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By Email

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

Re: *Aaron Berkowitz, Brett Berkowitz and Trevor Berkowitz v. the Republic of Costa Rica*
(ICSID Case No. UNCT/13/2)

Dear Ms. Fleckenstein:

Respondent writes in response to the Tribunal's letter of April 17, 2017 in which it invites the parties to comment on how the Tribunal should proceed in light of (i) its conclusion that additional documentation sent to it concerning, in particular Lot B1, discloses an error or omission of fact in its Interim Award; and (ii) the Berkowitz Claimants' request of March 15, 2017 to terminate these proceedings. For the reasons provided below, Respondent requests that the Tribunal terminate these proceedings and award Respondent costs and fees. In addition, Respondent does not object to a factual correction of the Interim Award.

Given the Berkowitz Claimants' conduct anything but termination of these proceedings would be unfair and prejudicial to Costa Rica. On March 15, 2017, the Berkowitz Claimants requested that the Tribunal terminate these arbitral proceedings.¹ Since then, the Berkowitz Claimants have refused to participate in any way in these proceedings: they did not respond to the Tribunal's March 20, 2017 request to submit on the record any documents evidencing developments in the domestic legal proceedings in Costa Rica concerning the Berkowitz Claimants' properties;² they have failed to pay ICSID costs requested on March 3, 2017;³ and their counsel has made public declarations stating that Claimants will insist that the proceedings be terminated.⁴ In the meantime, Costa Rica has continued to

¹ See Letter from Berkowitz Claimants to ICSID, March 15, 2017.

² See Letter from Berkowitz Claimants to ICSID, April 3, 2017.

³ See Letter from ICSID to Claimants, April 17, 2017.

⁴ See, e.g., "Costa Rica Says Default Against It Should Be Vacated," *Law360*, April 21, 2017 ("An attorney for the Berkowitzes, GST LLP partner Diego Gosis, told Law360 on Thursday that they will insist that the proceedings be terminated without prejudice in the same terms given to the other investors who voluntarily withdrew their claims. In the meantime, they intend to continue with the annulment bid in D.C. federal court.").

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participate in good faith—*i.e.*, it responded to the Tribunal’s March 20, 2017 request for additional documents; it has paid its share of the arbitration fees and costs; and it has responded to all other requests of the Tribunal, all while incurring additional costs and fees. In light of Berkowitz Claimants’ conduct, there is no reason for these proceedings to continue and for Costa Rica to continue incurring costs and fees. Costa Rica, therefore, respectfully requests that the Tribunal terminate these proceedings and award Costa Rica costs and fees incurred from the date of the issuance of the Interim Award to the date of termination. With the termination of these proceedings, the Berkowitz Claimants would be precluded, under the doctrine of *res judicata*, from submitting the same claims to a different CAFTA tribunal in any subsequent arbitration.⁵

With respect to the Tribunal’s inquiries related to the correction of the Interim Award, Costa Rica does not object to a factual correction of the award—*i.e.*, that the Interim Award be amended to reflect the factual developments discussed in the documents submitted to the Tribunal on April 3, 2017. Costa Rica, however, does not believe that any factual correction to the Interim Award would affect, and would require an amendment of, the Tribunal’s legal analysis and conclusions. As Respondent stated in its April 7, 2017 letter, the Berkowitz Claimants were granted a higher value for Lot B1 by the first instance court than they were awarded in the administrative proceedings.⁶ That court judgment has been appealed by Costa Rica, and the legal proceedings are ongoing. None of these facts affects any of the Tribunal’s analysis and conclusions in the Interim Award. Moreover, and importantly, the Berkowitz Claimants have not made and explicitly refuse to make any additional arguments in these proceedings with respect to the Tribunal’s conclusion regarding Lot B1. Therefore, there is no pending matter before the Tribunal other than ensuring that the factual narrative is complete by reflecting the latest development.

Therefore, Costa Rica respectfully requests that, to the extent the Tribunal deems it necessary to amend the Interim Award, it limit that amendment to correcting the Interim Award’s factual findings. Respondent also requests that the Tribunal terminate these arbitral proceedings and award Respondent costs and fees.

Respectfully submitted,



Stanimir A. Alexandrov
Jennifer Haworth McCandless
Counsel for Respondent

⁵ See Procedural Order Taking Note of the Termination of the Case with Respect to Certain Claimants, February 10, 2017, para. 15.

⁶ See Letter from Respondent to ICSID, April 7, 2017.