

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE DOMINICAN
REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT AND
THE UNCITRAL ARBITRATION RULES (2010)**

**SPENCE INTERNATIONAL INVESTMENTS, LLC, BERKOWITZ ET AL
V.
THE REPUBLIC OF COSTA RICA
(UNCT/13/2)**

**PROCEDURAL ORDER TAKING NOTE OF THE TERMINATION OF THE CASE
WITH RESPECT TO CERTAIN CLAIMANTS**

Daniel Bethlehem, Presiding Arbitrator
Mark Kantor, Arbitrator
Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal
Anneliese Fleckenstein

Date of dispatch to the parties: 10 February 2017

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

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Representing the Respondent

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Introduction

1. On 25 October 2016, the Tribunal issued its Interim Award deciding as follows:

“1. The Tribunal finds that it has no jurisdiction to entertain the Claimants’ claims in respect of Lots B1, A39, C71, C96, SPG3, V30, V31, V32, V33, V38, V39, V40, V46, V47, V59, V61a, V61b and V61c.

2. The Tribunal finds that it has no jurisdiction to entertain the Claimants’ claims in respect of Lots A40, B3, B8, SPG1 and SPG2 save in respect of the Claimants’ allegations that, by reference to relevant and applicable judgments of the Costa Rican courts, the assessment of compensation in respect of Lots B3, B8, A40, SPG1 and SPG2 amounts to manifest arbitrariness and / or blatant unfairness contrary to CAFTA Article 10.5.

3. The Tribunal finds that the Parties should be afforded an opportunity to be heard on the question of whether the Tribunal has jurisdiction to entertain the Claimants’ allegations of breach of CAFTA Article 10.5 by reference to relevant and applicable judgments of the Costa Rican courts rendered after 10 June 2013 in respect of Lots B5, B6 and B7.

4. The procedure applicable to further proceedings is reserved for further decision by the Tribunal in due course, following consultations with the Parties.

5. The Claimants and the Respondent shall each bear their own costs, including counsel’s fees and expenses, and shall bear equally half of the fees and expenses of the Tribunal and the Secretariat, in respect of the proceedings to date, without prejudice to the possibility of a different apportionment of costs, fees and expenses in respect of any future phase of these proceedings.”

2. Noting the heavy factual detail of the case, and recalling Article 38 of the UNCITRAL Rules, the Tribunal invited the parties to draw its attention to “*any error in computation, any clerical or typographical error, or any error or omission of a similar nature*” within 30 days of receipt of the Interim Award so that the Tribunal could consider whether any correction was appropriate.
3. By letter dated 28 November 2016, the Respondent replied noting that it had “*not identified any corrections to be made to the Interim Award.*” By a letter of the same date, the Claimants replied that they had “*not identified any errors in the nature of those set out in Article 38 of the UNCITRAL Arbitration Rules to which they wish to draw the Tribunal’s attention.*” The Claimants further informed the Tribunal that “*the Spence Claimants have decided not to pursue any of their potential remaining claims in the arbitration*” and also that the Berkowitz Claimants were no longer represented

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by Fasken Martineau Dumoulin LLP, Dr. Todd Weiler or Mr. Vianney Saborío Hernández.

4. By letter of 14 December 2016, the Respondent requested that the Tribunal terminate the proceeding with prejudice with respect to the Spence International and Mr. Gremillion claims that they fail to pursue and order those Claimants to pay costs (including the Respondent's attorney fees) related to those claims.
5. With respect to Spence International, the Respondent argued that after vigorously pursuing its claims, forcing the Respondent to devote substantial resources to defend itself, once the Tribunal found it had jurisdiction to hear claims regarding three of Spence International's properties, it decided to abandon them without stating reasons other than its consideration of the Tribunal's Interim Award. If the Tribunal were not to order the termination with prejudice nothing would preclude the Claimant from initiating in the future a same or similar case against the Respondent. The Respondent further requested that the Tribunal amend its decision on costs and order Spence International to reimburse the Respondent for all reasonable costs, fees and expenses incurred "*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.*"
6. With respect to Mr. Glen Gremillion, the Respondent argued that there is no indication whether Mr. Gremillion is currently represented by counsel nor whether he will pursue his claim with respect to his lot B7. As such, the Respondent requested that the Tribunal order Mr. Gremillion to indicate whether he will pursue his claim and if not, or if a timely answer is not received, to order the termination of the proceeding with prejudice with respect to Mr. Gremillion's claims for the same reasons set out above. The Respondent further requested that the Tribunal amend its decision on costs and order Mr. Gremillion to reimburse the Respondent for all reasonable costs, fees and expenses incurred in proportion "*to the percentage of properties in these proceedings owned by Mr. Gremillion—i.e., 3.8%, approximately US \$83,000.*"
7. By letter of 16 December 2016, the Tribunal invited counsel of record to the Spence and Mr. Gremillion Claimants to:

"submit any response they may have to this letter [the Respondent's letter of 13 December 2016]. The Tribunal further requests counsel of record for Mr. Gremillion to state what the position is regarding Mr. Gremillion's representation and, if they no longer represent him in respect of any further phase of proceedings, to nonetheless: (i) make all reasonable efforts to contact Mr. Gremillion and inform him of the Respondent's applications against him, (ii) seek instructions from him on the issue of the Respondent's applications on the basis that the issues in question are connected with matters in respect of which they were counsel of record, and (iii) inform him that a failure to submit views to the Tribunal in response to the

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Respondent's application will prejudice the Tribunal's consideration of the issues, possibly to his detriment."

8. By letter of 23 December 2016, the Spence and Mr. Gremillion Claimants submitted a response to the Respondent's application. Regarding Mr. Gremillion, Counsel confirmed that Mr. Gremillion formed part of the Berkowitz Claimants, as defined in the Notice of Arbitration and Statement of Claim, and therefore was no longer represented by Fasken Martineau DuMoulin LLP, Dr. Todd Weiler or Lic. Vianney Saborío Hernández. However, Mr. Gremillion requested that Counsel inform the Tribunal that he would not pursue his claim with respect to Lot B7 and adopted the same position as Spence International.
9. Regarding the Spence International claims, the Claimant disagreed with the Respondent's position that those claims should have never been brought. The Claimant argued that they invested in Costa Rica in good faith, that in fact the Tribunal did not dismiss all the claims and noted paragraph 300 of the Interim Award where the Tribunal emphasized that the Award principally addressed issues that went to its jurisdiction and the justiciability of the Claimants' case under the DR-CAFTA. The Claimant noted that after an agreed schedule established in Procedural Order No. 1, the hearing on the merits and jurisdiction took place in April 2015, with post hearing submissions in May and June 2015, questions posed to the parties by the Tribunal and answers in November and December 2015, and regular updates on the expropriation process up to June 2016, the Tribunal issued an Interim Award in October 2016, retaining jurisdiction over certain claims and issuing a decision, including as regards a final decision on costs in respect of the proceedings to that point. As such, Claimants' contended, the Tribunal was *functus officio* with respect to the issue of costs and that it could not revisit its decision, even though it retained jurisdiction to issue a different award on costs with respect to future proceedings. In light of the prolonged proceeding, the costs incurred and the costs to be incurred in continuing, the Claimant had made a business decision not to pursue any further claims, which does not reflect its views on the Respondent's liability under Chapter 10 of the DR-CAFTA.
10. Finally, the Claimant argued that terminating these proceedings "with prejudice", as requested by the Respondent, was unnecessary as the concept of "dismissal with prejudice" was a common law concept inappropriate to a proceeding under international law. In the Claimants' view, the Tribunal need only take note of the termination of the particular claims pursuant to Article 36(2) of the UNCITRAL Arbitration Rules. Spence International further confirmed its understanding that the doctrine of *res judicata* would preclude the same Claimants from submitting the same claims to a different DR-CAFTA tribunal in a subsequent arbitration.
11. Accordingly, Spence International and Mr. Gremillion requested that the Tribunal acknowledge their withdrawal of their remaining claims in the arbitration and that ICSID refund any unused deposits advanced by the Claimants to date.

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12. Pursuant to Article 36(2) of the UNCITRAL Arbitration Rules, on 26 January 2017 the Tribunal informed the parties of its intention to issue an order for the termination of the proceeding with respect to Spence International and its lots A40, SPG 1 and SPG 2 and Mr. Glen Gremillion and his lot B7.

Decision

13. The Tribunal takes note of the notification by Spence International and Mr. Glen Gremillion of their decision not to pursue their remaining claims.

14. The Tribunal has carefully considered the parties' arguments regarding the Respondent's requests to terminate the proceeding with prejudice with respect to Spence International and its lots A40, SPG 1 and SPG 2, and Mr. Glen Gremillion and his lot B7, and that the Tribunal order these Claimants to pay costs to the Respondent.

15. The Tribunal is persuaded by the Claimants' arguments on the Respondent's application. The Tribunal does not consider it necessary or appropriate to order the termination of the claims in question "with prejudice". The Tribunal notes the confirmation by Spence International, a position that Mr. Gremillion can also be taken to have adopted, that the doctrine of *res judicata* would preclude the same Claimants from submitting the same claims to a different DR-CAFTA tribunal in a subsequent arbitration. The Tribunal considers that any issue of the re-opening of the claims in question would be appropriately addressed by reference to this doctrine and that a "with prejudice" order is not appropriate to these proceedings.

16. Nor does the Tribunal consider it appropriate to re-open its decision on costs, set out in its Interim Award, as regards the phase of the proceedings concluded by the Interim Award.

17. In the light of the preceding, the Tribunal takes note of the decision of the Spence International and Mr. Gremillion Claimants to withdraw their remaining claims in this arbitration and orders the termination of the proceeding with respect to Spence International and its lots A40, SPG 1 and SPG 2 and Mr. Glen Gremillion and his lot B7. The Tribunal further decides that no order for variation of costs, from that contained in the Interim Award, is made.

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18. In light of the above, the ICSID Secretariat will proceed to amend the name of the case to reflect the present Procedural Order on Termination and to refund to the Spence International and Mr. Gremillion Claimants that proportion of any unused funds deposited with the secretariat for purposes of the proceedings.

Done on 31 January 2017 in Washington, D.C.

[signed]

Mark Kantor
Arbitrator
Date:

[signed]

Raúl E. Vinuesa
Arbitrator
Date:

[signed]

Daniel Bethlehem
Presiding Arbitrator
Date: