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Ms. Jean Kalicki
President of the Tribunal

Mr. John M. Townsend
Member of the Tribunal

Prof. Zachary Douglas QC
Member of the Tribunal

September 25, 2020

**Re: Daniel W. Kappes and Kappes, Cassidy & Associates v.
Republic of Guatemala (ICSID Case No. ARB/18/43)**

Dear Members of the Tribunal:

Pursuant to the procedural calendar, the Republic of Guatemala (“Guatemala”) hereby respectfully informs the Tribunal of its position regarding the request filed by the “Peaceful Movement of Environmental Justice La Puya” (“La Puya”) on July 29, 2020 (the “Application”) to participate as *amicus curiae* in the current ICSID proceedings.

Guatemala again appreciates the Tribunal’s invitation to present these observations and reiterates the position expressed in its letter dated October 31, 2019, wherein it indicated that it does not oppose La Puya’s participation as *amicus curiae* in the merits of these proceedings, in accordance with ICSID Arbitration Rule 37(2), CAFTA-DR Article 10.20.3 and section 18.2 of Procedural Order No. 1.

(i) Standard applicable to La Puya’s Application

Submissions by third persons, non-disputing parties or *amicus curiae* in these proceedings are regulated by section 18.2 of Procedural Order No. 1, in the following terms:

18.2. Pursuant to DR-CAFTA Article 10.20.3, the Tribunal has the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party. In deciding whether to accept a request to submit an *amicus curiae* submission, the Tribunal shall invite and consider the observations of the parties as to the appropriateness and relevance of the requested submission, within reasonable time limits to be established based on the circumstances. In the event the Tribunal decides to receive *amicus curiae* submissions, it shall establish an appropriate page limit for such

submissions, and shall provide the parties with an opportunity to comment on such submissions.¹

CAFTA-DR Article 10.20.3, referenced by the Tribunal in the section above, specifically provides that:

3. The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.

Additionally, ICSID Arbitration Rule 37(2) sets forth the criteria of appropriateness and relevance referred to in section 18.2 of Procedural Order No. 1, as follows:

(...) 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.

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.

(ii) The criteria set forth in ICSID Arbitration Rule 37(2)

(1) The first criterion that the Tribunal should consider under Arbitration Rule 37(2)(a) is whether the non-disputing party offers a particular perspective or knowledge that would assist in determining issues of facts or law related to the proceedings. This criterion was applied by tribunals

¹ Procedural Order No. 1 (September 10, 2019).

in the *Apotex v. United States*,² and *Bear Creek v. Peru* cases,³ and was interpreted broadly to allow a tribunal to access a wide variety of points of view relevant to the case, which ultimately enhance the legitimacy of the proceedings.

Applying this interpretation, the tribunal in *Infinito Gold v. Costa Rica*⁴ allowed the participation of a non-disputing party, finding that its involvement in the underlying facts of the dispute (in that case, it was involved in the judicial proceedings that resulted in the investor's claims) fulfilled the requirements provided in ICSID Arbitration Rule 37(2)(a). Similarly, in *Bear Creek v. Peru*, the tribunal allowed the participation of a non-disputing party and a Peruvian attorney due to their combined knowledge of the relationship between an indigenous community and the investor (who was developing a mining project), in addition to their legal expertise on business and human rights issues.

(2) The second criterion to be considered by the Tribunal under Arbitration Rule 37(2)(b) is whether the non-disputing party's submission addresses matters within the scope of the dispute. The aim of this second criterion, as applied by ICSID tribunals, is to avoid the unnatural broadening of the scope of the dispute, *i.e.*, to ensure that the *friend of the court's* participation is restricted to the dispute.⁵

² *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 (October 11, 2011), ¶ 22 (“In matters of public interest, the Tribunal considers that the requirement of a different expertise, experience or perspective from that of the Disputing Parties ought to be construed broadly, so as to allow the Tribunal access to the widest possible range of views. By ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened”) (RL-0113).

³ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 5 (July 21, 2016), ¶40 (“Without prejudice as to whether the submissions of the Applicants will finally be considered relevant for the Tribunal in drawing its conclusions in this case, it appears to the Tribunal that the combination of Dr. López’s legal expertise and DHUMA’s local knowledge of the facts may add a new perspective that differs from that of the Parties. This is so, irrespective of whether DHUMA speaks for the Aymara communities, or whether its interests may be synonymous with the communities’ interests.”) (RL-0114). *See also* *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (February 18, 2019) ¶ 31 (“[it is] require[d] a petitioner to demonstrate a “perspective, knowledge or insight” that differs from that which has or will be provided by the international counsel and experts who have been retained by both parties.”) (RL-0115).

⁴ *Infinito Gold v. Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2 (June 1, 2016), ¶¶ 31-34, 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.”) (RL-0116).

⁵ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Mr. Barry Appleton as Non-Disputing Party (March 4, 2013), ¶ 35 (“This criterion is intended to avoid the unnatural broadening of the scope of the dispute by non-disputing parties...”) (RL-0117).

(3) The third criterion to be considered by the Tribunal under Arbitration Rule 37(2)(c) is whether the non-disputing party demonstrates a significant interest in the proceeding.⁶ The tribunal in *Apotex v. United States*, in elaborating on this factor, explained that the interest must be more than a general interest in the proceedings. It must be shown rather that the outcome of the arbitration can have a direct or indirect impact on the rights or interests that the applicant represents and defends.⁷

Consequently, Guatemala does not object to the participation of La Puya as *amicus curiae* in these arbitral proceedings if the above criteria, as identified by the aforementioned arbitration tribunals and ultimately reflected in ICSID Arbitration Rule 37 (2) (a), are met.

(iii) Conditions for the *amicus curiae* participation

Finally, the Tribunal should also consider the criteria provided in the last section of ICSID Arbitration Rule 37(2), which provides that the application should not disrupt the proceedings, nor unduly burden or unfairly prejudice either party. The foregoing has been previously envisaged by the Tribunal in section 18.2 of Procedural Order No. 1, according to which:

In the event the Tribunal decides to receive *amicus curiae* submissions, it shall establish an appropriate page limit for such submissions, and shall provide the parties with an opportunity to comment on such submissions⁸.

As a result, Guatemala understands that La Puya's participation will be limited to a written submission, as the Parties and the Tribunal previously agreed, with both parties having an opportunity to comment in their respective Reply and Rejoinder Memorials. Likewise, it is Guatemala's understanding that La Puya's participation will not include participation at the Hearing.

⁶ See *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 (October 11, 2011), ¶ 28 (“The Applicant has not defined any significant interest in this arbitration. It has not explained how the rights or principles it may represent or defend might be directly or indirectly affected by the specific jurisdictional issue on which it intends to make submissions, or indeed by the outcome of the overall proceedings.”) (RL-0113); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 6 (July 21, 2016), ¶40, ¶19 (“[the Treaty] require[s] that the interests of the Applicant be tied to the specific arbitration at issue – not the general subject matter or the legal issues involved.”) (RL-0118).

⁷ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Mr. Barry Appleton as Non-Disputing Party (March 4, 2013), ¶ 38 (“To meet this requirement, the applicant needs to show that he has more than a “general” interest in the proceeding. For example, the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends.”) (RL-0117).

⁸ Procedural Order No. 1 (September 10, 2019).

(iv) Conclusion

For the reasons set out above, Guatemala does not object to La Puya's participation as *amicus curiae* in this arbitration as long as the Tribunal, after consideration of the factors set forth above, finds it to be relevant and appropriate. In the same vein, said participation must be permitted in a way that does not affect the Parties' right to be heard, nor alter or make the proceedings more expensive, and it must comply with the conditions already outlined by the Tribunal in section 18.2 of Procedural Order No. 1 as well as the criteria Guatemala outlines herein.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Ignacio Torterola'.

Ignacio Torterola
GST LLP

Counsel for Guatemala

cc:

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Anna Toubiana, ICSID
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