

PETITION FOR AMICUS CURIAE STATUS

**IN CASE NO. ARB/14/5 BEFORE THE INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES**

**INFINITO GOLD LIMITED
V.
REPUBLIC OF COSTA RICA**

Petitioner:
**Asociación Preservacionista de Flora y Fauna
Silvestre (APREFLOFAS)**

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1. ORDER BEING SOUGHT

The Petitioner, Asociación Preservacionista de Flora y Fauna Silvestre (APREFLOFAS), is a well-established Costa Rican non-governmental organization (NGO). Its mission is the protection of the environment. It respectfully requests the Tribunal to issue an order in the present arbitration in *Infinito Gold Limited v. Republic of Costa Rica* Case No. ARB/14/5 before the International Centre for Settlement of Investment Disputes:

- Conferring *amicus curiae* status upon the Petitioner;
- Providing the Petitioner with access to the principal arbitration documents;
- Permitting the Petitioner to file appropriate documents with the Tribunal regarding the limitations of its jurisdiction in this proceeding;
- Permitting the Petitioner to file appropriate documents with the Tribunal responding to any other issues that might arise in the course of this proceeding; and
- Permitting the Petitioner to attend and participate in any oral hearings held in this proceeding, and respond to any questions of the Tribunal.

2. RULES OF PROCEDURE PURSUANT TO WHICH THIS PETITION IS FILED

This petition is being filed pursuant to Rule 37(2) of the amended Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of the International Centre for the Settlement of Investment Disputes. These Rules are now in force and therefore apply to the present case. Rule 37(2) establishes the authority

of this Tribunal to accept *amicus curiae* submissions without express authorization from the parties. Although no mandatory procedural requirement exists with respect to parties appearing as *amici*, the precedent established in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N 5. (February 02, 2007) ("Biwater Gauff") clearly provides that Rule 37(2) permits the intervention of a non-disputing party, even if the parties oppose that participation.

Under other precedents of international investment law tribunals that have ruled on *amicus curiae* petitions,¹ it would appear that an application for *amicus status* under Rule 37(2) requires the following information:

- a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationship, if any, to the parties in the dispute;
- b. The nature of the petitioner's interest in the case;
- c. A statement as to whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case; and
- d. The reasons why the tribunal should accept the petitioner's *amicus curiae* brief.

Accordingly, and on the basis of the *Biwater Gauff* decision regarding participation of *amici* in proceedings of ICSID Tribunals, this Petition sets out in Section 3 the elements referred to in paragraphs (a) and (c) above. Section 4 then addresses the issues presented by paragraph (b). The remaining sections of this brief address the legal and procedural reasons that support the present petition for *amicus curiae* status.

3. DESCRIPTION OF THE PETITIONER AND ITS DIRECT RELATION TO THE SUBJECT MATTER OF THIS CASE

APREFLOFAS is a private non-profit, non-governmental organization incorporated as an association in the Republic of Costa Rica. It was founded in 1985 with the purpose of promoting the conservation of Costa Rican tropical forests. It is a member of the Federación Costarricense para la Conservación del Ambiente (FECON), the most important network of Costa Rican ecologists, and the International Union for Conservation of Nature (IUCN).

APREFLOFAS' principal objectives are the prevention of deforestation and illegal plant-trafficking, illegal hunting of wild animals and contamination of national rivers. In addition, APREFLOFAS has designed a rescue program for the relocation of birds, monkeys, reptiles and other native species. These activities are carried out by its Volunteer Park Guards, which is the principal means through which APREFLOFAS furthers the objectives of the organization.

As discussed in a subsequent portion of this Petition, APREFLOFAS initiated and obtained a favorable decision in a judicial process directed against the concession granted to Claimant's subsidiary, Industrias Infinito S.A. That process was conducted before the national court system of Costa Rica and resulted in three different decisions issued by Costa Rican courts cancelling the concession due to the illegal manner in which it was obtained, confirming on appeal the illegal nature of the concession and sustaining the constitutionality of the recession of the concession.

In addition, based on judicial decisions initiated by APREFLOFAS, several former government officials –including the former Minister of Environment and former President of Costa Rica- are now under

¹ See *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae (19 Jan 2001). *Agua Argentinas et al. v. Argentina*, Order in response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005).

investigation by the General Prosecutor of Costa Rica. In fact, the former Minister of Environment has already been indicted by the General Prosecutor for alleged corruption regarding the granting of permits, including the concession to the Claimant for the mining project in Crucitas de Cutris, San Carlos, Costa Rica.

Additional information regarding APREFLOFAS can be found on its website at www.apreflofas.or.cr.

The Petitioner hereby attests and affirms that it has no relationship, direct or indirect, with any party or any third party to this dispute. The Petitioner 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. If the Tribunal accepts this petition, APREFLOFAS will not receive any such assistance in the future in the furtherance of its *amicus* submissions.

4. UNDERLYING BASIS OF THIS PETITION

The present arbitration involves a dispute relating to the use of open-pit metallic mining in the tropical rainforests of a developing country that has, for a considerable period of time, placed a strong priority on the preservation of natural resources. The damage caused to the different species and water sources in Cutris, San Carlos, Costa Rica, the site of industrial activity by the Claimant and its affiliates, is of major importance to the entire country.

After several years of legal disputes between the Petitioner and the Claimant, the independent judicial system of Costa Rica determined that the concession granted to Claimant was void and breached the law of the host country. This decision by the Costa Rican First Chamber (Sala Primera) confirmed a previous decision by the Administrative Contentions Tribunal (Tribunal Contencioso Administrativo) which had ruled that apparent corrupt acts had occurred in granting permits to the Claimant. As a result, several criminal proceedings have been initiated by the Costa Rican Prosecutor's Office (Fiscalía General de la República). One of these cases is directed against the former Minister of Environment (Ministro de Ambiente), Roberto Dobles Mora, and the former President of Costa Rica, Oscar Arias Sánchez. The General Prosecutor has in fact, indicted Dobles Mora and former President Arias's case is still under investigation pending the receipt of evidence from Canada.

Thus, the case before this tribunal involves strong public interest concerns regarding the protection of the environment in Costa Rica and the manner in which governmental processes were apparently corrupted to the detriment of the environment. APREFLOFAS possesses important information regarding both of these policy concerns as well as the procedural and substantive issues presented to the Tribunal. APREFLOFAS respectfully submits that the Tribunal would therefore benefit considerably from its participation as an *amicus* in this proceeding.

APREFLOFAS's Petition is, moreover, strongly supported by a number of international investment law precedents. In other similar cases, Tribunals have granted *amicus* status when petitioners have presented relevant public interest issues.

For example, in *Methanex Corporation v. United States of America* and *Biwatter Gauff*² tribunals permitted several non-disputing parties to participate in the proceeding based on facts that are directly similar to the facts presented in the present case. The Tribunal in *Methanex* stated as follows:

[T]here is an undoubtedly public interest in this arbitration. The substantive issues extend

² Paragraph 51 of *Biwatter Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 5 (02 February 2007)

*far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm.*³

In *Aguas Argentinas v. Argentina*, a dispute involving water distribution and sewage services, the Tribunal granted amicus status to petitioners for similar reasons:

*The factor that gives this case particular public interest is that the investment dispute centers around water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.*⁴

These very same factors apply to the present case. In the *Aguas Argentinas* case, the Tribunal pointed out that “*the present dispute involves a water distribution and sewage systems and the possible contamination of such resource by Claimant.*” In this case the dispute involves the contamination of the natural resources of Costa Rica and the alleged corruption and illegality of governmental processes to obtain concessions. Therefore, as in the *Aguas Argentinas* case, this “*arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population's ability to enjoy basic human rights. This aspect of the case means that the process should be transparent and permit citizens' participation.*”

In view of the important, if not overriding, policy concerns present in this case, it is most important that the Tribunal hear from the Petitioner since it possesses a direct connection and knowledge of those issues. Petitioner, in fact, possesses evidence that has not been provided by the Claimant and may not be provided by the Respondent. The combination of natural resources and human rights issues as well as the alleged existence of corruption bear directly on this arbitration. Relevant aspects of the Costa Rican civil society should therefore be afforded a full opportunity to participate in the processes of the Tribunal. Granting *amicus* status to APREFLOFAS would further that objective. In addition, the direct link between APREFLOFAS and the reason why the concession, which forms the underlying basis of this case, was annulled provides a further important reason for granting Petitioner's request for *amicus curiae* status.

5. JURISDICTION OF THE TRIBUNAL TO ACCEPT AMICUS BRIEFS

The amended ICSID Rules of Arbitration apply to these proceedings, as the *amici* in *Bewater Gauff* pointed out, “[S]ince 10 April 2006, the amended ICSID Arbitration Rules explicitly give tribunals the power to permit submissions of non-disputing parties. The rule makes explicit not only that the Tribunal has the jurisdiction to accept *amicus curiae* submissions, but also that it may do so without the approval of one

³ Paragraph 49 of *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae (19 Jan 2001).

⁴ Paragraph 19 of *Aguas Argentinas et al. v. Argentina*, Order in response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005).

or both of the arbitrating parties.”⁵

Rule 37(2) of the new ICSID Arbitration Rules provides, *inter alia*:

Submissions of Non-disputing parties to the Tribunal

*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 “nondisputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute.*⁶

Accordingly, in *Biwater Gauff*, the Tribunal accepted the participation of *amici* on the basis of a two-stage process, and rejected the Claimant’s opposition to any participation by several *amici* in the arbitration process. The present Petition by APREFLOFAS presents even stronger reasons for granting the Petition for *amicus curiae* status. In contrast to APREFLOFAS, the organizations seeking *amicus curiae* status in *Biwater Gauff* were not directly related to the case. In this case, APREFLOFAS has a direct relation to the case since it litigated the impropriety of the Claimant’s concession. That concession is at the heart of this proceeding. If the *Biwater Gauff* Tribunal granted *amicus* status to organizations with an indirect interest in the issues presented to the Tribunal, surely *amicus* status should be granted here, where APREFLOFAS has a direct interest and connection to the facts and issues of this proceeding.

6. THE TEST TO APPLY IN THIS CASE

Rule 37(2) specifies a number of factors that Tribunals should considered in determining whether to grant *amicus* status in a particular case. Although APREFLOFAS has discussed a number of these factors in previous portions of this Petition, we will discuss each specific factor separately in order to provide the Tribunal with a full discussion of the reasons why this Petition should be granted. Rule 37(2) states as follows:

Rule 37(2): 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 “nondisputing 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.*⁷

This factor is certainly satisfied by the particular knowledge and point of view that APREFLOFAS would bring to the attention of the Tribunal.

For example, the Claimant has failed to provide a full disclosure of the facts related to this case. There is no discussion in the Claimant’s submissions to the Tribunal of the existing legal dispute between APREFLOFAS, the Claimant and the government of Costa Rica. It is this dispute that led the Costa Rican courts to find that the Claimant’s concession rights –which form the underlying basis of this case- were

⁵ Page 10, of Petition for Amicus Curiae Status by The Lawyers’ Environmental Action Team (LEAT) The Legal and Human Rights Centre (LHRC); The Tanzania Gender Networking Programme (TGNP); The Center for International Environmental Law (CIEL) and The International Institute for Sustainable Development (IISD) in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

⁶ ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

⁷ *Ibid.*

awarded illegally. Only the Petitioner is prepared to present the Tribunal with an in depth analysis of the different steps taken before the Costa Rican legal system. Additionally, APREFLOFAS 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.

In this regard, APREFLOFAS will provide the Tribunal with background information as well as a full explanation of the facts and law applied by the courts of Costa Rica that led to the rescission of the Claimant's concession and the rejection of its arguments that the concession was lawfully granted. The Petitioner also intends to present the Tribunal with important information regarding the ongoing criminal process with respect to alleged corruption and malfeasance in office that led to granting the Claimant's concession in the first place.

These criminal proceedings have important legal consequences in the present case before the Tribunal. The pending Costa Rican criminal processes will determine whether there was corruption and violation of the Costa Rican Penal Code in granting Claimant's concession. These criminal proceedings and the facts upon which they are based have a significant bearing on the jurisdiction of the Tribunal. As indicated in the award in *Metal-Tech Ltd v the Republic of Uzbekistan* "*the tribunal declined jurisdiction after finding that corruption had been established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan.*"⁸ Similarly, in the present proceeding, the rulings and analysis of the Costa Rican courts and the Prosecutor's Office of alleged corruption and violation of criminal laws directly affect the Tribunal's jurisdiction. APREFLOFAS is fully prepared to bring these facts and issues to the attention of the Tribunal.

Similarly, since the Claimant has not provided the Tribunal with information with respect to the judicial decisions involving the termination of its concession rights or the limitations of this Tribunal's jurisdiction under the Bilateral Investment Treaty (BIT) between the Republic of Costa Rica and the Government of Canada⁹ or the remedies that were available to the Claimant in different judicial proceedings in Costa Rica,¹⁰ it will be very important for the Tribunal to permit the Petitioner to provide that significant information. As we have pointed out previously, APREFLOFAS acted as plaintiff in several of those proceedings and based

⁸ Paragraph 372, of *Metal-Tech Ltd. v the Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013.

⁹ For example, Article XII(3)(d) of the CR-Canada BIT states that an international investment law tribunal will have jurisdiction over a dispute involving the Costa Rican government only if "*no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement*". Since in this case the Claimant appealed judgments against it and the Costa Rican courts sustained those judgments, this Tribunal has no jurisdiction to consider the present Complaint.

¹⁰ In this proceeding it will be particularly important for the Tribunal to consider the "Fork in the Road" clause specified in Article XII(3)(b) of the BIT. This clause provides that in order for an arbitral tribunal to exercise jurisdiction over the subject matter of a dispute between an investor and a State, the investor must have "*waived 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.*" However, the Claimant in this case affirmatively sought various remedies from the Costa Rican courts. As a result, it is now precluded from presenting the present dispute to any international tribunal. APREFLOFAS will demonstrate to the Tribunal that the Claimant presented an Appeal on Points of Law before the Costa Rican First Civil Chamber against a decision of the Administrative Contentions Tribunal that had cancelled its concession rights. The remedy that the Claimant sought was an extraordinary remedy that Claimant chose to present even though it could have instead presented its case directly to an international tribunal. In addition, APREFLOFAS will demonstrate that the Claimant further chose to file an action in the Constitutional Chamber of Costa Rica contending that prior decisions of the First Chamber and the Administrative Contentions Tribunal annulling its concession rights were unconstitutional. Article XII(3)(b) of the BIT is therefore directly applicable here and presents serious jurisdictional issues for the Tribunal. It 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.

on the information that APREFLOFAS will provide to it, the Tribunal might well conclude that it lacks jurisdiction in this case in accordance with the BIT.

(b) the non-disputing party submission would address a matter within the scope of the dispute;

APREFLOFAS respectfully appears before this tribunal and understands the need for limiting its participation to matters within the scope of the dispute before the Tribunal. Petitioner will provide useful factual and legal information regarding the subject matter of the case. As a former disputing party in the Costa Rica judicial processes, the Petitioner 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 Petitioner, 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 concession rights of the Claimant.
- The on-going corruption and criminal law proceedings against former Costa Rican public servants involved with the Claimant's concession.

These are facts and arguments that are critical to the Tribunal making an informed decision in this proceeding based on all the circumstances that led to this dispute.

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

As we pointed out in prior portions of this Petition, APREFLOFAS certainly has a significant interest in this proceeding. APREFLOFAS 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 for operating the gold mine in Cutris, San Carlos.

It was on the basis of the Petitioner's legal claims before the Costa Rican judicial authorities, that the concession was determined to be illegally obtained by the Claimant. In addition, as discussed above several former public servants have been indicted or are currently under investigation by the General Prosecutor of Costa Rica based on the illegality of the concession. Petitioner respectfully submits that its participation in this proceeding will provide the Tribunal with extensive information with respect to the subject matter of this case and the legal and factual issues that will be placed before the Tribunal for adjudication.

The Petitioner's strong interest in this proceeding is also based on the transparency requirements in the rules that govern this proceeding. Transparency is of major importance in the present case and is underscored by the Bilateral Investment Treaty between the Republic of Costa Rica and the Government of Canada. The Treaty states in ARTICLE XIV, Section 1 that:

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.¹¹

¹¹ ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

Moreover, in other cases such as *Methanex*¹², *Aguas Argentinas and Biwater Gauff*¹³, Tribunals have commented on the significant interest of third parties in participating in Tribunal proceedings, even when they had less direct involvement with the subject matter of those cases than APREFLOFAS' interest in the present case. For example, the Tribunal in *Aguas Argentinas* pointed out that:

*The acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how the process functions Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.*¹⁴

The ICSID policy objectives to which the *Aguas Argentinas* Tribunal alluded would certainly be furthered by the participation of APREFLOFAS in this proceeding. Transparency of the Tribunal's proceedings is critical to the success of ICSID's processes and in this case. It would be most important for the Tribunal to permit the participation as an *amicus* of an organization that led litigation that resulted in the rescission of the Claimant's concession and the judgment that it was obtained illegally.

7. ACCESS TO THE KEY ARBITRAL DOCUMENTS

Since the present arbitration is still in its initial stages, APREFLOFAS's participation will not disrupt in any way the appropriate development of the case. Consequently, APREFLOFAS respectfully asks 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.

8. PARTICIPATION AT ANY ORAL HEARINGS

Finally, the Petitioner 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. In this regard, we respectfully point out to the Tribunal that several investor-state cases, including *Biwater*, *Aguas Argentinas* and *Methanex* have now been opened to the public without any disruption whatever to the Tribunal's processes.

¹² *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, 15 January 2001.

¹³ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N. 5 (02 February 2007)

¹⁴ Paragraph 11, of *Aguas Argentinas et al. v. Argentina*, Order in response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005).

9. SUMMARY OF PETITION AND ORDER SOUGHT

Accordingly, APREFLOFAS, the Petitioner, respectfully requests that the Tribunal in the present arbitration in *Infinito Gold Limited v. Republic of Costa Rica, Case No. ARB/14/*, at the International Centre for Settlement of Investment Disputes issue an order that:

- Confers *amicus curiae* status upon the Petitioner in the present arbitration;
- Provides the Petitioner with access to the principal arbitration documents;
- Permits the Petitioner to file appropriate documents with the Tribunal regarding the limitations of its jurisdiction in this proceeding;
- Permits the Petitioner to file appropriate documents with the Tribunal responding to any other issues that may arise in the course of this proceeding; and
- Permits the Petitioner to attend and participate in any oral hearing held in this proceeding, and reply to any question of the Tribunal.

In order to further the orderly pace of this arbitration, and consistent with Rule 37(2) of the new Arbitration Rules, Petitioner further requests access to the documents referred to above as soon as the arbitral tribunal is constituted.

Respectfully submitted on behalf of
Asociación Preservacionista de Flora y
Fauna Silvestre (APREFLOFAS)

Washington D.C., 15 September 2014

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EXHIBIT P-1