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VIA E-MAIL

Ms. Jean Kalicki
Mr. John M. Townsend
Prof. Zachary Douglas, QC
c/o Ms. Anna Toubiana, Secretary of the Tribunal
International Centre for Settlement of Investment Disputes
1818 H Street, N.W.
Washington, DC 20433

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

Dear Members of the Tribunal:

In accordance with the Tribunal's direction,[1] Claimants write in response to the renewed petition for *amicus curiae* participation presented by the purported legal representatives of La Puya ("Applicant") on 29 June 2020 ("Renewed Application").[2] Claimants oppose Applicant's participation in the proceedings because the Renewed Application omits fundamental and critical information bearing on Applicant's identity and independence, and Applicant does not otherwise meet the criteria for making an *amicus curiae* submission.

I. The Renewed Application Omits Fundamental Identifying Information

As a preliminary matter, the contents of the Renewed Application and the circumstances of this case raise legitimate doubts as to Applicant's identity and independence that warrant rejecting the Renewed Application.

In accordance with Article 10.20(3) of the DR-CAFTA, the Tribunal has "the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party,"[3] which discretion is also reflected in Rule 37(2) of the ICSID Arbitration Rules. While the DR-CAFTA and the ICSID Arbitration Rules do not set out requirements for applications of non-disputing parties, without question the Parties to the dispute are entitled to know that an *amicus* applicant represents who it purports to represent and whether the applicant has ties to any Party to the dispute or to any entity or government that may have an interest in the dispute. This critical information is easily obtained by requiring the applicant to make these basic disclosures.

The Free Trade Commission of the NAFTA (on which the DR-CAFTA was modelled)[4] thus recommends that *amicus* applications, among others, "describe the applicant, including, where relevant, its membership

[1] Letter from ICSID to the Parties dated 27 July 2020 (attaching Procedural Order No. 1 – Revised Annex B dated 27 July 2020).

[2] Letter from La Puya to ICSID dated 29 June 2020.

[3] DR-CAFTA, Art. 10.20(3) (CL-0001-ENG/SPA).

[4] U.S. Trade Representative, The Dominican Republic-Central America-United States Free Trade Agreement: Summary of the Agreement, at 12, available at https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/cafta/CAFTA-

and legal status . . . , its general objectives, the nature of its activities, and any parent organization;" "disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;" and "identify any government, person or organization that has provided any financial or other assistance in preparing the submission."[5]

These disclosures are supported by investment arbitration practice (both within and outside of the NAFTA context), with many *amicus curiae* applications including detailed information about the applicant's organization, its objectives, the nature of its activities and, importantly, its affiliations and whether it has received or expects to receive financial support in connection with its submission.[6]

The Renewed Application contains none of this critical information. It has been submitted by a partner in SheppardMullin's Washington, D.C. office, purportedly on behalf of "La Puya." While "La Puya" is a name that has been used by the local press to refer to an area around Claimants' Project site where protests have occurred,[7] and the Renewed Application describes "La Puya" as "an environmental justice movement,"[8] the Renewed Application does not provide *any* information about the legal status of "La Puya," its membership, general objectives, the nature of its activities, or its management. In fact, according to the Renewed Application, "La Puya" purportedly "compris[es] community members from San José del Golfo and San Pedro Ayampuc," but these members remain unnamed and their number is unknown. Moreover, although counsel who submitted the Application purports to represent "La Puya" on behalf of those community members, the Renewed Application was submitted only in the English language rather than in Spanish, raising further questions as to who "La Puya" actually represents.

Critically, and contrary to the majority of applicants in the publicly-available decisions on *amicus curiae* applications, Applicant further failed to indicate whether it had received any assistance, financial or otherwise, to prepare its Renewed Application.[9] There is no indication that "La Puya" is composed of

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DR%20FTA%20Chapter%20Summaries.pdf ("[The DR-CAFTA] provisions reflect traditional standards incorporated in earlier U.S. investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties").

[5] Statement of the NAFTA Free Trade Commission on non-disputing party participation dated 7 Oct. 2003 ¶ B.2(c)-(e), available at https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file45_3600.pdf.

[6] *See, e.g., Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Procedural Order No. 8 dated 18 Apr. 2011 ¶ 7 (indicating that the applicants (two NGOs) provided detailed information about their goals, activities and affiliations); *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 dated 26 June 2012 ¶¶ 17-18 (indicating that the applicants (an NGO and four indigenous communities) provided information about their activities, goals, affiliations and membership); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party dated 4 Mar. 2013 ¶¶ 8-9 (indicating that the applicant (a commercial organization) provided detailed information about its operations, membership, goals, and affiliations); *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 6 dated 21 July 2016 ¶¶ 2-3 (indicating that the applicant (an academic institution) provided detailed information about its goals, activities and affiliations); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (Decision on Non-Disputing Parties' Application) dated 18 Feb. 2019 ¶¶ 9-16 (indicating that each of the applicants (six community organizations and NGOs) provided information about their goals, membership and activities).

[7] Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre* dated 13 Mar. 2016 (C-0009-SPA/ENG) ("On protest day 12, residents of La Puya, San José del Golfo, and San Pedro Ayampuc will continue to fight for the Ministry of Energy and Mines (MEM) to suspend operations in the mining project in that locality"); Jerson Ramos and Jose Rosales, "Protesters of La Puya burn doll of the Minister of Energy," *La Prensa Libre* dated 26 Mar. 2016 (C-0010-SPA/ENG) ("The group of residents of La Puya who oppose a mining project camped in the Ministry of Energy and Mines").

[8] Letter from La Puya to ICSID dated 29 June 2020, at 1.

[9] *See, e.g., Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Applicant Mr. Barry Appleton as a Non-Disputing Party dated 4 Mar. 2013 ¶ 9 ("The Applicant further confirms that he has no financial relationship with either Disputing Party and has received no financial contribution from anyone in the making of this submission"); *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 6 dated 21 July 2016 ¶ 3 ("The Applicant states that it has no affiliation with either of the Parties and that it has received no

members who pay dues to the organization. And, if, for example, one or more international non-governmental organizations are funding Applicant and using "La Puya" to enhance their ability to obtain standing,[10] that information is critical to determining the identity and independence of Applicant, without which the Renewed Application cannot be granted.

Applicant equally does not elaborate on the source of its purported expertise in various fields it seeks to cover in its *amicus curiae* submission, ranging from human rights law, to corruption in Guatemala, to application of international investment treaties, to technical expertise on health standards for arsenic levels.[11] Indeed, it appears that Applicant would seek inappropriately to rely on or introduce external expert reports on some of these topics,[12] as commented on further below. This also reinforces the questions about funding to this alleged organization.

The circumstances of this case thus raise legitimate doubts as to Applicant's identity, independence, and assistance received in the preparation of its Renewed Application, all of which Applicant failed to identify, corroborate, or disclose, as applicable. *Amicus* applications have been denied in similar circumstances. For example, having found that the *amicus* petitioner's application failed to "clarify many particulars regarding his identity and background," the *Lion Mexico v. Mexico* tribunal appropriately denied the application.[13] Facing circumstances giving rise to legitimate doubts as to the independence and neutrality of the applicants, the tribunal in *Pezold v. Zimbabwe* similarly held that "apparent lack of independence or neutrality of the Petitioners is a sufficient ground to deny the [*amicus*] Application," even where the application could otherwise satisfy the requirements under the ICSID Arbitration Rules (which it did not in that case).[14] The same is true here.

The Tribunal accordingly should deny the Renewed Application on account of Applicant's failure to submit full information about it and its affiliations.

II. Applicant Does not Meet the Criteria for Admitting its *Amicus Curiae* Submission

As shown below, apart from the critical deficiencies noted above, the Renewed Application does not meet the criteria for acceptance as an *amicus*. In determining whether to accept an *amicus* submission, the Tribunal ought to 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*;

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financial or other assistance from any government, person, or organization for the purpose of preparing the Application or the submission attached thereto"); *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4ϭ Procedural Order No. 4 dated 24 June 2019 ¶ 14 ("The Applicants affirm not to be affiliated, directly or indirectly, with any disputing party. They also affirm not having received direct financial or other assistance from any third party in making the application").

[10] *See, e.g.*, International Organizations Publish Statement in Solidarity with La Puya dated 1 Feb. 2019, available at https://nisgua.org/statement-solidarity-la-puya/ (listing 11 US and Central American international non-governmental organizations, "supporting" Applicant).

[11] Letter from La Puya to ICSID dated 29 June 2020, at 2.

[12] *Id.*

[13] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Letter Decision on *Amicus Curiae* Application dated 23 May 2017, at 2.

[14] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 dated 26 June 2012 ¶ 56.

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

(c) the non-disputing party has a *significant interest in the proceeding*.[15]

The Tribunal also 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."[16]

As explained below, Applicant does not meet any of these criteria to justify its participation as *amicus curiae* in this proceeding.

A. Assistance to the Tribunal

In its Renewed Application, Applicant claims that it can assist the Tribunal with a wide range of issues, including (i) determining legal and factual issues that directly bear on the claimed violations of the DR-CAFTA; (ii) understanding human rights law obligations of Guatemala; (iii) providing information regarding bribery and corruption in Guatemala; (iv) providing expert evidence to show alleged flaws in Claimants' environmental impact studies; (v) understanding Guatemalan court proceedings; and (vi) describing purported "inconveniences" caused to the community members by "the political forces" and the El Tambor mining project.[17] In this regard, Applicant fails to show that its submission satisfies the requirements of ICSID Arbitration Rule 37(2)(a).

Applicant fails to explain how it, as a purported "environmental justice movement comprising community members from San José del Golfo and San Pedro Ayampuc, Guatemala," can assist the Tribunal with understanding the wide range of complex legal and factual issues as put forward in the Renewed Application. The Renewed Application suffers the same defect as that in *Eco Oro v. Colombia*, where the tribunal denied the *amicus* application where the applicant failed to explain the nature of its perspective, knowledge, and insight other than merely asserting that it would be different to that of the disputing parties.[18]

First, while Applicant states that, without its "unique perspective, knowledge, and insight" on various legal or factual issues, the tribunal will be left with an incomplete picture of whether Guatemala breached its obligations under the DR-CAFTA,[19] it fails to explain the sources of its "unique perspective, knowledge, and insight." In any event—and even assuming *arguendo* that Applicant had a "unique perspective" on the issue of Guatemala's liability under the Treaty (which it does not and certainly has not shown)—the Tribunal does not need Applicant's assistance on "legal or factual issues" that bear on the issue of violations of the DR-CAFTA,[20] because both Parties' legal representatives have extensive experience in investment treaty arbitration.

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[15] ICSID Arbitration Rules, Rule 37(2) (emphasis added); *see also* Letter from Claimants to the Tribunal dated 31 Oct. 2019.

[16] ICSID Arbitration Rules, Rule 37(2) (emphasis added).

[17] Letter from La Puya to ICSID dated 29 June 2020.

[18] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (Decision on Non-Disputing Parties' Application) dated 18 Feb. 2019 ¶¶ 32-33 ("The Tribunal notes that the Petitioners have not sought to explain in their Application what is the nature of their 'perspective, knowledge and insight' other than merely to assert that it would be different to that of the disputing parties").

[19] Letter from La Puya to ICSID dated 29 June 2020, at 3.

[20] *Id*. ("As described in more detail above, without La Puya's involvement, the Tribunal will be left with an incomplete picture regarding the circumstances surrounding the El Tambor mining project, which will inhibit the Tribunal from adequately concluding

In *Apotex v. United States* and *Resolute Forest Prods. v. Canada*, the tribunals determined that it was unlikely that the applicants could provide the tribunal with any particular perspective or insight different from that of the disputing parties where both parties were represented by experienced legal counsel.[21] This view was also endorsed by the tribunal in *Bear Creek v. Canada*, which stated that it did not require any assistance with determination of factual or legal issues related to the arbitration where "both Parties [were] represented by distinguished international law firms with extensive experience in international investment arbitration" and "filed lengthy and detailed submissions and evidence regarding every aspect of the case."[22] It would be perverse for Applicant to avoid this outcome by having filed its Renewed Application before Respondent filed its Counter-Memorial; it can be expected that Respondent, like Claimants, will file "detailed submissions and evidence regarding every aspect of the case."[23] In this regard, Applicant's assertions that "[t]he types of evidence La Puya will present … will not be raised by Claimant or Respondent," and that "[w]ithout La Puya's involvement, there will be no party to present evidence regarding how the government fell short of its requirements to consult with the local communities under the ILO Convention," are similarly unavailing, precisely because they are based on Applicant's conjecture as to what Respondent will or will not argue in its upcoming Counter-Memorial. Either way, Respondent is capable of presenting its own defense as to both legal and factual issues, and Applicant cannot add any value thereon.

Second, Applicant similarly fails to indicate the sources of its expertise in human rights law violations or provide any evidence showing that it has any unique expertise or knowledge about corruption in general or corruption in Guatemala, in particular. Even if it did have such expertise—which, again, it does not have and has not shown— generalized, non-particularized allegations of corruption in the host State are irrelevant and cannot assist the Tribunal in determining the issues in dispute in this arbitration.[24] Moreover, as with violations of the DR-CAFTA, issues of human rights law and corruption are well within the areas of expertise of well-versed international counsel, and are often brought up by parties to international

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whether the Guatemalan courts properly halted Claimants' mining activities, or whether the Government did, in fact, breach its obligations under CAFTA-DR Article 10.3 (National Treatment), Article 10.4 (Most Favored Nation Treatment), Article 10.5 (Minimum Standard of Treatment), and Article 10.7 (Expropriation and Compensation)").

[21] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Applicant Mr. Barry Appleton as a Non-Disputing Party dated 4 Mar. 2013 ¶¶ 32-34 ("While the Tribunal has no doubt that Mr. Appleton has acquired the experience and expertise he states in the understanding of the meaning of investment treaty obligations …. the Tribunal does not consider that this knowledge and insight by one individual practitioner, however extensive, equals (still less surpasses) the very considerable experience and insights possessed by the Disputing Parties' several Counsel in this particular arbitration"); *Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 6 dated 29 June 2017 ¶ 4.4 ("On legal issues, the Tribunal does not consider that the Applicants, experienced and knowledgeable as they no doubt are as individual practitioners and scholars, bring a 'perspective, particular knowledge or insight different from that of the disputing parties' as specified in Section B(6)(a) of the FTC Statement. This is particularly so in circumstances where both Disputing Parties are represented by experienced counsel who have extensively briefed the issues on the interpretation of NAFTA").

[22] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 6 dated 21 July 2016 ¶¶ 36-38.

[23] *Id.*, ¶ 37.

[24] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award dated 2 July 2013 ¶ 8.1.10 ("It is not enough to make generalised allegations about the insufficiency of a state's legal system. Against the backdrop of relevant Turkmen laws introduced into the record by Respondent, such material as has been relied upon by Claimant cannot constitute sufficient evidence of unavailability or ineffectiveness"); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award dated 23 Apr. 2012 ¶¶ 302-303 ("The Claimants suggested bribery as a possible explanation for the alleged conducts of relevant actors, and offered general reports about corruption in Slovak courts …. [T]hey cannot substitute for evidence of a treaty breach in a specific instance. . . . . Mere insinuations cannot meet the burden of proof ….").

investment arbitrations.[25] Applicant suggests that "the Guatemalan government is unlikely to raise" corruption issues on its own, and "may well seek to deny or diminish the existence of any corruption."[26] This statement is demonstrably incorrect, as states very often cite to the corruption of their own agents as a defense in investment arbitrations, if such defense is available (which, of course, it is not in this case). It does not take an NGO for states to come up with such a defense; indeed, states are even better placed than NGOs to investigate and assert such matters.

Third, without indicating that it has any special knowledge or expertise in this field, Applicant wishes to demonstrate to the Tribunal the purported flaws in Claimants' environmental impact studies (which were approved nine years ago),[27] including the assessment of arsenic levels and impact on local water sources.[28] In *Apotex v. United States*, the tribunal refused to accept an *amicus curiae* submission from a commercial company purporting to submit expert evidence on U.S. food and drug laws, where the applicant did not have "any special knowledge or relevant expertise or experience with the food and drug laws of the United States, or any other aspect of the United States legal and judicial system."[29] The very fact that Applicant claims to have consulted with experts on this issue[30] indicates that Applicant itself has no expertise in the field and cannot assist the Tribunal with the understanding of the content of the environmental studies (even if such issue was relevant to the dispute between the Parties, which it is not). Applicant further fails to explain why the State—which is in charge of assessing environmental impact studies—would be any less able to comment on these studies, or propose experts to that effect, to the extent that such comments were remotely relevant (which they are not).

Fourth, Applicant has no "unique perspective" on the Guatemalan court proceedings relevant to Claimants' claims and, indeed, did not participate in any of those court proceedings, so its participation ostensibly to assist the Tribunal in understanding "the context underlying the Guatemalan trial court's decision"[31] is not needed. The Guatemalan court proceedings are extensively discussed by Claimants in their Memorial and expert report on Guatemalan law, and Respondent can be expected to address these court proceedings in response to Claimants' submissions. Any purported "context" that is not contained within the Courts' decisions or the materials before the Courts—all of which is before this Tribunal—is irrelevant to any issue in dispute. Furthermore, Applicant's suggestion that it will offer a unique perspective that will assist the Tribunal because "the Government opposed La Puya's interests in domestic proceedings, (*see* Exhibit A)"[32] is disingenuous.

The document, annexed to the Renewed Application as Exhibit A[33] is a decision of the Municipal Council of San Pedro Ayampuc dated July 2015, which concerns a challenge to the issuance of Exmingua's construction permit. That permit was issued by the Municipal Council of San Pedro Ayampuc in 2011, and construction of the facilities (including the processing plant) was completed before this challenge was even

[25] *See, e.g., Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 Oct. 2013; *World Duty Free Co. v. Republic of Kenya*. ICSID Case No. ARB/00/7, Award dated 4 Oct. 2006.

[26] Letter from La Puya to ICSID dated 29 June 2020, at 2.

[27] Resolution No. 1010-2011 of the Ministry of Environment and Natural Resources approving the Environmental Impact Assessment for Progreso VII dated 23 May 2011 (C-0212-SPA/ENG).

[28] *See* Letter from La Puya to ICSID dated 29 June 2020, at 2.

[29] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party dated 4 Mar. 2013 ¶¶ 22-26.

[30] Letter from La Puya to ICSID dated 29 June 2020, at 2.

[31] *Id.*

[32] *Id.*

[33] *Id.*, Exhibit A.

brought.[34] The belated challenge to the construction permit was meritless and is unrelated to issues in dispute in this arbitration. Notably, the Municipal Council of San Pedro Ayampuc's decision mentions that, although the challenge to Exmingua's construction permit was brought in the name of the "Peaceful Resistance group of La Puya,"[35] the challenge failed to name any particular applicants.[36] While Applicant ostensibly includes this decision as evidence of its "participation" in proceedings involving Exmingua's mining project, it is not even clear whether "La Puya" and the "Peaceful Resistance group of La Puya" are the same entity, and the failure of the applicant in the Municipal Council proceedings as well as Applicant's failure here to submit any information about itself further supports Claimants' legitimate doubts as to Applicant's identity, legal status and membership.

Fifth, Applicant gives no indication as to what information it can provide regarding "political forces affecting the local communities," how any such information or alleged expertise could assist the Tribunal, or why Respondent will be unable to adequately address such "political forces," to the extent at all relevant to this dispute.

Finally, because, as shown below, the issues on which Applicant seeks to make submissions are clearly outside of the scope of the dispute, Applicant's submission cannot assist the Tribunal with the determination of the present dispute.

B. Scope of the dispute

Applicant's assertion that the "types of evidence" that it will present are "within the scope of this dispute"[37] is inaccurate. Instead of providing knowledge or insight about "a matter within the scope of the dispute,"[38] Applicant is effectively attempting to submit its personal grievances to the Tribunal and intervene as a third party in this arbitration,[39] which is impermissible.

First, Applicant suggests that it can assist the Tribunal in the general understanding of "human rights law obligations" of Guatemala. This issue is outside the scope of the Parties' dispute. Investment tribunals are not the proper forum for complaints about generalized issues of human rights compliance in different countries, as was confirmed by the tribunal in *Pezold v. Zimbabwe*.[40] Applicant's statements that

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[34] Construction permit - Minutes of the San Pedro Ayampuc Municipal Council meeting dated 15 Nov. 2011 (C-0092-SPA/ENG) (confirming that the construction permit was issued at the San Pedro Ayampuc Municipal Council meeting held on 15 Nov. 2011).

[35] Letter from La Puya to ICSID dated 29 June 2020, Exhibit A, at 9 (referring to "grupo de Resistencia Pacifica la Puya").

[36] *Id.*, at 13 ("As far as the applicants are not identified, it is clear that it refers to the Amparistas (claimants) and that they appear in accordance with Amparo No. 01050-2014-871. However, the municipality itself as an autonomous entity must have the precautionary measures it deems appropriate regardless of whether the neighbors request it or act ex officio as mandated by the same law, due to its obligation, commitment and responsibility to its inhabitants.").

[37] Letter from La Puya to ICSID dated 29 June 2020, at 2.

[38] ICSID Arbitration Rules, Rule 37(2).

[39] Letter from La Puya to ICSID dated 29 June 2020, at 1 ("The members of La Puya have an ongoing interest in the Matter inasmuch as they have been greatly and detrimentally impacted by the El Tambor mining project, and they have been active in the affected communities and in related domestic legal proceedings in Guatemala. For example, the members of La Puya have personally witnessed, and expect to testify about, the physical and psychological aggression that the community members have suffered due to political forces. The members of La Puya are also well-positioned to discuss the general risks and vulnerabilities associated with living in the areas affected by the El Tambor mining project, including negative health impacts, as well as intrusion on personal and community life, and community development").

[40] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 dated 26 June 2012 ¶ 60 ("As noted above, the Petitioners propose to make a submission on the putative rights of the indigenous communities as 'indigenous peoples' under international human rights law, a matter outside of the scope of the dispute, as it is presently constituted. Indeed, as the Claimants have noted, in order for the Arbitral Tribunals to consider such a submission, they would need to consider

Claimants' Request for Arbitration "question[s] whether the Guatemalan government, in issuing their mining licenses consulted with local communities as required under the [ILO Convention 169]," and that "without La Puya's involvement there will be no party to present evidence regarding how the government fell short of its requirements to consult with the local communities under the ILO Convention" highlights Applicant's misunderstanding of the issues in dispute in this arbitration and the fact that its participation will not assist the Tribunal in its determination of those issues.[41] Facts concerning Exmingua's thorough consultations with the very communities that La Puya purports to represent are set forth in Claimants' Memorial; as Claimants' Memorial and the Guatemalan court decisions confirm, Exmingua, and not the Government, conducted consultations as part of the social studies for Exmingua's Progreso VII EIA. "La Puya's" participation is thus not needed to "present evidence regarding how the government fell short of its requirements to consult," as there is no dispute that the government did not conduct the consultations. Nor will the Tribunal be assisted by the Applicant's interpretation of the government's legal obligations in that regard; once again, Respondent is perfectly capable of submitting any arguments as to its laws and obligations thereunder.

Second, Applicant's attempt to submit information regarding "bribery and corruption that takes place in Guatemala" does not concern an issue in dispute in the arbitration. Nor can the Applicant's derogatory, conclusory, and baseless accusation that Claimants have been "involv[ed] in the challenged conduct"[42] change this fact. There is simply no allegation that Claimants have engaged in any bribery or corruption in this arbitration or in any of the multitude of Guatemalan court proceedings and investigations. Applicant cannot be permitted to interject such issues into the arbitration.

Third, Applicant attempts to show alleged "fundamental flaws" and "deficiencies" in Exmingua's environmental impact studies,[43] which is not an issue in the arbitration. Exmingua's exploitation license for Progreso VII was suspended for reasons that have nothing to do with its environmental studies, which were approved nine years ago, without any objections from the public.[44] Again, Applicant cannot be permitted to interject into these proceedings—and compel the Parties to respond to—issues that are not germane to their dispute.

As shown, Applicant proposes to comment on multiple issues that are beyond the scope of the Parties' dispute and are thus irrelevant to the arbitration proceedings.

C. Direct and significant interest

Applicant's assertion that it has an ongoing interest in the current dispute inasmuch as it has been "greatly and detrimentally impacted by the El Tambor mining project"[45] is insufficient to meet its burden of showing that it has a significant interest in the proceedings to warrant *amicus* status.

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and decide whether the indigenous communities constitute 'indigenous peoples' for the purposes of grounding any rights under international human rights law. Setting aside whether or not the Arbitral Tribunals are the appropriate arbiters of this decision, the decision itself is clearly outside of the scope of the dispute before the Tribunals").

[41] Letter from La Puya to ICSID dated 29 June 2020, at 2.

[42] *Id*.

[43] *Id*.

[44] Environmental impact license issued by the MARN dated 26 May 2011 (C-0088-SPA/ENG); MEM Resolution No. 03394 issuing License No. LEXT-054-08 dated 30 Sept. 2011 (C-0090-SPA/ENG).

[45] Letter from La Puya to ICSID dated 29 June 2020, at 1.

In *Apotex v. United States*, for instance, the tribunal denied an *amicus curiae* application where the applicant failed to define any significant interest in the arbitration or show how it could be affected by the outcome of the proceedings.[46] And facing an application from an environmental non-governmental organization in *Eco Oro v. Colombia*, the tribunal held that the concerns of a "strong civil society movement" about the commercial activities of a gold mine and the applicant's assertion that "Colombian citizens have a lasting interest in the outcome of this dispute" were insufficient to establish that the applicant had an interest in the dispute that would warrant allowing its participation as an *amicus*.[47]

Here, Applicant has no direct and significant interest in the outcome of this dispute. Claimants are seeking compensation for Guatemala's breaches of the DR-CAFTA, among other things, as a result of the suspension of Exmingua's exploitation license and the *de facto* suspension of its exploration license. Any award rendered by this Tribunal will have no effect on the local community. The Tribunal is not asked to order that Exmingua's exploitation license for Progreso VII be reinstated or that an exploitation license for Santa Margarita be issued. Equally, any purported "impact" on the local community of San José del Golfo and San Pedro Ayampuc is not part of this arbitration. Indeed, the direct and significant interest criterion would be rendered illusory were it sufficient that any award would be paid indirectly from taxpayers' funds, as every national of the respondent State automatically would be deemed to have a direct and significant interest in the outcome of any investment arbitration. That cannot be the case.

In a similar vein, in denying the petitioner *amicus* status, the *Eco Oro v. Colombia* tribunal explained that "[t]he Claimant is not seeking restitution of its investment but compensation arising out of alleged breaches of the FTA, asserting that the Respondent's actions have prevented it from developing the … Project. Accordingly, the Tribunal does not consider that the Petitioners have sought to show how generalised issues of human rights, and particularly the right to live in a healthy environment, may be said to relate to the scope of the specificities of this dispute."[48] Here, moreover, the relationship is even more tenuous, as the Renewed Application has been submitted by a non-national law firm, in English, on behalf of unknown and undisclosed members of a purported organization without any legal form and with undisclosed sources of funding.

D. Undue burden

Applicant's *amicus curiae* submission, if allowed, would disrupt the proceedings and unduly burden and unfairly prejudice Claimants because it would require unnecessary additional work, time, and expense to respond to Applicant's submission, which intends to raise issues beyond the scope of the Parties' dispute and to support such submissions with expert and witness evidence.[49]

In its Renewed Application, Applicant does not even attempt to show that its submission will "not disrupt the proceeding or unduly burden or unfairly prejudice either party"[50] or that it addresses the relevant facts and arguments advanced in this arbitration. Instead, it wishes to submit evidence on multiple issues, which

[46] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Applicant Mr. Barry Appleton as a Non-Disputing Party dated 4 Mar. 2013 ¶ 38 ("[T]he 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").

[47] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (Decision on Non-Disputing Parties' Application) dated 18 Feb. 2019 ¶¶ 34-35.

[48] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (Decision on Non-Disputing Parties' Application) dated 18 Feb. 2019 ¶ 28.

[49] Letter from La Puya to ICSID dated 29 June 2020, at 2-3.

[50] ICSID Arbitration Rules, Rule 37(2).

according to its own admission, "will not be raised by Claimant or Respondent."[51] Because these issues, as set out above, are not raised in the arbitration proceedings, granting the Renewed Application would inevitably impose an unnecessary burden on both Parties.

In similar circumstances, the tribunal in *Apotex v. United States* determined that an *amicus curiae* submission would be materially disruptive and unduly burdensome, where the submission did not address the relevant facts and arguments advanced in the arbitration.[52] In fact, the burden of allowing the Renewed Application would fall disproportionately on Claimants, as Applicant has made clear that it is hostile to Claimants and their mining project.[53] This hostility and the burdensome effect of Applicant's involvement in this proceeding is also evidenced by the fact that Guatemala made clear in its 31 October 2019 letter that it would welcome Applicant's *amicus* submission in the merits phase, notwithstanding that, in its 23 October 2019 original Application, Applicant had not even attempted to indicate any topics that were germane to the dispute on which it wished to make an *amicus* submission, much less shown that it had any unique perspective and expertise on such topic.[54] Respondent's opportunistic endorsement of Applicant's request reflects Respondent's implicit agreement with the premise in Applicant's submission that Respondent is somehow unable or unwilling to mount its own defense. More likely, Respondent merely seeks to make this proceeding as onerous as possible for Claimants, a stance that cannot be endorsed by the Tribunal.

* * *

In light of the above, and due to Applicant's failure to submit full information about its identity and to disclose its affiliations as well as its failure to meet any of the requirements for the admission of its proposed *amicus curiae* submission, Claimants respectfully request that the Tribunal deny Applicant's Renewed Application.

Respectfully submitted,

Andrea J. Menaker

cc: Counsel for Respondent
Respondent

[51] Letter from La Puya to ICSID dated 29 June 2020, at 2.

[52] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party dated 4 Mar. 2013 ¶ 37 ("In view of the Tribunal's decisions above, it would be materially disruptive and would unduly burden the Disputing Parties to grant permission to BNM to file a non-disputing party submission in this arbitration, given especially the fact that BNM's application does not address the relevant facts and arguments advanced in this arbitration").

[53] Letter from La Puya to ICSID dated 29 June 2020, at 2 ("For the past eight years, La Puya has resisted the imposition of the mining project ….").

[54] *See* Respondent's Letter to the Tribunal dated 31 Oct. 2019, at 1 ("Respondent does not object to the participation of La Puya as an *amicus curiae* in the merits phase of the Arbitration ….")*; id.* at 2 (reiterating its lack of any objection to "La Puya's participation as an *amicus curiae* in the merits phase").