

IN THE ARBITRATION UNDER CHAPTER TEN OF THE DOMINICAN REPUBLIC—CENTRAL AMERICA—  
UNITED STATES FREE TRADE AGREEMENT AND THE ARBITRATION RULES OF THE INTERNATIONAL  
CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
BETWEEN

**DANIEL W. KAPPES**  
AND  
**KAPPES, CASSIDAY & ASSOCIATES**  
*Claimants*

AND

**REPUBLIC OF GUATEMALA**  
*Respondent*

ICSID Case No. ARB/18/43

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**REPUBLIC OF GUATEMALA'S  
REQUEST FOR COSTS**

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14 February 2020

Before:  
Ms. Jean E. Kalicki, President of the Tribunal  
Mr. John M. Townsend, Arbitrator  
Prof. Zachary Douglas, QC, Arbitrator

Pursuant to the Tribunal’s email dated January 2, 2020, the Republic of Guatemala (“Guatemala” or “Respondent”) hereby submits this request for the costs it has incurred in the preparation and defense of its Preliminary Objections. Guatemala respectfully requests that the Tribunal order Daniel W. Kappes (“Kappes”) and Kappes, Cassidy & Associates (“KCA” and, together with Kappes, “Claimants”) to bear these costs in their entirety, plus interest assessed at a reasonable commercial rate applicable from the date of the award or decision on Preliminary Objections to the date of the payment of such costs.<sup>1</sup>

## **I. THIS TRIBUNAL HAS DISCRETION TO ALLOCATE COSTS AND FEES.**

1. Article 61(2) of the ICSID Convention addresses this Tribunal’s authority to award costs as follows:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

2. Article 10.20.6 of CAFTA-DR provides the following in connection with a tribunal’s allocation of costs and fees resulting from the submission of or opposition to a respondent’s preliminary objections under Articles 10.20.4 and 10.20.5 of CAFTA-DR, as in the present case:

When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

3. The above provisions<sup>2</sup> grant this Arbitral Tribunal the authority to allocate costs and fees between the Parties.<sup>3</sup>

## **II. CLAIMANTS MUST BEAR THE COSTS AND FEES OF THEIR FRIVOLOUS CLAIMS.**

4. Article 10.20.6 of CAFTA-DR states that in determining whether an award on costs is warranted, the Tribunal must consider whether Claimants’ claims are “frivolous.”<sup>4</sup> Investment arbitration tribunals also consider the “circumstances” of the case for the determination of the allocation on costs.<sup>5</sup>

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<sup>1</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Final Award (Concerning the Apportionment of Costs Between the Disputing Parties), 30 December 2002, **RL-0111-018-ENG**, ¶¶ 50-51.

<sup>2</sup> Pursuant to Procedural Order No. 1, § 1.1, this Arbitration is being conducted under the ICSID Arbitration Rules, in force as of April 10, 2006, except to the extent modified and/or supplemented by the CAFTA-DR.

<sup>3</sup> *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019, **RL-0112-182-ENG/SPA**, ¶ 621.

<sup>4</sup> Art. 10.20.6 of CAFTA-DR, **RL-0001-025-ENG/SPA**; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, **RL-0021-046-ENG**, ¶¶ 135-136; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, **RL-0002-087-ENG/SPA**, ¶ 277.

<sup>5</sup> *Corona*, Award, 31 May 2016, **RL-0002-086-087-ENG/SPA**, ¶ 275; *Ballantine*, Award, 3 September 2019, **RL-0112-182-ENG/SPA**, ¶ 622.

5. Guatemala argued in its first Preliminary Objection that Kappes and KCA's claims must be dismissed because, among other reasons, they fail as a matter of law.<sup>6</sup> Article 10.20.4 of CAFTA-DR sanctions with dismissal claims which fail as a matter of law, presumably to discourage "frivolous" actions by private claimants.<sup>7</sup> Here, the claims are frivolous because Claimants purposefully initiated this Arbitration in a manner that openly seeks to circumvent important safeguards built into the Treaty. Respondent should not have to bear the costs of Claimants' attempt to directly recover Exmingua's losses in contravention with the Treaty. In effect, Claimants attempt to relitigate claims previously litigated in Guatemala and seek to have their enterprise, Exmingua, avoid paying taxes and creditors while maintaining parallel litigation in Guatemala which may lead to a double recovery.
6. Further, the circumstances of the case also merit that Claimants be ordered to bear Guatemala's fees and costs. First, this Tribunal has no jurisdiction to hear Claimants' claims because despite seeking to recover Exmingua's losses, Claimants failed to submit a waiver signed by Exmingua, as CAFTA-DR requires.<sup>8</sup> Claimants' failure to submit this waiver is not a mistake, or the consequence of unclear language in a treaty, or the result of a reasonable expectation that the submission was not required. CAFTA-DR and the U.S. Model BIT are clear that a waiver by the enterprise (here, Exmingua) is required in order to seek to recover the enterprise's alleged loss.<sup>9</sup> This safeguard was designed by the U.S. to avoid double recovery, among other concerns, and later incorporated into the CAFTA-DR. Claimants' counsel are well aware of it,<sup>10</sup> and yet Claimants purposefully circumvented this safeguard by submitting claims on their own behalf and without a waiver from Exmingua.
7. Also, Claimants' procedural bad faith merits that Respondent be awarded the costs incurred in submitting its Preliminary Objections. Claimants have played "moving target" throughout the entire Preliminary Objections stage, by initially bringing claims to recover the loss of value in Exmingua's projects and assets, and later re-writing their claims to pursue reflective loss claims.<sup>11</sup> Moreover, Claimants brought an MFN claim without providing Guatemala with the required notice. In response to Guatemala's objection, they first alleged the Notice of Intent "did include the essential facts and legal basis for the MFN claim,"<sup>12</sup> only to later argue that the "specific facts giving rise to that claim

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<sup>6</sup> Preliminary Objections, ¶ 39(a); Reply, ¶ 57(a).

<sup>7</sup> D. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30(2) B.C. Int'l & Comp. L. Rev. 331, **RL-0050-048-ENG**, p. 377.

<sup>8</sup> Preliminary Objections, ¶ 39(c).

<sup>9</sup> Art. 10.18.2(b)(ii) of CAFTA-DR, **RL-0001-022-ENG/SPA**; Art. 26.2(b)(ii) of U.S. Model BIT, **RL-0011-026-ENG**.

<sup>10</sup> *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Peru's Reply on Waiver, 17 August 2015, ¶ 31, **RL-0014-013-014-ENG**.

<sup>11</sup> *Compare* Notice of Intent, **C-0005**, p. 4 and Notice of Arbitration, ¶ 78, *with* Counter-Memorial, ¶¶ 12, 57, Rejoinder, ¶¶ 61, 63.

<sup>12</sup> Counter-Memorial, ¶ 83.

did not exist at the time Claimants submitted their Notice of Intent.”<sup>13</sup> Furthermore, Claimants submitted a Notice of Arbitration which included multiple references to “continuous and systematic” protests and blockades since 2012 as the basis for their full protection and security claim.<sup>14</sup> When Guatemala objected to the claim as time-barred, Claimants re-wrote their claim and alleged that it was “not based on a single continuing breach” but on a new wave of blockades starting in 2016<sup>15</sup> (an allegation not contained in the Notice of Arbitration). Claimants’ shifting arguments made arguing the Preliminary Objections unnecessarily complicated because it required Guatemala to address multiple, different claims, instead of the three claims included in the Notice of Intent *and* the Notice of Arbitration.

8. Finally, Guatemala has requested all the claims be dismissed. It is unfair for Guatemala to have to bear the costs of defending itself from claims that should have never been brought in the first place.<sup>16</sup>

### **III. GUATEMALA’S COSTS ARE REASONABLE.**

9. Pursuant to Article 61(2) of the ICSID Convention, Respondent hereby requests Claimants be ordered to pay the costs incurred by Guatemala in this Arbitration in the total amount of US\$1,225,000. The costs include: (i) advances of fees and expenses of the members of the Tribunal and ICSID’s administrative fees for US\$125,000; and (ii) legal fees and costs incurred by Guatemala for an approximate amount of US\$1,100,000. A summary of all costs is included in Annex I.
10. These costs are reasonable. Guatemala submitted three preliminary objections, based on multiple legal grounds. The first objection has never been decided by a CAFTA-DR Tribunal and required extensive research. Guatemala submitted dozens of legal authorities, briefs totaling more than 150 pages, and attended a hearing in Washington, D.C., being advised by outside legal counsel.

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<sup>13</sup> Rejoinder, ¶ 98.

<sup>14</sup> Notice of Arbitration, ¶¶ 48, 49.

<sup>15</sup> Counter-Memorial, ¶ 127.

<sup>16</sup> *Ansung Housing Co., Ltd. v. People’s Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, ¶ 159, **RL-0103-051-ENG**.

Respectfully submitted,

**Office of the Attorney General  
Republic of Guatemala**



Jorge Luis Donado Vivar  
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**Ministry of Economy  
Republic of Guatemala**



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Adolfo E. Jiménez  
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Katharine Menéndez de la Cuesta  
Arantxa Cuadrado

**Annex I**

|                            |                     |
|----------------------------|---------------------|
| <b>Total</b>               | <b>1,294,117.65</b> |
| Holland & Knight LLP Fees  | 1,087,425.90        |
| Holland & Knight LLP Costs | 12,574.10           |
| Withholding tax*           | 194,117.65          |
| <b>Total net of taxes</b>  | <b>1,100,000</b>    |

\* Amount retained by Guatemala as non-recoverable withholding tax

|                         |                  |
|-------------------------|------------------|
| ICSID Advance Payment** | 125,000          |
| <b>Total</b>            | <b>1,225,000</b> |

\*\* To the extent this advance payment has been applied to the determination or is related to the Preliminary Objections.

Guatemala will make available underlying fee notes and disbursement information that the Tribunal may require with respect to the above costs.