

**International Centre for Settlement of Investment Disputes**

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**Infinito Gold Ltd.**

Claimant

**v.**

**Republic of Costa Rica**

Respondent

**ICSID Case No. ARB/14/5**

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**Award**

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**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: 3 June 2021

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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 First Petition	APREFLOFAS's Petition for Amicus Curiae Status filed on 15 September 2014
APREFLOFAS's First Submission	APREFLOFAS's First Non-Disputing Party Written Submission filed on 19 July 2016
APREFLOFAS's Second Petition	APREFLOFAS's Second Petition for Amicus Curiae Status filed on 19 January 2018
APREFLOFAS's Second Submission	APREFLOFAS's Second Non-Disputing Party Written Submission filed on 30 April 2018
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 or Treaty	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
Canada's Application	Canada Application for Leave to Intervene as a Non-Disputing Party filed on 24 August 2018
Canada's Submission	Canada Non-Disputing Party Written Submission filed on 30 November 2018
CAN-[#]	Non-Disputing Party (Canada) Legal Authority
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-Costs Merits	Claimant's Statement of Costs on Merits dated 20 September 2019
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
C-Reply Merits	Claimant's Reply on the Merits dated 4 February 2019
CL-[#]	Claimant's Legal Authority
CER-[Name]	Claimant's Expert Report
CER-Araya 1	First Expert Report of Irene Araya Ortiz dated 29 January 2019



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-Calzada 3	Third Expert Report of Ana Virginia Calzada dated 30 January 2019
CER-Colborne 1	First Expert Report of Michael Colborne of Thorsteinssons LLP dated 31 January 2019
CER-Colborne 2	Second Expert Report of Michael Colborne of Thorsteinssons LLP dated 31 January 2019
CER-Colborne 3	Third Expert Report of Michael Colborne of Thorsteinssons LLP dated 31 January 2019
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-FTI Consulting 3	Third Expert Report of Howard Rosen, Chris Milburn and Edward Tobis of FTI Consulting Inc. dated 1 February 2019
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-Hernández 3	Third Expert Report of Rubén Hernández dated 29 January 2019
CER-Rojas 3	Third Expert Report of Erasmo Rojas dated 29 January 2019
CER-RPA 1	First Expert Report of Graham Clow and Brenna Scholey of Roscoe Postle Associates Inc. ("RPA") dated 23 December 2015
CER-RPA 2	Second Expert Report of Graham Clow and Brenna Scholey of Roscoe Postle Associates Inc. ("RPA") dated 31 January 2019
CER-Salto 1	First Expert Report of Diego Salto of Consortium Legal dated 29 January 2019
CER-Salto 2	Second Expert Report of Diego Salto of Consortium Legal dated 29 January 2019
CWS-[Name]	Claimant's Witness Statement
CWS-Agüero 1	First Witness Statement of Esteban Agüero Guier dated 31 January 2019
CWS-Barrientos 1	First Witness Statement of Rolando Barrientos Saborio dated 30 January 2019
CWS-Blanco 1	First Witness Statement of Rodrigo Blanco Solís dated 29 January 2019

CWS-Hall 1	First Witness Statement of Vern Hall dated 29 January 2019
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-Hernández 4	Fourth Witness Statement of Juan Carlos Hernández dated 30 January 2019
CWS-LaPrairie 1	First Witness Statement of Scott LaPrairie dated 25 January 2019
CWS-Peschke 1	First Witness Statement of Manfred Peschke dated 1 February 2019
CWS-Rauguth 1	First Witness Statement of Erich Rauguth dated 22 December 2015
CWS-Rauguth 2	Second Witness Statement of Erich Rauguth dated 31 January 2019
CWS-Rojas 1	First Witness Statement of Warner Rojas Quirós dated 29 January 2019
CWS-Ulloa 1	First Witness Statement of Franz Ulloa dated 29 January 2019
CWS-Vega 1	First Witness Statement of Carlos Alberto Vega Rojas dated 29 January 2019
CX-[#]	Claimant's Demonstrative Exhibit
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
Crucitas Project or Project	Gold mining project in the area of Las Crucitas, in Costa Rica
DCF	Discounted Cash Flow Method of calculating financial loss
Decision on Jurisdiction	Tribunal's Decision on Jurisdiction dated 4 December 2017
DGM	Directorate of Geology and Mines
EIA	Environmental Impact Assessment
FET	Fair and Equitable Treatment

FPS	Full Protection and Security
Hearing on Jurisdiction	Hearing on Jurisdiction held 19-20 January 2017
Hearing on the Merits	Hearing on the Merits held 22-25 July 2019
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
MINAE	Ministry of the Environment and Energy
MINAET	Ministry of the Environment, Energy and Telecommunications
MFN	Most Favored Nation
MST	Minimum Standard of Treatment
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-[#]	Non-Disputing Party (APREFLOFAS's) Exhibit
RFA	Request for Arbitration dated 6 February 2014
R-[#]	Respondent's Exhibit
R-Costs Jur.	Respondent's Statement of Costs on Jurisdiction dated 10 March 2017
R-Costs Merits	Respondent's Statement of Costs on the Merits dated 20 September 2019
R-CM Merits	Respondent's Counter-Memorial on the Merits dated 30 July 2018
R-Mem. Jur.	Respondent's Memorial on Jurisdiction dated 8 April 2016
R-Rej. Merits	Respondent's Rejoinder on the Merits dated 31 May 2019
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-Credibility 1	First Expert Report of Timothy Hart of Credibility Consulting LLC dated 26 July 2018
RER-Credibility 2	Second Expert Report of Timothy Hart of Credibility Consulting LLC dated 30 May 2019
RER-León 1	First Expert Report of Anabelle León Feoli dated 27 July 2018
RER-León 2	Second Expert Report of Anabelle León Feoli dated 31 May 2019

RER-Torrealba 1	First Expert Report of Adrián Torrealba dated 30 May 2019
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
RER-WGM 1	First Expert Report of Mr. Joe Hinzer and Mr. Ross MacFarlane of Watts, Griffis and McOuat Ltd. dated 26 July 2018
RER-WGM 2	Second Expert Report of Mr. Joe Hinzer and Mr. Ross MacFarlane of Watts, Griffis and McOuat Ltd. dated 30 May 2019
RWS-[Name]	Respondent's Witness Statement
RX-[#]	Respondent's Demonstrative Exhibit
SENARA	National Groundwater, Irrigation, and Drainage Service
SETENA	National Technical Environmental Secretariat
SINAC	National System of Areas Conservation
TCA	Contentious Administrative Tribunal
Tr. Jur. Day [#] (ENG/SPA), [page:line] [Speaker(s)]	Transcript of the Hearing on Jurisdiction (as revised by the Parties on 27 February 2017)
Tr. Merits Day [#] (ENG/SPA), [page:line] [Speaker(s)]	Transcript of the Hearing on the Merits (as revised by the Parties on 4 September 2019)
Tribunal	Arbitral Tribunal constituted on 29 September 2014
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969
2002 Concession	Industrias Infinito's mining exploitation concession granted by Resolution No. R-578-2001-MINAE (17 December 2001)
2002 Moratorium	Moratorium on open-pit mining decreed by President Abel Pacheco on 5 June 2002
2002 Constitutional Chamber Decision	Supreme Court (Constitutional Chamber), Decision (20 August 2002)
2004 Constitutional Chamber Decision	Supreme Court (Constitutional Chamber), Decision (26 November 2004).
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 Moratoria or	Chinchilla Moratorium Decree together with the Arias Moratorium Decree

2010 Executive Moratoria	
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 Mining Ban or Legislative Mining Ban	Amendment to the Mining Code by the Costa Rican legislature, which entered into force on 10 February 2011
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 MINAET Resolution	MINAET 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
2017 Administrative Chamber Decision	Administrative Chamber, Decision No.1567-F-S1-2017 (6 December 2017)

## 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  
Mr. Nick Kennedy  
Ms. Emily Sherkey  
Ms. Suzan Mitchell-Scott  
Ms. Shoshana Israel  
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  
Ms. Natalia Giraldo Carrillo  
Ms. Cristina Arizmendi  
Mr. Peter Schmidt  
Arnold & Porter Kaye Scholer LLP  
601 Massachusetts Avenue NW  
Washington, DC 20001-3743  
United States of America

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

Ms. Adriana González  
Ms. Arianna Arce  
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. This dispute arises out of the development of a gold mining project in the area of Las Crucitas, in Costa Rica (the “**Crucitas Project**”).

## II. PROCEDURAL HISTORY

5. This Section summarizes the procedural history of this arbitration since the issuance of the Decision on Jurisdiction dated 4 December 2017. The procedural history of the first phase of the arbitration is recounted at Section II of the Decision on Jurisdiction. That Decision constitutes an integral part of this Award, and it is incorporated as **Annex A**.

### A. DECISION ON JURISDICTION

6. On 4 December 2017, the Tribunal issued its Decision on Jurisdiction.<sup>1</sup> Therein, the Tribunal decided to join 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 complied with Article I(g) of the BIT; and denied all other preliminary objections raised by the Respondent.<sup>2</sup> The Tribunal also reserved the decision on costs to a later stage and declared that, upon consultation with the Parties, it would issue a procedural order regarding the merits phase.
7. Also on 4 December 2017, the Tribunal informed the Parties that, pursuant to paragraph 24.1 of Procedural Order No. 1 (“**PO1**”), ICSID would proceed with the publication of the Decision on Jurisdiction. The Tribunal invited the Parties to confer and submit their proposals for the Procedural Calendar for the next phase of the arbitration.
8. On 22 December 2017, the Parties submitted a joint proposal of the Procedural Calendar for the remainder of the proceeding. The proposed calendar was approved by the Tribunal on 27 December 2017.

### B. PARTIES’ WRITTEN SUBMISSIONS AND PROCEDURAL APPLICATIONS

9. On 27 July 2018, the Parties communicated to the Tribunal that they had agreed to certain adjustments to the Procedural Calendar.
10. On 30 July 2018, the Tribunal amended the Procedural Calendar as proposed subject to an adjustment concerning the document production stage (“**Revision No. 5**”). On the same day, the Parties confirmed their agreement to the Tribunal’s adjustment.

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<sup>1</sup> The Spanish version was provided to the Parties thereafter, on 27 December 2017, in accordance with paragraph 12.10 of Procedural Order No. 1.

<sup>2</sup> Decision on Jurisdiction, ¶ 364.

11. Also on 30 July 2018, the Respondent submitted its Counter-Memorial on Jurisdiction and the Merits ("**Counter-Memorial**"), accompanied by exhibits R-0147 to R-0269; legal authorities RL-0183 to RL-0243; and three (3) expert reports, namely, by: (i) Ms. Anabelle León Feoli; (ii) Mr. Joe Hinzer and Mr. Ross MacFarlane of Watts, Griffis and McOuat Ltd., and (iii) Mr. Timothy Hart of Credibility Consulting LLC, respectively.<sup>3</sup>
12. On 13 August 2018, the Parties exchanged their requests for production of documents.
13. On 20 August 2018, the Parties exchanged their responses on document production. The Claimant's response was accompanied with exhibits C-0446 and C-0447.
14. On 27 August 2018, each Party submitted its reply on document production, and its complete Redfern Schedule for decision by the Tribunal.
15. On 17 September 2018, the Tribunal issued Procedural Order No. 6 on document production ("**PO6**").<sup>4</sup>
16. On 7 December 2018, the Respondent filed an application requesting the Tribunal to order the Claimant to submit non-redacted versions of certain documents over which the Claimant had asserted privilege. The Tribunal invited the Claimant to provide its observations on the Respondent's application by 14 December 2018.
17. On 14 December 2018, the Claimant provided its response opposing to the Respondent's application, together with exhibits C-0448 to C-0451 and legal authorities CL-0242 to CL-0248.
18. On 8 January 2019, the Tribunal issued its decision on the Respondent's application of 7 December 2018. The Tribunal ruled that the redacted portions of the disputed documents were protected by solicitor-client privilege, and denied the Respondent's request.
19. On 30 January 2019, the Parties communicated to the Tribunal that they had agreed to certain adjustments to the Procedural Calendar. On the same day, the Tribunal approved the Parties' agreement and issued an amended version of the Procedural Calendar ("**Revision No. 6**").
20. On 5 February 2019, the Claimant submitted its Reply on the Merits ("**Reply**"), accompanied by exhibits C-0032 (revised), C-0162 (revised), C-0213 (revised), C-0233 (revised), C-0452 to C-0862;<sup>5</sup> legal authorities CLA-0249 to CLA-0268; eleven (11)

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<sup>3</sup> A corrected version of the First Expert Report of Watts, Griffis and McOuat Ltd. was submitted on 30 August 2018.

<sup>4</sup> Pursuant to the Parties' agreement, some procedural orders in this case have been issued in English only. See, Parties' communications of 3 June 2016 (regarding PO2); Parties' communications of 10 June 2016 (regarding PO3); Parties' communications of 27 January 2017 (regarding PO4); Parties' communications of 13 March 2018 (regarding PO5); and Parties' communications of 21 September 2018 (regarding PO6).

<sup>5</sup> Exhibits C-0497, C-0505, C-0522, C-0534, C-0559, C-0572 and C-0828 were intentionally left blank.



witness statements, namely, by: (i) Mr. Esteban Agüero Guier, (ii) Mr. Rolando Barrientos Saborio, (iii) Mr. Rodrigo Blanco Solís, (iv) Mr. Vern Hall, (v) Mr. Juan Carlos Hernández Jiménez, (vi) Mr. Scott LaPrairie, (vii) Mr. Manfred Peschke, (viii) Mr. Erich Rauguth, (ix) Mr. Warner Rojas Quirós, (x) Mr. Franz Ulloa, (xi) Mr. Carlos Alberto Vega Rojas; and eleven (11) experts reports, namely, by: (i) Ms. Irene Araya Ortiz, (ii) Ms. Ana Virginia Calzada Miranda, (iii) Mr. Michael Colborne (three reports), (iv) Mr. Chris Milburn, Mr. Howard Rosen and Mr. Edward Tobis of FTI Consulting Inc., (v) Mr. Rubén Hernández Valle, (vi) Mr. Erasmo Rojas Madrigal, (vii) Mr. Graham G. Clow and Ms. Brenna J.Y. Scholey of Roscoe Postle Associates, and (viii) Mr. Diego Salto of Consortium Legal (two reports).

21. On 7 February 2019, following consultation with the Parties, the Tribunal issued an amended version of the Procedural Calendar establishing dates for the notifications of witness and experts to be examined at the Hearing and for the Pre-Hearing Organizational Call ("**Revision No. 7**").
22. On 25 February 2019, the Tribunal wrote to the Parties observing that the Claimant had added a new claim in its Reply.<sup>6</sup> Pursuant to Article 46 of the ICSID Convention and ICSID Arbitration Rule 40(3), the Tribunal invited the Respondent to provide any observations to the new claim together with the Rejoinder on the Merits.
23. On 31 May 2019, the Respondent filed its Rejoinder on Jurisdiction and the Merits ("**Rejoinder**"), together with exhibits R-0270 to R-0411; legal authorities RL-0130 (revised) and RL-0244 to RL-0279; and four (4) expert reports, namely, by: (i) Mr. Timothy Hart of Credibility Consulting LLC, (ii) Mr. Joe Hinzer and Mr. Ross MacFarlane of Watts, Griffis and McOuat Ltd., (iii) Ms. Anabelle León Feoli and (iv) Mr. Adrián Torrealba, respectively.
24. On 14 June 2019, the Respondent communicated to the Tribunal that it had identified certain clerical errors in its submission of 31 May 2019, and sought approval to submit one missing exhibit (R-0412), revised versions of two expert reports (Mr. Torrealba's report and Ms. León's report), and two revised exhibits (R-0347 and R-0348). On 17 June 2019, the Tribunal wrote to the Parties stating that, subject to any compelling objections by the Claimant, the Tribunal accepted the Respondent's corrections. On the same day, the Claimant confirmed that it had no objections. Accordingly, on 18 June 2019, the Respondent submitted the aforementioned revised materials to the record through the electronic file sharing platform.
25. On 5 July 2019, the Claimant dispatched the Core Electronic Hearing Bundle for use at the Hearing, jointly prepared by the Parties.
26. On 19 July 2019, the Claimant sought leave from the Tribunal to submit revised versions of certain exhibits (C-0116, C-0524, C-0531, C-0538, C-0555, C-0585 and R-0016), observing that it had previously conferred with the Respondent in that regard. On 20 July 2019, the Tribunal granted the requested leave. On the same day, the

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<sup>6</sup> C-Reply Merits, ¶ 823(b). See also, *id.* ¶¶ 18; 374-375; 611-614.

Claimant submitted the aforementioned revised exhibits to the record through the electronic file sharing platform.

27. On 20 July 2019, the Claimant sought leave to submit an additional legal authority (CL-0269). That same day, the Respondent confirmed that it did not oppose the request. On 21 July 2019, the Tribunal granted the requested leave. On the same day, the Claimant submitted the aforementioned legal authority to the record through the electronic file sharing platform.
28. On 21 July 2019, the Respondent sought leave to submit an additional exhibit (R-0413), indicating that it had previously conferred with the Claimant, who had not opposed the request on condition that some additional related correspondence (designated as R-0414 to R-0418) also be added to the record. That same day, the Claimant confirmed its agreement. Subsequently, on the same day, the Tribunal granted the requested leave. On 22 July 2019, the Respondent submitted the aforementioned exhibits to the record through the electronic file sharing platform.

## **C. NON-DISPUTING PARTY APPLICATIONS AND SUBMISSIONS**

### **1. APREFLOFAS's Non-Disputing Party Applications and Submissions**

29. On 15 September 2014, APREFLOFAS, a Costa Rican non-governmental organization for the promotion of the environment, submitted a petition for *amicus curiae* (i.e., non-disputing party) status pursuant to ICSID Arbitration Rule 37(2) ("**APREFLOFAS's First Petition**"). Following observations by the Parties, on 1 June 2016, the Tribunal authorized APREFLOFAS to file a written submission. Thereafter, on 19 July 2016, APREFLOFAS filed its Non-Disputing Party Submission, together with exhibits NDP-0001 to NDP-0013 ("**APREFLOFAS's First Submission**"); and on 18 August 2016 it submitted exhibit translations designated as NDP-0014 to NDP-0020.<sup>7</sup> In the Decision on Jurisdiction,<sup>8</sup> the Tribunal deferred to the merits phase the issue raised by APREFLOFAS of whether the Claimant's investment complied with the legality requirement provided in Article I(g) of the BIT.
30. On 27 December 2017, on instructions of the Tribunal, the ICSID Secretariat informed APREFLOFAS that in accordance with the Procedural Calendar agreed upon by the Parties, should APREFLOFAS intend to file an application to intervene as a Non-Disputing Party during the merits phase of this arbitration, it should do so no later than 19 January 2018.
31. On 19 January 2018, APREFLOFAS filed a second petition for *amicus curiae* (i.e., non-disputing party) status ("**APREFLOFAS's Second Petition**").

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<sup>7</sup> Decision on Jurisdiction, ¶¶ 41-50.

<sup>8</sup> Decision on Jurisdiction, ¶¶ 135-140, 364.

32. On 9 February 2018, the Parties submitted their comments to APREFLOFAS's Second Petition. The Parties' comments were accompanied by legal authorities CL-0239 to CL-0240<sup>9</sup> and RL-0182, respectively.
33. On 22 February 2018, the Tribunal issued Procedural Order No. 5 on APREFLOFAS's Second Petition ("**PO5**"). The Tribunal (i) authorized APREFLOFAS to file a Non-Disputing Party Submission; (ii) granted it access to the Parties' pleadings on jurisdiction and the Claimant's Memorial on the Merits and an index of exhibits and legal authorities on the record, subject to confidentiality restrictions; and (iii) afforded the Parties an opportunity to present their observations on APREFLOFAS's Non-Disputing Party Submission in their submissions on the merits.
34. On 27 February 2018, pursuant to paragraph 54(a)(v) of PO5, each Party submitted its consolidated index of exhibits and legal authorities for transmission to APREFLOFAS.
35. On 28 February 2018, APREFLOFAS received the pleadings and index authorized by the Tribunal at paragraph 54(a) of PO5.
36. On 30 April 2018, APREFLOFAS filed its Second Non-Disputing Party Submission, together with exhibits NDP-0021 to NDP-0035 ("**APREFLOFAS's Second Submission**"). Pursuant to paragraph 54(d) of PO5, the Parties presented their observations on APREFLOFAS's Second Submission in their submissions on the merits.

## **2. Canada's Non-Disputing Party Application and Submission**

37. On 24 August 2018, Canada made an application to file a written submission as a Non-Disputing Party pursuant to ICSID Arbitration Rule 37(2) ("**Canada's Application**"), concerning the interpretation of the BIT. On the same day, the Tribunal invited the Parties to provide their observations on Canada's Application by 31 August 2018.
38. On 31 August 2018, the Parties submitted their observations to Canada's Application.
39. On 18 September 2018, the Tribunal issued its decision on Canada's Application. In its ruling, the Tribunal authorized Canada to file a Non-Disputing Party Submission by 30 November 2018, limited to providing comments on the BIT provisions in dispute. The Tribunal ruled that should Canada wish to file documents together with its written submission, it could only submit documents not already on the record.
40. Following the Tribunal's request, each Party submitted its consolidated list of exhibits and authorities to date, respectively on 18 and 21 September 2018, which were subsequently circulated to Canada on 21 September 2018.

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<sup>9</sup> On 20 February 2018, the Tribunal observed that the Claimant had already submitted a legal authority numbered CL-0239, and for clarity of the record, it informed the Parties that the legal authority formerly filed as CL-0239 would be renumbered as CL-0241.

41. On 30 November 2018, Canada filed its Non-Disputing Party Submission, together with legal authorities CAN-0001 to CAN-0022 ("**Canada's Submission**").
42. On 10 December 2018, the ICSID Secretariat informed the Parties that a third party had sought access to Canada's Application, the Parties' observations to it, and Canada's Submission. The Parties were invited to provide their comments. On the same day, the Respondent provided its consent for disclosure of the requested documents. On 13 December 2018, the Claimant objected to said disclosure. Accordingly, on 17 December 2018, the ICSID Secretariat confirmed that, in light of the Parties' responses and pursuant to ICSID Administrative and Financial Regulation 22(2), the aforementioned materials would not be published or shared by the Centre.
43. On 31 December 2018, the Respondent informed that, unless the Tribunal instructed otherwise, it intended to disclose to the public Canada's Submission on 7 January 2019. On the following day, the Tribunal invited the Claimant to comment on this matter by 3 January 2019.
44. On 3 January 2019, the Claimant confirmed that it had no objections to the disclosure of Canada's Submission by Costa Rica, but it reserved all rights to make submissions to the Tribunal with respect to disclosure of any additional parts of the record.

#### **D. PRE-HEARING PROCEDURE**

45. On 14 June 2019, the Parties jointly requested an extension of time to identify the witnesses and experts to be cross-examined at the Hearing on the Merits. On 17 June 2019, the Tribunal granted the extension.
46. On 19 June 2019, the Parties communicated to the Tribunal their agreement on the list of witnesses and experts to be cross-examined at the Hearing on the Merits. The Parties further observed that they continued holding discussions to narrow down the list.
47. On 21 June 2019, the Tribunal circulated a Draft of Procedural Order No. 7 ("**Draft PO7**"), to serve as agenda for the Pre-Hearing Organizational Call, and invited the Parties to provide their observations thereto.
48. On 26 June 2019, the Parties submitted their joint comments to Draft PO7 and indicated their points of discord.
49. On 27 June 2019, the President of the Tribunal (by delegation of her co-arbitrators) and the Parties held a Pre-Hearing Organizational Call in preparation of the Hearing on the Merits. The following persons participated in the conference call:

##### For the Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal

##### ICSID Secretariat and Tribunal Assistant

Ms. Luisa Fernanda Torres, Secretary to the Tribunal

Ms. Sabina Sacco, Assistant to the Tribunal

For the Claimant

Mr. Eric Rauguth, Infinito Gold Ltd.  
Mr. Juan Carlos Hernández Jiménez, Industrias Infinito S.A.  
Mr. John Terry, Torys LLP  
Ms. Myriam Seers, Torys LLP  
Ms. Emily Sherkey, Torys LLP

For the Respondent

Ms. Adriana González, Ministry of Foreign Trade  
Ms. Arianna Arce, Ministry of Foreign Trade  
Ms. Marisol Montero, Ministry of Foreign Trade  
Mr. Paolo Di Rosa, Arnold & Porter LLP  
Mr. Patricio Grané, Arnold & Porter LLP  
Mr. Timothy Smyth, Arnold & Porter LLP

50. On 28 June 2019, the Parties informed the Tribunal of their agreement to exclude their technical experts, Roscoe Postle Associates and Watts, Griffis and McOuat Ltd., from the list of experts to be examined at the Hearing on the Merits.
51. On 1 July 2019, the Tribunal issued Procedural Order No. 7 (“**PO7**”) on the organization of the Hearing on the Merits.
52. On 11 July 2019, the Claimant informed the Tribunal that the Parties had agreed that Mr. Erich Rauguth would testify at the Hearing on the Merits through videoconference due to medical constraints. The Claimant undertook to make the necessary logistical arrangements and to cover any reasonable costs associated with the conduct of the examination by videoconference.
53. On 12 July 2019, Tribunal endorsed the Parties’ agreement concerning the examination of Mr. Rauguth by videoconference.
54. On 15 July 2019, the Tribunal issued further logistical and procedural directions for the examination of Mr. Rauguth by videoconference. On 16 July 2019, the Claimant informed the Tribunal that the Parties had agreed to certain modifications to the Tribunal’s directions in this regard, which were submitted for the Tribunal’s consideration. The Parties’ agreement was approved by the Tribunal that same day.

**E. HEARING ON THE MERITS**

55. The Hearing on the Merits was held from 22 to 25 July 2019 at ICSID facilities in Washington D.C.<sup>10</sup> The following persons were present:

The Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal  
Professor Bernard Hanotiau, Arbitrator  
Professor Brigitte Stern, Arbitrator

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<sup>10</sup> The venue for the Hearing on the Merits was established pursuant to paragraph 11(1) of PO1.

The ICSID Secretariat and Tribunal Assistant

Ms. Luisa Fernanda Torres, Secretary to the Tribunal

Ms. Sabina Sacco, Assistant to the Tribunal

For the Claimant

***Counsel***

Mr. John Terry, Torys LLP

Ms. Myriam Seers, Torys LLP

Mr. T. Ryan Lax, Torys LLP

Mr. Nick Kennedy, Torys LLP

Ms. Emily Sherkey, Torys LLP

Ms. Claudia Garcia Mera, Torys LLP

Ms. Suzan Mitchell Scott, Torys LLP, Law Clerk

Ms. Tiana Vida, Torys LLP, Assistant

***Party Representatives***

Mr. Juan Carlos Hernández Jiménez, Ambien-T Legal Counsel

***Witnesses (\*)***

Mr. Erich Rauguth, by videoconference

Mr. Manfred Peschke

***Experts***

Ms. Irene Araya Ortiz

Ms. Ana Virginia Calzada Miranda

Mr. Howard N. Rosen, FTI Consulting

Mr. Chris Millburn, FTI Consulting

Mr. Edward Tobis, FTI Consulting

For the Respondent

***Counsel***

Mr. Paolo Di Rosa, Arnold & Porter LLP

Mr. Patricio Grané Labat, Arnold & Porter LLP

Mr. Dmitri Evseev, Arnold & Porter LLP

Mr. Timothy Smyth, Arnold & Porter LLP

Mr. Peter Schmidt, Arnold & Porter LLP

Ms. Natalia Giraldo Carrillo, Arnold & Porter LLP

Ms. Cristina Arizmendi, Arnold & Porter LLP

Ms. Christina Poehlitz, Arnold & Porter LLP

Ms. Kaila Millett, Arnold & Porter LLP

Ms. Fabiola Madrigal, Arnold & Porter LLP

***Party Representatives***

Ms. Adriana González, Ministry of Foreign Trade

Ms. Arianna Arce, Ministry of Foreign Trade

Ms. Marisol Montero, Ministry of Foreign Trade

***Experts***

Ms. Anabelle León Feoli

Mr. Timothy H. Hart, Credibility International

Mr. Mark A. Funk, Credibility International

Ms. Rebecca Vélez, Credibility International

Court Reporters

Mr. David Kasdan, B&B Reporters

Ms. María Eliana Da Silva, D-R Esteno

Interpreters

Mr. Luis Eduardo Arango

Ms. Silvia Colla

Mr. Daniel Giglio

(\*) not present prior to their examination

56. During the Hearing on the Merits, the Tribunal heard opening and closing submissions by counsel, asked questions to the Parties and heard evidence from the following witnesses and experts:

For the Claimant

Mr. Erich Rauguth, witness, appearing by videoconference  
Mr. Manfred Peschke, witness  
Ms. Irene Araya Ortiz, expert  
Ms. Ana Virginia Calzada Miranda, expert  
Mr. Howard N. Rosen, FTI Consulting, expert  
Mr. Chris Millburn, FTI Consulting, expert  
Mr. Edward Tobis, FTI Consulting, expert

For the Respondent:

Ms. Anabelle León Feoli, expert  
Mr. Timothy H. Hart, Credibility International, expert

57. During the first day of the Hearing on the Merits, 22 July 2019, the Parties jointly updated the Core Electronic Hearing Bundle to add the materials incorporated into the record after submission of the 5 July 2019 version.<sup>11</sup>
58. During the Hearing on the Merits, the Parties introduced the following materials into the record:
- Claimant: Demonstrative Exhibits CX-001 to CX-007
  - Respondent: Demonstrative Exhibits RX-004 to RX-007

**F. POST-HEARING PROCEDURE**

59. On 29 July 2019, the Tribunal communicated to the Parties a summary of certain directions on Post-Hearing matters discussed at the conclusion of the Hearing on the Merits. Pursuant to those directions: (i) in accordance with paragraph 36 of PO7 and the discussion at the Hearing,<sup>12</sup> there would be no post-hearing briefs, unless the Tribunal informed the Parties in due course that it required assistance on a specific question; (ii) in accordance with paragraph 33 of PO7, transcript corrections were welcomed by 28 August 2019; and (iii) in accordance with paragraph 38 of PO7 and the discussion at the Hearing,<sup>13</sup> Statement of Costs limited to itemization of costs were due by 16 September 2019.
60. On 28 August 2019, the Parties requested an extension of time to submit the revised Hearing Transcript. On the same day, the Tribunal granted the requested extension.

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<sup>11</sup> *Supra*, ¶¶ 25-28.

<sup>12</sup> Tr. Merits Day 4 (ENG), 1178:3-17 (President of the Tribunal).

<sup>13</sup> Tr. Merits Day 4 (ENG), 1178:18-1180:16 (President of the Tribunal).

61. On 4 September 2019, the Parties submitted their agreed corrections to the transcript of the Hearing on the Merits.
62. On 13 September 2019, the Parties requested an extension of time to submit their Statements of Costs. On 16 September 2019, the Tribunal granted the requested extension.
63. On 20 September 2019, the Parties filed their respective Statements of Costs.
64. On 14 September 2020, the Tribunal informed the Parties that it estimated that it would be in a position to render the award in late March or early April 2021, and would revert with a more precise indication closer to the date of issuance.
65. On 19 January 2021, the Tribunal invited the Parties to indicate whether, for purposes of the Spanish version of the Award, they would consent to including quotations in English to exhibits or legal authorities for which there was no Spanish translation on record. The Parties provided their consent on 20 January 2021.
66. Also on 19 January 2021, the Tribunal informed the Parties that the Assistant to the Tribunal, Ms. Sabina Sacco, had left the firm of Lévy Kaufmann-Kohler, but would continue to act as Assistant under the terms described in Section 8 of PO1. Neither Party objected to Ms. Sacco's continued participation as Assistant to the Tribunal in this arbitration.
67. On 29 March 2021, the Tribunal updated the Parties that it estimated that it would issue the Award in the month of May 2021. The proceeding was closed on 19 May 2021.

### III. FACTUAL BACKGROUND

68. In May 2000, the Claimant (then known as Vannessa Ventures Ltd.) acquired Industrias Infinito S.A. ("**Industrias Infinito**").<sup>14</sup> Industrias Infinito held an exploration permit for the Crucitas area which had been granted in 1993,<sup>15</sup> the term of which had been extended to 18 September 1999.<sup>16</sup> One of Industrias Infinito's predecessor companies had submitted an Environmental Impact Assessment ("**EIA**"), which had been approved on 1 October 1993 by the Interdisciplinary Evaluation and Control Commission for Environmental Impact Studies ("**CONEIA**") — competent body before National Technical Environmental Secretariat ("**SETENA**") was created.<sup>17</sup>

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<sup>14</sup> CWS-Rauguth 1, ¶¶ 12, 63.

<sup>15</sup> As discussed in the Decision on Jurisdiction, this exploration permit had been obtained by the company Vientos de Abangares, S.A., and then transferred to Placer Dome de Costa Rica, S.A., which was Industrias Infinito's previous name under other owners. See Decision on Jurisdiction, ¶¶ 64-66.

<sup>16</sup> C-Mem. Merits, ¶ 58; CWS-Hernández 1, ¶ 72; Resolution No. 193 of the Directorate of Geology and Mines (2 April 1998), Exh. **C-0046**; R-Mem. Jur., ¶ 43.

<sup>17</sup> CWS-Hernández 1, ¶ 70.



69. In 1997, President Figueres and the Minister of the Environment issued a decree that declared mining to be an industry of national convenience.<sup>18</sup>
70. Between 1993 and 2000, Industrias Infinito performed drilling and studies to prove the existence and extent of the gold deposit. This included a pre-feasibility study in 1996,<sup>19</sup> which was accompanied by several reports and reviews on the viability of the Project;<sup>20</sup> other studies and reports addressing the environmental and socio-economic impact of the Project;<sup>21</sup> and a feasibility study in 1999 that proved the existence of a substantial gold deposit in the Las Crucitas area.<sup>22</sup>
71. In December 1999, Industrias Infinito submitted the feasibility study to the Directorate of Geology and Mines (“**DGM**”) and requested an exploitation concession to develop a surface gold mine at Las Crucitas.<sup>23</sup>
72. Between 2000 and 2001, Industrias Infinito continued the exploration work and obtained an updated resource estimate.<sup>24</sup>
73. On 7 June 2001, the DGM approved the feasibility study, including the socio-economic and environmental impacts of the Project.<sup>25</sup>
74. 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.<sup>26</sup> The concession became effective

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<sup>18</sup> C-Mem. Merits, ¶ 56; Forestry Law Regulation, *La Gaceta* No. 16 (23 January 1997), Exh. **C-0042**.

<sup>19</sup> CWS-Rauguth 1, ¶¶ 31-32; Placer Dome Explorations, Cerro Crucitas Project, Pre-Feasibility Study (December 1996), Exh. **C-0040**.

<sup>20</sup> CWS-Rauguth 1, ¶ 34; Placer Dome de Costa Rica, Report on Black Sewage (Septic Tank) Treatment System Operation and Maintenance (September 1995), Exh. **C-0026**; Placer Dome Inc., Preliminary Metallurgical Evaluation (September 1995), Exh. **C-0027**; Placer Dome Inc., Gravity Concentration/Cyanide Leaching and Gravity Centration/Flotation Tests on Three Rock Type Composites (July 1996), Exh. **C-0032**; Hay & Company Consultants Inc., Sediment Reconnaissance Survey: Cerro Crucitas Project (August 1996), Exh. **C-0033**; Placer Dome de Costa Rica, Phase 1 Assessment of Potential for Acid Rock Drainage at the Cerro Crucitas Project, Costa Rica (5 December 1996), Exh. **C-0041**; Bruce Geotechnical Consultants Inc., Cerro Crucitas-Tailing Dam Assessment Area B Tailing and Waste Rock Materials Balance (28 August 1997), Exh. **C-0043**.

<sup>21</sup> CWS-Rauguth 1, ¶¶ 35-37; Annex 4 to Exploration Permit No. 7339: Socio-Economic Study (November 1998), Exh. **C-0047**; ICAPD Socio-Economic Impact Study (July 1995), Exh. **C-0025**; ICAPD Social Impact Study (December 1995), Exh. **C-0030**.

<sup>22</sup> CWS-Rauguth 1, ¶ 38; Placer Dome, Feasibility Study (Executive Summary) (September 1999), Exh. **C-0052**.

<sup>23</sup> CWS-Hernández 1, ¶ 74; Placer Dome, Feasibility Study - Executive Summary (September 1999), Exh. **C-0052**; Industrias Infinito S.A., Request for Exploitation Concession (18 December 1999), Exh. **C-0053**.

<sup>24</sup> CWS-Rauguth 1, ¶¶ 64-76.

<sup>25</sup> CWS-Hernández 1, ¶ 80; Resolution No. 364-2001 (7 June 2001), Exh. **C-0064**.

<sup>26</sup> CWS-Hernández 1, ¶ 83; Resolution No. R-578-2001-MINAE (17 December 2001), Exh. **C-0069**.

on 30 January 2002 (the “**2002 Concession**”).<sup>27</sup> The exploitation concession specified that “[t]he concession holder, prior to commencing the exploitation activities, shall obtain the approval of the Environmental Impact Assessment, duly approved by the [SETENA]. Six months shall be granted for its submission to the [DGM].”<sup>28</sup>

75. In March 2002, Industrias Infinito submitted its EIA to the SETENA for its approval.<sup>29</sup>
76. On 13 February 2002, Mr. Abel Pacheco, at the time a presidential candidate, filed a challenge before the Ministry of Environment and Energy (“**MINAE**”), requesting the revocation of the 2002 Concession, alleging that it was against the national interest and endangered the constitutional right to a healthy and ecologically balanced environment.<sup>30</sup> Due to similar challenges pending before the Supreme Court, the MINAE deferred its decision on this challenge.
77. On 1 April 2002, environmental activists Carlos and Diana Murillo filed an *amparo* petition (a constitutional challenge) against the resolution that granted the 2002 Concession on environmental grounds (the “**Murillo Amparo**”).<sup>31</sup>
78. 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**”).<sup>32</sup> It is undisputed that the 2002 Moratorium operated prospectively and did not affect acquired rights.<sup>33</sup>
79. On 12 August 2002, another mining concession holder, 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 and those of Industrias Infinito. 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 (“**2002 Constitutional Chamber**

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<sup>27</sup> R-Mem. Jur., ¶ 49; Resolution No. R-578-2001-MINAE (17 December 2001), Exh. **C-0069**.

<sup>28</sup> Resolution No. R-578-2001-MINAE (17 December 2001), Operative Part, ¶ 2, Exh. **C-0069**.

<sup>29</sup> CWS-Hernández 1, ¶ 96.

<sup>30</sup> Request for Review against Resolution No. 578-2001-MINAE, Abel Pacheco de la Espriella (13 February 2002), Exh. **R-0001**.

<sup>31</sup> CWS-Hernández 1, ¶ 125; Supreme Court (Constitutional Chamber), Decision (26 November 2004), ¶ 1, Exh. **C-0116**.

<sup>32</sup> Executive Decree No. 30477-MINAE (5 June 2002), Exh. **C-0080**.

<sup>33</sup> Executive Decree No. 30477-MINAE (5 June 2002), Exh. **C-0080**, Transitional Provision I provided: “Any procedures related to the exploration and open-pit mining of gold currently pending before the [DGM] and before the [SETENA] to the date of publication hereof shall be suspended. Any rights acquired before the publication of this decree will be respected.”

**Decision**").<sup>34</sup> In its findings, the Constitutional Court expressly stated that the same applied to Industrias Infinito, as follows:<sup>35</sup>

[N]o fundamental right has been violated - at least not in a direct manner- by the enactment of the Executive Decree No. 30477-MINAE of June 5th of this year. While it is true that through this decree the Executive declares a national moratorium on open-pit gold mining in the national territory for an undefined term (article 1), it is also true that in Transitional provision 1 it expressly establishes that all '[...] rights acquired before the publication of this decree will be respected', therefore the objections made by the appellant lack[] substance. That means **this decree [does not] violate rights acquired or [] juridical situations [established] in favor of [the] companies that [currently] carry out the activity subject to the indefinite moratorium, as the decree expressively provides for their protection**. Eventually, a **violation may result from its application, but that [has not] happened either**. The threats to the fundamental rights that the appellant claims are no more than mere subjective fears. The fact that both the President of the Republic and the Minister of the Environment and Energy have made certain statements to the media, according to which, in the opinion of the appellant, [they] will indemnify the companies Río Minerales S.A. and **Industrias Infinito S.A.**, holders of the exploitation concessions in the National Mining Registry of the Directorate of Geology and Mines, presents no threat to the companies' fundamental rights since they merely are informal declarations without any action on behalf of the Executive Power to stop these companies from the exploitation of the granted concessions. The threat must be real and imminent, meaning that there must be concrete acts by the administration that threaten a fundamental right, which is not the case here. On the contrary, **the text of the disputed decree itself shows respect for the acquired rights of these companies, and as a result there has been no violation of its fundamental rights**. In consequence, the present appeal is rejected, as is declared in effect.

80. On 10 March 2003, Industrias Infinito filed an *amparo* petition requesting the Constitutional Chamber to compel the SETENA to issue its decision on its EIA, which it had requested in March 2002.<sup>36</sup>
81. 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.<sup>37</sup> 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.<sup>38</sup> The MINAE agreed with Industrias Infinito, and, on

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<sup>34</sup> Supreme Court (Constitutional Chamber), Decision (20 August 2002), Exh. **C-0085**.

<sup>35</sup> Supreme Court (Constitutional Chamber), Decision (20 August 2002), Sole Whereas (emphasis added), Exh. **C-0085**. The Tribunal has used the Parties' translations included in the exhibits cited, unless it has considered that the translation did not faithfully reflect the Spanish original, in which case it has inserted its own translation in brackets.

<sup>36</sup> CWS-Hernández 1, ¶ 119; Request for Amparo, Industrias Infinito S.A. (10 March 2003), Exh. **R-0006**.

<sup>37</sup> Resolution No. 272-2003-SETENA (11 March 2003), Exh. **C-0097**.

<sup>38</sup> R-Mem. Jur., ¶ 58.

20 October 2003, ordered the SETENA to conduct a new evaluation of Industrias Infinito's application.<sup>39</sup>

82. On 21 April 2003, Industrias Infinito filed a second *amparo* petition with the Constitutional Chamber against the SETENA for violation of due process, requesting disclosure of the reports.<sup>40</sup> The Constitutional Chamber 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.<sup>41</sup>
83. On 26 November 2004, the Constitutional Chamber ruled on the Murillo Amparo (the “**2004 Constitutional Chamber Decision**”). It held that the 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. Specifically, the Constitutional Chamber held that, given the definition of the EIA in the Mining Code, and in line with the preventive/precautionary principle,<sup>42</sup> “it is clear that the Environmental Impact Assessment is necessary to obtain the exploitation concession.”<sup>43</sup> The Constitutional Chamber noted that the preventive (precautionary) principle in environmental matters had been incorporated into the constitutional regime through a judgment of 21 December 2001, and was reinforced by Article 34 of the Mining Code and Article 9 of the Regulation of the Mining Code.<sup>44</sup> It also found that the Government had not previously consulted the communities that might be affected by the concession.<sup>45</sup> The Constitutional Chamber thus held that the grant of the 2002 Concession had violated the preventive/precautionary principle and the constitutional right to a healthy and balanced environment.<sup>46</sup> It thus annulled the 2002 Concession, “*todo sin perjuicio de lo que determine el estudio de impacto ambiental*,”<sup>47</sup> which the Respondent translates as “without prejudice to what the environmental impact assessment *may determine*,”<sup>48</sup> while the Claimant's translation is “without prejudice to

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<sup>39</sup> R-Mem. Jur., ¶ 60; Resolution No. 569-2003-MINAE (20 October 2003), Exh. **C-0106**.

<sup>40</sup> Second Request for Amparo, Industrias Infinito S.A. (21 April 2003), Exh. **R-0008**.

<sup>41</sup> CWS-Hernández 1, ¶ 124; Supreme Court (Constitutional Chamber), Decision (25 August 2004), Exh. **C-0113**.

<sup>42</sup> The Constitutional Chamber refers to the “*principio de prevención*”, but the translation refers to the preventive principle or precautionary principle indistinctly.

<sup>43</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Section IV, p. 24 (PDF) (English), p. 57 (PDF) (Spanish), Exh. **C-0116**.

<sup>44</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Section IV, pp. 26-27 (PDF) (English), pp. 60-61 (PDF) (Spanish), Exh. **C-0116**.

<sup>45</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Section VII, pp. 30-32 (PDF) (English), pp. 64-66 (PDF) (Spanish), Exh. **C-0116**.

<sup>46</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Sections V, VI and VIII, pp. 27-30, 32 (PDF) (English), pp. 61-64, 66 (PDF) (Spanish), Exh. **C-0116**.

<sup>47</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Operative Part, pp. 32-33 (PDF) (English), pp. 66-67 (PDF) (Spanish), Exh. **C-0116**.

<sup>48</sup> R-Mem. Jur., ¶ 62 (emphasis in original).

the findings of the Environmental Impact Assessment.”<sup>49</sup> The Tribunal finds that the Respondent’s translation is more accurate.

84. On 12 December 2005, the SETENA approved Industrias Infinito’s EIA.<sup>50</sup>

85. In May 2006, President Óscar Arias took office.

86. On 4 December 2006, Industrias Infinito requested the Constitutional Chamber to clarify whether the annulment of the 2002 Concession had been “absolute” or “relative”, in which case it would be subject to cure (*saneamiento*).<sup>51</sup> On 7 June 2007, the Constitutional Chamber concluded that this request was a matter of administrative law and that it had no jurisdiction to opine on it.<sup>52</sup> Specifically, the Constitutional Chamber stated:

I.- If the respondent [...] considers that the violation indicated by the Chamber in [the 2004 Constitutional Chamber Decision] has been corrected, which nullifies [the 2002 Concession] because the requirements of conducting the public hearing and the Environmental Impact Study (EIS) approved, according to him, on December 12, 2005 by the [SETENA] have been fulfilled, that is a matter that should be brought by using the corresponding administrative and jurisdictional processes since the subsequent fulfillment of the requirements whose omission led to the declaration of admissibility of the appeal of legal protection (*recurso de amparo*) filed on April 1, 2002 has no incapacitating effect on the decision but it is rather the effect or consequence of its fulfillment. As a consequence, the motion filed is unfounded and should be declared as such.

II.- As for determining the nature of the annulment —whether absolute or relative—of [the 2002 Concession] [...] these are aspects related to the validity of the administrative decree elements whose content and transcendence may not and must not be discussed or determined by this appeal as it constitutes a matter of administrative nature that exceeds the competence of this Court. However, the petitioner should keep in mind that the annulment [of the 2002 Concession] set in [the 2004 Constitutional Chamber Decision], is not because defects were detected in the administrative decree itself which, as it was stated, may only be declared by the competent administrative authorities or before a common judge, but because the Chamber determined that the decree was infringing the precautionary principle and constitutional right for the enjoyment of a healthy and balanced environment, as contemplated in the Political Constitution. ***The possibility of restoring the concession or the impossibility of doing so by virtue of being an absolute or relative nullity, is not part of the object of the writ of amparo, but rather is an issue that must be determined in the administrative area or in ordinary jurisdiction.*** The decision on the amparo whose clarification is requested has one singular and specific effect and objective, without being

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<sup>49</sup> C-CM Jur., ¶ 67. The Tribunal further notes that the English translation of Exh. C-0116 (p. 32, PDF, English) provided by the Claimant translates it as: “without prejudice to that concluded by the Environmental Impact Assessment.”

<sup>50</sup> Resolution No. 3638-2005-SETENA (12 December 2005), Exh. C-0134.

<sup>51</sup> RER-Ubico 1, ¶ 76.

<sup>52</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Exh. C-0164.

able to rule upon what decisions or actions based upon the resolution the Administration must adopt after the decision. The decision resolving the amparo, in accordance with its factual records and applicable legal rules, [does not] contemplate the determination of the absolute or relative nature of the errors or omissions contained in the concession; that determination is not within the jurisdiction of this court, since the possibility of correcting or rectifying a defect of legal transgression, or the impossibility of doing so, is an issue that must be resolved in compliance with the definitions and limits contained in ordinary legislation. The nature of these procedural defects, when applying the traditional terminology in relation to relative or absolute errors, is that they are conceptual categories whose application corresponds to the processes developed before the ordinary jurisdiction. For this reason, this motion is to be rejected in every respect.<sup>53</sup>

87. On 31 October 2007, the MINAE granted Mr. Pacheco's 2002 challenge against Industrias Infinito's 2002 Concession, on the basis of the Constitutional Chamber's 2004 finding that the 2002 Concession violated Article 50 of the Constitution.<sup>54</sup>
88. On 1 January 2008, the new Code of Contentious Administrative Procedure, entered into force.<sup>55</sup> This Code allowed individuals with diffuse interests to challenge the legality of administrative acts before the Contentious Administrative Tribunal ("**TCA**").
89. On 4 February 2008, the SETENA approved a revised EIA.<sup>56</sup>
90. On 18 March 2008, President Arias issued a decree repealing the 2002 Moratorium, which entered into force on 4 June 2008.<sup>57</sup>
91. On 21 April 2008, President Arias and the MINAE granted Industrias Infinito an exploitation concession (the "**2008 Concession**" or the "**Concession**"), using the administrative law concept of "conversion" (*i.e.*, the previous annulled concession is converted into a valid one).<sup>58</sup> Industrias Infinito had requested that its 2002 Concession be cured through the concept of *saneamiento*, but the Government deemed that it was more appropriate to convert it.<sup>59</sup> It is undisputed that a conversion does not reinstate the original concession (as would be the case with a *saneamiento*), but creates a new concession.<sup>60</sup>

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<sup>53</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas I and II (emphasis added), Exh. **C-0164**.

<sup>54</sup> Resolution No. R-613-2007-MINAE (31 October 2007), Exh. **R-0079**.

<sup>55</sup> CWS-Hernández 1, ¶ 189.

<sup>56</sup> Resolution No. 170-2008-SETENA (4 February 2008), Exh. **C-0170**.

<sup>57</sup> Decree No. 34492-MINAE (18 March 2008), Exh. **C-0172**.

<sup>58</sup> Resolution No. R-217-2008-MINAE (21 April 2008), Exh. **C-0176**.

<sup>59</sup> Letter from Industrias Infinito to the DGM (30 May 2007), Exh. **C-0527**; Resolution No. R-217-2008-MINAE (21 April 2008), Second Whereas, p. 19 (PDF) (English), p. 40 (PDF) (Spanish), Exh. **C-0176**.

<sup>60</sup> CER-Hernández-Rojas 1, ¶ 67; RER-León 2, ¶ 109, Table 5; General Law of Public Administration, Law No. 6227 (5 February 1978), Article 189, Exh. **C-0014**.

92. On 13 October 2008, President Arias designated the Crucitas Project as one of national interest.<sup>61</sup>
93. On 17 October 2008, the National System of Areas Conservation (the “**SINAC**”)<sup>62</sup> authorized the logging of trees on the land of the Crucitas Project.<sup>63</sup> Industrias Infinito commenced logging that same day.<sup>64</sup>
94. 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.<sup>65</sup> The NGO FECON filed a similar *amparo* petition on 23 October 2008.<sup>66</sup>
95. On 20 October 2008, the Constitutional Chamber issued a temporary injunction suspending the forest-clearing operations, the execution of the Crucitas Project, and the implementation of the decree declaring the Project in the national interest.<sup>67</sup>
96. In November 2008, Mr. Jorge Lobo and APREFLOFAS filed challenges before the TCA requesting the annulment of various administrative acts, including (i) the SETENA resolution declaring the environmental viability of the Project; (ii) the SETENA resolution approving the modification of the Crucitas Project; (iii) the MINAE resolution granting the 2008 Concession; and (iv) the Executive Decree declaring the Project in the national interest.<sup>68</sup> The petitioners also requested the TCA to order Industrias Infinito and Costa Rica to restore the site and provide compensation for environmental damage.<sup>69</sup>
97. 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**”).<sup>70</sup> In a majority

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<sup>61</sup> Executive Decree No. 34801-MINAET (13 October 2008), Exh. **C-0196**.

<sup>62</sup> In Spanish: *Sistema Nacional de Áreas de Conservación*.

<sup>63</sup> Resolution No. 244-2008-SCH (17 October 2008), Exh. **C-0197**.

<sup>64</sup> R-Mem. Jur., ¶ 78.

<sup>65</sup> R-Mem. Jur., ¶ 78, citing RER-Ubico 1, ¶ 80 and Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>66</sup> R-Mem. Jur., ¶ 78, citing RER-Ubico 1, ¶ 80 and Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>67</sup> R-Mem. Jur., ¶ 79, citing RER-Ubico 1, ¶ 80 and Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>68</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 3 (Spanish), p. 3 (English), Exh. **C-0239**.

<sup>69</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 4 (Spanish), p. 4 (English), Exh. **C-0239**.

<sup>70</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**. The denial was with one exception: the Supreme Court upheld the *amparo* with respect to the allegation that the EIA had been approved without the prior opinion of the National Groundwater, Irrigation, and Drainage Service (*Servicio de Nacional de Aguas Subterráneas, Riego y Avenimiento* (“**SENARA**”)). However, it did not annul the resolution granting the EIA nor the 2008 Concession, as the SENARA had subsequently issued its opinion, but ordered the State to pay

decision that was 279 pages long and after reviewing extensive evidence, the Constitutional Chamber held that the Crucitas Project (and thereby the 2008 Concession and the other administrative acts cited in the preceding paragraph) did not violate the petitioners' constitutional right to a healthy environment.<sup>71</sup> The Parties dispute whether the Constitutional Chamber made findings of the underlying legality of these administrative acts.<sup>72</sup> The decision only refers to the 2002 Moratorium as a matter of fact and does not address the Moratorium's impact on the Crucitas Project.<sup>73</sup>

98. Also on 16 April 2010, the TCA issued its own temporary injunction preventing the Crucitas Project from moving forward.<sup>74</sup>
99. On 29 April 2010, President Arias issued a decree declaring a new moratorium on open-pit gold mining (understood as the exploration, exploitation and processing of gold using cyanide or mercury in the work to recover the mineral), which entered into force on 11 May 2010 (the "**Arias Moratorium Decree**").<sup>75</sup>
100. On 8 May 2010, President Chinchilla took office and issued a decree which essentially restated the Arias Moratorium Decree (the "**Chinchilla Moratorium Decree**," together with the Arias Moratorium Decree, referred to as the "**2010 Moratoria**" or "**2010 Executive Moratoria**"). It also declared an indefinite moratorium on open-pit gold mining, understood as mining activities using cyanide and mercury in the processing of ore.<sup>76</sup> The Chinchilla Moratorium Decree entered into force on 11 May 2010. However, 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.<sup>77</sup>
101. Meanwhile, on 11 June 2010, environmental activists Carlos and Douglas Murillo filed an *amparo* petition with the Constitutional Chamber on the basis that Industrias Infinito's Concession was in breach of the 2002 Moratorium.<sup>78</sup> The Constitutional Chamber denied this petition on 24 August 2010, on the grounds that it lacked jurisdiction to review the legality of the exploitation concession (including its conversion)

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damages for its failure to comply with this requirement. Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas LXIX, CXXI, Exh. **C-0225**.

<sup>71</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas CXXI, Exh. **C-0225** ("[I]n accordance with the considerations given in this ruling, the remaining alleged violations of the law for a healthy and ecologically balanced environment under the terms outlined by Article 50 of the Political Constitution and constitutional jurisprudence are dismissed.")

<sup>72</sup> See, e.g., C-CM Jur., ¶ 76; C-Mem. Merits, ¶¶ 157-158; C-Reply Merits, ¶ 274; CER-Hernández-Rojas 1, ¶¶ 84-104; R-Mem. Jur., ¶ 82; R-CM Merits, ¶ 97.

<sup>73</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Fact No. 105, Exh. **C-0225**.

<sup>74</sup> Contentious Administrative Tribunal, Resolution No. 1377-2010 (16 April 2010), Exh. **C-0226**.

<sup>75</sup> Decree No. 35982-MINAET (29 April 2010), Exh. **R-0032**.

<sup>76</sup> Executive Decree No. 36019-MINAE (8 May 2010), Exh. **C-0229**.

<sup>77</sup> Letter by President Chinchilla (27 July 2010), Exh. **C-0233**.

<sup>78</sup> RER-Ubico 1 ¶ 84, citing Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), ¶ 1, Exh. **R-0028**.



and that of the related administrative acts.<sup>79</sup> Specifically, the Constitutional Chamber stated:<sup>80</sup>

Although this Court finds that, indeed, on 20 May 2008 (the date when the resolution R-217-2008-MINAE [approving the 2008 Concession] was issued) Executive Decree number 30477-MINAE (issued on 12 June 2002, repealed on 4 June 2008) [i.e. the 2002 Moratorium] was still in force, and that the Decree stated that acquired rights would be respected, [ ] **[the assessment and analysis of] whether a mining concession violates an executive decree [is not a matter of constitutionality but of legality].** [...]

[A]lthough this Court verifies that the aforementioned Constitutional Court resolution revoked Resolution R-578-2001-MINAE which granted the mining concession to the company in question [the 2002 Concession], and that the respondents interpreted such annulment as a relative annulment [and that therefore] the 'conversion of an administrative act' figure under Article 164 of the General Law of Public Administration was admissible, **[the assessment of] whether the respondents proceeded appropriately when they 'converted' the [grant of the] mining concession [ ] that had previously been annulled by [this] Constitutional Court [is not a matter of constitutionality but of legality].**

102. 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 upheld (the **"2010 TCA Decision"**).<sup>81</sup> The TCA issued its full written decision on 14 December 2010,<sup>82</sup> where, *inter alia*, it dismissed the *res judicata* defense raised by Industrias Infinito and the Government,<sup>83</sup> and annulled Industrias Infinito's 2008 Concession together with related administrative decisions.<sup>84</sup> The main

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<sup>79</sup> Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), Exh. **R-0028**.

<sup>80</sup> Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), Whereas V, pp. 1-2 (PDF) (English), pp. 12-13 (PDF) (Spanish) (emphasis added), Exh. **R-0028**.

<sup>81</sup> RER-Ubico 1 ¶ 89, citing Contentious-Administrative Procedural Code, Law No. 8508 (28 April 2006) ("**CPCA**"), Article 111(1), Exh. **R-0082**.

<sup>82</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Exh. **C-0239**. This decision is also referred to by the Parties as the "2010 TCA Judgment."

<sup>83</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 134 (Spanish), p. 134 (English), Exh. **C-0239**.

<sup>84</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 135 (Spanish), p. 135 (English), Exh. **C-0239**. 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 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 Crucitas Project;
- (iii) Resolution No. R-217-2008-MINAE, through which the President of Costa Rica and the Minister of Environment and Energy awarded the mining concession to Industrias Infinito;

basis for this annulment was that, when the 2004 Constitutional Chamber Decision annulled the 2002 Concession, that annulment qualified as an absolute nullity and thus invalidated Industrias Infinito's rights *ab initio*. As a result, there was no concession in existence that could be "converted" into a new one. Accordingly, when the Government granted Industrias Infinito the 2008 Concession, this was necessarily a new concession, which thus violated the 2002 Moratorium, then in force.<sup>85</sup> The TCA also found that the Concession's conversion had violated the principle of non-derogability of rules ("*principio de inderogabilidad singular de la norma*"), pursuant to which the Government may not override a general rule through a specific act.<sup>86</sup> Further, as discussed *infra* in Section V.C (discussing the Respondent's objection of illegality), the TCA also declared that the 2008 Concession had other legal and technical flaws, and held that Industrias Infinito had engaged in "*fraude de ley*."<sup>87</sup>

103. The TCA ordered *inter alia*: (i) the MINAE to cancel the 2008 Concession;<sup>88</sup> (ii) 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;<sup>89</sup> and (iii) the file to be transmitted to the prosecutor to determine whether criminal proceedings should be initiated against Government officials (including President Arias).<sup>90</sup>
104. In December 2010, the Costa Rican legislature enacted an amendment to the Mining Code prohibiting open pit mining, which came into force on 10 February 2011 (the "**2011 Legislative Mining Ban**").<sup>91</sup> As discussed later when addressing the Respondent's illegality objection, the 2011 Legislative Mining Ban prohibited mining exploitation in areas declared national parks, biological reserves, forest reserves and state refuges of

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- (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 Crucitas Project of public interest and national convenience.

<sup>85</sup> RER-León 1, ¶¶ 184-188; Contentious Administrative Tribunal, Decision (14 December 2010), pp. 64-65, 67, 76-77 (Spanish), pp. 64-65, 67, 76-77 (English), Exh. **C-0239**.

<sup>86</sup> RER-León 1, ¶¶ 247-253; Contentious Administrative Tribunal, Decision (14 December 2010), p. 65 (Spanish), p. 65 (English), Exh. **C-0239**.

<sup>87</sup> RER-León 1, ¶¶ 218-223; Contentious Administrative Tribunal, Decision (14 December 2010), pp. 82, 105-106, 108 (Spanish), pp. 82, 104-107 (English), Exh. **C-0239**.

<sup>88</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 136 (Spanish), p. 136 (English), Exh. **C-0239**.

<sup>89</sup> Contentious Administrative Tribunal, Decision (14 December 2010), pp. 135-136 (Spanish), pp. 135-136 (English), Exh. **C-0239**.

<sup>90</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 136 (Spanish), p. 136 (English), Exh. **C-0239**.

<sup>91</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Exh. **C-0238**. In the Decision on Jurisdiction, the Tribunal used the term "Legislative Moratorium." Having reviewed this law in the context of the merits, it finds the term Legislative Mining Ban more appropriate.

wildlife, and declared certain mining reserve zones.<sup>92</sup> It also limited mining of any reserves to “cooperatives of workers for the development of mining in a small scale for the subsistence of families, artisanal mining and prospector use (*coligallero*) from communities surrounding the exploitation sites, based on the amount of affiliates of such cooperatives.”<sup>93</sup> It explicitly added a new provision to the Mining Code stating that “[p]ermits or concessions shall not be granted for the exploration and exploitation activities of open-pit mining of metallic minerals on national territory,” and “established as an exception that only exploration permits for scientific and investigatory purposes shall be granted.”<sup>94</sup>

105. 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.<sup>95</sup>
106. On 10 February 2011, the 2011 Legislative Mining Ban entered into force.<sup>96</sup>
107. 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.<sup>97</sup>
108. 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**”).<sup>98</sup> In particular, it upheld the TCA’s decisions on *res judicata*, non-derogability of rules, nullity of the 2002

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<sup>92</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 1 (amending Article 8 of the Mining Code), Exh. **C-0238**.

<sup>93</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 1 (amending Article 8 of the Mining Code) (English), Exh. **C-0238**.

<sup>94</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 2 (adding a new Article 8 bis to the Mining Code) (English), Exh. **C-0238**.

<sup>95</sup> Submissions of Industrias Infinito S.A. to the Supreme Court (Administrative Chamber), File No. 08-1282-1027-CA (18 January 2011), Exh. **C-0248**.

<sup>96</sup> The Parties differ as to the date on which the 2011 Legislative Mining Ban 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: 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.

<sup>97</sup> RER-Ubico 1, ¶ 112; Unconstitutionality Action, Industrias Infinito to the Supreme Court (Constitutional Chamber) (11 November 2011), Exh. **C-0259**.

<sup>98</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Exh. **C-0261**.

Concession and applicability of the 2002 Moratorium.<sup>99</sup> It did not pronounce on the TCA's findings on technical flaws and *fraude de ley*.<sup>100</sup>

109. On 9 January 2012, the Ministry of the Environment, Energy and Telecommunications (“**MINAET**”) canceled Industrias Infinito’s 2008 Concession (the “**2012 MINAET Resolution**”).<sup>101</sup> The resolution stated in its operative part:<sup>102</sup>

By virtue of the foregoing, in due compliance with the decision in accordance with Articles 156 section 1 and 158 of the Contentious Administrative Procedural Code, we hereby declare the cancellation of the mining exploitation concession granted to the company Industrias Infinito S.A., granted by Executive Branch resolution No. R-217-2008-MINAE at 3:00 p.m. on April 21, 2008, which was rendered null and void by decision No. 4399-2010 issued at 4:00 p.m. on the December 14, 2010, by the Contentious Administrative Tribunal, section IV. Administrative file 2594 is archived, the area is liberated from the Mining Registry.

110. On 12 April 2012, APREFLOFAS and Mr. Jorge Lobo Segura requested the TCA to enforce the 2010 TCA Decision<sup>103</sup> and, specifically, to order Industrias Infinito, SINAC, and the State to repair the environmental damage caused to the site.<sup>104</sup>
111. On 30 April 2012, a panel of four experts was appointed to assess the quantum of the environmental damages and any reparation measures.<sup>105</sup> This panel issued its expert opinion on 8 June 2012, which estimated the environmental damages at USD 6.4 million and recommended certain reparation measures to be implemented.<sup>106</sup>
112. On 19 June 2013, the Constitutional Chamber dismissed Industrias Infinito’s unconstitutionality challenge (which had been filed on 11 November 2011), holding that

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<sup>99</sup> RER-León 1, ¶¶ 267-286; Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas XIV-XVIII, LVI, LVIII-LIX, Exh. **C-0261**.

<sup>100</sup> According to Dr. León, it did not do so because its previous holdings were sufficient to annul the relevant administrative acts. RER-León 1, ¶¶ 285-286; Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas LII, LIII, LX, Exh. **C-0261**.

<sup>101</sup> Resolution No. 0037, MINAET, File No. 2594 (9 January 2012), Exh. **C-0268**.

<sup>102</sup> Resolution No. 0037, MINAET, File No. 2594 (9 January 2012), Exh. **C-0268**.

<sup>103</sup> To recall, the 2010 TCA Decision had *inter alia* ordered Industrias Infinito, the SINAC and the State to repair the environmental damages caused by the logging activities carried out in Industrias Infinito’s property after the issuance of Resolution No. 244-2008-SCH. The TCA specified that the amount of these environmental damages should be determined during the enforcement proceedings for the 2010 TCA Decision on the basis of an expert opinion. Contentious Administrative Tribunal, Decision (14 December 2010), p. 135 (Spanish), p. 135 (English), Exh. **C-0239**.

<sup>104</sup> Contentious Administrative Tribunal, Decision No. 1438-2015 (24 November 2015), ¶ A, Exh. **C-0305**.

<sup>105</sup> Contentious Administrative Tribunal, Decision No. 1438-2015 (24 November 2015), ¶ F, Exh. **C-0305**.

<sup>106</sup> Contentious Administrative Tribunal, Decision No. 1438-2015 (24 November 2015), ¶ H, Exh. **C-0305**.

the challenge was inadmissible because the Administrative Chamber had already issued its ruling (the “**2013 Constitutional Chamber Decision**”).<sup>107</sup>

113. Industrias Infinito left the Crucitas site on 10 September 2015.<sup>108</sup>
114. On 24 November 2015, on the basis of the expert report mentioned above, the TCA ordered Industrias Infinito, the SINAC and the State to pay USD 6.4 million for environmental damages within six months (the “**2015 TCA Damages Decision**”).<sup>109</sup>
115. Upon appeals from the SINAC and the State, on 6 December 2017, the Administrative Chamber of the Supreme Court overturned the 2015 TCA Damages Decision for lack of motivation and remanded the file to the TCA (“**2017 Administrative Chamber Decision**”).<sup>110</sup> More specifically, the Administrative Chamber held that the TCA did not assess the experts’ report on environmental damages, did not make any reference to the parties’ positions and did not justify the rate which it applied to determine the amount of the damages.<sup>111</sup>
116. On 14 January 2019, the TCA invited the parties to the proceedings for the enforcement of the 2010 TCA Decision to comment on the 2017 Administrative Chamber Decision within five business days.<sup>112</sup> The TCA also informed the parties involved that they could resolve their dispute through a conciliation process.<sup>113</sup>
117. On 22 January 2019, Industrias Infinito filed a brief with the TCA alleging that the Crucitas area had suffered additional environmental damage since the 2015 TCA Damages Decision due to a hurricane and third parties’ illegal mining activities.<sup>114</sup>
118. On 22 February 2019, noting that the parties had not objected to a conciliation proceeding, the TCA remitted the file to the conciliation office of the TCA.<sup>115</sup> According

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<sup>107</sup> R-Mem. Jur., ¶ 120; Supreme Court (Constitutional Chamber), Decision (19 June 2013), Exh. **C-0283**.

<sup>108</sup> CWS-Rojas 1, ¶ 206.

<sup>109</sup> Contentious Administrative Tribunal, Decision No. 1438-2015 (24 November 2015), p. 14 (PDF) (English), p. 29 (PDF) (Spanish), Exh. **C-0305**.

<sup>110</sup> Supreme Court (Administrative Chamber), Decision No. 1567-F-S1-2017 (6 December 2017), p. 40 (PDF) (Spanish), Exh. **C-0859**.

<sup>111</sup> Supreme Court (Administrative Chamber), Decision No. 1567-F-S1-2017 (6 December 2017), Whereas IX, pp. 36-39 (PDF) (Spanish), Exh. **C-0859**.

<sup>112</sup> Contentious Administrative Tribunal, Resolution (14 January 2019), p. 4 (PDF) (Spanish), Exh. **C-0861**.

<sup>113</sup> Contentious Administrative Tribunal, Resolution (14 January 2019), p. 4 (PDF) (Spanish), Exh. **C-0861**.

<sup>114</sup> Reply to Hearing on Judgement Enforcement (22 January 2019), Exh. **C-0862**.

<sup>115</sup> Conciliation Notice (22 February 2019), Exh. **R-0370**.

to the Respondent, this amounts to a suspension the proceedings,<sup>116</sup> and the Claimant has not disputed it.

#### IV. SCOPE OF THIS DECISION

119. As agreed by the Parties and reflected in Annex A to Procedural Order No. 1, these proceedings have been bifurcated between jurisdiction and merits.
120. In the Decision on Jurisdiction, the Tribunal dismissed all of the Respondent's preliminary objections (whether they went to jurisdiction or admissibility), with the exception of the following, which were deferred to the present phase:
- a. Whether the Claimant's investment complies with Article I(g) of the BIT (more specifically, whether it is an investment made in accordance with Costa Rican law). This objection was first raised by APREFLOFAS, but was subsequently endorsed by the Respondent in its Counter-Memorial.<sup>117</sup>
  - b. Whether the Tribunal lacks jurisdiction *ratione temporis* because the claims are time-barred under the three-year statute of limitations contained in Article XII(3)(c) of the BIT. In the Decision on Jurisdiction, the Tribunal also deferred to the merits phase the discussion whether this objection goes to jurisdiction or admissibility, should it become relevant.<sup>118</sup>
  - c. Whether the Claimant can invoke the Most Favored Nation ("**MFN**") clause provided in Article IV of the BIT to "circumvent" the jurisdictional flaws in its case. In the Decision on Jurisdiction, the Tribunal noted that this objection only remained relevant with respect to the time bar objection. As the Claimant invokes the MFN clause on an alternative basis, the Tribunal will address the MFN argument only if it upholds this latter objection.<sup>119</sup>
121. Further, in the Decision on Jurisdiction, the Tribunal held that the application of Section III(1) of Annex I of the BIT was a matter of merits, not jurisdiction.<sup>120</sup> As the Tribunal explained in that Decision, this provision "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."<sup>121</sup> The Tribunal will deal with this provision at the end of the merits review, if it finds that any of the claims on the merits are founded.

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<sup>116</sup> R-Rej. Merits, ¶ 207. The Tribunal observes that the paragraph numbering between the English and Spanish versions of the Rejoinder does not coincide. The Tribunal has used the numbering in the English version. Where necessary, the Spanish text of the Award indicates in brackets the equivalent paragraph from the Spanish version of the Rejoinder.

<sup>117</sup> Decision on Jurisdiction, ¶¶ 135-140; R-CM Merits, Section III.C.

<sup>118</sup> Decision on Jurisdiction, ¶ 174, Sections IV.C.4.b and IV.C.4.c.

<sup>119</sup> Decision on Jurisdiction, ¶¶ 360-362.

<sup>120</sup> Decision on Jurisdiction, ¶ 358.

<sup>121</sup> *Ibid.*

122. This Award first addresses the Respondent's remaining preliminary objections. To the extent they are dismissed, it will then address the merits of the dispute.

## **V. JURISDICTION / ADMISSIBILITY**

### **A. LAW APPLICABLE TO JURISDICTION**

123. As was noted in the Decision on Jurisdiction, it is undisputed that (i) jurisdiction is governed by Article 25 of the ICSID Convention and by the BIT;<sup>122</sup> (ii) 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**");<sup>123</sup> and (iii) the Tribunal has the power to rule on its own jurisdiction.<sup>124</sup>

### **B. OVERVIEW OF THE PARTIES' POSITIONS**

#### **1. The Respondent's Position**

124. The Respondent objects to the Tribunal's jurisdiction on the following grounds:
- a. The Tribunal lacks jurisdiction *ratione materiae* and *ratione voluntatis*, because the Claimant's investment was not owned or controlled in accordance with Costa Rica's laws as required by Article I(g) of the BIT. While the Respondent does not dispute that the Claimant has made an investment in Costa Rica, it argues that the 2008 Concession was obtained by fraud and misrepresentation, was grossly defective under Costa Rican law and may have been procured by corruption.<sup>125</sup>
  - b. The Tribunal lacks jurisdiction *ratione temporis*, because the claims are time-barred pursuant to the three-year limitation period imposed by Article XII(3)(c) of the BIT. This is because the Claimant acquired knowledge of the alleged breach and of the damage it caused when the 2010 TCA Decision was issued on 24 November 2010, *i.e.*, prior to the cut-off date of 6 February 2011.<sup>126</sup>
  - c. Should the Tribunal find that the claims are barred under Article XII(3)(c), the Claimant cannot invoke the MFN clause to attempt to circumvent this finding by relying on a more favorable temporal limitation provision in another treaty. The Claimant has failed to show how it has suffered from less favorable treatment, and Article XII of the BIT contains jurisdictional requirements that cannot be bypassed by operation of the MFN clause. The BIT's MFN clause does not explicitly

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<sup>122</sup> Decision on Jurisdiction, ¶ 118.

<sup>123</sup> Decision on Jurisdiction, ¶ 119.

<sup>124</sup> Decision on Jurisdiction, ¶ 120.

<sup>125</sup> R-CM Merits, Section III.C.

<sup>126</sup> R-CM Merits, Section III.A.

encompass dispute resolution, but the majority view is that MFN clauses do not apply to dispute settlement.<sup>127</sup>

## **2. The Claimant's Position**

125. The Claimant argues that the Respondent's jurisdictional objections are meritless:

- a. With respect to the objections *ratione materiae and voluntatis*, the Claimant submits that its investment falls within the scope of Article I(g) of the BIT, because (i) it was valid at the time it was acquired, which is the relevant time to determine legality; (ii) any breaches of Costa Rican law were not sufficiently serious to deprive the Tribunal of jurisdiction, and are in any event primarily attributable to the State itself; (iii) the Respondent is estopped from arguing illegality of measures issued by its own officials; and (iv) there is no evidence whatsoever of corruption.<sup>128</sup>
- b. In connection with the Respondent's objection *ratione temporis*, the evidence shows that the Claimant knew, and could only have known, that the Respondent breached the BIT and that Infinito had suffered damages on 30 November 2011, *i.e.*, the date on which the Administrative Chamber annulled the resolutions restoring the Claimant's exploitation concession and other key permits, and on which the 2011 Legislative Mining Ban for the first time made it impossible for the Claimant to apply for another updated exploitation concession.<sup>129</sup>
- c. Finally, even if the Tribunal were to find that the claims are time-barred under Article XII(3)(c), the Claimant submits that Article IV(a) of the BIT (which includes an MFN clause) permits it to benefit from more favorable dispute resolution mechanisms under the Respondent's bilateral investment treaties with Taiwan and the Republic of Korea that contain no temporal limitations.<sup>130</sup>

## **C. DOES THE CLAIMANT OWN OR CONTROL AN INVESTMENT IN ACCORDANCE WITH COSTA RICAN LAW?**

### **1. The Respondent's Position**

126. During the jurisdictional phase, the Respondent's position was that the evidence was insufficient to argue that "the entirety of Infinito's investment was procured through fraud, corruption or other malfeasance."<sup>131</sup> However, in its Counter-Memorial, it alleged that "fresh evidence suggesting that the Concession was indeed procured by corruption has come to light since the Hearing on Jurisdiction. Having previously reserved its rights

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<sup>127</sup> R-CM Merits, Section III.B.

<sup>128</sup> C-Reply Merits, ¶ 381.

<sup>129</sup> C-Reply Merits, ¶ 382.

<sup>130</sup> C-Reply Merits, ¶¶ 488-494.

<sup>131</sup> R-Reply Jur., ¶ 337.



in respect of this issue, Costa Rica now exercises those rights and objects to the jurisdiction of the Tribunal on this basis.”<sup>132</sup>

127. The Respondent’s position during this phase has been that the Tribunal lacks jurisdiction over the Claimant’s entire case because the Claimant’s 2008 Concession was not owned or controlled in accordance with Costa Rican law, as required under Article I(g) of the BIT. The Respondent thus argues that the Claimant’s investment falls outside the scope of the BIT’s protection and Costa Rica’s consent to arbitration. Consequently, the Tribunal would lack jurisdiction *ratione materiae* and *ratione voluntatis*.<sup>133</sup>
128. The Respondent’s argument is essentially the following: Article I(g) of the BIT expressly requires that the investment be owned or controlled in accordance with Costa Rican law (a). The Claimant did not own or control an investment in accordance with Costa Rican law (b).

**a. Article I(g) of the BIT Requires that the Investment Be Owned or Controlled in Accordance with Costa Rican Law**

129. As noted in the Decision on Jurisdiction, the BIT expressly requires that investments must be “owned or controlled” in accordance with Costa Rican law.<sup>134</sup> The Respondent submits that “[i]t is uncontroversial and well established in investment law that where a treaty contains a provision requiring investments to be in accordance with a host-State’s laws, investments which are illegal under that law are not protected by the BIT and fall outside the scope of the State’s consent to arbitration.”<sup>135</sup> Relying on *Anderson*, the Respondent further submits that, if an investment is not owned or controlled in accordance with Costa Rican law, it will not qualify as an investment under the BIT.<sup>136</sup>
130. The consequences are three-fold. First, the Tribunal lacks jurisdiction *ratione materiae*, because the substantive protections of the BIT apply only to investments as defined under the BIT.<sup>137</sup> Second, it also lacks jurisdiction *ratione voluntatis*, because Costa Rica’s consent to arbitration under the BIT applies only to “investors” who own or control an “investment” as defined under the BIT.<sup>138</sup> Third, the investment falls outside the

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<sup>132</sup> R-CM Merits, ¶ 296.

<sup>133</sup> R-CM Merits, ¶ 297.

<sup>134</sup> R-CM Merits, ¶ 301; Decision on Jurisdiction, ¶¶ 138, 235(iii).

<sup>135</sup> R-CM Merits, ¶ 298, citing *inter alia* *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (“*Fraport I*”), ¶ 339, Exh. **CL-0207**; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2000 (“*Inceysa*”), ¶ 207, Exh. **RL-0183**; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001 (“*Salini*”), ¶ 46, Exh. **RL-0184**.

<sup>136</sup> R-CM Merits, ¶ 301, citing *Alasdair Ross Anderson, et al., v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 (“*Anderson*”), ¶ 58, Exh. **RL-0187**.

<sup>137</sup> R-CM Merits, ¶ 301.

<sup>138</sup> R-CM Merits, ¶ 301.

Respondent's consent to ICSID arbitration, since the latter only applies to a legal dispute arising out of an investment.<sup>139</sup>

131. Again relying on *Anderson*, the Respondent submits that the test for compliance with this requirement is an objective one, *i.e.*, "[e]ach Claimant must meet this requirement, regardless of his or her knowledge of the law or his or her intention to follow the law."<sup>140</sup>
132. The Respondent points out that, unlike similar requirements under other treaties, the temporal scope of the legality requirement under Article I(g) of the BIT is not limited to the establishment phase of the investment. The terms "owned" or "controlled" do not relate to a particular point in time (as opposed to the terms "made", "established" or "admitted").<sup>141</sup> Consequently, the legality requirement applies throughout the life of an investment.<sup>142</sup> The Respondent relies on the wording of Article I(g) of the BIT and denies that *Vannessa Ventures* and *Copper Mesa* support the Claimant's position.<sup>143</sup>
133. Costa Rica further submits that the illegality arose in any event at the time of the establishment of the investment in April 2008, marked by the granting of the 2008 Concession and related approvals.<sup>144</sup> Hence, even if the legality were to be assessed at the establishment phase, the assessment would have to be made when the 2008 Concession and related approvals were granted.<sup>145</sup>
134. The Respondent further contends that the illegality of the 2008 Concession invalidates the protection of the Claimant's investment, because each stage of an investment's establishment must be legal and *bona fide* to qualify for protection under a BIT.<sup>146</sup> Citing to *Chevron*, the Respondent notes that the commercial reality of many large-scale natural resource exploitation projects is that they are usually made in stages.<sup>147</sup> The multi-phase nature of a mining investment has been acknowledged by various investment tribunals, such as *Bear Creek Mining*.<sup>148</sup> With reference to *Yukos*, the Respondent concludes that if an illegality of a sufficiently serious nature is identified at

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<sup>139</sup> R-CM Merits, ¶ 302, relying on *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 ("**Phoenix**"), ¶ 101, Exh. **RL-0165**.

<sup>140</sup> R-CM Merits, ¶ 303, citing *Anderson*, ¶ 52, Exh. **RL-0187**.

<sup>141</sup> R-CM Merits, ¶ 304.

<sup>142</sup> R-Rej. Merits, ¶¶ 248-257.

<sup>143</sup> R-Rej. Merits, ¶¶ 254-255, referring to *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013 ("**Vannessa Ventures**"), Exh. **RL-0078** and *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016 ("**Copper Mesa**"), Exh. **CL-0234**.

<sup>144</sup> R-Rej. Merits, ¶ 271.

<sup>145</sup> R-Rej. Merits, ¶ 271.

<sup>146</sup> R-Rej. Merits, ¶ 272.

<sup>147</sup> R-Rej. Merits, ¶ 273, citing *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [II]*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012 ("**Chevron Third Interim Award**"), ¶ 4.16, Exh. **RL-0096**.

<sup>148</sup> R-Rej. Merits, ¶ 274, citing *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 ("**Bear Creek Mining**"), ¶ 296, Exh. **RL-0234**.

any stage of the investment, this will render the investment illegal.<sup>149</sup> Thus, in order for the Claimant's investment to qualify for protection, the 2008 Concession and its later operation must be legal.

135. In the Respondent's submission, under Article I(g) of the BIT, the Tribunal will lack jurisdiction if the following two elements are met. First, the alleged illegality must be sufficiently serious for the investment to lose the protections under the BIT and/or access to dispute settlement under the BIT.<sup>150</sup> As was held in *Quiborax*, the subject-matter scope of the legality requirement is limited to non-trivial violations of the State's legal order, violations of the State's foreign investment regime, and fraud aimed at securing the investment.<sup>151</sup> Second, the respondent State must not have knowingly overlooked or accepted the illegality, such that it is estopped from arguing that the investment is illegal.<sup>152</sup> The factors that are relevant in this assessment include the length of the time the State tolerated the illegal action without any intervention, and whether the investor concealed its actions from the State, in which case the latter would not be estopped.<sup>153</sup>

**b. The Claimant Did Not Own or Control an Investment in Accordance with Costa Rican Law**

136. The Respondent argues that the Claimant did not own or control an investment in accordance with Costa Rican law because (i) the Claimant obtained its investment through deceitful conduct ("*fraude de ley*"); (ii) the Claimant's 2008 Concession suffered from other irredeemable legal defects; and (iii) there are indicia that the Claimant's investment was procured through corruption.

**(i) The Claimant Obtained Its Investment Through Deceitful Conduct ("*Fraude de Ley*")**

137. According to the Respondent, as declared by the 2010 TCA Decision and confirmed by the 2011 Administrative Chamber Decision, the 2008 Concession was illegally obtained through misrepresentation to Costa Rican officials, which amounted to a legal fraud (*fraude de ley*) under Costa Rican law.<sup>154</sup> Relying on its legal expert, Dr. León, the Respondent submits that a "*fraude de ley*" occurs "when acts are carried out under the guise of lawful conduct, but are aimed at obtaining unlawful effects."<sup>155</sup>

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<sup>149</sup> R-Rej. Merits, ¶ 275, citing *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014 ("*Yukos*"), ¶¶ 1368-1369, Exh. **CL-0093**.

<sup>150</sup> R-CM Merits, ¶ 305, citing *Quiborax S.A., Non-Metallic Minerals S.A., & Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("*Quiborax Jurisdiction*"), ¶ 266, Exh. **CL-0233**.

<sup>151</sup> R-CM Merits, ¶ 305.

<sup>152</sup> R-CM Merits, ¶ 306.

<sup>153</sup> R-CM Merits, ¶ 306.

<sup>154</sup> R-CM Merits, ¶ 311; R-Rej. Merits, ¶ 279.

<sup>155</sup> R-CM Merits, ¶ 311, relying on RER-León 1, ¶ 218.

138. The Respondent points out that the 2010 TCA Decision identified the following instances of legal fraud: (i) the fact that Industrias Infinito interpreted the exploration permit as automatically granting it an exploitation concession; (ii) the application of the conversion of the administrative act to an act that had been annulled *ab initio* by a Costa Rican court six years before; and (iii) the fact that Industrias Infinito requested a modification of the environmental viability instead of filing a new EIA.<sup>156</sup> In addition, the Claimant attempted to circumvent certain environmental protections when submitting its application for the 2002 and 2008 Concessions, by failing to inform the environmental authorities that it planned to create a tailings pond over a public road.<sup>157</sup> The Claimant also illegally attempted to amend its mining Project to allow itself to extract minerals from a depth beyond the limit set by the DGM.<sup>158</sup>
139. Relying on *Hamester*, *Inceysa*, and *Plama*, the Respondent submits that, where an investment is obtained through misrepresentation or fraud, it cannot benefit from the protection afforded by the BIT and falls outside the scope of the respondent State's consent to arbitration.<sup>159</sup>
140. The Respondent denies that it is estopped from asserting illegality, because, if at all, a State is only estopped from raising an illegality objection where its acceptance of the illegality gives rise to a legitimate expectation that the investment was legal.<sup>160</sup> While the Respondent acknowledges that SETENA approved the relevant changes to the Claimant's Concession in February 2008, it notes that the approval was challenged only seven months later and was eventually annulled through the 2010 TCA Decision.<sup>161</sup>

**(ii) The 2008 Concession Suffered from Other Irredeemable Legal Defects**

141. The Respondent contends that the 2008 Concession suffered from other irreparable deficiencies which rendered it null and void under Costa Rican law. The Respondent explains that the 2008 Concession suffered from at least the following fundamental legal defects:<sup>162</sup>
- a. The grant of the 2008 Concession was illegal due to the application of the 2002 Moratorium. The attempt to apply the principle of conversion to the concession

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<sup>156</sup> R-CM Merits, ¶ 311, referring to Contentious Administrative Tribunal, Decision (14 December 2010), pp. 77-78, 82, 105 (Spanish), pp. 78, 82, 105-106 (English), Exh. **C-0239**.

<sup>157</sup> R-CM Merits, ¶ 312.

<sup>158</sup> R-CM Merits, ¶ 313.

<sup>159</sup> R-CM Merits, ¶¶ 325-327, citing *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 ("**Hamester**"), ¶¶ 123-124, Exh. **RL-0185**; *Inceysa*, ¶¶ 239-240, Exh. **RL-0183**; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("**Plama**"), ¶ 146, Exh. **RL-0235**.

<sup>160</sup> R-CM Merits, ¶ 329.

<sup>161</sup> R-CM Merits, ¶ 329.

<sup>162</sup> R-CM Merits, ¶¶ 332-333; R-Rej. Merits, ¶ 279.

previously held by Industrias Infinito was invalid because such concession had been annulled and declared void *ab initio* more than six years before.<sup>163</sup>

- b. The grant of the 2008 Concession breached the principle of non-derogability of general administrative regulations by individual, specific administrative acts.<sup>164</sup>
- c. The 2008 Concession and related approvals breached numerous environmental protection laws, in particular:
  - i. The changes introduced by Industrias Infinito to the Project in December 2007, after obtaining approval of its EIA in December 2005, were significant, and would have required an additional EIA to have been carried out.<sup>165</sup>
  - ii. The mandatory technical analysis of Industrias Infinito's proposed changes to the mining Project in December 2007 were not carried out.<sup>166</sup>
  - iii. SETENA's approval of Industrias Infinito's modified EIA in February 2008 was invalid because it was based on the original EIA approval of December 2005, which had a validity of two years and thus expired in December 2007.<sup>167</sup>
  - iv. SETENA failed to hold a public hearing for the Project in accordance with the requirements of the Organic Law of the Environment, which imposes on the State an obligation to encourage public participation when actions could affect the environment.<sup>168</sup>
  - v. Industrias Infinito's land-use permit was invalid, because it failed to consider that the area in question included protected species of tree; it incorrectly identified the species of tree in the area and it depended on the declaration of national interest in relation to the Project, which the TCA declared void.<sup>169</sup>
  - vi. The permit for change in land use was invalid, since it was based on the 2008 Concession that was declared void.<sup>170</sup>
  - vii. When providing its approval for the modified EIA requested by Industrias Infinito in December 2007, SETENA did not carry out the required cost-benefit analysis under Costa Rican law.<sup>171</sup>

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<sup>163</sup> R-CM Merits, ¶ 334; R-Rej. Merits, ¶ 279(c).

<sup>164</sup> R-CM Merits, ¶ 335.

<sup>165</sup> R-CM Merits, ¶ 336.

<sup>166</sup> R-CM Merits, ¶ 337.

<sup>167</sup> R-CM Merits, ¶ 338.

<sup>168</sup> R-CM Merits, ¶ 339.

<sup>169</sup> R-CM Merits, ¶ 340.

<sup>170</sup> R-CM Merits, ¶ 341.

<sup>171</sup> R-CM Merits, ¶ 342.

- viii. When applying for the EIA approval in 2002, Industrias Infinito failed to disclose the existence of a public road in the area where the tailings pond for the mine was planned to be built. It did so again when applying for modifications to the Project in December 2007.<sup>172</sup>
  - ix. SETENA relied upon certain reports provided by Industrias Infinito that were not duly signed and stamped by the chemical engineer from the Professional Association of Chemical Engineers.<sup>173</sup>
  - d. The decree that the Project was in the national interest was invalid, both in terms of procedure and motivation.<sup>174</sup>
142. For the Respondent, these defects, which were identified by the TCA and confirmed by the Costa Rican Supreme Court, do not constitute minor, technical flaws but rather demonstrate that the Claimant's investment was fundamentally invalid. Hence, they are sufficiently serious to make the Claimant's alleged investment ineligible for the protection of the BIT.
143. Nor is the Respondent estopped from arguing that the Claimant's investment was illegal as a result of these deficiencies. Although the TCA held that Costa Rican authorities shared responsibility for the legal defects, Costa Rica's judiciary found that the 2008 Concession had been illegally granted and invalidated it. Relying on the actions taken by Costa Rica's judiciary as well as the commencement of criminal and disciplinary proceedings against certain Costa Rican officials involved in illegally granting the 2008 Concession, the Respondent asserts that it did not accept the defects in the Claimant's investment.<sup>175</sup>
144. With respect to the responsibility for the defects and the Claimant's arguments that they were attributable to the Costa Rican authorities, the Respondent submits that the reference to *SPP* is inapposite. While that tribunal held that the complicity of the Egyptian authorities in the alleged illegality defeated the respondent's objection, the extract cited by the Claimant makes no mention of the seriousness of the illegality, and is thus irrelevant.<sup>176</sup>
145. As to the Claimant's assertion that there is no evidence of deceitful conduct, the Respondent argues that the Claimant rehashes the arguments that it had unsuccessfully raised before the Administrative Chamber of the Supreme Court, ignoring the Costa Rican Court's findings, in the "hope that this Tribunal will act as a

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<sup>172</sup> R-CM Merits, ¶ 343.

<sup>173</sup> R-CM Merits, ¶ 344.

<sup>174</sup> R-CM Merits, ¶ 345.

<sup>175</sup> R-CM Merits, ¶ 354.

<sup>176</sup> R-Rej. Merits, ¶ 303, referring to *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 ("*SPP*"), ¶¶ 82-83, Exh. **CL-0249**.

court of appeal in respect of domestic law decisions.”<sup>177</sup> The Claimant’s attempt to persuade the Tribunal to question the findings of the Costa Rican courts ignores a consistent line of authorities that recognize that tribunals should give due deference to the decisions of domestic courts regarding the application of their own law. The Respondent relies in particular on *Chevron*, and on *Cortec*, according to which a tribunal should “accept the findings of local courts” as long as there are no gross deficiencies.<sup>178</sup>

146. The TCA made its findings, continues the Respondent, following a comprehensive review of the evidence and a lengthy hearing, including testimony from numerous witnesses and experts proffered by Industrias Infinito, which the Administrative Chamber found in compliance with due process.
147. Regarding the Claimant’s allegation that Costa Rica relies on *ex post facto* declarations of invalidity that are based on laws that changed after the Claimant made its investment, the Respondent alleges that the two declarations cited by the Claimant were in force when the 2008 Concession was granted.<sup>179</sup>
148. The Respondent further denies that the support for the Claimant’s mining project expressed by its officials now estops it from pleading illegality. That support did not amount to a representation that the 2008 Concession was exempt from judicial scrutiny. In any event, the estoppel doctrine does not mean that statements or acts of the executive can supersede court decisions, the judiciary being the ultimate arbiter of Costa Rican law pursuant to Costa Rica’s Constitution.
149. In addition, Costa Rica stresses that the cases on which the Claimant relies in support of its estoppel argument, such as *Kardassopoulos* and *ADC*, were solely concerned with endorsements by the executive branch of a State and did not involve any contrary ruling from the judiciary. They are thus distinguishable. Moreover, Costa Rica considers that it cannot be estopped from asserting illegality where the Claimant itself fraudulently concealed the illegality, a rule that was confirmed in *Fraport I* and in *Arif*. Finally, for the Respondent, the issue of estoppel does not arise in respect of investments that, because of their nature and associated risks, may be made subject to special regulations, such as investments in open-pit mining.<sup>180</sup>

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<sup>177</sup> R-Rej. Merits, ¶ 304, citing Decision on Jurisdiction, ¶ 217.

<sup>178</sup> R-Rej. Merits, ¶¶ 306-307, citing *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* [II], UNCITRAL, PCA Case No. 2009-23, Decision on Track 1B, 12 March 2015 (“***Chevron Decision on Track 1B***”), ¶ 140, Exh. **RL-0252**; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018, ¶ 339, Exh. **RL-0248**.

<sup>179</sup> R-Rej. Merits, ¶¶ 308-309.

<sup>180</sup> R-Rej. Merits, ¶¶ 312-317, citing *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (“***Kardassopoulos***”), ¶¶ 183, 185-188, 191-192, 194, Exh. **CL-0208**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, (“***ADC***”), ¶ 475, Exh. **CL-0009**; *Fraport I*, ¶¶ 346-347, 387, Exh. **CL-0207**; *Mr. Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (“***Arif***”), ¶¶ 374, 376, Exh. **CL-0014**.

**(iii) There Are Indicia that the Claimant's Investment Was Procured Through Corruption**

150. In its Counter-Memorial, the Respondent asserted that there were indicia that the Claimant's investment was procured through corruption. In particular, it noted that there were ongoing criminal investigations in respect of the Claimant's investment, and thus it would be inappropriate for the Tribunal to exercise jurisdiction over the dispute.<sup>181</sup>
151. However, in its Rejoinder, the Respondent expressly withdrew this objection:

[T]he investigation of possible bribery resulting from the donation by the Claimant's shareholder Ronald Mannix to former President Mr Arias' foundation has been discontinued following the decision of the Costa Rican Criminal Court that specific charges against Mr Arias (but not others) were time-barred. Accordingly, Costa Rica is no longer pursuing its jurisdictional objection on the basis of the indicia of corruption in respect of the Claimant's investment.<sup>182</sup>

**2. The Claimant's Position**

152. The Claimant maintains that its investments fall within the scope of Article I(g) of the BIT for the reasons set out below.

**a. The Assessment of Legality of an Investment Focuses on the Time When the Investment Was Acquired**

153. The Claimant submits that the Respondent bears the burden of proving that the Claimant breached the legality requirement under Article I(g) of the BIT. The applicable standard of proof for assertions of illegality, fraud and corruption requires clear and convincing evidence.<sup>183</sup>
154. Referring to *Fraport I*, the Claimant submits that the legality must be assessed at the time when the investment was acquired, as "the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment."<sup>184</sup> The Claimant also cites *Vannessa Ventures*, where the tribunal found that "the jurisdictional significance of the 'legality requirement' in the definition of an investment [...] is exhausted once the investment has been made."<sup>185</sup> The Claimant further points out that, in *Copper Mesa*, the tribunal held that "the wording of the Treaty is confined, at most, to a jurisdictional bar applying to the time when the Claimant first made its investment," and "does not extend to the subsequent operation, management

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<sup>181</sup> R-CM Merits, ¶¶ 355-365.

<sup>182</sup> R-Rej. Merits, ¶ 239, fn. 404.

<sup>183</sup> C-Reply Merits, ¶ 389, relying on *Waguih*, where the tribunal held that "the applicable standard of proof is greater than the balance of probabilities but less than beyond reasonable doubt." *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ("*Waguih*"), ¶¶ 325-326, Exh. CL-0089.

<sup>184</sup> C-Reply Merits, ¶ 391, citing *Fraport I*, ¶ 345, Exh. CL-0207.

<sup>185</sup> C-Reply Merits, ¶ 391, citing *Vannessa Ventures*, ¶ 109, Exh. RL-0078.



or conduct of an investment.”<sup>186</sup> According to that tribunal, requiring the legality standard to be met throughout the life of an investment would have serious and undesirable consequences.<sup>187</sup>

**b. There Was No Illegality at the Time Infinito Initially Acquired Its Investment**

155. It is the Claimant’s contention that its investment was legal when it was initially made in 2000. Since there was no illegality associated with the Claimant’s acquisition of Industrias Infinito in 2000, the Claimant submits that the Respondent is trying to argue that Industrias Infinito’s exploitation concession was actually acquired in 2008.<sup>188</sup> However, the Claimant argues, Industrias Infinito’s 2008 Concession is the same investment as its 2002 Concession, which meets the legality requirement under Article I(g) because there were no legal defects when it was first acquired in 2001, which Costa Rica admitted at the hearing on jurisdiction. For that reason alone, this jurisdictional challenge should be dismissed.<sup>189</sup>
156. As explained by Ms. Araya, Industrias Infinito’s right to an exploitation concession crystallized once it had proven the existence of an exploitable deposit while an exploration permit holder. The resolutions issued in 2001 and 2008 with respect to the concession are part of the same investment.<sup>190</sup>
157. Moreover, the Claimant observes that the Respondent relies on the 2011 Administrative Chamber Decision to argue that the 2002 and 2008 exploitation concession resolutions are different instruments and that Industrias Infinito never owned a valid mining concession under Costa Rican law. The Claimant submits that this argument should be rejected for two reasons. First, its investments in Costa Rica are not limited to the resolutions granting the exploitation concession; as at the time the Claimant acquired Industrias Infinito, Industrias Infinito held an exploration permit granting a right under the Mining Code to obtain an exploitation concession and that right was not unlawful. Second, the argument is based on *ex post facto* declarations of invalidity by the Constitutional Chamber in 2004 and by the Administrative Chamber in 2011, based on laws that changed after the investment was made.<sup>191</sup> The Claimant refers to *Arif*, in which the tribunal held that the State’s use of a declaration by its own judiciary of the illegality of the claimant’s investment under its law was formalistic in that it relied on a judicially declared invalidity that applied retrospectively to the date of the investment.<sup>192</sup>

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<sup>186</sup> C-Reply Merits, ¶ 391, citing *Copper Mesa*, Part 3A, ¶ 5.54, Exh. **CL-0234**.

<sup>187</sup> C-Reply Merits, ¶ 392, citing *Copper Mesa*, ¶ 5.55, Exh. **CL-0234**.

<sup>188</sup> C-Reply Merits, ¶ 396.

<sup>189</sup> C-Reply Merits, ¶¶ 390, 396.

<sup>190</sup> C-Reply Merits, ¶ 396, citing CER-Araya 1, ¶¶ 71-120.

<sup>191</sup> C-Reply Merits, ¶ 397.

<sup>192</sup> C-Reply Merits, ¶ 398, citing *Arif*, ¶ 374, Exh. **CL-0014**.

**c. Any Subsequent Illegality Cannot Deprive the Tribunal of Jurisdiction**

158. The Claimant submits that, even if the Tribunal were to consider events that post-date the investment to assess its jurisdiction, any breaches of Costa Rican law that occurred during the life of the Crucitas Project were not sufficiently serious to warrant the Tribunal declining jurisdiction. In any event, the vast majority of the illegalities identified by the TCA, on which Costa Rica relies, were attributable to the State itself and not to Infinito or Industrias Infinito. As a result, they cannot deprive the Tribunal of jurisdiction (i).<sup>193</sup> The Claimant adds that, in any event, the Respondent is estopped from arguing that the resolution granting the exploitation concession and related approvals were illegal (ii). Finally, the Claimant maintains that there is no evidence of corruption (iii).

**(i) The Breaches of Costa Rican Law Alleged by the Respondent Do Not Meet the Illegality Standard**

159. The Claimant submits that, to deprive the Tribunal of jurisdiction, any breaches of Costa Rican law must be serious and attributable to the Claimant. This principle is well-established in international law and was acknowledged by the Tribunal in its Decision on Jurisdiction. Cases of illegality have resulted in an investor being deprived of treaty protections only in the event of corruption or forgery, fraudulent misrepresentation, and serious breaches of the host State's law.<sup>194</sup>
160. According to the Claimant, this standard is not met here. There was no deceitful conduct by Industrias Infinito, and the remaining issues identified by the TCA would not have prevented the Project from proceeding.
161. The basis for the Respondent's argument of deceitful conduct are the TCA's findings that Industrias Infinito committed *fraude de ley*. *Fraude de ley* is a civil and administrative law concept in Costa Rica, not a criminal law one.<sup>195</sup> According to the Claimant, none of the TCA's findings of *fraude de ley* amount to deceitful conduct by Industrias Infinito:
- a. The TCA first found that Industrias Infinito's interpretation of its rights under the Mining Code as automatically granting it the right to an exploitation concession "insult[ed] the intelligence of this Court, violates the law, and results in a process of fraudulent abuse of law."<sup>196</sup> For the Claimant, "a legal interpretation, shared by all relevant Costa Rican authorities over a number of years, cannot possibly be

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<sup>193</sup> C-Reply Merits, ¶ 399.

<sup>194</sup> C-Reply Merits, ¶¶ 399-404.

<sup>195</sup> C-Reply Merits, ¶¶ 405-408.

<sup>196</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 82 (English), p. 82 (Spanish), Exh. C-0239. The Claimant argues that the TCA did not expressly characterize this as *fraude de ley*, but the Respondent and its expert, Sra. León, have done so. C-Reply Merits, ¶ 410; RER-León 1, ¶ 222; R-CM Merits, ¶ 311.

construed as fraud or an intent to deceive at all, let alone one which is sufficiently serious to warrant depriving the Tribunal of jurisdiction.”<sup>197</sup>

- b. The second finding characterized as *fraude de ley* was based on the fact that the Administration used the mechanism of conversion to restore the exploitation concession in an attempt to avoid the 2002 Moratorium. That mechanism was chosen by President Arias and Minister Dobles on the advice of the MINAE, even though Industrias Infinito had requested a different mechanism, *i.e.* convalidation. According to the Claimant, “[t]his cannot possibly be construed as deceitful conduct on the part of [Industrias Infinito], or even deceitful conduct at all.”<sup>198</sup>
  - c. The third finding of *fraude de ley* was linked to the fact that, in its modified EIA, Industrias Infinito stated that the extraction depth of the mine was meters below the surface, rather than meters above sea level. For the Claimant, there is no evidence that Industrias Infinito had any intent to deceive or mislead SETENA. Had SETENA required the information stated in a different form to properly assess it, it could have requested that information. SETENA found no adverse impacts and approved the modifications, following which Industrias Infinito presented the revision to its feasibility study to the DGM, with the increased extraction depth. In 2010, the Constitutional Chamber held that SETENA’s approval of the EIA modification had been compliant with Costa Rica’s constitutional guarantee of a clean and healthy environment.<sup>199</sup>
162. The TCA also found that Industrias Infinito did not inform authorities of its intent to create a tailings pond in the location of a public road. According to the Claimant, there was no basis for this finding, as the road was clearly identified in all Project drawings, as were mitigation measures.<sup>200</sup>
163. In any event, so says the Claimant, the Administrative Chamber did not uphold the TCA’s findings of “*fraude de ley*” or other allegedly deceitful conduct, and instead ruled on the narrower grounds that the 2002 Moratorium applied to the Crucitas Project.<sup>201</sup>
164. As to the remaining “irredeemable legal defects” allegedly identified by the TCA, the Claimant contends that none would have prevented Industrias Infinito from proceeding with the Crucitas Project and obtaining a new resolution granting it an exploitation concession, had it not been barred by the 2011 Legislative Mining Ban. Moreover, these

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<sup>197</sup> C-Reply Merits, ¶ 410.

<sup>198</sup> C-Reply Merits, ¶ 411.

<sup>199</sup> C-Reply Merits, ¶¶ 412-414, citing Industrias Infinito, Presentation to SETENA of Environmental Assessment of Project Modifications (3 December 2007), Exh. **C-0168**; Industrias Infinito S.A., Report on Environmental Evaluation of Proposed Changes to the Project (1 November 2007), Exh. **C-0524**; Resolution No. 170-2008-SETENA (4 February 2008), Exh. **C-0170**; Technical-Economic Feasibility Study Update (15 February 2008), Exh. **C-0531**; Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>200</sup> C-Reply Merits, ¶ 416.

<sup>201</sup> C-Reply Merits, ¶ 415.

legal defects were (with limited exceptions) attributable to the State itself.<sup>202</sup> They included actions by President Arias and Minister Dobles, *i.e.* the issuance of the 2008 resolution granting Industrias Infinito's exploitation concession and the alleged failure to hold a public hearing, to conduct a sufficient cost-benefit analysis, and to allow the clearance of a larger area of forest than had been permitted by SETENA;<sup>203</sup> several actions of SETENA, namely the decision not to require a full EIA to be completed in respect of the project modifications, the supposed failure to conduct sufficient analysis of the EIA modification proposal, the decision not to require a public hearing in respect of the EIA modifications, and the alleged failure to carry out a sufficient cost-benefit analysis, and SINAC's supposed failure to take into account that the area contained protected species of tree.<sup>204</sup>

165. Infinito further contends that these legal defects were not sufficiently serious to justify depriving the Tribunal of jurisdiction. Mere technical defects do not meet the illegality standard, particularly where they are the result of the *ex post facto* application by the courts of laws that changed after the investment was made. The same applies to Industrias Infinito's alleged failure to disclose the existence of a public road, and reports relied on by SETENA that were not signed and stamped by a chemical engineer from the Professional Association of Chemical Engineers.<sup>205</sup>

**(ii) Costa Rica is Estopped from Arguing that the Resolution Granting the Exploitation Concession and Related Approvals Was Illegal**

166. In any event, the Claimant submits that, given its conduct during the relevant time, the Respondent is estopped from arguing that the resolution granting the exploitation concession and related approvals was illegal. From 2001 onwards, the Claimant, Industrias Infinito and the Government all proceeded on the understanding that the exploitation concession and related approvals were valid. This remained true following the enactment of the 2002 Moratorium and the 2004 Constitutional Chamber Decision. Costa Rican officials and courts repeatedly concluded over a decade that the 2002 Moratorium did not apply to the Project. The doctrine of estoppel bars the Respondent from now claiming that purported technical and legal errors by Costa Rican officials should deprive the Claimant of the BIT's protection. In support, the Claimant relies on *Desert Line*, *ADC*, and *Arif*.<sup>206</sup>

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<sup>202</sup> C-Reply Merits, ¶¶ 419-421.

<sup>203</sup> C-Reply Merits, ¶ 421.

<sup>204</sup> C-Reply Merits, ¶ 421.

<sup>205</sup> C-Reply Merits, ¶¶ 420-424.

<sup>206</sup> C-Reply Merits, ¶¶ 425-427, citing *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 ("*Desert Line*"), ¶ 119, Exh. **RL-0196**; *ADC*, ¶ 475, Exh. **CL-0009**; *Arif*, ¶ 374, Exh. **CL-0014**.

**(iii) There Is No Evidence of Corruption**

167. Finally, it is the Claimant's case that there is no evidence whatsoever of corruption. Specifically, there is no evidence that a donation was made by a principal investor in Infinito to the Fundación Arias Para La Paz.
168. The Claimant notes that the Tribunal had previously indicated that there was insufficient evidence to make out this claim. As new evidence, Costa Rica has invoked the reopening of the investigation against President Arias regarding this alleged donation, which is no proof of corruption. The Respondent and APREFLOFAS also point to criminal charges against Costa Rican officials in connection with the Crucitas Project. However, so says the Claimant, there have been no final convictions, except for the one against Minister Dobles, for *prevaricato*, which was overturned on appeal.<sup>207</sup>

**3. Analysis**

169. The Respondent objects that the Tribunal lacks jurisdiction *ratione materiae* and *ratione voluntatis* over the entire dispute because the Concession was not owned or controlled in accordance with Costa Rican law, as required under Article I(g) of the BIT.<sup>208</sup>
170. Article XII of the BIT, which contains Costa Rica's offer of arbitration, refers 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 [...]."<sup>209</sup>
171. Accordingly, jurisdiction depends, *inter alia*, on the existence of a dispute between a Contracting Party and an investor of the other Contracting Party. An investor is defined in Article I(h) as a natural person or an enterprise "who owns or controls an investment made in the territory of the other Contracting Party."<sup>210</sup> An investment, in turn, is defined in Article I(g) of the BIT in the following words:<sup>211</sup>
- (g) 'investment' means 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;

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<sup>207</sup> C-Reply Merits, ¶¶ 428-434.

<sup>208</sup> R-CM Merits, ¶ 297.

<sup>209</sup> BIT, Article XII(1), Exh. C-0001.

<sup>210</sup> BIT, Article I(h), Exh. C-0001.

<sup>211</sup> BIT, Article I(g), Exh. C-0001.

- (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.

[...].

172. The Respondent submits that it is well established that, where a treaty contains a legality requirement, as is the case here, investments which are illegal are not protected and fall outside the scope of the State's consent to arbitration.<sup>212</sup> The Respondent thus argues that the Tribunal lacks jurisdiction *ratione materiae*, because the BIT applies only to investments as defined under the BIT, *i.e.* investments that meet the legality requirement. Similarly, it asserts that the Tribunal lacks jurisdiction *ratione voluntatis*, because the Respondent's consent to arbitration only covers "investors" and "investments" as defined under the BIT, which again implies legality.<sup>213</sup>
173. Depending on the content of the treaty, illegality can affect jurisdiction, admissibility or the merits of the claims. Here, the legality requirement forms part of the definition of investment. Consequently, the Tribunal agrees with the Respondent that, to qualify as a protected investment under the BIT, the Claimant's investment must be an asset owned or controlled in accordance with Costa Rica's laws. If it is not, then the Tribunal will lack jurisdiction. Indeed, the conditions for jurisdiction as defined under the BIT will not be fulfilled and, by the same token, the requirement for consent under Article 25 of the ICSID Convention will not be met.
174. As recorded in the Decision on Jurisdiction, 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 [P]roject; (vi) the physical assets associated with the [P]roject, including the half-built mining infrastructure; and (vii) the intangible assets associated with the [P]roject."<sup>214</sup> At the time, the Respondent did not contest this.<sup>215</sup> However, as APREFLOFAS had alleged that the investment had been procured by corruption, the Tribunal deferred the matter to the merits.<sup>216</sup>

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<sup>212</sup> R-CM Merits, ¶ 298, citing *inter alia* *Fraport I*, ¶ 339, Exh. **CL-0207**; *Inceysa*, ¶ 207, Exh. **RL-0183**; *Salini*, ¶ 46, Exh. **RL-0184**.

<sup>213</sup> R-CM Merits, ¶¶ 301-302.

<sup>214</sup> Decision on Jurisdiction, ¶ 175(b), citing C-Mem. Merits, ¶ 219.

<sup>215</sup> Decision on Jurisdiction, ¶ 175(b).

<sup>216</sup> Decision on Jurisdiction, ¶¶ 139-140.

175. In the course of the merits phase, the Respondent objected that the investment had not been made in accordance with Costa Rican law. This objection centers exclusively on whether the Claimant owned or controlled the 2008 Concession (and related approvals) in accordance with Costa Rican law. As noted above, the Respondent argues that Industrias Infinito obtained the 2008 Concession and related approvals through deceitful conduct, and that the 2008 Concession suffered from other irredeemable legal defects.<sup>217</sup> Yet, under the terms of the Treaty, it is not on the 2008 Concession that the Tribunal must focus for purposes of establishing its jurisdiction. The 2008 Concession does not qualify as an investment of the Claimant under Article I(g) of the Treaty. Indeed, it is not an “asset owned or controlled [...] directly” by the Claimant, as it is owned or controlled by Industrias Infinito. In other words, it is an asset owned indirectly. Yet, it does not fall within the scope of the Treaty’s definition, which requires an “asset owned or controlled [...] indirectly through an enterprise or natural person of a **third State** [...]”<sup>218</sup> Industrias Infinito is an enterprise incorporated in the host State and thus does not qualify as an enterprise of a third State. The same applies to the pre-existing mining rights, other approvals for the Crucitas Project, and any physical or intangible assets owned by Industrias Infinito and alleged to constitute Infinito’s investments.
176. In light of the Treaty’s text, the asset that qualifies as an investment for purposes of establishing jurisdiction are the Claimant’s shares in Industrias Infinito, which the Claimant owns indirectly, through Crucitas (Barbados) Limited, a corporation incorporated under the laws of Barbados, *i.e.*, an enterprise of a third State.<sup>219</sup> As a result, the shares are the investment to which, according to the Treaty, the legality requirement attaches. Seen in this light, the Claimant’s shares in Industrias Infinito are far from being an “ancillary investment,” as the Respondent contends. To the contrary, it is the Claimant’s main investment, without which it would have no access to jurisdiction under the Treaty.
177. The Respondent has not disputed that the Claimant owns or controls its shares in Industrias Infinito in accordance with Costa Rican law. Nor has it argued that the Claimant acquired these shares illegally, or that its ownership or control of these shares has been vitiated in any way. As to the allegations of corruption, the record is clear that they concerned “matters that happened after the initial investment was made.”<sup>220</sup> On

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<sup>217</sup> *Supra*, Section V.C.1. At one point, the Respondent alleged that there were indications that the 2008 Concession was procured through corruption, but it has since withdrawn that claim. *Supra*, ¶¶ 150-151.

<sup>218</sup> BIT, Article I(g), Exh. **C-0001** (emphasis added).

<sup>219</sup> CER-FTI Consulting 1, n. 15. While the Claimant has also referred to moneys it has invested in Industrias Infinito, the Tribunal considers it unnecessary to refer to these if ownership to the shares is established. In the event that these funds were still owned by Infinito and had not passed into the ownership of its subsidiary at the relevant time, the Tribunal notes that, as observed in *Inmaris*, for purposes of jurisdiction it need not examine whether each and every element of an investment meets the requirements of the BIT and the ICSID Convention; it “need only determine the existence of a covered investment in the transaction as a whole.” *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (“*Inmaris*”), ¶ 92, Exh. **CL-0258**.

<sup>220</sup> Tr. Jur. Day 2 (ENG), 421:5-6 (Mr. Evseev).

this basis, the Tribunal finds that the Respondent's allegations that the 2008 Concession and related approvals were acquired illegally or were affected by legal flaws are irrelevant for purposes of jurisdiction.

178. There being no dispute that the Claimant has made an indirect investment in Costa Rica (*i.e.*, its shares in Industrias Infinito) in accordance with its laws, the Tribunal rejects the Respondent's illegality objection. For reasons of procedural economy, it finds it unnecessary to address the Parties' conceptual disagreements as to the temporal and subject matter scopes of the legality requirement found at Article I(g), or their arguments on estoppel. This being said, as the corruption allegations made by APREFLOFAS raise an issue of international public policy, which the Tribunal must address *ex officio*, the Tribunal will review whether the acquisition of this investment was tainted by corruption.
179. As noted above, both the Respondent and APREFLOFAS have alleged that there are indicia that the Claimant's investment was procured through corruption,<sup>221</sup> and that consequently, the Claimant's investment "falls outside both the scope of the BIT's protections and Costa Rica's consent to arbitration."<sup>222</sup> The Respondent has since withdrawn this objection, with the justification that "the investigation of possible bribery resulting from the donation by the Claimant's shareholder Ronald Mannix to former President Arias' foundation has been discontinued following the decision of the Costa Rican Criminal Court that specific charges against Mr Arias (but not others) were time-barred."<sup>223</sup>
180. In spite of this withdrawal, the Tribunal will address this corruption allegation for the reasons mentioned above. First of all, the Tribunal notes that the allegations of corruption by the Respondent and APREFLOFAS relate to the acquisition of the 2008 Concession, which was granted during President Arias's administration.<sup>224</sup> As the Respondent admitted during the Hearing on Jurisdiction, the allegations of corruption concern "matters that happened after the initial investment was made,"<sup>225</sup> which the Tribunal understands to mean that they do not relate to the Claimant's acquisition of shares in Industrias Infinito. Hence, even if the corruption allegations were well-founded, *quod non*, this would not imply that the acquisition of the shares, which is the relevant investment for present purposes, was unlawful. It would mean that later conduct of the investor was tainted, which could be a defense on the merits, but not an obstacle to jurisdiction.
181. In any event, there are insufficient signals in the record that the 2008 Concession was obtained through corruption. In particular, APREFLOFAS and the Respondent were relying on an investigation against former President Oscar Arias and other officials

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<sup>221</sup> R-CM Merits, ¶ 297.

<sup>222</sup> R-CM Merits, ¶ 297.

<sup>223</sup> R-Rej. Merits, ¶ 239, fn. 404. See also R-Rej. Merits, ¶¶ 208-209.

<sup>224</sup> R-CM Merits, ¶¶ 363-365; APREFLOFAS's First Submission, ¶¶ 10-12, 15-21; APREFLOFAS's Second Submission, ¶¶ 9-15.

<sup>225</sup> See Tr. Jur. Day 2 (ENG), 421:5-6 (Mr. Evseev).



involved in the granting of the Concession<sup>226</sup> that has been discontinued.<sup>227</sup> While it appears that the discontinuation decision was annulled and remanded to the first court for a *de novo* assessment,<sup>228</sup> there is no indication that the charges against President Arias can proceed. Moreover, there is no element on record accrediting APREFLOFAS's suggestion that the Arias foundation received a USD 200,000 donation from one of the Claimant's investors. When assessing the record and reaching the findings just set out, the Tribunal has taken into consideration that it is notoriously difficult to prove corruption and that, as a result, tribunals tend to focus on circumstantial evidence, relying on indicia or red flags. Even adopting such less demanding standard of proof, it cannot conclude that the 2008 Concession was procured by corruption. As a consequence, it will not revert to this issue in the context of the merits, considering that the inquiry would not be different on the merits and that it has discharged its *ex officio* duty in matters of international public policy for purposes of jurisdiction and merits here.

182. Therefore, the Tribunal denies the Respondent's illegality objection. It will consider the Respondent's arguments that the 2008 Concession suffered from legal defects or that Industrias Infinito otherwise breached Costa Rican administrative or environmental law when assessing the merits.

#### **D. ARE THE CLAIMS TIME-BARRED UNDER ARTICLE XII(3)(C) OF THE BIT**

##### **1. The Respondent's Position**

183. The Respondent contends that the Tribunal lacks jurisdiction *ratione temporis* as the Claimant's claims are time-barred, because the Claimant had actual or constructive knowledge of (a) the alleged breaches and (b) the fact that it had incurred loss or damage, before 6 February 2011.

##### **a. The Claimant Had Actual or Constructive Knowledge of the Alleged Breaches Prior to 6 February 2011**

184. According to the Respondent, the evidence shows that the alleged breaches crystallized before the cut-off date and that the Claimant acquired knowledge of such

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<sup>226</sup> APREFLOFAS's First Submission, ¶¶ 3, 10-14, 19-23; Accusation and Request to Open a Trial, Criminal Court of the Treasury, File No. 08-000012-033-PE (8 November 2012), Exh. **C-0278**; Criminal Court for Treasury and Public Service, II Judicial Circuit of San Jose, Case No. 08-000011-033-PE, Trial Order (5 May 2013), Exh. **NDP-001**; Criminal Trial's Tribunal, II Judicial Circuit of San Jose, Case No. 08-00011-033-PE, Decision No. 32-2015 (28 January 2015), Exh. **NDP-002**.

<sup>227</sup> R-Rej. Merits, ¶¶ 208-209; "Óscar Arias sobreseído por prescripción en caso Crucitas," *La Nación*, 21 February 2019, Exh. **R-0273**.

<sup>228</sup> R-Rej. Merits, ¶¶ 210-211; "Juez señaló 'grosero error' en sobreseimiento a favor de Óscar Arias," *CRHoy.com*, 9 May 2019, Exh. **R-0274**.

breaches when the 2010 TCA Decision was issued on 24 November 2010, before the cut-off date.<sup>229</sup>

185. To identify when a breach crystallizes, the Respondent argues that the Tribunal should apply the approach taken by other tribunals when analyzing whether a claim falls within the temporal scope of a BIT.<sup>230</sup> More specifically, the Tribunal should assess whether the distinct measures that are alleged to be in breach of the BIT were legally significant and distinct events from measures that occurred prior to the cut-off date, or whether the measures were deeply rooted in measures or events taking place before the cut-off date and did not have any separate effect, or bring about any fundamental change in relation to those earlier measures.<sup>231</sup> The Respondent relies on *Spence*, which found that the investors had “failed to show [...] that the breaches that they allege are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted.”<sup>232</sup> It further refers to case law that demonstrates that, where a State’s overall conduct has affected an investor’s rights and such conduct has consisted of actions, some of which have occurred before the cut-off date and some thereafter, the tribunal will not have jurisdiction over the acts post-dating the cut-off if the relevant legal and factual situation had already crystallized before that date.<sup>233</sup> In other words, a claimant cannot invoke the last act in a chain or series of events, on the ground that the breach crystallized then, if in reality that act was not a distinct and legally significant event and brought about no separate effect or fundamental change to the *status quo ante*.<sup>234</sup>
186. Here, the Respondent contends that the alleged breaches had already crystallized prior to the cut-off date, because (i) the legal and factual situation underlying the Claimant’s complaints had already been shaped by events prior to 6 February 2011; and (ii) the measures complained of had no separate effect on such legal and factual situation. Instead, these simply maintained or confirmed the *status quo ante*.<sup>235</sup> Specifically, the legal and factual situation regarding the Claimant’s alleged investment had already taken definite shape – and therefore crystallized – prior to 6 February 2011, as a consequence of the following two events: (i) the 2010 TCA Decision (issued on 24

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<sup>229</sup> R-CM Merits, ¶ 201.

<sup>230</sup> R-CM Merits, ¶¶ 204-206.

<sup>231</sup> R-CM Merits, ¶ 205.

<sup>232</sup> R-CM Merits, ¶ 207, citing *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016 (“*Spence*”), ¶ 246, Exh. **CL-0221**.

<sup>233</sup> R-CM Merits, ¶¶ 206, 208, citing *Spence*, ¶¶ 146, 163, 246, Exh. **CL-0221**; *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 CAFTA-DR, 31 May 2016 (“*Corona*”), ¶¶ 212, 215, Exh. **CL-0130**; *ST-AD GmbH (Germany) v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (“*ST-AD*”), ¶ 332, Exh. **RL-0075**; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 (“*EuroGas*”), ¶ 455, Exh. **RL-0197**.

<sup>234</sup> R-CM Merits, ¶ 208.

<sup>235</sup> R-CM Merits, ¶ 215; R-Rej. Merits, ¶ 335.

November 2010, which annulled the 2008 Concession and related project approvals); and (ii) the 2010 Executive Moratoria (which became effective as of 11 May 2010, and banned open-pit mining in Costa Rica).<sup>236</sup> Indeed, it was the 2010 TCA Decision, as opposed to the 2011 Administrative Chamber Decision, which ordered the annulment of the 2008 Concession. The 2011 Administrative Chamber Decision did nothing other than confirm the legality of the 2010 TCA Decision – no effects or specific orders were altered.<sup>237</sup> Likewise, it was the 2010 Executive Moratoria that banned open-pit mining in Costa Rica. The legal and factual situation underlying the Claimant’s complaint in relation to the 2011 Legislative Mining Ban had thus already crystallized prior to the cut-off date.<sup>238</sup>

187. By contrast, the measures on which the Claimant predicates its BIT claims had no separate effect on the *status quo ante* that had already been shaped by the previous two measures (the 2010 TCA Decision and the 2010 Executive Moratoria). Essentially, the first three of the measures invoked by the Claimant (the 2011 Administrative Chamber Decision; the 2012 MINAET Resolution, and the 2013 Constitutional Chamber Decision) did nothing more than confirm or maintain the annulment of the Concession, which had already occurred with the 2010 TCA Decision in November 2010, over two months before the cut-off date of 6 February 2011. The fourth measure (the 2011 Legislative Mining Ban) replicated the prior 2010 Executive Moratoria. Hence, the legal and factual situation on which the Claimant’s BIT claims are based had already crystallized with the prior 2010 Executive Moratoria and the 2010 TCA Decision.<sup>239</sup> As a result, such measures do not constitute distinct and legally significant events, and cannot form an independent or free-standing basis for Claimant’s BIT claims.<sup>240</sup>
188. More specifically, the Respondent contends that the 2011 Administrative Chamber Decision was not a distinct and legally significant event that was independently actionable under the BIT<sup>241</sup> for the following reasons:
  - a. First, it did nothing more than confirm the findings of the 2010 TCA Decision, namely that the 2008 Concession should be annulled because it breached the 2002 Moratorium.<sup>242</sup>
  - b. Second, even if the 2011 Administrative Chamber Decision had never been issued, the Concession would have remained annulled (as a result of the 2010 TCA Decision). The 2011 Administrative Chamber Decision therefore had no separate effect on the Claimant’s investment from the 2010 TCA Decision. The Claimant relies on the award in *Rumeli* to argue that, where judicial measures are alleged to

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<sup>236</sup> R-CM Merits, ¶ 216.

<sup>237</sup> R-CM Merits, ¶ 217.

<sup>238</sup> R-CM Merits, ¶ 218.

<sup>239</sup> R-CM Merits, ¶¶ 220-221.

<sup>240</sup> R-CM Merits, ¶ 219.

<sup>241</sup> R-Rej. Merits, ¶ 338.

<sup>242</sup> R-Rej. Merits, ¶ 342.

breach a treaty, it is only the final appeal court judgment that crystallizes the breach. However, the passage cited from that case has no bearing on the issue of when a particular breach crystallizes. Furthermore, “as the tribunal’s decision in *ST-AD* demonstrates, in instances in which a judicial appeal is decided after the cut-off date, but the appeal and the resulting appellate judgment are deeply rooted in a judgment rejecting the same arguments prior to the cut-off date, the resulting appellate judgment will not constitute a distinct and legally significant event capable of giving rise to a separately actionable breach.”<sup>243</sup> In the same vein, the Respondent argues that “[t]he status of the 2008 Concession remained the same both before and after the 2011 Administrative Chamber [Decision].”<sup>244</sup>

- c. Third, the operative part of the 2011 Administrative Chamber Decision does not refer to any annulment of the 2008 Concession. By contrast, the operative part of the 2010 TCA Decision expressly contains the decision to annul *Industrias Infinito’s* rights.<sup>245</sup>
  - d. Fourth, many of the Claimant’s arguments to show that the 2008 Concession is valid were assessed solely by the TCA and not by the Administrative Chamber, since the latter “exercised procedural economy.”<sup>246</sup>
  - e. Fifth, assuming that the 2011 Administrative Chamber Decision had upheld the Claimant’s appeal, this would not have automatically reinstated the 2008 Concession. Indeed, the issue would have been remanded to the TCA.<sup>247</sup>
  - f. Sixth, the Claimant does not dispute that the 2010 TCA Decision annulled the 2008 Concession. Rather, the Claimant is arguing that the decision only “became firm” with the 2011 Administrative Chamber Decision.<sup>248</sup>
  - g. Seventh, the Claimant did not carry out any mining activities following the 2010 TCA Decision. The Respondent argues that this shows that the “2008 Concession and related approvals had been annulled [...]”<sup>249</sup>
189. Similarly, the Respondent contends that the 2012 MINAET Resolution was not a distinct and legally significant event that was independently actionable under the BIT because its only purpose was to implement the express instruction contained in the 2010 TCA Decision to the Executive, such instruction being the legal and logical consequence of the TCA having declared the 2008 Concession null and void. This

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<sup>243</sup> R-CM Merits, ¶¶ 223-226, citing *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (“*Rumeli*”), ¶ 795, Exh. **CL-0075**.

<sup>244</sup> R-Rej. Merits, ¶ 343.

<sup>245</sup> R-Rej. Merits, ¶¶ 339-341.

<sup>246</sup> R-Rej. Merits, ¶ 345.

<sup>247</sup> R-Rej. Merits, ¶ 346.

<sup>248</sup> R-Rej. Merits, ¶ 348, citing C-Reply Merits, ¶ 478.

<sup>249</sup> R-Rej. Merits, ¶ 350.

resolution therefore cannot form the basis of a separate breach of the BIT.<sup>250</sup> As Dr. León explains, “the annulment of a concession and its cancellation [...] have the same effect: the termination of the concession.”<sup>251</sup> Further, the Respondent argues that the Claimant and its witness have recognized that Industrias Infinito no longer had any exploration permit or pre-existing mining rights since its exploration permit had expired on 18 September 1999.<sup>252</sup>

190. Likewise, the Respondent argues that the 2013 Constitutional Chamber Decision was not a distinct and legally significant event that was independently actionable under the BIT. The Respondent recalls that, in that judgment, the Constitutional Chamber determined that it could not rule on the constitutionality of the 2010 TCA Decision because the Administrative Chamber had already rendered its decision. In any event, the Respondent submits that “[a]ny ruling by the Constitutional Chamber on the constitutionality of the 2010 TCA Judgment in any event would have had no effect at all on the 2010 TCA Judgment’s findings in relation to the legality of the concession, since such findings (which examined the legality, and not the constitutionality, of the 2008 Concession and related measures) would fall outside the competence of the Constitutional Chamber.”<sup>253</sup> In the alternative, the Respondent argues that the 2010 TCA Decision annulled the 2008 Concession on other grounds that were not part of the Claimant’s *res judicata* defense.<sup>254</sup>
191. Finally, the Respondent contends that the fourth measure (the 2011 Legislative Mining Ban, which the Respondent refers to as the Legislative Moratorium) was also not a distinct and legally significant event and cannot form an independent basis for a BIT claim. The 2011 Legislative Mining Ban replicated the substance of the 2010 Executive Moratoria that had been issued by the executive branch prior to the cut-off date, and that had remained in full force and effect from the time of their enactment, and past the cut-off date. The Claimant was therefore subject to precisely the same constraints both before and after the cut-off date, which means *a fortiori* that the 2011 Legislative Mining Ban had no separate effects or impact than those generated earlier by the 2010 Executive Moratoria. In other words, the 2010 Executive Moratoria already prevented the Claimant from applying for a new concession, which is the very grievance that the Claimant now complains of in relation to the 2011 Legislative Mining Ban. Thus, the 2011 Legislative Mining Ban did not fundamentally change or shape the legal and factual situation that existed prior to 6 February 2011; it simply recast in legislative terms a legal limitation that already existed by virtue of the 2010 Executive Moratoria.<sup>255</sup>
192. The Respondent further contends that the Claimant’s position is contrary to its contemporaneous understanding of the 2010 Executive Moratoria. The Respondent

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<sup>250</sup> R-CM Merits, ¶ 228; R-Rej. Merits, ¶ 354.

<sup>251</sup> RER-León 1, ¶ 303.

<sup>252</sup> R-Rej. Merits, ¶ 355.

<sup>253</sup> R-CM Merits, ¶ 230.

<sup>254</sup> R-Rej. Merits, ¶ 360.

<sup>255</sup> R-CM Merits, ¶¶ 234-235; R-Rej. Merits, ¶¶ 362-366.

submits that in its Quarterly Report of 30 September 2010, the Claimant stated that it had registered impairment charges of USD 309,000 and USD 450,000 with respect to its “properties impacted by the mining moratorium announced by the Costa Rican Government on May 8 2010 [*i.e.*, the date of the Chinchilla Moratorium Decree].”<sup>256</sup> Hence, the legal and factual situation on which the Claimant’s BIT claims are based had already crystallized with the prior 2010 Executive Moratoria and the 2010 TCA Decision.<sup>257</sup>

**b. The Claimant Had Actual or Constructive Knowledge of the Loss or Damage Caused Prior to the Cut-Off Date**

193. The Respondent contends that the Claimant had actual or constructive knowledge of the loss or damage it had suffered with the 2010 TCA Decision, *i.e.*, before the cut-off date.<sup>258</sup> It denies that the relevant moment for the purposes of Article XII(3)(c) is the moment at which the investor “[k]nows” its investment became ‘substantially worthless,’ as suggested by the Claimant.<sup>259</sup> Relying on various investment arbitration decisions, the Respondent argues that “it is not necessary to show that the Claimant knew, or ought to have known, the exact magnitude of the loss it suffered in order to determine when it had knowledge of loss or damage for the purposes of a temporal limitation provision.”<sup>260</sup>
194. First, the Respondent argues that the loss objectively occurred before the cut-off date. It notes that the Claimant’s share price dropped by more than 50% immediately following the issuance of the 2010 TCA Decision,<sup>261</sup> and stresses that its quantum expert found that “[f]rom a financial perspective, 24 November 2010 is the correct valuation date as that is the date that activity stopped and the investment should have been impaired on Infinito’s books.”<sup>262</sup> The Respondent further argues that this loss results directly from the annulment of the 2008 Concession by the 2010 TCA Decision, and that the subsequent measures – the 2011 Administrative Chamber Decision, the

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<sup>256</sup> R-Rej. Merits, ¶ 367.

<sup>257</sup> R-CM Merits, ¶¶ 220-221.

<sup>258</sup> R-CM Merits, ¶ 240; R-Rej. Merits, ¶ 386.

<sup>259</sup> R-Rej. Merits, ¶ 380.

<sup>260</sup> R-CM Merits, ¶ 245; R-Rej. Merits, ¶ 378; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (“**Mondev**”), ¶ 87, Exh. **CL-0062**; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (“**Rusoro**”), ¶ 217, Exh. **RL-0181**; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (“**UPS Award**”), ¶ 29, Exh. **RL-0227**; *William Ralph Clayton, et al., and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (“**Clayton & Bilcon**”), ¶ 275, Exh. **CL-0172**.

<sup>261</sup> R-CM Merits, ¶ 241.

<sup>262</sup> R-CM Merits, ¶ 240, citing RER-Credibility 1, ¶¶ 9(i), 72.

2012 MINAET Resolution and the 2013 Constitutional Court Decision – did not cause any additional loss or damage because they did not alter the 2010 TCA Decision.<sup>263</sup>

195. The same conclusion applies with regard to the 2011 Legislative Mining Ban. The Respondent argues that this Ban had no “additional or different impact on the Claimant beyond that which had already been caused by the 2010 Executive Moratoria”, which had imposed a ban on open-pit mining before the cut-off date.<sup>264</sup>
196. Second, the Respondent argues that the Claimant acquired knowledge of the loss before the cut-off date. In particular, the Claimant knew that the loss had been caused by the 2010 TCA Decision.<sup>265</sup> According to the Respondent, the Claimant expressly recognized that the 2010 TCA Decision had deprived it of the entire value of its investment in its press release of 18 January 2011, whereby it stated that “[t]he Company [*i.e.*, the Claimant] is seeking to re-establish the security and value of its considerable and long-term investments in Costa Rica and to reverse the negative impact that the Ruling has had with respect to the Company’s share price and the inherent negative impact on its investors and employees.”<sup>266</sup> The Respondent also points to Infinito’s reports, press releases and financial statements in which it recognized the loss caused by the 2010 TCA Decision; to Mr. Rojas’s confirmation that the Project was halted, and to Infinito’s decision to allow the BNP’s facility to lapse.<sup>267</sup> Indeed, the Respondent argues that the Claimant’s investment was worthless even before the 2010 TCA Decision, noting that various financial statements issued between 2008 and 2010 showed that Infinito’s finances were already deteriorating.<sup>268</sup>
197. The Respondent further contends that the Claimant did not contest that it had become aware of the 2010 Executive Moratoria at the time that the relevant decrees were promulgated (and in any event, prior to 6 February 2011). The Respondent infers from this fact that the Claimant was aware of the loss or damage before the cut-off date caused by the 2011 Legislative Mining Ban, since the loss is the same.<sup>269</sup>
198. The Respondent further contends that the Claimant’s arguments based on merely subjective beliefs and expectations, for instance that the Administrative Chamber would overturn the 2010 TCA Decision, are irrelevant for the purposes of the objective test required by Article XII(3)(c).<sup>270</sup>

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<sup>263</sup> R-CM Merits, ¶ 243.

<sup>264</sup> R-CM Merits, ¶ 244.

<sup>265</sup> R-Rej. Merits, ¶ 383.

<sup>266</sup> R-CM Merits, ¶ 246, citing Infinito Gold Ltd. Press Release, “Infinito Gold Files to Annul the Tribunal Contencioso Administrativo Ruling” (18 January 2011), p. 1, Exh. **C-0246**; R-Rej. Merits, ¶ 383.

<sup>267</sup> R-Rej. Merits, ¶ 383.

<sup>268</sup> R-CM Merits, ¶ 248; R-Rej. Merits, ¶ 384.

<sup>269</sup> R-CM Merits, ¶ 252.

<sup>270</sup> R-Rej. Merits, ¶ 379.

**c. Article IV of the BIT Does Not Permit Infinito to Bypass the Requirements of Article XII(3)(c)**

199. Finally, the Respondent denies that the MFN clause, contained in Article IV of the BIT, permits the Claimant to bypass the requirements of Article XII(3)(c). More specifically, it argues that Article IV does not permit the Claimant to import the more favorable dispute resolution provisions in the Costa Rica-Taiwan and Costa Rica-Korea BITs, which do not contain a provision such as Article XII(3)(c).<sup>271</sup>
200. First, the Respondent argues that the BIT's MFN clause is a substantive provision and cannot be used to import provisions from other investment treaties entered into by the Respondent.<sup>272</sup> To be able to invoke that clause, the Claimant would need to show affirmatively that the MFN obligation has not been met due to some action or omission by the Respondent, which the Claimant has not done.<sup>273</sup>
201. Second, the Respondent contends that Article IV(a) of the BIT does not encompass dispute resolution.<sup>274</sup>
202. Third, the Respondent submits that Article XII of the BIT contains jurisdictional requirements (rather than admissibility requirements), and such requirements cannot be bypassed by operation of the MFN clause.<sup>275</sup>

**2. The Claimant's Position**

203. The Claimant contends that it filed its claim in accordance with the statute of limitations provisions contained in the BIT. It argues that it first acquired knowledge of the Respondent's breaches of the BIT and knowledge that its investment in Costa Rica had been rendered substantially worthless on 30 November 2011 (*i.e.* within the limitations period). This was the date on which the Administrative Chamber released its decision annulling the resolutions granting Industrias Infinito's exploitation concession and other key permits, and the date that the 2011 Legislative Mining Ban for the first time made it impossible for the Claimant to continue with the Crucitas Project.<sup>276</sup>

**a. The Claimant First Knew that the Respondent Breached the BIT, and that It Had Suffered Damages, on 30 November 2011**

204. The Claimant maintains that it first knew that the Respondent breached the BIT and that it suffered damages on 30 November 2011. The Claimant asserts that it did not consider the 2010 TCA Decision to be final; instead it expected that it would be able to

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<sup>271</sup> R-CM Merits, Section III.B; R-Rej. Merits, Section III.C.

<sup>272</sup> R-CM Merits, ¶¶ 257-261.

<sup>273</sup> R-CM Merits, ¶¶ 262-265.

<sup>274</sup> R-CM Merits, ¶¶ 267-283.

<sup>275</sup> R-CM Merits, ¶¶ 286-291.

<sup>276</sup> C-Reply Merits, ¶ 446.



continue to develop the Crucitas Project following the release of a favorable judgment by the Administrative Chamber.<sup>277</sup>

205. First, according to the Claimant, the record shows that, after the TCA released its Decision, the Claimant was “surprised and frustrated, but it had every expectation that the Administrative Chamber would overturn the [2010 TCA Decision],” allowing the Claimant to “finish building, and start operating, the Crucitas [P]roject.”<sup>278</sup> The Claimant points to the following facts to support this allegation:
- a. The Claimant and its independent auditor Ernst & Young did not record an impairment charge in the Claimant’s audited financial statements regarding the Claimant’s mineral properties in Costa Rica after the release of the 2010 TCA Decision. The Claimant’s external auditors noted in a presentation that Claimant would only have to consider impairment in the event of an adverse decision from the Administrative Chamber. The Claimant further refers to (i) internal accounting memoranda, explaining its reasoning for not recording an impairment charge; (ii) internal emails, explaining its reasoning for not recording an impairment charge; and (iii) public statements made by the Claimant’s management under Canadian securities laws, confirming their view that an impairment was not warranted.<sup>279</sup>
  - b. The Claimant asserts that it anticipated resuming construction after the Administrative Chamber overturned the 2010 TCA Decision, as demonstrated by numerous internal communications. This same expectation is also reflected in the securities filings.<sup>280</sup>
206. Second, the Claimant understood that it was the 2011 Administrative Chamber Decision which had finally and irreversibly annulled the resolutions granting Industrias Infinito’s key permits and rendered the Claimant’s investment in Industrias Infinito substantially worthless,<sup>281</sup> as shown by the following evidence:
- a. Infinito recorded an impairment charge on the assets related to the Crucitas Project following the 2011 Administrative Chamber Decision. As explained in an accounting memorandum, Infinito did not consider that the Crucitas Project was cancelled until the 2011 Administrative Chamber Decision.<sup>282</sup>
  - b. The Claimant relies on Mr. Peschke’s witness statement in which he explains that (i) he agreed with the impairment, as well as with the accounting memorandum, and (ii) Infinito began to wind-down the Crucitas Project only after the 2011

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<sup>277</sup> C-Reply Merits, ¶ 452.

<sup>278</sup> C-Reply Merits, ¶ 472.

<sup>279</sup> C-Reply Merits, ¶¶ 455-462.

<sup>280</sup> C-Reply Merits, ¶¶ 463-464.

<sup>281</sup> C-Reply Merits, Part Three, II.A.c.

<sup>282</sup> C-Reply Merits, ¶ 467; Memorandum from Brian Orgnero (Infinito Gold Ltd.) to Q3 2012 W/P File regarding the 31 December 2011 unaudited interim consolidated financial statements of Infinito Gold Ltd. (3 February 2012), Exh. **C-0696**.

Administrative Chamber Decision.<sup>283</sup> For instance, Industrias Infinito undertook massive employee layoffs at that time.<sup>284</sup>

- c. Internal emails exchanged between 7 December 2011 and 10 January 2012 with regard to the closure of the Project confirm the Claimant's understanding that the 2011 Administrative Chamber Decision was the judicial measure that caused a breach.<sup>285</sup>
- d. The Claimant's securities filings show that the Claimant was not considering its investments in the Crucitas Project to be substantially worthless and, by contrast, was expecting to carry on the Project, until the 2011 Administrative Chamber Decision.<sup>286</sup>

**b. The Challenged Measures Are All Distinct Legal Measures with Distinct Legal and Practical Effects**

207. The Claimant denies that the challenged measures are deeply rooted in the 2010 TCA Decision, as suggested by the Respondent.<sup>287</sup> By contrast, the Claimant contends that the 2011 Administrative Chamber Decision, the 2011 Legislative Mining Ban, the 2012 MINAET Resolution and the 2013 Constitutional Chamber Decision are distinct from measures pre-dating the cut-off date and had separate legal and practical effects on the Claimant's investment in Costa Rica.<sup>288</sup>
208. First, the Claimant does not share the Respondent's view that the breaches crystallized with the 2010 TCA Decision because the 2011 Administrative Chamber Decision merely upheld the annulment of the 2008 Concession and thus did not alter the Claimant's rights.<sup>289</sup> Relying on the decisions in *Rumeli*, *Apotex* and *Eli Lilly*, the Claimant submits that "a lower court decision does not trigger a limitation period if appealed."<sup>290</sup> The Claimant argues that in the present case, the 2010 TCA Decision was suspended during the appeal and was not implemented until the Administrative

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<sup>283</sup> C-Reply Merits, ¶ 468; CWS-Peschke 1, ¶¶ 152-155.

<sup>284</sup> C-Reply Merits, ¶ 468; CWS-Rojas 1, ¶ 199.

<sup>285</sup> C-Reply Merits, ¶ 469; Email from Jason Moore to John Morgan (Infinito Gold Ltd.) regarding Meeting (13 December 2011), Exh. **C-0687**; Email from John Thomas (Infinito Gold Ltd.) to Bladimir Arroyo (Grupo 8) regarding contract with Grupo 8 (10 January 2012), Exh. **C-0701**; Email from Brian Orgnero (Infinito Gold Ltd.) to Adnet Updates Dept. regarding Infinito Gold website (7 December 2011), Exh. **C-0686**; CWS-Peschke 1, ¶ 151.

<sup>286</sup> C-Reply Merits, ¶¶ 461, 464, 470.

<sup>287</sup> C-Reply Merits, ¶ 484.

<sup>288</sup> C-Reply Merits, ¶ 484

<sup>289</sup> C-Reply Merits, ¶ 477.

<sup>290</sup> C-Reply Merits, ¶ 480, *Apotex Inc. v. Government of the United States of America*, UNCITRAL Award on Jurisdiction and Admissibility, 14 June 2013 ("**Apotex**"), ¶¶ 315-316, 333-334, Exh. **RL-0020**; *Rumeli*, ¶¶ 795-796, Exh. **CL-0075**; *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 ("**Eli Lilly**"), ¶ 170, Exh. **CL-0266**.

Chamber had rendered its Decision in 2011, namely when the decision to cancel the 2008 Concession became firm and final.<sup>291</sup>

209. Second, the 2011 Legislative Mining Ban is a separate measure from the 2010 Executive Moratoria, because (i) it supplanted the effects of the two prior moratorium decrees, which were inferior legal instruments; (ii) it had broader and stronger effects than those moratoria; and, (iii) the Claimant was only affected by the 2011 Legislative Mining Ban when the Costa Rican courts annulled its mining rights so that it needed to apply again to obtain new rights.<sup>292</sup>
210. Third, the Claimant argues that 2012 MINAET Resolution did not merely implement the 2010 TCA Decision, as alleged by the Respondent. According to the Claimant, (i) the 2012 MINAET Resolution did not implement the 2010 TCA Decision but the 2011 Administrative Chamber Decision and (ii) it went further than merely implementing the 2011 Administrative Chamber Decision. The Claimant argues in this respect that the 2012 MINAET Resolution cancelled the 2008 Concession, the related approvals and all of Industrias Infinito's remaining procedural rights in the Crucitas area, including its exploration permit and its pre-existing mining rights.<sup>293</sup>
211. Fourth, the Claimant contends that the 2013 Constitutional Chamber Decision is independent from the 2011 Administrative Chamber Decision. Indeed, the Claimant argues that it brought before the Constitutional Chamber an entirely new issue, namely the existence within the Costa Rican judicial systems of various conflicting decisions.<sup>294</sup>
212. Finally, the Claimant argues that the cases cited by the Respondent, *Spence*, *Corona* and *ST-AD* provide no guidance for the present case.<sup>295</sup> According to the Claimant, the tribunals in these cases found that they lacked jurisdiction either because (i) the breach clearly occurred before the cut-off date; (ii) subsequent facts, such as the sending of a letter or the filing of a motion for reconsideration, are not sufficient to constitute a different breach than a measure that had occurred before the cut-off date; or (iii) the breaches occurred before the entry in force of the applicable BIT.<sup>296</sup> The present case is different because Industrias Infinito filed an appeal before the Supreme Court for legitimate reasons and because that proceeding suspended the prior 2010 TCA Decision.<sup>297</sup>

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<sup>291</sup> C-Reply Merits, ¶ 478.

<sup>292</sup> C-Reply Merits, ¶ 484(b).

<sup>293</sup> C-Reply Merits, ¶ 484(c).

<sup>294</sup> C-Reply Merits, ¶ 484(d).

<sup>295</sup> C-Reply Merits, ¶¶ 485-487.

<sup>296</sup> C-Reply Merits, ¶ 486(a)-(c).

<sup>297</sup> C-Reply Merits, ¶ 486(b)-(c).

**c. In Any Event, Article IV of the BIT Permits Infinito to Bypass the Requirements of Article XII(3)(c)**

213. The Claimant argues that, should the Tribunal find that the temporal condition in Article XII(3)(c) of the BIT is not met, it should then conclude that Article XII(3) is not applicable by operation of Article IV of the BIT (the MFN clause).<sup>298</sup> The Claimant's position is that Article IV of the BIT allows it to benefit from the more favorable dispute resolution provisions in the Costa Rica-Taiwan and Costa Rica-Korea BITs, which do not contain a provision such as Article XII(3)(c).<sup>299</sup>
214. The Claimant submits that the purpose of Article IV is to extend "treatment" with respect to the "enjoyment, use, management, conduct, operation, expansion, and sale or other disposition of an investment", which includes more favorable provisions of other BITs, including more favorable dispute resolution mechanisms.<sup>300</sup>
215. In response to the Respondent's argument that temporal limitations cannot be circumvented by the application of an MFN clause on the basis that they constitute jurisdictional rather than admissibility requirements, the Claimant argues that Article XII(3)(c) of the BIT sets out an admissibility requirement to submit a claim to arbitration. The Respondent gave its unconditional consent to arbitrate under Article XII(5) of the BIT. Therefore, the limitation period requirement in Article XII(3)(c) of the BIT is part of the procedure which an investor must follow before it can invoke the consent to arbitrate by a State party on the basis of the Treaty.<sup>301</sup>

**3. Analysis**

216. 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."<sup>302</sup> In other words, a claim is barred if the Claimant had (actual or constructive) knowledge (i) of the alleged breach and (ii) of the loss it caused, more than three years before the Request for Arbitration was filed.
217. As stated in the Decision on Jurisdiction, 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

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<sup>298</sup> C-CM Jur., ¶ 486.

<sup>299</sup> C-Reply Merits, ¶ 488.

<sup>300</sup> C-Reply Merits, ¶¶ 488-493.

<sup>301</sup> C-Reply Merits, ¶ 494.

<sup>302</sup> BIT, Article XII(3)(c), Exh. **C-0001**.

must determine whether the Claimant knew or should have known that it had incurred loss or damage before that date.”<sup>303</sup>

218. The analysis deals first with the cut-off date (Section (a) *infra*), then with knowledge of breach and loss (Section (b) *infra*).

**a. Cut-Off Date**

219. As discussed in the Decision on Jurisdiction, the Request for Arbitration was filed on 6 February 2014. Hence, the Tribunal lacks jurisdiction over claims regarding which the Claimant first acquired knowledge of the breach and loss more than three years earlier, *i.e.* before **6 February 2011**. The Parties agree with this cut-off date.<sup>304</sup>

**b. Knowledge of Breach and Loss**

220. For the claims to be time-barred, Article XII(3)(c) requires the Claimant to have first acquired both knowledge of the alleged breach and knowledge that it has incurred loss or damage, prior to the cut-off date. The Tribunal notes that the BIT refers to knowledge of the alleged *breach*, and not to knowledge of the *facts* that make up the alleged breach. In other words, the limitations period only starts to run once the breach (as a legal notion) has occurred. While a breach will necessarily have been caused by facts, as discussed below, the moment at which a breach “occurs” will depend on when a fact or group of facts is capable of triggering a violation of international law.
221. Although the Treaty does not expressly say so, the loss or damage must flow from the alleged breach. This does not necessarily mean that the loss always postdates the breach. Depending on the standard breached, breach and loss can coincide. This may be the case for expropriation, where the breach will usually crystallize when the direct taking or substantial deprivation occurs. This might also be the case for claims grounded upon a breach of fair and equitable treatment, if the violation of legitimate expectations or arbitrariness is perpetrated by way of an act that causes damage. Hence, the Tribunal finds it more appropriate to address knowledge of breach and loss jointly for each alleged breach.
222. When undertaking its analysis, the Tribunal must also bear in mind that the Treaty (i) uses the conjunction “and”, so knowledge of breach and loss are cumulative requirements; (ii) refers to “first” knowledge and not only knowledge; (iii) covers both actual and constructive knowledge.
223. To establish when the Claimant first acquired actual or constructive knowledge of an alleged breach, the Tribunal must start by identifying when the alleged breach occurred.
224. The Claimant argues that the breaches of the Treaty occurred through five measures, which post-date the cut-off date, and which it alleges had the following effects:

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<sup>303</sup> Decision on Jurisdiction, ¶ 330.

<sup>304</sup> Decision on Jurisdiction, ¶ 331; *see, e.g.*, C-Mem. Merits, ¶ 233; R-Mem. Jur., ¶ 17.

- a. The 2011 Administrative Chamber Decision dated 30 November 2011,<sup>305</sup> which confirmed the 2010 TCA Decision and rendered 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.
  - b. The 2011 Legislative Mining Ban on open-pit mining,<sup>306</sup> which entered into force on 10 February 2011, and which prohibited Industrias Infinito from applying for new permits.
  - c. The 2012 MINAET Resolution dated 9 January 2012,<sup>307</sup> which 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.
  - d. The 2013 Constitutional Chamber Decision dated 19 June 2013,<sup>308</sup> which declined to resolve the conflict between its earlier decision upholding the constitutionality of the Crucitas Project approvals and the 2010 TCA Decision.
  - e. The reinitiation of the TCA proceedings for environmental damage in January 2019.<sup>309</sup>
225. This being so, the Claimant does not allege that each of these measures was a separate treaty breach. As recorded in the Decision on Jurisdiction and confirmed in the Reply,<sup>310</sup> the Claimant argues that “[i]t is the **combined operation** of these four measures [...] that meant that Industrias Infinito definitively could no longer pursue the development of the Crucitas project.”<sup>311</sup>
226. Specifically, the Claimant submits that the combined result of the first four measures breached the BIT in four ways:
- a. It expropriated its investments by definitively precluding Infinito from building and operating the Crucitas gold mine.<sup>312</sup>

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<sup>305</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Exh. **C-0261**.

<sup>306</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Exh. **C-0238**.

<sup>307</sup> Resolution No. 0037, MINAET, File No. 2594 (9 January 2012), Exh. **C-0268**.

<sup>308</sup> Supreme Court (Constitutional Chamber), Decision (19 June 2013), Exh. **C-0283**.

<sup>309</sup> Contentious Administrative Tribunal, Resolution (14 January 2019), Exh. **C-0861**. See, C-Reply Merits, ¶¶ 18, 611-614, 823(b).

<sup>310</sup> C-Reply Merits, ¶ 16 (“The combined effect of the measures adopted by Costa Rica accordingly breached four protections of the BIT.”) See *also* C-Reply Merits, ¶¶ 19, 448, 466, 473, 551, 590-592, 598, 692.

<sup>311</sup> C-CM Jur., ¶ 12 (emphasis added). It should be noted that, at that time, Infinito had not yet complained about measure (e).

<sup>312</sup> C-CM Jur., ¶ 13; C-Mem. Merits, ¶¶ 246-289.

- b. It breached Costa Rica's obligation to provide fair and equitable treatment ("**FET**") by violating Infinito's legitimate expectations, treating Infinito arbitrarily and inconsistently, and denying both procedural and substantive justice to Infinito.<sup>313</sup>
  - c. It failed to grant Infinito's investments full protection and security ("**FPS**").<sup>314</sup>
  - d. It breached two substantive obligations imported into the BIT through the BIT's MFN clause from other investment treaties entered into by Costa Rica: (i) the obligation to do "what is necessary" to protect Infinito's investments, imported from the Costa Rica-France BIT, and (ii) the umbrella clause requiring the host State to "comply with [or observe] any obligation assumed regarding investments of investors of the other Contracting Party," found in Costa Rica's BITs with Taiwan and Korea.<sup>315</sup>
227. As to the fifth measure, the Claimant argues that it is a continuation of Costa Rica's previous FET breach.<sup>316</sup> However, as is discussed in Section (vi) *infra*, it appears to have a separate effect.
228. The formulation of the claims suggests that the Claimant relies on a composite breach, *i.e.*, a breach by "a series of actions or omissions defined in aggregate as wrongful."<sup>317</sup> While it only expressly refers to composite acts in a footnote,<sup>318</sup> the argument is that the alleged breaches are the result of the combined effect of the various measures cited above (with the possible exception referred to in Section (vi) *infra*). A composite breach "occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."<sup>319</sup> Accordingly, were the Tribunal to accept the Claimant's composite breach argument, it would need to determine the date on which the Claimant first acquired knowledge of the action in the series which was sufficient to constitute the breach, and of the resulting loss.
229. However, the Respondent denies that the Claimant has properly pleaded a composite breach. It states that "[t]he Claimant's few passing reference[s] in its Reply to 'combined' or 'composite' effect of those measures cannot be taken as a serious attempt at raising – let alone proving – a creeping violation of the fair and equitable

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<sup>313</sup> C-CM Jur., ¶ 14; C-Mem. Merits, ¶¶ 290-344.

<sup>314</sup> C-CM Jur., ¶ 15; C-Mem. Merits, ¶¶ 345-347.

<sup>315</sup> C-CM Jur., ¶ 16; C-Mem. Merits, ¶¶ 348-360.

<sup>316</sup> C-Reply Merits, ¶¶ 18, 613.

<sup>317</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, Vol. II, Part Two (2001) ("**ILC Articles on State Responsibility**"), Article 15(1), Exh. **CL-0007**.

<sup>318</sup> C-Reply Merits, p. 170, fn. 835 ("In cases involving a composite breach, there is no need to establish separate losses that are tied to each individual measure.")

<sup>319</sup> ILC Articles on State Responsibility, Article 15(1), Exh. **CL-0007**. The Commentary further explains that a composite act "occurs" at "the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series." ILC Articles on State Responsibility, Commentary to Article 15, ¶ 8, Exh. **CL-0007**.

treatment obligation under Article II(2)(a).”<sup>320</sup> The Respondent also insists on the lack of reference to the fact that a “breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful require that such actions or omissions be ‘sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system.’”<sup>321</sup>

230. The Tribunal agrees with the Respondent that the Claimant has not properly substantiated its composite breach argument. The Claimant merely makes some references to combined or composite effect. It makes no submissions on the effect of a composite breach on the time bar requirement. Be this as it may, even if the Claimant had properly pleaded a composite breach, the Tribunal can see no composite breach in the measures impugned. The Commentary to ILC Article 15 makes it clear that, to amount to a composite breach, the various acts must not separately amount to the same breach as the composite act (although they could separately amount to different breaches).<sup>322</sup> It also clarifies that the breach cannot “occur” with the first of the acts in the series.<sup>323</sup> Here, each of the measures could arguably amount separately to the same breach (an expropriation or a violation of FET), and the Claimant expressly alleges that the breach occurred with what it considers to be the first act in the series, namely, the 2011 Administrative Chamber Decision.<sup>324</sup> The Tribunal will thus assess the measures as simple breaches.
231. A simple breach is a breach by an “act of a State not having a continuing character.”<sup>325</sup> As the Commentary to ILC Article 14 explains, it “occurs at the moment when the act is performed, even if its effects continue.”<sup>326</sup> The Tribunal must thus determine the point in time in which an act is capable of constituting an international wrong. The cases cited by the Respondent suggest that, where the State has taken a series of separate measures that predate and post-date the cut-off date, tribunals have focused on the

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<sup>320</sup> R-Rej. Merits, ¶ 590.

<sup>321</sup> R-Rej. Merits, ¶ 590, citing ILC Articles on State Responsibility, Commentary to Article 15, ¶ 5, Exh. **CL-0007**.

<sup>322</sup> ILC Articles on State Responsibility, Commentary to Article 15, ¶ 9, Exh. **CL-0007** (“While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation.”)

<sup>323</sup> ILC Articles on State Responsibility, Commentary to Article 15, ¶ 7, Exh. **CL-0007** (“A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.”)

<sup>324</sup> The Tribunal notes that, chronologically, the first act in the series is the 2011 Legislative Mining Ban, which entered into force on 10 February 2011; however, the Claimant has repeatedly asserted that this measure only applied to it after the notification of the 2011 Administrative Chamber Decision on 30 November 2011. See, e.g., C-Reply Merits, ¶ 334.

<sup>325</sup> ILC Articles on State Responsibility, Article 14(1), Exh. **CL-0007**.

<sup>326</sup> ILC Articles on State Responsibility, Article 14(1), Exh. **CL-0007**.



event which gave rise to the breach and have refused to look at subsequent events that are not legally significant or distinct.<sup>327</sup>

232. The Commentary to Article 14 provides further useful guidance. It states that “the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach [...]”.<sup>328</sup> It also notes that “[i]nternationally wrongful acts usually take some time to happen,” the “critical distinction” being between a breach that is continuing and one which has already been completed. As to “the moment when the act is performed” (point in time in which a completed act “occurs”), the Commentary notes that the words “at the moment” were “intended to provide a more precise description of the time frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.”<sup>329</sup>
233. The Commentary goes on to explain that “[w]hether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case.”<sup>330</sup> For instance “[w]here an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, ‘creeping’ or disguised occupation, however, may well be different.”<sup>331</sup>
234. Significantly for present purposes, the Commentary to Article 14 addresses the question of “when a breach of international law occurs, as distinct from being merely apprehended or imminent.”<sup>332</sup> It notes that this question “can only be answered by reference to the particular primary rule,” noting that “where the internationally wrongful act is the occurrence of some event – e.g. the diversion of an international river – mere preparatory conduct is not necessarily wrongful”.<sup>333</sup>

Preparatory conduct does not itself amount to a breach if it does not ‘predetermine the final decision to be taken’. Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term ‘occurs’ in paragraphs 1 and 3 of article 14.<sup>334</sup>

235. On this basis, the Tribunal concludes that a simple act “occurs” when it has been “performed” or “completed”; that the concept of “completion” relates to the point in time

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<sup>327</sup> See, R-CM Merits, ¶¶ 201-214, citing *Spence*, ¶¶ 146, 163, 246, Exh. **CL-0221**; *Corona*, ¶¶ 212, 215, Exh. **CL-0130**; *ST-AD*, ¶ 332, Exh. **RL-0075**; *EuroGas*, ¶ 455, Exh. **RL-0197**.

<sup>328</sup> ILC Articles on State Responsibility, Commentary to Article 14, ¶ 1, Exh. **CL-0007**.

<sup>329</sup> ILC Articles on State Responsibility, Commentary to Article 14, ¶ 2, Exh. **CL-0007**.

<sup>330</sup> ILC Articles on State Responsibility, Commentary to Article 14, ¶ 4, Exh. **CL-0007**.

<sup>331</sup> ILC Articles on State Responsibility, Commentary to Article 14, ¶ 4, Exh. **CL-0007**.

<sup>332</sup> ILC Articles on State Responsibility, Commentary to Article 14, ¶ 13, Exh. **CL-0007**.

<sup>333</sup> ILC Articles on State Responsibility, Commentary to Article 14, ¶ 13, Exh. **CL-0007**.

<sup>334</sup> ILC Articles on State Responsibility, Commentary to Article 14, ¶ 13, Exh. **CL-0007**.

at which the act is capable of constituting a breach, which depends on the content of the primary obligation; and that a breach need not be completed in a single act.

236. Hence, the majority of the Tribunal concludes that the first step in the analysis is to identify when a given act or omission was performed or *completed*. The second step is to assess when the Claimant first knew of the completion of the action or omission and of the loss caused thereby. This analysis must be conducted for each of the standards allegedly breached (Sections (i) to (vi) *infra*). The analysis that follows is adopted by a majority of the Tribunal even when this is not expressly so stated. Arbitrator Stern will set out her views in her Separate Opinion on Jurisdiction and Merits.

**(i) Expropriation**

237. The Claimant contends that “the substantial deprivation of Infinito’s investments did not occur until after and as a result of the combined application of both the [2011] Administrative Chamber’s [D]ecision and the 2011 [L]egislative [M]ining [B]an.”<sup>335</sup> The Claimant argues in this respect that it learned about the breach when the 2011 Administrative Chamber Decision was announced on 30 November 2011, because (i) this is the first time that it knew that the annulment of the Concession was final and irreversible; (ii) it was also the first time that it knew that the 2011 Legislative Mining Ban would apply to it; and (iii) it was only after the 2011 Administrative Chamber Decision that the MINAET could implement that annulment (which it did through the 2012 MINAET Resolution). The Claimant points out that the 2010 TCA Decision was suspended while the *recurso de casación* was in process.
238. By contrast, the Respondent argues that “it was the 2010 TCA Judgment and the legal defects in the 2008 Concession described therein which rendered the 2008 Concession invalid and development of the Crucitas Mining Project impossible.”<sup>336</sup> According to the Respondent, the Claimant first knew or should have known of the breach with the 2010 TCA Decision, because (i) this is the measure that declared the annulment of the Concession and other rights; (ii) all of the challenged measures are deeply rooted in the 2010 TCA Decision, and none of them were distinct and legally significant events; and (iii) had the 2011 Administrative Chamber Decision not been issued, Industrias Infinito’s Concession would have remained annulled.
239. The majority of the Tribunal agrees with the Claimant that an expropriation could only have occurred with the 2011 Administrative Chamber Decision. For an expropriation to occur, the taking or substantial deprivation must be *permanent*, or at least not ephemeral in nature. More specifically, a judicial expropriation cannot occur through a

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<sup>335</sup> C-Reply Merits, ¶ 692 (emphasis in original). See also C-Reply Merits, ¶ 472 (“There is [...] overwhelming fact evidence that Infinito first knew, and only could have known, that the resolutions granting IISA’s key approvals had been finally and irreversibly annulled, and that Infinito’s investment in the Crucitas project had been rendered substantially worthless, on November 30, 2011.”)

<sup>336</sup> R-Rej. Merits, ¶ 672. As a result, on the merits of the expropriation claim, the Respondent argues that the Claimant has failed to prove a causal link between the challenged measures and the loss of its investment. R-Rej. Merits, Section IV.B.5.

decision by a first instance court, the execution of which is stayed pending an appeal, because it lacks finality and enforceability. A judicial expropriation can only occur when a final judgment is rendered or when the time limit to appeal has expired. Here, the procedural framework of the relevant court action shows that the deprivation of the Claimant's investment only became a permanent loss with the 2011 Administrative Chamber Decision. Indeed, it is only with this judgment that the 2010 TCA Decision became final (*firme*),<sup>337</sup> the *casación* proceedings having suspensive effect over the 2010 TCA Decision. From a legal perspective, the expropriation occurred at the time the suspension was lifted, that is, upon issuance of the cassation decision. To paraphrase the Commentary to the ILC Articles, the legal process initiated by the 2010 TCA Decision was completed with the 2011 Administrative Chamber Decision, which is when the expropriation became a completed act.

240. That is not to say that an investor is required to exhaust local remedies before resorting to arbitration as a requirement for the admissibility of the claim. The question here is a different one: it is whether the 2010 TCA Decision was sufficiently final and enforceable to inflict harm on the Claimant and qualify as a breach as a matter of substance. Court decisions are not final and enforceable if an appellate remedy with suspensive effect is still available. The situation is generally different for administrative decisions, with the result that, "an expropriation occurs at the moment of the decision of an administrative authority and is not only completed with the final refusal to remedy the administrative act."<sup>338</sup>
241. The record further confirms that, while the 2010 TCA Decision may have initiated the legal process whereby the 2008 Concession was annulled, that annulment did not become definitive and the consequent loss of value to the Claimant's investment did not become permanent until the 2011 Administrative Chamber Decision on 30 November 2011. First, the evidence shows that, although the 2010 TCA Decision did cause the cessation of the works on the mine,<sup>339</sup> the site was kept in a state that allowed the works to resume following a favorable outcome of the cassation remedy. In particular:
  - a. The quarterly report dated 30 June 2011 stated that "the Company remains in a position to restart construction activities within three to six months of a favorable SALA I [*i.e.* Administrative Chamber] ruling, recalling its employees and consultants and successfully obtaining project financing. No changes to the

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<sup>337</sup> Resolution No. 0037, MINAET, File No. 2594 (9 January 2012), Exh. **C-0268**, Considering 2: "The Judicial Decision of the Contentious Administrative Tribunal cited above was confirmed by the First Chamber of the Supreme Court of Justice, and as a result became final."

<sup>338</sup> Ursula Kriebaum, *Local Remedies and the Standards for the Protection of Foreign Investment*, in Binder C., Kriebaum, U., Reinisch, A., Wittich, S., *International Investment Law for the 21<sup>st</sup> Century*, Essays in Honour of Christoph Schreuer, Oxford University Press, 2009, p. 456 (referring to the PCIJ's holding in *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/B, No. 74,), p. 28, as discussed in James Crawford, *Second Report on State Responsibility*, Document A/CN.4/498 and Add. 1-4 (17 March, 1 and 30 April, 19 July 1999), Exh. **RL-0034**, ¶ 148.

<sup>339</sup> Mr. Rojas states that following the 2010 TCA Decision "works were halted and only camp, infrastructure, reforestation, security and kitchen tasks were performed." CWS-Rojas 1, ¶ 198.

Company's level of preparedness have occurred during the three months ended June 30, 2011, but the Company plans to ramp up activity cautiously in the event of a positive SALA I ruling."<sup>340</sup>

- b. On 26 November 2010, Industrias Infinito's VP of Operations sent an email stating that Industrias Infinito "will continue with an appeal with confidence we will win" and "we will carry on with the project."<sup>341</sup>
  - c. It was only after the 2011 Administrative Chamber Decision that Industrias Infinito laid off 223 of its 243 employees.<sup>342</sup>
242. Second, the facts on record about the financial effects of the 2010 TCA Decision show that the Claimant did not suffer a substantial deprivation of its investment (a requirement for an indirect expropriation to occur) until the 2011 Administrative Chamber Decision. One indicator is Infinito's market capitalization: as the Claimant's financial expert, FTI, explains, while the behavior of Infinito's share price "is not a reliable indication of the fair market value of the Project for the purposes of determining damages," it "is illustrative of the market's perception of the magnitude of the impact of the alleged wrongful acts of the Respondent, and also provides an objective measure on the timing of when Infinito's investments in the Project became substantially worthless."<sup>343</sup> Here, it is true that the Claimant's market capitalization dropped about 50% after the issuance of the 2010 TCA Decision, from CAD 36 million to CAD 18 million on the day following the announcement of the 2010 TCA Decision (24 November 2010),<sup>344</sup> and the Respondent's damages expert shows a drop to USD 15.4 million by 14 December 2010 (date on which the full decision was issued).<sup>345</sup> In the Tribunal's view, a drop of 50% in value does not amount to a substantial deprivation. The fact that Infinito's market capitalization remained at approximately CAD 15.8 million in the period between the two decisions, reaching a high of CAD 27 million on 11 November 2011,<sup>346</sup>

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<sup>340</sup> Management Discussion and Analysis for Infinito Gold Ltd. for the First Quarter ended 30 June 2011 (2011), Exh. **C-0253**.

<sup>341</sup> Email from John Thomas (Industrias Infinito S.A) to Yokebec Soto regarding the appeal of the Contentious Administrative Tribunal's Decision (26 November 2010), Exh. **C-0649**.

<sup>342</sup> CWS-Peschke 1, ¶ 150; "Gold mining company Industrias Infinito lays off 223 Costa Rican employees," Tico Times (15 December 2011), Exh. **C-0406**; Minutes of the Meeting of the Board of Directors (Infinito Gold Ltd.) held at the head office of the Company (20 December 2011), Exh. **C-0689**; Consolidated Interim Financial Statements for Infinito Gold Ltd. for the Third Quarter ended 31 December 2011, Exh. **C-0407**.

<sup>343</sup> CER-FTI Consulting 2, ¶¶ 5.32-5.34.

<sup>344</sup> C-CM Jur. ¶ 146; CER-FTI Consulting 2, ¶ 5.37.

<sup>345</sup> R-CM Merits, ¶ 241; RER-Credibility 1, ¶ 150 and Table 10.1, citing Infinito Share Pricing by Capital IQ, Exh. **C-0332**; Infinito Market Cap provided by Capital IQ, Exh. **C-0331**; Infinito Gold Ltd. Press Release, "Court in Costa Rica Suspends Clearing Operations at Crucitas," (21 October 2008), Exh. **C-0198**; Infinito Gold Ltd. Press Release, "Administrative Tribunal Rules on Crucitas," (24 November 2010), Exh. **C-0237**; Infinito Gold Ltd. Press Release, "Infinito Gold Ltd. Announces the Release of the Full Administrative Tribunal Ruling on Crucitas," (15 December 2010), Exh. **C-0240**; Infinito Gold Ltd. Press Release, "Sala I Upholds Tribunal Decision," (30 November 2011), Exh. **C-0262**.

<sup>346</sup> C-CM Jur., ¶ 146; CER-FTI Consulting 2, ¶ 5.38.

also shows that the drop could have been reverted had the outcome of the cassation remedy been favorable to Infinito.

243. By contrast, the reduction in market capitalization and share price was substantial and permanent after the 2011 Administrative Chamber Decision. Market capitalization fell from CAD 17.4 million on 29 November 2011 to CAD 6.8 million on 1 December 2011 (the day after the 2011 Administrative Chamber Decision), *i.e.* a further decline of approximately 61%.<sup>347</sup> The share price fell from CAD 0.14 on 29 November 2011 to CAD 0.05 on 1 December 2011.<sup>348</sup> From December 2011 to the end of February 2012, the share price remained at a value of approximately 0.05.<sup>349</sup> It then continued to decline, reaching CAD 0.01 per share in January 2013, and has remained at or close to zero ever since.<sup>350</sup>
244. Other elements in the record confirm that the Claimant did not suffer a substantial and permanent deprivation until the 2011 Administrative Chamber Decision:
- a. BNP Paribas allowed its engagement letter to expire in November 2010.<sup>351</sup> However, following the 2010 TCA Decision, Infinito continued to receive loans from its investor Exploram to finance its ongoing operations.<sup>352</sup> The record further suggests that BNP Paribas sought to renew its engagement, but Infinito decided not to sign the letter because of the uncertainty about the timing of the cassation decision.<sup>353</sup>
  - b. Infinito's audited financial statements suggest that the Claimant suffered no loss of asset value until after the 2011 Administrative Chamber Decision.<sup>354</sup>

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<sup>347</sup> C-CM Jur., ¶ 147; CER-FTI Consulting 2, ¶ 5.39.

<sup>348</sup> Infinito Share Pricing by Capital IQ, p. 11, Exh. **C-0332**.

<sup>349</sup> Infinito Share Pricing by Capital IQ, pp. 11-12, Exh. **C-0332**.

<sup>350</sup> C-CM Jur., ¶ 147; CER-FTI Consulting 2, ¶ 5.40.

<sup>351</sup> Letter from BNP Paribas to Industrias Infinito S.A., and Infinito Gold Ltd. (30 November 2010), Exh. **C-0652**.

<sup>352</sup> Secured Demand Promissory Note from Infinito Gold Ltd. to Exploram Enterprises Ltd. (13 December 2010), Exh. **C-0654**; Secured Demand Promissory Note from Infinito Gold Ltd. to Exploram Enterprises Ltd. (21 January 2011), Exh. **C-0663**; Secured Demand Promissory Note from Infinito Gold Ltd. to Exploram Enterprises Ltd. (23 February 2011), Exh. **C-0669**; Secured Demand Promissory Note from Infinito Gold Ltd. to Exploram Enterprises Ltd. (15 April 2011), Exh. **C-0671**; Secured Demand Promissory Note from Infinito Gold Ltd. to Exploram Enterprises Ltd. (12 May 2011), Exh. **C-0673**; Consent Resolutions of the Board of Directors of Infinito Gold Ltd. (16 June 2011), Exh. **C-0674**; Secured Demand Promissory Note from Infinito Gold Ltd. to Exploram Enterprises Ltd. (25 July 2011), Exh. **C-0677**; Secured Demand Promissory Note from Infinito Gold Ltd. to Exploram Enterprises Ltd. (12 September 2011), Exh. **C-0680**.

<sup>353</sup> Letter from BNP Paribas to Industrias Infinito S.A., and Infinito Gold Ltd. (30 November 2010), Exh. **C-0652**; Email from John Morgan (Infinito Gold Ltd.) to Elliot Rothstein (Lascaux Resource) regarding Executed Confidentiality Agreement (21 October 2011), Exh. **C-0683**.

<sup>354</sup> CER-FTI Consulting 2, ¶ 5.5: "Thus, according to Infinito's audited financial statements which were prepared in accordance with GAAP, the carrying value of its investment in the Project increased from \$48.0 million CAD in fiscal 2010 to \$53.2 million CAD in fiscal 2011, after the TCA Decision but then following the Administrative Chamber Decision, decreased to \$7.1 million

- c. The Claimant recorded impairment charges of USD 44.6 million in respect of the Crucitas Project following the 2011 Administrative Chamber Decision.<sup>355</sup> Conversely, the Claimant did not record an impairment after the TCA rendered its Decision in 2010. Both the Claimant's external auditor and FTI Consulting confirmed that the 2010 TCA Decision did not warrant recording an impairment charge for Infinito's assets.<sup>356</sup>
  - d. Mr. Peschke emphasized on numerous occasions that the loss stemmed from the 2011 Administrative Chamber Decision, and that any loss flowing from the TCA Decision was reversible.<sup>357</sup>
245. The Claimant makes no distinction between the time when the alleged breach (in this context, an expropriation) occurred and the time when it learned about it. In any event, the Claimant could not have acquired knowledge of the loss before 30 November 2011.
246. The majority of the Tribunal thus finds that the Claimant acquired knowledge of the alleged breach and of the loss after the cut-off date. On this basis, it concludes that the Claimant's expropriation claim is not time-barred under Article XII(3)(c).
247. This conclusion is consistent with the *raison d'être* of a statute of limitations, which is to promote legal certainty by avoiding that claimants delay bringing their claims. This being so, for the statute of limitations to start running, the claimant must be legally in a position to bring a claim. If a claim cannot be brought for legal reasons (for instance, because the claim is not ripe), it would be fundamentally unfair to find that the statute of limitations has started to run. Such a finding may entail that, in some instances, a claimant/investor would have less time to initiate its claim than the statute of limitations. In exceptional situations, that finding might even mean that the claimant/investor has no time left at all to start proceedings, which would effectively result in a denial of justice – an outcome that cannot reflect the meaning of the Treaty. The fact that this situation does not arise in the circumstances of this dispute is no answer to the issue of principle.

## (ii) **Fair and Equitable Treatment**

248. The Claimant submits that "Costa Rica has breached the FET standard based on the composite effect of all of the challenged measures, and in particular the actions (and omissions) of the [L]egislature and [E]xecutive before and after the [2011 Administrative Chamber Decision]."<sup>358</sup> For the Claimant, the challenged measures violated the

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CAD." Consolidated Financial Statements for Infinito Gold Ltd. for Years Ended 31 March 2012 and 2011 (17 July 2012), Exh. **C-0275**.

<sup>355</sup> C-Reply Merits, ¶ 348.

<sup>356</sup> C-Reply Merits, ¶¶ 455, 459.

<sup>357</sup> See, e.g., Tr. Merits Day 3 (ENG), 592:7-17, 593:9-15, 594:16-18, 596:9-20, 597:4-18, 598:9-599:1, 618:10-12 (Mr. Peschke).

<sup>358</sup> C-Reply Merits, ¶ 551. See also, C-Reply Merits, ¶ 592 ("Infinito's [FET] claim is based on the composite effect of the four challenged measures: the 2011 Administrative Chamber's decision which annulled the resolutions granting the exploitation concession and other key permits; the 2011 legislative mining ban that prevented IISA from seeking the restoration of its exploitation

Claimant's legitimate expectations; failed to treat Infinito's investment in a consistent, predictable manner; were arbitrary and served no rational purpose; and amount to a denial of justice.<sup>359</sup>

249. The Tribunal addresses first whether the Claimant's FET claim (other than denial of justice) is time-barred (a) and then whether the denial of justice claim is time-barred (b). For purposes of the present jurisdictional inquiry, the Tribunal has assumed that a judicial measure can breach the FET standard beyond a denial of justice, a matter which is disputed<sup>360</sup> and is addressed in Section VI.C.1.d(iii) *infra*. The present analysis in no way purports to prejudge this matter, which is properly for the merits.

*a. FET (Other than Denial of Justice)*

250. The Claimant contends that its "legitimate expectation was that it would be allowed to proceed through the legal framework established by the Mining Code in order to build and operate the Crucitas project."<sup>361</sup> This expectation was frustrated by the annulment of the 2008 Concession by the 2011 Administrative Chamber Decision,<sup>362</sup> and the prohibition set forth in the 2011 Legislative Mining Ban and the 2012 MINAET Resolution to apply for new permits.<sup>363</sup> The Claimant also argues that these measures breached its legitimate expectation to be treated in a consistent and predictable manner.
251. Similarly, the Claimant submits that the 2011 Administrative Chamber Decision and the 2012 MINAET Resolution were arbitrary because they relied on the 2002 Moratorium to annul the 2008 Concession, even though that moratorium had been repealed in 2008.<sup>364</sup> The Respondent thus arbitrarily changed the legal framework applicable to the Concession.<sup>365</sup> Second, as an exploration permit holder, Industrias Infinito was entitled to obtain new mining rights following the 2008 Concession's annulment. The annulment of its pre-existing mining rights served no rational purpose and was thus an arbitrary measure.<sup>366</sup>

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concession and other permits; the 2012 MINAE resolution that invalidated IISA's remaining rights in the administrative process; and the 2013 Constitutional Chamber decision that failed to address the Contentious TCA's violation of constitutional *cosa juzgada* and *erga omnes* decisions. The combined result of these four measures was that, despite the years of Government encouragement of investment in mining, the rights contained in the Mining Code and the many steps different organs of the Government took to advance the Crucitas project, IISA was left without any rights, or any opportunity to fix the defects identified by the Administrative Chamber and obtain new rights.")

<sup>359</sup> C-Mem. Merits, ¶¶ 290-344; C-Reply Merits, ¶ 590.

<sup>360</sup> R-Reply Jur., ¶¶ 203-208; R-CM Merits, ¶ 401.

<sup>361</sup> C-Reply Merits, ¶ 500.

<sup>362</sup> C-Mem. Merits, ¶¶ 323, 326-327; C-Reply Merits, ¶¶ 592, 594.

<sup>363</sup> C-Mem. Merits, ¶¶ 324-325, 338-339; C-Reply Merits, ¶¶ 592, 599-601.

<sup>364</sup> C-Mem. Merits ¶¶ 335-336; C-CM Jur., ¶ 350; C-Rej. Jur., ¶ 286.

<sup>365</sup> C-Reply Merits, ¶ 599.

<sup>366</sup> C-Mem. Merits, ¶ 336.

252. The FET claim thus has two elements, one related to the possibility to operate the Crucitas Project, which was frustrated by the 2008 Concession's annulment, and another premised on the impossibility to reinitiate the process after the 2011 Legislative Mining Ban.
253. In respect of the first element, the alleged FET breach appears to have been completed at the time when Industrias Infinito lost the 2008 Concession, which the Tribunal has determined above occurred with the 2011 Administrative Chamber Decision.<sup>367</sup> As a result, the claim that legitimate expectations were deceived by the annulment of the 2008 Concession is not time-barred.
254. As to the opportunity to apply for new permits, the FET breach appears to have been completed with the 2011 Legislative Mining Ban and the 2012 MINAET Resolution, both of which prevented Industrias Infinito from fixing the defects in its current rights and obtaining new mining rights.
255. The 2011 Legislative Mining Ban was enacted before the cut-off date, but it entered into force thereafter (on 10 February 2011), and the Claimant could not have known that it applied to the Crucitas Project until 30 November 2011. However, Industrias Infinito was already precluded from obtaining new permits as a result of the 2010 Executive Moratoria, which had been in place since May 2010 and which were not abrogated by the 2011 Legislative Mining Ban. That said, the Claimant submits that the effects of the Ban, which was permanent, were more preclusive than those of the Moratoria, which were temporary. More specifically, it alleges that the 2011 Legislative Mining Ban cancelled all pending proceedings and prohibited the renewal or extension of all exploitation concessions in perpetuity, whereas the prior Moratoria only suspended the proceedings.<sup>368</sup>
256. The terms used by the 2010 Executive Moratoria and the 2011 Legislative Mining Ban are indeed different. Both the Arias and Chinchilla Moratoria declared a national moratorium for an indefinite time on open-pit mining, which applied to all exploration and exploitation activities that used cyanide and mercury.<sup>369</sup> By contrast, the 2011 Legislative Mining Ban "prohibited" mining exploitation in areas declared national parks, biological reserves, forest reserves and state refuges of wildlife, and declared certain mining reserve zones.<sup>370</sup> It also limited mining in any mining reserves to "cooperatives

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<sup>367</sup> See *supra*, ¶¶ 239-241.

<sup>368</sup> Tr. Merits Day 1 (ENG), 45:20-46:4 (Mr. Terry).

<sup>369</sup> Article 1 of the Arias Moratorium provided that "[a] national moratorium for an indefinite term is declared for the activity of open pit metallic gold mining in the national territory. This is understood as exploration, exploitation and processing using cyanide or mercury in the work to recover the mineral." Decree No. 35982-MINAET (29 April 2010), Article 1, Exh. **R-0032** (English). In turn, Article 1 of the Chinchilla Moratorium amended Article 1 of the Arias Moratorium to say "[a] national moratorium is declared for an undefined term for the metallic gold mining activity in the national territory. This is understood as the exploration, exploitation, and benefitting from the materials extracted using cyanide or mercury." Executive Decree No. 36019-MINAE (8 May 2010), Article 1, Exh. **C-0229** (English).

<sup>370</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 1 (amending Article 8 of the Mining Code), Exh. **C-0238** (English).



of workers for the development of mining in a small scale for the subsistence of families, artisanal mining and prospector use (*coligallero*) from communities surrounding the exploitation sites, based on the amount of affiliates of such cooperatives.”<sup>371</sup> It explicitly added a new provision to the Mining Code stating that “[p]ermits or concessions shall not be granted for the exploration and exploitation activities of open-pit mining of metallic minerals on national territory,” and “established as an exception that only exploration permits for scientific and investigatory purposes shall be granted.”<sup>372</sup> As a result, the Tribunal finds that the effects of the 2011 Legislative Mining Ban are not identical to those of the 2010 Executive Moratoria, and are in principle capable of triggering a separate FET breach. Accordingly, the Tribunal comes to the conclusion that, to the extent that the Claimant’s legitimate expectations claim is related to the opportunity to apply for new permits, it is not time-barred.

257. The 2012 MINAET Resolution which post-dates the cut-off implemented the annulment of the 2008 Concession and declared the Crucitas area free of mining rights. It is a mere administrative implementation of the 2011 Administrative Chamber Decision. As such, it must follow the fate of the claim pertaining to that decision which, as discussed above, is not time-barred.<sup>373</sup>
258. For the foregoing reasons, the majority of the Tribunal finds that the Claimant’s FET claim is not time-barred.

#### *b. Denial of Justice*

259. At the Hearing on the Merits, the Claimant clarified that its case on denial of justice was “structural”: it is premised on the Costa Rican judicial system’s failure to provide a mechanism to solve contradictions between the various chambers of the Supreme Court on questions of constitutional *cosa juzgada*.<sup>374</sup> The claim is “not about the failure to afford a due process,” nor “about the decisions themselves being arbitrary.”<sup>375</sup> The Claimant’s submission is that the TCA first refused to uphold the constitutional *cosa juzgada* deriving from the 2010 Constitutional Chamber Decision (the decision which had declared the Crucitas Project constitutional from an environmental perspective), and the Administrative Chamber did the same by denying the cassation request.<sup>376</sup> In other words, the Costa Rican judicial system offers no mechanism to ensure consistency, as was confirmed by the Constitutional Chamber itself when it dismissed the Claimant’s action to declare the 2010 TCA Decision unconstitutional on admissibility grounds (through the 2013 Constitutional Chamber Decision).

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<sup>371</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 1 (amending Article 8 of the Mining Code), Exh. **C-0238** (English).

<sup>372</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 2 (adding a new Article 8 bis to the Mining Code), Exh. **C-0238** (English).

<sup>373</sup> See *supra*, ¶ 253.

<sup>374</sup> Tr. Merits Day 4 (ENG), 995:9-996:10, 1163:6-1164:19, 1165:8-21 (Ms. Seers).

<sup>375</sup> Tr. Merits Day 4 (ENG), 1164:2-4 (Ms. Seers).

<sup>376</sup> Tr. Merits Day 4 (ENG), 1164:4-9 (Ms. Seers).

260. The majority of the Tribunal considers that this claim is not barred by the statute of limitations. Even if the initial failure to uphold constitutional *cosa juzgada* arises from the 2010 TCA Decision, a denial of justice cannot occur until a decision has been rendered by the highest court. The exhaustion of local remedies rule is a substantive component of the denial of justice breach.<sup>377</sup> Because a denial of justice points to a systemic flaw in the State's administration of justice, there can be no denial of justice until the system had a full opportunity to correct itself.<sup>378</sup> Accordingly, the alleged denial of justice could have occurred at the earliest with the 2011 Administrative Chamber Decision, *i.e.* after the cut-off date.

**(iii) Full Protection and Security**

261. The Claimant's full protection and security claim is premised on Costa Rica's alleged failure to provide *legal* security to its investments. The Claimant's latest formulation of its arguments appears to have two main components. First, "Costa Rica failed to create a legal system that protected IISA's mining rights and provided a process for Infinito to uphold its rights," in particular because "[t]he Administrative Chamber [Decision] failed to follow constitutional *cosa juzgada*, creating irreconcilable decisions between the Administrative and Constitutional Chambers."<sup>379</sup> This component is thus virtually identical to the Claimant's denial of justice argument.
262. The second element of the submission is that the Costa Rican executive branch "failed to rectify the situation" after the 2011 Administrative Chamber Decision.<sup>380</sup> Rather than protecting the Claimant's investment, the MINAET chose to implement the decision, and even went beyond what was legally required. With the 2012 MINAET Resolution, the Government not only cancelled Industrias Infinito's exploitation concession but also its pre-existing mining rights. According to the Claimant, "Costa Rica's executive branch had a duty not only to refrain from acting negligently, as it did, but to take actions to correct unacceptable behavior."<sup>381</sup> It adds that "[b]eyond the executive branch's own errors in granting IISA's permits and approvals, it failed to adopt a mechanism to

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<sup>377</sup> See, e.g., Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), ¶ 59, Exh. **CL-0200** (noting that, in cases of denial of justice, "the local remedies rule is a **substantive** requirement for liability rather than a **procedural** precondition for the presentation of claims to an international court or tribunal.") (Emphasis in original).

<sup>378</sup> See, e.g., J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), p. 108, Exh. **CL-0205** ("In the particular case of denial of justice, however, claims will not succeed unless the victim has indeed exhausted municipal remedies, or unless there is an explicit waiver of a type yet to be invented. (An *ad hoc compromis* might do.) This is neither a paradox nor an aberration, for it is in the very nature of the delict that a state is judged by the final product – or at least a **sufficiently** final product – of its administration of justice. A denial of justice is not consummated by the decision of a court of first instance. Having sought to rely on national justice, the foreigner cannot complain that its operations have been delictual until he has given it scope to operate, including by the agency of its ordinary corrective functions.") (Emphasis in original).

<sup>379</sup> C-Reply Merits, ¶ 644.

<sup>380</sup> C-Reply Merits, ¶ 647.

<sup>381</sup> C-Reply Merits, ¶ 647.

address the inconsistencies in its legal system and thereby correct the untenable legal situation in which Infinito found itself.”<sup>382</sup>

263. The Tribunal comes to the conclusion that the FPS claim is not time-barred. First, to the extent that it is premised on Costa Rica’s failure to provide a system that prevents judicial inconsistency among the various decisions of the judiciary, the alleged FPS breach could only have occurred on the date of the 2011 Administrative Chamber Decision, or alternatively with the 2013 Constitutional Chamber Decision, both of which post-date the cut-off date. While it is true that the original inconsistency can be traced to the 2010 TCA Decision (which is the one which originally purportedly failed to uphold *cosa juzgada constitucional*), the claim is directed to the functioning of the judicial system, which must be viewed as a whole, including the decision of the highest court.
264. Second, insofar as it relates to the 2012 MINAET Resolution, or to the Executive’s failure to redress the situation or otherwise protect Infinito’s investment after the 2011 Administrative Chamber Decision, any such omission would have occurred after the cut-off date.
265. Accordingly, the majority of the Tribunal concludes that the FPS claim is not time-barred.

**(iv) Obligation to Do “What is Necessary” to Protect Infinito’s Investments**

266. Through the MFN clause of the BIT, the Claimant has invoked the more favorable FET standard found at Article 3 of the Costa Rica-France BIT, which includes the obligation to “do what is necessary so that the exercise of the right so recognized [*i.e.* FET] is not impaired either in law or in fact.”<sup>383</sup>
267. According to the Claimant, to comply with this standard, after the 2011 Administrative Chamber Decision “Costa Rica should have taken positive steps to protect Infinito’s investments, and in particular to protect the exploitation concession and the other project approvals.”<sup>384</sup> Such steps could have included (i) granting Industrias Infinito a new exploitation concession and new Project approvals not tainted by the supposed defect identified by the Administrative Chamber; (ii) repealing the new moratorium on open-pit mining, or ensuring that the new moratorium did not apply to Industrias Infinito; or (iii) ensuring that there was a mechanism in place to address the inconsistencies between the decisions of the different chambers of the Supreme Court.<sup>385</sup>

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<sup>382</sup> C-Reply Merits, ¶ 647.

<sup>383</sup> Agreement Between the Government of Costa Rica and the Government of the French Republic for the Promotion and Reciprocal Protection of Investment, signed 8 March 1984 (“**Costa Rica-France BIT**”), Article 3, Exh. **CL-0005**; as translated into English in C-Mem. Merits, ¶ 352.

<sup>384</sup> C-Mem. Merits, ¶ 353.

<sup>385</sup> C-Mem. Merits, ¶ 353.

268. In short, the claim relates to acts that the Respondent should have performed following the cancellation of the 2008 Concession by the 2011 Administrative Chamber Decision, which post-dates the cut-off. Hence, according to the majority of the Tribunal, this claim is not time-barred.

**(v) Umbrella Clause**

269. Again through the Treaty's MFN clause, the Claimant further invokes the umbrella clause requiring the host State to "comply with [or observe] any obligation assumed regarding investments of investors of the other Contracting Party," found in Costa Rica's BITs with Taiwan and Korea.<sup>386</sup>
270. The Claimant's position is that, by annulling the 2008 Concession, Costa Rica failed to comply with its obligations under the Concession, specifically to grant Industrias Infinito the exclusive right to exploit, extract and sell gold, silver, copper and associated minerals from the Crucitas Project.<sup>387</sup>
271. This claim is thus linked to the loss of the 2008 Concession. As such, it can be deemed to follow the fate of the expropriation or FET claims insofar as the latter deal with the annulment of the concession. As a result, this claim is not time-barred.

**(vi) Fifth Measure**

272. In its Reply, the Claimant challenged a fifth measure: the reinitiation by the TCA of the proceedings to quantify the costs due by Industrias Infinito and others to remedy the environmental damage and return the Crucitas site to its pre-Project state.<sup>388</sup>
273. The Claimant explains that the 2015 TCA Damages Decision ordered Industrias Infinito, the Government and SINAC to bear the costs of restoring the Crucitas site to its pre-Project condition.<sup>389</sup> This decision was overturned by the Administrative Chamber and remanded to the TCA in December 2017, where it sat inactive until January 2019, when the TCA reinitiated these proceedings.<sup>390</sup> The Claimant argues that "[t]he continuation of this proceeding continues Costa Rica's breach of the fair and

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<sup>386</sup> C-Mem. Merits, ¶ 356, citing Agreement Between the Republic of Costa Rica and the Republic of China on the Promotion and Reciprocal Protection of Investment, signed 25 March 1999 ("**Costa Rica-Taiwan BIT**"), Article 3(2), Exh. **CL-0002**; Agreement Between the Government of the Republic of Korea and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, signed 11 August 2000 ("**Costa Rica-Korea BIT**"), Article 10(3), Exh. **CL-0001** ("Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.")

<sup>387</sup> C-Mem. Merits, ¶¶ 355, 360.

<sup>388</sup> C-Reply Merits, ¶¶ 18, 823(b).

<sup>389</sup> C-Reply Merits, ¶ 612; Contentious Administrative Tribunal Decision No. 1438-2015, File No. 08-001282-1027-CA-6 (24 November 2015), Exh. **C-305**.

<sup>390</sup> Contentious Administrative Tribunal, Resolution (14 January 2019), Exh. **C-0861**.

equitable standard, and any damages and costs (including defence costs) associated with this proceeding are further damages to Infinito resulting from that breach.”<sup>391</sup>

274. The facts invoked differ from the measures challenged under the other heads of claim. The previous four measures are linked to Industrias Infinito’s loss of the 2008 Concession and relate to its inability to pursue it. This measure, however, relates to damages that Industrias Infinito might be required to pay as a result of its use of the site, which damages Infinito deems arbitrary given alleged environmental damage suffered by the site after Industrias Infinito left it. Consequently, the Tribunal considers that this claim pertains to a distinct FET violation, occurring if at all in 2019, that is after the cut-off date. As a consequence, this claim is not time-barred.
275. For the sake of completeness, the Tribunal notes that the Respondent objects to the Tribunal’s jurisdiction over this claim. First, it submits that the claim is premature and falls outside of Costa Rica’s consent to arbitrate. It argues in this respect that the Claimant has failed to fulfil the jurisdictional requirements under Article XII(1) in respect of loss or damage, and has likewise failed to establish a *prima facie* case of breach.<sup>392</sup> This is essentially because there is no decision ordering the Claimant to pay damages, as a result of which the Respondent also contends that the claim “is premature, manifestly without legal merit and should be rejected.”<sup>393</sup> In the Tribunal’s view, the Respondent’s jurisdictional objection relates to the fact that the claim is premature and is thus properly a defense on the merits, which is addressed in Section VI.C.2.c(ii)c *infra*. Indeed, the question is not whether the Tribunal has the authority to hear the claim; the question is whether the claim is ripe enough to be heard. Second, the Respondent argues that the Claimant has failed to comply with the amicable settlement, notice and waiver requirements under Article XII of the BIT.<sup>394</sup> The Tribunal cannot agree: the provisions on amicable settlement and waiver set out at Article XII of the BIT relate to the dispute as a whole; not to its individual claims. While the fifth measure arises from subsequent facts, it forms part of the overall dispute related to the failure of the Crucitas Project and the economic consequences of this failure on the Claimant. The Tribunal does not consider that the Claimant was required to provide notice of this claim, attempt to settle it or waive its rights to litigate it separately from the other claims that form part of this dispute.

### c. Conclusion

276. In light of the foregoing considerations, the majority of the Tribunal concludes that the claims are not time-barred.

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<sup>391</sup> C-Reply Merits, ¶ 613. Consequently, Infinito requests “a declaration that Costa Rica is liable to indemnify Infinito for any amounts Infinito or IISA are required to pay as a result of, or in connection with, this late-blooming proceeding.” *Ibid*.

<sup>392</sup> R-Rej. Merits, ¶¶ 418-433.

<sup>393</sup> R-Rej. Merits, ¶ 601.

<sup>394</sup> R-Rej. Merits, ¶¶ 418; 434-438.

277. It derives from this conclusion that the Tribunal can dispense with examining whether the MFN clause may disable the statute of limitations under Article XII(3)(c) of the BIT. Indeed, the Claimant submitted its MFN arguments in the event that the preconditions of Article XII(3)(c) of the BIT were not met.<sup>395</sup> The Tribunal has found in the foregoing sections and in the Decision on Jurisdiction that all of the pre-conditions of Article XII(3) are met, including its time bar provisions, with the result that the Claimant's MFN arguments have become moot.<sup>396</sup> For the same reason the Tribunal can dispense with determining whether the Respondent's time bar objection goes to jurisdiction or admissibility, as this question arose only if the Respondent prevailed on this objection and in the context of the applicability of the BIT's MFN clause.<sup>397</sup>

## VI. LIABILITY

### A. LAW APPLICABLE TO THE MERITS

278. Pursuant to Article XII(7) of the BIT, "[a] tribunal established under [Article XII] 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."<sup>398</sup>
279. Accordingly, the primary source of law for this Tribunal is the BIT itself, which must be interpreted in accordance with the VCLT. Other sources of law may also be applicable, as may be the case with Costa Rican domestic law, provided it is not inconsistent with the BIT or principles of international law. As Article XII(7) of the BIT does not allocate matters to specific sources of law, it is for the Tribunal to determine when an issue is subject to the BIT, other rules of international law or domestic law.
280. When applying the law (whether national or international), the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The maxim *jura novit curia* – or better, *jura novit arbiter* – allows the Tribunal to apply the law of its own motion, provided always that it seeks the Parties' views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.<sup>399</sup>

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<sup>395</sup> C-CM. Jur., ¶ 486.

<sup>396</sup> *Supra*, ¶ 276; Decision on Jurisdiction, ¶¶ 361-362.

<sup>397</sup> Decision on Jurisdiction, ¶¶ 341-342.

<sup>398</sup> BIT, Article XII(7), Exh. **C-0001**.

<sup>399</sup> See, e.g., *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, ¶ 295 ("[...] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it"). See also *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Merits, Judgment, 25 July 1974, ¶ 18 ("[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or

## B. OVERVIEW OF THE PARTIES' POSITIONS

### 1. Overview of the Claimant's Position

281. The Claimant submits that the Respondent has breached four of its obligations under the BIT.
282. First, the Claimants argues that Costa Rica failed to grant Infinito and its investments FET in accordance with Article II(2)(a) of the BIT. According to the Claimant, this provision provides for an autonomous standard that goes beyond the minimum standard of treatment under customary international law ("**MST**"). More specifically, the Claimant advances that the Respondent (i) breached the Claimant's legitimate expectations that "it would be allowed to follow the procedure set out under the Mining Code [...] to obtain permits for, and ultimately build and operate, the Crucitas project" and was arbitrary and inconsistent in the treatment of its investment;<sup>400</sup> (ii) committed a procedural denial of justice by refusing to provide Infinito with a mechanism to address the inconsistencies between the Costa Rican court decisions on the validity of the Concession; and (iii) committed a substantive denial of justice by retroactively applying to the Crucitas Project the 2002 Moratorium on open-pit mining activities.
283. Second, the Claimant argues that the Respondent did not grant to its investments FPS within the meaning of Article II(2)(b) of the BIT. Indeed, for the Claimant, the Respondent failed to take the necessary steps to ensure the legal security and protection of its investments and thereby prevent the repudiation of its mining rights.
284. Third, the Claimant submits that the Respondent unlawfully expropriated the Claimant's investments. The 2011 Administrative Chamber Decision (which upheld the annulment of the exploitation concession and other project approvals), the 2012 MINAET Resolution and the 2011 Legislative Mining Ban directly expropriated the Claimant's Concession and other key approvals, as well as its mining rights. Through the combination of these measures, the Respondent indirectly expropriated all of the Claimant's investments.
285. Fourth, the Claimant asserts that the Respondent breached its substantive obligations imported through the BIT's MFN clause (i) to "do what is necessary" to protect Infinito's investments, and (ii) to comply with its legal obligations.

### 2. Overview of the Respondent's Position

286. The Respondent denies that it has breached any of its obligations under the BIT.

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proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court"); *Albert Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award, 23 April 2012 ("**Oostergetel**"), ¶ 141, Exh. **RL-0017**; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 ("**Metal-Tech**"), ¶ 287, Exh. **RL-0190**.

<sup>400</sup> C-Reply Merits, ¶ 17.

287. First, the Respondent submits that the FET standard provided in Article II(2)(a) of the BIT is limited to the MST. The consequences of this limitation are twofold: (i) legitimate expectations are not protected under the BIT, and (ii) the fair and equitable treatment that a State must grant with regard to judicial measures is limited to denial of justice. According to the Respondent, the Claimant had in any event no legitimate expectations, and Costa Rica did not commit a denial of justice.
288. Second, the Respondent argues that the Claimant mischaracterizes the FPS standard provided in Article II(2)(b), which does not extend to legal security. In the alternative, Costa Rica contends that the Claimant cannot reasonably expect the Government to disregard the judicial decisions rendered by its domestic courts. By contrast, the Respondent argues that its executive branch did what it could to protect Infinito's investments by defending the legality of the Concession in the proceedings before Costa Rican courts.
289. Third, the Respondent argues that no expropriation could have taken place. Indeed, Industrias Infinito's mining rights (in particular, the exploitation concession) had been cancelled *ab initio* in accordance with Costa Rican law. As a result, the Claimant held no rights capable of being expropriated. In the alternative, the Respondent is of the view that judicial measures cannot constitute an expropriation unless the investor establishes that it suffered a denial of justice. The Respondent further contends that the alleged expropriatory measures were adopted in accordance with the police powers doctrine to enforce underlying measures aimed at protecting the environment against open-pit mining activities.
290. Fourth, the Respondent argues that the MFN standard does not grant the Claimant the right to import substantive protections from other investment treaties signed by Costa Rica. In the alternative, the Respondent asserts that (i) it complied with the alleged obligation to "do what is necessary" and (ii) that it has neither assumed nor breached any specific obligation.
291. Finally, the Respondent submits that Section III(1) of Annex I to the BIT relieves it of liability even if the Tribunal were to find that the challenged measures infringed the BIT.

### **C. FAIR AND EQUITABLE TREATMENT**

292. The Tribunal will first address the applicable FET standard under the BIT (1), before reviewing whether the standard has been breached (2).

#### **1. The FET Standard**

293. The Tribunal will first summarize the Parties' positions (a-b) as well as the Non-Disputing Party Submission filed by Canada (c), before engaging in its analysis (d).



**a. The Claimant's Position**

294. The Claimant argues that Article II(2)(a) of the BIT requires the Respondent to grant to its investments fair and equitable treatment in accordance with the principles of international law.<sup>401</sup> Relying on *El Paso*, it submits that Article II(2)(a) “ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances,” and that “FET is a means to guarantee justice to foreign investors.”<sup>402</sup> More specifically, the standard is intended to protect the Claimant’s investment against various categories of harmful treatment, including measures which (i) breach its legitimate expectations; (ii) lack legal basis or transparency; (iii) are adopted without any legitimate purpose and are thus arbitrary; (iv) amount to a denial of justice; and (v) are inconsistent with the good faith principle.<sup>403</sup>
295. Contrary to the Respondent’s contentions, the Claimant submits that the FET standard articulated in Article II(2)(a) of the BIT is not limited to the MST (i). In any event, it argues that the MST offers the same level of protection as the autonomous FET standard (ii).

**(i) The FET Standard in Article II(2)(a) Is Not Limited to the MST**

296. Infinito submits that the FET standard enshrined in Article II(2)(a) of the BIT is not limited to the MST under customary international law.<sup>404</sup> It first argues that the ordinary meaning of Article II(2)(a) does not limit the FET standard to the MST, as it does not refer to the MST or to customary international law.<sup>405</sup> As several investment tribunals have held,<sup>406</sup> the reference to “principles of international law” does not restrict Article II(2)(a) to the MST under customary law.<sup>407</sup> Relying on *Vivendi II*, the Claimant notes that there is “no basis for equating principles of international law with the minimum standard of treatment.”<sup>408</sup> By contrast, the decisions cited by the Respondent are

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<sup>401</sup> C-Mem. Merits, ¶ 292.

<sup>402</sup> C-Mem. Merits, ¶ 293, citing *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (“*El Paso*”), ¶ 373, Exh. **CL-0035**.

<sup>403</sup> C-Mem. Merits, ¶¶ 294-303.

<sup>404</sup> C-Reply Merits, ¶¶ 502-503.

<sup>405</sup> C-Reply Merits, ¶¶ 504-506.

<sup>406</sup> C-Reply Merits, ¶ 507, citing *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (“*Total*”), ¶ 125, Exh. **CL-0088**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (“*Crystallex*”), ¶ 530, Exh. **CL-0131**; *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*”), ¶¶ 7.4.5-7.4.7, Exh. **CL-0029**; *Arif*, ¶ 529, Exh. **CL-0014**; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (“*EDF*”), ¶¶ 1001-1003, Exh. **CL-0034**; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (“*Tecmed*”), ¶ 155, Exh. **CL-0085**; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (“*Gold Reserve*”), ¶ 567, Exh. **CL-0042**.

<sup>407</sup> C-Reply Merits, ¶ 506.

<sup>408</sup> C-Reply Merits, ¶ 507, citing *Vivendi II*, ¶ 7.4.7, Exh. **CL-0029**.

irrelevant because they do not explain why the expression “principles of international law” should be understood to be an implicit reference to MST.<sup>409</sup>

297. Second, the fact that the Treaty may have been based on the North American Free Trade Agreement (“**NAFTA**”) does not mean that it must be interpreted in the same manner.<sup>410</sup> The wording of these treaties and their supplementary means of interpretation are different. Article 1105 of the NAFTA refers explicitly to the MST, and the NAFTA Free Trade Commission’s binding Notes of Interpretation, removed any doubt by confirming that Article 1105 only covers the MST.<sup>411</sup> By contrast, the Treaty does not refer to the MST and there are no binding guidelines on its interpretation which would support the Respondent’s reading of Article II(2)(a).<sup>412</sup>
298. Third, so the Claimant says, none of the documents on which Costa Rica relies are part of the context of the Treaty within the meaning Article 31(2) of the VCLT, as they are not the BIT’s text, preamble or annexes, nor do they constitute agreements or instruments related to the BIT.<sup>413</sup> Costa Rica did not identify any subsequent agreements between the BIT’s Contracting States or practice in the application of the BIT.<sup>414</sup> Canada’s submissions in unrelated disputes which the Respondent invokes do not bind the Contracting States and do not reflect their intention at the time of signing of the BIT.<sup>415</sup>
299. Fourth, Infinito contends that it is not necessary to use supplementary means of interpretation within the meaning of Article 32 of the VCLT because the Treaty’s language is clear. Relying on the Tribunal’s Decision on Jurisdiction, the Claimant submits that supplementary means of interpretation can only be used when “the interpretation [...] leaves the meaning ‘ambiguous or obscure’ or leads to a result which is ‘manifestly absurd or unreasonable’ or to confirm the interpretation that emerged.”<sup>416</sup>
300. In any event, the Claimant submits that Costa Rica has provided no evidence that could qualify as a supplementary means of interpretation within the meaning of Article 32 of the VCLT. For the Claimant, Article 32 “limits ‘supplementary means of interpretation’ to evidence that provides insight into the negotiations and events leading up to the signing of the BIT [...]”.<sup>417</sup> However, the Respondent has not pointed to anything in the *travaux préparatoires* that supports its restrictive interpretation of Article II(2)(a). Rather, the evidence submitted by the Respondent (which includes academic writings,

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<sup>409</sup> C-Reply Merits, ¶ 508.

<sup>410</sup> C-Reply Merits, ¶¶ 509-511.

<sup>411</sup> C-Reply Merits, ¶ 514, citing NAFTA Free Trade Commission Interpretation of NAFTA Chapter 11, 31 July 2011, Exh. **RL-0097**.

<sup>412</sup> C-Reply Merits, ¶ 514.

<sup>413</sup> C-Reply Merits, ¶ 516.

<sup>414</sup> C-Reply Merits, ¶ 517.

<sup>415</sup> C-Reply Merits, ¶¶ 518-519.

<sup>416</sup> C-Reply Merits, ¶ 520, citing Decision on Jurisdiction, ¶ 288.

<sup>417</sup> C-Reply Merits, ¶ 522.

statements by Infinito and unilateral statements by Costa Rican officials) does not qualify as supplementary means of interpretation because it is subsequent to the signing of the BIT and does not establish the Contracting States' intent.<sup>418</sup>

**(ii) The Content of the FET Standard Is the Same Under the Autonomous Standard or the MST**

301. Infinito submits that the content of the MST and of the autonomous FET standard is virtually the same.<sup>419</sup> Relying on *Rusoro*, it alleges that “the [MST] has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter.”<sup>420</sup> In the same vein, the tribunal in *Waste Management II* held that the MST offers the same level of protection as the autonomous standard.<sup>421</sup>
302. The Claimant further contends that the standard calls for a pragmatic and fact-based approach:<sup>422</sup> “[t]he precise scope of the standard is therefore left to the determination of the Tribunal to decide whether, in all of the circumstances, the conduct in issue is fair and equitable or unfair and unequitable.”<sup>423</sup> Be this as it may, both standards protect investors against “arbitrariness, gross unfairness, discrimination, a complete lack of transparency,”<sup>424</sup> including measures which frustrate their legitimate expectations.<sup>425</sup> Relying on *Mobil* and *Bilcon*, the Claimant submits that an investor’s legitimate expectations are “relevant considerations” in finding a breach of the MST.<sup>426</sup> In the same vein, the tribunal in *Glamis Gold* held that “a State may be tied to the objective expectations that it creates *in order to induce* investment.”<sup>427</sup> The Claimant further puts forward that Costa Rican law contains “a principle that a citizen can rely on legitimate expectations created by the actions of Government.”<sup>428</sup>
303. The Claimant also disagrees with the Respondent’s position that legitimate expectations can only arise from a host State’s specific promises or guarantees that a State would not change its legal framework.<sup>429</sup> It submits that legitimate expectations

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<sup>418</sup> C-Reply Merits, ¶¶ 523-526.

<sup>419</sup> C-Reply Merits, ¶¶ 523, 528-530.

<sup>420</sup> C-Reply Merits, ¶ 530, citing *Rusoro*, ¶ 520, Exh. **RL-0181**.

<sup>421</sup> C-Reply Merits, ¶ 531, citing *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (“*Waste Management II*”), ¶ 98, Exh. **CL-0090**.

<sup>422</sup> C-Reply Merits, ¶ 534.

<sup>423</sup> C-Reply Merits, ¶ 535.

<sup>424</sup> C-Reply Merits, ¶¶ 531-532.

<sup>425</sup> C-Reply Merits, ¶ 537.

<sup>426</sup> C-Reply Merits, ¶ 539, citing *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) (“*Mobil*”), ¶ 152, Exh. **RL-0023**; *Clayton & Bilcon*, ¶¶ 445-454, Exh. **CL-0172**.

<sup>427</sup> C-Reply Merits, ¶ 541, citing *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (“*Glamis Gold*”), ¶ 621, Exh. **RL-0105** (emphasis in original).

<sup>428</sup> C-Reply Merits, ¶ 543.

<sup>429</sup> C-Reply Merits, ¶ 544.

may equally arise from explicit or implicit “undertakings and representations by the host state, or the circumstances surrounding investment.”<sup>430</sup> Relying on *Frontier Petroleum*, Infinito argues that “[t]he investor may rely on [the host state’s] legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment.”<sup>431</sup>

304. Finally, the Claimant observes that denial of justice is not the only manner in which judicial measures can breach the FET standard.<sup>432</sup> It points out that the BIT does not distinguish between judicial, legislative or executive measures,<sup>433</sup> and finds the Respondent’s position inconsistent with “the principle that a state is internationally responsible for the conduct of all its organs equally” as defined by the ILC’s Draft Articles on State Responsibility and recognized in the *Azinian* decision.<sup>434</sup> The Claimant further notes that its position has been endorsed by several arbitral decisions, including *Vivendi II*, *Arif* and *ATA*.<sup>435</sup> In any event, the Claimant is not only challenging the 2011 Administrative Chamber Decision; its case is that “Costa Rica has breached the FET standard based on the composite effect of all of the challenged measures, and in particular the actions (and omissions) of the legislature and executive before and after the Administrative Chamber’s decision,” as “[i]t is as a result of those actions that the Crucitas project was unable to proceed and Infinito’s investment became worthless.”<sup>436</sup>

## **b. The Respondent’s Position**

### **(i) The FET Standard Is Limited to the MST**

305. For the Respondent, the legal standard under Article II(2)(a) of the BIT is the MST under customary international law. The reference in Article II(2)(a) to the “principles of international law” means that the standard is tied to the MST.<sup>437</sup>
306. According to Costa Rica, its position is consistent with the rules of interpretation provided in Article 31 of the VCLT. Indeed, reading Article II(2)(a) in light of the ordinary meaning of the terms and of its context shows that it excludes the application of an

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<sup>430</sup> C-Reply Merits, ¶ 544.

<sup>431</sup> C-Reply Merits, ¶ 545, citing *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (“*Frontier Petroleum*”), ¶ 285, Exh. **CL-0039**.

<sup>432</sup> C-Reply Merits, ¶ 550.

<sup>433</sup> C-Reply Merits, ¶ 553.

<sup>434</sup> C-Reply Merits, ¶¶ 554-555, citing *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (“*Azinian*”), ¶ 98, Exh. **CL-0017**.

<sup>435</sup> C-Reply Merits, ¶ 556; *Vivendi II*, ¶¶ 7.4.10-7.4.11, Exh. **CL-0029**; *Arif*, ¶¶ 445, 454, 547, Exh. **CL-0014**; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (“*ATA*”), ¶¶ 73, 123, 125, Exh. **CL-0016**.

<sup>436</sup> C-Reply Merits, ¶ 551.

<sup>437</sup> R-CM Merits, ¶¶ 366-368.

autonomous standard.<sup>438</sup> The Contracting States would not have defined the FET standard by reference to the “principles of international law” if they intended to provide for an autonomous standard.<sup>439</sup> The Claimant’s contrary view cannot be reconciled with the fundamental treaty interpretation principle of *effet utile* or effectiveness.<sup>440</sup>

307. The Respondent disputes that the majority of investment awards have held that the reference to “principles of international law” does not limit the FET standard to the MST. For instance, in *UPS*, *Chemtura* and *ADF*, the tribunals rejected the investors’ attempt to import allegedly broader FET standards provided in other treaties, including the Canada-Costa Rica BIT, through the MFN clause provided in the NAFTA. More specifically, these tribunals held that the FET clauses invoked by the investors offered the same substantive protection as the FET clause in the NAFTA, namely the MST.<sup>441</sup> In addition, *Koch*, *Rusoro* and *OI* concluded that the reference to “principles of international law” or “international law” in a FET clause meant a limitation to the MST under customary international law.<sup>442</sup>
308. The Respondent underlines that it has submitted abundant evidence supporting its interpretation, such as express statements by Canada,<sup>443</sup> contemporaneous writings of Canadian commentators,<sup>444</sup> and the Claimant’s own regulatory filings with the United

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<sup>438</sup> R-CM Merits, ¶ 368; R-Rej. Merits, ¶ 440.

<sup>439</sup> R-Rej. Merits, ¶ 442.

<sup>440</sup> R-Rej. Merits, ¶¶ 443-445.

<sup>441</sup> R-Rej. Merits, ¶¶ 457-461, citing *Chemtura Corporation v. Government of Canada*, UNCITRAL Award, 2 August 2010 (“*Chemtura*”), ¶¶ 235, 236, Exh. **CL-0025**; *UPS Award*, ¶¶ 182-184, Exh. **RL-0227**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (“*ADF*”), ¶ 194, Exh. **RL-0014**.

<sup>442</sup> R-Rej. Merits, ¶¶ 467-468, citing *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017 (“*Koch*”), ¶ 8.44, Exh. **RL-0200**; *Rusoro*, ¶ 520, Exh. **RL-0181**; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 482 (“*OI*”), Exh. **CAN-0006**.

<sup>443</sup> R-CM Merits, ¶ 371, referring to statements made by Canada in *UPS* confirming that foreign investment protection agreements (such as the BIT) were based on the NAFTA. *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Respondent’s Counter-Memorial on the Merits, 22 June 2005, ¶ 1011 (“*UPS Counter-Memorial*”), Exh. **RL-0172**.

<sup>444</sup> R-CM Merits, ¶ 372, referring to L. Reif, *Canada and Foreign Direct Investment in Latin America and the Caribbean: Evolution of an International Investment Agreement Framework*, International Trade and Business Law Review, Vol. 13 (2010) 86, p. 98, Exh. **RL-0006** (describing the standard in the Costa Rica-Canada BIT and Canada’s other BITs based on the same model as “[t]he minimum standard of treatment (or fair and equitable treatment) [...] under customary international law [...]”); C. Wilkie, *The Origins of NAFTA Investment Provisions: Economic and Policy Considerations*, NAFTA Chapter Eleven Reports (Kluwer Law International, 2006), p. 14, Exh. **RL-0163**; T. Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, Columbia Journal of Transnational Law, Vol. 42, No. 1 (2004) 35, p. 76 Exh. **RL-0100** (describing Article II of the BIT as “minimum standard provision[ ]” which is “even more explicit” than NAFTA Article 1105); A. Newcombe, *Canada’s New Model Foreign Investment Protection Agreement*, Investment Treaty Arbitration (2004), p. 1, Exh. **RL-0176** (“Canada has signed 23 BITs since 1989, when it first began negotiating investment treaties. Five of these BITs were concluded before 1995 and are based on the OECD model. The

States authorities,<sup>445</sup> as well as Costa Rica's contemporaneous understanding of Article II(2)(a).<sup>446</sup> It follows from this evidence, the Respondent argues, that the FET standard in the BIT, such as the one in NAFTA "is tied to the minimum standard of treatment."<sup>447</sup> According to the Respondent, this evidence shows that the Contracting States "understood the reference to 'principles of international law' as tied to the minimum standard of treatment under customary international law."<sup>448</sup>

309. Even if the ordinary meaning of Article II(2)(a) of the BIT were not clear, supplementary means of interpretation, so says Costa Rica, show that the BIT's FET standard is limited to the MST under customary international law.<sup>449</sup> First, there is no evidence that the Contracting States were willing to grant the investors an FET standard that would go beyond the MST. To the contrary, when the BIT was signed, no arbitral decision had been rendered on an autonomous FET standard offering more extensive protection than what is required under the MST.<sup>450</sup> In other words, the Contracting States could not have intended to grant an autonomous FET standard while the debate from which this standard arose had not even started.<sup>451</sup> Second, Canada's treaty practice confirms that Article II(2)(a) of the BIT is limited to the standard of treatment under customary international law.<sup>452</sup>

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remaining 18 are based on NAFTA Chapter 11"); Transcript of Informational Session on Foreign Investment Promotion and Protection Agreements (FIPA), Government of Canada, Foreign Affairs, Trade and Development (22 September 2015), p. 2, Exh. **R-0138** ("All core obligations found in Canada's FIPA are essentially identical to those found in NAFTA Chapter Eleven. Moreover, the core obligations in Canada's FIPAs and investment chapters have been essentially the same since the initiation of the FIPA program 24 years ago"); C. Cherniak, *Canada Will Pursue Bilateral and Regional Trade Arrangements if Doha Round Ends*, Trade Lawyers Blog (29 July 2008), p. 1, Exh. **R-0139** (listing the Canada-Costa Rica FIPA as "based on Chapter 11 of the NAFTA").

<sup>445</sup> R-CM Merits, ¶ 373, citing 2007 Annual Report, Form 20-F, Infinito Gold Ltd., before the United States Securities and Exchange Commission, for the Fiscal Year ended in 31 March 2007 (12 October 2007), Exh. **R-0045**.

<sup>446</sup> R-CM Merits, ¶ 374, referring to Foreign Trade Ministry of Costa Rica, Memorandum No. DVI 279-98 (29 September 1998), p. 6, Exh. **R-0142** ("Fair and equitable treatment: It is generally accepted that the primary purpose of this type of clause is to offer the investment a minimum standard of protection in accordance with the principles of international law"); Rafael Acosta and Rafael Matamoros, Economic Report No. 473.98 to Costa Rica's Legislative Assembly (28 July 1998), Ex. **RL-0164** (explaining that the BIT was based on Canada's 1994 model FIPA, which was in turn based on NAFTA).

<sup>447</sup> R-Reply Jur., ¶¶ 197-199; R-CM Merits, ¶¶ 370-374.

<sup>448</sup> R-Rej. Merits, ¶ 450.

<sup>449</sup> R-CM Merits, ¶ 381.

<sup>450</sup> R-CM Merits, ¶ 381.

<sup>451</sup> R-Rej. Merits, ¶ 448.

<sup>452</sup> R-Reply Jur., ¶ 198; R-CM Merits, ¶ 382; R-Mem. Jur., ¶ 212; Department of External Affairs, NAFTA: Canadian Statement of Implementation, Canada Gazette (1 January 1994), p. 149, Exh. **RL-0098** (setting out Canada's position that Article 1105 of the NAFTA, providing for "fair and equitable treatment" and "full protection and security," "provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law"); *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Claimant's Memorial on the Merits, 23 March 2005 ("**UPS Memorial**"), ¶¶ 700-702 and fn. 695,

310. Finally, Costa Rica and Canada, so argues the former, confirmed in these proceedings that Article II(2)(a) of the BIT was restricted to the minimum standard.<sup>453</sup> Indeed, Canada has stated that “[t]he wording in Article II(2)(a) guarantees FET in accordance with the minimum standard of treatment under customary international law.”<sup>454</sup> For the Respondent, this constitutes a “subsequent agreement between the parties” (i.e., the parties to the BIT) within the meaning of Article 31(3) of the VCLT, which demonstrates the intent of the Contracting States. The Respondent further argues that Article 31(3) of the VCLT requires no formal agreement for it to be effective.<sup>455</sup>

**(ii) The Content of the Autonomous FET Standard Is Different From the Content of the MST**

311. The Respondent does not share the Claimant’s view that the content of the autonomous FET standard and of the MST is the same.<sup>456</sup> Even if the MST is a flexible concept, “it has not evolved to the point of being identical or indistinguishable from the so-called autonomous treaty standard,”<sup>457</sup> nor has the Claimant met its burden of proving such an evolution.<sup>458</sup> More precisely, the MST standard does not protect the investor’s legitimate expectations and is more limited with regard to judicial measures.
312. First, the Respondent contends that the investor’s legitimate expectations are not protected under the MST standard.<sup>459</sup> No legal authority has held that a host State is bound to protect an investor’s legitimate expectations under customary international law.<sup>460</sup>
313. Relying on submissions by Canada in *Mesa Power*, the Respondent submits that there is “no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ ‘expectations.’”<sup>461</sup> The position in investment arbitration is consistent with the ICJ’s jurisprudence according to which “[i]t does not follow from such references [to investment arbitration decisions] that there exists in general international law a principle that would give rise

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Exh. **RL-0171** and Canada response confirming that “Canada has been consistent in its statements that these FIPAs are based on the NAFTA. They are referred to as Agreements Based on new Model (NAFTA based) on the website of International Trade Canada.” *UPS* Counter-Memorial, Exh. **RL-0172**; List of Canada’s Foreign Investment Protection and Promotion Agreements (FIPAs) ([www.dfait-maeci.gc.ca/tna-nac/fipa-e.asp](http://www.dfait-maeci.gc.ca/tna-nac/fipa-e.asp) as at 5 January 2001), Exh. **R-0136** (listing the BIT among “Agreements Based on new Model (NAFTA based)”).

<sup>453</sup> R-Rej. Merits, ¶¶ 471, 474.

<sup>454</sup> Canada’s Submission, ¶ 20.

<sup>455</sup> R-Rej. Merits, ¶¶ 475-477.

<sup>456</sup> R-Rej. Merits, ¶ 482.

<sup>457</sup> R-Rej. Merits, ¶ 484.

<sup>458</sup> R-Rej. Merits, ¶ 485.

<sup>459</sup> R-Rej. Merits, ¶ 490.

<sup>460</sup> R-Rej. Merits, ¶ 490.

<sup>461</sup> R-Rej. Merits, ¶ 491, citing *Mesa Power Group, LCC. v. Government of Canada*, UNCITRAL, Canada’s Response to 1128 Submissions, 26 June 2015, ¶ 12, Exh. **RL-0246**.

to an obligation on the basis of what could be considered a legitimate expectation.”<sup>462</sup> Relying on *Glamis Gold*, the Respondent argues that “[a]t most, the investor’s expectations can be taken into account when analysing whether other components of Article II(2)(a) have been breached.”<sup>463</sup>

314. Even in the autonomous FET standard, the Respondent submits that only expectations that are objectively legitimate and reasonable qualify for protection.<sup>464</sup> Specifically, such expectations must meet the following requirements: “(i) they must derive from representation[s] or assurances that induced the investor to invest; (ii) they should be legitimate and reasonable in light of all the circumstances of the case; (iii) their exact origin must be clearly identifiable; and (iv) they cannot trump the State’s right to regulate within its territory (unless specific commitments of regulatory stability were given by the State in favour of the investor).”<sup>465</sup> By contrast, “in the absence of a stabilization clause, legitimate expectations neither ensure that the legal environment in which the Claimant invested will remain unchanged nor waive a State’s right to regulate in the public interest.”<sup>466</sup>
315. Furthermore, an investor cannot expect a host State to refrain from revoking pre-existing decisions under any circumstances.<sup>467</sup> The Respondent emphasizes that “[o]ne of the pillars of a democratic State is the principle of separation of powers,” and “[a]n investor cannot legitimately expect that the executive branch’s decisions cannot be reviewed and annulled by independent municipal courts” when such decisions “are not in accordance with the law.”<sup>468</sup>
316. Second, the Respondent submits that “judicial measures are only capable of violating the customary international law minimum standard of treatment if such measures amount to a denial of justice.”<sup>469</sup> Relying on *Swisslion*, *Parkerings*, *Bosh* and *Jan de Nul*, the Respondent argues that this rule applies both under the MST and the autonomous FET standard.<sup>470</sup>

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<sup>462</sup> R-Rej. Merits, ¶ 493, citing *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 1 October 2018, 2018 ICJ Rep. 507, ¶ 162, Exh. **RL-0245**.

<sup>463</sup> R-Rej. Merits, ¶¶ 492, 498, citing *Glamis Gold*, ¶ 620, Exh. **RL-0105**.

<sup>464</sup> R-Rej. Merits, ¶ 500.

<sup>465</sup> R-Rej. Merits, ¶ 500.

<sup>466</sup> R-Rej. Merits, ¶ 501.

<sup>467</sup> R-Rej. Merits, ¶ 504.

<sup>468</sup> R-Rej. Merits, ¶ 504.

<sup>469</sup> R-Rej. Merits, ¶ 510.

<sup>470</sup> R-Rej. Merits, ¶ 524, citing *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 (“**Swisslion**”), ¶ 264, Exh. **RL-0112**; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (“**Parkerings**”), ¶ 313, Exh. **CL-0068**; *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012 (“**Bosh**”), ¶ 280; Exh. **RL-0120**; *Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (“**Jan de Nul Award**”), ¶ 191, Exh. **RL-0091**.



317. The Respondent explains that judicial measures cannot be assessed under a lower standard than denial of justice, which requires the investor to show that the host State's judicial system failed as a whole to accord justice.<sup>471</sup> The contrary solution would allow investors to circumvent the "high standard of denial of justice simply by claiming that the challenged judicial measure is 'unfair and inequitable', even if it falls short of constituting denial of justice."<sup>472</sup>
318. The Respondent denies that its interpretation conflicts with the principle that a State is internationally responsible for the conduct of all of its organs equally. Article 4 of the ILC Articles (on which the Claimant relies for this argument) refers to the principle of attribution, under which the conduct of any organ of the State must be regarded as an act of that State. While the Respondent acknowledges that it is internationally responsible for the conduct of all of its organs, including its courts, attribution is only one component of State responsibility. While a decision from a judicial court is an act of the State for purposes of Article 4, it may not necessarily constitute a breach of international law.<sup>473</sup>
319. Accordingly, the Respondent argues that three of the five measures that the Claimant challenges – the 2011 Administrative Chamber Decision, the 2013 Constitutional Chamber Decision and the TCA Damages Proceedings – must be assessed under the denial of justice standard.<sup>474</sup>
320. In sum, Costa Rica maintains that the FET and MST standards are not identical. However, even if they were, the claim would still fail because "both standards set a high threshold that the Claimant must meet if it is to persuade this Tribunal that Costa Rica has breached that standard under the BIT."<sup>475</sup>

### **c. Canada's Position**

321. Canada's Non-Disputing Party Submission comments *inter alia* on the content of Article II(2)(a) of the BIT.
322. Essentially, Canada submits that Article II(2)(a) guarantees FET in accordance with the MST under customary international law. Canada contends that the phrase "in accordance with principles of international law" is a reference to the MST. Pursuant to the principle of *effet utile*, this phrase must be given meaning. This interpretation is confirmed by the Notes of Interpretation issued under some of Canada's treaties, such as the one under the NAFTA.<sup>476</sup>

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<sup>471</sup> R-Rej. Merits, ¶¶ 512-518.

<sup>472</sup> R-Rej. Merits, ¶ 519.

<sup>473</sup> R-Rej. Merits, ¶¶ 520-521.

<sup>474</sup> R-Rej. Merits, ¶ 525.

<sup>475</sup> R-Rej. Merits, ¶ 507.

<sup>476</sup> Canada's Submission, ¶¶ 18-21.

323. According to Canada, “[t]here is no difference between the FET standard in NAFTA Article 1105(1) and Article II(2)(a) of the Canada-Costa Rica FIPA.”<sup>477</sup> Canada has consistently expressed the position that its post-NAFTA FIPAs, including the Canada-Costa Rica FIPA, are based on the NAFTA. Canada also argues that, “in clarifying and reaffirming the meaning of the provisions, the Notes of Interpretation under Canada’s other treaties do not amend or alter the substantive obligation.”<sup>478</sup> As a result, “tribunals have rejected attempts to distinguish NAFTA Article 1105(1) from the FET obligations in Canada’s post-NAFTA FIPAs, including Article II(2)(a) of the Canada-Costa Rica FIPA.”<sup>479</sup>
324. Canada further opines that “the disputing party alleging the existence of a rule of customary international law has the burden of proving it,” and that “[t]his high threshold for proving a breach of FET in accordance with customary international law is what distinguishes the obligation in Article II(2)(a) from the autonomous FET standard.”<sup>480</sup> In order to establish the content of the FET standard under customary international law, the investor must provide proof of State practice and *opinio juris*, i.e., “evidence of consistent and general practice amongst States that is supported by a conviction by States that such practice is legally required by them under international law.”<sup>481</sup> For this purpose, the investor must point to the actions of States, not to decisions of arbitral tribunals. Citing *Glamis Gold* and *Cargill*, Canada submits that “[p]ast arbitral decisions are only relevant to the extent that they include an examination of State practice and *opinio juris*,”<sup>482</sup> “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom.”<sup>483</sup>
325. As to the content of the FET standard under customary international law (and hence Article II(2)(a) of the BIT), Canada makes the following submission:
- a. It does not allow tribunals to second-guess Government policy and decision-making, because “international law generally grants a high level of deference to States with respect to their domestic policy choices and balancing of public interest and individual rights.”<sup>484</sup>

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<sup>477</sup> Canada’s Submission, ¶ 22.

<sup>478</sup> Canada’s Submission, ¶ 22.

<sup>479</sup> Canada’s Submission, ¶ 22, citing *Chemtura*, ¶¶ 235-236, Exh. **CL-0025**; *UPS Award*, ¶¶ 182-284, **RL-0227**; *ADF*, ¶ 194, Exh. **RL-0014**.

<sup>480</sup> Canada’s Submission, ¶ 23.

<sup>481</sup> Canada’s Submission, ¶ 24.

<sup>482</sup> Canada’s Submission, ¶ 25, referring to *Glamis Gold*, ¶¶ 605-607, Exh. **RL-0105**. See also, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (“*Cargill Mexico*”), ¶ 277, Exh. **RL-0115**.

<sup>483</sup> *Glamis Gold*, ¶ 608, Exh. **RL-0105**.

<sup>484</sup> Canada’s Submission, ¶ 26.

- b. It does not protect an investor's legitimate expectations. According to Canada, "[t]he mere failure to fulfil a commitment does not, without more, fall below the customary international law standard of treatment."<sup>485</sup>
- c. Denial of justice is the only basis upon which judgments of a domestic court may violate the FET standard under customary international law. Canada's "consistently held position" is that (i) absent a denial of justice, judicial measures cannot breach the MST, and (ii) "claims of arbitrariness or unfairness in the context of judicial decisions must be viewed through the lens of denial of justice."<sup>486</sup> For a denial of justice to occur, there must be a very serious failure in the administration of justice. The erroneous application of the law is not sufficient; there must be manifest injustice or gross unfairness. According to Canada, "[t]his rule stems from the recognition of the independence of the judiciary and the great deference afforded to domestic courts acting in their *bona fide* role of adjudication and interpretation of a State's domestic law."<sup>487</sup>

#### d. Analysis

326. The Tribunal will first determine whether the FET standard in Article II(2)(a) of the BIT is limited to the MST under customary international law (i). It will then set out the content of the FET standard under Article II(2)(a) (ii). The Tribunal will then address the question whether judicial decisions may breach the FET standard only through a denial of justice (iii). This Section sets out the analysis and conclusions of the majority of the Tribunal, even when it is not expressly so stated. Arbitrator Stern will develop her views in her Separate Opinion on Jurisdiction and Merits.

##### (i) *Is the Protection Afforded by Article II(2)(a) Limited to the MST?*

327. Article II(2)(a) of the BIT provides that "[e]ach Contracting Party shall accord investments of the other Contracting Party: (a) fair and equitable treatment in accordance with principles of international law; [...]."<sup>488</sup>
328. The Claimant argues that this provision provides for an autonomous FET standard, while the Respondent considers that it is limited to the MST under international law.
329. The Respondent has pointed to several awards in which the tribunals have held that the reference to "principles of international law" or to "international law" is equivalent to "customary international law."<sup>489</sup> In turn, the Claimant has referred to other awards that

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<sup>485</sup> Canada's Submission, ¶ 27.

<sup>486</sup> Canada's Submission, ¶ 31.

<sup>487</sup> Canada's Submission, ¶ 30.

<sup>488</sup> BIT, Article II(2)(a), Exh. C-0001.

<sup>489</sup> *Koch*, ¶ 8.44, Exh. RL-0200 ("The FET and FPS standards in this Treaty are prefaced with the express qualification: 'in accordance the rules and principles of international law.' In the Tribunal's view, this additional express wording is conclusive in confirming the meaning of the FET and FPS standards as the duties imposed by customary international law and in precluding

have reached the contrary conclusion.<sup>490</sup> While these decisions may provide guidance, the Tribunal must conduct its own interpretation of Article II(2)(a) of the BIT in accordance with the rules of treaty interpretation set out in the VCLT.

330. The Respondent further argues that the text of Article II(2)(a) of the BIT is very similar to that of NAFTA Article 1105(1), which provides that “[e]ach Party shall accord to investments of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment [...]”.<sup>491</sup> Yet, Article 1105 is expressly entitled “Minimum Standard of Treatment,” a reference that is absent from Article II(2)(a) of the BIT. Moreover, in their Notes of Interpretation issued in 2001, the NAFTA Contracting States clarified that Article 1105(1) prescribes the “customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party” and that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum

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an independent or autonomous meaning”); *Rusoro*, ¶ 520, Exh. **RL-0181** (“[As] the BIT qualifies Venezuela’s commitment to accord FET (and FPS) treatment ‘in accordance with the principles of international law’, the rule is referring to the CIM [or customary international minimum] Standard”); *OI*, ¶ 482, Exh. **CAN-0006** (“[I]t is not true that the Treaty with the United Kingdom offers superior treatment to the minimum customary standard, since in reality it only offers protected investors FET ‘in accordance with international law.’ The Treaty therefore does not guarantee FET in abstract, but rather only as recognized by international law. And the level of protection that international law offers and ensures to foreign nationals is precisely what is known as the minimum customary standard.”)

<sup>490</sup> *Vivendi II*, ¶¶ 7.4.5-7.4.7, Exh. **CL-0029** (“Dealing first with Respondent’s argument that the fair and equitable treatment is limited to and to be weighed against the so-called minimum standard of treatment under international law, the Tribunal concludes that there is no basis for such a limitation and that such an interpretation runs counter to the ordinary meaning of the text of Article 3. Article 3 refers to fair and equitable treatment in conformity with the principles of international law, and not to the minimum standard of treatment. [...] The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty’s fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.”); *Total*, ¶ 125, Exh. **CL-0088** (“[...] the phrase ‘fair and equitable in conformity with the principles of international law’ cannot be read as ‘treatment required by the minimum standard of treatment of aliens/investors under international law.’”); *Crystallex*, ¶ 530, Exh. **CL-0131** (“[T]he Tribunal begins with the examination of the formulation ‘in accordance with the principles of international law’, which is found in Article II(2) of the Treaty [...]. The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the ‘international minimum standard of treatment’ under customary international law, but rather constitutes an autonomous treaty standard. Unlike treaties such as NAFTA, which expressly incorporate the minimum standard of treatment, the Canada-Venezuela BIT nowhere refers to such minimum standard.”); *EDF*, ¶ 1001, Exh. **CL-0034** (“Article 3 nowhere mentions ‘minimum standard’ as such, but rather speaks simply of principles of international law. The treaty thus invites consideration of a wider range of principles related to fairness and equity.”)

<sup>491</sup> NAFTA, Article 1105(1) (emphasis added).

standard of treatment of aliens.”<sup>492</sup> No such note of interpretation has been issued by the Contracting Parties to the BIT.

331. Applying the general rule of interpretation set out in Article 31 of the VCLT,<sup>493</sup> the majority of the Tribunal cannot conclude that the content of Article II(2)(a) of the BIT is limited to the MST under customary international law.
332. Starting first with the ordinary meaning of the terms, there is nothing in the text of the BIT that limits the FET standard to *customary* international law. Article II(2)(a) provides that the Contracting Parties are required to accord to investments fair and equitable treatment “in accordance with principles of international law.” The words “principles of international law” could be understood as a reference to the general principles of law cited in Article 38(1)(c) of the ICJ Statute (“**GPL**”). It is now widely accepted that GPL include both general principles that emanate from domestic laws (*foro domestico*) and are then transposed to international law after an appropriate distillation process, as well as general principles of international law that have emerged directly on the international plane.<sup>494</sup> Alternatively, the reference to “principles of international law” could designate

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<sup>492</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001, Section B(1)-(2), Exh. **RL-0097**.

<sup>493</sup> Vienna Convention on the Law of Treaties (27 January 1980) (“**VCLT**”), Article 31, Exh. **CL-0198**. Article 31 provides:

“Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.”

<sup>494</sup> The Tribunal finds confirmation of its understanding for instance in Special Rapporteur Vázquez-Bermúdez, First Report on General Principles of Law by Special Rapporteur, International Law Commission Seventy-first Session (Geneva, 29 April – 7 June and 8 July – 9 August 2019) (“**First Report on GPL**”), ¶ 22 (“Among the categories of general principles of law that may fall under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, two appear to stand out: (a) general principles of law derived from national legal systems; and (b) general principles of law formed within the international legal system.”); Draft conclusion 3 (“General principles of law comprise those: (a) derived from national legal systems; (b) formed within the international legal system”); and in Patrick Dumberry, A Guide to General Principles of Law in

the various sources of international law set out in Article 38(1) of the ICJ Statute.<sup>495</sup> By contrast, the expression “principles of international law” cannot be regarded as a reference to customary international law, which is but one source of international law and is distinct from general principles. That understanding would imply adding limiting language to Article II(2)(a) of the BIT that the provision does not contain. As noted by the *Vivendi II* tribunal, “the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone.”<sup>496</sup>

333. More specifically, GPL (including both principles arising from domestic laws and general principles of international law) are a source of international law distinct from custom.<sup>497</sup> For a rule of customary international law to emerge, it requires uniform and consistent State practice and the acceptance of this practice as law (*opinio juris*).<sup>498</sup> By contrast, GPL are a more flexible concept; they may emerge in a number of ways (including from treaties, case law of international courts and tribunals, and custom<sup>499</sup>) and require “recognition” from States,<sup>500</sup> rather than acceptance as law.<sup>501</sup>
334. The Tribunal thus concludes that, in accordance with their ordinary meaning, the terms used by Article II(2)(a) cannot be interpreted as a reference to customary international law in general or to the MST in particular.
335. There is likewise nothing in the context of the provision that would lead to restricting the FET standard to the MST. Neither the text of other provisions of the BIT, nor its preamble or annexes, limit the FET standard to customary international law. To the contrary, when choosing the applicable law, the Contracting Parties to the BIT made a

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International Investment Arbitration (Oxford University Press 2020) (“**Dumberry, A Guide to GPL**”), ¶¶ 1.27; 1.44-1.53.

<sup>495</sup> Article 38(1) of the ICJ Statute provides:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

<sup>496</sup> *Vivendi II*, ¶ 7.4.7, Exh. **CL-0029**.

<sup>497</sup> Dumberry, A Guide to GPL, ¶¶ 1.14-1.15.

<sup>498</sup> Special Rapporteur Vázquez-Bermúdez, First Report on GPL, ¶ 164; A Guide to GPL, ¶¶ 1.14-1.15.

<sup>499</sup> Dumberry, A Guide to GPL, ¶¶ 1.49; 1.52.

<sup>500</sup> Today there is wide agreement that there is no need to attribute any particular meaning to the term “civilized” in Article 38(1)(c) of the ICJ Statute. Special Rapporteur Vázquez-Bermúdez, First Report on GPL, ¶¶ 178, 185-187.

<sup>501</sup> Special Rapporteur Vázquez-Bermúdez, First Report on GPL, ¶¶ 163-175.

distinction between “rules of international law” and “principles of international law”, which distinction is unhelpful to decide whether Article II(2)(a) refers to customary international law only or to international law in its entirety.

336. Nor is there “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty,” or “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”<sup>502</sup> establishing that Article II(2)(a) of the BIT must be interpreted as limiting the FET standard to the MST under customary international law.
337. Article 31(3) of the VCLT further provides that the interpreter must take into account, together with the context, “(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; [and] (c) any relevant rules of international law applicable in the relations between the parties.”<sup>503</sup> The Respondent argues in this respect that both Costa Rica and Canada have confirmed in this arbitration that Article II(2)(a) of the BIT is limited to the MST, and that this constitutes a “subsequent agreement between the parties” pursuant to Article 31(3) of the VCLT that demonstrates the intent of the Treaty’s Contracting States. According to the Respondent, Article 31(3) of the VCLT does not require any formal agreement in “treaty form” to be effective.<sup>504</sup>
338. In the Tribunal’s view, Costa Rica’s and Canada’s concurrent positions in this arbitration do not amount to an agreement within the meaning of Article 31(3) of the VCLT. As Roberts explains, agreements on treaty interpretation “need not be in binding or treaty form but must demonstrate that the parties intended their understanding to constitute an agreed basis for interpretation.”<sup>505</sup> Oppenheim’s International Law also notes that the parties to a treaty “may in some other way and before, during, or after the conclusion of the treaty, agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure, as by an interpretative declaration or protocol or a supplementary treaty.”<sup>506</sup> Yet, the Contracting Parties must have *agreed* to a particular interpretation. This requires a joint manifestation of consent from the Contracting Parties, or at least an offer and acceptance, evidencing their common intention that Article II(2)(a) of the BIT reflects the MST under customary international law.

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<sup>502</sup> VCLT, Article 31(2), Exh. **CL-0198**.

<sup>503</sup> VCLT, Article 31(3), Exh. **CL-0198**.

<sup>504</sup> R-Rej. Merits, ¶¶ 475-477.

<sup>505</sup> A. Roberts, *Power and Persuasion in Investment Treaty Interpretation*, The American Journal of International Law, Vol. 104, No. 2 (2010), p. 199, Exh. **RL-0275**.

<sup>506</sup> R. Jennings and A. Watts, *Oppenheim’s International Law* (9th ed., Oxford University Press, 1992), Vol. 1, Section 630, cited in *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005 (“*Methanex*”), Part II, Chapter H, ¶ 23, Exh. **CL-0059**.

339. No such consent is found here. The submissions made by Costa Rica and Canada in this arbitration reflect legal arguments put forward in the context of this dispute to advance their respective interests. Although they happen to coincide, they do not reflect an *agreement* as just described over the interpretation of the BIT. Even if the Tribunal could infer an “agreement” from the Contracting States’ submissions, *quod non*, this agreement would postdate the commencement of this arbitration and the Tribunal could not take it into consideration in favour of one litigant to the detriment of the other without incurring the risk of breaching the latter’s due process rights.
340. Finally, Article 31(4) of the VCLT requires the interpreter to give a treaty term “[a] special meaning [...] if it is established that the parties so intended.”<sup>507</sup> The Tribunal finds that the Respondent has not met its burden of proving that the Contracting Parties intended the terms “fair and equitable treatment in accordance with principles of international law” to mean “the minimum standard of treatment under customary international law.”
341. The Respondent and Canada also rely on the principle of effectiveness or *effet utile*, which the Respondent argues is “broadly accepted as a fundamental principle of treaty interpretation.”<sup>508</sup> They argue that, if the Claimant’s interpretation of Article II(2)(a) of the BIT were correct, the terms “in accordance with principles of international law” would be rendered meaningless.<sup>509</sup> The Tribunal cannot agree. When determining the protection owed under Article II(2)(a), the Tribunal must be guided by international law (be it GPL or sources of international law in general) as opposed to subjective notions of fairness and equity. The BIT was signed in 1998, before any meaningful debate on the meaning of FET had taken place and before the *Mondev* tribunal famously clarified that a tribunal “may not simply adopt its own idiosyncratic standard of what is ‘fair’ or ‘equitable’, without reference to established sources of law.”<sup>510</sup>
342. The UNCTAD Series on the FET standard, on which the Respondent relies, confirms this interpretation:<sup>511</sup>

This formulation [provisions stating that investments ‘shall be accorded fair and equitable treatment in accordance with international law’] prevents the use of a purely semantic approach to the interpretation of the FET standard and is meant to ensure that the interpreter uses principles of international law, including, but not limited to, customary international law. Indeed a tribunal faced with such language may not go beyond what the sources of international law dictate the scope and meaning of FET to be. It requires a review of the sources to ascertain whether a specific claim that a State’s

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<sup>507</sup> VCLT, Article 31(4), Exh. **CL-0198**.

<sup>508</sup> R-Rej. Merits, ¶ 445, citing *The Renco Group, Inc. v. Republic of Peru*, UNCITRAL, Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4, 18 December 2014 (“**Renco**”), ¶ 177, Exh. **CL-0223**; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (“**Wintershall**”), ¶ 165, Exh. **RL-0070**.

<sup>509</sup> R-Rej. Merits, ¶ 445; Canada’s Submission, ¶ 19.

<sup>510</sup> *Mondev*, ¶ 119, Exh. **CL-0062**.

<sup>511</sup> Fair and Equitable Treatment, UNCTAD Series on International Investment Agreements II, 2012, pp. 22-23 (p. 41, PDF), Exh. **RL-0266**.



conduct breaches fair and equitable treatment is justified. General principles of law derived from national legal systems may prove useful in analysing the scope of the relevant FET obligations (Schill, 2010). The process of discerning such principles can be laborious, but it will advance the understanding of the FET content.

343. It is true that the Respondent has pointed to various sources which suggest that Article II(2)(a) of the BIT should be given the same interpretation as NAFTA 1105, and that it was the Contracting Parties' intention that Article II(2)(a) of the BIT referred to the MST. The Tribunal cannot give weight to these sources because they do not qualify as means of interpretation under the general rule of Article 31 of the VCLT, nor is there reason to resort to supplementary interpretation means as the application of Article 31 does not result in a meaning that is "ambiguous or obscure" or "manifestly absurd or unreasonable." Even if the Tribunal were inclined to use supplementary means to "confirm the meaning resulting from the application of article 31," the sources invoked by Costa Rica would not constitute such means as they do not relate to "the preparatory work of the treaty and the circumstances of its conclusion."
344. The Respondent first refers to "express statements by Canada" which would confirm that the BIT is based on the NAFTA.<sup>512</sup> However, these statements are arguments made by Canada in *UPS v. Canada* arguing that foreign investment protection agreements were based on the NAFTA.<sup>513</sup> Similarly, the Respondent alleges that, like Canada, Costa Rica "has consistently held that the fair and equitable treatment obligation under its investment protection treaties does not establish an autonomous standard."<sup>514</sup> In support, the Respondent points to its defense in pleadings in arbitration proceedings.<sup>515</sup> These sources reflect Canada's and Costa Rica's litigation posture, and do not qualify as means of treaty interpretation under Article 31 of the VCLT. More specifically, none of these cases was based on the Treaty and thus these statements cannot establish a "practice in the application of the treaty" within the meaning of Article 31(3)(b) of the VCLT.
345. The Respondent has also referred to the contemporaneous writings of Canadian commentators explaining that Canada's foreign investment protection treaties ("FIPAs") post-dating the NAFTA are based on NAFTA's Chapter 11 and the obligations thereunder should be given the same interpretation.<sup>516</sup> However, it is unclear how the writings of commentators could qualify as context of the BIT under Article 31 of the VCLT; nor do they constitute subsequent agreement or practice of the Contracting States, or rules of international law applicable to them. Finally, they are not

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<sup>512</sup> R-CM Merits, ¶ 370.

<sup>513</sup> *UPS* Counter-Memorial, ¶ 1011, Exh. **RL-0172**.

<sup>514</sup> R-Rej. Merits, ¶ 454.

<sup>515</sup> R-Rej. Merits, ¶ 454, citing *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014 ("*Cervin*"), ¶ 337, Exh. **RL-0101**; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012 ("*Unglaube*"), ¶ 242, Exh. **RL-0102**.

<sup>516</sup> For the list of writings by commentators the Respondent refers to see *supra* fn. 444.

supplementary means of interpretation under Article 32 of the VCLT, as they do not serve to establish the intent of the Contracting States.

346. For the same reasons, the Tribunal can give no weight to the Claimant's regulatory filings with the United States authorities, in which Infinito stated that the FIPAs such as the BIT were "based on the investment protection standards of the NAFTA investment chapter."<sup>517</sup> Statements made by an investor who is not a party to the Treaty do not qualify as means of interpretation under the VCLT.
347. The Respondent has also submitted two documents which purportedly evidence its understanding of Article II(2)(a) at the time when the BIT was concluded. The first is a Memorandum by the Ministry of Foreign Trade of Costa Rica to the President of the Permanent Committee on Economic Affairs of the Legislative Assembly, sent in connection with the approval of the bilateral investment treaties concluded by Costa Rica with Canada, Paraguay, Spain and Argentina, and explaining the scope and content of bilateral investment treaties generally.<sup>518</sup> With respect to "fair and equitable treatment," the memorandum states that "[i]t is generally accepted that the primary purpose of this type of clause is to offer the investment a minimum standard of protection in accordance with the principles of international law."<sup>519</sup> While this memorandum might reflect Costa Rica's understanding, it does not qualify as supplementary means of interpretation, as it is not "preparatory work of the treaty," nor does it provide information on the "circumstances of its conclusion."<sup>520</sup> Nor can it be characterized as an "instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" within the meaning of Article 31(2)(b) of the VCLT, as there is no evidence that Canada has accepted it as relating to the BIT.
348. The second document cited by the Respondent is an economic report on the BIT presented to the Legislative Assembly in July 1998, which states that the BIT was based on Canada's 1994 model FIPA, which was in turn based, *inter alia*, on the NAFTA.<sup>521</sup> It is not clear from the document itself whether the authors were Government

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<sup>517</sup> 2007 Annual Report, Form 20-F, Infinito Gold Ltd., before the United States Securities and Exchange Commission, for the Fiscal Year ended in 31 March 2007, p. 28, Exh. **R-0045**.

<sup>518</sup> Foreign Trade Ministry of Costa Rica, Memorandum No. DVI279-98 on the Meaning and Scope of BITs, 29 September 1998, Exh. **R-0142**.

<sup>519</sup> Foreign Trade Ministry of Costa Rica, Memorandum No. DVI279-98 on the Meaning and Scope of BITs, 29 September 1998, p. 6 (English), Exh. **R-0142**.

<sup>520</sup> VCLT, Article 32, Exh. **CL-0198**.

<sup>521</sup> R. Acosta and R. Matamoros, Economic Report No. 473.98 to Costa Rica's Legislative Assembly (July 1998), p. 4, Exh. **RL-0164** ("*Para 1994 el modelo de acuerdos FIPA había sido revisado y adecuado, tomando en cuenta los aspectos de protección y obligaciones que en forma reciente, a ese año, se habían dado en acuerdos de inversión internacional; en particular lo relativo al NAFTA y a nuevos compromisos con la WTO, y en general con la regulación vigente en materia de inversiones internacionales. Basados en el nuevo modelo comentado, a partir de 1994 Canadá ha suscrito convenios con Armenia, Croacia, Rumania, Ucrania, Barbados, Trinidad y Tobago, Panamá, Ecuador, Venezuela, Uruguay, Egipto, Líbano, Sur Africa, Filipinas, Thailandia y Costa Rica.*") (submitted by the Respondent in Spanish only)

officials<sup>522</sup> (indeed, the Respondent has filed this as a legal authority, not as a fact exhibit). Even if they were, for the reasons given in the preceding paragraph, it cannot qualify as context of the treaty under Article 31(2)(b) of the VCLT, or as supplementary means of interpretation under Article 32 of the VCLT.

349. Even accepting that the BIT was drafted on the basis of Canada's model FIPA, which in turn was based on or inspired by NAFTA Chapter 11, this does not necessarily mean that it offers investors identical protections as the NAFTA. Faced with a treaty provision, the Tribunal must interpret it in accordance with the rules of interpretation of the VCLT, in particular its text and context; it cannot dispense with doing so simply because a provision might have been inspired by another treaty.
350. The majority of the Tribunal thus concludes that Article II(2)(a) of the BIT provides for an autonomous FET standard and is not limited to the MST under customary international law.

### **(ii) Content of the FET Standard**

351. To ascertain the content of the FET standard, the Tribunal must again start by assessing the ordinary meaning of the words. However, the ordinary meaning of "fair and equitable treatment" is of limited assistance.<sup>523</sup> These notions can "only be defined by terms of almost equal vagueness,"<sup>524</sup> such as "just", "even-handed", "unbiased", and "legitimate."<sup>525</sup> The tribunal in *S.D. Myers* for instance stated that, unfair and inequitable treatment means "treat[ment] in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."<sup>526</sup> As noted in *Saluka*, "[t]his is probably as far as one can get by looking at the 'ordinary meaning' of the terms of Article 3.1 of the Treaty."<sup>527</sup>
352. That being said, while the terms "fair and equitable" are vague, they "are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow

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<sup>522</sup> Exh. **RL-0164** is on header paper of the "*Departamento de Servicios Técnicos*" of the "*Asamblea Legislativa*" (Technical Services Department of the Legislative Assembly), and the authors appear to be members of the "*Unidad de Estudios Económicos*" (Economic Studies Unit). See Exh. **RL-0164**, p. 3, fn. 1. While this suggests a unit within the Legislative Assembly, its exact status is unclear. Indeed, the Respondent characterizes this document as "report submitted to Costa Rica's legislature in July 1998 for the ratification of the BIT [...]" R-Rej. Merits, ¶ 464.

<sup>523</sup> See, e.g., *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 ("*Micula*"), ¶ 504, Exh. **CL-0060**.

<sup>524</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("*Saluka*"), ¶ 297, Exh. **CL-0077**.

<sup>525</sup> *MTDEquity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("*MTD*"), ¶ 113, Exh. **CL-0063**.

<sup>526</sup> *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 ("*SD Myers*"), ¶ 263, Exh. **CL-0078**.

<sup>527</sup> *Saluka*, ¶ 297, Exh. **CL-0077**.

the case to be decided on the basis of law,”<sup>528</sup> and more specifically on the basis of principles of international law as mandated by Article II(2)(a) of the BIT. Indeed, in elucidating the content of the autonomous FET standard, investment tribunals have extracted a number of inherent components, which are implicitly if not expressly derived from GPL and have been reflected in the decisions of international tribunals. For instance, the tribunal in *Rumeli* held that:

The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles: - the State must act in a transparent manner; - the State is obliged to act in good faith; - the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor’s reasonable and legitimate expectations.<sup>529</sup>

353. Similarly, the tribunal in *Lemire* identified the following components of the FET standard:

[W]hether the State has failed to offer a stable and predictable legal framework; - whether the State made specific representations to the investor; - whether due process has been denied to the investor; - whether there is an absence of transparency in the legal procedure or in the actions of the State; - whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State; - whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent.<sup>530</sup>

354. In the same vein, the *Electrabel* tribunal described the content of the FET standard as follows:

[T]he obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor’s reasonable expectations with respect to the legal framework adversely affecting its investment.<sup>531</sup>

355. While formulations may vary across awards, a consensus emerges as to the core components of FET, which encompass the protection of legitimate expectations, the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking

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<sup>528</sup> *Saluka*, ¶ 284, Exh. **CL-0077**; see also *MTD*, ¶ 113, Exh. **CL-0063**; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (“*Azurix*”), ¶ 360, Exh. **CL-0018**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (“*Siemens*”), ¶ 290, Exh. **CL-0081**.

<sup>529</sup> *Rumeli*, ¶ 609, Exh. **CL-0075**.

<sup>530</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (“*Lemire*”), ¶ 284, Exh. **CL-0051**.

<sup>531</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (“*Electrabel*”), ¶ 7.74, Exh. **RL-0126**.

in good faith, and the principles of due process and transparency. FET also includes a protection against denial of justice.

**(iii) Can Judicial Measures Breach the FET Standard Outside of a Denial of Justice?**

356. Three of the measures challenged by the Claimant – the 2011 Administrative Chamber Decision, the 2013 Constitutional Chamber Decision and the TCA Damages Proceeding – are judicial measures. The Respondent and Canada submit that judicial measures can only engage the State’s international responsibility if they amount to a denial of justice. The Claimant challenges this position, arguing that neither the BIT nor the ILC Articles on State Responsibility preclude international State responsibility for acts of judicial organs that do not qualify as a denial of justice.
357. Costa Rica and Canada essentially argue that, absent a denial of justice, judicial decisions interpreting domestic law cannot breach international law, and that “claims of arbitrariness or unfairness in the context of judicial decisions must be viewed through the lens of denial of justice.”<sup>532</sup> The Tribunal agrees that this is the case under customary international law. The question before the Tribunal is, however, whether judicial measures breach the BIT’s FET standard, which the Tribunal has held not to be limited to the MST under customary international law.
358. To discharge its mandate, which is to determine whether Costa Rica has breached the BIT, the Tribunal must assess whether the State’s conduct is contrary to the obligations that Costa Rica assumed under the BIT. Judicial measures “emanat[e] from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.”<sup>533</sup> The BIT does not distinguish between the acts of different Government branches. When Costa Rica committed itself to treating the Claimant’s investments fairly and equitably, it did not exclude the acts of the judiciary from this obligation.<sup>534</sup> Nor did it specify that breaches of the FET standard were limited to instances of denial of justice or other forms of manifest arbitrariness or lack of due process.
359. In the majority of the Tribunal’s view, there is no principled reason to limit the State’s responsibility for judicial decisions to instances of denial of justice. Holding otherwise would mean that part of the State’s activity would not trigger liability even though it would be contrary to the standards protected under the investment treaty. While the

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<sup>532</sup> Canada’s Submission, ¶¶ 28, 31.

<sup>533</sup> *Azinian*, ¶ 98, Exh. **CL-0017**.

<sup>534</sup> See, e.g., *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 (“*Liman*”), ¶ 268, Exh. **CL-0054** (“The Tribunal does see merit in Claimants’ argument that the two standards are not synonymous with regard to acts of courts because this would introduce a distinction between acts of courts and acts of other State entities for which no support is provided by the ECT”). See also H. Gharavi, *Discord Over Judicial Expropriation*, ICSID Review, Vol. 33, No. 2 (2018), p. 353; J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), p. 71, 98, Exh. **CL-0205**.

Tribunal agrees that domestic courts must be given deference in the application of domestic law, this does not mean that their decisions are immune from scrutiny at the international level. As noted by the tribunal in *Sistem*, court decisions may deprive investors of their property rights “just as surely as if the State had expropriated [them] by decree.”<sup>535</sup> In the same vein, judicial decisions that are arbitrary, unfair or contradict an investor’s legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice.<sup>536</sup>

360. Crucially, the question before investment tribunals is not whether the domestic court misapplied its own domestic law. The question is whether, in its application of domestic law, the court has breached *international* law, and more specifically, the standards of protection contained in the relevant treaty.<sup>537</sup> In the words of the *Azinian* tribunal, “[w]hat must be shown is that the court decision itself constitutes a violation of the treaty.”<sup>538</sup> This can happen if the court misapplies domestic law, but also when it applies domestic law correctly, if it leads to a result that is incompatible with international law. In the latter case, it could be said that it is the underlying law which breaches the treaty. However, if the court is the first State organ to apply that law to the investor, it is the court decision which perpetrates the breach of the treaty.
361. The majority of the Tribunal thus concludes that denial of justice is only one of the ways in which judicial decisions may breach the BIT. Even if a decision does not amount to a denial of justice, it may violate other treaty standards (such as FET or expropriation), provided the requirements for these breaches are met.
362. It is true that there are authorities putting forward a contrary view. For these authors<sup>539</sup> and tribunals,<sup>540</sup> the main reason for restricting the responsibility for judicial acts to

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<sup>535</sup> *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, (“*Sistem*”), ¶ 118, Exh. **CL-0082**. See also, *Rumeli*, ¶ 702, Exh. **CL-0075** (finding that “a taking by the judicial arm of the State may also amount to an expropriation”).

<sup>536</sup> See, e.g., *Arif*, ¶¶ 445, 454, 547, Exh. **CL-0014**; *Frontier Petroleum*, ¶¶ 284, 525, Exh. **CL-0039**.

<sup>537</sup> Decision on Jurisdiction, ¶ 217 (holding that “it is the Tribunal’s duty to verify if the measures complained of have breached the BIT.”)

<sup>538</sup> *Azinian*, ¶ 99, Exh. **CL-0017**.

<sup>539</sup> See, e.g., G. Fitzmaurice, *The Meaning of the Term ‘Denial of Justice,’* 13 Brit. Y.B Int’l L. (1932) 93, p. 110, Exh. **CAN-0013** (“[t]he rule may be stated that the merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice, and, moreover, does not involve the responsibility of the state.”); C. Greenwood, *State Responsibility for the Decisions of National Courts*, in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions*, (Oxford, 2004), p. 61, Exh. **CAN-0011** (“it is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.”); Z. Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Reconstructed*, International and Comparative Law Quarterly, Vol. 63, No.4 (2014), p. 34, Exh. **RL-0109**.

<sup>540</sup> See in particular *Mondev*, ¶ 126, Exh. **CL-0062** (“It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal.”); *Parkerings*, ¶ 313, Exh. **CL-0068** (“subject to denial of justice, which is not at issue here, an

denial of justice appears to lie in the nature of the court function and, as the Respondent's put it, in "the recognition of the judiciary's independence and the great deference afforded to domestic courts acting in their bona fide role of adjudication and interpretation of a State's domestic law."<sup>541</sup> That deference seems linked to the courts' decision making-process, which resolves complex legal questions and involves a choice among plausible options.<sup>542</sup> While these considerations certainly justify restraint when international tribunals consider the local courts' application of *domestic* law, in the Tribunal's opinion, they cannot be an obstacle to adjudicating on breaches of *international law*.<sup>543</sup>

363. This being so, the conclusion of the Tribunal's majority is supported by numerous scholars and investment tribunals. Paulsson submits that "[a] national court's breach of other [non-procedural] rules of international law, or of treaties, is not a denial of justice, but a direct violation of the relevant obligation imputable to the state like any acts or omissions by its agents."<sup>544</sup> Similarly, Gharavi argues that "[t]he acts or measures of the judiciary can [...] be found in violation of the FET standard irrespective of a finding of a denial of justice."<sup>545</sup>
364. This position is not limited to contemporary authorities. Former ICJ President Eduardo Jiménez de Aréchaga considered that denial of justice was not the only cause of action that could give rise to international responsibility for acts of the judiciary:

[I]n the present century State responsibility for acts of judicial organs came to be recognized. Although independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority

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erroneous judgment [...] shall not in itself run against international law, including the Treaty."); *Bosh*, ¶ 280, Exh. **RL-0120** ("It is only in a situation where those proceedings would '[offend] a sense of judicial propriety' that it would be open to the Tribunal to find that those proceedings did not meet international standards.") The Tribunal notes that the Respondent has also cited to other cases which purportedly confirm the position, including *Swisslion*. Yet, in that case the tribunal only stated that "ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice" (*Swisslion*, ¶ 264, Exh. **RL-0112**), a statement that does not limit liability for judicial acts to cases of denials of justice.

<sup>541</sup> R-Mem. Jur., ¶ 224; see also Z. Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Reconstructed*, *International and Comparative Law Quarterly*, Vol. 63, No.4 (2014), pp. 6-7, 28, Exh. **RL-0109**.

<sup>542</sup> See in particular J. Brierly, *The Law of Nations* (Oxford: Clarendon Press, 1963), p. 287, **CAN-0012**; Z. Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Reconstructed*, *International and Comparative Law Quarterly*, Vol. 63, No.4 (2014), pp. 10-11, Exh. **RL-0109**.

<sup>543</sup> This is so in respect of breaches of rules in investment treaties as well as treaties in other areas of the law, e.g. the breach of the International Covenant on Civil and Political Rights (*Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Judgment, 30 November 2010, ¶¶ 75-82, Exh. **RL-0015**).

<sup>544</sup> Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), p. 98, Exh. **CL-0205**. See also B. Demirkol, *Judicial Acts and Investment Treaty Arbitration* (Cambridge University Press, 2017), p. 24, for whom "[t]he current approach accepts that wrongful acts other than denial of justice can be committed in the exercise of judicial function."

<sup>545</sup> H. Gharavi, *Discord Over Judicial Expropriation*, *ICSID Review*, Vol. 33, No. 2 (2018), p. 355.

emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.

***The responsibility of the State for acts of judicial authorities may result from three different types of judicial decision.***

***The first is a decision of a municipal court clearly incompatible with a rule of international law.***

The second is what is known traditionally as a 'denial of justice.'

The third occurs when, in certain exceptional and well-defined circumstances, a State is responsible for a judicial decision contrary to municipal law.<sup>546</sup>

365. International courts and tribunals have also accepted that a judicial decision may amount to a treaty breach in the absence of a denial of justice. Most tribunals have addressed this from the perspective of expropriation. For instance, the Iran-US Claims Tribunal admitted that "it is well established in international law that the decision of a court in fact depriving an owner of the use of his property may amount to an expropriation of such property [...]."<sup>547</sup> Further, in *Karkey*, the tribunal held that "an international tribunal may decide not to defer to an arbitrary judicial decision which is, as such, incompatible with international law."<sup>548</sup> It ultimately found that the Supreme Court judgment which had declared the relevant contract to be void *ab initio* was arbitrary and amounted to an expropriation of the investor's contractual rights.<sup>549</sup> In *Saipem*, the tribunal held that the Bangladeshi courts had expropriated the claimant's right to an ICC award because they had "exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights."<sup>550</sup>
366. Other investment tribunals have found that judicial decisions may breach FET even when they do not amount to denials of justice. In *Tatneft*, the tribunal assessed the decisions of the Ukrainian domestic courts against the broader FET standard, noting that "[t]he discussion about whether these various decisions amounted to a denial of justice is immaterial because what this Tribunal has to determine in the end is whether they were manifestly unfair and unreasonable."<sup>551</sup> It also noted that "[a] predictable,

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<sup>546</sup> E. J. de Aréchaga, *International Law in the Past Third of a Century*, 159-1 Recueil des cours (General Course in Public International Law, The Hague, 1978), quoted in Azinian, ¶ 98, Exh. CL-0017 (emphasis added).

<sup>547</sup> *Oil Field of Texas, Inc. v. Iran and the National Iranian Oil Company*, IUSCT Case No. 43, Award, 8 October 1986 (1986/III), 12 Iran-US CTR 308, 318, Exh. CL-0151.

<sup>548</sup> *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("*Karkey*"), ¶ 550.

<sup>549</sup> *Karkey*, ¶¶ 645, 648.

<sup>550</sup> *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 ("*Saipem*"), ¶¶ 161, 181, Exh. CL-0076. See also *Sistem*, ¶¶ 118-119, Exh. CL-0082; *Rumeli*, ¶¶ 702, 705-706, 619, Exh. CL-0075; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 ("*Middle East Cement*"), ¶ 139, Exh. CL-0061.

<sup>551</sup> *OAQ Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014 ("*Tafnet*"), ¶¶ 394-395, 405, Exh. RL-0212.



consistent and stable legal framework is a FET requirement which ought to be safeguarded in its integrity irrespective of which organ of the State might compromise its availability as is well recognized under international law in the context of attribution of wrongful acts.”<sup>552</sup> Similarly, the tribunal in *Eli Lilly* was “unwilling to shut the door” on claims based on judicial measures not amounting to a denial of justice, such as when court decisions are manifestly arbitrary or blatantly unfair.<sup>553</sup> The Tribunal in *Frontier Petroleum* likewise assessed a decision of the Czech courts against the broader FET standard.<sup>554</sup> Finally, the tribunal in *Arif* accepted the possibility that a judicial decision that frustrated the investor’s legitimate expectations could amount to a breach of FET.<sup>555</sup>

367. The authorities cited above corroborate the Tribunal’s majority conclusion that Costa Rica may incur international responsibility as a result of the decisions of its courts even in the absence of a denial of justice. The existence of such responsibility will depend on whether the requirements of the various treaty standards, such as FET or expropriation, are met.

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<sup>552</sup> *Tafnet*, ¶ 407, Exh. **RL-0212**.

<sup>553</sup> *Eli Lilly*, ¶ 223, Exh. **CL-0266** (“[I]t is evident that there are distinctions to be made between conduct that may amount to a denial (or gross denial) of justice and other conduct that may also be sufficiently egregious and shocking, such as manifest arbitrariness or blatant unfairness. It is also apparent, in the Tribunal’s view, that concepts of manifest arbitrariness and blatant unfairness are capable, as a matter of hypothesis, of attaching to the conduct or decisions of courts. It follows, in the Tribunal’s view, that a claimed breach of the customary international law minimum standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms. As noted above, the conduct of the judiciary will in principle be attributable to the State by reference to uncontroversial principles of State responsibility. As a matter of principle, therefore, having regard to the content of the customary international law minimum standard of treatment, the Tribunal is unwilling to shut the door to the possibility that judicial conduct characterized other than as a denial of justice may engage a respondent’s obligations under NAFTA Article 1105, within the standard articulated in the award in *Glamis*.”)

<sup>554</sup> *Frontier Petroleum*, ¶ 525, Exh. **CL-0039** (“[T]he Tribunal rejects Respondent’s argument that this Tribunal does not have the power to review the decision of a national court’s conception of the public policy exception under the New York Convention. The Tribunal’s role under this claim is to determine whether the refusal of the Czech courts to recognise and enforce the Final Award in full violates Article III(1) of the BIT. In order to answer this question, the Tribunal must ask whether the Czech courts’ refusal amounts to an abuse of rights contrary to the international principle of good faith, i.e. was the interpretation given by the Czech courts to the public policy exception in Article V(2)(b) of the New York Convention made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment standard.”)

<sup>555</sup> *Arif*, ¶ 555(g), Exh. **CL-0014**.

## 2. Did the Respondent Breach the FET Standard?

### a. The Claimant's Position

#### (i) *The Respondent Breached the Claimant's Legitimate Expectations and Treated it Arbitrarily and Inconsistently*

368. On the basis of the legal framework in place at the time when it invested, Infinito claims that it had a reasonable and legitimate expectation that it would be able to proceed with the Crucitas Project in accordance with the provisions set out under the Mining Code, which contained no moratorium at that time.<sup>556</sup> More specifically, Infinito's expectations included receiving an exploitation concession when the statutory preconditions were met, having the opportunity to apply for and be treated fairly in respect of remaining approvals, and ultimately to build and operate the Crucitas mine once those administrative processes had been fulfilled.<sup>557</sup>
369. The Claimant argues that it decided to invest in Costa Rica since the Government strongly encouraged investment in mining exploration as a means of bringing development to the economically depressed north of the country and repeatedly confirmed that mining was a major component of Costa Rica's economic development. In 1997, the President even went so far as to declare that mining was an industry of national convenience.<sup>558</sup>
370. According to Infinito, Costa Rica created a clear legal framework for investments in mining. Under the terms of the Mining Code, the first step in acquiring the right to a mining project is to obtain an exploration permit. If the exploration permit holder successfully proves the existence of a mineral deposit, it is entitled – as of right – to an exploitation concession.<sup>559</sup> Once an exploitation concession is granted, it may only be annulled or cancelled on very limited grounds set out in the Mining Code and under a set procedure.<sup>560</sup>
371. The Claimant submits further that its expectation that the Crucitas Project would be allowed to proceed arose directly from the Government's conduct. Costa Rica confirmed this expectation by treating Industrias Infinito consistently with its legislative scheme: after it had proved the existence of gold deposits at Crucitas, Industrias Infinito was granted an exploitation concession by the President of Costa Rica for a period of

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<sup>556</sup> C-Reply Merits, ¶ 561.

<sup>557</sup> C-Reply Merits, ¶ 568.

<sup>558</sup> C-Reply Merits, ¶ 563.

<sup>559</sup> Mining Code, Law No. 6797 (4 October 1982), Article 23, Exh. **C-0015** ("An exploration permit holder shall be specially entitled to the following: [...] (b) Receive one or more exploitation concessions if [it] demonstrate[s] that one or more commercially viable mineral substances deposits exist and are located within the perimeter zone specified in their exploration permit"), and Article 26 ("During the term of an exploration permit and up to sixty days after the expiration of the term or its extension, the holder shall be entitled to obtain an exploitation concession, provided that [it] ha[s] fulfilled [its] obligations and the requirements of this Law and its regulations.")

<sup>560</sup> C-Reply Merits, ¶ 564.

ten years.<sup>561</sup> Costa Rica continued to advance the Crucitas Project, including when the Project encountered obstacles.<sup>562</sup>

372. Having obtained an exploitation concession, the Claimant argues that it expected to be allowed to build and operate the Crucitas mine, and to sell the gold and other minerals from the mine, provided that it received the required environmental approvals. At the time when it invested in Costa Rica, it never envisaged that this right could or would be taken away by a moratorium on open-pit gold mining.<sup>563</sup>
373. According to the Claimant, it was not concerned that the Crucitas Project would be affected by President Pacheco's 2002 Moratorium, because that Moratorium exempted from its application projects with acquired rights.<sup>564</sup> It adds that it would not have invested in the Project if its right to an exploitation concession and such concession itself could be revoked at any time. This expectation was reinforced by Costa Rica's Political Constitution, which declares that "[n]o law shall have retroactive effect in prejudice to any person, or to his acquired patrimonial rights or to any consolidated legal situations."<sup>565</sup> It was equally strengthened by unambiguous representations by the Government. The Claimant stresses in particular that in 2002 Minister of the Environment Rodríguez assured it that the 2002 Moratorium would not apply to the Crucitas Project, which was also confirmed by the 2002 Constitutional Chamber Decision.<sup>566</sup>
374. Infinito thus continued to invest in the Crucitas Project, on the understanding that the exploitation concession was valid and the 2002 Moratorium did not apply. It could not have expected, so it says, that through a complex series of judicial decisions and Government action and inaction, Costa Rica would end up retroactively applying the 2002 Moratorium to the Crucitas Project, "nine years after it was decreed and three years after it was repealed."<sup>567</sup>
375. The Claimant further contends that its expectation was bolstered by the Government's continued acts in support of the Crucitas Project, even after the Constitutional Chamber annulled the resolution granting Industrias Infinito's exploitation concession in 2004. For the Claimant, these actions in favor of the Crucitas Project included the following:<sup>568</sup>

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<sup>561</sup> C-Mem. Merits, ¶ 308.

<sup>562</sup> C-Reply Merits, ¶ 573.

<sup>563</sup> C-Mem. Merits, ¶ 308.

<sup>564</sup> C-Reply Merits, ¶ 571.

<sup>565</sup> C-Reply Merits, ¶¶ 571-572, citing Political Constitution of the Republic of Costa Rica, Article 34, Exh. **C-0013** (English).

<sup>566</sup> C-Reply Merits, ¶ 572.

<sup>567</sup> C-Reply Merits, ¶ 572.

<sup>568</sup> C-Reply Merits, ¶ 575.

- a. The acknowledgment by President Pacheco and his Minister of the Environment of the legality of the Crucitas Project and the obligation to allow it to proceed following the 2004 Constitutional Chamber Decision.
  - b. SETENA's review of Industrias Infinito's EIA, spanning 22 months, which included discussions with Industrias Infinito's representatives, visits to the site, and the largest public hearing in Costa Rica's history.
  - c. SETENA's approval of the EIA for the Project in 2005 and its declaration that the Project was environmentally viable.
  - d. The Constitutional Chamber's 2007 clarification that it only required approval of the EIA to precede the grant of an exploitation concession. While that clarification left it to the Minister of the Environment to define both the legal mechanism and the manner in which the exploitation concession could be granted or restored to Industrias Infinito, it did not suggest that the exploitation concession could not be restored.
  - e. SETENA's review of the EIA modifications and its declaration that the modified Project was environmentally viable in February 2008.
  - f. President Arias' decision to repeal the 2002 Moratorium in March 2008, as part of a decree safeguarding the mining environment in Costa Rica.
  - g. President Arias' and Minister Dobles' decision to restore Industrias Infinito's exploitation concession in April 2008.
  - h. President Arias' and Minister Dobles' executive decree issued in October 2008 declaring the Crucitas Project in the public interest and of national convenience.
  - i. Minister Dobles' appearance before the Costa Rican Legislative Assembly explaining the benefits of the Project, and noting that the Project had been approved in accordance with Costa Rican law, including environmental laws. He made no suggestion that the 2002 Moratorium might have applied to render the exploitation concession or the declaration of public interest and national convenience invalid.
  - j. The grant by SINAC of a land use change permit in October 2008, which was the last permit required before construction of the mine could be completed.
  - k. The 2010 Constitutional Chamber Decision, which concluded that the Project was environmentally sound, in compliance with Article 50 of the Political Constitution and that the exploitation concession and other Project approvals were constitutional and lawful.
376. On this basis, the Claimant submits that "following the 2004 Constitutional Chamber decision, all relevant organs of the Government of Costa Rica – SETENA, SINAC, DGM, MINAE, the Minister of the Environment and Energy, the President of Costa Rica

and the Constitutional Chamber of the Supreme Court, among others – worked to advance the Crucitas project through the administrative process.”<sup>569</sup>

377. The Claimant also contends that it relied on the Government to apply Costa Rican law correctly, and indeed, that it was entitled to rely on the validity of the Government’s own acts through the Costa Rican law principle of legitimate expectations (*confianza legítima*) and the Government’s obligation to direct the administrative process (*impulso de oficio*). Infinito could not have known that the 2002 Moratorium “secretly applied” to the Project, when the Government itself considered that it did not apply.<sup>570</sup>
378. It is the Claimant’s submission that its expectations were objectively reasonable, which “must be assessed through contemporaneous understanding **at the time the investment was made**, not hindsight reinterpretation.”<sup>571</sup> Applying this test, it was reasonable to expect that:
- a. Infinito would be entitled to proceed in accordance with the administrative process under the Mining Code.
  - b. The Government would apply Costa Rican law correctly and grant Industrias Infinito valid permits.
  - c. If there were issues to be resolved, Industrias Infinito would have an opportunity to remedy those deficiencies, especially if they were the result of Government errors.<sup>572</sup>
379. In response to the Respondent’s argument that Infinito could have no expectation that the judiciary would not declare the exploitation concession invalid, the Claimant clarifies that its expectation was not that the judiciary would not find fault with a “manifestly illegal” act; it was that the Government would apply its own law correctly, would treat Infinito in accordance with the Mining Code, and that its approvals would not be rendered invalid years later on the basis of the 2002 Moratorium when multiple arms of the Government had assured Infinito that such Moratorium was not applicable.<sup>573</sup>
380. The Claimant further submits that the Government is liable for granting defective permits, a defect which Infinito only discovered with the 2010 TCA Decision.<sup>574</sup> The Claimant stresses that it was the Arias administration which selected the *conversión* mechanism, although Industrias Infinito had requested it to carry out a “convalidation” proceeding.<sup>575</sup>

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<sup>569</sup> C-Reply Merits, ¶ 576.

<sup>570</sup> C-Reply Merits, ¶ 578.

<sup>571</sup> C-Reply Merits, ¶ 580 (emphasis in original).

<sup>572</sup> C-Reply Merits, ¶ 581.

<sup>573</sup> C-Reply Merits, ¶¶ 582-583.

<sup>574</sup> C-Reply Merits, ¶¶ 585-586.

<sup>575</sup> C-Reply Merits, ¶ 240; Tr. Merits Day 1 (ENG), 35:17-21 (Mr. Terry).

381. For the Claimant, whether or not the Administrative Chamber properly applied Costa Rican law or properly annulled the resolution granting the exploitation concession is not determinative of Costa Rica's FET obligation. Relying on *Arif* and *SPP*, the Claimant submits that the Respondent cannot rely on its own internal law to justify an internationally wrongful act, and thus cannot point to the judiciary's decisions to avoid international responsibility.<sup>576</sup>
382. Infinito claims that, through the following measures, the Respondent frustrated its legitimate expectations and treated it in an arbitrary and inconsistent manner:
- a. The 2011 Administrative Chamber Decision, which partially 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."<sup>577</sup>
  - b. The 2013 Constitutional Chamber Decision, which declined to resolve the conflict between its earlier decision upholding the constitutionality of the Crucitas Project approvals and the 2010 TCA Decision.<sup>578</sup>
  - c. The 2011 Legislative Mining Ban, which prohibited open-pit mining indefinitely save for those holding exploitation concessions, and thus prevented Industrias Infinito from applying for new permits.<sup>579</sup>
  - d. The 2012 MINAET Resolution, which 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.<sup>580</sup>
383. According to the Claimant, the "combined effect" of these measures violated the FET standard,<sup>581</sup> with the result that Industrias Infinito was "left without any rights, or any opportunity to fix the defects identified by the Administrative Chamber and obtain new rights."<sup>582</sup>
384. For the Claimant, it is crucial to emphasize that "the fate of the Crucitas Project was enabled by the decision of the Administrative Chamber, but the end result was the

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<sup>576</sup> C-Reply Merits, ¶¶ 587-588; *Arif*, ¶ 547(c), Exh. **CL-0014**; *SPP*, ¶ 83, Exh. **CL-0249**.

<sup>577</sup> C-CM Jur., ¶ 56(a); Supreme Court (Administrative Chamber), Decision (30 November 2011), Exh. **C-0261**.

<sup>578</sup> C-CM Jur., ¶ 56(b); Supreme Court (Constitutional Chamber), Decision (19 June 2013), Exh. **C-0283**.

<sup>579</sup> C-CM Jur., ¶ 56(d); C-Reply Merits, ¶ 599; Amendment to Mining Code, No. 8904 (1 December 2010), Exh. **C-0238**.

<sup>580</sup> C-CM Jur., ¶ 56(c); Resolution No. 0037, MINAET, File No. 2594 (9 January 2012), Exh. **C-0268**. Infinito also refers to this as the 2012 DGM Resolution.

<sup>581</sup> C-Reply Merits, ¶ 590.

<sup>582</sup> C-Reply Merits, ¶ 592.

choice of the Government of Costa Rica.”<sup>583</sup> As a consequence, “the end result was the Government’s policy choice” which “was not preordained or required, and was inconsistent with the Government’s preceding conduct.”<sup>584</sup>

385. More specifically, the Claimant makes the following submissions with respect to the 2011 Administrative Chamber Decision:

- a. Before the 2010 TCA Decision, there was never any suggestion that the 2002 Moratorium applied to the Project. Hence, its application in the 2011 Administrative Chamber Decision breached the Claimant’s legitimate expectations that the Crucitas Project would proceed in conformity with the Mining Code and that the Government would act consistently, transparently and in accordance with its own law correctly.<sup>585</sup>
- b. Costa Rica’s argument that it was evident that the 2002 Moratorium applied since 2004 relies on hindsight and is not credible considering the Government’s conduct between 2004 and 2010.<sup>586</sup>
- c. Had the 2002 Moratorium applied to the Crucitas Project in 2002, it would have violated Costa Rica’s FET obligation, as it would have eviscerated the legal framework upon which Infinito was induced to invest. The Administrative Chamber’s application of the 2002 Moratorium nine years later is no less a breach.<sup>587</sup>
- d. The 2011 Administrative Chamber Decision applied the 2002 Moratorium to the Crucitas Project even though that Moratorium had been repealed by the Government in March 2008. The application of the 2002 Moratorium to the Project served no rational purpose and was thus arbitrary and in breach of the FET standard.<sup>588</sup>
- e. The 2011 Administrative Chamber Decision also breaches FET for failing to treat Infinito consistently and in a predictable manner. The Administrative Chamber applied the 2002 Moratorium years after Infinito made a substantial investment and contradicted various decisions of the Constitutional Chamber and specific commitments of other arms of the State.<sup>589</sup>

386. Following the 2011 Administrative Chamber Decision, the Claimant alleges that Costa Rica’s FET breach culminated through the combined effect of such Decision, the 2011 Legislative Mining Ban, the 2012 MINAET Resolution, the 2013 Constitutional Chamber

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<sup>583</sup> C-Reply Merits, ¶ 593.

<sup>584</sup> C-Reply Merits, ¶ 593.

<sup>585</sup> C-Reply Merits, ¶ 594.

<sup>586</sup> C-Reply Merits, ¶ 595.

<sup>587</sup> C-Reply Merits, ¶ 596.

<sup>588</sup> C-Mem. Merits, ¶ 335.

<sup>589</sup> C-Reply Merits, ¶ 597.

Decision, and the Chinchilla Government's inaction.<sup>590</sup> Costa Rica simply "wash[ed] its hands" of the Crucitas Project.<sup>591</sup> In this context, Infinito submits that Article IV of the BIT allows the Tribunal to import the standard found in the Costa Rica-France BIT that requires the State to do "what is necessary" to protect Infinito's investments. However, Costa Rica did nothing to address the unfair manner in which Infinito was treated.<sup>592</sup>

387. With respect to the 2011 Legislative Mining Ban, the Claimant emphasizes that, contrary to previous moratoria, the Ban was permanent, it cancelled all pending proceedings (rather than suspending them), and prohibited the renewal or extension of all exploitation concessions in perpetuity.<sup>593</sup> The Claimant characterizes the 2011 Legislative Mining Ban as an "unprecedented change in the applicable legal framework" that violated its legitimate expectations.<sup>594</sup> It also submits that the choice to change the regime previously enshrined in the Mining Code by prohibiting the grant of any further exploitation concessions was arbitrary, capricious, and lacked transparency.<sup>595</sup>
388. The Claimant further contends that there was no rational purpose for applying the 2011 Legislative Mining Ban to the Crucitas Project. There is no evidence, so says the Claimant, that the Crucitas Project threatened the environment or biodiversity. To the contrary, the Project had obtained all environmental permits and was found to be environmentally sound by the Constitutional Chamber.<sup>596</sup>
389. As to the 2012 MINAET Resolution, the Claimant asserts that it went beyond what was ordered by the Administrative Chamber and cancelled all of Industrias Infinito's pre-existing mining rights, striking them from the Mining Registry. The Claimant speculates that "[t]his was likely done pursuant to the terms of the 2011 [L]egislative [M]ining [B]an, which unlike prior moratoria, required that all administrative processes under the Mining Code without a valid exploitation concession be archived."<sup>597</sup> The Claimant also contends that this cancellation served no rational purpose and was thus arbitrary.<sup>598</sup>
390. Finally, the Claimant submits that Costa Rica did transform the legal and business environment of the investment.<sup>599</sup> When Infinito purchased Industrias Infinito in 2000, it relied on the Government's support for mining investment and on the Mining Code.<sup>600</sup> Starting with the 2002 Moratorium, Costa Rica eviscerated the legal framework under

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<sup>590</sup> C-Reply Merits, ¶ 598.

<sup>591</sup> C-Reply Merits, ¶ 598.

<sup>592</sup> C-Reply Merits, ¶¶ 598, 600, fn. 1082.

<sup>593</sup> Tr. Merits Day 1 (ENG), 45:20-46:4 (Mr. Terry).

<sup>594</sup> C-Reply Merits, ¶ 599.

<sup>595</sup> C-Reply Merits, ¶ 601.

<sup>596</sup> C-Reply Merits, ¶ 604.

<sup>597</sup> C-Reply Merits, ¶ 600.

<sup>598</sup> C-Mem. Merits, ¶ 336.

<sup>599</sup> C-Reply Merits, ¶¶ 607-610.

<sup>600</sup> C-Reply Merits, ¶ 607.



the Mining Code that formed the basis of Infinito's investment, through changes to laws and judicial decisions. In 2011, the Administrative Chamber annulled the resolutions granting Infinito's key permits and approvals on novel grounds.<sup>601</sup>

391. Infinito, so it says, was then prevented from remedying any of the defects identified by the Administrative Chamber by the operation of the 2011 Legislative Mining Ban. The Claimant emphasizes that "[i]t is impossible to see these changes as anything other than a complete repudiation of the statutory scheme underlying Infinito's investment that made it impossible for the Crucitas [P]roject to proceed."<sup>602</sup>
392. The Claimant further asserts that Costa Rica's unfair and inequitable treatment towards its investments has not stopped with the measures challenged in this arbitration.<sup>603</sup> It recalls that, in 2015, the TCA ordered Industrias Infinito, SINAC and the Government to pay to return the Crucitas site to its pre-project state.<sup>604</sup> This decision, which was contrary to the Constitutional Chamber's conclusion that Industrias Infinito's activities posed no environmental risk, was overturned by the Administrative Chamber and remitted back to the TCA in December 2017.<sup>605</sup>
393. The Claimant stresses that, two weeks before the filing of the Reply, Costa Rica re-initiated this dormant proceeding.<sup>606</sup> For the Claimant, "[t]he continuation of this proceeding continues Costa Rica's breach of the fair and equitable standard, and any damages and costs (including defence costs) associated with this proceeding are further damages to Infinito resulting from that breach."<sup>607</sup> Indeed, a reasonable court could not hold Industrias Infinito liable to pay to return the site to its pre-project state, given that the site has been harmed by illegal mining and hurricane Otto in 2016.<sup>608</sup>
394. Accordingly, the Claimant requests "a declaration that Costa Rica is liable to indemnify Infinito for any amounts Infinito or [Industrias Infinito] are required to pay as a result of, or in connection with, this late-blooming proceeding."<sup>609</sup>

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<sup>601</sup> C-Reply Merits, ¶ 609.

<sup>602</sup> C-Reply Merits, ¶ 610.

<sup>603</sup> C-Reply Merits, ¶¶ 611-614.

<sup>604</sup> C-Reply Merits, ¶ 612.

<sup>605</sup> C-Reply Merits, ¶ 612.

<sup>606</sup> C-Reply Merits, ¶ 611.

<sup>607</sup> C-Reply Merits, ¶ 613.

<sup>608</sup> C-Reply Merits, ¶ 611.

<sup>609</sup> C-Reply Merits, ¶ 613.

**(ii) Costa Rica Denied Infinito Justice**

395. It is the Claimant's further submission that Costa Rica committed a denial of justice by failing to provide a legal system capable of protecting its investments. More specifically, it argues that Infinito was denied procedural and substantive justice.<sup>610</sup>
396. First, Infinito complains about a procedural denial of justice, which in its words "is caused by systemic issues with the operation of a justice system 'as a whole'," <sup>611</sup> that is "not by the 'aberrant decision by a lower official,' but rather from the lack of a 'reasonably available national mechanism to correct the challenged action,' when appellate proceedings are 'dysfunctional,' or because 'a failure of a judicial system [...] is not capable of being rectified by existing remedies'." <sup>612</sup>
397. For the Claimant, the elements of a procedural denial of justice are met here. The Costa Rican court system failed, because it resulted in two fundamentally inconsistent decisions from two different Chambers of the same Supreme Court.<sup>613</sup> The Administrative Chamber failed to respect the Constitutional Chamber's Decisions, which had *res judicata* and *erga omnes* effects, and Costa Rica's judicial system provided no mechanism to resolve this conflict.<sup>614</sup>
398. More particularly, the Claimant argues that the 2011 Administrative Chamber Decision is inconsistent with previous decisions of the Constitutional Chamber declaring that Industrias Infinito obtained the Concession in compliance with Costa Rican law:
- a. In 2002, the Constitutional Chamber held that the 2002 Moratorium did not apply to the Crucitas Project.<sup>615</sup>
  - b. In 2004, the Constitutional Chamber held that the Crucitas Project could proceed through the EIA approval process.<sup>616</sup>

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<sup>610</sup> C-Reply Merits, ¶¶ 615-616.

<sup>611</sup> C-CM Jur., ¶ 397.

<sup>612</sup> C-CM Jur., ¶ 397, citing *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 ("**Loewen**"), ¶ 153, Exh. **CL-0055**; J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), p. 100, Exh. **CL-0205**; *Jan de Nul Award*, ¶ 260, Exh. **RL-0091**; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 ("**Renée Rose Levy**") ¶ 424, Exh. **CL-0159**.

<sup>613</sup> C-Mem. Merits, ¶¶ 342-343.

<sup>614</sup> C-Mem. Merits, ¶ 344.

<sup>615</sup> C-Mem. Merits, ¶ 342, citing Supreme Court (Constitutional Chamber), Decision (20 August 2002), Exh. **C-0085**.

<sup>616</sup> C-Mem. Merits, ¶ 342, citing Supreme Court (Constitutional Chamber), Decision (24 November 2004), Exh. **C-0116**.

- c. In 2007, the Constitutional Chamber determined that it only required approval of the EIA in order for the Concession to be granted to Industrias Infinito.<sup>617</sup>
  - d. In 2010, the Constitutional Chamber upheld the Concession and the related approvals on the ground that the Project was constitutional and lawful.<sup>618</sup>
399. The Claimant argues that the emergence of such conflict between decisions of the Supreme Court was enabled by the creation of the TCA in 2008.<sup>619</sup> Prior to the TCA's creation, persons with diffuse interests could only challenge the constitutionality of administrative acts before the Constitutional Chamber. Thereafter, they could also proceed before administrative courts. The Claimant accepts that it was able to seek a declaration from the Constitutional Chamber that the 2010 TCA Decision was unconstitutional. However, when the Administrative Chamber upheld the 2010 TCA Decision, the Constitutional Chamber rejected that action as inadmissible.<sup>620</sup> At that stage, there was no mechanism to resolve the conflict between the Constitutional Chamber and the Administrative Chamber's confirmation of the 2010 TCA Decision.
400. Relying on *Dan Cake*, the Claimant asserts that "[t]he absence of any reasonably available further recourse against the Court order is such that, in the circumstances of this case, the breakdown must be treated as 'systemic'."<sup>621</sup>
401. Second, the Claimant contends that it was denied substantive justice because the Administrative Chamber incorrectly applied the 2002 Moratorium to the Crucitas Project.<sup>622</sup> For the Claimant, the Administrative Chamber incurred in a "gross and wrongful error" by applying the 2002 Moratorium to the Concession. Indeed, the 2011 Administrative Chamber Decision annulled the Concession despite the fact that (i) the Costa Rican Constitution prohibits the retroactive application of laws, (ii) the 2002 Moratorium expressly provided that it did not apply to any right acquired before its publication, (iii) the 2004 Constitutional Chamber Decision annulled the Concession on a relative (rather than an absolute) basis and "without prejudice to the findings of the Environmental Impact Study," and (iv) the Constitutional Chamber declared in several decisions that the Crucitas Project complied with Costa Rican law.<sup>623</sup>
402. The Claimant explains that any "inappropriate and egregious" misapplication of Costa Rican law amounts to a denial of justice.<sup>624</sup> It also submits that the retroactive

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<sup>617</sup> C-Mem. Merits, ¶ 342, citing Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas II, Exh. **C-0164**.

<sup>618</sup> C-Mem. Merits, ¶ 342, citing Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>619</sup> C-CM Jur., ¶ 402.

<sup>620</sup> C-Mem. Merits, ¶ 344.

<sup>621</sup> C-CM Jur., ¶ 398, citing *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 ("**Dan Cake**"), ¶ 154, Exh. **CL-0031**.

<sup>622</sup> C-CM Jur., ¶ 403; C-Reply Merits, ¶ 628.

<sup>623</sup> C-CM Jur., ¶¶ 408, 410.

<sup>624</sup> C-CM Jur., ¶ 408.

application of laws can constitute a denial of justice, particularly when the new law amounts to a repudiation of the pre-existing legal framework. Invoking *Bilcon*, the Claimant argues that “breaches of the international minimum standard might arise in some special circumstances — such as changes in a legal or policy framework that have retroactive effect, are not proceeded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor.”<sup>625</sup> In the same vein, the tribunal in *ATA* held that the retroactive application of Jordan’s arbitration law by local courts violated the State’s international obligations towards the investor.<sup>626</sup>

## **b. The Respondent’s Position**

403. The Respondent submits that there has been no breach of legitimate expectations (i), nor have Costa Rica’s actions otherwise breached FET (ii). It further contends that there has been no denial of justice (iii).

### **(i) There Was No Breach of Legitimate Expectations**

404. The Respondent argues that, even if legitimate expectations were protected by Article II(2)(a) of the BIT, Costa Rica has not breached any of the Claimant’s legitimate expectations. The Respondent’s argument is essentially that the Claimant’s expectations were neither legitimate nor reasonable (a);<sup>627</sup> and the challenged measures did not breach any of the Claimant’s expectations (b).<sup>628</sup>

#### **a. The Claimant’s Expectations Were Neither Legitimate Nor Reasonable**

405. The Respondent submits that neither the legal framework established by the Mining Code at the time of the Claimant’s investment nor the Government’s support for investment in the mining sector amount to specific assurances or promises to the investor that could constitute the basis for any legitimate expectation.<sup>629</sup> To the extent that the Claimant relies on statements by Government officials, these statements (i) were not directly addressed to the Claimant or to Industrias Infinito; (ii) were not specific; and (iii) did not relate to the Crucitas Mining Project.<sup>630</sup>
406. With respect to the Claimant’s alleged expectation that it would obtain an exploitation concession and be able to operate the Crucitas Project, the Respondent argues that

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<sup>625</sup> C-CM Jur., ¶ 405, citing *Clayton & Bilcon*, ¶ 572, Exh. **CL-0172**.

<sup>626</sup> C-CM Jur., ¶ 407, citing *ATA*, ¶¶ 125-126, 128, Exh. **CL-0016**.

<sup>627</sup> R-Rej. Merits, ¶ 527.

<sup>628</sup> R-Rej. Merits, ¶ 532.

<sup>629</sup> R-Rej. Merits, ¶ 547.

<sup>630</sup> R-Rej. Merits, ¶ 535.

the Claimant is misrepresenting the Mining Code.<sup>631</sup> First, an exploration permit holder is not automatically entitled to obtain an exploitation concession, as expressly confirmed by the TCA.<sup>632</sup> Second, Article 61 of the Mining Code does not provide an exhaustive list of the grounds to cancel or invalid a concession.<sup>633</sup> Third, relying on the Constitutional Chamber of the Supreme Court's jurisprudence and on Dr. León's expert report, the Respondent stresses that the approval of the EIA is a pre-condition for obtaining an exploitation concession since 1993.<sup>634</sup>

407. The Respondent further denies that the Claimant or any investor "could have held a legitimate expectation that Costa Rica's environmental regulations and policies would remain static."<sup>635</sup> Relying on *Micula*, the Respondent submits that absent a stabilization clause or other specific assurance, an investor can have no legitimate expectation that the legal framework will not be modified after the establishment of the investment.<sup>636</sup> Indeed, even before the Claimant made its investment, the Costa Rican environmental legal framework was evolving.<sup>637</sup>
408. The Respondent disputes that Costa Rica's conduct bolstered the Claimant's expectation to carry out the Crucitas Project. Infinito "could and should have been aware that in a rule of law State such as Costa Rica, permits and concession licenses granted by the executive branch must be in accordance with the law and are not shielded or immune from legal challenge from third parties."<sup>638</sup>
409. According to the Respondent, Costa Rica has never stated or suggested that the 2002 Moratorium would not apply to the Project. First, the Claimant's argument that Minister of the Environment Rodríguez represented in 2002 that the 2002 Moratorium would not apply to the Crucitas Project is not supported by any evidence. In any event, the Minister could not have made any statement at such time with respect to the 2008 Concession.<sup>639</sup> Second, the *amparo* requests filed before the Constitutional Chamber did not involve the Claimant but unrelated companies and the decision did not "verify, analyse or validate the process by which Industrias Infinito obtained the [2002] concession or the legality thereof."<sup>640</sup> The Respondent further denies that the 2010 TCA Decision applied the 2002 Moratorium retroactively to the Concession, since the

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<sup>631</sup> R-Rej. Merits, ¶ 538.

<sup>632</sup> R-Rej. Merits, ¶ 538.

<sup>633</sup> R-Rej. Merits, ¶ 539.

<sup>634</sup> R-Rej. Merits, ¶¶ 541-543, citing RER-León 1, ¶¶ 141-143, 182; Decree No. 29300-MINAE (March 2001), Regulation to the Mining Code, Article 9, Exh. **C-0059**; Supreme Court (Constitutional Chamber), Decision (24 November 2004), pp. 24-25, Exh. **C-0116**.

<sup>635</sup> R-Rej. Merits, ¶ 536.

<sup>636</sup> R-Rej. Merits, ¶ 545, citing *Micula*, ¶ 666, Exh. **CL-0060**.

<sup>637</sup> R-Rej. Merits, ¶¶ 536-537, citing RER-León 2, ¶ 69, Table 3; RER-Ubico 1, ¶ 67.

<sup>638</sup> R-Rej. Merits, ¶ 548.

<sup>639</sup> R-Rej. Merits, ¶ 549.

<sup>640</sup> R-Rej. Merits, ¶¶ 550-551, citing RER-León 1, ¶ 113.

Claimant had no vested right following the annulment *ab initio* of the 2002 Concession.<sup>641</sup>

410. Further, the Respondent denies that the Claimant's alleged expectations would have been bolstered by the Government's continued acts to advance the Crucitas Project even when the Project encountered hurdles. The Respondent argues that "the Executive never represented to the Claimant – nor is the Claimant alleging that it did – that (i) the mining concession was exempt from the law or from judicial scrutiny, and (ii) that the judiciary would confirm the legality or rubber stamp the measures adopted by the Executive, including the 2008 Concession."<sup>642</sup>
411. The Respondent contends that the Claimant cannot rely on the Constitutional Chamber's judgments from 2007 and 2010 as a basis to its expectation that the 2008 Concession was valid. The Constitutional Chamber declared in its decisions that the Administrative Chamber was the only competent court to rule on the legality of administrative acts such as the 2008 Concession. Accordingly, the Respondent concludes that "there is no court judgment or other pronouncement from any Costa Rican Court that the Claimant can invoke that would have given rise to a legitimate expectation."<sup>643</sup>
412. Finally, the Respondent asserts that the Claimant's reliance on the Costa Rican legal concepts of *confianza legítima* and *impulso de oficio* is not material in the present case. The first principle requires the applicant to have acted in good faith, which is not the case here since the Claimant misled the Costa Rican administration to obtain the 2008 Concession. In turn, the *impulso de oficio* concept is not a guarantee or insurance policy. The Claimant could not expect under this concept that the Executive's decisions would be free from any legal defect.<sup>644</sup>
413. The Respondent further argues that the Claimant's expectations were not objectively reasonable, for the following reasons:
- a. First, the 2008 Concession was clearly not valid.<sup>645</sup> As a result, the Claimant "could not reasonably expect, either at the time that it made its investment or at any other time, that the Concession and related permits would be immune from judicial review and not subject to annulment."<sup>646</sup>
  - b. Second, the Claimant could not reasonably have expected that the 2008 Concession would be exempt from defects and judicial review, since it had already

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<sup>641</sup> R-Rej. Merits, ¶ 552.

<sup>642</sup> R-Rej. Merits, ¶ 555.

<sup>643</sup> R-Rej. Merits, ¶ 556.

<sup>644</sup> R-Rej. Merits, ¶¶ 560-561.

<sup>645</sup> R-Rej. Merits, ¶ 563.

<sup>646</sup> R-Rej. Merits, ¶ 569.

had a similar experience with its 2002 Concession, which the Constitutional Chamber annulled in 2004.<sup>647</sup>

- c. Third, the Claimant could not reasonably have expected the Executive to ignore the rulings of the Costa Rican courts; it could only have expected that the Executive would defend the legality of Industrias Infinito's rights in the administrative proceedings. The Claimant does not dispute that the Executive did so.<sup>648</sup>
- d. Fourth, the Respondent recalls that, even during the Arias' administration, there was fierce opposition to open-pit mining and legal challenges to Industrias Infinito's Concession.<sup>649</sup>
- e. Finally, the Respondent stresses that the Claimant misled the Costa Rican administration and thus cannot invoke the *confianza legítima* principle.<sup>650</sup>

*b. The Respondent's Measures Did Not Breach Any Legitimate Expectation*

- 414. The Respondent submits that none of the four measures challenged by the Claimant, analyzed either individually or together, violated the Claimant's legitimate expectations.
- 415. First, the Respondent submits that the 2011 Administrative Chamber Decision did not frustrate the Claimant's expectation that the Crucitas Project would be allowed to proceed through the administrative process set out under the Mining Code.<sup>651</sup> The Respondent further emphasizes that "[i]f the Costa Rican courts annul a permit or concession because it contradicts Costa Rican law, as they did in this case, this cannot be considered as an inconsistent treatment in breach of the investor's legitimate expectations" and that "[t]his merely reflects the proper operation of an independent judiciary."<sup>652</sup>
- 416. Second, the Respondent claims that a measure can only breach an investor's legitimate expectations, if it has transformed the legal and business environment existing at the time of the investment.<sup>653</sup> According to the Respondent, none of the challenged measures had the effect of transforming the legal and business environment in which the investment was made:
  - a. The 2011 Administrative Chamber Decision only confirmed the 2010 TCA Decision,<sup>654</sup> and did not reinterpret the 2004 Constitutional Chamber Decision, as

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<sup>647</sup> R-Rej. Merits, ¶ 565.

<sup>648</sup> R-Rej. Merits, ¶ 566.

<sup>649</sup> R-Rej. Merits, ¶ 567.

<sup>650</sup> R-Rej. Merits, ¶ 568.

<sup>651</sup> R-Rej. Merits, ¶ 572.

<sup>652</sup> R-Rej. Merits, ¶ 579.

<sup>653</sup> R-CM Merits, ¶ 395; R-Rej. Merits, ¶ 591.

<sup>654</sup> R-Rej. Merits, ¶ 593.

the Claimant asserts. The Constitutional Chamber annulled the 2002 Concession because it was unconstitutional, but did not rule on the legality of the Concession, since issues of compliance with administrative law fall outside its jurisdiction.<sup>655</sup>

- b. The 2011 Legislative Mining Ban had no impact on the Claimant, since the 2010 Executive Moratoria already prevented Industrias Infinito from acquiring new mining rights.<sup>656</sup>
- c. The 2012 MINAET Resolution simply implemented the orders of the 2010 TCA Decision.<sup>657</sup>
- d. The 2013 Constitutional Chamber Decision simply rejected Industrias Infinito's constitutionality challenge on procedural grounds.<sup>658</sup>

**(ii) The Challenged Measures are not Arbitrary, Unreasonable, or Otherwise Contrary to FET**

- 417. According to the Respondent, none of the challenged measures have otherwise breached Article II(2)(a) of the BIT.
- 418. Starting with the 2011 Administrative Chamber Decision, the Respondent argues that it did not treat the Claimant in an arbitrary, unreasonable, grossly unfair, unjust, discriminatory or disproportionate manner.<sup>659</sup> The TCA applied the 2002 Moratorium to Industrias Infinito on the basis of an in-depth, reasonable and fair analysis and objective assessment of all the evidence relating to the legality of the Concession.<sup>660</sup> More specifically, the TCA found that Industrias Infinito lost any right related to the Crucitas Project as a result of the 2004 Constitutional Chamber Decision which annulled the 2002 Concession, and thus that it had no “acquired right” within the meaning of the grandfathering provision provided in the 2002 Moratorium.<sup>661</sup> The Respondent further contends that the Claimant “could and should have expected that the 2002 Moratorium would apply the moment that the 2002 concession was annulled.”<sup>662</sup> For the Respondent, the fact that the Claimant sought to overturn the 2004 Constitutional Chamber Decision and requested a confirmation that the annulment of the 2002 Concession was only relative shows that it was aware of the impact of the 2004 Constitutional Chamber Decision on its rights.<sup>663</sup>

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<sup>655</sup> R-Rej. Merits, ¶ 594.

<sup>656</sup> R-Rej. Merits, ¶ 595.

<sup>657</sup> R-Rej. Merits, ¶ 596.

<sup>658</sup> R-Rej. Merits, ¶ 597.

<sup>659</sup> R-Rej. Merits, ¶ 574.

<sup>660</sup> R-Rej. Merits, ¶ 574.

<sup>661</sup> R-Rej. Merits, ¶ 573. *See also, id.*, ¶ 182.

<sup>662</sup> R-Rej. Merits, ¶ 575.

<sup>663</sup> R-Rej. Merits, ¶ 575.



419. Further, the 2011 Administrative Chamber Decision did not treat the Claimant's investments in an inconsistent and unpredictable manner, as this judgment is consistent with the earlier decisions of the Constitutional Chamber dealing with the Concession.<sup>664</sup> Indeed, the Constitutional Chamber stated that it had no jurisdiction over the legality of a mining project and made no ruling on the issues brought before the administrative courts.<sup>665</sup>
420. As to the 2011 Legislative Mining Ban (which the Respondent refers to as the "Legislative Moratorium"), it did not specifically target the Crucitas Project, but reflected the Government's intent to prohibit an activity it deemed harmful for the environment.<sup>666</sup> In any event, it did not have any impact on the Claimant because the 2002 Moratorium and the 2010 Executive Moratoria had already prohibited open-pit mining from 2002 to 2010.<sup>667</sup>
421. The Respondent also challenges that the 2011 Legislative Mining Ban prevented Industrias Infinito's from obtaining a new concession after the 2008 Concession was annulled, because the company had already lost its right to obtain a concession when the Ban entered into force.<sup>668</sup> Indeed, Industrias Infinito's exploration permit and the purported "pre-existing mining rights" relating to it expired in September 1999. The Claimant is thus incorrect when it argues that, because its mining rights reverted to the status prior to the annulment of the 2008 Concession, it could have requested a new concession to exploit the Crucitas mine absent the 2011 Legislative Mining Ban. Industrias Infinito no longer held any valid or pre-existing mining rights when the 2008 Concession was annulled in November 2010.<sup>669</sup>
422. Contrary to the Claimant's contentions, the application of the 2011 Legislative Mining Ban and its implementation through the 2012 MINAET Resolution were premised on a rational purpose. The challenges filed against Industrias Infinito's concessions as well as the bans on open-pit mining were all motivated by environmental concerns. In any event, the Respondent submits that "Costa Rica is not required to prove in this proceeding that the Claimant's project would have caused harm; what Costa Rica has to demonstrate is that Costa Rican Courts applied the laws and regulations correctly."<sup>670</sup>
423. The Respondent also advances that the 2012 MINAET Resolution was not contrary to FET. The Claimant could not expect the MINAET to ignore the 2010 TCA Decision and 2011 Administrative Chamber Decision by refusing to cancel the Concession and extinguish the related mining rights. The executive branch made its best efforts within

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<sup>664</sup> R-Rej. Merits, ¶ 578.

<sup>665</sup> R-Rej. Merits, ¶ 578.

<sup>666</sup> R-Rej. Merits, ¶ 582.

<sup>667</sup> R-Rej. Merits, ¶ 581.

<sup>668</sup> R-Rej. Merits, ¶ 584, citing C-Reply Merits, ¶ 601.

<sup>669</sup> R-Rej. Merits, ¶ 584.

<sup>670</sup> R-Rej. Merits, ¶ 587.

the limits of its powers, namely it actively supported Industrias Infinito through the legal proceedings before the Costa Rican courts.<sup>671</sup>

424. With regard to the 2013 Constitutional Chamber Decision, the Respondent argues that the Claimant “has not even attempted to explain how [this decision] allegedly breached the fair and equitable treatment standard” and that “[n]either the Claimant nor its Costa Rican legal experts have claimed that the 2013 Constitutional Chamber [Decision] was wrong as a matter of Costa Rican law, let alone that it constitutes denial of justice under international law, or even that it is grossly or manifestly arbitrary or unfair.”<sup>672</sup> The Claimant “cannot allege any procedural impropriety, legal unreasonableness or arbitrariness on the part of the Constitutional Chamber” when it issued that decision. In any event, the premise of the claim against this judgment – that the 2010 TCA Decision contradicted earlier findings by the Constitutional Chamber – is flawed, because there was no such contradiction.<sup>673</sup>
425. The Respondent submits that, even taken together, the challenged measures did not breach Article II(2)(a) of the BIT. For Costa Rica, the Claimant has failed to argue or prove a creeping violation of the FET standard through a composite breach.<sup>674</sup> In particular, it has failed to show that “the relevant measures constitute a pattern or system seeking an intended purpose.”<sup>675</sup>
426. Finally, with respect to the fifth measure challenged by the Claimant, the Respondent denies that the reopening of the TCA Damages Proceeding amounts to a breach of FET. As there is to date no judicial measure requiring Industrias Infinito to pay any compensation, the Claimant’s claim is premature and manifestly without legal merit.<sup>676</sup> The Respondent notes that the Claimant’s new claim arises from a remand notice related to the TCA Damages Proceeding. However, the Claimant has not alleged that it has suffered loss or damage as a result of the remand notice. The Respondent argues that “[t]he Claimant is not arguing that the mere initiation of the TCA Damages Proceeding constitutes an internationally wrongful act;” “[i]t is attempting to bring a claim for potential losses even though such losses may never arise.”<sup>677</sup> In the Respondent’s submission, “[t]he Tribunal cannot determine at present whether a future judicial decision by a Costa Rican court will constitute a breach Article II(2)(a) of the BIT.”<sup>678</sup>
427. The Respondent further denies that the present case can be compared to *Chevron II*, in which the tribunal granted the investor declaratory relief similar to the one sought

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<sup>671</sup> R-Rej. Merits, ¶¶ 583, 586.

<sup>672</sup> R-Rej. Merits, ¶ 588.

<sup>673</sup> R-Rej. Merits, ¶ 588.

<sup>674</sup> R-Rej. Merits, ¶ 590.

<sup>675</sup> R-Rej. Merits, ¶ 590.

<sup>676</sup> R-Rej. Merits, ¶¶ 598-601.

<sup>677</sup> R-Rej. Merits, ¶ 599.

<sup>678</sup> R-Rej. Merits, ¶ 599.

here. This is because in *Chevron II*, the relief related to a judicial decision for damages that had already been issued against it.<sup>679</sup>

**(iii) There Has Been No Denial of Justice**

428. The Respondent asserts that it has not denied the Claimant justice. The threshold for determining a denial of justice is high and goes far beyond the mere misapplication of domestic law.<sup>680</sup> Relying on *Azinian* and *Pantechniki*, the Respondent submits that “[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way”<sup>681</sup> and that “the error must be of a kind which no ‘competent judge could reasonably have made.’”<sup>682</sup>
429. The Respondent stresses that mere allegations that a judicial decision is improper are not enough to constitute a breach of denial of justice, unless it is also shown that the decision was “clearly inappropriate or ignominious.”<sup>683</sup> To demonstrate that Costa Rica denied it justice, the Claimant must establish that “the judicial measures that it challenges constitute a systemic failure of Costa Rica’s domestic justice system as a whole, a manifest injustice or gross unfairness, a flagrant and inexcusable violation in which bad faith, not judicial error, seems to be the heart of the matter and that there has been a failure of the judicial system as a whole.”<sup>684</sup>
430. According to the Respondent, the Claimant has failed to meet this test. There has been neither a procedural (i) nor a substantive denial of justice (ii).

**a. There Has Been No Procedural Denial of Justice**

431. The Respondent submits that there has been no procedural denial of justice. More specifically, it denies that the 2011 Administrative Chamber Decision is inconsistent with the decisions issued by the Constitutional Chamber in 2002, 2004, 2007 and 2010, or that the Costa Rican judicial system failed to resolve that alleged inconsistency.
- a. First, there is no inconsistency with the Constitutional Chamber’s decisions in April and August of 2010, because the Constitutional Chamber did not rule on the legality of the Crucitas Project; it limited itself to ruling on its constitutionality. Indeed, “the Constitutional Chamber itself acknowledged in its decisions of April

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<sup>679</sup> R-Rej. Merits, ¶ 600, citing *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (“***Chevron Second Partial Award Track II***”), ¶ 9.36, Exh. **CL-0268**.

<sup>680</sup> R-CM Merits, ¶ 462.

<sup>681</sup> R-CM Merits, ¶ 462, citing *Azinian*, ¶¶ 102-103, Exh. **CL-0017**.

<sup>682</sup> R-CM Merits, ¶ 463 citing *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 (“***Pantechniki***”), ¶ 94, Exh. **RL-0027**.

<sup>683</sup> R-CM Merits, ¶ 464, citing *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 (“***Iberdrola***”), ¶ 492, Exh. **RL-0024**.

<sup>684</sup> R-Rej. Merits, ¶ 603.

and August 2010 [that] it did not have competence to rule definitively on the legality of the [P]roject, since this was a matter which would fall within the competence of the Administrative branch of the judiciary.”<sup>685</sup> As a result, the Claimant’s arguments that the 2011 Administrative Chamber Decision breached the *res judicata* principle and rendered a decision that was inconsistent with the 2010 Constitutional Chamber decisions is baseless.<sup>686</sup> Industrias Infinito had already raised these arguments when it challenged the 2010 TCA Decision, and the Administrative Chamber expressly rejected them in its 2011 Decision.<sup>687</sup>

- b. Second, there is no inconsistency with the 2004 Constitutional Chamber Decision, because the 2011 Administrative Chamber Decision assessed the legality of the 2008 Concession, while the 2004 Constitutional Chamber Decision annulled the 2002 Concession.<sup>688</sup>
- c. Third, there is no inconsistency with the 2002 Constitutional Chamber Decision, because the Constitutional Chamber did not pronounce on the legality of the 2002 Concession or on the applicability of the 2002 Moratorium.<sup>689</sup>

432. According to the Respondent, “[i]n making its allegations of inconsistency, the Claimant betrays a fundamental misunderstanding of the Costa Rican court system.”<sup>690</sup> The Respondent explains that each Chamber of Costa Rica’s Supreme Court has its own area of competence. In the cases at issue, both the Administrative Chamber and the Constitutional Chamber addressed the issue of their competence and concluded that there was no conflict between their rulings in relation to the Crucitas Project because “[e]ach Chamber ruled on the basis of its separate jurisdiction, and explicitly recognized and respected the other Chamber’s jurisdiction.”<sup>691</sup> Further, the Respondent stresses that the Claimant raised these arguments before the Costa Rican courts, which rejected them.<sup>692</sup>

433. Finally, the Respondent denies that Costa Rica should be liable because the Claimant’s challenge before the Constitutional Chamber was rendered moot when the Administrative Chamber issued its decision. The Respondent argues that “[b]y initiating its constitutional review petition only 19 days before the 2011 Administrative Chamber

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<sup>685</sup> R-CM Merits, ¶ 467; R-Rej. Merits, ¶ 605.

<sup>686</sup> R-Rej. Merits, ¶ 605.

<sup>687</sup> R-Rej. Merits, ¶ 606.

<sup>688</sup> R-CM Merits, ¶ 468.

<sup>689</sup> R-CM Merits, ¶¶ 469-470.

<sup>690</sup> R-CM Merits, ¶ 470.

<sup>691</sup> R-CM Merits, ¶ 470, citing the Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**, and the Supreme Court (Administrative Chamber), Decision (30 November 2011), Exh. **C-0261**.

<sup>692</sup> R-CM Merits, ¶ 470.

[Decision] was rendered, Industrias Infinito itself made it impossible for the Constitutional Chamber from addressing the petition on the merits.”<sup>693</sup>

*b. There Has Been No Substantive Denial of Justice*

434. The Respondent further submits that there has been no substantive denial of justice. In particular, the 2011 Administrative Chamber Decision did not retroactively apply the 2002 Moratorium to the Crucitas Project, as the Claimant maintains.<sup>694</sup> The Supreme Court merely upheld the 2010 TCA Decision, which found that the 2008 Concession had been granted in breach of the 2002 Moratorium.<sup>695</sup> The Administrative Chamber did not apply the 2002 Moratorium retroactively, since it was in effect when the 2008 Concession was granted.<sup>696</sup>
435. The Respondent further contends that the Claimant has not shown any illegitimate conduct on the part of the Costa Rican courts that would amount to a denial of justice.<sup>697</sup> In particular, the Claimant has made no allegations of corruption, improper influence or bias by any of the judges that rendered these decisions.<sup>698</sup> Accordingly, “the Claimant’s claims amount to a mere disagreement by the Claimant with Costa Rican domestic court decisions, and their application of domestic law to the facts.”<sup>699</sup> Relying on the Tribunal’s finding that “it is not its role to act as a court of appeal with respect to decisions of domestic courts,”<sup>700</sup> the Respondent concludes that the Claimant’s arguments do not meet the high threshold to establish the existence of a denial of justice.<sup>701</sup>

**c. Analysis**

436. The Tribunal will assess whether the Respondent denied Infinito justice (i) or otherwise treated Infinito unfairly and inequitably, including by deceiving legitimate expectations, and by treatment that was arbitrary or inconsistent (ii).

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<sup>693</sup> R-CM Merits, ¶ 471.

<sup>694</sup> R-CM Merits, ¶ 473; R-Rej. Merits, ¶ 608.

<sup>695</sup> R-CM Merits, ¶ 473.

<sup>696</sup> R-Rej. Merits, ¶ 608.

<sup>697</sup> R-CM Merits, ¶ 475.

<sup>698</sup> R-CM Merits, ¶ 475.

<sup>699</sup> R-CM Merits, ¶ 474.

<sup>700</sup> Decision on Jurisdiction, ¶ 217.

<sup>701</sup> R-CM Merits, ¶ 474.

(i) **Did the Respondent Deny Justice to the Claimant?**

a. *The Standard for Denial of Justice*

437. While the BIT does not expressly refer to the concept of denial of justice, the Parties agree – and rightly so – that it is comprised in the FET standard provided in Article II(2)(a) of the BIT.<sup>702</sup> The authorities are unanimous in that a denial of justice amounts to a breach of fair and equitable treatment.<sup>703</sup>

438. Different authors endorse varying definitions of denial of justice. Some submit that a denial of justice can be procedural (when it relates to lack of access to justice or breaches of due process) or substantive (when it involves a manifestly unfair judgment or the malicious misapplication of the law).<sup>704</sup> For Brownlie,<sup>705</sup> for instance, the best guide to defining the concept of denial of justice is the Harvard Research Draft, which provides:<sup>706</sup>

Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

439. For others, like Paulsson, “[d]enial of justice is always procedural,” because its objective is to ensure that foreigners are afforded “procedural fairness” as measured by an international standard.<sup>707</sup> Accordingly, a host State commits a denial of justice if it “administers justice to aliens in a fundamentally unfair manner.”<sup>708</sup> Complaints against

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<sup>702</sup> C-Mem. Merits, ¶ 301; C-Reply Merits, ¶ 615; R-CM Merits, ¶ 401; R-Rej. Merits, ¶ 510.

<sup>703</sup> See, for instance, *Vivendi II*, ¶ 7.4.11, Exh. **CL-0029**; *Jan de Nul Award*, ¶ 188, Exh. **RL-0091**; *Frontier Petroleum*, ¶ 293, Exh. **CL-0039**; *Oostergetel*, ¶ 272, Exh. **RL-0017**. See also R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 142.

<sup>704</sup> See, e.g., R. Jennings and A. Watts, *Oppenheim’s International Law* (9<sup>th</sup> ed., Oxford University Press, 1992), Vol. I, pp. 543-544 cited in C. Greenwood, *State Responsibility for the Decisions of National Courts*, in M. Fitzmaurice and D. Sarooshi (eds.) *Issues of State Responsibility before International Judicial Institutions*, (Oxford, 2004), p. 61, Exh. **CAN-0011** (“If the courts or other appropriate tribunals of a State refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice, or if there occurs an obvious or malicious act of misapplication of the law by the courts which is injurious enough to a foreign State or its nationals, there will be a ‘denial of justice’ for which the State is responsible[.]”)

<sup>705</sup> I. Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed., Oxford: Clarendon Press, 1998), p. 532.

<sup>706</sup> Harvard Research in International Law, *The Law of Responsibility of the States for Damage Done in their Territory to the Person or Property of Foreigners*, 23 AJIL 131 (Spec. Suppl. 1929), p. 173.

<sup>707</sup> J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), p. 98, Exh. **CL-0205**.

<sup>708</sup> J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), pp. 4, 62, Exh. **CL-0205**.

the substance of a decision may amount to other breaches of the treaty, but are not denials of justice.<sup>709</sup>

440. For Douglas, the better view lies somewhere in between: while he agrees that denials of justice are essentially procedural, he argues that a theory of procedural fairness must be linked to substantive rights and outcomes, as the purpose of the judicial system is to decide cases and generate good outcomes.<sup>710</sup>

441. A review of investment arbitration decisions shows similar fluctuations. Some tribunals have considered that a denial of justice involves a failure of procedure and have accepted that a manifestly unfair outcome may be indicative of a procedural failure. For instance, the *Loewen* tribunal defined denial of justice as a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.”<sup>711</sup> Citing Fitzmaurice and de Visscher, *Pantechniki* articulated this point further:

The general rule is that ‘mere error in the interpretation of the national law does not per se involve responsibility.’ Wrongful application of the law may nonetheless provide ‘elements of proof of a denial of justice.’ But that requires an extreme test: the error must be of a kind which no ‘competent judge could reasonably have made.’ Such a finding would mean that the state had not provided even a minimally adequate justice system.<sup>712</sup>

442. The *Liman* tribunal endorsed a similar view:

[T]he Tribunal concludes that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.<sup>713</sup>

443. Other tribunals have favored a broader view in which a denial of justice may also be caused by the substance of the judgment, along the lines of the Harvard Research Draft quoted above. For instance, the tribunal in *Azinian* held that “[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way” and noted that, in addition, “[t]here is a fourth type of denial of justice, namely the clear and malicious

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<sup>709</sup> J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), p. 98, Exh. **CL-0205**.

<sup>710</sup> Z. Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Reconstructed*, *International and Comparative Law Quarterly*, Vol. 63, No.4 (2014), pp. 4, 18, Exh. **RL-0109**.

<sup>711</sup> *Loewen*, ¶ 132, Exh. **CL-0055**.

<sup>712</sup> *Pantechniki*, ¶ 94, Exh. **RL-0027**, citing G. Fitzmaurice, *The Meaning of the Term ‘Denial of Justice,’* BYIL (1932) 93, p. 111, fn. 1, and p. 114; and C. de Visscher, *Le déni de justice en droit international* 34 *Recueil des cours* (1935) 370, p. 376.

<sup>713</sup> See also *Liman*, ¶ 279, Exh. **CL-0054**.

misapplication of the law.”<sup>714</sup> More recently, the tribunal in *Iberdrola* summed up the concept of denial of justice as follows:

[U]nder international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed.<sup>715</sup>

444. In these latter cases, the tribunals have insisted that the substantive unfairness of the decision must be egregious. For the *Azinian* tribunal, the evidence for the domestic court’s finding must be “so insubstantial, or so bereft of a basis in law” as to conclude that “the judgments were in effect arbitrary or malicious.”<sup>716</sup> The *Iberdrola* tribunal added that “denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided.”<sup>717</sup> For the *Mondev* tribunal, the applicable test was:

[W]hether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable.<sup>718</sup>

445. From the authorities cited above, the Tribunal concludes that a denial of justice occurs when there is a fundamental failure in the host’s State’s administration of justice. The following elements can lead to this conclusion (i) the State has denied the investor access to domestic courts; (ii) the courts have engaged in unwarranted delay; (iii) the courts have failed to provide those guarantees which are generally considered indispensable to the proper administration of justice (such as the independence and impartiality of judges, due process and the right to be heard); or (iv) the decision is manifestly arbitrary, unjust or idiosyncratic. The Tribunal thus concludes that a denial of justice may be procedural or substantive, and that in both situations the denial of justice is the product of a systemic failure of the host State’s judiciary taken as a whole.<sup>719</sup> The latter point explains that a claim for denial of justice presupposes the exhaustion of local remedies, a requirement that is met here as the complaint targets decisions of the highest courts.

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<sup>714</sup> *Azinian*, ¶¶ 102, 103, Exh. **CL-0017**.

<sup>715</sup> *Iberdrola*, ¶ 432, Exh. **RL-0024**.

<sup>716</sup> *Azinian*, ¶ 105, Exh. **CL-0017**.

<sup>717</sup> *Iberdrola*, ¶ 432, Exh. **RL-0024**.

<sup>718</sup> *Mondev*, ¶ 127, Exh. **CL-0062**.

<sup>719</sup> *Oostergetel*, ¶ 225, Exh. **RL-0017**; *Jan de Nul Award*, ¶ 209, Exh. **RL-0091**; *Corona*, ¶ 254, Exh. **CL-0130**.



*b. Did the Respondent Commit a Procedural Denial of Justice?*

446. As explained in Section V.D.3.b(ii)b *supra*, the Claimant submits that its denial of justice claim is “structural”: it is premised on the Costa Rican judicial system’s failure to provide a mechanism to solve contradictions between the various chambers of the Supreme Court on questions of constitutional *cosa juzgada*.<sup>720</sup> More precisely, the Claimant asserts that it has experienced a procedural denial of justice because (i) the Administrative Chamber failed to comply with the *res judicata* and *erga omnes* effects of prior decisions of the Constitutional Chamber, and (ii) the Costa Rican judicial system lacked a mechanism to resolve these inconsistent decisions.<sup>721</sup> This was confirmed when the Constitutional Chamber dismissed the Claimant’s action to declare the 2010 TCA Decision unconstitutional on admissibility grounds (through the 2013 Constitutional Chamber Decision).
447. The Respondent objects to the Claimant’s position on the ground that its premise is false. More specifically, Costa Rica contends that the 2011 Administrative Chamber Decision is consistent with the Constitutional Chamber’s decisions because the latter has never assessed the Concession’s *legality*, it has only assessed whether it complied with the relevant constitutional standards. The Respondent notes that Industrias Infinito raised the same arguments on *res judicata* before the TCA and the Administrative Chamber, both of which heard and dismissed them. As to the 2013 Constitutional Chamber Decision, the Respondent explains that “the extraordinary constitutional review petition [...] must relate to another ongoing proceeding because the Constitutional Chamber cannot enjoin a proceeding that has already been completed.”<sup>722</sup> According to the Respondent, “[b]y initiating its constitutional review petition only 19 days before the 2011 Administrative Chamber Judgment was rendered, Industrias Infinito itself made it impossible for the Constitutional Chamber [to] address[] the petition on the merits.”<sup>723</sup>

*(i) Is the 2011 Administrative Chamber Decision Inconsistent with Previous Decisions of the Constitutional Chamber?*

448. The Claimant argues that the 2011 Administrative Chamber Decision is inconsistent with previous decisions by the Constitutional Chamber where the latter allegedly declared that the Crucitas Project complied with Costa Rican law.<sup>724</sup>
449. The Tribunal understands that this is the factual premise for the Claimant’s procedural denial of justice claim. The Tribunal understands that the Claimant is not arguing that the 2011 Administrative Chamber Decision amounts to a procedural denial of justice because the decisions of the Administrative Chamber and the Constitutional Chamber were allegedly inconsistent; its argument is that there is no mechanism to resolve the

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<sup>720</sup> Tr. Merits Day 4 (ENG), 995:9-996:10; 1163:6-1164:19, 1165:8-21 (Ms. Seers).

<sup>721</sup> C-CM Jur., ¶ 392.

<sup>722</sup> R-CM Merits, ¶ 471.

<sup>723</sup> R-CM Merits, ¶ 471.

<sup>724</sup> C-Mem. Merits, ¶¶ 341-343.

inconsistency between decisions of these two Chambers of the Supreme Court, or more specifically, to ensure that the non-constitutional courts will recognize the *res judicata* and *erga omnes* effects of previous decisions of the Constitutional Chamber.<sup>725</sup> As the Claimant puts it, “Infinito has suffered a denial of justice because of an institutional failure rooted in the design of Costa Rica’s court system – the creation of separate arms of the judiciary with overlapping jurisdiction, each with diffuse rights of standing, without a mechanism for resolving the conflicting decisions of the Constitutional Chamber and the Administrative Chamber.”<sup>726</sup>

450. The Claimant directs its argument against the 2011 Administrative Chamber Decision, which upheld the 2010 TCA Decision. It contends that the Administrative Chamber failed to reverse certain findings made by the TCA which directly contradicted previous rulings of the Constitutional Chamber in the following decisions:
- a. The Constitutional Chamber’s Decision of 20 August 2002,<sup>727</sup> which the Claimant alleges held that the 2002 Moratorium did not apply to the Crucitas Project.<sup>728</sup>
  - b. The Constitutional Chamber’s Decision of 24 November 2004, which annulled the 2002 Concession “without prejudice to what the environmental impact assessment

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<sup>725</sup> Tr. Merits Day 4 (ENG), 1163:8-1165-21 (Ms. Seers):

“MS. SEERS: “[...] We’ve said from the very beginning [...] the denial of justice claim is structural. [...] By ‘structural,’ I mean [...] the failure of the Costa Rican judicial order [...] to provide a mechanism to resolve the failure by the non-Constitutional Courts to respect constitutional *cosa juzgada*. [...] It’s not about the failure to afford a due process. It’s not about the decisions themselves being arbitrary. We’re not saying that at all. What we are saying is that the Administrative Chamber refused to follow constitutional – TCA first and then the Administrative Chamber by refusing the cassation requests, refused to follow constitutional *cosa juzgada*. [...]”

PRESIDENT KAUFMANN-KOHLER: So, what you’re telling us is that the denial of justice claim is structural, which there is a lack of mechanism to resolve conflicting situations with conflicting decisions? But then is that what it is?

MS. SEERS: It is with one precision, if I may. Not any conflicting decision. Failure by the non-Constitutional Courts – in this case the Administrative Court – to follow constitutional *cosa juzgada*.

PRESIDENT KAUFMANN-KOHLER: And so the ‘*cosa juzgada*’ argument is part of your structural denial of justice claim.

MS. SEERS: That’s correct.”

<sup>726</sup> C-CM Jur., ¶ 398.

<sup>727</sup> Supreme Court (Constitutional Chamber), Decision (20 August 2002), Exh. **C-0085**.

<sup>728</sup> C-Mem. Merits, ¶ 342.

may determine.”<sup>729</sup> In the Claimant’s view, this decision held that the Crucitas Project could proceed through the EIA approval process.<sup>730</sup>

- c. The Constitutional Chamber’s Decision of 7 June 2007,<sup>731</sup> which according to the Claimant determined that it only required approval of the EIA for the Concession to be granted.<sup>732</sup>
  - d. The Constitutional Chamber’s Decision of 16 April 2010,<sup>733</sup> which upheld the Concession and the approvals relating thereto on the ground that the Project was constitutional and (according to the Claimant) lawful.<sup>734</sup>
451. Having carefully reviewed the 2010 TCA Decision and the 2011 Administrative Chamber Decision, the Tribunal does not find these decisions inconsistent with those of the Constitutional Chamber cited above. The Tribunal has also assessed the procedural conduct and reasoning of these courts, and concludes that they were based on the relevant provisions of Costa Rican law and are not objectionable from the point of view of international law.
452. Industrias Infinito raised the *res judicata* objection both with the TCA and the Administrative Chamber. Both courts denied that objection on the ground that the Constitutional Chamber had expressly declined its jurisdiction to entertain issues of legality. To reach this conclusion, the TCA, in a thirteen-page-long reasoning, started by noting that administrative and constitutional courts have different areas of competence under Costa Rican law. It explained that the *amparo* proceedings governed by Article 48 of the Costa Rican Constitution<sup>735</sup> and Article 29 of the Constitutional Jurisdiction Law<sup>736</sup> were only intended to ensure the protection of

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<sup>729</sup> Supreme Court (Constitutional Chamber), Decision (24 November 2004), Exh. **C-0116** (as translated into English by Respondent at R-Mem. Jur., ¶ 62).

<sup>730</sup> C-Mem. Merits, ¶ 342.

<sup>731</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas II, Exh. **C-0164**.

<sup>732</sup> C-Mem. Merits, ¶ 342.

<sup>733</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>734</sup> C-Mem. Merits, ¶ 342.

<sup>735</sup> Political Constitution of the Republic of Costa Rica, Article 48, Exh. **C-0013** (“Everyone has the right to habeas corpus to guarantee personal freedom and integrity, and to writs of amparo to maintain or restore the enjoyment of the other rights enshrined in this Constitution, as well as those of a fundamental character established in the international instruments [on] human rights, [applicable] to the Republic. Both writs shall be within the jurisdiction of the Chamber referred to in Article 10.”)

<sup>736</sup> Law on Constitutional Jurisdiction, Law No. 7135 (10 October 1989), Article 29, Exh. **C-0016** (“The writ of amparo guarantees the fundamental rights and freedoms referred to by this Law, except those protected by habeas corpus. The writ may proceed against any provision, agreement or decision and, in general, against any action, omission or simple material act not based on a valid administrative act of public officials and public bodies, which has violated, violates or threatens to violate any of those rights. The writ of amparo shall not only proceed against arbitrary acts, but also against acts or omissions based on wrongly interpreted or improperly applied rules.”)

fundamental and constitutional rights.<sup>737</sup> By contrast, pursuant to Article 49 of the Costa Rican Constitution, the competence to review the legality of administrative acts lies exclusively with the contentious-administrative courts.<sup>738</sup> Furthermore, the TCA pointed to Article 55 of the Law on Constitutional Jurisdiction, pursuant to which “the rejection of the action for constitutional rights protection (*amparo*) does not prejudice the liabilities that the offender may have incurred into [...]”.<sup>739</sup> On this basis, the TCA concluded that, while the dismissal of an *amparo* action might mean that there is no violation of constitutional rights, it does not imply that the defendant cannot be held liable on other grounds.<sup>740</sup>

453. The TCA then reviewed whether the Constitutional Chamber had made findings on the 2008 Concession’s legality. It observed that the Constitutional Chamber had expressly declined jurisdiction to entertain issues relating to the legality of the Concession.<sup>741</sup> Hence, the TCA concluded that “[t]he above shows that the Constitutional Chamber itself was always aware of its constitutional jurisdiction and never ventured into the scope of legality when assessing the Crucitas Mining Project, but made its assessment from the perspective of the violation or not of the fundamental rights, which is what proceeds in the case of an action for constitutional rights protection (*amparo*).”<sup>742</sup>
454. The TCA further remarked that “the Political Constitution makes an important distinction between the powers assigned to the Constitutional Jurisdiction and the Contentious-Administrative Jurisdiction. [...] This distinction within the scope of the competence of each of the mentioned bodies is what determines the lack of identity between the object and cause of what is heard by the Constitutional Chamber in the *amparos* cited and reviewed by the Contentious-Administrative Court in this proceeding.”<sup>743</sup> Finally, the TCA explained that its finding was consistent with the Administrative Chamber’s jurisprudence.<sup>744</sup>

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<sup>737</sup> Contentious Administrative Tribunal, Decision (14 December 2010), pp. 45-46 (English), p. 45 (Spanish), Exh. **C-0239**.

<sup>738</sup> Political Constitution of the Republic of Costa Rica, Article 49, Exh. **R-0269** (“The administrative [-contentious] jurisdiction is established as a [power] of the [Judicial] Branch to guarantee the legality of the administrative function of the State, of its institutions and of any other public law entity. Deviation of power will be a cause for contesting administrative acts. The law will protect, at least, the subjective rights and legitimate interests of the administered parties.”)

<sup>739</sup> Law on Constitutional Jurisdiction, Law No. 7135 (10 October 1989), Article 55, Exh. **C-0016** and Exh. **C-0786** (as translated in Exh. **C-0239**, p. 46 (English)).

<sup>740</sup> Contentious Administrative Tribunal, Decision (14 December 2010), pp. 45-46 (English), p. 45 (Spanish), Exh. **C-0239**.

<sup>741</sup> Contentious Administrative Tribunal, Decision (14 December 2010), pp. 53 *et seq.* (English), pp. 52 *et seq.* (Spanish), Exh. **C-0239**.

<sup>742</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 54 (English), p. 53 (Spanish), Exh. **C-0239**.

<sup>743</sup> Contentious Administrative Tribunal, Decision (14 December 2010), p. 46 (English), p. 46 (Spanish), Exh. **C-0239**.

<sup>744</sup> Contentious Administrative Tribunal, Decision (14 December 2010), pp. 50-51 (English), pp. 50-51 (Spanish), Exh. **C-0239**.

455. On appeal, the Administrative Chamber upheld the TCA's decision. It stressed that the *res judicata* principle "implies the prohibition to discuss, again, a controversy already resolved by the competent jurisdictional body [...] [which] requires full coincidence between the decided controversy and the one subsequently filed."<sup>745</sup> The Administrative Chamber further explained that only decisions of the Constitutional Chamber setting a precedent on the interpretation of fundamental rights and constitutional rules have *erga omnes* effects.<sup>746</sup> Relying on its own case law, the Administrative Chamber held that the *erga omnes* effects of the Constitutional Chamber's decisions did not extend to issues of legality.<sup>747</sup>
456. The Administrative Chamber went on to compare the issues resolved by the TCA with those resolved by the Constitutional Chamber in the decisions invoked by the Claimant.<sup>748</sup> It noted in particular that the Constitutional Chamber had declared that "[the] assess[ment and analysis of] whether a mining concession violates an executive decree [is not a matter of constitutionality but of legality]."<sup>749</sup> On this basis, the Administrative Chamber rejected Infinito's objection in the following terms:
- Thus, as the Constitutional Chamber did not assess this point as it found that it was a question of legality, there can be no *res judicata* or binding pronouncement on this matter. Now, beyond the reasons given by the TCA to declare the nullity of the decree of national convenience and public interest and the change in land use and felling authorization [...], the truth is that their validity depends on the validity of the concession act [...]. Therefore, in that respect and from this perspective, there can be no *res judicata* or binding effect either.<sup>750</sup>
457. On this basis, the Tribunal finds that both the TCA and the Administrative Chamber adequately assessed Industrias Infinito's *res judicata* objection on the basis of the applicable law, and that their reasoning complies with what could be expected from any competent judge. As the Claimant's own experts, Messrs. Hernández and Rojas, have explained, the *res judicata* principle is intended to prevent another court from issuing a decision on a matter on which the Constitutional Chamber has already decided.<sup>751</sup> The TCA's and the Administrative Chambers' assessment was directed precisely at determining whether this was so: after summarizing the parties' positions and defining

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<sup>745</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas XVI, p. 34 (PDF) (English), p. 157 (PDF) (Spanish), Exh. **C-0261**.

<sup>746</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas XVI, pp. 35-36 (PDF) (English), pp. 158-159 (PDF) (Spanish), Exh. **C-0261**.

<sup>747</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas XVI, p. 36 (PDF) (English), p. 159 (PDF) (Spanish), Exh. **C-0261**.

<sup>748</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas XVII, pp. 37-38 (PDF) (English), pp. 162-164 (Spanish), Exh. **C-0261**.

<sup>749</sup> Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), Whereas V, Exh. **R-0028**. See also, quote in Supreme Court (Administrative Chamber), Decision (30 November 2011), p. 38 (PDF) (English), p. 164 (PDF) (Spanish), Exh. **C-0261**.

<sup>750</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas XVIII, pp. 164-165 (PDF) (Spanish), Exh. **C-0261** (Tribunal translation).

<sup>751</sup> CER-Hernández-Rojas 1, ¶¶ 42, 256.

the applicable legal standard under Costa Rican law, they reviewed the Constitutional Chamber's Decisions in order to determine whether they had definitively settled the issue of the 2008 Concession's validity. They concluded that they had not. As a matter of procedure, the Tribunal can find no fault with either court's conduct, nor can it find their conclusions unreasonable.

458. In any event, the Tribunal has confirmed for itself that the 2011 Administrative Chamber Decision is not inconsistent with the previous decisions of the Constitutional Chamber identified by the Claimant in connection with the legality of the 2008 Concession.
459. The Claimant essentially argues that the Constitutional Chamber held that (i) the 2002 Moratorium did not apply to the Crucitas Project (2002 Constitutional Chamber Decision);<sup>752</sup> (ii) that the Crucitas Project "could proceed through the EIA approval process" (2004 Constitutional Chamber Decision, as confirmed by the 2007 Constitutional Chamber Decision);<sup>753</sup> and, (iii) that the Crucitas Project was "environmentally sound, constitutional and lawful, and upheld the exploitation concession and all of the Project's approvals" (2010 Constitutional Chamber Decision).<sup>754</sup> The Claimant contends that, by annulling the 2008 Concession because the 2002 Moratorium was still in force when that Concession was granted, the Administrative Chamber rendered a decision on matters that the Constitutional Chamber had already settled.
460. The Tribunal cannot agree with the Claimant's position. The latter's interpretation of the Constitutional Chamber's Decisions is at odds with their plain language.
461. First, the Constitutional Chamber never determined that the 2002 Moratorium did not apply to the Crucitas Project:
  - a. In its 2002 Decision, the Constitutional Chamber merely found that the 2002 Moratorium did not infringe any of the petitioner's (or Industrias Infinito's<sup>755</sup>) constitutional rights because it contained a grandfathering provision to protect vested rights.<sup>756</sup> In other words, the Constitutional Chamber rendered a decision

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<sup>752</sup> C-Mem. Merits, ¶ 342, referring to Supreme Court (Constitutional Chamber), Decision (20 August 2002), Exh. **C-0085**.

<sup>753</sup> C-Mem. Merits, ¶ 342, referring to Supreme Court (Constitutional Chamber), Decision (24 November 2004), Exh. **C-0116**; and Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Exh. **C-0164**.

<sup>754</sup> C-Mem. Merits, ¶ 342 and CER-Hernández-Rojas 1, ¶¶ 84-85, referring to Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>755</sup> While Industrias Infinito was not a party to these proceedings, the Constitutional Chamber expressly referred to it in its recitals as one of the potentially affected companies. Supreme Court (Constitutional Chamber), Decision (20 August 2002), Recital 1, Exh. **C-0085**.

<sup>756</sup> Supreme Court (Constitutional Chamber), Decision (20 August 2002), Sole Whereas, pp. 2-3 (PDF), Exh. **C-0085** ("[...] no fundamental right has been violated – at least not in a direct manner – by the enactment of the [2002 Moratorium]. While it is true that through this decree the Executive declares a national moratorium on open-pit gold mining in the national territory for an undefined term (article 1), it is also true that in Transitional provision 1 it expressly establishes that all 'rights acquired before the publication of this decree will be respected.'")

*in abstracto* as to the constitutionality of the 2002 Moratorium. In any event, the Constitutional Chamber could not have assessed in 2002 whether the 2002 Moratorium applied to the 2008 Concession, which was granted several years later.

- b. Further, in its August 2010 Decision in response to the Murillo Amparo, the Constitutional Chamber expressly declined to determine whether the 2002 Moratorium applied to the 2008 Concession, holding that “it is not a constitutional matter, but a matter of legality to assess whether a mining concession violates an executive decree.”<sup>757</sup> As a result, the Constitutional Chamber declined to entertain the applicant’s claim.<sup>758</sup> It follows that the Constitutional Chamber did not decide whether the 2008 Concession had been granted in violation of the 2002 Moratorium.
462. Second, there is no basis to conclude that the Constitutional Chamber found that the 2002 Concession could definitely proceed through the EIA approval process. It is undisputed that, in its 2004 Decision, the Constitutional Chamber annulled the 2002 Concession because it had been granted without a prior EIA.<sup>759</sup> It is true that the Constitutional Chamber added that this annulment was “without prejudice to what the environmental impact assessment may determine,”<sup>760</sup> which suggests that the Chamber intended for the Concession to be reinstated if a positive EIA was concluded. However, even if this was the case, it does not alter the fact that the 2002 Concession was thereby annulled and deprived of effectiveness.
463. The Claimant argues that the Constitutional Chamber’s “without prejudice” statement amounted to a declaration of relative, as opposed to absolute, nullity. It contends that, as a result, the 2002 Concession could have been cured (*convalidada*) and could have continued in place, with a vested right to exploit the mine despite the 2002 Moratorium. However, the Constitutional Chamber expressly declined its jurisdiction to specify whether the nullity of the 2002 Concession was absolute or relative. Indeed, when Industrias Infinito requested the Constitutional Chamber to clarify its 2004 Decision, that Chamber (through its 2007 Decision) found that whether the approval of an EIA could remedy the annulment of the 2002 Concession, or whether the nullity it had declared was absolute or relative, were matters “not within the jurisdiction of this court” because they pertained to the legality of an administrative act and were thus of the

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<sup>757</sup> Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), Whereas V, Exh. **R-0028**.

<sup>758</sup> Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), Exh. **R-0028**.

<sup>759</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Operative Part, p. 32 (PDF) (English), pp. 66-67 (PDF) (Spanish), Exh. **C-0116**.

<sup>760</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Operative Part, Exh. **C-0116**. (The Tribunal notes that it has used the Respondent’s English translation at R-Mem. Jur., ¶ 62).

exclusive competence of the administrative courts.<sup>761</sup> Specifically, the Constitutional Chamber stated:

II.- As for determining the nature of the annulment —whether absolute or relative—of [the 2002 Concession] [...] these are aspects related to the validity of the administrative decree elements whose content and transcendence may not and must not be discussed or determined by this appeal as it constitutes a matter of administrative nature that exceeds the competence of this Court. [...] The possibility of restoring the concession or the impossibility of doing so by virtue of being an absolute or relative nullity, is not part of the object of the writ of amparo, but rather is an issue that must be determined in the administrative area or in ordinary jurisdiction. [...] The decision resolving the amparo, in accordance with its factual records and applicable legal rules, [does not] contemplate the determination of the absolute or relative nature of the errors or omissions contained in the concession; that determination is not within the jurisdiction of this court, since the possibility of correcting or rectifying a defect of legal [significance], or the impossibility of doing so, is an issue that must be resolved in compliance with the definitions and limits contained in ordinary legislation. The nature of these procedural defects, when applying the traditional terminology in relation to relative or absolute errors, is that they are conceptual categories whose application corresponds to the processes developed before the ordinary jurisdiction. For this reason, this motion is to be rejected in every respect.<sup>762</sup>

464. Third, while in April 2010 the Constitutional Chamber held that the 2008 Concession did not violate the constitutional right to a healthy environment,<sup>763</sup> it did not declare that it complied with all legality requirements, as the Claimant contends. Indeed, the Constitutional Chamber repeatedly stated that it was not competent to rule on the technical requirements of the EIA, or on whether the Government agencies had assessed them correctly.<sup>764</sup> The Chamber's assessment was limited to verifying

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<sup>761</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas II, Exh. **C-0164**.

<sup>762</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas II, Exh. **C-0164**.

<sup>763</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas CXXI, Exh. **C-0225** and **R-0096**. This finding had one exception, related to the Government's failure to request the SENARA's prior approval, but it did not annul the concession on this ground. ("The Chamber [definitely] concludes that a constitutional violation occurs in the case under review with regard to granting environmental viability without the prior knowledge or approval of the hydrogeological studies of the entire area of the Crucitas Mining Project from the National Groundwater, Irrigation, and Drainage Service, without such a declaration, [...] having [had] a nullifying effect on the Environmental Impact Assessment nor a retroactive effect on the proceedings at the moment of presenting said assessment, precisely because this body still endorsed them extemporaneously. Moreover, in accordance with the considerations given in this ruling, the remaining alleged violations of the law for a healthy and ecologically balanced environment under the terms outlined by Article 50 of the Political Constitution and constitutional jurisprudence are dismissed. Therefore, the appeal is partially [upheld], as [ ] provided [to that effect] [with] the warnings and dispositions in the previous recitals.")

<sup>764</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas XXX, Exh. **C-0225** and **R-0096** ("[T]his chamber in unanimous form has been emphatic in establishing in repeated declarations, that it is not a technical instance [with the competence to] determine if the Environmental Impact Assessment conforms or not to the professional requirements [...] what is relevant [for] this [court], is that the assessments that our legislation [requires] are carried out



whether the relevant Government agencies had assessed the Project in accordance with the relevant procedures, relied on technical evidence and complied with other relevant requirements, such as community participation.<sup>765</sup> Once that had been verified, the Chamber relied on the Government's technical assessment of the environmental risk, and declared itself incompetent to determine if the technical requirements had been met, noting that any technical infringement should be taken to the appropriate bodies.<sup>766</sup>

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and that once[,] they were [reviewed] by the corresponding off[ic]ial technical professionals[,] the viability or not of the project is determined, [taking into account beforehand] the impacts that could occur in the environment, [their] valuation, mitigation and compensation.”); Whereas XLIII (it “[is beyond the scope of competence of this court to] stop[] and assess if the studies have been carried out properly or if they comply with the necessary information, aspects that should be settled by the technical instances that correspond.”); Whereas LXX (noting in connection with the risk of water pollution by cyanide that “it is clear that all these aspects were provided by the company, valued and approved by [SETENA] to validate the Environmental Impact Assessment and its annexes, and grant the environmental feasibility to the Crucitas Mining Project.”)

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Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas LIV, Exh. **C-0225** and **R-0096** (“[o]nce the corresponding process, including community participation, was developed, [SETENA] granted environmental viability to the Crucitas mining project, [thereby considering valid the technical studies that were presented and taking into consideration the social perception of the activity; in addition, as it has been observed, the technical authorities have] determined that there would not be any danger or risk to [the survival of] species like the Yellow Almendro tree and the Green Macaw [which together with the socio-economic benefits of the activity, caused the administration to approve its development under the commitments and control mechanisms that were approved.]”) (Tribunal's translation in brackets); Whereas LX (“the Court opined that the competent technical entity in this matter[] had knowledge of the contents of the proposed modification, [of] the applied mechanisms, and the use of explosives, and the social diffusion which [was given to] these modifications—including the use of explosives—, all of which [led] [...] the administration to determine that the use of explosives would not generate a negative impact towards the biological environment, [and for this reason the] proposal presented by the company under appeal [was approved].”); Whereas LXXII (“it is evident that the topic of the acid drainage of rocks was considered both in the Environmental Impact Assessment as in the proposed modification to the project, resulting finally that both documents were duly validated by the competent administrative authority.”); Whereas LXXIV (“It is clear that the Environmental Impact Assessment did consider the seismicity of the area, which was not considered to be a factor barring the realization of the project because such study was approved by [SETENA] [...] the appellee arrives to the same conclusion already established in the Environmental Impact Assessment and its approval by SETENA, in the sense that there would not be an effect of the tailings reservoir or its dam from seismic events in the area.”); Whereas LXXVIII (“it is clear that the seismic risk in the area of the Crucitas mining project was considered on the Environmental Impact Assessment and validated by the technical administration.”); Whereas LXXIX (“there is evidence that the situation of climate change was considered in environmental studies of the mining project, concluding a minimal impact of this process during the years of operation of the project; [t]hus, it is inaccurate to claim the lack thereof and that this factor was not considered by the technical administration.”); Whereas LXXXI (“it is clear that the situation of a possible overflow was considered within the Environmental Impact Assessment approved by SETENA, where the competent authority in the matter considered and validated related technical aspects”); Whereas LXXXII (“it is evident that the situation with regard to a possible involvement of the environment before a break or overflow of water from the tailings reservoir was taken into account in environmental assessments carried out and thus validated by the authorities under appeal.”).

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Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas LX, Exh. **C-0225** and **R-0096** (“[i]t must be reiterated that the technical knowledge of the applications and [requests such as those hereby indicated, belong to technical entities in the administration] so if relevant bodies have shed their scientific judgment on the matter, [...] is beyond the jurisdiction

465. The Chamber adopted a similar standard of assessment for the decree of national convenience,<sup>767</sup> which was one of the requirements for the granting of the Concession. As to the Chamber's discussion of the change of land use and felling authorization, the ultimate purpose of the Chamber's assessment was to determine whether the authorization had been arbitrary, not whether it had reached the right conclusions.<sup>768</sup>
466. As a result, the Tribunal cannot agree with the Claimants' experts, Messrs. Hernández and Rojas, when they assert that "[t]his judgment [...] established that the Crucitas Mine exploitation concession was fully compliant with the law, both from the legal and from the constitutional point of view."<sup>769</sup> The Constitutional Chamber expressly limited its competence to determining whether the Crucitas Project was constitutional. It is true that, to do so, it had to assess whether Industrias Infinito and the Government had complied with the relevant procedures and whether the decisions of the governmental agencies were based on evidence. However, it carried out a *prima facie* assessment, which relied on the Government's technical appreciation of that evidence. The Chamber did not attempt – and indeed, explicitly refused – to decide if the technical criteria required by law had been fulfilled.

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of the [c]onstitutional [c]ourts, [to discuss whether such] criterion is [consonant with the also] technical nature [of] the factors taken into account by the administration for issuing its [ruling]. Consequently, if those interested consider that there exists an inconformity in this respect, they [should start the] appropriate actions before the corresponding bodies.") (Tribunal's translation in bracketed portions).

<sup>767</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas CIII, Exh. **C-0225** and **R-0096** ("the Chamber observes that the referenced decree does, in fact, demonstrate the execution of a previous [work] that allowed the administration to determine the existence of socio-economic benefits outweighing the eventual environmental costs. The administration arrived at this determination by utilizing the technical instruments established and available for this purpose, instruments that were required, presented, and valued by the relevant agencies within their scope of technical competence—Directorate of Geology and Mines and SETENA—[and this being a determination of] technical nature [the chamber] is faced with an issue of ordinary legality already defined by the competent authorities in each case."); Whereas CIV ("the Chamber concludes that decree 34801 is duly substantiated and complies with demonstrating that at the administrative [level] the cost-benefit analysis procedure was completed, whose result is explained in the decree in question, by which contrary to that which is alleged by the petitioners, an objective scientific-technical basis does exist to establish the specified benefits that the project's implementation will [generate].")

<sup>768</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas XLVII, Exh. **C-0225** and **R-0096** ("the respondent administration authorized the change of land use and the cutting of the almendro trees, after carrying out the necessary administrative process, which [...] considered [both] the technical demonstration of the impact of the cutting to be done, [and] the Declaration of National Convenience of the project to be executed. Once these requirements were completed, the administration authorized the posed request, **for which [it] must be discarded [that such] administrative decision is arbitrary**, [...], the administration took the [precautions] necessary to ensure that the proposed did not impact in a negative way the environment.") (emphasis added); Whereas CXVI ("the ruling [...] through which the change of land use is authorized, is far from being an arbitrary decision, since for its issuance it relied on the decree [declaring] the project to be of national convenience, and the certification of types of tree that would be affected with the change of land use.")

<sup>769</sup> CER-Hernández-Rojas 1, ¶ 102.

467. It is also true that the Constitutional Chamber made several findings of fact with respect to the Project's environmental viability.<sup>770</sup> While the Tribunal fails to understand the purpose of the Constitutional Chamber doing so, it remains that the latter left the validity of the 2008 Concession open, and expressly noted that allegations of non-conformity should be brought to the relevant authorities, namely, the administrative courts. Be this as it may, the Administrative Chamber did not confirm the TCA's findings on environmental viability; it limited itself to assessing whether the 2008 Concession was valid in light of the 2002 Moratorium.<sup>771</sup>
468. In conclusion, the Tribunal does not find that the 2011 Administrative Chamber Decision was inconsistent with previous rulings of the Constitutional Chamber.

(ii) *Is the Costa Rican Judicial System Structurally Flawed?*

469. The Claimant argues that the Costa Rican judicial system is structurally flawed because it does not provide any "mechanism to resolve the Administrative Chamber's failure to respect constitutional *cosa juzgada*."<sup>772</sup> Its argument has two prongs. First, the Claimant argues that, unlike other judicial systems, in Costa Rica there is no body responsible for resolving inconsistencies between the decisions by the different

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<sup>770</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas LXXX, Exh. **C-0225** and **R-0096** ("So, this technical consideration, as well as the limited impact that climate change would have on the project area during its execution and closing phase determines that it should mitigate significantly the concern that was raised at the hearing on this aspect because according to this, the technical studies determine that the risk for the Mining Project is minimum, and with it, removing the given risk of drainage acid with [due to] the climate change."); Whereas LXXXIV ("So, taking into account the evaluations contained in the Environmental Impact Assessment, as well as those indicated in other technical documents provided, there is evidence that the risk of rupture of the dam of the tailings reservoir or overflow of the same reservoir is minimal, and would have a limited effect on the terrestrial and water environment. In any case, they would be temporary and reversible. In this sense, [no] constitutional violation is [found] with respect to the assessment carried out."); Whereas LXXXVI ("[T]he technical test attached to the record is highly favorable to the use of the system reported by the appellee to the treatment and disposal of cyanide, as well as to the management and safety plans that will be implemented to prevent acid drainage of rocks as that feared [by the appellants due to] accidents or as the product of seismic events. [The coincidence] to and complementarily of the concerned reports, [allows] the Chamber [...] to conclude that handling the cyanide in the foreseen manner will certainly substantially lower the contamination risk by cyanide, both on the aquifer and in general, because technically it has been shown that cyanide will be destroyed and properly removed from the sterile material."); Whereas CV ("To conclude [...] the Chamber establishes that the survival of the yellow almendro tree is ensured, as the authorized felling has no negative determin[ing] impact for the population of this species, nor is it barred due to its absent relation to nesting and breeding sites for the great green macaw."); CVI ("Furthermore, it has been demonstrated that this almendro tree felling is not categorized as certain threat to the existence and survival of the great green macaw, since it has been proved that the bird does not nest in those trees which were authorized to fell, but rather it only arrives to the Crucitas area during non-breeding seasons and when the almendro tree does not bear fruit, by which in this season its food supply comes from the fruit of more than thirty varieties of trees in the area.")

<sup>771</sup> RER-León 1, ¶¶ 285-286; Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas LIII, p. 243 (PDF) (Spanish), p. 79 (PDF) (English); Whereas LX, p. 257 (PDF) (Spanish), p. 86 (PDF) (English), Exh. **C-0261**.

<sup>772</sup> C-CM Jur., ¶ 401.

Chambers of the Supreme Court.<sup>773</sup> Second, it contends that the only available remedy to address conflicting decisions – an action for unconstitutionality – was ineffective.<sup>774</sup> The Claimant explains that it challenged the TCA's interpretation of the constitutional principle of *res judicata* before the Constitutional Chamber but that such Chamber dismissed the challenge on admissibility grounds.<sup>775</sup> As a result, Industrias Infinito had no remedies left to seek the resolution of the inconsistencies between the 2011 Administrative Chamber Decision and the Constitutional Chamber's prior Decisions.

470. For the Claimant, the lack of such a remedy amounts to a denial of justice. The Tribunal does not share this view for the following reasons.
471. First, the premise of the Claimant's argument has failed. As discussed above, the 2011 Administrative Chamber Decision is not in conflict with any decision by the Constitutional Chamber. In particular, the Constitutional Chamber only ruled on the Crucitas Project's constitutionality; it did not rule on the 2008 Concession's legality or on the applicability of the 2002 Moratorium to that Concession. Hence, there is no conflict of decisions that requires resolutions.
472. Second, leaving aside that first reason, the record shows that such jurisdictional conflicts are unlikely to arise. As Dr. León, who was the President of the Administrative Chamber in 2010 and 2011, explains, the Constitutional Chamber has no jurisdiction over the legality of administrative acts under the Constitution and the Law on Constitutional Jurisdiction.<sup>776</sup> This is consistent with the TCA's and the Administrative Chamber's reasoning in their respective 2010 and 2011 Decisions. It is also in conformity to the Constitutional Chamber's repeated assertions that it was not competent to determine matters of legality, as discussed in the preceding section.
473. The Tribunal is aware that Dr. Calzada, who was the President of the Constitutional Chamber between 2008 and 2012, has testified that the Constitutional Chamber has the power to define its own jurisdiction and may thus decide to address matters of legality that are relevant to determining whether there has been a violation of a constitutional right.<sup>777</sup> Dr. Calzada referred to this as a "gray [sic] area" (*zona limítrofe*) that may give rise to a jurisdictional conflict.<sup>778</sup> While this may be so, the Tribunal cannot fail to notice that Dr. Calzada presided the Constitutional Chamber when it issued the April 2010 Decision, where the Chamber repeatedly stated that it was not competent to rule on technical matters, which it characterized as "*asunto[s] de legalidad ordinaria*" (matters of ordinary legality).<sup>779</sup> The Tribunal thus concludes that a jurisdictional conflict

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<sup>773</sup> C-Mem. Merits, ¶ 344.

<sup>774</sup> C-Mem. Merits, ¶ 344.

<sup>775</sup> C-Mem. Merits, ¶ 344.

<sup>776</sup> RER-León 1, ¶¶ 62-63.

<sup>777</sup> CER-Calzada 1, ¶¶ 87-98.

<sup>778</sup> CER-Calzada 1, ¶ 90.

<sup>779</sup> Supreme Court (Constitutional Chamber), Decision (16 April 2010), Whereas CIII, Exh. **C-0225** and **R-0096**.

could only arise, if at all, in the event that the Constitutional Chamber, when exercising its power to define its own jurisdiction, were to determine that it must rule on a matter of legality in order to decide on the breach of a constitutional right.

474. Third, in the rare event that such a jurisdictional conflict might arise, the Tribunal is not convinced that the Costa Rican judicial system would not provide a mechanism to resolve it. As Dr. León explains, a party may file an action against jurisprudence (*acción contra la jurisprudencia*) if it considers that a court decision is unconstitutional.<sup>780</sup> Indeed, Dr. Calzada cites a decision of the Constitutional Chamber in which it declared that a ruling by the TCA had violated constitutional *cosa juzgada*.<sup>781</sup>
475. However, pursuant to Articles 75 and 77 of the Law on Constitutional Jurisdiction, this action must relate to an ongoing proceeding to be admissible;<sup>782</sup> the Constitutional Chamber cannot enjoin a proceeding that has already been completed by another Chamber of the Supreme Court.<sup>783</sup> According to Dr. León, “[t]he Constitutional Chamber can only undertake the action of unconstitutionality against a jurisprudential line (or a law), when it is a reasonable means to protect the right or interest that is considered as injured. For the ruling of the Constitutional Chamber to be useful and applicable to the [underlying proceeding], it is necessary that [the latter] has not been resolved.”<sup>784</sup>
476. Here, Industrias Infinito filed its action of unconstitutionality on 11 November 2011, while the proceedings before the Administrative Chamber were still pending. However, the Administrative Chamber ruled on the challenge against the 2010 TCA Decision on 30 November 2011. As the underlying proceeding had therefore been resolved, the Constitutional Chamber could no longer rule on the matter and thus considered it inadmissible.<sup>785</sup> The Court reasoned as follows:

It must be emphasized that in this case, [the discussion in the jurisdictional context has been exhausted]. That is to say, a firm [judgment] was [rendered] [and therefore] it was [legally] impossible [for] an action of unconstitutionality [to develop], in some context, its incidental role. If this was [decided] on [the] substance, this would not affect at all the legal relations regulated by the [decision] of the contentious administrative

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<sup>780</sup> RER-León 1, ¶¶ 317-323.

<sup>781</sup> CER1-Calzada 1, ¶ 99, Supreme Court (Constitutional Chamber), Decision No. 2014-128-25 (6 August 2014), Whereas IX, p. 42 (PDF) (Spanish), p. 4 (PDF) (English), Exh. **C-0415** (“Additionally, it must be noted that the position taken in the administrative decision regarding the environmental viability was repeated and upheld by the judgment in the report submitted to this Chamber on [the] occasion [of this *amparo*]. Thus the situation, without doubt, in the opinion of the Constitutional Chamber, constitutes a clear violation of the fundamental [right to the] authority of *cosa juzgada*.”)

<sup>782</sup> Law on Constitutional Jurisdiction, Law No. 7135 (10 October 1989), Articles 75 and 77, Exh. **C-0016**.

<sup>783</sup> RER-León 1, ¶¶ 319-320.

<sup>784</sup> RER-León 1, ¶ 323.

<sup>785</sup> Supreme Court (Constitutional Chamber), Decision (19 June 2013), Exh. **C-0283**.

[tribunal] and the basic sense of this procedural instrument would be lost.<sup>786</sup>

477. The Claimant's experts, Messrs. Hernández and Rojas do not object to Dr. León's interpretation of the Law on Constitutional Jurisdiction or to the 2013 Constitutional Chamber Decision. Rather, they argue that "[t]he Administrative Chamber, knowing that Industrias Infinito S.A., would bring the unconstitutionality action against its jurisprudence alleging *cosa juzgada* of the judgments of the Constitutional Chamber as the communication that initiated the proceeding alleged this unconstitutionality, hastened to resolve the appeal so that the action was left without procedural support and the Constitutional Chamber was forced to, as was done, reject the action for lack of a procedural mechanism. With it, it avoided that the Chamber could annul its prior jurisprudence on the matter and would necessarily be forced to annul the judgment of the Contentious Administrative Tribunal."<sup>787</sup>
478. However, the Claimant has adduced no evidentiary support for these statements. There is nothing on record (other than Messrs. Hernández and Rojas's report) indicating that the Administrative Chamber intentionally hastened to issue its Decision for the sole purpose of rendering Industrias Infinito's unconstitutionality action ineffective.
479. The Tribunal thus concludes that there is a mechanism to resolve conflicts of competence between the Constitutional Chamber and administrative courts which must be exercised while the administrative proceedings are ongoing. This necessarily implies that an injured party cannot challenge the unconstitutionality of a decision of the Administrative Chamber because, as it is the highest administrative court, the matter will be closed by the time it has ruled on a matter. The question thus arises whether this limitation to the conflict resolution mechanism constitutes a denial of justice. For the reasons set out below, the Tribunal does not consider that it does.
480. Fourth and finally, the Tribunal finds that the lack of a specific body responsible for resolving conflicts of jurisdiction between the Supreme Court's chambers cannot by itself amount to a denial of justice.
481. Citing Paulsson, the Claimant argues that "this lack of a 'reasonably available national mechanism to correct the challenged action' is a systemic failure of Costa Rica's legal system."<sup>788</sup> However, Paulsson's full statement ("[i]nternational law attaches state responsibility for judicial action only if it is shown that there was no reasonably available national mechanism to correct the challenged action"<sup>789</sup>) relates to the requirement of exhaustion of local remedies, which is a different matter. Paulsson did not affirm, as

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<sup>786</sup> Supreme Court (Constitutional Chamber), Decision (19 June 2013), Whereas III, Exh. **C-0283** (Tribunal's translation in brackets).

<sup>787</sup> CER-Hernández-Rojas 1, ¶ 115.

<sup>788</sup> C-Rej. Jur., ¶ 319, citing J. Paulsson, *Denial of Justice in International Law* (Oxford University Press, 2005), p. 100, Exh. **CL-0205**.

<sup>789</sup> J. Paulsson, *Denial of Justice in International Law* (Oxford University Press, 2005), p. 100, Exh. **CL-0205**.

the Claimant suggests, that the absence of a court similar to the French *Tribunal des conflits* amounts to a denial of justice.

482. The Claimant also relies on *Dan Cake* to submit that a denial of justice can occur when “[t]he absence of any reasonably available further recourse against the Court order is such that, in the circumstances of this case, the breakdown must be treated as ‘systemic’.”<sup>790</sup> The *Dan Cake* tribunal indeed reached this conclusion after having identified two fundamental flaws in Hungary’s judicial system. First, the local bankruptcy court refused without proper justification to convene a composition hearing (through which the investor could have sought to reach a settlement with its creditors). Second, Hungary’s judicial system provided no means to appeal the bankruptcy court’s order.<sup>791</sup> This decision cannot be applied by analogy in the present case, where the Claimant had access to an appeal (more specifically, to a *recurso de casación* or annulment action) before the Administrative Chamber of the Supreme Court.
483. In the Tribunal’s view, only a lack of remedy within the host State’s judicial system that deprives an investor from a fair opportunity to plead its case or implies that access to justice is virtually non-existent would amount to a denial of justice. That is not the case here. As discussed in the preceding section, Industrias Infinito raised the *res judicata* objection before the TCA and then again before the Administrative Chamber and both courts considered it. Even in the absence of a court such as the French *Tribunal des conflits*, the Respondent’s judicial system provided the Claimant with several instances and remedies to address the alleged jurisdictional conflict.
484. The Tribunal’s conclusion is in line with the decision in *Philip Morris*, where the tribunal held that the lack of a mechanism for resolving conflicts between the administrative and civil courts did not amount to a denial of justice:<sup>792</sup>

In the Tribunal’s view, it is unusual that the Uruguayan judicial system separates out the mechanisms of review in this way, without any system for resolving conflicts of reasoning. The Tribunal believes, however, that it would not be appropriate to find a denial of justice because of this discrepancy. The Claimants were able to have their day (or days) in court, and there was an available judicial body with jurisdiction to hear their challenge to the 80/80 Regulation and which gave a properly reasoned decision. The fact that there is no further recourse from the TCA decision, which did not follow the reasoning of the SCJ, seems to be a quirk of the judicial system.

485. Consequently, the Tribunal comes to the conclusion that the Respondent committed no procedural denial of justice.

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<sup>790</sup> C-Reply Merits, ¶ 627, citing *Dan Cake*, ¶ 154, Exh. **CL-0031**.

<sup>791</sup> *Dan Cake*, ¶¶ 54, 55, 150, Exh. **CL-0031**.

<sup>792</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (“*Philip Morris*”), ¶ 527, Exh. **RL-0222**.

*(iii) Has There Been a Breach of Due Process?*

486. Before moving to the Claimant's substantive denial of justice argument, the Tribunal notes that, in its arguments on expropriation, the Claimant has suggested that in the TCA proceedings it did not have the opportunity to fully defend itself with respect to the arguments relating to the applicability of the 2002 Moratorium.<sup>793</sup> Specifically, the Claimant alleges that the application of the 2002 Moratorium was not part of the original complaint brought by APREFLOFAS and was only incorporated at a later stage. As a result, Industrias Infinito could not respond to this issue in writing and was thus "denied its greatest opportunity to address the application of the moratorium in detail."<sup>794</sup> The Claimant argues that "[t]his lack of procedural fairness was not cured before the Administrative Chamber, given that the Administrative Chamber proceeding was an appeal rather than a hearing at first instance."<sup>795</sup> While the Claimant has raised this argument as part of its expropriation claim and has not expressly argued that this amounts to a denial of justice, as it relates to an alleged procedural unfairness, the Tribunal will address it here.
487. For the Tribunal, the Claimant has not established that the TCA or the Administrative Chamber have breached any rule of due process.<sup>796</sup> The Claimant has not explained how the TCA departed from Costa Rican procedural law, nor has it proved that it had no opportunity to make submissions on this matter. To the contrary, the record suggests that Industrias Infinito was aware of this argument prior to the hearing as it already asserted that the 2002 Moratorium was not applicable to it in its Answer to APREFLOFAS' petition before the TCA.<sup>797</sup>
488. In any event, any failure by the TCA to comply with due process would have occurred before the cut-off date and the Tribunal would have no jurisdiction over it. The relevant question is whether the Administrative Chamber failed to remedy this alleged breach of due process. In the Tribunal's view, such a failure is not established. In fact, the record shows that Industrias Infinito made comprehensive submissions on the applicability of the 2002 Moratorium in front of the Administrative Chamber,<sup>798</sup> which the Chamber addressed in its Decision.<sup>799</sup>

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<sup>793</sup> C-Mem. Merits, ¶ 283.

<sup>794</sup> C-Mem. Merits, ¶¶ 182, 283.

<sup>795</sup> C-Mem. Merits, ¶ 283.

<sup>796</sup> While the Tribunal's analysis focuses on the 2011 Administrative Chamber Decision, it finds that any breaches of due process by the TCA that might not have been addressed or cured by the Administrative Chamber could have relevance to whether the Respondent denied justice to the Claimant.

<sup>797</sup> Industrias Infinito, Answer to Jorge Lobo's Request for Annulment (23 August 2010), p. 35, Exh. **R-0030**.

<sup>798</sup> Submissions of Industrias Infinito S.A. to the Supreme Court (Administrative Chamber), File No. 08-1282-1027-CA (18 January 2011), pp. 876-903, Exh. **C-0248**.

<sup>799</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas IV, pp. 115-116 (PDF) (Spanish), p. 13 (PDF) (English), Exh. **C-0261**.



489. On this basis, the Tribunal finds that the Claimant has not established a procedural breach by the TCA or the Administrative Chamber that could amount to a denial of justice in relation to the application of the 2002 Moratorium.

*c. Did the Respondent Commit a Substantive Denial of Justice?*

490. The Claimant submits that the 2011 Administrative Chamber Decision amounts to a substantive denial of justice because the court applied the 2002 Moratorium to the Crucitas Project in violation of Costa Rican law.<sup>800</sup> Relying on the expert report of Messrs. Hernández and Rojas, the Claimant argues that the 2011 Administrative Chamber Decision is contrary to Costa Rican law because:<sup>801</sup>
- a. Costa Rica's Constitution prohibits the retroactive application of laws to investors with acquired rights.
  - b. On its face, the 2002 Moratorium did not apply to Industrias Infinito's rights, which were acquired before the Moratorium was decreed, as the Constitutional Chamber confirmed in 2002 and 2010.
  - c. The 2004 Constitutional Chamber Decision annulled the 2002 Concession on a relative, rather than absolute basis, "without prejudice to the findings of the Environmental Impact Study," which meant that Industrias Infinito's acquired rights had not been extinguished.
  - d. The application of the 2002 Moratorium was contrary to binding decisions of the Constitutional Chamber, and thus violated the principles of *cosa juzgada* and *erga omnes* effects.
491. Relying on *Arif*, *Azinian* and *Oostergetel*, the Claimant submits that the Administrative Chamber's cancellation of the 2008 Concession when Industrias Infinito had vested rights within the meaning of the Mining Code is "an inappropriate and egregious misapplication of Costa Rican law" that amounts to a denial of justice.<sup>802</sup>
492. The Respondent disputes that there has been a substantive denial of justice. It argues that the Administrative Chamber "correctly determined that [Industrias Infinito] did not have vested rights that would be protected under the Grandfathering Provision of the 2002 Moratorium."<sup>803</sup> The Administrative Chamber found that the 2004 Constitutional Chamber Decision annulled the 2002 Concession with retroactive effects (annulment

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<sup>800</sup> C-CM Jur., ¶¶ 403-411.

<sup>801</sup> C-CM Jur., ¶ 410. See, in the same vein, CER-Hernández-Rojas 1, ¶¶ 199-212; CER-Hernández-Rojas 2, ¶¶ 43-49.

<sup>802</sup> C-CM Jur., ¶ 408; *Arif*, ¶ 442, Exh. **CL-0014**; *Azinian*, ¶ 103, Exh. **CL-0017**; *Oostergetel*, ¶ 274, Exh. **RL-0017**.

<sup>803</sup> R-CM Merits, ¶ 172.

*ab initio*), and that Industrias Infinito “did not have an automatic right to an exploitation concession by virtue of the exploration permit that it held at one point.”<sup>804</sup>

493. The Respondent stresses that the Claimant is not challenging the conduct, independence or good faith of the Costa Rican courts; it is merely in disagreement with the administrative courts’ decisions.<sup>805</sup> According to the Respondent, “[j]ust because the Claimant does not agree that the 2011 Administrative Chamber should have reached its decision does not make the decision a denial of justice.”<sup>806</sup> The Respondent concludes that “[t]he Claimant’s claims are so far from meeting the threshold for a substantive denial of justice that they can be properly described as frivolous.”<sup>807</sup>
494. For the following reasons, the Tribunal is of the opinion that the Respondent has not engaged in a substantive denial of justice.
495. First, as was discussed above, the Constitutional Chamber made no definitive findings on the applicability of the 2002 Moratorium to the Crucitas Project. In its 2002 Decision, the Constitutional Chamber merely stated that the 2002 Moratorium was not unconstitutional because it contained a grandfathering provision; in its 2004 Decision, it did not discuss the applicability of the 2002 Moratorium to the Crucitas Project, and in its August 2010 Decision, it declined to determine whether the 2002 Moratorium applied to the 2008 Concession.<sup>808</sup> The TCA was thus the first judicial authority to rule on this matter. There can be thus no breach of the principles of *cosa juzgada* and *erga omnes* effects in this respect.
496. Second, after carefully reviewing the 2010 TCA Decision and the 2011 Administrative Chamber Decision, the Tribunal cannot conclude that these courts applied Costa Rican law incorrectly. The 2010 TCA Decision, which the 2011 Administrative Chamber Decision confirmed and made irreversible, devoted five pages to the Government’s failure to apply the 2002 Moratorium to the Crucitas Project.<sup>809</sup> Relying on Article 13 of the General Law of Public Administration,<sup>810</sup> the TCA explained that under the principle of non-derogability of rules (*principio de inderogabilidad singular de la norma*) “the public authority cannot issue resolutions for a specific case whose contents ignore or do not apply what the same public authority had previously decided to the contrary in a

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<sup>804</sup> R-CM Merits, ¶ 173.

<sup>805</sup> R-CM Merits, ¶¶ 474-475.

<sup>806</sup> R-CM Merits, ¶ 474.

<sup>807</sup> R-CM Merits, ¶ 475.

<sup>808</sup> *Supra*, ¶¶ 461-463.

<sup>809</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XI, p. 63 (English), p. 63 (Spanish), Exh. **C-0239**.

<sup>810</sup> General Law of Public Administration, Law No. 6227 (5 February 1978), Article 13, Exh. **C-0014** (“1. The Administration will be subject, in general, to all the written and unwritten rules of the administrative system, and to the private law supplementary thereof, without being able to repeal or not apply them for specific cases. 2. The previous rule will also be applied in relation to the regulations, whether they come from the same authority, whether they come from a higher or lower competent authority.”) (Tribunal translation)

general act.”<sup>811</sup> The TCA further noted that, in accordance with the 2002 Moratorium Decree’s First Transitory Provision, all procedures related to open-pit gold exploration and exploitation pending before the DGM and the SETENA would be suspended, and all rights acquired before the publication of that decree would be respected. The TCA also noted that the 2002 Moratorium was lifted on 4 June 2008, and was thus in place from June 2002 to June 2008.<sup>812</sup>

497. The TCA then found that the 2002 Concession had been annulled by the Constitutional Chamber in 2004. In the TCA’s opinion, this nullity was absolute and applied *ab initio*. With the Constitutional Chamber’s declaration of nullity, Industrias Infinito’s right to the exploitation concession thus disappeared. Hence, when in April 2008, the Government decided to “convert” Industrias Infinito’s concession, the latter had no vested rights. Accordingly, the TCA concluded that the approval of the EIA, the approval of the changes to the Project, and the granting of the 2008 Concession (all of which had occurred while the 2002 Moratorium was in force) had violated the principle of non-derogability of rules and were thus null and void.<sup>813</sup>
498. The TCA dismissed Industrias Infinito’s argument that an exploration permit automatically grants the permit holder the right to an exploitation concession. It held that, under a systematic interpretation of the Mining Code, the right to explore is different and independent from the right to exploit. Pursuant to Articles 23(b) and 26 of the Mining Code, an exploitation concession will only be granted to an exploration permit holder if the requirements listed in Articles 8 and 9 of the Regulation to the Mining Code are fulfilled.<sup>814</sup> The TCA therefore found that Industrias Infinito’s submission that it had acquired exploitation rights as an exploration permit holder was “absolutely unfounded and, in addition, [it] d[id] not conform to reality.”<sup>815</sup> Accordingly, the TCA concluded that Industrias Infinito had no acquired right within the meaning of the Mining Code when it applied to validate its concession on 30 May 2007.
499. The TCA further considered that the conversion of the 2002 Concession had been unlawful, *inter alia* because such mechanism could not apply to acts which had been declared null and void by a court, as was the case here, because such a declaration implies that the act has been eliminated from the legal system. It also found that it did not follow from the Constitutional Chamber’s “without prejudice” statement that such

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<sup>811</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XI, p. 64 (English), p. 63 (Spanish), Exh. **C-0239**.

<sup>812</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XI, p. 64 (Spanish), p. 65 (English), Exh. **C-0239**.

<sup>813</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XI, pp. 63-65 (Spanish), pp. 63-66 (English), Exh. **C-0239**.

<sup>814</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XI, pp. 65-67 (Spanish), pp. 66-67 (English), Exh. **C-0239**.

<sup>815</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XI, p. 65 (Spanish), p. 66 (English), Exh. **C-0239**.

court regarded the nullity as relative, or that the 2002 Concession could be converted.<sup>816</sup>

500. Finally, as discussed in the preceding section, the TCA assessed and rejected Industrias Infinito's *res judicata* objection. When discussing the applicability of the 2002 Moratorium, the TCA once again stressed that the Constitutional Chamber had expressly referred the application of the 2002 Moratorium and the conversion of the concession to the administrative courts, which were the competent authorities to resolve these matters.<sup>817</sup>
501. The Administrative Chamber confirmed the TCA's reasoning in this respect. It undertook an in-depth analysis of the applicability of the 2002 Moratorium to the Crucitas Project, focusing on the principle of non-derogability of rules, and concluded that (i) an exploration permit does not automatically ensure its holder that it will be granted an exploitation concession, which is subject to different and separate requirements; (ii) Industrias Infinito had no vested right to exploit the Crucitas mine following the annulment of the 2002 Concession, and (iii) the mechanism of conversion was not applicable in this case, and in any event the conversion would have been effective *ex nunc*, i.e., as of the date of the conversion. The Administrative Chamber also noted that the 2002 Moratorium had been in effect from 12 June 2002 until 4 June 2008. Accordingly, the entire administrative process that led to the granting of the 2008 Concession, as well as the actual grant of that Concession, was in violation of the 2002 Moratorium and of the principle of non-derogability of rules.<sup>818</sup> As this was the crucial element upon which the validity of the Concession depended, the Administrative Chamber considered that it did not need to address the remaining challenges against the TCA's decision.<sup>819</sup>
502. When assessing a claim for denial of justice, the Tribunal's analysis must focus on the judgment of the court ruling on the last remedy, i.e., the Administrative Chamber Decision. Having assessed that decision, the Tribunal cannot discern the existence of a substantive denial of justice. The 2011 Administrative Chamber Decision was premised on Costa Rican law and reasoned. While the Administrative Chamber's

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<sup>816</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XIV, pp. 76-77 (Spanish), pp. 76-77 (English), Exh. **C-0239**.

<sup>817</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Whereas XI, p. 67 (Spanish), p. 68 (English), Exh. **C-0239**.

<sup>818</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas LIII-LX, pp. 243-257 (PDF) (Spanish), pp. 79-86 (PDF) (English), Exh. **C-0261** ("it is clear that from the time the concession was annulled in 2004, it imposed a suspension of all administrative procedures subsequently initiated by IISA for the purpose of obtaining the exploitation concession. Nevertheless, the Public Administration, far from acting that way, continued [to move the process forward] until the issuance of Act R-217-2008-MINAE on 3pm on April 21, 2008, applying the conversion of the Act that originally approved the concession. With this procedure, the Public Administration breached the provisions of the transitory provision and, therefore, also the singular non-derogability principle of the regulation or Rule [...].")

<sup>819</sup> Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas LIII, p. 243 (PDF) (Spanish), p. 79 (PDF) (English); Whereas LX, p. 257 (PDF) (Spanish), p. 86 (English), Exh. **C-0261**.

reasons and conclusions could be characterized as formalistic, there was no misapplication of domestic law. As discussed above, the Administrative Chamber did not violate *res judicata* in respect of the applicability of the 2002 Moratorium or the validity of the Concession, because the Constitutional Court had not adjudged these matters.

503. Moreover, contrary to the Claimant's contention, the Administrative Chamber did not apply the 2002 Moratorium retroactively. While the 2002 Moratorium had been repealed when the 2008 Concession was granted, that repeal had not yet come into effect.
504. Industrias Infinito's argument was that it owned a vested right that was protected from the application of the 2002 Moratorium. The Administrative Chamber addressed this argument and concluded that Industrias Infinito did not own a vested right on the date when the 2002 Moratorium came into force, and thus could not be validly granted an exploitation concession while the 2002 Moratorium was in effect.
505. In conclusion, the Tribunal is not persuaded that the Administrative Chamber incurred in a substantive denial of justice.

**(ii) Did the Respondent Otherwise Breach the FET Standard?**

506. The Tribunal now turns to whether the Respondent has treated the Claimant's investments unfairly and inequitably through conduct that does not amount to a denial of justice.
507. The Claimant submits that the "combined effect" of four of the challenged measures (*i.e.*, the 2011 Administrative Chamber Decision, the 2011 Legislative Mining Ban, the 2012 MINAET Resolution and the 2013 Constitutional Chamber Decision), together with "the Government's choice not to allow the project to proceed, violated the FET standard by breaching Infinito's legitimate expectations, failing to treat Infinito's investment in a consistent, predictable manner, and treating Infinito arbitrarily because the foundational measure served no rational purpose."<sup>820</sup> The Claimant also argues that, through the 2015 TCA Damages Decision and the proceedings reinitiated thereafter the Respondent has continued to breach FET.<sup>821</sup>
508. To assess whether the challenged measures were unfair and inequitable, the Tribunal must review the facts that led to those measures. Pursuant to Article XII(3)(c) of the BIT, claims for breaches and damage in respect of which the Claimant had actual or constructive knowledge prior to 6 February 2011 are time-barred. However, to understand the context and reasoning of the challenged measures (of which three are judicial decisions that by nature rely on prior facts to reach their conclusions), the Tribunal must assess all of the facts that led to the challenged measures. A majority of

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<sup>820</sup> C-Reply Merits, ¶ 590.

<sup>821</sup> C-Reply Merits, ¶¶ 612-613.

the Tribunal has also determined that claims related to the annulment of the Concession by the Administrative Chamber on 30 November 2011 are not time-barred.

509. As discussed in Section V.D.3.b(ii)a *supra*, the Claimant's FET claim has two main elements, one related to the loss of the Concession (a) and another premised on the impossibility to reinstate the process after the 2011 Legislative Mining Ban (b). A third element relates to the 2015 TCA Damages decision and the proceedings that have been reinstated thereafter (c), as discussed in Section V.D.3.b(vi) *supra*. The Tribunal will address these elements in turn.

*a. Did the Respondent Treat the Claimant Unfairly and Inequitably in Relation to the Loss of the Concession?*

510. Infinito's FET claim in relation to the loss of the Concession has three prongs. It contends that the Respondent breached its legitimate expectations, failed to treat it consistently and predictably, and acted in an arbitrary manner.

511. In terms of legitimate expectations, the Claimant argues that "[w]hen the Government's conduct is considered as a whole, it is clear that Infinito had an objectively reasonable legitimate expectation that it would be able to proceed with the Crucitas project in accordance with the Mining Code, which contained no moratorium at the time of investment."<sup>822</sup> The Claimant has grounded this expectation on two elements: (i) the legal framework (and in particular the Mining Code) in force when it made its initial investment and (ii) the Government's conduct, which supported this expectation by making efforts to advance the Project.

512. With respect to the legal framework, the Claimant submits that it invested in reliance on the clear provisions of the Mining Code, pursuant to which an exploration permit holder would have the right to obtain an exploitation concession, provided it had discovered an exploitable deposit. The Claimant contends that this mechanism was established specifically to attract foreign investors such as itself,<sup>823</sup> and constituted the *quid pro quo* upon which the granting of the exploitation concession was based.<sup>824</sup> Based on this "clear legal framework", the Claimant asserts that:

- a. "[W]hen Industrias Infinito obtained an exploration permit in January 1996, it legitimately expected to be able to conduct exploration work to search for minerals in the Crucitas project area and to receive an exploitation concession for the Crucitas project area once it proved the existence of deposits within the Crucitas project area."<sup>825</sup>
- b. It also "legitimately expected that its rights could not be taken away except in accordance with the legal framework set out in the Mining Code then in effect,"

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<sup>822</sup> C-Reply Merits, ¶ 561.

<sup>823</sup> C-Reply Merits, ¶ 564.

<sup>824</sup> Tr. Merits Day 1 (ENG), 17:6-18:3, 19:19-20:1, 50:21-51:3; 51:13-18 (Mr. Terry).

<sup>825</sup> C-Mem. Merits, ¶ 307.

arguing that “[i]t would not have invested in the project if its right to an exploitation concession and the exploitation concession itself could be arbitrarily revoked at any time by the application of a moratorium on open-pit mining.”<sup>826</sup> The Claimant notes in this respect that the Costa Rican Constitution provides that “[n]o law shall have retroactive effect in prejudice to any person, or to his acquired patrimonial rights or to any consolidated legal situations.”<sup>827</sup>

513. For the following reasons, the Tribunal does not consider that the Respondent's conduct should be assessed under the prism of legitimate expectations.
514. First, as a matter of fact, Industrias Infinito was granted an exploitation concession in accordance with the Mining Code, not once, but twice. The problem was not the Government's refusal to grant this concession; it was that, in both instances, the Costa Rican courts found that concession to be flawed, and therefore annulled it. The Claimant's first expectation is therefore moot.
515. Second, the Tribunal is not convinced that the Claimant's second expectation qualifies as “legitimate”, as this term is understood in international investment law. Investment tribunals have consistently held that, to be protected under the FET standard, the expectation must have arisen from a specific assurance, commitment or representation given by the State on which the investor relied to make its investment.<sup>828</sup>
516. Here, the Claimant has not been able to identify any specific assurances that it would be allowed to proceed with the Crucitas Project. In particular, it received no specific assurances that “[a]bsent any of the specific grounds set out in the Mining Code, and absent compliance with the associated annulment or cancellation process, an exploitation concession could not be annulled or cancelled.”<sup>829</sup> Indeed, none of the facts alleged by the Claimant amount to specific assurances from the Government that Industrias Infinito would be able to operate the Crucitas Project, that the 2002 Moratorium did not apply to it, or that the concession could not be cancelled or annulled other than on the grounds set out in the Mining Code. In addition, many of the facts that the Claimant invokes as assurances occurred after its initial investment. Specifically:

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<sup>826</sup> C-Mem. Merits, ¶ 310.

<sup>827</sup> Political Constitution of the Republic of Costa Rica, Article 34, Exh. **C-0013**.

<sup>828</sup> *See, inter alia*, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (“**Duke**”), ¶ 340, Exh. **CL-0033**; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (“**Feldman**”), ¶¶ 148-149, Exh. **CL-0038**; *Frontier Petroleum*, ¶ 287, Exh. **CL-0039**; *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 5 March 2008 (“**Cargill Poland**”), ¶ 490, Exh. **RL-0226**; *El Paso*, ¶¶ 375-379, Exh. **CL-0035**; *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 (“**White Industries**”), ¶ 10.3.17, Exh. **CL-0092**; *Venezuela Holdings B. V. and Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014 (“**Venezuela Holdings**”), ¶ 256, Exh. **CL-0225**.

<sup>829</sup> C-Mem. Merits, ¶ 305.

- a. The Claimant alleges that Minister of the Environment Rodríguez represented to Infinito in 2002 that the 2002 Moratorium did not apply to the Crucitas Project.<sup>830</sup> However, there is no evidence of this representation other than the witness testimony of Mr. Hernández, who asserts that, during a meeting in the first quarter of 2003 after the 2002 Moratorium had entered into force, the Minister (i) “confirmed the Government’s position against mining, but stated that acquired rights would be respected;” (ii) “declared that SETENA would continue with [the EIA] process and that his office would not intervene in the process;” and (iii) “expressed that SETENA’s decision would be respected.”<sup>831</sup> There is no documentary evidence of these statements, but in any event the Minister merely declared that acquired rights would be respected and that the Government would not interfere with the permitting process. He did not represent that Industrias Infinito had an acquired right to exploit the Crucitas Project.
- b. The Claimant further alleges that in August 2002 the Constitutional Chamber confirmed that the 2002 Moratorium did not apply to the Crucitas Project.<sup>832</sup> As discussed in paragraph 461.a *supra*, the Constitutional Court only held that the 2002 Moratorium was constitutional because it respected acquired rights; it did not say that Industrias Infinito held an acquired right.
- c. The Claimant relies on certain statements that President Pacheco made in May 2004, allegedly accepting that the Project could continue. Specifically, a news article reports the President as having stated that “there is no way of stopping something in progress, and if I had not kept the word of previous governments, then Costa Rica would have been subject of a multimillion dollar claim [...]”.<sup>833</sup> Mr. Rauguth commented in this respect that he “was personally satisfied to learn that President Pacheco himself grudgingly acknowledged the legality of the project, and [he] viewed this as further indication that development of the Crucitas site would not be further delayed by questionable government and political intervention.”<sup>834</sup> However, this does not amount to an assurance that any permits or concessions granted would be immune from judicial scrutiny.
- d. The Claimant also submits that the 2004 Constitutional Chamber Decision (which annulled the 2002 Concession “without prejudice” to the EIA) constitutes an assurance that the project could proceed through the EIA approval process, even though the 2002 Moratorium was in effect.<sup>835</sup> However, as noted in paragraph 462 *supra*, in 2004 the Constitutional Chamber did annul the 2002 Concession, and the

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<sup>830</sup> C-Mem. Merits, ¶ 315(a); C-Reply Merits, ¶ 572.

<sup>831</sup> CWS-Hernández 1, ¶ 106.

<sup>832</sup> C-Mem. Merits, ¶ 315(b); C-Reply Merits, ¶ 572; Supreme Court (Constitutional Chamber) Decision (20 August 2002), Exh **C-0085**; CWS-Ulloa 1, ¶¶ 79-82.

<sup>833</sup> *Al Día Newspaper, Government Discomfort Persists* (19 May 2004), Exh. **C-0108**.

<sup>834</sup> CWS-Rauguth 1, ¶ 99.

<sup>835</sup> C-Mem. Merits, ¶ 315(c); CWS-Hernández 1, ¶¶ 127-130; Supreme Court (Constitutional Chamber), Decision (26 November 2004), Exh. **C-0116**.



meaning of its “without prejudice” statement is unclear. Moreover, in 2007 the Constitutional Chamber declared itself incompetent to clarify whether an EIA would cure the nullity,<sup>836</sup> and in August 2010 it declared itself incompetent to determine whether the 2002 Moratorium applied to the Project.<sup>837</sup>

- e. Infinito stresses that the Minister of the Environment defended the legality and constitutionality of the 2002 Concession before the Constitutional Chamber during the proceedings that led to the 2004 Constitutional Chamber Decision.<sup>838</sup> While this shows that the Government supported the Project or, at the very least, defended the legality of its actions, it is not equivalent to an assurance that the Project could proceed if the 2002 Concession was found to be flawed.
- f. The Claimant further notes that, following the 2004 Constitutional Chamber Decision, “Infinito and the Government proceeded on the mutual understanding that [Industrias Infinito] had the right to rectify the defect found by the Constitutional Chamber and have its exploitation concession restored.”<sup>839</sup> The Claimant points to (i) SETENA’s review of Industrias Infinito’s EIA spanning 22 months and including significant discussions with Industrias Infinito’s representatives, visits to the Project site, and the largest public hearing in Costa Rica’s history;<sup>840</sup> (ii) SETENA’s ultimate approval of the EIA for the Project in 2005, and the declaration by SETENA that the Project was environmentally viable;<sup>841</sup> (iii) SETENA’s review and approval of the EIA modification and its declaration that the modified Project was environmentally viable in February 2008;<sup>842</sup> (iv) President Arias’s decision to repeal the 2002 Moratorium in March of 2008, as part of a decree safeguarding the mining environment in Costa Rica;<sup>843</sup> (v) President Arias and Minister Dobles’s decision to restore Industrias Infinito’s exploitation concession in April 2008 through the

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<sup>836</sup> *Supra*, ¶ 463; Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas II, Exh. **C-0164**. Contrary to the Claimant’s contentions, this decision does not clarify that Industrias Infinito “only required approval of the EIA to precede the grant of an exploitation concession.” C-Reply Merits, ¶ 575(d).

<sup>837</sup> Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), Exh. **R-0028**.

<sup>838</sup> C-Mem. Merits, ¶ 315(d); CWS-Hernández 1, ¶ 126; MINAE, Response to the Amparo (23 April 2002), Exh. **C-0076**.

<sup>839</sup> C-Reply Merits, ¶ 574; CWS-Rauguth 1, ¶¶ 99-101; CWS-Peschke 1, ¶ 18.

<sup>840</sup> C-Reply Merits, ¶ 575(b); CWS-Hernández 1, ¶¶ 84, 96-100; CWS-Peschke 1, ¶ 22.

<sup>841</sup> C-Reply Merits, ¶ 575(c); CWS-Hernández 1, ¶ 140; Resolution No. 3638-2005-SETENA (12 December 2005), Exh. **C-0134**; Vannessa Ventures Press Release, “Vannessa Receives Final Environmental Approval,” (12 December 2005), Exh. **C-0135**.

<sup>842</sup> C-Reply Merits, ¶ 575(e); CWS-Hernández 1, ¶ 156; Resolution No. 170-2008-SETENA (4 February 2008), Exh. **C-0170**; Vannessa Ventures Press Release, “SETENA Approves Vannessa’s Modified Environmental Impact Statement Involving Hard-Rock Mining at Crucitas,” (4 February 2008), Exh. **C-0171**.

<sup>843</sup> C-Reply Merits, ¶ 575(f); CWS-Hernández 1, ¶¶ 148-149; Decree No. 34492-MINAE (18 March 2008), Exh. **C-0172**.

process of conversion;<sup>844</sup> and (vi) the grant by SINAC of a land use change permit in October 2008, which was the last permit required before the construction of the mine could be completed.<sup>845</sup> While the Tribunal agrees that these facts show the Government's understanding that the 2002 Moratorium did not apply to the Project, they do not amount to an assurance that the Moratorium did not apply as a matter of law, nor did they guarantee that authorizations or concessions would be shielded from judicial scrutiny.

- g. The Claimant also relies on Minister Dobles' appearance before the Costa Rican Legislative Assembly in October 2008.<sup>846</sup> It is true that Minister Dobles stated that "[t]he processes [for the approval of the EIA and the granting of the exploitation concession], whose final acts [SETENA Resolution 170-08 and MINAE Resolution 217-08] are firm today, have [been carried out in] to a strict adherence to legal and constitutional regulations," and that "[a]bsolutely all of the processes have been respected, and furthermore, the company has complied with all legal and regulatory requirements."<sup>847</sup> However, these statements, which were not addressed to Infinito, cannot be construed as a guarantee that the Concession and related approvals would not be subject to judicial scrutiny, or that they would not be annulled if the courts found that some statutory or regulatory requirements had not been complied with.
- h. Finally, the Claimant argues that the 2010 Constitutional Chamber Decision "concluded that the project was environmentally sound, in compliance with Article 50 of the Political Constitution and that the exploitation concession and other project approvals were constitutional and lawful."<sup>848</sup> As discussed in paragraphs 464-467 *supra*, the Constitutional Court only held that the Project did not violate the constitutional right to a healthy environment, but expressly declined its competence to opine on whether it met the (legal) technical requirements.<sup>849</sup>

517. While the overall conduct of the Government (including statements, authorizations and the granting of the 2008 Concession) indeed demonstrates that the Government supported the Crucitas Project and considered that the 2002 Moratorium did not apply to it, they do not amount to specific assurances granted to the Claimant in order to

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<sup>844</sup> C-Reply Merits, ¶ 575(g); CWS-Hernández 1, ¶ 159; Resolution No. R-217-2008-MINAE (21 April 2008), Exh. **C-0176**.

<sup>845</sup> C-Reply Merits, ¶ 575(j); CWS-Hernández 1, ¶¶ 174-175; Resolution No. 244-2008 SCH (17 October 2008), Exh. **C-0197**.

<sup>846</sup> Legislative Assembly, Minutes of Plenary Session No. 93 (27 October 2008), Exh. **C-0200**; CWS-Hernandez 1, ¶ 175.

<sup>847</sup> Legislative Assembly, Minutes of Plenary Session No. 93 (27 October 2008), p. 12, Exh. **C-0200**.

<sup>848</sup> C-Reply Merits, ¶ 575; CWS-Hernández 1, ¶¶ 179-188; Supreme Court (Constitutional Chamber), Decision (16 April 2010), Exh. **C-0225**.

<sup>849</sup> *Supra*, ¶¶ 464-467.

induce it to invest, nor do they amount to a guarantee that the 2002 Moratorium did not apply to the Project as a matter of law.

518. The Claimant appears to recognize the lack of specific assurances, as it grounds its alleged expectation on the legal framework as it existed at the time of the investment, and in particular on the Mining Code and the Costa Rican Constitution's prohibition of retroactivity. However, the legal framework does not assist the Claimant. Contrary to the Claimant's contentions, Articles 61 and 63 of the Mining Code do not provide an exhaustive list of the grounds on which a concession may be annulled or cancelled; they merely list examples of such grounds.<sup>850</sup> Indeed, Article 61 makes it clear that concessions shall be null and void if they are granted in violation of "the law," not "this law." It is thus clear that, to be valid, exploitation concessions must meet all applicable legal requirements, not only those set out in the Mining Code. The Claimant could not have legitimately expected that its exploitation concessions would be immune from judicial scrutiny if they were granted in violation of applicable legal norms.
519. The Claimant also argues that the 2002 Moratorium changed or "eviscerated" the legal framework. Yet, absent specific assurances, the FET standard does not protect expectations in relation to the stability of a State's legal framework.<sup>851</sup> Unless they expressly undertake not to do so, States are free to modify the legal regime applicable at the time of the investment to the extent they do so within the limits prescribed by FET, *i.e.*, the evolution must not be unreasonable, discriminatory, disproportionate, or adopted contrary to due process.<sup>852</sup>
520. Moreover, a prohibition of retroactivity, such as the one in Article 34 of the Costa Rican Constitution, usually does not prohibit the passing of legislation with effects for the future, at least when acquired rights are protected. Here, when Costa Rica modified its legal framework through the 2002 Moratorium, it did in fact respect acquired rights. It is undisputed that the 2002 Moratorium did not apply to exploitation concessions that had already been granted. It is for this reason that the Claimant believed that the 2002 Concession, which was granted prior to the enactment of the 2002 Moratorium, was not affected by it. However, as discussed in paragraphs 83, 497 and 501 *supra*, the

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<sup>850</sup> Mining Code, Law No. 6797 (4 October 1982), Article 61, Exh. **C-0015** ("Permits and concessions granted in contravention of the law shall be null, and especially in the following circumstances: [...]"); Article 62 ("Exploration permits may be cancelled if the holder fails to comply with the obligations specified in this Law and its regulations, particularly in the following cases: [...]").

<sup>851</sup> See *e.g.*, *Parkerings*, ¶ 332, Exh. **CL-0068**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 ("**TECO**"), ¶ 629, Exh. **CL-0165**; *Micula*, ¶ 666, Exh. **CL-0060**. It is true that some decisions upheld legitimate expectations regarding legal frameworks deemed to (i) have contained specific guarantees; and/or (ii) have been adopted precisely to attract foreign investors and encourage their investments, which is not established to be the case of the Costa Rican Mining Code. See *e.g.* *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 ("**LG&E**"), ¶ 139, Exh. **CL-0053**; *Murphy Exploration and Production Company International v. Republic of Ecuador*, UNCITRAL, Partial Final Award, 6 May 2016, ¶¶ 248, 273, 292, Exh. **CL-0238**.

<sup>852</sup> *Parkerings*, ¶ 332, Exh. **CL-0068**; *TECO*, ¶ 630, Exh. **CL-0165**.

Constitutional Court found that the 2002 Concession was null and void because it had been granted without a prior EIA, and the TCA and the Administrative Chamber found that this nullity was absolute and operated *ab initio*. Accordingly, the basis for Industrias Infinito's acquired rights disappeared. When a new concession was granted in 2008, the TCA and the Administrative Chamber held that the 2008 Concession was also null and void because it was granted while the 2002 Moratorium was in force.

521. In light of the preceding considerations, it is clear to the Tribunal that the loss of the Claimant's Concession was not caused by a modification of the legal framework. This is not a case of breach of legitimate expectations of legal stability. What is at stake here is something different: it is whether, when guiding the Claimant in its investment process and issuing the relevant permits, the Respondent acted reasonably, consistently, and in compliance with its own law, and whether its courts applied domestic law in conformity with Costa Rica's international obligation to accord FET to the Claimant's investment.
522. In this respect, the Tribunal starts by recalling that the Claimant invested in Costa Rica in 2000, when it acquired Industrias Infinito. In 1997, the then President of Costa Rica had declared mining to be an industry of national convenience.<sup>853</sup>
523. Industrias Infinito held an exploration permit which had been granted in 1993, and had been extended to September 1999. Between 1993 and 2000, Industrias Infinito confirmed the existence of gold deposits. It applied for an exploitation concession on 18 December 1999, which it obtained in December 2001 and which became effective in January 2002 ("**2002 Concession**").<sup>854</sup> The 2002 Concession had a ten-year term, subject to extensions and one renewal, and allowed Industrias Infinito to extract, process and sell the minerals from the Las Crucitas gold deposit.<sup>855</sup> The 2002 Concession specified that "[t]he concession holder, prior to commencing the exploitation activities, shall obtain the approval of the Environmental Impact Assessment, duly approved by the [SETENA]. Six months shall be granted for its submission to the [DGM]."<sup>856</sup>
524. However, in 2004, the Constitutional Chamber declared the 2002 Concession invalid, because the EIA should have been approved *before* the concession was granted.<sup>857</sup> The Chamber thus annulled the 2002 Concession, "without prejudice to what the environmental impact assessment may determine."<sup>858</sup>

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<sup>853</sup> *Supra*, ¶ 68.

<sup>854</sup> Request for Exploitation Concession, Industrias Infinito S.A. (18 December 1999), Exh. **C-0053**; Resolution No. R-578-2001-MINAE (17 December 2001), Exh. **C-0069**.

<sup>855</sup> CWS-Hernández 1, ¶¶ 83-87; Resolution No. R-578-2001-MINAE (17 December 2001), Exh. **C-0069**.

<sup>856</sup> Resolution No. R-578-2001-MINAE (17 December 2001), Operative Part, ¶ 2, Exh. **C-0069**.

<sup>857</sup> *Supra*, ¶ 83.

<sup>858</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Operative Part, p. 32 (PDF) (English), pp. 66-67 (PDF) (Spanish), Exh. **C-0116** (as translated in R-Mem. Jur., ¶ 62).

525. To assess the implications of this Decision, it is necessary to address the legal framework that governed exploitation concessions at the time. Article 23 of the Mining Code provides that an exploration permit holder “shall have the right” (or “shall be entitled”, according to the Claimant’s translation), *inter alia*, to “[r]eceive one or more exploitation concessions if [it] demonstrate[s] that one or more commercially viable mineral substances deposits exist and are located within the perimeter zone specified in their exploration permit [.]”<sup>859</sup> However, contrary to the Claimant’s contentions, the Mining Code does not guarantee that an exploitation concession will be automatically granted under any circumstances. Article 26 makes it clear that, in order to obtain an exploitation concession, the exploration permit holder must have complied with the obligations and met the requirements set out in both the Mining Code and related Regulations.<sup>860</sup> Indeed, the Claimants’ own experts, Messrs. Hernández and Rojas, confirm that the right to obtain an exploitation concession is not automatic.<sup>861</sup>
526. It is undisputed that, on 17 December 2001, (the date on which Industrias Infinito was granted the 2002 Concession), the Mining Code did not require the approval of an EIA as a prerequisite for an exploitation concession. Article 34 of the Mining Code provided that “[a]n exploitation concession holder shall be obliged: [...] To carry out a complete environmental impact study of the exploitation process in compliance with the requirements set forth in Article 97 and with the rules that regulate environmental pollution and the recovery of renewable natural resources.”<sup>862</sup> In other words, the Mining Code required those who had already obtained an exploitation concession to carry out an EIA. The 2002 Concession thus appeared to comply with the requirements set out in the Mining Code.
527. This being so, it is undisputed that a new regulation to the Mining Code was issued in February or March 2001 (the “**2001 Regulation**”) which required that the EIA be approved prior to the granting of the concession.<sup>863</sup> The Claimant argues that, pursuant to the transitory provisions of the 2001 Regulation, the new sequencing of the EIA did

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<sup>859</sup> Mining Code, Law No. 6797 (4 October 1982), Article 23(b), Exh. **C-0015** (“An exploration permit holder shall be specially entitled to the following: [...] (b) Receive one or more exploitation concessions if [it] demonstrate[s] that one or more commercially viable mineral substances deposits exist and are located within the perimeter zone specified in their exploration permit.”)

<sup>860</sup> Mining Code, Law No. 6797 (4 October 1982), Article 26, Exh. **C-0015** (“During the term of an exploration permit and up to sixty days after the expiration of the term or its extension, the holder shall be entitled to obtain an exploitation concession, provided that [it] ha[s] fulfilled [its] obligations and the requirements of this Law and its regulations.”)

<sup>861</sup> CER-Hernandez-Rojas 2, ¶ 80 (“We have not asserted, as expert Ubico rashly asserts, that the exploration permit automatically grants the right to exploitation, but we have done so regarding the right to obtain a final answer within the validly initiated concession procedure.”)

<sup>862</sup> Mining Code, Law No. 6797 (4 October 1982), Article 34(ch), Exh. **C-0015**.

<sup>863</sup> Decree No. 29300-MINAE (March 2001), Regulation to the Mining Code, Article 9, Exh. **C-0059**. The Tribunal notes that the date does not appear on the exhibit, but the Parties seem to agree that the decree is from March 2001. See Claimant’s Consolidated List of Exhibits and R-Mem. Jur., ¶ 61. However, other documents on record refer to this decree as having been issued in February 2001. See Executive Decree No. 37225-MINAE, 23 July 2012, Exh. **R-0397** (referring in the *chapeau* to “the Regulation to the Mining Code, Executive Decree No. 29300-MINAE of 8 February 2001.”)

not apply to applications for exploitation concessions already submitted when the 2001 Regulation came into effect (as was the case with Industrias Infinito's application), and that those applications continued to be processed in accordance with the rules in place before the 2001 Regulation came into force.<sup>864</sup> Transitory Provision I of the 2001 Regulation reads as follows:

All applications pending on the date of publication of this regulation, will continue their process with the regulations in force at the time of their application. However, once granted the right to a permit or concession, the work of supervision and control will be carried out pursuant to this regulation.<sup>865</sup>

528. The Constitutional Chamber did not refer to this transitory provision, but stated that “once the exploitation concession is granted, the Administration retains the authority to revoke the exploitation concession for a breach of the obligations of the company listed in the preceding subparagraphs of [that] precept), 100 and 101 (sanctions and prohibitions), all from the Mining Code.”<sup>866</sup> By “that precept”, the Tribunal understands the Constitutional Chamber to mean Article 9 of the 2001 Regulation, to which it had referred earlier in the paragraph. The Tribunal agrees with the Claimant that, on its own, this appears to amount to a retroactive application of the 2001 Regulation. However, the Constitutional Chamber also noted that the requirement that the EIA should be approved prior to the granting of the concession stemmed from the preventive principle in environmental matters, which had been “absorbed in constitutional jurisprudence” under Article 50 of the Constitution since 1995,<sup>867</sup> but the excerpt quoted by the Constitutional Chamber did not refer specifically to the requirement of an EIA.
529. The Respondent has argued that “the requirement to present an EIA prior to the granting of an exploitation concession had been firmly established in Costa Rica’s legal order since 1993.”<sup>868</sup> The Respondent cites a decision of the Constitutional Chamber of May 2001, issued *after* the 2001 Regulation had become effective,<sup>869</sup> which referred to a decision from 1993 that found that a provision of the draft Hydrocarbons Law was unconstitutional because it allowed the EIA to be approved after a concession had been granted.<sup>870</sup> However, this is the only jurisprudential instance on record requiring an EIA

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<sup>864</sup> C-Reply Merits, ¶ 109.

<sup>865</sup> Decree No. 29300-MINAE (March 2001), Regulation to the Mining Code, Transitory Provision I, Exh. **C-0059**.

<sup>866</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Section IV, p. 27 (PDF) (English), p. 61 (PDF) (Spanish), Exh. **C-0116**.

<sup>867</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Section IV, pp. 23-26 (PDF) (English), pp. 57-60 (PDF) (Spanish), Exh. **C-0116**.

<sup>868</sup> R-Rej. Merits, ¶ 98; see *also* ¶ 112.

<sup>869</sup> R-Rej. Merits, ¶ 111, citing Supreme Court (Constitutional Chamber), Resolution 2001-4245 (23 May 2001), Exh. **R-0253**.

<sup>870</sup> Supreme Court (Constitutional Chamber), Resolution 2001-4245 (23 May 2001), Whereas IV, Exh. **R-0253** (referring to Supreme Court (Constitutional Chamber), Judgment No. 6240-93 (26 November 1993)).

to be approved prior to the granting of a concession before the issuance of the 2001 Regulation.<sup>871</sup>

530. The Respondent also notes that, according to Article 17 of the Organic Law on the Environment, enacted in 1995, “[t]he prior approval [of an EIA] by [the SETENA] shall be an indispensable requirement to **initiate activities, works or projects**” “that alter or destroy elements of the environment or generate residues, toxic or dangerous materials.”<sup>872</sup> The TCA also invoked this provision in 2010 to argue that Article 34 ch) of the Mining Code had been tacitly abrogated.<sup>873</sup> However, the Organic Law on the Environment does not require the approval of an EIA prior to the granting of the concession; it requires approval of an EIA prior to the commencement of activities. Article 34 ch) of the Mining Code is thus not inconsistent with the Organic Law on the Environment. Importantly, the 2002 Concession complied with both provisions, as it specified that “[t]he concession holder, **prior to commencing the exploitation activities**, shall obtain the approval of the Environmental Impact Assessment, duly approved by the [SETENA]. Six months shall be granted for its submission to the [DGM].”<sup>874</sup>
531. As a result, the Tribunal finds that the requirement of an EIA prior to the granting of a concession was not “firmly established” in the Costa Rican legal framework when the 2002 Concession was granted, and that the 2002 Concession met the requirements of the Mining Code, the transitory provisions of the 2001 Regulation and the Organic Law on the Environment.
532. The Claimant has not claimed that the 2004 Constitutional Chamber Decision was a denial of justice, nor could it, as the claim would be time-barred. The Tribunal is thus not concerned with the reasoning in this Decision. What matters for present purposes is that the Constitutional Chamber annulled the 2002 Concession because it was flawed. There is no evidence on record that this flaw was induced by any misconduct on the part of the Claimant. Accordingly, it can only be attributed to the State, specifically to the MINAE, which issued the Concession.
533. This is consistent with the Costa Rican administrative law principle of *impulso de oficio*, pursuant to which the Administration has the duty to “encourage or promote the procedure *ex officio*, even without requiring a gesture from a party, in order to make the procedure as expeditious and effective as possible, that is, to process without undue

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<sup>871</sup> The Tribunal notes that the Claimant’s legal expert, Ms. Araya, has referred to two other instances in which the Constitutional Chamber stated that the an EIA should be a prerequisite to the granting of a mining permit or concession (Constitutional Chamber, Decision No. 1221-2002, 6 February 2002, Exh. **C-0805**, and Constitutional Chamber, Decision No. 1220-2002, 6 February 2002, Exh. **C-0807**), but they both post-date the issuance of the 2001 Regulation. CER-Araya 1, ¶ 101 and fn. 79.

<sup>872</sup> R-Rej. Merits, ¶ 108; Organic Law on the Environment, Law No. 7554 (4 October 1995), Article 17, Exh. **R-0085** (Tribunal’s translation) (emphasis added).

<sup>873</sup> RER-León 1, ¶ 182.

<sup>874</sup> Resolution No. R-578-2001-MINAE (17 December 2001), Operative Part, ¶ 2 (emphasis added), Exh. **C-0069**.

delay for its interveners.”<sup>875</sup> The Claimant’s expert, Dr. Araya explains this principle as follows (an explanation with which Dr. León concurs<sup>876</sup>):

[P]ublic agencies have the obligation to ‘push’ the process forward to its final phase. That is why, in response to requests from individuals, agencies must review them, verify their requirements and, if they do not comply, **it is their duty** to request clarification or modification of submitted matters or request the presentation of information that is missing. Once the presentation of all the requirements has been verified, if approved, the process must move on to the next stage, and so on, until the final decision is reached.<sup>877</sup>

534. Dr. Araya concludes that (i) “it is illogical to attribute to a private entity (and not to the State) the responsibility for directing an administrative process, determining the applicable legal instruments, interpreting the regulations, detecting formal or technical omissions, taking into account specific prohibitions of the matter or making clarifications in cases of lack of certainty”,<sup>878</sup> and (ii) “it is the State (and not the private entity) that is responsible for the advancement and direction of the administrative procedures, and it makes its own decisions, which must always be motivated and in accordance with the principle of legality.”<sup>879</sup> Dr. León agrees with both statements, but clarifies that “this principle does not assure compliance with the legality principle, nor does it exclude the jurisdictional control over the conduct (either active or passive).”<sup>880</sup> Be that as it may, it remains that it is the Government’s duty to determine the necessary requirements for an administrative procedure, and to inform the petitioner of the action which it needs to take for that procedure to be successful.
535. As a consequence, it is clear that the legal defect of the 2002 Concession can only be attributed to the State. It was the State’s duty to direct the process whereby Industrias Infinito would obtain its exploitation concession, and to determine the sequencing of the various approvals. Given the clear terms of Article 34 of the Mining Code, Transitory Article I of the 2001 Regulation and Article 17 of the Organic Law on the Environment, the lack of a firmly established jurisprudence to the contrary, and the *impulso de oficio* principle, one cannot reasonably blame the Claimant for not having realized that the black letter law laid down in the Mining Code, the 2001 Regulation (transitory provisions) and the Organic Law on the Environment had been tacitly abrogated.
536. Because the 2002 Concession was declared null and void, the TCA and the Administrative Chamber finally held in 2011 that the 2002 Concession had been removed from the legal system, with the consequence that Industrias Infinito had no acquired rights that would protect it from the operation of the 2002 Moratorium.

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<sup>875</sup> RER-León 2, ¶ 215, quoting Contentious Administrative Tribunal, Resolution No. 00095-2017 (31 July 2017), Section VI, Exh. **R-0300**.

<sup>876</sup> RER-León 2, ¶ 216.

<sup>877</sup> CER-Araya 1, ¶ 12 (emphasis in original).

<sup>878</sup> CER-Araya 1, ¶ 17.

<sup>879</sup> CER-Araya 1, ¶ 20.

<sup>880</sup> RER-León 2, ¶ 220.



Notwithstanding, the Government continued to work with Industrias Infinito to move the Project forward. Industrias Infinito continued with the EIA process, which included a public hearing with the participation of over 1,000 persons and visits by the SETENA Plenary Commission.<sup>881</sup> In August 2005, SETENA approved the EIA, and requested Industrias Infinito to present a sworn affidavit of environmental commitments, make a financial deposit to serve as an environmental guarantee, appoint an environmental regent, and submit to SETENA a book of records.<sup>882</sup> In December 2005, once Industrias Infinito had submitted the environmental affidavit, SETENA confirmed the environmental viability of the Project.<sup>883</sup> In response to changing market conditions, Industrias Infinito updated its feasibility study (carried out in compliance with Canadian securities law), and requested an amendment of its EIA, which SETENA approved on 4 February 2008.<sup>884</sup> On 15 February 2008, Industrias Infinito presented a revised feasibility study to the DGM, which considered extracting more gold from the same amount of material, as a result of the rise in the price of gold.<sup>885</sup>

537. The record shows that these processes were lengthy and involved several presentations from Industrias Infinito, many meetings with Government officials, and extensive review by SETENA. The Claimant's witnesses assert, and the Respondent has not denied, that during these processes no Government official suggested that these administrative processes or the approvals granted were prohibited by the 2002 Moratorium.<sup>886</sup>
538. Relying on the Constitutional Chamber's statement that the 2002 Concession had been annulled "without prejudice to what the environmental impact assessment may determine,"<sup>887</sup> on 30 May 2007 (after its EIA had been approved), Industrias Infinito applied to cure its concession through the mechanism of validation (*convalidación*),<sup>888</sup>

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<sup>881</sup> CWS-Hernández 1, ¶ 136.

<sup>882</sup> CWS-Hernández 1, ¶ 138; Resolution No. 2237-2005-SETENA (30 August 2005), Exh. **C-0130**.

<sup>883</sup> CWS-Hernández 1, ¶ 140; Resolution No. 3638-2005-SETENA (12 December 2005), Exh. **C-0134**.

<sup>884</sup> Micon International Limited, Bankable Feasibility Study for the Crucitas Gold Project (July 2006), Exh. **C-0152**; CWS-Peschke 1, ¶¶ 28, 51; Industrias Infinito, Presentation to SETENA of Environmental Assessment of Project Modifications (3 December 2007), Exh. **C-0168**; Industrias Infinito S.A., Report on Environmental Evaluation of Proposed Changes to the Project (1 November 2007), Exh. **C-0524**; List of Studies Conducted, Exh. **C-0456**; Resolution No. 170-2008-SETENA (4 February 2008), Exh. **C-0170**.

<sup>885</sup> CWS-Hernández 4, ¶ 78; Technical-Economic Feasibility Study Update (15 February 2008), Exh. **C-0531**.

<sup>886</sup> CWS-Hernández 4, ¶¶ 27, 75; CWS-Peschke 1, ¶ 36.

<sup>887</sup> Supreme Court (Constitutional Chamber), Decision (26 November 2004), Operative Part, pp. 66-67 (PDF) (Spanish), Exh. **C-0116**. (The Tribunal notes that it has used the Respondent's translation at R-Mem. Jur., ¶ 62).

<sup>888</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Fact No. 19, p. 22 (PDF) (English), p. 162 (PDF) (Spanish), Exh. **C-0239**; Letter from Industrias Infinito to the DGM (30 May 2007), Exh. **C-0527**; Resolution No. R-217-2008-MINAE (21 April 2008), Second Whereas, p. 19 (PDF) (English), p. 40 (PDF) (Spanish), Exh. **C-0176**.

which would have cured the concession retroactively.<sup>889</sup> However, on 11 April 2008, the DGM recommended to MINAE's legal counsel to use the mechanism of conversion to restore the exploitation concession.<sup>890</sup> Article 189 of the General Law of Public Administration makes it clear that conversion may be applied to acts that are invalid as a result of absolute or relative nullity, that it converts the invalid act into a different valid one provided the former meets all formal and material requirements of the latter, and that it takes effect as of the date of the conversion.<sup>891</sup>

539. It bears noting at this juncture that, concerned about the status of its concession, in 2006 Industrias Infinito requested the Constitutional Chamber to clarify the nature of the annulment it had declared and whether it had been cured through the approval of the EIA.<sup>892</sup> But the Constitutional Chamber refused to give this clarification, declaring itself incompetent.<sup>893</sup> Yet, the Constitutional Chamber expressly told Industrias Infinito that if it considered that it had remedied the violations previously identified, it should take its query to the relevant "administrative and jurisdictional processes."<sup>894</sup> The Constitutional Chamber also stressed that it had annulled the 2002 Concession not because it had detected defects in the administrative decree itself, but because the Chamber had determined that the decree violated the precautionary principle and constitutional right for the enjoyment of a healthy and balanced environment set out in the Constitution.<sup>895</sup> Similarly, when faced with a request from a different petitioner, the Constitutional Chamber declared, in August 2010, that it lacked jurisdiction to decide whether the 2002 Moratorium applied to the Crucitas Project.<sup>896</sup>
540. The Respondent has also contended that, by filing its 2006 request for clarification to the Constitutional Chamber, Industrias Infinito showed that it had doubts as to the type of nullity declared by the Constitutional Chamber and that, when that court declared itself incompetent to give this clarification, it should have applied to the TCA. Had

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<sup>889</sup> CER-Hernández-Rojas 1, ¶¶ 65-66; General Law of Public Administration, Law No. 6227 (5 February 1978), Article 187, Exh. **C-0014**.

<sup>890</sup> Memorandum No. DGM-RNM-284-2008 from the Director of the DGM to the Coordinator of the MINAE's Legal Department (11 April 2008), p. 1, Exh. **C-0174** ("I am referring a recommendation to you, for processing, so that pursuant to Article 189 of the General Public Administration Law, you proceed to the conversion of the resolution N° 578-2001-MINAE at 9:00 on December 17, 2001 granting the mineral exploitation concession to the Industrias Infinito Sociedad Anonima company [...].")

<sup>891</sup> General Law of Public Administration, Law No. 6227 (5 February 1978), Article 189, Exh. **C-0014** ("1. The invalid act, absolute or relatively void, may be converted into a different valid one by the Administration's express declaration, on the condition that the former meets all formal and material requirements of the latter. 2. The conversion takes effect on its date.")

<sup>892</sup> RER-Ubico 1, ¶ 76.

<sup>893</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Exh. **C-0164**.

<sup>894</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas I, Exh. **C-0164**.

<sup>895</sup> Supreme Court (Constitutional Chamber), Decision No. 2007-7973 (7 June 2007), Whereas II, Exh. **C-0164**.

<sup>896</sup> Supreme Court (Constitutional Chamber), Resolution No. 2010-014009 (24 August 2010), Whereas V, pp. 13-14 (PDF) (Spanish), pp. 1-2 (PDF) (English), Exh. **R-0028**.

Industrias Infinito done so, it would have known that it had no vested rights, that the Project was subject to the 2002 Moratorium and therefore could not proceed.<sup>897</sup>

541. The Tribunal sees the matter differently. Whether or not the 2002 Moratorium applied to the Crucitas Project was not clear. First, Industrias Infinito had been granted a Concession before the Moratorium entered into force; in principle its right to exploit the concession was grandfathered. Second, while the 2002 Concession was indisputably annulled by the Constitutional Chamber, given the Constitutional Chamber's "without prejudice" statement, it was unclear whether that nullity was absolute or relative. Had the nullity been relative, the Concession could potentially have been validated (*convalidada*) or remedied (*saneada*) with retroactive effect,<sup>898</sup> which would have meant that Industrias Infinito's Concession would have been grandfathered, and the 2002 Moratorium would not have applied to it. Third, the Government continued to work with Industrias Infinito towards the approval of the EIA and restoration of the Concession. It is undisputed that no branch of the Government attempted to apply the 2002 Moratorium to Industrias Infinito prior to the 2010 TCA Decision. Fourth, Industrias Infinito tried, unsuccessfully, to obtain clarification from the Constitutional Chamber as to the status of its Concession, which shows diligence and good faith. Fifth, the Constitutional Chamber's cryptic 2004 Decision (annulling the Concession "without prejudice to what the [EIA] may determine"), coupled with its 2006 and 2010 Decisions refusing to opine on the nature of the nullity declared or the applicability of the 2002 Moratorium, add to the lack of transparency of the legal framework. In view of all of these elements, the Tribunal does not concur with the Respondent that the Claimant should have known that the 2002 Moratorium applied to it. Even if it suspected that it might, neither the administrative agencies nor the courts had confirmed such application at that stage.
542. Indeed, as anticipated above when discussing the assurances alleged by the Claimant, the actions of the Government between 2004 and 2008 show that it considered that the 2002 Moratorium did not apply to the Project. These actions are discussed in paragraph 516 *supra* to which the Tribunal refers. It is particularly clear from Minister Dobles's statements quoted at paragraph 516 (g) *supra* that the Government firmly believed that the Project complied with all statutory and regulatory requirements and was not subject to the 2002 Moratorium.
543. The Government thus moved forward with all the necessary authorizations and granted the 2008 Concession. It is not clear why the Government decided to "convert" the Concession (which created a new concession rather than restoring the previous

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<sup>897</sup> R-Rej. Merits, ¶¶ 124-130.

<sup>898</sup> General Law of Public Administration, Law No. 6227 (5 February 1978), Article 187, Exh. C-0014 ("1. The act rendered relatively null by defect in form, content or competence may be validated by a new one that mentions the defect and its correction. 2. The validation has retroactive effect to the date of the validated act."); Article 188(1) and (3) ("1. When the defect in the relatively null act consists of the absence of a substantial formality, such as an obligatory authorization, a proposal or request by another body, or a petition or claim by the petitioner, these may take place after the act, accompanied by a declaration of conformity with all its terms. [...] 3. The remediation will produce a retroactive effect at the date of the remediated act.")

one),<sup>899</sup> but there is no doubt that the Government's intention was for the Project to go ahead.

544. This intention is confirmed by the fact that President Arias repealed the 2002 Moratorium by decree on 18 March 2008,<sup>900</sup> *i.e.*, *before* the 2008 Concession was granted about a month later on 21 April 2008. However, under its Article 6, this decree would come into effect on the date of its publication, which occurred only on 4 June 2008. The reasons for this delay in publication are unclear. Be this as it may, the fact is that the Government issued the 2008 Concession when the 2002 Moratorium was still in effect. Once again, the exploitation rights granted to Industrias Infinito were vitiated by a legal flaw that can only be attributed to the Costa Rican Government.
545. The facts just discussed resemble a comedy of errors, with tragic consequences for the Claimant: the two exploitation concessions granted to Industrias Infinito were legally deficient and, as a result, Industrias Infinito was caught by the 2002 Moratorium. As unfortunate as this situation may be, the Tribunal cannot disregard the fact that all of the events described above happened prior to the cut-off date (6 February 2011). Any claims arising from the Government's conduct between 2001 and 2008 are thus time-barred.
546. The Tribunal turns to assessing whether the Costa Rican courts treated the Claimant unfairly and inequitably. Two decisions are relevant here: the 2010 TCA Decision, which declared the annulment of the 2008 Concession, and the 2011 Administrative Chamber Decision, which confirmed the TCA Decision. While the 2010 TCA Decision was issued prior to the cut-off date, it became irreversible on 30 November 2011, when it was confirmed by the Administrative Chamber. Accordingly, the majority of the Tribunal has found that any claims arising from the annulment of the 2008 Concession are not time-barred.<sup>901</sup>
547. As discussed in paragraphs 496-500 *supra*, in 2010 the TCA declared that the 2008 Concession was null and void on various grounds, including that it had been granted while the 2002 Moratorium was in force. The other grounds for annulment stated by the TCA were (i) the fact that Industrias Infinito interpreted the exploration permit as automatically granting an exploitation concession; (ii) the application of the doctrine of conversion to an act that had been annulled *ab initio* by a Costa Rican court six years earlier; (iii) the fact that Industrias Infinito had requested a modification of the declaration of environmental viability instead of filing a new EIA; and (iv) that Industrias Infinito omitted to inform the administration that it was planning to create a pond on a public road and that it attempted to circumvent the technical restrictions as to

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<sup>899</sup> The DGM Memorandum recommending the conversion is silent as to the reasons for the choice of mechanism. Memorandum No. DGM-RNM-284-2008 from the Director of the DGM to the Coordinator of the MINAE's Legal Department (11 April 2008), Exh. **C-0174**.

<sup>900</sup> Decree No. 34492-MINAE (18 March 2008), Article 5, Exh. **C-0172** and Exh. **R-0034**.

<sup>901</sup> *Supra*, ¶¶ 239, 245-246, 258, 271.

excavation.<sup>902</sup> However, it was the fact that the 2008 Concession was granted while the 2002 Moratorium was in force, that the Administrative Chamber characterized in its 2011 Decision as the crux of the matter, upon which the validity of the Concession rested. On this basis, the Administrative Chamber addressed only the violation of the 2002 Moratorium and deemed it unnecessary to refer to the other deficiencies identified by the TCA.<sup>903</sup>

548. As discussed in paragraph 501 *supra*, the Administrative Chamber found that, as a result of the annulment of the 2002 Concession by the Constitutional Chamber in 2004, Industrias Infinito had no vested right to exploit the Crucitas mine following the annulment of the 2002 Concession. Hence, the 2002 Moratorium precluded the Government from continuing the permitting process with Industrias Infinito, and the 2008 Concession (which was granted while the 2002 Moratorium was still in force) was null and void.
549. The Tribunal cannot find fault with these conclusions. As noted when discussing the Claimant's denial of justice claim, this decision was premised on Costa Rican law and reasoned. It cannot be characterized as arbitrary or capricious. As explained in *EDF* and *Lemire*, a measure is arbitrary when (i) it "inflicts damage on the investor without serving any apparent legitimate purpose;" (ii) it "is not based on legal standards but on discretion, prejudice or personal preference;" (iii) it is "taken for reasons that are different from those put forward by the decision maker;" or (iv) it is "taken in wilful disregard of due process and proper procedure."<sup>904</sup> As summed up in *Lemire*, "the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law."<sup>905</sup> That was clearly not the case here.
550. The Claimant nonetheless argues that the application of the 2002 Moratorium to the Crucitas Project in 2010-2011 served no rational purpose because by then the 2002 Moratorium had been repealed. However, when dealing with court decisions that is not the proper test. The question is whether the court decided on the basis of the law that was applicable to the facts before it. When the 2008 Concession was granted, it is undisputed that the 2002 Moratorium was in force. The fact that it was later repealed should have no effect on the court's reasoning.
551. Nor can the 2011 Administrative Chamber Decision be faulted for being inconsistent with the Government's prior conduct. While a government's conduct might qualify as inconsistent for purposes of FET if the same agency (or two agencies in the same sphere of competence) issue contradictory decisions that cause harm to an investor,

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<sup>902</sup> Contentious Administrative Tribunal, Decision (14 December 2010), Exh. **C-0239**, pp. 63-114 (Spanish), pp. 63-114 (English).

<sup>903</sup> RER-León 1, ¶¶ 285-286; Supreme Court (Administrative Chamber), Decision (30 November 2011), Whereas LIII, p. 243 (PDF) (Spanish), p. 79 (English), Whereas LX, p. 257 (PDF) (Spanish), p. 86 (English), Exh. **C-0261**.

<sup>904</sup> *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 ("*EDF (Services)*"), ¶ 303, Exh. **RL-0016**; *Lemire*, ¶ 262, Exh. **CL-0051**.

<sup>905</sup> *Lemire*, ¶ 263, Exh. **CL-0051**.

this is not the case “when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency.”<sup>906</sup> As the Respondent has rightly pointed out, this is not inconsistent conduct; it is the operation of the rule of law. Here, the Tribunal has found that the Administrative Chamber Decision complied with Costa Rican law.

552. For these reasons, the majority of the Tribunal finds that the Administrative Chamber’s decision to annul the 2008 Concession cannot be deemed a breach of Costa Rica’s obligation to accord FET to the Claimant’s investments.<sup>907</sup>

*b. Did the Respondent Prevent the Claimant from Applying for a New Concession in Breach of the FET Standard?*

553. The Claimant also contends that, through the combination of the 2011 Legislative Mining Ban and the 2012 MINAET Resolution, the Respondent prevented it from reinitiating the concession process in breach of FET.

554. The Claimant’s case in this respect is essentially that the 2011 Administrative Chamber Decision only annulled the 2008 Concession and some related administrative acts, but not the administrative process (the “*trámite*”) itself. In the Claimant’s submission, under the Mining Code before the 2011 Legislative Mining Ban was passed, upon the revocation of the 2008 Concession, Industrias Infinito would have reverted to the status it would have had before the grant of the Concession, *i.e.*, that of an exploration permit holder who had applied for an exploitation concession.<sup>908</sup> In this capacity, it would have been able to reinitiate the process and request a new concession. However, this was made impossible by the combined effect of the 2011 Legislative Mining Ban, which prohibited the grant of new exploitation concessions in perpetuity and ordered the cancellation of all pending proceedings, and the 2012 MINAET Resolution, which cancelled not only the Concession, but also all of Industrias Infinito’s pre-existing mining rights (presumably to implement the 2011 Legislative Mining Ban, as the 2011 Administrative Chamber Decision did not order the cancellation of Industrias Infinito’s pre-existing mining rights).

555. As a result, the Claimant argues that the 2011 Legislative Mining Ban “breached Infinito’s expectation that it could proceed with the Project in accordance with the Mining Code, and arbitrarily changed ‘the rules of the game’ and the legal framework applicable to Infinito.”<sup>909</sup> It also contends that the application of this Ban to the Crucitas Project served no rational purpose, as the Constitutional Chamber had confirmed that

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<sup>906</sup> *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1420.

<sup>907</sup> Arbitrator Stern does not disagree with the substantive statement, but considers that such a statement is barred for two cumulative procedural reasons, one being that a court decision cannot be reviewed under the standard of FET, the other being that the act which has annulled the Concession was the 2010 TCA Decision, not the 2011 Administrative Chamber Decision.

<sup>908</sup> C-Reply Merits, ¶ 601. See also CWS-Hernández 1, ¶¶ 230-231, 235-236.

<sup>909</sup> C-Reply Merits, ¶ 599.

the Project was environmentally viable.<sup>910</sup> Not only was there “no proportionality between the means employed and the aim sought to be realized,” but Infinito bears an excessive burden – indeed, the only burden, as Industrias Infinito was the only company affected by the Ban.<sup>911</sup>

556. As to the 2012 MINAET Resolution, the Claimant argues, first, that the Government could have chosen to take a different course of action following the 2011 Administrative Chamber Decision, and second, that the Government exceeded its powers as the Resolution went beyond what the Administrative Chamber had ordered. Not only did the 2012 MINAET Resolution cancel the 2008 Concession; it also archived the file and declared the Crucitas area free of any mining right, thus preventing Industrias Infinito from continuing with the administrative process it had already started with its exploration permit. The Claimant speculates that this cancellation might have been premised on the 2011 Legislative Mining Ban, which ordered all pending proceedings to be cancelled and archived.<sup>912</sup> The Claimant’s FET claim against the 2012 MINAET Resolution is thus tied to its claim against the 2011 Legislative Mining Ban, which the 2012 MINAET Resolution allegedly implemented (and indeed, the Claimant repeatedly characterizes the “interaction” between these two measures as the source of the alleged breach of FET).<sup>913</sup>

557. The 2011 Legislative Mining Ban was a statute that amended several provisions of the Mining Code. In particular, it amended Article 8 of the Mining Code as follows: <sup>914</sup>

Mining exploitation in areas declared national parks, biological reserves, forest reserves and state refuges of wildlife is prohibited.

[...]

All the areas of The Abangares Canton, Osa and Golfito, with potential for metal mining, are declared mining reserve zones and are frozen in favour of the State, based on the technical studies carried out by the Directorate of Geology and Mines of the Ministry of Environment, Energy and Telecommunications (Minaet).

This reserve includes all the areas which are free of exploitation concessions and all of those which, in the future, may acquire such condition, whether it is by the expiration, cancellation or any other form of expiration of the previously granted rights.

In the mining reserve area established in this article, only exploration permits, mining exploitation concessions and [benefit of] material[s] may be granted to properly organized workers in cooperatives dedicated to mining in a small scale for the subsistence of families, artisanal mining and prospector use (coligallero), according to the terms established in this Law and its Regulations.

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<sup>910</sup> C-Reply Merits, ¶ 604.

<sup>911</sup> C-Reply Merits, ¶ 604.

<sup>912</sup> C-Reply Merits, ¶ 600.

<sup>913</sup> See, e.g., C-Reply Merits, ¶¶ 601, 604.

<sup>914</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 1 (amending Article 8 of the Mining Code), Exh. **C-0238**.

The granting of these permits and concessions shall be given, exclusively, to cooperatives of workers for the development of mining in a small scale for the subsistence of families, artisanal mining and prospector use (coligallero) from communities surrounding the exploitation sites, based on the amount of affiliates of such cooperatives. The affiliated workers cannot belong, at the time, to more than one small scale mining cooperative.

Small scale mining for the subsistence of families is understood as the underground extraction carried out through manual and mechanic collective work, where the extraction volume is established by the Directorate of Geology and Mines according to the technical-geological studies submitted in the concession request, taking into consideration the use of modern exploitation techniques to maximize the metal extraction and the environmental protection in line with sustainable development. For determining the volume to be under concession, the Directorate of Geology and Mines shall apply equity and proportionality criteria according to the number of affiliated workers and the concession requests.

For this purpose, the Executive Branch shall recover through the relevant authority, in accordance with the due process, the concessions which are in no use or exploited in an irregular manner. No concession shall be renovated or extended if it fails to comply with the provisions of this article.

The Directorate of Geology and Mines is authorized to grant exploration permits and mining concessions for mining in small scale for the subsistence of families, artisanal mining and coligallero.

558. The 2011 Legislative Mining Ban also amended Article 8 bis of the Mining Code in the following terms: <sup>915</sup>

Permits or concessions shall not be granted for the exploration and exploitation activities of open-pit mining of metallic minerals on national territory. It is established as an exception that only exploration permits for scientific and investigatory purposes shall be granted.

559. The Ban contained a grandfathering provision, according to which “concession rights acquired in good faith and in compliance with all requirements of the current legislation, prior to its entry into force are excluded from the provisions of this Law.”<sup>916</sup> However, it also stated that “[a]ll [proceedings] related to exploration permits and [exploitation] concessions to engage in open-pit metal mining activities, which are pending in the Directorate of Geology and Mines and the National Technical Environmental Secretariat at the date of entry into force of the present Law, shall be archived.”<sup>917</sup>
560. The Tribunal is not convinced that, in the abstract, the 2011 Legislative Mining Ban was unfair and inequitable. More specifically, it is not convinced that the Ban lacked a rational purpose and is therefore arbitrary. While it is not clear from the Ban itself that its purpose was to protect the environment (there is no preamble or message explaining its reasons), certain provisions in the Ban suggest that the protection of the environment

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<sup>915</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 2 (amending Article 8 bis of the Mining Code), Exh. **C-0238**.

<sup>916</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Transitory Provision II, Exh. **C-0238**.

<sup>917</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Transitory Provision III, Exh. **C-0238**.



may have been at least part of the purpose behind its enactment.<sup>918</sup> The Tribunal also notes that small-scale miners (organized workers in cooperatives dedicated to mining in a small scale for the subsistence of families, artisanal mining and prospector use (coligallero)) were excluded from the Ban.<sup>919</sup> They were also allowed to use cyanide and mercury leaching techniques for eight years following the entry into force of the Ban, which does not quite conform to the objective of protecting the environment. However, the Tribunal accepts that Costa Rica may have had other reasons (e.g., social or economic reasons) to exclude small-scale mining from the Ban.

561. By contrast, the Tribunal is of the view that the *application* of the 2011 Legislative Mining Ban to the Claimant was unfair and inequitable. While as discussed above the Claimant could have no legitimate expectation of legal stability, the Tribunal finds that the application of the Ban to the Crucitas Project was disproportionate to the public policy pursued.
562. As noted in *AES*, for a measure to be reasonable, “there needs to be an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it,” and “[t]his has to do with the nature of the measure and the way it is implemented.”<sup>920</sup> In the Tribunal’s view, the measure must also be proportionate to its purpose. The Claimant has alleged (and the Respondent has not contested) that, at the time of its enactment, the only project caught by its provisions was the Crucitas Project. However, at that point in time, the Constitutional Chamber had already ruled that the Project was environmentally sound. There was thus no reasonable correlation between the aim sought by the measure and its effect on the Claimant.
563. To be reasonable and proportionate vis-à-vis the Claimant (while still capturing future projects that were untested), Parliament could have included a grandfathering provision that protected the Crucitas Project, or could have allowed pending proceedings to continue.
564. The Respondent has argued that the 2011 Legislative Mining Ban had no impact on the Claimant, because as a result of the 2010 Executive Moratoria, Industrias Infinito was in any event precluded from applying for a new concession. For the Tribunal, this argument relates to causation (and is addressed further below). In terms of its content and scope, the Tribunal finds that the 2011 Legislative Mining Ban definitively forbade open pit-mining for an indefinite period, thus depriving the Claimant of any real opportunity to reinitiate the Crucitas Project. By contrast, the 2010 Executive Moratoria did not prohibit open-pit mining outright; they merely established a suspension of such

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<sup>918</sup> For instance, Article 4 amended Article 103 of the Mining Code to add that “[t]he use of cyanide and mercury leaching techniques in mining and the improper use of dangerous substances in accordance with the provisions of The World Health Organization” “shall be considered factors that deteriorate the environment.” Amendment to Mining Code, No. 8904 (1 December 2010), Article 4 (amending Article 103 of the Mining Code), Exh. **C-0238**.

<sup>919</sup> Amendment to Mining Code, No. 8904 (1 December 2010), Article 1 (amending Article 8 of the Mining Code), Exh. **C-0238**.

<sup>920</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (“**AES**”), ¶ 10.3.9, Exh. **CL-0260**.

activities. Nor did they order all pending proceedings to be archived. The Tribunal is not persuaded by Dr. León's explanation that archiving a file is a physical process and does not mean that the rights do not exist.<sup>921</sup> It is clear from the Ban that the intention was to terminate all pending proceedings.

565. The effect of the 2011 Legislative Mining Ban on the Claimant was that, once the 2011 Administrative Chamber Decision confirmed the annulment of the Concession, it was no longer allowed to request a new mining concession. Had the 2011 Legislative Mining Ban not ordered the cancellation of pending proceedings, and had the 2012 MINAET Resolution not acted upon it, following the annulment of the 2008 Concession, Industrias Infinito would have returned to the position it was in before the grant of the concession, *i.e.*, an exploration permit holder with a pending application for an exploitation concession. To reach this conclusion, the Tribunal has taken the following elements into account:
566. First, the Claimant relies on the expert evidence of Messrs. Hernández and Rojas,<sup>922</sup> and of Dr. Araya.<sup>923</sup> While Dr. Araya's reliability was called into question at the hearing, her evidence is grounded on the clear terms of Article 171 of the General Law of Public Administration, which provides that "[t]he declaration of absolute nullity shall have a purely declaratory and retroactive effect to the date of the act, all without prejudice to the rights acquired in good faith."<sup>924</sup>
567. Second, the Respondent has not specifically addressed the Claimant's argument that the annulment of a concession does not cancel the underlying proceedings and previously acquired administrative rights. The Respondent has argued that an exploration permit does not automatically grant the right to an exploitation concession,<sup>925</sup> but that is not the point here. It has also submitted that, because Industrias Infinito's exploration permit expired in September 1999, it could not have applied for a new exploitation concession even absent the 2011 Legislative Mining Ban and the 2012 MINAET Resolution.
568. It is true that Article 26 of the Mining Code provides that "[d]uring the term of an exploration permit and up to sixty days after the expiration of the term or its extension, the [exploration permit] holder shall be entitled to obtain an exploitation concession, provided that [it] ha[s] fulfilled [its] obligations and the requirements of this Law and its regulations."<sup>926</sup> However, this provision must be interpreted as requiring an exploration

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<sup>921</sup> RER-León 2, ¶ 136 ("Subsequently, it was ordered to be archived. This decision did not change the company's status since it only meant that the file was physically sent to a different place called the archive. A decision to 'archive' is not a synonym for nullity or non-existence in relation to what should have happened at that time.")

<sup>922</sup> CER-Hernández-Rojas 1, ¶¶ 322-323; 327.

<sup>923</sup> CER-Araya 1, ¶ 56.

<sup>924</sup> General Law of Public Administration, Law No. 6227 (5 February 1978), Exh. **C-0014**, Article 171.

<sup>925</sup> RER-León 2, ¶¶ 31-42.

<sup>926</sup> Mining Code, Law No. 6797 (4 October 1982), Article 26, Exh. **C-0015**.

permit holder to *apply* for an exploitation concession within that period. To interpret it as requiring an exploitation concession to be granted within those 60 days would not conform with reality, as the permitting process may take several years, as the case at hand proves. Indeed, Dr. León confirms that this interpretation is correct.<sup>927</sup>

569. It appears undisputed that Industrias Infinito applied for an exploitation concession in a timely manner, *i.e.*, within 60 days following the expiry of the exploration permit.<sup>928</sup> If, prior to the 2011 Legislative Mining Ban, Industrias Infinito could have retained its rights in *trámite* (as acquired administrative rights), it seems irrelevant if the exploration permit had already expired.
570. Third, the Tribunal is not convinced by the Respondent's argument that, pursuant to Article 63 of the Mining Code, the cancellation of all mining rights is the natural consequence of the concession's annulment. While it is true that Article 63 provides that, once a concession is cancelled, the DGM "shall issue the corresponding cancellation resolution," and once this resolution is firm, "the zone shall be liberated from the respective mining rights,"<sup>929</sup> Article 63 refers to cases of cancellation due to *caducidad*, *i.e.*, cases in which the concession holder has failed to comply with the conditions set out in the concession or in the law.<sup>930</sup> It does not refer to cases of annulment caused by legal flaws attributable to the granting authority when the concession holder is in good faith.
571. In the Tribunal's view, in light of Article 171 of the General Law of Public Administration, the right of an exploration permit holder to apply for an exploitation concession must survive the annulment of a concession granted unlawfully when the concession holder is in good faith. Importantly, Dr. León appears to acknowledge that the process initiated by Industrias Infinito in 1999 to obtain an exploitation concession was still pending ("*en trámite*") as a result of the annulment of the concession(s):<sup>931</sup>

In Industrias Infinito's case, the Mining Registry was cancelled by judicial order, as a consequence of the absolute nullity of Concession 578-2001 and, by default, nullity of Concession 217 - 2008. That very nullity caused the company to have a case in process and a procedure that was suspended due to the indicated moratorium.

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<sup>927</sup> RER-León 1, ¶ 308 ("Infinito's witness Juan Carlos Hernández affirmed that the term of the exploration permit expired on 18 September 1999. In strict interpretation of Article 26 of the Mining Code, Infinito had two moments to submit the mining concession application: (i) during the period of validity of the exploration permit (7 June 1993 to 18 September 1999), or (ii) sixty days after the indicated expiration.")

<sup>928</sup> Industrias Infinito S.A., Request for Exploitation Concession (18 December 1999), Exh. **C-0053**. The term of the exploration permit had been extended to 18 September 1999. Resolution No. 193-DGM (2 April 1998), Exh. **C-0046**.

<sup>929</sup> Mining Code, Law No. 6797 (4 October 1982), Article 63, Exh. **C-0015**; RER-León 1, ¶ 303.

<sup>930</sup> Mining Code, Law No. 6797 (4 October 1982), Article 63, Exh. **C-0015** ("The exploitation concession may be cancelled if the holder does not comply with the conditions specified in the resolution granting it, in accordance with this Law and its regulations, especially in the following cases [...]").

<sup>931</sup> RER-León 2, ¶ 136.

572. These considerations suggest that, but for the 2011 Legislative Mining Ban and the 2012 MINAET Resolution, after the 2011 Administrative Chamber Decision, Industrias Infinito would have been restored to the position of an exploration permit holder with a pending application for an exploitation concession. While the 2010 Executive Moratoria would not have allowed Industrias Infinito to request a new exploitation concession then, this Moratorium was not an outright prohibition, and Industrias Infinito could have retained its rights in *trámite* until those Moratoria were repealed.
573. For these reasons, the Tribunal finds that the application of the 2011 Legislative Mining Ban to the Claimant was unfair and inequitable.
574. The Claimant also argues that the 2012 MINAET Resolution amounted to a breach of FET. It is true that the 2012 MINAET Resolution declared the Crucitas Project free of all mining rights,<sup>932</sup> when neither the TCA nor the Administrative Chamber expressly so provided. However, this declaration logically flowed from the annulment of the 2008 Concession and more particularly from the order in the 2011 Legislative Mining Ban that all pending proceedings be archived. The Tribunal sees the 2012 MINAET Resolution as an ancillary action taken in the implementation of the 2011 Administrative Chamber Decision and the 2011 Legislative Mining Ban. As such, it cannot be assessed as an independent breach of FET, but shares the fate of these actions. Accordingly, to the extent that it applied the 2011 Administrative Chamber Decision, the 2012 MINAET Decision does not amount to a breach of FET. However, to the extent that it applied the 2011 Legislative Mining Ban, it forms part of that FET breach.
575. As to the Claimant's argument that the Government's inaction following the 2011 Administrative Chamber Decision was a policy choice, the Tribunal is of the view that the Government could not have acted differently once the 2011 Legislative Mining Ban was in place. The Government cannot issue permits that violate domestic law. The breach of FET occurred with the Ban itself; not with the Government's subsequent conduct.

*c. Does the Respondent Continue to Treat the Claimant in an Unfair Manner?*

576. The Claimant also contends that, by reinitiating the TCA Damages proceeding, the Respondent continues to treat Infinito unfairly and inequitably.
577. The 2010 TCA Decision ordered Industrias Infinito, the Government and SINAC to bear the costs of restoring the Crucitas site to its pre-project condition. Through the 2015 TCA Damages Decision, the TCA ordered Industrias Infinito, the SINAC and the State to pay USD 6.4 million for environmental damages within six months. In December 2017, the Administrative Chamber overturned the 2015 TCA Damages Decision for lack of motivation and remanded the file to the TCA. More specifically, the Administrative Chamber held that the TCA did not assess the experts' report on

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<sup>932</sup> Resolution No. 0037, MINAET, File No. 2594 (9 January 2012), Exh. **C-0268**. In addition to cancelling the 2008 Concession, this resolution ordered the "Administrative file 2594 [to be] archived," and "the area [to be] liberated from the Mining Registry."

environmental damages, did not make any reference to the parties' positions and did not justify the rate which it applied to determine the amount of the damages. This proceeding sat inactive until January 2019, when the TCA reinitiated it.<sup>933</sup>

578. The Claimant contends that "[t]he continuation of this proceeding continues Costa Rica's breach of the fair and equitable standard, and any damages and costs (including defence costs) associated with this proceeding are further damages to Infinito resulting from that breach."<sup>934</sup>
579. In contrast to the four other measures challenged by Infinito, this measure does not relate to the loss of the Concession or Industrias Infinito's inability to pursue a new one; it relates to damages that Industrias Infinito might be required to pay as a result of its use of the site, which damages Infinito deems arbitrary. As discussed in Section V.D.3.b(vi) *supra*, the Tribunal considers that this claim pertains to a distinct FET violation.
580. The Tribunal agrees with the Respondent that this claim is premature. The TCA has not issued any decision quantifying the damages to be paid by Industrias Infinito. However, it cannot be said that the claim is manifestly without legal merit, as the Respondent also contends. It is undisputed that the 2010 TCA Decision ordered Industrias Infinito to bear part of the costs of restoring the site, and this decision was confirmed by the Administrative Chamber. What remains to be decided is the amount that Industrias Infinito will need to pay. Accordingly, the Tribunal finds that the claim is premature and thus inadmissible at this stage, but will not declare that it lacks merit.

### **3. Conclusion on FET and Impact on Quantum**

581. In conclusion, a majority of the Tribunal considers that the Respondent has breached its FET obligation through the 2011 Legislative Mining Ban and, as an ancillary act, the 2012 MINAET Resolution (to the extent that it implemented that Ban). The effect of these measures was to deprive Industrias Infinito of the opportunity to apply for a new exploitation concession.
582. Although it considers the breach established, the Tribunal has difficulty identifying the damage which the breach may have caused. Had it not been for the 2011 Legislative Mining Ban and the 2012 MINAET Resolution, after the 2011 Administrative Chamber Decision Industrias Infinito would have been restored to the position of an exploration permit holder with a pending application for an exploitation concession. However, at that time, the 2010 Executive Moratoria, which were still in place, would have barred Industrias Infinito from obtaining a new exploitation concession.

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<sup>933</sup> *Supra*, ¶¶ 114-118.

<sup>934</sup> C-Reply Merits, ¶ 613. Consequently, Infinito requests "a declaration that Costa Rica is liable to indemnify Infinito for any amounts Infinito or [Industrias Infinito] are required to pay as a result of, or in connection with, this late-blooming proceeding." *Ibid*.

583. The Claimant argues that, despite this, the 2011 Legislative Mining Ban had a “clear impact” on the Crucitas Project.<sup>935</sup> The argument is essentially that (i) it was the 2011 Legislative Mining Ban and not the Administrative Chamber Decision which mandated the cancellation of its remaining mining rights, and (ii) the 2010 Executive Moratoria “would not have deprived [Industrias Infinito] of its underlying rights, which [Industrias Infinito] could have built on to seek restoration of its key permits, once lifted.”<sup>936</sup>
584. While these considerations may well be correct, they do not suggest that the 2011 Legislative Mining Ban caused a quantifiable harm. The fact remains that, regardless of the 2011 Legislative Mining Ban, Industrias Infinito was precluded from applying for an exploitation concession because of the 2010 Executive Moratoria. While these Moratoria did not establish a permanent mining ban, there is no indication in the record as to when Industrias Infinito would have been able to reapply for an exploitation concession. It should also be noted in this context that the 2010 Executive Moratoria were issued prior to the cut-off date and that therefore any claim related to them is time-barred.
585. Even if the Tribunal were to accept that the fact of harm was established, this would not assist the Claimant’s case. There is no basis in the record, and Infinito has articulated none, allowing the Tribunal to quantify the damage caused by this standalone breach. Pursuant to the full reparation standard stated in the *Chorzów Factory* case, “[r]eparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>937</sup> Here, absent the 2011 Legislative Mining Ban and the 2012 MINAET Resolution, Industrias Infinito would have been in the situation of an exploration permit holder. Assuming *arguendo* that the 2010 Executive Moratoria did not already prevent Industrias Infinito from restarting the process, the Claimant’s harm would essentially consist in the loss of an opportunity or chance to apply for an exploitation concession. Yet, the Claimant has not put forward a quantification for such a loss of opportunity, nor has it provided the Tribunal with any elements to calculate it. If one adds the inherent uncertainty and the regulatory risk involved in any application process, the monetary consequences of this loss of chance appear too speculative to give rise to an award of damages.
586. The Tribunal thus concludes that it cannot award damages for the FET breach stemming from the 2011 Legislative Mining Ban, alone or in conjunction with the 2012 MINAET Resolution.

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<sup>935</sup> C-Reply Merits, ¶ 737.

<sup>936</sup> C-Reply Merits, ¶ 737.

<sup>937</sup> *Case Concerning the Factory at Chorzów* (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17 (13 September 1928), ¶ 125, Exh. **CL-0024**.

## D. FULL PROTECTION AND SECURITY

### 1. The Claimant's Position

587. The Claimant contends that, contrary to Article II(2)(b) of the BIT, Costa Rica failed to grant Infinito's investments FPS.

#### a. The FPS Standard Under Article II(2)(b)

588. The Claimant makes four submissions with respect to the scope of the FPS standard enshrined at Article II(2)(b) of the BIT.

589. First, it argues that the FPS standard covers the physical as well as the legal security of its investments.<sup>938</sup> The wording of the BIT does not limit the obligation to physical security and, in the absence of such language, the standard should be interpreted to include legal security.<sup>939</sup> Relying on *Biwater Gauff*, the Claimant submits that "when the terms 'protection' and 'security' are qualified by 'full', the content of the standard may extend to matters other than physical security."<sup>940</sup> This is supported by the definition of "Investment" in the BIT, which is broad and includes both tangible and intangible assets.<sup>941</sup>

590. Second, the Claimant asserts that the FPS standard is independent from the FET standard.<sup>942</sup> These standards are contained in two different provisions, which means that the "drafters intended for these standards to independently provide protection."<sup>943</sup> The Claimant further contends that "it would significantly undermine the protections of the BIT to declare a decisive rule that the [FPS] standard imposes nothing separate or independent from Article II(2)(a)."<sup>944</sup>

591. Third, the Claimant acknowledges that the FPS standard does not impose strict or absolute liability on the Respondent, but requires it to act with due diligence to protect its investments by adopting all possible measures that could be reasonably expected. It thus requires active conduct on the part of the State, not the mere abstention from prejudicial conduct.<sup>945</sup>

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<sup>938</sup> C-Mem. Merits, ¶ 346.

<sup>939</sup> C-Mem. Merits, ¶ 346, citing *Vivendi II*, ¶ 7.4.15, Exh. **CL-0029**.

<sup>940</sup> C-Mem. Merits, ¶ 346, citing *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ("**Biwater Gauff**"), ¶ 729, Exh. **CL-0021**.

<sup>941</sup> C-Reply Merits, ¶ 635.

<sup>942</sup> C-Reply Merits, ¶ 638.

<sup>943</sup> C-Reply Merits, ¶¶ 638-639, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 ("**Jan de Nul Jurisdiction**"), ¶ 269, Exh. **CL-0204**.

<sup>944</sup> C-Reply Merits, ¶ 639.

<sup>945</sup> C-Reply Merits, ¶¶ 642-643.

592. Fourth, the Claimant contends that the FPS standard protects investors from injuries, irrespective of whether they were caused by the host State actors or a third party.<sup>946</sup> The Claimant further contends that “[d]enying the application of the full protection and security clause against the state’s own actions would deprive the application of the clause to legal security of any meaning.”<sup>947</sup>

**b. The Respondent Breached Its Obligation to Provide Full Protection and Security**

593. The Claimant contends that the Respondent failed to provide legal security to Infinito’s investments and that its behavior falls below the standard of due diligence. Specifically, Costa Rica failed to create a legal system protecting Industrias Infinito’s mining rights and providing a process to uphold those rights.<sup>948</sup>

594. For the Claimant, the following actions by the Respondent show that it did not grant legal security for the Claimant’s investments: (i) the Administrative Chamber annulled the 2008 Concession on the basis of the 2002 Moratorium even though it did not apply to the Crucitas Project; (ii) the Minister of the Environment then formally cancelled the 2008 Concession and extinguished Industrias Infinito’s pre-existing mining rights; (iii) the Respondent did not put in place a legal system to prevent the issuance of inconsistent decisions by its courts.<sup>949</sup>

595. Contrary to the Respondent’s contentions, making the judicial system available to the investor and ensuring that decisions are taken in good faith is insufficient; the FPS standard includes ensuring the stability of the legal system as a whole. By “maintaining a legal system that allows for contradictory decisions to co-exist without a mechanism to address this inconsistency,” the Respondent failed to do so, and it did not make its judicial system available to the Claimant in a meaningful way.<sup>950</sup>

596. Infinito further argues that the FPS obligation binds not only Costa Rica’s judicial organs and executive branch, which “had a duty not only to refrain from acting negligently, as it did, but to take actions to correct unacceptable behavior.”<sup>951</sup> Here, the Government committed errors in granting Industrias Infinito’s permits and approvals and failed to adopt a mechanism to address the conflicting decisions issued by the Supreme Court,

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<sup>946</sup> C-Reply Merits, ¶ 640; *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (“**American Manufacturing**”), ¶ 6.13, Exh. **CL-0120**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (“**Wena**”), Exh. **CL-0091**; *Biwater Gauff*, ¶ 731, Exh. **CL-0021**.

<sup>947</sup> C-Reply Merits, ¶ 641.

<sup>948</sup> C-Reply Merits, ¶ 644.

<sup>949</sup> C-Mem. Merits, ¶ 347.

<sup>950</sup> C-Reply Merits, ¶ 645.

<sup>951</sup> C-Reply Merits, ¶ 647.



or to rectify the situation created by the annulment of the Concession and the 2011 Legislative Mining Ban.<sup>952</sup>

## 2. The Respondent's Position

### a. The FPS Standard

597. The Respondent argues that (i) the FPS standard under Article II(2)(b) of the BIT is limited to physical security; (ii) the definition of “investment” does not expand the scope of the FPS standard; (iii) the FPS standard does not provide protection in addition to the FET obligation; and (iv) the correct legal standard of the FPS obligation only requires due diligence and good faith.<sup>953</sup>
598. First, the Respondent submits that the FPS standard does not compel a host State to ensure the legal security of investors' assets. Relying on *Saluka* and *Rumeli*, the Respondent argues that the FPS clause is not meant to cover any kind of impairment of an investor's investment, but only to protect the physical integrity of an investment against interference by use of force.<sup>954</sup> The fact that this is not expressly stated in the BIT does not mean that the FPS standard extends to legal security.<sup>955</sup> Citing *Parkerings*, the Respondent denies that the reference to “full” protection and security makes a difference in the level of protection a State is required to provide.<sup>956</sup>
599. According to the Respondent, the Claimant's interpretation of Article II(2)(b) of the BIT is at odds with the Contracting Parties' intention. As Canada has emphasized in its Non-Disputing Party Submission, the scope of the FPS standard of the BIT is limited to physical protection and security of qualifying investments.<sup>957</sup> This interpretation is consistent with the rules on treaty interpretation provided in the VCLT, as it conforms to the ordinary meaning of “full protection and security” in its context and in light of the Treaty's object and purpose. It is also supported by Canada's treaty practice, as in recent treaties “Canada has taken steps to clarify that the [FPS] obligation ‘has always been intended to refer to physical protection and security’ – for example through a joint interpretive statement.”<sup>958</sup>
600. Second, the Respondent denies that the definition of “investment” widens the scope of the FPS standard because it includes both tangible and intangible assets.<sup>959</sup> Many arbitral awards involving treaties with similarly broad definitions of “investment” have

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<sup>952</sup> C-Reply Merits, ¶ 647.

<sup>953</sup> R-Rej. Merits, ¶¶ 676-693.

<sup>954</sup> R-CM Merits, ¶ 478, citing *Saluka*, ¶¶ 483-484, Exh. **CL-0077**; *Rumeli*, ¶ 668, Exh. **CL-0075**.

<sup>955</sup> R-Rej. Merits, ¶ 676.

<sup>956</sup> R-Rej. Merits, ¶ 677, citing *Parkerings*, ¶ 354, Exh. **CL-0068**.

<sup>957</sup> R-Rej. Merits, ¶ 678, citing Canada's Non-Disputing Party Submission, ¶¶ 40-47.

<sup>958</sup> R-Rej. Merits, ¶ 679.

<sup>959</sup> R-Rej. Merits, ¶ 682.

held that the FPS standard is limited to physical protection.<sup>960</sup> As noted by the *AWG Group* tribunal, the cases cited by the Claimant (such as *CME*<sup>961</sup> and *Azurix*<sup>962</sup>) have not provided any reason to depart from the historical interpretation of the standard.<sup>963</sup>

601. Third, even assuming, *quod non*, that the FPS obligation protects legal security, the Respondent contends that it could not impose an obligation that would go beyond the FET standard.<sup>964</sup> The Claimant's position that the FPS and FET standards impose distinct and independent protections is unfounded.<sup>965</sup> Several arbitral decisions have held that an extensive interpretation of the FPS standard would result in an undesirable overlap with the FET standard.<sup>966</sup> The Respondent further agrees with Canada's view that the FPS standard reflects the MST under customary international law.<sup>967</sup> Insofar as the FPS standard has independent significance, its application is limited to the protection against acts of third parties.<sup>968</sup>
602. Fourth, the Respondent submits that the FPS standard does not impose strict liability on the host State; it only requires due diligence from the host State, namely a "reasonable degree of vigilance" and an obligation "to act in good faith."<sup>969</sup> In other words, the FPS standard is not a guarantee or an obligation of result.<sup>970</sup> Relying on

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<sup>960</sup> R-Rej. Merits, ¶ 682, citing *Rumeli*, ¶¶ 340, 668, Exh. **CL-0075**; *Saluka*, ¶¶ 198, 483-484, Exh. **CL-0077**; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 ("**PSEG**"), ¶¶ 66, 258, Exh. **CL-0073**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 ("**Enron Jurisdiction**"), ¶ 42, Exh. **RL-0003**; *Crystallex*, ¶¶ 661, 632-633, Exh. **CL-0131**; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005 ("**Sempra Jurisdiction**"), ¶¶ 92, 321-324, Exh. **CL-0163**; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006 ("**AWG Jurisdiction**"), ¶¶ 47-48, **CL-0211**; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010 ("**AWG Liability**"), ¶¶ 176-177, Exh. **RL-0208**.

<sup>961</sup> *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 ("**CME**"), ¶¶ 591, 613, Exh. **CL-0026**.

<sup>962</sup> *Azurix*, ¶¶ 406-408, Exh. **CL-0018**.

<sup>963</sup> R-Rej. Merits, ¶ 682, citing *AWG Liability*, ¶¶ 176-177, Exh. **RL-0208** (finding that "[n]either the *CME* nor *Azurix* awards provide a historical analysis of the concept of full protection and security or give any clear reason as to why it was departing from the historical interpretation traditionally employed by courts and tribunals and expanding that concept to cover non-physical actions and injuries.")

<sup>964</sup> R-CM Merits, ¶ 480; R-Rej. Merits, ¶ 684.

<sup>965</sup> R-Rej. Merits, ¶ 685.

<sup>966</sup> R-Rej. Merits, ¶¶ 685-687, citing *PSEG*, ¶ 258, Exh. **CL-0073**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 286 ("**Enron Award**"), Exh. **CL-0036**; *Sempra Energy International v. Argentine Republic*, Award, 28 September 2007 ("**Sempra Award**"), ¶ 323, Exh. **R-0218**; *AWG Liability*, ¶ 174, Exh. **RL-0208**.

<sup>967</sup> R-Rej. Merits, ¶ 688.

<sup>968</sup> R-CM Merits, ¶¶ 481-482.

<sup>969</sup> R-CM Merits, ¶ 483; R-Rej. Merits, ¶ 690, citing C. Schreuer, "Full Protection and Security", 1 *Journal of International Dispute Settlement* (2010), p. 16, Exh. **CL-0178**.

<sup>970</sup> R-Rej. Merits, ¶ 690.

*AAPL* and *Lauder*, the Respondent argues that the “due diligence requirement is limited to what is reasonable in the circumstances.”<sup>971</sup> The Respondent further stresses that the threshold to establish a breach to the FPS obligation is high.<sup>972</sup>

**b. The Respondent Did Not Breach Its FPS Obligation**

603. The Respondent submits that it did not breach Article II(2)(b) of the BIT, as neither the challenged judicial measures nor the actions of the executive branch have failed to provide FPS to the Claimant’s investments.

**(i) The Judicial Measures Challenged by the Claimant Did Not Amount to a Breach of Costa Rica’s Full FPS Obligation**

604. The Respondent denies that the judicial measures of which the Claimant complains (the 2011 Administrative Chamber Decision and the alleged lack of a mechanism to address inconsistencies between the decisions of the Supreme Court) amount to a breach of FPS.
605. First, the Respondent argues that Costa Rica could not have breached the FPS standard since there is no allegation of physical harm.<sup>973</sup>
606. Second, assuming that the FPS standard extends to legal security and protection, *quod non*, Infinito has established no denial of justice.<sup>974</sup>
607. Third, under the same assumption, the Respondent complied with the due diligence imposed by the FPS standard, which only requires “Costa Rica’s judicial system [to be] available to the Claimant and [...] the decisions of the Costa Rican judiciary [to be] taken in good faith and tenable.”<sup>975</sup> The issuance by a domestic court of a judgment adverse to the investor does not establish a breach of the FPS obligation.<sup>976</sup> According to the Respondent, the Costa Rican courts rendered their decisions “in good faith, impartially and with due respect for Industrias Infinito’s procedural rights” and in accordance with Costa Rican law. More specifically, the Administrative Chamber provided Industrias Infinito with a full opportunity to present its case, including through written and oral pleadings.<sup>977</sup> In the alternative, the Respondent contends that a mere

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<sup>971</sup> R-Rej. Merits, ¶ 691, citing *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (“*AAPL*”), ¶ 77, Exh. **CL-0121**; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (“*Lauder*”), ¶ 308, Exh. **RL-0229**.

<sup>972</sup> R-Rej. Merits, ¶ 692, citing *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (“*Noble Ventures*”), ¶ 165, Exh. **RL-0214**.

<sup>973</sup> R-CM Merits, ¶ 492; R-Rej. Merits, ¶ 697.

<sup>974</sup> R-Rej. Merits, ¶ 698.

<sup>975</sup> R-CM Merits, ¶ 494; R-Rej. Merits, ¶¶ 699-700.

<sup>976</sup> R-CM Merits, ¶ 495; R-Rej. Merits, ¶ 700.

<sup>977</sup> R-CM Merits, ¶ 497; R-Rej. Merits, ¶ 701.

error in the application of domestic law does not amount to a breach of the FPS standard.<sup>978</sup>

608. Further, the Respondent contends that the Costa Rican courts assessed and rejected all of the Claimant's arguments relating to the *res judicata* principle and the co-existence of contradictory decisions within Costa Rica's judicial order.<sup>979</sup> As discussed in the context of denial of justice, there is no inconsistency between the decisions of the Administrative and the Constitutional Chambers, because each Chamber has its own area of competence.<sup>980</sup>
609. Finally, the Respondent argues that "it would not have been reasonable to expect Costa Rica to overhaul its entire legal system and introduce a new judicial mechanism simply to address these allegedly conflicting decisions."<sup>981</sup> Its actions were reasonable: it ensured a fair process for all parties and provided for a judicial system in which each Chamber has its own area of jurisdiction, precisely in order to avoid contradictory decisions.<sup>982</sup>

**(ii) The Actions of Costa Rica's Executive Branch Did Not Amount to a Breach of the FPS**

610. At the outset, the Respondent repeats that the FPS standard could not have been breached since the Claimant does not point out to any physical harm.<sup>983</sup> In any event, the Respondent disputes that Costa Rica's executive branch acted in a manner that could give rise to a breach of the FPS standard.
611. First, the FPS standard only requires the host State to comply with a duty of due diligence.<sup>984</sup>
612. Second, the Claimant's argument that Costa Rica's executive branch "failed to rectify the situation" is too vague to establish a breach to the BIT. If the Claimant's argument is that the MINAET should have disregarded the 2010 TCA Decision and the 2011 Administrative Chamber Decision, it is misguided, as "[s]uch action would not only be 'contrary to the legal system', but also likely result in criminal and disciplinary proceedings against MINAE[T] officials for failure to abide by an express legal mandate."<sup>985</sup>

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<sup>978</sup> R-Rej. Merits, ¶ 701.

<sup>979</sup> R-Rej. Merits, ¶ 702.

<sup>980</sup> R-CM Merits, ¶ 496; R-Rej. Merits, ¶ 702.

<sup>981</sup> R-Rej. Merits, ¶ 704.

<sup>982</sup> R-Rej. Merits, ¶¶ 703, 705.

<sup>983</sup> R-Rej. Merits, ¶¶ 708-709.

<sup>984</sup> R-Rej. Merits, ¶ 710.

<sup>985</sup> R-Rej. Merits, ¶ 711.

613. Third, as to the Claimant's position that the executive branch failed to adopt a mechanism to address the inconsistencies in its legal system, the Respondent contends that the executive branch cannot "reform the judiciary at will and thereby alter the checks and balances under the Costa Rican Constitution."<sup>986</sup>
614. Fourth, the Respondent submits that the Tribunal cannot take into account the executive errors in granting Industrias Infinito's permits and approvals since these facts fall outside its jurisdiction *ratione temporis*.<sup>987</sup>
615. Fifth, the Respondent disagrees with the Claimant that the 2012 MINAET Resolution extinguished its pre-existing mining rights without a valid basis. This is because the Claimant did not have such rights when the 2008 Concession was annulled, as Industrias Infinito's exploration permit had expired on 18 September 1999.<sup>988</sup>
616. Sixth, the Respondent submits that the most the Claimant could reasonably have expected was for the executive branch to assist Industrias Infinito in defending the legality of the Concession before the Costa Rican courts, which it did.<sup>989</sup>
617. Finally, the Respondent stresses that any complaint with regard to the 2011 Legislative Mining Ban relates to the actions of Costa Rica's legislative branch. In any event, as discussed in the context of FET, the 2011 Legislative Mining Ban had not impact on the Claimant.<sup>990</sup>

### 3. Canada's Position

618. In its Non-Disputing Party Submission, Canada argues that Article II(2)(b) of the BIT does not extend beyond the physical protection and security of investments. Canada submits that this interpretation is in accordance with Article 31(1) of the VCLT, as the ordinary meaning of the words "protection" and "security" point to "a general meaning of safety from physical harm, injury or impairment."<sup>991</sup>
619. Canada further asserts that the FPS standard was historically developed in the context of physical protection and security of a company's officials, employees or facilities, and submits that the notions of "protection and constant security" or "full protection and security" in international law have traditionally been associated with situations where

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<sup>986</sup> R-Rej. Merits, ¶ 712.

<sup>987</sup> R-Rej. Merits, ¶ 713.

<sup>988</sup> R-CM Merits, ¶ 501; R-Rej. Merits, ¶ 714.

<sup>989</sup> R-Rej. Merits, ¶ 715.

<sup>990</sup> R-Rej. Merits, ¶ 716.

<sup>991</sup> Canada's Submission, ¶ 41, citing the definitions of "protection;" "protect;" "harm;" "injure;" "security;" "danger;" and "threat" in the English Oxford Living Dictionaries, online: <https://en.oxforddictionaries.com/>, Exh. **CAN-0018**.

the physical security of the investor or its investment was compromised.<sup>992</sup> Hence, when it is interpreted in light of its object and purpose, it is clear that the FPS standard is intended to provide physical protection and security for investments.

620. Canada also states that this interpretation is supported both by arbitral jurisprudence<sup>993</sup> and its treaty practice.<sup>994</sup> For instance, recent treaties concluded by Canada provide that the FPS obligation refers to physical security or police protection.<sup>995</sup> Canada has also taken steps to clarify that the FPS obligation in older treaties (which do not expressly refer to physical safety) has always been limited to physical protection and security.<sup>996</sup>

#### 4. Analysis

##### a. The FPS Standard

621. Article II(2)(b) of the BIT provides as follows:<sup>997</sup>

(2) Each Contracting Party shall accord investments of the other Contracting Party:

[...]

(b) full protection and security.

622. According to Costa Rica, “full protection and security” refers only to physical security, while the Claimant attributes to this term a wider meaning including legal security.

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<sup>992</sup> Canada's Submission, ¶ 42, citing *Enron Award*, ¶¶ 284-287, Exh. **CL-0036**; and *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (“*BG Group*”), ¶ 324, Exh. **CAN-0019**.

<sup>993</sup> Canada's Submission, ¶¶ 43-44, citing *Saluka*, ¶¶ 483-484, Exh. **CL-0077**; *Gold Reserve*, ¶¶ 622-623, Exh. **CL-0042**; *BG Group*, ¶¶ 323-328, Exh. **CAN-0019**; *Crystallex*, ¶¶ 632-633, Exh. **CL-0131**.

<sup>994</sup> Canada's Submission, ¶¶ 45-47.

<sup>995</sup> Canada's Submission, ¶ 45, citing CETA, Article 8.10(5), Exh. **RL-0224**; Canada-Korea FTA, Article 8.5(3)(b), Exh. **CAN-0003**; Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, 8 May 2009 (entered into force 23 November 2011), Annex D, Exh. **CAN-0020**.

<sup>996</sup> Canada's Submission, ¶ 46, noting that in 2017, a new paragraph was added to the 1997 Canada-Chile Free Trade Agreement clarifying that the obligation to provide “‘full protection and security’ means that each Party is required to provide the level of police protection required under customary international law.” Canada-Chile FTA, Appendix I, Article G-05(3)(b) and Article G-05, fn. 3, Exh. **CAN-0004**. Similarly, Canada notes that in 2017 the Canada-Colombia Joint Commission issued an interpretation reaffirming that “[t]he concept of ‘full protection and security’ in Article 805 [of the 2011 Canada-Colombia Free Trade Agreement] refers to a Party's obligations relating to the physical security of investors and covered investments.” Canada-Colombia Free Trade Agreement, 21 November 2008 (entered into force 15 August 2011), Can. T.S. 2011 No. 11, Article 805(1), Exh. **CAN-0021**; Decision of the Colombia-Canada Joint Commission Interpretation of Certain Chapter Eight Provisions, Decision No. 6, 24 October 2017, Article 3(a); Exh. **CAN-0022**.

<sup>997</sup> BIT, Article II(2)(b), Exh. **C-0001**.

623. The Tribunal's view is that, absent treaty language indicating that legal security is covered, the FPS standard is intended to ensure physical protection and integrity of the investor and its property within the territory of the host State. While the stability of the business environment and legal security are captured by the standard of fair and equitable treatment, the full protection and security standard primarily seeks to protect investment from physical harm done by third parties.<sup>998</sup> As noted by the *Enron* tribunal, "there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation."<sup>999</sup> This Tribunal concurs that an overly extensive interpretation of FPS standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable.
624. While some awards, such as *CME*, adopted a broader interpretation of FPS covering also legal security and protection, a number of subsequent awards have maintained the more traditional approach to interpreting the notion of FPS. In *Saluka*, the tribunal noted that "[t]he practice of arbitral tribunals seems to indicate [...] that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment but to protect more specifically the physical integrity of an investment against interference by use of force."<sup>1000</sup> Similarly, the tribunal in *Parkerings* held that "[i]t is generally accepted that the variation of language between the formulation 'protection' and 'full protection and security' does not make a difference in the level of protection a State is to provide."<sup>1001</sup> A similar rationale has been applied by arbitral tribunals in *BG*, *PSEG* and *Rumeli*.<sup>1002</sup>
625. The Parties further disagree as to whether the FPS standard forms part of FET standard, as submitted by the Respondent, or is a separate standard of protection, as argued by the Claimant. In the Tribunal's opinion, the fact that the Costa Rica-Canada BIT addresses FET and FPS in two distinct subparagraphs of Article II(2) indicates that the Contracting Parties intended them to cover two different obligations. Thus, a contextual interpretation requires the Tribunal to give effect to that intention by giving the two concepts distinct meanings and fields of application, a position that is supported by the practice of investment tribunals.<sup>1003</sup> For instance, as stated in *Jan de Nul*, "[t]he notion of continuous protection and security is to be distinguished here from the fair

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<sup>998</sup> *AWG Liability*, ¶ 173, Exh. **RL-0208**; *El Paso*, ¶¶ 522-523, Exh. **CL-0035**.

<sup>999</sup> *Enron Award*, ¶ 286, Exh. **CL-0036**.

<sup>1000</sup> *Saluka*, ¶ 484, Exh. **CL-0077**.

<sup>1001</sup> *R-Rej. Merits*, ¶ 677, citing *Parkerings*, ¶ 354, Exh. **CL-0068**.

<sup>1002</sup> *BG Group*, ¶¶ 323-328, Exh. **CAN-0009**; *PSEG*, ¶¶ 258-259, Exh. **CL-0073**; *Rumeli*, ¶ 669, Exh. **CL-0075**.

<sup>1003</sup> *Jan de Nul Award* ¶ 269, Exh. **RL-0091**; *Electrabel*, ¶ 7.83, Exh. **RL-0126**; *Vannessa Ventures*, ¶¶ 221-224, Exh. **RL-0078**; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 ("*Mamidoil*"), ¶¶ 819-820, Exh. **RL-0022**; *Arif*, ¶¶ 504-506, Exh. **CL-0014**; *Frontier Petroleum*, ¶ 296, Exh. **CL-0039**.

and equitable treatment standard since they are placed in two different provisions of the BIT, even if the two guarantees overlap.”<sup>1004</sup>

626. As to the content of the FPS standard, the Tribunal is of the view that the FPS standard does not provide absolute protection against physical harm.<sup>1005</sup> In the words of the ICJ in *ELSI*, “[t]he reference [...] to the provision of ‘constant protection and security’ cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”<sup>1006</sup>
627. Nor is the standard one of strict liability; rather, it imposes an obligation of due diligence.<sup>1007</sup> After a thorough analysis on the subject, *AAPL* concluded that the FPS standard imposes “an ‘objective’ standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State.”<sup>1008</sup> More specifically, the tribunal clarified that this standard requires the State to take “the **reasonable measures of prevention** which a well-administered government could be expected to exercise **under similar circumstances**.”<sup>1009</sup> Other tribunals have endorsed this position,<sup>1010</sup> with the result that the FPS standard is thus an obligation of means, not of result. That said, a mere lack of due diligence will suffice to breach international law; there is no need to establish malice or negligence.<sup>1011</sup>
628. With these specifications in mind, the Tribunal will now determine whether the Respondent breached Article II(2)(b) of the BIT.

#### **b. Has the Respondent Breached the FPS Standard?**

629. The Claimant’s FPS claim is premised on an alleged failure by Costa Rica to provide legal security to the Claimant’s investments; the Claimant has not pointed to any physical harm. As the Tribunal has found that the BIT’s FPS standard only protects against physical harm, the Claimant’s claim must fail.

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<sup>1004</sup> C-Reply Merits, ¶ 639, referring to *Jan de Nul Award*, ¶ 269, Exh. **RL-0091**.

<sup>1005</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), pp. 149-150. See also *Lauder*, ¶ 308, Exh. **RL-0229** (“[T]he Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State.”)

<sup>1006</sup> *Elettronica Sicula S.p.A. (ELSI), United States of America v. Italy*, 1989 ICJ Reports 15, Judgment, 20 July 1989, ¶ 108, Exh. **RL-0274**.

<sup>1007</sup> *AALP*, ¶¶ 49, 76-77; Exh. **CL-0121**.

<sup>1008</sup> *AAPL*, ¶ 77, Exh. **CL-0121**.

<sup>1009</sup> *AAPL*, ¶ 77, Exh. **CL-0121** (emphasis added).

<sup>1010</sup> *Saluka*, ¶ 484, Exh. **CL-0077** (the State was under an obligation to “adopt all reasonable measures to protect assets and property from threats or attacks”); *Tecmed*, ¶ 177, Exh. **CL-0085**; *AES*, ¶ 13.3.2; Exh. **CL-0260**.

<sup>1011</sup> *AAPL*, ¶ 77, Exh. **CL-0121**; *Lauder*, ¶ 308, Exh. **RL-0229**.



## E. EXPROPRIATION

### 1. The Claimant's Position

630. The Claimant submits that Article VIII of the BIT covers both direct and indirect expropriation and that judicial measures can be expropriatory (a). The Claimant also alleges that it held rights capable of expropriation (b) and that the challenged measures amount to both a direct and indirect expropriation of its investments.

#### a. The Standard for Expropriation

##### (i) Definition of Expropriation Under Article VIII of the BIT

631. The Claimant submits that the concept of expropriation provided in Article VIII of the BIT covers any measure having an effect “equivalent to” nationalization or expropriation and therefore encompasses direct and indirect expropriation.<sup>1012</sup>

632. Relying on *Quiborax* and *Burlington*, the Claimant argues that a direct expropriation occurs “where a measure permanently deprives an investor of its property by forcibly taking or transferring the property to the State.”<sup>1013</sup> The Claimant further asserts that “[a]n indirect expropriation occurs where a measure, or a combination of measures, substantially interfere with the investor’s ability to use or derive the economic benefits from an investment established in the territory of the host State, even if it is not necessarily to the obvious benefit of the host State.”<sup>1014</sup>

633. Based on *Vivendi II* and *Burlington*, the Claimant further submits that “[e]vidence of an expropriatory intent may only serve to confirm the expropriation under the effects test, but is not a requirement in and of itself.”<sup>1015</sup>

634. Finally, the Claimant argues that an expropriation is lawful and complies with Article VIII of the BIT when the following requirements are met: (i) it is for a public purpose; (ii) it was conducted in accordance with due process of law; (iii) it was conducted on a non-discriminatory basis; and (iv) prompt, adequate and effective compensation was paid.<sup>1016</sup>

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<sup>1012</sup> C-Mem. Merits, ¶ 251.

<sup>1013</sup> C-Mem. Merits, ¶ 252, citing *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (“**Quiborax Award**”), ¶ 200, Exh. **CL-0074**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (“**Burlington Resources**”), ¶ 506, Exh. **CL-0023**.

<sup>1014</sup> C-Mem. Merits, ¶ 253, citing *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (“**Metalclad**”), ¶ 103, Exh. **CL-0058**; *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, 1 July 2004 (“**Occidental**”), ¶ 87, Exh. **CL-0066**.

<sup>1015</sup> C-Mem. Merits, ¶ 256; *Burlington Resources*, ¶ 401, Exh. **CL-0023**; *Vivendi II*, ¶ 7.5.20, Exh. **CL-0029**.

<sup>1016</sup> C-Mem. Merits, ¶ 275.

**(ii) Judicial Measures Can Be Expropriatory**

635. The Claimant argues that judicial measures can be expropriatory, since Article VIII of the BIT draws no distinction between expropriations conducted through executive, legislative or judicial measures.<sup>1017</sup> Relying on *Rumeli*, it submits that “a taking by the judicial arm of the State may also amount to an expropriation.”<sup>1018</sup> Along the same lines as its argumentation in respect of FET, the Claimant disputes that judicial measures can only breach the prohibition against unlawful expropriation under international law if they constitute a denial of justice, as the Respondent suggests, for the following reasons.<sup>1019</sup>
636. First, the Claimant argues that the Respondent cannot raise the compliance with its domestic legal framework as a defense to expropriation.<sup>1020</sup> Relying on *ATA*, the Claimant submits that “a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law.”<sup>1021</sup>
637. Second, relying on *Biwater*, the Claimant asserts that investment tribunals have repeatedly confirmed that denial of justice is not a requirement for a judicial measure to amount to an expropriation.<sup>1022</sup> For instance, in *Rumeli*, the tribunal held that “the final decision of Kazakhstan’s Supreme Court affirming the compulsory redemption of the claimant’s shares amounted to unlawful expropriation, even though the decision was made ‘in accordance with due process of law.’”<sup>1023</sup> In *Sistem*, the tribunal found that the invalidation of a share purchase agreement constituted an expropriation because it had the effect of abrogating the claimant’s ownership rights in a hotel. As noted by the tribunal in *Sistem*, States are “not immune from liability for this expropriation simply because the state organs that had carried out the expropriation were judicial entities.”<sup>1024</sup>
638. Third, the Claimant argues that the cases cited by the Respondent and by Canada are not material for the present dispute. The tribunal in *Azinian* did not find that a denial of justice is always a requirement for a finding of expropriation, but rather that tribunals can impose international responsibility on a State for multiple types of breaches including denial of justice. In any event, the Claimant stresses that no judicial measure was challenged in *Azinian*.<sup>1025</sup> In the same vein, the Claimant argues that the tribunal

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<sup>1017</sup> C-Mem. Merits, ¶ 258; C-Reply Merits, ¶ 668.

<sup>1018</sup> C-Mem. Merits, ¶ 258, citing *Rumeli*, ¶ 702, Exh. **CL-0075**.

<sup>1019</sup> C-Reply Merits, ¶ 668.

<sup>1020</sup> C-Reply Merits, ¶ 670.

<sup>1021</sup> C-Reply Merits, ¶ 670, citing *ATA*, ¶¶ 121-122, 128, Exh. **CL-0016**.

<sup>1022</sup> C-Reply Merits, ¶ 671(a); *Biwater Gauff*, ¶¶ 457-458, Exh. **CL-0021**.

<sup>1023</sup> C-Reply Merits, ¶ 671(b); *Rumeli*, ¶¶ 705-706, Exh. **CL-0075**.

<sup>1024</sup> C-Reply Merits, ¶ 671; *Sistem*, ¶¶ 117-118, Exh. **CL-0082**.

<sup>1025</sup> C-Reply Merits, ¶ 672.

in *Loewen* did not purport to limit judicial expropriations in all cases to denial of justice.<sup>1026</sup>

**b. The Claimant's Rights Were Capable of Expropriation**

639. The Claimant submits that its rights were capable of expropriation. Indeed, Article VIII of the BIT protects “investments of investors” against unlawful expropriation, which notion includes the exploitation Concession, the pre-existing mining rights, the shares in Industrias Infinito, the money lent to Industrias Infinito and invested throughout the Project's life, the other Project approvals and the property associated with the Project.<sup>1027</sup> The Claimant challenges that it held no valid rights capable of being expropriated following their annulment by the Costa Rican courts.<sup>1028</sup>
640. The Claimant further submits that the Respondent is estopped from raising the illegality of such rights as a defense in this arbitration.<sup>1029</sup> Indeed, Costa Rica's Government – through the acts of SETENA, SINAC, DGM, MINAE, various Ministers, the President of Costa Rica and the Constitutional Chamber – led the Claimant to believe that its rights were valid by upholding them and encouraging Infinito to carry on with the Project.<sup>1030</sup> More precisely, the Claimant argues that “[i]f the 2002 Moratorium applied to the [P]roject, then the Government should not have restored the exploitation concession, granted the EIA, declared the [P]roject to be in the national interest, or granted the change of land use permit.”<sup>1031</sup> Further, the Claimant stresses that its witness, Mr. Agüero, confirmed that the Government understood that Industrias Infinito had valid rights.<sup>1032</sup>
641. According to Infinito, its position is echoed by various arbitral decisions. In particular, the tribunal in *ADC* rejected the State's argument that the relevant agreements were illegal because it had performed these agreements for several years.<sup>1033</sup> In *Kardassopoulos*, the tribunal dismissed the respondents' illegality argument as the State had endorsed the investment.<sup>1034</sup>
642. In the alternative, the Claimant argues that the Respondent's argument only applies to the resolutions granting Industrias Infinito its Concession and other key approvals. The 2011 Administrative Chamber Decision did not affect the pre-existing mining rights. Rather, the 2012 MINAET Resolution expropriated the Claimant's pre-mining rights by

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<sup>1026</sup> C-Reply Merits, ¶ 673.

<sup>1027</sup> C-Mem. Merits, ¶ 260.

<sup>1028</sup> C-Reply Merits, ¶ 654.

<sup>1029</sup> C-Reply Merits, ¶ 661.

<sup>1030</sup> C-Reply Merits, ¶¶ 661, 665.

<sup>1031</sup> C-Reply Merits, ¶ 666.

<sup>1032</sup> C-Reply Merits, ¶ 667; CWS-Agüero 1, ¶ 35.

<sup>1033</sup> C-Reply Merits, ¶ 663.

<sup>1034</sup> C-Reply Merits, ¶ 664.

archiving Industrias Infinito's file in the Mining Registry and declaring the Crucitas area free of mining rights in accordance with the 2011 Legislative Mining Ban.<sup>1035</sup>

643. Contrary to the Respondent's contentions, Industrias Infinito's pre-existing mining rights were capable of expropriation for two reasons. First, pursuant to Articles 23 and 26 of the Mining Code, "an exploration permit holder becomes entitled as of right to an exploitation concession once it proves the existence of an exploitable deposit and meets defined statutory conditions,"<sup>1036</sup> a matter on which the Respondent's expert, Dr. Léon expressed no opinion.<sup>1037</sup>
644. Second, it is not true that Industrias Infinito's exploration permit had expired. Relying on Dr. Araya's expert report, the Claimant submits that "[a]n exploration permit expires only if the permit holder fails to apply for an exploitation concession within sixty days of the permit's expiry, not if its conditions are met and the permit holder moves onto the next stage in the process."<sup>1038</sup> Industrias Infinito was thus an exploration permit holder that had applied for an exploitation concession and its prior rights remained acquired.<sup>1039</sup>

**c. The Respondent Expropriated the Claimant's Investments**

**(i) The Expropriation Was Direct and Indirect**

645. The Claimant argues that, by annulling the Claimant's rights, the 2011 Administrative Chamber Decision permanently deprived Infinito of its investments in Costa Rica.<sup>1040</sup> The Claimant contends that this expropriation was both direct and indirect.<sup>1041</sup>

**a. Direct Expropriation**

646. It is the Claimant's submission that, through the 2011 Administrative Chamber Decision, the Respondent directly expropriated (i) the exploitation Concession, (ii) other project approvals, and (iii) its pre-existing mining rights.<sup>1042</sup>
647. According to the Claimant, the cancellation of its Concession is a classic case of direct expropriation. Infinito defines the Concession as "a bundle of legal rights to which Industrias Infinito became entitled in 2001, when it proved the existence of a gold deposit at Crucitas [...] and had complied with all of its obligations as an exploration permit holder." The Claimant argues that the 2011 Administrative Chamber Decision

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<sup>1035</sup> C-Reply Merits, ¶¶ 655-656.

<sup>1036</sup> C-Reply Merits, ¶ 658.

<sup>1037</sup> C-Reply Merits, ¶ 659.

<sup>1038</sup> C-Reply Merits, ¶ 660; CER-Araya 1, ¶¶ 74-75.

<sup>1039</sup> C-Reply Merits, ¶ 660; CER-Araya 1, ¶¶ 65, 120, 162, 172.

<sup>1040</sup> C-Mem. Merits, ¶ 263.

<sup>1041</sup> C-Mem. Merits, ¶¶ 246-248; C-Reply Merits, ¶ 649.

<sup>1042</sup> C-Mem. Merits, ¶ 262.

took these rights away from Industrias Infinito and thereby expropriated the Concession.<sup>1043</sup>

648. The other project approvals are likewise “bundles of legal rights that conferred on Industrias Infinito certain rights in connection with the development, construction and operation of the Crucitas gold mine,” including the 2005 EIA approval, the 2005 declaration of environmental viability and the 2008 approval of project modifications and granting of environmental viability.<sup>1044</sup> For the Claimant, the 2011 Administrative Chamber Decision also directly expropriated these rights.<sup>1045</sup>
649. That said, the Claimant argues that the 2011 Administrative Chamber Decision did not impact its pre-existing mining rights because “[i]f the final act, such as the resolution granting a concession, is annulled, the rights-holder reverts to the position it was in immediately before the final act was granted.”<sup>1046</sup> Accordingly, the Claimant was entitled under its exploration permit to apply for a new concession and new project approvals in order to carry out the Crucitas Project.<sup>1047</sup> However, the 2012 MINAET Resolution expropriated the pre-mining rights by extinguishing them. Moreover, the 2011 Legislative Mining Ban barred open-pit mining and thereby prevented the Claimant from obtaining new rights to build and operate the Crucitas mine.<sup>1048</sup>

*b. Indirect Expropriation*

650. The Claimant submits that the Respondent indirectly expropriated its other investments, including its shares in Industrias Infinito, the funds it invested into its subsidiary and the property associated with the Crucitas Project.
651. More precisely, the Claimant argues that with the loss of Industrias Infinito's Concession and related rights, the Claimant's other investments immediately became substantially and permanently worthless.<sup>1049</sup> The Claimant stresses that Industrias Infinito's share value began to fall on 30 November 2011 because of the 2011 Administrative Chamber Decision and dropped to zero in March 2013.<sup>1050</sup> Relying on the expert report of FTI, the Claimant submits that the fall in Industrias Infinito's share value shows “the market's perception of the magnitude of the impact of the alleged wrongful acts on Infinito's investment.”<sup>1051</sup>

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<sup>1043</sup> C-Mem. Merits, ¶ 264.

<sup>1044</sup> C-Mem. Merits, ¶ 265.

<sup>1045</sup> C-Mem. Merits, ¶ 265.

<sup>1046</sup> C-Mem. Merits, ¶ 266.

<sup>1047</sup> C-Mem. Merits, ¶¶ 266-267.

<sup>1048</sup> C-Mem. Merits, ¶¶ 266-267.

<sup>1049</sup> C-Mem. Merits, ¶¶ 268, 269, 271.

<sup>1050</sup> C-Mem. Merits, ¶ 270; Infinito Gold Ltd. Share Prices (21 September 2000 to 16 July 2015), Exh. C-0303.

<sup>1051</sup> C-Mem. Merits, ¶ 270; CER-FTI 1, ¶ 7.69.

**(ii) The Expropriation Is Not Justified Under the Police Powers Doctrine**

652. The Claimant disagrees with the Respondent that a tribunal must take into account the State's goal in assessing whether it has expropriated the investor's investments. Rather, the Claimant argues that the test is entirely objective and consists in assessing whether the host State deprived the investor of its investment or altered the economic value of these investments.<sup>1052</sup>

653. According to the Claimant and contrary to the Respondent's contentions, the police powers doctrine is narrow and does not apply in the present case because the challenged measures served no public purpose.

**a. There Is No Broad "Public Purpose" Exception to Expropriation**

654. For the Claimant, the Respondent's broad definition of the public purpose exception, under which any measure adopted for public interest or in good faith is covered by this exception, is inconsistent with the BIT and with the jurisprudence.<sup>1053</sup>

655. First, the Claimant emphasizes that an expropriation is lawful when it meets four requirements, including that it serves a public purpose. Following Costa Rica's arguments, it would escalate the public purpose requirement from a condition for a lawful expropriation to a bar to a finding of expropriation, irrespective of the other preconditions.<sup>1054</sup>

656. Second, the Claimant submits that, as noted in *Quiborax*, *Burlington*, *Tecmed* and *Saluka*, the police powers doctrine is narrow.<sup>1055</sup> Relying on the decision in *Vivendi II*, the Claimant argues that "[i]f public purpose automatically immuni[z]es measures from being found to be expropriatory, then there would never be a compensable taking for a public purpose."<sup>1056</sup> Most investment arbitration decisions held that the police powers doctrine only applies when the measure (i) is truly necessary and proportionate to its stated rationale; (ii) is not contrary to the investor's legitimate expectations; (iii) does not otherwise breach international obligations; or (iv) is not contrary to domestic law.<sup>1057</sup>

657. Infinito further notes that the Respondent has not referred to any case in support of its argument "that any measure aimed at general welfare and adopted in good faith will be exempted from to [sic] Article VIII's prohibition against unlawful expropriation, unless it is 'obviously disproportionate'."<sup>1058</sup> In *Philip Morris* and in *Chemtura*, the tribunals

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<sup>1052</sup> C-Reply Merits, ¶ 677.

<sup>1053</sup> C-Reply Merits, ¶ 679.

<sup>1054</sup> C-Reply Merits, ¶ 680.

<sup>1055</sup> C-Reply Merits, ¶ 682; *Quiborax Award*, ¶ 200, Exh. **CL-0074**; *Burlington Resources*, ¶ 506, Exh. **CL-0023**; *Tecmed*, ¶ 119, Exh. **CL-0085**; *Saluka*, ¶¶ 258, 263, Exh. **CL-0077**.

<sup>1056</sup> C-Reply Merits, ¶ 681, citing, *Vivendi II*, ¶ 7.5.21, Exh. **CL-0029**.

<sup>1057</sup> C-Reply Merits, ¶ 682.

<sup>1058</sup> C-Reply Merits, ¶ 683.

accepted that the respondent States had exercised their police powers because the measures were required to prevent scientifically established harm to public health. Likewise, in *Saluka*, the respondent's banking system was at stake.<sup>1059</sup>

658. Finally, relying on *Santa Elena*, the Claimant submits that “[e]xpropriatory environmental measures – no matter how laudable or beneficial to society as a whole – are in this respect, similar to any other expropriatory measures that a state may implement in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.”<sup>1060</sup>

*b. The Police Powers Doctrine Has No Application in the Present Case*

659. In any event, the Claimant denies that the Respondent adopted the challenged measures in good faith and for the legitimate purpose of protecting the environment.<sup>1061</sup>
660. First, the Claimant argues that there is no evidence on record establishing that the Crucitas Project was harmful for the environment. To the contrary, the Claimant stresses that Costa Rica’s authorities, including SETENA, SINAC and the Constitutional Chamber, found that the Project was consistent with Costa Rican environmental law. In the same vein, the Claimant puts forward that the executive branch defended the Crucitas Project before the Costa Rican courts. Finally, the Claimant argues that the 2002 Moratorium and the 2012 MINAET Resolution merely reflect a change in policy following the election of President Chinchilla.<sup>1062</sup>
661. Second, the Claimant submits that Costa Rica enacted the 2011 Legislative Mining Ban (i) in violation of the Political Constitution and (ii) to prevent the Crucitas Project from proceeding.<sup>1063</sup>
662. Third, Infinito emphasizes that the Respondent’s “recent conduct belies its argument that concern for the environment motivated the cancellation of the Crucitas [P]roject.”<sup>1064</sup> Indeed, as noted by President Arias, “[t]he environmental devastation caused by the illegal mining in Crucitas is a tragedy that, unfortunately, we could have

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<sup>1059</sup> C-Reply Merits, ¶ 683; *Philip Morris*, ¶¶ 284-286, Exh. **RL-0222**; *Saluka*, ¶¶ 262-265, 270-275, Exh. **CL-0077**; *Chemtura*, ¶ 266, Exh. **CL-0025**.

<sup>1060</sup> C-Reply Merits, ¶ 684, citing *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000 (“***Santa Elena***”), ¶ 71, Exh. **CL-0030**.

<sup>1061</sup> C-Reply Merits, ¶ 685.

<sup>1062</sup> C-Reply Merits, ¶¶ 687-688.

<sup>1063</sup> C-Reply Merits, ¶ 689.

<sup>1064</sup> C-Reply Merits, ¶ 690.

avoided.”<sup>1065</sup> The Claimant contends that Costa Rica did nothing to prevent these illegal activities and the resulting harm to the environment.<sup>1066</sup>

663. On this basis, the Claimant argues that the Respondent did not establish that the measures were proportionate and necessary to protect the environment, and thus the expropriation is not exempted under the police powers doctrine.<sup>1067</sup>

#### **d. The Expropriation Was Unlawful**

664. The Claimant submits that the expropriation did not meet the legality requirement set in Article VIII of the BIT.
665. First, the expropriation was not for a public purpose. Relying on the decision in *ADC* and on ILC reports, the Claimant explains that this condition “requires some genuine interest of the public” and is not a self-judging standard.<sup>1068</sup> The 2011 Administrative Chamber Decision and the 2012 MINAET Resolution, however served no public purpose,<sup>1069</sup> as “[f]ar from having achieved any social good, the cancellation of the Crucitas gold mine has deprived an already economically depressed community of jobs, revenue, and social and physical infrastructure.”<sup>1070</sup>
666. Second, the expropriation was not completed in accordance with due process. Invoking *ADC*, the Claimant argues that “‘due process of law’, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.”<sup>1071</sup> Industrias Infinito had no knowledge, so says the Claimant, that it would have to submit arguments as to the application of the 2002 Moratorium to the 2008 Concession. Indeed, this issue was not part of the complaint filed before the TCA. As a result, Industrias Infinito only had the opportunity to make brief submissions on this issue. The Claimant further argues that the Administrative Chamber did not cure this procedural flaw “given that the Administrative Chamber proceeding was an appeal rather than a hearing at first instance.”<sup>1072</sup>
667. Third, the Claimant draws attention to the fact that Costa Rica has paid no compensation to Industrias Infinito or to the Claimant, contrary to Article VIII of the BIT

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<sup>1065</sup> C-Reply Merits, ¶ 690, citing Press Release, “Why did I approve the Crucitas Project?”, La Nación (15 January 2019), Exh. **C-0753**.

<sup>1066</sup> C-Reply Merits, ¶ 690.

<sup>1067</sup> C-Reply Merits, ¶ 691.

<sup>1068</sup> C-Mem. Merits, ¶¶ 276-278, citing *ADC*, ¶ 423, Exh. **CL-0009**.

<sup>1069</sup> C-Mem. Merits, ¶ 280.

<sup>1070</sup> C-Mem. Merits, ¶ 280.

<sup>1071</sup> C-Mem. Merits, ¶ 281, citing *ADC*, ¶ 435, Exh. **CL-0009**.

<sup>1072</sup> C-Mem. Merits, ¶ 283.



which requires the payment of a compensation equivalent to the fair market value of the investment.<sup>1073</sup>

## 2. The Respondent's Position

### a. The Claimant Had No Mining Rights Capable of Expropriation

668. The Respondent submits that “[t]here can be no expropriation of a right that does not exist” in the first place.<sup>1074</sup> Invoking the award in *Vestey*, the Respondent submits that “[f]or a private person to have a claim under international law arising from the deprivation of its property it must hold that property in accordance with applicable rules of domestic law.”<sup>1075</sup> Likewise, the tribunal in *EnCana* ruled that “for there to have been an expropriation of an investment or return [...] the rights affected must exist under the law which creates them, in this case, the law of Ecuador.”<sup>1076</sup>
669. The Respondent further argues that the Claimant had no valid mining right because (i) the 2010 TCA Decision confirmed that the 2002 Concession was null *ab initio* and that Industrias Infinito had no right covered by the 2002 Moratorium grandfathering provision, and (ii) the 2008 Concession was granted when the 2002 Moratorium was still in effect.<sup>1077</sup>
670. Contrary to the Claimant's submission, the Respondent asserts that the same is true of Industrias Infinito's alleged pre-existing mining rights. As a preliminary matter, the Respondent argues that the Claimant's position on this point is unclear, as it argued in its Memorial that the expropriatory measure was the 2011 Administrative Chamber Decision, and later in its Reply that it was the 2011 Legislative Mining Ban and the 2012 MINAET Resolution.<sup>1078</sup>
671. In any event, the Respondent considers that Industrias Infinito had no pre-existing mining rights since an exploration permit holder is not entitled as of right to an exploitation concession, as confirmed by the TCA and Dr. León,<sup>1079</sup> and Industrias Infinito's exploration permit expired in September 1999.<sup>1080</sup> The Respondent stresses

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<sup>1073</sup> C-Mem. Merits, ¶ 287.

<sup>1074</sup> R-CM Merits, ¶¶ 504, 506; R-Rej. Merits, ¶ 612; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, (“*Vestey*”), ¶ 257, Exh. **CL-0206**; *EnCana Corporation v. Republic of Ecuador*, LCIA, Award, 3 February 2006 (“*EnCana*”), ¶ 184, Exh. **RL-0127**; *Arif*, ¶¶ 417, 420, Exh. **CL-0014**; *Emmis International Holding, B.V., et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (“*Emmis*”), ¶¶ 161-162, Exh. **RL-0086**; *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 (“*Accession*”), ¶ 75, Exh. **RL-0175**.

<sup>1075</sup> R-CM Merits, ¶ 506, citing *Vestey*, ¶ 257, Exh. **CL-0206**.

<sup>1076</sup> R-CM Merits, ¶ 506, citing *EnCana*, ¶ 184, Exh. **RL-0127**.

<sup>1077</sup> R-CM Merits, ¶¶ 507-509; R-Rej. Merits, ¶ 613.

<sup>1078</sup> R-Rej. Merits, ¶ 616.

<sup>1079</sup> R-CM Merits, ¶ 510; R-Rej. Merits, ¶ 617; RER-León 1, ¶¶ 88, 190; RER-León 2, ¶ 26.

<sup>1080</sup> R-CM Merits, ¶ 510; R-Rej. Merits, ¶ 618; RER-León 1, ¶¶ 308, 337.

that this fact was not disputed until the Claimant's Reply, and that the Claimant's witness Mr. Juan Carlos Hernández admitted that the exploration permit had expired in 1999.<sup>1081</sup>

672. The Respondent adds that, even assuming that Industrias Infinito had held pre-existing mining rights, the outcome would still have been same. The 2012 MINAET Resolution and the 2011 Legislative Mining Ban had no impact on those alleged rights,<sup>1082</sup> as the 2010 Executive Moratoria, which entered into force in 2010 before the cut-off date under the BIT, already prevented the Claimant from applying for a new concession. In other words, "irrespective of the Legislative Moratorium and the 2012 MINAE Resolution, Industrias Infinito could not have obtained an exploitation concession following the annulment of its 2008 Concession."<sup>1083</sup>
673. The Respondent further contends that "the Claimant's lack of any valid mining right also defeats its indirect expropriation claim."<sup>1084</sup> This is because the value of the assets allegedly subjected to indirect expropriation depended on the validity of the 2008 Concession and related rights.

**b. The Respondent Is Not Estopped from Arguing that the Claimant's Rights Were not Valid**

674. The Respondent disputes being estopped from relying on the invalidity of the Claimant's rights because its executive branch spent a decade upholding the validity of such rights.<sup>1085</sup>
675. First, Costa Rica asserts that "[t]he [...] decade to which the Claimant refers in its Reply was a stretch of unremitting uncertainty about the validity of Industrias Infinito's purported mining rights."<sup>1086</sup> It underlines that between the granting of the 2002 Concession and the annulment in 2010 of the 2008 Concession, various proceedings were initiated as to the validity of the Claimant's rights: On 1 April 2002, environmental activists filed an *amparo* against the 2002 Concession, which led to its annulment in 2004; the 2008 Concession was also immediately suspended by the filing of *amparo* petitions; from 12 June 2002 to 4 June 2008 and from 29 April 2010 onwards, open-pit mining was prohibited by either the 2002 Moratorium, the 2010 Executive Moratoria or the 2011 Legislative Mining Ban, which demonstrates that "there was no abrupt change in the conditions of the mining activity."<sup>1087</sup>

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<sup>1081</sup> R-Rej. Merits, ¶ 618; CWS-Hernández 1, ¶ 72 ("[T]he term of the exploration permit expired on September 18, 1999").

<sup>1082</sup> R-Rej. Merits, ¶ 620; RER-León 1, ¶¶ 300-304.

<sup>1083</sup> R-Rej. Merits, ¶ 620.

<sup>1084</sup> R-CM Merits, ¶ 511; R-Rej. Merits, ¶ 621.

<sup>1085</sup> R-Rej. Merits, ¶ 622.

<sup>1086</sup> R-Rej. Merits, ¶ 623.

<sup>1087</sup> R-Rej. Merits, ¶ 623.

676. During this period, Costa Rica's executive branch never represented to the Claimant that (i) its rights were exempt from legal or judicial scrutiny or that (ii) the judicial branch would necessarily confirm the legality of its rights.<sup>1088</sup> To the contrary, "[t]he fact that some administrative agencies worked to advance the Crucitas Mining Project only reaffirms that Costa Rica acted in good faith in respect of the Claimant's investment."<sup>1089</sup>
677. Second, the Respondent argues that the cases which the Claimant cites are inapposite as they all relate to the admissibility of a jurisdictional objection based on the alleged illegality of the investor's investment.<sup>1090</sup> For Costa Rica, the estoppel theory is not applicable here since it "can neither create rights that did not exist, nor make the Tribunal ignore the fact that the alleged rights in question were declared void in fair judicial proceedings before the Costa Rican Courts."<sup>1091</sup> Further, in *Kardassopoulos, Railroad Development* and *Fraport*, the objection to jurisdiction was not admissible because both parties conducted themselves for years as if the relevant agreements were legal. Here, Costa Rica did not conduct itself as if the 2008 Concession was legal and never represented so to the Claimant.<sup>1092</sup>
678. Third, invoking *Arif*, the Respondent submits that "Costa Rica cannot be held liable at an international level for the correct application by Costa Rican Courts of Costa Rican law in lawsuits filed by a third party."<sup>1093</sup> Otherwise, a State would be denied the possibility to review the legality of executive measures, which would be inconsistent with the separation of powers. According to the Respondent, "[i]f every declaration of annulment of an illegally granted concession following fair judicial proceedings could be considered as an expropriation, States would be unable to enforce their laws against investors."<sup>1094</sup>
679. Fourth, the Respondent denies that the Government misled the Claimant into making further investments in the Project. In the alternative, the Respondent argues that the Costa Rican judicial system provided the Claimant with a mechanism to dispel any doubt as to whether the 2004 Constitutional Chamber Decision annulled the 2002 Concession with absolute or relative effects. The Respondent cites in this regard the decision in *Amto*, pursuant to which "[an] investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for

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<sup>1088</sup> R-Rej. Merits, ¶ 624.

<sup>1089</sup> R-Rej. Merits, ¶ 633.

<sup>1090</sup> R-Rej. Merits, ¶¶ 625-628; *ADC*, ¶¶ 474-475, Exh. **CL-0009**; *Kardassopoulos*, ¶ 183, Exh. **CL-0208**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 ("**RDC**"), ¶¶ 146-147, Exh. **CL-0157**; *Fraport I*, ¶ 347, Exh. **CL-0207**.

<sup>1091</sup> R-Rej. Merits, ¶ 627.

<sup>1092</sup> R-Rej. Merits, ¶ 628.

<sup>1093</sup> R-Rej. Merits, ¶ 631; *Arif*, ¶ 419, Exh. **CL-0014**.

<sup>1094</sup> R-Rej. Merits, ¶ 632.

the outcome to the administration of justice, and from there to the host State in international law.”<sup>1095</sup>

**c. Judicial Measures Cannot Constitute an Expropriation**

680. The Respondent and Canada submit that judicial measures cannot constitute an expropriation because “in [the] absence of a denial of justice, there is no basis for an international tribunal to interfere with a domestic court’s determination of what rights exist at domestic law.”<sup>1096</sup>
681. Relying on the legal test laid down in *Azinian*, the Respondent submits that, to find that the 2011 Administrative Chamber Decision expropriated the Claimant’s investments, the Tribunal must be convinced that (i) domestic legal standards violate Costa Rica’s international law obligations under the BIT; (ii) the Costa Rican courts themselves are disavowed at the international level (for instance, as a result of a denial of justice); or (iii) the Costa Rican courts were not only wrong with respect to the invalidity of the 2008 Concession, but there has been a pretense of form to achieve an internationally unlawful end. According to the Respondent, the Claimant has failed to meet this test. It has not argued that the legal framework on which the 2011 Administrative Chamber Decision was grounded was expropriatory, nor has it proved a denial of justice or a pretense of form to achieve an internationally wrongful end.<sup>1097</sup>

**d. The Respondent’s Measures are Covered by the Police Powers Doctrine**

682. It is the Respondent’s case that all of the impugned measures were “*bona fide*, proportionate regulations aimed at the general welfare.” As a result, they represented a legitimate use of the State’s police powers and could not give rise to a claim for expropriation.<sup>1098</sup>
683. The Respondent further submits that the police powers doctrine “protects a State’s right to regulate and to exercise its police power in the interests of public welfare.”<sup>1099</sup> Relying on *Philip Morris*, *S.D. Myers*, *Saluka* and *LG&E*, the Respondent argues that a measure is valid under this doctrine if (i) it is adopted in good faith; (ii) it is not obviously disproportionate; and (iii) it aims at the general welfare.<sup>1100</sup>
684. Costa Rica disagrees with the Claimant that the police powers doctrine cannot exempt a State of liability because the standard of lawful expropriation already requires the measures to be adopted for a “public purpose.” It argues that the police powers doctrine

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<sup>1095</sup> R-Rej. Merits, ¶¶ 634-635; *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008 (“*Amto*”), ¶ 76. Exh. **RL-0270**.

<sup>1096</sup> R-Rej. Merits, ¶ 636, citing Canada’s Submission, ¶ 38.

<sup>1097</sup> R-CM Merits, ¶¶ 518-522; *Azinian*, ¶¶ 96-99, Exh. **CL-0017**.

<sup>1098</sup> R-CM Merits, ¶ 523.

<sup>1099</sup> R-CM Merits, ¶ 524.

<sup>1100</sup> R-CM Merits, ¶¶ 524-528; *Philip Morris*, ¶ 307, Exh. **RL-0222**; *S.D. Myers*, ¶ 281, Exh. **CL-0078**; *Saluka*, ¶¶ 255, 260, 262, Exh. **CL-0077**; *LG&E*, ¶ 195, Exh. **CL-0053**.

has been recognized as a stand-alone exception which requires an assessment of the “nature of purpose of the State’s action.”<sup>1101</sup> In reliance on *Feldman*, *Chemtura* and Canada’s recent treaty practice, the Respondent submits that the protection of the environment falls within the police powers doctrine.<sup>1102</sup>

685. The Respondent further submits that, contrary to the Claimant’s arguments, the first step in the analysis is not whether there has been a deprivation of the Claimant’s investment and if that deprivation was permanent. In the two cases cited by the Claimant (*Quiborax* and *Burlington*), the tribunal chose to start with the assessment of the third requirement, namely whether the measure was a legitimate exercise of the police powers doctrine.<sup>1103</sup>
686. According to the Respondent, the challenged measures (the 2011 Administrative Chamber Decision, the 2012 MINAET Resolution and the 2011 Legislative Mining Ban) fall within the police powers doctrine, because they were *bona fide*, proportionate and aimed at the general welfare.<sup>1104</sup> These measures “were all taken in order to maintain or enforce prior measures that had the overriding purpose of protecting the environment from the possible negative effects of open-pit mining.”<sup>1105</sup> Specifically, the 2011 Administrative Chamber Decision and the 2012 MINAET Resolution both upheld measures whose aim was to protect the environment. Indeed, they both maintained and enforced the 2010 TCA Decision, which in turn had confirmed the application of the 2002 Moratorium to the 2002 Concession as a result of the Constitutional Chamber’s annulment of that concession in 2004.<sup>1106</sup> As for the 2011 Legislative Mining Ban, it was issued as a safeguard against a possible repeat of the 2010 Executive Moratoria and, like those Moratoria, was motivated by legitimate concerns about the environmental impact of open-pit mining.<sup>1107</sup>
687. In contrast to the Claimant’s position, it is not necessary for Costa Rica to prove that the Crucitas Project would have been harmful for the environment; it is sufficient for it to demonstrate that Costa Rican courts applied the laws and regulations correctly.<sup>1108</sup> The Respondent argues in this respect that the challenged measures were based primarily on the 2002 Moratorium, which sought to “ensure a balance between the activities and their possible consequences on the environment, aimed at the protection

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<sup>1101</sup> R-Rej. Merits, ¶ 655, citing *Philip Morris*, ¶ 295, Exh. **RL-0222**.

<sup>1102</sup> R-CM Merits, ¶¶ 530-532; *Feldman*, ¶ 103, Exh. **CL-0038**; *Chemtura*, ¶ 266, Exh. **CL-0025**; Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, 30 October 2016 (“CETA Canada-EU”), Article 8.12 with reference to Annex 8-A, Exh. **RL-0224**.

<sup>1103</sup> R-Rej. Merits, ¶¶ 655-656; *Quiborax Award*, ¶ 227, Exh. **CL-0074**; *Burlington Resources*, ¶ 529, Exh. **CL-0023**.

<sup>1104</sup> R-CM Merits, ¶¶ 529, 536.

<sup>1105</sup> R-CM Merits, ¶ 533.

<sup>1106</sup> R-CM Merits, ¶ 534.

<sup>1107</sup> R-CM Merits, ¶ 535.

<sup>1108</sup> R-Rej. Merits, ¶ 664.

of human health, and the natural, economic and social equilibrium.”<sup>1109</sup> In any event, the record shows that the Crucitas Project gave rise to numerous environmental concerns.<sup>1110</sup>

688. The Respondent further denies that the 2011 Legislative Mining Ban is unconstitutional and thus cannot result from the exercise of police powers. In 2013, the Constitutional Chamber declared the 2011 Legislative Mining Ban constitutional because “it was of general application, [...] applied prospectively, contained a transitory provision that respected acquired rights, and was based on objective and technical evidence to conclude that open-pit mining represented a risk to public health and the environment.”<sup>1111</sup> Dr. Calzada’s opinion must be disregarded, so says Costa Rica, as her analysis of the compatibility of the 2011 Legislative Mining Ban with the principles of precaution and equality is flawed.<sup>1112</sup>
689. The Respondent also opposes the Claimant’s view that “Costa Rica has done very little to address illegal mining” ever since.<sup>1113</sup> To the contrary, “Costa Rica has actively sought to eradicate the illegal mining activities in the Crucitas Mining Project site with a view to preventing environmental damage.”<sup>1114</sup>

**e. There Is No Causal Link Between the Loss or Damage and the Allegedly Expropriatory Measures**

690. The Respondent submits that, for an expropriation to occur under international law, “[t]he investor must be deprived of all or nearly all of the benefits and value of the investment.”<sup>1115</sup> The investor must also “identify the necessary causal link between the substantial loss or near destruction of the value of the investment and the challenged measure that allegedly led to that loss or radical deprivation.”<sup>1116</sup> According to the Respondent, the Claimant has failed to establish that the challenged measures (the 2011 Administrative Chamber Decision, the 2012 MINAET Resolution, and the 2011 Legislative Mining Ban) are the cause of the deprivation of its investment.<sup>1117</sup>

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<sup>1109</sup> R-CM Merits, ¶ 533, citing Decree No. 30477-MINAE (12 June 2002), p. 1, Exh. **C-0080**.

<sup>1110</sup> R-Rej. Merits, ¶ 664.

<sup>1111</sup> R-Rej. Merits, ¶ 666; RER-León 2, ¶¶ 159-163; Supreme Court (Constitutional Chamber), Resolution No. 2013-001594 (13 January 2013), Section V, pp. 1-3, 6-7, Exh. **R-0020**.

<sup>1112</sup> R-Rej. Merits, ¶¶ 666-669.

<sup>1113</sup> R-Rej. Merits, ¶ 670, citing C-Reply Merits, ¶ 690.

<sup>1114</sup> R-Rej. Merits, ¶ 670.

<sup>1115</sup> R-CM Merits, ¶ 538.

<sup>1116</sup> R-CM Merits, ¶ 538.

<sup>1117</sup> R-CM Merits, ¶ 540.

691. According to the Respondent, the evidence shows that the loss occurred with the 2010 TCA Decision and not at a later date,<sup>1118</sup> which the Claimant actually recognized in a press release.<sup>1119</sup>
692. The Respondent further points out that, at the jurisdictional stage, the Claimant attempted to circumvent the question of causation by arguing that it had suffered a composite breach and a creeping expropriation, as a result of which “there [was] no need to establish separate losses that are tied to each individual measure.”<sup>1120</sup> However, the Claimant is now arguing that the present case is a “‘classic case’ of direct expropriation.”<sup>1121</sup> This cannot be the case, since an expropriation cannot be at the same time direct, indirect and creeping.<sup>1122</sup> The Respondent concludes that, under the Claimant’s own theory, there is no composite breach; rather, the Claimant’s case is based on a single measure, namely the 2011 Administrative Chamber Decision.<sup>1123</sup>
693. As to the alleged expropriation of Industrias Infinito’s pre-existing mining rights, the Respondent reiterates that no such rights existed.<sup>1124</sup> Even assuming that the Claimant had pre-existing mining rights that would have allowed it to request a new exploitation concession (*quod non*), “the 2010 Executive Moratoria had already imposed a ban on open-pit mining.”<sup>1125</sup> Accordingly, even absent the 2011 Legislative Mining Ban and the 2012 MINAET Resolution, Industrias Infinito could not have obtained an exploitation concession following the annulment of the 2008 Concession.<sup>1126</sup>

### 3. Canada’s Position

694. Canada submits that the expropriation standard under the BIT, reflects customary international law and forms part of the customary international law minimum standard of treatment.<sup>1127</sup> It notes that, for a measure to amount to an expropriation under Article VIII of the BIT, “there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.”<sup>1128</sup>

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<sup>1118</sup> R-CM Merits, ¶ 541, citing CER-Credibility 1, ¶ 72.

<sup>1119</sup> R-CM Merits, ¶ 542; Infinito Gold Ltd. Press Release, “Infinito Gold Files to Annul the Tribunal Contencioso Administrativo Ruling” (18 January 2011), Exh. **C-0246**.

<sup>1120</sup> R-CM Merits, ¶ 543, citing C-Rej. Jur, ¶ 367.

<sup>1121</sup> R-CM Merits, ¶ 544, citing C-Mem. Merits, ¶ 264.

<sup>1122</sup> R-CM Merits, ¶ 544.

<sup>1123</sup> R-CM Merits, ¶ 545.

<sup>1124</sup> R-CM Merits, ¶ 504; R-Rej. Merits, ¶¶ 617-618.

<sup>1125</sup> R-Rej. Merits, ¶ 620.

<sup>1126</sup> R-Rej. Merits, ¶ 620.

<sup>1127</sup> Canada’s Submission, ¶ 35.

<sup>1128</sup> Canada’s Submission, ¶ 33.

695. According to Canada, the first step in an expropriation analysis is the identification of the investment allegedly expropriated.<sup>1129</sup> When determining legal entitlements under domestic law, international tribunals should defer to domestic court rulings.<sup>1130</sup> Canada further considers that “a non-discriminatory measure that is designed to protect legitimate public welfare objectives does not constitute indirect expropriation, except in rare circumstances where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.”<sup>1131</sup>

#### 4. Analysis

696. The Tribunal will first set out the standard for expropriation (a). It will then address whether there has been a direct expropriation (b) and/or an indirect expropriation of the Claimant’s investments (c). In the affirmative, the Tribunal will determine whether the expropriation was unlawful (d).

##### a. The Standard for Expropriation

697. Article VIII of the Costa Rica-Canada BIT provides:<sup>1132</sup>

Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as ‘expropriation’) in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the fair market value of the investment expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier.  
[...]

698. The Parties appear to be in agreement on the standard for expropriation. The Claimant has cited the formulation set out in *Quiborax* and *Burlington* as to what measures amount to direct and indirect expropriations,<sup>1133</sup> and the Respondent has not contested it nor given a different version of the standard.
699. The Tribunal agrees. A State measure constitutes expropriation if (i) the measure deprives the investor of its investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine.<sup>1134</sup> An expropriation is direct when the deprivation occurs through a forcible taking or transfer of the property

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<sup>1129</sup> Canada’s Submission, ¶ 33.

<sup>1130</sup> Canada’s Submission, ¶ 35.

<sup>1131</sup> Canada’s Submission, ¶ 34.

<sup>1132</sup> BIT, Article VIII, Exh. **C-0001**.

<sup>1133</sup> C-Mem. Merits, ¶¶ 252-253, citing *Quiborax Award*, ¶ 200, Exh. **CL-0074**; *Burlington Resources*, ¶ 506, Exh. **CL-0023**.

<sup>1134</sup> *Burlington Resources*, ¶ 506, Exh. **CL-0023**; *Quiborax Award*, ¶ 200; Exh. **CL-0074**.



to the State.<sup>1135</sup> It is indirect when the measure “substantially interfere[s] with the investor’s ability to use or derive the economic benefits from an investment established in the territory of the host State, even if it is not necessarily to the obvious benefit of the host State.”<sup>1136</sup>

700. If a measure amounts to an expropriation under such test, the Tribunal must assess whether the expropriation was lawful. Pursuant to Article VIII of the BIT, the expropriation is lawful if it is (i) made for a public purpose, (ii) under due process of law, (iii) in a non-discriminatory manner and (iv) against prompt, adequate and effective compensation. These requirements are cumulative, such that failure to meet any one of them makes the expropriation wrongful.
701. While the Parties appear to concur on this standard, they diverge on whether a judicial decision may effect an expropriation if it does not amount to a denial of justice. For the reasons given in Section VI.C.1.d(iii) *supra* (on FET), a majority of the Tribunal answers this question in the affirmative, provided that the requirements for an expropriation set out in paragraph 699 *supra* are met.

**b. Has There Been a Direct Expropriation of the Claimant’s Investments?**

702. The Claimant argues that, through the 2011 Administrative Chamber Decision and the 2012 MINAET Resolution, Costa Rica directly expropriated its Concession, project approvals and pre-existing mining rights.<sup>1137</sup> The Respondent retorts that no expropriation could have taken place, because the Claimant did not hold rights capable of being expropriated, the judicial measures did not constitute a denial of justice, and the measures were adopted in accordance with the police powers doctrine to enforce underlying measures aimed at protecting the environment against open-pit mining activities.
703. At paragraph 175 *supra*, the Tribunal has held that the 2008 Concession and Industrias Infinito’s other pre-existing mining rights did not qualify as “investments” of the Claimant under Article I(g) of the Treaty, because they are assets controlled indirectly by the Claimant through a host State enterprise that do not fall within the scope of the Treaty’s definition of investment. For the same reason, these assets do not qualify as investment that can be expropriated directly in breach of Article VIII of the Treaty. While a State measure resulting in the loss of the 2008 Concession and other rights might potentially lead to the destruction of value of the shares of Industrias Infinito, this could only qualify as an indirect expropriation.
704. The Tribunal is mindful that the Parties have not raised this point. The Respondent’s main argument is not that the 2008 Concession does not qualify as a direct investment; it is that this Concession was not valid under domestic law, and as result was not capable of being expropriated. The Tribunal will thus address the Claimant’s direct

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<sup>1135</sup> *Burlington Resources*, ¶ 506, Exh. **CL-0023**; *Quiborax Award*, ¶ 200; Exh. **CL-0074**.

<sup>1136</sup> C-Mem. Merits, ¶ 253, citing *Metalclad*, ¶ 103, Exh. **CL-0058**; *Occidental*, ¶ 87, Exh. **CL-0066**.

<sup>1137</sup> C-Mem. Merits, ¶ 262; C-Reply Merits, ¶ 649.

expropriation claim as the Parties have argued it, noting that the outcome would not be different.

705. As this claim has been framed by the Parties, the Tribunal must first determine whether the Claimant (through Industrias Infinito) held rights capable of being expropriated.<sup>1138</sup> If no valid rights exist under domestic law, there can be no expropriation.<sup>1139</sup>
706. As explained in *Vestey*, the existence of rights subject to expropriation must be assessed immediately before the adoption of the measures impugned.<sup>1140</sup> The Tribunal will thus assess whether Industrias Infinito held any valid rights immediately before 30 November 2011, the date of the 2011 Administrative Chamber Decision. As discussed in Section V.D.3.b(i) *supra*, this is when the annulment became definitive and the consequent loss of value to the Claimant's investment became permanent.<sup>1141</sup>
707. The Claimant asserts that the exploitation Concession, project approvals and pre-existing mining rights form a bundle of rights that qualify as "investments of investors" under Article I(g) of the BIT and are thus protected under Article VIII.<sup>1142</sup> The Respondent, for its part, argues that the Concession and related project approvals were not validly granted because (i) the 2010 TCA Decision confirmed that the 2002 Concession was null *ab initio* and that Industrias Infinito had no right covered by the 2002 Moratorium's grandfathering provision; and (ii) the 2008 Concession was granted when the 2002 Moratorium was still in effect.<sup>1143</sup> It also contends that Industrias Infinito held no valid pre-existing mining rights, as its exploration permit had expired in September 1999.
708. As it was already made clear in the analysis of the claims of denial of justice and breach of FET, for the Tribunal Industrias Infinito held no valid Concession and related approvals capable of being expropriated. It is undisputed that the 2002 Concession was annulled by the 2004 Constitutional Chamber Decision. The TCA regarded this annulment as absolute, with the result that the 2002 Concession was null and void *ab initio*, a finding confirmed by the Administrative Chamber in 2011.
709. While the Claimant disagrees with the Administrative Chamber's conclusion and argues that the nullity was only relative, it is common ground that the Government did not attempt to cure such nullity with a validation or remediation (as requested by Industrias Infinito), but purported to "convert" the 2002 Concession in 2008. The Tribunal understands that, if it had been effective, the conversion would have resulted in a new

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<sup>1138</sup> See e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A. S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 ("*Bayindir*"), ¶ 442, Exh. **CL-0019** ("The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated.").

<sup>1139</sup> *Vestey*, ¶ 257, Exh. **CL-0206**; *EnCana*, ¶ 184, Exh. **RL-0127**; *Arif*, ¶¶ 417, 420, Exh. **CL-0014**; *Emmis*, ¶¶ 161-162, **RL-0086**; *Accession*, ¶ 75, Exh. **RL-0175**.

<sup>1140</sup> *Vestey*, ¶ 254, Exh. **CL-0206**.

<sup>1141</sup> *Supra*, ¶¶ 239-241.

<sup>1142</sup> C-Mem. Merits, ¶ 260; C-Reply Merits, ¶ 655.

<sup>1143</sup> R-CM Merits, ¶¶ 507-509; R-Rej. Merits, ¶ 613.

concession.<sup>1144</sup> In other words, a successful conversion would have had the same effect as the grant of a new concession; it would not have restored the 2002 Concession. There can thus be no doubt that, on 30 November 2011, Industrias Infinito held no valid rights over the 2002 Concession.

710. As to the 2008 Concession and related approvals, the TCA held in 2010 (and the Administrative Chamber upheld a year later) that the conversion had been improper and that in any event the Government had granted the 2008 Concession and related approvals while the 2002 Moratorium was still in effect. Accordingly, the TCA annulled the 2008 Concession and approvals, annulment which was confirmed by the Administrative Chamber.
711. As discussed above, the Tribunal must focus on the moment immediately preceding the Administrative Chamber Decision on 30 November 2011. At that time, the 2008 Concession and related approvals which Industrias Infinito formally held were vitiated by an absolute nullity. Consequently, Industrias Infinito could not be said to have owned valid rights capable of being expropriated.
712. As to Industrias Infinito's alleged pre-existing mining rights, the Tribunal has already found at paragraph 573 *supra* that Industrias Infinito had certain pre-existing mining rights that arose from its status as an exploration permit holder and that the application to the Crucitas Project of the 2011 Legislative Mining Ban (the MINAET Resolution being an ancillary measure not independent of the Ban) violated FET. For reasons of judicial economy, it can be left open whether these pre-existing rights were in addition subject to an expropriation. Indeed, even in the affirmative, no greater harm could be caused than the one generated by the FET breach. As noted when discussing the FET breach, the Tribunal is not persuaded that the Claimant has proved the existence of a quantifiable harm, and finds that that any alleged harm is in any event too speculative to give rise to an award of damages.

**c. Has There Been an Indirect Expropriation of the Claimant's Remaining Investments?**

713. The Claimant further contends that the Respondent indirectly expropriated its other investments in Costa Rica, namely: (i) the shares in Industrias Infinito, which it acquired in 2000; (ii) the funds it invested in Industrias Infinito; (iii) the physical assets associated with the Project, including the half-built mining infrastructure; and (iv) the intangible assets associated with the Project. The Claimant argues that, with the loss of the Concession, these other investments became substantially and permanently worthless.<sup>1145</sup>

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<sup>1144</sup> General Law of Public Administration, Law No. 6227 (5 February 1978), Exh. **C-0014**, Article 189 ("1. The invalid act, absolute or relatively void, may be converted into **a different valid one** by the Administration's express declaration, on the condition that the former meets all formal and material requirements of the latter. 2. **The conversion takes effect on its date.**") (Emphasis added)).

<sup>1145</sup> C-Mem. Merits, ¶¶ 268, 269, 271.

714. The Respondent does not dispute that the Claimant validly held these assets prior to the 2011 Administrative Chamber Decision and the Tribunal has noted as much when discussing jurisdiction.<sup>1146</sup> Rather, its case is that the Claimant's main investment was the Concession, and that the value of these remaining investments depended on the Concession.
715. For present purposes, the Tribunal considers it necessary to distinguish what assets were held by the Claimant, and which by Industrias Infinito. It appears undisputed that the Claimant indirectly held the shares in Industrias Infinito through Crucitas (Barbados) Limited, a corporation incorporated under the laws of Barbados.<sup>1147</sup> The Claimant also asserts that it invested funds into the Project, but the record is not clear as to how these funds were deployed (e.g., whether they were a capital contribution to Industrias Infinito or a shareholder loan). As to the physical and intangible assets, the record suggests that they were owned by Industrias Infinito,<sup>1148</sup> and thus formed part of its share value. The Tribunal thus finds that the Claimant's other assets should be assessed as part of Industria's Infinito's value.
716. It is evident from the Claimant's own case that the exploitation Concession for the Crucitas Project was the most valuable asset, upon which the value of Industrias Infinito's shares (and indeed, of the entire Project) rested. The Claimant's argument is that, as a result of the loss of the Concession, Industrias Infinito's shares were substantially deprived of their value.
717. As explained above, for a measure to amount to an indirect expropriation, it must cause the deprivation of the investment. It is widely accepted that this deprivation must be substantial,<sup>1149</sup> and that there must be a causal link between the measure and the deprivation.<sup>1150</sup> Here, the Tribunal finds that there was no causal link between the alleged deprivation and the challenged measures.
718. The Tribunal agrees that, as a matter of fact, the Claimant's shares in Industrias Infinito lost their value when the 2011 Administrative Chamber Decision annulled the 2008 Concession. But this does not mean that, as a legal matter, the decision caused the substantial deprivation of the value of Industrias Infinito. The Administrative Chamber found that the 2008 Concession was vitiated by a legal flaw that rendered it null and void *ab initio*. This means that the 2011 Administrative Chamber Decision merely confirmed this legal status. Had this decision been rendered in bad faith, in order to deprive Industrias Infinito of a validly held concession, it would have been open to the

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<sup>1146</sup> *Supra*, ¶ 174; Decision on Jurisdiction, ¶ 175(b).

<sup>1147</sup> CER-FTI Consulting 1, n. 15.

<sup>1148</sup> See, e.g., CER-FTI Consulting 1, ¶¶ 2.4; 4.14.

<sup>1149</sup> *Burlington Resources*, ¶¶ 396-397, Exh. **CL-0023**; *Quiborax Award*, ¶¶ 237-238, Exh. **CL-0074**; *Pope & Talbot v. Government Canada*, UNCITRAL, Interim Award, 26 June 2000 ("**Pope**"), ¶ 102, Exh. **CL-0072**; *Charanne B. V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Arbitration No. 062/2012 ("**Charanne**"), Award, 21 January 2016, ¶ 461, Exh. **RL-0203**.

<sup>1150</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 140; *Cargill Poland*, ¶¶ 632-635, Exh. **RL-0226**.

Tribunal to assess whether it was expropriatory. However, this is not the case here: as discussed in Section VI.C.2.c *supra*, the 2011 Administrative Chamber Decision cannot be characterized as a denial of justice, nor was it fundamentally arbitrary or unfair. It was a *bona fide* decision of the Costa Rican Supreme Court that found that Industrias Infinito did not hold valid rights under Costa Rican law. Accordingly, it cannot be characterized as an expropriatory measure.

719. In other words, the value of Industrias Infinito's shares and other intangibles was premised on an illusion, *i.e.* that the mining rights were valid when they were not. In reality, the Claimant's shares in Industrias Infinito were already worthless prior to the challenged measures, which can thus not have caused their loss of value.

**F. DID THE RESPONDENT VIOLATE OTHER OBLIGATIONS IMPORTED INTO THE BIT FROM OTHER TREATIES?**

**1. The Claimant's Position**

**a. The MFN Clause Allows the Tribunal to Import more Favorable Substantive Protections from Other Treaties**

720. The Claimant submits that in accordance with "international jurisprudence," the MFN clause of the BIT (Article IV), which contains no restrictions in this respect, allows it to "benefit from 'more favourable' substantive protections contained in other treaties concluded by the host State," including FET and umbrella clauses.<sup>1151</sup>
721. Infinito disagrees with the Respondent and Canada that the references in Article IV to "treatment", "in its territory", and "in like circumstances," mean that the MFN standard is limited to the material treatment of an investor and does not extend to substantive obligations in other treaties.<sup>1152</sup>
722. Further, the Claimant contends that its position does not disregard the BIT drafters' intent. Invoking *White Industries*, it submits that its position "does not 'subvert' the negotiated balance of the BIT," but that "it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause."<sup>1153</sup>

**b. The Respondent Failed to Do "What Is Necessary" to Protect the Claimant's Investment**

723. On the basis of Article IV of the BIT, the Claimant cites Article 3 of the Costa Rica-French Republic BIT under which the host State must "do what is necessary so that the exercise of the right so recognized is not impaired either in law or in fact,"<sup>1154</sup> arguing

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<sup>1151</sup> C-Mem. Merits, ¶¶ 349, 350.

<sup>1152</sup> C-Reply Merits, ¶ 694.

<sup>1153</sup> C-Reply Merits, ¶ 695, citing *White Industries*, ¶¶ 11.2.1-11.2.9, Exh. CL-0092.

<sup>1154</sup> C-Mem. Merits, ¶ 352, citing Costa-Rica France BIT, Article 3, Exh. CL-0005.

that it should benefit from this protection beyond the BIT's FET standard.<sup>1155</sup> It further explains that "[t]o comply with this standard, Costa Rica should have taken positive steps to protect Infinito's investments, and in particular to protect the exploitation concession and the other project approvals."<sup>1156</sup> To the extent that this positive obligation is not already part of the FET standard provided for in the BIT, "this provision does provide additional protection."<sup>1157</sup>

724. According to the Claimant, Costa Rica failed to grant such additional protection.<sup>1158</sup> Specifically, (i) it did not grant Industrias Infinito new rights to allow the exploitation of the Crucitas mine; (ii) it did not repeal the Moratoria on open-pit mining; and (iii) it did not provide a mechanism to address the inconsistencies between the decisions issued by the Supreme Court's Chambers.<sup>1159</sup>

### **c. The Respondent Failed to Comply with Specific Obligations**

725. Looking to Article IV of the BIT, Infinito invokes the umbrella clauses found in the Respondent's treaties with Taiwan and Korea, pursuant to which the host State "shall comply with [or observe] any obligation assumed regarding investments of investors of the other Contracting Party."<sup>1160</sup> As these umbrella clauses refer to "any obligation," the Claimant argues that the Respondent must comply with "obligations of any nature, regardless of their source, provided that they are indeed obligations entered into with a particular investor with regard to his or her investment."<sup>1161</sup>
726. In the Claimant's submission, by granting Industrias Infinito a Concession, Costa Rica assumed the specific obligation to grant Industrias Infinito the exclusive right to exploit the Crucitas mine, which it breached by annulling the Concession, thereby breaching the umbrella clauses.<sup>1162</sup>

## **2. The Respondent's Position**

### **a. The MFN Clause Does Not Allow the Claimant to Benefit from More Favorable Substantive Obligations Contained in Other Treaties**

727. The Respondent submits that the MFN clause in Article IV(a) of the BIT is not a "treaty-shopping device" but a substantive obligation.<sup>1163</sup> The Respondent argues that the

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<sup>1155</sup> C-Mem. Merits, ¶ 352.

<sup>1156</sup> C-Mem. Merits, ¶ 353.

<sup>1157</sup> C-Reply Merits, ¶ 698.

<sup>1158</sup> C-Mem. Merits, ¶ 354.

<sup>1159</sup> C-Mem. Merits, ¶ 353.

<sup>1160</sup> C-Mem. Merits, ¶ 356, citing Costa Rica-Taiwan BIT, Article 3(2), Exh. **CL-0002**; Korea-Costa Rica BIT, Article 10(3), Exh. **CL-0001**.

<sup>1161</sup> C-Mem. Merits, ¶ 358, citing *Micula*, ¶ 415, Exh. **CL-0060**.

<sup>1162</sup> C-Mem. Merits, ¶ 360; C-Reply Merits, ¶ 700.

<sup>1163</sup> R-CM Merits, ¶ 548; R-Rej. Merits, ¶ 725.

protection provided in this clause is subject to three cumulative requirements: the investor must (i) identify an appropriate comparator, chiefly an investment of another investor that is in “like circumstances;” (ii) establish that its investment is being granted treatment in the Respondent’s territory that is “less favourable” than that afforded to the comparator investment in connection to the “enjoyment, use, management, conduct, operation, expansion, and sale or other disposition” of the investment; and, (iii) establish that the less favorable treatment which it has received is not objectively justified.<sup>1164</sup>

728. Relying on *Parkerings*, *Bayindir* and *İçkale*, the Respondent explains that an investor can only benefit from the MFN standard if it has established that all the foregoing requirements are met.<sup>1165</sup> In the present case, the Claimant failed to establish any of these requirements; it has merely identified provisions contained in other treaties that are allegedly more favorable.<sup>1166</sup> However, the Respondent argues that granting the nationals of another State more favorable substantive guarantees does not qualify as “treatment” within the ordinary meaning of Article IV.<sup>1167</sup> Relying on Canada’s Non-Disputing Party Submission, the Respondent describes the standard in Article IV as follows:

In contrast to the ordinary meaning of the term ‘treatment’, treaty standards are not behaviour in respect of an entity or a person. Thus, absent measures adopted or maintained by a Contracting Party, substantive obligations and procedural rights in other international treaties do not automatically convert to ‘treatment’ for the purposes of the MFN obligation and cannot, themselves, give rise to a breach of Article IV(a).<sup>1168</sup>

729. As a result, the Respondent alleges that the MFN clause does not allow the Claimant “to rewrite the terms of the BIT, by attempting to import Costa Rica’s substantive obligations in other treaties.”<sup>1169</sup>

**b. The Respondent Did Not Breach the Alleged Obligation to “Do What is Necessary”**

**(i) The Claimant Has Failed to Show that Article 3 of the France-Costa Rica BIT Affords Investors More Favorable Treatment**

730. The Respondent denies that the Claimant is entitled to invoke Article 3 of the France-Costa Rica BIT, because this clause does not afford more favorable protection than

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<sup>1164</sup> R-CM Merits, ¶ 551; R-Rej. Merits, ¶ 726.

<sup>1165</sup> R-Rej. Merits, ¶¶ 727-730; *Parkerings*, ¶¶ 369, 371, Exh. **CL-0068**; *İçkale Insaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016 (“*İçkale*”), ¶¶ 328-329, Exh. **RL-0051**; *Bayindir*, ¶¶ 416-420, Exh. **CL-0019**.

<sup>1166</sup> R-Rej. Merits, ¶¶ 731-732.

<sup>1167</sup> R-Rej. Merits, ¶ 732.

<sup>1168</sup> R-Rej. Merits, ¶ 732, citing Canada’s Submission, ¶ 15.

<sup>1169</sup> R-Rej. Merits, ¶ 733.

Article II(2)(a) of the BIT.<sup>1170</sup> The former provision speaks of the “exercise of the right so recognized,” which refers back to the right to be treated fairly and equitably addressed in the first part of Article 3.<sup>1171</sup> Calling on the award in *Lahoud*, the Respondent argues that the two parts of Article 3 relate to the same test and that the obligation to “do what is necessary” therefore does not “place any more onerous an obligation on Costa Rica than that already required under the FET clause in the BIT.”<sup>1172</sup>

731. The Respondent further asserts that the FET standard in the France-Costa Rica BIT is limited to treatment “through its legislation” (“*por medio de su legislación*” / “[à] travers sa législation”). Consequently, the FET standard of the French BIT is no more favorable than the FET standard of the applicable Treaty.<sup>1173</sup>

**(ii) The Respondent Has Not Failed to “Do What is Necessary”**

732. The Respondent denies that the obligation to “do what is necessary” requires the host State to “take positive steps” to protect an investor’s investment. To the contrary, Article 3 of the French BIT provides for a less burdensome obligation that consists in doing “what is necessary so that the Claimant’s right to [FET] [...] is not hindered, either in law or in fact.”<sup>1174</sup>
733. That said, the Respondent argues that the Claimant could not reasonably have expected the State to “(i) disregard[ ] the fact that the Claimant’s investment was fundamentally illegal under Costa Rican law; (ii) refrain[ ] from exercising its sovereign right and executive powers to protect the environment; and (iii) [...] go[ ] as far as to overhaul its judicial system.”<sup>1175</sup> The Claimant fails to address Costa Rica’s arguments, and merely affirms that Costa Rica failed to “do what is necessary” because it did not redress the inconsistency and unfairness of the judgment of its courts and that, it permanently deprived the Claimant of its mining rights by issuing the 2012 MINAET Resolution and the 2011 Legislative Mining Ban. For the Respondent, these arguments are flawed because “no reasonable interpretation of the obligation to ‘do what is necessary’ would require Costa Rica to exempt foreign investments from the application of domestic law,” and because no tribunal has interpreted this provision in this way.<sup>1176</sup>
734. In any event, the Respondent argues that this claim is unfounded because (i) the 2011 Legislative Mining Ban had no impact on Industrias Infinito due to the 2010 Executive

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<sup>1170</sup> R-CM Merits, ¶ 552; R-Rej. Merits, ¶ 735.

<sup>1171</sup> R-CM Merits, ¶ 555; R-Rej. Merits, ¶ 738.

<sup>1172</sup> R-Rej. Merits, ¶¶ 738, 740-741; *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, 7 February 2014 (“*Lahoud*”), ¶ 438, Exh. **RL-0204**.

<sup>1173</sup> R-CM Merits, ¶¶ 554-555; R-Rej. Merits, ¶ 739.

<sup>1174</sup> R-CM Merits, ¶ 559.

<sup>1175</sup> R-CM Merits, ¶ 558; R-Rej. Merits, ¶ 742.

<sup>1176</sup> R-Rej. Merits, ¶¶ 743-744.



Moratoria and (ii) Industrias Infinito had no pre-mining rights anymore since the expiration of its exploration permit.<sup>1177</sup>

**c. The Respondent Never Assumed or Breached Any “Specific Obligation”**

735. According to Costa Rica, it has never assumed or breached any “specific obligation.”
736. First, it submits that the BIT Contracting States did not intend to protect investors against the breach of specific obligations, since the BIT contains no umbrella clause. An investor should not be allowed to import an entirely new right into a treaty, which amounts to unilaterally modifying an international treaty, contrary to the drafters’ intent.<sup>1178</sup> In reliance on *Teinver*, the Respondent argues that “the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so.”<sup>1179</sup> By contrast, the Respondent contends that the decision in *White Industries* to which the Claimant refers provides no guidance for present purposes, as India did not raise the same argument as Costa Rica, namely that MFN clauses cannot be used to import new rights.<sup>1180</sup>
737. Second, the Respondent alleges that it has “never assumed the specific obligation on which the Claimant’s argument is premised,”<sup>1181</sup> because the 2008 Concession has been found null and void *ab initio* in accordance with domestic law.<sup>1182</sup>
738. Third, the Respondent challenges that Infinito was entitled to rely on the 2008 Concession’s validity. As argued in the context of FET, the Claimant could not have held any legitimate expectation that its Concession would be exempt from legal defects.<sup>1183</sup>

**3. Canada’s Position**

739. In its Non-Disputing Party Submission, Canada makes two main submissions with respect to the BIT’s MFN clause.
740. First, it submits that Article IV(a) of the BIT requires a comparison between the treatment accorded to the investment of an investor of a Contracting Party and the treatment accorded to the investment of an investor of a third State. According to Canada, the purpose of this provision which, cannot be applied in the abstract, is to

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<sup>1177</sup> R-Rej. Merits, ¶ 745.

<sup>1178</sup> R-CM Merits, ¶ 562; R-Rej. Merits, ¶ 748.

<sup>1179</sup> R-CM Merits, ¶ 562, citing *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017 (“*Teinver*”), ¶ 884, Exh. **RL-0205**.

<sup>1180</sup> R-Rej. Merits, ¶ 750.

<sup>1181</sup> R-CM Merits, ¶¶ 566-567; R-Rej. Merits, ¶¶ 751-753.

<sup>1182</sup> R-Rej. Merits, ¶ 756.

<sup>1183</sup> R-Rej. Merits, ¶¶ 754-755.

prohibit nationality-based discrimination against investors of the Contracting Party. The investor bears the burden of proving that: “(1) the Contracting Party has granted both the investments of the investor and an investor of a third State ‘treatment’ with respect to ‘the enjoyment, use, management, conduct, operation, expansion, and sale or disposition’ of their investments; (2) the alleged treatment was granted ‘in like circumstances’; and (3) the treatment accorded to the investments of the investor was ‘less favourable’ than the treatment accorded to the investment of the investor of a third State.”<sup>1184</sup>

741. Second, Canada argues that, when interpreted in accordance with Article 31 of the VCLT, Article IV(a) of the BIT does not allow for the importation of substantive or procedural rights in other treaties, nor was this the Parties’ intention. The term “treatment” refers to measures adopted or maintained (*i.e.*, “taken or not taken”) by the Contracting Party, which is confirmed by the wording of other treaty provisions, such as Article XII (which refers to claims by an investor “that a measure taken or not taken by the former Contracting Party is in breach of this Agreement”), and Article XII(2)(b) of the BIT (which provides that when an investor submits a claim, it bears the burden of proving, *inter alia*, “that the measure taken or not taken by the Contracting Party is in breach of this Agreement.”).<sup>1185</sup>
742. The fact that “treatment” refers to actual measures and not to standards is also corroborated by the reference in Article IV(a) to a comparison in respect of “investments in its territory of investors of a third State.” According to Canada, this “reflects the Contracting Parties’ intention that the MFN obligation apply to activities in their territory, which is distinct from the dispute settlement procedures and substantive treaty standards that are contained in other international treaties.”<sup>1186</sup> Canada further notes that several international investment tribunals have recognized that the phrase “in its territory” is inconsistent with an interpretation of the MFN clause that expands the scope of international arbitration beyond what is explicitly provided for in the treaty.
743. Canada further notes that the chapeau of Article IV provides that the “treatment” must be “with respect to investments and the enjoyment, use, management, conduct, operation, expansion, and sale or other disposition thereof.” Treaty standards are not “treatment”, says Canada, because they are not behavior in respect of an entity or a person. Thus, “absent measures adopted or maintained by a Contracting Party, substantive obligations and procedural rights in other international treaties do not automatically convert to ‘treatment’ for the purposes of the MFN obligation and cannot, themselves, give rise to a breach of Article IV(a).”<sup>1187</sup>

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<sup>1184</sup> Canada’s Submission, ¶¶ 10-11, citing *UPS Award*, ¶ 83, **RL-0227**; *Loewen*, ¶ 139, Exh. **CL-0055**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 (“**Archer Daniels**”), ¶ 205, Exh. **CL-0013**; *S.D. Myers*, ¶ 252, Exh. **CL-0078**.

<sup>1185</sup> Canada’s Submission, ¶¶ 12-13.

<sup>1186</sup> Canada’s Submission, ¶ 14.

<sup>1187</sup> Canada’s Submission, ¶ 15.

744. For Canada, the context of Article IV(a) of the BIT confirms this interpretation. The BIT was concluded before *Maffezini* held that more favorable dispute settlement provisions could be imported *via* the MFN clause, and Canada's subsequent treaty practice confirms that the term "treatment" does not encompass dispute settlement procedures, and that substantive obligations in other treaties do not in themselves amount to "treatment" that could give rise to a breach of the MFN clause.<sup>1188</sup>

#### 4. Analysis

##### a. No Need to Determine Whether the MFN Clause Allows the Importation of More Favorable Protections

745. Article IV(a) of the BIT provides for the most-favored nation (MFN) treatment in the following terms:<sup>1189</sup>

With respect to investments and the enjoyment, use, management, conduct, operation, expansion, and sale or other disposition thereof, each Contracting Party shall accord treatment no less favourable than that which, in like circumstances, it grants in respect of:

- (a) investments in its territory of investors of a third State;
- (b) investments in its territory of its own investors.

746. On this basis, the Claimant seeks to rely on two substantive obligations from other treaties: (i) the obligation to do "what is necessary" to protect an investor's investments found in Article 3 of the Costa Rica-France BIT; and (ii) an umbrella clause requiring the State to "comply with [or observe] any obligation assumed regarding investments of investors of the other Contracting Party," contained in Article 3(2) of the Taiwan-Costa Rica BIT and Article 10(3) of the Korea-Costa Rica BIT. The Respondent and Canada deny that the Claimant may "import" obligations from other treaties, because the reference in Article IV(a) to "treatment," "in its territory" and "in like circumstances" means that the MFN clause is limited to the material treatment of an investor and does not extend to substantive obligations in other treaties.<sup>1190</sup>

747. The Tribunal considers that it can dispense with resolving the Parties' divergence on whether the MFN clause entitles an investor to import a more favorable protection found in a third party treaty into the basic treaty, *i.e.* the BIT, or whether the investor must show an actual difference in treatment between him/herself and another investor who is in like circumstances. Indeed, even assuming that the importation of a more favorable guarantee were sufficient, *i.e.* assuming that Infinito's theory prevails, the latter's claim would still fail under the terms of the BIT and the facts on record.

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<sup>1188</sup> Canada's Submission, ¶¶ 16-17.

<sup>1189</sup> BIT, Article IV(a), Exh. C-0001.

<sup>1190</sup> R-CM Merits, ¶ 548; R-Rej. Merits, ¶¶ 718, 720, 726, 731-733.

**b. Does the Obligation “To Do What is Necessary” to Protect the Claimant’s Investments Provide Additional Protection to the Claimant?**

748. Even assuming that the BIT’s MFN clause allowed the Claimant to import the obligation to “do what is necessary so that the exercise of the right so recognized is not impaired either in law or in fact” contained at Article 3 of the Costa Rica-France BIT,<sup>1191</sup> the Tribunal does not find that it provides additional protection in the present case.
749. The full text of Article 3 of the France-Costa Rica BIT provides as follows:

Cada una de las Partes contratantes, por medio de su legislación, se compromete a garantizar en su territorio y en sus zonas marítimas un tratamiento justo y equitativo conforme a los principios del Derecho Internacional, para las inversiones de los nacionales y sociedades de la otra Parte y a hacer lo necesario para que el ejercicio del derecho así reconocido no se vea obstaculizado ni en derecho ni de hecho.<sup>1192</sup>

750. It is clear from the text of the provision that the obligation to do what is necessary is tied to the FET obligation. It is a corollary to that obligation to ensure that “the exercise of the right so recognized [*i.e.*, the right to FET] is not impaired either in law or in fact.” In the Tribunal’s view, this does not provide the Claimant further rights, nor does it impose any additional obligations on the Respondent, beyond the FET standard. As the Tribunal has already discussed, there is nothing further for the Tribunal to address in this respect.

**c. Did the Respondent Breach the Umbrella Clauses Imported Through the MFN Clause?**

751. The Claimant further submits that the BIT’s MFN clause allows it to import the umbrella clauses contained in Costa Rica’s BITs with Taiwan and Korea, which provide as follows:

Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.<sup>1193</sup>

[...] Each Contracting Party shall comply with any obligation assumed regarding investments of investors of the other Contracting Party.<sup>1194</sup>

752. On the basis of these imported clauses, the Claimant argues that the Respondent breached its obligation, assumed through the grant of the Concession(s), to allow the Claimant to exploit the Crucitas mine.

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<sup>1191</sup> Costa-Rica-France BIT, Article 3, Exh. **CL-0005**.

<sup>1192</sup> Costa Rica-France BIT, Article 3, Exh. **CL-0005**.

<sup>1193</sup> Costa Rica-Korea BIT, Article 10(3), Exh. **CL-0001**.

<sup>1194</sup> Costa Rica-Taiwan BIT, Article 3(2), Exh. **CL-0002**.

753. The Tribunal cannot follow this argument. For an obligation to be protected under the umbrella clause, it must be valid under domestic law.<sup>1195</sup> As discussed above, both the 2002 and the 2008 Concessions were granted in violation of Costa Rican law. There was thus no valid obligation under domestic law that could be complied with.

754. The Tribunal thus dismisses the Claimant's claim based on the BIT's MFN clause.

**G. DOES THE ENVIRONMENTAL EXCEPTION IN SECTION III(1) OF ANNEX I OF THE BIT EXEMPT THE RESPONDENT FROM LIABILITY?**

755. A majority of the Tribunal has found that the Respondent breached its FET obligation through the 2011 Legislative Mining Ban and, as an ancillary act, the 2012 MINAET Resolution (to the extent that it implemented that Ban), which had the effect of depriving Industrias Infinito of the opportunity to apply for a new exploitation concession.<sup>1196</sup>

756. While the Tribunal has found that the Claimant has not established that this breach caused a quantifiable harm, it must address the Respondent's argument that the environmental exception in Section III(1) of Annex I of the BIT exempts Costa Rica from liability.

**1. The Respondent's Position**

757. The Respondent submits that, as a result of Annex I, Section III(1) of the BIT, it cannot be held liable for the challenged measures.<sup>1197</sup> Annex I, Section III(1) provides as follows:

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.<sup>1198</sup>

758. The Respondent argues that Section III(1) provides for an environmental exception whose purpose is to "grant some margin of discretion, as well as some level of protection from liability, to the States Parties to enable them to enact, maintain and enforce measures to protect the environment and thereby advance the public good."<sup>1199</sup>

759. The Respondent explains that the environmental exception applies to measures that (i) are otherwise consistent with the BIT, and (ii) that the host State "considers appropriate

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<sup>1195</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 126, Exh. **RL-0028**; *Burlington Resources*, ¶ 214, Exh. **CL-0023**; *Micula*, ¶ 418, Exh. **CL-0060**.

<sup>1196</sup> See Section VI.C *supra*.

<sup>1197</sup> R-CM Merits, ¶ 568; R-Rej. Merits, ¶ 760.

<sup>1198</sup> BIT, Annex I, Section III(1), Exh. **C-0001**.

<sup>1199</sup> R-CM Merits, ¶ 581.

to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”<sup>1200</sup>

760. Contrary to the Claimant’s contentions, it is not necessary for both the underlying environmental measures and the measures adopted to enforce or maintain them to be “otherwise consistent” with the BIT.<sup>1201</sup> If Section III(1) only permitted Costa Rica to enact measures that are “otherwise consistent” with the BIT, as the Claimant argues, the environmental exception could only apply where all the relevant measures are consistent with the BIT. In other words, it would only apply in situations where the host State’s liability is not at stake, that is, where “there is no need for any exemption from liability.”<sup>1202</sup> The Claimant’s interpretation would thus establish a mechanism that would never be triggered, and would be inconsistent with the clause’s substantive purpose.<sup>1203</sup>
761. By contrast, the Respondent submits that “the term ‘measure’ refers to the *underlying* measure that is safeguarding the environment, rather than to a subsequent measure that maintains or enforces such underlying measure.”<sup>1204</sup> The decision in *Al Tamimi*, which involved an environmental clause identical to Section III(1),<sup>1205</sup> confirms its interpretation.<sup>1206</sup> Finally, the Respondent argues that its interpretation of Section III(1) ensures that the environmental exception is effective and serves its purpose.<sup>1207</sup>
762. The Respondent contends that the clause applies in the present case, with the result that the Respondent is exempted from liability,<sup>1208</sup> because all of the challenged measures – with exception of the 2013 Constitutional Chamber Decision – were adopted to maintain and/or enforce measures aiming at protecting the environment from possible negative effects of open-pit mining.<sup>1209</sup>
763. Further, the underlying measures (namely, the (i) the 2002 Moratorium; (ii) the 2004 Constitutional Chamber Decision; (iii) Resolution R-613-2007-MINAE which rendered the 2002 Concession null and void; (iv) the annulment of the 2008 Concession by the 2010 TCA Decision; and (v) the 2010 Executive Moratoria) should be deemed to be

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<sup>1200</sup> R-CM Merits, ¶ 573.

<sup>1201</sup> R-CM Merits, ¶ 576.

<sup>1202</sup> R-CM Merits, ¶ 579; R-Rej. Merits, ¶ 765.

<sup>1203</sup> R-CM Merits, ¶¶ 579-583.

<sup>1204</sup> R-CM Merits, ¶ 576 (emphasis in original).

<sup>1205</sup> United States-Oman Free Trade Agreement, 1 January 2009 (“**US-Oman FTA**”), Article 10.10, Exh. **CL-0111**, states: “Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

<sup>1206</sup> R-CM Merits, ¶ 585, citing *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (“*Al Tamimi*”), ¶ 440, Exh. **RL-0104**.

<sup>1207</sup> R-Rej. Merits, ¶ 763.

<sup>1208</sup> R-CM Merits, ¶ 604.

<sup>1209</sup> R-CM Merits, ¶ 588.

consistent with the BIT because the Claimant did not challenge them, and because they pre-date the cut-off date under the limitations provision in Article XII(3)(c).<sup>1210</sup>

## **2. The Claimant's Position**

764. The Claimant denies that Annex I, Section III(1) of the BIT relieves the Respondent from liability. The Claimant essentially argues that (i) the Respondent is mischaracterizing Section III(1), which is not an exemption clause; (ii) Costa Rican authorities and the Supreme Court had confirmed that the Crucitas Project complied with Costa Rican environmental policy; and (iii) there is no evidence that Costa Rica adopted the contested measures on environmental grounds.<sup>1211</sup>
765. First, the Claimant submits that Section III(1) is not an “environmental exception” under which a host State would be exempt of liability if it adopted the challenged measures to enforce environmentally motivated measures.<sup>1212</sup> According to the Claimant, Section III(1) is “limited to confirming environmental regulatory authority where that authority does not override the substantive provisions of the BIT.”<sup>1213</sup> Simply put, Section III(1) merely acknowledges the State’s sovereign right to regulate on environmental matters and cannot be used to “override the substantive obligations of the BIT and exempt otherwise infringing measures [...]”.<sup>1214</sup>
766. According to the Claimant, this interpretation is confirmed by the literal meaning of Section III(1), which refers expressly to “any measure otherwise consistent with this Agreement.”<sup>1215</sup> For the Claimant, the reference to “any measure” includes the “underlying” measure that is adopted by a State, as well as any subsequent measure that maintains or enforces the “underlying” measure. There is thus no basis to distinguish between the underlying environmental measures and the measures adopted by the host State to enforce or maintain the former.<sup>1216</sup> If Costa Rica’s interpretation were correct, it would “provide a back door for the Government to avoid its obligations under the BIT by framing any measure in terms of maintaining or enforcing pre-existing or underlying measures, which could not be challenged owing to the three-year limitation.”<sup>1217</sup>

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<sup>1210</sup> R-CM Merits, ¶ 588.

<sup>1211</sup> C-Reply Merits, ¶ 703.

<sup>1212</sup> C-Reply Merits, ¶ 705.

<sup>1213</sup> C-Reply Merits, ¶ 706.

<sup>1214</sup> C-Reply Merits, ¶¶ 705, 710.

<sup>1215</sup> C-Reply Merits, ¶ 705.

<sup>1216</sup> C-Reply Merits, ¶ 709.

<sup>1217</sup> C-Reply Merits, ¶ 709.

767. The Claimant further contends that the *Al Tamimi* case on which the Respondent relies is irrelevant because the measures at issue in that case did not breach the applicable BIT.<sup>1218</sup>
768. Second, the Claimant argues that the Respondent is estopped from invoking Section III(1) since its own authorities – SETENA, SINAC and the Constitutional Chamber of the Supreme Court – have confirmed that the Crucitas Project was environmentally viable.<sup>1219</sup> Indeed, the Costa Rican Government defended the Crucitas Project's environmental viability before the Costa Rican courts.<sup>1220</sup> Relying on *Metalclad*, the Claimant argues that the Respondent cannot ignore its own Government's conduct, and that "where the state has demonstrated that it considers the project at issue to be sensitive to environmental concerns," provisions such as Section III(1) do not apply.<sup>1221</sup>
769. Third, the Claimant argues that the challenged measures have no environmental purpose and thus do not engage Section III(1).<sup>1222</sup> The Claimant stresses that the main measure it challenges is the 2011 Administrative Chamber Decision, which merely engaged in a technical analysis of the 2010 TCA Decision in light of Costa Rican administrative law. The 2011 Administrative Chamber Decision has thus no "sound environmental purpose."<sup>1223</sup> Similarly, the 2012 MINAET Resolution and the 2011 Legislative Ban "were not motivated by *bona fide* environmental concerns."<sup>1224</sup> More precisely, the Claimant argues that (i) the 2012 MINAET Resolution was merely implementing a judgment rendered on administrative grounds and thus cannot be characterized as an environmental measure;<sup>1225</sup> and (ii) several factors show that the 2011 Legislative Ban was issued for political reasons unrelated to environmental concerns.<sup>1226</sup> This is confirmed by the fact that Costa Rica has not taken adequate measures to prevent illegal mining and environmental damage caused by that mining on the Project site, or to police or remediate that damage.<sup>1227</sup>

### 3. Analysis

#### a. Does Annex I, Section III(1) of the BIT Provide for an Exception to Liability?

770. Annex I, Section III(1) of the BIT provides:

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<sup>1218</sup> C-Reply Merits, ¶ 707.

<sup>1219</sup> C-Reply Merits, ¶ 711.

<sup>1220</sup> C-Reply Merits, ¶ 712.

<sup>1221</sup> C-Reply Merits, ¶ 714, citing *Metalclad*, ¶ 98, Exh. **CL-0058**.

<sup>1222</sup> C-Reply Merits, ¶¶ 716-717.

<sup>1223</sup> C-Reply Merits, ¶¶ 717-719.

<sup>1224</sup> C-Reply Merits, ¶ 720.

<sup>1225</sup> C-Reply Merits, ¶ 721.

<sup>1226</sup> C-Reply Merits, ¶ 720.

<sup>1227</sup> C-Reply Merits, ¶ 720.



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.<sup>1228</sup>

771. According to the general rule of interpretation enshrined in Article 31 of the VCLT, the Tribunal must interpret the Treaty's provisions in accordance with their ordinary meaning, in their context and in light of the treaty's object and purpose.
772. The Tribunal notes that, unlike other provisions on environmental protection in other investment treaties,<sup>1229</sup> Annex I, Section III(1) of the Costa Rica-Canada BIT contains the wording "any measure otherwise consistent with this Agreement." In the Tribunal's view, this wording makes it clear that measures meant "to ensure that investment activity [...] is undertaken in a manner sensitive to environmental concerns" must also be consistent with the investment protections set forth in the BIT.
773. Commentators agree that provisions with such wording "cannot [...] be used to override mandatory treaty obligations,"<sup>1230</sup> and that the "requirement that environmental measures be 'otherwise consistent' with the investment treaty [...] undermines the effectiveness of that shield."<sup>1231</sup> One commentator opines that the scope of these provisions is "extremely limited," and that, despite the fact that most of them are entitled "general exceptions," "they do not really do much to narrow States' potential liability [...]. Rather, they merely recognize and affirm the State's sovereign right to regulate [...]."<sup>1232</sup> For instance, this author submits that these "general provisions [...] have no impact whatsoever on the expropriation provision, which does not prohibit a State from enacting regulations that effectively expropriate investors' property, but demands compensation in return."<sup>1233</sup>
774. The Tribunal notes that both Parties refer to *Al Tamimi*, an arbitration brought under the U.S.-Oman Free Trade Agreement. The tribunal in that case considered the treaty's provisions recognizing the importance of environmental measures as the context for interpreting the State Parties' obligations, and noted that the States enjoyed a "margin

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<sup>1228</sup> BIT, Annex I, Section III(1), Exh. **C-0001**.

<sup>1229</sup> See e.g., Jordan-Singapore BIT (2004); Japan-Singapore New Age Economic Partnership (2003), India-Singapore CECA (2005), Japan-Malaysia Economic Partnership (2005); Korea-Singapore FTA (2005).

<sup>1230</sup> 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) 24:2 *Hastings Int'l & Comp L Rev* 173, p. 182, Exh. **CL-0195**.

<sup>1231</sup> L. Johnson & L. Sachs, "International Investment Agreements, 2011-2012: A Review of Trends and New Approaches" in A. Bjorklund, ed, *Yearbook on International Investment Law & Policy 2012-2013* (Oxford University Press, 2014), p. 235, Exh. **CL-0185**.

<sup>1232</sup> S. H. Nikièma, *Best Practices: Indirect Expropriation* (Winnipeg: International Institute for Sustainable Development, 2012), p. 9, Exh. **CL-0190**.

<sup>1233</sup> S. H. Nikièma, *Best Practices: Indirect Expropriation* (Winnipeg: International Institute for Sustainable Development, 2012), p. 9, Exh. **CL-0190**.

of discretion” in relation to the enforcement of their environmental laws.<sup>1234</sup> There is no basis to conclude, however, that the tribunal considered that the treaty’s references to environmental measures suggested there should be greater deference in matters relating to the environment than the deference due generally to States in relation to their domestic regulatory affairs.<sup>1235</sup> Notably, the *Al Tamimi* tribunal also observed that “even an express provision such as Article 10.10 will not protect a State from liability for measures that are carried out in bad faith, or in violation of the expected standards of basic fairness or due process.”<sup>1236</sup>

775. Finally, Costa Rica contends that the words “otherwise consistent with this Agreement” in Annex I, Section III(1) do not apply to the measures that Infinito challenges because they merely “maintain or enforce” pre-existing measures, and that Infinito is not challenging and is not permitted to challenge those pre-existing measures because of the three-year limitation period.<sup>1237</sup> It argues that the phrase “otherwise consistent” refers to the word “measure,” and the context shows that the term “measure” refers to the underlying measure that is safeguarding the environment, rather than to a subsequent measure that maintains or enforces such underlying measure.<sup>1238</sup>
776. The Tribunal cannot follow this interpretation. The terms “otherwise consistent with this Agreement” also apply to measures that are “maintain[ed]” or “enforc[ed],” not only to measures that are “adopted.” Consequently, in accordance with its ordinary meaning, Annex I, Section III(1) does not exempt an environmental measure from the substantive provisions of the BIT, regardless of whether that measure is a new measure that is “adopted” or whether it is a measure that “maintains” or “enforces” an earlier measure.
777. The Tribunal concludes that, interpreted in accordance with the VCLT, Annex I, Section III(1) is not a carve-out from the BIT’s protections, but rather a reaffirmation of the State’s right to regulate.
778. The Respondent argues however that, unless it is interpreted as exempting the Respondent from liability for the adoption of environmental measures, Annex I, Section III(1) is deprived of its *effet utile*. The Tribunal cannot agree. It understands that the purpose of this provision is to protect the Contracting State’s legitimate regulatory space and to reserve a margin of discretion in environmental matters.<sup>1239</sup> Provisions like Annex I, Section III(1) must be viewed as acknowledging and reminding interpreters that these two objectives – environment and investment protection – should, if possible,

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<sup>1234</sup> *Al Tamimi*, ¶ 389, Exh. **RL-0104**.

<sup>1235</sup> *Al Tamimi*, ¶ 389, Exh. **RL-0104** (referring in this respect to the well-established principle that investment treaty tribunals “do not have an open-ended mandate to second-guess government decision-making”).

<sup>1236</sup> *Al Tamimi*, ¶ 445, Exh. **RL-0104**.

<sup>1237</sup> R-CM Merits, ¶¶ 572-577, 588; R-Rej. Merits, ¶ 761.

<sup>1238</sup> R-CM Merits, ¶ 576.

<sup>1239</sup> See *Clayton & Bilcon*, ¶ 597, Exh. **CL-0172** (confirming, notwithstanding the identical reference in NAFTA, Chapter 11, that “[t]he mere fact that environmental regulation is involved does not make investor protection inapplicable”).

be reconciled so that they are mutually supportive and reinforcing.<sup>1240</sup> In other words, this provision reaffirms the State's right to regulate.

779. *Al Tamimi* supports this interpretation. In that case, the tribunal found that fines issued by the government for repeated and serious breaches of environmental regulations were issued in furtherance of its role "to regulate and supervise compliance with Oman's environmental laws."<sup>1241</sup> In reaching this conclusion, the tribunal relied on a provision of the U.S.-Oman FTA with the exact language contained in Annex I, Section III(1) of the BIT.<sup>1242</sup> Significantly, the measures at issue did not breach the substantive protections in the relevant treaty.<sup>1243</sup> While this provision confirmed Oman's right to sanction violations of its environmental laws in a manner that did not otherwise breach its obligations under the treaty, the Tribunal is not persuaded that it would have operated as a defense had the tribunal found that those measures breached the treaty.
780. Conversely, the Respondent's argument that Annex I, Section III(1) of the BIT provides a defense to substantive breaches of the BIT would render meaningless the "otherwise consistent with this Agreement" language. Other exceptions and exemptions contained in Section III are not limited by similar language. For example, Section III(3) contains an unlimited exemption enabling the Contracting Parties to adopt or maintain "reasonable measures for prudential reasons" related to financial market protection and regulation. Similarly, Section III(4) exempts "investments in cultural industries" from the provisions of the BIT. Since Section III(1) does contain the "otherwise consistent" language, it cannot be construed as an exception or exemption from the BIT protections for environmental measures.
781. The Tribunal concludes that Annex I, Section III(1) of the Costa Rica-Canada BIT does not exempt the Respondent from liability for breaches of the substantive protections granted by the BIT. Accordingly, it cannot exempt the Respondent for its breaches of its FET obligation.

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<sup>1240</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000, ¶ 118 ("I view Article 1114 as acknowledging and reminding interpreters of Chapter 11 (Investment) that the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives and, if possible, to make them mutually supportive").

<sup>1241</sup> *Al Tamimi*, ¶ 340, Exh. **RL-0104**.

<sup>1242</sup> *Al Tamimi*, ¶ 445, Exh. **RL-0104**, citing Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, Article 10.10, Exh. **CL-0111**.

<sup>1243</sup> *Al Tamimi*, ¶¶ 376, 390, 430-431, 445-447, 467, Exh. **RL-0104**.

## VII. COSTS

### A. THE PARTIES' COSTS

#### 1. The Claimant's Position

782. The Claimant has requested that “the Tribunal award Infinito all of its costs and expenses associated with this arbitration proceeding, including attorneys’ fees.”<sup>1244</sup>

783. The Claimant submits that it has incurred (i) USD 2,099,918.27 for costs and expenses for the jurisdictional phase;<sup>1245</sup> and (ii) USD 3,513,732.09<sup>1246</sup> for costs and expenses in the merits phase.<sup>1247</sup>

784. The Claimant provides the following breakdown of its costs and expenses for the jurisdictional phase:<sup>1248</sup>

Description	Amount (USD)
Costs of Legal Representation	\$1,353,949.23
Torys Disbursements	\$46,747.82
Costs for Experts and Consultants	\$324,221.22
Arbitration Costs (advance payments to ICSID and lodging fee) <sup>1249</sup>	\$375,000.00
<b>TOTAL</b>	<b>\$2,099,918.27</b>

785. In turn, it provides the following breakdown of its costs and expenses for the merits phase:<sup>1250</sup>

Description	Amount (USD)
Costs of Legal Representation	\$2,165,604.69
Torys Disbursements	\$194,412.38
Costs for Witnesses, Experts and Consultants	\$1,803,715.02
Arbitration Costs (advance payments to ICSID) <sup>1251</sup>	\$250,000.00

<sup>1244</sup> C-Mem. Merits, ¶ 428. See also, *id.*, ¶ 429(i) (“[...] Infinito requests: (i) all legal fees and costs associated with this arbitration”); C-Reply Merits, ¶ 822 (the Claimant “reiterates its request that it be awarded all of its legal costs and fees associated with this arbitration.”)

<sup>1245</sup> C-Costs Jur., p. 2.

<sup>1246</sup> This amount does not include the fourth advance payment as set out in fn. 1251 *infra*. In addition, this amount appears to contain a mathematical error, as set out in fn. 1252 *infra*.

<sup>1247</sup> C-Costs Merits, p. 2.

<sup>1248</sup> C-Costs Jur., p. 2.

<sup>1249</sup> C-Costs Jur., p. 4.

<sup>1250</sup> C-Costs Merits, p. 2.

<sup>1251</sup> C-Costs Merits, p. 5. The Tribunal observes that this amount does not reflect the fourth advance payment requested from the Parties on 9 September 2020 and paid by the Claimant on 14 October 2020, after the Parties’ Statement of Costs were filed. See ICSID’s communication of 19 October 2020. Accordingly, ICSID’s financial records reflect that adding the fourth advance payment of USD 200,000.00, during the merits phase the Claimant provided advance payments of USD 449,990.00, for a total of advance payments in this proceeding of USD 799,970.00.

<b>TOTAL</b>	<b>\$3,513,732.09</b> <sup>1252</sup>
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## 2. The Respondent's Position

786. The Respondent “requests that the Tribunal exercise its authority and discretion under Article 61(2) of the ICSID Convention and order the Claimant to pay all of the costs incurred by Costa Rica in this proceeding, including the ICSID administrative costs, fees and expenses of the members of the Tribunal, legal fees, and any related expense [...]”<sup>1253</sup>

787. The Respondent submits that it has incurred (i) USD 997,403.63 for costs and expenses for the jurisdictional phase;<sup>1254</sup> and (ii) USD 2,016,863.95 for costs and expenses in the merits phase.<sup>1255</sup>

788. The Respondent provides the following breakdown of its costs and expenses for the jurisdictional phase:<sup>1256</sup>

Description	Amount (USD)
Costs and Expenses (excluding advance payments to ICSID) <sup>1257</sup>	\$27,553.63
ICSID Fees and Expenses <sup>1258</sup>	\$350,000.00
Legal Fees	\$619,850.00
<b>TOTAL</b>	<b>\$997,403.63</b>

789. In turn, it provides the following breakdown of its costs and expenses for the merits phase:<sup>1259</sup>

Description	Amount (USD)
Costs and Expenses (excluding advance payments to ICSID) <sup>1260</sup>	\$548,733.95
ICSID Fees and Expenses <sup>1261</sup>	\$249,980.00

<sup>1252</sup> That total seems to have a mathematical error. Adding all the amounts in the last column, the total amounts to **USD 4,413,732.09**.

<sup>1253</sup> R-Costs Merits, ¶ 2. See *also*, R-Cost Jur., ¶ 2.

<sup>1254</sup> R-Costs Jur., ¶¶ 2, 4.

<sup>1255</sup> R-Costs Merits, ¶¶ 4, 6. This amount does not include the last advance payment as set out in fn. 1261 *infra*.

<sup>1256</sup> R-Costs Jur., ¶ 4.

<sup>1257</sup> This amount refers to expert fees, translation costs, and travel expenses. R-Costs Jur., ¶ 4.

<sup>1258</sup> This amount refers to the advance payments made to ICSID to cover ICSID administrative costs, and Tribunal fees and expenses. See R-Cost Jur., ¶ 2 (i).

<sup>1259</sup> R-Costs Merits, ¶ 6.

<sup>1260</sup> This amount refers to expert fees, translation costs and travel expenses. R-Cost Merits, ¶ 6.

<sup>1261</sup> This amount refers to the advance payments made to ICSID to cover ICSID administrative costs, and Tribunal fees and expenses. See R-Costs Merits, ¶ 3(i). The Tribunal observes that this amount does not reflect the fourth advance payment requested from the Parties on 9 September 2020 and paid by the Respondent on 9 October 2020, after the Statements of Costs were filed. See ICSID's communication of 19 October 2020. Accordingly, ICSID's financial records reflect that adding the fourth advance payment of USD 199,975.00, during the merits phase the Respondent provided advance payments of USD 449,955.00, for a total of advance payments

Legal Fees	\$1,218,150.00
<b>TOTAL</b>	<b>\$2,016,863.95</b>

790. Accordingly, the Respondent asks the Tribunal to (i) “order the Claimant to pay to Costa Rica **USD 3,014,267.58** to cover the Costs and Expenses that Costa Rica has incurred in this proceeding, plus compound interest on those amounts before and after the issuance of the award and until the date of payment, calculated on the basis of a reasonable commercial rate determined by the Tribunal;”<sup>1262</sup> and (ii) “order the Claimant to pay any additional Costs and Expenses that Costa Rica may reasonably incur before the Tribunal renders its award, plus interest.”<sup>1263</sup>

## B. THE COSTS OF THE PROCEEDING

791. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID’s administrative fees and direct expenses, amount to (in USD):

Description	Amount (USD)
Arbitrators’ Fees and Expenses	
Prof. Gabrielle Kaufmann-Kohler	\$ 364,816.22
Prof. Bernard Hanotiau	\$ 242,789.95
Prof. Brigitte Stern	\$ 236,420.02
Assistant’s Fees and Expenses	\$ 191,862.54
ICSID’s Administrative Fees	\$ 264,000.00
Direct Expenses	\$ 224,302.64
<b>TOTAL</b>	<b>\$ 1,524,191.37</b>

792. These costs (“**Costs of the Proceeding**”) have been paid out of the advances made by the Parties.<sup>1264</sup> The expended portion of each Party’s advances to cover the above costs of the arbitration was: USD 762,695.69 (for the Claimant) and USD 761,495.69 (for the Respondent).<sup>1265</sup>

## C. ANALYSIS

793. Each Party seeks an award of the entirety of the costs related to this arbitration, including the legal fees and expenses incurred in connection with these proceedings.

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in this proceeding of USD 799,913.00. (In addition, the Respondent credited to the case fund in this proceeding an additional amount of USD 49,308.15 in transfers from remanent funds in other concluded proceedings, as reflected in ICSID’s letter to the Parties dated 7 December 2017).

<sup>1262</sup> R-Costs Merits, ¶ 10.

<sup>1263</sup> R-Costs Merits, ¶ 11.

<sup>1264</sup> The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case fund. The remaining balance shall be reimbursed to the Parties based on the payments that they advanced to ICSID.

<sup>1265</sup> The small difference in the disbursements from the case fund allocated to each Party relates to the Parties’ agreement that the costs associated with the conduct of the examination of Mr. Erich Rauguth at the Hearing on the Merits via videoconference would be covered by the Claimant. See the Parties’ emails of 11 July 2019.

794. Pursuant to Article 61(2) of the ICSID Convention:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

795. The Tribunal has broad discretion to allocate the costs of the arbitration between the Parties, including legal fees and expenses, as it deems appropriate. The Parties have not disputed the Tribunal's discretion, and in fact, the Respondent has explicitly recognized it.<sup>1266</sup>

796. Two approaches have been adopted by ICSID tribunals in awarding costs. The first consists in apportioning ICSID costs in equal shares and ruling that each party shall bear its own costs. The second applies the principle "costs follow the event," such that the losing party bears the costs of the proceedings, including those of the other party, or that the parties share in the costs proportionately to their success or failure.

797. In reaching its decision on costs in this case, the Tribunal has considered the Parties' arguments as well as the circumstances of this case, including the Parties' conduct in pursuing their claims and defenses. The Tribunal observes that the Claimant has prevailed on jurisdiction and the Respondent has largely but not entirely succeeded on the merits. It also notes that the factual and legal issues to which this dispute gave rise were highly complex and that it can certainly not be deemed illegitimate or frivolous for the Claimant to have brought this arbitration. Its claims gave rise to difficult questions, the outcome of which could not easily be predicted at the time of initiating these proceedings. It must also be observed that both Parties and their counsel have conducted these proceedings in a professional, cooperative, and efficient manner.

798. Weighing all these elements, the Tribunal, in the exercise of its discretion under Article 61(2) of the ICSID Convention, finds it fair that the Costs of the Proceeding shall be shared equally between the Parties,<sup>1267</sup> and that each Party shall bear its own legal fees and other costs.

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<sup>1266</sup> R-Costs Merits, ¶ 2; R-Cost Jur., ¶ 2.

<sup>1267</sup> Except for the Parties' own agreement with respect to the costs of the videoconference of Mr. Rauguth, which are to be borne by the Claimant as agreed and already reflected in the distribution of disbursements in the case fund. *Supra* ¶ 792, and fn.1265.

## **VIII. OPERATIVE PART**

799. For the foregoing reasons, the Tribunal:

- a. DECLARES that it has jurisdiction over the claims before it and that, with the exception noted in paragraph (b) below, the claims are admissible;
- b. DECLARES that the claim arising from the reinitiation in 2019 of the TCA damages proceeding is premature and thus inadmissible at the present stage;
- c. DECLARES that, by enacting the 2011 Legislative Mining Ban and implementing it through the 2012 MINAET Resolution, the Respondent has breached its obligation under Article II(2)(a) of the BIT to accord to the Claimant's investments fair and equitable treatment;
- d. DETERMINES that it can award no damages from this breach;
- e. ORDERS that each Party bear 50% of the Costs of the Proceeding and its own legal fees and other costs;
- f. DISMISSES all remaining claims and requests for relief.



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Professor Bernard Hanotiau  
Arbitrator  
Date:

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Professor Brigitte Stern  
Arbitrator  
Date:

[SIGNED]

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Professor Gabrielle Kaufmann-Kohler  
President  
Date: [26 May 2021]

[SIGNED]

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Professor Bernard Hanotiau  
Arbitrator  
Date: [26 May 2021]

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Professor Brigitte Stern  
Arbitrator  
Date:

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Professor Gabrielle Kaufmann-Kohler  
President  
Date:

[SIGNED]

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Professor Bernard Hanotiau  
Arbitrator  
Date:

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Professor Brigitte Stern  
Arbitrator  
Date: [26 May 2021]

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Professor Gabrielle Kaufmann-Kohler  
President  
Date:



**International Centre for Settlement of Investment Disputes**

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**Infinito Gold Ltd.**

Claimant

**v.**

**Republic of Costa Rica**

Respondent

**ICSID Case No. ARB/14/5**

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**SEPARATE OPINION ON JURISDICTION AND ON  
THE MERITS**

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Professor Brigitte Stern, Arbitrator

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1. Although I greatly respect and esteem my distinguished colleagues, I cannot concur with them on several important legal findings, both on jurisdiction and on the merits. I specify that I do not disagree with the overall solution given to the case, but it is impossible for me to subscribe to some of the analyses and reasonings, especially when they involve public international law interpretation. As stated by Lao-Tseu, “*le but n'est pas seulement le but, mais le chemin qui y conduit*” (“the aim is not only the goal but the way to it”). In a nutshell, I would have reached the same overall conclusion to the dispute, but through significantly different avenues. Although it might appear superfluous, as **I agree with the final outcome of the case**, I feel important to describe these avenues.
2. My main disagreement concerns the existence of jurisdiction *ratione temporis*: in my view, according to the statute of limitations included in Article XII(3)(c) of the BIT, the Tribunal has no jurisdiction over the claims presented by Infinito. Of course, my comments could thus have stopped at that point since, without jurisdiction, there is no need to deal with the merits. However, as the majority of the Tribunal decided that it had jurisdiction and dealt with the merits, I consider it as my Arbitrator’s duty to point – briefly – to what I analyze as misinterpretations in the application of public international law to the interpretation of the standard of FET in the BIT between the Government of Canada and the Government of the Republic of Costa Rica.

# **I. JURISDICTION: APPLICATION OF THE TIME BAR PROVISION IN ARTICLE XII(3)(C) BIT**

3. The central jurisdictional question,<sup>1</sup> on which this Opinion will concentrate is whether the claims of Infinito were time-barred or not.
4. At the outset, it can be mentioned that there is no disagreement, between the Parties, that the cut-off date is 6 February 2011, as acknowledged in the Award:

As discussed in the Decision on Jurisdiction, the Request for Arbitration was filed on 6 February 2014. Hence, the Tribunal lacks jurisdiction over claims regarding which the Claimant first acquired knowledge of the breach and loss more than three years earlier, *i.e.* before **6 February 2011**. The Parties agree with this cut-off date.<sup>2</sup>

5. The Claimant invokes five measures—adopted after the cut-off date—which it considers to be in breach of the BIT, as is summarized in § 224 of the Award:

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<sup>1</sup> Another objection was that the Tribunal lacks jurisdiction *ratione materiae* and *ratione voluntatis*, because the Claimant’s investment was not owned or controlled in accordance with Costa Rica’s laws as required by Article I(g) of the BIT. I will just signal here that, although there are some ambiguities in the Award on what exactly was the Claimant’s investment, I agree with the approach found in §§ 177 and 178 of the Award: “177. The Respondent has not disputed that the Claimant owns or controls its shares in Industrias Infinito in accordance with Costa Rican law. Nor has it argued that the Claimant acquired these shares illegally, or that its ownership or control of these shares has been vitiated in any way [...]. 178. There being no dispute that the Claimant has made an indirect investment in Costa Rica (*i.e.*, its shares in Industrias Infinito) in accordance with its laws, the Tribunal rejects the Respondent’s illegality objection. [...]”

<sup>2</sup> Award, § 219. (Emphasis in the Award).

The Claimant argues that the breaches of the Treaty occurred through five measures, which post-date the cut-off date [...]:

- a. The 2011 Administrative Chamber Decision dated 30 November 2011 [...]
- b. The 2011 Legislative Mining Ban on open-pit mining, which entered into force on 10 February 2011 [...]
- c. The 2012 MINAET Resolution dated 9 January 2012 [...]
- d. The 2013 Constitutional Chamber Decision dated 19 June 2013 [...]
- e. The reinitiation of the TCA proceedings for environmental damage in January 2019.

6. Its argumentation however is centered on the main breach that has to be taken into account for the application of the statute of limitations, *i.e.*, **the Administrative Chamber Decision**,<sup>3</sup> dated 30 November 2011, that is after the cut-off date.
7. The Respondent considers that the measure that allegedly deprived Infinito of its investment in violation of the BIT is the **TCA Decision**, which was rendered as an oral ruling on 24 November 2010, and a written ruling on 14 December 2010,<sup>4</sup> that is before the cut-off date.
8. This Opinion will concentrate on the 2011 Administrative Chamber Decision, as it is, according to the Claimant, the measure that deprived Industrias Infinito of the 2008 Concession.
9. In order to go step by step, I will first define precisely the scope of the disagreement between my colleagues and myself, next consider the general approach based on law and doctrine relating to the timing of a breach, which, I believe, supports my position, before engaging in a factual approach dealing with the specific circumstances of this case, mainly scrutinizing the behavior of both Parties, over the relevant time period.

#### A. THE SCOPE OF THE DISAGREEMENT

10. As a reminder, Article XII(3)(c) of the BIT provides, in relevant part:

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 [...].  
(Emphasis added)

11. I consider that the majority instead applied the following provision, a kind of Article XII(3)(c) bis:

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<sup>3</sup> Supreme Court, Administrative Chamber, Decision (confirming the TCA Decision), 30 November 2011, **C-261**.

<sup>4</sup> Contentious Administrative Tribunal, Decision (cancelling exploitation concession and approvals), Judgment 4399-2010, 14 December 2010, **C-239**.



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 **finally acquired**, or should have **finally** acquired, **knowledge** of the alleged **breach** and knowledge that the investor has incurred a **complete – substantial and permanent**<sup>5</sup> – loss or damage.

12. To me, it is evident, as I will elaborate on below, that the first knowledge both of a breach and of a loss occurred with the TCA Decision.
13. Concerning the time when the breach occurred, I really have a difficulty with the Award's approach, which has been summarized in its § 236:

Hence, the majority of the Tribunal concludes that the first step in the analysis is to identify when a given act or omission was performed or **completed**. The second step is to assess when the Claimant **first knew of the completion of the action** or omission and of the loss caused thereby. This analysis must be conducted for each of the standards allegedly breached [...]. (Emphasis added)

14. I think that to look at the first knowledge of a breach and loss is in conformity with the rules of interpretation of the VCLT, as Article XII(3)(c) refers to “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.” I do not really understand how first knowledge has been metamorphosed in **first knowledge of a completed breach, which disguises in fact final knowledge**, which I do not consider to be in conformity with the rules of interpretation of the VCLT of the text of Article XII(3)(c). The Article refers to the date when an investor **first** acquired knowledge of a breach and loss not when the existence of the breach and loss was **finally** ascertained and known.
15. In fact, the Award mentions numerous times<sup>6</sup> that the Administrative Chamber Decision **confirmed** the TCA Decision. When an act confirms another act, **it means that the content of the first act has to be considered as existing since the date it was adopted**. In the same vein, the Award refers multiple times<sup>7</sup> to a **completed act** – brought about by the Administrative Chamber Decision – to circumvent the requirement that the relevant date is the date of the **first act** – the TCA Decision. The idea underlying the majority's approach must be that something was missing to the TCA Decision and that it had to be completed, *i.e.*, that an additional element was needed for the act to exist. However, the Administrative Chamber Decision **did not itself produce any new breach** of which the Claimant complains. The situation was just that **the status quo remained as it was** after the TCA Decision. The simplest proof of this is the fact that, even if the 2011 Administrative Chamber Decision would never have been issued, the concession rights would still be null and void by virtue of the 2010 TCA Decision. The only thing that the Administrative Chamber Decision did was to **confirm an earlier**

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<sup>5</sup> This point was insisted upon by the majority in the analysis of expropriation, but seems to have been implicitly admitted also for the other violations.

<sup>6</sup> Award, §§ 137, 142, 224(a), 382(a), 416(a), 496, 501, 546 (two times), 565, 580, 708, 710.

<sup>7</sup> Award, §§ 232 (4 times), 233 (2 times), 235 (two times), 236, 239, 253, 254.

**breach**, or if said differently, to refuse to cure the earlier breach, that earlier breach being already known to the Claimant.

16. The Award's approach, as just summarized, is based on the idea that the TCA Decision was not a breach, and on the analysis according to which the breach only occurred, as a final breach, with the Administrative Chamber Decision.
17. I wonder how this analysis can be reconciled with the principle that a breach of international law occurs at the moment when the act or acts of the State cease to be in conformity with the obligations which are alleged to be violated.<sup>8</sup> **The Award's position implies that the TCA Decision annulling the concession was in conformity with Costa Rica's international obligations, while suddenly the Administrative Chamber Decision – which did not modify the *status quo* – was not in conformity with Costa Rica's international obligations.**
18. Concerning the time when the loss that resulted from the breach occurred, looking first at the claim of expropriation, the majority insisted that the loss has to be permanent and substantial, and that this only occurred with the Administrative Chamber Decision. The majority considered that:

[T]he deprivation of the Claimant's investment only became a **permanent** loss with the 2011 Administrative Chamber Decision. Indeed, it is only with this judgment that the 2010 TCA Decision became **final (*firme*)**.<sup>9</sup>

[...]

[T]he facts on record about the financial effects of the 2010 TCA Decision show that the Claimant did not suffer a **substantial deprivation** of its investment (a requirement for an indirect expropriation to occur) until the 2011 Administrative Chamber Decision.<sup>10</sup>

19. However, it is easy to understand that, assuming there would have been no Administrative Chamber Decision, the result of the TCA Decision was exactly the same: a permanent and substantial loss. It is well known that the loss was already quite severe, after the TCA Decision, but it was also known to be **virtually substantial and permanent, it nothing changed**. The fact that the complete drop in value only materialized after the Administrative Chamber Decision is readily understandable, by the hope of Infinito to see the TCA Decision be set aside. But in the absence of such reversal, the **substantial and permanent loss was already there, inherent in the TCA Decision**.

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<sup>8</sup> See Article 12 of the ILC Articles on the International Responsibility of States (CL-007):

Article 12. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

<sup>9</sup> Award, § 239. (Emphasis added)

<sup>10</sup> Award, § 242. (Emphasis added)

20. I would also like to deal with the argument that the TCA Decision was suspended during the cassation proceedings. A suspension does not annul the suspended judgment, **which still exists**, it has just as a consequence that it cannot provisionally be enforced.
21. In other words, I consider that **the alleged breach is the TCA Decision**. When a court annuls a concession, it is difficult for me to say that this was not a breach entailing losses. If no cassation proceedings would have been commenced, the breach would still be existing. In this case, **a cassation proceeding was commenced before the cut-off date, which is an undeniable recognition that there was a breach (and losses) before the cut-off date**, although the investor wanted to overturn it. The TCA Decision is alleged to have breached the investor's rights. As cassation proceedings were commenced, the breach still existed, until it was either confirmed (which would be a final knowledge of the breach and not a first knowledge of the breach) or overturned (which means that there is no longer a breach and therefore no necessity to apply the statute of limitations to a useless arbitration, the national courts having solved the problem).
22. **The breach occurred in 2010**, before the cut-off date. The only thing that was not known is whether this breach would remain as it was or whether the national courts would remedy the breach.
23. The TCA Decision is undoubtedly the **first** step to which the other acts complained of do not add anything. They only did not cancel this **first** act. Four of the acts complained of by the Respondent are linked with the TCA Decision.
24. If the TCA Decision would not have been the first breach, the other decisions of the courts and administrative organs would not have existed. **The TCA Decision is the root of all the subsequent events**: (1) the 2011 Administrative Chamber Decision upheld the 2010 TCA Decision; (2) the 2013 Constitutional Chamber Decision denied a separate challenge on constitutional grounds against the 2010 TCA Decision; (3) the 2012 MINAET Resolution enforced the 2010 TCA Decision in its order to cancel Industrias Infinito's concession and remove it from the Mining Registry; (4) even the reopening of the proceedings for environmental damages was linked with the TCA Decision.
25. If the 2011 Administrative Chamber Decision had not been issued, the 2008 Concession, which was annulled before the cut-off date by the TCA Decision, would have remained annulled.
26. Some last general remarks might be in order.
27. First, it is well known that access to international arbitration does not require – unless it is specifically foreseen – the exhaustion of local remedies. Article 26 of the ICSID Convention is quite clear in this respect:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

28. There is no requirement of an exhaustion of local remedies in the BIT. In deciding that the breach only occurred when the final decision of the Supreme Court was adopted, **the majority reintroduces in the arbitration process a condition of exhaustion of the local remedies that was not agreed between the Contracting Parties of the BIT.**
29. Second, the majority takes comfort with the solution to which it has arrived at, in stating the following:
- This conclusion is consistent with the *raison d'être* of a statute of limitations, which is to promote legal certainty by avoiding that claimants delay bringing their claims. This being so, for the statute of limitations to start running, the claimant must be legally in a position to bring a claim. If a claim cannot be brought for legal reasons (for instance, because the claim is not ripe), it would be fundamentally unfair to find that the statute of limitations has started to run. Such a finding may entail that, in some instances, a claimant/investor would have less time to initiate its claim than the statute of limitations. In exceptional situations, that finding might even mean that the claimant/investor has no time left at all to start proceedings, which would effectively result in a denial of justice – an outcome that cannot reflect the meaning of the Treaty.<sup>11</sup>
30. But, I consider this reasoning entirely circular and again based on the idea that no breach occurs before the local remedies have been exhausted, suggesting that before such exhaustion the claim is not ripe. It can also be mentioned that, in the specific case, the Claimant had until 5 February 2014 to file a claim, if my analysis is applied, which is a little more than 26 months after the Decision which the majority considers to be the breach. In other words, the fear mentioned by the majority that the finding that the first knowledge of a breach might prevent a claimant to bring a claim, if it waits for the final knowledge, does not exist in the circumstances of the present case.

## **B. THE GENERAL APPROACH**

### **1. Case Law in Support of the Arbitrator's Analysis**

31. There are many cases applying a similar analysis, which can be cited here, although, as often, there are also cases adopting a different point of view. The question of the cut-off date or critical date can arise in different contexts: the existence of a statute of limitations like in the present case, referring expressly to a first knowledge, the existence of a dispute before a treaty enters into force, the existence of facts pre-dating and facts post-dating the making of an investment.
32. In *Corona Materials v. Dominican Republic*,<sup>12</sup> the tribunal cited with approval a submission of the United States, as *amicus curiae*, in the case of *Grand River v. USA*,

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<sup>11</sup> Award, § 247.

<sup>12</sup> The relevant article of DR-CAFTA was similar to the one in the present case:

Article 10.18: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant **first** acquired, or should have **first** acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the

relating to a similar statute of limitations, stating 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’.”<sup>13</sup> In that case, there was an act of the State authorities which was the refusal of a license which occurred before the cut-off date, and a refusal to reconsider this decision which occurred after the cut-off date. The tribunal clearly indicated that the refusal was the first act and the fact that it was not overturned did not change the analysis:

In this context, the Respondent’s failure to reconsider the refusal to grant the license is nothing but an **implicit confirmation of its previous decision**. [...]

[...] DR’s failure to respond to the Claimant’s Motion for Reconsideration was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision.<sup>14</sup>

33. In the same way, it can be said that, in the present case, the Administrative Chamber Decision was an **explicit confirmation** of the previous Decision of the TCA.
34. In *Spence v. Costa Rica*,<sup>15</sup> the statute of limitations had the exact same wording than in Article XII(3)(c) of the Canada-Costa Rica BIT, and the tribunal considered that the relevant date for jurisdictional purposes was the first knowledge of a breach and not the subsequent confirmation of the breach. It is worth quoting extensive extracts of the award, as it presents things quite clearly:

162. The Claimants face formidable jurisdictional hurdles. On the face of it, the conduct of which they complain has deep roots in the period before the CAFTA entered into force between Costa Rica and the United States on 1 January 2009. [...]

163. [...] If the Claimants cannot establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after 10 June 2010, they fall at the first hurdle. To surmount this obstacle, each claimant must show, in respect of each property claim, that they have a cause of action, **a distinct and legally significant event that is capable of founding a claim in its own right**, of which they first became aware in the period after 10 June 2010. If they can establish this, a further jurisdictional question arises, namely, **whether, in the circumstances of each claim presented, that post-critical limitation date cause of action can be sufficiently detached from acts or facts that pre-date the CAFTA’s entry into force on 1 January 2009 so as to be independently justiciable**, even if it may be appropriate still to have regard to pre-1 January 2009 conduct and developments for purposes of

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enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage. (Emphasis added)

<sup>13</sup> *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, § 215, **CL-130**.

<sup>14</sup> *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, §§ 211-212, **CL-130**. (Emphasis added)

<sup>15</sup> *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments, LLC, Berkowitz, et al.) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016, § 246, **CL-221**.

determining whether there was a subsequent breach of a CAFTA obligation.

[...]

210. On the issue of first knowledge of the breach, if a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period.

[...]

213. On the issue of whether loss or damage must be crystallised, and whether the claimant must have a concrete appreciation of the quantum of that loss or damage, the Tribunal agrees with the approach adopted in *Mondev, Grand River, Clayton and Corona Materials* that **the limitation clause does not require full or precise knowledge of the loss or damage**. Indeed, in the Tribunal's view, the Article 10.18.1 requirement, *inter alia*, to point to the date on which the claimant *first* acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that **such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred**. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.<sup>16</sup> (Emphasis in bold added, in italics in the original)

35. Another award is worth mentioning, as it deals with the existence of a loss due to a breach, just discussed in the last paragraph of the citation in *Spence*. In *Rusoro v. Venezuela*, the tribunal found that Rusoro's claim based on measures adopted in 2009 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 simple knowledge that loss or damage has been caused, **even if the extent and quantification are still unclear**."<sup>17</sup>
36. Also, in *Vieira v. Chile*,<sup>18</sup> 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 solution was adopted despite the claimant's

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<sup>16</sup> *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments, LLC, Berkowitz, et al.) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016, §§ 162-163, 210-213, **CL-221**. (Emphasis added)

<sup>17</sup> *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, § 217, **RL-181**. (Emphasis added)

<sup>18</sup> Agreement Between the Republic of Chile and the Kingdom of Spain for the Reciprocal Protection and Promotion of Investments, entered into force on 29 March 1994, Article 2(3): El Tratado "[n]o se aplicará, sin embargo, a las controversias o reclamaciones surgidas o resueltas con anterioridad a su entrada en vigor." ["shall not apply, however, to disputes or claims arising or resolved prior to its entry into force."] (Free translation). Although this rule is different than the one at stake in the present case, the issue is the same *i.e.*, when a dispute relating to a breach arises, whether with a first decision denying a license or a subsequent decision refusing to overturn that decision.

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.<sup>19</sup>

[...] *Sostener lo contrario se traduciría en permitir que en la generalidad de los casos un demandante eluda las restricciones ratione temporis establecidas en cualquier Acuerdo de Promoción y Protección Recíproca de Inversiones, planteando en un momento posterior a la fecha de vigencia del correspondiente tratado una nueva reclamación para luego sostener que la respuesta negativa ante dicha reclamación constituye un hecho ilícito que da lugar a una nueva controversia, situación que este tribunal estima contraria a la intención de las partes pactada en el artículo 2 del ACUERDO.*

[...] To find the opposite would mean to allow a claimant generally to elude *ratione temporis* restrictions established in any Agreement on Encouragement and Reciprocal Protection of Investments [by] submitting a new claim after the relevant treaty's entry into force in order to later argue that the denial of such claim constitutes a violation that gives rise to a new dispute, a situation which this tribunal considers would be contrary to the intention of the parties agreed in Article 2 of the Agreement.

37. Also, in *ST-AD v. Bulgaria*, some acts of the respondent occurred before the investor made its investment and some after. 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:

In fact, that is the only possible relevant event that happened after the critical date of May 25, 2006, when the Claimant became a protected investor under the BIT, *i.e.*, the second set aside application and its rejection by the Supreme Cassation Court [...].<sup>20</sup>

38. And the tribunal added, in order to make things perfectly clear:

[A] tactic based on the resubmission of an application that has been 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.<sup>21</sup>

39. Finally, in *EuroGas v. Slovak Republic*,<sup>22</sup> the same reasoning as the one presented in this Separate Opinion was presented:

455. This chart illustrates the fact that the situation was exactly the same on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were

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<sup>19</sup> *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007, § 274, **RL-162**.

<sup>20</sup> *ST-AD GmbH (Germany) v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, § 316, **RL-075**.

<sup>21</sup> *ST-AD GmbH (Germany) v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, § 317, **RL-075**.

<sup>22</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, §§ 455-456, 459-460, **RL-197**.

reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont's rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to reconstitute the rights to Rozmin. The decision of the DMO, on 30 March 2012, to reassign exclusive rights over the Mining Area to VSK Mining, and its confirmation by the MMO on 1 August 2012, **did not change Belmont's legal and factual situation**: since the reassignment of the Mining Area in 2005, it had lost its rights on the Mining Area and was not present on the site.

456. Contrary to Belmont's position, the decisions of 30 March 2012 and 1 August 2012 cannot be considered the source of a new dispute; rather, they were **a refusal to resolve the ongoing dispute**, which arose from the alleged breach in 2005.

[...]

459. The State Parties to the Canada-Slovakia BIT cannot have intended that Article 15(6) be read and applied in a way that exposes them to claims from investors that could date from more than three years before the entry into force of the treaty, just because a certain dispute was not settled and/or might give rise to a follow-up action. **Considering that the State's refusal to overturn an existing alleged breach gives rise to a new dispute would open the floodgates to a possible complete disregard of the condition *ratione temporis* of the application of a BIT.** The consequence would be that an investor could bypass the *ratione temporis* limitations of a treaty by commencing local court proceedings after the entry into force of the treaty, in respect of an old dispute. This cannot be a sensible legal result.

460. The Tribunal does not accept that an investor may invoke the last event in a series of related or similar actions by the State to claim the benefit of the treaty. In the present case, the situation is clear-cut since there has not been a series of (alleged) transgressions by the Respondent, but **one (alleged) transgression whose effects have been maintained throughout domestic court proceedings and repeated decisions by the mining authorities.** (Emphasis added)

40. It can also be mentioned here the case *Sistem Mühendislik İnşaat v. Kyrgyz Republic*,<sup>23</sup> where the tribunal did hold that, "as a matter of law," the judicial taking of the claimant's hotel **took place at the date of a lower court judgment** invalidating the underlying contract. What remained was a "**chance of restoration**" of the taken right, later extinguished by the highest appellate instance. (Emphasis added)
41. This analysis is not only to be found in investment law as applied by international arbitral tribunals, but is an approach more generally accepted in legal systems.
42. An example can be given here. The Permanent Court of International Justice has considered that, when faced with an act and a refusal to overturn the act, the relevant element for analysing jurisdiction is the initial act. In the *Phosphates in Morocco* case, it considered that, as here, the alleged breach of the Italian investor's rights by the French

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<sup>23</sup> *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)06/1, Award, 9 September 2009, § 128, **CL-082**.



authorities refusing to overturn a former decision fell outside the Court's jurisdiction.<sup>24</sup> Like *Infinito* in the present case, Italy argued that the "violation only became definitive" when the investor sought and was refused redress by the French Ministry of Foreign Affairs. The PCIJ denied Italy's claim on the ground that the subsequent refusal to redress the 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.** (Emphasis added)

43. The Court held that the claim concerning the alleged breach was precluded *ratione temporis*.

## 2. Doctrine in Support of the Arbitrator's Analysis

44. The International Law Commission, ILC, is a well-regarded actor of international law. Professor James Crawford, Special Rapporteur, ILC, discussed the situation in which there is an exhaustion of local remedies. He made it clear that two situations can occur: either the last decision is by itself a violation (for example a denial of justice), or it only confirms the initial wrongful act. In that later case, absent an additional internationally wrongful act by the local courts providing the local remedy against the breach, **"the local remedy is a failed cure, not part of the illness [...]"**<sup>25</sup> (Emphasis added)

45. Professor Crawford added that:

[T]he breach of international law occurs at the time when the treatment occurs. **The breach is not postponed to a later date when local remedies are exhausted [...]**<sup>26</sup> (Emphasis added)

46. Others have adopted the same position, among them the Swiss academic, Eric Wyler.<sup>27</sup>
47. The general approach relating to the timing of a breach having been clarified, I will now examine carefully how the behavior of the Parties in the circumstances of the case should be analyzed within this framework.

## C. THE FACTUAL APPROACH

48. To understand the facts and circumstances of this case, the positions of the Parties in the arbitration, but may be more importantly, the positions of the Parties at the time of the disputed events, have to be scrutinized.

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<sup>24</sup> *Phosphates in Morocco (Italy v. France)*, PCIJ Series A/B Fascicule No. 74, Decision on Preliminary Objections, 14 June 1938, p. 21, **RL-007**.

<sup>25</sup> Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, 1st Sess., U.N. Doc. A/CN.4/498 (1999), § 140, **RL-034**.

<sup>26</sup> Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, 1st Sess., U.N. Doc. A/CN.4/498 (1999), § 145, **RL-034**.

<sup>27</sup> Eric Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite," *RGDIP*, vol. 95, No. 4, 1991, pp. 881–914.

49. In a nutshell, the Respondent argues that the cancellation of the 2008 Concession was enacted by the TCA Decision adopted before the cut-off date, a circumstance which deprives the Tribunal of jurisdiction over Infinito's claims; while the Claimant contends that the annulment was enacted by the Administrative Chamber Decision, after the cut-off date, giving thus jurisdiction to this Tribunal to deal with its claims.
50. It is my view that the Claimant assigned a role for the 2011 Administrative Chamber Decision, for the purpose of this arbitration, in order to be able to assert jurisdiction. I find that such a reconstruction of what happened does not fit with the facts of the case, especially with the behavior of the Parties as both the Claimant and the State authorities always considered at the time of the events – before the launch of the arbitration – that the breach was caused by the TCA Decision.
51. I will now give some concrete elements to support this last statement, which I consider quite important.

# **1. The Summary of the Positions of the Parties in the Tribunal's Decision on Jurisdiction**

52. In fact, the mere reading of the summaries of the positions of the Parties, as presented in the Tribunal's Decision on Jurisdiction shows that the Respondent relies – rightly – on the **first** knowledge, while the Claimant relies – wrongly – on the **final** knowledge.
53. The Respondent's position as summarized in the Decision on Jurisdiction is the following:

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.' 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, both before the cut-off date. 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. 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**. 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.<sup>28</sup> (Emphasis added).

54. The Claimant's position as summarized in the Decision on Jurisdiction is the following:

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.'

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<sup>28</sup> Decision on Jurisdiction, § 304, footnotes omitted.

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. (Emphasis on 'not' in the Claimant's Rejoinder on Jurisdiction, and for the rest, emphasis added)<sup>29</sup>

55. It appears clearly that the positions of the two Parties are not contradictory: the Respondent argues that the Claimant had **first knowledge** of a violation and a loss with the TCA Decision of November 2010, before the cut-off date; the Claimant does not contest this (and has indicated as much in contemporaneous documents, as will be shown later); the Claimant argues however that it had **final knowledge** of a breach and a loss only with the refusal by the Administrative Chamber Decision dated 30 November 2011, after the cut-off date, to reverse the initial breach and loss existing already in 2010.

**2. At All Relevant Times Before the Arbitration, the Claimant Considered that the Breach was Committed by the TCA Decision of 2010**

**a. Just After the TCA Decision**

56. Five days after the oral ruling of the TCA, the management of Infinito acknowledged that it was a negative decision:

On November 24, 2010 the Tribunal rendered a summary ruling on the challenges raised by a number of citizens [...] The verbal ruling read in court was negative and **included cancellation of the Company's exploitation concessions, cancellation of the environmental and other approvals** held by the Company's local subsidiary, Industrias Infinito SA ('IISA'). [...] (Emphasis added)

57. This is a recognition, in an internal document, even before the written ruling, that the TCA had cancelled all of Infinito's rights.<sup>30</sup>
58. Soon after Infinito received the written ruling of the TCA, the same analysis was made public, at the beginning of 2011. The Claimant itself acknowledged, in no doubtful terms, that it had suffered a breach of its rights and a loss brought about by the TCA Decision in a press-release dated 18 January 2011, that is before the cut-off date, which is a quite clear and crucial document:

The filing of the Casación seeks to overturn **the Ruling which annulled the Exploitation Concession** of the Company's Crucitas gold project.

[...]

The Company is seeking **to re-establish the security and value** of its considerable and long term investments in Costa Rica and **to reverse the**

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<sup>29</sup> Decision on Jurisdiction, § 316. This has been the leitmotiv of Claimant's position. See for example, a citation of its Reply, § 472: "There is [...] overwhelming fact evidence that Infinito first knew, and only could have known, that the resolutions granting IISA's key approvals had been **finally and irreversibly annulled**, and that Infinito's investment in the Crucitas project had been rendered substantially worthless, on November 30, 2011." (Emphasis added)

<sup>30</sup> Second Quarter Report, Management's Discussion and Analysis for the Three and Six Month Periods Ended September 30, 2010, C-637.

**negative impact that the Ruling has had** with respect to the Company's share price and the **inherent negative impact** on its investors and employees.<sup>31</sup> (Emphasis added)

59. In this press release, the Claimant **acknowledges the annulment of the Concession**, which it considered as **a breach**, as it wanted to try to overturn it through a cassation proceeding. It also wanted to erase the loss, as the cassation procedure was launched to restore the value of its investment. When an investor starts a proceeding in order to overturn a decision, it is on the assumption that such decision is illegal, thus a breach of the law having resulted in a loss for the investor.
60. At that point in time, the breach could be analyzed both as a breach of Costa Rican law and a breach of the Treaty. An alleged expropriation indeed falls squarely among the breaches of the BIT. Nothing prevented the investor just after the TCA Decision to go to ICSID immediately. Infinito rather chose to go to the national courts. I would also like to mention that the existence of a breach is an objective fact, contrary to the existence of a dispute which implies subjective elements to be ascertained.
61. The press release also said that among the future unknown factors is “whether the negative impacts of the Ruling on the Company can be reversed by the Casación [...]” recognizing thus clearly that it had a first **knowledge** at the time of the TCA Decision of **damage** to its investment.
62. This press release shows undoubtedly knowledge by the Claimant, and even a **public recognition of breach and damage** on its date, 18 January 2011, which is before the cut-off date, while of course also indicating a hope to be able to modify the situation.
63. I consider it also an important element in the interpretation of the facts of the case that Infinito started a cassation proceeding before the cut-off date, which means that **it clearly considered that there was a breach, at that point in time**. Moreover, in a Memorandum dated 17 February 2011 – and this is quite important – Infinito indicated that, while the proceeding before the Administrative Chamber was unfolding, **it could at any time go to international arbitration**:
- The Company can elect to halt the appeal process and move to international arbitration at any point in time during the process.<sup>32</sup>
64. When an investor considers resorting to international arbitration, it is because it considers that it has suffered a breach of its rights by the State, and suffered damages. In other words, on 17 February 2011, before the Administrative Chamber Decision, Infinito considered that it had suffered a breach, which could be the basis of an international claim.

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<sup>31</sup> Infinito Gold Ltd. Press Release, “Infinito Gold Files to Annul the Tribunal Contencioso Administrativo Ruling,” 18 January 2011, **C-246**.

<sup>32</sup> Memorandum from John Morgan (Infinito Gold Ltd.) to Q3 2011 Interim W/P File regarding the ruling issued by the Contentious Administrative Tribunal (17 February 2011), p. 5, **C-667**.

65. Acknowledgments by the Claimant of a breach before the Administrative Chamber Decision are numerous. I just give here another example, which is a Report on an update on Crucitas Project dated 24 June 2011.<sup>33</sup>

On November 24, 2010 the Tribunal Contencioso Administrativo [*sic*] (the ‘Tribunal’) rendered a summary ruling (the ‘Ruling’) on the challenges raised by a number of citizens against the relevant government agencies alleging that certain official approvals and permits received by the Company’s wholly owned subsidiary in Costa Rica, Industrias Infinito SA (‘IISA’), pertaining to the Crucitas gold mining project, were not issued in compliance with applicable laws and regulations.

[...]

**The Ruling annulled the Exploitation Concession of the Company’s Crucitas gold project.** In addition, the Ruling invalidated the original approval of the environmental impact study received in December of 2005 during the Abel Pacheco presidency, the amended environmental impact study received in February of 2008, and the Presidential Decree declaring the project to be in the national interest received in October of 2008. The Ruling also states that the Company may be liable to restore certain areas at the Crucitas mine site to their original pre-tree-clearing condition.

[...]

In the Casación the Company is seeking **to overturn the Ruling** [...]. (Emphasis added)

#### **b. Just After the Administrative Chamber Decision**

66. The Claimant still refers to the TCA Decision as the breach, after the Administrative Chamber Decision. In a press release dated the day of the Administrative Chamber Decision, Infinito wrote the following:

Infinito Gold Ltd. (the ‘Company’) announces that the Administrative Law Chamber of the Supreme Court of Costa Rica (‘SALA I’) has rendered its decision and **rejected the request for annulment** (‘Casación’) of the sentence (the ‘TCA Ruling’) imposed by the Tribunal Contencioso Administrativo (‘TCA’) on November 24, 2010, in respect of the Company’s gold mining permits and the Costa Rican permitting procedures for the Crucitas gold project.

**The TCA Ruling annulled the Exploitation Concession of the Company’s Crucitas gold project** [...].<sup>34</sup> (Emphasis added)

67. Even after the Administrative Chamber Decision of November 2011, according to the Claimant itself, the annulment of the concession, which is the act complained of, *i.e.*, the breach, occurred with the TCA Decision.

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<sup>33</sup> Update on Crucitas Project, 24 June 2011, **R-310**, p. 1.

<sup>34</sup> Infinito Gold Ltd. Press Release, “SALA I Upholds Tribunal Decision,” 30 November 2011, **C-262**.

3. **At All Times – Before and During the Arbitration – the Costa Rican Authorities Considered that the Alleged Breach was Committed by the TCA Decision of 2010**

68. All the final steps of the proceedings against Infinito were based on the TCA Decision, not on the Administrative Chamber Decision.
69. For example, the 2012 MINAET Resolution, Cancellation of the Concession,<sup>35</sup> indicates the following:

CONSIDERING THAT

1) Oral Judicial Decision No. 4399-2010 issued at 4:00 p.m. on **December 14, 2010, by the Contentious Administrative Tribunal**, section IV, determined, among other matters, to '[...] set aside resolutions number 3638-2005-SETENA, number 170-2008-SETENA, number R-217-2008-MINAE, number 244-2008-SCH and Executive Decree number 34801-MINAET [...].' '[...] The National Mining Registry is ordered to cancel the concession for Industrias Infinito S.A. which was processed as mining file N° 2594[...]'.

2) The Judicial Decision of the Contentious Administrative Tribunal cited above was **confirmed** by the First Chamber of the Supreme Court of Justice, and as a result became **final**.

[...]

WHEREAS

ONE: In due compliance with the sentence as required under Articles 156 section 1 and 158 of the Contentious Administrative Procedural Code, we hereby declare the cancellation of the mining exploitation concession granted to the company Industrias Infinito S.A., **which was rendered null and void** by decision N° 4399-2010 issued at 4:00 p.m. on December 14, 2010, **by the Contentious Administrative Tribunal**, section IV.

THEREFORE

By virtue of the foregoing, in due compliance with the decision in accordance with Articles 156 section 1 and 158 of the Contentious Administrative Procedural Code, we hereby declare the cancellation of the mining exploitation concession granted to the company Industrias Infinito S.A., granted by Executive Branch resolution No. R-217-2008-MINAE at 3:00 p.m. on April 21, 2008, which **was rendered null and void by decision No. 4399-2010 issued at 4:00 p.m. on the December 14, 2010, by the Contentious Administrative Tribunal**, section IV. Administrative file 2594 is archived, the area is liberated from the Mining Registry. (Emphasis added)

70. In other words, the Costa Rican authorities themselves considered that the annulment of the concession was NOT performed by the Administrative Chamber Decision but by the TCA Decision, which has not been overturned. The Administrative Chamber's Decision is a failed attempt by Infinito to correct **a breach that had already occurred**.

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<sup>35</sup> Resolution No. 0037, Ministry of Environment, Energy and Telecommunications, File No. 2594, 9 January 2012, **C-268**.

## D. CONCLUSION

71. In conclusion, I am totally convinced that all the “measures” challenged by the Claimant are nothing more than decisions not to reverse the 2010 TCA Decision and/or measures of implementation of the TCA Decision or other pre-existing measures.
72. The fact that the 2010 TCA Decision was not reversed by the Administrative Chamber Decision cannot be equated to a new breach or a new loss. It just meant that the first breach and loss which occurred before the cut-off date, were not cured. All of the other challenged measures are deeply rooted in the 2010 TCA Decision, and none of them were distinct and legally significant events. It must be reiterated that, had the 2011 Administrative Chamber Decision not been issued, the Claimant’s Concession would have remained annulled.
73. I would therefore have concluded that jurisdiction was lacking.

## II. MERITS: THE SCOPE OF THE FET STANDARD IN ARTICLE II(2)(A) OF THE BIT

74. As mentioned at the outset of this opinion, I will – although quite briefly – discuss the interpretation of the standard of FET made by the majority as a standard disconnected from the principles of international law. I do not consider this analysis to be in accordance with the structure of public international law, as I will explain. This misunderstanding has the double consequence that the majority of the Tribunal considered, firstly that the FET standard is an autonomous standard different from the Minimum Standard of Treatment of customary international law and secondly, that when applied to a review of courts’ decisions, a finding of a violation of the autonomous FET is less demanding than denial of justice.

### A. IS THE FET STANDARD IN THE RELEVANT BIT AN AUTONOMOUS STANDARD OR IS IT EQUIVALENT TO MST?

75. The question raised by the Parties is a divergence concerning the scope of the FET standard of protection of foreign investors. As summarized in § 328 of the Award, “[t]he Claimant argues that this provision provides for an autonomous FET standard, while the Respondent considers that it is limited to the MST under international law.”
76. As always, the starting point for the interpretation of the standards of protection is the text of the BIT. Article II(2)(a) of the BIT provides that:

Each Contracting Party shall accord investments of the other Contracting Party: (a) fair and equitable treatment **in accordance with principles of international law**; [...] (Emphasis added)

77. My first remark is that the members of the majority **add a word** to Article II(2)(a) when they concentrate their analysis on “general principles” of international law, while the text refers to “principles” of international law.
78. I consider that a rigorous legal approach has to be based on the exact expression to be analyzed. In that sense, a distinction has to be made between “principles of international law” (*principes du droit international*), “general principles of law” (*principes généraux*

*de droit*) and “general principles of international law” (*principes généraux du droit international*).

79. **Principles of international law** can easily be understood as merely a reference to general international law. This has in fact been stated by the PCIJ in the famous *Lotus* case<sup>36</sup> in no dubious terms:

[T]he Court considers that the words ‘principles of international law’, as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States.

[...]

In these circumstances it is impossible – except in pursuance of a definite stipulation – to construe the expression ‘principles of international law’ otherwise than as meaning the principles which are in force between all independent nations [...].<sup>37</sup>

80. This interpretation is even more compelling here, as the BIT asks the Tribunal also to take into account in its analyses the “**rules**” of international law, as indicated in Article XII (7) entitled “Settlement of Disputes between an Investor and the Host Contracting Party” referring to the applicable law:

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.

81. I consider that the double reference to “the applicable rules of international law” and to “the principles of international law”, without elaborating more on this topic, especially on the content of the MST, is sufficient to conclude that the FET must be interpreted according to international law as applied among all nations, which is customary international law. Therefore, the FET standard is limited by the BIT to the Minimum Standard of Treatment under customary international law.

82. This is supported by Canada, in its intervention as a Non–Disputing Party, as mentioned in the Award, § 322, which stated that:

Canada contends that the phrase ‘in accordance with principles of international law’ is a reference to the MST. Pursuant to the principle of *effet utile*, **this phrase must be given meaning**. This interpretation is

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<sup>36</sup> *The Case of the S.S. “Lotus”*, Judgment, 7 September 1927, Serie A, No. 10. The Court was interpreting the following provision: “Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be **decided in accordance with the principles of international law**.” *Id.*, p. 16 (Emphasis added)

<sup>37</sup> *Id.*, pp. 16-17. French version: “Or, la Cour estime que le sens des mots ‘principes du droit international’ ne peut, selon leur usage général, signifier autre chose que le droit international tel qu’il est en vigueur entre toutes les nations faisant partie de la communauté internationale. [...] Dans ces conditions, il n’est pas possible – sauf en vertu d’un texte précis – d’interpréter le terme ‘principes du droit international’ autrement que comme signifiant les principes en vigueur entre toutes les nations indépendantes [...]”



confirmed by the Notes of Interpretation issued under some of Canada's treaties, such as the one under the NAFTA.<sup>38</sup> (Emphasis added)

83. And the meaning given to the reference of “principles of international law” by Canada in § 20 of its Non-Disputing Party Submission is the following:

The wording in Article II(2)(a) guarantees FET in accordance with the minimum standard of treatment under customary international law.

84. This conclusion is rejected by the majority. And in fact, the majority's analysis arrives at a conclusion that **does not give any meaning, any *effet utile* to the reference in the BIT to the principles of international law**, which are completely ignored. In other words, international law has been eliminated, although it is mentioned in the BIT. The result would have been exactly the same, in the absence of the expression “in accordance with principles of international law.” Moreover, even having based its analysis on the general principles of international law, the majority has not endeavored to give any content to these general principles that could be used for the interpretation of the FET standard.
85. In fact, I was at pains to understand how the conclusion of the majority was arrived at, but I think it is important to clarify, at the outset, the necessary distinctions to be made, which have been ignored by the majority. I refer to the *Dictionnaire de droit international public*,<sup>39</sup> which clearly distinguishes the three concepts earlier mentioned.
86. First, “Principles of international law” (p. 877):

*E. Dans l'expression 'principes du droit international' ensemble de propositions fondamentales du droit international.*

*L'expression peut alors signifier*

*(a) ou bien l'ensemble du droit international dans ses bases essentielles*

*(b) [...] ou bien l'ensemble des principes gouvernant un type de relations: ainsi les 'principes du droit international touchant les relations amicales'.*

*(c) [...] ou bien encore les principes gouvernant un domaine particulier du droit international:*

*Exemples:*

*[...] les principes du contentieux international.*

E. [...] the expression ‘principles of international law’ the body of fundamental propositions of international law.

The expression can thus mean

**(a) either international law as a whole in its essential bases**

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<sup>38</sup> This is in line with the uncontested interpretation in the same way of Article 1105 of NAFTA, which provides that “[e]ach Party shall accord to investments of investors of another Party treatment **in accordance with international law**, including fair and equitable treatment [...]” NAFTA, Article 1105(1)(emphasis added). According to Canada, “[t]here is no difference between the FET standard in NAFTA Article 1105(1) and Article II(2)(a) of the Canada-Costa Rica FIPA.” Canada's Submission, § 22.

<sup>39</sup> *Dictionnaire de droit international public*, dir. Jean Salmon, Bruylant, Bruxelles, 2001.

- (b) [...] or all of the principles governing a type of relationship: thus the ‘principles of international law concerning the friendly relations’.
- (c) [...] or even the principles governing a particular area of international law:

Examples:

[...] the principles of international litigation.

87. Point a) refers in fact to the position of the PCIJ on the principles of international law in the *Lotus* case. Another example to illustrate b) or c) could of course be the international principles relating to the protection of foreign investment, among which the MST and denial of justice.

88. Second, “General principles of law” (p. 879):

*Source autonome du droit international aux termes de l’article 38 § 1 du Statut de la Cour internationale de Justice.*

[...]

*Selon une doctrine majoritaire ces principes généraux de droit sont des principes communs aux ordres juridiques internes [...] et transposables à l’ordre international.*

Autonomous source of international law under Article 38 § 1 of the Statute of the International Court of Justice.

[...]

According to a majority of scholars, these general principles of law are principles common to internal legal orders [...] and transposable to the international order.

89. In the *Droit international public* of Daillier, Forteau and Pellet,<sup>40</sup> some of these general principles of law are mentioned: good faith, principle of *effet utile*, principle of full reparation of damages, equality of the parties and so on.

90. Third, “General principles of international law” (p. 880):

*Principe général du droit international*

*Formulation globalisatrice des principales règles du droit international issues du droit coutumier ou du droit conventionnel.* (Emphasis added)

General principle of international law

Globalizing formulation of the main rules of international law which **stem from customary** or conventional law. (Emphasis added)

91. Some examples are given under this rubric: the prohibition of the use of force or the principle of non-intervention, to which can be added, among others, the principle of self-determination.

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<sup>40</sup> *Droit international public*, Patrick Daillier, Mathias Forteau, Alain Pellet, 8 Ed., LGDJ, 2009.

92. Some examples are also given by Patrick Dumberry, cited by the majority, in an article entitled “The Emergence of the Concept of ‘General Principle of International Law’”,<sup>41</sup> in which he studies the concepts of burden of proof, estoppel, *res judicata* and abuse of rights. Interestingly, he also remarks that:

Most tribunals seem to have a poor understanding of both the meaning and the function of general principles under international law. Awards often do not explain where the general principles they mention are emerging from (i.e. from which legal order: domestic or international?). Tribunals also rarely explain why they are referring to a given principle and which function or role it actually plays in their reasoning.<sup>42</sup>

93. This is a warning to all arbitrators.

94. Let us now look at the starting premise of the majority’s analysis, in § 332 of the Award:

Starting first with the ordinary meaning of the terms, there is nothing in the text of the BIT that limits the FET standard to customary international law. [...] the expression ‘principles of international law’ cannot be regarded as a reference to customary international law which is but one source of international law and is distinct from general principles.<sup>43</sup>

95. This paragraph is quite problematic: the two concepts of principles of international law and general principles are used in the same sentence and seem to be considered equivalent. But more importantly, contrary to what the majority claims here, it is quite clear, as explained by the PCIJ in the *Lotus* case, that a mention of “principles of international law” is indeed a reference to customary international law.
96. I conclude that the majority has erred in basing its analysis on the general principles of international law and not on the principles of international law.<sup>44</sup>
97. Having eliminated the reference to principles of international law, the majority concludes that the FET is an autonomous standard, whose scope is not defined in customary international law, allowing therefore the arbitral Tribunal to decide freely what are the sources of international law and what are the contours of concepts like FET or denial of justice, without any constraint coming from principles of international law,

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<sup>41</sup> Patrick Dumberry, “The Emergence of the Concept of ‘General Principle of International Law’ in Investment Arbitration Case Law,” *Journal of International Dispute Settlement*, 2020, 11, pp. 194–216.

<sup>42</sup> Patrick Dumberry, “The Emergence of the Concept of ‘General Principle of International Law’ in Investment Arbitration Case Law,” *Journal of International Dispute Settlement*, 2020, 11, p. 196.

<sup>43</sup> Award, § 332.

<sup>44</sup> Subsidiarily, I also disagree with the extensive analysis performed by the majority concerning the source of the general principles of international law, even if, as explained earlier, the latter is irrelevant and should not have been referred to at all. However, this is more an academic theoretical debate, where different analyses of the source of the general principles of international law can be made, rooted in different understandings of the structure of international law and I don’t think it is necessary to enter here into this debate. I will simply point out that, in fact, what the majority ignores in its analysis is that both the principles of international law and the general principles of international law are closely linked with custom, the principles of international law being equivalent to customary international law and the general principles of international law deriving – directly or indirectly – from customary international law.

as required by the BIT, nor indeed from the general principles of international law referred to erroneously by the majority.

98. I think that arbitrators have a mission to fulfil in the framework of the provision giving them jurisdiction. When they are required to interpret concepts in accordance with principles of international law, their power is limited by the content of these principles, *i.e.*, by customary international law.

**B. IS THE FET STANDARD WHEN APPLIED TO COURTS' DECISIONS LESS DEMANDING THAN DENIAL OF JUSTICE?**

99. What I consider the same misunderstanding of the structure of public international law is at the root of my strong disagreement with the analysis of the role of denial of justice. More precisely, the majority stated the following:<sup>45</sup>

Costa Rica and Canada essentially argue that, absent a denial of justice, judicial decisions interpreting domestic law cannot breach international law, and that 'claims of arbitrariness or unfairness in the context of judicial decisions must be viewed through the lens of denial of justice.' **The Tribunal agrees that this is the case under customary international law.** The question before the Tribunal is, however, whether judicial measures breach the BIT's FET standard, which the Tribunal has held not to be limited to the MST under customary international law. (Emphasis added)

100. It is because the majority has considered that the principles of international law do not refer to customary international law, that it also rejected the well accepted concept of denial of justice in customary international law and therefore concluded that "judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice,"<sup>46</sup> going as far as to state that a court can violate international law even if it "applies domestic law correctly."<sup>47</sup>
101. I understand that the majority agrees that if the FET were equivalent to the MST, denial of justice would be the only standard of review of national courts decisions.
102. The majority, however, considered that, as it analyzed the FET is an autonomous standard, the review of national courts' decisions by an international tribunal can go significantly beyond the denial of justice. This question is hotly debated.
103. As a first mention in this debate, it can be said that it is common ground that the interdiction of denial of justice is part of FET, even when considered as an autonomous standard. This was clearly articulated in many investment awards, for example in *Jan de Nul v. Egypt*:

The Tribunal recognizes that the 2002 and 1977 BITs do not comprise a specific provision regarding the miscarriage or denial of justice. It

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<sup>45</sup> Award, § 357.

<sup>46</sup> Award, § 359.

<sup>47</sup> Award, § 360.

considers, however, that **the fair and equitable treatment standard encompasses the notion of denial of justice.**<sup>48</sup> (Emphasis added)

104. It is also not contested that a finding of denial of justice is a very demanding one. This has been articulated for example in *Oostergetel v. Slovak Republic*:

**The Tribunal notes that a claim for denial of justice under international law is a demanding one.** To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.<sup>49</sup> (Emphasis added)

105. The same position was also adopted in *Philip Morris v. Uruguay*:<sup>50</sup>

The fair and equitable treatment obligation may be breached if the host State's judicial system subjects an investor to denial of justice. The Parties appear to be broadly in agreement on the legal standard for a denial of justice. Both cite *Arif v. Moldova*, its basic proposition being that a denial of justice is found 'if and when the judiciary breached the standard by *fundamentally* unfair proceedings and *outrageously wrong, final and binding decisions.*'

**An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such.** A denial of justice claim may be asserted only after all available means offered by the State's judiciary to redress the denial of justice have been exhausted. As held by one decision, '[a] denial of justice implies the failure of a national system as a whole to satisfy minimum standards.' (Emphasis added)

106. What is debated is whether a lesser standard of FET is also applicable when international tribunals review the judgments of national courts.
107. The problem I see with the majority's position is that it can authorize an international tribunal to review fully a national court decision and therefore to act, in fact, as a court of appeal, which is unanimously considered as beyond its powers, as even recognized by this Tribunal, in its Decision on Jurisdiction, where it is stated that "it is not its role to act as a court of appeal with respect to decisions of domestic courts."<sup>51</sup>

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<sup>48</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, § 188, **RL-091**.

<sup>49</sup> *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Award, 23 April 2012, § 273, **RL-017**.

<sup>50</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award, 8 July 2016, §§ 498-499, **RL-222**.

<sup>51</sup> Decision on Jurisdiction, § 217. See also, *Helnan International Hotels A.S. v. The Arab Republic of Egypt*, ICSID Case No. 05/19, Award, 3 July 2008, §§ 106, 263, **RL-010**; *Luigiterzo Bosca v. The Republic of Lithuania*, UNCITRAL PCA Case No. 2011-05, Award, 17 May 2013, § 198, **RL-011**.

108. This is common ground, as can be illustrated by many awards, of which I give just one example, the *Helnan v. Egypt* case, where the tribunal stated:

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, 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.<sup>52</sup> (Emphasis added)

109. Last but not the least, if any violation by a court of an FET standard less demanding than a denial of justice were admitted, the denial of justice would become useless and **the concept of denial of justice would no longer have any *effet utile***. Even more concerning, as already mentioned, a review of courts' decisions by an international arbitral tribunal, with the same standard of FET as the one used for a review of legislative or administrative decisions, opens the door to international arbitral tribunals playing the role of courts of appeal, which is unanimously considered as not entering into their function.
110. In conclusion on the merits, absent the objection *ratione temporis* which led me to infer a lack of jurisdiction of this Tribunal over the Claimant's claims, I would have interpreted the FET in the BIT as meaning MST<sup>53</sup> and accordingly would have only covered the analysis in the Award of denial of justice, with which I agree.

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<sup>52</sup> *Helnan International Hotels A.S. v. The Arab Republic of Egypt*, ICSID Case No. 05/19, Award, 3 July 2008, §§ 105-106, 125, **RL-010**: "an international tribunal must accept the res judicata effect of a decision made by a national court within the legal order where it belongs"; *RSM Production Corporation and Others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, §. 7.1.11: "[...] BIT tribunals do not reopen the municipal law decisions of competent *fora*, absent a denial of justice."

<sup>53</sup> This means that I would not have developed Award, §§ 356-367.

[SIGNED]

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Professor Brigitte Stern  
Arbitrator  
Date: [26 May 2021]

## **ANNEX A**



# International Centre for Settlement of Investment Disputes

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**Infinito Gold Ltd.**

Claimant

**v.**

**Republic of Costa Rica**

Respondent

**ICSID Case No. ARB/14/5**

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## **DECISION ON JURISDICTION**

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**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,<sup>1</sup> 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;<sup>2</sup> legal authorities CL-001 to CL-100;<sup>3</sup> 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.<sup>4</sup>
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,<sup>5</sup> accompanied by exhibits R-001 to R-117; legal authorities RL-001 to RL-131; and one (1) expert report by Mr. Carlos Ubico.

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

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

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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;<sup>6</sup> 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

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<sup>6</sup> 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.<sup>7</sup>

#### **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.

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<sup>7</sup> *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 City<sup>8</sup> 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:

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<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup>
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.<sup>11</sup>

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

<sup>10</sup> 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).

<sup>11</sup> 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.<sup>12</sup>
67. In 1997, President Figueres and the Minister of the Environment issued a decree that declared mining to be an industry of national convenience.<sup>13</sup>
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,<sup>14</sup> which was accompanied by several reports and reviews on the viability of the project.<sup>15</sup>
  - b. Industrias Infinito also commissioned other studies and reports addressing the environmental and socio-economic impact of the project.<sup>16</sup>
  - 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.<sup>17</sup> According to the Claimant, under the Mining Code this gave Industrias Infinito the exclusive right to obtain an exploitation concession.<sup>18</sup>
  - 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

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<sup>12</sup> 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.

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

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

<sup>15</sup> 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).

<sup>16</sup> 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).

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

<sup>18</sup> 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.<sup>19</sup>

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

#### **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

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<sup>19</sup> 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).

<sup>20</sup> CWS-Rauguth 1, ¶ 63.

<sup>21</sup> CWS-Rauguth 1, ¶¶ 64-76.

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

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

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

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

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

<sup>27</sup> C-Mem. Merits, ¶ 97.

<sup>28</sup> R-Mem. Jur., ¶ 49.

<sup>29</sup> CWS-Hernández 1, ¶ 96.

constitutional right to a healthy and ecologically balanced environment.<sup>30</sup> 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").<sup>31</sup> It is undisputed that the 2002 Moratorium operated prospectively, and did not affect acquired (vested) rights.<sup>32</sup>
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.<sup>33</sup>
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.<sup>34</sup> 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.<sup>35</sup>
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.<sup>36</sup> 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.<sup>37</sup> The MINAE agreed with Industrias Infinito, and on 20 October 2003 ordered the SETENA to conduct a new evaluation of Industrias Infinito's application.<sup>38</sup>

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

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

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

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

<sup>34</sup> C-CM Jur., ¶ 64.

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

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

<sup>37</sup> R-Mem. Jur., ¶ 58.

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>
82. In the meantime, on 4 April 2003, the Claimant filed its first Notice of Dispute with the Ministry of Commerce.<sup>41</sup>
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*,"<sup>42</sup> which the Respondent translates as "without prejudice to what the environmental impact assessment **may determine**,"<sup>43</sup> while the Claimant translates as "without prejudice to the findings of the Environmental Impact Assessment."<sup>44</sup>
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.<sup>45</sup>
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*).<sup>46</sup>
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

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

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

<sup>41</sup> 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).

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

<sup>43</sup> R-Mem. Jur., ¶ 62 (emphasis in original).

<sup>44</sup> C-CM Jur., ¶ 67.

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

<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup>
90. On 1 January 2008, the new Code of Contentious Administrative Procedure (which created the Contentious Administrative Tribunal ("TCA")) entered into force.<sup>49</sup>
91. On 4 February 2008, the SETENA approved a revised EIA.<sup>50</sup>
92. On 18 March 2008, President Arias issued a decree repealing the 2002 Moratorium, which entered into force on 4 June 2008.<sup>51</sup>
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.<sup>52</sup>
94. On 13 October 2008, President Arias designated the Las Crucitas Project as one of national interest.<sup>53</sup>
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.<sup>54</sup> Industrias Infinito commenced logging the same day.<sup>55</sup>
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.<sup>56</sup>

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

<sup>48</sup> 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**.

<sup>49</sup> CWS-Hernández 1, ¶ 189.

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

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

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

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

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

<sup>55</sup> R-Mem. Jur., ¶ 78.

The NGO FECON filed a similar *amparo* petition somewhat later on 23 October 2008.<sup>57</sup>

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.<sup>58</sup>
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.<sup>59</sup>
99. The petitioners also requested the TCA to order Industrias Infinito and Costa Rica to restore the site and provide compensation for environmental damage.<sup>60</sup>
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.<sup>61</sup>
101. Also on 16 April 2010, the TCA issued its own temporary injunction preventing the Las Crucitas Project from moving forward.<sup>62</sup>
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").<sup>63</sup>

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

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

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

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

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

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

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

<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>
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.<sup>66</sup> 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.<sup>67</sup>
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”).<sup>68</sup> The TCA issued its full written decision on 14 December 2010,<sup>69</sup> where, *inter alia*, it dismissed the *res judicata* defense raised by Industrias Infinito and the Government,<sup>70</sup> and annulled Industrias Infinito’s 2008 Concession together with related administrative decisions.<sup>71</sup>

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

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

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

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

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

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

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

<sup>71</sup> 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.<sup>72</sup>
  - 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.<sup>73</sup>
  - 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.<sup>74</sup> The Claimant alleges that this moratorium “supplanted” the previous decrees,<sup>75</sup> but the Respondent asserts that it did not repeal the previous decrees; rather, it provided an additional legislative safeguard against open-pit mining.<sup>76</sup>
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.<sup>77</sup>
110. On 10 February 2011, the 2011 Legislative Moratorium entered into force.<sup>78</sup>

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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.

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

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

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

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

<sup>76</sup> R-Mem. Jur., ¶ 141.

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

<sup>78</sup> 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.<sup>79</sup>
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").<sup>80</sup>
113. On 9 January 2012, the MINAE canceled Industrias Infinito's 2008 Concession (the "2012 MINAE Resolution").<sup>81</sup> According to Infinito, it also declared the Las Crucitas area to be free of all mining rights.<sup>82</sup> Costa Rica disputes this last fact.<sup>83</sup>
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").<sup>84</sup>
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").<sup>85</sup>
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

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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.

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

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

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

<sup>82</sup> C-CM Jur., ¶ 124 citing CWS-Hernández 1, ¶ 230.

<sup>83</sup> R-Mem. Jur., ¶ 126.

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

<sup>85</sup> 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."<sup>86</sup>
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.<sup>87</sup> 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."<sup>88</sup>
124. More specifically, APREFLOFAS alleges that the approval of Industrias Infinito's Concession "would have been impossible unless Infinito and the government officials

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

<sup>87</sup> NDP Submission, ¶ 3.

<sup>88</sup> 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.”<sup>89</sup> According to APREFLOFAS, this arises from the 2010 TCA Decision,<sup>90</sup> the 2011 Administrative Chamber Decision,<sup>91</sup> a Prosecutor Office’s indictment,<sup>92</sup> a trial order from a criminal judge,<sup>93</sup> and a (now annulled) criminal decision acquitting several defendants and confirming the conviction of former Minister Roberto Dobles.<sup>94</sup> 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.<sup>95</sup> 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.”<sup>96</sup>

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.<sup>97</sup>
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

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<sup>89</sup> NDP Submission, ¶ 5.

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

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

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

<sup>93</sup> 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).

<sup>94</sup> 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).

<sup>95</sup> NDP Submission, ¶ 10.

<sup>96</sup> NDP Submission, ¶ 12.

<sup>97</sup> 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.<sup>98</sup> 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).<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup> 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.<sup>102</sup> 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* [...]"<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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<sup>98</sup> 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.

<sup>99</sup> 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.

<sup>100</sup> NDP Submission, ¶ 22.

<sup>101</sup> NDP Submission, ¶ 23.

<sup>102</sup> 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*").

<sup>103</sup> NDP Submission, ¶ 25 (emphasis in original).

<sup>104</sup> NDP Submission, ¶ 25.

<sup>105</sup> 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.<sup>106</sup>
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.<sup>107</sup>
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.<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup>

**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,

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<sup>106</sup> R-Reply Jur., ¶¶ 332-333.

<sup>107</sup> R-Reply Jur., ¶¶ 334-335.

<sup>108</sup> R-Reply Jur., ¶ 336.

<sup>109</sup> R-Reply Jur., ¶ 337.

<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup>
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.”<sup>113</sup> 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.<sup>114</sup>

#### 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.”<sup>115</sup> 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

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<sup>111</sup> C-Rej. Jur., ¶¶ 409-411.

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

<sup>113</sup> 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 (“*Liman*”), ¶ 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.

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

<sup>115</sup> 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."<sup>116</sup>
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 [...]."<sup>117</sup> 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.

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<sup>116</sup> R-Reply Jur., ¶ 337.

<sup>117</sup> 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.<sup>118</sup>
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."<sup>119</sup> 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".<sup>120</sup>
- 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."<sup>121</sup> As a result, "Article XII(3)(d) must [...] be understood to preclude

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<sup>118</sup> R-Mem. Jur., ¶ 8.

<sup>119</sup> R-Mem. Jur., ¶ 5 (emphasis in original).

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

<sup>121</sup> 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.”<sup>122</sup>

- 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.”<sup>123</sup>
148. The Respondent acknowledges however that the Claimant seeks to challenge the following measures:<sup>124</sup>
- 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.<sup>125</sup>
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.”<sup>126</sup> 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.”<sup>127</sup> The Claimant’s disagreement with the Costa Rican courts’ decisions on matters of domestic law “cannot serve to magically transform

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<sup>122</sup> R-Mem. Jur., ¶ 10(d) (emphasis in original).

<sup>123</sup> R-Mem. Jur., ¶ 11.

<sup>124</sup> 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.

<sup>125</sup> 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).

<sup>126</sup> R-Mem. Jur., ¶ 12.

<sup>127</sup> 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."<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup> 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).<sup>131</sup> 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."<sup>132</sup> 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."<sup>133</sup>
  - 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.<sup>134</sup>

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<sup>128</sup> R-Mem. Jur., ¶ 15.

<sup>129</sup> R-Mem. Jur., ¶ 13.

<sup>130</sup> 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).

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

<sup>132</sup> R-Mem. Jur., ¶ 18.

<sup>133</sup> R-Mem. Jur., ¶ 18.

<sup>134</sup> 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.<sup>135</sup>
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.<sup>136</sup>
  - 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.<sup>137</sup>
  - 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.<sup>138</sup>
  - 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.<sup>139</sup>
  - 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

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<sup>135</sup> R-Mem. Jur., ¶ 20.

<sup>136</sup> R-Mem. Jur., ¶¶ 21-24.

<sup>137</sup> R-Mem. Jur., ¶ 25(a).

<sup>138</sup> R-Mem. Jur., ¶ 25(b).

<sup>139</sup> 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.<sup>140</sup>

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.<sup>141</sup>
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[.]”<sup>142</sup>
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.”<sup>143</sup> 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

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<sup>140</sup> R-Mem. Jur., ¶ 25(d).

<sup>141</sup> R-Mem. Jur., ¶¶ 26-28.

<sup>142</sup> 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).

<sup>143</sup> 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.<sup>144</sup> 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."<sup>145</sup>

#### **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.<sup>146</sup>
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."<sup>147</sup>
  - 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.<sup>148</sup>
  - 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.<sup>149</sup>

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<sup>144</sup> R-Mem. Jur., ¶ 30.

<sup>145</sup> R-Mem. Jur., ¶ 30.

<sup>146</sup> C-CM Jur., ¶ 1.

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

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

<sup>149</sup> 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 Infinito from applying for new permits.<sup>150</sup>
158. According to the Claimant, “[i]t is the combined operation of these four measures [...] that meant that Industrias Infinito definitively could no longer pursue the development of the Crucitas project.”<sup>151</sup> 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 Infinito from building and operating the Crucitas gold mine.<sup>152</sup>
  - b. It breached Costa Rica’s obligation to provide FET to Infinito’s investments, by violating its legitimate expectations and denying both procedural and substantive justice to Infinito.<sup>153</sup>
  - c. It failed to grant Infinito’s investments full protection and security.<sup>154</sup>
  - 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 Infinito’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.<sup>155</sup>
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 Infinito’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,”<sup>156</sup> 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 Infinito’s investments substantially worthless. Neither this decision, nor the other measures challenged by Infinito have been the subject of the judgment of a Costa Rican

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

<sup>151</sup> C-CM Jur., ¶ 12.

<sup>152</sup> C-CM Jur., ¶ 13; C-Mem. Merits, ¶¶ 246-289.

<sup>153</sup> C-CM Jur., ¶ 14; C-Mem. Merits, ¶¶ 290-344.

<sup>154</sup> C-CM Jur., ¶ 15; C-Mem. Merits, ¶¶ 345-347.

<sup>155</sup> C-CM Jur., ¶ 16; C-Mem. Merits, ¶¶ 348-360.

<sup>156</sup> C-CM Jur., ¶ 20.

court.<sup>157</sup> 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.”<sup>158</sup> 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.”<sup>159</sup>

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.<sup>160</sup>
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.<sup>161</sup> 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.”<sup>162</sup> 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,

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<sup>157</sup> C-CM Jur., ¶ 19.

<sup>158</sup> C-CM Jur., ¶ 20. See also C-CM Jur., ¶ 160.

<sup>159</sup> C-CM Jur., ¶ 22.

<sup>160</sup> C-CM Jur., ¶¶ 23-24.

<sup>161</sup> C-CM Jur., ¶ 25.

<sup>162</sup> 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."<sup>163</sup> 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."<sup>164</sup> 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.<sup>165</sup>
  - 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.<sup>166</sup> 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."<sup>167</sup> 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."<sup>168</sup> 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,"

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<sup>163</sup> C-CM Jur., ¶ 28 (emphasis in original).

<sup>164</sup> C-CM Jur., ¶ 28 (emphasis in original).

<sup>165</sup> C-CM Jur., ¶ 34 (emphasis in original).

<sup>166</sup> C-CM Jur., ¶ 32.

<sup>167</sup> C-CM Jur., ¶ 32.

<sup>168</sup> 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.<sup>169</sup>

- 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.<sup>170</sup>

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.<sup>171</sup> 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.<sup>172</sup>
- 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.<sup>173</sup>
- 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.<sup>174</sup>
- 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.<sup>175</sup> Here, the Claimant alleges that, as applied by the Administrative Chamber, the 2002 Moratorium was in itself expropriatory.

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<sup>169</sup> C-CM Jur., ¶ 32.

<sup>170</sup> C-CM Jur., ¶ 33.

<sup>171</sup> C-CM Jur., ¶ 35.

<sup>172</sup> C-CM Jur., ¶ 35.

<sup>173</sup> C-CM Jur., ¶ 35.

<sup>174</sup> C-CM Jur., ¶ 36.

<sup>175</sup> 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."<sup>176</sup>
  - 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.<sup>177</sup>
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.<sup>178</sup>
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.<sup>179</sup> 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."<sup>180</sup> 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

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<sup>176</sup> C-CM Jur., ¶ 37.

<sup>177</sup> C-CM Jur., ¶ 38.

<sup>178</sup> C-CM Jur., ¶ 39.

<sup>179</sup> C-CM Jur., ¶ 40.

<sup>180</sup> C-CM Jur., ¶ 41.

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

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.<sup>182</sup>
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,<sup>183</sup> 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."<sup>184</sup>

## **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.<sup>185</sup> 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.<sup>186</sup>
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

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<sup>181</sup> C-CM Jur., ¶ 42.

<sup>182</sup> C-CM Jur., ¶ 43.

<sup>183</sup> See *supra*, n. 124 and *infra*, n. 208.

<sup>184</sup> C-CM Jur., ¶ 44.

<sup>185</sup> R-Reply Jur., ¶¶ 282-288.

<sup>186</sup> 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)).<sup>187</sup>
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

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<sup>187</sup> 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.<sup>188</sup>

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

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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."<sup>189</sup> 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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<sup>189</sup>

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 Infinito<sup>190</sup> have both consented in writing to arbitrate this dispute by filing the Request for Arbitration and providing written consents to arbitration,<sup>191</sup> 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,<sup>192</sup> with the exception of the

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<sup>190</sup> 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; [...]."

<sup>191</sup> 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).

<sup>192</sup> 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."<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> 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 [...]."<sup>197</sup> 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."<sup>198</sup>
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

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<sup>193</sup> R-Mem. Jur., ¶ 156.

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

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

<sup>196</sup> R-Mem. Jur., ¶ 159.

<sup>197</sup> 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.

<sup>198</sup> 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.”<sup>199</sup> 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.<sup>200</sup>

(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.”<sup>201</sup> 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.”<sup>202</sup> 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.<sup>203</sup>
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.”<sup>204</sup>

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<sup>199</sup> R-Reply Jur., ¶ 131(a).

<sup>200</sup> R-Reply Jur., ¶ 131(a).

<sup>201</sup> C-Rej. Jur., ¶ 222.

<sup>202</sup> C-CM Jur., ¶ 157.

<sup>203</sup> C-Rej. Jur., ¶ 222.

<sup>204</sup> 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.<sup>205</sup> 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.”<sup>206</sup>

(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.<sup>207</sup>

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.

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<sup>205</sup> C-Rej. Jur., ¶ 223.

<sup>206</sup> C-Rej. Jur., ¶¶ 225-226.

<sup>207</sup> 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:<sup>208</sup>

- 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.”<sup>209</sup>
- 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.<sup>210</sup>
- 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.<sup>211</sup>
- 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.<sup>212</sup>

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).

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<sup>208</sup> 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.

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

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

<sup>211</sup> 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.

<sup>212</sup> 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.<sup>213</sup> 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.”<sup>214</sup> 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.<sup>215</sup>
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.”<sup>216</sup>
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.<sup>217</sup> 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.<sup>218</sup> To the contrary, the list in Article I(i) of the BIT is non-exhaustive (as evidenced by the use of

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<sup>213</sup> R-Reply Jur., ¶ 131(b).

<sup>214</sup> R-Reply Jur., ¶ 131(b) (emphasis in original).

<sup>215</sup> R-Reply Jur., ¶ 133(a).

<sup>216</sup> R-Reply Jur., ¶ 133(b).

<sup>217</sup> 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.

<sup>218</sup> 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).<sup>219</sup>

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.<sup>220</sup>

(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 NAFTA<sup>221</sup> and CAFTA,<sup>222</sup> and tribunals have invariably concluded that it covered judicial measures.<sup>223</sup>

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<sup>219</sup> 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).

<sup>220</sup> C-CM Jur., ¶ 169.

<sup>221</sup> Exh. **CL-0113**, NAFTA, Art. 201.

<sup>222</sup> Exh. **CL-0112**, CAFTA, Art. 2.1.

<sup>223</sup> 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.<sup>224</sup>
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.<sup>225</sup> The Tribunal is simply not competent to “second-guess [a local] court’s interpretation and application of local law.”<sup>226</sup> 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,

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<sup>224</sup> 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.

<sup>225</sup> 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.

<sup>226</sup> 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.<sup>227</sup>

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.”<sup>228</sup> This is confirmed by the *Azinian*<sup>229</sup> and *Iberdrola*<sup>230</sup> 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.<sup>231</sup>
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.”<sup>232</sup> 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.”<sup>233</sup> 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.<sup>234</sup> Nor has the Claimant challenged the independence or good faith of the Costa Rican courts.<sup>235</sup>

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<sup>227</sup> 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).

<sup>228</sup> R-Mem. Jur., ¶ 183.

<sup>229</sup> 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”).

<sup>230</sup> 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.*”).

<sup>231</sup> R-Mem. Jur., ¶ 186.

<sup>232</sup> R-Mem. Jur., ¶ 184.

<sup>233</sup> R-Mem. Jur., ¶ 184.

<sup>234</sup> R-Mem. Jur., ¶¶ 184-185.

<sup>235</sup> 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.<sup>236</sup> 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."<sup>237</sup> 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."<sup>238</sup>
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:<sup>239</sup>
- 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.<sup>240</sup>

(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

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<sup>236</sup> R-Reply Jur., ¶ 145.

<sup>237</sup> R-Reply Jur., ¶ 146.

<sup>238</sup> R-Mem. Jur., ¶ 12.

<sup>239</sup> R-Reply Jur., ¶ 147.

<sup>240</sup> 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.”<sup>241</sup>

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).”<sup>242</sup> 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.<sup>243</sup> 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.”<sup>244</sup> In this context, the application of domestic law forms part of the Tribunal’s factual analysis.<sup>245</sup>

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.<sup>246</sup>
- 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

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<sup>241</sup> C-CM Jur., ¶ 461.

<sup>242</sup> C-CM Jur., ¶ 462.

<sup>243</sup> C-Rej. Jur., ¶¶ 362-366; C-CM Jur., ¶¶ 462-467.

<sup>244</sup> C-Rej. Jur., ¶ 365.

<sup>245</sup> C-Rej. Jur., ¶ 365.

<sup>246</sup> 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."<sup>247</sup> 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.<sup>248</sup> 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.<sup>249</sup> 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."<sup>250</sup>

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."<sup>251</sup>

(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

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<sup>247</sup> C-CM Jur., ¶ 465.

<sup>248</sup> 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.

<sup>249</sup> 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.

<sup>250</sup> 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.

<sup>251</sup> 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].”<sup>252</sup> 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.”<sup>253</sup> Citing *Impregilo* and *Burlington*, the Tribunal cannot limit itself to the Claimant’s characterization of the case.<sup>254</sup>
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.”<sup>255</sup>
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.<sup>256</sup>
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

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<sup>252</sup> 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.

<sup>253</sup> R-Mem. Jur., ¶ 205.

<sup>254</sup> 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.

<sup>255</sup> 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.

<sup>256</sup> 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."<sup>257</sup>

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."<sup>258</sup> 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."<sup>259</sup> 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.<sup>260</sup>
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.<sup>261</sup> 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."<sup>262</sup> 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."<sup>263</sup>
225. According to the Respondent, "the same is true for determining issues of law relevant to the jurisdictional inquiry."<sup>264</sup> 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

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<sup>257</sup> R-Reply Jur., ¶ 105.

<sup>258</sup> 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).

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

<sup>260</sup> R-Reply Jur., ¶ 107.

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

<sup>262</sup> 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.

<sup>263</sup> R-Reply Jur., ¶ 111.

<sup>264</sup> R-Reply Jur., ¶ 112.

on the proper interpretation of a provision.<sup>265</sup> 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.”<sup>266</sup> 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.”<sup>267</sup>

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.”<sup>268</sup> 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.<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup>

(ii) *The Claimant’s Position*

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

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<sup>265</sup> 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.

<sup>266</sup> 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.

<sup>267</sup> R-Reply Jur., ¶ 116.

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

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

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

<sup>271</sup> 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.”<sup>272</sup>

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.<sup>273</sup>
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.<sup>274</sup> 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.”<sup>275</sup> 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.’”<sup>276</sup>
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.<sup>277</sup> The Respondent has acknowledged that “the Tribunal must ‘accept *pro tem* the facts as alleged’ by the Claimant ‘to be true.’”<sup>278</sup> 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.”<sup>279</sup> 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

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<sup>272</sup> C-CM Jur., ¶¶ 293, 299-300 (emphasis in original), citing Exh. **CL-0115**, *Abacat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (“*Abacat*”), ¶ 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.

<sup>273</sup> C-CM Jur., ¶¶ 295-298.

<sup>274</sup> C-CM Jur., ¶ 302.

<sup>275</sup> C-CM Jur., ¶ 302 (emphasis in original).

<sup>276</sup> C-CM Jur., ¶ 302.

<sup>277</sup> C-CM Jur., ¶¶ 298, 305-308.

<sup>278</sup> C-CM Jur., ¶ 306, citing R-Mem. Jur., ¶ 202.

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

Claimant were false,<sup>280</sup> 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.”<sup>281</sup> 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.<sup>282</sup>

231. In answer to the Respondent’s arguments on the appropriate standard of review for the jurisdictional stage, the Claimant articulates the following principles:<sup>283</sup>

- 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.”<sup>284</sup>

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.

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

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

<sup>282</sup> C-CM Jur., ¶ 308.

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

<sup>284</sup> 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),<sup>285</sup> 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:<sup>286</sup>
- 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).

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<sup>285</sup> Exh. **RL-0086**, *Emmis*, ¶ 172.

<sup>286</sup> 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]."<sup>287</sup>
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

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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.”<sup>288</sup> 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.<sup>289</sup>

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.’”<sup>290</sup>
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.

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<sup>288</sup> Exh. **RL-0086**, *Emmis*, ¶ 172.

<sup>289</sup> Exh. **CL-0115**, *Abaclat*, ¶ 303.

<sup>290</sup> 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.”<sup>291</sup> 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.<sup>292</sup>

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<sup>291</sup> Exh. **RL-0086**, *Emmis*, ¶ 172.

<sup>292</sup> 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 BIT<sup>293</sup> 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.<sup>294</sup>
  - 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."<sup>295</sup> 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."<sup>296</sup>
  - 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.<sup>297</sup> 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:<sup>298</sup> "It is logically impossible for something that *has already been lost* to be lost again through a subsequent act."<sup>299</sup> Citing *Pey Casado*, the Respondent contends that "a

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<sup>293</sup> R-Mem. Jur., ¶ 304.

<sup>294</sup> R-Mem. Jur., ¶ 305.

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

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

<sup>297</sup> R-Mem. Jur., ¶ 306.

<sup>298</sup> R-Reply Jur., ¶ 258, referring to C-CM Jur., ¶¶ 138-140.

<sup>299</sup> 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.”<sup>300</sup>

- 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*.”<sup>301</sup> 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.<sup>302</sup> 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.”<sup>303</sup>

(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).<sup>304</sup>
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.<sup>305</sup> Pending the proceedings before the Administrative Chamber, the 2010 TCA Decision was contingent, suspended, and capable of being reversed in full.<sup>306</sup> 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.<sup>307</sup> The Claimant notes that Costa Rica has not presented expert evidence to the contrary.

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<sup>300</sup> 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.

<sup>301</sup> R-Mem. Jur., ¶ 307.

<sup>302</sup> R-Mem. Jur., ¶ 308.

<sup>303</sup> R-Mem. Jur., ¶ 309 (emphasis in original).

<sup>304</sup> C-CM Jur., ¶ 469.

<sup>305</sup> C-CM Jur., ¶ 470.

<sup>306</sup> C-CM Jur., ¶ 475.

<sup>307</sup> 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."<sup>308</sup>

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."<sup>309</sup> 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.<sup>310</sup> Costa Rica is asking the Tribunal to prejudge the merits and decide now that the 2011 Administrative Chamber Decision caused no loss.<sup>311</sup> 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.<sup>312</sup>
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."<sup>313</sup> 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."<sup>314</sup>
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

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<sup>308</sup> C-Rej. Jur., ¶ 371.

<sup>309</sup> 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.

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

<sup>311</sup> C-Rej. Jur., ¶ 369.

<sup>312</sup> 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.

<sup>313</sup> C-CM Jur., ¶ 483, citing CER-RPA 1, ¶¶ 159, 181.

<sup>314</sup> 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.”<sup>315</sup>

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.<sup>316</sup> *Pey Casado*, cited by the Respondent, is inapposite because it did not address whether each individual measure must cause separate damages.<sup>317</sup> 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.”<sup>318</sup>

(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.

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<sup>315</sup> C-CM Jur., ¶ 471.

<sup>316</sup> 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.

<sup>317</sup> C-Rej. Jur., ¶ 373.

<sup>318</sup> 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.<sup>319</sup> 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.<sup>320</sup>
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.<sup>321</sup> 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.<sup>322</sup> 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.<sup>323</sup>
  - 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.”<sup>324</sup>
  - 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

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<sup>319</sup> R-Mem. Jur., ¶ 149.

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

<sup>321</sup> R-Reply Jur., ¶ 126.

<sup>322</sup> R-Reply Jur., ¶ 126.

<sup>323</sup> R-Reply Jur., ¶ 126.

<sup>324</sup> R-Mem. Jur., ¶ 151.

genuine connection with the Costa Rican court judgment.”<sup>325</sup> For the Respondent, the word “regarding” must be equated with “concerning,” “about” or “related to.”<sup>326</sup> 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.<sup>327</sup>

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.<sup>328</sup>
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.”<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup>
  - b. The 2010 TCA Decision is, in itself, a judgment rendered by a Costa Rican court regarding the annulment.<sup>332</sup>
  - c. The 2010 TCA Decision was also the subject of the 2013 Constitutional Chamber Decision.<sup>333</sup>
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

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<sup>325</sup> R-Mem. Jur., ¶ 152.

<sup>326</sup> R-Mem. Jur., ¶ 152.

<sup>327</sup> R-Mem. Jur., ¶ 152.

<sup>328</sup> R-Mem. Jur., ¶ 153.

<sup>329</sup> R-Mem. Jur., ¶ 154.

<sup>330</sup> See *supra*, ¶¶ 179-181.

<sup>331</sup> R-Mem. Jur., ¶ 161.

<sup>332</sup> R-Mem. Jur., ¶ 156.

<sup>333</sup> 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.”<sup>334</sup>

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.”<sup>335</sup> 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.’”<sup>336</sup>
  - b. Likewise, the 2013 Constitutional Chamber Decision is also a judgment of a Costa Rican court.<sup>337</sup>
  - 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.<sup>338</sup>
  - 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).<sup>339</sup>

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<sup>334</sup> R-Mem. Jur., ¶ 169.

<sup>335</sup> R-Mem. Jur., ¶ 166 (emphasis in original).

<sup>336</sup> R-Mem. Jur., ¶ 167.

<sup>337</sup> R-Mem. Jur., ¶ 170.

<sup>338</sup> R-Mem. Jur., ¶¶ 168, 170.

<sup>339</sup> 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.<sup>340</sup> 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.”<sup>341</sup> In any event, the Respondent maintains that it is perfectly possible for a measure to be “regarding,” “concerning” or “related to” itself.<sup>342</sup> 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.”<sup>343</sup>
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.”<sup>344</sup> 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.<sup>345</sup> 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.<sup>346</sup>
  - 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

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<sup>340</sup> R-Reply Jur., ¶¶ 129-131.

<sup>341</sup> R-Reply Jur., ¶ 130(a).

<sup>342</sup> R-Reply Jur., ¶ 130(a).

<sup>343</sup> R-Reply Jur., ¶ 130(b).

<sup>344</sup> R-Reply Jur., ¶ 130(c) (emphasis in original).

<sup>345</sup> R-Reply Jur., ¶ 132.

<sup>346</sup> 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.”<sup>347</sup>

- 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).<sup>348</sup>
  - 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).<sup>349</sup> 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.”<sup>350</sup>
266. While the Respondent agrees with the Claimant<sup>351</sup> 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.<sup>352</sup> 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

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<sup>347</sup> R-Reply Jur., ¶ 133(b).

<sup>348</sup> R-Reply Jur., ¶ 133(c).

<sup>349</sup> R-Reply Jur., ¶ 133(d).

<sup>350</sup> R-Reply Jur., ¶ 133(e).

<sup>351</sup> R-Reply Jur., ¶ 127.

<sup>352</sup> R-Reply Jur., ¶ 140.

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

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.<sup>354</sup>
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."<sup>355</sup> 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."<sup>356</sup> 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."<sup>357</sup>
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."<sup>358</sup> 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.<sup>359</sup>

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<sup>353</sup> R-Reply Jur., ¶ 142.

<sup>354</sup> R-Reply Jur., ¶ 143.

<sup>355</sup> R-Reply Jur., ¶ 128 (emphasis in original).

<sup>356</sup> 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.

<sup>357</sup> R-Reply Jur., ¶ 134 (emphasis in original).

<sup>358</sup> R-Reply Jur., ¶ 135(a).

<sup>359</sup> 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.<sup>360</sup>
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*.<sup>361</sup> 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."<sup>362</sup>
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."<sup>363</sup>

(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.<sup>364</sup> The Respondent mischaracterizes Infinito's claims as an attack against the 2010 TCA Decision, but this is not Infinito's case.<sup>365</sup> Its case is

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<sup>360</sup> R-Reply Jur., ¶ 135(b).

<sup>361</sup> R-Reply Jur., ¶ 136.

<sup>362</sup> R-Reply Jur., ¶ 138 (emphasis in original).

<sup>363</sup> R-Reply Jur., ¶ 139.

<sup>364</sup> C-CM Jur., ¶ 156.

<sup>365</sup> 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.”<sup>366</sup>

273. Specifically, the Claimant alleges that:

- a. There is no judgment of a Costa Rican court regarding the 2011 Administrative Chamber Decision.<sup>367</sup> 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).<sup>368</sup>
- 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.”<sup>369</sup>
- 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.<sup>370</sup>

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<sup>366</sup> C-CM Jur., ¶ 157.

<sup>367</sup> C-CM Jur., ¶¶ 231-236.

<sup>368</sup> C-CM Jur., ¶ 237.

<sup>369</sup> C-CM Jur., ¶ 238.

<sup>370</sup> C-CM Jur., ¶ 239.

- e. Finally, the Claimant contends that there is no judgment regarding the composite impact of the individual measures.<sup>371</sup>
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.<sup>372</sup> 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.”<sup>373</sup> 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.<sup>374</sup> 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.”<sup>375</sup>
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

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<sup>371</sup> C-CM Jur., ¶ 240.

<sup>372</sup> C-CM Jur., ¶¶ 159, 164.

<sup>373</sup> C-CM Jur., ¶¶ 184-185.

<sup>374</sup> C-CM Jur., ¶¶ 20, 160, 165.

<sup>375</sup> C-CM Jur., ¶ 165.

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

277. According to the Claimant, this interpretation “reflects the BIT drafters’ confidence in Costa Rica’s judiciary.”<sup>377</sup> It “facilitates a robust dispute resolution system that simultaneously respects the independence and sovereignty of the Costa Rican judiciary.”<sup>378</sup>
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.<sup>379</sup>
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.”<sup>380</sup>
  - 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.<sup>381</sup>
  - 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.<sup>382</sup> 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’.”<sup>383</sup> 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.”<sup>384</sup>

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<sup>376</sup> C-CM Jur., ¶ 166.

<sup>377</sup> C-CM Jur., ¶ 21. See also C-CM Jur., ¶ 161.

<sup>378</sup> C-CM Jur., ¶ 21. See also C-CM Jur., ¶ 161.

<sup>379</sup> C-Rej. Jur., ¶ 176.

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

<sup>381</sup> C-Rej. Jur., ¶ 177(c) and (d).

<sup>382</sup> C-CM Jur., ¶¶ 206-208.

<sup>383</sup> 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.

<sup>384</sup> 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.”<sup>385</sup> 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.”<sup>386</sup> 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.”<sup>387</sup>
- 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.<sup>388</sup> Only Infinito’s interpretation of this provision can be reconciled with this intended purpose.<sup>389</sup>
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*.”<sup>390</sup>
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.<sup>391</sup> Costa Rica also ignores that the “measure” affected by the judgment must be the one “alleged to be in

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<sup>385</sup> C-CM Jur., ¶ 216.

<sup>386</sup> C-CM Jur., ¶ 216.

<sup>387</sup> 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.

<sup>388</sup> 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).

<sup>389</sup> C-CM Jur., ¶ 224.

<sup>390</sup> C-CM Jur., ¶ 22. See also C-CM Jur., ¶¶ 162-163.

<sup>391</sup> C-CM Jur., ¶ 169.

breach.”<sup>392</sup> Costa Rica’s interpretation contradicts the plain meaning of these terms,<sup>393</sup> 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.”<sup>394</sup>
- 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.”<sup>395</sup> 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.”<sup>396</sup> 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.”<sup>397</sup>
- 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.’”<sup>398</sup>

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.<sup>399</sup> 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

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<sup>392</sup> C-CM Jur., ¶ 168; C-Rej. Jur., ¶ 193.

<sup>393</sup> C-CM Jur., ¶¶ 185, 188.

<sup>394</sup> C-CM Jur., ¶ 189.

<sup>395</sup> 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.

<sup>396</sup> C-CM Jur., ¶ 193.

<sup>397</sup> 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.”

<sup>398</sup> C-Rej. Jur., ¶ 192 (emphasis in original).

<sup>399</sup> C-CM Jur., ¶ 169.

exercises legislative, executive, judicial or any other functions [...],” and by international tribunals.<sup>400</sup> 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.<sup>401</sup> 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).<sup>402</sup>

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.<sup>403</sup> 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).<sup>404</sup> 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.”<sup>405</sup>
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.”<sup>406</sup> 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.”<sup>407</sup>
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

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<sup>400</sup> 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.

<sup>401</sup> C-Rej. Jur., ¶¶ 194-199.

<sup>402</sup> 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).

<sup>403</sup> C-CM Jur., ¶ 171.

<sup>404</sup> C-CM Jur., ¶¶ 194-205.

<sup>405</sup> 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.

<sup>406</sup> C-CM Jur., ¶ 208.

<sup>407</sup> 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.’”<sup>408</sup> 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.”<sup>409</sup>

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.<sup>410</sup> The Respondent asserts that “objective evidence” of the parties’ intentions may be considered under appropriate circumstances, but does not define this term.<sup>411</sup> 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.”<sup>412</sup> 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.”<sup>413</sup>
- 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.”<sup>414</sup>

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<sup>408</sup> C-Rej. Jur., ¶ 184.

<sup>409</sup> C-Rej. Jur., ¶ 185.

<sup>410</sup> C-Rej. Jur., ¶ 186.

<sup>411</sup> C-Rej. Jur., ¶ 186, citing R-Reply Jur., ¶ 127.

<sup>412</sup> C-Rej. Jur., ¶ 186, citing R-Reply Jur., ¶ 127.

<sup>413</sup> C-Rej. Jur., ¶ 220.

<sup>414</sup> 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."<sup>415</sup>
- 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.<sup>416</sup> 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.<sup>417</sup>

(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.<sup>418</sup>

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

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<sup>415</sup> C-Rej. Jur., ¶ 200; see also C-Rej. Jur., ¶¶ 219-221.

<sup>416</sup> C-Rej. Jur., ¶ 221.

<sup>417</sup> C-Rej. Jur., ¶ 221.

<sup>418</sup> 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."<sup>419</sup> 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:<sup>420</sup>

- 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."<sup>421</sup> 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."<sup>422</sup> 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."<sup>423</sup> 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."<sup>424</sup>
- 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

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<sup>419</sup> Exh. C-0001, Canada-Costa Rica BIT, Art. XII(3)(c).

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

<sup>421</sup> R-Reply Jur., ¶ 155.

<sup>422</sup> R-Reply Jur., ¶ 155 (emphasis in original).

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

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



or irreversible.<sup>425</sup> 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.”<sup>426</sup>

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).<sup>427</sup> 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.”<sup>428</sup>
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.”<sup>429</sup> 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.”<sup>430</sup> 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)<sup>431</sup> the principal grievance alleged by the Claimant is the loss of its 2008 Concession.<sup>432</sup> As a matter of Costa Rican law, this annulment was caused by the 2010 TCA Decision.<sup>433</sup> 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

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<sup>425</sup> R-Reply Jur., ¶ 156.

<sup>426</sup> 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.

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

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

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

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

<sup>431</sup> 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).

<sup>432</sup> R-Mem. Jur., ¶ 191.

<sup>433</sup> 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.”<sup>434</sup>

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.”<sup>435</sup> 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,<sup>436</sup> both before the cut-off date.<sup>437</sup> 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.<sup>438</sup> 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.<sup>439</sup> 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.<sup>440</sup>
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.<sup>441</sup>
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

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<sup>434</sup> 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).

<sup>435</sup> R-Mem. Jur., ¶ 194.

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

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

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

<sup>439</sup> R-Mem. Jur., ¶ 194.

<sup>440</sup> 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).

<sup>441</sup> 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.<sup>442</sup>

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.<sup>443</sup> 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’.”<sup>444</sup> 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.”<sup>445</sup> 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.”<sup>446</sup> 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.’”<sup>447</sup>
- 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.<sup>448</sup>
- 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

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<sup>442</sup> R-Reply Jur., ¶¶ 181-182.

<sup>443</sup> R-Reply Jur., ¶¶ 163-175.

<sup>444</sup> R-Reply Jur., ¶ 164.

<sup>445</sup> R-Reply Jur., ¶ 165.

<sup>446</sup> R-Reply Jur., ¶ 173.

<sup>447</sup> 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.

<sup>448</sup> 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.”<sup>449</sup>

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.<sup>450</sup> *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.<sup>451</sup> 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.<sup>452</sup> 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.<sup>453</sup> 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.<sup>454</sup>
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*.<sup>455</sup> 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.<sup>456</sup>
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

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

<sup>450</sup> 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.

<sup>451</sup> R-Reply Jur., ¶ 185.

<sup>452</sup> R-Reply Jur., ¶¶ 186-190.

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

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

<sup>455</sup> R-Reply Jur., ¶¶ 176-177.

<sup>456</sup> 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."<sup>457</sup>

(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."<sup>458</sup>
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."<sup>459</sup>
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."<sup>460</sup> 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

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<sup>457</sup> 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.

<sup>458</sup> C-Rej. Jur., ¶ 131 (emphasis in original).

<sup>459</sup> 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.

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

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

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.”<sup>463</sup>
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.”<sup>464</sup> 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.<sup>465</sup> 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.<sup>466</sup>
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.<sup>467</sup> 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

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<sup>461</sup> 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.

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

<sup>463</sup> C-CM Jur., ¶ 249.

<sup>464</sup> C-Rej. Jur., ¶ 130 (emphasis in original).

<sup>465</sup> C-CM Jur., ¶¶ 250-251; C-Rej. Jur., ¶¶ 133-143.

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

<sup>467</sup> C-Rej. Jur., ¶, 137; CWS-Hernández 1, ¶ 213.

to employ 243 employees.<sup>468</sup> 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."<sup>469</sup>

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."<sup>470</sup> 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.<sup>471</sup> 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."<sup>472</sup> 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."<sup>473</sup>
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.<sup>474</sup> In any event, Infinito does not challenge the existence of the 2011 Legislative Moratorium in and of itself,

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<sup>468</sup> 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).

<sup>469</sup> C-Rej. Jur., ¶ 141.

<sup>470</sup> C-CM Jur., ¶ 252.

<sup>471</sup> C-CM Jur., ¶ 254.

<sup>472</sup> C-CM Jur., ¶ 254.

<sup>473</sup> C-CM Jur., ¶ 254.

<sup>474</sup> 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."<sup>475</sup> 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.<sup>476</sup>

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.<sup>477</sup>
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."<sup>478</sup> 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.'"<sup>479</sup> 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."<sup>480</sup> 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.<sup>481</sup>

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<sup>475</sup> C-CM Jur., ¶ 255.

<sup>476</sup> C-Rej. Jur., ¶¶ 142-143.

<sup>477</sup> C-CM Jur., ¶ 256.

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

<sup>479</sup> 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.

<sup>480</sup> 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.

<sup>481</sup> 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.’”<sup>482</sup> 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.”<sup>483</sup>

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.”<sup>484</sup> 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.”<sup>485</sup> 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.<sup>486</sup> As confirmed in *Corona*, only the final, crystallizing breach may be challenged, and it is that breach that must fall within the limitation period.<sup>487</sup>
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.<sup>488</sup> 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.<sup>489</sup>

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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.

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

<sup>483</sup> 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.

<sup>484</sup> C-CM Jur., ¶ 262.

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

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

<sup>487</sup> C-CM Jur., ¶¶ 268-269.

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

<sup>489</sup> 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.<sup>490</sup>
  - 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.<sup>491</sup> 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.<sup>492</sup>
  - 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."<sup>493</sup>
  - 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.<sup>494</sup>
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.<sup>495</sup>
- 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.

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<sup>490</sup> 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.

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

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

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

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

<sup>495</sup> 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.<sup>496</sup> 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."<sup>497</sup>

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.<sup>498</sup> 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.<sup>499</sup>

(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.

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<sup>496</sup> C-Rej. Jur., ¶¶ 149-154.

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

<sup>498</sup> 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."

<sup>499</sup> 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.<sup>500</sup> 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.<sup>501</sup>
  - 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."<sup>502</sup>
  - 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.<sup>503</sup> 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."<sup>504</sup> 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).<sup>505</sup>
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.<sup>506</sup> According to the Claimant, the tribunal in *Churchill* rejected a similar attempt by Indonesia to import a legality requirement into the conditions for consent.<sup>507</sup>

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<sup>500</sup> C-CM Jur., ¶¶ 515-521.

<sup>501</sup> C-CM Jur., ¶ 516.

<sup>502</sup> C-CM Jur., ¶ 516.

<sup>503</sup> C-CM Jur., ¶¶ 516, 519.

<sup>504</sup> C-CM Jur., ¶ 519 (emphasis in original).

<sup>505</sup> C-CM Jur., ¶ 516.

<sup>506</sup> C-CM Jur., ¶ 518.

<sup>507</sup> 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.<sup>508</sup> 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.<sup>509</sup>

(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.<sup>510</sup> 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."<sup>511</sup> 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."<sup>512</sup> 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.<sup>513</sup> 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

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<sup>508</sup> 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.

<sup>509</sup> C-CM Jur., ¶ 524.

<sup>510</sup> R-Reply Jur., ¶ 283.

<sup>511</sup> R-Reply Jur., ¶ 283.

<sup>512</sup> R-Reply Jur., ¶ 284.

<sup>513</sup> R-Reply Jur., ¶ 284.

limits to jurisdiction, and not conditions for admissibility.<sup>514</sup> 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.<sup>515</sup>

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.<sup>516</sup> 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.<sup>517</sup>

(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.

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<sup>514</sup> 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.

<sup>515</sup> 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*”).

<sup>516</sup> 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*”).

<sup>517</sup> 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.”<sup>518</sup>

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.”<sup>519</sup>

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.<sup>520</sup>

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:<sup>521</sup>

- 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

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<sup>518</sup> R-Mem. Jur., ¶ 201.

<sup>519</sup> R-Mem. Jur., ¶ 199.

<sup>520</sup> R-Mem. Jur., ¶¶ 199-201.

<sup>521</sup> 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."<sup>522</sup>
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.<sup>523</sup> 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.<sup>524</sup> By contrast, the Respondent's interpretation would render the terms

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<sup>522</sup> C-CM Jur., ¶ 273.

<sup>523</sup> 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. Nikiéma, *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.

<sup>524</sup> 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.<sup>525</sup>

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.<sup>526</sup>
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.<sup>527</sup>
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,<sup>528</sup> 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.<sup>529</sup>
  - b. The SINAC, the national system of conservation areas, approved Industrias Infinito’s land use change permit allowing it to fell trees.<sup>530</sup>
  - 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.<sup>531</sup>

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<sup>525</sup> C-CM Jur., ¶ 282.

<sup>526</sup> C-CM Jur., ¶¶ 284-285.

<sup>527</sup> C-CM Jur., ¶¶ 286-292.

<sup>528</sup> 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.

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

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

<sup>531</sup> 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.”<sup>532</sup>
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:<sup>533</sup>
- 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,<sup>534</sup> 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.<sup>535</sup>

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

<sup>533</sup> 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).

<sup>534</sup> R-Mem. Jur., ¶ 199.

<sup>535</sup> 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.<sup>536</sup> 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.<sup>537</sup>
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.<sup>538</sup> 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.<sup>539</sup> 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.<sup>540</sup>
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.

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<sup>536</sup> C-CM Jur., ¶¶ 273.

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

<sup>538</sup> C-Mem. Merits, ¶¶ 231-236.

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

<sup>540</sup> 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]

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Professor Bernard Hanotiau  
Arbitrator

[Signed]

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Professor Brigitte Stern  
Arbitrator

[Signed]

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Professor Gabrielle Kaufmann-Kohler  
President