INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Daniel W. Kappes and Kappes, Cassiday & Associates

v.

Republic of Guatemala

(ICSID Case No. ARB/18/43)

PROCEDURAL ORDER NO. 2

On *Amici Curiae* Application for Leave to File Non-Disputing Party Submissions

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

Secretary of the Tribunal
Mr. Francisco Grob

Date of the Order: November 7, 2019

I. INTRODUCTION

1. On October 23, 2019, La Puya, which describes itself as an environmental justice movement comprising community members from San José del Golfo and San Pedro Ayampuc, Guatemala ("La Puya"), submitted an "*Amici Curiae* Application for Leave to File Non-Disputing Party Submissions" in this proceeding.

2. On October 23, 2019, the Tribunal invited the parties to provide their observations on the Application, pursuant to ICSID Arbitration Rule 37(2), DR-CAFTA Article 10.20.3 and Section 18.2 of Procedural Order No. 1.

3. As scheduled, each party filed its observations on October 31, 2019.

II. LA PUYA'S APPLICATION

4. La Puya's position is that: (i) it has an ongoing interest in the proceeding as its members have been "greatly and detrimentally impacted" by El Tambor Mining Project and "have been active in the affected communities and in related domestic legal proceedings" in Guatemala; and (ii) its "unique perspective, knowledge, and insight" regarding the subject-matter in this proceeding, "which differs from that of Claimants and Respondents," will assist the Tribunal in determining "various legal and factual issues that will arise throughout the course of the arbitration."

5. Pursuant to ICSID Arbitration Rule 37(2) and DR-CAFTA Article 10.20.3, La Puya requests that the Tribunal: (i) accept and consider *amicus* submissions from La Puya; and (ii) make available to La Puya and the public all relevant documents of record in the case. According to La Puya, the Government of Guatemala has not published the notice of intent, notice of arbitration and other case materials as required by DR-CAFTA Article 10.21.

III. THE PARTIES' OBSERVATIONS

A. The Claimants' Observations

6. The Claimants oppose La Puya's application. They state that La Puya has failed to meet its burden of showing that its *amicus curiae* submission(s) should be accepted, in accordance with the rules governing the intervention of non-disputing parties in this proceeding.

7. First, the Claimants say that La Puya has failed 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, as required by ICSID Arbitration Rule 37(2)(a). According to the Claimants, La Puya has failed to identify a legal or factual issue that is relevant to the dispute or explain what unique knowledge or perspective it has with regard to that issue.

8. Second, the Claimants say that La Puya has not shown how its submission "would address a matter within the scope of the dispute," as required by ICSID Arbitration Rule 37(2)(b). The Claimants observe that the parties have yet to file their Memorial and Counter-Memorial,

respectively. Only after such pleadings have been filed could La Puya know what issues will be in dispute, in order to demonstrate that its perspective, knowledge, or insight of that issue is different from that of the parties to the dispute. Moreover, the Claimants assert that La Puya has not even attempted to show that it has any expertise relevant to the issues in dispute in this preliminary phase, which is devoted to addressing the Respondent's preliminary objections.

9. Third, the Claimants argue that La Puya has not established that is has a "significant interest in the proceeding," as required by ICSID Arbitration Rule 37(2)(c). According to the Claimants, La Puya merely asserts that it has such an interest, but does not expand on the point in any way, and its "bare assertion … is insufficient to meet this burden."

10. Finally, the Claimants urge that it would be disruptive to the proceedings and prejudicial to the parties to accept La Puya's *amicus curie* submission at this time, rather than after the submission of the Parties' respective Memorial and Counter-Memorial, following the current preliminary objections phase. The Claimants observe that accepting La Puya's *amicus curiae* submission at this time would require the parties to engage in another round of briefing to respond to the submission, which would be an undue burden and impractical given the expedited schedule of the preliminary phase.

B. The Respondent's Observations

11. The Respondent submits that it has no objection to the participation of La Puya as an *amicus curiae* during the merits phase of the proceeding. However, it asserts that La Puya's intervention at this preliminary stage is premature.

12. The Respondent considers that La Puya's participation in the merits phase may assist the Tribunal in obtaining information and understanding on issues relating to the communities of San José del Golfo and San Pedro Ayampuc and el El Tambor mining project. The current preliminary stage, however, is restricted to legal issues, with the Respondent "assum[ing] all the facts in the Notice of Arbitration to be true for the purposes of the Preliminary Objections," and therefore not discussing the underlying factual issues. Therefore, La Puya's intervention should be admitted only if Respondent's Preliminary Objections are denied in whole or in part and the case moves to the merits.

13. The Respondent also notes that it has published on the Ministry of Economy of Guatemala's website all the documents required under the DR-CAFTA Article 10.21.[1]

IV. THE TRIBUNAL'S ANALYSIS

14. The Tribunal agrees with the Parties that La Puya's *amicus* application is premature, given that the current phase of proceedings is directed entirely to the Respondent's preliminary objections. The amicus application will be moot if those objections are successful. If they are not, and the case moves in whole or in part to the merits, there will be ample time later for the Tribunal to consider, in conjunction with the Parties' more detailed submissions, whether it

[1] The documents are accessible at this institutional electronic address: https://www.mineco.gob.gt/controversias-inversionista-estado

would be assisted by the alleged "unique perspective, knowledge, and insight" of La Puya and its members. There is no need to determine that issue now.

V. THE TRIBUNAL'S DECISION

15. For the above reasons, the Tribunal reserves decision on the La Puya application, until after its decision on the preliminary objections. Should the case proceed thereafter to the merits, either the applicant or one or both of the Parties may request renewed consideration of La Puya's application, based on a showing at that time of the relevance and materiality of the proposed *amicus* submission to the merits issues in dispute.

For and on behalf of the Tribunal,

[signed]
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Ms. Jean Kalicki
President of the Tribunal
Date: November 7, 2019