

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE DOMINICAN
REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT AND
THE UNCITRAL ARBITRATION RULES (2010)**

AARON C. BERKOWITZ, BRETT E. BERKOWITZ AND TREVOR B. BERKOWITZ
V.
THE REPUBLIC OF COSTA RICA
(UNCT/13/2)

**PROCEDURAL ORDER ON THE CLAIMANTS' REQUEST
FOR A STAY OF THE PROCEEDINGS**

Daniel Bethlehem, Presiding Arbitrator
Mark Kantor, Arbitrator
Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal
Anneliese Fleckenstein

28 February 2017

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(UNCT/13/2)

Procedural Order on the Claimants' Request for a Stay of the Proceedings

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**DECISION ON THE CLAIMANTS' REQUEST
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The commencement of proceedings and other relevant background

1. Pursuant to CAFTA Article 10.16.2, the Claimants delivered to the Respondent notices of intent to submit their claims to arbitration on 9 October 2012. These took the form of two separate notices of intent, the first in the names of Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher and Ronald E. Copher, which was supplemented by a notice in respect of an additional parcel of land on 21 December 2012. The second notice of intent was in the names of Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz, and Glen Gremillion. Following discussions between the Claimants and the Respondent, the claims addressed in the two notices of intent were consolidated into a single Notice of Arbitration and Statement of Claim dated 10 June 2013 ("Notice of Arbitration").
2. In their Notice of Arbitration, the Claimants appointed Mr Mark Kantor, a U.S. national, as arbitrator. On 2 August 2013, the Respondent appointed Mr Raúl Emilio Vinuesa, a national of Argentina and Spain, as arbitrator.
3. On 16 October 2013, the Parties wrote jointly to the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") requesting that it act as administering authority for the proceedings and that the ICSID Secretary-General act as appointing authority with respect to the presiding arbitrator. ICSID indicated its agreement to act in this capacity by letter to the Parties of 17 October 2013.
4. On 20 November 2013, the ICSID Secretary-General informed the Parties of the appointment of Mr Daniel Bethlehem, a national of the United Kingdom, as presiding arbitrator.
5. The Tribunal held a procedural meeting with the Parties on 4 February 2014, following which, on 26 February 2014, it issued Procedural Order No.1. This set out, *inter alia*, the pleading and hearing timetable of the case. The Parties duly submitted their pleadings in accordance with this timetable.

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6. A hearing on both jurisdiction and merits issues took place in Washington D.C. on 20 – 24 April 2015. As directed by the Tribunal at the end of the hearing, the Parties submitted post-hearing submissions on 26 May 2015.

7. Following the hearing, the Parties, at the request the Tribunal, submitted periodic updates – 3 in total, the last of these being filed on 6 July 2016 – on on-going developments in the Costa Rican proceedings concerning each of the Lots that are the subject of the arbitration. In requesting the Parties to provide the Tribunal with such periodic updates, the Presiding Arbitrator observed at the close of the hearing that the request was for the Parties “to draw to the Tribunal’s attention material developments of fact” so that the Tribunal did not find, as it put its signature to an Award, “that the day before there was some material development.”¹

8. In the course of its deliberations, by a letter dated 25 November 2015, the Tribunal put 5 additional questions to the Parties. Questions 3 and 4 were as follows:

3. Please produce, or identify where in the documentary record there is produced, all the purchase records (including subsequent sale and reversion records) for each of the 26 Lots that are the subject of the claim, including as may be available in Claimants’ records, from estate agents, from lawyers, and/or from public filing and the records.

4. In respect of Lot B1, Appendix 2 to the Claimants’ Rejoinder (Procedural History of the Claimants’ Lots) indicates an Appeal Judgment of 31 July 2013, referring to Respondent’s Exhibit R-36. There is no reference to any Judgment in respect of this Lot. Additionally, the Exhibit refers to the suspension of judicial proceedings. The parties are asked to clarify the position in respect of any judicial proceedings in respect of this Lot and to provide any relevant documentation.

9. The Parties submitted their responses to these questions, together with accompanying documentation, on 23 December 2015. In their response to the Tribunal’s questions, the Claimants provided “purchase records (including subsequent sale and reversion records) for each of the 26 lots that are the subject of the claim”. In response to the Tribunal’s Question 4 regarding Lot B1, the Claimants responded, *inter alia*, as follows:

¹ Transcript, p.1296.

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In respect of the Tribunal's inquiry regarding the judicial proceedings for Lot B1, Appendix 2 to the Claimants' Rejoinder (Procedural History of the Claimants' Lots) contains a typographical error. It ought to indicate the suspension of judicial proceedings under the column entitled "Judgment" rather than the column "Appeal Judgment". Judicial proceedings were suspended before a first instance judgment was issued.

In summary, the administrative and judicial proceedings in respect of Lot B1 are as follows:

[...]

Since the second judicial appraisal of 2009, no judgment has been made and nothing has moved forward with the expropriation process (see Berkowitz WS2 at para.56). In 2013, the judicial procedure for Lot B1 was suspended in response to the waiver filed by Claimants for the purposes of this arbitration (Respondent's Memorial on Jurisdiction and Counter-memorial on the Merits at para. 100; Respondent's Reply on Jurisdiction and Rejoinder on the Merits at para. 116; Exhibit R-036).

Claimants apologize for any confusion caused by the error in Appendix 2. A corrected version of Appendix 2 is attached for the Tribunal's convenience.

10. In its response to the Tribunal's questions, the Respondent similarly attached "the documents that it has been able to identify that are responsive to the Tribunal's request with respect to each lot." In response to the Tribunal's Question 4, the Respondent stated as follows:

Claimants' reference in Annex 2 of their Rejoinder on Jurisdiction to an Appeal Judgment dated July 31, 2013 for Lot B1 appears to be in error. The document referenced by Claimants is Exhibit R-036, which shows a July 31, 2013 request for suspension of judicial proceedings concerning Lot B1 submitted by Claimants to the Court. Ms. Georgina Chaves, the Deputy Attorney General at the Office of the Attorney General in Costa Rica, explained in her witness statement that on July 31, 2013 Claimants requested the suspension of judicial proceedings regarding Lot B1 in light of the current arbitral proceedings. Claimants' request for suspension was denied and the proceedings are currently ongoing. No judgment has yet been entered, either in the first instance or on appeal, regarding Lot B1. [Footnote omitted]

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The Tribunal's Interim Award

11. On 25 October 2016, the Tribunal issued an Interim Award addressing both issues of jurisdiction and consequential issues of liability and damages. On jurisdiction, the Tribunal decided as follows:

1. The Tribunal finds that it has no jurisdiction to entertain the Claimants' claims in respect of Lots B1, A39, C71, C96, SPG3, V30, V31, V32, V33, V38, V39, V40, V46, V47, V59, V61a, V61b and V61c.

2. The Tribunal finds that it has no jurisdiction to entertain the Claimants' claims in respect of Lots A40, B3, B8, SPG1 and SPG2 save in respect of the Claimants' allegations that, by reference to relevant and applicable judgments of the Costa Rican courts, the assessment of compensation in respect of Lots B3, B8, A40, SPG1 and SPG2 amounts to manifest arbitrariness and / or blatant unfairness contrary to CAFTA Article 10.5.

3. The Tribunal finds that the Parties should be afforded an opportunity to be heard on the question of whether the Tribunal has jurisdiction to entertain the Claimants' allegations of breach of CAFTA Article 10.5 by reference to relevant and applicable judgments of the Costa Rican courts rendered after 10 June 2013 in respect of Lots B5, B6 and B7.

12. On consequential issues of liability and damages, the Tribunal stated, *inter alia*, as follows:

304. The preceding discussion addresses issues of jurisdiction only. Although it summarises the arguments of the Parties on the issues of liability and damages, it reaches no view on their submissions.

305. This Award does, however, have important implications for the Parties' arguments on liability and damages. In the first place, the Tribunal's decision on the scope of its jurisdiction has the effect of fusing together the issues of liability and valuation. The Respondent will not be liable if the Tribunal concludes in due course that the property valuations adopted by the Costa Rican courts in respect of the directly expropriated portions of Lots A40, B3, B8, SPG1 and SPG2 were manifestly not arbitrary, blatantly unfair or were otherwise in breach of the minimum standard of treatment requirements of Article 10.5.

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306. This being the case, and recalling the Tribunal's observation at the close of the hearing that, if the Tribunal was with the Claimants on any issue of jurisdiction, it would be likely to require additional evidence, and perhaps submissions, on damages, the Tribunal has concluded that, on the basis of the Parties' submissions and the evidential record in the case to this point, it is not in a position to reach a considered conclusion on either liability or damages in respect of the claims over which it has jurisdiction. The reasons for this go to the assumptions provided by each Party to its Expert on compensation issues and the methodology adopted by these Experts in the extensive reports submitted alongside the Parties' pleadings. This is not to express a view on the reliability of either Expert Report on compensation but simply to observe that a number of the Tribunal's findings in this Award are likely to be material to a revised valuation assessment. These findings include, but are not necessarily limited to, the following:

[...]

307. In the light of this Award and the immediately preceding observations, and having regard to Article 17(1) and 24 of the UNCITRAL Arbitration Rules, the Tribunal, after affording the Parties [an] opportunity to present their views, will determine an appropriate procedure to address the issues that remain outstanding in this case.

13. As a central element of its Interim Award, the Tribunal set out in detail, on a Lot-by-Lot basis, all relevant developments in the Costa Rican proceedings that had been drawn to its attention by the Parties. The Tribunal also noted various inconsistencies in the property information provided by the Parties, both as regards information provided by a Party individually and as between the Parties. The Tribunal, further, noted gaps in the information provided by the Claimants as regards particular Lots, notwithstanding additional Question 3 put to the Parties in the course of the Tribunal's deliberations (noted in paragraph 8 above).

14. In the 25 October 2016 letter from the Tribunal Secretary transmitting the Interim Award to the Parties, the Tribunal, "noting the heavy factual detail of the case, and recalling Article 38 of the UNCITRAL Arbitration Rules (as revised in 2010)," expressly invited the Parties to draw to its attention "any error in computation, any clerical or typographical error, or any error or omission of a similar nature" within 30 days of receipt of the Interim Award "so that the Tribunal could consider whether any correction was appropriate."

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15. Following receipt of the Interim Award, no request was made by any Party (within the 30 day time limit in Article 38(1) of the UNCITRAL Arbitration Rules or subsequently) to make any correction in the Award, whether for reason of any claimed error or omission or otherwise. On the contrary, by letter dated 28 November 2016, the Claimants replied that they had “not identified any errors in the nature of those set out in Article 38 of the UNCITRAL Arbitration Rules to which they wish to draw the Tribunal’s attention.” By a letter of the same date, the Respondent replied noting that it had “not identified any corrections to be made to the Interim Award.” The Claimants further informed the Tribunal that “the Spence Claimants have decided not to pursue any of their potential remaining claims in the arbitration” and also that the Berkowitz Claimants were no longer represented by Fasken Martineau Dumoulin LLP, Dr. Todd Weiler or Mr. Vianney Saborío Hernández.

16. By email of 29 November 2016, the Secretariat, the Respondent and the Tribunal were informed that Mr. Diego Gosis and his law firm GTS LLP had been retained by the Berkowitz Claimants to act as their counsel going forward.² In the same email, counsel for the Berkowitz Claimants requested a three-week extension in order to review the file and reach an agreement with the Respondent on the next procedural steps. The Respondent agreed to the extension by email of 30 November 2016. The Tribunal granted the extension on 2 December 2016.

17. By letter of 13 December 2016, the Respondent requested that the Tribunal order the termination of the proceeding with prejudice with respect to the Spence International claims and Mr. Gremillion’s claims and order that those Claimants pay costs to the Respondent. By letter of 16 December 2016, the Tribunal invited counsel of record to the Spence International and Mr. Gremillion Claimants to submit their views on the Respondent’s requests and to indicate the position regarding Mr. Gremillion’s representation. Following receipt of the Parties’ observations, the Tribunal, by a Procedural Order of 31 January 2017, despatched to the Parties on 10 February 2017, took note of the decisions by Spence International and Mr. Gremillion to withdraw their remaining claims and ordered the termination of the proceeding with respect to Spence International and its Lots A40, SPG 1 and SPG 2 and Mr. Glen Gremillion and his Lot B7. The Tribunal further decided that no order for variation of costs, from that contained in the Interim Award, is made.³ In the light of the termination of the Spence International and Gremillion claims,

² On 30 November 2016, a power of attorney signed by each Berkowitz Claimant was received by the Secretary of the Tribunal.

³ In accordance with the transparency requirements of DR-CAFTA Article 10.21, the Tribunal notes that its Termination Order is published on the ICSID website.

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the case name was changed from *Spence International Investments, LLC, Berkowitz et al v. the Republic of Costa Rica (UNCT/13/2)*, reflecting the names of the Claimants when the proceedings were instituted, to the Claimants in the present Procedural Order, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica (UNCT/13/2)*.

18. By a letter dated 21 December 2016, the Respondent informed the Tribunal that the Parties were unable to reach an agreement on the next procedural steps and attached a proposed schedule. By an email dated 21 December 2016, the Berkowitz Claimants confirmed the Parties' inability to reach an agreement on next procedural steps and requested leeway to inform the Tribunal of their position on procedure "after reviewing any presentations by the remaining Claimants this next Friday, 23 December." By an email dated 22 December 2016, in response to a request for clarification from the Tribunal, counsel for the Berkowitz Claimants confirmed the intent of the Berkowitz Claimants to proceed with their claims. By an email of the same date from the Tribunal Secretary (22 December 2016), the Tribunal indicated that, following receipt of submissions due on 23 December 2016 from the Spence International and Gremillion Claimants, the Tribunal would circulate for the Parties' comments a draft procedural order addressing next steps. No further information was provided by the Berkowitz Claimants on their position concerning next procedural steps.

The Claimants' application to the Tribunal to stay its proceedings and the submissions of the Parties

19. By a letter dated 25 January 2017 ("Stay Request"), the Claimants notified the Tribunal that they had

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 ...

20. The Claimants' U.S. District Court *Petition to Vacate or Set Aside Interim Arbitration Award* was attached to the Claimants' correspondence ("Set Aside Petition").

21. In their Stay Request, the Claimants further state:

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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.

22. The Claimants base their observation that the arbitral proceedings should be stayed on CAFTA Article 10.26(6), which states:

(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.

23. In their Stay Request, the Claimants elaborate in the following terms on their contention that the arbitration proceedings should be stayed for reasons of procedural economy pending a decision of the U.S. District Court on their Set Aside Petition:

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 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.

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,

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if the arbitration was to continue and the Award was 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 [U.S. District Court] Application is decided upon.

24. By letter of 31 January 2017, the Respondent requested an extension until 8 February 2017 to submit its observations on the Claimants' request to stay the proceeding. By letter of the same date, the Tribunal granted the requested extension.

25. In its 8 February 2017 response to the Claimants' Stay Request, the Respondent submitted that the Tribunal should deny the Claimants' request for a suspension. It also requested that the Tribunal should order the Claimants to withdraw their request that the U.S. District Court stay the arbitral proceedings pending the outcome of the Claimants' petition to vacate or set aside the Interim Award.

26. On the Claimants' Stay Request, the Respondent observed, *inter alia*, as follows:

- Regarding the Claimants allegations that continuing the parallel proceedings "represents a risk of forcing a party to adopt simultaneous, contradictory positions by accepting and challenging the Award at the same time", the Respondent asserted that such allegation was baseless. According to the Respondent:

The rationale behind [the Claimants'] claim appears to 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. 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. [Footnote omitted]

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- Regarding the Claimants' claim that it would be uneconomical to continue with two parallel proceedings because the Interim Award could be set aside, the Respondent contends that this claim is equally without merit because the Interim Award is not ripe for review. According to the Respondent:

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. 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 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. [Footnote omitted]

- Furthermore, the Respondent contends that the Set Aside Petition is 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 claim 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, regarding the Claimants' assertion that a suspension of the proceeding would not harm the Respondent but, rather, would bring legal certainty regarding the Tribunal's decisions, the Respondent submits that a suspension of the arbitral proceedings at this point

would be highly disruptive to Respondent. Respondent has been defending this arbitration for more than 3.5 years, and it should not be forced to wait longer so that

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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 proceedings would be postponed if the Berkowitz Claimants' request were granted. ... 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. ... Respondent should not be forced to continue to wait for resolution of these proceedings while the Berkowitz Claimants reargue their case before the District Court.

27. With respect to the Respondent's request that the Tribunal order the Claimants to withdraw their request that the District Court stay the arbitral proceedings, the Respondent contends that the continuation of the arbitration would not be an enforcement of the Interim Award. Further, the Respondent contends that, "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, the Respondent contends that, for the reasons set out above, "a suspension of these proceedings would be unreasonable and may cause prejudice to Respondent." According to the Respondent, even if the Tribunal rejects the Claimants' stay request, the U.S. District Court could rule in favour of the Claimants,

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.

28. By an email of 10 February 2017, the Claimants addressed the Respondent's letter of 8 February 2017 contending that, while the Respondent takes issue with the Claimants' interpretation of CAFTA-DR §10.26(6)(b)(ii), the Respondent does not cite to any authority for its position and that "[a]ny attempt by the Tribunal to assert any opportunity to address any 'outstanding issue' – meaning some were resolved– inherently requires an enforcement of the Interim Award as to the outstanding issues. Paucity of authority notwithstanding, the

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[Respondent's] Letter necessarily relies on a request to turn a blind eye to the requirements of the next stage of this proceeding." According to the Claimants:

The Berkowitz Claimants are not seeking to litigate the terms of their Motion to Vacate or Set Aside the Interim Award (the "Motion") before this Tribunal. Rather, the relevant issue is the effect of the Motion. To the extent the Letter seeks to question the finality of the Interim Award, there is more than sufficient support for this position in the Motion, which the Letter at least recognizes by going out of its way to cite court decisions not binding on this Tribunal. Even the two sentences offered by the Letter are contradictory. On the one hand, the Letter argues that federal courts can only "review arbitral awards unless the awards purport to resolve finally the issues submitted to them." Certainly, there is no requirement to resolve "all" issues in order for the award to be sufficiently final, yet in the very next sentence, the Letter urges exactly this result—a strange juxtaposition, indeed. In any event, the Motion is firmly grounded in precedent and merely applies the finality recognized in pages 1 and 2 of the Letter. Any further discussion of the finality of the Interim Award could only be relevant to the extent that Costa Rica invites this Tribunal to reconsider its prior decision.

29. The Claimants also assert that notwithstanding the Respondent's complaints about potential delays, the Respondent itself is inviting another delay by requiring that the motion before the District Court be served upon it according to the Hague Convention. This creates uncertainty and a waste of resources and could be resolved if the Respondent appeared in Court and made its arguments.

30. Regarding the Respondent's request for the withdrawal of the stay in the District Court, the Claimants argued that they would honour the first stay request granted and suspend the other request "leaving the proceedings where they should be —paused."

31. By letter dated 13 February 2017, the Tribunal acknowledged receipt of the Respondent's response and the Claimants' reply. The Tribunal also dismissed the Respondent's application that the Tribunal order the Claimants to withdraw their stay request before the U.S. District Court.

Decision

32. The Tribunal has given careful consideration to the Parties' submissions and the issues raised thereby.

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33. As a preliminary matter, the Tribunal observes that the issue that here requires decision by the Tribunal is the Claimants' application that the Tribunal stays the arbitral proceedings of which it is seised pending the outcome of the Claimants' Set Aside Petition before the U.S. District Court. The 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. Accordingly, save for some tangential observations on this aspect below that are necessary for purposes of its Decision, the Tribunal makes no comment on the detail of the Claimants' Set Aside Petition.

34. The Tribunal is constituted under Section B of Chapter 10 of the CAFTA, an international treaty to which the United States and Costa Rica are parties, alongside the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua. The Tribunal's competence derives from the Treaty. It is a dispute settlement mechanism of international law.

35. Pursuant to CAFTA Article 10.22, the law governing the adjudication of claims submitted to the Tribunal is the CAFTA and applicable rules of international law. As recorded in §1.1 of the Tribunal's Procedural Order No.1 of 26 February 2014, the relevant procedural rules governing the conduct of the arbitration are the UNCITRAL Arbitration Rules, as revised in 2010, save insofar as these are modified by Section B of Chapter 10 of the CAFTA. By the Respondent entering into CAFTA and permitting claims to be brought under the UNCITRAL Arbitration Rules, and the Claimants bringing their CAFTA claims under the UNCITRAL Arbitration Rules, the Parties have mutually agreed to use the UNCITRAL Arbitration Rules in these proceedings.

36. The issues engaged by the Claimants' stay application addressed to the Tribunal are straightforward. The question for the Tribunal is whether, by some provision of law by which it is bound, the Tribunal is required to, or should otherwise, in the exercise of its inherent competence, stay its own proceedings pending the outcome of the Set Aside Petition submitted to the U.S. District Court? This question falls to be addressed in the first instance by reference to the governing law of the proceedings. In the absence of controlling requirements of that law directing an outcome, the exercise of the Tribunal's discretion must comport with the proper limits of its inherent competence as an international tribunal established by treaty for the purpose of the adjudication of investment disputes coming within the scope of Chapter 10 of the CAFTA.

37. The Claimants' Stay Request does not elaborate on the legal basis for its application to the Tribunal other than to cite CAFTA Article 10.26(6), with an accompanying footnote referencing the *TECO Guatemala Holdings LLC v. Republic of Guatemala* Decision on Guatemala's Request

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for a Continuation of the Stay of Enforcement of the Award which references this CAFTA provision.⁴ The Respondent contests the relevance of CAFTA Article 10.26(6)(b)(ii) on the grounds that “no party is seeking to enforce the Interim Award”.

38. In addition to the provisions of CAFTA Chapter 10 and the *TECO Guatemala* case cited by the Claimants, the Tribunal has also had regard, *inter alia*, to procedural orders in two NAFTA Chapter Eleven investment cases which addressed stay applications, namely, Procedural Order No.18 of 26 February 2001 in the case of *S.D. Myers, Inc. v. Canada* and Procedural Order No.19 of 10 August 2015 in the case of *Bilcon et al v. Canada*.⁵ Although the proceedings in those cases arose under the investment chapters of the NAFTA, and for this reason as well as others engaged considerations that are different from those presently before this Tribunal, these decisions nonetheless afford a useful frame of reference for consideration of stay applications.

39. The first issue that requires consideration is whether there is any provision of the Tribunal's governing law that either itself imposes a stay of proceedings or requires that the Tribunal stay its proceedings in circumstances in which, as in this case, a set aside challenge is raised before a national court. The only provision to which the Tribunal has been referred is CAFTA Article 10.26(6)(b) which, insofar as may conceivably be relevant for present purposes, provides as follows:

A disputing party may not seek the enforcement of a final award until:

[...]

(b) in the case of a final award under ... the UNCITRAL Arbitration Rules

[...]

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and hence there is no further appeal.

40. The Tribunal observes that this provision is focused on the enforcement of a final award. Neither element operates in the present circumstances. The Claimants' Set Aside Petition

⁴ *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Annulment Proceedings, Decision of 10 February 2015, at paragraph 33.

⁵ *S.D. Myers, Inc. v. Government of Canada*, Procedural Order No.18 of 26 February 2001; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (PCA Case No. 2009-04), Procedural Order No.19 of 10 August 2015.

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addresses the Tribunal's Interim Award, not a final award. Nor is any issue of the enforcement of an award engaged, whether interim or final. As the Respondent has observed, "no party is seeking to enforce the Interim Award. ... Continuing with the arbitration will not enforce the Interim Award." The Tribunal agrees with this assessment.

41. Nor, in any event, does CAFTA Article 10.26(6)(b)(ii) address any issue of a stay of arbitral proceedings. Rather, it constrains a disputing party from seeking the enforcement of a final award, i.e., it has in contemplation a procedure, ordinarily judicial in nature, that is subsequent to and distinct from the arbitral proceedings giving rise to the final award.

42. The Tribunal accordingly fails to see any sustainable basis in CAFTA Article 10.26(6)(b)(ii) to support the Claimants' Stay Request.

43. The Tribunal is, further, aware of no other provision, whether of the CAFTA, in the UNCITRAL Arbitration Rules, or in other applicable rules of international law, that would either impose a stay of proceedings or would otherwise require the Tribunal to stay its proceedings. The *TECO Guatemala* case to which Claimants make passing reference is not in any way apposite, concerning, as it does, the interpretation and application of Article 52 of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules that prescribe a *lex specialis* relevant to ICSID annulment proceedings. The arbitration of which the Tribunal is seised is not an ICSID arbitration. The ICSID Convention and Arbitration Rules in issue in the *TECO Guatemala* case have no bearing on the present case.

44. Given this, the question that follows is whether the Tribunal should, in the exercise of its inherent competence in the conduct of the arbitral proceedings of which it is seised, stay its proceedings in the light of the Claimants' Set Aside Petition.

45. As an initial matter, the Tribunal considers that it would have the power to stay its proceedings were it to consider a stay to be warranted. In addition to its inherent competence in respect of the administration of international justice, the Tribunal considers that the discretionary power to proceed in this manner is properly derived from its general power in respect of the conduct of the arbitration expressed in Article 17(1) of the UNCITRAL Arbitration Rules. The Tribunal notes that the *S.D. Myers* tribunal reached the same conclusion, by reference to the

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relevant terms of the applicable UNCITRAL Arbitration Rules.⁶ The tribunal in *Bilcon* similarly concluded that it was within the scope of its discretion to grant a stay.⁷

46. The question is whether it would be appropriate for the Tribunal to exercise its discretion to stay its proceedings in the present circumstances.

47. The Tribunal observes that it is for the Claimants to sustain their application for a stay on grounds, *inter alia*, going notably to considerations of fairness and prejudice, as well as to the balance of convenience and cost between the Parties. The continuation of the proceedings commenced by the Claimants cannot without more be subject to a presumption in favour of a stay consequent only on the raising of a set aside challenge before the U.S. District Court. To adopt such an approach would in effect be to give the Claimants a veto over the continuation of proceedings in the face of what they perceive to be an adverse decision or outcome. From a systemic perspective, such an approach would ultimately be encouraging of unsustainable set aside petitions motivated for reason of achieving some procedural advantage or enhanced negotiating position. In this regard, the Tribunal notes that Article 17(1) of the UNCITRAL Arbitration Rules enjoins a tribunal, in exercising its discretion in the conduct of proceedings, "to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." The Tribunal notes also the observation of the tribunal in the *S.D. Myers* case, with which it agrees, that the "point of departure is the presumption that a party to an arbitration (whether claimant or respondent) is entitled to have the arbitration proceedings continue at a normal pace."⁸ The burden is accordingly properly on the Claimants to establish that a stay is warranted and necessary.

48. The central plank of the Claimants' case in favour of a stay is the contention that the Set Aside Petition goes to issues of enforcement and the claimed finality of the Interim Award. As the Tribunal has already observed, however, continuing with its proceeding would not be to engage in any kind of enforcement measure. The Tribunal notes the same conclusion by the *Bilcon* tribunal.⁹

⁶ *S.D. Myers, Inc. v. Government of Canada*, Procedural Order No.18 of 26 February 2001, at paragraph 7.

⁷ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (PCA Case No. 2009-04), Procedural Order No.19 of 10 August 2015, at paragraph 16.

⁸ *S.D. Myers, Inc. v. Government of Canada*, Procedural Order No.18 of 26 February 2001, at paragraph 8.

⁹ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (PCA Case No. 2009-04), Procedural Order No.19 of 10 August 2015, at paragraph 13.

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49. Beyond the issue of enforcement, the Claimants have advanced, although hardly developed, what is essentially a balance of convenience case in favour of a stay – the risk of forcing a party to adopt simultaneous, contradictory positions, reasons of procedural economy, considerations of costs, and the assertion that a stay would cause no harm to the Respondent.

50. For its part, the Respondent avers that a stay would be highly disruptive to the Respondent, which has been defending the arbitration for more than 3½ years. The Respondent points in this regard to potential delay of years before the U.S. Federal Court process finally runs its course at the District Court and appellate levels, during which time the integrity of the proceedings could be significantly prejudiced, including as regards the record of the case, witnesses evidence, the availability of counsel and of members of the Tribunal currently constituted, etc. The Respondent further asserts that even if the U.S. District Court decided that it could review the Interim Award, or portions of it, the Claimants' case is "unlikely to prevail on the merits."

51. Leaving aside the Respondent's contention that the Claimants would be unlikely to prevail on the merits, a point to which the Tribunal returns briefly below, the Tribunal considers that considerations of fairness and prejudice, and the balance of convenience and cost between the Parties, overwhelmingly favours the continuation of the proceedings. The Tribunal agrees with the Respondent on the issue of the risk of prejudice to the proceedings consequent upon a stay pending the outcome of the U.S. Federal Court proceedings. As the tribunal in the *S.D. Myers* case observed, "[a]n arbitral tribunal has no permanent, independent or institutional life of its own. There are strong policy reasons for not placing the performance of its functions 'on hold' (unless of course the parties so agree) ..." ¹⁰ In the Tribunal's view, the Claimants in the present case have come nowhere near sustaining the case in favour of a discretionary decision by the Tribunal to stay its proceedings.

52. An observation is warranted on the Respondent's contention that even if the U.S. District Court decided that it could review the Interim Award, or portions of it, the Claimants' case is "unlikely to prevail on the merits."

53. The issue of the likelihood of success of the Claimants' Set Aside Petition is not a matter for this Tribunal. It is not simply that this is an issue for the U.S. District Court, seised of a petition under U.S. law. It is also, in the Tribunal's estimation, that there is a proper differentiation of

¹⁰ *S.D. Myers, Inc. v. Government of Canada*, Procedural Order No.18 of 26 February 2001, at paragraph 16.

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responsibility between the role and function of the Tribunal, as an institution of international law established pursuant to a treaty, and the role and function of the U.S. Federal Courts as the authoritative arbiters on matters of U.S. law. The Tribunal accordingly considers that deference requires it to forebear from any comment on its appreciation of the issues engaged by the Claimants' Set Aside Petition.

54. Without detracting from this, the Tribunal, in common with any tribunal of law, ought properly to have regard to any claimed shortcomings in its own procedure and decision-making. Like all courts and tribunals, it is fallible and a sense of self-examination is properly warranted.

55. This does not take the Tribunal into consideration of questions that will properly be addressed by the U.S. District Court. It does, however, in the Tribunal's estimation, require the Tribunal, independently of the arguments advanced by the Claimants and the Respondent, to consider whether a stay of its proceedings may properly be warranted in the interests of the administration of justice.

56. Having regard to the docket of the case of which it is seised; having regard to its Interim Award; having regard to the issues that remain to be addressed in these proceedings; having regard to the fairness of the proceedings and the balance of convenience between the Parties; the Tribunal concludes that a stay of its proceedings is not warranted in the interests of the administration of justice and that there is no sound and proper basis for it to exercise its discretion to order a stay of its proceedings.

57. In this regard, the Tribunal has given careful consideration to the fact that an element of the Claimants' Set Aside Petition concerns Lot B1, and claims concerning the shortcomings of the Tribunal's decision in respect of this Lot. The Tribunal's decision in respect of this Lot was that "it has no jurisdiction to entertain the Claimants' claims in respect of Lot B1" for the reason that there is

no act or other conduct that amounts to an independently actionable breach in respect of this property, including for [CAFTA] entry into force and limitation period purposes. There is therefore no basis, by reference to [CAFTA] Article 10.5, or indeed even arguable by reference to Article 10.7, on which the Claimants can sustain a claim to a justifiable cause of action.¹¹

¹¹ Interim Award, paragraph 288.

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58. The 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. Of relevance to the Tribunal's decision on whether to stay, however, are the considerations, first, that there are no further proceedings to stay as regards Lot B1, and, second, that the balance overwhelmingly favours continuation of the proceedings in respect of the other Lots over which the Tribunal has concluded that it does have jurisdiction (Lots B3 and B8) and in respect of which there is an outstanding jurisdictional question (Lots B5 and B6). The Claimants will not be disadvantaged as regards any submissions that they may wish to make to the Tribunal on the outstanding jurisdictional issues concerning Lots B5 and B6 or the merits and quantum issues remaining with respect to Lots B3 or B8 and, potentially, Lots B5 and B6. The outstanding jurisdictional issue of law that remains is generic. The Claimants will not therefore be in any way disadvantaged as regards their submissions to come on Lots B3, B5, B6 or B8 by the absence of Lot B1 from the proceedings going forward. Even having regard to the set aside claims made concerning Lot B1, therefore, the Tribunal concludes that considerations of fairness and prejudice, and the balance of convenience and costs between the Parties, overwhelmingly favours the continuation of the proceedings.

59. For the reasons set out above, having given careful consideration to the issues presented by the Claimants' application, the Tribunal can see no ground or basis for a stay of proceedings and considers that a stay would be fundamentally inequitable and prejudicial to the Respondent in the circumstances of this case. The Tribunal accordingly rejects the Claimants' request that it stay these proceedings pending the decision by the U.S. District Court on the Claimants' Set Aside Petition.

60. As a result of the Tribunal's decision, and taking into account that the Parties have failed to reach an agreement on the schedule for the next procedural steps, the Tribunal will be sending to the Parties for comment a draft procedural order on next steps in the coming days.

Done on 28 February 2017 in Washington, D.C.

[signed]

Sir Daniel Bethlehem QC
Presiding Arbitrator, on behalf of the Tribunal