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FOUNDED 1866

December 14, 2016

By Email

Anneliese Fleckenstein
Legal Counsel
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: *Spence International Investments, LLC, et al. v. the Republic of Costa Rica*
(UNCT/13/2)

Dear Ms. Fleckenstein:

Respondent writes to request that the Tribunal terminate these proceedings with respect to certain Claimants' claims and order that those Claimants pay costs (including attorney's fees) to Respondent.

On October 25, 2016, the Tribunal issued an Interim Award in the above-mentioned case finding that:

- (i) it had no jurisdiction to entertain Claimants' claims with respect to Lots B1, A39, C71, C96, SPG3, V30, V31, V32, V33, V38, V39, V40, V46, V47, V59, V61a, V61b, and V61c.¹ These lots belong to Claimants Aaron C. Berkowitz, Trevor B. Berkowitz, Bob F. Spence, Spence International Investments, LLC ("Spence International"), Joseph M. Holsten, Brenda K. Copher, and Ronald E. Copher;²
- (ii) it had jurisdiction to entertain Claimants' claims with respect to Lots A40, SPG1, SPG2, B3, and B8 but only regarding Claimants' allegations that the assessment of compensation of these lots in the local proceedings amounts to manifest arbitrariness and/or blatant unfairness contrary to CAFTA Article 10.5.³ These

¹ See *Spence International Investments LLC, et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award, October 25, 2016 ("Interim Award"), para. 308(1).

² See Interim Award at p. 4, Table 1.

³ See Interim Award at para. 308(2).

Ms. Fleckenstein
December 14, 2016
Page 2

lots belong to Claimants Aaron C. Berkowitz, Trevor B. Berkowitz, Brett E. Berkowitz, and Spence International;⁴

- (iii) it will provide an opportunity to hear the parties' arguments on the question of whether the Tribunal has jurisdiction to entertain Claimants' allegations regarding breaches of CAFTA Article 10.5 with respect to Costa Rican court judgments rendered after June 10, 2013 concerning Lots B5, B6 and B7.⁵ These lots belong to Claimants Glen Gremillion and Brett E. Berkowitz;⁶ and
- (iv) the Parties shall each bear their costs, and shall bear equally half of the fees and expenses of the Tribunal and the Secretariat with respect to the proceedings to date. The Tribunal left open the possibility of a different apportionment of costs, fees and expenses for any future phases of the proceedings.⁷

On November 28, 2016, counsel for Claimants sent a letter to the Tribunal stating that "Spence Claimants have decided not to pursue any of their potential remaining claims in the arbitration,"⁸ and that "Berkowitz Claimants are no longer represented in the arbitration by Fasken Martineau, Dr. Todd Weiler or Lic. Vianney Saborio Hernandez."⁹ On November 29, 2016, the law firm GST LLP notified ICSID by email that it was now representing Claimants Brett, Aaron, and Trevor Berkowitz.¹⁰ The email does not mention Claimant Glen Gremillion. We understand based on discussions with counsel for the Spence Claimants and counsel for the Berkowitz's that neither currently represents Mr. Gremillion.

I. The Tribunal Should Terminate the Proceedings with Prejudice with Respect to the Spence International and Mr. Gremillion Claims They Fail to Pursue and Order Spence International and Mr. Gremillion to Pay Costs Related to Those Claims

In light of recent developments, and for the reasons discussed below, Respondent respectfully requests that the Tribunal terminate the proceedings with prejudice with respect to Spence International's claims that it has decided not to pursue and order costs related to those claims. Respondent also respectfully requests that the Tribunal terminate the proceedings with prejudice with respect to Mr. Gremillion's claims to the extent he does not pursue them and order costs related to those claims.

⁴ See Interim Award at p. 4, Table 1.

⁵ See Interim Award at para. 308(3).

⁶ See Interim Award at p. 4, Table 1.

⁷ See Interim Award at para. 308(5).

⁸ Letter from Fasken Martineau, November 28, 2016, p. 1. The "Spence Claimants" are Bob F. Spence, Spence International Investments, LLC, Joseph M. Holsten, Brenda K. Copher, and Ronald E. Copher. See Claimants' Notice of Arbitration and Statement of Claim, June 10, 2013 ("Claimants' Notice of Arbitration"), para. 2.

⁹ Letter from Fasken Martineau, November 28, 2016, p. 1. The "Berkowitz Claimants" are Brett Berkowitz, Aaron Berkowitz, and Trevor Berkowitz and Glen Gremillion. See Claimants' Notice of Arbitration at para. 3.

¹⁰ See Email from Diego B. Gosis to ICSID notifying that GST LLP will now represent the Berkowitz Claimants (*i.e.*, Brett, Aaron and Trevor Berkowitz), November 29, 2016.

A. The Tribunal Should Terminate the Proceedings with Prejudice with Respect to Spence International's Claims It Failed to Pursue and Order Spence International to Pay Costs Related to Those Claims

Claimant Spence International initiated these proceedings with respect to its claims on June 10, 2013. Spence International, along with the other Claimants in this case, pursued its claims with zeal for over three years. Nevertheless, notwithstanding the fact that the Tribunal found that it had jurisdiction to hear claims regarding three of Spence International's properties (*i.e.*, Lots A40, SPG1, and SPG2), Spence International decided not to pursue its claims. The only reason it gave for abandoning its claims was because it had "carefully considered the Tribunal's Interim Award."¹¹

Respondent respectfully requests that the Tribunal terminate the proceedings with respect to Spence International's claims that it has now abandoned and that the aforementioned termination be with prejudice. If the Tribunal were not to order that the proceedings be terminated with prejudice with respect to Lots A40, SPG1, and SPG2, it would severely prejudice Respondent. This is because Claimant Spence International would not be deterred from initiating a same or similar case against Respondent in the future, forcing Respondent to once again defend against Claimant's meritless accusations.

In addition, although the Tribunal has already issued a ruling on the apportionment of costs, fees, and expenses in this case, Respondent respectfully requests that, in light of recent events, the Tribunal amend its decision on costs and order that Claimant Spence International pay costs to Respondent in relation to the claims it has now abandoned.

In this case, Respondent has been forced to devote substantial resources to defend claims brought against it by, in this situation, a Claimant who has now abandoned its remaining claims. Spence International cannot expect Respondent to bear the cost of defending claims Spence International pursued vigorously and then abandoned. Spence International's claims, as the other Claimants' claims, should have never been brought in the first place.

Accordingly, Respondent respectfully requests that the Tribunal amend its decision on costs, and order Spence International to reimburse it for all reasonable and appropriate costs, fees, and expenses incurred in this arbitration in proportion to the percentage of properties owned by Spence International regarding which the Tribunal found it had jurisdiction but which Spence International failed to pursue—*i.e.*, 11.5%,¹² approximately US \$250,000.

¹¹ Letter from Fasken Martineau, November 28, 2016, p. 1.

¹² This percentage corresponds to the number of properties Spence International owns and regarding which the Tribunal found it had jurisdiction in comparison with the total number of properties at issue in this case. It is the number of properties owned, not the value of those properties, that matters for the purposes of determining costs.

B. The Tribunal Should Order Glen Gremillion to Notify It Whether He Will Continue to Pursue His Claims Against Costa Rica and If Not, the Tribunal Should Terminate the Proceedings with Respect to His Property at Issue in this Case and Order Mr. Gremillion to Pay Costs

Mr. Gremillion also initiated these proceedings with respect to his claims on June 10, 2013, and as Spence International, also vigorously pursued them for over three years. Mr. Gremillion owns one of the 26 lots that are the subject of this dispute, Lot B7. Now, notwithstanding that the Tribunal gave him a second opportunity to present arguments on jurisdiction with respect to his property, there is no indication that Mr. Gremillion is currently represented by counsel nor is it clear that Mr. Gremillion wishes to pursue his claims related to his property at issue in this case.

Respondent needs—indeed, is entitled—to know, whether Mr. Gremillion intends to pursue his claims against Respondent. The Tribunal has ordered the parties to notify it of their views regarding the next steps regarding the remaining claims by December 21, 2016. Respondent, therefore, respectfully requests that the Tribunal order Mr. Gremillion to inform the Tribunal no later than December 20, 2016 whether he intends to pursue his claims in the arbitration so that Respondent may reach out to him or his counsel before the December 21, 2016 deadline.

If Mr. Gremillion does not timely respond or if he indicates that he no longer wishes to pursue his claims regarding Lot B7 then, for the reasons provided above concerning Spence International's claims, Respondent respectfully requests that the Tribunal terminate the proceedings with prejudice with respect to Mr. Gremillion's claims.

Respondent also respectfully requests that the Tribunal amend its decision on costs and order that Mr. Gremillion pay Respondent's costs and fees incurred in defending Mr. Gremillion's frivolous claims against Respondent. As with Spence International, Respondent proposes that the amount of costs and fees to be reimbursed by Mr. Gremillion be proportionate to the percentage of properties in these proceedings owned by Mr. Gremillion—*i.e.*, 3.8%, approximately US \$83,000.

II. The Tribunal Has Authority to Terminate These Proceedings and Apportion Costs

Article 36(2) of the UNCITRAL Arbitration Rules provides that “[i]f, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1 [*i.e.*, because of settlement], the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings.” In this case, Spence International (and potentially Mr. Gremillion) has decided not to pursue its claims concerning properties over which the Tribunal found it had jurisdiction. Thus, continuation of the proceedings with respect to claims concerning those properties is both unnecessary and impossible. Although Article 36(2) provides that such termination shall not occur if “there are remaining matters that may need to be decided,” there are no such remaining matters with respect to Lots A40, SPG1, or SPG2 (nor with respect to Lot B7, if Mr. Gremillion decides not to pursue his claims).

Ms. Fleckenstein
December 14, 2016
Page 5

The Tribunal also has authority and broad discretion to apportion costs in this proceeding. Article 40(1) of the UNCITRAL Arbitration Rules provides that “[t]he arbitral tribunal shall fix the costs of the arbitration in the final award and, if it deems appropriate, in another decision.” Thus, the Tribunal has the authority to fix costs even where, as here, it has not yet issued a final award in the case. Article 40(2) defines costs as including legal fees, the fees and expenses of the tribunal, and ICSID expenses.¹³

According to Article 42(1) of the UNCITRAL Rules, “The costs of the arbitration shall in principle be borne by the unsuccessful party or parties.” Despite the presumption in favor of the so-called “loser pays” approach, the Rules nevertheless afford tribunals substantial discretion to “apportion [the] costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.” In addition, Article 42(2) provides that tribunals shall in the final or “any other award” “determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.” Accordingly, the Tribunal has the authority to amend its decision on costs and order Spence International (and Mr. Gremillion) to reimburse Respondent for all reasonable and appropriate costs, fees, and expenses incurred in this arbitration.

In the event that the Tribunal orders that either Spence International or Glen Gremillion or both pay costs to Respondent, Respondent stands ready to submit its cost submission to the Tribunal.

Respectfully submitted,



Stanimir A. Alexandrov
Jennifer Haworth McCandless
Counsel for Respondent

¹³ Article 40(2) provides that the term “costs” includes only: “(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41; (b) The reasonable travel and other expenses incurred by the arbitrators; (c) The reasonable costs of expert advice and of other assistance required by the tribunal; (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.” (Emphasis added).