

International Centre for Settlement of Investment Disputes

Infinito Gold Ltd.

Claimant

v.

Republic of Costa Rica

Respondent

ICSID Case No. ARB/14/5

DECISION ON JURISDICTION

Arbitral Tribunal

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Bernard Hanotiau, Arbitrator

Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

Assistant to the Tribunal

Ms. Sabina Sacco

Date of dispatch to the Parties: 4 December 2017

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TABLE OF ABBREVIATIONS AND DEFINITIONS

APREFLOFAS	Asociación Preservacionista de Flora y Fauna Silvestre / Association for the Preservation of Flora and Fauna (Costa Rica)
APREFLOFAS's Petition	APREFLOFAS's Petition for Amicus Curiae Status filed on 15 September 2014
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Arias Moratorium Decree	Moratorium on open pit mining declared by President Arias on 29 April 2010
BIT	Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, signed 18 March 1998, entered into force on 29 September 1999
C-[#]	Claimant's Exhibit
C-CM Jur.	Claimant's Counter-Memorial on Jurisdiction dated 7 July 2016
C-Costs Jur.	Claimant's Statement of Costs on Jurisdiction dated 10 March 2017
C-Mem. Merits	Claimant's Memorial on the Merits dated 23 December 2015
C-Rej. Jur.	Claimant's Rejoinder on Jurisdiction and Observations on Non-Disputing Party's Submission dated 16 December 2016
CL-[#]	Claimant's Legal Authority
CER-[Name]	Claimant's Expert Report
CER-Calzada 1	First Expert Report of Ana Virginia Calzada dated 5 July 2016
CER-Calzada 2	Second Expert Report of Ana Virginia Calzada dated 10 December 2016
CER-FTI Consulting 1	First Expert Report of Howard Rosen and Chris Milburn of FTI Consulting Inc. dated 23 December 2015
CER-FTI Consulting 2	Second Expert Report of Howard Rosen and Chris Milburn of FTI Consulting Inc. dated 5 July 2016
CER-Hernández-Rojas 1	First Expert Report of Rubén Hernández and Erasmo Rojas dated 5 July 2016
CER-Hernández-Rojas 2	Second Expert Report of Rubén Hernández and Erasmo Rojas dated 14 December 2016
CER-RPA 1	First Expert Report of Graham Clow and Brenna Scholey of Roscoe Postle Associates Inc. ("RPA") dated 23 December 2015
CWS-[Name]	Claimant's Witness Statement
CWS-Hernández 1	First Witness Statement of Juan Carlos Hernández dated 23 December 2015

CWS-Hernández 2	Second Witness Statement of Juan Carlos Hernández dated 5 July 2016
CWS-Hernández 3	Third Witness Statement of Juan Carlos Hernández dated 16 December 2016
CWS-Rauguth 1	First Witness Statement of Erich Rauguth dated 22 December 2015
Chinchilla Moratorium Decree	Decree issued by President Chinchilla on 8 May 2010 which expanded the Arias Moratorium Decree by also prohibiting all mining activities using cyanide and mercury in the processing of ore
Concession or 2008 Concession	Industrias Infinito's exploitation concession granted by President Arias and MINAE on 21 April 2008
DCF	Discounted Cash Flow Method of calculating financial loss
DGM	Directorate of Geology and Mines
EIA	Environmental Impact Assessment
FET	Fair and equitable treatment
Hearing on Jurisdiction	Hearing on Jurisdiction held 19-20 January 2017
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Las Crucitas Project	Gold mining project in the area of Las Crucitas, in Costa Rica
MINAE	Ministry of the Environment and Energy
Murillo Amparo	Constitutional challenge on environmental grounds filed on 1 April 2002 by environmental activists Carlos and Diana Murillo against the resolution that granted Industrias Infinito's 2002 concession to mine
NDP Submission or APREFLOFAS's Submission	Non-Disputing Party Written Submission of Asociación Preservacionista de Flora y Fauna Silvestre ("APREFLOFAS") dated 19 July 2016
NDP-[#]	Non-Disputing Party Exhibit
R-[#]	Respondent's Exhibit
R-Costs Jur.	Respondent's Statement of Costs on Jurisdiction dated 10 March 2017
R-Mem. Jur.	Respondent's Memorial on Jurisdiction dated 8 April 2016
R-Reply Jur.	Respondent's Reply on Jurisdiction and Observations on Non-Disputing Party's Submission dated 1 October 2016

RL-[#]	Respondent's Legal Authority
RER-[Name]	Respondent's Expert Report
RER-Ubico 1	First Expert Report of Carlos Ubico filed on 8 April 2016
RER-Ubico 2	Second Expert Report of Carlos Ubico dated 30 September 2016
RWS-[Name]	Respondent's Witness Statement
SETENA	National Technical Environmental Secretariat
SINAC	National System of Areas Conservation
TCA	Contentious Administrative Tribunal
Tr. Day [#] (ENG/SPA), [page:line] [Speaker(s)]	Transcript of the Hearing on Jurisdiction (as revised by the Parties on 27 February 2017)
Tribunal	Arbitral Tribunal constituted on 29 September 2014
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969
2002 Moratorium	Moratorium on open-pit mining decreed by President Abel Pacheco on 5 June 2002
2005 RFA	The Claimant's first Request for Arbitration of 3 June 2005
2008 Concession or Concession	Industrias Infinito's exploitation concession granted by President Arias and MINAE on 21 April 2008
2010 Constitutional Chamber Decision	Constitutional Chamber of the Costa Rican Supreme Court's decision denying UNOVIDA's and FECON'S <i>amparo</i> petitions and lifting injunction against forest-clearing operations
2010 Moratorium or 2010 Executive Moratorium	Chinchilla Moratorium Decree together with the Arias Moratorium Decree
2010 TCA Decision	Decision by the TCA on the annulment request file by Mr. Lobos and APREFLOFAS which declared that all requests for annulment had been granted. Oral summary of decision provided on 24 November 2010, written decision was provided on 14 December 2010
2011 Legislative Moratorium	Amendment to the Mining Code by the Costa Rican legislature, which entered into force on 10 February 2010
2011 Administrative Chamber Decision	Administrative Chamber of the Costa Rican Supreme Court's decision of 30 November 2011, denying Industrias Infinito's cassation request and upholding the main conclusions of the 2010 TCA Decision
2012 MINAE Resolution	MINAE Resolution No. 0037 of 9 January 2012
2013 Constitutional Chamber Decision	Constitutional Chamber of the Costa Rican Supreme Court's decision of 19 June 2013, dismissing Industrias Infinito's

	unconstitutionality challenge deeming it inadmissible on account of the fact that the Administrative Chamber had already issued its ruling
2015 TCA Damages Decision	TCA decision of 24 November 2015 which determined that Costa Rica, the SINAC and Industrias Infinito should pay compensation of USD 6.4 million for environmental damage

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, signed 18 March 1998, entered into force on 29 September 1999 (the “BIT” or “Treaty”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “ICSID Convention”).

2. The Claimant is Infinito Gold Ltd. (“Infinito” or the “Claimant”), a company incorporated under the laws of the Province of British Columbia, Canada. The Claimant is represented in this arbitration by:

Mr. John Terry
Ms. Myriam M. Seers
Mr. Ryan Lax
Ms. Aria Laskin
Torys LLP
79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, ON
Canada, M5K 1N2

3. The Respondent is the Republic of Costa Rica (“Costa Rica” or the “Respondent”). The Respondent is represented in this arbitration by:

Mr. Paolo Di Rosa
Mr. Raúl Herrera
Mr. Csaba Rusznak
Ms. Natalia Giraldo-Carrillo
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
United States of America

Mr. Dmitri Evseev
Mr. Patricio Grané Labat
Arnold & Porter Kaye Scholer LLP
Tower 42, 25 Old Broad Street
London, EC2N1Q
United Kingdom

Ms. Adriana González
Ms. Arianna Arce
Ms. Francinie Obando
Ms. Marisol Montero
Ministerio de Comercio Exterior de Costa Rica
Plaza Tempo, sobre la Autopista Próspero Fernández, contiguo al Hospital Cima
Piso 3
San José

Republic of Costa Rica

4. The Claimant and the Respondent are collectively referred to as the “Parties.”
5. This dispute arises out of the development of a gold mining project in the area of Las Crucitas, in Costa Rica (the “Las Crucitas Project”).
6. The present decision concerns the Respondent’s preliminary objections.

II. PROCEDURAL HISTORY

A. REGISTRATION AND CONSTITUTION OF THE TRIBUNAL

7. On 6 February 2014, ICSID received a request for arbitration dated also 6 February 2014 from the Claimant against Costa Rica, together with exhibits C-001 to C-008 (the “Request for Arbitration”).
8. On 4 March 2014, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”).
9. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed to constitute the Tribunal as follows: three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties.
10. The Tribunal is composed of Gabrielle Kaufmann-Kohler, a national of Switzerland, President, appointed by agreement of the Parties; Bernard Hanotiau, a national of Belgium, appointed by the Claimant; and Brigitte Stern, a national of France, appointed by the Respondent.
11. On 29 September 2014, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Luisa Fernanda Torres, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
12. On 29 September 2014, the President of the Tribunal proposed to the Parties the appointment of an assistant to the Tribunal. Both Parties confirmed their agreement on that same day.
13. On 9 December 2014, with the approval of the other Members of the Tribunal, the President of the Tribunal proposed that Ms. Sabina Sacco be appointed as the assistant to the Tribunal. On 12 January 2015, both Parties approved the appointment.

B. FIRST SESSION

14. In accordance with ICSID Arbitration Rule 13(1), and in accordance with the Parties' agreement to extend the 60-day deadline set forth in Rule 13(1), the Tribunal held a first session with the Parties on 22 January 2015 by telephone conference.
15. Following the first session, on 17 February 2015, the President of the Tribunal issued Procedural Order No. 1 on behalf of the Tribunal. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules are those in effect from 10 April 2006, that the procedural languages are English and Spanish, and that the place of the proceeding is Washington, DC. Procedural Order No. 1 also sets out the Procedural Calendar for the jurisdictional phase of these proceedings.

C. PARTIES' WRITTEN SUBMISSIONS AND PROCEDURAL APPLICATIONS

16. On 17 June 2015, following a request from the Claimant agreed upon by the Respondent, the Tribunal amended the Procedural Calendar ("Revision No. 1"). According to the revised Procedural Calendar, the Claimant's Memorial on the Merits was due on 10 July 2015.
17. On 13 July 2015, the Tribunal wrote to the Parties observing that the Claimant had failed to file its Memorial on the Merits on the due date and inviting explanations from the Claimant, to be followed by observations from the Respondent.
18. On 15 July 2015, the Claimant's counsel provided explanations relating to its inability to obtain client instructions as a result of the resignation of all of the Claimant's directors and officers. The Claimant's counsel requested a temporary suspension of the Procedural Calendar.
19. Following an invitation from the Tribunal, on 24 July 2015, the Respondent opposed the suspension request, and asked the Tribunal to declare the Claimant in default under ICSID Arbitration Rule 26(3). In addition, the Respondent sought an order for discontinuance of the proceeding under ICSID Arbitration Rule 44 (the "Respondent's Request for Discontinuance"). In the alternative, the Respondent sought an order for security for costs (the "Respondent's Request for Security for Costs") coupled with a revision to the Procedural Calendar. The Respondent's submission was accompanied by one legal authority.
20. On 27 July 2015, the Tribunal invited the Claimant to provide by 10 August 2015 observations on the Respondent's Requests for Discontinuance and Security for Costs.
21. On 10 August 2015, the Claimant's counsel requested an extension of the deadline to file its observations, citing again inability to obtain client instructions as a result of the Claimant's lack of directors and management.
22. On 14 August 2015, the Respondent stated that it did not consent to the extension request, and insisted that the proceeding be discontinued "immediately" pursuant to

ICSID Arbitration Rule 44, on grounds of lack of opposition from the Claimant. The Respondent also raised a further issue relating to the transfer of certain property in Costa Rica.

23. On 20 August 2015, the Tribunal granted the Claimant an extension until 1 September 2015 to provide observations on the Respondent's Requests for Discontinuance and Security for Costs of 24 July 2015, and the transfer of property issue raised in the Respondent's letter of 14 August 2015. On 1 September 2015, the Claimant's counsel informed the Tribunal that it still was not in a position to receive client instructions to respond, and reiterated the request for a temporary suspension of the Procedural Calendar. On 1 September 2015, the Respondent provided further observations on the matter.

24. On 8 September 2015, the Tribunal gave the following directions to the Parties:

[...]

At this stage, the Tribunal is of the view that it cannot order the discontinuance requested by the Respondent. This request has been made under Rule 44 of the ICSID Arbitration Rules, which addresses discontinuance of the proceedings at the request of a party. According to the Explanatory Notes to Rule 44 in the 1968 version of the Rule (which is identical to its 2006 version), 'under this Rule the agreement (express or implied) of both parties must be secured for discontinuance' (Note C). The Claimant has not consented to the discontinuance, neither expressly nor impliedly. To the contrary, although it has not made a formal objection, it has stated that 'a discontinuance of the proceeding [...] would cause significant prejudice to the Claimant.' The Tribunal understands this to be an implied objection.

That being said, the present state of uncertainty cannot last indefinitely. As noted in the Explanatory Notes cited above, 'this Rule provides that if either party wishes to discontinue the proceeding unilaterally, the acquiescence of the other party must be obtained; but, so as not to permit such party to block a discontinuance by inaction, intentional or unintentional, a time limit is to be set for its response' (Note B). The Tribunal already set one time limit for this purpose, of which the Claimant now requests an extension. Given the special circumstances surrounding the Claimant's corporate organization and management, the Tribunal is willing to extend this deadline for an additional three weeks, *i.e.* until 29 September 2015. If by then the Claimant does not indicate clearly whether it wishes to pursue this arbitration and present a formal objection to the discontinuance requested by the Respondent, the Tribunal will apply Rule 44 and deem that the Claimant has acquiesced in the discontinuance.

The Respondent's request for security for costs is deferred until the Tribunal's final ruling on the discontinuance, if at that stage the request remains applicable.

25. On 29 September 2015, the Claimant filed a submission in response to the Respondent's Requests for Discontinuance and Security for Costs, and renewed its request for a temporary suspension of the Procedural Calendar. This submission

was accompanied by exhibits C-008 to C-012,¹ and legal authorities CL-001 to CL-014.

26. On 2 October 2015, the Tribunal dismissed the Respondent's Requests for Discontinuance and Security for Costs. The Tribunal further invited the Parties to confer and submit by 16 October 2015 a joint proposal for a revised Procedural Calendar, or individual proposals if an agreement was not possible.
27. Following various requests for extension, on 6 November 2015, each Party filed a communication to the Tribunal setting forth its position concerning the Procedural Calendar. The Claimant submitted an additional communication on 7 November 2015, and the Respondent on 9 November 2015.
28. On 10 November 2015, the Tribunal ruled on the Parties' disagreement over the timetable, and established a new Procedural Calendar ("Revision No. 2").
29. On 23 December 2015, the Claimant filed its Memorial on the Merits, accompanied by exhibits C-001 to C-350;² legal authorities CL-001 to CL-100;³ two (2) witness statements, by Mr. Eric Rauguth and Mr. Juan Carlos Hernández, respectively; and two (2) expert reports by FTI Consulting Inc. and Roscoe Postle Associates Inc., respectively.⁴
30. On 14 January 2016, the Claimant informed the Tribunal that it had entered into a funding agreement with Vannin Capital PCC in connection with the present proceeding. On 18 January 2016, the Tribunal informed the Parties that no conflict arose for any of the Members of the Tribunal as a result of this arrangement. It further invited the Respondent to provide any observations it may have in connection with the Claimant's third party funding arrangement within one week. No observations were received from the Respondent.
31. On 21 March 2016, following a request from the Respondent agreed upon by the Claimant, the Tribunal amended the Procedural Calendar ("Revision No. 3").
32. On 8 April 2016, the Respondent filed its Memorial on Jurisdiction,⁵ accompanied by exhibits R-001 to R-117; legal authorities RL-001 to RL-131; and one (1) expert report by Mr. Carlos Ubico.

¹ The document designated as C-008 differs from another document previously submitted using the same numerical designation. *See supra*, ¶ 7.

² The same documents designated as exhibits C-001 to C-008 had been previously submitted. *See supra*, ¶¶ 7 and 25.

³ The documents designated as CL-001 to CL-014 in this submission differ from those previously submitted under the same numerical designation. *See supra*, ¶ 25.

⁴ On 26 December 2015, the Claimant submitted a Revised CER-RPA 1 and a Revised CER-FTI Consulting 1. On 6 January 2016, with the Respondent's agreement, the Claimant submitted a Revised Memorial on the Merits.

⁵ On 9 May 2016, with the Claimant's agreement, the Respondent submitted a Revised Memorial on Jurisdiction.

33. Following a prior exchange of requests for document production among the Parties, on 20 May 2016, the Respondent submitted to the Tribunal its objections to the Claimant's requests for document production. On that same date, the Claimant informed the Tribunal that it had no objection to the Respondent's single request for document production.
34. On 27 May 2016, the Claimant submitted its replies to the Respondent's objections on document production, together with exhibits C-352 to C-354.
35. On 10 June 2016, the Tribunal issued Procedural Order No. 3 on document production.
36. On 7 July 2016, the Claimant filed its Counter-Memorial on Jurisdiction, accompanied by exhibits C-351 to C-423; legal authorities CL-101 to CL-211;⁶ one (1) witness statement by Mr. Juan Carlos Hernández; and three (3) expert reports by Ms. Ana Virginia Calzada, Mr. Rubén Hernández together with Mr. Erasmo Rojas, and FTI Consulting Inc., respectively.
37. On 4 August 2016, following a request from the Respondent agreed upon by the Claimant, the Tribunal once more amended the Procedural Calendar ("Revision No. 4").
38. On 30 September 2016, the Respondent informed the Tribunal that the Parties had agreed on a short extension for the submission of its Reply on Jurisdiction and Observations on the Non-Disputing Party Submission, which was due that day.
39. On 1 October 2016, the Respondent filed its Reply on Jurisdiction and Observations on the Non-Disputing Party Submission, accompanied by exhibits R-118 to R-145; legal authorities RL-140 to RL-181; and one (1) expert report by Mr. Carlos Ubico.
40. On 16 December 2016, the Claimant filed its Rejoinder on Jurisdiction and Observations on the Non-Disputing Party Submission, accompanied by exhibits C-075 (revised), C-424 to C-444; legal authorities CL-212 to CL-238; one (1) witness statement, by Mr. Juan Carlos Hernández; and two (2) expert reports by Ms. Ana Virginia Calzada, and Mr. Rubén Hernández together with Mr. Erasmo Rojas, respectively.

D. NON-DISPUTING PARTY APPLICATION AND SUBMISSION

41. On 15 September 2014, prior to the constitution of the Tribunal, the *Asociación Preservacionista de Flora y Fauna Silvestre* ("APREFLOFAS") filed a "Petition for Amicus Curiae Status," together with exhibit P-1 ("APREFLOFAS's Petition").
42. On 20 February 2015, the Tribunal informed APREFLOFAS that (i) it had received APREFLOFAS's Petition upon constitution; (ii) pursuant to ICSID Arbitration Rule

⁶ The same documents designated as exhibits C-351 to C-354 and legal authorities CL-101 to CL-109 had been previously submitted. See *infra*, ¶ 45 and *supra*, ¶ 34.

37(2), it had invited the Parties to provide observations; and (iii) as a result of the Procedural Calendar set forth for such observations, a ruling on the Petition should not be expected until November 2015.

43. On 3 December 2015, APREFLOFAS filed a request for the Tribunal to rule on its Petition of 15 September 2014.
44. On 4 December 2015, the Tribunal informed APREFLOFAS that as a result of modifications to the Procedural Calendar, the Parties' observations on APREFLOFAS's Petition had been delayed until April 2016. In consequence, the Tribunal now expected to issue its ruling on APREFLOFAS's Petition in May 2016.
45. On 29 April 2016, the Respondent filed a Submission on APREFLOFAS's Petition, together with legal authorities RL-132 to RL-139. On that same date, the Claimant filed its Submission on APREFLOFAS's Petition, together with exhibit C-351, and legal authorities CL-101 to CL-109.
46. On 1 June 2016, the Tribunal issued Procedural Order No. 2 on APREFLOFAS's Petition. The Tribunal authorized APREFLOFAS to file a written submission, and granted it access to selected portions of the Parties' pleadings, subject to confidentiality restrictions. On 7 June 2016, both Parties consented to the publication of Procedural Order No. 2.
47. On 8 June 2016, APREFLOFAS received the pleading excerpts authorized by the Tribunal.
48. On 19 July 2016, APREFLOFAS filed its Non-Disputing Party Submission, together with exhibits NDP-001 to NDP-013 ("APREFLOFAS's Submission" or the "Non-Disputing Party Submission").
49. On 18 August 2016, following a request from the Tribunal, APREFLOFAS submitted translations of certain exhibits filed with its Non-Disputing Party Submission. Those translations were designated as exhibits NDP-014 to NDP-020.
50. The Parties presented their Observations on APREFLOFAS's Submission together with their respective Reply and Rejoinder on Jurisdiction.⁷

E. ORAL PROCEDURE

51. Following an initial proposal from the Tribunal, on 4 January 2017, the Parties presented an agreed submission concerning the procedural rules for the hearing on jurisdiction (the "Hearing on Jurisdiction"). Among others, the Parties agreed that no witness or expert examinations would take place, and that the Hearing on Jurisdiction would be conducted in English only, with a Spanish translation of the transcript to follow thereafter. The Parties further confirmed their agreement to dispense with the pre-hearing organizational call.

⁷ *Supra*, ¶¶ 39-40.

52. On 9 January 2017, the Tribunal issued Procedural Order No. 4 concerning the organization of the Hearing on Jurisdiction.
53. On 18 January 2017, following an agreement of the Parties, the Respondent submitted supplemental translations of two exhibits already on the record (R-016, and a translation of C-014, designated R-146).
54. On 18 January 2017, following an agreement of the Parties, the Claimant submitted one additional legal authority into the record, designated as CL-239.
55. The Hearing on Jurisdiction was held in New York City⁸ from 19 to 20 January 2017. The following persons were present:

Tribunal:

Prof. Gabrielle Kaufmann-Kohler	President
Prof. Bernard Hanotiau	Arbitrator
Prof. Brigitte Stern	Arbitrator

ICSID Secretariat:

Ms. Luisa Fernanda Torres	Secretary of the Tribunal
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For the Claimant:

Mr. John Terry	Torys LLP
Ms. Myriam Seers	Torys LLP
Mr. Ryan Lax	Torys LLP
Ms. Aria Laskin	Torys LLP
Mr. Erich Rauguth	Infinito Gold Ltd.
Mr. Juan Carlos Hernández	Infinito Gold Ltd.
Mr. Erber Hernández	Torys LLP (paralegal)

For the Respondent:

Mr. Paolo Di Rosa	Arnold & Porter Kaye Scholer LLP
Mr. Dmitri Evseev	Arnold & Porter Kaye Scholer LLP
Mr. Patricio Grané Labat	Arnold & Porter Kaye Scholer LLP
Ms. Natalia Giraldo-Carrillo	Arnold & Porter Kaye Scholer LLP
Ms. Daniela Páez	Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena	Arnold & Porter Kaye Scholer LLP
Ms. Adriana González	Ministerio de Comercio Exterior
Ms. Arianna Arce	Ministerio de Comercio Exterior

Court Reporter:

Mr. David Kasdan	B&B Reporters
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56. Pursuant to the Parties' agreement, no witness or expert examinations took place during the Hearing on Jurisdiction.
57. During the Hearing on Jurisdiction, each Party submitted a Core Bundle, and demonstrative exhibits designated as follows:

⁸ In accordance with Procedural Order No. 1, the venue for the Hearing on Jurisdiction was established following consultation with, and agreement of, the Parties. See Respondent's email (5 August 2016); Claimant's email (8 August 2016).

- Claimant: C-445
- Respondent: RX-001 to RX-003

F. POST-HEARING PROCEDURE

58. Having received leave from the Tribunal during the Hearing on Jurisdiction,⁹ on 9 February 2017, the Claimant submitted an additional translation of exhibit C-247.
59. Pursuant to the Parties' agreement reflected in Procedural Order No. 4, no Post-Hearing Submissions on Jurisdiction were filed by the Parties.
60. On 27 February 2017, the Parties submitted their agreed corrections to the transcript for the Hearing on Jurisdiction.
61. On 10 March 2017, the Parties filed their respective Statements of Costs for the jurisdictional phase.
62. On 18 April 2017, a Spanish translation of the transcript of the Hearing on Jurisdiction was provided to the Parties, as required by Procedural Order No. 4. On that same day, the Parties informed the Tribunal that they had agreed to dispense with corrections to this translation.

III. FACTS RELEVANT TO JURISDICTION

63. The facts summarized below are provided to give context to the Parties' jurisdictional arguments. The Tribunal has assessed these facts to the extent necessary to determine the issues of jurisdiction and admissibility raised by the Parties. The Tribunal will engage in a more comprehensive assessment of the facts during the merits phase, if appropriate.

A. ORIGINS AND DEVELOPMENT OF THE LAS CRUCITAS PROJECT

64. On 7 June 1993, Vientos de Abangares, S.A. (a company incorporated by a Canadian geologist) obtained an exploration permit for the Las Crucitas Project area.¹⁰
65. On 16 June 1993, Vientos de Abangares, S.A. submitted an Environmental Impact Assessment ("EIA"), which was approved by the National Technical Environmental Secretariat (the "SETENA") on 1 October 1993.¹¹

⁹ Tr. Day 1 (ENG), 302:10-22 (Ms. Seers, President of the Tribunal).

¹⁰ CWS-Hernández 1, ¶¶ 68-71; R-Mem. Jur., ¶ 43; Exh. **C-0022**, Exploration Permit from the Ministry of Natural Resources, Energy and Mines (7 June 1993).

¹¹ CWS-Hernández 1, ¶ 70.

66. In January 1996, the exploration permit was transferred to Placer Dome de Costa Rica, S.A. (a subsidiary of the Canadian mining company Placer Dome International), and its term was extended to 18 September 1999.¹²
67. In 1997, President Figueres and the Minister of the Environment issued a decree that declared mining to be an industry of national convenience.¹³
68. In 1998, Placer Dome de Costa Rica S.A. was sold to Lyon Lake Mines, Ltd., and its name was changed to Industrias Infinito S.A. (“Industrias Infinito”).
69. Between 1993 and 2000, Industrias Infinito allegedly performed drilling and studies to prove the existence and extent of the gold deposit. In particular:
 - a. In 1996, Industrias Infinito completed an extensive pre-feasibility study,¹⁴ which was accompanied by several reports and reviews on the viability of the project.¹⁵
 - b. Industrias Infinito also commissioned other studies and reports addressing the environmental and socio-economic impact of the project.¹⁶
 - c. In 1999, Industrias Infinito completed a comprehensive feasibility study that allegedly proved the existence of a substantial gold deposit in the Las Crucitas area.¹⁷ According to the Claimant, under the Mining Code this gave Industrias Infinito the exclusive right to obtain an exploitation concession.¹⁸
 - d. In December 1999, Industrias Infinito submitted the feasibility study to the Directorate of Geology and Mines (“DGM”), a subdivision of the Ministry of the

¹² C-Mem. Merits, ¶ 58; CWS-Hernández 1, ¶ 72; Exh. **C-0046**, Resolution No. 193 of the Directorate of Geology and Mines (2 April 1998); R-Mem. Jur., ¶ 43.

¹³ C-Mem. Merits, ¶ 56; Exh. **C-0042**, Forestry Law Regulation, *La Gaceta* No. 16 (23 January 1997).

¹⁴ CWS-Rauguth 1, ¶¶ 31-32; Exh. **C-0040**, Placer Dome Explorations, Cerro Crucitas Project, Pre-Feasibility Study (December 1996).

¹⁵ CWS-Rauguth 1, ¶ 34; Exh. **C-0026**, Placer Dome de Costa Rica, Report on Black Sewage (Septic Tank) Treatment System Operation and Maintenance (September 1995); Exh. **C-0027**, Placer Dome Inc., Preliminary Metallurgical Evaluation (September 1995); Exh. **C-0032**, Placer Dome Inc., Gravity Concentration/Cyanide Leaching and Gravity Centration/Flotation Tests on Three Rock Type Composites (July 1996); Exh. **C-0033**, Hay & Company Consultants Inc., Sediment Reconnaissance Survey: Cerro Crucitas Project (August 1996); Exh. **C-0041**, Placer Dome de Costa Rica, Phase 1 Assessment of Potential for Acid Rock Drainage at the Cerro Crucitas Project, Costa Rica (December 5, 1996); Exh. **C-0043**, Bruce Geotechnical Consultants Inc., Cerro Crucitas-Tailing Dam Assessment Area B Tailing and Waste Rock Materials Balance (28 August 1997).

¹⁶ CWS-Rauguth 1, ¶¶ 35-37; Exh. **C-0047**, Annex 4 to Exploration Permit No. 7339: Socio-Economic Study; Exh. **C-0025**, ICAPD Socio-Economic Impact Study (July 1995); Exh. **C-0030**, ICAPD Social Impact Study (December 1995).

¹⁷ CWS-Rauguth 1, ¶ 38; Exh. **C-0052**, Placer Dome, Feasibility Study (Executive Summary) (September 1999).

¹⁸ C-Mem. Merits, ¶ 68, citing CWS-Hernández 1, ¶¶ 43, 50, 80, 87, and Exh. **C-0015**, Mining Code, Law No. 6797 (4 October 1982), Art. 26.

Environment and Energy (“MINAE”), and requested an exploitation concession to develop a surface gold mine at Las Crucitas.¹⁹

70. In May 2000, the Claimant (then known as Vanessa Ventures Ltd.) acquired Industrias Infinito.²⁰
71. Between 2000 and 2001, Industrias Infinito continued the exploration work and obtained an updated resource estimate.²¹ The Claimant also alleges that it launched a reforestation initiative, planted 20,000 trees,²² and built relationships with local communities and governments.²³
72. On 7 June 2001, the DGM approved the feasibility study, including the socio-economic and environmental impacts of the project.²⁴
73. On 17 December 2001, Industrias Infinito obtained its exploitation concession, with a ten-year term subject to extensions and one renewal, allowing it to extract, process and sell the minerals from the Las Crucitas gold deposit.²⁵ The concession became effective on 30 January 2002, and is hereinafter referred to as the “2002 Concession.”²⁶ However, according to the Claimant, the exploitation activities could not begin until an EIA for the project was approved by the SETENA.²⁷ According to the Respondent, the validity of the 2002 Concession was conditioned upon the subsequent approval of an EIA.²⁸
74. In March 2002, Industrias Infinito submitted its EIA to the SETENA for its approval.²⁹

B. MEASURES THAT AFFECTED THE LAS CRUCITAS PROJECT

75. On 13 February 2002, Mr. Abel Pacheco, at the time a presidential candidate, filed a challenge before the MINAE, requesting the revocation of Industrias Infinito’s 2002 Concession, alleging that it was against the national interest and endangered the

¹⁹ CWS-Hernández 1, ¶ 74; Exh. **C-0052**, Feasibility Study - Executive Summary, Placer Dome (September 1999); Exh. **C-0053**, Request for Exploitation Concession, Industrias Infinito S.A. (13 December 1999).

²⁰ CWS-Rauguth 1, ¶ 63.

²¹ CWS-Rauguth 1, ¶¶ 64-76.

²² CWS-Rauguth 1, ¶ 72; Exh. **C-0081**, Vanessa Ventures Press Release, “Vanessa Update on Crucitas (Costa Rica)” (14 June 2002); Exh. **C-0220**, Corporate Presentation, Infinito Gold Ltd. (March 2010).

²³ CWS-Rauguth 1, ¶¶ 77-80; Exh. **C-0075**, Environmental Impact Assessment (March 2002).

²⁴ CWS-Hernández 1, ¶ 80; Exh. **C-0064**, Resolution No. 364-2001 (7 June 2001).

²⁵ CWS-Hernández 1, ¶ 83; Exh. **C-0069**, Resolution No. R-578-2001-MINAE (17 December 2001).

²⁶ R-Mem. Jur., ¶ 49; Exh. **C-0069**, Resolution No. R-578-2001-MINAE (17 December 2001).

²⁷ C-Mem. Merits, ¶ 97.

²⁸ R-Mem. Jur., ¶ 49.

²⁹ CWS-Hernández 1, ¶ 96.

constitutional right to a healthy and ecologically balanced environment.³⁰ Due to similar challenges before the Supreme Court, the MINAE deferred its decision on this challenge.

76. On 1 April 2002, environmental activists Carlos and Diana Murillo filed an *amparo* petition (constitutional challenge) against the resolution that granted Industrias Infinito's 2002 Concession on environmental grounds (the "Murillo Amparo").
77. On 8 May 2002, Mr. Abel Pacheco took office as President of Costa Rica. On 5 June 2002, President Pacheco declared an indefinite moratorium on open-pit mining (the "2002 Moratorium").³¹ It is undisputed that the 2002 Moratorium operated prospectively, and did not affect acquired (vested) rights.³²
78. On 12 August 2002, Río Minerales S.A. filed an *amparo* petition against the 2002 Moratorium, arguing that it violated the principles of legality, judicial certainty and non-retroactivity, as well as its vested rights. On 20 August 2002, the Constitutional Chamber of the Supreme Court declared that the 2002 Moratorium did not violate the petitioner's rights and was not retroactive in light of its grandfathering provision.³³
79. The Claimant alleges that this decision confirmed that Industrias Infinito's rights (in particular, the 2002 Concession) were not affected by the 2002 Moratorium.³⁴ Despite this, the SETENA had not yet ruled on Industrias Infinito's EIA, which had been requested in March 2002. For this reason, on 10 March 2003, Industrias Infinito filed an *amparo* petition requesting the Constitutional Chamber to compel the SETENA to issue its decision on Industrias Infinito's EIA.³⁵
80. The next day, on 11 March 2003, the SETENA denied approval of the EIA, on the grounds that it required a declaration by the Executive that the project was in the national interest, which was lacking, and that the request showed certain technical deficiencies.³⁶ However, it did not disclose the reports which had served as the basis for its conclusions. As a result, on that same day Industrias Infinito appealed this decision before the MINAE.³⁷ The MINAE agreed with Industrias Infinito, and on 20 October 2003 ordered the SETENA to conduct a new evaluation of Industrias Infinito's application.³⁸

³⁰ Exh. **R-0001**, Request for Review, Abel Pacheco de la Espriella (13 February 2002).

³¹ Exh. **C-0080**, Executive Decree No. 30477-MINAE (5 June 2002).

³² C-CM Jur., ¶ 63; Exh. **C-0080**, Executive Decree No. 30477-MINAE (5 June 2002).

³³ Exh. **C-0085**, Supreme Court (Constitutional Chamber), Decision (20 August 2002).

³⁴ C-CM Jur., ¶ 64.

³⁵ CWS-Hernández 1, ¶ 119; Exh. **R-0006**, Request for Amparo, Industrias Infinito S.A. (10 March 2003).

³⁶ Exh. **C-0097**, Resolution No. 272-2003-SETENA (11 March 2003).

³⁷ R-Mem. Jur., ¶ 58.

³⁸ R-Mem. Jur., ¶ 60; Exh. **C-0106**, Resolution No. 569-2003-MINAE (20 October 2003).

81. Industrias Infinito also filed on 21 April 2003 a second *amparo* petition with the Constitutional Chamber against the SETENA for violation of due process, requesting disclosure of the reports.³⁹ The Constitutional Chamber ultimately agreed with Industrias Infinito and, on 25 August 2004, it compelled the SETENA to provide copies of any internal and external assessments of the EIA.⁴⁰
82. In the meantime, on 4 April 2003, the Claimant filed its first Notice of Dispute with the Ministry of Commerce.⁴¹
83. On 26 November 2004, the Constitutional Chamber granted the Murillo Amparo. Specifically, it held that Industrias Infinito's 2002 Concession violated Article 50 of the Constitution, which guarantees the right to a healthy and ecologically balanced environment, because that concession was granted prior to the approval of the EIA. It thus annulled the 2002 Concession, "*todo sin perjuicio de lo que determine el estudio de impacto ambiental*,"⁴² which the Respondent translates as "without prejudice to what the environmental impact assessment **may determine**,"⁴³ while the Claimant translates as "without prejudice to the findings of the Environmental Impact Assessment."⁴⁴
84. On 3 June 2005, the Claimant filed its first Request for Arbitration ("2005 RFA").
85. On 12 December 2005, the SETENA approved Industrias Infinito's EIA.⁴⁵
86. In May 2006, President Óscar Arias took office.
87. On 4 December 2006, Industrias Infinito filed a request for clarification concerning the decision of 26 November 2004, asking the Constitutional Chamber to confirm that the annulment of the 2002 Concession had been "relative" as opposed to "absolute" and therefore subject to cure (*saneamiento*).⁴⁶
88. On 7 June 2007, the Constitutional Chamber of the Supreme Court concluded that the requested clarification was a matter of administrative law and that it had no

³⁹ Exh. **R-0008**, Second Amparo Proceeding (21 April 2003).

⁴⁰ CWS-Hernández 1, ¶ 124; Exh. **C-0113**, Supreme Court (Constitutional Chamber), Decision (25 August 2004).

⁴¹ Exh. **R-0007**, Letter from MINAE to SETENA, DM-684-03, PREIA 002-03 (4 April 2003) and Letter from Vannessa Ventures Ltd. to Ministry of Commerce (4 April 2003).

⁴² Exh. **C-0116**, Supreme Court (Constitutional Chamber), Decision (26 November 2004).

⁴³ R-Mem. Jur., ¶ 62 (emphasis in original).

⁴⁴ C-CM Jur., ¶ 67.

⁴⁵ Exh. **C-0134**, Resolution No. 3638-2005-SETENA (12 December 2005).

⁴⁶ RER-Ubico 1, ¶ 76.

jurisdiction to opine on it, but clarified that the only prerequisite for granting the concession was the approval of the EIA.⁴⁷

89. On 31 October 2007, the MINAE granted Mr. Pacheco's 2002 challenge against Industrias Infinito's 2002 Concession, on the basis of the Constitutional Chambers' 2004 finding that the 2002 Concession violated Article 50 of the Constitution.⁴⁸
90. On 1 January 2008, the new Code of Contentious Administrative Procedure (which created the Contentious Administrative Tribunal ("TCA")) entered into force.⁴⁹
91. On 4 February 2008, the SETENA approved a revised EIA.⁵⁰
92. On 18 March 2008, President Arias issued a decree repealing the 2002 Moratorium, which entered into force on 4 June 2008.⁵¹
93. On 21 April 2008, President Arias and the MINAE granted Industrias Infinito an exploitation concession (the "2008 Concession", also referred to simply as the "Concession"), using the administrative law concept of "conversion" (*i.e.*, the previous annulled concession is converted into a valid one). The Parties agree that the applicable concept is conversion, but dispute its legal effect.⁵²
94. On 13 October 2008, President Arias designated the Las Crucitas Project as one of national interest.⁵³
95. On 17 October 2008, the National System of Areas Conservation ("SINAC") authorized the logging of trees on the land of the Las Crucitas Project.⁵⁴ Industrias Infinito commenced logging the same day.⁵⁵
96. On 19 October 2008, the NGO UNOVIDA filed an *amparo* petition against Industrias Infinito's 2008 Concession based on the violation of Article 50 of the Constitution.⁵⁶

⁴⁷ Exh. **C-0164**, Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007).

⁴⁸ Exh. **R-0079**, Resolution No. R-613-2007-MINAE (31 October 2007). The Claimant has submitted a different (unsigned and unstamped) version of this resolution, which purportedly rejects Mr. Pacheco's challenge (Exh. **C-0167**). After the Respondent contested the authenticity of Exh. **C-0167** (R-Mem. Jur., ¶ 68), the Claimant's witness Mr. Hernández explained that this was a digital version that he had obtained from the MINAE and that he was unaware that it might not have been the final version (CWS-Hernández 2, ¶¶ 3-9). Thereafter, the Claimant appears to accept that the official version of the resolution is the one provided by the Respondent, *i.e.*, Exh. **R-0079** (see, e.g., C-Rej. Jur., ¶ 61 and n. 140). The Tribunal thus understands that the Parties agree that the correct version of this document is Exh. **R-0079**.

⁴⁹ CWS-Hernández 1, ¶ 189.

⁵⁰ Exh. **C-0170**, Resolution No. 170-2008-SETENA (4 February 2008).

⁵¹ Exh. **C-0172**, Decree No. 34492-MINAE (18 March 2008).

⁵² Exh. **C-0176**, Resolution No. R-217-2008-MINAE (21 April 2008).

⁵³ Exh. **C-0196**, Executive Decree No. 34801-MINAET (13 October 2008).

⁵⁴ Exh. **C-0197**, Resolution No. 244-2008 SCH (17 October 2008).

⁵⁵ R-Mem. Jur., ¶ 78.

The NGO FECON filed a similar *amparo* petition somewhat later on 23 October 2008.⁵⁷

97. On 20 October 2008, the Constitutional Chamber issued a temporary injunction suspending the forest-clearing operations, the execution of the Las Crucitas Project, and the implementation of the decree declaring the project in the national interest.⁵⁸
98. In November 2008, Mr. Jorge Lobo and APREFLOFAS filed challenges before the TCA requesting the annulment of various administrative acts, including:
 - a. The SETENA resolution declaring the environmental viability of the project.
 - b. The SETENA resolution approving the modification of the Las Crucitas Project.
 - c. The MINAE resolution granting the 2008 Concession.
 - d. The Executive Decree declaring the project in the national interest.⁵⁹
99. The petitioners also requested the TCA to order Industrias Infinito and Costa Rica to restore the site and provide compensation for environmental damage.⁶⁰
100. On 16 April 2010, the Constitutional Chamber of the Supreme Court denied UNOVIDA's and FECON's *amparo* petitions and lifted the injunction against forest-clearing operations (the "2010 Constitutional Chamber Decision"). The decision did not refer to the impact of the 2002 Moratorium.⁶¹
101. Also on 16 April 2010, the TCA issued its own temporary injunction preventing the Las Crucitas Project from moving forward.⁶²
102. On 29 April 2010, President Arias issued a decree declaring a new moratorium on open-pit gold mining, which entered into force on 11 May 2010 (the "Arias Moratorium Decree").⁶³

⁵⁶ R-Mem. Jur., ¶ 78 citing RER-Ubico 1, ¶ 80 and Exh. **C-0225**, Supreme Court (Constitutional Chamber), Decision (16 April 2010).

⁵⁷ R-Mem. Jur., ¶ 78 citing RER-Ubico 1, ¶ 80 and Exh. **C-0225**, Supreme Court (Constitutional Chamber), Decision (16 April 2010).

⁵⁸ R-Mem. Jur., ¶ 79 citing RER-Ubico 1, ¶ 80 and Exh. **C-0225**, Supreme Court (Constitutional Chamber), Decision (16 April 2010).

⁵⁹ RER-Ubico 1, ¶ 81; Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010).

⁶⁰ Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010).

⁶¹ Exh. **C-0225**, Supreme Court (Constitutional Chamber), Decision (16 April 2010).

⁶² R-Mem. Jur., ¶ 84 citing Exh. **C-0225**, Supreme Court (Constitutional Chamber), Decision (16 April 2010).

⁶³ Exh. **R-0032**, Decree No. 35982-MINAET (29 April 2010).

103. On 8 May 2010, President Chinchilla took office. On that same day, President Chinchilla issued a decree which expanded the Arias Moratorium Decree (the “Chinchilla Moratorium Decree” and, together with the Arias Moratorium Decree, the “2010 Moratorium” or “2010 Executive Moratorium”). In addition to prohibiting open-pit gold mining, it prohibited all mining activities using cyanide and mercury in the processing of ore.⁶⁴ The Chinchilla Moratorium Decree entered into force on 11 May 2010.
104. On 27 July 2010, President Chinchilla issued a letter acknowledging the 2010 Constitutional Chamber Decision and the possibility of Government liability if the 2008 Concession was cancelled.⁶⁵
105. Meanwhile, on 11 June 2010, environmental activists Carlos and Douglas Murillo filed an *amparo* petition with the Constitutional Chamber of the Supreme Court on the basis that Industrias Infinito’s Concession was in breach of the 2002 Moratorium.⁶⁶ The Constitutional Chamber rejected this petition on 24 August 2010, on the grounds that it lacked jurisdiction to review the legality of the exploitation concession (including its conversion) and that of the related administrative acts.⁶⁷
106. On 24 November 2010, the TCA issued an oral summary of its decision on the annulment request filed by Mr. Lobos and APREFLOFAS, declaring that all requests for annulment had been granted (the “2010 TCA Decision”).⁶⁸ The TCA issued its full written decision on 14 December 2010,⁶⁹ where, *inter alia*, it dismissed the *res judicata* defense raised by Industrias Infinito and the Government,⁷⁰ and annulled Industrias Infinito’s 2008 Concession together with related administrative decisions.⁷¹

⁶⁴ Exh. **C-0229**, Executive Decree No. 36019-MINAE (8 May 2010).

⁶⁵ Exh. **C-0233**, Letter by President Chinchilla (27 July 2010).

⁶⁶ RER-Ubico 1 ¶ 84 citing Exh. **R-0028**, Resolution No. 2010-014009, Constitutional Chamber of the Supreme Court of Justice (24 August 2010), ¶ 1.

⁶⁷ Exh. **R-0028**, Resolution No. 2010-014009, Constitutional Chamber of the Supreme Court of Justice (24 August 2010).

⁶⁸ RER-Ubico 1 ¶ 89 citing Exh. **R-0082**, Contentious-Administrative Procedural Code, Law No. 8508 (28 April 2006) (“CPCA”), Art. 111(1).

⁶⁹ Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010). This decision is also referred to by the Parties as the “2010 TCA Judgement”.

⁷⁰ Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010), pp. 134-135 (SPA); 174-175 (ENG).

⁷¹ Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010), p. 135 (SPA), 175 (ENG). Specifically, the decision annulled the following resolutions (*see also* RER-Ubico 1, ¶ 81):

- (i) Resolution No. 3638-2005-SETENA, through which the SETENA declared the environmental viability for the extraction phase of the Las Crucitas Project for a period of 2 years, under specific terms and conditions;
- (ii) Resolution No. 170-2008-SETENA, through which the SETENA approved the amendment of the Las Crucitas Project;

107. As a result, the TCA ordered *inter alia*:
- a. The MINAE to cancel the 2008 Concession.⁷²
 - b. Industrias Infinito and the Government to facilitate the restoration of the site, with the quantum of damages to be determined in a different TCA proceeding.⁷³
 - c. The file to be transmitted to the prosecutor to determine whether criminal proceedings should be initiated against Government officials (including President Arias).
108. In December 2010, the Costa Rican legislature enacted an amendment to the Mining Code with essentially the same scope as the Chinchilla Moratorium Decree (the “2011 Legislative Moratorium”), which came into force on 10 February 2011.⁷⁴ The Claimant alleges that this moratorium “supplanted” the previous decrees,⁷⁵ but the Respondent asserts that it did not repeal the previous decrees; rather, it provided an additional legislative safeguard against open-pit mining.⁷⁶
109. On 18 January 2011, Industrias Infinito filed a request for cassation of the 2010 TCA Decision before the Administrative Chamber of the Supreme Court, which had the effect of staying the challenged decision.⁷⁷
110. On 10 February 2011, the 2011 Legislative Moratorium entered into force.⁷⁸

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- (iii) Resolution No. R217-2008-MINAE, through which the President of Costa Rica and the Minister of Environment and Energy awarded the mining concession to Industrias Infinito;
 - (iv) Resolution No. 244-2008-MINAE (the Tribunal notes that this document has not been referred to be either Party);
 - (v) Resolution No. 244-2008-SCH, through which the Arenal-Huetar Norte Conservation Area, through the sub-region San Carlos-Los Chiles, authorized the change of land use in forest areas of forest, in areas of agricultural use without forest, and in plantation areas;
 - (vi) Executive Decree No. 34801-MINAET, through which the President of Costa Rica and the Minister of Environment and Energy declared the Las Crucitas Project of public interest and national convenience.

⁷² Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010), p. 136 (SPA), 176 (ENG).

⁷³ Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010), pp. 135-136 (SPA), 175-176 (ENG).

⁷⁴ Exh. **C-0238**, Amendment to Mining Code, No. 8904 (1 December 2010). See *infra*, ¶ 110 and n. 78.

⁷⁵ C-CM Jur., ¶ 128; CER-Hernández-Rojas 1, ¶¶ 329-331; CWS-Hernández 1, ¶¶ 200-201.

⁷⁶ R-Mem. Jur., ¶ 141.

⁷⁷ Exh. **C-0248**, Submissions of Industrias Infinito SA to the Supreme Court (Administrative Chamber), File No. 08-1282-1027-CA (18 January 2011).

⁷⁸ The Parties differ as to the date on which the 2011 Legislative Moratorium came into force. While the Respondent alleges that it was 10 February 2011 (R-Mem. Jur., ¶ 141), the Claimant states that it was 11 February 2011 (C-CM Jur., ¶ 128, citing CWS-Hernández 1, ¶ 201). In the Tribunal’s view, the record suggests that the correct date is 10 February 2011:

111. On 11 November 2011, Industrias Infinito requested the Constitutional Chamber to declare that the 2010 TCA Decision was unconstitutional because it conflicted with the Constitutional Chamber's earlier decisions, in particular the 2010 Constitutional Chamber Decision.⁷⁹
112. On 30 November 2011, the Administrative Chamber of the Supreme Court denied Industrias Infinito's cassation request, and upheld the main conclusions of the 2010 TCA Decision (the "2011 Administrative Chamber Decision").⁸⁰
113. On 9 January 2012, the MINAE canceled Industrias Infinito's 2008 Concession (the "2012 MINAE Resolution").⁸¹ According to Infinito, it also declared the Las Crucitas area to be free of all mining rights.⁸² Costa Rica disputes this last fact.⁸³
114. On 19 June 2013, the Constitutional Chamber dismissed Industrias Infinito's unconstitutionality challenge, holding that the challenge was inadmissible because the Administrative Chamber had already issued its ruling (the "2013 Constitutional Chamber Decision").⁸⁴
115. On 24 November 2015, the TCA determined the amount of compensation for environmental damage to be paid by Costa Rica, the SINAC and Industrias Infinito at USD 6.4 million (the "2015 TCA Damages Decision").⁸⁵
116. In December 2015, the Government filed an appeal against the 2015 TCA Damages Decision with the Administrative Chamber of the Supreme Court.

IV. ANALYSIS

A. PRELIMINARY MATTERS

1. Scope of this Decision

117. As agreed by the Parties prior to the First Session and reflected in Annex A to Procedural Order No. 1, these proceedings have been bifurcated between jurisdiction

the amendment to the Mining Code (Exh. **C-0238**) states that it becomes effective on the date of its publication, and the date of publication appears to have been 10 February 2011. In any event, this discrepancy has no impact on the Parties' arguments.

⁷⁹ RER-Ubico 1, ¶ 112; Exh. **C-0259**, Action by Industrias Infinito to the Supreme Court (Constitutional Chamber) (11 November 2011).

⁸⁰ Exh. **C-0261**, Supreme Court (Administrative Chamber), Decision (30 November 2011).

⁸¹ Exh. **C-0268**, Resolution No. 0037, MINAE, File No. 2594 (9 January 2012).

⁸² C-CM Jur., ¶ 124 citing CWS-Hernández 1, ¶ 230.

⁸³ R-Mem. Jur., ¶ 126.

⁸⁴ R-Mem. Jur., ¶ 120; Exh. **C-0283**, Supreme Court (Constitutional Chamber), Decision (19 June 2013).

⁸⁵ Exh. **C-0305**, Contentious Administrative Tribunal, Decision No. 1438-2015, File No. 08001282-1027-CA-6 (24 November 2015).

and merits. This Decision addresses the Respondent's objections to the jurisdiction of the Centre and the competence of the Tribunal.

2. The Law Applicable to the Jurisdiction of the Tribunal

118. It is undisputed that the Tribunal's jurisdiction is governed by the ICSID Convention and the BIT. The relevant provisions are quoted in Sections IV.B and IV.C *infra*.
119. Both Parties agree that the interpretation of the ICSID Convention and the BIT is governed by the customary international law principles on treaty interpretation as codified in the Vienna Convention on the Law of Treaties of 23 May 1969 ("VCLT").
120. It is also undisputed that the Tribunal has the power to rule on its own jurisdiction.

3. Relevance of APREFLOFAS's Non-Disputing Party Submission

121. Before addressing the Parties' positions on jurisdiction, the Tribunal will address the comments on jurisdiction made by the *Asociación Preservacionista de Flora y Fauna Silvestre* ("APREFLOFAS") in its Non-Disputing Party Submission.

a. APREFLOFAS's Submission

122. APREFLOFAS, who was one of the plaintiffs in the proceedings that culminated with the 2010 TCA Decision, asserts that Industrias Infinito's Concession "was always illegal under the law of Costa Rica (as it applies to any party, foreign or not)" and "granted through an evident and intentional disregard of the applicable laws, and, as alleged by Prosecutors in cases before the Costa Rica Courts, likely through corruption and graft."⁸⁶
123. In compliance with the Tribunal's directions in Procedural Order No. 2, APREFLOFAS has limited its submission to factual and legal material not mentioned by the Parties. Specifically, it submits that (i) "the Concession was illegal under the laws of Costa Rica," and (ii) "Costa Rica courts have found that the events that led to the grant of the Concession were so egregious as to be likely criminal," leading to the prosecution of various public officers involved in the granting of the Concession.⁸⁷ In APREFLOFAS's view, "[b]oth arguments should [...] lead this Tribunal to rule that it does not have jurisdiction over Infinito's claims under the rules of the ICSID, the BIT and the prevailing view from several previous decisions by international investment law tribunals."⁸⁸
124. More specifically, APREFLOFAS alleges that the approval of Industrias Infinito's Concession "would have been impossible unless Infinito and the government officials

⁸⁶ APREFLOFAS Non-Disputing Party Written Submission dated 19 July 2016 ("NDP Submission"), ¶ 2.

⁸⁷ NDP Submission, ¶ 3.

⁸⁸ NDP Submission, ¶ 3.

described the Concession in a fraudulent manner” and that “[b]oth Infinito Gold and Government [o]fficials misrepresented the nature and scope of the Concession by failing even to consider the real environmental consequences of the Concession, illegally transforming a public road into a part of the private Concession and by the invalid conversion of an already annulled administrative act.”⁸⁹ According to APREFLOFAS, this arises from the 2010 TCA Decision,⁹⁰ the 2011 Administrative Chamber Decision,⁹¹ a Prosecutor Office’s indictment,⁹² a trial order from a criminal judge,⁹³ and a (now annulled) criminal decision acquitting several defendants and confirming the conviction of former Minister Roberto Dobles.⁹⁴ In particular, APREFLOFAS alleges that the TCA found that “the decision to grant the permits was part of a knowing and intentional conspiracy between public servants to disregard the laws of Costa Rica,” and, as a result, prosecutions and/or sanctions have been brought against several officials who were responsible for the grant of the Concession, including former President Arias and former Minister of the Environment Roberto Dobles.⁹⁵ According to APREFLOFAS, this shows that “the Costa Rican courts not only found that the grant of the Concession and the subsequent ‘conversion’ were illegal under Costa Rican Law, but also that there was sufficient evidence to suggest the occurrence of criminal conduct under the Costa Rican Criminal Code, such as malfeasance in office or official misconduct.”⁹⁶

125. APREFLOFAS notes in particular that, in addition to the criminal investigations initiated against the public officials involved, a criminal process for extortion (*concusión*) was initiated against former President Óscar Arias due to an alleged donation made by Infinito to former President Arias’s non-profit organization *Fundación Arias Para La Paz*. However, this process was abandoned (*desestimado*) due to lack of sufficient evidence. APREFLOFAS points out however that, because the termination (*desestimación*) was solely based on the lack of evidence, if new evidence is presented the case could be reopened.⁹⁷
126. APREFLOFAS further explains that the other criminal prosecutions proceeded to an indictment, and that after the relevant hearings all of the indicted persons (with the

⁸⁹ NDP Submission, ¶ 5.

⁹⁰ Exh. **C-0239**, Contentious Administrative Tribunal, Decision (14 December 2010).

⁹¹ Exh. **C-0261**, Supreme Court (Administrative Chamber), Decision (30 November 2011).

⁹² Exh. **C-0278**, Accusation and Request to Open a Trial, Criminal Court of the Treasury, File No. 08-000012-033-PE (8 November 2012).

⁹³ Exh. **NDP-001**, Trial Order of the Criminal Court for Treasury and Public Service, 2nd Judicial Circuit of San Jose, Case No. 08-000011-0033-PE (5 May 2013).

⁹⁴ Exh. **NPD-002**, Judgment by the Criminal Trials’ Tribunal, 2nd Judicial Circuit of San Jose, Case No. 08-000011-0033- PE, Decision No. 32-2015 (28 January 2015).

⁹⁵ NDP Submission, ¶ 10.

⁹⁶ NDP Submission, ¶ 12.

⁹⁷ NDP Submission, ¶ 19; Exh. **NDP-012**, “Good Riddance Infinito Gold, A Long Overdue Farewell to Costa Rica”, Mining Watch Canada (22 July 2015); Exh. **NDP-013**, “*Fiscalía pide desestimar causa contra Óscar Arias por Industrias Infinito; alega ‘falta de pruebas’*”, CRHOY (3 October 2014).

exception of former Minister Dobles) were acquitted, the court having found that there was no criminal action because the officials had acted within their discretionary powers.⁹⁸ As to Minister Dobles, while he was acquitted for criminal action in the issuance of Resolution No. R-217-2008-MINAE, he was found guilty of criminal malfeasance in office for issuing Executive Decree No. 34801-MINAET (the decree declaring that the Las Crucitas Project was in the national interest).⁹⁹ However, the trial court's decision acquitting the public officials and convicting former Minister Dobles was ultimately annulled on appeal and remanded for a new hearing. As of the date of APREFLOFAS's Submission, no decision on the remanded case had been rendered.¹⁰⁰

127. APREFLOFAS submits that the pending criminal proceedings and the facts upon which they are based have a significant bearing on the jurisdiction of the Tribunal, as they will determine whether there was corruption and violation of Costa Rica's criminal law.¹⁰¹ Relying on *Metal-Tech*, *Inceysa* and *Fraport I*, APREFLOFAS argues that investment tribunals lack jurisdiction if the claimant violated the host State's laws in the process of its investment activities.¹⁰² APREFLOFAS notes that Article I(g) of the BIT expressly defines investment as "any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of other Contracting Party *in accordance with the latter's laws* [...]."¹⁰³ Accordingly, for an investment to be considered as such, it needs to have been "initiated and developed" in accordance with the laws of Costa Rica.¹⁰⁴ For APREFLOFAS, this is not the case here, because Industrias Infinito obtained an illegal concession through alleged criminal collaboration with a number of public officers. As a result, APREFLOFAS submits that this case is outside the Tribunal's jurisdiction, which is limited to the protection of legal investments controlled by the BIT.¹⁰⁵

⁹⁸ NDP Submission, ¶ 21; Exh. **NDP-002**, Judgment by the Criminal Trials' Tribunal, 2nd Judicial Circuit of San Jose, Case No. 08-000011-0033- PE, Decision No. 32-2015 (28 January 2015), pp. 187-197.

⁹⁹ NDP Submission, ¶ 21; Exh. **NDP-002**, Judgment by the Criminal Trials' Tribunal, 2nd Judicial Circuit of San Jose, Case No. 08-000011-0033- PE, Decision No. 32-2015 (28 January 2015), pp. 224-258.

¹⁰⁰ NDP Submission, ¶ 22.

¹⁰¹ NDP Submission, ¶ 23.

¹⁰² NDP Submission, ¶¶ 24-26, citing *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 ("*Inceysa*"); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 ("*Metal-Tech*"); Exh. **CL-0207**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ("*Fraport I, Award*"), and *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, 23 December 2010 ("*Fraport I, Annulment*").

¹⁰³ NDP Submission, ¶ 25 (emphasis in original).

¹⁰⁴ NDP Submission, ¶ 25.

¹⁰⁵ NDP Submission, ¶ 25.

b. The Respondent's Comments on APREFLOFAS's Submission

128. The Respondent alleges that its factual presentation and legal arguments are fully supported by APREFLOFAS's Submission. It notes, in particular, that the APREFLOFAS's Submission recognizes that the Concession was annulled by the 2010 TCA Decision, and that the Administrative Chamber denied a cassation request against that decision after an extensive analysis of Industrias Infinito's allegations.¹⁰⁶
129. The Respondent further asserts that APREFLOFAS's Submission supports its interpretations of domestic law and of the BIT relevant to its jurisdictional objections. In particular, it agrees that Infinito's claims amount to a mere disagreement with Costa Rican courts on matters of domestic law, and that the BIT does not permit recourse to arbitration where a party has sought and failed to obtain a remedy in domestic courts.¹⁰⁷
130. The Respondent also notes that, while APREFLOFAS urges the Tribunal to decline jurisdiction to hear the case, its focus is different to the Respondent's, as it requests the Tribunal to base its decision on the illegal nature of Industrias Infinito's Concession as a matter of domestic and international law. The Respondent finds this difference in focus "hardly surprising," given that the Tribunal had ordered APREFLOFAS to limit its submission to factual and legal material not put forward by the Parties.¹⁰⁸ That said, the Respondent disagrees with the substance of APREFLOFAS's jurisdictional argument. Specifically, it states:

[...] Costa Rica does not believe that the evidence available to date is sufficient to sustain such a jurisdictional objection, *i.e.*, that the entirety of Infinito's investment was procured through fraud, corruption or other malfeasance such that it fails to qualify as a *bona fide* investment under the BIT and the ICSID Convention. As the summary provided by APREFLOFAS shows, the numerous investigations of public officials for corruption and other crimes in relation to the granting of the 2008 Concession are either still ongoing or have resulted in dismissal of the charges.¹⁰⁹

131. Despite this, the Respondent considers that the evidence provided by APREFLOFAS could be relevant for the Tribunal, especially if the case were to proceed to the merits, where the Tribunal would have to review in greater detail the nature of Infinito's rights and the manner in which they were obtained.¹¹⁰

c. The Claimant's Comments on APREFLOFAS's Submission

132. The Claimant contends that APREFLOFAS's allegations are factually and legally unfounded. First, it points out that neither Infinito nor any of its representatives,

¹⁰⁶ R-Reply Jur., ¶¶ 332-333.

¹⁰⁷ R-Reply Jur., ¶¶ 334-335.

¹⁰⁸ R-Reply Jur., ¶ 336.

¹⁰⁹ R-Reply Jur., ¶ 337.

¹¹⁰ R-Reply Jur., ¶ 338.

personnel or advisors, has ever been found liable for, or even charged with, intentional wrongdoing. The Claimant also denies having purposefully omitted or concealed information from the Costa Rican Government in connection with the Concession or the EIA.¹¹¹

133. Second, there have been no conclusive findings of wrongdoing against any Costa Rican officials in connection with actions related to the Las Crucitas Project. In any event, the only charges were for the technical misapplication of Costa Rican law (*delito de prevaricato*); and corruption has never been an issue. Not a single Costa Rican official has been convicted or charged with corruption. As to the charges for *prevaricato*, there have been no convictions of public officials. In particular, the conviction of former Minister Dobles was annulled due to a flawed procedure, and a new proceeding is pending.¹¹²
134. In any event, the Claimant argues that Costa Rica cannot be shielded from the protections of the BIT by the wrongdoing of its own officials. Relying on *RDC, Fraport I* and *Kardassopoulos*, among others, the Claimant submits that “[i]t is well-established that states cannot rely on their own wrong-doing to defeat jurisdiction.”¹¹³ According to the Claimant “[i]llegality only undermines BIT protections where the illegality is a result of intentional and serious wrongdoing by the investor, in deliberate evasion of domestic law,” which is not the case here.¹¹⁴

d. Discussion

135. APREFLOFAS argues that this Tribunal should decline jurisdiction because the Claimant’s investment has not been made in accordance with Costa Rican law. Specifically, it argues that “the Concession was illegal under the laws of Costa Rica,” and “Costa Rica courts have found that the events that led to the grant of the Concession were so egregious as to be likely criminal.”¹¹⁵ In this context, it alleges that the public officials involved in the granting of the Concession intentionally violated the law, leading to criminal proceedings for malfeasance in office (*prevaricato*), although it recognizes that these proceedings are still pending. APREFLOFAS also

¹¹¹ C-Rej. Jur., ¶¶ 409-411.

¹¹² C-Rej. Jur., ¶¶ 412-415; CWS-Hernández 3, ¶¶ 8-25.

¹¹³ C-Rej. Jur., ¶ 416, citing Exh. **CL-0203**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (“*RDC, Award*”), ¶ 116; Exh. **CL-0207**, *Fraport I, Award*, ¶ 346; Exh. **CL-0208**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Decision on Jurisdiction, 6 July 2007 (“*Kardassopoulos*”), ¶¶ 182-184; Exh. **CL-0014**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (“*Arif*”), ¶ 376; Exh. **CL-0054**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 (“*Limari*”), ¶ 187; Exh. **RL-0112**, *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 (“*Swisslion*”), ¶¶ 125-126; Exh. **CL-0136**, *El Paso Energy International Company. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (“*El Paso*”), ¶ 64.

¹¹⁴ C-Rej. Jur., ¶¶ 417-418, citing Exh. **CL-0207**, *Fraport I, Award*, ¶¶ 346, 323, 347.

¹¹⁵ NDP Submission, ¶ 3.

alleges that the Concession was procured through extortion (*concusión*), noting that criminal proceedings were initiated against former President Arias, although it accepts that these proceedings were terminated for lack of evidence. On the basis of Article I(g) of the BIT, which contains a legality requirement, APREFLOFAS submits that the Claimant's investment is not owned or controlled in accordance with Costa Rican law, and as a result this Tribunal has no jurisdiction to hear Infinito's claims.

136. Notably, both the Claimant and the Respondent disagree with APREFLOFAS. The Claimant adamantly denies that its investment was established in violation of Costa Rican law, and in particular, it denies that there is any evidence of corruption or intentional serious wrongdoing on its part. The Respondent, for its part, expressly recognizes that the evidence available to date is insufficient to argue that “the entirety of Infinito’s investment was procured through fraud, corruption or other malfeasance such that it fails to qualify as a *bona fide* investment under the BIT and the ICSID Convention.”¹¹⁶
137. The Tribunal has noted the Parties’ positions. However, the legality requirement contained in the BIT impacts the Tribunal’s jurisdiction, which the Tribunal has a duty to assess *ex officio*, in accordance with ICSID Arbitration Rule 41(2). As a result, the Tribunal cannot merely rely on the Parties’ assessment and must engage in its own inquiry on the basis of the evidence in the record. This is particularly true when there are allegations of corruption, which is a matter of international public policy.
138. Article I(g) of the BIT defines “investment” as “any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws [...]”¹¹⁷ Hence, to be protected under the BIT, an investment must have been at the very least established in accordance with Costa Rican law (the provision could also be understood as requiring that the ownership and control must be exercised in accordance with Costa Rican law, a matter on which the Parties have not commented and that can remain open at this juncture).
139. In the Tribunal’s view, not every violation of domestic law will preclude the investment from benefitting from the substantive protections of the BIT. However, APREFLOFAS submits that the Concession was acquired through extortion or through intentional and/or non-trivial violations of Costa Rican law (malfeasance in office). At this stage and on the current record, the Tribunal cannot dismiss these allegations outright. While it has found no clear concrete evidence of malfeasance in office or extortion, the allegations are serious and the Tribunal cannot ignore that criminal proceedings have been initiated against public officials for these charges. It therefore defers this matter to the merits phase when further briefing and evidence may be submitted.

¹¹⁶ R-Reply Jur., ¶ 337.

¹¹⁷ Exh. **C-0001**, Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments (18 March 1998) (“Canada-Costa Rica BIT”), Art. I(g).

140. Even in the absence of intentional wrongdoing, APREFLOFAS alleges that the Concession was obtained in violation of Costa Rican law, and the alleged violations do not appear to be trivial. Under Article I(g) of the BIT, to determine whether Infinito has made an investment that is protected under the BIT, the Tribunal must assess each of these allegations. However, whether the Concession was illegally granted is intertwined with the merits. Indeed, as this argument was raised by APREFLOFAS and not by the Parties, the latter have not addressed it in depth and will thus be given an opportunity to do so during the merits phase. The Tribunal thus finds it procedurally efficient to defer this matter to the merits phase.

B. JURISDICTION UNDER THE ICSID CONVENTION

141. Jurisdiction under the ICSID Convention is governed by Article 25(1), which reads as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

142. Accordingly, for the Tribunal to have jurisdiction over this dispute, the following conditions must be met:

- a. There must be a legal dispute.
- b. That dispute must arise directly out of an investment.
- c. The dispute must be between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State.
- d. The parties to the dispute must have consented in writing to submit the dispute to the Centre. Once given, this consent may not be withdrawn unilaterally.

143. The Respondent does not challenge conditions (a) to (c). It is thus undisputed – and rightly so – that the present case concerns a “legal dispute arising directly out of an investment between a Contracting State [...] and a national of another Contracting State [...].” The Respondent’s objections to jurisdiction all relate to its consent to arbitrate, required under condition (d) above and allegedly given in Article XII of the BIT.

C. JURISDICTION UNDER THE BIT

144. Article XII of the BIT reads as follows:

ARTICLE XII

Settlement of Disputes between an Investor and the Host Contracting Party

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.
2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). The investor will bear the burden of proof to demonstrate:
 - (a) that it is an investor as defined by Article I of this Agreement;
 - (b) that the measure taken or not taken by the Contracting Party is in breach of this Agreement; and
 - (c) that the investor has incurred loss or damage by reason of, or arising out of, that breach.

For the purpose of this Agreement, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:
 - (a) the investor has consented in writing thereto;
 - (b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;
 - (c) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage; and
 - (d) in cases where Costa Rica is a party to the dispute, no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement.
4. The dispute may be submitted to arbitration under:
 - (a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 18 March, 1965 ('ICSID Convention'), if both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention;

or

- (b) the Additional Facility Rules of ICSID, if either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or
 - (c) an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in case neither Contracting Party is a member of ICSID, or if ICSID declines jurisdiction.
5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.
6. (a) The consent given under paragraph (5), together with either the consent given under paragraph (3), or any relevant provision of Annex II, shall satisfy the requirements for:
- (i) written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules; and
 - (ii) an 'agreement in writing' for purposes of Article II of the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ('New York Convention').
- (b) Any arbitration under this Article shall be held in a State that is a party to the New York Convention, and claims submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of that Convention.
7. A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement, the applicable rules of international law, and with the domestic law of the host State to the extent that the domestic law is not inconsistent with the provisions of this Agreement or the principles of international law.
8. An investor of one Contracting Party may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Contracting Party that is a party to the dispute, according to the latter's domestic legislation, prior to the institution of the arbitral proceeding.
9. A tribunal may award, separately or in combination, only:
- (a) monetary damages and any applicable interest;
 - (b) restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.
- A tribunal may also award costs in accordance with the applicable arbitration rules.
10. An award of arbitration shall be final and binding and shall be enforceable in the territory of each of the Contracting Parties.
11. Any proceedings under this Article are without prejudice to the rights of the Contracting Parties under Articles [sic] XIII. Without limiting the generality of the foregoing, however, it is agreed that neither Contracting Party shall give diplomatic protection, or bring an

international claim in respect of specific loss or damage suffered by an investor of that Contracting Party, where such loss or damage is, or has been, the subject matter of arbitration under this Article, unless the other Contracting Party fails to comply with the award rendered in such arbitration.

1. Overview of the Parties' Positions

a. Overview of the Respondent's Position

145. As noted above, the Respondent's objections to jurisdiction relate to the scope of Costa Rica's consent to arbitration under the BIT.¹¹⁸
146. As a general matter, the Respondent submits that the Claimant's case is "simply a rehash of arguments already considered – and unambiguously rejected – by *multiple* levels of Costa Rica's judicial system."¹¹⁹ The Claimant's entire case rests on a single premise: the annulment of the 2008 Concession by the 2010 TCA Decision. While the Claimant purports to be challenging subsequent acts by other Costa Rican judicial, executive and administrative organs, it is apparent from its submissions that its central claim is about the loss of the 2008 Concession, which was annulled by the 2010 TCA Decision. Because the Tribunal lacks jurisdiction to hear a claim based on the 2010 TCA Decision, the Respondent submits that the Tribunal lacks jurisdiction to hear the Claimant's case. Specifically, the Respondent puts forward the following reasons:
147. First, the Respondent submits that the claims are barred under Article XII(3)(d) of the BIT, which excludes claims if a "judgment has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement".¹²⁰
- a. While the Claimant purports to challenge other acts by the Costa Rican judicial, executive and administrative organs, its complaint is directed to the effects of the 2010 TCA Decision, and as such this is the act that should be deemed to be the relevant "measure" in this case. As in 2011, the Administrative Chamber of the Supreme Court has already rendered a decision on the 2010 TCA Decision, the Tribunal has no jurisdiction to hear the Claimant's claims.
- b. Even if one were to consider that the relevant measure is the 2011 Administrative Chamber Decision (which the Respondent denies), the latter submits that "there exist multiple judgments of Costa Rican courts related to that measure within the meaning of BIT Article XII(3)(d)," in particular because "the 2011 Administrative Chamber Judgment is *itself* a judgment of a Costa Rican court and is inextricably related to another judgment of a Costa Rican court, *i.e.* the 2010 TCA Judgment."¹²¹ As a result, "Article XII(3)(d) must [...] be understood to preclude

¹¹⁸ R-Mem. Jur., ¶ 8.

¹¹⁹ R-Mem. Jur., ¶ 5 (emphasis in original).

¹²⁰ Exh. C-0001, Canada-Costa Rica BIT, Art. XII(3)(d); R-Mem. Jur., ¶¶ 9-11.

¹²¹ R-Mem. Jur., ¶ 10(d) (emphasis in original).

any challenge either to the 2010 TCA Judgment *or* to the 2011 Administrative Chamber Judgment, especially given that the challenge is ultimately based on a disagreement with the legal conclusions reached by the Costa Rican courts on matters of domestic law.”¹²²

- c. Likewise, all of the other measures of which the Claimant complains “(a) are nothing more than vehicles for Claimant’s indirect challenge to the 2010 TCA Judgment, and (b) constitute acts regarding which the Costa Rican judiciary has already rendered judgment, and are therefore beyond the Tribunal’s jurisdiction pursuant to Article XII(3)(d) of the BIT.”¹²³
148. The Respondent acknowledges however that the Claimant seeks to challenge the following measures:¹²⁴
- a. The 2011 Administrative Chamber Decision, which upheld the 2010 TCA Decision.
 - b. The 2013 Constitutional Chamber Decision, which denied a separate challenge on constitutional grounds against the 2010 TCA Decision.
 - c. The 2012 MINAE Resolution, which executed the 2010 TCA Decision’s order to cancel the 2008 Concession and remove it from the Mining Registry.
 - d. The 2011 Legislative Moratorium consolidating the open-pit mining ban implemented in 2010 through the 2010 Executive Moratorium, which the Claimant alleges deprived it of the right to seek a new concession after its existing concession was annulled by the 2010 TCA Decision.¹²⁵
149. Second, the Respondent contends that the Tribunal lacks jurisdiction *ratione materiae* to consider Infinito’s claims because “they amount to no more than assertions that Costa Rica’s judicial authorities incorrectly applied Costa Rican law.”¹²⁶ Further, “[t]his Tribunal is not a court of appeals on matters of domestic law; it may only consider claims that arise under *international* law, and more particularly under the Canada-Costa Rica BIT.”¹²⁷ The Claimant’s disagreement with the Costa Rican courts’ decisions on matters of domestic law “cannot serve to magically transform

¹²² R-Mem. Jur., ¶ 10(d) (emphasis in original).

¹²³ R-Mem. Jur., ¶ 11.

¹²⁴ R-Mem. Jur., ¶ 4. The Respondent also included in this list the 2015 TCA Damages Decision, which quantified the liability for environmental remediation imposed by the 2010 TCA Decision, but the Claimant has withdrawn its challenge against this decision. C-CM Jur., ¶ 44; R-Reply Jur., ¶ 11.

¹²⁵ Initially the Respondent appears to consider that the Claimant is also challenging the 2010 Executive Moratorium issued by presidential decrees in 2010 (R-Mem. Jur., ¶ 4), but in later submissions it appears to acknowledge that the Claimant is challenging only the 2011 Legislative Moratorium. R-Reply Jur., ¶ 9(d).

¹²⁶ R-Mem. Jur., ¶ 12.

¹²⁷ R-Mem. Jur., ¶ 12 (emphasis in original).

[Infinito's] complaint from a purely domestic-law argument to a legitimate claim under international law (whether for 'expropriation,' breach of 'fair and equitable treatment,' 'denial of justice,' or anything else)," because "[a]ll of these standards require evidence of fundamental failures of justice that go well beyond mere disagreement with a court's reasoning."¹²⁸ And while the Claimant does allege that it faced a fundamental failure by the Costa Rican judicial system to reconcile allegedly conflicting rulings, this alleged inconsistency was already raised before and addressed by the Costa Rican courts.¹²⁹

150. Third, the Respondent submits that the Tribunal lacks jurisdiction *ratione temporis*, *i.e.* that the claims are time-barred under the three-year statute of limitations contained in Article XII(3)(c) of the BIT.¹³⁰ According to the Respondent, "much of Claimant's case depends on challenges to measures that predate 6 February 2011," which the Claimant accepts is the cutoff date for purposes of assessing the applicability of this provision (the dispute having been submitted to arbitration on 6 February 2014).¹³¹ More specifically:
- a. The Respondent contends that "the main pillars of Claimant's arguments about Costa Rican law were thoroughly rejected by the 2010 TCA Judgment, which was officially rendered on 14 December 2010, as well as by earlier decisions of the Constitutional Chamber that Claimant either ignores or plainly misrepresents."¹³² However, this Tribunal has no jurisdiction *ratione temporis* to review the substantive correctness of any of these court decisions, and "[i]t would also be improper for the Tribunal to find that later-occurring judicial or administrative acts that merely left in place or applied the 2010 TCA Judgment to constitute independently justiciable breaches of the BIT."¹³³
 - b. Nor can the Claimant escape the "fatal implications of the statute of limitations" for its claim related to the 2010 Moratorium: although Infinito focuses on the mining code amendment (or 2011 Legislative Moratorium) adopted in late 2010 and effective from 10 February 2011 (*i.e.*, within the limitation period), it ignores the fact that the 2010 Moratorium was already in force as a result of two earlier presidential decrees.¹³⁴

¹²⁸ R-Mem. Jur., ¶ 15.

¹²⁹ R-Mem. Jur., ¶ 13.

¹³⁰ R-Mem. Jur., ¶¶ 16-19. Article XII(3)(c) of the BIT provides: "An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: [...] not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage[.]" Exh. C-0001, Canada-Costa Rica BIT, Art. XII(3)(c).

¹³¹ R-Mem. Jur., ¶¶ 16-17, referring to C-Mem. Merits, ¶¶ 233-234.

¹³² R-Mem. Jur., ¶ 18.

¹³³ R-Mem. Jur., ¶ 18.

¹³⁴ R-Mem. Jur., ¶ 19.

151. Fourth, the Respondent contends that even if the Claimant attempts to focus on actions taken after 6 February 2011, the claims are barred under Section III(1) of Annex I of the BIT. This is because the actions challenged by the Claimant merely maintain or enforce earlier measures that were designed to ensure that investment in the territory of Costa Rica is undertaken in a manner sensitive to environmental concerns. Such actions are exempt from review by an international arbitral tribunal under Section III(1) of Annex I of the BIT, so long as the underlying “measures” are “otherwise consistent” with the BIT.¹³⁵
152. Fifth, the Respondent argues that the Claimant has failed to present a *prima facie* case that there has been a breach of the BIT’s provisions on fair and equitable treatment (“FET”) (Article II(a)), full protection and security (Article II(b)), or expropriation (Article VIII):
- a. With respect to the 2011 Administrative Chamber Decision, under the relevant BIT provisions the Claimant must prove that the judicial acts challenged amount to a denial of justice, which it has failed to do. Nor could the Claimant have acquired any legitimate expectations from the 2010 Constitutional Chamber Decision that could later have been violated by the 2011 Administrative Chamber Decision.¹³⁶
 - b. With respect to the 2013 Constitutional Chamber Decision, the Claimant appears to recognize that the rejection of its unconstitutionality complaint was based on valid procedural grounds. And while it complains of the time that it took to resolve the case, it does not claim prejudice or damage arising from the delay.¹³⁷
 - c. With respect to the 2012 MINAE Resolution, the Claimant “fails to present an intelligible theory for how this Resolution went beyond the 2010 TCA Judgment, which expressly ordered MINAE to expunge the concession from the Mining Registry,” nor has it shown that this decision cancelled any of the Claimant’s additional rights.¹³⁸
 - d. Similarly, the 2015 TCA Damages Decision simply implemented the 2010 TCA Decision by imposing joint liability on the defendants for environmental remediation of the Las Crucitas site. The Claimant does not argue that this decision violated Costa Rican law or was inconsistent with the 2010 TCA Decision. Nor does it claim any damage arising from that decision.¹³⁹
 - e. As to the ban on open pit-mining, the Claimant has not alleged that the 2011 Legislative Moratorium or the executive decrees that preceded it were illegal or improperly implemented as a matter of Costa Rican law. In addition, while these

¹³⁵ R-Mem. Jur., ¶ 20.

¹³⁶ R-Mem. Jur., ¶¶ 21-24.

¹³⁷ R-Mem. Jur., ¶ 25(a).

¹³⁸ R-Mem. Jur., ¶ 25(b).

¹³⁹ R-Mem. Jur., ¶ 25(c).

decrees precluded the granting of new mining rights, the Claimant has not explained how they could have infringed on any right already held by Infinito (indeed, the Costa Rican courts had found that these decrees did not violate the petitioners' acquired rights). Nor has the Claimant shown that it would have been entitled to obtain a new concession and all the necessary permits to develop the Las Crucitas Project in the absence of the 2011 Legislative Moratorium.¹⁴⁰

153. Sixth, the Respondent submits that none of the five “measures” expressly challenged by the Claimant were the cause of the damage that it asserts in this arbitration. As a result, they cannot give rise to a dispute within the meaning of the dispute settlement provisions in the BIT, which repeatedly refer to the investor’s obligation to specify how it “has incurred loss or damage” as a result of the asserted breach. The Respondent notes in this regard that Infinito has asserted that its investment had lost its entire value by November 2011, prior to three of the measures of which it complains. As to the remaining two measures (the 2011 Administrative Chamber Decision and the 2011 Legislative Moratorium), they could not have caused the damage alleged by the Claimant.¹⁴¹
154. Seventh, the Respondent contends that the Claimant has failed to comply with the BIT’s mandatory conditions on the submission of the dispute to arbitration with respect to the 2015 TCA Damages Decision (which had not even been issued when the Claimant submitted this dispute to arbitration). Such conditions include a pre-notification of the dispute to Costa Rica at least six months prior to the initiation of the arbitration under Article XII(2) of the BIT, and express consent to arbitration and waiver of the right to domestic law remedies under Article XII(3) of the BIT no later than the submission of the Request for Arbitration. According to the Respondent, “[t]his Tribunal’s jurisdiction is to be assessed as of the time of submission of the Request to Arbitration, and does not extend to any and all disputes that might arise subsequent to that date[.]”¹⁴²
155. Eighth, the Respondent submits that the “Claimant cannot circumvent any of the jurisdictional flaws described above by selective importation of clauses from Costa Rica’s investment treaties with third States through the Most Favored Nation (MFN) clause contained in Article IV of the BIT.”¹⁴³ According to the Respondent, “[t]he MFN clause of the BIT does not provide a license to disregard treaty provisions that were specifically negotiated and ratified as a package deal by Canada and Costa Rica,” in

¹⁴⁰ R-Mem. Jur., ¶ 25(d).

¹⁴¹ R-Mem. Jur., ¶¶ 26-28.

¹⁴² R-Mem. Jur., ¶ 29. Subsequently to this submission, and in light of the Claimant’s withdrawal of the claim concerning the 2015 TCA Damages Decision, the Respondent stated it was reducing its objections to jurisdiction to seven, thereby eliminating the objection directed specifically at the 2015 TCA Damages Decision claim. R-Reply Jur., ¶ 11. During the Hearing on Jurisdiction, the Respondent explained, however, that “it want[ed] to make sure that the Tribunal understands that the Claimant cannot claim to withdraw the measure or the claim, rather, and then, after the jurisdictional objections, assuming that we even get to the merits stage, that they will somehow revive that measure.” Tr. Day 1 (ENG), 160:16-22 (Mr. Grané).

¹⁴³ R-Mem. Jur., ¶ 30.

particular as Infinito has failed to identify any third party investor who has been accorded more favorable treatment in like circumstances.¹⁴⁴ A majority of investment tribunals have found that MFN clauses cannot modify the terms of a BIT's dispute resolution clause, especially in cases involving MFN clauses with similar wording as the one at issue here, or where a claimant seeks to expand the scope of a State's consent to arbitration. The Respondent argues in this regard that most of the provisions it invokes to challenge the jurisdiction of the Tribunal "are not procedural pre-conditions to arbitration but rather provide clear substantive limits on the type of dispute Costa Rica has consented to arbitrate," and "[t]he Tribunal lacks jurisdiction to go beyond the limits of such consent."¹⁴⁵

b. Overview of the Claimant's Position

156. As a general matter, the Claimant argues that the Respondent impermissibly attempts to re-characterize Infinito's case, and that the Respondent's objections are directed to that reformulated case, not to the case that the Claimant has brought.¹⁴⁶
157. The Claimant recalls that in this arbitration it is challenging the following four measures:
- a. The 2011 Administrative Chamber Decision, which the Claimant alleges confirmed the 2010 TCA Decision, "thereby rendering final and irreversible the annulment of the exploitation concession, environmental approvals, the declaration of public interest and national convenience, and the land use change permit."¹⁴⁷
 - b. The 2013 Constitutional Chamber Decision, which Infinito alleges declined to resolve, on admissibility grounds, the conflict between its earlier decision upholding the constitutionality of the Las Crucitas Project approvals and the 2010 TCA Decision.¹⁴⁸
 - c. The 2012 MINAE Resolution, which Infinito alleges cancelled the 2008 Concession and expunged all of Industrias Infinito's mining rights from the mining registry, going further than what was ordered by the Administrative Chamber.¹⁴⁹

¹⁴⁴ R-Mem. Jur., ¶ 30.

¹⁴⁵ R-Mem. Jur., ¶ 30.

¹⁴⁶ C-CM Jur., ¶ 1.

¹⁴⁷ C-CM Jur., ¶ 56(a); Exh. **C-0261**, Supreme Court (Administrative Chamber), Decision (30 November 2011).

¹⁴⁸ C-CM Jur., ¶ 56(b); Exh. **C-0283**, Supreme Court (Constitutional Chamber), Decision (19 June 2013).

¹⁴⁹ C-CM Jur., ¶ 56(c); Exh. **C-0268**, Resolution No. 0037, MINAE, File No. 2594 (9 January 2012). Infinito also refers to this as the 2012 Directorate of Geology and Mines (DGM) Resolution.

- d. The 2011 Legislative Moratorium on open-pit mining, which the Claimant alleges replaced the 2010 Executive Moratorium, prohibiting Industrias Infito from applying for new permits.¹⁵⁰
158. According to the Claimant, “[i]t is the combined operation of these four measures [...] that meant that Industrias Infito definitively could no longer pursue the development of the Crucitas project.”¹⁵¹ More particularly, the Claimant submits that the composite result of these measures breached the BIT in four ways:
- a. It expropriated the Claimant’s investments by definitively precluding Infito from building and operating the Crucitas gold mine.¹⁵²
 - b. It breached Costa Rica’s obligation to provide FET to Infito’s investments, by violating its legitimate expectations and denying both procedural and substantive justice to Infito.¹⁵³
 - c. It failed to grant Infito’s investments full protection and security.¹⁵⁴
 - d. It breached two substantive obligations imported into the BIT through the BIT’s MFN clause from other bilateral investment treaties signed by Costa Rica: (i) Costa Rica’s obligation to do “what is necessary” to protect Infito’s investments, imported from the Costa Rica-France bilateral investment treaty, and (ii) the “umbrella clause” requiring Costa Rica to “comply with [or observe] any obligation assumed regarding investments of investors of the other Contracting Party,” found in Costa Rica’s bilateral investment treaties with Taiwan and Korea.¹⁵⁵
159. On this basis, the Claimant submits that the Respondent’s objections to jurisdiction must fail for the following reasons:
160. First, there is no merit to the Respondent’s argument that Infito’s case is “really” a challenge to the 2010 TCA Decision, and that the Tribunal’s jurisdiction is excluded under Article XII(3)(d) of the BIT because a Costa Rican court has rendered a judgment with respect to that measure. “It is the investor’s prerogative to allege and formulate its claims as it sees fit,”¹⁵⁶ and the Respondent cannot reformulate them. Here, the Claimant is challenging the four measures listed above, and in particular the 2011 Administrative Chamber Decision, which is the measure that rendered Infito’s investments substantially worthless. Neither this decision, nor the other measures challenged by Infito have been the subject of the judgment of a Costa Rican

¹⁵⁰ C-CM Jur., ¶ 56(d); Exh. **C-0238**, Amendment to Mining Code, No. 8904 (1 December 2010).

¹⁵¹ C-CM Jur., ¶ 12.

¹⁵² C-CM Jur., ¶ 13; C-Mem. Merits, ¶¶ 246-289.

¹⁵³ C-CM Jur., ¶ 14; C-Mem. Merits, ¶¶ 290-344.

¹⁵⁴ C-CM Jur., ¶ 15; C-Mem. Merits, ¶¶ 345-347.

¹⁵⁵ C-CM Jur., ¶ 16; C-Mem. Merits, ¶¶ 348-360.

¹⁵⁶ C-CM Jur., ¶ 20.

court.¹⁵⁷ According to the Claimant, “Costa Rica ignores the ordinary meaning, context and purpose of Article XII(3)(d),” which “encourages the pursuit (though does not require exhaustion) of local remedies while insulating lower domestic judicial decisions from being challenged under the BIT.”¹⁵⁸ In addition, the Respondent’s interpretation would “gut the investor protections in the BIT by allowing Costa Rica to shield its measures from challenge merely by ensuring that a judgment of a Costa Rican court was generated regarding that measure.”¹⁵⁹

161. Second, the Claimant contends that the Respondent impermissibly attempts to reframe its claims so that they fall outside of the three-year limitation period set out in Article XII(3)(c) of the BIT. The Claimant reiterates that the focus must be on the claims as it has pleaded them, not as re-characterized by the Respondent. The Respondent also ignores the plain wording of the provision: Article XII(3)(c) bars a claim only if three years have elapsed from the time at which the Claimant first acquired (or should have first acquired) (i) knowledge of the alleged breach and (ii) knowledge that it has sustained loss or damage. The breaches of the BIT did not crystallize until the 2011 Administrative Chamber Decision, at the earliest, because it was after this decision that Infinito’s investments in Costa Rica became substantially worthless. As a result, the limitation period did not begin to run before November 2011 at the earliest, and accordingly Infinito’s claims were brought on time.¹⁶⁰
162. Third, the Respondent distorts the meaning of Annex I, Section III(1) of the BIT. This provision only applies to measures “otherwise consistent” with the BIT, *i.e.*, measures that do not breach other substantive BIT protections. The Respondent’s interpretation undermines the object and purpose of the BIT, which is investment protection.¹⁶¹ In addition, the provision only applies to measures sensitive to environmental concerns, and the Claimant contends that the measures it challenges were not motivated by *bona fide* environmental concerns. In particular, “[t]he exploitation concession and other project approvals were annulled on the basis of the technical application of the 2002 moratorium to the project after the project was deemed environmentally sound by all competent authorities in Costa Rica and by the Constitutional Chamber,” and that “[t]he Costa Rican government and environmental authorities defended the project’s environmental soundness before Costa Rican courts.”¹⁶² As a result, Infinito argues that the Respondent cannot invoke Annex I, Section III(1).
163. Fourth, while purporting to require the Tribunal to assess whether Infinito has made a *prima facie* case on the merits, the Respondent is in fact asking the Tribunal to determine the merits of the dispute and thus to determine contentious issues of fact and law that are inappropriate at the jurisdictional stage. According to the Claimant,

¹⁵⁷ C-CM Jur., ¶ 19.

¹⁵⁸ C-CM Jur., ¶ 20. *See also* C-CM Jur., ¶ 160.

¹⁵⁹ C-CM Jur., ¶ 22.

¹⁶⁰ C-CM Jur., ¶¶ 23-24.

¹⁶¹ C-CM Jur., ¶ 25.

¹⁶² C-CM Jur., ¶ 26 (emphasis in original).

“[a] *prima facie* analysis requires the Tribunal to accept the facts pleaded as true and assess whether they could support a claim for breach of the BIT.”¹⁶³ The Claimant asserts that it “has demonstrated Costa Rica’s breaches of the BIT on a balance of probabilities,” and has thus “more than met its burden to establish *prima facie* breaches of the BIT.”¹⁶⁴ Specifically:

a. With respect to the FET standard in Article II(2)(a) of the BIT:

- i. The Claimant argues that no investment tribunal has ever dismissed a claim for breach of the FET standard because the claimant failed to show a *prima facie* case. This is because the determination of the standard is fact-specific and flexible, and must be assessed in the context of the facts and evidence, which are a matter for the merits.
- ii. In any event, the Claimant rejects the Respondent’s argument that the FET standard of the BIT is equivalent to the minimum standard of treatment under customary international law (“MST”), and argues that it would be premature for the Tribunal to determine this question during the jurisdictional phase.
- iii. Whether the FET standard is autonomous or limited to the MST, the Claimant contends that it has “demonstrated that its claims are *capable* of breaching the FET standard in Article II(2)(a),” and therefore it has established a *prima facie* case that this provision was breached.¹⁶⁵
 - With respect to its legitimate expectations claim, the Claimant argues that the Government provided repeated assurances to Infinito, upon which Infinito reasonably relied for more than a decade in deciding to continue investing in the Las Crucitas Project.¹⁶⁶ Specifically, “Industrias Infinito was granted an exploration permit, an exploitation concession, and several other permits and approvals over the course of the project’s life,” and “[a]t each step, it was encouraged and induced to continue investing in the project.”¹⁶⁷ The Claimant further alleges that “[t]he legality of the Crucitas project’s exploitation concession and approvals was confirmed in multiple judicial decisions including by the country’s highest court.”¹⁶⁸ That after “these repeated and far-reaching assurances” “the Administrative Chamber retroactively applied the 2002 moratorium, nine years after it was adopted, and after Infinito had spent millions developing and building the project in reliance on its mining rights and that the 2002 moratorium did not apply to its project,”

¹⁶³ C-CM Jur., ¶ 28 (emphasis in original).

¹⁶⁴ C-CM Jur., ¶ 28 (emphasis in original).

¹⁶⁵ C-CM Jur., ¶ 34 (emphasis in original).

¹⁶⁶ C-CM Jur., ¶ 32.

¹⁶⁷ C-CM Jur., ¶ 32.

¹⁶⁸ C-CM Jur., ¶ 32.

amounts to a breach of the Claimant's legitimate expectations, regardless of whether the standard is autonomous or limited to the MST.¹⁶⁹

- Likewise, the Claimant submits that it has made a *prima facie* case of a procedural and substantive denial of justice. Procedurally, the Claimant contends that the Respondent denied justice to Infinito by failing to provide a legal system capable of protecting Infinito's investments, because it lacked a mechanism to resolve the inconsistency between the decisions of different chambers of the Supreme Court. Substantively, the Claimant argues that the Administrative Chamber denied justice to Infinito by incorrectly and retroactively applying the 2002 Moratorium to the 2008 Concession and other project approvals.¹⁷⁰

b. With respect to expropriation, the Claimant contends that it has demonstrated both on a balance of probabilities and on a *prima facie* basis that Costa Rica expropriated its investments both directly and indirectly.¹⁷¹ In particular, the Claimant advances the following arguments:

- i. The sole effects doctrine applies to judicial expropriations in the same manner as it does to other expropriatory measures.¹⁷²
- ii. Costa Rica cannot argue that the Administrative Chamber was applying the 2002 Moratorium as a defense. This amounts to arguing that Costa Rica legitimately exercised its police powers, but this defense is not available to Costa Rica because the application of the 2002 Moratorium was neither necessary nor proportionate to any legitimate objective and was in breach of the FET standard.¹⁷³
- iii. Compliance with domestic law is not a defense to expropriation, particularly where the domestic law in question (the 2002 Moratorium) post-dates the investment.¹⁷⁴
- iv. A court decision that applies domestic law may be expropriatory where the domestic law applied is itself expropriatory or breaches a rule of international law.¹⁷⁵ Here, the Claimant alleges that, as applied by the Administrative Chamber, the 2002 Moratorium was in itself expropriatory.

¹⁶⁹ C-CM Jur., ¶ 32.

¹⁷⁰ C-CM Jur., ¶ 33.

¹⁷¹ C-CM Jur., ¶ 35.

¹⁷² C-CM Jur., ¶ 35.

¹⁷³ C-CM Jur., ¶ 35.

¹⁷⁴ C-CM Jur., ¶ 36.

¹⁷⁵ C-CM Jur., ¶ 36.

- v. The Respondent's argument that a denial of justice is a prerequisite for a judicial measure to be expropriatory cannot succeed on a *prima facie* basis.
 - vi. The Claimant has established beyond a *prima facie* standard that it had investments capable of being expropriated. The Respondent's argument that Infinito's rights were not capable of expropriation because they were deemed invalid by the 2011 Administrative Chamber Judgment should be rejected: Infinito's investments extended beyond the 2008 Concession and other approvals annulled by the Administrative Chamber and were not capable of being "invalidated" by it. In addition, the validity of the Concession and other approvals must be assessed independently from the 2011 Administrative Chamber Decision, because this is the very measure that the Claimant alleges breached the BIT. In any event, "Costa Rica is estopped from asserting that the 2002 moratorium rendered Industrias Infinito's rights invalid when its own Constitutional Chamber and authorities represented over the course of more than a decade that the moratorium did not apply to the project."¹⁷⁶
- c. Finally, the Claimant submits that it has established on a *prima facie* basis that Costa Rica failed to provide full protection and security to its investments in breach of Article II(2)(b) of the BIT. The Claimant argues that the Tribunal need not (and should not) definitively determine the scope of this provision at the jurisdictional stage.¹⁷⁷
164. Fifth, the Claimant denies that its case is nothing more than an appeal from the decisions of Costa Rican courts. This argument inaccurately characterizes and fails to analyze the claims it has actually made.¹⁷⁸
165. Sixth, the Claimant asserts that, contrary to the Respondent's contention, it has demonstrated its damages case on a balance of probabilities and at the very least on a *prima facie* basis.¹⁷⁹ Its losses crystallized on the date of the 2011 Administrative Chamber Decision. In any event, it argues that "Infinito's evidence must be accepted as true for the purpose of the jurisdictional analysis," and "[t]he question of the precise date on which Infinito's losses crystallized must be left for the merits" and is "irrelevant to the Tribunal's jurisdiction."¹⁸⁰ The Claimant also denies that it must prove separate losses for the other measures that it challenges: these measures prevented Industrias Infinito from obtaining a new exploitation concession and new project approvals, and

¹⁷⁶ C-CM Jur., ¶ 37.

¹⁷⁷ C-CM Jur., ¶ 38.

¹⁷⁸ C-CM Jur., ¶ 39.

¹⁷⁹ C-CM Jur., ¶ 40.

¹⁸⁰ C-CM Jur., ¶ 41.

thus operated in combination with the 2011 Administrative Chamber Decision to render Infinito's investments substantially worthless.¹⁸¹

166. Seventh, the Claimant submits that, through the BIT's MFN clause (Article IV), it is entitled to benefit from the more favorable drafting of the dispute settlement provisions found in the bilateral investment treaties signed by Costa Rica with Taiwan and Korea, from which the preconditions set out in Article XII(3) are absent. The Respondent's interpretation ignores the broad wording of Article IV of the BIT, which includes more favorable substantive and procedural protections under other bilateral investment treaties. Such interpretation also undermines the purpose of Article IV and the investment protection purpose of the BIT as a whole. In addition, Article XII(3) is an admissibility and not a jurisdictional provision, and as such does not define the Tribunal's jurisdiction, so the Respondent's concerns are inapplicable.¹⁸²
167. Finally, although the Claimant withdraws its claim with respect to the 2015 TCA Damages Decision because it is not final and binding on Industrias Infinito,¹⁸³ it reserves its right to challenge as an ancillary measure any future Administrative Chamber decision that breaches the BIT. The Claimant argues that "[a]lthough the Tribunal need not determine the issue at this stage, no new notice or amicable settlement period would be required in respect of this claim because it arises from the same subject-matter as the measures already challenged by Infinito."¹⁸⁴

2. Jurisdictional Requirements under Article XII

168. The Parties dispute whether Article XII sets out only jurisdictional requirements, or also admissibility requirements. The Respondent submits that all of the requirements set out in Article XII are jurisdictional, because they establish the scope of Costa Rica's consent to arbitration.¹⁸⁵ By contrast, the Claimant argues that the relevant jurisdictional requirements are found in Article XII(2), in conjunction with Costa Rica's unilateral consent to arbitrate provided under Article XII(5), while those in Article XII(3) are conditions for admissibility.¹⁸⁶
169. The Tribunal agrees with the Respondent that most (but not all) of the requirements in Article XII are jurisdictional, as they determine the conditions under which Costa Rica has consented to submit claims to arbitration. Jurisdictional requirements are obviously first found in Article XII(1) of the BIT, read together with Article XII(2), which provide as follows:

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a

¹⁸¹ C-CM Jur., ¶ 42.

¹⁸² C-CM Jur., ¶ 43.

¹⁸³ See *supra*, n. 124 and *infra*, n. 208.

¹⁸⁴ C-CM Jur., ¶ 44.

¹⁸⁵ R-Reply Jur., ¶¶ 282-288.

¹⁸⁶ C-CM. Jur., ¶¶ 516-518.

measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.

2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). The investor will bear the burden of proof to demonstrate:
 - (a) that it is an investor as defined by Article I of this Agreement;
 - (b) that the measure taken or not taken by the Contracting Party is in breach of this Agreement; and
 - (c) that the investor has incurred loss or damage by reason of, or arising out of, that breach.

For the purpose of this Agreement, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

170. For the Tribunal, not all of the conditions set out in these provisions go to its jurisdiction. Only the following are jurisdictional requirements:
 - a. There must be a dispute (Article XII(1)). Read together with Article 25(1) of the ICSID Convention, this dispute must be legal in nature.
 - b. The dispute must be between one Contracting Party to the BIT and an investor of the other Contracting Party (Article XII(1)).
 - c. The dispute must relate to a claim by the investor that a measure taken or not taken by the host State is in breach of the BIT (Article XII(1)).
 - d. The dispute must also relate to a claim “that the investor has incurred loss or damage by reason of, or arising out of, that breach” (Article XII(1)).
 - e. A period of six months must have elapsed from the date on which a notice of dispute has been delivered in accordance with the final paragraph of Article XII(2)), during which the Parties must have attempted to settle the dispute amicably, before the claim can be submitted to arbitration (Article XII(2)).¹⁸⁷
171. By contrast, sub paragraphs (a) to (c) of Article XII(2) do not establish jurisdictional requirements; they set out rules on burden of proof. Indeed, the provision states that “[t]he investor will bear the burden of proof to demonstrate: (a) that it is an investor as defined by Article I of this Agreement; (b) that the measure taken or not taken by the Contracting Party is in breach of this Agreement; and (c) that the investor has incurred loss or damage by reason of, or arising out of, that breach.” These rules on burden of proof will thus apply whenever the relevant requirement needs to be

¹⁸⁷ Exh. C-0001, Canada-Costa Rica BIT, Art. XII(1)-XII(2).

proven, be it at the jurisdictional or at the merits stage. With respect to (a), the investor must prove that it qualifies as an investor under the BIT during the jurisdictional phase, because the condition of investor is necessary to establish jurisdiction. By contrast, the conditions under (b) and (c) of Article XII(2) must be proven at the merits stage.

172. Other requirements can be found in Article XII(3), which reads as follows:

3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:
 - (a) the investor has consented in writing thereto;
 - (b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;
 - (c) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage; and
 - (d) in cases where Costa Rica is a party to the dispute, no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement.

173. Article XII(3)(a) is clearly a jurisdictional requirement, as there can be no jurisdiction without a party's consent. Article XII(3)(b) is also jurisdictional in nature: the host State has not consented to arbitrate if the investor has not waived its right to initiate or continue other proceedings before the courts of the host State.

174. The Parties dispute whether the conditions set out in sub-paragraphs (c) and (d) of Article XII(3) constitute jurisdictional requirements or go to admissibility. As explained in Section IV.C.4.c *infra*, in what pertains to Article XII(3)(c) the Tribunal defers this discussion to the merits phase, should it become relevant at that stage; and in what pertains to Article XII(3)(d), the Tribunal observes that the matter is of no consequence (Section IV.C.4.a(iii) *infra*).

175. Accordingly, for the Tribunal to have jurisdiction over this dispute, the following conditions must be met:

- a. There must be a dispute (Article XII(1)). Read together with Article 25(1) of the ICSID Convention, this dispute must be legal in nature. The Parties agree (and rightly so) that there is a legal dispute in this case.
- b. The dispute must be between one Contracting Party to the BIT and an investor of the other Contracting Party (Article XII(1)). Here, the dispute clearly involves one Contracting Party (Costa Rica). The notion of "investor", on the other hand, is defined in Article I(h) as:
 - (i) any natural person possessing the citizenship of one Contracting Party who is not also a citizen of the other Contracting Party; or

- (ii) any enterprise as defined by paragraph (b) of this Article, incorporated or duly constituted in accordance with applicable laws of one Contracting Party;

who owns or controls an investment made in the territory of the other Contracting Party.¹⁸⁸

Article I(b) defines “enterprise” as:

- (i) any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and
- (ii) a branch of any such entity;

For further certainty, ‘business enterprise’ means any enterprise which is constituted or organized in the expectation of economic benefit or other business purposes.

In turn, Article I(g) defines “investment” as:

[...] any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:

- (i) movable and immovable property and any related property rights, such as mortgages, liens or pledges;
- (ii) shares, stock, bonds and debentures or any other form of participation in an enterprise;
- (iii) money, claims to money, and claims to performance under contract having a financial value;
- (iv) goodwill;
- (v) intellectual property rights;
- (vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources;

but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.

For further certainty, investment does not mean, claims to money that arise solely from:

- (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of one Contracting Party to a national or an enterprise in the territory of the other Contracting Party; or

¹⁸⁸ The Tribunal has omitted the additional definition regarding the term "natural person possessing the citizenship of one Contracting Party" for Canada, as the Claimant is not a natural person.

- (ii) the extension of credit in connection with a commercial transaction, such as trade financing, where the original maturity of the loan is less than three years.

Without prejudice to subparagraph (ii) immediately above, a loan to an enterprise where the enterprise is an affiliate of the investor shall be considered an investment.

For the purpose of this Agreement, an investor shall be considered to control an investment if the investor has the power to name a majority of its directors or otherwise to legally direct the actions of the enterprise which owns the investment.

Any change in the form of an investment does not affect its character as an investment.

For greater clarity, returns shall be considered a component of investment. For the purpose of this Agreement, "returns" means all amounts yielded by an investment, as defined above, covered by this Agreement and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income.

The Respondent does not dispute that the Claimant is an investor under this definition. Indeed, it is undisputed that Infinito is an enterprise duly constituted in accordance with the applicable laws of Canada, being incorporated in that country. Nor does the Respondent dispute that Infinito owns or controls an investment made in the territory of Costa Rica. The Claimant asserts that it owns or controls the following assets in the territory of Costa Rica: "(i) its shares in Industrias Infinito; (ii) the money it invested in Industrias Infinito through intercompany loans; (iii) the exploitation concession; (iv) the pre-existing mining rights underlying the exploitation concession; (v) the other approvals for the Crucitas project; (vi) the physical assets associated with the project, including the half-built mining infrastructure; and (vii) the intangible assets associated with the project."¹⁸⁹ The Respondent does not contest this. However, as noted in Section IV.A.3 *supra*, APREFLOFAS has argued that the Claimant's investment was not obtained in accordance with Costa Rican law, and therefore does not meet the definition of investment at Article I(g) of the BIT. As explained in that same Section, the Tribunal has deferred this matter to the merits.

- c. The dispute must relate to a claim by the Claimant that a measure taken or not taken by Costa Rica is in breach of the BIT (Article XII(1)). Here, there is no dispute that the Claimant claims that measures taken by Costa Rica are in breach of the BIT, but the Parties dispute what those measures are and whether they qualify as "measures" for the purposes of the BIT. This dispute is at the heart of several of the Respondent's objections to jurisdiction.
- d. The dispute must also relate to a claim "that the investor has incurred loss or damage by reason of, or arising out of, that breach" (Article XII(1)). Again, the Claimant claims that it has incurred loss or damage arising out of the breaches it alleges, but the Respondent disputes that this damage could have arisen from

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C-Mem. Merits, ¶ 219.

the measures identified by the Claimant as being in breach of the BIT. This dispute is also central to one of the Respondent's objections.

- e. The Claimant must have consented in writing to submit the dispute to arbitration (Article XII(3)(a)). There is no dispute that Infinito and Industrias Infinito¹⁹⁰ have both consented in writing to arbitrate this dispute by filing the Request for Arbitration and providing written consents to arbitration,¹⁹¹ with the exception of the objection directed to the claim regarding the 2015 TCA Damages Decision, a claim that the Claimant has in any event withdrawn, and an objection that the Respondent does not presently pursue, as discussed at paragraphs 154 and 167 and note 142 *supra*. It is noted in this context that the Respondent's consent is found at Article XII(5), which provides that "[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article."
- f. A period of six months must have elapsed from the date in which a notice of dispute has been delivered in accordance with the final paragraph of Article XII(2), during which the Parties must have attempted to settle the dispute amicably, before the claim can be submitted to arbitration (Article XII(2)). There is no dispute that this requirement has been met, with the same exception as the one noted in subparagraph (e) above.
- g. The Claimant must have waived its right to initiate or continue any other proceedings in relation to the measures that are alleged to be in breach of the BIT before the Costa Rican courts or tribunals or in a dispute settlement procedure of any kind (Article XII(3)(b)). There is no dispute that both Infinito and Industrias Infinito have provided the required waiver,¹⁹² with the exception of the

¹⁹⁰ In this context, the Tribunal notes that Section II of Annex II of the BIT provides:

"II. Damage Incurred by a Controlled Enterprise

1. A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of that Contracting Party has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case:

(a) any award shall be made to the affected enterprise;

(b) the consent to arbitration of both the investor and the enterprise shall be required; [...]."

¹⁹¹ C-Mem. Merits, ¶ 232; Exh. **C-0289**, Request for Arbitration (6 February 2014); Exh. **C-0002**, Consent to Arbitration and Waiver of Infinito (3 February 2014); Exh. **C-0003**, Resolution of the Board of Directors of Infinito Authorizing the Consent to Arbitration and Waiver and the Submission of the Request for Arbitration (4 February 2014); Exh. **C-0005**, Consent to Arbitration and Waiver of Industrias Infinito (3 February 2014).

¹⁹² C-Mem. Merits, ¶ 232; Exh. **C-0289**, Request for Arbitration (6 February 2014); Exh. **C-0002**, Consent to Arbitration and Waiver of Infinito (3 February 2014); Exh. **C-0003**, Resolution of the Board of Directors of Infinito Authorizing the Consent to Arbitration and Waiver and the Submission of the Request for Arbitration (4 February 2014); Exh. **C-0005**, Consent to Arbitration and Waiver of Industrias Infinito (3 February 2014).

objection directed to the claim regarding the 2015 TCA Damages Decision mentioned in subparagraph (e) above.

176. In addition, the following two requirements must also be met (whether as a matter of jurisdiction or admissibility, a debate over which the Tribunal does not presently rule):
- a. Not more than three years must have elapsed from the date on which Infinito first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it had incurred loss or damage (Article XII(3)(c)). The Respondent disputes that this requirement is met.
 - b. No judgment has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of the BIT (Article XII(3)(d)). Compliance with this requirement is also disputed by the Respondent.
177. The disagreements noted at (c) and (d) of the preceding paragraph are at the heart of several of the Respondent's objections. Specifically:
- a. Underlying virtually all of the Respondent's objections is the argument that the Claimant is formally challenging certain measures, when its case is "really" about other (previous) measures. The question thus arises whether, for jurisdictional purposes, the Tribunal must focus on the measures as pleaded or whether it can re-characterize them, including by determining whether the acts impugned qualify as "measures" for purposes of the BIT at all.
 - b. The Respondent also submits that the claims amount to a disagreement with Costa Rican courts on matters of domestic law, rather than a genuine claim under the BIT. While it does not expressly ground this objection on a particular provision of Article XII, the Tribunal understands that this is related to the jurisdictional requirement that the dispute must relate to a claim by the Claimant that a measure taken or not taken by Costa Rica is in breach of the BIT (Article XII(1)).
 - c. The Respondent further argues that the Claimant fails to show a *prima facie* case of any of the alleged breaches of the BIT. This objection also appears to be grounded on the jurisdictional requirement that the dispute must relate to a claim that a measure taken or not taken by Costa Rica is in breach of the BIT (Article XII(1)), as well as on Article XII(2)(b).
 - d. In addition, the Respondent contends that the Claimant has failed to articulate how it suffered losses from the challenged measures. Again, this objection appears to be based on the jurisdictional requirement that the dispute must relate to a claim that the investor has incurred loss or damage by reason of, or arising out of, the breaches alleged (Article XII(1)), and on Article XII(2)(c), according to which the Claimant bears the burden of proving that it has "incurred loss or damage."

178. The Tribunal will address these issues first, in order to establish whether the main jurisdictional requirements are met (Section IV.C.3 *infra*).

3. The Respondent's Objections Arising from Article XII(1) and (2)

a. Should the Tribunal Consider the Case as Pleaded by the Claimant?

(i) *The Respondent's Position*

179. At the heart of the Respondent's objections is the same underlying argument: "the key measure underlying Infinito's claims is the annulment of Infinito's concession by the 2010 TCA Judgment."¹⁹³ For the Respondent, this is the measure that annulled the 2008 Concession and other project approvals, an annulment that the Claimant has recognized "instantly," rendered its investments "substantially worthless," and breached the BIT.¹⁹⁴ In other words, the Claimant's case is "really" about the 2010 TCA Decision, and not about the measures formally challenged by the Claimant.

180. Relying on the expert report of Carlos Ubico, the Respondent asserts that, as a matter of Costa Rican law, it was the 2010 TCA Decision which ordered the annulment of the Concession and other approvals, and that it was not in any way provisional or dependent on any confirmation by the Administrative Chamber of the Supreme Court.¹⁹⁵ Although Industrias Infinito's cassation request before the Administrative Chamber of the Supreme Court temporarily suspended the execution of the 2010 TCA Decision, the decision itself remained valid and binding unless reversed by the Administrative Chamber.¹⁹⁶ This cassation request did not "undo" the annulment, so that the Administrative Chamber could once more annul it; rather, it merely constituted pursuit and exhaustion by the Claimant of its local remedies. Citing James Crawford, the Respondent argues that "the breach of international law occurs at the time when the treatment occurs" and "[t]he breach is not postponed to a later date when local remedies are exhausted [...]."¹⁹⁷ As stated by the PCIJ in the *Phosphates* case, a refusal to redress a prior wrong "merely results in allowing the [allegedly] unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it."¹⁹⁸

181. According to the Respondent, the Tribunal is empowered to go beyond a party's characterization of its claim. In the context of Article XII(3)(d), when the BIT refers to

¹⁹³ R-Mem. Jur., ¶ 156.

¹⁹⁴ R-Mem. Jur., ¶ 155, referring to C-Mem. Merits, ¶¶ 269 and 291.

¹⁹⁵ R-Mem. Jur., ¶¶ 157-159; RER-Ubico 1, ¶¶ 60, 90-91.

¹⁹⁶ R-Mem. Jur., ¶ 159.

¹⁹⁷ R-Mem. Jur., ¶ 160, citing Exh. **RL-0034**, J. Crawford, Special Rapporteur, *Second Report on State Responsibility*, International Law Commission, 51st Sess., U.N. Doc. A/CN.4/498 (1999), ¶ 145.

¹⁹⁸ R-Mem. Jur., ¶ 163, quoting Exh. **RL-0007**, *Phosphates in Morocco (Italy v. France)*, PCIJ Series A/B Fascicule No. 74, Decision on Preliminary Objections, 14 June 1938 ("*Phosphates*"), p. 22.

a measure that is “alleged to be in breach,” this does not mean that a tribunal must take the Claimant’s word for what is in fact alleged in the complaint. According to the Respondent, “[n]othing in Article XII(3)(d) divests the Tribunal of the power to examine what Claimant’s case is actually about,” and “it is clear that the measure centrally at issue in the case is the TCA’s annulment of Infinito’s 2008 Concession.”¹⁹⁹ The word “alleged” is used to qualify the word “breach” simply because the absence of that qualifier would be inappropriate when a breach has not yet been established.²⁰⁰

(ii) *The Claimant’s Position*

182. The Claimant denies that its case is about the 2010 TCA Decision. It argues that the Tribunal must focus on the case as it has pleaded it. Contrary to the Respondent’s contentions, the Claimant asserts that it does not “really” challenge the 2010 TCA Decision “for the simple reason that that decision was neither final nor the proximate cause of the loss of Infinito’s rights and damages.”²⁰¹ Rather, the Claimant’s case is that, as a composite whole, the four measures that it challenges (specifically, the 2011 Administrative Chamber Decision, the 2012 MINAE Resolution, the 2011 Legislative Moratorium, and the 2013 Constitutional Chamber Decision) “had the combined effect of stripping Infinito of all of its rights, barring it from seeking any sort of meaningful remedy, and eliminating any possibility of proceeding with the Crucitas project.”²⁰² In particular, it was the 2011 Administrative Chamber Decision which rendered the 2010 TCA Decision final, thereby crystallizing the annulment of the Concession and related approvals. The Claimant explains that it challenges this decision, among other measures, because until the release of the 2011 Administrative Chamber Decision, no breach of the BIT had occurred.²⁰³
183. In any event, the Claimant submits that the Tribunal must hear its claims as it has pleaded them, not as the Respondent attempts to redefine them. Tribunals have consistently found that, at the jurisdictional stage, the Tribunal must consider “presumed or supposed violations of [the Treaty as] invoked by the Claimant.”²⁰⁴

¹⁹⁹ R-Reply Jur., ¶ 131(a).

²⁰⁰ R-Reply Jur., ¶ 131(a).

²⁰¹ C-Rej. Jur., ¶ 222.

²⁰² C-CM Jur., ¶ 157.

²⁰³ C-Rej. Jur., ¶ 222.

²⁰⁴ C-Rej. Jur., ¶ 223 (emphasis in original), referring to Exh. **RL-0035**, *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000 (“*Waste Management I*”), ¶ 27(b); Exh. **CL-0135**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (“*ECE Projektmanagement*”), ¶ 4.743; Exh. **RL-0096**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012 (“*Chevron II*”), ¶ 4.8. See also C-CM Jur., ¶¶ 179-181.

184. In the context of Article XII(3)(d), the “measure that is alleged to be in breach” of the BIT must be the measure that the *Claimant* alleges, not the measure as redefined by the Respondent. Likewise, the “breach” that has been alleged must be assessed as pleaded by the Claimant. To suggest otherwise would strip the word “alleged” of its ordinary meaning.²⁰⁵ The Claimant notes in this respect that the term “alleged” is being used as a verb, not an adjective, and that, contrary to the Respondent’s suggestion, the term “breach” is often unaccompanied by the qualifier “alleged.”²⁰⁶

(iii) *Discussion*

185. The Tribunal agrees with the Claimant: it is the Claimant’s prerogative to formulate its claims as it sees fit. As stated in *ECE Projektmanagement*:

[I]t is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants’ claims accordingly fall to be assessed on the basis on which they are pleaded.²⁰⁷

186. The Tribunal considers that this conclusion is supported by the express language of Article XII(3)(d) of the BIT, which stipulates that “[a]n investor may submit a dispute as referred to in paragraph (1) to arbitration [...] only if [...] (d) in cases where Costa Rica is a party to the dispute, no judgment has been rendered by a Costa Rican court regarding the measure that is *alleged* to be in breach of this Agreement” (emphasis added). The Tribunal is persuaded that the ordinary meaning of the term “alleged,” which is used as a verb in this context, is “pleaded” or “claimed.” Further, at the jurisdictional stage, a tribunal must be guided by the case as put forward by the claimant in order to avoid breaching the claimant’s due process rights. To proceed otherwise is to incur the risk of dismissing the case based on arguments not put forward by the claimant, at a great procedural cost for that party.
187. Accordingly, the Tribunal must assess the case before it focusing on the measures that the Claimant has deemed fit to challenge, and determine its jurisdiction, the admissibility of these claims and, if appropriate, the *prima facie* existence of rights to be protected at the merits phase, on that basis. It is a different question whether, assuming there is jurisdiction and admissibility, the claims as raised are founded or not. This is a matter for the merits stage where the Claimant will have to establish that the claims as presented arise from breaches of the BIT and caused a compensable loss.

²⁰⁵ C-Rej. Jur., ¶ 223.

²⁰⁶ C-Rej. Jur., ¶¶ 225-226.

²⁰⁷ Exh. **CL-0135**, *ECE Projektmanagement*, ¶ 4.743.

188. The Tribunal notes in this respect that the Claimant asserts that the following measures breached the BIT:²⁰⁸
- a. The November 2011 Administrative Chamber Decision, which the Claimant alleges confirmed the 2010 TCA Decision, “thereby rendering final and irreversible the annulment of the exploitation concession, environmental approvals, the declaration of public interest and national convenience, and the land use change permit.”²⁰⁹
 - b. The June 2013 Constitutional Chamber Decision, which Infinito alleges declined on preliminary admissibility grounds to resolve the conflict between its earlier decision upholding the constitutionality of the Las Crucitas Project approvals and the 2010 TCA Decision.²¹⁰
 - c. The January 2012 MINAE Resolution, which Infinito alleges cancelled the 2008 Concession and expunged all of Industrias Infinito’s mining rights from the mining registry, going further than what was ordered by the Administrative Chamber.²¹¹
 - d. The 2011 Legislative Moratorium on open-pit mining, which the Claimant alleges replaced the 2010 Executive Moratorium, prohibiting Industrias Infinito from applying for new permits.²¹²
189. The Tribunal will now focus its analysis on these measures.

b. Are the Acts Challenged by the Claimant “measures” for Purposes of the BIT?

(i) *The Respondent’s Position*

190. The Respondent denies that judicial measures can be considered “measures” capable of breaching the BIT. For this reason, it contends that the Claimant cannot challenge the 2011 Administrative Chamber Decision, nor the 2013 Constitutional Chamber Decision (nor, for that matter, the 2010 TCA Decision, which according to the Respondent is the “real” measure at issue).

²⁰⁸ C-CM Jur., ¶ 56. Although in its Memorial on the Merits the Claimant also challenged a fifth measure, the 2015 TCA Damages Decision, the Claimant has withdrawn its challenge to that decision “because the government and SINAC appealed it to the Administrative Chamber in December 2015” and “[a]s a result, the decision is not final or binding on Industrias Infinito.” However, the Claimant “reserves its right to challenge as an ancillary measure any future Administrative Chamber decision that breaches the BIT.” C-CM Jur., ¶ 44.

²⁰⁹ C-CM Jur., ¶ 56(a); Exh. **C-0261**, Supreme Court (Administrative Chamber), Decision (30 November 2011).

²¹⁰ C-CM Jur., ¶ 56(b); Exh. **C-0283**, Supreme Court (Constitutional Chamber), Decision (19 June 2013).

²¹¹ C-CM Jur., ¶ 56(c); Exh. **C-0268**, Resolution No. 0037, MINAE, File No. 2594 (9 January 2012). Infinito also refers to this as the 2012 Directorate of Geology and Mines (DGM) Resolution.

²¹² C-CM Jur., ¶ 56(d); Exh. **C-0238**, Amendment to Mining Code, No. 8904 (1 December 2010).

191. The Respondent argues that the term “measure” is specifically defined in the BIT, which is unusual. The definition includes “any law, regulation, procedure, requirement or practice,” with no reference to judgments.²¹³ It is thus “irrelevant that the term ‘measure’ is *normally* understood to include judgments, because the Parties have adopted a special and narrower definition that must be given effect.”²¹⁴ The Claimant’s position is incoherent in this respect: while it acknowledges that the BIT contains a special definition of the term “measure,” it then proceeds to ignore that definition, asserting that the term is generally understood to encompass judicial measures.²¹⁵
192. Even if the BIT’s definition of “measure” should be read to include judicial measures, it does not follow that judicial breaches must be arbitrable. According to the Respondent, “[i]t is quite common for investment treaties to provide protection against a wide range of breaches, but to restrict international dispute resolution concerning such measures to a narrower subset.”²¹⁶
193. Finally, as noted in paragraph 264 *infra*, the Respondent submits that this interpretation of the term “measure” is consistent with its interpretation that Article XII(3)(d) excludes challenges to decisions by Costa Rica’s judiciary.

(ii) *The Claimant’s Position*

194. The Claimant asserts that judicial measures constitute “measures” for the purposes of the BIT. It notes that, according to Article I(i) of the BIT, a “measure” includes “any law, regulation, procedure, requirement or practice,” which encompasses judicial decisions and processes, as recognized by the ILC Articles on State Responsibility and by international tribunals.²¹⁷ While the ordinary meaning of a term may be supplanted by a special agreed meaning, the party invoking a special meaning must meet a high burden of proof, which the Respondent has failed to meet.²¹⁸ To the contrary, the list in Article I(i) of the BIT is non-exhaustive (as evidenced by the use of

²¹³ R-Reply Jur., ¶ 131(b).

²¹⁴ R-Reply Jur., ¶ 131(b) (emphasis in original).

²¹⁵ R-Reply Jur., ¶ 133(a).

²¹⁶ R-Reply Jur., ¶ 133(b).

²¹⁷ C-CM Jur., ¶ 188, citing Exh. **CL-0007**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, II(2) Yearbook of the International Law Commission (2001), Art. 4; Exh. **CL-0075**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (“*Rumeli*”), ¶ 702; Exh. **RL-0090**, *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (“*Saipem*”), ¶ 143; Exh. **CL-0055**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (“*Loewen Award*”), ¶ 148; Exh. **CL-0014**, *Arif*, ¶ 334.

²¹⁸ C-Rej. Jur., ¶¶ 194-199.

the word “includes”) and already encompasses judicial measures (which are included in the categories of law, procedure, requirement and practice).²¹⁹

195. As discussed in Section IV.C.4.a(ii) *infra*, the Claimant further submits that this is consistent with its interpretation of Article XII(3)(d). As noted in that section, judicial measures may be challenged under the BIT if they are final and not subject to further appeal. This interpretation is consistent with the ordinary meaning of the provision in its context and in light of the object and purpose of the BIT. By contrast, Costa Rica’s interpretation of Article XII(3)(d), would also exclude any challenge to a judicial measure, even if the claim is for denial of justice or expropriation.²²⁰

(iii) *Discussion*

196. There is no dispute that two of the measures challenged by the Claimant constitute “measures” for the purposes of the BIT, namely, the 2012 MINAE Resolution and the 2011 Legislative Moratorium. The question arises with respect to the 2011 Administrative Chamber Decision and the 2013 Constitutional Chamber Decision, which are judicial decisions. The Claimant asserts that judicial measures qualify as “measures” for the purposes of the BIT, while the Respondent denies this.
197. The Tribunal considers that judicial decisions are indeed “measures” for the purposes of the BIT. First, it notes that the definition of “measure” in Article I(i) of the BIT is very wide and non-exhaustive. It includes “any [...] procedure,” which in the Tribunal’s view encompasses judicial procedures and, by necessary implication, judicial decisions, which are the ultimate goal of any judicial procedure and thus an inherent part of them. The Tribunal also notes that this same definition has been used in other treaties such as NAFTA²²¹ and CAFTA,²²² and tribunals have invariably concluded that it covered judicial measures.²²³

²¹⁹ C-Rej. Jur., ¶¶ 194-199 citing Exh. **CL-0113**, NAFTA, Art. 201; Exh. **CL-0112**, CAFTA, Art. 2.1; Exh. **CL-0166**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction, 5 January 2001 (“*Loewen, Jurisdiction*”), ¶ 40; Exh. **CL-0221**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016 (“*Spence*”), ¶ 276; and **RL-0020**, *Apotex Inc v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013 (“*Apotex*”), ¶¶ 333-334, 337(a).

²²⁰ C-CM Jur., ¶ 169.

²²¹ Exh. **CL-0113**, NAFTA, Art. 201.

²²² Exh. **CL-0112**, CAFTA, Art. 2.1.

²²³ See, e.g., Exh. **CL-0166**, *Loewen, Jurisdiction*, ¶ 40; Exh. **CL-0221**, *Spence*, ¶ 276; and Exh. **RL-0020**, *Apotex*, ¶¶ 333-334, 337(a).

198. Second, the ILC Articles on State Responsibility consider that the acts of the State organs exercising judicial functions constitute acts of State which may give rise to the international responsibility of the State.²²⁴
199. Finally, as explained in Section IV.C.4.a(iii) *infra* in the context of Article XII(3)(d), the Tribunal considers that including judicial decisions in the concept of “measure” is consistent with the context of that provision and with the object and purpose of the BIT.
200. Accordingly, all of the measures that the Claimant alleges are in breach of the BIT can be considered “measures” for purposes of Articles XII(1), XII(2) and XII(3)(d) of the BIT.

c. Are the Claimant’s Claims Genuine Claims under the BIT, or Do They Amount to a Disagreement with Costa Rican Courts on Matters of Domestic Law?

(i) *The Respondent’s Position*

201. The Respondent contends that the Claimant’s claims are not genuine claims under the BIT; they merely express a disagreement with Costa Rican courts on matters of domestic law. Citing international commentary and jurisprudence, it is submitted that the Tribunal lacks jurisdiction *ratione materiae* to act as a court of appeal on matters of domestic law.²²⁵ The Tribunal is simply not competent to “second-guess [a local] court’s interpretation and application of local law.”²²⁶ The Respondent refers in particular to the following comment from the *Helnan* tribunal :

An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies,

²²⁴ Exh. **CL-0007**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, II(2) Yearbook of the International Law Commission (2001), Art. 4, 12 and 28.

²²⁵ R-Mem. Jur., ¶¶ 174-181, citing *inter alia* Exh. **RL-0008**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (“*Generation Ukraine*”), ¶ 20.33; Exh. **RL-0009**, *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, ICJ, Separate Opinion of Judge Tanaka, 5 February 1970, p. 158; Exh. **RL-0013**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Decision on Jurisdiction, 6 December 2000 (“*Feldman*”), ¶ 61; Exh. **CL-0090**, *Waste Management, Inc. v. United Mexican States* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (“*Waste Management II*”) ¶ 129; Exh. **CL-0062**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (“*Mondev*”), ¶ 136.

²²⁶ R-Mem. Jur., ¶¶ 178-181, citing Exh. **RL-0021**, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014 (“*Perenco*”), ¶ 583; Exh. **RL-0022**, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (“*Mamidoil*”), ¶ 764; Exh. **CL-0054**, *Liman*, ¶ 347; Exh. **RL-0013**, *Feldman*, ¶ 61; Exh. **RL-0014**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (“*ADF*”), ¶ 190; Exh. **RL-0024**, *Iberdrola Energía S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 (“*Iberdrola, Award*”), ¶ 349.

in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.²²⁷

202. The Respondent acknowledges that the Claimant alleges several breaches of BIT provisions. However, it contends that the Claimant “cannot manufacture international jurisdiction simply by labelling its disagreement with domestic court judgments as breaches of the BIT.”²²⁸ This is confirmed by the *Azinian*²²⁹ and *Iberdrola*²³⁰ decisions. The Claimant makes no effort to explain why the TCA’s and Administrative Chamber’s decisions amount to a breach of any provision of the BIT.²³¹
203. Instead, the Claimant’s case is nothing more than “a complaint that the Costa Rican administrative courts (*i.e.* the TCA and the Administrative Chamber) disagreed with the Claimant’s understanding of domestic law, including its understanding of earlier judgments of the Constitutional Chamber.”²³² According to the Respondent, the “Claimant’s arguments in this arbitration are based on assertions about Costa Rican law that the Costa Rican courts have expressly and repeatedly rejected.”²³³ The Claimant even fails to acknowledge the reasoning provided by the Costa Rican courts. For instance, it ignores that the different chambers of the Supreme Court confirmed that there was no conflict between the allegedly conflicting judgments invoked by the Claimant.²³⁴ Nor has the Claimant challenged the independence or good faith of the Costa Rican courts.²³⁵

²²⁷ R-Mem. Jur., ¶ 176, citing Exh. **RL-0010**, *Helnan International Hotels A.S. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008 (“*Helnan*”), ¶ 106 (emphasis removed).

²²⁸ R-Mem. Jur., ¶ 183.

²²⁹ Exh. **CL-0017**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (“*Azinian*”), ¶ 90 (“[L]abeling is [...] no substitute for analysis”).

²³⁰ Exh. **RL-0031**, *Iberdrola Energía S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment, 13 January 2015 (“*Iberdrola, Annulment*”), ¶ 93 (“The Committee considers that tribunals have the power to legally qualify the parties’ claims [...]. If it were sufficient that the parties simply invoked a violation of international standards to assert ICSID jurisdiction, any analysis of *ratione materiae* jurisdiction would lack practical sense and would be limited to stating that the parties simply invoke the substantive norms of the BIT.” (Unofficial translation from Spanish. The original Spanish reads: “*El Comité considera que los tribunales tienen facultades para calificar legalmente las peticiones de las partes [...]. Si fuese suficiente con que las partes solamente invocaran una vulneración de estándares internacionales para afirmar la jurisdicción del CIADI, el análisis de jurisdicción ratione materiae, carecería prácticamente de sentido y se limitaría a constatar que las partes simplemente invocaron normas sustantivas de un TBI.*”).

²³¹ R-Mem. Jur., ¶ 186.

²³² R-Mem. Jur., ¶ 184.

²³³ R-Mem. Jur., ¶ 184.

²³⁴ R-Mem. Jur., ¶¶ 184-185.

²³⁵ R-Mem. Jur., ¶ 186.

204. The Respondent maintains that the Claimant has failed to explain how its claims, even if accepted at face value, reflect a violation of international, rather than domestic law.²³⁶ Despite the Claimant's efforts to focus on the effect of the challenged measures, "it remains patently clear that the only real question Claimant is asking this Tribunal to resolve is whether the Costa Rican judiciary erred in its determinations on issues of Costa Rican law."²³⁷ In particular, it requests the Tribunal to find that Costa Rican courts incorrectly applied the 2002 Moratorium to Industrias Infinito's 2008 Concession and other permits. For the Respondent, the "[m]ere misapplication of domestic law, even if proven, is insufficient to establish a breach of international law, yet Claimant does not contend (or present any evidence to suggest) that Costa Rica's courts and administrative authorities did anything more than apply the law as they understood it in good faith."²³⁸
205. Unless the Tribunal is able to assume Costa Rican appellate jurisdiction and accept that the TCA's rulings (as upheld by the Administrative Chamber) were incorrect as a matter of Costa Rican law, the Claimant's case concerning the annulment of the 2008 Concession fails:²³⁹
- a. The arbitrariness claim fails in the face of correct (or even good-faith) application of domestic law.
 - b. The legitimate expectations claim fails because the expectation of engaging in an activity cannot be legitimate if it is illegal under domestic law.
 - c. The expropriation claim fails because no wrongful taking can result from the legitimate application of Costa Rica's legal system.
206. The Respondent further contends that none of the Claimant's remaining claims (specifically, its denial of justice claim and its claims against the 2012 MINAE Resolution and the 2011 Legislative Moratorium) is supported by any evidence that withstands *prima facie* scrutiny, and therefore fail on that basis.²⁴⁰

(ii) *The Claimant's Position*

207. The Claimant denies that there is any merit to the Respondent's contention that Infinito's BIT claims amount to "labelling" and are not genuine. The arguments that the Respondent makes under this heading are essentially the same as those advanced in its objection that the Claimant has not made a *prima facie* case of breaches of the BIT. As explained in Section IV.C.3.d(ii) *infra*, the Claimant asserts

²³⁶ R-Reply Jur., ¶ 145.

²³⁷ R-Reply Jur., ¶ 146.

²³⁸ R-Mem. Jur., ¶ 12.

²³⁹ R-Reply Jur., ¶ 147.

²⁴⁰ R-Reply Jur., ¶¶ 149-150.

that it “has established both on a balance of probabilities and on a *prima facie* basis that the various measures which it challenges breached the BIT.”²⁴¹

208. The Claimant further submits that the cases cited by the Respondent to support the proposition that this Tribunal is not a court of appeal on issues of Costa Rican law are inapposite. The Claimant “does not contest [...] that the Tribunal’s jurisdiction is limited to determining whether the four administrative and judicial measures at issue constitute breaches of the Canada–Costa Rica BIT (i.e. breaches of international, rather than domestic, law).”²⁴² Most of its claims do not depend on whether the Costa Rican courts correctly applied Costa Rican law, and for the one claim in which Infinito does challenge the application of Costa Rican law by local courts, such challenge is validly brought under the BIT.²⁴³ For those claims in which Costa Rican law is relevant, the Tribunal may consider the correctness with which Costa Rican law was applied as part of its analysis of whether the Respondent has breached the BIT: the question for this Tribunal is “not whether Costa Rican domestic law was misapplied, but whether the failure to correctly apply domestic law in addition to other relevant facts constitutes a breach of the BIT.”²⁴⁴ In this context, the application of domestic law forms part of the Tribunal’s factual analysis.²⁴⁵

209. More specifically, the Claimant submits that:

- a. Neither the legitimate expectations nor the expropriation claim depend on whether Costa Rican courts correctly applied Costa Rican law (in particular, the 2002 Moratorium). Although the Respondent relies on its domestic law as a defense, it is well-established that a State cannot rely on its internal law to justify an internationally wrongful act.²⁴⁶
- b. The procedural denial of justice claim, the claim for breach of FET because the 2011 Administrative Chamber Decision was arbitrary, and the full protection and security claim are based on expert evidence that the 2011 Administrative Chamber Decision conflicted with binding decisions of the Constitutional Chamber. As explained in paragraph 163 *supra*, the Claimant asserts that there is no mechanism available in Costa Rica to resolve that conflict. While the Administrative Chamber considered that there was no conflict, under Costa Rican law only the Constitutional Chamber is empowered to make that decision, but there is no mechanism allowing it to do so.
- c. The substantive denial of justice claim is the only claim which implies that the Tribunal find that the Administrative Chamber incorrectly applied Costa Rican law

²⁴¹ C-CM Jur., ¶ 461.

²⁴² C-CM Jur., ¶ 462.

²⁴³ C-Rej. Jur., ¶¶ 362-366; C-CM Jur., ¶¶ 462-467.

²⁴⁴ C-Rej. Jur., ¶ 365.

²⁴⁵ C-Rej. Jur., ¶ 365.

²⁴⁶ C-Rej. Jur., ¶ 364, citing Exh. **CL-0014**, *Arif*, ¶ 547(c). See also, C-CM Jur., ¶ 463.

by applying the 2002 Moratorium to Industrias Infinito's 2008 Concession and other project approvals. The Claimant submits that, "in the context of a substantive denial of justice claim, the Tribunal has the power to determine whether the Administrative Chamber's failure to properly apply Costa Rican law also amounts to breaches of the BIT."²⁴⁷ Citing Dolzer and Schreuer, the Claimant submits that the Tribunal is not bound by the findings of the Administrative Chamber in deciding whether its decision was arbitrary, or whether Infinito was denied justice or legal security.²⁴⁸ The Claimant accepts that the task of applying and interpreting domestic law lies primarily with the courts of the host country, but this is not exclusively so: where domestic law is applied in a manner that is evidently arbitrary, unjust or idiosyncratic, or in breach of a fundamental right, international liability arises.²⁴⁹ Citing *Chevron*, the Claimant further contends that "the defectiveness of internal law, the refusal to apply it, or its wrongful application by judges [can] constitute elements of proof of a denial of justice, in the international understanding of the expression."²⁵⁰

210. In sum, "[w]hether or not certain of Infinito's claims depend on a finding that Costa Rican law was applied incorrectly, Infinito's claims are all grounded in breaches of the BIT."²⁵¹

(iii) *Discussion*

211. The Respondent contends that the Tribunal has no jurisdiction *ratione materiae* under the BIT, because the claims amount to no more than a disagreement with the Costa Rican courts on matters of domestic law. The Claimant contests this, arguing that Infinito's claims are all grounded on breaches of the BIT. It also submits that whether or not Costa Rican law was applied incorrectly is part of the factual analysis which the Tribunal must carry out in respect of certain BIT breaches.
212. The Tribunal's jurisdiction *ratione materiae* is defined by Article XII(1) of the BIT (read in conjunction with Article XII(2)). Accordingly, the Tribunal's jurisdiction extends to "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach." This provision

²⁴⁷ C-CM Jur., ¶ 465.

²⁴⁸ C-CM Jur., ¶ 466, citing Exh. **CL-0098**, R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed. 2012), pp. 179-182.

²⁴⁹ C-CM Jur., ¶ 467, citing Exh. **RL-0010**, *Helnan*, ¶¶ 105-106; Exh. **RL-0021**, *Perenco*, ¶ 583; Exh. **CL-0090**, *Waste Management II*, ¶ 130, and Exh. **CL-0031**, *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 ("*Dan Cake*"), ¶ 117.

²⁵⁰ C-CM Jur., ¶ 467, citing Exh. **RL-0019**, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, Expert Opinion of Jan Paulsson, 12 March 2012, ¶ 16.

²⁵¹ C-Rej. Jur., ¶ 362.

clearly sets out that the Tribunal's subject-matter jurisdiction extends to disputes relating to claims that (i) a measure taken or not taken by the host State is in breach of the BIT, and that (ii) the investor has incurred loss or damage as a result of that breach.

213. In the Tribunal's view, for jurisdictional purposes, it suffices to establish the existence of (i) a claim that a measure breaches the BIT, and of (ii) a claim that such breach has caused the investor loss or damage.
214. With respect to (i), the Tribunal has already found that it must focus on the claim as pleaded by the Claimant. Here, the Claimant is clearly and unequivocally arguing that the four measures identified at paragraph 188 *supra* have breached several of the Respondent's obligations under the BIT, namely its obligations under Article II(a) (fair and equitable treatment or the CIL minimum standard), Article II(b) (full protection and security), and Article VIII (expropriation). The jurisdictional requirement under (i) is thus met.
215. With respect to (ii), it is also undisputed that the Claimant claims that the breaches identified above have caused it loss or damage. The Tribunal thus finds that this jurisdictional requirement is also met.
216. The Respondent also objects to the Tribunal's jurisdiction on the grounds that the Claimant has neither made a *prima facie* case of the breaches it alleges, nor of the damage it claims arose from these breaches. The Tribunal addresses these objections in Sections IV.C.3.d and IV.C.3.e *infra*.
217. This does not mean that the Tribunal will not consider the Respondent's argument that the claims merely represent a disagreement with Costa Rican courts on domestic law. The Tribunal agrees that it is not its role to act as a court of appeal with respect to decisions of domestic courts. That said, it is the Tribunal's duty to verify if the measures complained of have breached the BIT. The Tribunal notes in this respect that only two of the measures complained of are judicial measures (the 2011 Administrative Chamber Decision and the 2013 Constitutional Chamber Decision). As such, the Respondent's argument can only apply to these two measures. However, the Claimant has expressly brought claims of denial of justice against those measures. Whether these claims are well-founded (in particular, whether they go beyond a mere disagreement between the Claimant and Costa Rican courts on the application of municipal law) is a matter for the merits.

d. Has the Claimant Made a *Prima Facie* Case of Any of the Alleged Breaches of the BIT?

(i) *The Respondent's Position*

218. The Respondent submits that, to establish the Tribunal's jurisdiction, the Claimant must make a *prima facie* case that the conduct of which it complains is capable of breaching the BIT. For the Respondent, the appropriate analysis in the face of a

preliminary objection to jurisdiction was articulated by Judge Higgins in the *Oil Platforms* case, according to which the tribunal must “accept *pro tem* the facts as alleged by [the claimant] to be true and in that light to interpret [the applicable treaty] for jurisdictional purposes – that is to say, to see if on the basis of the claims of fact there could occur a violation of one or more of [the treaty provisions].”²⁵² In other words, the test is to assess whether, on the facts alleged by the Claimant, the challenged acts are capable of violating the BIT.

219. According to the Respondent, the Claimant “cannot meet the *prima facie* test by simply labelling the disputed conduct as a treaty breach.”²⁵³ Citing *Impregilo* and *Burlington*, the Tribunal cannot limit itself to the Claimant’s characterization of the case.²⁵⁴
220. The Respondent further contends that a *prima facie* case must be supported with *prima facie* evidence. While that evidence need not be sufficient to show that the claim is well founded, it must at least demonstrate that there is some truth behind a claimant’s allegations. In addition, such *prima facie* evidence need not be accepted *pro tem* if the respondent submits other evidence that conclusively contradicts the claimant’s assertions. Citing *Chevron I*, the Respondent argues that, if from the evidence submitted in the jurisdictional phase “the Tribunal finds that facts alleged by the Claimant[] are shown to be false or insufficient to satisfy the *prima facie* test, jurisdiction would have to be denied.”²⁵⁵
221. The Respondent argues that here, the Claimant has failed to make a *prima facie* showing of any of the breaches of the BIT that it alleges. According to the Respondent, the conduct that the Claimant attributes to Costa Rica, even if it were proven, would not violate the relevant standards, and in those cases in which the Claimant’s assertions could plausibly give rise to a breach of the BIT, those allegations find no support in the evidentiary record.²⁵⁶
222. In response to the Claimant’s arguments, the Respondent denies that the Tribunal must accept the Claimant’s factual and legal allegations as true on their face. According to the Respondent, “the Tribunal’s role at the jurisdictional stage is to determine, based on its own review of the available evidence, whether the relevant

²⁵² R-Mem. Jur., ¶ 202, citing Exh. **RL-0085**, *Oil Platforms (Iran v. USA)*, International Court of Justice, Opinion of Judge Higgins, 12 December 1996 (“*Oil Platforms*”), ¶ 32.

²⁵³ R-Mem. Jur., ¶ 205.

²⁵⁴ R-Mem. Jur., ¶ 205, citing Exh. **RL-0087**, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (“*Impregilo I*”), ¶ 239; Exh. **RL-0093**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (“*Burlington*”), ¶ 110.

²⁵⁵ R-Mem. Jur., ¶¶ 206-207, citing Exh. **RL-0095**, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, Interim Award, 1 December 2008 (“*Chevron I*”), ¶ 110.

²⁵⁶ R-Mem. Jur., ¶¶ 209-301.

State conduct could be deemed to constitute a substantive breach of the BIT within Costa Rica's consent to arbitration under Article XII."²⁵⁷

223. Relying on *Emmis*, the Respondent submits that a tribunal must engage in two distinct types of inquiries at the jurisdictional stage, each having a different level of inquiry. The first type of inquiry "relates to questions of fact that must be definitively determined at the jurisdictional stage," while "[t]he second involves questions of fact that go to the merits, which the Tribunal must ordinarily not prejudge, unless they are plainly without foundation."²⁵⁸ The second inquiry "necessarily involves assessing whether the alleged conduct of the [r]espondent is capable of constituting a breach of the substantive protections of the investment treaty so as to fall within the jurisdiction of the [t]ribunal *ratione materiae* but this has to be determined on a *prima facie* basis only."²⁵⁹ According to the Respondent, the Claimant attempts to conflate these two inquiries, and mistakenly argues that it must only make a *prima facie* showing with respect to both jurisdictional and merits inquiries.²⁶⁰
224. On this basis, the Respondent submits that the Tribunal may conclusively determine issues of fact and law at the jurisdictional stage. In particular, it must determine decisively those issues that are essential to establish jurisdiction, such as the existence or ownership of an investment, or threshold requirements of the BIT or the ICSID Convention.²⁶¹ Citing *Ampal-American*, the Respondent submits that it is "not only appropriate, but necessary, for the Tribunal to hold Claimant to a higher level of proof than a *prima facie* showing for all issues bearing directly on the question of jurisdiction."²⁶² For the Respondent, "[t]his means that the Tribunal does not have to take Infinito's assertions or evidence at face value;" it "should test the Claimant's characterizations and its evidence in order to make its jurisdictional determinations."²⁶³
225. According to the Respondent, "the same is true for determining issues of law relevant to the jurisdictional inquiry."²⁶⁴ Citing *Achmea*, the Respondent contends that the Tribunal is entitled to engage in a preliminary interpretation of the substantive provisions of the BIT for purposes of jurisdiction, especially when the parties disagree

²⁵⁷ R-Reply Jur., ¶ 105.

²⁵⁸ R-Reply Jur., ¶ 106, citing Exh. **RL-0086**, *Emmis and Others v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 ("*Emmis*"), ¶ 172 (emphasis removed).

²⁵⁹ R-Reply Jur., ¶ 106, citing Exh. **RL-0086**, *Emmis*, ¶ 172.

²⁶⁰ R-Reply Jur., ¶ 107.

²⁶¹ R-Reply Jur., ¶¶ 108-109 citing Exh. **RL-0086**, *Emmis*, ¶ 174.

²⁶² R-Reply Jur., ¶¶ 110-111 citing Exh. **RL-0168**, *Ampal-American Israel Corporation and Others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016 ("*Ampal-American*"), ¶ 219.

²⁶³ R-Reply Jur., ¶ 111.

²⁶⁴ R-Reply Jur., ¶ 112.

on the proper interpretation of a provision.²⁶⁵ Relying on *EnCana* and *Continental Casualty*, the Respondent submits that “it is proper for an arbitral tribunal to identify the relevant State acts or omissions that make up the alleged treaty breach, and to examine the facts of the dispute critically.”²⁶⁶ For this purpose, “[a] tribunal is empowered to look beyond the superficial assertions of a pleading and examine the true substance of a claimant’s complaint, and may arrive at contrary conclusions of fact or law where the claimant’s assertions are demonstrably false, or where claimant ascribes to them a strained interpretation.”²⁶⁷

226. For the Respondent, the cases cited by the Claimant are inapposite. *ECE Projektmanagement* dealt with the attempt of the respondent State to recast a claim for violation of the FET standard as a claim for denial of justice; here Costa Rica is not attempting to change the Claimant’s legal theory, it “is simply pointing out that the factual predicate of a particular claim (as defined by Claimant) must have a sufficiently compelling evidentiary foundation.”²⁶⁸ In *Glamis*, the earlier measures that the respondent claimed would have been time-barred did not have the same impact as the later measures alleged by the claimant, which is the case here.²⁶⁹ In *Pope & Talbot*, the tribunal agreed with the claimant that the critical date for purposes of the relevant statute of limitations should be counted as of the date of a later event, but it did so only after assessing the relevant evidence.²⁷⁰ In the *Phosphates* case, the PCIJ refused to accept Italy’s characterization of its claim as one of denial of justice arising out of the French authorities’ refusal to redress a previous dispossession of an Italian national, and recognized that the claim was directed at the dispossession itself, which was time-barred.²⁷¹

(ii) *The Claimant’s Position*

227. The Claimant submits that the *prima facie* test applicable at the jurisdictional stage is a low one: “Infinite need only establish that *if* the facts it alleges are ultimately

²⁶⁵ R-Reply Jur., ¶¶ 112-113 citing Exh. **CL-0117**, *Achmea B.V. v. Slovak Republic [II]*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, (“*Achmea*”), ¶ 228.

²⁶⁶ R-Reply Jur., ¶¶ 112-116, citing Exh. **RL-0174**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Partial Award on Jurisdiction, 27 February 2004 (“*EnCana*”), ¶ 25; Exh. **CL-0128**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006 (“*Continental Casualty*”), ¶ 61.

²⁶⁷ R-Reply Jur., ¶ 116.

²⁶⁸ R-Reply Jur., ¶ 117, citing Exh. **CL-0135**, *ECE Projektmanagement*.

²⁶⁹ R-Reply Jur., ¶¶ 118-119, citing Exh. **RL-0105**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (“*Glamis*”).

²⁷⁰ R-Reply Jur., ¶ 120 citing Exh. **CL-0154**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award, 24 February 2000 (“*Pope & Talbot I*”).

²⁷¹ R-Reply Jur., ¶ 121 citing Exh. **RL-0007**, *Phosphates*, p. 21.

established, those facts *could* constitute a violation of the BIT;” it “need not demonstrate that such facts, if proven, *would* violate the BIT.”²⁷²

228. The Claimant argues that the Respondent improperly tries to force the Tribunal to determine at the jurisdictional stage questions that belong to the merits. The Claimant emphasizes that the Tribunal’s current task is to determine whether it has jurisdiction, but it must refrain from prejudging the merits.²⁷³
229. In particular, the Respondent is inappropriately requesting the Tribunal to engage in a detailed legal interpretation of the substantive provisions of the BIT, including (i) the scope of the FET protection in Article II, (ii) whether Infinito’s legitimate expectations are relevant to determining whether that standard has been breached, and (iii) whether judicial decisions can only violate the BIT if they amount to a denial of justice. The jurisdictional stage is not the place for this analysis.²⁷⁴ According to the Claimant, “[t]he Tribunal need simply be satisfied that the claims, as formulated by the claimant, could fall under the scope of the substantive BIT provisions the claimant invokes;” “[o]nly where a substantive protection is ‘plainly incapable’ of bearing the claim put forth by the claimant will it be appropriate for that claim to be dismissed on a *prima facie* basis.”²⁷⁵ Citing *Chevron I*, the Claimant argues that, at the jurisdictional stage, “[t]o require a claimant to prove its interpretation of substantive BIT provisions is to ‘prejudge the merits of the dispute.’”²⁷⁶
230. Likewise, the Claimant submits that the Tribunal must accept the Claimant’s evidence on its face. It must not assess the weight of the fact and expert evidence put forward by the Claimant.²⁷⁷ The Respondent has acknowledged that “the Tribunal must ‘accept *pro tem* the facts as alleged’ by the Claimant ‘to be true.’”²⁷⁸ Citing the *Oil Platforms* case, the Claimant argues that “[i]t is only at the merits stage that a tribunal ‘has jurisdiction to determine exactly what the facts are and see whether they do sustain a violation’ of the BIT.”²⁷⁹ The Respondent’s reliance on *Chevron I* and *II* is misplaced: in *Chevron I*, the tribunal was dealing with a situation where there was conflicting evidence that could have demonstrated that the facts alleged by the

²⁷² C-CM Jur., ¶¶ 293, 299-300 (emphasis in original), citing Exh. **CL-0115**, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (“*Abaclat*”), ¶ 303; Exh. **RL-0090**, *Saipem*, ¶ 91; Exh. **CL-0080**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (“*Siemens*”), ¶ 180; Exh. **RL-0087**, *Impregilo I*, ¶ 254; Exh. **RL-0088**, *Bayindir İnşaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (“*Bayindir*”), ¶ 195, and others.

²⁷³ C-CM Jur., ¶¶ 295-298.

²⁷⁴ C-CM Jur., ¶ 302.

²⁷⁵ C-CM Jur., ¶ 302 (emphasis in original).

²⁷⁶ C-CM Jur., ¶ 302.

²⁷⁷ C-CM Jur., ¶¶ 298, 305-308.

²⁷⁸ C-CM Jur., ¶ 306, citing R-Mem. Jur., ¶ 202.

²⁷⁹ C-CM Jur., ¶ 306, citing Exh. **RL-0085**, *Oil Platforms*, ¶¶ 32, 34.

Claimant were false,²⁸⁰ and in *Chevron II*, the tribunal addressed the possibility that the facts pleaded in the Notice of Arbitration (not the evidence submitted by the claimant) would not be accepted as true if they were “incredible, frivolous, vexatious or otherwise advanced by the claimant in bad faith.”²⁸¹ Here, the Respondent has not identified a single piece of evidence adduced by Infinito that should not be accepted on its face on the basis of the situations contemplated in the *Chevron* cases.²⁸²

231. In answer to the Respondent’s arguments on the appropriate standard of review for the jurisdictional stage, the Claimant articulates the following principles:²⁸³
- a. The facts and law that are necessary to determine jurisdiction may be assessed rigorously. At the jurisdictional stage, tribunals may definitively determine questions of fact that relate to jurisdiction, such as whether there was an investment, or an investor, but these questions do not arise in this case. The cases on which the Respondent relies all relate to this type of inquiry.
 - b. By contrast, the facts and law that are relevant to the merits must be considered on a *prima facie* standard. The Tribunal must accept the Claimant’s factual allegations relating to the merits unless they are plainly without foundation. The Respondent cannot cite a single arbitral decision where the tribunal engaged, at the jurisdictional stage, in a detailed review of the factual evidence to determine whether a substantive BIT standard had been breached. Nor is it appropriate for the Tribunal to engage in a detailed analysis of the BIT’s substantive provisions at this stage.
 - c. The Tribunal’s analysis should be based on the Claimant’s allegations, not on the Respondent’s reformulation of the case. The Claimant submits that “Infinito is free to plead its claims as it deems appropriate,” and “is entitled to provide facts and legal theory in support of its arguments. In response, Costa Rica is entitled to provide its own facts and legal theory. The Tribunal then considers both sides’ positions, in light of the allegations made by the claimant. The claimant’s facts and argument are not shielded from arbitral review; but the Tribunal’s analysis must be based on the claimant’s case, not the respondent’s recasting of it.”²⁸⁴
232. In any event, the Claimant contends that not only has it satisfied the low *prima facie* standard applicable at the jurisdictional stage; it has also shown that Costa Rica has breached its obligations under the Articles II, VIII, and IV of the BIT on the standard applicable to the Tribunal’s assessment of the merits, *i.e.*, the balance of probabilities standard.

²⁸⁰ C-CM Jur., ¶ 307, citing Exh. **RL-0095**, *Chevron I*, ¶¶ 110-112.

²⁸¹ C-CM Jur., ¶ 307, citing Exh. **RL-0096**, *Chevron II*, ¶ 4.6.

²⁸² C-CM Jur., ¶ 308.

²⁸³ C-Rej. Jur., ¶¶ 121-129, citing Exh. **RL-0086**, *Emmis*, ¶¶ 172,174.

²⁸⁴ C-Rej. Jur., ¶ 128 (emphasis in original).

(iii) *Discussion*

233. Both Parties appear to agree that, at the jurisdictional stage, the Tribunal must engage in two separate inquiries, each of which entail a different standard of review. As noted in *Emmis* (on which both Parties rely),²⁸⁵ the first inquiry refers to facts that go to jurisdiction. The second inquiry involves the merits of the breaches claimed.
234. The Parties appear to differ on the identification of the facts that fall within the ambit of the first inquiry. For the Tribunal, it is clear that all the facts that underlie the jurisdictional requirements set by the ICSID Convention and the BIT must be established – proven – at the jurisdictional stage. If these facts are not established, the Tribunal must dismiss the case for lack of jurisdiction.
235. Thus, the Tribunal must finally assess whether the facts that prove the following requirements are established:²⁸⁶
- i. Whether there is a legal dispute (Article 25(1) of the ICSID Convention, and Article XII(1) of the BIT).
 - ii. Whether that dispute arises directly out of an investment (Article 25 of the ICSID Convention).
 - iii. Whether that investment qualifies as such under Article I(g) of the BIT, including whether it is owned or controlled in accordance with Costa Rican Law (Article I(g) of the BIT in connection with Article 25 of the ICSID Convention and Article XII(1) of the BIT).
 - iv. Whether the Parties qualify as a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State); and an “investor” of another Contracting State (Article 25 ICSID of the ICSID Convention, and Article XII(1) of the BIT).
 - v. Whether the Parties have consented in writing to ICSID arbitration (Article 25(1) of the ICSID Convention, and Article XII(3)(a) of the BIT).
 - vi. Whether the dispute relates to a claim that a measure breaches the BIT (Article XII(1) of the BIT).
 - vii. Whether the dispute relates to a claim that the investor has incurred a loss or damage (Article XII(1) of the BIT).

²⁸⁵ Exh. **RL-0086**, *Emmis*, ¶ 172.

²⁸⁶ As noted *supra*, ¶ 174 and explained further *infra*, ¶ 343, the Tribunal will determine whether the requirement set out under Article XII(3)(c) is jurisdictional in nature at the merits stage; and it considers that the issue whether the requirement in Article XII(3)(d) is jurisdictional or admissibility is of no consequence in light of the Tribunal’s finding in Section IV.C.4.a(iii) *infra*.

- viii. Whether a period of six months has elapsed since the notice of dispute and the Parties have attempted to settle the dispute amicably (Article XII(2) of the BIT).
 - ix. Whether the Claimant has waived its right to other proceedings in relation to the measures (Article XII(3)(b) of the BIT).
 - x. Whether more than three years have elapsed from the date on which the Claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it had incurred loss or damage (Article XII(3)(c) of the BIT).
 - xi. Whether a judgment has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of the BIT (Article XII(3)(d) of the BIT).
236. As noted in Sections IV.B and IV.C.2 *supra*, the Parties agree that the jurisdictional requirements listed above in sub-paragraphs (i), (ii), (iv), (viii) and (ix) are met. The Parties also agree that the requirement listed at sub-paragraph (iii) (existence of an investment protected under the BIT) is met, but given APREFLOFAS's argument that the investment was not obtained in accordance with Costa Rican law, the Tribunal has deferred this issue to the merits. The Parties dispute whether the remaining requirements have been met. The Tribunal has already found that those in sub-paragraphs (vi) and (vii) are present, *i.e.* an alleged claim which relates to a breach of the BIT and which relates to an alleged loss caused by the alleged breach. As for consent (requirement (v)), the Parties diverge on requirements (x) and (xi), which the Tribunal addresses in Sections IV.C.4.a and IV.C.4.b *infra*. The analysis of these latter requirements will complete the first inquiry under the *Emmis* standard, *i.e.* the inquiry referring to facts going to jurisdiction or admissibility.
237. The Tribunal must next engage in the second inquiry, which is to assess *prima facie* whether the claims asserted may constitute treaty breaches. For the Tribunal, this is equivalent to the *pro tem* test articulated by Judge Higgins in the *Oil Platforms* case. Accordingly, to determine whether the claims are "sufficiently plausibly based" upon the applicable treaty, the appropriate analysis "is to accept *pro tem* the facts as alleged by [the claimant] to be true and in that light to interpret [the applicable treaty] for jurisdictional purposes – that is to say, to see if on the basis of [the claimant's] claims of fact there could occur a violation of one or more [provisions of the treaty]."²⁸⁷
238. In making this *prima facie* determination, the Tribunal must first assume the facts as the Claimant alleges them. *Pro tem – pro tempore*, that is for the time being – the Tribunal must accept that the facts alleged will later be proven. Second, the Tribunal must review whether the facts alleged are susceptible of constituting breaches of the treaty's guarantees of protections as it understands these guarantees. To this second inquiry, the Tribunal must apply a *prima facie* standard of review, both in

²⁸⁷ Exh. **RL-0085**, *Oil Platforms*, ¶ 32.

respect of the capacity of the facts to fall within the ambit of the treaty protections and of the understanding of these protections.

239. The Tribunal is neither required nor entitled to engage in a review exceeding the *prima facie* standard. The *Emmis* tribunal expressly recognized this, when it stated that the second inquiry “necessarily involves assessing whether the alleged conduct of the [r]espondent is capable of constituting a breach of the substantive protections of the investment treaty so as to fall within the jurisdiction of the [t]ribunal *ratione materiae* but this has to be determined on a *prima facie* basis only.”²⁸⁸ Similarly, the *Abaclat* tribunal restated the *pro tem* test as follows:

[T]he task of the Tribunal at the stage of determining whether it has jurisdiction to hear a claim under an investment treaty merely consists in determining whether the facts alleged by the claimant(s), if established, are capable of constituting a breach of the provisions of the BIT which have been invoked [...]. In performing this task, the Tribunal applies a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions invoked as well as to the assessment of whether the facts alleged may constitute breaches of these provisions on its face.²⁸⁹

240. As a result, the Tribunal will not engage now in a detailed analysis of the facts alleged or of the substantive provisions of the BIT. As noted by Judge Higgins in her separate opinion in the *Oil Platforms* case, it is for the merits “to determine what exactly the facts are, whether as finally determined they do sustain a violation of [the treaty provisions]; and if so, whether there is a defence to that violation [...]. In short, it is at the merits that one sees ‘whether there really has been a breach.’”²⁹⁰
241. The Tribunal is of the view that it is essential to clearly distinguish the limited *prima facie* review at the jurisdictional level from the full-fledged review that will be undertaken at the merits stage. Going beyond a *prima facie* test at such an incipient stage of the proceedings creates a risk of breach of due process. In bifurcated proceedings, the disputing parties expect that the merits will be tried in the subsequent phase of the arbitration and do not put before the tribunal at the jurisdictional stage the entire spectrum of evidence and argument that is reserved for the merits. As a result, if the Tribunal delves too deeply into the merits at the jurisdictional stage, without having the benefit of a complete record and full submissions, the Parties can be deprived of the opportunity to fully present and defend their case, as required by fundamental principles of procedure. Moreover, exceeding the strict bounds of the *pro tem* or *prima facie* test imperils the manageability and efficiency of the proceedings. Applying an expansive test, such as the one put forward by the Respondent, could result in trying the case twice whenever the Tribunal upholds jurisdiction, thus resulting in unnecessary costs and delays.

²⁸⁸ Exh. **RL-0086**, *Emmis*, ¶ 172.

²⁸⁹ Exh. **CL-0115**, *Abaclat*, ¶ 303.

²⁹⁰ Exh. **RL-0085**, *Oil Platforms*, ¶ 34.

242. This being so, while noting that at the jurisdictional stage one should not prejudge facts that go to the merits, the Tribunal considers that an exception needs to be made when these facts are “plainly without foundation.”²⁹¹ This is not the case here. With a few minor exceptions, the Parties agree on the main facts, in particular on the existence of the measures alleged by the Claimant. What they do disagree on is the legal characterization and impact of these facts and whether they amount to breaches of the BIT. However, these are all properly issues for the merits. In the absence of manifestly false factual allegations, the Tribunal sees no reason to depart from the *pro tem* test.
243. On the basis of these principles, the Tribunal has no hesitation concluding that the *pro tem* or *prima facie* test is met. For the purposes of jurisdiction, and on a *prima facie* basis only, the Tribunal holds that the facts alleged could potentially amount to a treaty breach. Whether such a breach, would actually constitute an unlawful expropriation, a breach of FET or of the customary international law minimum standard of treatment, or a denial of justice, is a determination that exceeds the ambit of the present inquiry and belongs to the merits analysis. Moreover, the Tribunal notes that the Claimant challenges non-judicial measures, which on a *prima facie* basis may also potentially constitute treaty breaches.
244. On the basis of the foregoing analysis, the Tribunal holds that the Claimant has satisfied the *prima facie* test needed to establish the Tribunal’s jurisdiction *ratione materiae*. In other words, it has shown that the facts which it alleges, if accepted as true, could entail breaches of the BIT.

e. Must Infinito Make a *Prima Facie* Case on Damages and, if So, Has It Done So?

(i) *The Respondent’s Position*

245. Articles XII(1) and XII(2) of the BIT provide that an investor may submit to arbitration “[a]ny dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach [...]”
246. According to the Respondent, the BIT conditions a valid claim on the existence of both (i) a measure alleged to have breached the BIT and (ii) a specification of loss or damage arising out of the alleged breach. This means that a claimant must establish a *prima facie* case for both (i) an alleged breach and (ii) an alleged damage flowing from such breach. If the claimant does not identify the loss or damage resulting from the measure, then it fails to state a *prima facie* claim.²⁹²

²⁹¹ Exh. **RL-0086**, *Emmis*, ¶ 172.

²⁹² R-Mem. Jur., ¶ 303; R-Reply Jur., ¶ 255.

247. The Respondent contends that the Claimant has failed to establish a *prima facie* case for both breach and damage. The Respondent's arguments regarding a *prima facie* case on the alleged breach are addressed in Section IV.C.3.d *supra*. The Respondent's arguments regarding a *prima facie* case on damages are reviewed here.
248. The Respondent submits that the Claimant has failed to present a plausible theory of loss or damage attributable to any of the measures it has identified as being in breach of the BIT²⁹³ for the following reasons:
- a. First, the Claimant has asserted that its investment in Costa Rica lost all value as a result of the 2011 Administrative Chamber Decision (indeed, on the Claimant's damages theory, this is the only cause asserted for the Claimant's alleged damage). However, the Respondent contends that the 2011 Administrative Chamber Decision was not the true cause of the Claimant's loss; the true cause was the 2010 TCA Decision, which annulled the Claimant's 2008 Concession.²⁹⁴
 - b. Second, even if the 2010 TCA Decision was not the true cause of the Claimant's loss, the Claimant has failed to show what specific damage the 2011 Administrative Chamber decision caused to its business. The Claimant's main argument appears to be that it suffered losses "based on stock valuations, which fluctuate on a daily basis and are often based on nothing more than a hope or wishful thinking;" "[b]ut a loss of hope is not a compensable injury for which a tribunal may award damages in international arbitration."²⁹⁵ As to the Claimant's argument that it continued to spend money on the project in the period between the 2010 TCA Decision and the 2011 Administrative Chamber Decision, it is likely that "such money related to the legal actions it was pursuing at the time, as it was affirmatively barred from undertaking any development on the project during the pendency of the cassation request."²⁹⁶
 - c. Third, if the 2011 Administrative Chamber Decision is the true cause of the Claimant's losses, it is unclear how the Claimant could have "incurred loss or damage by reason of, or arising out of" later measures.²⁹⁷ By its own admission, its losses became final, and its investment in Costa Rica substantially worthless, with the issuance of the 2011 Administrative Chamber Decision:²⁹⁸ "It is logically impossible for something that *has already been lost* to be lost again through a subsequent act."²⁹⁹ Citing *Pey Casado*, the Respondent contends that "a

²⁹³ R-Mem. Jur., ¶ 304.

²⁹⁴ R-Mem. Jur., ¶ 305.

²⁹⁵ R-Reply Jur., ¶ 257, referring to Exh. **RL-0086**, *Emmis*, ¶ 255.

²⁹⁶ R-Reply Jur., ¶ 257, referring to Exh. **RL-0086**, *Emmis*, ¶ 255.

²⁹⁷ R-Mem. Jur., ¶ 306.

²⁹⁸ R-Reply Jur., ¶ 258, referring to C-CM Jur., ¶¶ 138-140.

²⁹⁹ R-Reply Jur., ¶ 261 (emphasis in original).

claimant must prove damages for each relevant act and cannot pretend that its damages were caused by one act when in fact they were caused by another.”³⁰⁰

- d. Fourth, the 2011 Legislative Moratorium could not have caused the Claimant any damage because this moratorium did not deprive the Claimant of the possibility to obtain a new concession, which it had lost before through the 2010 Executive Moratorium. The Respondent presumes that the Claimant chose not to challenge those decrees because they are “evidently outside the Tribunal’s jurisdiction *ratione temporis*.”³⁰¹ In addition, the 2010 TCA Decision ordered the Las Crucitas area to be reforested, thus precluding the Claimant’s possibility of obtaining new mining rights.³⁰² Even if the Claimant could have potentially sought *new* mining rights, it has “failed to explain how the vaguely defined hope to acquire new mining rights could qualify as a genuine *loss* under the BIT.”³⁰³

(ii) *The Claimant’s Position*

249. Contrary to the Respondent’s suggestion, the Claimant asserts that it has demonstrated its losses on a balance of probabilities, and thus has more than established a *prima facie* case of damages for the purposes of Article XII(1) and (2).³⁰⁴
250. According to the Claimant, its losses crystallized on the date of the 2011 Administrative Chamber Decision, not on the date of the 2010 TCA Decision. At that time, the annulment of Industrias Infinito’s 2008 Concession and other project approvals was rendered complete, final and irreversible under Costa Rican law.³⁰⁵ Pending the proceedings before the Administrative Chamber, the 2010 TCA Decision was contingent, suspended, and capable of being reversed in full.³⁰⁶ This is supported by Costa Rican law, Infinito’s actions, the response of public markets, and the actions of the Government of Costa Rica. It is also confirmed in the First and Second Reports of FTI Consulting, who analyzed Infinito’s financial statements, changes in market capitalization, management actions and public disclosure, investing activities after the relevant decisions, contemporaneous actions of the Costa Rican Government, and contemporaneous Costa Rican media statements.³⁰⁷ The Claimant notes that Costa Rica has not presented expert evidence to the contrary.

³⁰⁰ R-Reply Jur., ¶ 262 citing Exh. **RL-0170**, *Victor Pey Casado and Foundation “Presidente Allende” v. The Republic of Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016 (“*Pey Casado*”), ¶¶ 205-206.

³⁰¹ R-Mem. Jur., ¶ 307.

³⁰² R-Mem. Jur., ¶ 308.

³⁰³ R-Mem. Jur., ¶ 309 (emphasis in original).

³⁰⁴ C-CM Jur., ¶ 469.

³⁰⁵ C-CM Jur., ¶ 470.

³⁰⁶ C-CM Jur., ¶ 475.

³⁰⁷ C-CM Jur., ¶ 476, citing CER-FTI Consulting 2, ¶¶ 3.1, 5.2, 5.28-5.30, 5.51, 5.56, 5.62, 5.66, 5.75.

As to the Respondent's arguments on the value of the evidence submitted by Infinito, the Claimant contends that "[f]or a publicly-traded company, its share price reflects real value," and notes that "the price of Infinito's shares has remained at close to zero since the Administrative Chamber's decision" and "[t]here is no reason to think it will recover."³⁰⁸

251. In any event, the Claimant argues that its evidence must be accepted as true for the purposes of jurisdictional analysis. When assessing jurisdiction, "the question is whether the facts alleged, taken to be true, 'may be capable' of breaching the BIT's protections."³⁰⁹ Thus, at this stage, the Tribunal must accept the expert evidence provided by the Claimant regarding Infinito's losses and the cause of those losses.³¹⁰ Costa Rica is asking the Tribunal to prejudge the merits and decide now that the 2011 Administrative Chamber Decision caused no loss.³¹¹ According to the Claimant, the only investment tribunal that has declined jurisdiction on this basis (in *Telenor*) found that the claimant had failed to establish a *prima facie* case of expropriation because it had failed to adduce any fact or expert evidence to prove that its investments had been rendered substantially worthless.³¹²
252. That is not the case here: the Claimant notes that FTI Consulting, in consultation with RPA, has calculated Infinito's losses as of 30 November 2011 (the date of the 2011 Administrative Chamber Decision) at USD 321 million, using the discounted cash flow ("DCF") method based on a financial model that concluded that "technical aspects and assumptions of the Crucitas project were developed using standard industry practices and were reasonable and well supported," and that "the capital and operating cost assumptions of the Crucitas project [...] were reasonable."³¹³ RPA has also concluded that the Las Crucitas Project had value beyond the DCF analysis, "contained in resource ounces not included in the production schedule, and prospective exploration ground located on the exploitation concession territory but outside the development area," and values these assets at "between US\$23.7 million and US\$37.1 million based on comparable transactions for non-producing gold deposits."³¹⁴
253. The Claimant denies that it must establish separate losses from the other measures it has challenged. These other measures prevent Infinito from obtaining a new exploitation concession and new project approvals, or from having the existing

³⁰⁸ C-Rej. Jur., ¶ 371.

³⁰⁹ C-CM Jur., ¶ 474, citing Exh. **CL-0134**, *Duke Energy International Peru Investments No 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 22 April 2005 ("*Duke Energy*"), ¶ 118; Exh. **CL-0210/RL-0096**, *Chevron II*, ¶ 4.7; Exh. **RL-0090**, *Saipem*, ¶ 85; Exh. **RL-0087**, *Impregilo I*, ¶ 254.

³¹⁰ C-CM Jur., ¶ 474, referring to CER-FTI Consulting 1 and CER-FTI Consulting 2.

³¹¹ C-Rej. Jur., ¶ 369.

³¹² C-CM Jur., ¶ 473, citing Exh. **RL-0052**, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 ("*Telenor*"), ¶¶ 74-75.

³¹³ C-CM Jur., ¶ 483, citing CER-RPA 1, ¶¶ 159, 181.

³¹⁴ C-CM Jur., ¶ 484, citing CER-RPA 1, ¶¶ 6.10, 188.

concession and approvals restored. As a result, “these measures operated in combination with the Administrative Chamber’s decision to effectively render Infinito’s investments substantially worthless.”³¹⁵

254. According to the Claimant, in the case of a composite breach, a claimant is not required to prove separate damages associated with each individual measure.³¹⁶ *Pey Casado*, cited by the Respondent, is inapposite because it did not address whether each individual measure must cause separate damages.³¹⁷ Here, the Claimant is alleging that its losses only crystallized by the combined operation of the four challenged measures: “absent the other measures that Infinito challenges, the exploitation concession and other project approvals could have been restored or a new concession and new approvals could have been granted. Had that occurred, then the Crucitas project could have continued, and Infinito’s investments would not have been rendered substantially worthless.”³¹⁸

(iii) *Discussion*

255. The Tribunal can dispense with determining whether, under the terms of Article XII(1), the Claimant must make out a *prima facie* case on damages in addition to a *prima facie* case on breach. Indeed, what matters for the purposes of a possible *prima facie* test on damages is that the facts *as alleged* may constitute a loss. There is no question that this requirement is met here. What act may constitute a breach, if any, and whether that act can have caused the damages claimed are different questions, which exceed the limited scope of the *prima facie* test and must be dealt with at the merits stage.

³¹⁵ C-CM Jur., ¶ 471.

³¹⁶ C-CM Jur., ¶¶ 477-479, citing Exh. **CL-0131**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (“*Crystallex*”), ¶¶ 667, 669-672, 708; Exh. **CL-0032**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (“*Deutsche Bank*”), ¶¶ 509, 520-521, 561; Exh. **CL-0058**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (“*Metalclad*”), ¶¶ 106-107, 109, 113; Exh. **CL-0142**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010 (“*Gemplus*”), ¶¶ 8-27-8-28, 15.7, 15.14; Exh. **CL-0049**, *Khan Resources Inc. v. Mongolia* (UNCITRAL, PCA Case No. 2011-09), Award on the Merits, 2 March 2015 (“*Khan*”), ¶ 310; and Exh. **CL-0029**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (“*Vivendi II*”), ¶¶ 7.5.26-7.5.34.

³¹⁷ C-Rej. Jur., ¶ 373.

³¹⁸ C-CM Jur., ¶ 481.

4. The Respondent's Objections under Article XII(3)

a. Are the Claimant's Claims Barred under Article XII(3)(d) of the BIT Because They Challenge Measures Regarding which the Costa Rican Courts Have Already Rendered Judgment?

(i) *The Respondent's Position*

256. The Respondent highlights the unusual nature of Article XII(3)(d) of the BIT. It first argues that it is not a "fork-in-the-road" clause: rather than providing investors with a choice to submit the same *dispute* either to the courts of the host State or to an arbitral tribunal, this clause bars any claim against *measures* "regarding" which a Costa Rican court has rendered a judgment. Unlike a fork-in-the-road clause, this provision does not require that the Costa Rican judicial proceedings and the investor-State proceedings satisfy the triple identity test.³¹⁹ However, in its later submissions, it argues that this provision is similar to (but broader than) a fork-in-the-road clause, although it recognizes that it does not include many of the limitations contained in such clauses.³²⁰
257. The Respondent submits that, pursuant to Article 31 of the VCLT, this provision must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of the BIT. With respect to the ordinary meaning of Article XII(3)(d), the following submissions are made:
- a. While the starting point should be the ordinary meaning of the provision, an ordinary meaning that leads to an illogical result should not be accepted.³²¹ In addition, where, as here, there are several equally authentic versions of a treaty, it may be necessary to consider the terms in each of the authentic languages.³²² Further, in accordance with Article 31(4) of the VCLT, the ordinary meaning does not apply where a special meaning has been agreed by the parties.³²³
 - b. In accordance with the ordinary meaning of its terms, it is "clear that Article XII(3)(d) constitutes a limitation of arbitral jurisdiction in an investor-State dispute under the BIT."³²⁴
 - c. All that is required to trigger this bar is a judgment of a Costa Rican court "regarding" the measure in question. The ordinary meaning of the term "regarding" is broad and "must be understood to cover a broad range of possible relationships between the challenged measure and the relevant Costa Rican judgment," denoting "a situation in which the measure in question has any type of

³¹⁹ R-Mem. Jur., ¶ 149.

³²⁰ See, e.g., R-Reply Jur., ¶¶ 132; 133(d); 138.

³²¹ R-Reply Jur., ¶ 126.

³²² R-Reply Jur., ¶ 126.

³²³ R-Reply Jur., ¶ 126.

³²⁴ R-Mem. Jur., ¶ 151.

genuine connection with the Costa Rican court judgment.”³²⁵ For the Respondent, the word “regarding” must be equated with “concerning,” “about” or “related to.”³²⁶ This is consistent with the authentic Spanish version of the provision, which uses the terms “*relativo a la medida*” (*i.e.*, “related” to the measure), and to the equally authentic French version, which uses the words “*au sujet de la mesure*,” which the Respondent translates as “on the subject of” or “about” the measure.³²⁷

258. The Respondent notes that Article XII(3)(d) is asymmetric. It only applies to cases in which Canadian investors contest measures regarding which a Costa Rican court has issued a judgment, not cases brought by Costa Rican investors against measures taken by Canada. This shows that this provision was specifically negotiated with the Costa Rican judiciary in mind.³²⁸
259. According to the Respondent, “the obvious intended effect of Article XII(3)(d) of the BIT is to prevent Canadian investors from overriding the judgments of Costa Rican courts before international arbitral tribunals,” which “is precisely what Claimant attempts to do in this arbitration.”³²⁹ As noted above, the Respondent contends that the Tribunal need not accept the Claimant’s characterization of the measure, and that the real measure at the heart of the Claimant’s case is the 2010 TCA Decision that annulled Industrias Infinito’s 2008 Concession.³³⁰ However, because there are multiple judgments of the Costa Rican courts “regarding” this annulment, this claim is barred under Article XII(3)(d) of the BIT:
- a. The 2010 TCA Decision has been the subject of the judgment of a Costa Rican court, specifically of the 2011 Administrative Chamber Decision which ruled on Industrias Infinito’s cassation request regarding the 2010 TCA Decision.³³¹
 - b. The 2010 TCA Decision is, in itself, a judgment rendered by a Costa Rican court regarding the annulment.³³²
 - c. The 2010 TCA Decision was also the subject of the 2013 Constitutional Chamber Decision.³³³
260. The Respondent contends that a direct challenge to the 2010 TCA Decision is thus barred by Article XII(3)(d) of the BIT. It is for this reason that, in an attempt to

³²⁵ R-Mem. Jur., ¶ 152.

³²⁶ R-Mem. Jur., ¶ 152.

³²⁷ R-Mem. Jur., ¶ 152.

³²⁸ R-Mem. Jur., ¶ 153.

³²⁹ R-Mem. Jur., ¶ 154.

³³⁰ See *supra*, ¶¶ 179-181.

³³¹ R-Mem. Jur., ¶ 161.

³³² R-Mem. Jur., ¶ 156.

³³³ R-Mem. Jur., ¶ 156.

circumvent this provision, the Claimant formally challenges other measures. However, this attempt must fail because the claims regarding these measures “rest almost entirely on the premise that the 2010 TCA Judgment was wrongly decided.”³³⁴

261. In any event, even if one were to consider that the “measures” formally challenged by the Claimant are the relevant measures, they are all barred under Article XII(3)(d) because they are all measures “regarding” which the Costa Rican courts have rendered a judgment:
- a. The 2011 Administrative Chamber Decision is in itself a judgment of Costa Rica’s highest court. According to the Respondent, “it is impossible to identify a measure more closely related to a Costa Rican court judgment than a *judicial* ‘measure,’ especially when such measure consists in upholding *another* Costa Rican court judgment.”³³⁵ A contrary interpretation “would render the treaty provision essentially meaningless because it could always be circumvented by defining the judicial decision (rather than the act regarding which that judgment was rendered), as the relevant ‘measure.’”³³⁶
 - b. Likewise, the 2013 Constitutional Chamber Decision is also a judgment of a Costa Rican court.³³⁷
 - c. Seen from a different perspective, the 2011 Administrative Chamber Decision, the 2013 Constitutional Chamber Decision and the 2012 MINAE Resolution are all “measures” related to the 2010 TCA Decision, which is in itself a judgment of a Costa Rican Court.³³⁸
 - d. The 2010 Executive Moratorium and the 2011 Legislative Moratorium have also been subject to multiple judgments of the Costa Rican courts. The 2010 Executive Moratorium was comprised of two executive decrees (the Arias Moratorium Decree and the Chinchilla Moratorium Decree), as well as the 2011 Legislative Moratorium, which all were challenged before the Constitutional Chamber of the Supreme Court. In each case, the Constitutional Chamber dismissed the challenge. With respect to the 2011 Legislative Moratorium, the Constitutional Chamber even considered and rejected claims that it violated the BIT (the fact that the plaintiff was not Industrias Infinito is irrelevant for present purposes, because the Article XII(3)(d) does not require that the judgment regarding the “measure” involve the same parties).³³⁹

³³⁴ R-Mem. Jur., ¶ 169.

³³⁵ R-Mem. Jur., ¶ 166 (emphasis in original).

³³⁶ R-Mem. Jur., ¶ 167.

³³⁷ R-Mem. Jur., ¶ 170.

³³⁸ R-Mem. Jur., ¶¶ 168, 170.

³³⁹ R-Mem. Jur., ¶¶ 172, 133-143.

262. According to the Respondent, all of these judgments are “regarding” the annulment of the Claimant’s Concession, which is the real measure challenged by the Claimant.³⁴⁰ As recognized in *Methanex*, upon which the Claimant relies, the term “regarding” refers to a legally significant connection. For the Respondent, “[t]here can be no dispute that the connection between Costa Rican judgments and what Claimant’s BIT claim is about is a legally significant one.”³⁴¹ In any event, the Respondent maintains that it is perfectly possible for a measure to be “regarding,” “concerning” or “related to” itself.³⁴² In addition, “in the case of judgments, it is appropriate to distinguish between the substantive content of the judgment (*i.e.* the operative part of the decision) and the form of the ruling (*i.e.* a written judgment),” and “the written judgment is necessarily ‘regarding’ the substantive content included therein,” being “the substantive content, not the form, which is ‘alleged to be in breach’ of the BIT.”³⁴³
263. The Respondent also argues that the Claimant’s interpretation has the effect of excluding from the scope of the Respondent’s exception to consent any challenges that question the judgment itself. According to the Respondent, “[t]here is no logical reason why measures that are the *subject of* a judgment should be excluded from the scope of the dispute resolution clause, while measures that are themselves judgments should be covered.”³⁴⁴ This interpretation leads to an absurd result and cannot be accepted.
264. As noted in Section IV.C.3.b *supra*, the Respondent also argues that judicial measures are excluded from the scope of the BIT, which supports Costa Rica’s interpretation that Article XII(3)(d) excludes challenges to decisions by Costa Rica’s judiciary.
265. Contrary to the Claimant’s contentions, the Respondent asserts that its interpretation is consistent with the context of the provision. It is entirely consistent with other provisions of the BIT and with the fact that it does not contain many of the limitations typically found in a fork-in-the-road clause.³⁴⁵ By contrast, according to the Respondent, the Claimant’s arguments on context are incoherent:
- a. The Claimant acknowledges that the BIT contains a special definition of the term “measure,” but then proceeds to ignore that definition, asserting that the term is generally understood to encompass judicial measures.³⁴⁶
 - b. Even if the BIT’s definition of “measure” should be read to include judicial decisions, it does not follow that judicial breaches must be arbitrable. According

³⁴⁰ R-Reply Jur., ¶¶ 129-131.

³⁴¹ R-Reply Jur., ¶ 130(a).

³⁴² R-Reply Jur., ¶ 130(a).

³⁴³ R-Reply Jur., ¶ 130(b).

³⁴⁴ R-Reply Jur., ¶ 130(c) (emphasis in original).

³⁴⁵ R-Reply Jur., ¶ 132.

³⁴⁶ R-Reply Jur., ¶ 133(a).

to the Respondent, “[i]t is quite common for investment treaties to provide protection against a wide range of breaches, but to restrict international dispute resolution concerning such measures to a narrower subset.”³⁴⁷

- c. The jurisdictional limitation contained in Article XII(3)(d) cannot be inconsistent with Costa Rica’s “unconditional consent” to arbitration, as the Claimant suggests, because such “unconditional consent” has been given in accordance with the provisions of the entirety of Article XII, which includes the carve-out in Article XII(3)(d).³⁴⁸
 - d. The fact that Article VIII(1) of the BIT gives investors the opportunity for judicial review of expropriations in Costa Rica is not inconsistent with Costa Rica’s interpretation of Article XII(3)(d).³⁴⁹ The BIT does not impose a requirement to exhaust domestic remedies, but if judicial remedies are invoked and result in a judgment, Article XII(3)(d) precludes an investor from bringing another challenge by means of international arbitration.
 - e. Costa Rica’s interpretation is not inconsistent with its substantive obligation to provide FET, insofar as that obligation must be understood to include an obligation not to deny justice in domestic courts. The Claimant confuses the existence of a substantive obligation with the question of which treaty breaches are subject to arbitration. While Costa Rica agrees in principle that the minimum standard of treatment under international law includes a protection against denial of justice, “Article II(2)(a) of the BIT makes no mention of judicial measures or denial of justice *per se*, meaning that nothing in the particular wording of the clause contradicts Costa Rica’s assertion that, under Article XII(3)(d) of the BIT, Costa Rican court judgments are not subject to review through arbitration.”³⁵⁰
266. While the Respondent agrees with the Claimant³⁵¹ that treaty terms should be interpreted to ensure that each term has meaning (*effet utile*), it views the Claimant’s interpretation as lacking *effet utile*. It defies common sense to interpret Article XII(3)(d) as a provision that “encourages (without requiring) pursuit of local remedies, [...] and shields lower court decisions from arbitral review when a final domestic decision has been rendered,” as the Claimant contends.³⁵² It is illogical to interpret a provision that prohibits arbitration where a judgment has been rendered by a Costa Rican court as encouraging the pursuit of local remedies. The provision clearly discourages the pursuit of local remedies. In addition, the Claimant’s interpretation would mean that the exception provided under Article XII(3)(d) would be meaningless

³⁴⁷ R-Reply Jur., ¶ 133(b).

³⁴⁸ R-Reply Jur., ¶ 133(c).

³⁴⁹ R-Reply Jur., ¶ 133(d).

³⁵⁰ R-Reply Jur., ¶ 133(e).

³⁵¹ R-Reply Jur., ¶ 127.

³⁵² R-Reply Jur., ¶ 140.

to Costa Rica, as an investor could always circumvent it by not challenging the lower court decision directly.³⁵³

267. In any event, the Respondent argues that, even on the Claimant's interpretation, Article XII(3)(d) would bar a challenge to the 2010 TCA Decision, because the Claimant does not contest that a final domestic decision has been rendered regarding that judgment.³⁵⁴
268. As to the object and purpose of the treaty, the Respondent disagrees with the Claimant's suggestion that Article XII(3)(d) must be interpreted restrictively because the object and purpose of the BIT is to promote investment. According to Costa Rica, "[i]nvestment treaties are *always* intended to promote investment, but this does not mean that exceptions to a Contracting Party's consent to arbitration under such treaties must be read narrowly."³⁵⁵ As recognized by multiple courts and tribunals, "a sovereign State's expression of consent to arbitration must be unambiguous, and that consent cannot be implied or expanded simply by reference to the object and purpose of the treaty."³⁵⁶ Indeed, "numerous BITs promote investment without providing *any* recourse to investment arbitration at all, or by limiting it in ways that are much more severe than the limitations imposed by this BIT."³⁵⁷
269. Nor does Costa Rica's interpretation unreasonably preclude arbitration, as the Claimant suggests:
- a. The Claimant's argument that, under Costa Rica's interpretation, the State could always defeat jurisdiction by launching a challenge of the measure and ensuring that its courts reject that challenge, "implies the existence of collusion between administrative authorities and the courts to deny an investor its day in court."³⁵⁸ In such a scenario, a tribunal may well find that the State is estopped by its own bad faith conduct from invoking an otherwise valid jurisdictional exception. Here, however, there is no suggestion that Costa Rica initiated judicial challenges in bad faith, nor can it be disputed that the Claimant took full advantage of the Costa Rican court system to defend its Concession.³⁵⁹

³⁵³ R-Reply Jur., ¶ 142.

³⁵⁴ R-Reply Jur., ¶ 143.

³⁵⁵ R-Reply Jur., ¶ 128 (emphasis in original).

³⁵⁶ R-Reply Jur., ¶ 128 citing Exh. **RL-0007**, *Phosphates*, pp. 17-18; Exh. **RL-0068**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 ("*Plama*"), ¶ 198; Exh. **RL-0070**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 ("*Wintershall*"), ¶ 155; Exh. **RL-0179**, *The Russian Federation v. Veteran Petroleum Limited and others*, Hague District Court Judgment, ECLI:NL:RBDHA:2016:4230, 20 April 2016 (English translation), ¶ 5.19.

³⁵⁷ R-Reply Jur., ¶ 134 (emphasis in original).

³⁵⁸ R-Reply Jur., ¶ 135(a).

³⁵⁹ R-Reply Jur., ¶ 135(a).

b. With respect to the Claimant's suggestion that it would be inappropriate to interpret Article XII(3)(d) as precluding arbitration related to judgments in proceedings in which the Claimant did not take part, the Respondent argues that it is for the Tribunal to determine whether the relevant judgment is sufficiently related to the measure being challenged. Here, however, the Respondent notes that the Claimant participated in all the key proceedings in this case, with the exception of those cited by Costa Rica with respect to the 2010 Moratorium. That said, the Respondent insists that these judgments are sufficiently related to the challenged measure as to fall within the scope of Article XII(3)(d) of the BIT.³⁶⁰

270. The Respondent notes that its interpretation is not based on the *travaux préparatoires* or on other supplementary means of interpretation. It is based on the primary interpretation rules of Article 31 of the VCLT. The Respondent alleges that the *travaux* do not contain much information on the drafting history of Article XII(3)(d), and that the Claimant's suggestion that it was intended as a compromise on the exhaustion of local remedies finds no support in the *travaux*.³⁶¹ Even if there had been a link between the discussions on exhaustion of local remedies and Article XII(3)(d), it would support Costa Rica's interpretation, as a provision similar to (but broader than) a fork-in-the-road clause. The Respondent argues in this respect that "[a]n exhaustion of remedies requirement, however, is flatly *inconsistent* with a 'fork-in-the-road' provision, insofar as the first *requires* and the other *prohibits* access to domestic courts before resorting to arbitration;" "[i]t is therefore hardly surprising that, [...] following the inclusion of Article XII(3)(d), Costa Rica dropped its earlier proposal to include an exhaustion of remedies requirement."³⁶²

271. In any event, the Respondent asserts that the circumstances of the conclusion of the BIT confirm Costa Rica's pride in its legal system and its belief that its system was fully in compliance with international law concerning due process and investor rights. The Respondent notes in this regard that the memorandum accompanying Costa Rica's submission of the BIT for ratification by the legislature concluded that the "costs of ratifying such BITs were low because they did not provide for a level of protection beyond that already existing under domestic law."³⁶³

(ii) *The Claimant's Position*

272. The Claimant denies that its claims are barred by Article XII(3)(d) of the BIT. None of the measures that it challenges in this arbitration have been the subject of a judgment of a Costa Rican court.³⁶⁴ The Respondent mischaracterizes Infinito's claims as an attack against the 2010 TCA Decision, but this is not Infinito's case.³⁶⁵ Its case is

³⁶⁰ R-Reply Jur., ¶ 135(b).

³⁶¹ R-Reply Jur., ¶ 136.

³⁶² R-Reply Jur., ¶ 138 (emphasis in original).

³⁶³ R-Reply Jur., ¶ 139.

³⁶⁴ C-CM Jur., ¶ 156.

³⁶⁵ *See supra*, ¶ 182.

that, as a composite whole, the four measures that it challenges “had the combined effect of stripping Infinito of all of its rights, barring it from seeking any sort of meaningful remedy, and eliminating any possibility of proceeding with the Crucitas project.”³⁶⁶

273. Specifically, the Claimant alleges that:

- a. There is no judgment of a Costa Rican court regarding the 2011 Administrative Chamber Decision.³⁶⁷ The Claimant notes that this decision was made by an appellate court in Costa Rica and is not subject to review by Costa Rican courts. Indeed, part of Infinito’s claim is based on the lack of availability of judicial recourse to address the inconsistency created by this decision. As explained further below, the Claimant denies that this decision is a judgment “regarding” itself for purposes of Article XII(3)(d). The Claimant also denies that the 2013 Constitutional Chamber Decision was a judgment “regarding” the 2011 Administrative Decision; it was a statement by the Constitutional Chamber that it was not empowered to render a judgment regarding the 2010 TCA Decision.
- b. There is no judgment regarding the application of the 2011 Legislative Moratorium to the Las Crucitas Project. The court decisions to which Costa Rica refers relate to the application of the 2011 Legislative Moratorium and previous moratorium decrees to other parties and other projects. As explained below, these decisions do not fall under the scope of Article XII(3)(d).³⁶⁸
- c. There is no judgment regarding the 2012 MINAE Resolution. Contrary to Costa Rica’s contention, the 2010 TCA Decision cannot be understood to be a judgment “regarding” the 2012 MINAE Resolution. While the 2012 MINAE Resolution may be “regarding” the 2010 TCA Decision and the 2011 Administrative Chamber Decision, the reverse is not true. But Article XII(3)(d) does not “bar challenges to administrative measures that were adopted subsequently to judgments and that go further than what those judgments require.”³⁶⁹
- d. Likewise, there is no judgment regarding the 2013 Constitutional Chamber Decision. This decision, which dismissed Industrias Infinito’s unconstitutionality action on admissibility grounds, has never been the subject of any Costa Rican judgment.³⁷⁰

³⁶⁶ C-CM Jur., ¶ 157.

³⁶⁷ C-CM Jur., ¶¶ 231-236.

³⁶⁸ C-CM Jur., ¶ 237.

³⁶⁹ C-CM Jur., ¶ 238.

³⁷⁰ C-CM Jur., ¶ 239.

- e. Finally, the Claimant contends that there is no judgment regarding the composite impact of the individual measures.³⁷¹
274. The Claimant submits that, for a claim to be barred under Article XII(3)(d), two conditions must be satisfied: (i) there must be a measure alleged by the Claimant to be in breach of the BIT, and (ii) there must be a judgment regarding that measure.³⁷² The Claimant interprets these conditions as follows, according to the plain meaning of the terms of Article XII(3)(d):
- a. As discussed in Section IV.C.3.a(ii) *supra*, the “measure that is alleged to be in breach” of the BIT must be the measure that the *Claimant* alleges is in breach of the BIT, not the measure as redefined by the Respondent. Likewise, the “breach” that has been alleged must be assessed, at the jurisdictional level, as pleaded by the Claimant.
 - b. As discussed in Section IV.C.3.b(ii) *supra*, the term “measure” includes judgments.
 - c. The judgment “regarding” the measure alleged to be in breach must be an act different from the measure. The term “regarding” denotes a connection between the relevant measure and the relevant judgment, which in turn requires at least two discrete entities or acts. To permit the “judgment” to be the same act as the “measure” would be contrary to the ordinary meaning of the term “regarding.”³⁷³ As a result, a judgment cannot be “regarding” itself, as the Respondent maintains.
275. Accordingly, under the Claimant’s interpretation, judicial measures may be challenged under the BIT, with the following limitations: (i) if a lower court judgment has been challenged by an appeal, it cannot be challenged; and (ii) if the measure is an appellate judgment, the investor may only challenge the final measure in the chain of appeals.³⁷⁴ In this manner, “Costa Rican courts have the opportunity to reverse the harmful effects of lower court judgments on investments, and to remedy breaches of international law, before a dispute is submitted to arbitration. If the investment is harmed as a result of the final appellate decision, such that the harm becomes final, the investor may challenge the last judgment.”³⁷⁵
276. The Claimant adds that, if the investor’s investment has been harmed by an executive, administrative, or legislative measure, the investor may challenge that measure directly under the BIT. If in turn the measure has been the subject of the

³⁷¹ C-CM Jur., ¶ 240.

³⁷² C-CM Jur., ¶¶ 159, 164.

³⁷³ C-CM Jur., ¶¶ 184-185.

³⁷⁴ C-CM Jur., ¶¶ 20, 160, 165.

³⁷⁵ C-CM Jur., ¶ 165.

judgment of a Costa Rican court, the investor may challenge that judgment as described in the preceding paragraph.³⁷⁶

277. According to the Claimant, this interpretation “reflects the BIT drafters’ confidence in Costa Rica’s judiciary.”³⁷⁷ It “facilitates a robust dispute resolution system that simultaneously respects the independence and sovereignty of the Costa Rican judiciary.”³⁷⁸
278. The Claimant insists that Article XII(3)(d) is not a fork-in-the-road provision. It is not designed to make investors choose between domestic and international remedies; rather, it encourages, but does not require, the exhaustion of local remedies.³⁷⁹
279. The Claimant submits that its interpretation is consistent with the interpretive principles of Articles 31 and 32 of the VCLT:
- a. As explained above, it is consistent with the plain meaning of the terms “alleged to be in breach” and “regarding.”³⁸⁰
 - b. It is consistent with the BIT as a whole in light of its context. As explained further below, there is no support in the context of Article XII(3)(d) for the exclusion of judicial measures, or requiring only a tenuous connection between the “judgment” and the “measure.” Likewise, the Claimant argues that its interpretation is consistent with the remainder of the BIT’s provisions.³⁸¹
 - c. It is in line with the object and purpose of the BIT, which for the Claimant is the promotion and protection of investments, as stated in the BIT’s Preamble.³⁸² Citing *Aguas del Tunari*, the Claimant submits that “[t]he ‘primary objective’ of the BIT is to create the framework, and to select [...] ‘an independent and neutral forum for the resolution of investment disputes in accordance with a substantive applicable law’.”³⁸³ Its interpretation is further in conformity with the treaty’s object and purpose, because it “preserves investors’ rights to submit to international arbitration claims that substantive provisions of the BIT [...] have been breached.”³⁸⁴

³⁷⁶ C-CM Jur., ¶ 166.

³⁷⁷ C-CM Jur., ¶ 21. See also C-CM Jur., ¶ 161.

³⁷⁸ C-CM Jur., ¶ 21. See also C-CM Jur., ¶ 161.

³⁷⁹ C-Rej. Jur., ¶ 176.

³⁸⁰ C-CM Jur., ¶¶ 179-185; C-Rej. Jur., ¶ 177(a) and (b).

³⁸¹ C-Rej. Jur., ¶ 177(c) and (d).

³⁸² C-CM Jur., ¶¶ 206-208.

³⁸³ C-CM Jur., ¶ 208, citing Exh. **CL-0118**, *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005 (“*Aguas del Tunari*”), ¶ 153.

³⁸⁴ C-CM Jur., ¶ 209.

- d. Its interpretation facilitates the fulfillment of the object and purpose of the BIT by allowing investors to pursue, without requiring them to exhaust, domestic remedies. The Claimant notes that the “exhaustion of local remedies is often considered a requirement for an investor to establish that it has experienced a denial of justice at the hands of the host state.”³⁸⁵ With respect to other claims, it submits that “the pursuit of local remedies is widely accepted as a desirable, if not necessary, pre-requisite to arbitration, even in the absence of an explicit exhaustion of local remedies requirement in the relevant BIT.”³⁸⁶ Citing *Generation Ukraine, Apotex and Loewen*, the Claimant submits that “[t]o qualify as a final ‘measure’ under the BIT, an investor must make at least a reasonable effort to obtain local redress.”³⁸⁷
- e. Finally, the Claimant’s interpretation is supported by the available supplementary interpretative aids under Article 32 of the VLCT, in particular, by the BIT’s *travaux préparatoires*. The negotiating history of the BIT shows that Costa Rica attempted to introduce an exhaustion of local remedies requirement, but Canada did not accept it. Instead, the parties reached a compromise, reflected in Article XII(3)(d), which encouraged the use of local remedies.³⁸⁸ Only Infinito’s interpretation of this provision can be reconciled with this intended purpose.³⁸⁹
280. By contrast, the Respondent’s interpretation “ignores the ordinary meaning of the provision, renders portions of the BIT inoperative and offers an interpretation that conflicts with the object and purpose of the BIT and finds no support in the *travaux préparatoires*.”³⁹⁰
281. Under Costa Rica’s interpretation, the term “regarding” should be defined to include even the most incidental connection, regardless of the identity of the parties involved or whether the judgment has any direct connection to the investor or impact on the investment. In addition, according to Costa Rica, judicial decisions may never be challenged because they are judgments “regarding” themselves.³⁹¹ Costa Rica also ignores that the “measure” affected by the judgment must be the one “alleged to be in

³⁸⁵ C-CM Jur., ¶ 216.

³⁸⁶ C-CM Jur., ¶ 216.

³⁸⁷ C-CM Jur., ¶¶ 216-219, citing Exh. **RL-0008**, *Generation Ukraine*, ¶ 20.30; Exh. **RL-0020**, *Apotex*, ¶¶ 280-281; Exh. **CL-0055**, *Loewen, Award*, ¶¶ 156, 166.

³⁸⁸ C-CM Jur., ¶¶ 221-226, referring to Exh. **C-0369**, Draft Version of the Canada–Costa Rica BIT (1 January 1996) (Spanish), pp. 11-13; Exh. **C-0371**, Draft Version of the Canada–Costa Rica BIT (22 April 1996) (English), p. 25; Exh. **C-0373**, Draft Version of the Canada–Costa Rica BIT (23 January 1997) (English), p. 29; Exh. **C-0352**, Draft Version of the Canada–Costa Rica BIT (1 January 1997) (English), pp. 17-18; Exh. **C-0372**, Draft Version of the Canada–Costa Rica BIT with Comments from Both Parties (8 May 1996) (English), p.14; Exh. **C-0353**, Summary Minutes of the Canada–Costa Rica BIT Negotiations (29 January 1997), and Exh. **C-0354**, Draft Version of the Canada–Costa Rica BIT (28 August 1997) (Spanish and English).

³⁸⁹ C-CM Jur., ¶ 224.

³⁹⁰ C-CM Jur., ¶ 22. See also C-CM Jur., ¶¶ 162-163.

³⁹¹ C-CM Jur., ¶ 169.

breach.”³⁹² Costa Rica’s interpretation contradicts the plain meaning of these terms,³⁹³ as well as the context of Article XII(3)(d):

- a. “Read in harmony with the broader context of the BIT, the ‘judgment’ must be ‘regarding’ the application of the ‘measure’ to Infinito before Article XII(3)(d) will be engaged;” “[i]t is not enough for there to be a tenuous, immaterial connection or for the judgment to relate to aspects of the measure not directed at Infinito’s investments.”³⁹⁴
- b. Citing *Methanex*, where the tribunal was interpreting the phrase “relating to,” the Claimant argues that the term “regarding” should be “defined with some form of logical limit, that requires proximity between the investor, measure and judgment.”³⁹⁵ For a “judgment” to be “regarding” a “measure [...] alleged to be in breach,” it must relate to the investor’s allegation as to how that measure breached its rights. Accordingly, “the judgment must relate to the application of the measure to Infinito or its investments.”³⁹⁶ According to the Claimant, “[t]he question is not whether there are any judgments relating to Infinito’s claims;” the question is “whether there are judgments regarding the measures alleged to be in breach.”³⁹⁷
- c. Nor can a judgment be “regarding” itself: as explained above, the term “regarding” requires a connection between two discrete entities. The Respondent cannot circumvent this requirement by artificially bifurcating judgments into written reasons and dispositive results: “[w]hen investors challenge judicial measures, they challenge the ‘obligation created by the decree of the court;’ the ‘measure’ is the ‘judgment.’”³⁹⁸

282. Costa Rica’s interpretation would also exclude any challenge to a judicial measure, even if the claim is for denial of justice or expropriation.³⁹⁹ According to the Claimant, this is inconsistent with the ordinary meaning and context of Article XII(3)(d), as evidenced by other provisions of the BIT. According to Article I(i) of the BIT, a “measure” includes “any law, regulation, procedure, requirement or practice,” which encompasses judicial decisions and processes, as recognized in Article 4 of the ILC Articles on State Responsibility, which provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ

³⁹² C-CM Jur., ¶ 168; C-Rej. Jur., ¶ 193.

³⁹³ C-CM Jur., ¶¶ 185, 188.

³⁹⁴ C-CM Jur., ¶ 189.

³⁹⁵ C-CM Jur., ¶¶ 190-193, citing Exh. **CL-0148**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (“*Methanex*”), ¶¶ 127-128, 136-137.

³⁹⁶ C-CM Jur., ¶ 193.

³⁹⁷ C-Rej. Jur., ¶ 193 (emphasis in original). The Tribunal understands that this is what the Claimant meant when it said “whether there are judgments regarding the measures alleged to be breached.”

³⁹⁸ C-Rej. Jur., ¶ 192 (emphasis in original).

³⁹⁹ C-CM Jur., ¶ 169.

exercises legislative, executive, judicial or any other functions [...],” and by international tribunals.⁴⁰⁰ While the ordinary meaning of a term may be supplanted by a special agreed meaning, the party invoking a special meaning must meet a high burden of proof, which the Respondent has failed to meet.⁴⁰¹ To the contrary, the list in Article I(i) of the BIT is non-exhaustive (as evidenced by the use of the word “includes”) and already encompasses judicial measures (which are included in the categories of law, procedure, requirement and practice).⁴⁰²

283. In addition, under Costa Rica’s interpretation, an investor would never be able to challenge an executive, administrative or legislative measure, if it has been the subject of a Costa Rican judgment. Nor could the investor challenge the court judgment.⁴⁰³ By insulating all judicial measures from review, Costa Rica’s interpretation would render many treaty provisions meaningless, including Costa Rica’s unconditional consent to arbitration (Article XII(5) of the BIT), the right to seek judicial review of an expropriatory measure (Article VIII(2) of the BIT), Costa Rica’s obligation not to deny justice (Article II(2)(a) of the BIT).⁴⁰⁴ Referring to *Pope & Talbot*, the Claimant argues that “[t]o exclude all judicial measures from the scope of the BIT would create a ‘gaping loophole in international protections’ against state conduct that breaches the protections of the BIT.”⁴⁰⁵
284. The Respondent’s interpretation would also be inconsistent with the purpose of the BIT. For the Claimant, “[a]n interpretation that undermines the entire operative force of the treaty frustrates [its] primary objective of facilitating the dispute resolution mechanism deliberately established in the BIT.”⁴⁰⁶ Indeed, “[i]nstead of creating a functional framework for dispute resolution, it would render the substantive protections in the BIT ineffective by allowing Costa Rica to shield its measures from challenge under the BIT in almost every case merely by ensuring that a judgment of a Costa Rican court were adopted ‘regarding’ any measure that could be the subject of a challenge.”⁴⁰⁷
285. With respect to the applicability of supplementary means of interpretation under Article 32 of the VCLT, the Claimant submits that tribunals may turn to them only

⁴⁰⁰ C-CM Jur., ¶ 188, citing Exh. **CL-0007**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, II (2) Yearbook of the International Law Commission (2001), Art. 4; Exh. **CL-0075**, *Rumeli*, ¶ 702; Exh. **RL-0090**, *Saipem*, ¶ 143; Exh. **CL-0055**, *Loewen Award*, ¶ 148; Exh. **CL-0014**, *Arif*, ¶ 334.

⁴⁰¹ C-Rej. Jur., ¶¶ 194-199.

⁴⁰² C-Rej. Jur., ¶¶ 194-199, citing Exh. **CL-0113**, NAFTA, Art. 201; Exh. **CL-112**, CAFTA, Art. 2.1, Exh. **CL-0166**, *Loewen, Jurisdiction*, ¶ 40; Exh. **CL-0221**, *Spence*, ¶ 276; and Exh. **RL-0020**, *Apotex*, ¶¶ 333-334, 337(a).

⁴⁰³ C-CM Jur., ¶ 171.

⁴⁰⁴ C-CM Jur., ¶¶ 194-205.

⁴⁰⁵ C-CM Jur., ¶ 188, citing Exh. **CL-0072**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 (“*Pope & Talbot II*”), ¶ 99.

⁴⁰⁶ C-CM Jur., ¶ 208.

⁴⁰⁷ C-CM Jur., ¶ 210.

when the ordinary meaning, context, object and purpose of a treaty provision leads to a “manifestly absurd or unreasonable” result; not when the result is illogical, as the Respondent contends. For the Claimant, “[t]reaty interpreters are not empowered to consider the ‘logic’ of a provision; rather, Article 32 of the VCLT and the principle of *effet utile* are directed towards avoiding ‘manifestly absurd’ results,” *i.e.*, results that “render[] a provision meaningless or [...] ‘untenable as a matter of international law.’”⁴⁰⁸ Even then, tribunals cannot ignore the text of the provision; “they are simply permitted to consider supplementary means of interpretation and to attempt to read treaty provisions in a way that does not render them absurd or strip them of legal effect.”⁴⁰⁹

286. In particular, Article 32 of the VCLT limits recourse to evidence of the parties’ intentions. The Claimant submits that presumed intention is irrelevant; intention will only be relevant if it is derived from the text of the treaty or, if the text leads to ambiguity or absurdity, from acceptable supplementary means of interpretation.⁴¹⁰ The Respondent asserts that “objective evidence” of the parties’ intentions may be considered under appropriate circumstances, but does not define this term.⁴¹¹ Instead, it asks the Tribunal “to consider its unsupported assertions of what the parties must have thought, without providing any text-based support for its position.”⁴¹² There is no textual support in the BIT or *travaux préparatoires* for the Respondent’s interpretation of Article XII(3)(d). In particular, the Claimant makes the following submissions:

- a. As explained above, the *travaux préparatoires* show that Costa Rica insisted on a provision that would require the exhaustion of local remedies. The fact that the drafters previously discussed and removed an exhaustion of local remedies clause does not demonstrate, as Costa Rica now alleges, that Article XII(3)(d) is a fork-in-the-road clause. It is “nonsensical” to argue that “the treaty drafters decided, after months of debating one possible clause, to replace it with an entirely unique clause that had the opposite effect, without any related discussion.”⁴¹³
- b. Nor is there any evidence in the *travaux* that the parties intended to insulate all judgments from being challenged under the BIT: had the parties intended this result, they presumably would have said so explicitly, for instance by excluding judicial measures from the definition of “measure.”⁴¹⁴

⁴⁰⁸ C-Rej. Jur., ¶ 184.

⁴⁰⁹ C-Rej. Jur., ¶ 185.

⁴¹⁰ C-Rej. Jur., ¶ 186.

⁴¹¹ C-Rej. Jur., ¶ 186, citing R-Reply Jur., ¶ 127.

⁴¹² C-Rej. Jur., ¶ 186, citing R-Reply Jur., ¶ 127.

⁴¹³ C-Rej. Jur., ¶ 220.

⁴¹⁴ C-CM Jur., ¶ 226.

- c. The Claimant also argues that the parties' intentions cannot be discerned from Costa Rica's pride in its judiciary. While the Claimant "does not dispute that Costa Rica is proud of its judiciary; it challenges the impermissible leap from that pride to Costa Rica's proposed interpretation of Article XII(3)(d), which is made without evidence or justification."⁴¹⁵
- d. The Claimant finally objects to Costa Rica's reliance on an internal memorandum that stated that certain rights enshrined in the BIT were also protected under Costa Rica's constitution.⁴¹⁶ This evidence is not probative. Even if it were relevant (*quod non*), it provides no support for Costa Rica's argument, as it refers to the substantive content of Costa Rica's constitution, not the procedure it agreed for international arbitration.⁴¹⁷

(iii) *Discussion*

287. The question before the Tribunal is whether Infinito's claims are barred under Article XII(3)(d) of the BIT. For the sake of clarity, the Tribunal recalls that the relevant part of the provision reads as follows:

An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:

[...]

- (d) in cases where Costa Rica is a party to the dispute, no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement.⁴¹⁸

288. To establish the meaning of this provision which is disputed, the Tribunal will apply the rules of interpretation contained in Articles 31 and 32 of the VCLT. It will thus in good faith assess the ordinary meaning of the terms taken in their context in the light of the object and purpose of the BIT (Article 31). If the interpretation performed in application of these rules leaves the meaning "ambiguous or obscure" or leads to a result which is "manifestly absurd or unreasonable," the interpreter may resort to supplementary means of interpretation such as the *travaux préparatoires*. It may also do so to confirm the meaning emerging from the interpretation obtained based on primary means of interpretation (Article 32).

289. As noted by the Claimant, two conditions must be satisfied for Article XII(3)(d) to apply: (i) there must be a measure alleged by the claimant to be in breach of the BIT, and (ii) there must be a judgment regarding that measure.

290. Applying Article 31 of the VCLT, the Tribunal interprets the first condition (i) as meaning the measure pleaded by the Claimant to be in breach of the BIT, considering

⁴¹⁵ C-Rej. Jur., ¶ 200; see also C-Rej. Jur., ¶¶ 219-221.

⁴¹⁶ C-Rej. Jur., ¶ 221.

⁴¹⁷ C-Rej. Jur., ¶ 221.

⁴¹⁸ Exh. **C-0001**, Canada-Costa Rica BIT, Art. XII(3)(d).

both the measure and the breach as formulated by the Claimant. This is consistent with the ordinary meaning of the term “alleged,” which is used as a verb in this provision and should be considered a synonym to “pleaded” or “claimed.” It is also consistent with the Tribunal’s finding at paragraph 187 *supra* that it must assess the Claimant’s case as it has pleaded it. It is recalled that the Claimant has alleged that four measures breach the BIT: (i) the 2011 Administrative Chamber Decision, which the Claimant alleges annulled Industrias Infinito’s 2008 Concession; (ii) the 2013 Constitutional Chamber Decision, which the Claimant alleges refused to resolve the conflict between that Chamber’s decision and the 2010 TCA Decision; (iii) the 2012 MINAE Resolution, which the Claimant alleges cancelled Industrias Infinito’s 2008 Concession and extinguished all of its mining rights; and (iv) the 2011 Legislative Moratorium, which the Claimant alleges prevented Industrias Infinito from obtaining a new exploitation concession.

291. The measures alleged to be in breach of the BIT must also be “measures” within the meaning of Article I(i) of the BIT. The Tribunal has already found at Section IV.C.3.b(iii) *supra* that judicial decisions are included in Article I(i)’s definition of “measure.”
292. As a second condition, Article XII(3)(d) requires the existence of a judgment “regarding” the measure alleged to be in breach. Relying on the plain meaning and the context of the provision, the Tribunal interprets the term “regarding” to refer to a legally relevant connection between two elements, the “measure” on the one hand and the “judgment” on the other. In the Tribunal’s view, not every legally relevant connection will suffice: the judgment must be “about” the measure. Stated differently, the measure must be the subject matter (or at least, part of the subject matter) of the judgment. This is consistent with the equally authentic versions of the BIT in Spanish and French. The Spanish version uses the terms “*relativo a la medida*,” which, means “in relation to the measure” (and not, as the Respondent suggests, “related to the measure” – the correct translation of that term would be “*relacionado a la medida*”). Likewise, the French version employs the words “*au sujet de la mesure*,” which means “in respect of” or “in relation to” the measure. In other words, the Tribunal considers that the effect of Article XII(3)(d) is to bar claims when the measure in question has already been adjudicated (*i.e.*, subject of a judgment) by a Costa Rican court.
293. The Tribunal does not accept Costa Rica’s argument that a measure that is in itself a judgment can be a “judgment” about itself for purposes of Article XII(3)(d). As noted above, the use of the word “regarding” clearly requires two elements, a measure and a judgment about that measure. Nor does the Tribunal accept Costa Rica’s contention that a written judgment can be distinguished from its substantive content (*i.e.* its operative part), the written part being “regarding” the substantive content. When a judgment is alleged to be a measure that breaches the BIT, it must be considered in its totality. The act of the State is the judgment in its entirety. While in most cases the alleged breach of international law will derive from the *dispositif*, the latter will be informed by the reasons. Accordingly, the Tribunal considers that, for Article XII(3)(d) to be triggered, the measures challenged by the Claimant must have

been the subject of a separate judgment by a Costa Rican court. The fact that two of the challenged measures are themselves judgments is insufficient to meet this requirement.

294. The Tribunal interprets Article XII(3)(d) as barring claims against acts of the executive or legislative branches of the Costa Rican State (in other words, any non-judicial acts) once there has been a judgment on these acts. It also bars claims against a judicial act if there has been a separate judgment about that first judicial act. In other words, once a judgment has been rendered (be it final or not) on any State act, and that judgment has a direct connection to the investor, an investor cannot bring a claim that the State act breaches the BIT. However, the investor is not barred from alleging that the *judgment* adjudicating on the State act is a breach of the BIT. It is a different question what substantive protections are available against a judgment when the judgment is the measure alleged to be in breach, as compared to the protections available against the underlying State act, but this is a debate that belongs to the merits.
295. The Tribunal does not believe that this leads to an absurd or even illogical result. It is perfectly reasonable for Costa Rica to bar claims against a particular State measure when the measure in question has already been adjudicated by a Costa Rican court. This reflects the BIT Contracting Parties' confidence in the Costa Rican judiciary and a desire for procedural economy. However, it would be contrary to the context of the provision, as well as the object and purpose of the BIT, to exclude claims against the judgment adjudicating the measure. This could void the procedural and substantive protections which the Respondent granted to qualifying investors through the BIT of any meaning, as every measure could potentially be the subject of judicial proceedings in Costa Rica.
296. The Tribunal believes that this interpretation is consistent with the ordinary meaning of the terms of Article XII(3)(d) taken in their context in light of the object and purpose of the BIT. It does not find that the *travaux préparatoires* cast a different light.
297. After assessing the record, the Tribunal concludes that the Claimant has established that no judgment by a Costa Rican court has been rendered "regarding" the measures which it alleges to breach the BIT. Specifically, there is no judgment of a Costa Rican court regarding the 2011 Administrative Chamber Decision. This is a judgment issued by Costa Rica's highest court (the Supreme Court) acting as an appellate court, and it is not subject to review in Costa Rica. Likewise, there is no judgment of a Costa Rican court regarding the 2013 Constitutional Chamber Decision. To date, there has been no judgment regarding the 2012 MINAE Resolution either. The fact that the resolution implements the 2010 TCA Decision is irrelevant for present purposes. While the 2012 MINAE Resolution may be "regarding" the 2010 TCA Decision, there is no judgment "regarding" the 2012 MINAE Resolution. Finally, while the Respondent argues that there have been judgments in Costa Rica regarding the 2011 Legislative Moratorium, none of these judgments has a significant connection to the Claimant or to the measure alleged to be in breach.

298. The Tribunal thus finds that the Claimant's claims are not barred by Article XII(3)(d).

b. Are Infinito's Claims Time-Barred under Article XII(3)(c)?

(i) *The Respondent's Position*

299. The Respondent contends that Infinito's claims concern measures which are time-barred under the statute of limitations specified in Article XII(3)(c) of the BIT. Pursuant to this provision, an investor may only submit a claim to arbitration if "not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."⁴¹⁹ The measures that really caused the loss or damage alleged by the Claimant occurred before the cut-off date for the statute of limitations.

300. The Respondent submits that the Tribunal must address three issues to determine this objection:⁴²⁰

- a. First, it must identify the cut-off date for the three-year limitation period.
- b. Second, it must determine whether the Claimant knew or should have known of the alleged breach or breaches before that cut-off date. The Respondent submits that the "treaty [...] requires identification of the moment when, for the first time, Infinito knew or should have known that its rights to the Crucitas project had been impaired."⁴²¹ For the Respondent, "[t]he triggering event is not *certainty* of such impairment;" [n]or is it relevant whether because of later governmental action, the relevant impairment may have been magnified."⁴²² In this respect, the Tribunal must also determine "when there is an earlier measure along with a later one that confirms, implements, and/or reinstates the earlier one, which one should be considered relevant for purposes of this Clause of the Treaty."⁴²³ The Respondent submits that "[t]he Tribunal must objectively determine the relevant facts for purposes of jurisdictional issues, including this one, and it need not accept blindly the Claimant's factual characterizations."⁴²⁴
- c. Third, it must determine whether the Claimant knew or should have known that it had incurred loss or damage before the cut-off date. The Respondent emphasizes that the BIT asks when the Claimant *first* acquired knowledge of having incurred loss or damage; it does not require the loss to be complete, final

⁴¹⁹ Exh. **C-0001**, Canada-Costa Rica BIT, Art. XII(3)(c).

⁴²⁰ Tr. Day 1 (ENG), 103:9-104:7 (Mr. Di Rosa).

⁴²¹ R-Reply Jur., ¶ 155.

⁴²² R-Reply Jur., ¶ 155 (emphasis in original).

⁴²³ Tr. Day 1 (ENG), 103:21-104:3 (Mr. Di Rosa).

⁴²⁴ Tr. Day 1 (ENG), 105:8-12 (Mr. Di Rosa).

or irreversible.⁴²⁵ Relying on *Mondev* and *Grand River*, the Respondent contends that “damage or injury may be incurred even though the amount or extent may not become known until some future time.”⁴²⁶

301. With respect to (a), the Respondent notes that the Parties have agreed that the cut-off date is 6 February 2011, which is three years prior to the date on which the Claimant filed its Request for Arbitration (6 February 2014).⁴²⁷ This means that “the Tribunal must dismiss Infinito's claims if, prior to 6 February 2011, Infinito had already acquired either actual or constructive knowledge of the alleged breach or breaches and of any loss or damage resulting from such breach or breaches.”⁴²⁸
302. With respect to (b) and (c), the Respondent contends that the Claimant already knew or should have known of the alleged breach or breaches, and of the losses that allegedly derived therefrom, before 6 February 2011. “[R]egardless of how Claimant characterizes or spins the relevant breaches, the Tribunal must focus on the actual source of the harm that's being alleged.”⁴²⁹ The Respondent submits that the four measures challenged by the Claimant “derive from two earlier measures which are the truly relevant ones for purposes of the statute of limitations analysis.”⁴³⁰ The real sources of the loss or damage alleged by the Claimant are (i) the 2010 TCA Decision, and (ii) the 2010 Executive Moratorium. As a result, these are the actual breaches for purposes of the statute of limitations analysis, and what matters is the date on which the Claimant first acquired knowledge of these measures and of the loss or damage arising from them.
303. With respect to the 2010 TCA Decision, the Respondent argues that (as the Claimant itself has recognized)⁴³¹ the principal grievance alleged by the Claimant is the loss of its 2008 Concession.⁴³² As a matter of Costa Rican law, this annulment was caused by the 2010 TCA Decision.⁴³³ While formally the Claimant challenges the 2011 Administrative Chamber Decision, the 2012 MINAE Resolution, and the 2013 Constitutional Chamber Decision, all of these measures either implemented or confirmed the 2010 TCA Decision. The fact that the 2010 TCA Decision was suspended pending the appeal to the Administrative Chamber is irrelevant. NAFTA

⁴²⁵ R-Reply Jur., ¶ 156.

⁴²⁶ R-Reply Jur., ¶ 156, citing Exh. **CL-0062**, *Mondev*, ¶ 87; Exh. **RL-0032**, *Grand River Enterprises Six Nations and others v. United States of America*, UNCITRAL, Decision on Jurisdiction, 20 July 2006 (“*Grand River*”), ¶¶ 80-81.

⁴²⁷ R-Mem. Jur., ¶ 189; C-Mem. Merits, ¶ 233; Tr. Day 1 (ENG), 104:10-17 (Mr. Di Rosa).

⁴²⁸ Tr. Day 1 (ENG), 104:18-105:1 (Mr. Di Rosa).

⁴²⁹ Tr. Day 1 (ENG), 106:4-7 (Mr. Di Rosa) (referring to **CL-0221**, *Spence*).

⁴³⁰ Tr. Day 1 (ENG), 107:11-13 (Mr. Di Rosa).

⁴³¹ R-Mem. Jur., ¶ 192, citing C-Mem. Merits, ¶¶ 12, 20, 177, 181, 186, 245, 249, 262, 264, 266, 269, 273, 291, 313, 327, 335, 378, 411 and Exh. **C-0246**, “Infinito Gold Files to Annul the *Tribunal Contencioso Administrativo* Ruling”, Infinito Gold Ltd. Press Release (18 January 2011).

⁴³² R-Mem. Jur., ¶ 191.

⁴³³ R-Mem. Jur., ¶ 192; RER-Ubico 1, ¶¶ 90-91.

jurisprudence confirms that “the limitation period under Article XII(3)(c) ‘is not subject to any suspension [...] prolongation or other qualification’ and cannot not be tolled by the simple expedient of instituting litigation against the disputed measure.”⁴³⁴

304. The Respondent points out that, under Article XII(3)(c), an investor “first” acquires knowledge of an alleged breach and loss at a particular “date.” For the Respondent, “[s]uch knowledge cannot ‘first’ be acquired at multiple points in time or on a recurring basis.”⁴³⁵ Here, the Claimant first acquired knowledge of its alleged loss or damage with the issuance of the 2010 TCA Decision in December 2010, and acknowledged this publicly in a press release dated 18 January 2011,⁴³⁶ both before the cut-off date.⁴³⁷ In that press release, the Claimant stated that it was seeking to reestablish the value of its investments and to reverse the negative impact of the 2010 TCA Decision on the company’s share price.⁴³⁸ While the cassation proceedings could have provided hope that the Administrative Chamber would reverse the Claimant’s loss, the fact that the 2010 TCA Decision was not reversed cannot be equated to a new loss.⁴³⁹ Moreover, Infinito was not certain that it would be able to reverse the 2010 TCA Decision, and the fact that it acknowledged that it needed to “restor[e] the Company’s rights or value” underscores that it believed that it had already suffered a loss.⁴⁴⁰
305. As to the 2011 Legislative Moratorium, while the Claimant formally challenges the legislative amendment which entered into force on 10 February 2011, the Respondent argues that this measure could not have caused it any damage, because the Claimant was already precluded from obtaining new permits as a result of the 2010 Executive Moratorium, which had been in place since May 2010 and was not abrogated by the 2011 Legislative Moratorium.⁴⁴¹
306. Further, Infinito’s argument that it was not affected by the 2010 Executive Moratorium, because it was only after the 2011 Administrative Chamber Decision that the 2011 Legislative Moratorium had an impact on its investment, is factually and legally flawed. Factually, the Claimant was aware of the loss of its Concession since the date of the 2010 TCA Decision. Legally, it is irrelevant when the Claimant actually became aware of the loss of its Concession; what matters is that it should have

⁴³⁴ R-Mem. Jur., ¶ 193, citing Exh. **RL-0020**, *Apotex*, ¶¶ 328–331 (in turn referring to Exh. **CL-0062**, *Mondev*, ¶ 87; and **RL-0032**, *Grand River*, ¶¶ 78, 81).

⁴³⁵ R-Mem. Jur., ¶ 194.

⁴³⁶ Exh. **C-0246**, “Infinito Gold Files to Annul the *Tribunal Contencioso Administrativo* Ruling”, Infinito Gold Ltd. Press Release (18 January 2011).

⁴³⁷ Tr. Day 1 (ENG), 113:4-114:8 (Mr. Di Rosa).

⁴³⁸ Exh. **C-0246**, “Infinito Gold Files to Annul the *Tribunal Contencioso Administrativo* Ruling”, Infinito Gold Ltd. Press Release (18 January 2011).

⁴³⁹ R-Mem. Jur., ¶ 194.

⁴⁴⁰ R-Reply Jur., ¶ 160 (emphasis in original), citing Exh. **C-0246**, “Infinito Gold Files to Annul the *Tribunal Contencioso Administrativo* Ruling”, Infinito Gold Ltd. Press Release (18 January 2011).

⁴⁴¹ R-Mem. Jur., ¶ 196; Tr. Day 1 (ENG), 117:5-118:12 (Mr. Di Rosa).

known about the existing moratorium, which applied to *Infinito* from the moment of its enactment.⁴⁴²

307. In response to the argument that the Tribunal must focus on the breaches as alleged by the Claimant, the Respondent contends that the Claimant has no right to tactically plead its case in a way designed to defeat temporal limitations established in a treaty.⁴⁴³ The fact that the BIT refers to an “alleged” breach does not mean that the Tribunal must accept the Claimant’s characterization of the breaches. The word “alleged” is simply used to denote that a breach has not been established; it “does not imply that, to resolve a jurisdictional issue, such as the applicability of a statute of limitations, a Tribunal may not look beyond what is ‘alleged’.”⁴⁴⁴ Investment arbitration jurisprudence confirms that it is for the Tribunal, applying an objective standard, to identify the relevant breach, and that “if [a] claimant was harmed by a particular measure that is outside the Tribunal’s jurisdiction, the claimant cannot overcome the jurisdictional bar merely by pretending that their [*sic*] challenge is targeted at a different set of measures.”⁴⁴⁵ According to the Respondent, “[s]ubstance must prevail over form, and tribunals must take care to distinguish between, on the one hand, good faith arguments that a treaty’s temporal requirements have been satisfied, and, on the other, abusive attempts to defeat a temporal objection by means of unilateral characterizations and artful pleading.”⁴⁴⁶ In support, the Respondent relies in particular on the following cases:

- a. *Corona*, in which the tribunal held that “[w]here a ‘series of similar and related actions by a respondent state’ is at issue, an investor cannot evade the limitations period by basing its claim on ‘the most recent transgression in that series.’”⁴⁴⁷
- b. *Vieira*, where the tribunal found that the dispute predated the relevant treaty because all of the claims derived from the State’s denial of a fishing license application before the treaty entered into force. This was despite the claimant’s argument that appeals were filed after the treaty had entered into force, and that the fact they had been denied constituted separate violations of the treaty.⁴⁴⁸
- c. *ST-AD*, where an attempt by a claimant to acquire jurisdiction by resubmitting an application that had been denied before it became an investor was rejected by the tribunal: “a tactic based on the resubmission of an application that has been

⁴⁴² R-Reply Jur., ¶¶ 181-182.

⁴⁴³ R-Reply Jur., ¶¶ 163-175.

⁴⁴⁴ R-Reply Jur., ¶ 164.

⁴⁴⁵ R-Reply Jur., ¶ 165.

⁴⁴⁶ R-Reply Jur., ¶ 173.

⁴⁴⁷ Exh. **CL-0130**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (“*Corona*”), ¶ 215.

⁴⁴⁸ Exh. **RL-0162**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007 (“*Vieira*”), ¶ 274.

denied before a claimant becomes an investor after it has acquired such status is unacceptable. It creates an illusion of an event that happened when a protected investor was on the scene. But like all illusions, it is a misleading illusion.”⁴⁴⁹

308. Contrary to the Claimant’s contention, the 2010 TCA Decision is not merely a background fact that may inform the Tribunal’s analysis; it is the central judgment that produced the legal effects that the Claimant complains of in this arbitration. The Claimant’s reliance on *Tecmed* is misplaced as, contrary to the situation in that case, here the Claimant fully assessed the significance and effects of the 2010 TCA Decision as soon as it was issued.⁴⁵⁰ *Renée Rose Levy* is similarly inapposite, as here it is clear that the dispute crystallized on the date of the annulment of Infinito’s 2008 Concession by the 2010 TCA Decision.⁴⁵¹ Nor can the Claimant rely on *Apotex* and *Mondev* for the proposition that, in cases involving judicial decisions, an injury typically does not crystallize until the final decision is rendered: the question under Article XII(3)(c) of the BIT is when Infinito itself first believed that its rights had been violated and that it suffered a loss.⁴⁵² Indeed, the tribunal in *Apotex* dismissed one of the claims (arising from administrative proceedings) as untimely, and held that a claimant cannot use late court proceedings to toll the earlier limitation period.⁴⁵³ Similarly, the *Mondev* tribunal reasoned that “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct,” a reasoning that should be applied by analogy here.⁴⁵⁴
309. In response to the Claimant’s contention that none of its investments became substantially worthless until after the issuance of the 2011 Administrative Chamber Decision, the Respondent argues that the BIT does not require evidence of the *extent* of the damage or loss, nor that the investment has been rendered substantially worthless, only that damage or loss *was incurred*.⁴⁵⁵ As such, expert analysis of the degree of impairment of the investment at different points in time is irrelevant for the determination of whether the claim is time-barred.⁴⁵⁶
310. Respondent adds that, in any event, it is clear from the Claimant’s January 2011 press release that it believed that the value of its investment had been significantly impacted by the 2010 TCA Decision, if not entirely lost, as of that time. Relying on

⁴⁴⁹ Exh. **RL-0075**, *ST-AD GmbH v. The Republic of Bulgaria*, UNCITRAL, Award, 18 July 2013 (“*ST-AD*”), ¶ 317.

⁴⁵⁰ R-Reply Jur., ¶ 184, citing Exh. **CL-0085**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (“*Tecmed*”), ¶ 68.

⁴⁵¹ R-Reply Jur., ¶ 185.

⁴⁵² R-Reply Jur., ¶¶ 186-190.

⁴⁵³ R-Reply Jur., ¶¶ 187-188, citing Exh. **RL-0020**, *Apotex*, ¶¶ 320, 325.

⁴⁵⁴ R-Reply Jur., ¶¶ 189-190, citing Exh. **CL-0062**, *Mondev*, ¶ 70.

⁴⁵⁵ R-Reply Jur., ¶¶ 176-177.

⁴⁵⁶ R-Reply Jur., ¶ 180.

Rusoro, the Respondent argues that such knowledge is sufficient to trigger the statute of limitations. In that case, the tribunal found that *Rusoro*'s claim was barred under the relevant statute of limitations because the claimant had admitted knowledge of its loss more than three years before bringing the arbitration. In circumstances similar to those here, the tribunal concluded that "what is required is simply knowledge that loss or damage has been caused, even if the extent and quantification are still unclear."⁴⁵⁷

(ii) *The Claimant's Position*

311. The Claimant denies that its claims are time-barred under Article XII(3)(c). The Respondent's objections, namely that the measures the Claimant is "really" challenging are: (i) the 2010 TCA Decision; and (ii) the 2010 Executive Moratorium, both of which occurred outside the three-year limitation period provided under Article XII(3)(c), are incorrect and should be rejected. The claims must be assessed as pleaded by the Claimant, and "[w]hen Article XII(3)(c) is applied to the measures that Infinito alleges breached the BIT, because they resulted in the actual loss of *Industrias Infinito*'s rights associated with the *Crucitas* project, it is clear that the arbitration commenced within the applicable limitation period."⁴⁵⁸
312. The Claimant emphasizes that Article XII(3)(c) bars claims only if three years have elapsed from the time at which the Claimant first acquired or should have first acquired knowledge of: (a) the alleged breach; and (b) the alleged loss or damage sustained. The Claimant acknowledges that "[i]f actual knowledge cannot be established, constructive knowledge may be imputed to the claimant if a reasonably prudent claimant would have known of the alleged breach and resulting loss."⁴⁵⁹
313. With respect to (a), as discussed in Section IV.C.3.a(ii) *supra*, the focus must be on the measure that the Claimant "alleges" is in breach of the BIT. This interpretation is consistent with the ordinary meaning of the terms used in the provision, as required by Article 31 of the VCLT. As discussed in that same section, the word "alleged" is not a meaningless qualifier; it denotes that the violations to be addressed are the "presumed or supposed violations of [the BIT] invoked by the Claimant."⁴⁶⁰ Thus, "[t]he only relevant question is whether the breach, *as alleged by the claimant*, is time-barred;" "[e]ven if a claimant references events that are outside the tribunal's temporal jurisdiction, the claim will not be time-barred if the alleged breach itself is

⁴⁵⁷ R-Reply Jur., ¶ 179, citing Exh. **RL-0181**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 ("*Rusoro*"), ¶ 217.

⁴⁵⁸ C-Rej. Jur., ¶ 131 (emphasis in original).

⁴⁵⁹ C-CM Jur., ¶ 248, citing Exh. **RL-0032**, *Grand River*, ¶ 66; Exh. **CL-0089**, *Waguieh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ("*Siag*"), ¶¶ 200-203.

⁴⁶⁰ C-Rej. Jur., ¶ 156, citing Exh. **RL-0035**, *Waste Management I*, ¶ 27.2(b).

timely.”⁴⁶¹ A respondent cannot reformulate a claim to suggest that it falls outside of the limitation period.⁴⁶²

314. As noted at paragraph 157 *supra*, the Claimant alleges that four specific measures breached the BIT, specifically, the 2011 Administrative Chamber Decision, the 2013 Constitutional Chamber Decision, the 2012 MINAE Resolution, and the 2011 Legislative Moratorium.
315. According to the Claimant, “[i]t was not possible for Infinito to have acquired actual or constructive knowledge of the alleged breaches and resulting loss more than three years before initiating its claim on February 6, 2014,” because “[n]one of the measures that Infinito alleges to have breached the BIT had been rendered by that time.”⁴⁶³
316. As discussed in Section IV.C.3.a(ii) *supra*, the Claimant emphasizes that the 2010 TCA Decision “is not the measure that Infinito is challenging because it did not result in the final or irreversible annulment of Industrias Infinito’s exploitation concession or other project approvals.”⁴⁶⁴ According to the Claimant, the annulment of Industrias Infinito’s exploitation concession and other rights only became final and could only be acted upon when the Administrative Chamber refused to reverse the 2010 TCA Decision on 30 November 2011. Until that time, the annulment of Industrias Infinito’s rights was suspended and could still be overturned.. The 2010 TCA Decision could not terminate the process in a definitive manner, nor could it be acted upon by administrative agencies. The Administrative Chamber could also have rendered a decision on the merits without sending it back to the TCA for reconsideration.⁴⁶⁵ This was acknowledged by the 2012 MINAE Resolution cancelling the 2008 Concession, which stated that the 2010 TCA Decision had been confirmed by the 2011 Administrative Chamber Decision and had thus become firm.⁴⁶⁶
317. Contrary to the Respondent’s contentions, Infinito did not understand that the 2008 Concession had been irrevocably annulled as a result of the 2010 TCA Decision; quite the opposite, it had every expectation that its Concession and other project approvals would remain intact because the 2010 TCA Decision would be overturned on appeal.⁴⁶⁷ This is confirmed by Infinito’s many public statements reflecting its continued and reasonable belief that it would be able to proceed with the Las Crucitas Project, as well as its continued investment in the project and the fact that it continued

⁴⁶¹ C-CM Jur., ¶ 246 (emphasis in original), citing Exh. **RL-0032**, *Grand River*, ¶ 53; Exh. **CL-0135**, *ECE Projektmanagement*, ¶ 3.181; Exh. **CL-0154**, *Pope & Talbot I*, ¶¶ 11-12.

⁴⁶² C-CM Jur., ¶ 247, citing Exh. **RL-0105**, *Glamis*, ¶¶ 348-349.

⁴⁶³ C-CM Jur., ¶ 249.

⁴⁶⁴ C-Rej. Jur., ¶ 130 (emphasis in original).

⁴⁶⁵ C-CM Jur., ¶¶ 250-251; C-Rej. Jur., ¶¶ 133-143.

⁴⁶⁶ C-Rej. Jur., ¶ 136; Exh. **C-0268**, Resolution No. 0037, MINAE, File No. 2594 (9 January 2012).

⁴⁶⁷ C-Rej. Jur., ¶, 137; CWS-Hernández 1, ¶ 213.

to employ 243 employees.⁴⁶⁸ This is also confirmed by the actions of Costa Rica's own Attorney General and environmental authorities, who "[b]y appealing the [2010 TCA Decision] [...] recognized that the annulment of the concession and other project approvals was not final."⁴⁶⁹

318. In any event, relying on FTI's expert report, the Claimant contends that Infinito's investments did not become substantially worthless until after the 2011 Administrative Chamber Decision was rendered. According to the Claimant, "Infinito's financial statements, market capitalization, management statements and public disclosure, and continuing investment in the Crucitas project after the [2010 TCA Decision] all consistently indicate that it was the Administrative Chamber's decision, not the [2010 TCA Decision], that rendered Infinito's investments substantially worthless. This is confirmed by the actions of the [G]overnment of Costa Rica in appealing the decision, and contemporaneous statements in Costa Rican media."⁴⁷⁰ It was thus on the date of the 2011 Administrative Chamber Decision (30 November 2011) that Infinito first knew that the measures it alleges to have breached the BIT had caused it loss or damage.
319. Likewise, the Claimant's claim regarding the open-pit mining moratorium is not time-barred. First, the 2011 Legislative Moratorium did not become applicable to Infinito until the Administrative Chamber finally annulled the 2008 Concession on 30 November 2011. Prior to that final annulment, the Concession remained valid, and Infinito was unaffected by the moratorium.⁴⁷¹ According to the Claimant, "[i]t is irrelevant when the moratorium was implemented, since Infinito is not alleging that the existence of the moratorium independent of its impact on Infinito breached the BIT."⁴⁷² For the Claimant, "[t]he breach occurred only after the moratorium became capable of affecting Infinito's rights, which could not have happened before the Administrative Chamber finally annulled Industrias Infinito's exploitation concession on November 30, 2011," "[o]nly then could Infinito have known of the moratorium's impact."⁴⁷³
320. Second, contrary to what Costa Rica suggests, the 2011 Legislative Moratorium does not merely "duplicate" the 2010 Executive Moratorium. According to the Claimant, the 2011 Legislative Moratorium "subsumed" earlier moratoriums.⁴⁷⁴ In any event, Infinito does not challenge the existence of the 2011 Legislative Moratorium in and of itself,

⁴⁶⁸ C-Rej. Jur., ¶¶ 138-140; CER-FTI Consulting 2, ¶¶ 5.52-5.59, 5.71, Figure 7; Exh. **C-0399**, Management Discussion and Analysis for the Year, Infinito Gold Ltd. (31 March 2011); Exh. **C-0227**, "Constitutional Court in Costa Rica Confirms Validity of Grant of Crucitas Gold Project Permits," Infinito Gold Ltd. (18 April 2010); Exh. **C-0228**, "Tribunal Contencioso Administrativo Extends Injunction at Crucitas Gold Project," Infinito Gold Ltd. (25 April 2010); **C-0230**, "Mining Moratorium in Costa Rica Will Not Impact Crucitas Project," Infinito Gold Ltd. (10 May 2010).

⁴⁶⁹ C-Rej. Jur., ¶ 141.

⁴⁷⁰ C-CM Jur., ¶ 252.

⁴⁷¹ C-CM Jur., ¶ 254.

⁴⁷² C-CM Jur., ¶ 254.

⁴⁷³ C-CM Jur., ¶ 254.

⁴⁷⁴ C-CM Jur., ¶ 255, citing CER-Hernández-Rojas 1, ¶¶ 330-331.

but rather the application of that moratorium to the Las Crucitas Project. The moratorium was irrelevant until the Administrative Chamber finally annulled Industrias Infinito's 2008 Concession and other permits on 30 November 2011. As a result, "the fact that earlier moratoriums existed is irrelevant to the question of when Infinito first learned that a breach had occurred and that it had suffered losses relating to that breach."⁴⁷⁵ In fact, in a May 2010 press release Infinito specifically noted that the 2010 Executive Moratorium did not apply to the Las Crucitas Project because at that time Infinito still held valid rights in the Las Crucitas area, including the 2008 Concession. Infinito had thus no reason to challenge the application of the moratorium before November 2011.⁴⁷⁶

321. Further, the Claimant highlights that it is also challenging the 2012 MINAE Resolution, which it argues extinguished Infinito's remaining rights over the Las Crucitas Project; and the 2013 Constitutional Chamber Decision, which declined on preliminary admissibility grounds to hear Infinito's unconstitutionality claim against the 2010 TCA Decision. The Claimant specifies that both of these measures were rendered within the three-year limitation period.⁴⁷⁷
322. The Claimant further rejects the Respondent's legal arguments regarding the application of the BIT's statute of limitations. First, there is no merit to Costa Rica's argument that events outside the three-year limitation period cannot be relied upon in establishing a breach of the BIT. Citing *Tecmed*, the Claimant submits that "[a] tribunal can rely on preceding events, in its analysis, if those events culminated in a breach that was itself timely."⁴⁷⁸ Prior events must not be confused with the measure challenged: "while 'a dispute may presuppose the existence of some prior situation or fact [...] it does not follow that the dispute arises in regard to the situation or fact.'"⁴⁷⁹ Circumstances that pre-date the alleged breach are not barred from the Tribunal's consideration; they "can provide the necessary background or context for determining whether breaches occurred during the time-eligible period."⁴⁸⁰ Tribunals may also rely on events pre-dating a treaty's entry into force, or pre-dating the moment at which an investor actually acquired an investment, provided that the alleged breach occurred after the treaty entered into force or the investor acquired its investment.⁴⁸¹

⁴⁷⁵ C-CM Jur., ¶ 255.

⁴⁷⁶ C-Rej. Jur., ¶¶ 142-143.

⁴⁷⁷ C-CM Jur., ¶ 256.

⁴⁷⁸ C-CM Jur., ¶ 261, citing Exh. **CL-0085**, *Tecmed*, ¶ 68.

⁴⁷⁹ C-CM Jur., ¶ 258, citing Exh. **RL-0032**, *Grand River*, ¶ 86, quoting *The Electricity Company of Sofia v. Bulgaria*, PCIJ Series A/B Fascicule No. 77, Judgment on Preliminary Objection, 4 April 1939, p. 82.

⁴⁸⁰ C-CM Jur., ¶ 259, citing Exh. **CL-0172**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon*"), ¶¶ 262-266, 282.

⁴⁸¹ C-CM Jur., ¶ 260, citing Exh. **RL-0099**, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 ("*M.C.I.*"), ¶ 136; Exh. **CL-0056**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7,

What matters is that the alleged breach itself is timely. Referring to *Tecmed*, the Claimant argues that “[t]he limitation period would not run until ‘the point of consummation of the conduct encompassing and giving an overarching sense to such acts.’”⁴⁸² Relying on *Renée Rose Levy*, the Claimant submits that “the critical date is the one on which the State adopts the disputed measure, even when the measure represents the culmination of a process or sequence of events which may have started years earlier. It is not uncommon that divergences or disagreements develop over a period of time before they finally ‘crystallize’ in an actual measure affecting the investor’s treaty rights.”⁴⁸³

323. Second, there is no merit to Costa Rica’s argument that in cases involving measures that render earlier measures final, it is the first measure that crystallizes the breach. According to the Claimant, “[a]n alleged breach that renders an earlier measure final is still a distinct breach,” and “[t]he breach is crystallized with the measure that renders its effects final.”⁴⁸⁴ Invoking *Apotex*, the Claimant argues that “[j]udicial proceedings [...] may form the basis of a timely claim even if they affirm the result of an earlier, time-barred measure.”⁴⁸⁵ It adds, relying on *Mondev*, that limitation periods will begin to run only after the issuance of a court decision that finally disposes of the claimant’s rights.⁴⁸⁶ As confirmed in *Corona*, only the final, crystallizing breach may be challenged, and it is that breach that must fall within the limitation period.⁴⁸⁷
324. Contrary to the Respondent’s assertions, an appellate decision that affirms and renders the judgment of a lower court final can be considered a distinct measure giving rise to a standalone breach.⁴⁸⁸ The cases on which the Respondent seeks to rely are either distinguishable (*Sistem*) or do not support its case (*Apotex*, *Feldman*, *Grand River*). Indeed, in most of these cases, the measure crystallizing the breach pre-dated the tolling of the statute of limitations, and the claimant manufactured a subsequent challenge to the measure despite the fact that no further procedural rights existed under domestic law:⁴⁸⁹

Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (“*Maffezini*”), ¶¶ 95-98; Exh. **CL-0157**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 (“*RDC, Jurisdiction*”), ¶¶ 118, 129-132; Exh. **CL-0153**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 (“*Philip Morris*”), ¶¶ 529-534.

⁴⁸² C-CM Jur., ¶ 261, citing Exh. **CL-0085**, *Tecmed*, ¶ 74.

⁴⁸³ C-CM Jur., ¶ 261, citing Exh. **CL-0158**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015 (“*Renée Rose Levy*”), ¶¶ 149-150, 161.

⁴⁸⁴ C-CM Jur., ¶ 262.

⁴⁸⁵ C-CM Jur., ¶ 263, citing Exh. **RL-0020**, *Apotex*, ¶¶ 317, 333-334.

⁴⁸⁶ C-CM Jur., ¶ 264, citing Exh. **CL-0062**, *Mondev*, ¶¶ 70,87.

⁴⁸⁷ C-CM Jur., ¶¶ 268-269.

⁴⁸⁸ C-CM Jur., ¶ 266, citing Exh. **CL-0075**, *Rumeli*, ¶¶ 705-706.

⁴⁸⁹ C-Rej. Jur., ¶ 157, citing Exh. **RL-0075**, *ST-AD*; Exh. **CL-0130**, *Corona*; and Exh. **RL-0162**, *Vieira*.

- a. In *Sistem*, the question whether an appellate decision amounted to a distinct breach of the treaty did not arise, which makes this case irrelevant to decide that issue.⁴⁹⁰
 - b. In *Apotex*, although the tribunal declined jurisdiction over a time-barred measure because the claimant had instituted further litigation to challenge it, it assumed jurisdiction over claims arising from the final appellate court decisions themselves.⁴⁹¹ Applying the tribunal’s reasoning, a direct claim against the 2010 TCA Decision would be time-barred, but a claim based on the 2011 Administrative Chamber Decision would not.⁴⁹²
 - c. *Feldman* and *Grand River* are inapposite because they stand for the proposition that a limitation period cannot be suspended or prolonged, but here “Infinito does not require any suspension or prolongation because the breaches *alleged by it* occurred within the three-year limitation period.”⁴⁹³
 - d. Contrary to the Respondent’s contention, *Mondev* does not suggest that appellate decisions represent a failure to remedy previous breaches rather than new breaches. It rather stands for the proposition that, to be successfully challenged, court decisions must independently give rise to actionable breaches, which the Claimant does not dispute. In fact, the *Mondev* tribunal did assume jurisdiction over challenges to judicial measures.⁴⁹⁴
325. Here, all of the measures challenged by Infinito constitute new and distinct breaches. All of them are positive acts by the Costa Rican Government that are distinct from the 2010 TCA Decision and do not fall outside the limitation period.⁴⁹⁵
- a. The 2011 Administrative Chamber Decision upheld the 2010 TCA Decision by applying the 2002 Moratorium to the 2008 Concession and other project approvals, even though it had the power to reverse it, thus rendering final and irreversible the annulment of the Concession and other approvals.
 - b. The 2012 MINAE Resolution went even further, extinguishing all of Infinito’s mining rights, not only those annulled by the Administrative Chamber.
 - c. Through the 2013 Constitutional Chamber Decision, a different chamber of the Supreme Court refused on procedural grounds to address the 2010 TCA Decision.

⁴⁹⁰ C-CM Jur., ¶ 265, citing Exh. **CL-0082**, *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 (“*Sistem*”), ¶ 128.

⁴⁹¹ C-CM Jur., ¶ 267, citing Exh. **RL-0020**, *Apotex*, ¶ 333.

⁴⁹² C-Rej. Jur., ¶¶ 145-146, citing Exh. **RL-0020**, *Apotex*, ¶¶ 333-337.

⁴⁹³ C-CM Jur., ¶ 267 (emphasis in original), citing Exh. **RL-0013**, *Feldman*, ¶¶ 179-180; Exh. **RL-0032**, *Grand River*, ¶ 86.

⁴⁹⁴ C-Rej. Jur., ¶ 147, citing Exh. **CL-0062**, *Mondev*, ¶¶ 75, 87.

⁴⁹⁵ C-CM Jur., ¶ 270.

- d. Finally, the 2011 Legislative Moratorium prevented Infinito from applying for a new concession and other approvals.
326. Third, the Claimant denies that the limitation period starts from the date on which Infinito's rights were impaired, even if that impairment was not certain, as the Respondent suggests.⁴⁹⁶ This interpretation is contrary to the plain meaning of Article XII(3)(c), according to which the limitation period cannot start before the investor has knowledge of the alleged breach. This means that a breach must already have occurred, and any so-called "impairment" before that date is irrelevant. Relying on *Renée Rose Levy*, the Claimant submits that "[e]vents that may give rise to later, permanent breaches or which foreshadow potential future breaches are not breaches at all under the BIT."⁴⁹⁷
327. Costa Rica's argument is also contrary to the context of Article XII(3)(c), because certain provisions of the BIT (such as expropriation) can only be triggered by irreversible State action.⁴⁹⁸ In addition, as explained in Section IV.C.4.a(ii) *supra*, when the measure is a judicial measure, Article XII(3)(d) of the BIT precludes the investor from bringing a claim against a decision that is not final. As explained by counsel for the Claimant during the Hearing on Jurisdiction:

And the provision in XII(3)(d), which prevents a measure with respect to which there has been a subsequent Judgment, prevents us from bringing any claim with respect to the TCA decision. So, we're operating very much consistently in our submission with the provisions of the Bilateral Investment Treaty in respecting the particular provisions that the Parties have agreed to with respect to when a claim can properly be brought in this case.⁴⁹⁹

(iii) *Discussion*

328. Pursuant to Article XII(3)(c) of the BIT, an investor may submit a dispute to arbitration only if "(c) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." The Respondent argues that Infinito's claims concern measures that are time-barred pursuant to this provision, and the Claimant denies this.
329. After careful consideration of the Parties' arguments, the Tribunal defers the consideration of this objection to the merits. In the Tribunal's view, the analysis of this objection requires the analysis of factual and legal issues that are intertwined with the merits.

⁴⁹⁶ C-Rej. Jur., ¶¶ 149-154.

⁴⁹⁷ C-Rej. Jur., ¶¶ 152-153, relying on Exh. **CL-0158**, *Renée Rose Levy*, ¶¶ 35-37, 149.

⁴⁹⁸ C-Rej. Jur., ¶ 152, citing Exh. **CL-0075**, *Rumeli*, ¶ 795, noting that a breach will crystallize only when there is "an expropriation which ha[s] taken definite and irrevocable effect."

⁴⁹⁹ Tr. Day 1 (ENG), 237:11-20 (Mr. Terry).

330. As noted by the Respondent, to decide this objection the Tribunal must answer three questions: (i) first, it must identify the cut-off date for the three-year limitation period; (ii) second, it must determine whether the Claimant knew or should have known of the alleged breach or breaches before that cut-off date; and (iii) third, it must determine whether the Claimant knew or should have known that it had incurred loss or damage before that date.
331. With respect to the first question, the Parties agree that the cut-off date for the three-year limitation period is 6 February 2011.
332. With respect to the second question, the Tribunal has already determined that it must consider the Claimant's claim as pleaded. This means that it must assess whether the Claimant knew or should have known of the breaches *as alleged by the Claimant* before the cut-off date. The Claimant argues that all of the measures that it is challenging in this arbitration occurred after the cut-off date. However, the Respondent correctly points out that Article XII(3)(c) requires identifying the date on which the Claimant *first* acquired knowledge of the alleged breach, which in the Respondent's view requires identifying the date on which the Claimant first acquired knowledge that its rights had been impaired. In the Respondent's view, the Claimant first acquired knowledge of the impairment of its rights in the Concession with the 2010 TCA Decision. Without accepting this argument at this stage, the Tribunal considers that, to determine when the Claimant first acquired (or should have first acquired) knowledge of a specific breach, it must begin by identifying the date on which the alleged breach crystallized. This requires a substantive review of each of the measures complained of as well as of the measures that the Respondent considers lie at the heart of the Claimant's case (in particular, of the 2010 TCA Decision). This analysis is deeply intertwined with the merits, and the Tribunal will thus conduct it during the merits phase.
333. The same applies to the third question. For the Tribunal to determine when the Claimant first acquired (or should have first acquired) knowledge that it had suffered loss or damage, the Tribunal must first identify the loss or damage alleged and the breach from which that loss or damage flows. Here, the Respondent argues that the real cause of the loss or damage alleged by the Claimant are the 2010 TCA Decision and the 2010 Executive Moratorium, not the four measures identified by the Claimant. Accordingly, the Tribunal will need to assess the evidentiary record to determine the loss or damage alleged, its cause, and when the Claimant first acquired knowledge of that loss or damage. In the Tribunal's view, this inquiry will be undertaken more efficiently together with the merits, when the Tribunal will have a full view of the evidentiary record.
334. For the foregoing reasons, the Tribunal defers this issue to the merits phase.

c. Are These Jurisdictional Requirements or Conditions for Admissibility?

(i) *The Claimant's Position*

335. The Respondent has framed its objections under Article XII of the BIT as objections to jurisdiction. The Claimant objects that, while Article XII(2) and (5) of the BIT contains Costa Rica's consent to jurisdiction, Article XII(3) (on which several of the Respondent's objections are premised) sets out the conditions for the admissibility of the claims.⁵⁰⁰ Specifically, the Claimant submits that:
- a. In Article XII(5) of the BIT, Costa Rica consents unconditionally to submit disputes under the BIT to international arbitration in accordance with the provisions of Article XII.⁵⁰¹
 - b. The Tribunal's jurisdiction (*i.e.*, "the power of the tribunal to hear the case") is defined by Article XII(2) of the BIT. Here, the jurisdictional requirements set out in Article XII(2) are satisfied because "Infinito (i) is an investor as defined in Article I of the BIT, (ii) claims damages resulting from measures that arose after the BIT came into force, [and] (iii) claims damages arising out of a breach of the BIT for an investment in Costa Rica's territory."⁵⁰²
 - c. By contrast, Article XII(3) sets out admissibility, not jurisdictional, requirements. For the Claimant, admissibility requirements relate to the "particulars of the claim," as opposed to the power of the tribunal to hear the case.⁵⁰³ Here, "Article XII(3) sets out admissibility requirement[s] because it provides the conditions that an investor must satisfy in order to submit a claim to arbitration."⁵⁰⁴ This is made clear by the opening language of Article XII(3) ("[a]n investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if [...]"), and is supported by the fact that on its plain language Article XII(2) is not qualified by or subject to the satisfaction of Article XII(3).⁵⁰⁵
336. As a result, the Claimant argues that Costa Rica may not rely on Article XII(3), or any other provision of Article XII, to vary its consent to arbitration.⁵⁰⁶ According to the Claimant, the tribunal in *Churchill* rejected a similar attempt by Indonesia to import a legality requirement into the conditions for consent.⁵⁰⁷

⁵⁰⁰ C-CM Jur., ¶¶ 515-521.

⁵⁰¹ C-CM Jur., ¶ 516.

⁵⁰² C-CM Jur., ¶ 516.

⁵⁰³ C-CM Jur., ¶¶ 516, 519.

⁵⁰⁴ C-CM Jur., ¶ 519 (emphasis in original).

⁵⁰⁵ C-CM Jur., ¶ 516.

⁵⁰⁶ C-CM Jur., ¶ 518.

⁵⁰⁷ C-CM Jur., ¶ 517, citing Exh. **RL-0128**, *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014 ("*Churchill Mining*"), ¶¶ 158, 174.

337. The Claimant submits that the distinction between jurisdiction and admissibility is relevant because tribunals have consistently found that MFN clauses can be used to import more favourable admissibility requirements from other bilateral investment treaties.⁵⁰⁸ Here, because the preconditions to arbitration set out in Article XII(3) are admissibility conditions, they can be overridden by application of the MFN provision in Article IV.⁵⁰⁹

(ii) *The Respondent's Position*

338. The Respondent categorically rejects this interpretation. According to Costa Rica, the requirements of Article XII(3) constitute mandatory limits to Costa Rica's consent to arbitration.⁵¹⁰ The three-year limitation period and the bar on claims concerning measures already adjudicated by a Costa Rican court "are not simply hurdles that Claimant must overcome to commence arbitration, such as compulsory prior litigation in municipal courts;" "[r]ather, the requirements of Article XII(3) are strict conditions, non-compliance with which renders Claimant's claim non-arbitrable."⁵¹¹ There is no basis to assume that these conditions can be relaxed or disregarded, or that any deficiency in that regard can be cured.

339. For the Respondent, the words "only if" used in Article XII(3) "leave no doubt as to the jurisdictional nature of the provision."⁵¹² In addition, Costa Rica's "unconditional consent" to arbitration in Article XII(5) expressly states that it is given "in accordance with the provisions of [Article XII]." Accordingly, it must be understood that this unconditional consent is contingent upon the requirements of Article XII(3) being met.⁵¹³ Citing the ICJ in the *Armed Activities on the Territory of the Congo* case, the Respondent submits that when consent to jurisdiction is expressed in a compromissory clause, any conditions to which such consent is subject will constitute

⁵⁰⁸ C-CM Jur., ¶¶ 522-524, citing *inter alia*, Exh. **CL-0047**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 ("*Impregilo II*"), ¶¶ 98-108; Exh. **CL-0211**, *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006 ("*AWG Group*"), ¶¶ 62-63; Exh. **CL-0064**, *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 ("*National Grid*"), ¶¶ 93-94; Exh. **CL-0084**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Aguas S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 ("*Suez*"), ¶ 66; Exh. **CL-0041**, *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 ("*Gas Natural*"), ¶ 31; Exh. **CL-0080**, *Siemens*, ¶¶ 102, 120; Exh. **CL-0086**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 ("*Teinver*"), ¶ 172; Exh. **CL-0056**, *Maffezini*, ¶ 64; Exh. **CL-0138**, *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 ("*Ethyl*"), ¶¶ 79-91; Exh. **CL-0083**, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd. v. Kazakhstan*, Case No. 1:14 cv-00175-ABJ, Award, 19 December 2013 ("*Stati*"), ¶ 829.

⁵⁰⁹ C-CM Jur., ¶ 524.

⁵¹⁰ R-Reply Jur., ¶ 283.

⁵¹¹ R-Reply Jur., ¶ 283.

⁵¹² R-Reply Jur., ¶ 284.

⁵¹³ R-Reply Jur., ¶ 284.

limits to jurisdiction, and not conditions for admissibility.⁵¹⁴ Citing the ICJ and the decision in *ICS Inspection and Control*, the Respondent argues that consent to jurisdiction must be indisputable and may not be presumed, and that the burden of proof falls on the Claimant.⁵¹⁵

340. In any event, the Respondent denies that MFN clauses can be used to import more favorable admissibility requirements from other bilateral investment treaties, as the Claimant contends.⁵¹⁶ Relying on *Plama* “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them,” which is not the case here.⁵¹⁷

(iii) *Discussion*

341. The Parties dispute whether the requirements set out in Article XII(3) are jurisdictional or go to the admissibility of the claims.
342. The Tribunal notes that the disagreement between the Parties is only relevant if the Tribunal finds that at least one of the objections based on this provision is sustained. In the Claimant’s view, even if the Tribunal were to conclude that one of the requirements of Article XII(3) was not met, because those requirements go to the admissibility of the claim and not the Tribunal’s jurisdiction, they could be bypassed by the MFN clause found at Article IV of the BIT.
343. The Respondent has raised two objections grounded on this provision: one based on Article XII(3)(c) and another on Article XII(3)(d). The Tribunal has found that the requirement set out in Article XII(3)(d) is met, so whether this requirement is one of jurisdiction or admissibility is of no consequence. As to the Respondent’s objection that the claims are time-barred under Article XII(3)(c), the Tribunal has deferred the consideration of this matter to the merits. As a result, the Tribunal will address the question of whether it is a jurisdictional or admissibility requirement during the merits phase if it becomes relevant, *i.e.*, if the Tribunal considers that the requirement has not been met and Costa Rica’s objection is sustained.

⁵¹⁴ R-Reply Jur., ¶ 285, citing Exh. **RL-0150**, *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, 2006 I.C.J. Reports, Judgement, 3 February 2006, ¶ 88.

⁵¹⁵ R-Reply Jur., ¶¶ 286-287, citing *inter alia* Exh. **RL-0140**, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. Reports, Judgement, 4 June 2008, p. 204, ¶ 62; and Exh. **RL-0048**, *ICS Inspection and Control v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 280 (“*ICS Inspection and Control*”).

⁵¹⁶ R-Reply Jur., ¶ 329, citing Exh. **RL-0070**, *Wintershall*; Exh. **RL-0048**, *ICS Inspection and Control*, and Exh. **RL-0056**, *Kiliç n aat thalat hracat Sanayi ve Ticaret Anonim irketi v. Turkmenistan*, ICSID Case No ARB/10/01, Award, 2 July 2013 (“*Kiliç*”).

⁵¹⁷ R-Reply Jur., ¶ 330, citing Exh. **RL-0068**, *Plama*, ¶ 223.

5. Other Objections

a. Do the Claims Fall under the Exclusion Contained in Annex I, Section III(1) of the BIT?

344. Annex I, Section III(1) of the BIT provides as follows:

III. General Exceptions and Exemptions:

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

(i) *The Respondent's Position*

345. According to the Respondent, “the judicial, executive and administrative acts challenged in this arbitration are limited to maintenance and enforcement of pre-existing environmental measures, and are therefore barred by Annex I, Section III(1) of the BIT, taken together with the other jurisdictional limitations of the BIT.”⁵¹⁸

346. The Respondent appears to acknowledge that, as this provision requires measures to be “otherwise consistent” with the BIT, it could be argued that this is a matter for the merits. However, the Respondent also contends that the Tribunal has no jurisdiction to consider whether measures that pre-date 6 February 2011 (*i.e.*, the cut-off date for purposes of the statute of limitations) are consistent with the BIT. “Thus, provided that such measures are motivated by environmental concerns, the language of Article III Annex I prohibits challenges to any State acts that adopt, maintain or enforce such a preexisting environmental measure.”⁵¹⁹

347. As explained in previous sections, the Respondent submits that the *real* measures being challenged pre-date the cut-off date, while the measures *formally* challenged by the Claimant merely adopt, maintain or enforce these pre-existing measures. As all of these measures (pre-existing or not) were motivated by environmental concerns, the Respondent submits that they are barred by Annex I, Section III(1) of the BIT.⁵²⁰

348. Specifically, relying on Dr. Ubico’s expert report, the Respondent argues that each of the acts challenged in this arbitration merely maintain and/or enforce pre-existing environmental measures:⁵²¹

a. The 2010 TCA Decision that annulled the 2008 Concession enforced the 2002 Moratorium as well as the 2004 Constitutional Chamber Decision, both of which were dictated by environmental concerns. In addition, the 2010 TCA Decision

⁵¹⁸ R-Mem. Jur., ¶ 201.

⁵¹⁹ R-Mem. Jur., ¶ 199.

⁵²⁰ R-Mem. Jur., ¶¶ 199-201.

⁵²¹ R-Mem. Jur., ¶ 200; RER-Ubico 1, ¶ 139.

itself is motivated by environmental concerns, and is therefore also an environmental measure.

- b. The 2011 Administrative Chamber Decision and the 2013 Constitutional Chamber Decision simply maintained the 2010 TCA Decision, essentially preserving the *status quo ante*.
- c. The 2012 MINAE Resolution enforced the 2010 TCA Decision, without going beyond it.
- d. The 2011 Legislative Moratorium maintained and enforced the 2010 Executive Moratorium, which was already in force under the pre-existing Arias and Chinchilla Moratorium Decrees. According to the Respondent, the 2011 Legislative Moratorium did not go beyond the scope of these decrees.

(ii) *The Claimant's Position*

349. The Claimant denies that its claims are barred by Annex I, Section III(1) of the BIT. This provision is not a defense to the Respondent's breaches of the BIT; it only applies to environmental measures that are otherwise consistent with the BIT, and it does not alter or override substantive treaty obligations. This means that the Respondent cannot invoke this provision as a defense in respect of measures that do breach the BIT. As a result, the Claimant submits that "the provision is irrelevant to the Tribunal's determination of the merits of Infinito's claims."⁵²²
350. This interpretation, so says the Claimant, is consistent with the plain meaning of the terms "otherwise consistent with this Agreement," and has been confirmed by commentators and tribunals alike.⁵²³ This does not mean that the provision is ineffective or devoid of meaning, as it confirms the State's right to sanction breaches of its environmental laws in a manner that is not otherwise inconsistent with the BIT.⁵²⁴ By contrast, the Respondent's interpretation would render the terms

⁵²² C-CM Jur., ¶ 273.

⁵²³ C-CM Jur., ¶¶ 278-281, citing Exh. **CL-0195**, T. Weiler, "A First Look at the Interim Merits Award in *S.D. Myers, Inc. v. Canada: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*" (2001); Exh. **CL-0185**, L. Johnson & L. Sachs, "International Investment Agreements, 2011-2012: A Review of Trends and New Approaches" in Andrea Bjorklund, ed, *Yearbook on International Investment Law & Policy 2012-2013* (Oxford: Oxford University Press, 2014); Exh. **CL-0190**, S. H. Nikièma, *Best Practices: Indirect Expropriation* (Winnipeg: International Institute for Sustainable Development, 2012); Exh. **CL-0126**, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Respondent's Counter-Memorial, 20 October 2008; Exh. **CL-0078**, *S.D. Myers v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 ("*S.D. Myers*"); Exh. **RL-0105**, *Glamis*; Exh. **CL-0150**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Award, 20 February 2015 ("*Mobil*"); and others.

⁵²⁴ C-CM Jur., ¶ 281, citing Exh. **RL-0104**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 ("*Hamadi*"), ¶ 340, 390, 445.

“otherwise consistent with this Agreement” meaningless. The Claimant also notes that these terms are not present in other exceptions in Annex I, Section III.⁵²⁵

351. The Claimant further submits that the Respondent’s attempt to link Annex I, Section III(1) of the BIT to the limitation period under Article XII(3)(c) is unfounded. The “otherwise consistent with this Agreement” language not only applies to new measures that are “adopted,” but also to measures that “maintain” or “enforce” an earlier measure. In any event, the limitation period is irrelevant because it only bars claims that relate to breaches or losses that became known more than three years before the claim was initiated; it does not bar claims for breaches or losses that became known within that period, even if those breaches are based on a measure that “adopts” or “maintains” an earlier measure.⁵²⁶
352. In any event, the Claimant denies that the annulment of its Concession and other project approvals were motivated by *bona fide* environmental concerns. The evidence shows that the Claimant’s rights were annulled for technical and administrative reasons.⁵²⁷
353. In this respect, relying on *Metalclad*, the Claimant submits that the environmental measures exception contained in Article 1114 of the NAFTA (on which Annex I, Section III(1) of the BIT is based) does not apply where the competent authorities of the host State have previously found the project to be environmentally sound,⁵²⁸ as is the case here. Indeed, the Claimant emphasizes that the Las Crucitas Project was determined to be environmentally sound by the appropriate Costa Rican authorities:
- a. The SETENA, Costa Rica’s national body charged with environmental approvals, approved the Environmental Impact Assessments for the Las Crucitas Project and declared the project environmentally viable.⁵²⁹
 - b. The SINAC, the national system of conservation areas, approved Industrias Infinito’s land use change permit allowing it to fell trees.⁵³⁰
 - c. The SINAC, SETENA and the Attorney-General of Costa Rica defended the Las Crucitas Project’s approvals before the Constitutional Chamber, arguing that they were environmentally viable and in conformity with Costa Rica’s constitutional right to a healthy and ecologically-balanced environment.⁵³¹

⁵²⁵ C-CM Jur., ¶ 282.

⁵²⁶ C-CM Jur., ¶¶ 284-285.

⁵²⁷ C-CM Jur., ¶¶ 286-292.

⁵²⁸ C-CM Jur., ¶ 287, citing Exh. **CL-0058**, *Metalclad*, ¶¶ 97-98; and Exh. **CL-0167**, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, 14 B.L.R., ¶ 104.

⁵²⁹ C-CM Jur., ¶ 288(a); Exh. **C-0134**, Resolution No. 3638-2005-SETENA (12 December 2005).

⁵³⁰ C-CM Jur., ¶ 288(b); Exh. **C-0187**, SINAC-AL-428-2008 (20 August 2008).

⁵³¹ C-CM Jur., ¶ 288(c); Exh. **C-0245**, File No. 08-12821027-CA, Submissions of SINAC to Supreme Court (Sala I) (17 January 2011).

- d. The Constitutional Chamber (which is the court with jurisdiction over environmental protection) rendered a detailed decision “exhaustively analyzing the Crucitas project’s environmental effects and conclusively determining that the project posed no threat to the environment.”⁵³²
354. Moreover, according to the Claimant, the 2011 Administrative Chamber Decision was not based on environmental concerns, but rather on the technical application of the 2002 Moratorium at a time when that moratorium had been repealed. Specifically:⁵³³
- a. The 2002 Moratorium could not represent a real environmental concern considering that the Government repealed it. In fact, as the Administrative Chamber recognized, had the Concession been issued two weeks later there would have been no problem with its validity.
- b. Further, the 2002 Moratorium did not apply to projects with acquired rights. Indeed, under the same administration that enacted the 2002 Moratorium, the SETENA approved the EIA for the project.
- c. In addition, the 2011 Administrative Chamber Decision was not based on an analysis of environmental soundness. Rather, it relied on a technical analysis of the principle of conversion used to restore the project’s Concession. This is confirmed by the fact that the SETENA, the SINAC and the Attorney-General all appealed the 2010 TCA Decision, underlining the project’s environmental viability.

(iii) *Discussion*

355. Before undergoing an analysis of this objection, the Tribunal must determine if this is the right moment to address it.
356. While the Respondent seems to acknowledge that issues arising from Annex I, Section III(1) of the BIT could be merits issues,⁵³⁴ it maintains that the matter is one of jurisdiction or possibly admissibility, or at the very least a threshold inquiry. As the Respondent explained during the Hearing on Jurisdiction:

So, you can call it jurisdictional, you can call it admissibility or anything else, but it's a threshold inquiry that disposes of the claim because if nothing in the BIT can be construed to prevent Costa Rica from doing it, then there is nothing to talk about.⁵³⁵

⁵³² C-CM Jur., ¶ 288(d); Exh. **C-0225**, Supreme Court (Constitutional Chamber), Decision (16 April 2010).

⁵³³ C-CM Jur., ¶¶ 290-291, Exh. **C-0261**, Supreme Court (Administrative Chamber), Decision (30 November 2011); Exh. **C-0080**, Executive Decree No. 30477-MINAE (12 June 2002), Exh. **C-0247**, File No. 08-1282-1027-CA, Submissions of the State to the Administrative Chamber of the Supreme Court (18 January 2011).

⁵³⁴ R-Mem. Jur., ¶ 199.

⁵³⁵ Tr. Day 1 (ENG), 162:17-20 (Mr. Evseev).

357. By contrast, the Claimant's position appears to be that the issues raised by Annex I, Section III(1) of the BIT are for the merits. Indeed, its primary position is that this provision is irrelevant.⁵³⁶ However, relying on the *Tamimi* case, it appears to acknowledge that if the issue is brought up at all, it should be dealt with at the merits stage.⁵³⁷
358. The Tribunal considers that any objection by the Respondent based on Annex I, Section III(1) of the BIT is a matter for the merits. As is obvious from its plain language quoted above, this provision sets out guidelines regarding the content of measures that may be adopted, maintained or enforced by the host State. It does not relate to the State's consent to arbitrate, nor to whether a claim can be heard or not; it relates to whether a particular measure has or has not breached the BIT. Accordingly, it cannot be deemed a matter of jurisdiction or admissibility; it must properly be regarded as a matter for the merits.
359. The Tribunal thus defers this question to the merits stage.

6. Can Infinito Invoke the BIT's MFN Clause?

360. As discussed above, the Claimant argues that all of the preconditions set out in Article XII(3) of the BIT have been met.⁵³⁸ In the alternative, it submits that these preconditions are not applicable by operation of the MFN clause in Article IV of the BIT, and that as a result Infinito is entitled to benefit from the more favorable absence of preconditions in Costa Rica's bilateral investment treaties with Taiwan and Korea.⁵³⁹ The Respondent denies that the Claimant can rely on the MFN clause of the BIT to circumvent the BIT's jurisdictional limitations or expand the scope of Costa Rica's consent to arbitration.⁵⁴⁰
361. The Tribunal has already found that the preconditions set out in Article XII(3)(a), (b) and (d) are met. It can thus dispense with reviewing the Claimant's alternative argument in respect of these preconditions.
362. As to the precondition set out in Article XII(3)(c) (*i.e.*, whether the claims are time-barred), the Tribunal has deferred this issue to the merits. It will thus address the Claimant's MFN argument and the Respondent's related objections at the merits stage, if necessary.

V. COSTS

363. The Tribunal defers its analysis of the Parties' cost submissions to the merits phase.

⁵³⁶ C-CM Jur., ¶ 273.

⁵³⁷ Tr. Day 1 (ENG), 326:8-327:9 (Mr. Lax).

⁵³⁸ C-Mem. Merits, ¶¶ 231-236.

⁵³⁹ C-Mem. Merits, ¶¶ 237-244; C-CM. Jur., ¶¶ 486-531; C-Rej. Jur., ¶¶ 374-407.

⁵⁴⁰ R-Mem. Jur., ¶¶ 324-358; R-Rej. Jur., ¶¶ 278-331.

VI. DECISION

364. For the reasons set forth above, the Arbitral Tribunal:

- a. Joins to the merits phase the Respondent's jurisdictional objections under Article XII(3)(c); under Annex I, Section III(1); and under Article IV of the BIT; as well as the determination of whether the Claimant's investment complies with Article I(g) of the BIT.
- b. Denies the Respondent's other preliminary objections.
- c. Declares that it will take the necessary steps for the continuation of the proceedings toward the merits phase by way of a procedural order to be issued after consultation with the Parties.
- d. Reserves the decision on costs for subsequent decision.

[Signed]

Professor Bernard Hanotiau
Arbitrator

[Signed]

Professor Brigitte Stern
Arbitrator

[Signed]

Professor Gabrielle Kaufmann-Kohler
President