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By Email

Anneliese Fleckenstein
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Re: *Spence International Investments, LLC, et al. v. the Republic of Costa Rica* (ICSID Case No. UNCT/13/2)

Dear Ms. Fleckenstein:

Respondent writes in response to your letter of January 26, 2017 in which the Tribunal invites Respondent to submit its views by February 8, 2017 on the request from the Berkowitz Claimants¹ that the above-mentioned arbitral proceeding be suspended in light of their purported motion before the U.S. District Court for the District of Columbia (“District Court” or “Court”) to vacate or set aside the Interim Award rendered by this Tribunal on October 25, 2016.² For the reasons set forth below, Respondent respectfully requests that the Tribunal deny the Berkowitz Claimants’ request.

In addition, the Berkowitz Claimants have requested that the District Court stay these arbitral proceedings pending the outcome of the Court’s ruling on their motion. For the reasons set forth below, Respondent also respectfully requests that the Tribunal order the Berkowitz Claimants to withdraw such request before the District Court.

I. BACKGROUND

On October 25, 2016, the Tribunal issued an Interim Award (“Interim Award”) in the above-mentioned case. The Tribunal dismissed most of Claimants’ claims on the basis that it lacked jurisdiction. With respect to the Berkowitz Claimants’ properties—*i.e.*, Lots B1, B3, B5, B6 and B8—the Tribunal found that (i) it had no jurisdiction to review any claims with respect to Lot B1;³ (ii) it had limited jurisdiction with respect to Lots B3 and B8 to review claims that the assessment of compensation

¹ The Berkowitz Claimants are Brett Berkowitz, Aaron Berkowitz and Trevor Berkowitz, owners of Lots B1, B3, B5, B6, and B8.

² See Letter from ICSID to the Parties, January 26, 2017, as amended by email from ICSID to the Parties, February 1, 2017 (granting Respondent’s request for an extension to respond to the Berkowitz Claimants’ request by February 8, 2017).

³ *Spence International Investments, LLC, et al. v. the Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award, October 25, 2016 (“Interim Award”), para. 308(1).

regarding those lots by the Costa Rican courts amounted to “manifest arbitrariness and/or blatant unfairness contrary to CAFTA Article 10.5”;⁴ and (iii) with respect to Lots B5 and B6, it would afford the parties an opportunity to be heard regarding the question of whether the Tribunal has jurisdiction to entertain Claimants’ allegations of breach of Article 10.5 of CAFTA with respect to judgments of the Costa Rican courts concerning those properties issued after June 10, 2013.⁵ Thus, while the Tribunal dismissed most of Claimants’ claims, the arbitral proceeding is still ongoing with respect to claims related to four of the Berkowitz properties—*i.e.*, Lots B3, B5, B6 and B8.⁶

On January 23, 2017, the Berkowitz Claimants submitted a petition to set aside or vacate the Interim Award before the U.S. District Court for the District of Columbia.⁷ The Berkowitz Claimants request that the District Court set aside the Interim Award on the basis that the Tribunal exceeded its powers when issuing the Award. In particular, the Berkowitz Claimants allege that the Tribunal exceeded its authority when it (i) reached findings of fact without Respondent offering any evidence and substituted its own policy judgments for applicable law; (ii) declined jurisdiction to hear about court rulings in Costa Rica after June 10, 2013 concerning Lot B1; and (iii) bifurcated the proceedings, denying the Berkowitz Claimants an opportunity to be heard on relevant jurisdictional objections raised *sua sponte* by the Tribunal in its Award.⁸ The Berkowitz Claimants have also asked the District Court to order the suspension of the arbitral proceedings. As discussed below, the Berkowitz Claimants’ allegations are without merit and are unlikely to succeed.

II. THE TRIBUNAL SHOULD DENY THE BERKOWITZ CLAIMANTS’ REQUEST FOR SUSPENSION

On January 25, 2017, the Berkowitz Claimants requested that the Tribunal suspend these arbitral proceedings in light of their motion before the District Court to vacate or set aside the Tribunal’s Interim Award. We discuss the specific assertions made by the Berkowitzs below.

First, the Berkowitzs claim that suspension is necessary because they may be forced to adopt contrary positions in the arbitration and the District Court—*i.e.*, accepting and challenging the Interim Award at the same time.⁹ The Berkowitzs’ claim is baseless. The rationale behind their claim appears to

⁴ Interim Award at para. 308(2).

⁵ Interim Award at para. 308(3).

⁶ The Tribunal also held that it had jurisdiction to hear claims with respect to Lots A40, SPG1, and SPG2 (owned by Spence Co.) regarding whether the assessment of compensation by the Costa Rican courts with respect to those properties amounted to “manifest arbitrariness and/or blatant unfairness” contrary to Article 10.5 of CAFTA. Interim Award at para. 308(2). In addition, the Tribunal held that it would afford Mr. Gremillion an opportunity to be heard on the question of whether the Tribunal has jurisdiction to entertain allegations of breach of Article 10.5 of CAFTA concerning judgments of the Costa Rican courts rendered after June 10, 2013 concerning Mr. Gremillion’s Lot B7 property. See Interim Award at para. 308(3). Spence Co. and Mr. Gremillion notified the Tribunal that they would no longer pursue their claims against the Republic of Costa Rica. See Letter from Fasken Martineau to ICSID, November 28, 2016, p. 1 (regarding Spence Co.) and Letter from Fasken Martineau to ICSID, December 23, 2016, p. 2 (regarding Mr. Gremillion).

⁷ See Petition to Vacate or Set Aside Interim Arbitration Award, January 23, 2017 (“Petition to Vacate Interim Award”).

⁸ See Petition to Vacate Interim Award at 17-21.

⁹ See Berkowitz Claimants’ Letter to ICSID, January 25, 2017, pp. 1-2.

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be that if the arbitral proceedings continue, the Berkowitzs will be deemed to have accepted the Award. Curiously, in support of this assertion, they refer to a CAFTA provision, Article 10.26(6)(b)(ii), that discusses enforcement of an award. That provision, however, is inapposite to this case as no party is seeking to enforce the Interim Award. They then seem to draw the conclusion that if the arbitral proceeding continues, the Interim Award will somehow be enforced. There is simply no basis for such an assertion, and the Berkowitzs fail to cite to any relevant authority in support.¹⁰ Continuing with the arbitration will not enforce the Interim Award. It will merely provide the Tribunal with an opportunity to address all outstanding issues remaining before it.

Second, the Berkowitzs claim that it would be uneconomical for them if the two proceedings continued in parallel because there is a chance that the Interim Award would be set aside.¹¹ This assertion is equally without merit. Critically, the Interim Award the Berkowitzs' seek to have set aside is not ripe for review before the District Court. Under the Federal Arbitration Act, the law governing their set aside motion, federal courts in the United States do not have power to review arbitral awards unless the awards purport to resolve finally the issues submitted to them.¹² In this case, the Tribunal did not resolve all issues before it. Instead, it left many issues open, including merits and jurisdictional issues concerning Lots B3, B5, B6 and B8 owned by the Berkowitzs. Thus, at the very least, the District Court lacks the authority to review the Tribunal's decisions with respect to Lots B3, B5, B6 and B8, and, therefore, the Tribunal should not suspend the arbitral proceedings with respect to those properties. If at all, the arbitral proceedings could be suspended with respect to Lot B1, where the Tribunal found it had no jurisdiction. This would be meaningless, however, because there is nothing pending before the Tribunal with respect to that property. If the Berkowitzs wish to seek to set aside the Tribunal's decision with respect to Lot B1, any such action would not require suspension of the proceedings with respect to the Berkowitzs' pending claims.

Moreover, even if the Court decided it could review the Interim Award, or portions thereof, the Berkowitzs' claims are unlikely to prevail on the merits. Although the alleged basis for their set aside motion is that the Tribunal exceeded its powers, a review of their claims reveals that they are, in fact, asking the Court to second guess the Tribunal's findings on jurisdiction. This is an inappropriate basis for seeking to set aside an Interim Award, and the Court should dismiss their claims outright.

Finally, the Berkowitz Claimants assert that the stay of the arbitral proceedings would not harm Respondent but, rather, would bring legal certainty regarding the Tribunal's decisions.¹³ This assertion also falls short. A suspension of the arbitral proceedings at this point would be highly disruptive to

¹⁰ The only case they cite in support of their assertion concerns the interpretation of Article 10.26(6) which, as noted above, discusses enforcement and is inapposite to this case. See Berkowitz Claimants' Letter ICSID, January 25, 2017, p. 2.

¹¹ See Berkowitz Claimants' Letter to ICSID, January 25, 2017, pp. 2-3.

¹² See *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980); see also, e.g., *Millmen Local 550 v. Wells Exterior Trim*, 828 F.2d 1373, 1377 (9th Cir. 1987) (finding the arbitrators' decision on liability—but not remedy—not final and not confirmable); *Schatt v. Aventura Limousine & Transportation Service, Inc.*, 603 Fed.Appx. 881, 887 (11th Cir. 2015) (finding that “[c]ourts interpreting [Section 10 of the FAA] commonly understand this to mean that the FAA allows review of final arbitral awards only, but not of interim or partial rulings”).

¹³ See Berkowitz Claimants' Letter to ICSID, January 25, 2017, p. 2.

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Respondent. Respondent has been defending this arbitration for more than 3.5 years, and it should not be forced to wait longer so that the Berkowitz Claimants can have a second chance to reargue their case before the District Court. A losing party should not be allowed to disrupt an ongoing arbitral proceeding in this manner.

Significantly, it is difficult to say exactly how long the arbitral proceeding would be postponed if the Berkowitz Claimants' request were granted. In this case, the party against whom the motion to vacate the Interim Award is being brought is a State. Accordingly, the Berkowitz Claimants are required to serve Respondent through the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (also known as the "Hague Convention").¹⁴ That process may take many months to complete. In addition, any decision by the District Court might be appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and any decision by that appellate court could be further appealed to the U.S. Supreme Court. The entire process could potentially take years to complete.

Such a delay in receiving final resolution of the issues that remain outstanding in this case would be unreasonable, because it could potentially impact the integrity of these proceedings and significantly prejudice Respondent. For example, by the time the motion before the District Court has become final, the record for this case could be lost, key witnesses and experts may no longer be available and/or willing to testify, and some of the parties' counsel and/or the arbitrators may no longer be available to argue or decide the case. Respondent should not have been submitted to this arbitration in the first place—most of Claimants' claims violated CAFTA's statute of limitations and/or were based on facts that occurred before CAFTA entered into force. Respondent should not be forced to continue wait for resolution of these proceedings while the Berkowitz Claimants reargue their case before the District Court.

III. THE TRIBUNAL SHOULD ORDER THE BERKOWITZS TO WITHDRAW THEIR REQUEST THAT THE DISTRICT COURT STAY THE ARBITRAL PROCEEDINGS PENDING THE OUTCOME OF THEIR MOTION

As previously noted, the Berkowitz Claimants have also asked the District Court to stay these arbitral proceedings pending the outcome of their motion. For reasons similar to those stated above, the Tribunal should order the Berkowitzs to withdraw such request. First, the Berkowitz Claimants allege before the District Court that a continuation of this arbitration would be an enforcement of the Interim Award, which may only take place after an application to vacate has concluded.¹⁵ As discussed above, the Interim Award is not being enforced if the arbitral proceedings were to continue. Second, at the very least, the District Court does not have jurisdiction to review the Interim Award on matters that have not been resolved in a final and definitive manner—*i.e.*, Lots B3, B5, B6 and B8. Therefore, no suspension should be allowed on matters that are pending and ongoing before this Tribunal. Finally, for the reasons discussed above, a suspension of these proceedings would be unreasonable and may cause prejudice to Respondent.

¹⁴ See Federal Rules of Civil Procedure, Rule 4(j) (stating that service of a foreign State must be made in accordance with 28 U.S.C. §1608) and 28 U.S.C. §1608(a)(2) (requiring a State to be served in accordance with applicable international conventions on service of judicial documents).

¹⁵ See Petition to Vacate Interim Award at 21-22.

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The Berkowitzs' request before the District Court would only cause severe disruptions to these proceedings. Even if the Tribunal were to deny the Berkowitzs' request to suspend these arbitral proceedings, if the Tribunal does not order them to withdraw the same request before the District Court, the Court could rule in favor of the Berkowitzs, directly contradicting this Tribunal's ruling. Thus, in order to avoid potentially contradictory results, Respondent respectfully requests that this Tribunal order the Berkowitz Claimants to withdraw their request before the District Court to order a stay of these proceedings.

IV. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Tribunal deny the Berkowitz Claimants' request to suspend these arbitral proceedings. Respondent also respectfully requests, for similar reasons, that the Tribunal order the Berkowitz Claimants to withdraw their request that the District Court order suspension of these arbitral proceedings.

Respectfully submitted,



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