FOREIGN DIRECT INVESTMENT
INTERNATIONAL ARBITRATION MOOT COMPETITION
8-11 NOVEMBER 2018

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE
STOCKHOLM CHAMBER OF COMMERCE

Fenoscadia Limited (Claimant)

v.

The Republic of Kronos (Respondent)

MEMORIAL FOR RESPONDENT

24 September 2018
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<th>Case</th>
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LIST OF ABBREVIATIONS

% Percent
¶/¶¶ Paragraph(s)
ABs Appellate Bodies
Agreement Republic of Kronos-Fenoscadia Limited Concession Agreement
Answer Answer to Request for arbitration
Art(s.) Article(s)
BIT(s) Bilateral Investment Treaty(ies)
BoD Board of Directors
CEO Chief Executive Officer
Claimant Fenoscadia Limited
Contracting Parties Republic of Ticadia-Republic of Kronos
CVDs Cardiovascular diseases
Decree Presidential Decree No. 2424
Disputing Parties Fenoscadia Limited-Republic of Kronos
ECoHR European Court of Human Rights
et al. Et alii
Facts Statement of uncontested facts
GATT General Agreement on Tariffs and Trade
House Kronian House of Representatives
i.e. In other words
Ibid. Ibidem
ICJ International Court of Justice
IIA(s) International Investment Agreement(s)
KEA Kronian Environmental Act
KFC Kronian Federal Court
MAFL Ministry for Agriculture, Forestry and Land
MEM Ministry for Environmental Matters
Nationalist Party A Kronian center-left political party
No. Number
p./pp. Page(s)
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<td>REM</td>
<td>Rare Earth Metal</td>
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<td>Respondent</td>
<td>Republic of Kronos</td>
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<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce Arbitration Institute</td>
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<tr>
<td>SCC Rules</td>
<td>Stockholm Chamber of Commerce Arbitration Rules</td>
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<tr>
<td>Site</td>
<td>An area of 1,071,000 m² nestled in Respondent’s inner territory</td>
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<td>Study</td>
<td>Study on exploitation of lindoro in Kronos’ territory</td>
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<td>Ticadia-Kronos BIT</td>
<td>Republic of Ticadia-Republic of Kronos Bilateral Investment Treaty</td>
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<td>University</td>
<td>Kronian Federal University</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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STATEMENT OF FACTS

1. In March 1997, an abundance of a high value REM, lindoro, was discovered in an area in Respondent’s territory.¹ Being an underdeveloped country² with a focus on agricultural activities,³ Respondent conducted a public auction, where companies with the appropriate technical expertise could compete for the rights to lindoro’s exploitation.⁴

2. On April 20, 2000, Claimant won the bid.⁵ Subsequently, Claimant and Respondent signed the Agreement, granting the former the right for the exclusive extraction of lindoro on June 1, 2000.⁶ Since Respondent did not possess a regulatory framework for the mining industry or a thorough environmental regulation preceding the Agreement, the latter was the only instrument regulating the exploitation of lindoro in Respondent’s territory.⁷

3. Claimant was incorporated in Ticadia in 1993.⁸ At the time, its shares were wholly owned by five Ticadian nationals.⁹ In 1998, an equity fund acquired 65% of the shares with voting rights.¹⁰ This fund is comprised by nationals of Ticadia, Kronos and others.¹¹

4. The exploitation of lindoro began in August 2008.¹² Claimant concentrated its activities and resources in Kronos, terminating its operations in Ticadia in 2010.¹³

5. Moreover, in 2012, three Kronian nationals, with extensive technical expertise and experience in mining matters, acquired a significant 35% of Claimant’s shares.¹⁴ Kronians exert considerable influence on Claimant’s decision-making regarding its investment in Kronos, since the BoD is comprised of a majority of Kronian nationals.¹⁵ Furthermore, the

¹ Facts, ¶3.
² Facts, ¶2.
³ Exhibit No.3.
⁴ Facts, ¶4.
⁵ Facts, ¶5.
⁶ Facts, ¶8; Exhibit No.2.
⁷ Facts, ¶10.
⁸ Facts, ¶6.
⁹ Ibid.
¹⁰ Ibid.
¹¹ PO2, ¶2.
¹² Facts, ¶8.
¹³ Facts, ¶12.
¹⁴ Facts, ¶6.
¹⁵ Facts, ¶7.
current CEO, appointed by the BoD, often travels to and stays in Kronos for long periods of time.\footnote{16 \textit{Ibid.}}

6. \textbf{In October 2014}, a political party with an extensive environmentalist agenda, the Nationalist Party, won the Kronian elections for the first time,\footnote{17 Facts, ¶14.} after the Liberal Party had been in power for 60 consecutive years.\footnote{18 Facts, ¶15.} \textbf{On June 12, 2015}, the House passed KEA, aiming at strengthening the protection of the waters endangered due to toxic waste in the regions where mining activities took place.\footnote{19 Facts, ¶16.} In line with its strong environmental policy, Respondent established the MEM.\footnote{20 Facts, ¶18.}

7. \textbf{In March 2015}, the University initiated a research analysing samples collected from Rhea River, as well as examining 240 residents of the area surrounding the exploitation of lindoro.\footnote{21 Exhibit No.4.} \textbf{In October 2015}, the MEM released data indicating a sharp increase in the concentration of toxic waste in Rhea River, the largest river in Respondent’s territory, two years after Claimant’s activities commenced.\footnote{22 Facts, ¶20.} Subsequently, the University filed a request to receive funding from Respondent, in order to complete its research on the potential contamination of Rhea River through the exploitation of lindoro.\footnote{23 Facts, ¶21.}

8. \textbf{On May 15, 2016}, the University published a comprehensive Study,\footnote{24 Facts, ¶22.} proving that the levels of contamination in Rhea River place it among the top three most polluted rivers in the world, appointing the extraction of lindoro as the chief culprit.\footnote{25 Exhibit No.4.} In a similar vein, the toxic substance, graspel, found in the River, is likely to have caused a 45% increase in CVDs and microcephaly - both previously non-existent in Kronos- afflicting Respondent’s residents.\footnote{26 Facts, ¶22.} The causal link between the graspel contamination and these diseases is strongly supported by multiple different studies conducted by top-tier universities across the globe.\footnote{27 \textit{Ibid.}}
9. Prompted by its obligation to protect its people and environment, on September 7, 2016 Respondent issued the Decree, which prohibited the exploitation of lindoro and terminated all related licenses and concessions in Respondent’s entire territory.  

10. On September 8, 2016, Claimant applied to the KFC, attempting to battle the Decree, but withdrew its motion on 22 February 2017.  

11. On November, 10 2017, Claimant filed its appeal once more, this time as a Request before the SCC.

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28 Facts, ¶23; Exhibit No.5.  
29 Facts, ¶25.  
31 Facts, ¶29.
SUMMARY OF ARGUMENTS

12. **PART ONE**: Respondent respectfully submits that this Tribunal lacks jurisdiction, since Claimant is not an enterprise of Ticadia covered under Art. 1(4) of the Ticadia-Kronos BIT, and abusively initiated the present proceedings (I).

13. Secondly, and in any event, Claimant’s claims before this Tribunal are inadmissible since the fork-in-the-road clause contained in Art. 11(2) of the Ticadia-Kronos BIT has been triggered by the lawsuit filed previously to the KFC (II).

14. Without prejudice to the jurisdiction and admissibility of Claimant’s claims, this Tribunal ought to consider Respondent’s counterclaim admissible, under both the Ticadia-Kronos BIT and the 2017 SCC Rules, since both permit the submission of counterclaims, and there is also sufficient nexus between the principal claim and the one introduced by Respondent (III).

15. **PART TWO**: Finally, if this Tribunal were to assume and exercise jurisdiction over Claimant’s claims, Respondent asserts that the issuance of the Decree and other related measures do not in any way constitute an expropriation, but rather a legitimate exercise of Respondent’s police powers, fully in line with its public policy objectives, the principles of non-discrimination and proportionality. In any event, Respondent’s measures would be justified under the general exceptions clause included in Art. 10 of the Ticadia-Kronos BIT (IV).
ARGUMENTS

16. Respondent, an underdeveloped country, during its search for new lucrative financial opportunities, initiated in November 1998 a public auction for the extraction of lindoro. Claimant won the bid, and on June 1, 2000 the Agreement granting Claimant the exclusive right to the exploitation of lindoro was concluded, the operations effectively starting in 2008. In 2010, Claimant transferred almost all of its activities and resources in Respondent’s territory and only maintained formal ties with Ticadia, its place of incorporation. Thus, as of 2010, the extraction of lindoro has been Claimant’s “sole activity”.

17. In October 2015, the MEM released data indicating an increase in toxic waste in Rhea River, the largest river in Respondent’s territory. In light of this incident, the Kronian Federal University requested funding from the Government to conduct a detailed research on the matter and avoid hasty conclusions.

18. The research results were damning. Claimant’s conduct since the very first day of its operations in 2008 caused the contamination of Respondent’s most precious water source, the Rhea River. The data displayed “an abnormal amount of heavy metals and graspel, a toxic substance released during the exploitation of lindoro” in the waters of Rhea River, placing it among the top three most polluted rivers globally. To add fuel to the fire, not only had Claimant contaminated the biggest water source in Kronos, but there were also strong indicia which revealed a possible link between the sharp increase of CVDs and microcephaly incidences among the residents of the areas surrounding the exploitation of lindoro. This is shocking, since both CVD and microcephaly had been virtually non-existent prior to Claimant’s mining operations.

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32 Facts, ¶2.
33 Facts, ¶8; Exhibit No2.
34 Facts, ¶12.
35 Facts, ¶6.
36 Request, ¶17.
37 Facts, ¶20.
38 Facts, ¶21.
39 Exhibit No.4.
40 Ibid.
41 Facts, ¶22.
19. Claimant, exploiting the lack of environmental legal framework resulting from the negligent administration of the Liberal Party for the last 60 years, profited at the expense of the Kronian citizens. Respondent’s reaction was timely and direct; setting aside its financial interests, it prohibited the exploitation of lindoro, in order to avoid further damage to its environment and to protect the very lives of its own people. Towards the same end, Respondent has spent exorbitant sums amounting to 25,000,000 USD to supply clean water to its citizens, treat and compensate the afflicted, and will continue to be burdened with rising costs for the years to come. Moreover, the required costs for the decontamination of Rhea River are expected to skyrocket to at least 75,000,000 USD.\(^4^2\) It becomes painfully evident that Claimant has ultimately devastated Kronos in more than one ways, reversing and negating whatever financial benefit the country had once expected.

**PART ONE: JURISDICTION AND ADMISSIONIBILITY**

20. Claimant, despite the severe damage it caused to Kronos and its people, abusively seeks to benefit from the protections afforded under the Ticadia-Kronos BIT. Instead of compensating Respondent for the catastrophic consequences of its mining operations, Claimant also attempts to shift the blame to Respondent, for having acted towards the welfare of its people.

21. In this vein, Respondent will establish that this Tribunal lacks jurisdiction to adjudicate Claimant’s unmeritorious claims, since Claimant does not qualify as a covered investor under the Ticadia-Kronos BIT (I); moreover, and in any event, Claimant has already submitted its case before domestic litigation, thus triggering the fork-in-the-road clause and rendering its meritless claims inadmissible (II). Finally, this Tribunal ought to consider Respondent’s counterclaim for the severe environmental damage Claimant inflicted in Kronos, admissible (III).

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\(^4^2\) Exhibit No.3.
I. THE TRIBUNAL LACKS JURISDICTION SINCE CLAIMANT DOES NOT QUALIFY AS AN INVESTOR UNDER THE TICADIA-KRONOS BIT

22. Respondent respectfully objects to the jurisdiction of this Tribunal constituted under the SCC Arbitration Rules and Art. 11(3) of the Ticadia-Kronos BIT. Claimant seeks to establish *ratione personae* jurisdiction in only seventeen words, i.e. simply alleging in its Request that “[Claimant was incorporated under the laws of the Republic of Ticadia, and so was its majority shareholder”]. This attempt to establish jurisdiction ought to be received with scepticism by this Tribunal.

23. In particular, Respondent will establish, first, that the critical date for determining the nationality of Claimant under the Ticadia-Kronos BIT is the date of institution of the present proceedings (A); second, that the scope of Art. 1(4) of the BIT ought to be construed in the light of Art. 31 VCLT (B). Following this interpretation, Claimant fails to qualify as a covered Ticadian enterprise under the BIT (C), and as such, it has manifestly attempted to transform a domestic dispute into an international one, abusing the rights conferred by the BIT (D).

A. The Critical Date for Establishing Claimant’s Nationality Is the Date of Institution of the Present Proceedings

24. In Claimant’s attempt to establish its Ticadian nationality in its Request, the vague use of past tense (“*was incorporated*”, “*was its majority shareholder*”) is striking. Investment tribunals have reiterated the general principle that a party’s standing in an international judicial forum for purposes of jurisdiction is determined by reference to the date of institution of proceedings. It was in this spirit, for instance, that the SCC Tribunal in *Cem* required Mr. Uzan to establish *ratione personae* jurisdiction on the day he filed his arbitration request and perfected Turkey’s consent to arbitrate.

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43 Request, ¶3.1.
44 Ibid.
45 CSOB, ¶31; Vivendi, ¶¶60-61.
46 Cem, ¶135.
25. In the matter at hand, and pursuant to Art. 8 of the SCC Rules, the date on which the present proceedings are deemed to have been instituted is November 10, 2017, i.e. the date on which the SCC received Claimant’s unfounded Request.\(^ {47}\)

26. Therefore, and since the critical date for establishing the nationality of Claimant under the Ticadia-Kronos BIT is November 10, 2017, any and all, implicit or explicit, efforts by Claimant to rely on the distant past should be rejected by this Tribunal.

B. The Scope of Art. 1(4) of the Ticadia-Kronos BIT in the Light of Art. 31 of the VCLT

27. Investment treaties generally include definitions regarding the persons or legal entities qualifying as investors and enjoying protection. These definitions usually prescribe explicit criteria as to whether a legal person is a national of a particular State.\(^ {48}\) However, the wording of Art. 1(4) illuminates the unconventional character of the Ticadia-Kronos BIT, since no explicit criteria for the determination of a covered investor’s nationality are included. More specifically, Art. 1(4) of the Ticadia-Kronos BIT provides as follows:

“The term “investor of a Contracting Party” means a Contracting Party, or a person or an enterprise of a Contracting Party, that seeks to make, is making, or has made an investment in the other Contracting Party's territory.”

28. In light of the above, the phrase “enterprise of a Contracting Party” in Art. 1(4) of the Ticadia-Kronos BIT must be interpreted in accordance with Art. 31 of the VCLT, which has been ratified by both Ticadia and Kronos;\(^ {49}\) to be sure, the general rule on treaty interpretation in Art. 31 of the VCLT is binding, in any case, since it also reflects customary international law on the matter.\(^ {50}\)

29. At the outset, Art. 31(1) VCLT requires that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty”. According to Black’s Law Dictionary, an “enterprise” is defined as “[a]n organization or venture, esp. for business purposes.”\(^ {51}\) No clear criteria for the determination of the

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\(^ {47}\) Facts, ¶29.

\(^ {48}\) Dolzer/Schreuer, p.47; Baumgartner, p.46; OECD, p.8.

\(^ {49}\) Facts, ¶2.

\(^ {50}\) Saluka, ¶296.

\(^ {51}\) Black’s Law, p. 611.
nationality of an enterprise are derived from this dictionary definition, much less the criteria of incorporation and majority shareholding, arbitrarily invoked by Claimant.

30. Since ordinary meaning analysis does not decide the issue of determination of nationality of legal persons under the Ticadia-Kronos BIT, one must also look to the other interpretative tools of Art. 31 VCLT. As the AdT Tribunal emphasised, a proper interpretation under Art. 31 VCLT must not be limited to the ordinary meaning of terms.

31. More specifically, Art. 31(3)(c) of the VCLT provides that when interpreting a treaty provision, “any relevant rules of international law applicable in the relations between the parties” should be “taken into account, together with the context”. The term “relevant rules of international law” also includes general customary international law.

32. Investment tribunals have in fact opted to consider other relevant rules of international law under Art. 31(3)(c) VCLT when interpreting BITs. For instance, the SCC Tribunal in Berschander stated in this respect that

> “insofar as the terms of the Treaty are unclear or require interpretation or supplementation, the Vienna Convention requires the Tribunal to consider “the relevant rules of international law applicable in relations between the parties.”

33. Indeed, the Tribunal in ADC expressed that there is no need to marshal customary rules regarding nationality, if the nationality criterion is specifically circumscribed in the relevant BIT and the applicable arbitration rules. In contradistinction, Art. 1(4) of the Ticadia-Kronos BIT does not make any mention whatsoever to specific criteria for the determination of nationality of corporations, in stark contrast to the vast majority of other BITs. It then follows that, for the proper interpretation of the phrase “enterprise of a Contracting Party” in Art. 1(4) of the Ticadia-Kronos BIT, this Tribunal should turn to customary international law regarding corporate nationality.

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52 Weeramantry, ¶3.35.
53 AdT, ¶226.
54 Kardassopoulos, ¶¶207-208; Saluka, ¶254.
55 Micula, ¶87; Ambiente, ¶¶599-601,603; Orascom, ¶¶293-294.
56 Berschander, ¶95.
57 ADC, ¶357.
34. Under customary international law, the nationality of a corporation is indicated by certain criteria, universally recognised in the law of diplomatic protection; these criteria are laid out in Art. 9 of the 2006 ILC Draft Articles on Diplomatic Protection in the following manner:

“For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”

35. Indeed, the customary rule regarding nationality of corporations enshrined in Art. 9 of the 2006 ILC Draft Articles on Diplomatic Protection is more than sufficiently comparable, similar and pertinent to Art. 1(4) of the Ticadia-Kronos BIT, so as to identify the former as a rule of international law “relevant” to the latter; they both serve the purpose of maintaining a host State’s sovereignty by preventing the introduction of claims by corporations, which are not protected and by establishing that only foreign investors and not domestic ones gain protection.

36. In view of the strong parallels between Art. 9 of the 2006 ILC Draft Articles on Diplomatic Protection and Art. 1(4) of the Ticadia-Kronos BIT, Respondent submits that a proper interpretation of the latter, in the light of Art. 31(3)(c) of the VCLT, results in the admission of the criteria expressed in the former. Accordingly, Art. 1(4) should be interpreted so as to render the incorporation element insufficient for the conferral of corporate nationality in cases where any other significant link or connection between the State of incorporation and the corporation is lacking, and significant connections of the corporation with another State exist.\(^{58}\)

37. This interpretation gives effect to the letter and spirit of the Ticadia-Kronos BIT, as well as its object and purpose. As any BIT in force, the Ticadia-Kronos BIT cannot be construes as protecting domestic investors; put differently, its object and purpose is not – and its effect, therefore, should not be – to afford domestic corporations the means of evading the jurisdiction of their domestic courts. Any contrary interpretation would lead to the protection

\(^{58}\) ILC ADP Commentary, p.38, ¶4.
of effectively Kronian investors and would plainly distort the true intentions of the drafters of the Ticadia-Kronos BIT, whose preamble clearly refers to

“investment by nationals and companies of one Contracting Party in the territory of the other Contracting Party” [emphasis added].

C. Claimant Is Not an Enterprise of Ticadia pursuant to Art. 1(4) of the Ticadia-Kronos BIT

38. As noted above, the interpretation of Art. 1(4) of the Ticadia-Kronos BIT, using Art. 31(3)(c) of the VCLT, should take into account the customary rule on nationality of corporations enshrined in Art. 9 of the 2006 ILC Draft Articles on Diplomatic Protection. It is in this vein that this Tribunal manifestly lacks jurisdiction, by virtue of Claimant’s strong and undeniable connection with Kronos. Accordingly, Respondent will demonstrate that Claimant is in fact controlled by Kronian nationals (a), has no substantial business activities in Ticadia (b), and that both its seat of management and the financial control are located in Kronos (c).

a. Claimant is controlled by Kronian nationals

39. Control must be considered as real and effective, relying on objective and material factors, i.e. technology, access to markets and know-how; the legal capacity or the majority of voting rights in shareholders meetings is not considered crucial in the international business world.59 As established in Plama, the exercise of control must be factual,

“including an ability to exercise substantial influence over the legal entity’s management, operation and the selection of members of its board of directors or any other managing body.”60

The Tribunal in Transglobal examined the issue of control irrespective of the percentage of shares held, turning instead to look at the de facto control.61 Furthermore, following the findings of the TSA Spectrum Tribunal, a mere literal approach would preclude common sense, especially when a corporation is controlled directly or indirectly by nationals of the host State.62

59 Thunderbird, ¶108.
60 Plama, ¶170.
61 Transglobal, ¶111.
62 TSA Spectrum, ¶145.
40. Claimant argues its Ticadian nationality by stating that its majority shareholder, an equity fund, was incorporated under the laws of Ticadia. The Tribunal in Vacuum Salt distinguished control from legal ownership, while examining the foreignness of control. Specifically, the Tribunal placed higher importance on the influence exerted by Mr. Panagiotopoulo in the enterprise, despite the fact that he owned only 20% of shares, accepting that majority shareholding cannot be a decisive factor for an enterprise’s control. Likewise, the Tribunal in Caratube did not consider Mr. Hourani’s legal capacity of 92% of shares essential to the control of the company, pointing that he did not demonstrate that he actually interfered in the company’s running.

41. In the present dispute, a description of Claimant’s corporate and managerial structure can be set forth in the following figure:

42. It is undisputed that Kronian shareholders have acquired a significant part of Claimant’s shares as of 2012. Albeit the fact that they own 35% of the shares, they exert essential influence on Claimant’s decision-making policy, due to their experience and

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63 Vacuum Salt, ¶¶44,50.
64 Caratube, ¶407.
65 Facts, ¶6.
expertise in the mining industry. This highlights precisely their indispensable contribution to the operation and management of Claimant’s mining activities.

43. That is not the end of the matter, however; the equity fund, which possesses 65% of the shares, is composed of nationals of various countries, including Ticadia and Kronos, and has delegated business judgement to the Kronian shareholders. Furthermore, Claimant’s BoD, which exercises the former’s actual control on a day-to-day basis, is comprised of a majority of Kronian nationals. Claimant’s BoD is entitled to carry out substantial procedures related to Claimant’s operation and is also tasked with the appointment of the company’s CEO, who does not have Ticadian nationality. Taking into account all the aforementioned factors, it becomes apparent that Claimant’s control lies in the hands of Kronian nationals.

b. Claimant has no substantial business activities in Ticadia

44. The AMTO Tribunal, aiming at precluding the protection of investors which invoke a nationality of convenience, interpreted the term “substantial” to mean “of substance, and not merely of form”. The important factor to consider is clearly the materiality of the activities related to the investment, not just the formal appearances. In this line, in ICJ’s Nottebohm case one of the clearest definitions regarding nationality in international law was presented. Nationality was defined as a legal bond which has at its core a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. While it is true that the Nottebohm case involved a natural person, this definition is also applicable to juridical persons; according to Brownlie, the borrowing of a concept developed in relation to individuals is well established. Respectively, Mr. Nottebohm’s transfer of his business activities in Guatemala, along with the fact that his economic interests

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66 Facts, ¶7.
67 Facts, ¶6.
68 PO2, ¶2.
69 Answer, ¶3.
70 Facts, ¶7.
71 Ibid.
72 PO2, ¶2.
73 AMTO, ¶69.
74 Nottebohm, p.23.
75 Brownlie, p.407.
were also located in the same State acted as more than adequate evidence for ICJ to deem that the necessary connection had been satisfied.\textsuperscript{76}

45. These propositions also find affirmation in the ICJ’s \textit{Barcelona Traction} case: as the ILC itself has remarked respectively, the ICJ in \textit{Barcelona Traction} was not satisfied with incorporation as the sole criterion for corporate nationality.\textsuperscript{77} In fact, the Court itself suggested that in addition to incorporation and a registered office, a \textit{“close and permanent connection”} of the company with Canada was needed.\textsuperscript{78}

46. In \textit{casu}, since 2010, Claimant has concentrated the entirety of its actual operations and resources in Respondent’s territory, effectively terminating its mining operations in its alleged State of nationality.\textsuperscript{79} As a result, Claimant has remained but a passive actor in Ticadia \textit{for almost a decade}. Following the findings of the \textit{Pac Rim} Tribunal, the fact that an entity maintains its lawful status and conducts some activities in accordance with the laws of its home-State is not sufficient.\textsuperscript{80} Consequently, a distinction between substantial and non-substantial business activities would be unnecessary; there is no issue of differentiation, since Claimant has no business activities -much less substantial ones- in Ticadia, as it has maintained only frail formal ties with its state of incorporation.

\textbf{c. Claimant’s seat of management and financial control are located in Kronos}

47. When determining corporate nationality, the grain of arbitral practice has rendered the place of effective management as a decisive factor.\textsuperscript{81} According to the \textit{Tenaris} Tribunal, the place of effective management is \textit{“the place where the company, in truth, operates”}.\textsuperscript{82} Moreover, the test of actual or effective management is a flexible one which takes into account \textit{“the precise nature of the company in question and its actual activities”}.\textsuperscript{83}

48. Indeed, the place of effective management used to be considered the place where managerial decisions necessary for the operation of a business were made. However, both the

\begin{footnotesize}
\textsuperscript{76} \textit{Nottebohm}, p.25.
\textsuperscript{77} ILC ADP Commentary, p.38, \textit{¶}3.
\textsuperscript{78} \textit{Barcelona Traction}, \textit{¶}71.
\textsuperscript{79} Facts, \textit{¶}12.
\textsuperscript{80} \textit{Pac Rim}, \textit{¶}4.67.
\textsuperscript{81} \textit{Yaung Chi Oo}, \textit{¶}52.
\textsuperscript{82} \textit{Tenaris}, \textit{¶}178.
\textsuperscript{83} \textit{Ibid.}, \textit{¶}200.
\end{footnotesize}
growing expansion of enterprises internationally and the advancement of transportation systems, have had a crucial impact on the concept of the place of effective management. In cases of transnational corporations, such as Claimant, the task of identifying where the management is conducted becomes challenging due to its subsequent mobility, let alone the technological evolution that is apparent through the use of telecommunication in business meetings, where directors from different countries conduct meetings by way of video-conferencing.

49. Under such circumstances, the place where “the fundamental decisions of the company's management are actually executed into valid and externally focused management acts”84 must prevail, in order to determine the actual place of effective management. Therefore, the fact that a part of Claimant’s meetings takes place in Ticadia85 cannot lead to assured conclusions about Claimant’s place of effective management. On the contrary, the fact that the rulings of the company’s decision-making instrument, the BoD, favour exclusively Claimant’s interest in Kronos, where the majority of them is implemented, given the concentration of the company’s activities in the latter,86 should prevail upon the determination of Claimant’s place of effective management.

50. It stands to reason that, since all of Claimant’s business activities and resources have been transferred from Ticadia to Respondent’s territory, its CEO travels to Kronos on a regular basis, where he stays for long durations.87 The fact that Claimant holds its tax residency in Ticadia88 is insignificant: according to the CEAC Tribunal, tax residency does not determine the term seat of a corporation, nor is it in any way equated to it.89

51. Consequently, excluding its place of incorporation, Claimant bears no connection to Ticadia. Its conduct of genuine business activities entirely takes place in Kronos and all the decisions are made in relation to said conduct in Respondent’s territory. No permanent and close connection exists between Claimant and its home State as required.

84 Baumgartner, p.75.
85 Facts, ¶12.
86 Ibid.
87 Facts, ¶7.
88 PO2, ¶2.
89 CEAC, ¶148.
Regarding all of the above, it is clear that Claimant is a Kronian investor and therefore, jurisdiction of this Tribunal cannot be justified.

**D. In Any Event, the Presentation of Claimant’s Claims Under the Circumstances Is Abusive**

Respondent maintains that the precise purpose of Claimant is to bring its purely domestic dispute before an international judicial body such as this Tribunal; such an abusive practice is directly at odds with the fundamental object and purpose of the Ticadia-Kronos BIT, which is meant to encourage international investment.

The abuse of rights doctrine, under general international law, functions as a remedy to limit the abusive conduct and “is to be determined in each case, taking into account all the circumstances of the case”. It is primarily considered under the prism of the *bona fide* principle, which holds that actors should exercise their obligations and rights in an honest and reasonable manner. In *Abaclat*, the abuse of rights was found to be an integral part of the good faith principle. Good faith is undisputedly applicable to the interpretation and application of obligations under IIAs, especially since Art. 31(1) VCLT dictates that treaties are to be interpreted “in good faith”. As underscored by the Tribunal in *Amco*:

“...any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.”

The Tribunal in *Cementownia*, when examining a case where a company falsely posed as an investor in order to find access to international arbitration, found that the latter had “intentionally and in bad faith abused the arbitration”. Similarly, in the case at bar Claimant abusively attempts to “internationalise” its domestic claim. This Tribunal should exercise its equitable discretion to look beyond the shell of Claimant’s corporate structure and not elevate form over substance. No protection should be afforded to investors which the Ticadia-Kronos BIT was not designed to protect, because they are in essence domestic investors.

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90 *Venezuela Holdings*, ¶177.
91 *Phoenix*, ¶107.
92 *Abaclat*, ¶646.
93 *Europe Cement*, ¶171.
94 *Amco*, ¶14.
95 *Cementownia*, ¶159.
investors disguised as foreign investors. Claimant’s initiation of this arbitration constitutes a manifest abuse of rights. Since the existence of abuse of rights is an issue of threshold, it precludes the exercise of the Tribunal’s jurisdiction.96

56. It is the duty of this Tribunal to guard against any abusive manipulation of the system of international investment protection under the Ticadia-Kronos BIT. Accepting jurisdiction in the present case would go against the basic objective underlying the BIT, namely the protection and promotion of foreign investment, and would clearly lead to consequences which Ticadia and Kronos never envisaged when concluding the BIT. Therefore, this Tribunal should decline jurisdiction, in view of Claimant’s abusive attempt to create artificial international jurisdiction over what clearly constitutes a domestic dispute.

II. THE TRIBUNAL SHOULD NOT EXERCISE JURISDICTION SINCE CLAIMANT TRIGGERED THE FORK-IN-THE-Road CLAUSE

57. Even in the unlikely scenario that this Tribunal deems Claimant a covered investor under Art. 1(4) of the Ticadia-Kronos BIT, it ought not to exercise its jurisdiction, on the grounds that Claimant has triggered the fork-in-the-road of Art. 11(2) of the BIT, which provides for the submission of an investment dispute for resolution:

“(a) to the domestic courts or administrative tribunals of the Contracting Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of the third paragraph below.” [emphasis added]

58. The Ticadia-Kronos BIT through its Arts. 11(2) and 11(3) explicitly offers investors the choice to litigate a claim against the host-State before administrative or domestic courts, alternate dispute mechanisms, which have been previously agreed upon, or before an international arbitral Tribunal constituted under the SCC Rules: in short, electa una via, or non datur recursus ad alteram.

59. When a fork-in-the-road clause is included in a BIT, the investor seeking protection is required to decide, at the very beginning, whether the dispute will be adjudicated in domestic

96 Transglobal, ¶100.
courts or through international arbitration. Once the election is made, it is final and, thus, the investor is prevented from changing track on its chosen dispute resolution mechanism.

60. On September 8, 2016, Claimant filed its lawsuit before Respondent’s KFC, seeking to suspend the effects of the Presidential Decree issued the day before. However, on November 10, 2017, almost a year later, Claimant filed its Request before the SCC, requesting relief due to the effects of the Decree. Since Claimant has already made its binding choice of forum when first resorting to Respondent’s domestic courts, the fork-in-the-road clause in Art. 11(2) of the Ticadia-Kronos BIT bars any later recourse to investment arbitration under the SCC Rules.

61. Respondent, hence, submits that Claimant’s claim before this Tribunal is inadmissible, since the withdrawal of its lawsuit before the KFC does not prevent the activation of the fork-in-the-road clause of Art. 11(2) (A), and while the domestic proceedings and the present arbitral proceedings involve the same dispute (B). In any event, had Claimant truly desired a suspension of the Decree, it could have indeed filed an application for the appointment of an Emergency Arbitrator pursuant to the SCC Rules (C).

A. Claimant’s Withdrawal of its Lawsuit before the KFC Does not Prevent the Activation of the Fork-in-the-Road Clause

62. In the Ticadia-Kronos BIT, Respondent’s consent for the submission of an investment dispute by binding arbitration under the SCC, according to Art. 11(3), is conditioned upon certain prerequisites: primarily, the investor concerned must have “not submitted the dispute for resolution” either in the host-State’s courts or in accordance with any applicable, previously agreed dispute-settlement procedures. The wording of this provision proves that the mere submission of the motion to a domestic court is sufficient to trigger the fork-in-the-road clause.

63. In this vein, the MCI Tribunal, for the purposes of determining admissibility, considered irrelevant that the domestic proceedings were annulled without a decision on the
merits having been made. If the right for litigation “had in fact been exercised, that would in any case have been irrevocable, whether or not there had been a final decision on the Merits”. Additionally, the Ampal Tribunal pointed out that, in cases where the same party submits the same claim before two different fora and their jurisdiction remains unclear, “once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits”, regardless of whether a final decision has been rendered.

64. In the present dispute, on September 8, 2016, Claimant made its choice of litigation forum. However, once Respondent displayed that it would not revoke the Decree, Claimant withdrew its lawsuit before the KFC. This withdrawal does not cancel its previous choice. Claimant was henceforth barred from bringing the same claim to another litigation forum under the BIT.

65. Therefore, Claimant’s submission of its claim to domestic litigation, as provided for in Art. 11(2) of the Ticadia-Kronos BIT, is more than sufficient to trigger the fork-in-the-road clause, regardless of its subsequent withdrawal.

B. The Domestic Proceedings and the Present Arbitral Proceedings Involve the Same Dispute

66. In the event that an investor’s choice of forum is not in favour of international arbitration, the Tribunal’s jurisdiction over the same dispute is unequivocally precluded. The required “sameness” between the submitted claims in question is not present only when the claim brought “before the international forum is autonomous of claims to be heard elsewhere”.

67. Claimant argues that its claim before this Tribunal is not identical with the one brought before the KFC. However, such difference arises out of mere labelling. Pursuant to

\[\text{References}\]

101 *MCI*, ¶182.
102 *Ibid*.
103 *Ampal*, ¶331.
104 Facts, ¶25.
106 Douglas 1, p.152.
107 *Pantechniki*, ¶61.
the *Pantechniki* Tribunal, the simple labelling of claims as inherently different does not, in any event, substitute analysis.\(^{108}\) Thus, it is clearly impermissible to reformulate and furnish claims as distinct treaty claims from the congruent claims already brought before domestic courts, so as to abusively avoid activating the fork-in-the-road provision.\(^{109}\)

68. In effect, when examining fork-in-the-road clauses, the “fundamental basis of a claim” test is to be applied, as it was set out in *Vivendi Annulment*.\(^{110}\) For instance, the *H&H* Tribunal, instead of placing focus on whether the cause of action relied upon by both claims shares the same identity of parties, considered it imperative to examine “whether the claims both share the same fundamental basis”.\(^{111}\) It is precisely the subject-matter of the dispute, which holds gravity in the determination of jurisdiction. If strict form were to prevail over substance, the provision would be deprived from any practical meaning.\(^{112}\)

69. In the present dispute, Claimant’s submissions in the domestic proceedings and the present arbitral proceedings involve the same dispute, since they have the same subject-matter and arise out of the same factual background: the effects of the Decree. Pursuant to Art.11(1) of the Ticadia-Kronos BIT, an investment dispute is defined as:

> “*a dispute between a Contracting Party and an investor of the other Contracting Party arising out of or relating to [...] an alleged breach of any right conferred or created by this Agreement with respect to an investment.*”

Claimant’s lawsuit before the KFC is a consequence of the rights conferred to potential investors by the Ticadia-Kronos BIT. Therefore, disputes arising out of the Agreement fall under the dispute resolution clause of the BIT at hand, inasmuch they share the same normative source.

70. In particular, Claimant’s submission before the KFC aimed at the suspension of the Decree, since its implementation terminated the Agreement.\(^{113}\) Similarly, the submission before this Tribunal was due to the Agreement’s termination.\(^{114}\) It is, thus, evident that Claimant’s main concern in both proceedings was the consequences deriving from the Decree.

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\(^{108}\) Ibid.

\(^{109}\) Ibid., ¶64.

\(^{110}\) *Vivendi Annulment*, ¶¶98-100.

\(^{111}\) *H&H*, ¶368.

\(^{112}\) Ibid., ¶367.

\(^{113}\) Facts, ¶25.

\(^{114}\) Request, ¶1.
71. This Tribunal must remain indifferent towards any other test proposed which could deprive Art. 11(2) of the Ticadia-Kronos BIT of its _effet utile_. In this vein, the Chevron Tribunal ruled that the strict application of any other test, such as the triple-identity test, would deprive the fork-in-the-road provision of any of its practical effect.\(^{115}\) Similarly, the Supervision Tribunal decided that the strict application of the triple-identity test “removes all legal effects from fork in the road clauses, which contravenes the _effet utile_ principle applicable to the interpretation of treaties”.\(^{116}\) Hence, apart from the fundamental basis test, any other test possibly invoked must not be deemed permissible, unless explicitly included in the treaty in dispute.\(^{117}\)

72. It is also, noteworthy that the investment tribunals which have applied a rigid triple-identity test, eventually ruled against the triggering of the fork-in-the-road clause, concluding that they have jurisdiction over the dispute despite the initiated domestic proceedings.\(^{118}\) It can, thus, be argued that the clause is deprived of its practical effectiveness when such test is preferred instead of the fundamental basis one.

73. Consequently, Claimant’s claims must be dismissed as inadmissible by this Tribunal, as the choice of forum regarding the settlement of this dispute has already been made, pursuant to Art. 11(2) of the Ticadia-Kronos BIT.

C. Respondent Could Have Sought the Appointment of an Emergency Arbitrator pursuant to the SCC Rules

74. In its Request, Claimant states that its appeal before the KFC was instituted “seeking to suspend the effects of the Decree on a provisional basis”.\(^{119}\) However, had Claimant truly desired to request interim measures for the suspension of the Decree, Respondent’s domestic courts were not the only available option: it could, and should, have filed an application for the appointment of an Emergency Arbitrator pursuant to the SCC Rules, instead of applying to the KFC. This choice was decisive, since from the date of the application Claimant has

\(^{115}\) _Chevron_, ¶4.74-4.77.

\(^{116}\) _Supervision_, ¶330.

\(^{117}\) _H&H_, ¶364.

\(^{118}\) _Yukos_, ¶¶598-600; _Charanne_, ¶410; _Total_, ¶¶443-444; _Azurix_, ¶¶89-92.

\(^{119}\) Request, ¶16.
been barred from submitting the dispute before the other judicial fora provided in Art. 11(2) of the Ticadia-Kronos BIT.

75. The 2017 SCC Rules refer to measures issued pursuant to Appendix II of the Rules, as a species of interim measures within the meaning of Article 37 of the Rules. With respect to Art. 8 of the SCC Rules governing emergency arbitration, through the application for the appointment of an emergency arbitrator, a party, which is in need of a prompt interim decision, may receive a decision on interim measures within five days. The interim measure will subsequently take the form of a binding order or an award.

76. The pendency of the “cooling-off period” included in Art. 11(3) of the Ticadia-Kronos BIT spanning for six months would in no way preclude the initiation of emergency arbitration. Therefore, Claimant was in no way restricted from filling an application for the appointment of an Emergency Arbitrator pursuant to the SCC Rules. Perhaps the deterring factor was Claimant’s doubts over its capacity to meet the requirements for the granting of interim measures, especially the requirement for a reasonable possibility that its case is likely to succeed on the merits. All in all, it is evident that Respondent did make a final and informed choice of forum, when filing its lawsuit before Respondent’s KFC.

77. In conclusion, Respondent respectfully urges this Tribunal not to exercise its jurisdiction, to the extent it finds arguendo that it has such, due to the triggering of the fork-in-the-road clause in Art. 11(2) of the Ticadia-Kronos BIT.

III. RESPONDENT’S COUNTERCLAIM IS ADMISSIBLE

78. Respondent brings forth a counterclaim regarding Claimant’s unlawful conduct, which caused disastrous environmental harm and put Respondent’s citizens’ lives in extreme jeopardy. Accordingly, and without prejudice to this Tribunal’s findings on jurisdiction and admissibility regarding Claimant’s unfounded claims, Respondent respectfully asks this Tribunal to find its counterclaim admissible.

120 SCC Rules Appendix II.
121 Tsikinvest, ¶66; Evrobalt, ¶22.
122 Tsikinvest, ¶54; Kompozit, ¶68.
79. As Respondent will move to demonstrate, counterclaims are provided for in both the Ticadia-Kronos BIT and the SCC Rules governing the present dispute (A). Furthermore, the counterclaim ought to be admitted, since it bears sufficient nexus to the principal, albeit meritless, claim advanced by Claimant (B).

A. Counterclaims Are Explicitly Provided in Both the Ticadia-Kronos BIT and the SCC Rules

80. It is Respondent’s submission that the provisions laid out in the Ticadia-Kronos BIT permit the admission of counterclaims raised by a host-State. More specifically, the Contracting Parties have evidently consented to the assertion of counterclaims under Art. 11 of the Ticadia-Kronos BIT (a), while Art. 9 constitutes the applicable law regarding Respondent’s counterclaim (b). In addition, the SCC Rules expressly permit the submission of counterclaims (c).

a. The Contracting Parties consented to the submission of counterclaims

81. At the outset, Respondent draws this Tribunal’s attention to Art. 11(4) of the Ticadia-Kronos BIT which states that “each Contracting Party hereby consents to the submission of any investment dispute for settlement by binding arbitration [...].” It is apparent that this wording is sufficiently broad to include the adjudication of “any investment dispute”, extending to counterclaims as well.

82. It should be recalled that the Inmaris Tribunal accepted the host-State’s counterclaim, stating that the BIT conferred the Tribunal jurisdiction over “disputes with regard to investments between either Contracting Party and a national or company of the other Contracting Party”. Even when a term not strictly related to an investment dispute is included in a treaty, counterclaims may still be considered admissible. Remarkably, the Paushok Tribunal concluded that even the term “all disputes” has the exact same effect and thus, is wide enough to include disputes giving rise to counterclaims.

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123 Inmaris, ¶432.
124 Paushok, ¶689.
83. The existence of consent is the cornerstone for asserting jurisdiction over submitted counterclaims. Respondent has provided potential Ticadian investors with a standing open-offer for arbitration and has given its consent in advance for the institution of both claims and counterclaims. However, the consent provided by the host-State remains inactive, until the investor files its request for arbitration. As stated by the Metal-Tech Tribunal, when an investor submits its request, it accepts the offer contained in the dispute arbitration clause. In addition, the Tribunal in Inmaris decided that it had jurisdiction to hear Ukraine’s counterclaims over a dispute “with regard to investments”, taking into account the prior consent of the plaintiff.

84. In casu, Claimant provided its consent through the initiation of the arbitral process before this Tribunal. It is apparent that Claimant has expressed its consent regarding “any investment dispute”. In any event, as displayed by the Tribunal in ICS, the investor cannot alter the consent given by the host-State; it constitutes a “take it or leave it” situation. Hence, Claimant’s acceptance of such offer clearly signifies its consent to counterclaims brought by Respondent.

85. The Roussalis and Oxus Tribunals ruled against the admission of a counterclaim by the host-States, since there was no provision for them included in the text of the treaty in question. In Urbaser, the Tribunal found that precluding the State's counterclaims contradicted with the simple wording of the dispute resolution clause in the BIT, which did not make any reference to barring host-States from their submission.

86. Furthermore, as it was supported in Roussalis, citing the Amco case, a treaty is to be construed in the proper manner, in order to recognise and respect the will of the contracting parties. In any other scenario, the submission of counterclaims may not be excluded from the scope of consent.

125 Douglas 2, p.429.
126 Metal-Tech, ¶409.
127 Inmaris, ¶432.
128 ICS, ¶272.
129 Roussalis, ¶871.
130 Oxus, ¶948.
131 Urbaser, ¶1143.
132 Roussalis, ¶867.
87. In the case at hand, Respondent’s position is further strengthened by the inclusion of a provision regarding counterclaims, in Art. 11(5) of Ticadia-Kronos BIT, which states:

“In any proceedings involving an investment dispute, a Contracting Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.”

88. It is ostensible that, under Art. 11(5) of Ticadia-Kronos BIT, there exist certain, predetermined, instances under which the presentation of counterclaims before an arbitral Tribunal is impermissible. This list is exhaustive. The present counterclaim does not, in any manner, conflict with Art. 11(5), as it does not concern an insurance or guarantee contract. Consequently, as agreed by the Contracting Parties to the Ticadia-Kronos BIT, any counterclaim not falling under the circumstances therein, must be deemed permissible and must therefore be accepted by this Tribunal.

89. There is a further reason for which this Tribunal ought to recognise its jurisdiction over Respondent’s counterclaims, so long as the Contracting Parties have not explicitly excluded them. As highlighted in the Declaration of Professor Michael Reisman in Roussalis, counterclaims work to the benefit of both respondent States and investors: for, neutral investment tribunals, selected by investors themselves seeking a forum outside the state apparatus, serve to avoid duplication, inefficiency and other transaction costs when hearing counterclaims, fully in line with the objectives of international investment law.133

90. In the present dispute, the Ticadia-Kronos BIT explicitly provides for counterclaims submitted by the host-State, and for good reasons indeed.

b. Art. 9(2) of the Ticadia-Kronos BIT constitutes the applicable law regarding Respondent’s counterclaim

91. Respondent asserts that Art.9 of the Ticadia-Kronos BIT is the applicable law regarding its counterclaim. Claimant has manifestly breached Art. 9 with its unlawful conduct.134 In particular, Art. 9(2) provides that:

133 Roussalis (Declaration by Reisman).
134 Answer, ¶24.
“In pursuit of sustainable development, each Contracting Party shall strive to minimise, in an economically efficient manner, harmful environmental impacts occurring within its territory. In doing so, each Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. 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.”

92. This provision entitles Respondent to proceed to the adoption and implementation of all proper and adequate measures, in order to safeguard environmental protection and, in the long run, its population. These measures ought to be established in response to potential harmful activities and for the prevention of any sort of pollution.  

93. Consequently, Respondent submits that it is only reasonable that such clause leaves some breathing room for a state to act, in response to an investor’s unbearable and illegal conduct. In Perenco, the Tribunal confirmed that, if the legal relationship connecting an investor and the host-State permits the latter to file a counterclaim based on the former’s activities and if the claim is considered to be valid, the host-State is entitled to full compensation pursuant to the aforementioned legal relationship.

94. Since IIAs are generally considered to be inherently asymmetrical, especially regarding obligations imposed on the investor, the right to submit counterclaims counterbalances this asymmetry. While BITs are rightly constructed so as to protect the rights of foreign investors, they are not meant to render the host-States defenceless. The Noble Ventures Tribunal positively declared that it is impermissible to interpret clauses included in BITs exclusively in favour of investors. This approach was further supported by the Urbaser Tribunal; in that dispute, Urbaser’s argument, stating that BITs are only constructed for the protection of investors, was rejected by the Tribunal.

95. In light of such circumstances, Art. 9 of the Ticadia-Kronos BIT would remain vacant and meaningless, unless Respondent could present and pursue such claims before an arbitral Tribunal.

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135 Ibid., ¶18.
136 Perenco, ¶134.
137 Kryvoi, p.218.
138 Noble Ventures, ¶52.
139 Urbaser, ¶1143.
c. Counterclaims are explicitly provided for in the SCC Rules

96. Following the findings of the AMTO Tribunal, the dispute resolution clause included in a BIT prevails over the applicable arbitration rules only if the BIT excludes counterclaims. Nevertheless, the SCC Rules provide for the permission of counterclaims extensively. For instance, Art. 9(1)(iii) SCC Rules states that:

“The Secretariat shall set a time period within which the Respondent shall submit an Answer to the SCC. The Answer shall include: [...] a preliminary statement of any counterclaims or set-offs, including an estimate of the monetary value thereof.”

97. It is undisputed that Respondent submitted its counterclaim in a timely manner, through its Answer to Claimant’s Request. Therefore, Respondent’s counterclaim must be admitted by this Tribunal, based on the relevant provisions in both the Ticadia-Kronos BIT and the 2017 SCC Rules.

B. The Principal Claim and the Counterclaim Are Sufficiently Connected

98. A requirement of equal significance for a counterclaim to be considered admissible is the degree of connection between an investor’s principle claim and a host-State’s counterclaim. As explained by the SCC Tribunal in AMTO, jurisdiction over a counterclaim must be determined with regard to “the relationship of the counterclaims with the claims in arbitration”.

99. The Tribunal in Urbaser highlighted that it is unnecessary to require anything more than a factual link between the counterclaim and the main complaint, inasmuch they arise from the same investment; Therefore, the claims in question must be based on a similar factual background, while the link between the two claims must be clear and obvious, therefore constituting an “indivisible whole”.

140 AMTO, ¶118.
141 Caron/Caplan, p.429.
142 AMTO, ¶118.
143 Urbaser, ¶1151.
144 Saluka Counterclaim, ¶65.
100. Following the findings in *Oxus*, the fact that the claims arise out of the same investment indicates a sufficient connection. In this regard, the *Gavazzi* Tribunal dismissed Romania’s counterclaims due to the lack of connection with the principle claim, for it considered them to be “free-standing” and operating “merely as a defence to the Claimants’ claim”. However, this is not the case here. Respondent acted reasonably and responsibly, aiming at the protection of the environment and public health. These actions led Claimant to its unmeritorious allegations of expropriation, while Respondent’s interest in the environment and public health was the *raison d’etre* of the counterclaim’s submission.

101. Moreover, the *ratio* behind the admissibility of counterclaims is solely the promotion and the more effective administration of justice in the sense that a dispute is holistically judged in the context of the same proceedings. In this line, arbitrator Rubino-Sammartano, in his dissenting opinion for *Gavazzi*, pointed out that it would be challenging to accept that the contracting parties in the BIT intended for the possibility to give rise to parallel proceedings before different courts and Tribunals by preventing the introduction of counterclaims.

102. In this respect, Respondent’s counterclaim bears the necessary proximity with the object of the primary claim, since they both derive from the exact same basis. It would be contrary to the very notion of counterclaims, if the same investment dispute were to be settled before different litigation fora, especially when the proceedings for its settlement are ongoing.

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145 *Oxus*, ¶954.
146 *Gavazzi*, ¶154.
147 Antonopoulos, p.57.
148 *Gavazzi (Dissenting Opinion by Rubino-Sammartano)*, ¶42(i).
PART TWO: MERITS

IV. RESPONDENT’S MEASURES DID NOT VIOLATE ART. 7(1) OF THE TICADIA-KRONOS BIT

103. Respondent strongly opposes Claimant’s baseless and unsubstantiated allegations that an expropriation has occurred in breach of Art. 7(1) of the Ticadia-Kronos BIT.

104. The general spirit of BITs points to the promotion of economically beneficial relations between sovereign States. This relationship, however, cannot be examined in isolation from a State’s ever-changing social, political and legal circumstances. The phrasing of the Ticadia-Kronos BIT supports this approach, since the Contracting Parties explicitly provided for “the promotion of investments and greater economic cooperation between them”, which are conducive to sustainable development, while Art. 9 of the BIT unambiguously states that “it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures”.

105. It is undeniable, that the protection of public health, safety, the environment and the preservation of natural resources are amongst the most fundamental regulatory interests of any given State. On these grounds, Respondent submits that its abidance by its obligation not to recognize or assist unlawful situations, setting aside its own sovereignty, cannot be equated to expropriation. Hence, it is Respondent’s contention that the Decree was implemented in absolute accordance with its police powers (A), and that any reasonable investment-related expectations of Claimant were not frustrated by the issuance of the Decree (B). In any event, even if this Tribunal finds the Decree to be tantamount to expropriation, it would still be justified under the general exceptions clause incorporated in Art. 10 of the Ticadia-Kronos BIT (C).

149 Feldman, ¶112.
A. The Issuance of the Decree Was Conducted Pursuant to Respondent’s Police Powers

106. It is Respondent’s submission that Art. 9 of the Ticadia-Kronos BIT recognises the State’s right to adopt measures to protect its public health and environment, when acting within the margin of its police powers. Following the approach adopted by the Philip Morris Tribunal, Art. 9 must be interpreted in accordance with Art. 31(3)(c) of the VCLT rules, requiring that treaty provisions be interpreted in the light of “[a]ny relevant rules of international law applicable to the relations between the parties”, including evolving rules of customary international law.150

107. The police power doctrine has been consistently recognised in investment arbitration151 and is universally accepted as a customary rule of international law.152 This doctrine was endorsed in the Third Restatement, where it was stated that:

“A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of states, if it is not discriminatory.”153

This general principle has evolved to the extent where it is undisputed that economic injury resulting from a bona fide non-discriminatory regulation within the police power of the State generates no compensatory obligation.154

108. The Invesmart Tribunal declared unequivocally that BITs never intend to strip the host-States from their right to regulate, dubbing this practice as “common sense”. The same Tribunal cited the findings of Saluka to support its decision, where, despite the absence of an explicit regulatory power exception, it was determined that the treaty imported the customary police power principle, where a deprivation does not constitute expropriation if it is the outcome of the exercise of regulatory actions. The Invesmart Tribunal continued by stating that the regulator would be constrained from the revocation of licenses, if such actions were “automatically to be labeled an expropriation”.155

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150 Philip Morris, ¶290.
151 Total, ¶197; Fireman’s Fund, ¶176(j); Chemtura, ¶266; Tecmed, ¶119; Glamis, ¶¶354,356.
152 Saluka, ¶262.
153 Third Restatement, Section 702, Comment g.
154 OECD Expropriation, p.5.
155 Invesmart, ¶498.
109. Respondent draws this Tribunal’s attention to the judgment of the Servier case, where the Tribunal ruled that Poland had manifestly provided prima facie justifications that the rejection of the investor’s applications was in accordance with domestic law and thus, it would be “unreasonable” to demand that Poland prove an absence of discrimination, bad faith or the lack of disproportionateness in the adopted measures. The Tribunal continued to state that the investor ought to bear the burden of proof to establish that Poland’s regulatory actions were not in fact a legitimate exercise pursuant to the police powers. The same must be considered true in the case at hand, since Respondent has ostensibly provided this Tribunal with prima facie evidence that the implementation of the Decree along with its effects took place under the police power doctrine.

110. In any event, in order to aid this Tribunal in the timely resolution of this dispute, Respondent will proceed by utilising the test employed by the Tribunal in Philip Morris157 to substantiate that the Decree fits squarely within its police powers. Specifically, Respondent will continue by demonstrating that it was a measure conducted solely for a public purpose (a), proportionate to the aim sought (b), and in a non-discriminatory manner (c).

a. The issuance of the Decree served a manifestly legitimate public purpose

111. Recent arbitral jurisprudence has consistently upheld that a State can regulate in the interest of its public welfare, without being stalled due to potential inconveniences affecting private entities.158 As the Tribunal in Tecmed expressed, a State may exercise its sovereign power, even when causing economic damage to those subject to its police powers, without being obliged to pay any compensation.159 If a measure has been adopted in accordance with the exercise of functions which are generally held as part of a government’s power to regulate the general welfare, it will not be identified as dispossession.160 Likewise, the Tribunal in Suez restated that upon evaluation of an expropriatory claim, a State’s legitimate right to regulatory must be recognized, as an exercise of its “police power in the interests of public welfare and not to confuse measures of that nature with expropriation”.161

156 Servier, ¶¶ 582-584.
157 Philip Morris, ¶ 305.
158 CME, ¶ 603; BG, ¶ 268; Lauder, ¶ 198.
159 Tecmed, ¶ 119.
160 Dolzer/Schreuer, p. 120.
161 Suez, ¶ 139.
112. The LG&E Tribunal has also displayed, concerning the power of a State to adopt measures with a social or general welfare purpose, that these measures must be deemed acceptable without any burden of liability. Moreover, the Feldman Tribunal demonstrated that “governments must be free to act in the broader public interest through protection of the environment”. States possess the unalienable constitutional power to redefine the relations between public and private interest, in order to work towards the general welfare. The Tribunal in Lemire echoed this view, stating that Ukraine, as a sovereign State, “has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people”. In this vein, Art. 9(2) of the Ticadia-Kronos BIT encourages the Contracting Parties “to minimize, in an economically efficient manner, harmful environmental impacts occurring within its territory”.

113. It is precisely the State’s obligation to regulate in favour of the public interest which demanded the enactment and prompt implementation of the Decree. The newly-elected government set out to right the wrongs of the previous administration, which had been lax in its governance the past years. In that wavelength, it stands to reason that one of the very first measures that the new government adopted was the passing of KEA in June 2015, since Respondent had lacked a comprehensive environmental framework until then. The Liberal Party which had been in power for 60 years, had not even provided for a legal framework concerning the mining industry, despite the variety of mining activities taking place in Kronian territory at least since 2008.

114. KEA dictates that all miners take great caution during their operations and increase the protection of the waters where their extraction is conducted from toxic mine waste. Were they not to adhere to these regulations, they could potentially be subjected to severe consequences. The penalties would be proportional to the damage caused or even lead to the revocation of licenses and the obligation to provide compensation for the environmental

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162 LG&E, ¶195.
163 Feldman, ¶103.
164 Montt, p.7.
165 Lemire, ¶505.
166 Facts, ¶16.
167 Facts, ¶15.
168 Facts, ¶10.
169 Facts, ¶8.
170 Facts, ¶16.
harm caused. After KEA’s passing, Respondent created the MEM, which was in charge of the formulation and enforcement of all the environmental-related policies.

115. Claimant was obliged under the Agreement to comply to biennial inspections carried out by the MAFL. Since the institution of the MEM, the latter undertook the conduct of the inspections. Upon examination of the results of previous inspections, data was released, which revealed a sharp increase in the toxic waste concentrated in Rhea River since 2010.

116. Taking into account that Rhea River is not only the largest river in Respondent’s territory, but also the primary source of drinkable water for the majority of the country, Respondent’s prompt reaction was hardly surprising. In order to reach a conclusive and informed consensus, researchers at the University conducted the Study to establish whether Claimant’s activities were entirely the culprit of said contamination.

117. The Study’s conclusion was damning; lindoro’s exploitation had indeed contaminated the Rhea River with graspel, a toxic substance. It was also very likely that Claimant has caused a 45% increase in CVDs and microcephaly among Respondent’s population since 2011. These diseases were non-existent prior to Claimant’s activities in Kronos. A multitude of other respected, top-tier universities, having conducted their own research reached the same conclusion, regarding connection between water contamination by graspel and an increase in CVDs in the population of surrounding areas.

118. Even in the unlikely scenario that this connection is considered insufficient, Respondent contends that it does not pose an issue in the present case. Considering the findings in Methanex, it is possible for any researcher to question in good faith the conclusions of a scientific report; in this line, the Methanex Tribunal, when presented with a comparable study carried out by a university, deemed it to be reflective of a “serious,
objective and scientific approach to a complex problem.” Accordingly, the Study emerges as a scientific work of great gravity, disconnected from any political engineering, contrary to Claimant’s unmeritorious allegations.

119. In light of these pressing circumstances, Respondent was forced to take expedited measures in order to eliminate -to the extent possible- the devastating damage caused to its environment and the very lives of its people. The issuance of the Decree was a necessary measure, to which Respondent was driven by the circumstances that the exploitation of lindoro had created. With respect to the S.D. Myers decision, a Tribunal must pay deference to the real interests, the purpose and the effect of the governmental measure adopted; in the present case, it is ostensible that Respondent’s sole motive was the protection of general welfare.

b. Respondent’s measure was proportionate to the aim sought

120. A State’s measures which aim at the protection of the public welfare “must be accepted without any imposition of liability” when they are proportionate to the need being addressed. In this spirit, the Tecmed Tribunal held that regulatory actions that serve public interest in a proportional way are not expropriatory. The Tribunal was guided by ECoHR case law, especially the James and Others case, where it was held that “a measure depriving a person of his property [must] pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’” and bear “a reasonable relationship of proportionality between the means employed and the aim sought to be realized”.

121. Three elements are usually considered in determining the proportionality of a measure. First, the relevant measure must be a suitable means to achieve a legitimate goal. Second, there must exist no other equally effective means of achieving the relevant goal that would infringe the investor’s rights to a lesser extent. Third, the measure adopted must be

181 Methanex, Part III, Chapter A, ¶101.
182 Request, ¶14.
183 S.D. Myers, ¶285.
184 LG&E, ¶195.
185 Tecmed, ¶122.
186 James and Others, ¶50.
proportionate *stricto sensu*, which involves a weighing and balancing of the different interests at stake.\(^{187}\)

122. The Decree is evidently a suitable measure for achieving Respondent’s priority, which is to protect its land and people from the detrimental consequences of lindoro’s exploitation. Its suitability is derived from the Study that preceded its issuance, which verified what the data from the MEM had already indicated, by stating that “*the contamination of the Rhea River is undoubtedly a direct consequence of the exploitation of lindoro*”.\(^{188}\)

123. Regarding the second element, a general prohibition of the exploitation of lindoro accompanied with the termination of the contracts and licenses concerning its extraction was the most effective way for the ongoing damage to the Kronian land and population to cease immediately. The damages which had already been caused by lindoro were so great that Respondent could not risk allowing their further fruition by implementing more lenient measures.

124. The *ratio* behind Respondent’s actions was the weighing and balancing of economic interests on one hand and public welfare on the other. This is why Respondent waited for the scientific verification of the damages indicated by the released data, despite being entitled to proceed to the appropriate measures in a precautionary manner, pursuant to Art. 9(2) of the Ticadia-Kronos BIT. The extraction of lindoro was indeed profitable for Respondent and the international market. However, no doubt can exist that the environmental and health equilibrium of Respondent must prevail over such interests when they are sought at its expense.

**c. The Decree was issued in a non-discriminatory manner**

125. Respondent rejects Claimant’s erroneous allegations that the implementation of the Decree occurred in a discriminatory manner\(^{189}\) as wholly inaccurate. In the present case, the issuance of the Decree took place “considering the utmost importance of the protection of the

\(^{187}\) Bücheler, p.3.
\(^{188}\) Exhibit No.4.
\(^{189}\) Request, ¶19.
environment, our natural resources, and human life in Kronian territory.” The Decree was issued free of any nationality-based considerations, and focuses solely on the protection of the environment and Kronian citizens.

126. According to Professor Schreuer, investment tribunals often consider the discriminatory intent of an applied measure; for instance, the LG&E Tribunal noted that a measure must be deemed discriminatory, if the intent of the adopted measure is indeed to discriminate. This is not at all comparable to the case at hand where the extraction of lindoro and the poor handling of the wastes resulting from it by Claimant forced Respondent into action.

127. In Respondent’s territory, lindoro is only found in the Site and its exploitation was carried out exclusively by Claimant. When one ethnic group owns the rights to a particular industry wholly, measures enacted by a state for a public purpose with this group as its recipient cannot be said to be necessarily discriminatory. This is congruent to the approach adopted in Mamidoil, where it was deemed that the measure adopted was not discriminatory against the investor, since it concerned all companies which were operating in the host-state. No distinct discrimination was made against Greek companies specifically, however, as Greek companies were the only ones vested with the right to operate in Duress, they were also the only ones affected.

128. Similarly, the ADC Tribunal’s finding of discrimination due to governmental measures resulting in the prohibition of the operation of the airport by foreigners has been strongly questioned; only one private operator existed and this operator happened to be foreign. If this reasoning were adopted, whenever a measure affected a unique foreign-held business, it would be deemed discriminatory by definition, since no other foreign businesses would be affected. This interpretation would also make little, if any, sense: discrimination,

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190 Exhibit No.5.
191 Dolzer/Schreuer, p.197.
192 LG&E, ¶146.
193 Newcombe/Paradell, ¶7.33.
194 Mamidoil, ¶550.
195 ADC, ¶441.
196 Newcombe/Paradell, ¶7.33.
under these circumstances would only be said to exist if other foreign businesses in like situations exist.\textsuperscript{197}

129. The Tribunal in \textit{Methanex} in particular, expressed that the company ought to have demonstrated that the State had \textit{actually intended} to favour domestic investors and that both the favoured and the discriminated party are in like circumstances.\textsuperscript{198} Additionally, differential treatment based on the existence of a different factual and legal situation does not constitute a breach of the discriminatory standard.\textsuperscript{199} The \textit{Enron} Tribunal ruled that no discrimination had occurred between different sectors, despite them having indeed been treated differently. However, since there was no evidence of “\textit{capricious, irrational or absurd differentiation in the treatment accorded to Claimant as compared to other entities or sectors}” the Tribunal found no improper differentiation to have occurred.\textsuperscript{200} In the present dispute, since no other company -domestic or otherwise- operated the extraction of lindoro,\textsuperscript{201} no other company could have been affected by the prohibition of it.

130. Concerning the presidential statements,\textsuperscript{202} Respondent would like to draw this Tribunal’s attention to the findings of \textit{Crystallex}, which affirmed that a prominent official’s derogatory comments concerning State’s legislation cannot suffice as evidence establishing discrimination.\textsuperscript{203} In the present case, the President’s statements cannot be held as conclusive elements in the record, which would support the conclusion that the Decree was conducted in a discriminatory manner. Even more so, these statements ought to be understood in the context of the circumstances at play, when the environmental stability and the health of Respondent’s people had already been harmed and were in danger of even further injury.

**B. Claimant’s Investment-Related Expectations Were not Frustrated by the Issuance of the Decree**

131. The need to protect the legitimate expectations of an investor is well-established in international law. That being said, as the Tribunal in \textit{Parkerings} declared, while an investor

\textsuperscript{197} Ibid.
\textsuperscript{198} \textit{Methanex}, Part IV, Chapter D, ¶12.
\textsuperscript{199} \textit{El Paso}, ¶315.
\textsuperscript{200} \textit{Enron}, ¶282.
\textsuperscript{201} Facts, ¶11.
\textsuperscript{202} Exhibit No.6.
\textsuperscript{203} \textit{Crystallex}, ¶715.
has a right to a certain stability in the legal environment where the investment has been made, this right is provided only if the investor has exercised due diligence and its expectations were “reasonable in light of the circumstances”. An investor must, therefore, anticipate and predict that circumstances are prone to change and structure its respective investment “in order to adapt it to the potential changes of legal environment”. This is all the more applicable in the present case, since the Agreement signed by the Disputing Parties explicitly states that Claimant is obliged to “observe the laws in force in the Republic of Kronos throughout the performance of this Agreement, with the adaptations that may be necessary in light of new laws and regulations”.

132. In this line, the Tribunal in Electrabel, while not disputing that investors are promised protection against unfair changes, declared a host-state’s right to maintain a reasonable margin of regulatory flexibility in order to adapt to changing conditions in the interest of public welfare. Hence, the requirement of fairness must not be construed to mean the:

“immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment”.

133. Respectively, the Quiborax Tribunal declared that the cancellation of licenses or concessions provided by host-states on the grounds that the investor has failed to satisfy or adhere to specific requirements in order to maintain such licenses, or has breached the relevant laws, which lead to the loss of such rights, cannot be held as a taking by the host-State. In the present dispute, Claimant’s licenses were revoked since it did not fulfil the requirements included either in the Agreement or KEA. Such failure expressly leads to the revocation of licenses which is, thus, neither expropriatory nor surprising.

C. In Any Event, Respondent’s Measures Are Justified Under Art. 10 of the Ticadia-Kronos BIT

134. Even in the unlikely scenario that this Tribunal considers that Respondent’s bona fide regulatory act violated Art. 7(1) of the Ticadia-Kronos BIT, the measures provided for in the Decree fall within the scope of the general exceptions clause of Art. 10. As a result,

204 Parkerings, ¶¶333,338.
205 Exhibit No.2.
206 Electrabel, ¶7.77.
207 Quiborax, ¶206.
Respondent must be exempted from any liability, since the measures taken were necessary for the protection of human, animal and plant life (a) and they did not discriminate arbitrarily or unjustifiably against Claimant (b).

a. The Decree was necessary for the protection of human, animal and plant life

135. General exceptions clauses in BITs provide host-States with the regulatory latitude to deal with threats to essential national interests.\textsuperscript{208} With respect to the findings in \textit{LG&E}, a State is precluded from any liability, when its actions fall within the scope of a general exception clause.\textsuperscript{209} Therefore, once such a clause is successfully invoked, the State is liberated from the obligation to pay compensation, since the measures in question are considered completely lawful.\textsuperscript{210}

136. Respondent’s actions fall within the scope of Art. 10(a) of the Ticadia-Kronos BIT, which provides for the enforcement of measures necessary “to protect human, animal or plant life or health”. This provision evidences that the encouragement and promotion of foreign investment should not be achieved by relaxing health, and environmental conditions nor be made at the expense the domestic public interest, especially when the investment in question bears considerable influence over environment and public health.

137. The general exceptions clause contained in Art. 10 of Ticadia-Kronos BIT is modelled on Art. XX of GATT. Thus, as the Continental Tribunal highlighted, for the interpretation of such clauses it is more appropriate to refer to the GATT and WTO case law, which has dealt with the notion of necessity extensively rather than refer to the requirement of necessity under customary international law.\textsuperscript{211}

138. According to WTO jurisprudence, a contracting party pursuing a legitimate domestic goal is entitled to choose for itself the level of achievement of that goal.\textsuperscript{212} The WTO AB has firmly established that States get to choose their “own level of protection” by implementing the “less-restrictive alternative test”, which is just what is required by the word “necessary”.

\textsuperscript{208} Salacuse, p.379.
\textsuperscript{209} \textit{LG&E}, ¶261.
\textsuperscript{210} Wang. p.450.
\textsuperscript{211} Continental, ¶193.
\textsuperscript{212} Korea-Beef, ¶176,178; EC-Asbestos ¶168; US-Gambling ¶308; DR-Cigarettes ¶72.
Eligible alternatives to the actual measure must be considered only measures which would secure the same level of protection.213

139. In the same spirit, the Belokon investment Tribunal emphatically stated that States possess considerable policy space to implement the laws and regulations as they deem appropriate.214 In Quiborax, the Tribunal ruled that Bolivia was undeniably vested with a sovereign right to determine what is in fact in favour of the national and public interest, thus judging that Bolivia might have acted in accordance with a legitimate interest. However, the Tribunal ruled that an unlawful expropriation had commenced, since the revocation of licenses was not carried out pursuant to domestic law.215 This could not be further from what has occurred in this dispute, since the revocation of Claimant’s licenses took place in full compliance with Kronian law, as it was based on KEA, a wholly legitimate legal instrument.

140. Since October 2015, Respondent has become aware of data which revealed a high concentration of toxic waste in the Rhea River.216 This data was released by the MEM and was largely based on the inspections of Claimant’s activities. The subsequent Study by the University concluded that “the contamination of the Rhea River is undoubtedly a direct consequence of the exploitation of lindoro”.217 Additionally, the Study considered the exploitation of lindoro highly likely to have caused the increase in the levels of CVDs in the resident population surrounding Claimant’s operations and microcephaly in newborns.218 As a result, Respondent hastened to take the appropriate measures necessary “to protect human, animal or plant life or health”.

141. Claimant has not denied that its activities were the culprit of the contamination and the rising of the incidences in microcephaly. Oddly enough, Claimant in its Request only expresses doubts regarding the conclusiveness of the causal link between lindoro and CVDs, Claimant conveniently chose to merely state that:

“The Study indicated a correlation but failed to conclusively confirm a causal link between the exploitation of lindoro and the increase of coronary heart diseases in Respondent’s population since 2009.”

213 Regan, pp.348-349.
214 Belokon, ¶198.
215 Quiborax, ¶245.
216 Facts, ¶20.
217 Exhibit No.4.
218 Ibid.
142. The certainty of Claimant’s liability for the contamination of the Rhea River in corroboration with the strong likelihood of its liability for the increase in CVDs and microcephaly were more than sufficient to trigger the precautionary principle deriving from Art. 9(2) of the Ticadia-Kronos BIT which provides that “each Contracting Party shall strive to take precautionary measures to prevent or minimize environmental degradation”. It is evident that the Ticadia-Kronos BIT accepts the aforementioned principle, according to which in dubio pro natura.\textsuperscript{219} In other words, lack of adequate scientific knowledge on the probability or magnitude of specific environmental threats and health hazards should be decided toward the benefit of the environment, not the other way around.

143. In cases where threats of serious damage exist, lack of sufficient certainty cannot stand as a reason for postponing cost-effective measures aiming at the avoidance of environmental degradation.\textsuperscript{220} This ascertainment is in full accordance with the provisions of Art. 9(2) which states that, where environmental damage is concerned, a State “shall act in a cost-effective manner”.

144. The Continental Tribunal, highlighted that the general exception clause of a treaty must not be interpreted in a way that would require the “total collapse” of the country before measures for protection are taken. Protection provided for in such provisions would be meaningless “if there is nothing left to protect”,\textsuperscript{221} while their scope must contain a significant margin of appreciation for the state, as a time of crisis “is not a time for nice judgments, particularly when examined by others with the [advantage] of hindsight”.\textsuperscript{222}

145. A precautionary approach also corresponds with the promotion of sustainable development,\textsuperscript{223} which was the chief goal adopted by the Contracting Parties in the Ticadia-Kronos BIT, as is evidenced by the preamble which declared that:

“The promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between the Contracting Parties and to the promotion of sustainable development.”

\textsuperscript{219} Trouwborst, p.149.
\textsuperscript{220} Ibid., p.32.
\textsuperscript{221} Continental, ¶180.
\textsuperscript{222} Ibid., ¶181.
\textsuperscript{223} Newcombe, p.377.
146. Preambles must be considered influential in the interpretation of treaties, since they indicate the true purpose of the treaty.\textsuperscript{224} This is plainly true for the Ticadia-Kronos BIT, for Art. 9 also reflects the same spirit, declaring that it is “inappropriate to encourage investment by relaxing domestic health, safety or environmental measures”. The Ticadia-Kronos BIT clearly has stipulated that its solitary purpose is not merely the protection of investments; it also serves as a means to facilitate sustainable development, while it reaffirms Respondent’s right to regulate in the public interest.

147. In this line, an investment which contradicts and in fact, operates contrary to the principle of sustainable development, cannot be held to enjoy the protection of the BIT. This provision functions further as a mechanism to protect the rights of indigenous peoples within the context of the BIT, with a direct impact on human rights. The improvement of the quality of life and international well-being for present and future generations, which is promoted via both health and environmental protection, as well as the protection of fundamental human rights are at the heart of the notion of sustainable development.\textsuperscript{225}

148. Hence, it is easily discernible that Claimant has grossly violated fundamental rights of the Kronian citizens. First and foremost, it has violated the fundamental right to water, recognised officially by the UN General Assembly,\textsuperscript{226} as Claimant’s activities placed the largest river of the State which supplies water to the vast majority of the country, among the top three most polluted rivers in the world.\textsuperscript{227} Moreover, concerning the fundamental right to public health acknowledged by the 1946 WHO Constitution,\textsuperscript{228} Claimant’s irresponsible behaviour caused microcephaly in newborns and raised the CVDs percentages to 45%, diseases which were non-existent in the Kronian territory prior to Claimant’s operations.\textsuperscript{229}

149. Respondent decided upon the measures also bearing in mind that state responsibility may arise where activities within States cause transboundary harm.\textsuperscript{230} The Contracting Parties to the Ticadia-Kronos BIT have both ratified the 1992 Convention on the Protection and Use

\textsuperscript{224} Dörr/Schmalenbach, p.544.  
\textsuperscript{225} Dupuy et al., p.580.  
\textsuperscript{226} UN General Assembly.  
\textsuperscript{227} Facts, ¶20.  
\textsuperscript{228} WHO Constitution, p.1.  
\textsuperscript{229} Facts, ¶22.  
\textsuperscript{230} Newcombe, p.369.
of Transboundary Watercourses and International Lakes,\textsuperscript{231} which stipulates in Art. 2(5) that the measures aiming at minimizing a potential transboundary impact, shall not be postponed on the basis that no causal link has been fully proven. In this vein, Respondent took the appropriate measures to prevent any risk of negative impact that could have occurred to the neighbouring county, as the Rhea River is located only 60 miles away from the interstate border\textsuperscript{232} and the consequences of the contamination have already began to present themselves in the surrounding areas.

150. Consequently, even in the unlikely scenario that the Study’s results may be considered insufficient, Respondent’s adopted measures were absolutely necessary, since Respondent was wholly obliged to act in a precautionary manner to protect both its environment and citizens.

\textbf{b. The Decree did not discriminate unjustifiably or arbitrarily against Claimant}

151. The measures provided for in Art. 10 are also subject to the requirement of Art. 10(2)(a) that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors. As it has already been analysed in section A(c), the Decree was not a discriminatory measure. However, in the highly unlikely event that this Tribunal deems it discriminatory, this contingent discrimination was not, in any case, conducted arbitrarily or unjustifiably under Art.10(2)(a) of the Ticadia-Kronos BIT, which is modelled on the “\textit{chapeau}” of Art. XX of the GATT.

152. Discrimination in the application of a measure under Art. 10 is allowed, if there are circumstances or factors which provide a regular and predictable (i.e., non-arbitrary) basis for its discriminatory effect or support a plausible explanation for the discrimination (i.e., enable it to be justified).\textsuperscript{233}

153. The Decree is based on KEA, which dictates \textit{all} miners to protect the waters from toxic mine waste. Otherwise, they could be subject to severe penalties, fines, the immediate

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\textsuperscript{231} Facts, ¶2.
\textsuperscript{232} PO2, ¶8.
\textsuperscript{233} Gaines, p.776.
\end{flushleft}
withdrawal of environmental licenses with the forfeiture of facilities, and the obligation to compensate for the environmental damage. Therefore, the impact of the measures provided for in the Decree on Claimant are a predictable and regular outcome of its inconsistency with KEA. Additionally, Claimant was the only mining industry exploiting lindoro in Respondent’s territory. Therefore, the fact that it was the only one affected by the measures regarding lindoro’s prohibition after the establishment of the contamination of Rhea River due to lindoro’s extraction is more than justifiable.

154. Respondent issued the Decree prohibiting the exploitation of lindoro, terminating any contract and revoking every license regarding relevant conduct, since the domestic environment and health were at imminent risk. The protection of Respondent’s population has always been and remains its primary aim.
PRAYER FOR RELIEF

155. Respondent respectfully asks this Tribunal to find that:
   (1) it lacks jurisdiction over Claimant’s claims;
   (2) in any event, Claimant’s claims are inadmissible in view of the lawsuit filed before the domestic courts of Respondent; and, that
   (3) Respondent’s counterclaim is admissible;

   Should this Tribunal find that it has jurisdiction to hear Claimant’s claims, Respondent urges this Tribunal to find that:
   (4) the enactment of the Presidential Decree No. 2424 does not amount to expropriation in violation of the Ticadia-Kronos BIT;
   (5) in any case, Respondent’s measures would still be justified under Art. 10 (1) of the Ticadia-Kronos BIT.

Respectfully Submitted on September 24, 2018

By

Team Owada

On behalf of Respondent

Republic of Kronos