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M e s s r s .
Daniel BETHLEHEM
President of the Arbitral Tribunal
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Member of the Arbitral Tribunal
Raúl E. VINUESA
Member of the Arbitral Tribunal

c/o: Anneliese Fleckenstein
afleckenstein@worldbank.org

By e-mail

Miami, May 1, 2017

REF: *Aaron C. Berkowitz et al. v. Republic of
Costa Rica (ICSID Case No. UNCT/13/2)*

Dear Madame Secretary,

We are writing to you and, through you, to the members of the arbitral Tribunal in the abovementioned case in relation to the Tribunal's letter of April 17, 2017, on behalf of Messrs. Brett Berkowitz, Trevor Berkowitz and Aaron Berkowitz (collectively the "Claimants").

In response to the Tribunal's communication, the Claimants respectfully remind the Tribunal that they cannot and should not make any submissions regarding Lot B1 before this Tribunal. As acknowledged by the Tribunal,¹ only the District Court considering the Motion to Vacate is currently competent to receive any submissions and evidence related to the findings of the Tribunal regarding Lot B1.² Therefore, the proper forum for the

¹ Letter from the Tribunal of 13 February 2017.

² This position finds further support in the Tribunal's Procedural Order on the Claimant's Request for a Stay of the Proceedings of 28 February 2017 (the "Stay Decision"), where the Tribunal stated that "[t]he grounds advanced in the Claimants' Set Aside Petition to the U.S. District Court are a matter for the U.S. District Court, not for the Tribunal[.]" (Stay Decision, ¶ 33) and continued to find that "[t]he Tribunal accordingly considers that deference requires it to forebear from any comment on its appreciation of the issues engaged by



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continued discussion of Lot B1 is the District Court, and thus Claimants must refrain, at the risk of being forced to adopt contradictory positions in these proceedings and the vacatur proceedings, from submitting any documents or comments.

In any event, it should be noted that the position adopted by Costa Rica is self-contradictory, ethically challenged and unbecoming of the high standards expected of sovereign States in their international disputes. Costa Rica has always known of the existence of the decision regarding Lot B1 –which Costa Rica itself issued–, and even its counsel knew of that decision at all times, as evidenced by the admission, posited in its last letter, that it attempted –albeit extemporaneously– to lodge an appeal against that decision.³

A closer look into the position adopted by Costa Rica and its counsel in these proceedings and the annulment proceedings will reveal that, **if Costa Rica knew** that the Tribunal might make a decision on the basis of whether a court decision had been issued regarding Lot B1 –even if Costa Rica had never incorporated that defense in the course of the proceeding–, then it had an obligation and an ethical duty to notify the Tribunal of the existence of the local decision, or to seek correction of the Tribunal’s “error” regarding this very critical fact. Not only did Costa Rica not do that, but, quite to the contrary, it expressly stated that it considered the award not to have any errors.⁴ On the other hand, **if Costa Rica did not know** that the Tribunal might make a decision on the basis of whether a court decision had been issued regarding Lot B1, this would confirm that it has to admit that the decision of the Tribunal was adopted *ultra petita*, and their opposition to the annulment before the District Court –where they are currently under a declaration of default issued by the clerk of the court– would be frivolous, and similarly self-contradictory, ethically challenged and unbecoming.

the Claimants’ Set Aside Petition” (Stay Decision, ¶ 53). Specifically as to Lot B1, the Tribunal wrote that “[t]he issue of the Claimants’ asserted shortcomings in the Tribunal’s decision as regards this Lot will be a matter for the U.S. District Court” (Stay Decision, ¶ 58).

³ E-mail from Respondent to the Tribunal of 3 April 2017.

⁴ Letter from Respondent to the Tribunal of 28 November 2016.



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The stance of Claimants, when faced with this ethical quandary –ie, whether to artificially take a knowingly wrong position to benefit from incorrect statements by the Tribunal– is the opposite of that of Respondent. Claimants have stood by their firm belief – based on applicable law– that the proper remedy for the Interim Award’s shortcomings is that of annulment, and have followed through consistently, even where the Tribunal repeatedly invited Claimants to allow the Tribunal to amend the Interim Award in certain areas, leading to the Tribunal itself now confirming that the information “concerning (but not limited to) Lot B1 discloses an error or omission of a factual nature in the Interim Award that would warrant correction of the Interim Award.”⁵

Claimants respectfully submit that the Tribunal applied an improper test, and used erroneous information to apply it. Correcting the information will not cure the impropriety of the test applied, and, at any rate, the Tribunal currently lacks competence to take any action regarding its decisions contained in the Interim Award, which, as confirmed by the Tribunal,⁶ are exclusively properly before the U.S. District Court. As a result, Claimants reiterate their request that these proceedings be terminated in the same terms as set forth paragraphs 15 and 18 of the Procedural Order Taking Note of the Termination of the Case with respect to Certain Claimants of 10 February 2017.

Sincerely,

A handwritten signature in black ink, appearing to read 'Diego Brian Gosis', written over a horizontal line.

Diego Brian Gosis
Quinn Smith

Counsel for Claimants

⁵ Letter from the Tribunal of 17 April, 2017.

⁶ See fn. 2 *supra*.