MEMORIAL FOR RESPONDENT

Dated this 24th of September, 2018.
MEMORIAL FOR RESPONDENT

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Congo v Rwanda  

Barcelona Traction  

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NAFTA  

USC AFTA-DR  
United States Central American Free Trade Agreement-Dominican Republic

UNCCC  
United Nations Framework: Convention on Climate Change

CBD  
Convention on Biological Diversity

KP  
Kyoto Protocol
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BC  Basel Convention

SCPOP  Stockholm Convention on Persistent Organic Pollutants

CTEIA  Convention on the Transboundary Effects of Industrial Accidents

CPUTWIL  Convention on the Protection and Use of Transboundary Watercourses and International Lakes

VCLT  Vienna Convention on the Law of Treaties

MISCELLANEOUS

Ministerial Declaration  Bergen Ministerial Declaration on Sustainable Development in the ECE Region (UN Doc. A/CONF.151/PC/10 (1990)) (para.7).

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<td>CA</td>
<td>Concession Agreement</td>
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<td>ICJ</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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**Statement of Facts**  FDI Moot Problem 2018

**UDHR**  Universal Declaration of Human Rights

**UNCITRAL**  United Nations Commission on International Trade Law

**UNGA**  United Nations General Assembly

**UNSC**  United Nations Security Council

**VCLT**  Vienna Convention on Law of Treaties
STATEMENT OF FACTS

1. The Claimant is Fenoscadia Limited a limited liability company incorporated under the laws of Ticadia. Fenoscadia has a worldwide reputation for exploration and exploitation of rare earth metals and has been in operation for 25 years.

2. The Respondent is the Republic of Kronos an underdeveloped country and the territory in which lindoro was discovered.

3. The Parties had signed the Ticadian-Kronos BIT in the year 1995 with an agreement to promote greater economic cooperation between them.

4. On 1 June 2000, the Claimant and Respondent had entered into an exclusive concession agreement for the extraction of lindoro by the Claimant within the Respondent’s territory. Claimant agreed to pay 22% of its monthly gross revenue with regard to the extraction of lindoro and to be subject to periodical inspections by the Respondent’s Ministry for Environmental Matters.

5. Over the course of 7 years, the Claimants extracted lindoro in adherence to the Agreement. The Respondents performed periodical inspections with positive outcomes up until the September of 2015, despite having a change of governmental policies and laws. In June 2015, the Respondents enacted a law the Kronian Environmental Act 2015 that effectively restricted Claimant’s mining activities.

6. This law was passed with great hast and was done with lack of a regard to due process, having waived the requirement for a public hearing before enactment.

7. Post-enforcement of these laws, an inspection of Claimants activities were found to be in full compliance of regulation on the September of 2015. However, only a month later, sudden data was released claiming that the Rhea River within the Respondent’s
territory was contaminated, and a nexus was attempted to be drawn to the Claimant’s mining activities.

8. It must be noted that the Claimants had exhausted measures to ensure that their activities were environmentally compliant. This by way of employing about 40 employees in charge of correctly disposing the waste originated from the extraction of lindoro.

9. The following year a study suggested that the Claimant’s mining activities directly caused contamination of the Rhea River. This Study was conducted by the Federal University of Kronos funded by the Kronian Ministry for Environmental Matters themselves without external expert opinion. The Study suggested also that said contamination resulted in a rising occurrence of a specific disease among Kronian children. There was however no causal link established between the two.

10. Despite a lack of surety, the Respondents issued a Presidential Decree bringing to a halt Claimant’s mining activities in their territory. Thereby causing the Claimant to suffer severe losses. The Respondents hence unilaterally terminated the Agreement between the parties and rendered all of Claimant’s investments useless.

11. The Claimant wanting to mend their relationship with the Respondents and salvage their financial situation, applied for a motion to the court to suspend the effects of the Decree which was subsequently withdrawn when the Respondent stated the said Decree would not be revoked.

12. The Claimant hence commenced proceedings against the respondent alleging a violation of the Bilateral Investment Treaty. More specifically, that by way of the Presidential Decree and the enactment of KEA, the Respondents had expropriated the Claimant’s investments, a direct violation of Article 7 of the BIT.
JURISDICTION & ADMISSIBILITY

ISSUE–1:
THE TRIBUNAL LACKS JURISDICTION OVER THIS DISPUTE

1. ‘Jurisdiction’ has been defined to mean “the power of a court or judge to entertain an action, petition, or other proceeding”.¹ Hence, when an arbitral tribunal lacks jurisdiction over a particular dispute, the tribunal cannot hear the dispute, as it does not have the power to do so.

2. Should in any event, the tribunal proceed to entertain the dispute, then the award passed by the tribunal would be one that is unenforceable later on, as it was passed in an arbitration that was lacking in jurisdiction². Thus, the question as to whether the Tribunal in this case has jurisdiction over this dispute: is manifestly pivotal to the sanctity of this arbitration.

3. The Respondent respectfully submits that this Tribunal lacks jurisdiction over the dispute. For this Tribunal to have jurisdiction over this dispute, three requirements need to be first satisfied, these are: (i) consent of the parties; (ii) the requirement of ratione materiae and; (iii) the requirement of ratione personae.

4. Consent of parties. An investor-state arbitration, like any other arbitration, is a creature of consent. States are free to resolve their disputes through any peaceful means of their choice³. Thus in the Corfu Channel⁴ case, the International Court of Justice (“ICJ”) laid down the foundational rule that State consent provides the cornerstone for the exercise of jurisdiction by any international court or tribunal, including itself.⁵

¹ John Burke.
² Dr. Mukesh Kumar Malviya.
³ Article 33(1) of the United Nations Charter.
⁴ UK v Albania.
⁵ Zachary Douglas.
It is State consent that provides the basis of the jurisdiction of international courts and tribunals generally, and for investment tribunals in particular. State consent is hence pivotal to any international adjudication. In investor-state arbitrations, generally, consent to arbitrate is typically accorded by host States through bilateral investment treaties (“BIT”).

In the instant case, both the Claimant’s State and the Respondent have consented to this arbitration. This consent is posited in Art. 11(3) of the TK-BIT, where it has been agreed that any dispute between parties may be resolved by way of binding arbitration at the SCC, in accordance with the SCC Rules. Resultantly the first requirement of the consent of both parties to the arbitration is satisfied.

The requirement of ratione materiae. Jurisdiction ratione materiae refers to the dispute being of a relevant and admissible subject matter. Only should the dispute be of an admissible subject matter, could this Tribunal then have jurisdiction ratione materiae to hear the dispute.

Customarily, there are said to be two elements that fulfill the composition of jurisdiction ratione materiae: (i) The dispute being of a legal nature and; (ii) The dispute arises directly out of an investment.

Dispute of a legal nature. A legal dispute is defined to be a disagreement on a point of law or fact, a conflict of legal views, or of interests between two persons. In the instant case, the Respondent does not deny that the dispute is of a legal nature, as it concerns an allegation of expropriation of the CA raised by the Claimant. It is an argument on a point of law, to which both parties have conflicting views. Hence,

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7. Michael Waibel.
8. Ibid.
10. Valts Nerets.
11. Catherine Yannaca-Small.
12. Ibid.
fulfilling the requirements to constitute a legal dispute, and rendering the instant dispute to be of a legal nature.

10. *The dispute arises directly out of an investment agreement.* ‘Investment’ may be defined in either an agreement between the Contracting State and the investor, or in the national law of the Contracting State, or in a clause of a treaty accepted by the investor.  

11. In the instant case, investment has been defined in the TK-BIT. Under Article 1(1) of the TK-BIT, an investment, among others, includes:

> "(f) an interest arising from the commitment of capital or other resources to the economic activities in the territory of a Contracting Party, such as under:

> (1) a contract involving the presence of an investor’s property in the territory of the Contracting Party, including a turnkey or construction contract, or concession ..."

and

> "(h) any other tangible and intangible, movable and immovable, property and related property rights acquired ..."

12. In the present scenario, the Respondent does not dispute that the Claimant has made an investment within the Respondent’s territory, as the Concession Agreement to mine *lindoro* constitutes an investment in accordance with the definition under the TK-BIT above.

13. Additionally, the Claimant’s assets are in tangible and intangible forms. Further, the plain and literal meaning of the definition provisions in the TK-BIT itself has recognized claims to performance of a given obligation under a concession agreement.

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16 C. H. Schreuer.
18 Ibid.
as an investment within the ambit of a BIT.\textsuperscript{22} Thus, it is undisputed that the instant dispute is one that arises directly out of an investment agreement.

14. To conclude on the requirement of \textit{ratione materiae}, as: (i) the instant dispute is of a legal nature, and (ii) arises directly out of an investment agreement; both the requirements that compose jurisdiction \textit{ratione materiae} have been satisfied. And thus, this Tribunal has jurisdiction \textit{ratione materiae} over this dispute.

15. \textbf{The requirement of \textit{ratione personae}.} Jurisdiction \textit{ratione personae} has been said to be possibly the most important, but yet the most perplexing and complex jurisdictional condition in the practice of international investment arbitration.\textsuperscript{23} \textit{Ratione personae}, in the context of an international investor-state arbitration, entails that the investor seeking to commence arbitration against the State, must be a “protected investor” under the BIT.\textsuperscript{24} This is to say, that the investor must have \textit{locus standi} to bring the said arbitration.\textsuperscript{25} If not, the requirement of jurisdiction \textit{ratione personae} is not satisfied, and the tribunal cannot have jurisdiction to hear the dispute.\textsuperscript{26}

16. The requirement of jurisdiction \textit{ratione personae} under the TK-BIT is found nestled within Arts. 11(1)\textsuperscript{27} and 1(4)\textsuperscript{28} of the TK-BIT, read together. The requirement of \textit{ratione personae} under the TK-BIT is thus as follows:—

\begin{quote}
\textit{“1. For purposes of this Article, an investment dispute is a dispute between a Contracting Party and an investor of the Other Contracting Party ...”}
\end{quote}

\begin{quote}
\textit{“4. The term ‘investor of a Contracting Party’ means a Contracting Party, or a person or an enterprise of a Contracting Party ...”}
\end{quote}

\begin{footnotes}
\textsuperscript{22} \textit{Inmaris Perestroika}
\textsuperscript{23} Valts Nerets.
\textsuperscript{24} C.F. Amerasinghe.
\textsuperscript{25} Andrea Vincze.
\textsuperscript{26} Zachary Douglas.
\textsuperscript{27} Official Statement of Facts, pg. 44, ¶1225.
\textsuperscript{28} Official Statement of Facts, pg. 39, ¶1095.
\end{footnotes}
17. Flowing from the above, it becomes clear that for the Claimant to fulfill the requirement of jurisdiction *ratione personae*, the Claimant must be capable of being recognised as an enterprise of Ticadia. To determine if the Claimant in the instant matter is an enterprise of Ticadia, the Tribunal must have regard to the nationality of the Claimant.\(^{29}\)

18. Nationality of an investor such as the Claimant may be determined in three (3) ways.\(^{30}\) Firstly, as per any requirements as to nationality as set out in the TK-BIT itself. Secondly, through the national law requirements of the Claimant’s state of Ticadia, as to what renders the Claimant a national of Ticadia. And thirdly, through the requirements and tests set out by international law.

19. In this dispute, the TK-BIT is silent as to the requirements or tests to determine the nationality of the Claimant.\(^{31}\) There is no requirement or test set out that may employed to determine if the Claimant is a national of Ticadia. Secondly, the Official Statement of Facts is silent as to Ticadia’s national law requirements for the Claimant to be deemed a national of Ticadia.

20. Hence, as the TK-BIT and national law of Ticadia does not specify any criteria or tests to determine if the Claimant is a national of Ticadia; determination as to the Claimant’s nationality may be made in accordance with the practice set out by international law, as the TK-BIT is treaty that is an instrument of international law\(^{32},^{33}\).

21. Customarily, the vast and exhaustive jurisprudence of international law has specified three (3) main tests that are commonly employed to determine the nationality of an investor, in an investor state-arbitration.\(^{34}\) These renowned applied tests are: the place of incorporation test, the control test, and the main seat of business test.\(^{35}\)

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\(^{29}\) *Barcelona Traction.*

\(^{30}\) *Ibid.*

\(^{31}\) Official Statement of Facts, pg. 39, ¶1095.

\(^{32}\) Article 1(a) of the Vienna Convention on the Law of Treaties & Art. 38(1) of the International Court of Justice Statute.

\(^{33}\) Malgosia Fitzmaurice.

\(^{34}\) United Nations Conference on Trade and Development.
22. In the instant case, this Tribunal does not have jurisdiction over this dispute, as the Claimant does not fulfill the requirement of jurisdiction *ratione personae* because: 
[A] The Claimant has not been incorporated in accordance with the laws of Ticadia;  
[B] The Claimant is controlled by Kronians and;  
[C] The main seat of business of the Claimant is in Kronos.

A. THE CLAIMANT HAS NOT BEEN INCORPORATED IN TICADIA.

i. *There is an inadequacy of fact to prove that Claimant has been duly incorporated under the laws of Ticadia.*

23. A corporation is an entity that is brought into existence by the due recognition of the law.\(^36\) Hence, the jurisprudence of international investment law has come about to impose a place of incorporation requirement to determine nationality. The place of incorporation test entails that legal entities that are incorporated in accordance with the laws of a particular State are deemed as having the nationality of that State.\(^37\)

24. Admittedly, the place of incorporation test is the most prevalent corporate nationality test\(^38\), as many investment law treaties\(^39\) and tribunals\(^40\) have applied it to determine the nationality of a corporation. Further, in *Saluka*\(^41\), it was opined that the place of incorporation test is the usual test to be applied, unless otherwise provided for by the treaty at hand.

25. Be that as it may, the place of incorporation test is inapplicable in the instant case. For, to successfully apply the place of incorporation test, it must be beyond clear and

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35 Robert Wisner and Nick Gallus.  
36 Giuseppe Dati-Mattia,..  
37 Zeynep Tekin,  
38 Michael Waibel.  
40 *Barcelona Traction, Tokio Tokeles.*  
41 *Saluka.*
apparent to this Tribunal as to what are the specific and exhaustive requirements promulgated under Ticadian law for the Claimant to be deemed to have been incorporated in Ticadia.\footnote{Tokios Tokeles.}

26. In the instant case, the Official Statement of Facts fail to disclose as to what are the specific requirements under Ticadian law that enable this Tribunal to conclusively determine that the Claimant has been incorporated in Ticadia. Thus, owing to a lack of factual information\footnote{International Law Association German Branch/Working Group.}, the Claimant in the instant dispute cannot successfully avail itself of the place of incorporation test. And as a result, it cannot be argued by the Claimant, or accepted by this Tribunal, that the Claimant has been duly incorporated in accordance with the laws of Ticadia.

   \textit{ii. In any event, the place of incorporation test is a rigid test that ought not be applied by this Tribunal.}

27. In any event, should this Tribunal find that the Claimant has satisfied the requirements of the place of incorporation test, and is duly incorporated in Ticadia; the Respondent submits that nevertheless, this Tribunal should refrain from applying the place of incorporation test, as it has become a rigid and outdated test today.

28. The place of incorporation test has been widely criticized\footnote{Antoine Martin.}. Should the Tribunal elect to apply the place of incorporation test to determine the nationality of the Claimant, this would—with respect—seriously undermine the sanctity of the BIT, and could lead to possible manifest abuse of the BIT. The place of incorporation test fails to conclusively ensure of a genuine link between the investor and the place of incorporation.\footnote{Michael Waibel.} Resultantly, it has become widely criticized by many arbitral tribunals in recent times.\footnote{Tokios Tokeles, Thunderbird.}
29. The place of incorporation test also fails to ensure of any economic link between the investor and its home-State.\textsuperscript{47} Thus, it resultantly and directly promotes treaty shopping\textsuperscript{48}, where the national of one State can merely incorporate an entity in another State, and when a dispute arises — take advantage of the BIT between the two States and sue its own State.

30. The application of the place of incorporation test is today further worsened by the sharp rise in multinational corporations (“\textbf{MNCs}”). Where MNCs in one country could incorporate an entity in other countries, to avail themselves of a certain BIT, thus resulting in treaty shopping.\textsuperscript{49}

31. Additionally, to apply the place of incorporation test in the instant dispute would be contrary to the object and purpose of the TK-BIT. The Preamble\textsuperscript{50} to the TK-BIT provides that the object and purpose of the TK-BIT is to promote and protect the investments of investors of one Contracting Party, into the territory of the other Contracting Party.

32. As the place of incorporation test merely allows this Tribunal to examine the place of the Claimant’s incorporation to decide if the Claimant can avail itself of protection under the BIT, this allows for an abuse of the TK-BIT as nationals of the Respondent could incorporate an entity in the Claimant’s State, and then when a dispute arises: invoke the TK-BIT to commence arbitration against the Respondent.

33. This is contrary to the object and purpose\textsuperscript{51} of the TK-BIT, as it would tantamount to nationals of the Respondent, suing the Respondent. Unless the TK-BIT expressly provides for it, any party is prevented from initiating arbitration against their own State.\textsuperscript{52}

\textsuperscript{47} Detlev Vagts.
\textsuperscript{48} Ibid.
\textsuperscript{49} Reuven S. Avi-Yonah.
\textsuperscript{50} Official Statement of Facts, pg. 38, ¶1045.
\textsuperscript{51} Official Statement of Facts, pg. 38, ¶1045.
\textsuperscript{52} TSA.
34. To conclude, this Tribunal—with respect—should hence refrain and prevent itself from applying the place of incorporation test, as it has become an unacceptable and widely criticized test, in today’s modern-day climate.

B. THE CLAIMANT IS CONTROLLED BY KRONIANS.

35. The control test ought to be employed since the object and purpose\(^{53}\) of the TK-BIT is to protect foreign investment. The TK-BIT thus should not be interpreted so as to allow domestic, national corporations to evade the application of their domestic, national law and the jurisdiction of their national tribunals.\(^{54}\)

36. Further, in addition to the place of incorporation test, the control test must be applied where there is an obvious abuse of nationality.\(^{55}\) There is an obvious abuse of nationality in instant case, as Kronians that are not allowed to invoke arbitration\(^{56}\) against their own State of Kronos, are shielding behind and abusing the Claimant’s Ticadian nationality\(^{57}\) to invoke arbitration against their own State of Kronos\(^{58}\).

37. In applying the control test, this Tribunal must pierce the Claimant’s corporate veil to examine the true controllers behind the Claimant. In this case, Claimant’s are effectively controlled by Kronians\(^{59}\) as majority of Claimant’s shares are owned by a private equity fund incorporated under the laws of Ticadia\(^{60}\). Further, majority of Claimant’s board of directors are composed of Kronian nationals, who likewise exercise considerable influence in the decision-making of Claimant’s operations in Kronos.

38. Resultantly, as the Claimant is controlled by Kronians, the Claimant lacks jurisdiction \textit{ratione personae} to commence arbitration against the Respondent pursuant to the TK-BIT.

\(^{53}\) Official Statement of Facts, pg. 38, ¶1045.
\(^{54}\) Tokios Tokeles.
\(^{55}\) Renée Rose Levy de Levi \textit{v. Republic of Peru, Phoenix Action}.
\(^{56}\) Official Statement of Facts, pg. 38, ¶1045.
\(^{58}\) Official Statement of Facts, pg. 2, ¶35.
\(^{59}\) Guardian Fiduciary Trust, Ltd.
\(^{60}\) Official Statement of Facts, pg. 32, ¶895.
C. THE MAIN SEAT OF BUSINESS OF THE CLAIMANT IS IN KRONOS.

i. The Claimant’s siège social lies in the Republic of Kronos.

39. Siège social is defined as the place of actual or effective management and not a mere registered office.\(^{61}\) Siege social or also known as the seat of incorporation test entails that states that a legal entity must have its seat and/or effective management in the State where it is incorporated in order to qualify as an investor in that State.\(^{62}\) The main seat test has also become one of the most widely used tests to determine nationality in investor-state arbitrations, to prevent occurrences such as treaty shopping.\(^{63}\)

40. In the instant case, all of the Claimants’ activities and resources have been relocated to Kronos\(^{64}\). Most if not all of its decisions were carried out and implemented in Kronos\(^{65}\). Even the Claimant’s CEO himself resides in Kronos for long durations of time\(^{66}\). All that remains in Ticadia are certain formal ties that the Claimant has retained to show some vague link to Ticadia\(^{67}\).

41. In view of the above, Respondent submits that it is beyond clear that the main seat of business of the Claimant is now in Kronos, and only mere formal ties with no genuine link, remain with Ticadia. As such, the Claimant cannot qualify as an investor of Ticadia, and cannot take on the nationality of Ticadia.\(^{68}\)

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61 Tenaris S.A.
62 Zeynep Tekin.
63 Rudolf Dolzer and Christopher Schruer.
64 Official Statement of Facts, pg. 33, ¶930.
65 Official Statement of Facts, pg. 34, ¶935.
67 Official Statement of Facts, pg. 34, ¶935.
68 Aleksanders Fillers.
42. Should this Tribunal hold that it has jurisdiction to hear this claim brought by the Claimant, the Respondent submits that in any event, the Claimant’s claim remains inadmissible before this Tribunal. The question of jurisdiction precedes the question admissibility, and the latter may only be decided once the issue of jurisdiction has been affirmed by this Tribunal.\(^{69}\) Therefore, should this Tribunal find that is has jurisdiction over this matter, it may then proceed to deliberate upon the issue of the admissibility of the Claimant’s claim.

43. The issue of ‘admissibility’\(^{70}\) in an investor-state arbitration, as opposed to ‘jurisdiction’, concerns the conundrum of whether it is appropriate for a tribunal to hear a particular case or claim.\(^{71}\) It hence refers to the suitability\(^{72}\) of a particular claim for adjudication on the merits\(^{73}\) of the matter.\(^{74}\) According to Brownlie in this regard, an objection in relation to the admissibility of a claim invites the tribunal to dismiss, or for that matter even postpone; the claim on a ground that while it does not exclude its authority over the matter in principle, it nonetheless affects the possibility or propriety of the tribunal’s deciding of the particular case at that particular time.\(^{75}\)

44. Hence, in the event a particular claim is inadmissible before a tribunal, but the tribunal proceeds anyway to hear the matters, the effects of such are truly adverse in nature.\(^{76}\) The award of the tribunal in relation to that matter claim would later on be rendered null and void, as the claim was inadmissible before the tribunal in the first place.\(^{77}\)

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\(^{69}\) Andrea Steingruber.

\(^{70}\) Zachary Douglas.

\(^{71}\) *Waste Management v. Mexico.*

\(^{72}\) *Abaclat and Others v. Argentine Republic.*

\(^{73}\) *Methanex Corporation v. United States of America.*

\(^{74}\) Hanno Wehland.

\(^{75}\) James Crawford.

\(^{76}\) Saar A Pauker.

\(^{77}\) Fillipo Fontanelli and Attila Tanzi.
45. In the instant case, the Respondent submits that this Tribunal lacks jurisdiction over the claims brought by the Claimant as: [A] The Kronian Courts hold exclusive jurisdiction over the dispute and; [B] The Fork-in-the-Road clause in Art. 11(3) has been triggered by the Claimant.

A. The Kronian Courts Hold Exclusive Jurisdiction Over This Dispute

   i. Exclusive jurisdiction clause in the CA prevails over the TK-BIT.

46. Respondent submits that as the CA clothes Kronian Courts with exclusive jurisdiction over any dispute arising directly out of the TK-BIT, the instant dispute must thus be brought before the Kronian Courts to be resolved.

47. Pursuant to Para. 7 of the CA, Kronian Courts hold exclusive jurisdiction over any dispute arising out of the CA:—

   “7. Dispute Resolution

   Any dispute arising directly out of this Agreement, including its termination, shall be submitted to the courts of the Republic of Kronos, which hold exclusive jurisdiction.”

48. The dispute at hand is a dispute that arises directly out of the CA. This is because the Decree prohibited what was the heart and soul of the CA — the mining of lindoro, and the license to mine lindoro that stemmed from the CA was terminated as well.78 Further, the CA in itself, was terminated.79 Thus it is clear that the dispute at hand concerns the CA wholly, and is indeed dispute arising out of the CA.

78 Official Statement of Facts, pg. 36, ¶1005.
With it being clear that the dispute is one arising out the CA, it follows that the Kronian Courts hold exclusive jurisdiction over the dispute. Be that as it may, the dispute at hand is further complicated by the TK-BIT, which by virtue of Art. 11(3) allows the parties to arbitrate an investment dispute:–

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

In this regard, grounded in the sound legal arguments that follow, Respondent submits that the exclusive jurisdiction clause in the CA which accords Kronian Courts with exclusive jurisdiction over this dispute, prevails over the general and wide arbitration clause housed in the TK-BIT.

Pursuant to the Latin legal maxim: *generalia specialibus non derogant*, general provisions do not have the effect of overriding more specific provisions of an agreement or contract.  

Arts. 11(2) and (3) of the BIT are hence only general provisions of the TK-BIT that provide for the possible alternative options dispute resolution mechanisms. The TK-BIT is only a “general framework” that is not intended to override a specific provision like Clause 7 of the Agreement after negotiations between parties.

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80 *SGS v Philippines.*


82 Richard Garnett.

83 *Vivendi v Argentina.*
MEMORIAL FOR RESPONDENT

53. This was the case in *SGS v Phillipines*\(^\text{84}\) and *Vivendi v Argentina*\(^\text{85}\) as well, where similarly the agreement between parties in the respective cases provided for exclusive jurisdiction of local courts, and the BITs also allowed for arbitration. The tribunals in both cases held that:

[I] **Firstly**, the BITs in point were not concluded with any specific investment or contract in view, and are thus general documents that cannot override provisions of specific contracts that were entered into freely negotiated by parties. Thus, documents containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application.\(^\text{86}\)

[II] **Secondly**, that the character of an investment protection agreement as a framework treaty, is intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.\(^\text{87}\)

54. In view of the above, it becomes clear that the CA, which was freely and specially negotiated by the Parties to clothe Kronian Courts with jurisdiction over any dispute arising out of it, prevails over the general arbitration provision of the BIT which is only a general document. In addition, this intention of the Parties is further strengthened by the fact that by the time the CA was signed, the TK-BIT had already come into effect for 5 years. Nonetheless, the Parties specifically chose to contract for exclusive jurisdiction to Kronos courts.

55. With that, the Respondent submits that the exclusive jurisdiction clause in the CA which provides that Kronian Courts have exclusive jurisdiction over this dispute, prevails over the TK-BIT. And, this Tribunal must give effect to the intention of the Parties as submitted above, and render the Claimant’s claims inadmissible for arbitration before this Tribunal.

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\(^{84}\) Supra, note 81.
\(^{85}\) Supra, note 84.
\(^{86}\) *SGS v Phillipines*, ¶141.
\(^{87}\) *SGS v Phillipines*, ¶141.
B. THE FORK-IN-THE-ROAD CLAUSE IN ART. 11(3) HAS BEEN TRIGGERED BY THE CLAIMANT

56. The Respondent submits that even if the Tribunal finds that the Claimant qualifies as an investor under Art. 1(4) of the TK-BIT, this Tribunal nevertheless still lacks jurisdiction to hear the case at hand pursuant to Art. 11(3) of the TK-BIT. The Claimant has triggered the fork-in-the-road provision housed in Art. 11(3) of the TK-BIT, and therefore, it lacks standing before this Tribunal.

57. On the 8th of September 2016, the Claimant applied to the Kronos Federal Court seeking to suspend the effects of the Decree until negotiations with the Government took place. This application to the Kronos Federal Court not only sought to suspend the decree, but the Claimant through the challenge also sought to declare the decree unconstitutional on grounds of violation of legislative process.

58. Therefore, the Claimant had already made its choice of forum under Art. 11(2)(a) of the TK-BIT, whereby the Claimant had elected to submit the dispute at hand to the Respondent’s domestic courts for resolution. This has thus triggered the fork-in-the-road clause housed in Art. 11(3) of the TK-BIT, whereby once the Claimant has elected to submit the dispute for resolution before any domestic courts, the Claimant cannot then turn around, and seek to arbitrate the very same dispute.

59. The Respondent submits that in present dispute, the applicable legal test to adopt concerning the trigger of the fork-in-the-road provision is that laid down in

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89 Official Statement of Facts, pg. 44, ¶1240.
91 Official Statement of Facts, pg. 36, ¶1015.
92 Official Statement of Facts, pg. 56, ¶1530.
95 Cameron May.
Pantechniki\textsuperscript{96,97} In this dispute, as in the Pantechniki case, the Respondents allege that the fork-in-the-road provision has been triggered by the Claimant.

60. In the Pantechniki case, the investor was a Greek company which had entered into contracts with the Albanian Government for the construction of roads and bridges in Albania. Due to civil disturbances, risks of losses were allocated to the Albanian Government’s General Road Directorate. In March 1997, wide-scale ransacking, looting and rioting throughout Albania caused Pantechniki’s equipment to be stolen or destroyed, for which it claimed compensation from the Albanian Government of approximately USD 4.8 million. A special commission created by the General Road Directorate valued Pantechniki’s losses at USD 1.8 million but the Ministry of Finance refused to pay. As a result, Pantechniki commenced litigation in the Albanian courts to enforce its contractual right to compensation.

61. The Albanian district courts and the Court of Appeal dismissed Pantechniki’s claims on the basis that the contractual provisions allocating the risk of losses to the General Road Directorate were contrary to Albanian public policy. Pantechniki appealed to the Supreme Court of Albania but withdrew its appeal before the case was decided, choosing instead to commence ICSID arbitration in August 2007 alleging breaches of the Greece-Albania BIT.

62. Among other issues, the issue of choice under the fork-in-the-road provision was considered by the Pantechniki tribunal. The Pantechniki tribunal considered that the appropriate test, the one expressed by the Mixed Claims Commission of U.S.-Venezuela in the Woodruff\textsuperscript{98} case and followed by the Vivendi Annulment\textsuperscript{99} Committee, was whether or not the ‘fundamental basis of a claim’ sought to be brought before the international forum is autonomous of claims to be heard elsewhere.\textsuperscript{100}

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\textsuperscript{96} Pantechniki.
\textsuperscript{98} Woodruff Case.
\textsuperscript{99} Vivendi v Argentina, Decision on Annulment, 3 July 2002.
\textsuperscript{100} Pantechniki.
63. The Respondent submits that the fundamental basis of the claim before the Kronos Federal Court and this Tribunal are congruent, and not autonomous of one another. In both cases, the fundamental basis of the dispute is a termination of the CA. The very reason the Claimant sought to suspend the decree at the Kronos Federal Court was because their contractual rights pursuant to the CA were being adversely affected by the Decree. And similarly today, the Claimants have come before this Tribunal to arbitrate for the very same reason — an adverse effect of their contractual rights pursuant to the CA.

64. Further, The Respondent further submits that the exceptional nature of the dispute at hand excludes the application of the approach taken by the tribunal in CMS Jurisdiction\(^1\) and followed by the tribunals in LG&E Jurisdiction\(^2\) and Pan American\(^3\). According to the CMS Jurisdiction approach, the fork-in-the-road provision can only be triggered if the Claimant pursues the identical treaty claim before the court of the Respondent State. Although the Respondent acknowledges the need for treaty claims to be heard only before one forum, it submits to the Tribunal that the question on identity of a treaty claim should not be answered merely by examining its label.\(^4\)

65. The tribunal in Pantechniki acknowledged the impermissibility of mere labelling and reformulation of the claims in order to furnish them as treaty claims and distinguished from the congruent claims before local courts to avoid the effects of fork-in-the-road provisions. Hence, in the present dispute, even if the Claimant argues that the claims before the Tribunal are different from those before the Kronos Federal Court, the difference is a result of mere labelling.\(^5\)

66. In conclusion, to determine the trigger of the fork-in-the-road provision in the case at hand, the Respondent submits that the “fundamental-basis” test adopted in the

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\(^1\) CMS Jurisdiction.
\(^2\) LG&E.
\(^3\) Pan American Energy.
\(^4\) Christopher Schruer.
\(^5\) H&H Enterprises, Supervisory Control v Costa Rica
Pantechniki case is to be the preferable legal test, whereas the CMS Jurisdiction approach will deprive the fork-in-the-road provision of its *effet utile*.\(^{106}\) As the Claimant had already made its choice of forum before the Kronos Federal Court, the Respondent submits that the fork-in-the-road provision contained in Art 11(3) of the TK-BIT has been triggered. Thus, the Tribunal ought to hold that the Claimant’s claims are inadmissible for arbitration before this tribunal.

\(^{106}\) *Fisheries Jurisdiction.*
MEMORIAL FOR RESPONDENT

MERITS

ISSUE-3:
RESPONDENT DID NOT EXPROPRIATE CLAIMANT’S INVESTMENT

67. Even if this Tribunal were to accept that the Claimant made a protected investment under the TK-BIT, the Respondent submits that it has consistently upheld its international obligations. Thus, any allegations made by the Claimants to the effect that the Respondent had breached Art 7 TK-BIT\(^{107}\) lacks both factual and legal basis.

68. Recognising that the preamble of the TK-BIT acknowledges the promotion and protection of the beneficial business activity of both contracting parties\(^{108}\), it must not be read in isolation to the fact of the ever changing political, social or economic climate\(^{109}\). The preamble of the TK-BIT further places emphasis on ensuring a sustainable development when carrying out the business activity within the State\(^{110}\).

69. It is for that reason that the Respondent submit that the enactment of the Presidential Decree No. 2424 (“Decree”), its implementations together with the other related acts of the Respondent cannot amount to an expropriation\(^{111}\) of the Claimant’s investment. It is the Respondent’s contention that [A] the Decree was implemented in absolute accordance with the Republic of Kronos’s police powers. In addition, [B] the physical confiscation of the lindoro was to ensure the Claimant’s compliance with domestic law.

A. THE DECREE WAS IMPLEMENTED IN ABSOLUTE ACCORDANCE WITH THE REPUBLIC OF KRONOS’S POLICE POWERS.

70. Prior to the Nationalist Party emerging victorious in the General Elections in October 2014, there was a huge void when it came to a regulatory structure ensuring the protection of the environment within the State\(^{112}\). The Respondent, being a

\(^{107}\)Official Statement of Facts, pg. 42.

\(^{108}\)TK-BIT, Preamble.

\(^{109}\)Feldman, ¶112.

\(^{110}\)Titi, p.116.

\(^{111}\)Yang, p.299.

\(^{112}\)Official Statement of Facts, ¶ 10.
responsible government, viewed the matter seriously as well as ensured the basic principles of fair regulation would not be infringed.

71. In specific, in exercising the state’s police powers, the Respondent action [i] clearly serve a legitimate public purpose objective to protect the environment, natural resources and human life which were [ii] undertaken in accordance with due process of law based on the Respondent’s domestic law and [iii] were not discriminatory towards Claimant as they do not target Claimant solely on the basis of its nationality.

72. Additionally, Respondent’s measures [iv] were proportionate towards the aim sought as Claimant incredibly profited at the expense of Respondent’s environment and health of its population. The measures were necessary, as there were no less-restrictive alternatives available for Respondent to secure its aim and were suitable as they promoted Respondent’s public interest.

73. Pursuant to the State’s regulatory powers, [v] Respondent is not liable to pay compensation to the Claimant as the essence of the police powers concept is that regulatory measure will not entail obligation to pay compensation to investor by the host State as it is not considered an expropriation but the State’s right to regulate.

i. Imposition of the Decree served the Republic of Kronos’s public purpose objective

74. Respondent submits that when it comes to public policy matters\textsuperscript{113}, governments must be free to act and regulate in the broader public interest\textsuperscript{114} without being held responsible for any inconvenience created for private entities within the State\textsuperscript{115}. This is recognised under customary international law\textsuperscript{116} in which a measure that falls within the State’s police powers resulting in loss of property or investment does not constitute an expropriation and accordingly does not give rise to an obligation to compensate\textsuperscript{117}.

\textsuperscript{113} Sacerdoti/Acconci/Valenti/Luca.
\textsuperscript{114} Dolzer/Schreuer, p.120, Giannakopoulos, p.12.
\textsuperscript{115} Montt, p. 7; Feldman, ¶103; S.D. Myers, ¶281; Saluka, ¶262; Too, ¶26.
\textsuperscript{116} Moloo/Jacinto, pp. 1-2.
\textsuperscript{117} Tecmed, ¶45.
75. In casu, the Kronian Environmental Act (‘KEA’) was passed by Parliament in June 2015\(^{118}\), whereas the Decree was enacted in September 2016\(^{119}\). This gave the Claimants enough time to ensure all activities complied with KEA which was to protect the waters of the region where the extraction took place from toxic mine waste.

76. KEA grants ample powers to intervene in the conduct of environmentally sensitive businesses, to unilaterally impose severe penalties, fines, withdraw environmental licenses with the forfeiture of facilities, and the obligation to compensate for the environmental damage\(^{120}\). It was in accordance with the said Act that the Kronian President implemented the Decree to revoke the mining license of the Claimant, evidently abiding by the domestic legislation of the State.

77. Respondent understands and values the importance of a foreign investment; however, it cannot come at the expense of the degradation of the environment and the health of the public\(^{121}\). On the facts, incidences of cardiovascular diseases (‘CVD’) among the Kronian population has risen by 45% since 2011\(^{122}\), a year after the Claimant transferred all its mining activities and resources to Kronos. This is read together with the data released in 2015 by the Ministry for Environmental Matters in Kronos, in which it indicated that the concentration of toxic waste had sharply increased since 2010\(^{123}\).

78. Further, 88% of new-borns have shown early symptoms of microcephaly which was virtually non-existent prior to the Claimant’s operation in the Respondent’s territory. These data show the correlation between the exploitation of lindoro and the health problems faced by Kronians within Respondent’s territory.

79. The Claimant may assert that the Study conducted was not yet possible to conclusively confirm a causal link between the Claimant’s activities and the rising incidences of CVD in the population, nevertheless, the Respondent submit that in

\(^{118}\) Official Statement of Facts, ¶16.
\(^{119}\) Official Statement of Facts, ¶23.
\(^{120}\) Official Statement of Facts, ¶16.
\(^{121}\) Nicaragua, ¶205.
\(^{122}\) Exhibit 4, p.51.
\(^{123}\) Official Statement of Facts, ¶20.
applying the ‘Precautionary Principle’, the Respondents, being decision makers, can act in advance of scientific certainty to protect the environment, the wellbeing and interest of not only the current generation, but that of the future generation of Kronians.

ii. *Due process is undeniably satisfied*

80. To satisfy the due process requirement, adoption of a measure must take place in accordance to the State’s domestic legislation. On the facts, the Decree was made in full compliance with the KEA. Further, there is a need for the host-State to provide the investor with an opportunity to contest the measures in question. In the case of the Decree, due process is respected, in the event that the body reviewing them is the one vested with the competence to repeal the Decree.

81. The opportunity for the Claimant to have its grievance, if any, heard before the competent Kronian Judiciary was never denied. This is evident when the Claimant, in September 2016, applied to the Kronian Federal Court seeking to suspend the effects of the Decree. However, it is to be noted that the decision to withdraw its appeal to the Kronos Courts was made entirely by the Claimant. Hence, the Claimant cannot complain about an absence of opportunity to voice its dissatisfaction.

82. Respondent thus adhered to the additional requirement of transparency as the measures were publicly published, and Claimant had every opportunity to substantively challenge the Decree and to defend itself against the environmental violation charges, before the domestic courts of Kronos.

83. In addition, Clause 2.1 of the Concession Agreement provides that Claimant must observe the laws in force in the Republic of Kronos throughout the performance of

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124 Cameron/Abouchar. Beau, p.156.
125 Birnie/Boyle/Redgwell, p.117, Tomoko, p.4.
126 Louka.
127 Sands/Peel/MacKenzie, pp.217-228, Trouwborst, p.347.
128 *AIG*, ¶10.5.1.
129 *ADC*, ¶435.
130 Newcombe/Paradell, pp.375-376.
MEMORIAL FOR RESPONDENT

this Agreement, “with the adaptations that may be necessary in light of new laws and regulations.”133. KEA and the subsequently issued Decree are new legislation that Claimant has agreed to follow and cannot assert that they were caught by surprise.

iii. The Decree was issued in a non-discriminatory manner

84. Despite the Decree clearly prohibiting all exploitation of lindoro in the Kronian Territory134, the Claimant somehow alleges that the imposition of the Decree happened in a discriminatory manner. This is disputed as the Respondent submit that the Decree was enacted and implemented in full accordance with the non-discrimination principle.

85. In order for the Decree to be found discriminatory, the revoking of the Claimant’s license should have been beneficial to either national companies of Respondent or other foreign enterprises135. However, Claimant is the only miner of lindoro not only in Respondent’s territory136, but also presumably in the world. Thus, by definition, there can be no discrimination.

86. The Decree did not single out the Claimant or its Nationality as its provision apply broadly to all government contracts that relate to exploitation of lindoro. In casu, Art. 2 of the Decree is clear that

“All Government contracts, licenses, and concessions for the exploitation of lindoro in Kronian territory are immediately and irrevocably terminated.”137

Thus, the Decree is obviously divorced from any nationality-based considerations.

87. Claimant was one of those entities, and by default could not but be affected, regardless of whether it was the only miner of lindoro in the Republic of Kronos.

133 Exhibit 2, p. 47.
135 Crystallex, ¶715.
137 Exhibit 5, p.52.
iv. The measures were proportionate to the aim sought

88. As far as the impact of the Decree is concerned, Respondent submits that the measures imposed on the exploitation of lindoro, including the Claimant’s activities, were not excessive, especially in light of their purpose. It is of utmost importance to examine the context in which a measure was adopted and the State’s purpose for said measure.

89. On the facts, there is a need to strike a proper balance, as in one hand we have the health and safety of the Kronian citizens which includes the future generations to come, and the other, the economic need of the Claimant. The Respondent, being a responsible government, could not allow further risk and danger to be done towards its people. Hence, Respondent submit that the effect of the Decree on the Claimant is inferior to the health and safety of the citizens of Kronos.

90. It is Respondent’s position that the measures taken were justifiable as Claimant failed to fulfil its obligations to preserve the environment. From the Study conducted by KFU, it acknowledges the presence of graspel, a toxic component released during the exploitation of lindoro in the Rhea River which lead to its contamination, which is undoubtedly a direct consequence of the exploitation of lindoro.

91. In examining the duration of the of the measure at hand, Respondent submits that it does not qualify as disproportionate to its aim. As expounded in the LG&E Tribunal, in which the tribunal determining that even a four-year measure cannot suffice as permanent. Hence, Respondent’s measure, being temporary measures that have lasted for only two years are proportionate to their purpose and not qualifying as expropriatory.

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138 Henckels, pp.252-253.
139 LG&E, ¶194.
140 Mostafa, p.294.
141 Exhibit 4, p.50-51
142 LG&E, ¶194.
v. **Respondent is not liable to pay compensation to Claimant**

92. Under arbitral jurisprudence\(^{143}\), a State is not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are commonly accepted as within the police power of the States. Reasonable government regulation of this type cannot be achieved if affected entities such as the Claimant may seek compensation\(^ {144}\).

93. State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable\(^ {145}\).

94. In other words, the police powers doctrine is firmly established under International Customary Law and generally accepted as a justification for ruling out a claim for compensation\(^ {146}\). On the facts, as addressed above, the Respondent action clearly serve a legitimate public purpose objective undertaken in accordance with due process of law and were proportionate towards the aim sought, thus, it does not give rise to an obligation to compensate.

**B. RESPONDENT SEIZED THE LINDORO AS SECURITY PURSUANT TO ART. 4 OF THE DECREE**

95. On the facts, Claimant had indicated its clear intention to not comply with its compensation obligation under KEA and the Decree, as no payment was made after a year had lapsed since the issuance of the Decree, pursuant to the polluter-pay principle. This left Respondent no choice but to enforce Art 4 of the Decree to seize all extracted lindoro owned as a way of security for such compensation\(^ {147}\).

96. Claimant asserts that the seizure of lindoro amounts to a direct expropriation of their investment. To examine whether there has been an expropriation\(^ {148}\), the element of

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\(^{143}\) *Tecmed*, ¶45; *Feldman*, ¶103.

\(^{144}\) *Utkarsh*, p.16.

\(^{145}\) *Tecmed*, ¶45.

\(^{146}\) *Crawford*, p.509.

\(^{147}\) Exhibit 5, p.52.

\(^{148}\) *Utkarsh*, p.18.
radically deprivation must first be fulfilled. The nature of a radical deprivation is that the effect must be permanent, in other words, it cannot have a temporary nature\textsuperscript{149}.

97. Since the confiscation of the lindoro was in the form of a security bond, it is temporary in nature, hence the element of radical deprivation being permanent is absent. In this sense, Respondent’s measures have not directly expropriated Claimant’s investment, as there has been no overt taking of Claimant’s tangible properties. The seizure of extracted lindoro, \textit{per se} was merely to guarantee compensation for the environmental damages caused by Claimant.

\textsuperscript{149} \textit{LG&E}, ¶194; \textit{S.D Myers}, ¶283.
ISSUE-4:
RESPONDENT’S COUNTERCLAIMS ARE ADMISSIBLE

98. In arguendo, assuming but not conceding that the Arbitral Panel has jurisdiction to hear the case, the same tribunal has the jurisdiction to also hear the Respondent’s counterclaims. It is the Respondent’s position that a separate submission is not necessary with respect to the Respondent’s counterclaims since a counterclaim should be treated like a claim for set-off, both being a defence to the primary claim.

99. Respondent’s counterclaims are admissible [A] as Art 11 TK-BIT expressly allows counterclaims, and [B] they remain admissible, as there exists a connection between the counterclaims and Claimant’s primary claim to satisfy the Close Connection Test.

A. ART 11 BIT ALLOWS FOR RESPONDENT TO RAISE COUNTERCLAIMS

100. Respondent may bring counterclaims as [i] the express reference to ‘investment dispute’ brings them within the scope of Art 11 TK-BIT and [ii] Claimant’s and Respondent’s consent to the counterclaims is implied by the wording used in Art 11(4) and 11(5) of the TK-BIT.

   i. “Arising from investments”

101. The TK-BIT refers to claims, “arising from investments”, making it possible for the state to initiate the arbitration as well. Pursuant to the Saluka tribunal, the wordings of Art 11 (4) of the current BIT, which is similar to Art 8 (2) of the Czech Republic-Netherlands BIT used in the Saluka Tribunal, concluded that the language of the provision was wide enough to include disputes giving rise to counterclaims.

102. In submitting this dispute for arbitration, Claimant effectively became bound by SCC Rules as provided under Art 11(3) of the TK-BIT. The SCC Arbitration Rules do not

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150 Douglas.
151 Atanasova/Martinez/ Ostransky, p.359.
152 TK BIT, Art 11 (1).
153 Saluka, ¶¶275-276.
impose any requirement in admitting a counterclaim, safe for, Art 9(1)(iii) of the SCC rules which allows the initiation of a counterclaim for as long as the Respondent submits the same with its Answer.  

103. On the facts, the Respondent fully complied with this requirement, having filed an answer denying all claims advanced by the Claimant and raising the counterclaims arising directly from the breach committed by the Claimant.

   ii. Valid consent to the counterclaims

104. Through the reading of Art 11 (4), it reflects the scope of contracting parties’ consent. What the contracting parties’ consent to arbitrate is “any investment dispute”. By this wording, it can be concluded that counterclaims are within the State’s consent. When an investor chooses to submit a dispute for arbitration, if not expressed otherwise, the investor has consented to arbitrate all claims including counterclaims arising from this dispute in this arbitration.

105. Consequently, a tribunal has no reason not to give effect to the text and purpose of such a clause and should find that the state has consented to have such counterclaims arbitrated.

106. Further, Art 11 (5) includes an express provision that excludes a counterclaim indicating “that the national or company has received or will receive...indemnification”. Logically, this provision indicates that the arbitration pursuant to Art 11 envisions the availability of counterclaims for a State, so long as it is not related to indemnification. Therefore, Claimant has consented to counterclaims, except those relating to indemnification, when it initiated this proceeding.

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154 SCC Rules, Art 9(1)(iii).
155 Response, ¶1 & ¶22.
156 Kendra, p.580.
157 Saluka, ¶¶275-276.
158 TK BIT, Art 11 (5).
B. RESPONDENT’S COUNTERCLAIMS ARE CLOSELY RELATED TO CLAIMANT’S CLAIM

107. The current and pertinent test used to determine admissibility of counterclaim is the Close Connection test as the test places emphasis on factual closeness which grants tribunals a greater degree of flexibility at the admissibility stage\textsuperscript{159}. This test provides that a connection between the primary claim and the counterclaim must be in relation to the concession agreement\textsuperscript{160}.

108. Respondent submits that, in essence, the counterclaim is under the same dispute and thus shall be arbitrate together. On the facts, pursuant to Clause 6 of the Concession Agreement, the applicable law governing the agreement is local and international law\textsuperscript{161}, which the TK-BIT falls under.

109. Art 9(2) of the TK-BIT provides that the polluter should, in principle, bear the cost of pollution\textsuperscript{162}. Having regulated the process to ensure the clean up of the pollution, the Counterclaims thus form a nexus with the Concession Agreement to satisfy the close connection test. Respondent’s counterclaims thus relate to Claimant’s environmental obligations under the BIT.

110. Claimant’s claim and Respondent’s counterclaims are based on the same facts and have the same legal grounding; therefore, they are indivisible and interdependent\textsuperscript{163}. Rejecting the counterclaims is not in favour of any party in this proceeding\textsuperscript{164}. To avoid parallel proceedings, inefficiency and conflicting results, the Tribunal is respectfully requested to admit the counterclaims.

\textsuperscript{159} Urbaser, ¶¶1143-1155.
\textsuperscript{160} Leathley, Ewad.
\textsuperscript{161} Exhibit 2, p.48.
\textsuperscript{162} TK BIT, Art 9 (2).
\textsuperscript{163} Bjorklund, p.473.
\textsuperscript{164} Wibel/Rylatt, p.14.
MEMORIAL FOR RESPONDENT

RESPONDENT’S PRAYER FOR RELIEF

Respondent respectfully requests this Tribunal to find that it lacks jurisdiction, given that:

(1) Claimant has no jurisdiction Ratione Personae to initiate arbitration under the Ticadia-Kronos BIT; and

(2) Claimant has waived its right to arbitrate.

Should the Tribunal find that it has and should exercise jurisdiction, Respondent urges the Tribunal to recognize that:

(3) The acts of the Respondent cannot amount to an expropriation of the Claimant’s investment; and

(4) The Respondent’s counterclaim is admissible before this Tribunal.

Dated this 24th of September, 2018.

Respectfully submitted by:–

Team Ngoma

On Behalf of Respondent

The Republic of Kronos