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By email

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

Dear Counsel,

Following the pre-hearing organizational meeting on April 2, 2015, I write at the request of the Presiding Arbitrator to convey the decision of the Tribunal on the outstanding organizational and administrative matters relevant to the hearing.

Commencement and conclusion of hearing

1. As previously transmitted, the hearing will commence at 10.30 on Monday, April 20, 2015. The Parties may have access to the hearing room, by prior arrangement with the Tribunal Secretary, from 08.00 on the morning of April 20, 2015 for purposes of set up.

2. Without prejudice to the Tribunal's latitude to conclude the proceedings earlier, if this is warranted, the hearing will run through to 17.30 on Friday, April 24, 2015.

Daily schedule of hearing

3. Subject to appropriate flexibility, and the equal allocation of time between the Parties (addressed in paragraphs 4 to 7 below), the daily schedule of the hearing will be as follows:

Monday, April 20
10.30 – 13.00 (to include a coffee break): opening formalities and Claimants' opening submissions
13.00 – 14.30: lunch break
14.30 – 17.00 (to include a coffee break): Respondent's opening submissions
17.00 – 17.30: coffee break
17.30 – 18.00: Claimants' reply submissions on jurisdiction (if any)

Tuesday, April 21 – Thursday, April 23
09.30 – 13.00 (to include a coffee break): witness evidence
13.00 – 14.30: lunch break
14.30 – 18.00 (to include a coffee break): witness evidence

Friday, April 24
09.30 – 12.00 (to include a coffee break): Claimants' closing submissions
12.00 – 14.00: lunch break
14.00 – 16.30 (to include a coffee break): Respondent's closing submissions
16.30 – 17.00: coffee break
17.00 – 17.30: closing formalities

Time allocation

4. The Tribunal notes the Parties' agreement on the "chess clock" method of time allocation between the Parties and is content to agree to this approach. The Tribunal Secretary will be responsible for keeping time. The Parties are requested to meet jointly with the Tribunal Secretary at the end of each hearing day to determine the time that has been used by each Party and to resolve any disagreements on this issue that may arise. Any disputes that remain shall be addressed by the Tribunal.

5. Subject to the principle that each Party is free to organize and present its case as it chooses, each Party is allocated a period of 12 hours to present its case. This includes the time available to each Party for its opening and closing submissions and for its examination-in-chief, cross-examination and re-examination of witnesses, as the case may be. Time spent on the interpretation of a Party's submissions and on the Party's examination of witnesses will count against the time allocated to that Party. Time spent on hearing formalities, questions by the Tribunal and responses thereto by the Parties, and any interventions by non-disputing Parties will not count against the time allocated to the Parties. Subject to the overarching principle of equality of time between the Parties, a Party may decide not to use any portion of time allocated to it. Any such decision will not prejudice the other Party's latitude to use the time allocated to it for the presentation of its case.

6. Without prejudice to the latitude of each Party to organize the presentation of its case as it chooses, a maximum period of 2.5 hours will be afforded to each Party to present its opening submissions and 2 hours to present its closing submissions. Any time that a Party chooses not to allocate to its opening or closing submissions may, at the discretion of that Party, be allocated to witness examination.

7. The 2.5 hours allocated to the Claimants for their opening submissions may include a maximum of 30 minutes of reply submissions, strictly confined to the issue of jurisdiction, following the presentation of the Respondent's opening submissions. Subject to this element, there shall be no reply or surreply submissions.

Examination of witnesses

8. The Tribunal notes the Parties' agreement on the order of the examination of witnesses and is content to agree to this approach.

9. A witness who is also a Party shall not be sequestered. This applies to the following factual witnesses of the Parties who have been notified to give oral evidence:

- for the Claimants: Robert Reddy, Bob F. Spence, Ronald Copher and Brett E. Berkowitz;
- for the Respondent: Rotney Piedra, Julio Jurado and Georgina Chaves.

10. Expert witnesses shall not be sequestered.

11. In all other cases, the principle set out in paragraph 20.6 of Procedural Order No.1 will apply. The Tribunal understands this to apply to Dr Kirt Rusenko and that the Parties are agreed that Dr Rusenko shall not be present in the hearing room prior to his testimony. The Claimant should also instruct Dr Rusenko, and take other steps as may be appropriate to ensure, that he should not discuss the issues addressed in his witness statement with any person prior to his testimony and, given the Tribunal's decision on public access indicated in paragraph 20 below, that he should not watch the webcast of the hearing prior to his testimony.

12. Subject to clarifications that follow, the presentation of witness evidence should take the form set out in paragraphs 20.5.1 to 20.5.6 of Procedural Order No.1. The Tribunal notes the Parties' agreement that that the direct examination of fact witnesses should be relatively short (e.g., 10-15 minutes) and the direct examination of expert witnesses shall be limited to approximately 30 minutes. The Tribunal is content with this approach but will allow such latitude beyond these periods as may be appropriate, having regard both to paragraph 20.5.1 of Procedural Order No.1 and the principle that it is for each Party to present it case as it chooses.

13. By way of clarification of the preceding, the Tribunal notes the disagreement of the Parties on the question of responsive witness testimony on issues that have arisen since a witness submitted his or her witness statement ("post-statement evidence"). The Tribunal understands this disagreement to relate in particular to the First Witness Statement of Ana Facio, submitted by the Claimants on February 4, 2015 as part of the Claimants' Rejoinder on Jurisdiction, which the Respondent and Respondent's witnesses have not had an opportunity to address in writing. The Tribunal decides that the Respondent's witnesses should have an opportunity to address Ana Facio's witness statement to the extent that a given Respondent witness is competent to testify on that evidence and materials. Insofar as post-statement evidence issues may arise in respect of other matters, the Tribunal decides that a Party should have the latitude to put questions to a witness on such matters, and that a witness should have an opportunity to respond to the extent that the issues raised fall within the scope of that witness's competence. Such that a Party is or ought reasonably to be aware of any such post-statement evidence issues by reference to the written filings in this case, that Party should notify the other Party no later than 17.00 EST on Tuesday, April 14, 2015 that it reserves its right to put the matter in question to a witness. Such that any post-statement evidence issues arises in the course of the hearing, the Tribunal will be inclined to allow questions to be put to a witness on such matters as fall with his or her competence. In the event of disagreement between the Parties on a specific issue, the Tribunal will address this in the course of the hearing having regard to paragraph 19.2 of Procedural Order No.1.

14. A Party that decides that it no longer wishes to examine a witness that it had previously notified to the other Party as required to give evidence shall notify that other Party, and the Tribunal, as soon as possible and in any event no later than 17.00 EST on Wednesday, April 15, 2015.

15. Where this can be avoided, it is desirable that the examination of a given witness should not straddle a lunch break or be held over from one day to another. Having regard to the daily schedule of the hearing, the Tribunal accordingly invites the Parties to consider the time that they anticipate may be required to complete the testimony of a given witness. The Presiding Arbitrator will enquire of the Parties in advance of the presentation of each witness whether they consider that the testimony of that witness is likely to be complete before a lunch or daily adjournment. Such an assessment will not bind a Party and the Tribunal will proceed on this issue with appropriate flexibility.

16. Following from the preceding, simply as an indication of the informal hearing management approach that is currently guiding the Tribunal's thinking, the Tribunal is proceeding on the basis that it may be possible to schedule the witness evidence as follows:

- Tuesday, April 21 – testimony of Robert Reddy, Bob F. Spence, Ronald Copher and Brett E. Berkowitz (and possibly Kirt Rusenko);
- Wednesday, April 22 – testimony of (Kirt Rusenko,) Rotney Piedra, Julio Jurado and Georgina Chaves;
- Thursday, April 23 – testimony of Michael P. Hedden and Brent Kaczmarek.

The Parties are invited to indicate to the Tribunal at an early stage if they consider that this schedule is unlikely to work or is otherwise undesirable.

17. Insofar as the Parties have not already done so, they are requested to inform the Tribunal by no later than 17.00 EST on Wednesday, April 15, 2015 of the language in which each of their witnesses will testify.

Non-disputing Party submissions

18. The United States has indicated that it wishes to submit a non-disputing Party written statement to the Tribunal and reserves its right to make an oral submission in the course of the hearing. The position of El Salvador remains to be determined. The Tribunal intends to write to both non-disputing Parties to indicate that any written submission must be submitted no later than 17.00 on Friday, April 17, 2015. In the event that either non-disputing Party indicates, either before or during the hearing, that it wishes to make an oral submission in the course of the hearing, the Tribunal will seek the views of the disputing Parties on timing. The Tribunal would be minded, on current thinking, to afford a non-disputing Party the right to make an oral submission either at the end of the day on Monday, April 20, 2015 or the start of the day on Tuesday, April 21, 2015.

The use of publicly available information not already on the record

19. The Tribunal notes the Parties' disagreement on the use of publicly available information not already on the record. The Tribunal notes that the scope of the term "publicly available information" is not settled and may conceivably extend from notorious information that is manifestly in the public domain, of which the Tribunal may properly take "judicial notice", to information that may be said to be in the public domain simply because it may be available to the public but without regard to its ease or cost of access. Having regard to this, the Tribunal considers that the appropriately applicable principle is that there should be no surprises in the hearing. A Party wishing to use information that is not already on the record is expected to notify the other Party at the earliest opportunity and to seek that Party's agreement. Insofar as there is or may be a dispute about the use of the information in question, the Party seeking to use the information should, as required by paragraph 17.3 of Procedural Order No.1, apply to the Tribunal for permission regarding its use, *without attaching the material in question*. The Tribunal will address any such application

having regard *inter alia* to paragraph 17.3 of Procedural Order No.1 as well as to the reason why the material was not previously produced, the asserted relevance of the material, and its public availability. Where a Party is permitted to use material that is not already on the record, the other Party will be afforded an opportunity to respond.

Public access to the hearing

20. The Tribunal notes the disagreement of the Parties on the appropriate modality for enabling the hearing to be open to the public. Having regard to the Tribunal's decision on the sequestration of witnesses in paragraph 9 above, and the desirability of affording effective public access to the hearing, the Tribunal determines that the hearing should be webcast.

Protected information

21. The Parties are invited to indicate to the Tribunal as early as possible whether they consider that any aspect of their submissions or any matter that might be addressed in witness testimony requires designation and safeguarding as protected information.

Post-hearing submissions

22. As envisaged in paragraph 25.1 of Procedural Order No.1, the Tribunal will address the issue of post-hearing submissions, evidence regarding the quantification of costs, and any related matters at the conclusion of the hearing.

Other matters

23. The Tribunal notes the March 17, 2015 award in the case of *Clayton et al v. Canada* (PCA Case No.2009-04), handed down after the close of the written proceedings in the present matter, which *inter alia* addresses the issue of the time bar in Article 1116(2), NAFTA (at paragraphs 242 – 282). As the Parties have not had an opportunity to address the relevance, or otherwise, of this award in their written pleadings, the Tribunal invites them to do so in their oral submissions.

Yours sincerely,

Giuliana Canè

Giuliana Canè
Secretary of the Tribunal

cc: Members of the Tribunal