

**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. 2**

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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: 1 June 2016

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**I. PROCEDURAL BACKGROUND**

1. On 15 September 2014, the Asociación Preservacionista de Flora y Fauna Silvestre (“APREFLOFAS”), a Costa Rican non-governmental organization for the promotion of the environment, submitted a petition for *amicus curiae* (i.e., non-disputing party) status pursuant to ICSID Arbitration Rule 37(2) (“Rule 37(2)”) (“APREFLOFAS’s Petition”). The petition was communicated to the Parties on 16 September 2014, and to the Tribunal upon its constitution on 29 September 2014.
2. In Procedural Order No. 1 issued on 17 February 2015, the Tribunal invited the Parties to file their submissions on APREFLOFAS’s Petition. According to the procedural calendar agreed upon by the Parties, these observations were initially due on 13 October 2015. Due to subsequent amendments to the procedural calendar, this time limit was ultimately modified, as described further below.
3. On 20 February 2015, APREFLOFAS was informed that the Tribunal was in receipt of the petition, that it had invited the Parties to provide their observations in accordance with Rule 37(2), and that the Tribunal expected to issue its ruling in November 2015, once the Parties’ observations were received.
4. On 3 December 2015, APREFLOFAS submitted a communication to the Tribunal renewing its petition.
5. On 4 December 2015, APREFLOFAS was informed that due to amendments to the procedural calendar that took place after 20 February 2015, the Parties had not yet filed their observations on its petition. The applicant was informed that the Tribunal expected to issue its ruling around May 2016, once the Parties’ observations were received.
6. After various amendments to the procedural calendar, the time limit for the Parties’ observations on APREFLOFAS Petition was ultimately moved to 29 April 2016.
7. On 29 April 2016, both Parties filed their submissions on APREFLOFAS’s Petition.
8. The present order rules on APREFLOFAS’s Petition.

**II. APREFLOFAS’S PETITION**

9. APREFLOFAS requests an order from the Tribunal:
  - a. “Conferring *amicus curiae* status upon [APREFLOFAS];”
  - b. “Providing [APREFLOFAS] with access to the principal arbitration documents;”
  - c. “Permitting [APREFLOFAS] to file appropriate documents with the Tribunal regarding the limitations of its jurisdiction in this proceeding;”

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- d. “Permitting [APREFLOFAS] to file appropriate documents with the Tribunal responding to any other issues that might arise in the course of this proceeding;” and
- e. “Permitting [APREFLOFAS] to attend and participate in any oral hearings held in this proceeding, and respond to any questions of the Tribunal.”<sup>1</sup>
10. APREFLOFAS submits that it meets the requirements set out in Rule 37(2) for non-disputing party status.
11. First, APREFLOFAS asserts that it possesses important information regarding two policy concerns at issue in this arbitration: (i) the protection of the environment in Costa Rica and (ii) “the manner in which governmental processes were apparently corrupted to the detriment of the environment.”<sup>2</sup> More specifically, APREFLOFAS contends that its submission would assist the Tribunal in the determination of matters related to its jurisdiction to hear this dispute. APREFLOFAS notes in particular that it was the plaintiff in the judicial process before Costa Rican courts that resulted in the cancellation of the Claimant’s concession, and as such it may provide explanations and evidence related to the factual and legal issues resulting in that cancellation. APREFLOFAS also asserts that it may provide information to the Tribunal regarding ongoing criminal proceedings related to “alleged corruption and malfeasance in office” that led to the granting of the Claimant’s concession in the first place. APREFLOFAS contends that these matters may directly affect the Tribunal’s jurisdiction, and as the Claimant has failed to provide full disclosure of the facts related to this case, it is important to allow APREFLOFAS to provide this information.<sup>3</sup>
12. Second, APREFLOFAS submits that it would address matters within the scope of the dispute. As a former disputing party in the Costa Rican judicial process, APREFLOFAS argues that it is well-qualified to present the Tribunal with extensive information with respect to:
- “The different judicial and administrative processes undertaken in Costa Rica;
  - The active role and participation of [APREFLOFAS], Claimant and the Government of Costa Rica in those processes[;]
  - The legal arguments presented in the Costa Rican judicial processes that concluded with the annulment of the [Claimant’s concession, and]
  - The on-going corruption and criminal law proceedings against former Costa Rican public servants involved with the Claimant’s concession.”<sup>4</sup>

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<sup>1</sup> APREFLOFAS’s Petition for *Amicus Curiae* Status (15 September 2014) (“APREFLOFAS’s Petition”), Sections 1 and 9.

<sup>2</sup> *Id.*, Section 4.

<sup>3</sup> *Id.*, Section 6(a).

<sup>4</sup> *Id.*, Section 6(b).

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13. Third, APREFLOFAS contends that it has a significant interest in this proceeding, as it “appears before this Tribunal not only as one of the leading organizations committed to the protection of the natural resources of Costa Rica, but also as an entity that actively participated in the judicial processes leading to the final annulment of the Claimant's concession rights [...]”<sup>5</sup> It was on the basis of the legal claims advanced by APREFLOFAS that the Claimant’s concession was annulled. APREFLOFAS’s interest in these proceedings is also based on the transparency requirements set out in Article XIV of the Bilateral Investment Treaty between the Republic of Costa Rica and the Government of Canada (the “BIT”),<sup>6</sup> as well as on the policy objective of more transparency in investor-state arbitration, as alluded in *Aguas Argentinas*.<sup>7</sup>
14. As the present arbitration is in its initial stages, APREFLOFAS submits that its participation would not disrupt the appropriate development of the case. As a result, it requests the Tribunal to provide it with “access to all documents that have already been presented or will be presented to the Tribunal, including:
- Any initial notice of arbitration and statement of defense;
  - The decisions, orders and directions of the Tribunal that have not already been placed in the public domain;
  - The pleadings and written memorials of the arbitrating parties[;]
  - Relevant witness statements and transcripts of any witness examinations; and
  - Any other documents issued or to be issued in the course of this proceeding.”<sup>8</sup>
15. APREFLOFAS also seeks an order from the Tribunal “directing that all hearings be open to the public and that amicus be allowed to attend all hearings and respond directly to any questions of the Tribunal concerning their submissions.”<sup>9</sup>
16. In support of its requests, APREFLOFAS points to several investor-state cases where tribunals have granted interested third parties non-disputing party status, as well as participation rights.<sup>10</sup>

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<sup>5</sup> *Id.*, Section 6(c).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (formerly *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005 (“*Suez*”), ¶ 11.

<sup>8</sup> *Id.*, Section 7.

<sup>9</sup> *Id.*, Section 8.

<sup>10</sup> APREFLOFAS relies in particular on *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, 15 January 2001 (“*Methanex*”); *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 5, 2 February 2007 (“*Biwater Gauff*”), and the *Suez* case cited above.

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**III. PARTIES' POSITIONS**

**A. The Claimant's Position**

17. The Claimant opposes APREFLOFAS's request for non-disputing party status. The Claimant essentially contends that (i) APREFLOFAS does not meet the test for disputing party status; (ii) its participation would disrupt the proceedings and unduly burden the Claimant, and (iii) APREFLOFAS's request is premature. The Claimant thus requests that APREFLOFAS's request be denied or, alternatively, be limited to a 10-page submission with no participation rights.
18. The Claimant first argues that APREFLOFAS does not meet the test for non-disputing party status set out in Rule 37(2), for the following reasons:
- a. First, APREFLOFAS brings no unique perspective, knowledge or insight. APREFLOFAS seeks to make submissions on matters that have already been fully addressed in the Parties' submissions and evidence. In the Claimant's Memorial on the Merits and the Respondent's Memorial on Jurisdiction, the Parties have addressed in depth the administrative and judicial processes that took place in Costa Rica and provided extensive evidence (including expert and witness evidence) on the factual and legal issues at stake. APREFLOFAS's submission would thus be redundant. APREFLOFAS does not demonstrate how it would offer a perspective different from the Parties' or what those differences may be.<sup>11</sup>
  - b. Second, APREFLOFAS would not address the matters in dispute. Citing *Apotex 1*, the Claimant argues that Rule 37(2)(b) "is intended to avoid the unnatural broadening of the scope of the Disputing Parties' dispute by non-disputing parties."<sup>12</sup> APREFLOFAS seeks to make submissions on "a bald, unsubstantiated allegation of corruption."<sup>13</sup> Neither Party has raised matters of this nature in the arbitration. As a result, APREFLOFAS seeks to make submissions that are irrelevant to the issues as framed by the Parties, and that would expand the scope of this dispute to matters not at issue.<sup>14</sup>
  - c. Third, APREFLOFAS has "no interest in this arbitration, let alone a significant one."<sup>15</sup> Environmental protection (APREFLOFAS's stated objective) is not at issue in this arbitration. The Claimant notes that "[t]he annulment of Infinito's exploitation concession and other project approvals was not based on the

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<sup>11</sup> Claimant's Submission on APREFLOFAS's Petition for *Amicus Curiae* Status, ¶¶ 1, 15-18.

<sup>12</sup> *Id.*, citing *Apotex Holdings Inc. & Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013 ("*Apotex 1*"), ¶ 27 (CL-102).

<sup>13</sup> Claimant's Submission on APREFLOFAS's Petition for *Amicus Curiae* Status, ¶ 19.

<sup>14</sup> *Id.*, ¶¶ 1, 3, 19.

<sup>15</sup> *Id.*, ¶ 21.

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project's environmental soundness"; "[i]t was based on the technical validity of the project's approvals."<sup>16</sup> Indeed, the Constitutional Chamber of the Supreme Court of Costa Rica "conclusively ruled that the project was environmentally sound", as did Costa Rica's environmental authorities.<sup>17</sup> Nor can an appeal to transparency change the fact that APREFLOFAS has no interest in the arbitration. The cases cited by APREFLOFAS related to projects which had the potential to affect the broader public in a significant way and on an ongoing basis. This is not the case here: the project was found to be environmentally sustainable, and in any event will never be developed. Tribunals have excluded non-disputing parties from participating in proceedings when they had no genuine interest in the dispute.<sup>18</sup> Unlike tribunals constituted under other rules, here the Tribunal has no discretion to broaden the test found in Rule 37(2).<sup>19</sup>

19. In addition, the Claimant argues that "APREFLOFAS' participation would disrupt the proceeding, and unduly burden and unfairly prejudice Infinito",<sup>20</sup> for the following reasons:
- a. Rule 37(2) requires the non-disputing party to act as "a volunteer, a friend of the court, not a party."<sup>21</sup> Tribunals have excluded non-disputing parties from participating where such participation is "markedly biased, prejudicial or non-neutral."<sup>22</sup> Here, APREFLOFAS seeks to act as a party, not a friend of the court. Allowing it to participate would compel the Claimant to meet two cases at once, which would be unfairly prejudicial.<sup>23</sup>
  - b. APREFLOFAS's participation would also burden both Parties with added time and expense.<sup>24</sup>
20. The Claimant further contends that APREFLOFAS's submission is premature, because it was submitted before the Parties' memorials were filed, and has no particular relevance for jurisdiction, which involves only narrow issues concerning compliance with the preconditions to arbitration in the BIT.<sup>25</sup>

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<sup>16</sup> *Id.*, ¶ 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, ¶¶ 21, 23, referring to *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012 ("*Pezold*"), ¶ 61 (CL-109).

<sup>19</sup> Claimant's Submission on APREFLOFAS's Petition for *Amicus Curiae* Status, ¶ 24.

<sup>20</sup> *Id.*, ¶ 26.

<sup>21</sup> *Id.*, ¶ 26, citing *Suez*, ¶ 13.

<sup>22</sup> Claimant's Submission on APREFLOFAS's Petition for *Amicus Curiae* Status, ¶ 26.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, ¶ 27.

<sup>25</sup> *Id.*, ¶¶ 28-29, 3, 5.

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21. As a result, the Claimant requests that APREFLOFAS's Petition be denied. Alternatively, it asks that its request for broad participation rights be denied and that its request to file a written submission be granted with a 10-page limit. According to the Claimant, "[t]he ICSID Rules simply do not contemplate any participation rights at all for non-disputing parties beyond the filing of a written submission."<sup>26</sup> Tribunals have recognized the need to safeguard due process, equal treatment, efficiency, confidentiality and procedural integrity, and have thus uniformly circumscribed participation of non-disputing parties, whether by limiting the length of submissions or restricting access to documentation.<sup>27</sup> The Claimant expressly objects to APREFLOFAS's request to attend the hearing, noting that under Rule 32(2) non-parties may not attend oral hearings if either party objects.<sup>28</sup>

**B. The Respondent's Position**

22. By contrast, the Respondent requests that the Tribunal (i) grant APREFLOFAS's request to make a written submission at this stage of the proceedings; (ii) grant APREFLOFAS's request for access to the Parties' key submissions filed prior to the due date for APREFLOFAS's submission; and (iii) defer decision on APREFLOFAS's request to attend the oral hearing and to participate further in the proceeding.<sup>29</sup>

23. According to the Respondent, APREFLOFAS meets the test for non-disputing parties set out in Rule 37(2). The Respondent essentially argues that:

a. APREFLOFAS would provide a unique perspective to the Tribunal with respect to (i) the domestic judicial proceeding that resulted in the annulment of the Claimant's concession, and (ii) environmental concerns. With respect to (i), the Respondent argues that APREFLOFAS can offer a unique perspective on the legal and factual arguments on which the Costa Rican courts reached their decision because APREFLOFAS was the successful plaintiff in that case, while the Claimant and the Respondent were the losing parties (indeed, Costa Rica supported the Claimant and opposed APREFLOFAS in those proceedings).<sup>30</sup> With respect to (ii), the Respondent argues that APREFLOFAS can provide unique assistance to the Tribunal in determining the relationship between the disputed measures and environmental concerns. This is relevant because the Claimant argues that the disputed measures served no public purpose, and because the Respondent objects to jurisdiction *inter alia* on the grounds that (i) the claims at issue concern implementation and/or maintenance of pre-existing environmental measures and as such fall under an exclusion in Section III(1) of Annex I of the BIT, and that (ii) the Claimant has failed to show a *prima facie*

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<sup>26</sup> *Id.*, ¶ 30.

<sup>27</sup> *Id.*, ¶ 31, citing *Suez*, ¶ 29 and *Bewater Gauff*, ¶¶ 60, 66.

<sup>28</sup> *Id.*, ¶ 33.

<sup>29</sup> Respondent's Submission on APREFLOFAS's Petition for *Amicus Curiae* Status, ¶ 2.

<sup>30</sup> *Id.*, ¶ 6.

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case that Costa Rica breached the BIT.<sup>31</sup> The Respondent also contends that APREFLOFAS would be uniquely placed to comment on the testimony of the Claimant's witness Mr. Juan Carlos Hernández.<sup>32</sup>

- b. APREFLOFAS would provide relevant information within the scope of the dispute. Due to its participation in the domestic judicial proceedings and given its environmental expertise, APREFLOFAS would provide information that could assist the Tribunal when ruling on Costa Rica's jurisdictional objections, including: (i) the relationship between the judgments in the domestic proceedings and the disputed measures; (ii) whether the Claimant's complaints are grounded on domestic rather than international law; (iii) whether the Claimant's claims are barred under Section III(1), Annex I of the BIT, and (iv) whether the Claimant has made out a *prima facie* case on any of its allegations on the merits.<sup>33</sup> The Respondent adds that "even if it were to deem that some of the evidence and arguments that APREFLOFAS wishes to present do not bear directly on Costa Rica's jurisdictional objections, the Tribunal may nonetheless wish to receive such evidence and arguments, so that the Tribunal has all the relevant information it may need in the arbitration."<sup>34</sup>
- c. APREFLOFAS has a significant interest in the proceedings: "As a civil society organization opposed to open-pit mining, APREFLOFAS clearly has a direct interest in ensuring that the legitimacy of the open-pit mining ban in Costa Rica is not undermined by international arbitration claims."<sup>35</sup> In addition, as APREFLOFAS was the plaintiff in the very judicial proceedings that the Claimant now seeks to impugn, "APREFLOFAS's interest in ensuring that the position it saw vindicated in Costa Rican courts is not thwarted by the judgment of an international tribunal is thus far more specific than simply a general interest in protecting the environment."<sup>36</sup>

24. According to the Respondent, allowing a written submission would not be disruptive, unduly burdensome or unfairly prejudicial to either Party. The Parties have had ample time to reflect on APREFLOFAS's Petition, and the Tribunal has already made procedural arrangements for a possible submission and for comments from the Parties.<sup>37</sup>

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<sup>31</sup> *Id.*, ¶ 7 (referring to the Respondent's "jurisdictional objections outlined in Section III.D and II.E [*sic*] of the Memorial on Jurisdiction.").

<sup>32</sup> *Id.*, ¶ 8.

<sup>33</sup> *Id.*, ¶¶ 10-16.

<sup>34</sup> *Id.*, ¶ 17.

<sup>35</sup> *Id.*, ¶ 18.

<sup>36</sup> *Id.*, ¶ 19.

<sup>37</sup> *Id.*, ¶ 20.



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25. To ensure that APREFLOFAS can make a valuable contribution to the Tribunal, the Respondent argues that it should be granted access to the key documents in this arbitration, including the Request for Arbitration, the Claimant's Memorial on the Merits and one of its accompanying witness statements, the Parties' first round of memorials on jurisdiction and the witness statements and expert reports submitted with those memorials. According to the Respondent, no specific rules of confidentiality govern these proceedings, and the Claimant's confidentiality interests are attenuated given that it does not operate any ongoing business and it has not included proprietary or secret information in its submissions. In any event, the Tribunal could give the Parties time to redact confidential information, and require APREFLOFAS to treat the documents as confidential and to refrain from using them outside of the context of this arbitration.<sup>38</sup>
26. Finally, the Respondent submits that the Tribunal need not rule now on APREFLOFAS's requests for further participation, including attendance at the hearing. It should defer its decision on that issue until after receipt of APREFLOFAS's written submission, when it will be in a better position to assess these requests.<sup>39</sup>

#### **IV. ANALYSIS**

##### **A. Preliminary Comments**

27. APREFLOFAS seeks an order in the terms quoted in paragraph 9 above.
28. APREFLOFAS bases its petition on ICSID Arbitration Rule 37(2) ("Rule 37(2)"), which reads as follows:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

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<sup>38</sup> *Id.*, ¶¶ 22-25.

<sup>39</sup> *Id.*, ¶ 26.

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The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

29. The Tribunal notes at the outset that APREFLOFAS's request exceeds the scope of Rule 37(2). Rule 37(2) only permits the Tribunal to allow a non-disputing party "to file a written submission with the Tribunal regarding a matter within the scope of the dispute." As such, it only covers APREFLOFAS's requests in sub-paragraphs (a), (c) and (d) of its petition quoted in paragraph 9 above.<sup>40</sup> The Tribunal will therefore address these requests first (B) and then discuss APREFLOFAS's remaining requests (C and D).

**B. APREFLOFAS's Request to File a Written Submission**

30. Having considered APREFLOFAS's and the Parties' submissions, the Tribunal starts by reviewing whether APREFLOFAS meets the test set out in Rule 37(2).
31. First, the Tribunal considers that APREFLOFAS's input may assist it in better understanding certain factual and legal aspects which may impact its jurisdiction and possibly the merits of the claims. APREFLOFAS was the plaintiff in the domestic proceedings that resulted in the cancellation of the Claimant's concession, one of the very measures that the Claimant alleges has breached the BIT.<sup>41</sup> It is true that both Parties have made submissions on these proceedings. However, APREFLOFAS was the successful plaintiff against both the Claimant and the Respondent, and therefore APREFLOFAS may provide a perspective different from that of the Parties.
32. Such perspective may be useful in assessing whether the Claimant has made out a *prima facie* case on the merits of its claim and on matters of jurisdiction, including in particular on whether the claims are barred under Article XII(3)(d) of the BIT<sup>42</sup> because the Costa Rican courts have already rendered judgment in the proceedings to which APREFLOFAS was a party.<sup>43</sup>
33. APREFLOFAS also asserts that it will provide information regarding "[t]he on-going corruption and criminal law proceedings against former Costa Rican public servants

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<sup>40</sup> With respect to APREFLOFAS's request (a), the Tribunal understands that, by requesting that it be conferred *amicus curiae* status, APREFLOFAS is requesting that it be allowed to file a written submission as a non-disputing party for purposes of Rule 37(2). In other words, APREFLOFAS is not requesting anything different from what it seeks under requests (c) and (d).

<sup>41</sup> The Claimant has alleged, inter alia, that the November 2011 decision from the Administrative Chamber of the Costa Rican Supreme Court has breached Articles VIII, II(2)(a), and II(2)(b) of the BIT.

<sup>42</sup> Article XII(3)(d) of the BIT provides: "An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: [...] (d) in cases where Costa Rica is a party to the dispute, no judgement [*sic*] has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement." (C-001).

<sup>43</sup> Resp. Memorial on Jurisdiction, Section III.A.

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involved with the Claimant's concession."<sup>44</sup> While neither Party has made any allegations of corruption, the BIT defines investment as "any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party *in accordance with the latter's laws* [...]."<sup>45</sup> In that context, the Tribunal cannot rule out at this early stage and without having heard the Parties that these matters may play some role in its assessment of this dispute.

34. The Respondent has also asserted that, due to APREFLOFAS's expertise in environmental law and environmental matters, it may provide information relevant to whether the Claimant's claims are grounded on domestic rather than international law, and assist in the determination of whether the disputed measures are barred under Article III(1) of Annex I of the BIT.<sup>46</sup> While the Tribunal notes that APREFLOFAS does not appear to seek to provide information regarding environmental law or environmental concerns, APREFLOFAS's submission could potentially shed light on these matters.
35. Second, it arises from the preceding paragraphs that APREFLOFAS's submission would fall within the scope of the dispute.
36. Third, the Tribunal notes that APREFLOFAS's general purpose as an NGO is the protection of the environment. It is in following that purpose that it obtained the cancellation of the Claimant's concession. The Claimant now impugns the judgment that APREFLOFAS obtained is contrary to international law. APREFLOFAS can thus be deemed to have an interest in ensuring that this Tribunal has all the information necessary to its decision-making.
37. The Tribunal thus concludes that APREFLOFAS meets the test set out in Rule 37(2). It thus confers it with non-disputing party status pursuant to that rule and allows it to make a written submission.
38. That being said, in accordance with Rule 37(2) *in fine*, the Tribunal must ensure that this submission "does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission." With respect to the need to avoid disruption of the proceeding, undue burden or unfair prejudice to the Parties, the Tribunal expressly recalls that APREFLOFAS must act as a "friend" of the Arbitral Tribunal. It also provides that APREFLOFAS's written submission shall focus on jurisdiction, being specified that if the dispute proceeds to the merits, APREFLOFAS

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<sup>44</sup> APREFLOFAS's Petition, p. 8.

<sup>45</sup> Article 1(g) of the BIT, emphasis added. (C-001).

<sup>46</sup> Article III(1) of Annex I of the BIT provides: "Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." (C-001).

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may file another application under Rule 37(2). Moreover, considering that the Parties have already addressed most matters on which APREFLOFAS proposes to comment from their perspective, APREFLOFAS shall limit its submission to 10,000 words, including footnotes. The submission may append contemporaneous documents provided these are not already in the record (see paragraph 43 below).

39. APREFLOFAS shall file its written submission on **19 July 2016**. The Tribunal is aware that, as a result of the Parties' agreement to extend the time limits for their submissions, the current Procedural Calendar states that the non-disputing party's submission is due on 5 August 2016. However, the Tribunal considers that this does not give the Respondent sufficient time for its comments on APREFLOFAS's submission, which are due on 8 August 2016.

**C. APREFLOFAS's Request that It Be Granted Access to the Principal Arbitration Documents**

40. APREFLOFAS further requests access to the "principal arbitration documents", including the Parties' pleadings, the Tribunal's decisions and orders, witness statements and transcripts of any witness examinations, and in general "[a]ny other documents issued or to be issued in the course of this proceeding."<sup>47</sup>
41. The ICSID Convention and Rules are silent on the non-disputing party's access to the record. On its website, ICSID states that "[t]he ICSID Convention and Arbitration Rules do not contain a general presumption of confidentiality or transparency applicable to the parties. Instead, the parties may tailor the level of confidentiality or transparency to their proceedings."<sup>48</sup> ICSID adds that, failing an agreement by the Parties or provisions in the applicable treaty, contract or law, the issue must be resolved by the Tribunal.<sup>49</sup>
42. Here, the Parties have not agreed on any transparency or confidentiality provisions other than the publication of substantive decisions, the award and procedural orders (the latter after the conclusion of the proceedings).<sup>50</sup> The BIT's transparency provision (Article XIV) does not address this matter.<sup>51</sup> It thus falls within the residual powers of the Tribunal to resolve this matter.

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<sup>47</sup> APREFLOFAS's Petition, p. 9.

<sup>48</sup> "Confidentiality and Transparency - ICSID Convention Arbitration" (icsid.worldbank.org) (RL-138).

<sup>49</sup> *Id.*

<sup>50</sup> Procedural Order No. 1, ¶ 24.1.

<sup>51</sup> Article XIV of the BIT provides:

"1. Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them.

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43. In the Tribunal's view, whether APREFLOFAS should be granted access to the record and to what extent depends essentially on whether access is required to APREFLOFAS to effectively discharge its task, i.e., provide the Tribunal with a useful and particular insight on facts or legal questions relevant to its jurisdiction. In order for APREFLOFAS to adequately meet this objective, it is undoubtedly preferable that it knows what information has already been submitted to the Tribunal. Otherwise, there is a risk that the information that it may submit may be redundant and thus useless. At the same time, the Tribunal must also ensure that no privileged information is disclosed to a third party which does not already have knowledge of it. It notes that while the Claimant has objected to the communication of documents to APREFLOFAS, it has not alleged that privileged information would thereby be disclosed.
44. Considering these various aspects, the Tribunal gives the following directions:
- a. On or around **8 June 2016**, the ICSID Secretariat shall make available to APREFLOFAS:
    - i. Selected portions of the Claimant's Memorial on the Merits, specifically Part I to Part III (pp. 1-91, including up to ¶ 244), and the exhibit lists attached to it (for both fact exhibits and legal authorities);
    - ii. The Respondent's Memorial on Jurisdiction and the exhibit lists attached to it (for both fact exhibits and legal authorities).
  - b. APREFLOFAS shall use these materials exclusively for the purposes of preparing its written submission in the arbitration and shall not communicate them to third parties or use them outside of this arbitration.
45. In the circumstances, the Tribunal does not consider that APREFLOFAS needs access to other documents in the record.

**D. APREFLOFAS's Request to Attend and Participate in any Hearings**

46. Finally, APREFLOFAS requests permission to "attend and participate in any oral hearings held in this proceeding, and respond to any questions of the Tribunal."<sup>52</sup>
47. The participation of third parties in oral hearings is addressed in ICSID Arbitration Rule 32(2), which provides as follows:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their

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2. Upon request by either Contracting Party, information shall be exchanged on the measures of the other Contracting Party that may have an impact on new investments or investments covered by this Agreement." (C-001)

<sup>52</sup> APREFLOFAS's Petition, p. 2.

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**Procedural Order No. 2**

testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

48. Here, the Claimant has expressly objected to APREFLOFAS's participation in any hearing. Accordingly, APREFLOFAS request must be denied.

**V. ORDER**

49. For the reasons set out above, the Tribunal makes the following Order:

- a. On or around **8 June 2016**, the ICSID Secretariat shall make available to APREFLOFAS:
  - i. Selected portions of the Claimant's Memorial on the Merits, specifically Part I to Part III (pp. 1-91, including up to ¶ 244), and the exhibit lists attached to it (for both fact exhibits and legal authorities);
  - ii. The Respondent's Memorial on Jurisdiction and the exhibit lists attached to it (for both fact exhibits and legal authorities).
- b. APREFLOFAS shall use these materials exclusively for the purposes of preparing its written submission in the arbitration and shall not communicate them to third parties or use them outside this arbitration.
- c. APREFLOFAS may file a written submission of no more than 10,000 words (including footnotes) addressing matters related to the Tribunal's jurisdiction by **19 July 2016**. This submission may append contemporaneous documents provided they are not already in the record, as shown by the exhibit lists referred to in subparagraph (a) above.
- d. APREFLOFAS's remaining requests are denied, being specified that, if the case proceeds to the merits, APREFLOFAS may file another application under Rule 37(2).
- e. Costs are reserved for a later decision.
- f. Procedural Order No. 2 shall be notified to APREFLOFAS and to the Parties.

On behalf of the Tribunal,

[Signed]

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Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal