IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)

- between -

ODYSSEY MARINE EXPLORATION, INC. (USA)

(the "Claimant")

and

THE UNITED MEXICAN STATES

(the "Respondent")

ICSID Case No. UNCT/20/1

PROCEDURAL ORDER No. 6

DECISION ON THE APPLICATION FOR LEAVE TO FILE A NON-DISPUTING PARTY SUBMISSION (*AMICUS CURIAE*)

Members of the Tribunal
Mr. Felipe Bulnes Serrano, Presiding Arbitrator
Dr. Stanimir Alexandrov, Arbitrator
Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal
Ms. Anna Toubiana, ICSID

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20 December 2021

I. Procedural Background

1. On 12 October 2021, the Center for International Environmental Law ("**CIEL**") and the Sociedad Cooperativa de Producción Pesquera Puerto Chale S.C.L. ("**Cooperativa**") (together, the "**Applicants**") submitted a joint application for leave to file a non-disputing party submission (*amicus curiae*) (the "**Application for Leave**") pursuant to Procedural Order No. 1 of 23 April 2021 and the Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003 (the "**FTC Statement**"). On 13 October 2021, the Centre acknowledged receipt of the application and transmitted it to the parties and the Tribunal.

2. On 26 October 2021, the Claimant proposed amendments to the procedural calendar to include a deadline for the parties to comment on applications for leave to file non-disputing party submissions (*amici curiae*). Pursuant to the Tribunal's invitation of 28 October 2021, the Respondent proposed further amendments to the procedural calendar on 2 November 2021.

3. By letter of 3 November 2021, the Tribunal issued a revised procedural calendar as Annex A to Procedural Order No. 1.

4. On 12 and 14 November 2021, the parties informed the Tribunal that they had reached an agreement to extend various pending deadlines, including the deadline to comment on the Application for Leave. On 17 November 2021, the Tribunal confirmed the parties' agreement.

5. On 19 November 2021, the parties submitted their comments on the Application for Leave.

II. Parties' Positions

6. The Tribunal refers to the parties' arguments as expressed in their comments on the Application for Leave of 19 November 2021.

III. Tribunal's Decision

7. The Tribunal hereby issues its decision – by majority decision – on the Application for Leave.

8. With regards to the criteria and requirements that the Tribunal must consider to decide the Application for Leave, both Parties agree that, pursuant to Section 25.2. of Procedural Order No. 1, the Tribunal must follow the recommendations set forth in the FTC Statement. In this regard, Section 25.2. of Procedural Order No. 1 states as follows:

> *Any non-disputing party, other than a NAFTA Party referred to in Article 1128 of the NAFTA, that wishes to file a written statement to the Tribunal shall apply for leave from the Tribunal to file such a submission in accordance with the schedule set out in Annex A. The Tribunal shall consider non-disputing party submissions in a manner consistent with the*

> *recommendations of the North American Free Trade Commission on non-disputing party participation, issued on 7 October 2003. As recognized therein, the disputing parties shall have the right to respond to all applications and submissions by non-disputing parties.*

9. Section B (2) of the FTC Statement sets forth several formal requirements for an application for leave to file a non-disputing party submission:

> *The application for leave to file a non-disputing party submission will:*
>
> *(a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;*
> *(b) be no longer than 5 typed pages;*
> *(c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);*
> *(d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;*
> *(e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;*
> *(f) specify the nature of the interest that the applicant has in the arbitration;*
> *(g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;*
> *(h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission;*
> *(i) and be made in a language of the arbitration.*

10. Section B (6) of the FTC Statement further provides that:

> *In determining whether to grant leave to file a non-disputing party submission, the Tribunal will 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 arbitration 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 matters within the scope of the dispute;*
> *(c) the non-disputing party has a significant interest in the arbitration;*
> *(d) and there is a public interest in the subject-matter of the arbitration.*

11. Section B (7) of the FTC Statement provides:

> *The Tribunal will ensure that:*
> *(a) any non-disputing party submission avoids disrupting the proceedings; and*
> *(b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.*

12. The question to be examined here is whether the Application for Leave meets the requirements of section B (2) of the FTC Statement and the criteria set forth in sections B (6) and (7).

13. After reviewing the comments of both parties on the submission filed by the Applicants, the Tribunal notes that they disagree on the concurrence of several of these elements.

14. The Respondent deems that the Applicants' appearance in these proceedings is justified since all the requirements above mentioned are met, whereas the Claimant objects to the Application for Leave, arguing that 3 of the FTC Statement criteria are not present. First, the Claimant states that the Applicants do not hold a significant interest in the arbitration; second, it asserts that the submission would not assist the Tribunal on a factual or legal issue related to the arbitration; and, third, it argues that the Applicants' submission would unduly burden or unfairly prejudice the Claimant. In addition, it argues that the Applicants breached one of the FTC Statement's requirements by not making a full and complete disclosure.

15. Therefore, the Tribunal must consider if the Application for Leave meets the criteria set forth in sections B (6) (a) and (c), and B (7) (b) of the FTC Statement and the requirement of sections B (2) (d).

(i) <u>The significant interest in the arbitration</u>

16. This criterion is contained in Section B(6)(c) of the FTC Statement:

> *(c) the non-disputing party has a significant interest in the arbitration;*

17. Cooperativa asserts that its interest in this arbitration relies on the fact that the Claimant's concessions to develop the Don Diego Project are located in the same area where the members of Cooperativa hold their fishing concessions. CIEL, on its part, states that it has an interest in ensuring that human rights and international environmental law are fully enforced and, therefore, that it has an interest in this arbitration.

18. With regards to Cooperativa, considering that the Claimant is not seeking the restitution of the project at issue but a compensation arising out of the alleged breaches of NAFTA, the Tribunal does not consider Cooperativa as having a significant interest in this dispute.

19. With regards to CIEL, the Tribunal reaches a similar conclusion. CIEL argues that its interest in this arbitration relates to its interest in ensuring that human rights and international environmental law are fully enforced. This Tribunal agrees with the standard set by the *Apotex* tribunal, that declared that, to establish a significant interest, the Applicants must demonstrate "*more than a general interest in the proceeding*."[1] The interest argued by CIEL does not prove a "*significant interest*" in this arbitration beyond the general interest that any environmental organisation may have on these proceedings. Therefore, in line with the *Apotex* tribunal, this Tribunal does not consider that CIEL has significant interest in this dispute.

(ii) <u>The assistance on a legal or factual issue</u>

20. This criterion is contained in Section B(6)(a) of the FTC Statement:

> *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*

21. The question to be answered is whether Cooperativa and CIEL can provide a unique or different perspective on a factual or legal issue, different than the ones provided by the parties, that assists the Tribunal in deciding the dispute.

22. With regards to Cooperativa, although the Tribunal considers that their view of the dispute might be different from those presented by the parties in this arbitration, it does not consider that such insight could bring a perspective that would assist the Tribunal in this arbitration. Similarly to the conclusion regarding Cooperativa's lack of interest in this arbitration, since the dispute does not relate to the Claimant's activities in the territory where Cooperativa operates but to the legality of the denial of permits to operate in Mexico, the Tribunal does not consider that Cooperativa's perspective will assist the Tribunal in determining a factual or legal issue related to the dispute.

23. In relation to CIEL, the Tribunal has no doubt that it has significant experience and expertise on matters of international environmental law. However, the Application for Leave has not demonstrated that CIEL can provide assistance on matters not addressed by the parties or that the parties are unable to provide in this arbitration. Both the Claimant and the Respondent are assisted in this arbitration by experienced counsel, have fully briefed the Tribunal with submissions attaching a large number of annexes, legal authorities and expert reports, where their position in both legal and factual issues is sufficiently expressed and detailed. The Tribunal, in line with the *Apotex*, *Bear Creek,* and *Eco Oro* tribunals, finds it unlikely that

[1] *Apotex v. United States*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party, 4 March 2013, ¶ 38, CL-239.

CIEL will bring a particular knowledge or insight different from that of the disputing parties.

24. Considering that the Tribunal has determined that the Applicants do not have significant interest in this arbitration and have not proven to be able to provide assistance in matters that the disputing parties are not able to address, and, therefore, that the Application for Leave cannot be granted, the Tribunal will not proceed to analyse the other grounds for opposition presented by the Claimant.

25. In consequence, based on the foregoing, the Tribunal, by a majority, denies Cooperativa's and CIEL's Application for Leave.

26. There shall be no order on costs.

On behalf of the Majority of the Tribunal:

[Signed]

Mr. Felipe Bulnes Serrano
Presiding Arbitrator

Professor Sands appends a dissent as follows:

1. I regret that I do not agree with the Majority's decision to reject the joint Request for Leave to file an *amicus curiae* brief. In applying the criteria in the FTC statement a Tribunal should show an awareness that the NAFTA Parties have recognised that *amicus curiae* submissions have the potential to improve both the quality and the legitimacy of the final award, even if the tribunal ultimately disagrees with the reasoning of those submissions. It is incumbent upon arbitrators to have regard to the need to consider the impact on the legitimacy of the final award in light of both (a) general legitimacy concerns in relation investment treaty arbitration, and (b) specific local community interests that are engaged by a particular case. Regrettably, the Majority's decision indicates no awareness of these considerations, and has in effect overridden the views of the Respondent, which contributed to the drafting of FTC statement.

Significant interest in the arbitration

2. Contrary to the view of the Majority, I believe it is clear that the *Cooperativa* has a significant interest in the outcome of the arbitration. The Majority's conclusion appears to rest exclusively on the basis that the Claimant in these proceedings is seeking compensation and not restitution, implying that only if the Claimant was seeking restitution would the Majority have found that the *Cooperativa* had a significant interest in the arbitration. This is an extraordinarily narrow reading of the 'significant interest' requirement, and the Majority has offered no justification in support. It is now well-recognised that investment treaty arbitration can have a significant impact on domestic regulatory regimes, even where compensation is the only remedy awarded. It is therefore entirely possible that a finding that the Respondent has breached the treaty could lead to regulatory changes which directly affect the interests of the *Cooperativa*, either immediately or in the future. The Majority's decision fails to recognise or take account of the broader impacts of investment treaty arbitration.

3. The position of *CIEL* is more difficult, and I agree with the Majority that it is not enough to demonstrate merely a 'general interest in the proceeding'. Nevertheless, I believe that CIEL has demonstrated a significant interest in the current case. In reaching this conclusion, I have

found the nature of *CIEL*'s work particularly significant. It is not an organisation which has a general interest in the protection of the environment, or a general academic interest in investment treaty arbitration. Rather, *CIEL* has a limited set of clear goals which focus on how the law (particularly international treaty arbitration) affects human rights and the environment. In my view, the present proceedings fall squarely within *CIEL*'s limited focus, and the outcome of these proceedings may impact on *CIEL*'s ability to achieve its aim. To the extent that more information was needed in this respect, the Tribunal could, as I proposed, have requested further information from *CIEL*.[2]

Assistance on a legal or factual issue

4. I believe that both the *Cooperativa* and *CIEL* are able to bring a unique perspective to the specific factual and legal issues in this dispute, and that these perspectives would assist the Tribunal.

5. The utility of the perspective offered by the *Cooperativa* relates to the impact that the Claimant's project may have had on the fishing activity of local people. To suggest, as the Majority appears to, that the impact of the project is irrelevant and that the dispute concerns only the legality of the decision to refuse operating permits is not persuasive. The two issues are intrinsically connected, and a conclusion on the latter cannot be reached without consideration of the former. Whilst the Parties themselves are in a position to explore the impact of the Claimant's project on the interests of local people, the *Cooperativa* is in a unique position to give a first hand account and thus support or challenge the arguments of the parties. This unique perspective would have been extremely valuable, and I consider it to be deeply regrettable that the Majority has decided that it does not wish to hear from a community that is directly affected by the outcome of the proceedings. Such a decision will only serve to undermine perceptions as the legitimacy of these proceedings.

[2] In addressing this issue, it is appropriate to disclose that I was involved in the founding of a predecessor organisation to CIEL, back in 1989. I have had no involvement or role in any aspect of the activity or operation of this incarnation of the organisation, since its founding more than twenty-five years ago.

6. In my view, *CIEL* is able to offer a unique perspective due to its ability to place this dispute in the context of broader debates and developments in international law. The focus of the Parties has naturally been on the legal standards of the treaty and the relevant factual evidence. In my view, these broader debates are highly relevant to the Tribunal's task in this case, given the potential interplay of investment, environmental and human rights issues in this case. Given its expertise, I believe that *CIEL* is well-placed to offer additional insights that could assist the Tribunal, and that its contribution would have enriched the material available to the Tribunal, beyond the pleadings of the Parties. At a time when challenges to the environment are recognised as affecting a range of stakeholders, I consider it regrettable that the Majority does not think it appropriate to allow those who have demonstrated that they may be affected by the outcome a chance to participate in the proceeding, by means of a limited *amicus* submission. A quarter of a century ago, the International Court of Justice recognised that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn", and there was now a general obligation to protect the environment which was "part of the corpus of international law relating to the environment".[3] An *amicus* filing offers an important means of giving effect to that obligation, whilst also recognising the rights and interests of affected persons.

Impact on the Parties

7. To have allowed the *Cooperativa* and *CIEL* to submit *amicus* briefs would not have unduly burdened the parties, unfairly prejudiced either party or disrupted the arbitral proceedings. Both sides are represented by experienced counsel, and are perfectly capable of responding to *amicus* briefs. That one or both of the *amici* may have offered a view which is contrary to the interests of either party is not in itself a sufficient reason to exclude the *amici* from proceedings. Indeed, parties should welcome the opportunity for more rigorous and detailed argument, as Respondent has done. Finally, any concern about the burden on the parties or disruption to the

[3] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996,* p. 226, at 241 (para. 29).

proceedings could be easily managed by imposing strict limits and requirements on the *amicus* briefs.

Professor Philippe Sands QC

16 December 2021