

31 October 2019

**VIA EMAIL**

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 Mr. John M. Townsend  
 Prof. Zachary Douglas, QC  
 c/o Mr. Francisco Grob, Secretary of the Tribunal  
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**Re: Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala  
 (ICSID Case No. ARB/18/43)**

Dear Members of the Tribunal:

In accordance with the Tribunal’s direction,<sup>1</sup> Claimants write in response to the application presented by representatives on behalf of La Puya (“Applicant”) on 24 October 2019, requesting that the Tribunal “accept and consider *amicus curiae* submissions” from Applicant.<sup>2</sup> As explained below, Applicant has failed to meet its burden of showing that its *amicus curiae* submission(s) should be accepted, and Claimants therefore object to their admission.

ICSID Arbitration Rule 37(2)(a) provides that, in determining whether to accept *amicus* submissions, “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 . . . .” Applicant, however, does not even attempt to explain how its *amicus curiae* submission(s) would assist the Tribunal in determining a relevant issue by bringing a perspective, knowledge or insight that is different from that of the Parties. Instead, it merely states in conclusory terms that “we believe La Puya’s participation will assist the tribunal in determining various legal and factual issues that will arise throughout the course of the arbitration.”<sup>3</sup> This is wholly insufficient. Applicant has failed to identify even a single legal or factual issue that is relevant to the dispute or explain what unique knowledge or perspective it has with regard to that issue. In such circumstances, Applicant’s application must be denied.<sup>4</sup>

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<sup>1</sup> Email from ICSID to the Parties dated 24 Oct. 2019.

<sup>2</sup> Letter from La Puya to ICSID dated 23 Oct. 2019 (“Application”), at 1.

<sup>3</sup> Application, at 1.

<sup>4</sup> See, e.g., *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 (“*Eco Oro Amicus Decision*”) ¶¶ 17-18, 29 (denying application by several petitioners where applicants asserted that “[t]here is a strong civil society movement within and outside of Colombia concerned with the effects of the commercial activities of Eco Oro Minerals Corp. in relation to the Eco Oro gold mine. Colombian citizens have a lasting interest in the outcome of the dispute between [the Claimant] and the state of Colombia,” and that they would make a “unique contribution to the resolution of factual, legal and policy issues within the scope of the dispute. . . [and] anticipate focusing on international law regarding human rights and particularly the right to live in a healthy environment,” because of the “generality of the assertion by the Petitioners and the total lack of any specificity from the

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Applicant also has not shown that its submission “would address a matter within the scope of the dispute,” as is required by ICSID Arbitration Rule 37(2)(b). Because the Parties have not yet filed their Memorial and Counter-Memorial, respectively, Applicant cannot know what issues will be in dispute and, even less, can it make any plausible assertion that it has a perspective, knowledge, or insight different from that of the Parties to the dispute. Only after such pleadings have been filed can a prospective *amicus* applicant demonstrate that it can address a matter within the scope of the dispute and convincingly explain that it can offer a perspective that has not already been presented to the Tribunal by one of the Parties.<sup>5</sup>

Indeed, it is unclear whether Applicant is even aware that Respondent has filed preliminary objections pursuant to DR-CAFTA Article 10.20.4. Applicant makes no attempt – nor could it show – that it has any expertise relevant to the issues in dispute in this preliminary phase.

Nor has Applicant demonstrated that it has a “significant interest in the proceeding,” as is required by ICSID Arbitration Rule 37(2)(c). Applicant’s bare assertion that “[t]he 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”<sup>6</sup> is insufficient to meet this burden. As in the *Eco Oro v. Colombia* case, where the petitioners alleged that they were part of a “strong civil society movement” “concerned with the effects of the Claimant’s commercial activities with respect to the Eco Oro gold mine,” and that “Colombian citizens have a lasting interest in the outcome of this dispute,” the Applicant here “do[es] not expand on why this gives them – or any of them – a significant interest.”<sup>7</sup>

Finally, ICSID Arbitration Rule 37(2) provides that “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.” The Tribunal will recall Claimants’ concern expressed at the First Session that Respondent’s proposed timetable would not allow Claimants to respond in writing to any non-disputing party submissions, and their objection in that regard. Procedural Order No. 1 ensures the Parties’ due process rights, by scheduling the submission of any non-disputing party submissions after the Parties’ respective Memorial and Counter-Memorial, so that the Parties may respond to any such submissions in their respective Reply and Rejoinder.<sup>8</sup> As of the date of this letter, Respondent’s Reply on its Article 10.20.4 Preliminary Objections already has been filed.<sup>9</sup> It therefore would be disruptive to the proceedings and prejudicial to the parties if an *amicus curiae* submission were filed and accepted at this time, as it would require the Parties to engage in another round of briefing in order to respond to the submission, which not only would impose an undue burden on the Parties, but also would be impractical given the expedited schedule for this preliminary phase.<sup>10</sup>

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Petitioners as to the relevance to the legal scope of the dispute. The Petitioners have not even sought to address how the matters they wish to raise could assist the Tribunal or the Parties in their work.”)

<sup>5</sup> See, e.g., *id.* ¶ 28 (denying *amicus* application where “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.”); *id.* ¶ 32 (denying *amicus* application where “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.”) (emphasis in original).

<sup>6</sup> Application, at 1.

<sup>7</sup> *Eco Oro Amicus* Decision ¶ 34.

<sup>8</sup> Procedural Order No. 1, Annex B.I, Annex B.II.

<sup>9</sup> See Respondent’s Reply on its 10.20.4 Preliminary Objections dated 25 Oct. 2019.

<sup>10</sup> Applicant also complains that Respondent has not made available to the public the relevant materials from this arbitration. Claimants note that, since the date of the First Session, and as of 25 October 2019, it appears that Respondent posted on its website Claimants’ Notice of Arbitration dated 9 November 2018 and Respondent’s Memorial on Preliminary Objections

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Because Applicant has failed to meet any of the requirements set forth in ICSID Arbitration Rule 37(2) for the admission of its proposed *amicus* submission(s), Claimants respectfully request that the Tribunal deny Applicant's application to make such submissions in this proceeding.

Respectfully submitted,



**Andrea Menaker**

cc: Counsel for Respondent  
Respondent

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under Article 10.20.5 of CAFTA-DR dated 16 Aug. 2019. See <https://www.mineco.gob.gt/controversias-inversionista-estado> (accessed 25 Oct. 2019).