

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**INFINITO GOLD LTD.**

CLAIMANT

**v.**

**REPUBLIC OF COSTA RICA**

RESPONDENT

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

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**PROCEDURAL ORDER No. 3**

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***Members of the Tribunal:***

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Bernard Hanotiau, Arbitrator

Prof. Brigitte Stern, Arbitrator

***Secretary of the Tribunal:***

Ms. Luisa Fernanda Torres

Date: 10 June 2016

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**I. PROCEDURAL BACKGROUND**

1. On 6 May 2016, in accordance with the Procedural Calendar set out in Annex A of Procedural Order No. 1 – Revision No. 3, the Parties exchanged their requests for production of documents.
2. On 20 May 2016, the Claimant informed the Tribunal that it would voluntarily produce on that same day all of the documents requested by the Respondent. On the same date, the Respondent submitted its objections to the Claimant’s document production request, and agreed to voluntarily produce that same day documents responsive to the Claimant’s Requests No. 1 to 9.
3. On 27 May 2016, the Claimant submitted its reply to the Respondent’s objections.
4. This Order addresses the Parties’ requests for the production of documents insofar as they have not been resolved between the Parties.

**II. APPLICABLE STANDARDS**

5. The production of documents in this arbitration is governed by the following rules, in order of priority:
  - a. The ICSID Convention (the “Convention”);
  - b. The ICSID Arbitration Rules (the “Arbitration Rules”), and
  - c. Section 16 of Procedural Order No. 1 (“P.O. 1”).
6. Article 43(a) of the ICSID Convention provides that “[e]xcept as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence[.] [...]”
7. Rule 34 of the Arbitration Rules further provides as follows:

Rule 34

Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

(a) call upon the parties to produce documents, witnesses and experts; and

(b) visit any place connected with the dispute or conduct inquiries there.

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(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

8. In turn, Section 16 of P.O. 1 provides:

16.1. Within the time limit set in **Annex A**, a Party may file a request to another Party for the production of documents or categories of documents within its possession, custody or control. Such a request for production shall identify each document or category of documents sought with precision, in the form of a Redfern Schedule as attached in Annex B hereto, in both Word and .pdf format, specifying why the documents sought are relevant and material to the outcome of the case.

16.2. Within the time limit set in **Annex A**, the other Party shall either produce the requested documents or, using the Redfern Schedule provided by the first Party, provide the requesting Party and the Tribunal with its reasons and/or objections for its failure or refusal to produce responsive documents.

16.3. Within the time limit set in **Annex A**, the requesting Party shall reply to the other Party's objections in that same Redfern Schedule. The reply shall be limited to answering specific objections regarding (i) legal impediment, privilege, confidentiality or political sensitivity and/or (ii) unreasonable and/or over-burdensome nature of the production and other fairness-related considerations.

16.4. On or around the date set in **Annex A**, the Tribunal will, in its discretion, rule upon the production of the documents or categories of documents requested by a Party, having regard to the legitimate interests of the other Party and all of the surrounding circumstances.

16.5. Documents shall be produced directly to the requesting Party without copying the Tribunal. Documents so produced shall not be considered to be on record unless and until the requesting Party subsequently files them as exhibits in accordance with §17 below.

16.6. In addition, the Tribunal may, on its own initiative at any time, order a Party to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2). In that case, the documents shall be submitted to the other Party and to the Tribunal in accordance with §17 below and shall be considered to be on record.

9. Finally, Section 25.1 of Procedural Order No. 1 provides that “[t]he Tribunal may seek guidance from, but shall not be bound by, the IBA Rules on the Taking of Evidence in

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International Arbitration (2010 edition)” (the “IBA Rules”). The Tribunal takes particular note of the provisions cited below.

a. Article 3.3 of the IBA Rules provides that requests to produce documents shall contain:

(a) (i) a description of each requested Document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

b. With respect to the admissibility and assessment of evidence, Article 9 of the IBA Rules provides, *inter alia*:

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(c) unreasonable burden to produce the requested evidence;

(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

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- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
  - (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
- (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
  - (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
  - (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
  - (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
  - (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.
4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

[...]

- c. Article 3(13) of the IBA Rules provides that “[a]ny Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.”

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10. On the basis of the rules cited above, the standards that have guided the Tribunal's reasoning are the following:
- a. The request for production must identify each document or narrow and specific category of documents sought with precision. Otherwise, the other Party may not be able to trace a document and the Arbitral Tribunal may possibly be unable to rule on its production. To assess whether a document or category of documents has been identified with "precision", the Tribunal will take into consideration all surrounding circumstances, including in particular whether the requesting Party has limited its request as to timing, subject matter and/or possible author/recipient of the document or category of documents.
  - b. The request for production must establish the relevance and materiality of each document or category of documents sought (paragraph 16.1 of P.O. 1) in such a way that the other Party and the Tribunal are able to refer to factual allegations in the submissions filed by the Parties to date or factual allegations to be made in future submissions, provided that such factual allegations are made or at least summarized in the request for production of documents. In other words, the requesting Party must make it clear with reasonable particularity what facts/allegations each document (or category of documents) is intended to establish.
  - c. For the sake of clarity, the Tribunal emphasizes that in ruling on the requests for document production, it has ruled on the *prima facie* relevance of the requested documents, having regard to the factual allegations made by the Parties in the submissions filed to date, or the future factual allegations they intend to make, as summarized in their request for production of documents. At the present stage of the proceedings, the Tribunal is not in a position to rule on the definitive relevance of the requested documents to the final determination of the Parties' claims and defenses in this arbitration.
  - d. The Tribunal will only order the production of documents or category of documents if the requesting Party shows that it is more likely than not that the documents exist and are within the possession, custody or control of the other Party, and that they are not in the possession, custody or control of the requesting Party.
  - e. Where appropriate, the Tribunal has also weighed the request of one Party for production against the legitimate interests of the other Party, including any applicable privileges, unreasonable burden and the need to safeguard confidentiality, taking into account all the surrounding circumstances.

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**III. DECISION ON THE REQUESTS FOR PRODUCTION**

11. The Tribunal's review and decision with respect to each of the specific document requests contained in the Claimant's request for production of documents is reflected in the completed version of the Redfern Schedule that is attached as Annex A hereto, and which forms an integral part of this Procedural Order.

**IV. ORDER**

12. In application of the standards set out above and of the reasons set forth in Annex A to this Procedural Order, the Tribunal:
- a. Takes note that the Claimant has voluntarily agreed to produce documents responsive to the Respondent's document production request.
  - b. Takes note that the Respondent has voluntarily agreed to produce documents responsive to Requests No. 1 through 9 of the Claimant's document request.
  - c. Takes note that the Claimant has withdrawn Request No. 13.
  - d. With respect to the Claimant's Requests No. 1 through 9 (which the Claimant maintains despite the voluntary production referred to in paragraph (b) above):
    - i. The Tribunal invites the Respondent to confirm, by **17 June 2016** whether it has produced all documents in its possession, custody or control that are responsive to the Claimant's Requests No. 1 through 9.
    - ii. If the Respondent provides the confirmation sought in the terms set out in sub-paragraph (i) above, the Tribunal will understand that the Claimant no longer seeks an order.
    - iii. If the confirmation sought in sub-paragraph (i) above is not forthcoming, the Tribunal partially grants Request No. 1 as set out in Annex A (denying the remainder of this request), and grants Requests 2 through 9.
  - e. In accordance with the Section 16.5 and the Procedural Calendar set out in Annex A to P.O. 1 – Revision No. 3, the Respondent shall produce the documents for which the Tribunal has ordered production at the latest by **24 June 2016**, as directed below:
    - i. Documents shall be produced directly to the requesting Party without copying the Tribunal.
    - ii. Documents so produced shall not be considered to be on record unless and until the Claimant subsequently files them as exhibits in accordance with Section 17 of P.O. 1.

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- iii. The Parties' attention is drawn to the confidential treatment that Article 3(13) of the IBA Rules provides for documents produced in an arbitration proceeding.
  
- f. All other requests for production of documents are denied.

On behalf of the Tribunal,

[Signed]

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Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal



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Annex A - Claimant's Request for Production of Documents

No.	Document(s) or Category of Documents Requested	Relevance and Materiality according to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Decision
		Ref. to Submissions	Comments			
1.	All documents relating to the negotiation of the Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments (the "BIT" or the "Canada–Costa Rica BIT") (Exhibit C-0001), including the negotiation history, <i>travaux préparatoires</i> and prior drafts.	Respondent's Memorial on Jurisdiction: paras. 9-12, 16-21, 26, 29-30, 146, 148-154, 161-173, 187-189, 193-201, 210-214, 239, 244, 263-265, 276-278, 287-288, 292-294, 301-302, 310-314, 317-319, 322, 324-326, 340-343, 345-358	<p>The requested documents are relevant and material to the outcome of the dispute between the parties. The interpretation of the BIT is central to almost every issue in dispute in the jurisdictional phase, and documents relating to the negotiation history are essential to a fulsome analysis of the meaning and scope of relevant clauses.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third</p>	<p>The phrase "[a]ll documents" denotes a broad and indeterminate request, thus contrary to the requirements of specificity and narrowness of Article 3.3 (a) (ii) of the IBA Rules, and the considerations for procedural economy enshrined in Article 9.2 (g) of the IBA Rules. It is also highly burdensome and, indeed, impossible, to identify all documents "relating to" the specified subject matter that may exist in some form in the custody of some government custodian. It is also highly likely that the vast majority of potentially responsive documents would be entirely <i>irrelevant</i> to the limited number of issues at stake in the jurisdictional phase of this case.</p> <p><b>Without waiving the above objection, the Republic of Costa Rica agrees to produce all the archived treaty negotiation materials</b></p>	<p><u>Infinito maintains the request despite voluntary production</u></p> <p>Infinito recognizes that Costa Rica has voluntarily produced a number of documents responsive to this request. However, Infinito maintains the request given that Costa Rica produced the documents without waiving its objection, to ensure that Costa Rica is formally ordered to produce all documents in its possession, custody or control that are responsive to the request.</p> <p>This is especially important given that the set of documents produced by Costa Rica appears to be incomplete. For example, the documents produced show that the draft of the Canada–Costa Rica BIT as of January 1997 did not include Article XII(3)(d), which is a provision not found in other BITs and on which Costa Rica relies heavily in its Counter-Memorial on Jurisdiction (see Exhibit C-352). The Canada and Costa Rica delegations attended a</p>	<p>The Tribunal notes that Costa Rica has voluntarily produced "all the archived treaty negotiation materials it has been able to obtain in connection with the BIT." It nonetheless maintains its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 1.</p> <p>If such confirmation is forthcoming, the Tribunal will understand that Infinito no longer requests an order.</p> <p>If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b> but limited to any documents relating to the negotiations that took place during the 28-29 January 1997 meeting, including (but not limited to) the annex attached to</p>

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			parties.	<b>it has been able to obtain in connection with the BIT.</b>	<p>meeting on January 28 and 29, 1997, at which point the text of the BIT was substantially finalized. The high-level summary minutes from that meeting state that the “final agreement regarding the definitive text of the treaty” was “attached as an Annex to this minute.” (see Exhibit <b>C-353</b>). Yet this Annex does not appear to have been produced, nor were any other documents relating to the negotiations that took place during the January 28-29, 1997 meeting. Treaty drafts following that meeting include Article XII(3)(d) (see Exhibit <b>C-0354</b>). Thus, it would appear that the decision to include Article XII(3)(d) was made at this meeting, yet there is no record of that decision or of the reasons why that provision was included in the documents produced by Costa Rica.</p> <p>Moreover, Costa Rica states that it “agrees to produce all the archived treaty negotiation materials it has been able to obtain in connection with the BIT.” It does not agree to produce all of the documents</p>	<p>the summary minutes identified by Infinito. The documents requested are relevant to the dispute, and while Infinito does not expressly narrow down its request to these documents, they have been identified in Infinito’s reply.</p> <p>The remainder of the request is <b>DENIED</b> because it is overbroad and overly burdensome to Costa Rica: it is not for Costa Rica to identify what documents are relevant to the dispute; it is for Infinito to identify documents or narrowly specified categories of documents that are relevant to the dispute with precision. Infinito appears to recognize this as in its Requests No. 2-9 it seeks documents relating to the negotiation of specific provisions, which the Tribunal addresses below.</p>

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					<p>responsive to the document request that are in its possession, custody or control. For example, Costa Rica does not exclude that there may be responsive documents in its possession, custody or control that it has not yet “been able to obtain”, for example because of the time constraints involved in producing the requested documents.</p> <p>It may be the case that all of the responsive documents in Costa Rica’s possession, custody or control have already been produced. If that is the case, then the Claimant would be content to accept Costa Rica’s formal confirmation, following the order of the Tribunal, that it has already produced all responsive documents that are within its possession, custody or control and of that of its counsel or advisors and that no further responsive documents exist.</p> <p><u>The request is not overbroad</u></p> <p>Infinito’s request defines a narrow and specific category of documents that are</p>	

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					<p>reasonably believed to exist, as required by Article 3(3)(a)(ii) of the IBA Rules. That Article explicitly provides that parties may make requests for categories of documents. Contrary to Costa Rica's assertion, there is nothing about the phrase "all documents" that informs the breadth or narrowness of a request. The phrase merely introduces the category of documents requested. Infito has further narrowed its requests through its general comment 3, above, by restricting all of its requests to: (i) documents in the possession, custody or control of the Respondent, its counsel or advisors; (ii) relevant to the dispute; and (iii) not protected by privilege.</p> <p>Infito has constructed its request as narrowly and specifically as possible, in compliance with the IBA Rules, in light of its knowledge about the documents likely to be in the possession, custody or control of Costa Rica (for example, documents relating to the negotiation history,</p>	

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					<p><i>travaux préparatoires</i> and prior drafts of the BIT). There is currently significant information asymmetry between the parties, as Costa Rica has access to all of the documentation surrounding the preparation of the treaty, and Infinito now has access only to the documents that Costa Rica has voluntarily produced.</p> <p>Moreover, contrary to the suggestion that it is "highly likely that the vast majority of potentially responsive documents would be entirely <i>irrelevant</i> to the limited number of issues at stake in the jurisdictional phase of this case," the request is explicitly limited to documents that are relevant to the dispute (as set out in general comment 3 above).</p> <p>In any event, nearly all of Costa Rica's jurisdictional arguments engage the interpretation of the provisions of the BIT. Pursuant to Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, recourse may be had to supplementary means of interpretation, such as the</p>	

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					<p>negotiation history, <i>travaux préparatoires</i> and prior drafts. The parties do not agree on the interpretation of much of the BIT. As a result, all of these requested documents are potentially relevant.</p> <p><u>No evidence that compliance would be burdensome</u></p> <p>Costa Rica baldly asserts that compliance with the request would be “highly burdensome” or “impossible”. Yet Costa Rica has offered no evidence, much less an explanation, as to why producing documents relating to the negotiation of the Canada–Costa Rica BIT would be either burdensome or impossible. The Tribunal should disregard this unsubstantiated submission, particularly given that the requested documents are potentially both highly relevant and material to the matters at issue during the jurisdictional phase.</p>	
2.	All documents relating to the negotiation of Article XII of the BIT,	Respondent's Memorial on Jurisdiction: paras. 9-11, 16-	The requested documents are relevant and material to the outcome of the dispute between the parties, in	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same	The response to this request is addressed in the response to Request No. 1.	The Tribunal notes Costa Rica's statement that “[t]he materials sought under this request are entirely

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	including the negotiation history, <i>travaux préparatoires</i> and prior drafts, if not already produced in response to request #1.	17, 19-20, 29-30, 146, 148-154, 161-173, 187-189, 193-196, 301- 302, 310-314, 317-319, 322, 324-325, 342-343, 354-358	<p>particular, the allegation raised by the Respondent that the Claimant has failed to meet preconditions established under Article XII of the BIT. The Respondent attempts to analyze the clause in a vacuum, and documents relating to the negotiation history are likely the illustrate the context within which the clause was finalized.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>	objections and agreement to produce.		<p>subsumed by Request No. 1 and are subject to the same objections and agreement to produce.” It also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced “all the archived treaty negotiation materials it has been able to obtain in connection with the BIT”, while maintaining its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 2.</p> <p>If such confirmation is forthcoming, the Tribunal will understand that Infinito no longer requests an order.</p> <p>If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b>. The Tribunal finds that Infinito has identified a narrowly specified category of documents</p>

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						that may be relevant to the dispute with sufficient precision. Costa Rica has neither explained nor established why complying with this request would be "highly burdensome."
3.	All documents relating to the negotiation of Article XII(3)(d) of the BIT, including the negotiation history, <i>travaux préparatoires</i> and prior drafts, if not already produced in response to requests #1 or #2.	Respondent's Memorial on Jurisdiction: paras. 9-11, 30, 146, 148-154, 161-173, 322, 358	<p>The requested documents are relevant and material to the outcome of the dispute between the parties; in particular, the allegation raised by the Respondent that the Claimant's claims are barred by the operation of Article XIII(3)(d) of the BIT. The Respondent repeatedly refers to the intentions and understanding of the parties when the BIT was negotiated, and documents relating to the negotiation history are integral to analyzing the parties' intentions, and the context within which the clause was drafted.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of</p>	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce.	Infinito's reply to this objection is addressed in its reply to Costa Rica's objection to Request No. 1.	<p>The Tribunal notes Costa Rica's statement that "[t]he materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce." It also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced "all the archived treaty negotiation materials it has been able to obtain in connection with the BIT", while maintaining its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 3.</p> <p>If such confirmation is</p>



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			<p>interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>			<p>forthcoming, the Tribunal understands that Infinito no longer requests an order.</p> <p>If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b>. The Tribunal finds that Infinito has identified a narrowly specified category of documents that may be relevant to the dispute. Costa Rica has neither explained nor established why complying with this request would be "highly burdensome."</p>
4.	All documents relating to the negotiation of XII(3)(c) of the BIT, including the negotiation history, <i>travaux préparatoires</i> and prior drafts, if not already produced in response to requests #1 or #2.	Respondent's Memorial on Jurisdiction: paras. 16-17, 19, 30, 146, 187-189, 193-196, 301-322, 358	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the allegation raised by the Respondent that the Tribunal has no jurisdiction <i>rationae temporis</i> to examine the claims as constituted by the Claimant. Documents relating to the negotiation history are likely to shed light on the purpose and intent of this provision.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on</i></p>	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce.	Infinito's reply to this objection is addressed in its reply to Costa Rica's objection to Request No. 1.	The Tribunal notes Costa Rica's statement that "[t]he materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce." It also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced "all the archived treaty negotiation materials it has been able to obtain in connection with the BIT",

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			<p><i>the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>			<p>while maintaining its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 4.</p> <p>If such confirmation is forthcoming, the Tribunal understands that Infinito no longer requests an order.</p> <p>If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b>. The Tribunal finds that Infinito has identified a narrowly specified category of documents that may be relevant to the dispute. Costa Rica has neither explained nor established why complying with this request would be "highly burdensome."</p>
5.	All documents relating to the negotiation of Article II(a) of the BIT, including the	Respondent's Memorial on Jurisdiction: paras. 21, 210-214, 239, 244,	The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the allegation	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to	Infinito's reply to this objection is addressed in its reply to Costa Rica's objection to Request No. 1.	The Tribunal notes Costa Rica's statement that "[t]he materials sought under this request are entirely subsumed by Request No.

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	negotiation history, <i>travaux préparatoires</i> and prior drafts, if not already produced in response to request #1.	263-265, 276-278, 287	<p>raised by the Respondent that the Claimant has failed to establish a <i>prima facie</i> meritorious case that the Respondent breached Article II(a) of the BIT. The Respondent repeatedly refers to the intentions and understanding of the parties when the BIT was negotiated, and documents relating to the negotiation history are likely to illustrate the context within which the clause was finalized.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third</p>	produce.		<p>1 and are subject to the same objections and agreement to produce.” It also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced “all the archived treaty negotiation materials it has been able to obtain in connection with the BIT”, while maintaining its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 5.</p> <p>If such confirmation is forthcoming, the Tribunal understands that Infinito no longer requests an order.</p> <p>If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b>. The Tribunal finds that Infinito has identified a narrowly specified category of documents that may be relevant to the</p>

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			parties.			dispute. Costa Rica has neither explained nor established why complying with this request would be "highly burdensome."
6.	All documents relating to the negotiation of Article VIII of the BIT, including the negotiation history, <i>travaux préparatoires</i> and prior drafts, if not already produced in response to request #1.	Respondent's Memorial on Jurisdiction: paras. 21, 293-294, 301	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the allegation raised by the Respondent that the Claimant has failed to establish a <i>prima facie</i> meritorious case that the Respondent breached Article VIII of the BIT.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the</p>	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce.	Infinito's reply to this objection is addressed in its reply to Costa Rica's objection to Request No. 1.	<p>The Tribunal notes Costa Rica's statement that "[t]he materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce." It also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced "all the archived treaty negotiation materials it has been able to obtain in connection with the BIT", while maintaining its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 6.</p> <p>If such confirmation is forthcoming, the Tribunal understands that Infinito</p>

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			Respondent and third parties.			no longer requests an order.  If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b> . The Tribunal finds that Infinito has identified a narrowly specified category of documents that may be relevant to the dispute. Costa Rica has not explained why complying with this request would be "highly burdensome."
7.	All documents relating to the negotiation of Article IV of the BIT, including the negotiation history, <i>travaux préparatoires</i> and prior drafts, if not already produced in response to request #1.	Respondent's Memorial on Jurisdiction: paras. 30, 324-326, 337, 340-341, 345-355, 358	The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the allegation raised by the Respondent that the Claimant has failed to establish a <i>prima facie</i> meritorious case that the Respondent breached Article IV of the BIT. The Respondent repeatedly refers to the intentions and understanding of the parties when the BIT was negotiated, and documents relating to the negotiation history are likely to the	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce.	Infinito's reply to this objection is addressed in its reply to Costa Rica's objection to Request No. 1.	The Tribunal notes Costa Rica's statement that "[t]he materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce." It also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced "all the archived treaty negotiation materials it has been able to obtain in connection with the BIT", while maintaining its objection.

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			<p>illustrate the context within which the clause was finalized.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>			<p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 6.</p> <p>If such confirmation is forthcoming, the Tribunal understands that Infinito no longer requests an order.</p> <p>If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b>. The Tribunal finds that Infinito has identified a narrowly specified category of documents that may be relevant to the dispute. Costa Rica has neither explained nor established why complying with this request would be "highly burdensome."</p>
8.	All documents relating to the negotiation of Article II(b) of the BIT, including the negotiation history, <i>travaux préparatoires</i> and prior drafts, if not	Respondent's Memorial on Jurisdiction: paras. 21, 210-214, 288-292	The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the allegation raised by the Respondent that the Claimant has failed to establish a <i>prima facie</i>	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce.	Infinito's reply to this objection is addressed in its reply to Costa Rica's objection to Request No. 1.	The Tribunal notes Costa Rica's statement that "[t]he materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce." It

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	already produced in response to request #1.		<p>meritorious case that the Respondent breached Article II(b) of the BIT.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>			<p>also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced “all the archived treaty negotiation materials it has been able to obtain in connection with the BIT”, while maintaining its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 8.</p> <p>If such confirmation is forthcoming, the Tribunal understands that Infinito no longer requests an order.</p> <p>If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b>. The Tribunal finds that Infinito has identified a narrowly specified category of documents that may be relevant to the dispute. Costa Rica has neither explained nor established why complying</p>

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						with this request would be "highly burdensome."
9.	All documents relating to the negotiation of Annex I, Section III of the BIT, including the negotiation history, <i>travaux préparatoires</i> and prior drafts, if not already produced in response to request #1.	Respondent's Memorial on Jurisdiction: paras. 146, 197-201	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the allegation raised by the Respondent that the Claimant's claims fall under the exclusion enumerated in Annex I, Section III of the BIT.</p> <p>In accordance with Article 32 of the <i>Vienna Convention on the Law of Treaties</i>, in interpreting the BIT, recourse may be had to supplementary means of interpretation, including the <i>travaux préparatoires</i> and the circumstances of the treaty's conclusion.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>	The materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce.	Infinito's reply to this objection is addressed in its reply to Costa Rica's objection to Request No. 1.	<p>The Tribunal notes Costa Rica's statement that "[t]he materials sought under this request are entirely subsumed by Request No. 1 and are subject to the same objections and agreement to produce." It also notes that, with respect to Request No. 1, Costa Rica states that it has voluntarily produced "all the archived treaty negotiation materials it has been able to obtain in connection with the BIT", while maintaining its objection.</p> <p>The Tribunal invites Costa Rica to confirm whether it has produced all documents in its possession, custody or control that are responsive to Request No. 9.</p> <p>If such confirmation is forthcoming, the Tribunal understands that Infinito no longer requests an order.</p>



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						If Costa Rica does not provide such confirmation, the request is <b>GRANTED</b> . The Tribunal finds that Infinito has identified a narrowly specified category of documents that may be relevant to the dispute. Costa Rica has neither explained nor established why complying with this request would be unduly burdensome.
10.	All documents relating to the negotiation of Article 9(5) of the Agreement on encouragement and reciprocal protection of investments between the Republic of Costa Rica and the Kingdom of the Netherlands ("Costa Rica-Netherlands BIT"), including negotiation history and prior drafts, that mention Article XII(3) of the Canada-Costa Rica BIT or its predecessor	Respondent's Memorial on Jurisdiction: paras. 148-173.	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the issue of how to interpret Article XII(3) of the Canada-Costa Rica BIT (Exhibit C-0001), which is a central contested point between the parties in the jurisdictional phase. Article 9(5) of the Costa Rica-Netherlands BIT, concluded months after the Canada-Costa Rica BIT, can be compared with Article XII(3).</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the</p>	<p>The request lacks sufficient relevance to the case, thus it is contrary to the relevance and materiality requirements contained Articles 9.2(a) and 3.3(b) of the IBA Rules. Specifically, Claimant has not explained how the negotiating history of a treaty concluded with a <i>third State after</i> the conclusion of the BIT at issue could be relevant to the interpretation of the Canada-Costa Rica BIT under the Vienna Convention on the Law of Treaties, Articles 31 or 32.</p> <p>Furthermore, the phrase "[a]ll documents" denotes a broad and indeterminate request,</p>	<p><u>Relevance</u></p> <p>Infinito will not comment further on the relevance of the requested documents given art. 16.3 of the procedural order, which limits the scope of reply.</p> <p><u>The request is not overbroad</u></p> <p>Infinito's request defines a narrow and specific category of documents that are reasonably believed to exist, as required by Article 3(3)(a)(ii) of the IBA Rules. That Article explicitly provides that parties may make requests for categories of documents. Contrary to Costa Rica's assertion, there is nothing</p>	The request is <b>DENIED</b> , because relevance is not sufficiently established and compliance may be too burdensome.

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	provisions.		documents are internal to the Respondent or were exchanged between the Respondent and third parties.	thus contrary to the requirements of specificity and narrowness of Article 3.3 (a) (ii) of the IBA Rules, and the considerations for procedural economy enshrined in Article 9.2 (g) of the IBA Rules. It is also highly burdensome and, indeed, impossible, to identify all documents " <i>relating to</i> " the specified subject matter that may exist in some form in the custody of some government custodian.	<p>about the phrase "all documents" that informs the breadth or narrowness of a request. The phrase merely introduces the category of documents requested. Infinito has further narrowed its requests through its general comment 3, above, by restricting all of its requests to: (i) documents in the possession, custody or control of the Respondent, its counsel or advisors; (ii) relevant to the dispute; and (iii) not protected by privilege.</p> <p>Infinito's request is limited to documents dealing with the negotiation of a single provision, in a single treaty between two contracting states. It is sufficiently narrow and specific.</p> <p><u>No evidence that compliance would be burdensome</u></p> <p>Costa Rica baldly asserts that compliance with the request would be "highly burdensome" or "impossible". Yet Costa Rica has offered no evidence, much less an explanation, as to why producing documents relating to the negotiation of the Costa</p>	

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					Rica-Netherlands BIT would be either burdensome or impossible. The Tribunal should disregard this unsubstantiated submission.	
11.	All documents relating to the negotiation of Article 4 of the Agreement between the Czech Republic and the Republic of Costa Rica for the Promotion and Reciprocal Protection of Investments ("Czech Republic-Costa Rica BIT"), including negotiation history and prior drafts, that mention Article XII(3) of the Canada-Costa Rica BIT or its predecessor provisions.	Respondent's Memorial on Jurisdiction: paras. 148-173.	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the issue of how to interpret Article XII(3) of the Canada-Costa Rica BIT (Exhibit C-0001), which is a central contested point between the parties in the jurisdictional phase. Article 4 of the Czech Republic-Costa Rica BIT, concluded months after the Canada-Costa Rica BIT, can be compared with Article XII(3).</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>	<p>The request lacks sufficient relevance to the case, thus it is contrary to the relevance and materiality requirements contained Articles 9.2(a) and 3.3(b) of the IBA Rules. Specifically, Claimant has not explained how the negotiating history of a treaty concluded with a <i>third State after</i> the conclusion of the BIT at issue could be relevant to the interpretation of the BIT under the Vienna Convention on the Law of Treaties, Articles 31 or 32.</p> <p>Furthermore, the phrase "[a]ll documents" denotes a broad and indeterminate request, thus contrary to the requirements of specificity and narrowness of Article 3.3 (a) (ii) of the IBA Rules, and the considerations for procedural economy enshrined in Article 9.2 (g) of the IBA Rules. It is also</p>	<p><u>Correction to the request</u></p> <p>Infinito notes that this request erroneously refers to Article 4 of the Czech Republic-Costa Rica BIT. It should have referred to Article 8(4) of that BIT. Infinito maintains the request, with that correction.</p> <p><u>Relevance</u></p> <p>Infinito will not comment further on the relevance of the requested documents given art. 16.3 of the procedural order, which limits the scope of reply.</p> <p><u>The request is not overbroad</u></p> <p>Infinito's request defines a narrow and specific category of documents that are reasonably believed to exist, as required by Article 3(3)(a)(ii) of the IBA Rules. That Article explicitly provides that parties may make requests for categories of documents.</p>	The request is <b>DENIED</b> , because relevance is not sufficiently established and compliance may be too burdensome.

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				<p>highly burdensome and, indeed, impossible, to identify all documents “relating to” the specified subject matter that may exist in some form in the custody of some government custodian.</p>	<p>Contrary to Costa Rica’s assertion, there is nothing about the phrase “all documents” that informs the breadth or narrowness of a request. The phrase merely introduces the category of documents requested. Infinito has further narrowed its requests through its general comment 3, above, by restricting all of its requests to: (i) documents in the possession, custody or control of the Respondent, its counsel or advisors; (ii) relevant to the dispute; and (iii) not protected by privilege.</p> <p>Infinito’s request is limited to documents relating to the negotiation of a single provision, in a single treaty between two contracting states. It is sufficiently narrow and specific.</p> <p><u>No evidence that compliance would be burdensome</u></p> <p>Costa Rica baldly asserts that compliance with the request would be “highly burdensome” or “impossible”. Yet Costa Rica has offered no evidence, much less an explanation, as to why</p>	

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					producing documents relating to the negotiation of the Czech Republic-Costa Rica BIT would be either burdensome or impossible. The Tribunal should disregard this unsubstantiated submission.	
12.	All documents describing the impact of the Contentious Administrative Tribunal decision dated November 24, 2010 (Exhibit C-0239) on the Claimant's exploitation concession and other project approvals.	Respondent's Memorial on Jurisdiction: paras. 158-161	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the Respondent's allegation that the Contentious Administrative Tribunal's decision had the effect of annulling the project's approvals, and that therefore the measure challenged is not the Administrative Chamber's decision but the Contentious Administrative Tribunal's decision.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>	<p>The request is improper insofar as it seeks argumentation/reasoning on a legal question rather than being targeted at obtaining factual <i>evidence</i>. Respondent has already articulated its position on the legal "<b>impact</b>" and "<b>effect</b>" of the relevant decision and Claimant is free to dispute these positions, using the facts and legal authorities at its disposal. Claimant has not explained why the documents already in its position are insufficient for this purpose (and consequently why additional documents, if any exist, would be necessary and material to the outcome of the case). Specifically, insofar as the document request seeks information on how the "impact" of the relevant decision was</p>	<p><u>Relevance</u></p> <p>Infinito will not comment further on the relevance of the requested documents given art. 16.3 of the procedural order, which limits the scope of reply.</p> <p><u>The requested documents are not already available to Infinito</u></p> <p>Costa Rica's suggestion that the requested documents are in the "case files" already available to Infinito is illogical. If Costa Rica means the "case files" before the Contentious Administrative Tribunal, then it is not possible that such files would include documents describing the impact of the Contentious Administrative Tribunal's decision. In any event, there is no merit to the suggestion that all documents in the possession, custody or control of Costa Rica that</p>	<p>The request is <b>DENIED</b>. Infinito has not identified the requested category of documents with sufficient precision, narrowness or specificity. While the term "all documents" does not necessarily mean that a request is overbroad, the Tribunal finds that in this case it is. While Infinito has described the general subject matter of the category of documents, this subject matter is too broad to allow Costa Rica to trace responsive documents.</p>

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				<p>assessed by courts or disputing parties, such materials are part of the case files and already available to Claimant. Insofar as the document request seeks non-public legal analysis, any such analysis would not be a proper subject of disclosure and would be covered by legal privilege.</p> <p>Furthermore, the phrase “[a]ll documents” denotes a broad and indeterminate request, thus contrary to the requirements of specificity and narrowness of Article 3.3 (a) (ii) of the IBA Rules, and the considerations for procedural economy enshrined in Article 9.2 (g) of the IBA Rules.</p>	<p>describe the impact of the Contentious Administrative Tribunal's decision on the Claimant's exploitation concession and other project approvals would be in any particular “case file” already available to Infinito.</p> <p><u>The request is not overbroad</u></p> <p>Infinito's request defines a narrow and specific category of documents that are reasonably believed to exist, as required by Article 3(3)(a)(ii) of the IBA Rules. That Article explicitly provides that parties may make requests for categories of documents. Contrary to Costa Rica's assertion, there is nothing about the phrase “all documents” that informs the breadth or narrowness of a request. The phrase merely introduces the category of documents requested. Infinito has further narrowed its requests through its general comment 3, above, by restricting all of its requests to: (i) documents in the possession, custody or control of the Respondent, its counsel or advisors; (ii) relevant to the</p>	

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					<p>dispute; and (iii) not protected by privilege.</p> <p><u>The request does not target privileged documents</u></p> <p>Contrary to the assertion that the request targets “non-public legal analysis” that would be covered by privilege, the request explicitly excludes privileged documents, as set out above.</p>	
13.	All documents describing when the Contentious Administrative Tribunal's November 24, 2010 decision (Exhibit C-0239) would take effect.	Respondent's Memorial on Jurisdiction: paras. 158-161	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the Respondent's allegation that the Contentious Administrative Tribunal's decision had the effect of annulling the project's approvals, and therefore the measure challenged is not the Administrative Chamber's decision.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the</p>	<p>The request is improper insofar as it seeks argumentation/reasoning on a legal question rather than being targeted at obtaining factual <i>evidence</i>. Respondent has already articulated its position on the <b>effective date</b> of the relevant decision and Claimant is free to dispute these positions, using the facts and legal authorities at its disposal. Claimant has not explained why the documents already in its position are insufficient for this purpose (and consequently why additional documents, if any exist, would be necessary and material to the outcome of the case). Insofar as the</p>	<p>Infinito will not pursue this request further, as it is included within Request #12.</p>	<p>The Tribunal notes that Infinito has withdrawn this request.</p>

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			Respondent and third parties.	document request seeks non-public legal analysis, any such analysis would not be a proper subject of disclosure and would be covered by legal privilege.  Furthermore, the phrase “[a]ll documents” denotes a broad and indeterminate request, thus contrary to the requirements of specificity and narrowness of Article 3.3 (a) (ii) of the IBA Rules, and the considerations for procedural economy enshrined in Article 9.2 (g) of the IBA Rules.		
14.	All documents describing the effect of the appeal of the Contentious Administrative Tribunal’s November 24, 2010 decision (Exhibit C-0239) to the Administrative Chamber of the Supreme Court on the effect of the Contentious Administrative Tribunal’s decision.	Respondent’s Memorial on Jurisdiction: paras. 158-161	The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the Respondent’s allegation that the Contentious Administrative Tribunal’s decision had the effect of annulling the project’s approvals, and therefore the measure challenged is not the Administrative Chamber’s decision.  The documents requested are not in the possession,	The request is improper insofar as it seeks argumentation/reasoning on a legal question rather than being targeted at obtaining factual <i>evidence</i> . Respondent has already articulated its position on the legal “ <b>effect of the appeal</b> ” of the relevant decision and Claimant is free to dispute these positions, using the facts and legal authorities at its disposal. Claimant has not explained why the documents already in its	<u>Relevance</u>  Infinito will not comment further on the relevance of the requested documents given art. 16.3 of the procedural order, which limits the scope of reply.  <u>The requested documents are not already available to Infinito</u>  There is no merit to the suggestion that all documents in the possession, custody or control of Costa Rica that are responsive to the request are in any particular “case file”	The request is <b>DENIED</b> . Infinito has not identified the requested category of documents with sufficient precision, narrowness or specificity. While the term “all documents” does not necessarily mean that a request is overbroad, the Tribunal finds that in this case it is. While Infinito has described the general subject matter of the category of documents, this subject matter is too broad to allow Costa Rica



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			<p>custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>	<p>position are insufficient for this purpose (and consequently why additional documents, if any exist, would be necessary and material to the outcome of the case). Specifically, insofar as the document request seeks information on how the “<b>effect of the appeal</b>” of the relevant decision was assessed by courts or disputing parties, such materials are part of the case files and already available to Claimant. Insofar as the document request seeks non-public legal analysis, any such analysis would not be a proper subject of disclosure and would be covered by legal privilege.</p> <p>Furthermore, the phrase “[a]ll documents” denotes a broad and indeterminate request, thus contrary to the requirements of specificity and narrowness of Article 3.3 (a) (ii) of the IBA Rules, and the considerations for procedural economy enshrined in Article 9.2 (g) of</p>	<p>already available to Infinito.</p> <p><u>The request is not overbroad</u></p> <p>Infinito’s request defines a narrow and specific category of documents that are reasonably believed to exist, as required by Article 3(3)(a)(ii) of the IBA Rules. That Article explicitly provides that parties may make requests for categories of documents. Contrary to Costa Rica’s assertion, there is nothing about the phrase “all documents” that informs the breadth or narrowness of a request. The phrase merely introduces the category of documents requested. Infinito has further narrowed its requests through its general comment 3, above, by restricting all of its requests to: (i) documents in the possession, custody or control of the Respondent, its counsel or advisors; (ii) relevant to the dispute; and (iii) not protected by privilege.</p> <p><u>The request does not target privileged documents</u></p> <p>Contrary to the assertion that the request targets “non-public</p>	<p>to trace responsive documents.</p>

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		Ref. to Submissions	Comments			
				the IBA Rules.	legal analysis" that would be covered by privilege, the request explicitly excludes privileged documents, as set out above.	
15.	All documents describing the effect of Ministry of Environment and Energy Resolution No. 0037, 9 January 2012 (Exhibit C-0268).	Respondent's Memorial on Jurisdiction: paras. 124-126, 200(c), 306	<p>The requested documents are relevant and material to the outcome of the dispute between the parties, in particular, the Respondent's allegation that the Ministry of Environment and Energy Resolution No. 0037, 9 January 2012, merely confirms and implements the Administrative Chamber's decision.</p> <p>The documents requested are not in the possession, custody or control of the Claimant because the documents are internal to the Respondent or were exchanged between the Respondent and third parties.</p>	<p>The request is improper insofar as it seeks argumentation/reasoning on a legal question rather than being targeted at obtaining factual <i>evidence</i>. Respondent has already articulated its position on the legal "<b>effect</b>" of the relevant decision and Claimant is free to dispute these positions, using any facts and legal authorities at its disposal. Claimant has not explained why the documents already in its position are insufficient for this purpose (and consequently why additional documents, if any exist, would be necessary and material to the outcome of the case). Specifically, insofar as the document request seeks information on how the "<b>effect</b>" of the relevant decision was assessed in course of administrative review, such materials are part of the case</p>	<p><u>Relevance</u></p> <p>Infinito will not comment further on the relevance of this request given art. 16.3 of the procedural order, which limits the scope of reply.</p> <p><u>The requested documents are not already available to Infinito</u></p> <p>There is no merit to the suggestion that all documents in the possession, custody or control of Costa Rica that are responsive to the request are in any particular "case file" already available to Infinito.</p> <p><u>The request is not overbroad</u></p> <p>Infinito's request defines a narrow and specific category of documents that are reasonably believed to exist, as required by Article 3(3)(a)(ii) of the IBA Rules. That Article explicitly provides that parties may make requests for categories of documents. Contrary to Costa Rica's</p>	<p>The request is <b>DENIED</b>. Infinito has not identified the requested category of documents with sufficient precision, narrowness or specificity. While the term "all documents" does not necessarily mean that a request is overbroad, the Tribunal finds that in this case it is. While Infinito has described the general subject matter of the category of documents, this subject matter is too broad to allow Costa Rica to trace responsive documents.</p>

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(ICSID Case No. ARB/14/5)

**Procedural Order No. 3**

No.	Document(s) or Category of Documents Requested	Relevance and Materiality according to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Decision
		Ref. to Submissions	Comments			
				<p>files and already available to Claimant. Insofar as the document request seeks non-public legal analysis, any such analysis would not be a proper subject of disclosure and would be covered by legal privilege.</p> <p>Furthermore, the phrase “[a]ll documents” denotes a broad and indeterminate request, thus contrary to the requirements of specificity and narrowness of Article 3.3 (a) (ii) of the IBA Rules, and the considerations for procedural economy enshrined in Article 9.2 (g) of the IBA Rules.</p>	<p>assertion, there is nothing about the phrase “all documents” that informs the breadth or narrowness of a request. The phrase merely introduces the category of documents requested. Infinito has further narrowed its requests through its general comment 3, above, by restricting all of its requests to: (i) documents in the possession, custody or control of the Respondent, its counsel or advisors; (ii) relevant to the dispute; and (iii) not protected by privilege.</p> <p><u>The request does not target privileged documents</u></p> <p>Contrary to the assertion that the request targets “non-public legal analysis” that would be covered by privilege, the request explicitly excludes privileged documents, as set out above.</p>	