

16 May 2018

The Honorable Acisclo Valladares Urruela  
Ministerio de Economía  
8a. Av. 10-43 Zona 1  
Guatemala, Guatemala

Mr. Alexander Salvador Cutz Calderón  
Dirección de Administración del Comercio Exterior  
Ministerio de Economía  
8a. Av. 10-43 Zona 1  
Guatemala, Guatemala

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## **Notice of Intent Pursuant to the Free Trade Agreement between the Dominican Republic, Central America and the United States**

Dear Mr. Minister and Mr. Director:

In accordance with Articles 10.15 and 10.16 of the Dominican Republic-Central America-United States Free Trade Agreement (“DR-CAFTA” or the “Treaty”), to which both the United States and Guatemala are Parties, and with a view towards resolving this dispute amicably through consultation and negotiation, Mr. Daniel W. Kappes, a national of the United States of America, and Kappes, Cassidy & Associates, a company established and wholly owned by Mr. Kappes and incorporated under the laws of the State of Nevada, United States of America, on 13 May 1982 (“KCA,” and jointly with Mr. Kappes, the “Investors”), respectfully submit to the Republic of Guatemala (“Guatemala” or the “State”) this written notice of their intention to submit a claim to arbitration under Chapter 10 of the DR-CAFTA.

### **The Investors and Their Investment**

Mr. Kappes and KCA are located at 7950 Security Circle, Reno, Nevada, 89506, United States of America. The Investors are highly regarded in the mining industry. Since 1982, KCA has provided process metallurgical services to international mining companies. KCA specializes in all aspects of heap leach and cyanide processing mining, including laboratory testing, project feasibility studies, engineering design, construction, and operations management.

The Investors entered the Guatemalan mining market in 2009 through the acquisition of Exploraciones Mineras de Guatemala, S.A. (“Exmingua” or the “Investment”), which was duly organized under the laws of Guatemala on 25 July 1996. Minerales KC Guatemala, Ltda. in which KCA owns 90% and Mr. Kappes owns 10%, owns 75% of Exmingua. Mr. Kappes directly owns the remaining 25% of Exmingua. Exmingua obtained an exploitation license to develop and operate the mining project of “El Tambor,” also known as Progreso VII Derivada (the “Progreso VII Project”), and holds an exploration license with respect to the Santa Margarita mining project (the “Santa Margarita Project”). In addition, Exmingua is the owner of an installed plant and processing equipment, located in the immediate outskirts

of San José del Golfo, Department of Guatemala and used to develop the Progreso VII and Santa Margarita Projects.

The Progreso VII Project is a gold and silver mining project located in the municipalities of San José del Golfo and San Pedro Ayampuc, within the orogenic Regional Gold Belt (*Cinturón Regional de Oro*) called “Tambor.” The Santa Margarita Project is also a gold and silver mining project located in the municipality of San Pedro Ayampuc.

### **Factual Basis for the Claim**

Despite the important positive contributions that the Progreso VII Project would bring to the local communities, the Investors have been deprived of the use and enjoyment of their investment in Exmingua, which has been subjected to a series of acts and omissions by the State that were arbitrary, unfair, and contrary to due process. As a consequence of these measures, the Progreso VII Project’s operations have been suspended for more than two years and Exmingua has been prevented from obtaining access to the site of the Santa Margarita mineral resources to complete actions in order to obtain an exploitation license.

After obtaining approval of its Environmental Impact Assessment (“EIA”) on 23 May 2011, by way of Resolution 03394 dated 30 September 2011, Exmingua secured a 25-year exploitation license issued by the Ministry of Energy and Mines (“MEM”) (the “Exploitation License”), with respect to the Progreso VII Project. During the course of its preparations for the Progreso VII Project, and as part of its EIA tasks, Exmingua conducted public consultations with local communities, and even participated in various community improvement projects. Article 46 of the Mining Law provides that “[t]hose considering themselves prejudiced by an application for a mining right may oppose the grant of same, formalizing their opposition before the Directorate at any moment prior to the dictating of the resolution of grant.... If the opponent does not comply with all requirements, notice will be given to comply within a period of ten days under penalty that no further process will be given to the petition.” No opposition was filed against Exmingua’s EIA pursuant to Article 46, and Exmingua satisfied all requirements to secure the authorizations to obtain its exploitation license.

In early 2012, the Progreso VII Project began construction and, in 2014, was in full production, achieving a first concentrate shipment on 12 December 2014. While the Progreso VII Project was ongoing, over 180 employees were on payroll, and more than 60 shipments were made.

On 28 August 2014, the *Centro de Acción Legal, Ambiental y Social de Guatemala* (“CALAS”), a Guatemalan non-governmental organization, filed an *amparo* action against the MEM, claiming that Exmingua’s Exploitation License had been wrongfully granted, because Guatemala had failed to carry out requisite consultations with the local communities pursuant to the Convention concerning Indigenous and Tribal Peoples in Independent Countries (the “ILO Convention”). Exmingua joined the action as a “third interested party.” The complaint was meritless, not least because, at the time Exmingua’s Exploitation License was granted, there was no Guatemalan law or regulation implementing the ILO Convention or requiring any particular means of consultation with the local communities. Yet, on 11 November 2015, the Guatemalan Supreme Court granted an *amparo provisional* against the MEM.

On 5 May 2016, the Constitutional Court confirmed the *amparo provisional* granted by the Supreme Court and ruled that Exmingua’s Exploitation License could regain effectiveness only if the State conducted consultations with the local communities under the ILO Convention. Thereafter, on 28 June 2016, the Guatemalan Supreme Court issued an *amparo definitivo* in favor of CALAS, ordering the

suspension of Exmingua's mining activities. The suspension ruling ordered the wholesale stoppage of the Progreso VII Project, even though the alleged failure to conduct consultations was solely attributable to the State. The Court failed to award any compensation to Exmingua for being a collateral victim of this alleged wrongful conduct of the State. On 30 June 2016, Exmingua appealed the *amparo definitivo* granted by the Supreme Court to the Constitutional Court. To date, this appeal has not been resolved by the Constitutional Court.

In issuing these adverse rulings, the Guatemalan courts notably have failed to rule in a consistent fashion when compared with other cases. For example, in another *amparo* action concerning two projects owned by Guatemalan companies, the Guatemalan Constitutional Court ruled on 26 May 2017 (*i.e.*, one year after the *amparo* ruling in the Exmingua case), that the Guatemalan entities were permitted to continue with their projects while the MEM carried out consultations under the ILO Convention. Also, unlike the Exmingua case, the State then promptly concluded consultations by the end of 2017. Here, even if the Constitutional Court were to reverse the Supreme Court ruling against Exmingua's Exploitation License, the Investors have been harmed by the stoppage of the Progreso VII Project for several years.

Adding further damage, Exmingua's Certificate of Exportation has been inexplicably suspended by order of the MEM. On 25 September 2015, the MEM issued Exmingua a valid and effective Certificate of Exportation. On 3 May 2016, however, the General Director of MEM ordered the suspension of this Certificate, citing to the Supreme Court ruling of 11 November 2015 and MEM's Resolution 1202, dated 10 March 2016, which suspended Exmingua's right to exploit gold and silver and to dispose such minerals for local sale, transformation, and exploitation. Importantly, neither of these instruments referred to Exmingua's Certificate of Exportation. The MEM thus further arbitrarily and unlawfully harmed the Investors by prohibiting Exmingua from exercising its right to export the minerals that it already had extracted from the Progreso VII Project before its Exploitation License was wrongfully suspended.

In addition, Guatemala has failed to provide full protection and security to Exmingua, despite its multiple requests to the State. In particular, protesters, mainly organized by CALAS, have illegally blocked the entrance to the Progreso VII and Santa Margarita Projects, preventing access to these sites. Despite the Investors' efforts to obtain relief by petitioning local and national governmental authorities and filing court actions, Guatemala has failed to provide Exmingua with access to its Projects' sites.

Guatemala's failure in this regard notably has prevented Exmingua from using and enjoying its exploration license for the Santa Margarita Project and from obtaining an exploitation license for that Project. Because access to that site has been blockaded and Exmingua's personnel have been threatened should they enter the site, Exmingua has been unable to work on the site of Santa Margarita and complete the consultations with the local communities to complete its EIA and all regulatory requirements to obtain the corresponding exploitation license.

### **Breach of Obligations Under The Treaty**

Guatemala, by and through its agencies and instrumentalities, as described above, has breached its obligations under Chapter 10 of the DR-CAFTA. Mr. Kappes and KCA have incurred significant losses as a consequence of those breaches. In particular, Guatemala's actions violate the following provisions of the DR-CAFTA:

- (i) Article 10.3 – National Treatment;

- (ii) Article 10.5 – Minimum Standard of Treatment; and
- (iii) Article 10.7 – Expropriation and Compensation

**Relief Requested**

As a consequence of the State’s breach: (i) the Progreso VII Project, with an estimated net current value of approximately US\$150 million in 2017, has been suspended for years and the Investors have been deprived of its value; (ii) the Santa Margarita Project has not received an exploitation license, because it has not been possible to complete the corresponding EIA, but based on the quantity and quality of the mineral resources, Guatemala’s measures have resulted in losses of at least, and very likely in excess of, the amount for the Progreso VII Project; and (iii) three concentrate shipments with a value of US\$500,000 were abruptly impounded, depriving the Investors of that revenue.

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In good faith and in the spirit of cooperation, the Investors invite Guatemala to engage in discussions and negotiations with a view to achieving an amicable resolution of the dispute noticed herein. If such consultations with Guatemala are unsuccessful, the Investors intend to submit a claim for arbitration under the Treaty, seeking damages for the harm and in the amounts described above, plus interest, costs, and any such further relief as the Tribunal may deem appropriate.

Sincerely,



**Andrea J. Menaker**

**Rafael Llano**

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cc: The Honorable Luis Alfonso Chang Navarro, Minister of the Ministry of Energy and Mines  
The Honorable Luis E. Arreaga, U.S. Ambassador to the Republic of Guatemala  
Mr. Daniel W. Kappes, Kappes, Cassidy & Associates