INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

DANIEL W. KAPPES
AND
KAPPES, CASSIDAY & ASSOCIATES
Claimants

V.

THE REPUBLIC OF GUATEMALA
Respondent

ICSID Case No. ARB/18/ ____

NOTICE OF ARBITRATION

9 November 2018

WHITE & CASE
Counsel for Daniel W. Kappes and Kappes, Cassiday & Associates

Daniel W. Kappes and Kappes, Cassiday & Associates v. *The Republic of Guatemala*

NOTICE OF ARBITRATION

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Daniel W. Kappes and Kappes, Cassiday & Associates v. *The Republic of Guatemala*

NOTICE OF ARBITRATION

I. INTRODUCTION

1. Mr. Daniel W. Kappes ("Mr. Kappes") and Kappes, Cassiday & Associates ("KCA," and jointly with Mr. Kappes, the "Investors" or "Claimants") hereby submit this Notice of Arbitration in respect of the legal dispute described herein with the Republic of Guatemala ("Guatemala" or "Respondent," and, together with Claimants, the "Parties"), in accordance with Chapter 10 of the Dominican Republic-Central America-United States Free Trade Agreement (the "DR-CAFTA"), which entered into force for Guatemala on 1 July 2006, and for the United States on 1 March 2006.[1]

2. Claimants hereby elect to proceed with this arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") and the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"), as provided for under Article 10.16.3(a) of the DR-CAFTA.[2]

3. As described below, Claimants' investments in two mining projects in Guatemala made through Exploraciones Mineras de Guatemala, S.A. ("Exmingua"), a company organized under the laws of Guatemala, have been rendered useless as a result of Respondent's arbitrary, unfair, and discriminatory actions and omissions. Specifically, despite making significant investments to improve the infrastructure in the area, assemble a plant and laboratory, and provide employment to the surrounding communities, and despite having consulted with the local communities and having received no objections to its mining plan, Claimants' mining project that already was operating was halted by the courts of Guatemala due to the State's own supposed failure to conduct consultations with local communities. The State has not compensated Claimants for their losses, or even begun to conduct the consultations at issue, years after the suspension of Claimants' mining project. Simply put, Claimants are paying the price for the State's own alleged wrongdoing.

4. Soon after commencing operations at one of its mines, Claimants' projects were the subject of protests supported by non-governmental organizations that enticed the local population to blockade access to the mining sites. Despite numerous entreaties, Respondent failed to address the situation to secure

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[1] *See* DR-CAFTA (C-1); *see also* United States Department of State, Treaties in Force—A List of Treaties and Other International Agreements of the United States in Force on January 1, 2018, at 551, *available at* **https://www.state.gov/documents/organization/282222.pdf** (indicating that the DR-CAFTA entered into force for the United States on 1 March 2006); **https://tcc.export.gov/Tradc_Agrccments/All_Trade_Agrecments/CentralAmericanFrceTA.asp** (official website of the U.S. Department of Commerce stating that "[t]he Dominican Republic-Central America-United States Free Trade Agreement (CAFTA/DR) entered into force … between the United States and Guatemala on 1 July 2006"); **http://www.minoeo.gob.gt/sites/dcrault/filcs/dccrcto_del_congrcso_31-2005_usa.pdf** (official website of the Ministry of Economy of the Republic of Guatemala reproducing Decree No. 31-2005 of the Congress of the Republic of Guatemala dated 10 Mar. 2005, which "[a]pproved the Dominican Republic-Central America-United States Free Trade Agreement, signed in the city of Washington, D.C., on the fifth day of August two thousand and four").

[2] *See* DR-CAFTA, Art. 10.16.3(a) (C-1).

Exmingua's access to its mining sites. Moreover, the blockades prevented Exmingua's engaged consultants from completing the consultations with the local communities that were required for the issuance of an exploitation license for the second of the two projects.

5. With respect to the first project, an exploitation license had been obtained after consulting with the local communities with no objections voiced by them, and mining operations had commenced, before non-governmental organizations instigated protests and blockades. One of the non-governmental organizations, moreover, then filed applications in the Guatemalan courts seeking to suspend Exmingua's mining operations, and assisted others in doing the same, on the ground that the State had failed to engage in consultations with the local communities pursuant to the Convention concerning Indigenous and Tribal Peoples in Independent Countries (the "ILO Convention"). The Guatemalan courts granted these applications, and suspended Exmingua's lawfully-issued license, preventing Exmingua from continuing to operate the mine. As a result, Guatemalan authorities also revoked Exmingua's certificate of exportation, and impounded concentrate that had been processed from materials mined prior to the suspension of the license. Although the suspension has been appealed, the Court has failed to take any action in more than two years and the Government likewise has failed to take any action to commence consultations in accordance with the courts' rulings.

6. By contrast, where a Guatemalan-owned investment was involved, the Guatemalan Constitutional Court permitted the investor to continue operations at its project, while the State conducted consultations, which were completed within only a few months, despite the fact that the action relating to this project was filed more than one year after the action that suspended Claimants' project. To date, while Claimants continue to expend resources to maintain equipment and staff, one of its mining projects remains suspended, its concentrate remains impounded, and the other project remains subject to a *de facto* moratorium on exploitation licenses and to unlawful blockades. As described below, the aforementioned acts and omissions of the State breach several of its obligations under the DR-CAFTA.

II. PARTIES TO THE ARBITRATION

A. Claimants

7. Claimants in this proceeding are Mr. Kappes and KCA. Mr. Kappes is a U.S. citizen and a registered professional engineer in Nevada and Idaho, who has served for more than 45 years as a mining and metallurgical engineer, specializing in precious metals heap leaching. In addition to providing engineering and design work on numerous projects around the world, Mr. Kappes has directed laboratory and field-testing on several projects that have subsequently become major precious metal mines. Mr. Kappes is a shareholder of Exmingua.

8. KCA is a corporation incorporated under the laws of the State of Nevada, with the purpose of providing process metallurgical services to the international mining industry, specializing in all aspects of heap leach and cyanide processing, including laboratory testing, project feasibility studies, engineering design, construction, and operation management. Since 1972, KCA has been involved in several high-profile projects involving complete engineering, procurement, construction, and management services, site assistance, laboratory testing, process development, preparation of feasibility studies, among others, in over 17 countries, such as Mexico, the United States, Turkey, Brazil, Mali, Guinea, Bolivia, Honduras, Ghana, Kazakhstan, Chile, Canada, Panama, Australia, Peru, Oman, and Malaysia. While primarily known for its

heap leach expertise, KCA's staff includes experienced process professionals with design capabilities in a wide range of metallurgical processes. KCA also provides modular laboratories and modular or permanent processing plants and related equipment for the mining industry. KCA is wholly owned by Mr. Kappes and is an indirect owner of Exmingua, through Minerales KC Guatemala, Ltda. ("Minerales KC"), which is a Guatemalan company in which KCA owns 90% of the shares and Mr. Kappes owns the remaining 10%.

9. Accordingly, Claimants, directly or indirectly, wholly own Exmingua.

10. Claimants' address is as follows:

7950 Security Circle
Reno, Nevada 89506
U.S.A.

11. Claimants are represented by the law firm of White & Case LLP at the following addresses:

Andrea J. Menaker 5 Old Broad Street London EC2N 1DW United Kingdom Tel: + 44 20 7532 2216 Fax: + 44 20 7532 1001 E-mail: **amenaker@Avhitecase.com**	Rafael Llano Blvd. Manuel Avila Camacho 24 - PH Col. Lomas de Chapultepec Delegation Miguel Hidalgo Ciudad de Mexico, Mexico C.P. 11000 Tel: (+52) 55 5540 9600 Fax: (+52) 55 5540 9699 E-mail: **iilano@whitecase.com**

12. All communications to Claimants in this Arbitration should be made to White & Case LLP at the above-referenced addresses, attention: Andrea J. Menaker and Rafael Llano, respectively.[3]

B. Respondent

13. The Respondent in this Arbitration is Guatemala, a sovereign State. For purposes of disputes arising under the DR-CAFTA, communications concerning this Arbitration should be addressed to:[4]

Minister Acisclo Valladares Urruela Ministry of Economy 8a. Av. 10-43, Zona 1 Guatemala, Guatemala Tel: + (502) 2412-0200 E-mail: **avalladares@mineco.gob.gt**	Mr. Alexander Salvador Cutz Calderon Direction de Administration del Comercio Exterior Ministry of Economy 8a. Av. 10-43, Zona 1 Guatemala, Guatemala Tel: + (502) 2412-0200 E-mail: **acutz@mineco.gob.gt**

[3] *See* Powers of Attorney issued by Claimants, dated 2 November 2018 (C-2).

[4] *See* DR-CAFTA, English and Spanish version of Annex 10-G (C-1).

III. PROCEDURAL AND JURISDICTIONAL REQUIREMENTS

A. Consent and Waiver

14. Guatemala has consented to arbitration pursuant to Article 10.17.1 of the DR-CAFTA, which provides that "Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement."[5]

15. Article 10.18 of the DR-CAFTA provides in relevant part as follows:

> 2. No claim may be submitted to arbitration under this Section unless:
>
> (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the notice of arbitration is accompanied,
>
> 0) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver …
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.
>
> 3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) … may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's … rights and interests during the pendency of the arbitration.

16. By submitting this Notice of Arbitration, Claimants hereby consent to arbitration in accordance with the procedures set forth in Chapter 10 of the DR-CAFTA. Mr. Kappes is authorized to commence arbitration, and KCA has taken all necessary internal actions to authorize the commencement of this arbitration.[6] Claimants also have executed a power of attorney authorizing White & Case LLP to act on their behalf in this arbitration.[7]

17. Claimants waive their rights to initiate or continue before any administrative tribunal or court, under the law of any Party, proceedings that seek redress with respect to any measure alleged to constitute a breach referred to in Article 10.16 of the DR-CAFTA and reserve their rights to initiate or continue any action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Guatemala, provided that the action is brought for

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[5] *See* DR-CAFTA, including evidence of its entry into force for Guatemala and for the United States of America, respectively (**C-1**).

[6] *See* Claimants' Authorization to Commence Arbitration, dated 2 November 2018 (**C-3**).

[7] *See* Powers of Attorney issued by Claimants, dated 2 November 2018 (**C-2**).

the sole purpose of preserving Claimants' rights and interests during the pendency of this arbitration. A copy of Claimants' waiver is attached hereto.[8]

R. Claimants Are Qualified to Submit a Claim to Arbitration Under the DR-CAFTA

18. Claimants are qualified to commence arbitration against Guatemala pursuant to Article 10.16.1(a) of the DR-CAFTA. Article 10.16.1(a) provides:

> In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach ....

19. Article 10.28 of the DR-CAFTA defines "claimant" as an investor of a Party. An "investor of a Party," in turn, is defined as "a Party ... or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party ...." Article 2.1 of the DR-CAFTA (entitled "Definitions of General Application"), provides that a "national" is a "natural person who has the nationality of a Party," and an "enterprise of a Party" includes any "enterprise constituted or organized under the law of a Party." Furthermore, Article 10.28 defines investment to include:

> [E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

[8] *See* Claimants' Waiver Pursuant to DR-CAFTA Article 10.18, dated 2 November 2018 (C-4).

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.

20. As described above, Mr. Kappes is a national of the United States, and KCA is a corporation incorporated under the laws of the State of Nevada, United States of America. Both Mr. Kappes and KCA have made significant investments in Guatemala through their Guatemalan company, Exmingua, which was incorporated in 1996 and acquired by the Investors in 2009. They therefore are "investors] of a Party" as defined in the DR-CAFTA. The Investors' investment in Exmingua, moreover, qualifies as an "investment" under the DR-CAFTA, as it is in the form of shares and contains all of the characteristics of an investment, including the commitment of capital, the expectation of gain or profit, and the assumption of risk.

21. The actions of Guatemala, as detailed below, breached 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) of the DR-CAFTA and, as a result, Claimants have incurred significant loss and damages by reason of, or arising out of, these breaches. Claimants therefore satisfy the requirements to submit a claim to arbitration under Article 10.16.1(a).

C. Claimants Are Qualified to Submit a Claim to Arbitration Under the ICSID Convention

22. Article 10.16.3 of the DR-CAFTA provides:

> Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:
>
> (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;
>
> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; or
>
> (c) under the UNCITRAL Arbitration Rules.

23. Claimants satisfy all jurisdictional requirements to bring this arbitration under the ICSID Convention and the ICSID Arbitration Rules. Both the United States and Guatemala are Contracting States to the ICSID Convention.[9] In this regard, Article 25(1) of the ICSID Convention provides:

[9] *See* ICSID, List of Contracting States and Other Signatories of the Convention (indicating that Guatemala signed the ICSID Convention on 9 November 1995 with the Convention entering into force for Guatemala on 20 February 2003; and that the United States signed the ICSID Convention on 27 August 1965 with the Convention entering into force for the United States on 14 October 1966), *available at* https://icsid.worldbank.org/en/Pagcs/about/Dalabase-of-Member-States.aspx.

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

24. The legal dispute at issue arises directly out of Claimants' investments in Guatemala.

25. Claimants therefore exercise their right to submit their claim under the ICSID Convention and the ICSID Arbitration Rules in accordance with Article 10.16.3(a) of the DR-CAFTA.

D. Notice and Time Requirements

26. In order for a claimant to submit a claim to arbitration under the DR-CAFTA: (1) at least "six months [must] have elapsed since the events giving rise to the claim";[10] (2) no "more than three years [may] have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant … has incurred loss or damage";[11] and (3) "[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent')."[12] Claimants have satisfied all of these requirements.

27. As detailed below, the events giving rise to the claim occurred more than six months, but less than three years, prior to the submission of this Notice of Arbitration.

28. On 16 May 2018, Claimants submitted a Notice of Intent ("NOI"), inviting Guatemala, "in good faith and in the spirit of cooperation," "to engage in discussions and negotiations with a view to achieving an amicable resolution of the dispute."[13] The required 90-day period between submitting the NOI and before submitting a notice of arbitration concluded on 14 August 2018. A negotiation meeting took place, but the Parties reached no agreement on the settlement of the dispute during or after the conclusion of this negotiation period.

29. As more than 90 days have elapsed since Claimants delivered their NOI to Guatemala, they are now submitting this Notice of Arbitration.

E. Constitution of the Arbitral Tribunal

30. Under Article 10.19.1 of the DR-CAFTA:

> Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third,

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[10] DR-CAFTA, Art. 10.16.3 (C-1).

[11] *Id.*, Art. 10.18.1 (C-1).

[12] *Id*, Art. 10.16.2 (C-1).

[13] *See* Notice of Intent Pursuant to the Free Trade Agreement between the Dominican Republic, Central America and the United States, dated 16 May 2018 (C-5).

who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

31. As the Parties have not otherwise agreed to the number and appointment of arbitrators, the default provisions of Article 10.19.1 remain applicable.

32. In accordance with DR-CAFTA Article 10.19.4(b), Claimants hereby confirm their agreement to the appointment of each individual member of the Tribunal.

33. Under Article 10.16.6 of the DR-CAFTA:

> The claimant shall provide with the notice of arbitration:
>
> (a) the name of the arbitrator that the claimant appoints; or
>
> (b) the claimant's written consent for the Secretary General to appoint such arbitrator.

34. Claimants hereby appoint Mr. John M. Townsend to the Tribunal. All communications to Mr. Townsend should be sent to the following address:

Hughes Hubbard & Reed LLP
1775 Street, N.W.
Washington, D.C. 20006-2401
United States of America
Tel: +1 (202) 721-4640
Fax: +1 (202) 721-4646
Email: john.townsend@hugheshubbard.com

IV. FACTUAL BASIS FOR CLAIMANTS' CLAIMS

35. In early 2009, Mr. Kappes and KCA acquired Minerales KC. On 19 June 2009, Minerales KC acquired an interest in Exmingua, a Guatemalan company incorporated on 25 July 1996. In 2012, Minerales KC acquired 41 shares of Exmingua, and Mr. Kappes acquired the remaining 42 shares of Exmingua. As a result of these transactions, Mr. Kappes directly owns 25% of Exmingua, and KCA indirectly owns 67.50% of Exmingua through Minerales KC, a Guatemalan company that owns the remaining 75% of Exniingua.

36. As owners of Exmingua, the Investors acquired all legal and beneficial rights, title, and interest in two mining projects located within the orogenic Regional Gold Belt *(Cinturon Regional de Oro*) called "Tambor" in Guatemala, *i.e.*, Progreso VII Derivada (the "Progreso VII Project") and Santa Margarita (the "Santa Margarita Project"). The Progreso VII Project is a gold and silver mining project located in the municipalities of San Jose del Golfo and San Pedro Ayampuc. The Santa Margarita Project is located in the municipality of San Pedro Ayampuc adjacent to the Progreso VII Project, and is also a gold and silver mining project.

37. Pursuant to Article 9 of the Guatemalan Mining Law, "[a]ny individual, person or corporate, national or foreign, may be the holder of mining rights provided they comply with the requirements of this Law and regulations." In this and all other respects, Exmingua complied with the necessary requirements to be able to carry out its mining activities in Guatemala. Exmingua also retained

experts in order to consult with the indigenous communities in the areas of the Projects, and to prepare the Environmental Impact Assessments ("ElAs") – which are necessary to obtain an exploitation license under Guatemalan law – for the Progreso VII Project and Santa Margarita Project.

38. As regards the Progreso VI! Project, on 4 November 2003, Entre Mares de Guatemala, S.A., a Guatemalan company, secured a three-year exploration license issued by the General Directorate of Mining – an entity within the Ministry of Energy and Mines ("MEM[5]") – to explore gold, silver, copper, lead, and zinc in the Progreso VII mining area. The exploration stage included, among other things, soil sampling, mapping, geological modeling, and drilling sites. After the Investors acquired Exmingua, Exmingua filed an application with the General Directorate of Mining for a 25-year exploitation license in order to exploit gold and silver located on the site.

39. In late 2008, the Mining Rights Department of the General Directorate of Mining concluded that "the area related to the application for the exploitation license Progreso VII ... 'COMPLIES' for an available area of 20.0000 km^2...." As part of its ElA tasks to obtain its exploitation license, in early 2010, Exmingua, with the assistance of Grupo Sierra Madre – a consulting firm specialized in environmental and natural resources management duly registered with the Ministry of Environment and Natural Resources ("MARN") in Guatemala – conducted public consultations with the local communities. On 4 July 2011, the Unit of Legal Assistance of the MEM issued a favorable opinion on Exmingua's exploitation license application, with the approval of the Attorney General, noting that the project was "in the interest of the country." As set forth in the EIA filed by Exmingua and approved by the MARN in 2011, the Progreso VII Project generated expectations of improving the lifestyle, economy, health, and wellbeing of the communities of San Pedro Ayampuc and San Jose del Golfo as a result of direct and indirect employment related to the mine. Pursuant to applicable laws and regulations, the EIA was made public and no opposition was filed.

40. After complying with all necessary requirements, on 30 September 2011, the MEM granted Exmingua a 25-year exploitation license for the Progreso VII Project. Further, the General Directorate of Mining granted a one-year, renewable certificate of exportation in favor of Exmingua, authorizing the exportation of 1,460 tons of gold and silver concentrate to Japan, Canada, Korea, Germany, Bulgaria, Mexico, United States of America, and China. The estimated life of the Progreso VII Project was at least 7 years, including a preparation-construction phase of nine to 12 months, an operation phase of five years, and a technical closure phase of 12 to 18 months.

41. In February 2012, Exmingua commenced development of the Progreso VII Project. The activities undertaken by Exmingua included works necessary for the execution of the project, such as, among other things, the rehabilitation and construction of access roads, the construction of offices and an assay lab, the installation of a process plant, the excavation of mining pits, and the development of tailings ponds.

42. One month after construction began, members of the communities near the project, supported by non-governmental organizations, blockaded access to the mine. Two months later, Exmingua obtained some police support, which attempted to break the resistance at the mining site, but the protesters denied them passage and the police ultimately turned around and left. KCA and Exmingua sought

assistance from various local and national government authorities, but the State failed to take meaningful or effective action to stop the ongoing, unlawful blockade of the Progreso VII Project.

43. Consequently, on 3 September 2012, Exmingua filed an *amparo* action against the General Director of the National Police, claiming the "omission of intervention, by the authority, to protect people and vehicles in and around the facilities of the mining project Progreso VII …." Exmingua noted that "illegal arrests, harassment, injuries, threats and coercion against the project's workers had occurred on the project site, in addition to various damages to its facilities, and although the national police was aware of this situation, the necessary measures have not been taken to guarantee and protect the people and vehicles that must enter to the project."

44. The Second Judicial Court of Appeals granted the *amparo* to Exmingua, ordering the National Police and the Attorney General "to make submissions to the courts regarding the viability of evicting people who are blocking the access to the site of Progreso VII Derivada." This *amparo* was appealed and revoked in 2013 by the Constitutional Court, on procedural grounds; however, the Court confirmed the principle provided in Article 419 of the Guatemalan Penal Code that "a police force that fails to act against unlawful interference commits the felonious act of dereliction of duty."

45. Following considerable efforts by Claimants, on 25 May 2014, the exploitation activities at Progreso VII resumed, and, by year-end, Exmingua made its first concentrate shipment. Irregular blockades continued, however, without effective responses from the State.

46. As part of its investment in Guatemala and before acquiring the exploitation license for the Progreso VII Project, Exmingua also acquired the exploration license for Santa Margarita by an assignment agreement in 2005. This license was originally granted in 2000 to Geominas, S.A., a Guatemalan Company, which secured a renewable three-year exploration license for the area named "Santa Margarita," in order to locate, study, analyze, and evaluate the deposits of cooper, lead, zinc, silver, and gold.

47. In 2007, the General Directorate of Mining granted Exmingua a further two-year extension of the exploration license. During this time, Exmingua filed annual reports with the MEM. On 19 January 2009, Exmingua applied for a 25-year exploitation license for Santa Margarita and, as a result, its exploration license for the Santa Margarita Project was automatically extended.

48. As part of the process to obtain the exploitation license for the Santa Margarita Project, Exmingua undertook all necessary efforts to prepare its EIA. Exmingua and its consultants, however, were unable to complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site since 2012.

49. On 21 December 2016, the MEM directed Exmingua to file the EIA for the Santa Margarita Project, duly approved by the MARN, within 30 days. In response, by letter dated 22 March 2017, Exmingua informed the MEM that due to the continuous protests and blockades at the site, it and its consultants could not access the site to complete the local consultations for the EIA. Accordingly, Exmingua asked the MEM to suspend the EIA requirement for the social study, including the approval by the MARN, until it was possible to complete the consultations. On 7 April 2017, Exmingua resubmitted its EIA in the new format required by the Ministry, and asked the MARN to provide guidelines and recommendations to complete the public consultations for the EIA.

50. Meanwhile, the continuous blockades and protests severely affected both of Exmingua's projects. As to the Progreso VII Project, Exmingua was prevented from exploiting the mine and processing and extracting product for export. As to the Santa Margarita Project, the blockades to the mining site prevented Exmingua from completing the E1A, which was a condition for securing an exploitation license.

51. Furthermore, Exmingua faced other unlawful and arbitrary actions and omissions of the State that destroyed its investments. In particular, after the Progreso VII mine already was in production and at a time when, but for the unlawful blockades, Exmingua would have been granted an exploitation license for the Santa Margarita mine, the State adopted a *de facto* moratorium on granting exploitation licenses. This self-imposed determination does not accord with domestic law, is contrary to the Investors' legitimate expectations when they made their investments in Guatemala, and prevented the Claimants from reaping any benefits from their investments.

52. To compound these problems, three months after one of the gate blockades was lifted and Exmingua's activities in Progreso VII resumed, on 28 August 2014, the non-governmental organization CALAS (*Centro de Accion Legal, Ambiental y Social de Guatemala)* filed an *amparo* against the MEM, claiming that Exmingua's exploitation license for the Progreso VII Project had been wrongfully granted. In particular, CALAS argued that the State had failed to carry out requisite consultations with the local communities pursuant to the ILO Convention. Exmingua joined the action as an interested third party.

53. At the time that Exmingua's exploitation license was granted (and to date), there was no Guatemalan law or regulation implementing the ILO Convention or requiring any particular means of consultation with the local communities. Guatemala, in fact, made publicly clear its view that an investor's engagement with the local communities to complete its social study submitted with its EIA application is an appropriate procedure to satisfy the ILO Convention. Specifically, Guatemala has represented before the Inter-American Commission on Human Rights that a mining company's consultations with the local communities as part of its EIA and prior to obtaining an exploitation license satisfied the ILO Convention.

54. Nevertheless, on 11 November 2015, the Guatemalan Supreme Court granted an *amparo provisional* (a form of constitutional protection) against the MEM, suspending the granting of the exploitation license for the Progreso VII Project. On 23 February 2016, Exmingua appealed this ruling arguing, among other things, that: (i) the exploitation license already had been granted; (ii) Exmingua had complied with all regulatory requirements to obtain the exploitation license; and (iii) pursuant to Guatemalan law, CALAS did not have standing to file the *amparo* action "on behalf of' the indigenous people.

55. On 2 March 2016, CALAS requested the Supreme Court to order the suspension of the Progreso VII Project and also to order the National Civil Police to monitor compliance with such resolution. As a result, and relying on the Supreme Court's ruling dated November 2015, on 10 March 2016, the MEM issued a resolution suspending Exmingua's right to exploit gold and silver and to dispose of such minerals for local sale, transformation, or exploitation on account of the State's alleged non-compliance with its obligations under the ILO Convention. Two months later, the MEM issued another resolution suspending Exmingua's certificate of exportation.

56. In response to the continuous blockades, and as part of Exmingua's efforts to protect its investments, on 22 April 2016, Exmingua filed an *amparo* against the President of Guatemala, the Ministry

of Government, and the General Directorate of the National Police, claiming "the failure and the threat that the denounced authorities do not guarantee the constitutional rights and maintain public order in the blockades promoted … in areas … of the Progreso VII Derivada mining project." The Guatemalan Constitutional Court did not grant the *amparo*, however, on the grounds that the Progreso VII Project was suspended.

57. On 5 May 2016, the Guatemalan Constitutional Court confirmed the *amparo provisional* granted by the Supreme Court in the proceeding initiated by CALAS, and ruled that Exmingua's exploitation license for the Progreso VII Project could regain effectiveness only once the State conducted and completed consultations with the local communities pursuant to the ILO Convention.

58. Simultaneously, in May 2016, the Guatemalan Attorney General filed a criminal action against four Exmingua workers, claiming that they were carrying concentrate, and, thus, were illegally exploiting natural resources in contravention of the Guatemalan Court rulings. The four workers were detained, and the concentrate they were carrying, which had been processed from product extracted *before* the Court had suspended Exmingua's exploitation license, was impounded. On 8 May 2018, a Court of Appeals acquitted the Exmingua workers, on the basis that it was not proven that the concentrate they were carrying had been extracted after Exmingua's license had been suspended. To date, however, the concentrate shipment remains impounded.

59. On 28 June 2016, the Guatemalan Supreme Court granted an *amparo definitivo* to CALAS, holding that, in the case of mining activities, public consultations by the State with indigenous peoples were mandatory. Exmingua's exploitation license was thus definitively suspended. On 30 June 2016, Exmingua appealed the Supreme Court's decision to the Constitutional Court. To date, and contrary to both Guatemalan law and the Courts' handling of other, similar cases, a decision on this appeal remains pending. Notwithstanding these rulings, the State has made no effort to commence the consultations at issue.

60. On 8 June 2017, Exmingua made an application to revoke the Constitutional Court's ruling dated 5 May 2016, citing to changed circumstances given the Court's ruling dated 26 May 2017 in a similar case (*Oxec*), as further discussed below. This request was rejected by the Constitutional Court on 5 October 2017.

61. The *Oxec* case arose from an application for an *amparo provisional* against the MEM filed with the Guatemalan Supreme Court on 11 December 2015 by an individual acting on behalf of the Q'Eqchi indigenous community, regarding the construction of two hydroelectric projects owned by Oxec, S.A. and Oxec II, S.A, two investments indirectly owned by Guatemalan nationals. The claimant argued that the construction licenses for these projects had been wrongfully granted by the MEM, due to its failure to conduct public consultations required by the ILO Convention. On 22 April 2016, the Guatemalan Supreme Court, as in the Exmingua Progreso VII case, granted an *amparo provisional* and suspended construction of the works. In January 2017, the Supreme Court ruled in favor of the claimant, ordering that construction be halted until public consultations were completed and, in February 2017, the Constitutional Court upheld the suspension of the *Oxec* projects. However, on 26 May 2017, the Guatemalan Constitutional Court lifted the suspension and granted *Oxec* permission to resume works. The Court, moreover, ordered the MEM to conduct public consultations within a 12-month period, and set out detailed guidelines for these consultations. The MEM proceeded to conduct consultations, which were completed by December 2017.

62. Notably, the *Oxec* case reached the Constitutional Court in May 2017, several months after Exmingua filed its appeal to the Constitutional Court. Unlike in the case of Exmingua, however, the *Oxec* case was decided in the span of three months, while Exmingua's case remains pending after more than two years. In addition, *Oxec*, unlike Exmingua, was permitted to continue operating despite the lack of State consultations, and the MEM commenced and completed consultations within seven months, while taking no action whatsoever with respect to Exmingua's Progreso VIJ Project, despite the fact that the State has been ordered to do so by its own courts. Nor has the State adopted any regulations or procedures for conducting such consultations.

63. Apart from the *Oxec* case, the Court also has taken action in the *Escobal* case, although that case was filed significantly later than Exmingua's case. The *Escobal* case concerns a large silver mine operated and developed by Minera San Rafael, S.A., the Guatemalan subsidiary of Tahoe Resources (of Canada). This project was suspended on 5 July 2017, after the Guatemalan Supreme Court granted an *amparo provisional* to CALAS, on behalf of the Xinca indigenous people. However, in contrast with Exmingua's case, the Guatemalan Supreme Court reinstated *EscobaVs* mining license in September 2017; nevertheless, one month later, on appeal, the project was again suspended. On 3 September 2018, the Constitutional Court ruled that the *Escobal* mining license would remain suspended until the MEM completed public consultations in accordance with the ILO Convention. This final ruling was rendered even though the *Escobal* appeal was filed more than one year after Exmingua filed its appeal with the Constitutional Court, which the Court has failed to act upon.

V. BREACH OF OBLIGATIONS UNDER THE DR-CAFTA

64. Guatemala has breached its obligations under Chapter 10 of the DR-CAFTA, namely, 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), and Claimants have incurred significant losses as a result of these breaches.

A. Breach of Articles 10.3 (National Treatment) and 10.4 (Most Favored Nation Treatment)

65. Article 10.3 of the DR-CAFTA provides:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

66. Article 10.4 of the DR-CAFTA provides:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

67. These standards of protection require that Guatemala accord treatment to U.S. investors and their investments that is no less favorable than the treatment Guatemala accords to its own nationals and nationals of third States and their investments. Here, as described above, the State breached these standards by according more favorable treatment to the investors of *Oxec* and *Escobal* and their investments as compared to the treatment accorded to Claimants and their investment in Exmingua.

68. Specifically, as described above, although *amparo* proceedings were commenced against all three investments for the same ostensible reason, namely, the alleged failure of the State to conduct consultations with the local communities in accordance with the ILO Convention, Exmingua has received less favorable treatment by the courts and by MEM than has been accorded lo the two other projects. In particular, although the *amparo* against *Oxec* was appealed to the Constitutional Court seven months after Exmingua filed its appeal, the Constitutional Court in May 2017 lifted the suspension on the *Oxec* projects and set out clear guidelines for the MEM to conduct consultations. The MEM then proceeded to complete the consultations in seven months. In the *Escobal* case, two months after the project was suspended, the mining license was reinstated by a Constitutional Court's ruling, albeit briefly before being again suspended. The Constitutional Court then ruled on the *Escobal* appeal in less than one year, providing a final resolution. By contrast, the Progreso VII Project been suspended for over two years, during which time an appeal to the Constitutional Court has been pending and the MEM has taken no action to commence consultations.

B. Breach of Article 10.5 (Minimum Standard of Treatment)

69. Article 10.5 of the DR-CAFTA provides:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) 'fair and equitable treatment[5] includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) 'full protection and security[5] requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

70. Annex 10-B specifies that, "[w]ith regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

1. Lack of Fair and Equitable Treatment

71. By agreeing to provide investors with the customary international law minimum standard of treatment, including fair and equitable treatment, Guatemala agreed to refrain from treating protected investments in a manner that is arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process, lacking in transparency or candor with respect to administrative proceedings, denying justice injudicial proceedings, or in breach of representations made by the State which were reasonably relied on by the investor.

72. Guatemala breached its obligation to accord Claimants' investment fair and equitable treatment by, among other things, suspending Exmingua's operations at Progreso VII although it was in possession of a validly-issued exploitation license; retroactively imposing a new requirement on Exmingua for the exploitation of resources after it already had been granted a valid exploitation license; unduly and arbitrarily delaying, in violation of its own laws, the issuance of court decisions; penalizing Exmingua for what the courts determined was a failure of the State; arbitrarily and unfairly granting preferential treatment to other investors and investments by allowing them to continue operating their investments while court proceedings were pending, conducting the consultations with respect to those projects while failing to do the same with respect to Exmingua's projects, and deciding those cases, which were filed after Exmingua's case, while Exmingua's case remains pending; adopting a *de facto* moratorium on granting exploitation licenses, contrary to law and Claimants' legitimate expectations; filing meritless criminal actions against Exmingua employees; and arbitrarily impounding concentrate that was derived from resources mined before Exmingua's exploitation license was suspended.

2. Lack of Full Protection and Security

73. The obligation to accord the minimum standard of treatment to investments encompasses the obligation to provide full protection and security, which requires the State to provide a reasonable level of police protection to protect investors' assets and property.

74. Guatemala has breached its obligation to provide Exmingua full protection and security by failing to take reasonable measures to ensure that Claimants and Exmingua have access to the Progreso VII and Santa Margarita project sites. Among other things, Guatemala's failure to act in this regard despite Claimants' and Exmingua's entreaties and petitions have resulted in Exmingua's employees being

threatened when attempting to access the sites and work stoppages at the site, and have prevented Exmingua's consultanls from being able to complete the social studies required for the ElA and thereby complete the application for an exploitation license for the Santa Margarita Project.

C. Breach of Article 10.7 (Expropriation and Compensation)

75. Article 10.7 of the DR-CAFTA provides:

> 1. No Party may expropriate or nationalize a covered investment either directly and indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
>
> (d) in accordance with due process of law and Article 10.5.
>
> 2. Compensation shall:
>
> (a) be paid without delay;
>
> (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation');
>
> (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
>
> (d) be fully realizable and freely transferable.

76. Annex 10-C (Expropriation) of the DR-CAFTA further addresses direct and indirect expropriation. Specifically, in accordance with Article 10.7.1, direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure,"[14] and indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[15]

77. Guatemala has expropriated Claimants' investment in Exmingua, because the State's suspension of the exploitation license for the Progreso VII Project and its illegal *moratorium* have deprived Exmingua of the use and enjoyment of its mining rights to the Progreso VII and Santa Margarita Projects. The Progreso VII Project has been suspended for more than two years, and the State has failed to conduct any consultations pursuant to the Guatemalan Court rulings. Guatemala, moreover, has expropriated Exmingua's concentrate, which has been unlawfully impounded for more than two years. With respect to the Santa Margarita Project, Claimants' investment likewise has been indirectly expropriated, because

[14] DR-CAFTA, Annex 10-C: Expropriation, ¶ 3 (C-1).

[15] *Id.*, ¶ 4.

Claimants have been unable to enjoy the benefits of their exploration license and to obtain an exploitation license due to the illegal *moratorium* and the failure of the State to protect their investment.

VI. RELIEF REQUESTED

78. Claimants hereby request that the Arbitral Tribunal to be constituted in this case issue a final award declaring that Guatemala has breached its obligations under the DR-CAFTA and ordering Guatemala to compensate Claimants in the amount of:

(i) Damages of no less than US$ 175 million in connection with the Progreso VII Project;

(ii) Damages of no less than US$ 175 million in connection with the Santa Margarita Project;

(iii) Damages of no less than US$ 500,000 for the concentrate shipments impounded by the State;

(iv) Costs associated with these proceedings, including arbitration costs, professional fees, attorneys' fees, and disbursements;

(v) Pre-award and post-award interest at a reasonable, commercial rate to be fixed; and

(vi) Such further or other relief as the Tribunal may deem appropriate.

79. Claimants reserve their rights to amend this Notice of Arbitration and assert additional claims as permitted by the ICSID Convention and the ICSID Arbitration Rules.

VII. REQUIRED COPIES AND LODGING FEE

80. In accordance with Rule 4(1) of the Institution Rules, this original Notice of Arbitration is accompanied by five additional signed copies thereof, including all exhibits; two additional hard copies for the opposing party identified herein; and eight electronic devices (USBs) containing copies of this Notice of Arbitration and its exhibits. Further, according to the 1 July 2017 Schedule of Fees, evidence of payment of the non-refundable lodging fee of twenty-five thousand dollars (US$ 25,000) is enclosed herewith.[16]

[16] Wire Transfer Confirmation for ICSID Lodging Fee (C-6).

Respectfully submitted,

WHITE & CASE

Counsel to Daniel W. Kappes and
Kappes, Cassiday & Associates

9 November 2018

Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala

NOTICE OF ARBITRATION

INDEX OF EXHIBITS

Exhibit C-1	DR-CAFTA Chapter 10 (English and Spanish versions), including evidence of its entry into force for Guatemala and for the United States of America, respectively.
Exhibit C-2	Powers of Attorney issued by Claimants dated 2 November 2018
Exhibit C-3	Claimants' Authorization to Commence Arbitration dated 2 November 2018
Exhibit C-4	Claimants' Waiver Pursuant to DR-CAFTA Article 10.18 dated 2 November 2018
Exhibit C-5	Notice of Intent Pursuant to the Free Trade Agreement between the Dominican Republic, Central America and the United States dated 16 May 2018 (English and courtesy translation into Spanish)
Exhibit C-6	Wire transfer confirmation for ICSID lodging fee