MEMORANDUM

To: Colleague

From: Arbitration Specialist

Date: 24 May 2024

Re: Strategy for Challenging Kronos’s Environmental Counterclaim in the Fenoscadia Limited Arbitration

You've asked for my analysis on challenging the environmental counterclaim brought by Kronos in the Fenoscadia arbitration. My assessment is that we have very strong grounds to attack the counterclaim, primarily at the jurisdictional level. This memorandum outlines a multi-layered strategy focusing on jurisdiction, admissibility, and merits, structured around the core issue you identified.

### 1. State of the Core Issue

The central legal question is: Whether the arbitral tribunal has jurisdiction over an environmental counterclaim brought by the host state (Kronos) under the relevant arbitration clause.

The foundation of our challenge rests on the principle that arbitral jurisdiction is based solely on consent. We will argue that Fenoscadia has not consented to arbitrate claims brought \*by\* Kronos.

### 2. Brief Recap of Case Theme

Our overarching theme is that Kronos is attempting to improperly expand the tribunal's mandate. The arbitration clause in the investment agreement is an instrument of investor protection, offering an asymmetrical pathway for an investor to seek recourse against the state, not the other way around. Kronos’s counterclaim is not a shield (like a set-off) but a sword—an independent claim for which no consent to arbitrate exists. It is a matter of public and tort law that belongs, if anywhere, in its domestic courts.

We will argue for a three-stage dismissal:

1. Lack of Jurisdiction: The tribunal fundamentally lacks the power to hear the claim.

2. Inadmissibility: Even if jurisdiction exists in principle, this specific claim is outside the scope of the dispute the parties agreed to arbitrate.

3. Lack of Merit: The claim is factually unsubstantiated, fails on causation, and is an attempt to retroactively penalize lawful operations.

### 3. Emphasising Strongest Evidence & Arguments

Here is a breakdown of the arguments, integrating the provided case law.

#### A. Jurisdictional Challenge: The Tribunal Lacks Consent-Based Authority

This is our strongest line of attack and should be our primary focus.

\* Argument 1: The Arbitration Clause is Asymmetrical and Lacks Consent for State Claims.

The fundamental basis of arbitration is mutual consent. The scope of that consent is defined by the arbitration agreement. Investment treaties and concession agreements typically contain asymmetrical dispute resolution clauses.

\* Evidence/Precedent: The Spain-Egypt BIT at issue in `Unión Fenosa Gas v. Egypt (IDS-567)` is a perfect example. Article 11 of that BIT states that a dispute "shall be submitted, \*at the choice of the investor\*." This language, common in such instruments, confers the right to initiate arbitration exclusively on the investor. It constitutes a standing offer by the state to arbitrate, which the investor accepts by filing a claim. There is no corresponding offer from the investor for the state to accept.

\* Application: We must argue that the arbitration clause in Fenoscadia’s concession agreement contains similar language. By its plain text, it does not grant Kronos the right to bring claims against Fenoscadia in this forum. Kronos cannot unilaterally expand the tribunal’s jurisdiction beyond the explicit terms of the parties’ agreement.

2LT Raphael Lim (AFTC), [13/9/2025 5:32 pm]

\* Argument 2: A Counterclaim Requires an Independent Jurisdictional Basis.

A counterclaim is not merely a defense but an autonomous claim seeking affirmative relief (USD 150 million). As such, it must have its own basis in the arbitration agreement. A state cannot "bootstrap" jurisdiction for its own claims onto the investor’s validly initiated arbitration.

\* Evidence/Precedent: While Unión Fenosa dealt with a state's jurisdictional \*objection\* based on corruption, the principle is the same: the tribunal's authority is strictly defined. The tribunal in that case carefully analyzed the scope of the treaty to determine its powers. We will urge our tribunal to do the same and find that its power does not extend to hearing offensive claims from the respondent state.

\* Application: We will characterize Kronos’s claim not as a set-off (a defense to reduce potential damages), but as a distinct claim sounding in tort and domestic environmental law. It seeks damages for environmental harm, health costs, and water purification—remedies far removed from the contractual dispute over the concession's termination. This requires specific consent, which is absent.

#### B. Admissibility Challenge: The Counterclaim is Outside the Scope of the Dispute

If the tribunal is hesitant to decline jurisdiction entirely, our fallback is to argue the claim is inadmissible.

\* Argument 1: The Claim Does Not Arise Directly from the Investment.

Most arbitration clauses limit jurisdiction to disputes "arising out of" or "in connection with" the investment or agreement. We can argue that Kronos’s environmental claim, while related to the \*consequences\* of the mining operation, does not arise \*directly\* from the concession agreement itself. The dispute is about alleged environmental torts, not the interpretation or breach of the contract.

\* Evidence/Precedent: The tribunal in `Cementos La Union v. Egypt (IDS-540)`, while dealing with a different issue, was careful to ground its analysis in the specific treaty obligations before it (e.g., the "effective means" standard imported via the MFN clause). This shows a disciplined approach to jurisdiction, which we should encourage. The tribunal did not assert a general power to resolve all related grievances but focused on the specific treaty protections.

\* Application: We will argue that the concession agreement governed Fenoscadia’s right to mine and its obligations related thereto. Kronos’s claim for broader societal harm is a matter of public law that should be adjudicated by domestic courts with the proper expertise and authority. Bringing it here makes the arbitral tribunal an environmental regulator and tort court, which was never the parties' intent.

\* Argument 2: Countering a Potential MFN Clause Argument.

Kronos might argue, by analogy to Cementos La Union, that an MFN clause in our agreement allows it to import a right to bring counterclaims from another treaty. This is a weak argument that we can defeat.

\* Application: We must argue that MFN clauses in investment treaties are almost universally held to apply to substantive standards of \*treatment\* for the investment (like FET, expropriation standards), not to procedural matters like dispute settlement. The right to bring a counterclaim is a procedural right that fundamentally alters the jurisdictional scope agreed to by the parties and cannot be imported via an MFN clause.

#### C. Merits Challenge: The Counterclaim is Speculative and Unproven

If we are forced to argue the merits, we have several strong points.

\* Argument 1: Failure to Establish Causation and Burden of Proof.

Kronos, as the claimant, bears the full burden of proving its allegations.

\* Evidence: The government’s own study "didn’t conclusively prove" a causal link. This is a critical failure. In arbitration, claims for damages cannot be based on speculation or conjecture. Kronos must establish, on a balance of probabilities, that (1) Fenoscadia breached a specific legal obligation (under the contract or Kronosian law), (2) this breach directly caused the specific harm alleged, and (3) the USD 150 million amount is a direct and foreseeable consequence of that breach. The inconclusive study fails at the first hurdle.

\* Argument 2: Fenoscadia Acted in Compliance with Applicable Laws.

Our position must be that Fenoscadia operated in full compliance with the environmental laws of Kronos and the environmental standards stipulated in the concession agreement \*as they existed during the operational period\*.

\* Application: Kronos cannot retroactively impose new, more stringent environmental standards and hold Fenoscadia liable for failing to meet them. The revocation of the license was based on "environmental concerns," not proven violations. This suggests a pretextual basis for the expropriation, which further weakens the legitimacy of the counterclaim.

\* Argument 3: Estoppel and Contributory Fault.

Kronos, through its regulatory bodies, presumably approved Fenoscadia’s Environmental Impact Assessments and monitored its operations. If they failed to raise these issues or enforce their own laws during the operational period, they are estopped from now seeking massive damages for the very conduct they permitted.

### 4. Damages and Relief Sought

Based on the above, we should request the following relief from the tribunal:

1. Primary Relief: A declaration that the tribunal lacks jurisdiction \*ratione voluntatis\* over the environmental counterclaim brought by Kronos, and an order dismissing it in its entirety.

2. Alternative Relief: A declaration that the environmental counterclaim is inadmissible as it falls outside the scope of the matters submitted to arbitration.

3. Further Alternative Relief: In the event the tribunal asserts jurisdiction, a full dismissal of the counterclaim on the merits for failure to prove breach, causation, and damages.

4. Costs: An order that Kronos bear all costs associated with this phase of the proceedings, as its counterclaim is an improper and unfounded attempt to expand the tribunal’s jurisdiction.

### 5. Conclusion

We have a formidable case to defeat Kronos's counterclaim at the jurisdictional threshold. Our arguments should be presented in a clear hierarchy: first, the lack of consent and asymmetrical nature of the dispute resolution clause, as supported by the principles in cases like Unión Fenosa; second, the inadmissibility of a tort-based claim in a contract-based arbitration; and only thirdly, the substantive weaknesses of the claim itself. By focusing relentlessly on the limits of consent, we can protect Fenoscadia from having to defend against a speculative and improperly filed claim.

Let's schedule a meeting to review the exact wording of the arbitration clause in the concession agreement, as that will be the linchpin of our jurisdictional challenge.