶ 98, Methanex 44 ILM 1345 at 1456
\textsuperscript{76} Uncontested facts, ¶ 945
\textsuperscript{77} Ibid, ¶ 919
\textsuperscript{78} Ibid, ¶¶ 963-965
\textsuperscript{79} Ibid, ¶ 995
\textsuperscript{80} Request for Arbitration P6, ¶¶ 175-180
research has not fully proved a causal link between the factor at which such action is aimed’. Therefore, not having a causal link is not a factor vitiating the admissibility of the Study in which the Decree was made for the public purpose.

73. When the definition of the public purpose is examined, it is required to be genuine and whether the measure concerned is indeed designed to ‘achieve it’. TECMED Tribunal ruled that to be able to detect what is for public purpose ‘public policy’, ‘interest in the society’ and ‘actions’ of the government should be taken into consideration.

74. Additionally, another condition for a public purpose to be legitimate is state of necessity. Considering the derogation caused and the requirement of protection of the population and environment in the territory of the Respondent carries great importance for the state of necessity. According to ILC Draft on ARSIWA(Articles on the Responsibility of States for Internationally Wrongful Acts) Article 25, when the act that is supposed to be taken is the only way to protect an essential interest against a grave and imminent peril then the necessity can be invoked. Furthermore, the acts had been taken appropriately in accordance with 1992 Convention on PUTWIL as it allows the States party to take required all kind of appropriate measures for the protection of the environment. This has provided an evidence on the due process of law of the Decree.

75. Similarly, in the case at hand, to be able to prevent the continuation of the hazardous contamination on the river and possible detrimental long-term health issues, the Decree was necessary, made only for the public purpose and due process of law. Hence, it is a bona fide regulation.

ii. The decree was non-discriminatory

76. The KEA was issued for all of the investors in the territory of the Respondent. It does not exclude any other investors but applicable to all miners to protect the environment and human health. Additionally, it has been found by the investment tribunals that violations of non-discrimination occur against foreign nationals. The regulation must be based on, linked to or taken for reasons of the investor’s nationality. However, at the case at hand,

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81 ADC, ¶432
82 UNCTAD: Expropriation, P 96
83 TECMED, ¶122
84 Ibid.
85 Ibid.
86 Oxford Handbook, P823
87 Article 25 of ILC Draft on ARSIWA
88 Article 2 of PUTWILL Convention
89 UNCTAD: Expropriation, P34
90 Ibid.
there is no foreign investor involved in the issuance of the Presidential Decree as it has been given in the arguments of the nationality of the Respondent. Moreover, these measures are not taken specifically for the investment of the Fenoscad sia Limited. The sole purpose behind the issuance was the activities of the investor and the violation of its obligations neglecting the protections required.

77. According to Newcombe and Paradell there are different ways for discrimination: either ‘unjustifiable or arbitrary regulatory distinctions made between things that are like or treating unlike things in the same way’ or ‘conduct targeted at specific persons or things motivated by bad faith or with an intent to injure or harass’. In this case, neither the regulations were unjustifiable nor arbitrary nor conducted targeted specific groups or motivated by bad faith. Respondent did not have the intent to harm the investor. Therefore making the decree in a non-discriminative nature due to environmental and protection of health purposes.

78. In the Chemtura Tribunal, similarly, Respondent's regulatory agency took measures to within its mandate in a non-discriminative manner motivated by the increase in awareness of the dangers presented by the extracted metal known as lindane for human health and environment do not constitute indirect expropriation.

79. Regarding the matter on joint venture Company with the Republic Ibi for the extraction of lindoro, with a trustable and with strict environmental inspections and precautions having a new agreement is what is expected from the nature of an investment. After the loss in trust in the matter of violation of its obligations and causing great harm to the Respondent the Claimant cannot be in full compliance with the law to fulfill its obligations for the future investments in the territory of the Respondent.

80. To conclude, Respondent did not act non-discriminatively toward the Claimant since the KEA was applicable to all of the investors in the territory of the Respondent.

iii. The decree was in the due process of law

81. The Decree has passed through a proper process having no effect on the rights of investor such as reasonable advance notice, a fair hearing, and unbiased and impartial adjudicator to assess the actions in dispute which must be readily available for the investor for them to have a meaning. Judicial and administrative procedures were available to the Claimant, who had a reasonable chance within a reasonable time to claim its legitimate rights and

91 Newcombe & Paradell, PP288-289  
92 Chemtura ¶¶ 265-266  
93 Ibid.
have its claims heard. It was Fenoscadia’s choice to abandon its rights in favor of pursuing this arbitration. In this case, there is no right of the investor that has been violated in which makes it in due process of law.

82. To conclude, the pollution that has been building up since 2011 and the KEA to be made in 2015 does not affect the applicability of the act since liability on the environmental harm is strict, regardless of whether a legal provision exists that establishes so⁹⁴.

C. The respondent has no obligation to pay compensation

83. This argument will be given in a detailed manner in issue four. However, for the sake of supporting the argument of the requirement of the Claimant ‘s duty to pay the compensation.

84. It is a widely accepted opinion by the tribunals that when the police power doctrine is applied for specific public purposes in good faith and non-discriminatively, in accordance with due process of law then the State is not responsible for the economic injury caused or any other compensation⁹⁵. International law authorities have regularly concluded that no right to compensation arises for reasonably necessary regulations passed for the ‘protection of public health, safety, morals or welfare or for government regulations that are non-discriminatory and within the commonly accepted police powers of states’.⁹⁶

85. Even if the police power doctrine is not considered to be applicable, the actions undertaken by the Respondent cannot be deemed as unlawful expropriation. According to Article 7 of the BIT, Respondent has the obligation to pay compensation even if the measures were taken for the public purpose, non-discriminatively and in accordance with due process of law. However considering the damage that has been given in the territory of the Respondent, Claimant is responsible with the obligation of paying compensation for the harm that it has caused the Respondent and also according to Article 9 ‘polluter pays’ principle is accepted in which bearing the cost of the pollution is expected in which any damage found must be considered significant and compensated.⁹⁷

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⁹⁴ Aguinda v. Chevron, ¶ 115
⁹⁵ Too v Greater Modesto, Iran-United States Cl Trib, ¶ 378
⁹⁶ Ben Mostafa, P 338
⁹⁷ Burlington case decision on the counterclaims ¶ 112
ADMISSIBILITY

ISSUE IV: THE RESPONDENT'S COUNTERCLAIMS ARE ADMISSIBLE BEFORE THE TRIBUNAL

87. Respondent’s claims are admissible and it is respectfully requested from the Tribunal to be considered for this case. Claimant's requests are not admissible before the arbitral tribunal even if the Claimant can be considered an investor according to the BIT.

88. According to the BIT Article 11 Section 2,

“BIT grants investors the option of pursuing a claim against the host State before (I) state courts or administrative courts of the host State, (II) other dispute resolution mechanisms previously agreed upon, when applicable, and (III) before an Arbitral Tribunal under the auspices of SCC and in accordance with the SCC Rules. Once the choice is made, the same claims are no longer admissible in the other forums.”

A. Claimant’s Claims are Inadmissible In This Case

89. Just as it was explained above, "It is unquestionable that Claimant's choice to seek relief before state courts prevents an Arbitral Tribunal from settling the dispute, as determined by Article 11, Section 2 of the BIT." Because that Claimant already chose local courts to pursue its claim, it now cannot use arbitration to further pursue their claims altogether. It is clear that even if they withdraw their pursuits in local courts, their claims are still inadmissible.

90. Addressing the issue of admissibility a distinction needs to be made between jurisdiction and admissibility. According to Waibel,

“Admissibility refers to the power of the tribunal to examine a case at a given point in time. It concerns the exercise of the tribunal's adjudicative power in relation to one or several specific claims submitted to it(conditions de recevabilite)”

B. Claimant's detrimental practices Harmed the Environment and the Population,

Therefore Claimant Needs to Pay Compensation

i. With its environmentally harmful actions Claimant has breached the BIT agreement between the parties

98 Facts, p.13, para 360-365
99 Facts, p.14, para 370
100 Waibel, 2014, p.5
91. Claimant’s claims are based on the arguments that Respondent unfairly revoked Claimant’s lindoro exploitation licenses without solid reasons. However, as it is stated below, the Study proves that Claimant’s investment acts and practices clearly damaged the environment (Rhea River especially) and the society of the Respondent. Therefore, Respondent used its rights as a state to protect the public interest and prevented Claimant’s damaging acts. Respondent also revoked the Claimant's licenses as a result of a clear breach of the BIT between the parties which was the result of the Claimant’s practices clearly breaching the agreement.

92. Claimant while exploiting lindoro and gaining immense profit from these actions, breached the BIT 1995. According to the BIT Article 9, "The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures". Additionally, in Article 9/2 the treaty states that "in pursuit of sustainable development, each Contracting Party shall strive to minimize, in an economically efficient manner, harmful environmental impacts occurring within its territory".\(^{101}\)

93. Therefore, not only Claimant did not minimize its actions to protect the Respondents territory from harmful environmental impacts, it also caused these impacts with its maximum efforts to gain more and more from Respondent's minerals.

94. Respondent also rests its claim for compensation on the BIT agreement Article 9 which suggests, "the Contracting Parties agree that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting investment or international trade".\(^{102}\) This article clearly suggests that the party who committed the pollution shall clear it or compensate for the damages the pollution would cost and with the University’s study has proven that the Claimant is committed massive pollution. Not only damaged the environment but also threatened the health of the people of the Kronos who use the Rhea River. These pollutions and toxications have been hurting people since 2011 as stated by the Respondent in the Record.

95. The states exercise their right to regulate to protect the public interest is a very common act in investment situations. Especially if the investment could risk the health of the population and the environment just like in our current case.

96. According to the ICSID case of Marvin Feldman v. Mexico, the arbitral tribunal stated that "Government must be free to act in the broader public interest through protection of

\(^{101}\) Article 9 of BIT  
\(^{102}\) Article 9 of BIT
the environment, Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation”. 103 Although Claimant’s business is surely affected by the revokement of their mining license but Respondent clearly has to put the public interest above all by any means necessary.

97. Respondent’s reactionary actions can also be further explained by Laurance Boisson de Chazournes who stated about government acts for the public interest that "The regulatory power of a State can also be framed by way of general exceptions, which include the possibility to adopt environmental measures.” 104

ii. According to The Study, Claimant’s exploitation of lindoro caused environmental damage and increased the coronary disease in Respondent’s society

98. Results of the study conducted by the Kronian National University showed that the exploitation of lindoro have definitely caused an increase in cardiovascular disease (CVD) among Respondent's population since 2011. Also, it is said that "The study demonstrates that the Claimant has failed to avoid contamination of the Rhea River, which supplies water for the vast majority of the country, with toxic waste.” 105

99. Although the damage is proven through The Study, Claimant still denies these truths and refuses to compensate for the Rhea River. Respondent, therefore, claims Claimant responsible and liable for all damages happened to the river and to the people of Kronos who got ill because the Rhea River is used by many Kronian people.

100. Respondent also requests from the Arbitral Tribunal to make Claimant pay for the river’s decontamination which will cost many high technological approaches and will take a long time. This procedure is the sole option left to adequately restore the Rhea River, preventing further damages to the river itself, to Respondent’s environment and to the local population. 106

101. The Study shows horrifying results as the contamination levels of the Rhea River,

"The samples revealed an abnormal amount of heavy metals and graspel, a toxic substance released during the exploitation of lindoro, in the waters of Rhea River. The current level of contamination of the waters of the Rhea River places it among the top three most polluted rivers in the world. The contamination of the Rhea River is undoubtedly a direct consequence of the exploitation of lindoro.” 107

103 Feldman v. Mexico, 2002, para. 103
104 Chazournes, 2016, p.385
105 Facts, p.16, para 425
106 Facts, p.16, para 450
107 The Study, p.50, para 1390
102. Study clearly states the unimaginable damage happened to the Rhea River because of the lindoro exploitation, with these undoubtful facts Respondent with rights granted from the BIT agreement and with international treaties on the environmental protection, Respondent canceled all lindoro exploitation licenses in the state. This certainly was not a special treatment for the Claimant, Respondent surely had to protect its environment and its society from the clear danger. Because of the reasons stated above Respondent asks the Arbitral Tribunal to make Claimant compensate for all the damages the environment and the society suffered because of the Claimant's acts.

103. The Study also showed that The Rhea River could still be saved and the decontamination of the Rhea River remains feasible, provided that urgent action is taken by Kronian authorities. We understand from the Study’s research that the costs for a complete decontamination and filtering of the waters of Rhea River is estimated to amount to USD 75 Million. Given the current level of contamination of the waters of the Rhea River, saving and helping efforts for the Rhea River might take at least 5 years.\textsuperscript{108}

\textbf{iii. Claimant Did Not Follow Its Environmental Obligations Stemmed From Domestic And International Law}

104. Before accomplishing the Kronian Environmental Act, Respondent had no prior environmental code and Claimant abused this situation for its own benefit. As a result, government of the Kronos could not force any repercussions to the Claimant because of its environmental damages caused by its operations in Kronos.\textsuperscript{109}

105. Scholars Ewad and Parlett state that during an investment situation "One of the possibilities for investor liability is on the basis of directly applicable international law rules governing the environment. Also it could thus be argued that investors are directly subject to obligations arising from international environmental treaties”\textsuperscript{110}

106. Both Respondent and Claimant are parties to the Vienna Convention on the Law of Treaties and more importantly to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.\textsuperscript{111} Even without the domestic laws providing the obligation, Claimant had to fulfill its obligations about the protection of the environment caused by the 1992 Convention that both it and Respondent were party of.

\textsuperscript{108} The Study, p.51, para 1400
\textsuperscript{109} Facts, p.15, para 400-405
\textsuperscript{110} Ewad/Parlett, 2017
\textsuperscript{111} Facts, p.32, para 875
Claimant did not fulfill its obligations that arising from both domestic and international law.

107. An example of obligation source arising from international treaties and conventions can be observed in the case of *Urbaser v. Argentina* in which it was decided that the investors could be bound by international human rights obligations concerning the right to water.\(^ {112} \)

108. For a long time inspectors of the Respondent have been following the operations of the Claimant and therefore the environmental footprints of the Claimant closely,

> “Inspection reports made by the Ministry for Agriculture, Forestry and Land have shown that the exploitation of lindoro conducted by Claimant had a significant potential to cause environmental damage. However, in the absence of a statute conferring them authority to impose sanctions on Claimant, inspectors were limited to collecting information over the years.”\(^ {113} \)

109. To prevent problems coming up because of lack of environmental code and necessary administrative, Respondents newly elected government created KEA and a new ministry called the Ministry for Environmental Affairs. After newly created Ministry for Environmental Affairs released an information about raising toxic waste levels in the area, especially in the Respondent’s rivers, researchers at Kronian National University started their study to prove if these increasing toxins was the result of Claimants actions.\(^ {114} \)

110. Respondent’s states new environmental code (KEA) requires that,

> “Miners to fully protect the waters of the region where the extraction takes place from toxic mine waste. Failure to comply may lead to severe penalties, including fines, the withdrawal of the environmental licenses and the forfeiture of facilities and the obligation to remedy and/or compensate the environmental damage.”\(^ {115} \)

It was obvious from the decontamination of the great Rhea River and the high increase of diseases in the Respondent’s society that Claimant did not fulfill its obligations and did not protect the environment from its dangerous activities of investment. So Respondent took action while resting its right on the KEA, this was the sole way for Respondent to protect its environment and society from damages arising from the exploitation of lindoro.

111. Respondent asks the arbitral tribunal to make Claimant compensate for the damages it made to the environment and the Rhea River proven by The Study, for Claimant clearly did not stay loyal to its obligation of environmental protection which is stated in the 1992

\(^{112} \textit{Urbaser v. Argentina}, 2016, \text{para 1144.} \\
^{113} \text{Facts, p.15, para 415} \\
^{114} \text{Facts, p.15, para 420} \\
^{115} \text{Facts, p.15, para 410} \)
Convention on the Protection and Use of Transboundary Watercourses and International Lakes and also in the BIT agreement Article 9 between the states.\textsuperscript{116}

\textsuperscript{116} Article 9 of BIT
PRAYER FOR RELIEF

112. Respondent respectfully requests this Arbitral Tribunal to:
   a) Declare its lack of jurisdiction over the dispute on the grounds that Claimant is not an investor under the BIT;
   b) Declare that Claimant’s requests are not admissible;
   c) Declare that Claimant’s claims be entirely rejected; and
   d) Order Claimant to pay USD 150,000,000 for the damages arising out of its operations in Kronos.

Submitted on 24 September 2018 by TEAM KHAN

On behalf of Respondent

THE REPUBLIC OF KRONOS