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Ms.
Anneliese Fleckenstein
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By e-mail

Miami, 25 January 2017

REF: *Spence International Investments et al. v. Republic of
Costa Rica (ICSID Case No. UNCT/13/2)*

Dear Madam Secretary,

We are writing to you and, through you, to the members of the arbitral Tribunal in the abovementioned case in order to inform that, in furtherance of their rights under CAFTA-DR and the applicable laws and rules, Messrs. Brett Berkowitz, Trevor Berkowitz and Aaron Berkowitz (collectively the “Berkowitz Claimants”) have filed a motion to vacate or set aside the partial Award rendered by this Tribunal on 25 October 2016 (the “Application” and the “Award,” respectively) before the competent federal courts in and for the United States District Court for the District of Columbia, which motion appears attached as Annex I.

The parallel course of these ongoing proceedings –based on the limited scope resulting from the Award– and of annulment proceedings aimed at setting aside or vacating the Award represents a risk of forcing a party to adopt simultaneous, contradictory positions by accepting and challenging the Award at the same time, and mandates that, under the applicable agreements, rules, laws and treaties, these proceedings should be stayed until a final decision on the Application is issued.



This result is prescribed by the CAFTA-DR, which provides that Awards subject to revision or annulment may not be enforced until the relevant proceedings have been completed.¹ In this regard, Art. 10.26 (6) states that:

6. A disputing party may not seek enforcement of a final award until:
 - (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
 - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

This provision has been peacefully interpreted by prior decisions, which have held that “Article 10.26.6 of the CAFTA-DR does not allow the disputing Parties to seek enforcement of the challenged Award before annulment proceedings are finalized”.²

In addition to being the necessary consequence of applying this provision, there are reasons of procedural economy that support the stay of these proceedings until a decision on the Application is issued. The fact that Claimants may be forced to continue with proceedings that could subsequently be annulled under an application already under course renders the prosecution of the dispute clearly antieconomic. In addition, the stay of the proceedings causes no harm to the Respondent. On the contrary, acting in accordance with the provisions of Art. 10.26 (6) of the CAFTA-DR would only bring legal certainty to all parties as to the validity of any decisions that the Tribunal may yet make within the context of these proceedings.

¹ In this case, the resumption of the procedural activities limited to, and in furtherance of, the terms of the Award, which impose limitations on the arguments to be made before the Tribunal, represents in practice an enforcement of the Award before the Tribunal itself.

² *Teco Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB 10/23, Decision on Stay of Enforcement of the Award, 10 February 2015, ¶33.



Moreover, during the stay of the proceedings, neither party needs to incur expenses or any other costs in relation to the arbitration, which would be mutually beneficial. On the contrary, if the arbitration were to continue and the Award were subsequently annulled, losses on account of the inefficient costs of the proceedings would range in the millions of dollars.

In view of the foregoing and in accordance with the provisions of the applicable treaty, rules and agreements, the Berkowitz Claimants request that the Tribunal stay the arbitration proceedings until the Application is decided upon.

Sincerely,



Diego B. Gosis