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By Email

Members of the Tribunal
c/o Anneliese Fleckenstein, Counsel
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Dear Members of the Tribunal:

Re: Spence International Investments, LLC, Berkowitz, et al. v the Republic of Costa Rica -- Response to the Tribunal’s Letter of 16 December 2016

Introduction

We write further to the Tribunal’s letter of 16 December 2016, which invited our response to the Respondent’s letter of 14 December 2016.

The Respondent’s application should be dismissed. The Tribunal’s decision as to costs in the Interim Award is a final decision, which the Tribunal cannot vary based on subsequent events. Further, terminating the proceedings “with prejudice” is unnecessary and inappropriate in the circumstances.

Mr. Gremillion

Regarding the Tribunal’s inquiries concerning Mr. Gremillion’s legal representation, we confirm that Mr. Gremillion formed part of the Berkowitz Claimants (defined in the Notice of Arbitration and Statement of Claim). Accordingly, Mr. Gremillion is no longer represented by Fasken Martineau DuMoulin LLP, Dr. Todd Weiler or Lic. Vianney Saborío Hernández.

Nevertheless, further to the Tribunal’s request, we have contacted Mr. Gremillion and informed him of the Respondent’s applications against him. We sought instructions from

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* Fasken Martineau DuMoulin LLP is a limited liability partnership and includes law corporations.

him concerning the issue of the Respondent's applications against him and we informed him that his failure to submit views to the Tribunal in response to the Respondent's application could prejudice the Tribunal's consideration of the issues, possibly to his detriment.

Mr. Gremillion requested us to advise the Tribunal that, after having carefully considered the Tribunal's Interim Award with respect to Lot B7, he has reluctantly determined that the costs of maintaining his claim through an additional phase of the arbitration would be prohibitive. Any positive result would accordingly be outweighed by the costs of obtaining it. He has asked us to inform the Tribunal that he adopts the position of Spence International Investments, LLC ("Spence International") as set out below in response to the Respondent's application.

The Tribunal Should Dismiss the Respondent's Application

In its letter of 14 December 2016, the Respondent asks the Tribunal to terminate the proceedings with prejudice as regards the Spence International claims over which the Tribunal found that it had jurisdiction and to order Spence International to pay costs to the Respondent in respect of the claims it has now withdrawn. It proposes that such an order could be made by having "the Tribunal amend its decision on costs" arguing that "Spence International cannot expect Respondent to bear the cost of defending claims Spence International pursued vigorously and then abandoned" and that "Spence International's claims, as the other Claimants' claims, should have never been brought in the first place."

Spence International submits that the Tribunal should dismiss the Respondent's application for the following reasons.

Procedural Order No. 1, issued by the Tribunal on 26 February 2014 after consultation with the parties, established the procedure for the arbitration. It provided that the claims of the Spence Claimants and the Berkowitz Claimants would be consolidated by agreement and that the Respondent's jurisdictional objections would be considered together with the merits.

Procedural Order No. 1 contemplated a single hearing in April 2015 with the possibility of a single round of post-hearing submissions and evidence as to costs at the Tribunal's direction, which would then be followed by a declaration that the hearings were closed at an appropriate point. In Procedural Order No. 1, the Tribunal also indicated that it would send regular updates to the parties concerning its drafting of the Award starting six months from the last step taken (hearing or submission) and, if the award had not been issued within that period of time, further updates every four months thereafter.

The hearing took place, as originally scheduled, from 20-24 April 2015. At the conclusion of the hearing, the Tribunal requested post-hearing submissions limited to observations on the issues of law and interpretation that were addressed in the submissions of the non-disputing parties and specifically admonishing the parties not to address issues of fact. The parties submitted their post-hearing briefs on 26 May 2015. On 11 June 2015, the Tribunal authorized the Claimants to submit a reply to the factual background included in the Respondent's post-hearing brief that went beyond the directed scope, which the Claimants submitted on 26 June 2015.

In addition, as noted at paragraph 21 of the Interim Award, at the conclusion of the oral hearing, the Tribunal indicated that it was not declaring the hearings closed stating that if the Tribunal was with the Claimants on jurisdiction and any issue of liability, it would be likely to require additional evidence and perhaps submissions on damages.

Also at the conclusion of the hearing, the Tribunal requested that the parties inform the Tribunal of any factual developments in relation to the issues involved in the proceedings, including, for example, any new decrees or declarations of public interest. Further to this request, counsel communicated on numerous occasions and additional documents were submitted on 11 August 2015 (five documents); 5 February 2016 (six additional documents); and 6 July 2016 (twelve documents). All of these documents related to the ongoing judicial expropriation process. The Respondent did not propose to submit any new decrees or declarations of public interest or responses to the Contraloría Report, which suggests that no new steps were taken by the Respondent with respect to any of the lots or more generally.

On 25 November 2015, the Tribunal put a number of questions to the parties for response, including requests for further evidence. The parties provided their responses by 23 December 2015.

On 25 October 2016, the Tribunal issued the Interim Award, which dismissed most of the Claimants' claims on the basis of jurisdiction; found that for Lots A40, B3, B8, SPG1 and SPG2 it had jurisdiction to entertain claims under CAFTA Article 10.5 and found that for Lots B5, B6 and B7 it required further submissions on jurisdiction.¹ The Tribunal indicated "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 claims over which it has jurisdiction".² The Interim Award contained a decision on the allocation of costs for all of the proceedings to date.

¹ Interim Award, para. 303.

² Interim Award, para. 306.

Specifically, in its Interim Award, the Tribunal ordered:

“The Claimants and the Respondent shall each bear their own costs, including counsel’s fees and expenses, and shall bear equally half of the fees and expenses of the Tribunal and the Secretariat, in respect of the proceedings to date, without prejudice to the possibility of a different apportionment of costs, fees and expenses in respect of any future phase of these proceedings.”

It is trite law that once a Tribunal has issued a final decision on an issue, the Tribunal is *functus officio* as to that issue. The Tribunal’s decision to order the parties to bear their own costs “in respect of the proceedings to date” was a final decision; the Tribunal has no jurisdiction to revisit a decision already made. As demonstrated in the procedural steps and submissions detailed above, the “proceedings to date” were extensive and prolonged and included submissions made in respect of the lots still at issue in the arbitration to date. While the Tribunal retains jurisdiction to make a different award of costs in respect of future proceedings (as was expressly acknowledged in the Interim Award), Spence International submits that it has no alternative other than to dismiss the Respondent’s application to vary the costs award already rendered.

The decision not to pursue remaining claims was a business decision made after careful consideration of the Interim Award and the estimated costs of proceeding with an additional hearing phase not originally contemplated by the parties. It does not reflect, nor could it be reasonably assumed to represent, any of the Claimants’ views on the Respondent’s liability under Part A of Chapter 10 of the US-DR-CAFTA.

The Claimants disagree with the Respondent’s view that the claims should never have been brought in the first place and note that the Tribunal’s Interim Award did not dismiss all claims. The Claimants invested in good faith in Costa Rica and do not deserve such derisive treatment at this stage of the proceedings from the Respondent. Indeed, as the Tribunal itself indicated at paragraph 300 of the Interim Award:

“...it warrants emphasis that the Tribunal, in this Award, is principally addressing questions that go to its jurisdiction and the justiciability of the Claimants’ case under the CAFTA. It is not addressing the merits of the Claimants’ allegations. It emphasises this point for two reasons. In the first place, the Tribunal’s finding that it does not have jurisdiction over a large part of the Claimants’ case should not be taken as sanguine endorsement of the delays that have self-evidently beset Costa Rica’s expropriation process. The criticisms of this process in the Contraloría Report are withering. The Claimants have for the most part fallen at the jurisdictional hurdles. This should not, however, leave the Respondent

with any sense that the Tribunal would not have subjected the Respondent's conduct to the most intense and critical scrutiny had the jurisdictional bars not applied."

Based on the terms of Procedural Order No. 1, the Claimants expected a single series of exchanges on the issues of jurisdiction, liability and damages; a single hearing; and a final award likely rendered in late 2015. After having spent almost half a million dollars on advances deposited with the ICSID Secretariat, not to mention legal fees and other out of pocket expenses, the Claimants find themselves - at the end of 2016 - at the beginning of a process rather than the end. Given the amounts now involved, and the costs of the process required to pursue their remaining claims in the arbitration, it no longer makes any business sense to continue with their claims. The Respondent is the beneficiary of Spence International and Mr. Gremillion's reluctant decision.

As a result of Spence International and Mr. Gremillion's decisions not to pursue their remaining claims, the Respondent will not have to incur costs or expenses to defend those claims in future proceedings. There is no basis on which to award the Respondent costs which it has not yet incurred.

Simple Termination of the Proceedings is Sufficient

Finally, Spence International submits that, in light of the withdrawal of these claims, it is unnecessary for the Tribunal to terminate the proceedings with respect to claims concerning those properties "with prejudice". The Respondent submits that failing to terminate the proceedings "with prejudice" would result in severe prejudice as "Claimant Spence International would not be deterred from initiating a same or similar case against Respondent in the future". The concept of "dismissal with prejudice" is a common law concept inappropriate to a proceeding under international law. The Tribunal can take note of the withdrawal of the claims in issue and terminate the proceedings related to these particular claims pursuant to Article 36(2) of the UNCITRAL Arbitration Rules. Spence International confirms its understanding that the doctrine of *res judicata* would preclude the same Claimants from submitting the same claims to a different DR-CAFTA Tribunal in a subsequent arbitration. The termination of the proceedings with respect to these lots under Article 36(2) of the UNCITRAL Arbitration Rules is sufficient to address Respondent's concern as articulated.

Spence International and Mr. Gremillion respectfully request that the Tribunal acknowledge their withdrawal of their remaining claims in the arbitration and that ICSID refund any unused deposits advanced by the Claimants to date. Additional deposits, if required, can be advanced in the course of future proceedings.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



Tina Cicchetti

TC/grb

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