



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Infinito Gold Ltd. v. Costa Rica (ICSID Case No. ARB/14/5) – Decision on Jurisdiction – 4 December 2017

Case Report by: Svetlana Evliya**, Editor: Diego Luis Alonso Massa***

Summary: Claimant brought an action for relief against Costa Rica pursuant to the Canada-Costa Rica BIT (“BIT”) and the ICSID Convention alleging Costa Rica had breached, *inter alia*, fair and equitable treatment, full protection and security, most-favoured nation and expropriation protections standards as set out in the aforementioned BIT in relation to its investment in a gold mining concession in Costa Rica. As agreed by the Parties, the proceedings were bifurcated between jurisdiction and merits. The decision addresses Respondent’s various objections to the jurisdiction of the Centre and the competence of the Tribunal in connection with the scope of Costa Rica’s consent to arbitration under the BIT.

Main Issues: Whether the Tribunal should consider claims as pleaded by Claimant; definition of “measure” under the BIT; qualification of a genuine claim under the BIT; *prima facie* test for establishing jurisdiction; interpretation of Article XII(3)(d) of the BIT in part of challenging measures regarding which the Costa Rican Courts have already rendered judgment.

Tribunal: Professor Gabrielle Kaufman-Kohler (President), Professor Bernard Hanotiau (Arbitrator), and Professor Brigitte Stern (Arbitrator)

Claimant's Counsel: Mr. John Terry, Ms. Myriam M. Seers, Mr. Ryan Lax, Ms. Aria Laskin (Torys LLP, Toronto)

Respondent's Counsel: Mr. Paolo Di Rosa, Mr. Raúl Herrera, Mr. Csaba Rusznak, Ms. Natalia Giraldo-Carrillo (Arnold & Porter Kaye Scholer LLP, Washington, DC); Mr. Dmitri Evseev, Mr. Patricio Grané Labat (Arnold & Porter Kaye Scholer LLP, London); Ms. Adriana González, Ms. Arianna Arce, Ms. Francinie Obando, Ms. Marisol Montero (Ministerio de Comercio Exterior de Costa Rica).

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Svetlana Evliya is Of Counsel at Jones, Swanson, Huddell & Garrison, LLC, working out of Istanbul, Turkey. She specializes in investor-state and international commercial arbitration, with a particular emphasis on disputes arising out of bilateral investment treaties. She is also an instructor on international arbitration at Yeditepe University Law School, Turkey. IACL’s case reports do not offer personal views but strictly reflect the content of

the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Ms Evliya can be contacted at svetlana.evliya@gmail.com.

*** Lawyer, University of Buenos Aires, admitted to practice law in the City of Buenos Aires; Sworn Translator, University of Buenos Aires, Argentina. LLM holder in International Relations – with a specialization in Private International Law – Institut de Hautes Études Internationales, University of Geneva, Switzerland. Mr. Alonso Massa can be contacted at: alonso@arbitrage-transnational.com or <https://ar.linkedin.com/in/diegoluisalonsomassa>

Digest:

1. Relevant Facts

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. On 16 June 1993, Vientos de Abangares S.A. submitted an Environmental Impact Assessment (“EIA”), which was approved by the National Technical Environmental Secretariat (“SETENA”) on 1 October 1993 (¶¶ 64-65). Vientos de Abangares S.A. subsequently changed its name to Industrias Infinito S.A. (“Infinito”). After a number of share transfers, Infinito was acquired by Claimant (¶¶ 66-68, 70).

Between 1993 and 2000, Infinito allegedly performed drilling and studies to prove the existence and extent of the gold deposit (¶ 69). On 17 December 2001, Infinito obtained its exploitation concession allowing it to extract, process and sell the minerals from the Las Crucitas gold deposit. The concession became effective on 30 January 2002 (“**2002 Concession**”). However, according to Claimant, the exploitation activities could not begin until an EIA for the project was approved by the SETENA. According to Respondent, the validity of the 2002 Concession was conditioned upon the subsequent approval of an EIA. In March 2002, Infinito submitted its EIA to the SETENA for its approval. (¶¶ 73-74).

On 1 April 2002, environmental activists filed a constitutional challenge against the resolution that granted Infinito’s 2002 Concession on environmental grounds. On 26 November 2004, the Constitutional Chamber annulled the 2002 Concession holding that it violated Art. 50 of the Constitution, which guarantees the right to a healthy and ecological balanced environment, because the 2002 Concession was granted prior to the approval of the EIA (¶ 83).

The SETENA approved Infinito’s EIA on 12 December 2005 and then in the revised form on 4 February 2008. On 21 April 2008, the then President of Costa Rica and the Ministry of Environment and Energy (“MINAE”) granted Infinito an exploration concession (“**Concession**”) using the administrative law concept of “conversion” (i.e., the previous annulled concession is converted into a valid one) (¶ 93). On 13 October 2008, the President designated the Las Crucitas Project as one of national interest (¶ 93).

On 17 October 2008, Infinito commenced the logging of trees on the land of the Project (¶ 95). However, later in October constitutional challenges were filed by various entities against Infinito’s Concession based on the violation of Art. 50 of the Constitution. On 20 October 2008, the Constitutional Chamber suspended forest-clearing operations (¶ 97). In November 2008, additional challenges, including the one by the Asociación Preservacionista de Flora y Fauna Silvestre (“**APREFLOFAS**”), were filed before the Contentious Administrative Tribunal (“**TCA**”) requesting the annulment of various administrative acts related to the Las Crucitas Project (¶ 98). On 16 April 2010, the Constitutional Chamber declined constitutional

challenges and lifted the injunction against forest-clearing operations (¶ 100). The TCA issued its own injunction preventing the Las Crucitas Project from moving forward on the same day. On 24 November 2010, the TCA issued an oral summary of its decision declaring that all requests for annulment had been granted (“**2010 TCA Decision**”), including cancellation of the Concession (¶ 106).

On 29 April 2010, the then President of Costa Rica issued a decree declaring a moratorium on open-pit mining. On 8 May 2010, a subsequent President issued a new decree that expanded the prior moratorium to prohibiting all mining activities using cyanide and mercury in the processing of ore (“**2010 Executive Moratorium**”) (¶ 103). In December 2010, the Costa Rican legislature enacted an amendment to the Mining Code with essentially the same scope as the 2010 Executive Moratorium, which came into force on 10 February 2011 (“**2011 Legislative Moratorium**”) (¶ 110).

On 18 January 2011, Infinito filed a request for cassation of the 2010 TCA Decision before the Administrative Chamber of the Supreme Court (¶ 109). On 11 November 2010, it also filed a request with the Constitutional Chamber to declare that the 2010 TCA Decision was unconstitutional because it conflicted with the Constitutional Chamber’s earlier decision. On 30 November 2011, the Administrative Chamber of the Supreme Court denied Infinito’s cassation request and upheld the 2010 TCA Decision (“**2011 Administrative Chamber Decision**”) (¶ 112). On 9 January 2012, the MINAE cancelled Concession (“**2012 MINAE Resolution**”) (¶ 113). On 19 June 2013, the Constitutional Chamber dismissed Infinito’s challenge, holding that the challenge was inadmissible because the Administrative Chamber had already issued its ruling (“**2013 Constitutional Chamber Decision**”) (¶ 114).

2. Procedural History

2.1. Registration and Constitution of the Tribunal

Claimant filed a Request for Arbitration on 6 February 2014, which was registered by ICSID on 4 March 2014 (¶¶ 7-8). The Tribunal was constituted on 29 September 2014 (¶ 11). On 12 January 2015, Parties approved the appointment of Ms. Sabina Sacco as the assistant to the Tribunal (¶¶ 12-13).

2.2 First Session

The first session was held by means of a telephone conference on 22 January 2015. On 17 February 2015, the Tribunal issued the Procedural Order No. 1 which *inter alia* set out the Procedural Calendar for the jurisdictional phase of the case. (¶¶ 14-15).

2.3 Parties Written Submissions and Procedural Applications

On 17 June 2015, the Tribunal amended the Procedural Calendar pursuant to Claimant’s request agreed by Respondent. Claimant failed to submit its Memorial on the due date of 10 July 2015. On 13 July 2015, the Tribunal invited Claimant to explain such failure. Claimant wrote in response to the Tribunal’s letter that counsel for Claimant is unable to obtain instructions from the client as a result of the resignation of all of the Claimant’s directors and officers and requested a temporary suspension of the Procedural Calendar (¶¶ 16-18). On 24 July 2015, Respondent opposed the suspension request and asked the Tribunal to declare Claimant in default under ICSID Arbitration Rule 26(3) and discontinue the proceedings under

ICSID Arbitration Rule 44. Alternatively, Respondent asked for security for costs and revision to the Procedural Calendar. Claimant could not provide observations on the Respondent's request but reiterated its request for a temporary suspension of the calendar (¶¶ 19-23).

On 8 September 2015, the Tribunal decided that it cannot order the discontinuance under Rule 44 requested by Respondent in the absence of Claimant's agreement. Further, it provided Claimant with an extension until 29 September 2015 to indicate whether it wishes to pursue the arbitration and formally object to discontinuance (¶ 24). On 29 September 2015, Claimant filed a submission in response to Respondent's request and renewed its request for a temporarily suspension of the Procedural Calendar. On 2 October 2015, the Tribunal dismissed Respondent's request for discontinuance and security for costs and invited Parties to submit a joint proposal for a revised Procedural Calendar or their individual proposals in the absence of such agreement. Each Party filed their individual positions on 6 November 2015 (¶¶ 25-27).

On 10 November 2015, the Tribunal established a new Procedural Calendar which was subsequently amended on 21 March 2016 and then again on 4 August 2016 as per Respondent's request agreed upon by Claimant. Claimant filed its Memorial on the Merits on 23 December 2015, Respondent filed its Memorial on Jurisdiction on 8 April 2016. Following exchange of document production requests between the Parties, on 10 June 2016, the Tribunal issued Procedural Order No. 3 on document production. Claimant filed its Counter-Memorial on Jurisdiction on 7 July 2016. Respondent filed its Reply on Jurisdiction and Observations on the Non-Disputing Party Submission on 1 October 2016. Claimant filed its Rejoinder on Jurisdiction and Observations on the Non-Disputing Party Submission on 16 December 2016 (¶¶ 28-40).

2.4. Non-Disputing Party Application and Submission

On 15 September 2014, APREFLOFAS filed a Petition for Amicus Curiae Status. Following Parties submissions on APREFLOFAS's petition, the Tribunal in its Procedural Order No. 2 authorized APREFLOFAS to file a written submission, and granted it access to selected portions of the Parties' pleadings, subject to confidentiality restrictions. On 19 July 2016, APREFLOFAS filed its Non-Disputing Party Submission. Parties presented their observations on the latter with their respective Reply and Rejoinder on Jurisdiction (¶¶ 41-50).

2.5. Oral Procedure

The hearing on jurisdiction was held in New York City from 19 to 20 January 2017 (¶ 55).

2.6. Post-Hearing Procedure

No post-hearing submissions were filed by the Parties pursuant to their agreement. The Parties filed their Statements on Costs on 10 March 2017 (¶¶ 59, 61).

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

3.1. APREFLOFAS's Submission

APREFLOFAS, who was one of the plaintiffs in the proceedings culminated with the 2010 TCA Decision, submitted that (i) the Concession was illegal under the laws of Costa Rica and granted through an evident disregard of the applicable laws and that (ii) local courts have found

that the events that led to 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. APREFLOFAS argued that investment tribunals lack jurisdiction if the claimant violated the host State's laws in the process of its investment activities. The BIT expressly requires that for an investment to be considered as such, it must be in accordance with the laws of Costa Rica. Thus, the case is outside of the Tribunal's jurisdiction (¶¶ 122-127).

3.2. Respondent's Comments on APREFLOFAS's Submission

Respondent noted that APREFLOFAS's submission is generally in line with Respondent's case as far as factual presentation and legal arguments are concerned. However, Respondent disagreed on the substance of the APREFLOFAS's jurisdictional argument. It stated that the evidence available to date is insufficient to sustain that the entirety of Infinito's investment was procured through some malfeasance such that it fails to qualify as a bona fide investment under the BIT and the ICSID Convention. However, it noted that such evidence could be relevant for the Tribunal if the case were to proceed to merits (¶¶ 128-131).

3.3. Claimant's Comments on APREFLOFAS's Submission

Claimant contended that APREFLOFAS's allegations are unfounded. First, it stated that neither Infinito nor any of its representatives have ever been found liable for intentional wrongdoing. Second, there have been no conclusive findings of wrongdoing against any Costa Rican officials in connection with the Las Crucitas Project. Finally, it is well-established that States cannot rely on the wrongdoings of their officials to defeat jurisdiction (¶¶ 132-134).

3.4. Tribunal's Analysis

The Tribunal agreed that to be protected under the BIT, an investment must have been at the very least established in accordance with Costa Rican law. The Tribunal stated that the allegations put forward by APREFLOFAS are not trivial and the Tribunal cannot ignore the criminal proceedings initiated against various public officials. However, it noted that whether the Concession was illegally granted is intertwined with the merits. The Tribunal therefore deferred the matter to the merits phase (¶¶ 135-140).

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

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

4.1.1. Respondent's Position

Respondent stated that although Claimant formally challenges four measures (specifically, the 2011 Administrative Chamber Decision, the 2012 MINAE Resolution, the 2011 Legislative Moratorium, and the 2013 Constitutional Chamber Decision), the Claimant's case is really about the annulment of the Concession by the 2010 TCA Decision. Respondent asserted that as a matter of Costa Rican law, it was the 2010 TCA Decision which ordered the annulment of the Concession and that it was not provisional or dependent on any subsequent confirmation. According to Respondent, the Tribunal is empowered to go beyond a party's characterization of its claim. In the context of Art. XII(3)(d), when the BIT refers to 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 (¶¶ 179-181).

4.1.2. Claimant's Position

Claimant denied that its case is about the 2010 TCA Decision and argued that the Tribunal must focus on the case as Claimant has pleaded it. Claimant has challenged the following four measures (¶ 157):

(1) 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.

(2) 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.

(3) The 2012 MINAE Resolution, which Infinito alleges cancelled the 2008 Concession and expunged all of Infinito's mining rights from the mining registry, going further than what was ordered by the Administrative Chamber.

(4) The 2011 Legislative Moratorium on open-pit mining, which Claimant alleges prohibited Infinito from applying for new permits.

Claimant submitted that its case is 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. 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 Claimant alleges, not the measure as redefined by Respondent (¶¶ 182-184).

4.1.3. Tribunal's Analysis

The Tribunal agreed with Claimant and found that it is the Claimant's prerogative to formulate its claims as it sees fit. Accordingly, the Tribunal concluded that it must assess the case before it focusing on the measures that 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 noted that 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 Claimant will have to establish that the claims as presented arise from breaches of the BIT and caused a compensable loss (¶¶ 185-189).

4.2. Are the Acts Challenged by Claimant "measures" for Purposes of the BIT?

4.2.1. Respondent's Position

Respondent denied that judicial measures can be considered "measures" capable of breaching the BIT. For this reason, it contended that Claimant cannot challenge the 2011 Administrative Chamber Decision and the 2013 Constitutional Chamber Decision (or, for that matter, the 2010 TCA Decision, which according to Respondent is the "real" measure at issue). Respondent argued that the term "measure" is specifically defined in the BIT. The definition includes "any law, regulation, procedure, requirement or practice," and does not refer to judgements. 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. Article XII(3)(d) of the BIT excludes challenges to decisions by Costa Rica's judiciary (¶¶ 190-193).

4.2.2. Claimant's Position

Claimant asserted that judicial measures constitute "measures" for the purposes of the BIT. Judicial decisions are included into the definition of "measure" but in any event, the list provided in the definition is non-exhaustive. According to Claimant, judicial measures may be challenged under the BIT, specifically under Article XII(3)(d), 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 (¶¶ 194-195).

4.2.3. Tribunal's Analysis

The Tribunal considered that judicial decisions are indeed "measures" for the purposes of the BIT. First, it noted that the definition of "measure" in 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. The Tribunal considered that including judicial decisions in the concept of "measure" is consistent with the context of Article XII(3)(d) and with the object and purpose of the BIT (¶¶ 196-200).

4.3. 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?

4.3.1. Respondent's Position

Respondent contends that the Claimant's claims are not genuine claims under the BIT; rather, they are a disagreement with Costa Rican courts on matters of domestic law labelled as breaches of the BIT. The Tribunal lacks jurisdiction *ratione materiae* to act as a court of appeal on matters of domestic law. Respondent maintained that Claimant has failed to explain how its claims, even if accepted at face value, reflect a violation of international, rather than domestic law (¶¶ 201-206).

4.3.2. Claimant's Position

Claimant asserted 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. It submitted that the question before the Tribunal vis-à-vis Costa Rican domestic law is not whether it was misapplied, but whether the failure to correctly apply domestic law in addition to other relevant facts constituted a breach of the BIT. In this context, according to Claimant, the application of domestic law forms part of the Tribunal's factual analysis. Claimant also submitted that all its claims are all grounded in breaches of the BIT (¶¶ 207-210).

4.3.3. Tribunal's Analysis

Tribunal concluded that 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. With respect to (i), the Tribunal noted that it has already found that it

must focus on the claim as pleaded by Claimant. Here, Claimant is clearly and unequivocally arguing that the four measures identified above have breached several of Respondent's obligations under the BIT. The jurisdictional requirement under (i) is thus met. With respect to (ii), it is also undisputed that Claimant claims that the breaches have caused it loss or damage. The Tribunal thus found that this jurisdictional requirement is also met (¶¶ 211-217).

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

4.4.1. Respondent's Position

Respondent submitted that, to establish the Tribunal's jurisdiction, Claimant must make a *prima facie* case that the conduct of which it complains is capable of breaching the BIT and that the test is to assess whether, on the facts alleged by Claimant, the challenged acts are capable of violating the BIT. According to Respondent, Claimant cannot meet the *prima facie* test by simply labelling the disputed conduct as a treaty breach. Respondent further contended that a *prima facie* case must be supported with *prima facie* evidence. Respondent argued that here, Claimant has failed to make a *prima facie* showing of any of the BIT breaches that it alleges. According to Respondent, the conduct that Claimant attributes to Costa Rica, even if it were proven, would not violate the relevant standards, and in those cases in which Claimant's assertions could plausibly give rise to a breach of the BIT, those allegations find no support in the evidentiary record (¶¶ 218-222).

Relying on *Emmis*, Respondent submitted that a tribunal must engage in two distinct types of inquiries at the jurisdictional stage, each having a different level of inquiry: (i) the first type of inquiry relates to questions of fact that must be definitively determined at the jurisdictional stage and (ii) the second involves questions of fact that go to the merits, which the Tribunal must ordinarily not prejudge, unless they are plainly without foundation. According to Respondent, Claimant attempts to conflate the two inquiries, and mistakenly argues that it must make a *prima facie* showing with respect to both jurisdictional and merits inquiries while according to Respondent, Claimant has a higher level of proof that a *prima facie* showing for issues relevant to the jurisdictional inquiry (¶¶ 223-225).

4.4.2. Claimant's Position

Claimant submitted that the *prima facie* test applicable at the jurisdictional stage is a low one and that Infinito need only establish that if the facts it alleges are ultimately established, those facts could constitute a violation of the BIT; it need not demonstrate that such facts, if proven, would violate the BIT. Claimant argued that Respondent improperly tries to force the Tribunal to determine at the jurisdictional stage questions that belong to the merits. Citing *Oil Platforms*, Claimant argued that it is only at the merits stage that a tribunal has jurisdiction to determine exactly what the facts are and see whether they violate the BIT (¶¶ 227-230).

In answer to the Respondent's arguments on the appropriate standard of review for the jurisdictional stage, Claimant articulated the following principles: (1) the facts and law that are necessary to determine jurisdiction may be assessed rigorously; (2) the facts and law that are relevant to the merits must be considered on a *prima facie* standard; (3) the Tribunal's analysis should be based on the Claimant's allegations, not on the Respondent's reformulation of the case (¶ 231).

4.4.3. Tribunal's Analysis

The Tribunal noted Parties' general agreement as to the standard of review at the jurisdictional stage that was adopted in *Emmis*, which is that the Tribunal must engage in two separate inquiries, the first inquiry refers to facts that go to jurisdiction; the second inquiry involves the merits of the breaches claimed. The Tribunal noted that 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, i.e. proven, at the jurisdictional stage. According to the Tribunal, such relevant facts have been established (¶¶ 233-236).

As for the second inquiry, the Tribunal concluded with reference to the *Oil Platform* case that it must assess *prima facie* whether the claims asserted may constitute treaty breaches. In making this *prima facie* determination, the Tribunal must first assume the facts as Claimant alleges them and must review whether the facts alleged are susceptible of constituting breaches of the treaty's guarantees of protections as it understands these guarantees. While noting that at the jurisdictional stage one should not prejudge facts that go to the merits, the Tribunal considered that an exception needs to be made when these facts are "plainly without foundation," which according to the Tribunal is not the case here. The Tribunal held that Claimant has shown that the facts which it alleges, if accepted as true, could entail breaches of the BIT, thus it found that Claimant has satisfied the *prima facie* test needed to establish the Tribunal's jurisdiction *ratione materiae* (¶¶ 237-244).

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

4.5.1. Respondent's Position

According to Respondent, under the BIT, Claimant must establish a *prima facie* case for both (i) an alleged breach and (ii) an alleged damage flowing from such breach. Respondent submits that 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 (¶¶ 245-248).

4.5.2. Claimant's Position

Claimant argued that it has submitted sufficient evidence, including expert evidence, to demonstrate its losses, and thus has more than established a *prima facie* case of damages for the purposes of the BIT (¶¶ 249-250). Claimant argued that its evidence must be accepted as true for the purposes of jurisdictional analysis, including the expert evidence provided by Claimant regarding Infinito's losses and the cause of those losses (¶¶ 251-252).

4.5.3. Tribunal's Analysis

The Tribunal concluded that 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 (¶ 255).

5. Respondent's Objections under Article XII(3)

5.1. 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?

5.1.1. Respondent's Position

Respondent contended that Article XII(3)(d) bars any claim against measures “regarding” which a Costa Rican court has rendered a judgment. In particular, (i) the 2010 TCA Decision has been the subject of the judgment of the 2011 Administrative Chamber Decision which ruled on Infinito's cassation request regarding the 2010 TCA Decision; (ii) the 2010 TCA Decision is, in itself, a judgment rendered by a Costa Rican court regarding the annulment; (iii) the 2010 TCA Decision was also the subject of the 2013 Constitutional Chamber Decision. Respondent contended that a direct challenge to the 2010 TCA Decision is thus barred by Article XII(3)(d) of the BIT (¶¶ 259-260). As for the other measures, they are also barred because they are all measures “regarding” which the Costa Rican courts have rendered a judgment with some of them being in itself a judgement (i.e. the 2011 Administrative Chamber Decision and the 2013 Constitutional Chamber Decision). Besides all of these judgements are “regarding” the annulment of the Claimant's Concession, which is the real measure challenged by Claimant. In addition, Respondent argued that in the case of judgments, it is possible 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 that the written judgment is necessarily ‘regarding’ the substantive content included therein (¶¶ 261-262). Respondent submitted that its interpretation is consistent with the context of the provision as well as with other provisions of the BIT (and in particular Art. XII(3)(d) which according to Respondent excludes judicial measures from the scope of the BIT) and that it is logical and based on the primary interpretation rules of Art. 31 of the VCLT (¶¶ 264-270).

5.1.2. Claimant's Position

Claimant denied that its claims are barred by Article XII(3)(d) of the BIT and argued that none of the measures that it challenges have been the subject of a judgment of a Costa Rican court. According to Claimant, Respondent mischaracterizes Infinito's claims as an attack against the 2010 TCA Decision, but this is not Claimant's case (¶¶ 272-273). 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 Claimant to be in breach of the BIT, and (ii) there must be a judgment regarding that measure. 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. Accordingly, under 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 (¶¶ 274-275). Claimant submitted that its interpretation is consistent with the interpretive principles of Arts. 31 and 32 of the VCLT while 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* (¶¶ 279-286).

5.1.3. Tribunal's Analysis

The Tribunal agreed with Claimant that 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. Applying Article 31 of the VCLT, the Tribunal interpreted the first condition (i) as meaning the measure pleaded by Claimant to be in breach of the BIT, considering both the measure and the breach as formulated by Claimant and noted that it has already found that judicial decisions are included in the definition of “measure” under the BIT (¶¶ 289-291).

As a second condition, the Tribunal noted that 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 interpreted 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, the measure must be the subject matter (or at least, part of the subject matter) of the judgment. The Tribunal did 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), because the use of the word “regarding” clearly requires two elements, a measure and a judgment about that measure. Nor did 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. Accordingly, the Tribunal considered that, for Article XII(3)(d) to be triggered, the measures challenged by Claimant must have been the subject of a separate judgment by a Costa Rican court (¶¶ 292-293).

The fact that two of the challenged measures are themselves judgments is insufficient to meet this requirement. 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. The Tribunal found this interpretation to be consistent with the context of the provision and the object and purpose of the BIT and it did not find that the *travaux préparatoires* cast a different light. After assessing the record, the Tribunal concluded that Claimant has established that no judgment by a Costa Rican court has been rendered “regarding” the measures which it alleges to breach the BIT. The Tribunal thus found that the Claimant’s claims are not barred by Article XII(3)(d) (¶¶ 294-298).

5.2. Are *Infinito*’s Claims Time-Barred under Article XII(3)(c)?

5.2.1. Respondent’s Position

Respondent argued 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 which, 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.” The measures that really

caused the loss or damage alleged by Claimant occurred before the cut-off date for the statute of limitations (¶ 299).

Respondent submitted that the Tribunal must address three issues to determine this objection: (i) it must identify the cut-off date for the three-year limitation period; (ii) it must determine whether Claimant knew or should have known of the alleged breach or breaches before that cut-off date; (iii) it must determine whether Claimant knew or should have known that it had incurred loss or damage before the cut-off date. With respect to (i), Respondent noted that the Parties have agreed that the cut-off date is 6 February 2011. With respect to (ii) and (iii), Respondent contended that 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. Respondent submitted that the real sources of the loss or damage alleged by Claimant are (i) the 2010 TCA Decision, and (ii) the 2010 Executive Moratorium, and not the four measures challenged by Claimant. According to Respondent, what matters for the purposes of Article XII(3)(c) is the date on which Claimant first acquired knowledge of these measures and of the loss or damage arising from them (i.e. such knowledge cannot ‘first’ be acquired at multiple points in time or on a recurring basis). Respondent submitted that Claimant “first” acquired knowledge of these measures and of the loss or damage arising from them with the issuance of the 2010 TCA Decision, i.e. before the cut-off date of 6 February 2011 (¶¶ 300-310).

5.2.2. Claimant’s Position

Claimant denied that its claims are time-barred under Article XII(3)(c). According to Claimant, Respondent’s objections that the measures 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), represent a reformulation of Claimant’s case. The claims must be assessed as pleaded by Claimant and Claimant challenges the four measures that postdate the cut-off date (¶¶ 311-312).

Claimant emphasized that Article XII(3)(c) bars claims only if three years have elapsed from the time at which Claimant first acquired or should have first acquired knowledge of: (a) the alleged breach (as alleged by Claimant); and (b) the alleged loss or damage sustained. Claimant acknowledges that if 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. According to Claimant, it 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 none of the measures that Infinito alleges to have breached the BIT had been rendered by that time (¶¶ 313-315).

In any case, Claimant submitted citing *Tecmed* that even if a measure is outside the three-year limitation period, a tribunal can rely on preceding events, in its analysis, if those events culminated in a breach that was itself timely. Claimant further argued citing *Apotex*, *Mondev* and *Corona* that in cases involving measures that render earlier measures final, it is the final and not the first measure that crystallizes the breach. Besides, 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 and all of the measures challenged by Infinito constitute new and distinct breaches (i.e. distinct from the 2010 TCA Decision) that do not fall outside the limitation period (¶¶ 322-325).

5.2.3. Tribunal's Analysis

The Tribunal differed the issue to the merits. The Tribunal agreed with Respondent that to decide this objection the Tribunal must answer three questions: (i) it must identify the cut-off date for the three-year limitation period; (ii) it must determine whether Claimant knew or should have known of the alleged breach or breaches before that cut-off date; and (iii) it must determine whether Claimant knew or should have known that it had incurred loss or damage before that date. With respect to (i), the Tribunal noted that Parties have agreed on 6 February 2011 as a cut-off date. With respect to (ii) and (iii), the Tribunal considered that, to determine when Claimant first acquired (or should have first acquired) knowledge of a specific breach as well as of the loss or damage, it must identify the date on which the alleged breach crystallized as well as the loss or damage alleged and the breach from which that loss or damage flows. This requires a substantive review of each of the measures complained of as well as of the measures that Respondent considers lie at the heart of the Claimant's case which is deeply intertwined with the merits (¶¶ 328-334).

5.3. Are These Jurisdictional Requirements or Conditions for Admissibility?

5.3.1. Claimant's Position

Claimant argued 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 jurisdictional objections are premised) sets out the conditions for the admissibility of the claims. As a result, Claimant argued that Costa Rica may not rely on Article XII(3), or any other provision of Article XII, to vary its consent to arbitration. Claimant submitted that 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 (¶¶ 335-337).

5.3.2. Respondent's Position

Respondent submitted that the requirements of Article XII(3) constitute mandatory limits to Costa Rica's consent to arbitration, which are strict conditions, non-compliance with which renders Claimant's claim non-arbitrable. In any case, Respondent argued relying on *Plama* that MFN clauses cannot be used to import more favorable admissibility requirements from other bilateral investment treaties unless the MFN provision leaves no doubt that the Contracting Parties intended to incorporate them and that is not the case here (¶¶ 338-340).

5.3.3. Tribunal's Analysis

The Tribunal stated that Respondent had raised only two objections grounded on this provision: one based on Article XII(3)(c) and another on Article XII(3)(d). The Tribunal noted that it had already found that the requirements set out in Article XII(3)(d) were met. As to the Respondent's objection that the claims are time-barred under Article XII(3)(c), the Tribunal pointed out that it had deferred the consideration of this matter to the merits. As a result, the Tribunal concluded that it will address the question of whether it is a jurisdictional or admissibility requirement during the merits phase if it becomes relevant (¶¶ 341-343).

6. Other Objections

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

6.1.1. Respondent's Position

Respondent submitted that the “real” measures being challenged by Claimant pre-date the cut-off date, while the measures formally challenged merely adopt, maintain or enforce these pre-existing measures. As all of these measures (pre-existing or not) were motivated by environmental concerns and are thus barred by Annex I, Section III(1). However, Respondent appeared to have acknowledged that issues arising from Annex I, Section III(1) of the BIT could be merits issues as this provision requires measures to be “otherwise consistent” with the BIT (¶¶ 345-348).

6.1.2. Claimant's Position

Claimant submitted that the provision is irrelevant to the Tribunal's determination of the merits of Infinito's claims because it applies to only environmental measures that are otherwise consistent with the BIT, and thus Respondent cannot invoke this provision as a defense in respect of measures that do breach the BIT.

Claimant denied that the annulment of its Concession and other project approvals were motivated by *bona fide* environmental concerns. Claimant noted that its rights were annulled for technical and administrative reasons. In addition, Claimant contended relying on *Metalclad*, that the environmental measures exception does not apply where the competent authorities of the host State have previously found the project to be environmentally sound, which is the case here (¶¶ 349-354).

6.1.3. Tribunal's Analysis

The Tribunal concluded that any objection by Respondent based on Annex I, Section III(1) of the BIT is a matter for the merits because this provision sets out guidelines regarding the content of measures that may be adopted, maintained or enforced by the host State and does not relate to the State's consent to arbitrate, or to whether a claim can be heard or not (¶¶ 355-358).

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

7.1. Claimant's Position

Claimant's primary position was that all of the preconditions set out in Article XII(3) of the BIT had been met. In the alternative, Claimant submitted 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 most favorable absence of preconditions in Costa Rica's BITs with Taiwan and Korea (¶ 360).

7.2. Respondent's Position

Respondent denied that 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 (¶ 360).

7.3. Tribunal's Analysis

The Tribunal concluded that it had already found that the preconditions set out in Article XII(3)(a), (b) and (d) are met. As to the precondition set out in Article XII(3)(c), the Tribunal noted that it had deferred this issue to the merits and will thus address the Claimant's MFN argument and the Respondent's related objections at the merits stage (¶¶ 361–362).

8. Costs

The Tribunal deferred the analysis of the Parties' cost submissions to the merits stage (¶ 363).