

**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. 5**

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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: 22 February 2018

**Procedural Order No. 5**

**I. PROCEDURAL BACKGROUND**

1. On 15 September 2014, the Asociación Preservacionista de Flora y Fauna Silvestre (“APREFLOFAS”),<sup>1</sup> 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)”) (“the First Petition”). The Tribunal ruled on that petition through Procedural Order No. 2 of 1 June 2016 (“PO2”), conferring APREFLOFAS non-disputing party status in the following terms:

- “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.”<sup>2</sup>

2. On 19 July 2016, APREFLOFAS filed its written submission addressing matters related to the Tribunal’s jurisdiction, together with exhibits NDP-001 to NDP-013 (“APREFLOFAS’s Submission”). On 18 August 2016, APREFLOFAS submitted translations of certain exhibits requested by the Tribunal, which were designated as exhibits NDP-014 to NDP-020. The Respondent submitted its comments on this

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<sup>1</sup> Unless otherwise noted, all terms in this Procedural Order have the meanings assigned to them in the Decision on Jurisdiction of 4 December 2017.

<sup>2</sup> PO2, ¶ 49.

**Procedural Order No. 5**

submission together with the Reply on Jurisdiction of 1 October 2016, and the Claimant with the Rejoinder on Jurisdiction of 16 December 2016.

3. On 4 December 2017, the Tribunal issued its Decision on Jurisdiction. In that Decision, the Tribunal dismissed some of the Respondent's objections on jurisdiction and deferred others to the merits. It also deferred to the merits determination of whether the Claimant's investment complied with Article I(g) of the Canada-Costa Rica Bilateral Investment Treaty ("the BIT"), a matter that was raised in APREFLOFAS's Submission.
4. On instructions of the Tribunal, on 27 December 2017, the ICSID Secretariat informed APREFLOFAS that, should it intend to file an application to intervene as a non-disputing party during the merits phase of this arbitration, it should file such an application no later than 19 January 2018.
5. On 19 January 2018, APREFLOFAS filed a second petition for *amicus curiae* status (the "Second Petition").
6. In accordance with the procedural calendar agreed by the Parties, both Parties submitted their comments to APREFLOFAS's Second Petition on 9 February 2018.
7. The present order rules on APREFLOFAS's Second Petition.

## **II. APREFLOFAS'S SECOND PETITION**

8. APREFLOFAS seeks the same relief as it did in its First Petition. It requests the Tribunal to issue an order:
  - a. "Confer[ring] *amicus curiae* status upon [APREFLOFAS] [...];"
  - b. "Provid[ing] [APREFLOFAS] with access to the principal arbitration documents;"
  - c. "Permit[ting] [APREFLOFAS] to file appropriate documents with the Tribunal regarding the limitations of its jurisdiction in this proceeding;"
  - d. "Permit[ting] [APREFLOFAS] to file appropriate documents with the Tribunal responding to any other issues that may arise in the course of this proceeding;"  
and
  - e. "Permit[ting] [APREFLOFAS] to attend and participate in any oral hearing held in this proceeding, and reply to any question of the Tribunal."<sup>3</sup>

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<sup>3</sup> Second Petition, pp. 2 and 13.

**Procedural Order No. 5**

9. As in its First Petition, APREFLOFAS submits that it meets the requirements set out in Rule 37(2) for non-disputing party status. First, because of its position as plaintiff in the domestic proceedings between itself, the Claimant and the government of Costa Rica, APREFLOFAS asserts that it “is in a particularly advantageous position to fully inform the Tribunal of the judicial remedies that were adopted by the Costa Rican courts that relate directly to the subject matter of this case.”<sup>4</sup> Indeed, according to APREFLOFAS, the Claimant has failed to provide a full disclosure of the facts related to this case, and “only [APREFLOFAS] is prepared to present the Tribunal with an in-depth analysis of the different steps taken before the Costa Rican legal system.”<sup>5</sup>
10. APREFLOFAS contends that, on the basis of such information, the Tribunal might well conclude that it lacks jurisdiction over the Claimant’s claims. Indeed, in addition to APREFLOFAS’s argument that the Claimant’s investment was not made in accordance with the law, which APREFLOFAS raised in its First Petition, APREFLOFAS now argues that the Tribunal lacks jurisdiction under Article XII(3)(d) of the BIT, because the Claimant has appealed judgments against it and the Costa Rican courts have sustained those judgments.<sup>6</sup> Further, APREFLOFAS argues that the Tribunal lacks jurisdiction under Article XII(3)(b) of the BIT, which requires the investor to “waive[] its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind.”<sup>7</sup> According to APREFLOFAS, because the Claimant has affirmatively sought various remedies from the Costa Rican courts, it is now precluded from submitting this dispute to an international tribunal.<sup>8</sup>
11. APREFLOFAS notes that neither the Claimant nor the Respondent has raised the issues which it is raising and argues that “[i]t is important that the Tribunal be presented with a full analysis of these facts and APREFLOFAS might very well be the only entity prepared to do so.”<sup>9</sup> APREFLOFAS adds that it is independent of any government hierarchy or commercial interest in the project, and that it “overridingly seeks to require compliance of all parties with Costa Rican Environmental Laws [...]”<sup>10</sup>

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<sup>4</sup> *Id.*, p. 9.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id.*, p. 10, fn. 11.

<sup>7</sup> **C-0001**, Canada-Costa Rica BIT (“BIT”), Article XII(3)(b).

<sup>8</sup> Second Petition, p. 10., fn. 12.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.*, p. 11.

**Procedural Order No. 5**

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>11</sup>
13. Third, APREFLOFAS contends that it has a significant interest in these proceedings, 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>12</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 BIT,<sup>13</sup> as well as on the policy objective of more transparency in investor-state arbitration, as alluded to in the *Suez* (formerly *Aguas Argentinas*) case.<sup>14</sup>
14. APREFLOFAS also attests that “it has no relationship, direct or indirect, with any party or any third party to this dispute;” it “has not received any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of this Petition for *amicus* status;” and “[i]f the Tribunal accepts this petition, APREFLOFAS will not receive any such assistance in the future in the furtherance of its *amicus* submissions.”<sup>15</sup>

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<sup>11</sup> *Id.*, p. 11.

<sup>12</sup> *Id.*, p. 11.

<sup>13</sup> *Id.*, p. 12.

<sup>14</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>15</sup> Second Petition, p. 6.

**Procedural Order No. 5**

15. As part of its Second Petition, APREFLOFAS also requests full access to all documents that have been 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>16</sup>
16. Given that these proceedings are still in the initial stages of the merits phase, APREFLOFAS submits that its participation would not disrupt the appropriate development of the case.
17. APREFLOFAS also seeks an order from the Tribunal “directing that all hearings be open to the public and/or that *amici* be allowed to attend all hearings and respond directly to any questions of the Tribunal concerning their submissions.”<sup>17</sup> APREFLOFAS argues that, to the extent that ICSID Arbitration Rule 32(2) does not allow for the participation of non-parties if one of the parties to the proceeding objects, “the [T]ribunal should find that APREFLOFAS is a party to the proceeding that must be included because of the strong public interest in the prevention of government corruption in the review of environmental matters in Costa Rica.”<sup>18</sup>

### **III. PARTIES’ POSITIONS**

#### **A. The Claimant’s Position**

18. The Claimant opposes APREFLOFAS’s request for *amicus curiae* status. It contends that there is no basis in the ICSID Arbitration Rules for the broad participation rights that APREFLOFAS seeks, which are akin to those of a respondent. Under Rule 37(2), the Tribunal may only allow a non-disputing party to make a written submission.
19. In any event, according to the Claimant, APREFLOFAS does not meet the test for non-disputing party status under Rule 37(2). First, APREFLOFAS would bring “no unique perspective, knowledge, or insight that has not been or will not be fully

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<sup>16</sup> *Id.*, p. 13.

<sup>17</sup> *Id.*, p. 13.

<sup>18</sup> *Id.*, p. 13.

**Procedural Order No. 5**

addressed by the parties;<sup>19</sup> rather, it “attempts to adduce evidence and make submissions on topics that have already been extensively briefed by the parties, and on matters outside the scope of APREFLOFAS’ knowledge and expertise.”<sup>20</sup>

20. During the jurisdictional phase already APREFLOFAS “focused almost entirely on making inaccurately characterized, inflammatory and unsubstantiated corruption allegations,” and “[t]here is no reason to believe that APREFLOFAS would provide helpful information regarding the proceedings through which Infinito’s permits and approvals were annulled if provided another opportunity.”<sup>21</sup> These judicial proceedings were already extensively addressed in both the Claimant’s and the Respondent’s submissions on the merits and jurisdiction and their accompanying witness statements and expert reports.
21. Nor would APREFLOFAS provide new information or a unique perspective with regard to the ongoing criminal proceedings regarding corruption and malfeasance in office that allegedly led to the granting of the Claimant’s concession. The Claimant contends that “[t]o the extent that the current status and outcome of such proceedings is relevant, it may be fully addressed through evidence and submissions to be adduced by the parties.”<sup>22</sup> The Claimant further contends that APREFLOFAS cannot be relied upon to provide accurate information, as in its previous submission it inaccurately characterized the nature and outcome of the various judicial proceedings, requiring correction from the Claimant’s witness Mr. Juan Carlos Hernández.
22. Second, so says the Claimant, APREFLOFAS proposes to address matters outside the scope of the merits phase of this arbitration “by impermissibly re-litigating issues relating to the Tribunal’s jurisdiction that have already been disposed of through the Tribunal’s Decision on Jurisdiction.”<sup>23</sup> Specifically:
  - a. APREFLOFAS argues that the Tribunal has no jurisdiction under Article XII(3)(d) of the BIT, when the Tribunal has already determined that the claims are not barred by Article XII(3)(d).
  - b. APREFLOFAS also raises a new jurisdictional issue, arguing that Infinito’s appeal of the 2010 TCA Decision to the Administrative Chamber deprived the Tribunal of jurisdiction under Article XII(3)(b) of the BIT.<sup>24</sup> The Claimant argues that this jurisdictional objection could have been raised by Costa Rica or by

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<sup>19</sup> Claimant’s Comments on APREFLOFAS’s Petition for *Amicus Curiae* Status of 9 February 2018 (“C-Comments on APREFLOFAS’s Second Petition”), ¶ 2.

<sup>20</sup> *Id.*, ¶ 14.

<sup>21</sup> *Id.*, ¶ 15.

<sup>22</sup> *Id.*, ¶ 18.

<sup>23</sup> *Id.*, ¶ 20.

<sup>24</sup> *Id.*, ¶ 22.

**Procedural Order No. 5**

APREFLOFAS during the jurisdictional phase, and that it is too late to raise it now, not to speak of the fact that this objection is meritless, as the Tribunal determined that the measure alleged to be in breach was the 2011 Administrative Chamber's Decision and Infito has not initiated or continued any other proceeding with respect to that measure.

23. Third, the Claimant submits that "APREFLOFAS' participation would disrupt this arbitration, and unduly burden and unfairly prejudice Infito."<sup>25</sup> According to the Claimant, Rule 37(2) requires the non-disputing party to act as "a volunteer, a friend of the court, not a party,"<sup>26</sup> and tribunals have excluded non-disputing parties from participating where such participation is "markedly biased, prejudicial or non-neutral."<sup>27</sup> Here, APREFLOFAS seeks to act as a party, not a friend of the court. It has a long history of opposing Infito and the Crucitas Project. Allowing it to participate would be akin to permitting a second respondent and would compel the Claimant to meet two cases at once, causing it unfair prejudice. There is also no merit to APREFLOFAS's argument that it should be considered a party to this arbitration: neither the BIT nor the ICSID Convention contemplates that a non-governmental organization, with no rights, property or investment at issue can be made a party.
24. The Claimant further argues that APREFLOFAS's participation would burden both Parties with added time and expense. If APREFLOFAS is allowed to intervene again, Infito will likely have to expend significant resources to correct APREFLOFAS's inaccurate statements and respond to its duplicative submissions, as it already had to do during the jurisdictional phase.
25. For the foregoing reasons, the Claimant requests that APREFLOFAS's request be denied. Alternatively, it requests that its participation be limited to making a non-disputing party written submission of a maximum of 10,000 words. As to APREFLOFAS's access to the record, the Claimant has no objection to APREFLOFAS receiving copies of the full version of Infito's Memorial on the Merits, Counter-Memorial on Jurisdiction and Rejoinder on Jurisdiction, Costa Rica's Memorial on Jurisdiction, and the list of exhibits and legal authorities accompanying them. In the Claimant's submission, there is no need for APREFLOFAS to access any documents beyond those listed.<sup>28</sup>
26. Finally, 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>29</sup>

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<sup>25</sup> *Id.*, ¶ 23.

<sup>26</sup> *Id.*, ¶ 23, citing *Suez*, ¶ 13.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.*, ¶ 26.

<sup>29</sup> *Id.*, ¶ 29.



**Procedural Order No. 5**

**B. The Respondent's Position**

27. The Respondent requests that the Tribunal (i) grant APREFLOFAS leave to file a non-disputing party submission in the merits phase; (ii) grant APREFLOFAS access to certain documents in the record, as specified below; and (iii) defer the decision on whether to allow APREFLOFAS to attend the oral hearing and/or to participate further in the proceeding.<sup>30</sup>
28. The Respondent submits that it is “incontrovertible that this Tribunal has the authority to grant APREFLOFAS’s request to intervene as a non-disputing party during the merits phase of this proceeding,” allowing it to file a written submission in the merits phase regarding matters that are within the scope of this dispute.<sup>31</sup> In deciding whether to do so, the Tribunal shall consider the factors set out in Rule 37(2). That said, according to the Respondent these three factors “are neither exhaustive nor prescriptive,” and as a result the Tribunal may consider other factors, or allow a written submission even in the absence of such factors.<sup>32</sup>
29. In any event, the Respondent submits that APREFLOFAS satisfies all of the elements of the test set out in Rule 37(2). The Tribunal had already concluded in PO2 that this was the case, and the reasons that led the Tribunal to that conclusion remain valid.
30. First, the Respondent argues that a written submission by APREFLOFAS “can reasonably be expected to assist the Tribunal in the determination of certain factual or legal issues related to the proceeding, by bringing a perspective, particular knowledge or insight that is different from that of the Parties”<sup>33</sup> on the following issues:
- a. The local proceedings that led to the cancellation of the Claimant’s concession in which APREFLOFAS was the plaintiff.<sup>34</sup>
  - b. Whether the Claimant’s concession was obtained in violation of Costa Rican law, including as a result of corruption or malfeasance in office. While the Respondent acknowledges that in its previous submission it stated that the evidence available was insufficient to show that the entirety of Infinito’s investment was procured through criminal acts,<sup>35</sup> the Respondent now asserts that since that time one official has been indicted and another one is under investigation in relation to the issuance of the Claimant’s concession.<sup>36</sup>

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<sup>30</sup> Respondent’s Submission on the APREFLOFAS Petition for *Amicus Curiae* Status of 9 February 2018 (“R-Comments on APREFLOFAS’s Second Petition”), ¶ 2.

<sup>31</sup> *Id.*, ¶ 5.

<sup>32</sup> *Id.*, ¶¶ 4-6.

<sup>33</sup> *Id.*, ¶ 9.

<sup>34</sup> *Id.*, ¶ 11.

<sup>35</sup> *Id.*, ¶ 16, citing Decision on Jurisdiction, ¶ 136.

<sup>36</sup> *Id.*, ¶ 16.

**Procedural Order No. 5**

- c. The environmental concerns involved in this dispute. APREFLOFAS could contribute particular knowledge or insight on the environmental law and policy objectives that underlie the challenged measures. As recognized by the Tribunal in PO2, it could also assist in the determination whether the disputed measures are barred under Section III(1) of Annex I of the BIT concerning measures taken to protect the environment – an issue that the Tribunal joined to the merits.<sup>37</sup>
31. Second, the Respondent argues that, if granted leave, APREFLOFAS’s written submission would address matters within the scope of the present dispute. APREFLOFAS would address the legality of the Claimant’s concession under Costa Rican law, as well as the local proceedings that resulted in the cancellation of that concession.<sup>38</sup>
32. Third, the Respondent notes that in PO2 the Tribunal determined that APREFLOFAS had an interest in these proceedings, which has not changed. Specifically, because the Claimant now challenges the judgments that APREFLOFAS obtained before the Costa Rican courts, APREFLOFAS has an interest in ensuring that the Tribunal has all the information necessary to reach its decision.<sup>39</sup>
33. For the foregoing reasons, the Respondent requests that APREFLOFAS be granted leave to make a written submission during the merits phase, concerning matters within the scope of this dispute.<sup>40</sup>
34. In order to ensure conformity with sub-paragraphs (a) and (b) of Rule 37(2), the Respondent further requests that APREFLOFAS be granted access to the following documents:<sup>41</sup>
- a. The remainder of Claimant’s Memorial on the Merits (noting that under PO2, APREFLOFAS was only granted access to Parts I and III of the Memorial);
  - b. Claimant’s Counter-Memorial on Jurisdiction;
  - c. Costa Rica’s Reply on Jurisdiction;
  - d. Claimant’s Rejoinder on Jurisdiction;
  - e. The witness statements of Juan Carlos Hernández Jiménez, the expert reports of Ana Virginia Calzada Miranda, Ruben Hernández Valle, Erasmo Rojas Madrigal, and Carlos Ubico;

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<sup>37</sup> *Id.*, ¶ 18, referring to PO2, ¶ 34 and Decision on Jurisdiction, ¶ 364(a).

<sup>38</sup> *Id.*, ¶ 19.

<sup>39</sup> *Id.*, ¶ 20.

<sup>40</sup> *Id.*, ¶ 21.

<sup>41</sup> *Id.*, ¶ 22.

**Procedural Order No. 5**

- f. The complete updated list of exhibits and legal authorities; and
  - g. The transcripts of the hearing on jurisdiction.
35. The Respondent argues that no concerns regarding confidentiality could prevent the Tribunal from allowing APREFLOFAS full access to these materials and, if there were any, the Tribunal could adopt measures to protect confidential information.<sup>42</sup>
36. The Respondent further submits that granting leave to APREFLOFAS to file a written submission and access the case materials just specified would not disrupt or unduly burden this proceeding or unfairly prejudice the Parties, as the Parties would have an opportunity to comment on APREFLOFAS's submission in their memorials. That said, in this context, the Respondent notes that the Tribunal may wish to consider imposing a word limit.<sup>43</sup>
37. Finally, the Respondent requests that the Tribunal defer its decision on APREFLOFAS's request to attend the oral hearing and to participate further in the proceedings, as the Parties and the Tribunal will be in a better position to address these requests after APREFLOFAS's written submission.<sup>44</sup>

#### **IV. ANALYSIS**

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

38. APREFLOFAS seeks an order in the terms quoted in paragraph 8 above. The Tribunal notes that APREFLOFAS's request for relief is identical to that submitted in its First Petition.
39. As with its First Petition, APREFLOFAS's request is based on 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;

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<sup>42</sup> *Id.*, ¶ 23.

<sup>43</sup> *Id.*, ¶ 24.

<sup>44</sup> *Id.*, ¶ 25.

**Procedural Order No. 5**

- (c) the non-disputing party has a significant interest in the proceeding.

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.”

40. As did its First Petition, APREFLOFAS’s Second Petition 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 8 above.<sup>45</sup> The Tribunal will therefore address these requests first (Section B below) and then discuss APREFLOFAS’s remaining requests (Sections C and D below).

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

41. In PO2, the Tribunal found that APREFLOFAS met the test set out in Rule 37(2) to be allowed to file a non-disputing party submission.<sup>46</sup> The Tribunal’s reasoning is still valid and applies *mutatis mutandis* to APREFLOFAS’s Second Petition with the following specifications.
42. First, for the reasons set out in PO2, the Tribunal continues to consider that APREFLOFAS’s input may assist it in better understanding certain factual and legal aspects related to the merits of this dispute.
43. By contrast, the Tribunal notes that (with the exception of the objections that have been deferred to the merits phase), the jurisdictional phase is closed. APREFLOFAS already had an opportunity to make submissions on the Tribunal’s jurisdiction and made use of it, arguing in particular that the Tribunal lacked jurisdiction because the Claimant’s concession was illegally obtained. In its Decision on Jurisdiction, the Tribunal held that “[a]t [that] stage and on the current record, the Tribunal [could not] dismiss these allegations outright,” and “therefore defer[red] this matter to the merits phase when further briefing and evidence may be submitted.”<sup>47</sup> Accordingly, APREFLOFAS may only submit further briefing and evidence in relation to this jurisdictional objection, subject to the limitations set out at paragraph 46 below to avoid duplication. APREFLOFAS may not raise new arguments on the Tribunal’s jurisdiction, nor address the other objections that the Tribunal deferred to the merits nor those that it denied in the Decision on Jurisdiction.

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<sup>45</sup> The Tribunal understands that, by requesting that it be conferred *amicus curiae* status (request (a)), APREFLOFAS is requesting that it be allowed to file a written submission as a non-disputing party for purposes of Rule 37(2), and this written submission would address the issues identified under requests (c) and (d).

<sup>46</sup> PO2, ¶¶ 30-37.

<sup>47</sup> Decision on Jurisdiction, ¶ 139.

**Procedural Order No. 5**

44. Second, it follows that a submission by APREFLOFAS addressing the issues set out in paragraph 42 and the one jurisdictional objection submitted in paragraph 43 would fall within the scope of the dispute.
45. Third, for the reasons set out in PO2, the Tribunal continues to consider that APREFLOFAS has an interest in the dispute.
46. For the foregoing reasons, the Tribunal allows APREFLOFAS to make a non-disputing party written submission in accordance with Rule 37(2). To ensure that it “does not disrupt the proceeding or unduly burden or unfairly prejudice either party,” that submission shall comply with the following directions:
- a. APREFLOFAS shall file its submission by **30 April 2018**, the date agreed by the Parties and confirmed by the Tribunal.
  - b. In that submission, APREFLOFAS shall act as a “friend” of the Tribunal, not a party. It shall endeavor to avoid duplication of statements of fact or arguments made by the Parties, and instead provide the particular knowledge or insight that justifies its non-disputing party submission.
  - c. The submission shall focus on the merits of the dispute. Arguments or evidence on jurisdiction shall be limited to the objection of lack of jurisdiction on the ground that the Claimant obtained its concession allegedly illegally, through extortion, malfeasance in office and other violations of Costa Rican law. In respect of such objection, arguments and evidence shall be restricted to new facts or documents which have occurred or been discovered after 19 July 2016 (date of APREFLOFAS’s submission in the jurisdictional phase).
  - d. The submission shall be limited to 10,000 words, including footnotes.
  - e. Subject to the limitation in (c) above, the submission may append contemporaneous documents provided these are not already in the record. If APREFLOFAS refers to a document in the record, it shall not append it and shall use the exhibit number assigned to it in the record.
47. The Parties shall have an opportunity to present their observations on APREFLOFAS’s non-disputing party submission in their submissions on the merits.

**C. APREFLOFAS’s Request for Access to the Record**

48. APREFLOFAS requests that it be granted full access to all documents that have been presented or will be presented to the Tribunal. APREFLOFAS also requests a copy of the latest procedural calendar.

**Procedural Order No. 5**

49. As noted in PO2, the ICSID Convention and Rules, and the BIT are silent on the non-disputing party's access to the record, with the result that this matter falls within the residual powers of the Tribunal.<sup>48</sup> In PO2, the Tribunal also concluded that APREFLOFAS needed to be given access to sufficient information to effectively discharge its task, provided no protected information would thereby be disclosed.<sup>49</sup>
50. Both Parties agree that APREFLOFAS may have access to full versions of all submissions submitted by the Parties to date and to the Parties' updated lists of exhibits and legal authorities.<sup>50</sup> Neither Party has alleged that privileged information would thereby be disclosed.
51. The Respondent also requests that APREFLOFAS be granted access to the transcripts of the hearing on jurisdiction, and to certain witness statements and expert reports submitted by the Parties.<sup>51</sup> In addition, APREFLOFAS requests a copy of the calendar of the arbitration. Under the circumstances, the Tribunal does not consider that APREFLOFAS needs other documents than those listed above to effectively discharge its functions of assistance for the Tribunal, as opposed to acting as a party to the proceedings.

**D. APREFLOFAS's Request to Attend and Participate in the Hearing**

52. Finally, APREFLOFAS requests permission to "attend and participate in any oral hearings held in the proceeding and to respond to any questions posed by the Tribunal."<sup>52</sup>
53. For the reasons set out in PO2<sup>53</sup> and because the Claimant has expressly objected to APREFLOFAS's attendance at the hearing on the merits, this request must be denied.

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<sup>48</sup> PO2, ¶ 42.

<sup>49</sup> PO2, ¶ 43.

<sup>50</sup> R-Comments on APREFLOFAS's Second Petition, ¶ 22; C-Comments on APREFLOFAS's Second Petition, ¶ 26. The Claimant refers expressly to all briefs filed by the Parties to date, with the exception of the Respondent's Reply on Jurisdiction. This appears to be an inadvertent omission rather than a conscious exclusion. Even if it were the latter, the Tribunal does not believe that the Claimant would be prejudiced by giving APREFLOFAS access to this brief.

<sup>51</sup> Specifically, the three witness statements of Juan Carlos Hernández Jiménez; the two expert reports of Ana Virginia Calzada Miranda; the two expert reports of Ruben Hernández Valle and Erasmo Rojas Madrigal; and the two expert Reports of Carlos Ubico.

<sup>52</sup> Second Petition, p. 2.

<sup>53</sup> PO2, ¶¶ 46-48.

**Procedural Order No. 5**

**V. ORDER**

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

- a. The ICSID Secretariat shall make available to APREFLOFAS:
  - i. The Claimant's full Memorial on the Merits;
  - ii. The Claimant's Counter-Memorial on Jurisdiction;
  - iii. The Respondent's Reply on Jurisdiction;
  - iv. The Claimant's Rejoinder on Jurisdiction;
  - v. The Parties' complete and updated lists of 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.
- c. APREFLOFAS may file a non-disputing party submission by **30 April 2018**. This submission must comply with the following directions:
  - i. APREFLOFAS shall act as a "friend" of the Tribunal, not as a party. It shall endeavor to avoid duplication of statements of fact or arguments made by the Parties, and instead provide the particular knowledge or insight that justifies its non-disputing party submission.
  - ii. The submission shall focus on the merits of the dispute. Arguments or evidence on jurisdiction shall be limited to the objection of lack of jurisdiction on the ground that the Claimant obtained its concession allegedly illegally, through extortion, malfeasance in office and other violations of Costa Rican law. In respect of such objection, arguments and evidence shall be restricted to new facts or documents which have occurred or been discovered after 19 July 2016 (date of APREFLOFAS's submission during the jurisdictional phase).
  - iii. The submission shall be limited to 10,000 words, including footnotes.
  - iv. Subject to the limitation in (ii) above, the submission may append contemporaneous documents provided these are not already in the record. If APREFLOFAS refers to a document in the record, it shall not append it and shall use the exhibit number assigned to it in the record.

**Procedural Order No. 5**

- d. The Parties shall have an opportunity to present their observations on APREFLOFAS's non-disputing party submission in their submissions on the merits.
- e. APREFLOFAS's remaining requests are denied.
- f. Costs are reserved for a later decision.
- g. This order shall be communicated to APREFLOFAS. The restriction referred to in paragraph 54(b) above also applies to the text of the present Procedural Order.

On behalf of the Tribunal,

[Signed]

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Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal