

**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)**

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**PROCEDURAL ORDER ON THE CORRECTION OF THE INTERIM AWARD  
AND THE TERMINATION OF THE PROCEEDINGS**

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

*Secretary of the Tribunal*  
Anneliese Fleckenstein

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*Date of dispatch to the parties:* 30 May 2017

*Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. the Republic of Costa Rica  
(UNCT/13/2)*

Procedural Order on the Correction of the Interim Award and the Termination of the Proceedings

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## **Introduction**

1. The Tribunal refers to its Procedural Order Taking Note of the Termination of the Case with respect to certain Claimants of 10 February 2017 and to its Procedural Order on the Claimants' Request for a Stay of the Proceedings of 28 February 2017,<sup>1</sup> which relate the procedural details of this case. Insofar as is necessary and appropriate for purposes of this Order, the Tribunal sets out below relevant events as well as those events that occurred after its 28 February 2017 Order.
2. Following the hearing on jurisdiction and merits which took place in Washington D.C. on 20 – 24 April 2015, the Parties, at the request of 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 26 Lots that were 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.”
3. On 25 November 2015, the Tribunal put 5 additional questions to the Parties. Question 4 was as follows:
  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.

4. The Parties submitted their responses to the questions, together with accompanying documentation, on 23 December 2015. In response to the Tribunal’s Question 4 regarding Lot B1, the Claimants responded, *inter alia*, as follows:

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.

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<sup>1</sup> In accordance with the transparency requirements of DR-CAFTA Article 10.21, the Tribunal notes that both Orders are published on the ICSID website.

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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.

5. 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]

6. The Tribunal relied on these representations by the Parties for purposes of its Interim Award.

7. On 25 October 2016, the Tribunal issued its Interim Award deciding 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.

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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.
4. The procedure applicable to further proceedings is reserved for further decision by the Tribunal in due course, following consultations with the Parties.
5. 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.
8. Noting the heavy factual detail of the case, and recalling Article 38 of the UNCITRAL Rules, the Tribunal, in its 25 October 2016 letter transmitting the Interim Award, expressly requested the Parties to draw its attention to "*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.
9. Following receipt of the Interim Award, neither Party notified to the Tribunal any factual error or omission, or other issue that might warrant a correction of the Interim Award. On the contrary, by letter dated 28 November 2016, the Respondent replied noting that it had "*not identified any corrections to be made to the Interim Award.*" By a letter of the same date, 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.*" 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.
10. 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, as well as other procedural matters concerning the next steps of the proceeding.
11. After hearing the Parties on the Spence Claimants request for termination, on 10 February 2017, at the request of the Parties and pursuant to Article 36(2) of the UNCITRAL Arbitration Rules, the Tribunal issued a Procedural Order taking note of the Termination of the case with respect to Spence International and its lots A40, SPG 1 and SPG 2 and Mr. Glen Gremillion and his lot B7, not altering the costs

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decision made in the Interim Award. Accordingly, 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)*.

12. On 25 January 2017, the Claimants informed the Tribunal that they had filed a motion to vacate or set aside the Interim Award before the U.S. District Court for the District of Columbia and therefore requested that this Tribunal stay the current proceeding. The parties exchanged their observations on the Claimants' Stay request and on 28 February 2017, the Tribunal issued a Procedural Order rejecting the Claimants' request for a Stay of the proceeding.
13. On 8 March 2017, the Tribunal circulated for the Parties' comments a draft Procedural Order No. 2 addressing the schedule for the next steps in the proceeding.
14. On 15 March 2017, the Parties submitted their comments to the draft Order. In its letter, the Respondent indicated that it was in general agreement with the proposed schedule. In their letter, the Claimants reiterated their application before the U.S. District Court for the District of Columbia to set aside the Interim Award, stating:

The Application, *inter alia*, takes issue with the legal standard applied to Lot B1, arguing that the Tribunal did not consider, or indicate it would consider, the actual status of certain court proceedings as to Lot B1, as a bar to jurisdiction regarding certain claims before this Tribunal.

Even though the district court will ultimately consider if the Tribunal exceeded its powers in this respect, the Tribunal chose to actively address the issue in the Procedural Order on the Claimants' Request for a Stay of Proceedings (the "Order"). The Berkowitz Claimants are now faced with exactly the type of contradiction that they sought to avoid by requesting the Tribunal to suspend the proceedings. Faced with the Order and the Tribunal's direct mention of the legal proceedings as to Lot B1, the Berkowitz Claimants are in an untenable position. If they respond to the Tribunal's assertions regarding Lot B1, it may give the impression that the Interim Award was not final on this point, playing into the argument that Costa Rica has made regarding an alleged lack of finality. If the Berkowitz Claimants remain silent, that silence could be construed as a form of judicial estoppel that Costa Rica could use in the proceedings to annul or set aside the Award, arguing that the Berkowitz Claimants somehow agreed with the Order. This is the kind of simultaneous, contradictory position that the Berkowitz Claimants cannot be expected, much less forced, to adopt.

In their footnote 1 to this paragraph the Claimants indicated:

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To further illustrate the point, it must be noted that it was not that the Claimants chose to hide the legal proceedings as to Lot B1 from the Tribunal, but rather that the court decision was sent to the ICSID Secretariat –to whom all communications aimed at the Tribunal, including these presents, should be addressed—before the Award was issued, but those materials were not relayed onto the Tribunal for reasons or no reasons beyond the scope of this communication and the current competence of the Tribunal. Any further exchanges on this issue can only undermine the consistency required of any party litigating before multiple tribunals, and Claimants thus reserve any further elaboration on this point for the competent court authorities hearing the Application.

15. On 16 March 2017, the Tribunal sent a letter to the Parties and requested:

1. ... clarification that the Claimants are in fact applying for an order terminating the outstanding proceedings on the grounds that Claimants have decided not to pursue any remaining claims that they may have; and
2. ... that Claimants clarify and elaborate on the allegation made in footnote 1 of their letter that the ICSID Secretariat failed to relay to the Tribunal information regarding a court decision regarding Lot B1 that had been set to the Secretariat.

16. On 17 March 2017, the Claimants confirmed that they were in fact applying for an order terminating the outstanding proceedings in identical terms to those of the previous Claimants in the Tribunal’s Procedural Order Taking Note of the Termination of the Case with Respect to Certain Claimants of 10 February 2017. The Claimants stated further that they:

... confirm their understanding that their ability to further pursue the claims originally pursued in this arbitration will be subject to the results of the application for annulment and setting aside of the Award currently being heard by the competent courts in Washington, D.C., and to any applicable *res judicata* effect of the Tribunal’s outstanding decisions.

Regarding the Tribunal’s invitation to further comment on the issues surrounding the court decision issued regarding Lot B-1, the Claimants –again—kindly note that this is precisely one of the matters being discussed as part of the application for annulment and setting aside of the Award currently being heard by the competent courts in Washington, D.C., which makes it improper and beyond the scope of these proceedings to revisit the matter before the Tribunal. The Tribunal has already rendered a final decision on Lot B-1, found that no court decision had been issued, and relied on the lack of a decision to deprive this Tribunal of jurisdiction regarding the relevant claims.

As a result, Claimants respectfully maintain that they cannot be expected to elaborate on issues regarding which the Tribunal has become *functus officio*, but will nonetheless entertain the request for a factual confirmation contained in the Secretariat’s note.

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Unfortunately, this representation did not receive a full copy of the exchanges among the parties and the Secretariat at the time of being retained, but what little sample it did receive suffices to confirm that –as appears from the communication attached as Exhibit I– the fact that the decision had in fact been issued and would be conveyed to the Tribunal had been discussed among the parties as early as August, 2016. Thereafter, all the then claimants informed the Secretariat of the developments in the court proceedings, and were told that there was no need for those materials to be transmitted to the Tribunal. [Footnotes omitted]

17. On 20 March 2017, the Tribunal sent a letter to the parties indicating:

... The Tribunal notes the exhibit attached to the Claimants' letter of March 17, 2017 indicating that there had been a judgment in the domestic proceedings concerning Lot B1 on 10 June 2016 and subsequent proceedings in respect of that judgment. These developments were not before the Tribunal when it came to finalise its Interim Award, which, but for translation into Spanish, had been complete by mid-September. Nor were these developments drawn to the Tribunal's attention following the transmittal of the Interim Award as a (potential) predicate error or omission of a factual nature going to an element of the Tribunal's decision. In the Tribunal's October 25, 2016 letter transmitting the Interim Award, the Tribunal "noting the heavy factual detail of this case, and recalling Article 38 of the UNCITRAL Arbitration Rules (as revised in 2010), invite[d] the parties to draw its attention to '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 the Tribunal can consider whether any correction is appropriate." Neither side drew to the attention of the Tribunal any error or omission, notwithstanding the conclusion, stated in paragraph 288 of the Interim Award, that there had been no judgment in the domestic proceedings related to Lot B1.

Although the Tribunal reached a decision on the question of its jurisdiction regarding Lot B1 in its Interim Award, it remains seised of the dispute between the Parties. It is not *functus officio*. Without prejudice as to any consequences that may follow from this, the Tribunal, in the exercise of its inherent competence in respect of the administration of justice, requests both Parties to submit to the Tribunal, without commentary, the documents to which reference is made in the exhibit to the Claimants' letter of March 17, 2017 concerning the domestic proceedings in respect of Lot B1. Should the Tribunal consider that the documents in question go to the conclusion expressed in paragraph 288 of the Interim Award, it will invite the views of both Parties on whether the Interim Award should be revised and corrected in respect of the conclusion regarding Lot B1 to allow the Parties to make submissions on jurisdiction in respect of Lot B1 alongside the submissions on jurisdiction in respect of Lots B5 and B6. The Tribunal would in that eventuality invite the Claimants to withdraw their application for an order of termination in respect of the Claimants' outstanding claims or would otherwise defer consideration on any such extant application until after the issue of any warranted revision of the Interim Award has been addressed.

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The Parties are also requested to draw to the Tribunal's attention any further developments in the domestic legal proceedings in Costa Rica in respect of any and all of the Berkowitz Claimants' Lots up until the date of the transmittal of the Interim Award on October 25, 2016.

18. On 3 April 2017, the Parties submitted communications regarding the Tribunal's 20 March 2017 letter. The Claimants did not provide any lot updates stating that:

...they cannot and should not respond by providing any further documents or submissions regarding Lot B1. As Claimants have maintained, only the district court considering the Motion to Vacate is currently competent to receive any submissions and evidence related to the findings of the Tribunal regarding Lot B1 and any accessory information. This position finds support in the Tribunal's Procedural Order on the Claimant's Request for a Stay of the Proceedings (the "Stay Decision"), where the Tribunal stated that "[t]he 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[,]” and continued to find that “[t]he 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.”

Specifically as to Lot B1, the Tribunal wrote that “[t]he 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.” Moreover, the submission of documents is equivalent to presenting an argument. Because the Letter opens the possibility for comment based on the content of the documents, the documents function as a condition precedent to later argument, making the documents part of the sequence resulting in an argument being made or forfeited. In light of Claimants' prior position that the proper forum for the continued discussion of Lot B1 is the district court and the statements by the Tribunal to this effect, Claimants must refrain, at the risk of taking contrary positions in these proceedings and the vacatur proceedings, from submitting any documents.

Claimants' position should not prejudice the Tribunal's evaluation of those documents as it relates to any claims that Costa Rica may make, whether it be a renewed request for costs and fees like Costa Rica's prior submission as to the Spence and Gremillion Claimants or a continuation of the proceedings despite the fact that the Stay Decision was specifically premised on the (false) non-existence of a court decision as to Lot B1. That decision has become final in accordance with Costa Rican law, but the situation would be identical even if Costa Rica had – *quod non* – in fact filed an appeal against it, as it has contended. As the plaintiff in the court proceedings related to Lot B1, Costa Rica should have the documents necessary for the Tribunal's rulings on this point, to the extent jurisdiction for such rulings exists. [Footnotes omitted]

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19. In its communication, the Respondent provided documents updating the Tribunal on the local court proceedings up until the issuance of the Interim Award regarding lots B1, B3, B5 and B8.
20. On 7 April 2017, the Respondent urged the Tribunal to act upon the Claimants' request for termination and requested an opportunity to comment on such request. The Respondent further stated that:

Claimants have consistently refused to participate further in this arbitration. First, in their letter of March 15, 2017, Claimants asked the Tribunal to terminate these proceedings. Second, in response to the Tribunal's request that the parties provide updates on judicial activity concerning Claimants' properties at issue in these proceedings up until the issuance of the Interim Award, Claimants refused to submit any such updates. This refusal is even more striking given that the Tribunal's request for update was prompted by Claimants' complaints that the Tribunal did not have sufficient information regarding recent activity in the judicial proceedings in Costa Rica concerning Lot B 1, which allegedly prejudiced Claimants. Yet Claimants refused to cure the situation by providing that information to the Tribunal. Claimants' refusal to respond to the Tribunal's request leaves no doubt that they have no intention to continue participating in these proceedings. In the meantime, Respondent continues to incur costs unnecessarily.

21. In their last footnote 3 to this paragraph, the Respondent asserted that:

Moreover, Claimants' complaints regarding Lot BI are entirely unjustified. As the Tribunal will have seen from the updates concerning Lot BI submitted by Respondent, the only intervening event is a judgment from the Costa Rican lower court. In its judgment, the court granted the owners of Lot BI greater compensation than initially determined. Claimants have not complained in this arbitration or before Costa Rican courts about the increased sum awarded. In fact, as the updates show, the State appealed the lower court judgment, not Claimants. Thus, there is no need for the Tribunal to amend the Interim Award in light of the updates provided.

22. On 17 April 2017, the Tribunal wrote to the Parties acknowledging receipt of their letters and stating the following:

The Tribunal has reviewed the additional documents submitted by the Respondent by email dated April [4], 2017 concerning Lots B1, B3, B5 and B8 responsive to the Tribunal's request dated March 20, 2017.

The Tribunal has concluded that this documentation, and in particular (but not limited to) the documentation concerning Lot B1 discloses an error or omission of a factual nature in the Interim Award of October 25, 2016 within the scope of Article 38 of the UNCITRAL Arbitration Rules that should have been drawn to the attention of the

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Tribunal by the Parties pursuant to the Tribunal's express request in its letter dated October 25, 2016 transmitting the Interim Award.

The Tribunal considers that it is not *functus officio*, being still seised of the dispute between the Parties and having expressly requested the Parties to draw to the Tribunal's attention errors or omissions going to the factual detail of the case.

Having regard to the above, the Tribunal invites comments from the Respondent and Claimants respectively on the Claimants' letter dated March 15, 2017 and the Respondent's letter dated April 7, 2017. The Tribunal also invites the comments of the Parties on how the Tribunal should proceed in the light of the additional documentation referred to above concerning Lots B1, B3, B5 and B8 and the Tribunal's conclusion that the documentation in question, notably concerning (but not limited to) Lot B1 discloses an error or omission of a factual nature in the Interim Award that would warrant correction of the Interim Award. The Tribunal's provisional conclusion is that this development ought properly to be reflected either in a corrected Interim Award or, if the Parties consider that the arbitral proceedings should be terminated without the issuing of a corrected Interim Award, in the Order of the Tribunal terminating the arbitral proceedings.

23. On 1 May 2017, the Parties submitted their observations on the Tribunal's 17 April 2017 letter. In their letter, the Claimants reiterated their position that they could not make any submissions regarding Lot B1 as the District Court was the proper forum to receive any submission or evidence regarding this Lot. Otherwise, the Claimants would be forced to adopt contrary positions in the two proceedings. The Claimants further stated that:

In any event, it should be noted that the position adopted by Costa Rica is selfcontradictory, ethically challenged and unbecoming of the high standards expected of sovereign States in their international disputes. Costa Rica has always known of the existence of the decision regarding Lot B1 –which Costa Rica itself issued–, and even its counsel knew of that decision at all times, as evidenced by the admission, posited in its last letter, that it attempted –albeit extemporaneously– to lodge an appeal against that decision.

A closer look into the position adopted by Costa Rica and its counsel in these proceedings and the annulment proceedings will reveal that, if Costa Rica knew that the Tribunal might make a decision on the basis of whether a court decision had been issued regarding Lot B1 –even if Costa Rica had never incorporated that defense in the course of the proceeding–, then it had an obligation and an ethical duty to notify the Tribunal of the existence of the local decision, or to seek correction of the Tribunal's “error” regarding this very critical fact. Not only did Costa Rica not do that, but, quite to the contrary, it expressly stated that it considered the award not to have any errors. On the other hand, if Costa Rica did not know that the Tribunal might make a decision on the basis of whether a court decision had been issued regarding

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Lot B1, this would confirm that it has to admit that the decision of the Tribunal was adopted *ultra petita*, and their opposition to the annulment before the District Court – where they are currently under a declaration of default issued by the clerk of the court – would be frivolous, and similarly self-contradictory, ethically challenged and unbecoming.

The stance of Claimants, when faced with this ethical quandary –*i.e.*, whether to artificially take a knowingly wrong position to benefit from incorrect statements by the Tribunal – is the opposite of that of Respondent. Claimants have stood by their firm belief – based on applicable law – that the proper remedy for the Interim Award’s shortcomings is that of annulment, and have followed through consistently, even where the Tribunal repeatedly invited Claimants to allow the Tribunal to amend the Interim Award in certain areas, leading to the Tribunal itself now confirming that the information “concerning (but not limited to) Lot B1 discloses an error or omission of a factual nature in the Interim Award that would warrant correction of the Interim Award.”

Claimants respectfully submit that the Tribunal applied an improper test, and used erroneous information to apply it. Correcting the information will not cure the impropriety of the test applied, and, at any rate, the Tribunal currently lacks competence to take any action regarding its decisions contained in the Interim Award, which, as confirmed by the Tribunal, are exclusively proper before the U.S. District Court. As a result, Claimants reiterate their request that these proceedings be terminated in the same terms as set forth paragraphs 15 and 18 of the Procedural Order Taking Note of the Termination of the Case with respect to Certain Claimants of 10 February 2017.

24. In its letter the Respondent requested the termination of the case and that the Tribunal award it costs and fees. The Respondent further stated that:

Given the Berkowitz Claimants’ conduct anything but termination of these proceedings would be unfair and prejudicial to Costa Rica. On March 15, 2017, the Berkowitz Claimants requested that the Tribunal terminate these arbitral proceedings. Since then, the Berkowitz Claimants have refused to participate in any way in these proceedings: they did not respond to the Tribunal’s March 20, 2017 request to submit on the record any documents evidencing developments in the domestic legal proceedings in Costa Rica concerning the Berkowitz Claimants’ properties; they have failed to pay ICSID costs requested on March 3, 2017; and their counsel has made public declarations stating that Claimants will insist that the proceedings be terminated. In the meantime, Costa Rica has continued to participate in good faith—*i.e.*, it responded to the Tribunal’s March 20, 2017 request for additional documents; it has paid its share of the arbitration fees and costs; and it has responded to all other requests of the Tribunal, all while incurring additional costs and fees. In light of Berkowitz Claimants’ conduct, there is no reason for these proceedings to continue and for Costa Rica to continue incurring costs and fees. Costa Rica, therefore, respectfully requests

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that the Tribunal terminate these proceedings and award Costa Rica costs and fees incurred from the date of the issuance of the Interim Award to the date of termination. With the termination of these proceedings, the Berkowitz Claimants would be precluded, under the doctrine of *res judicata*, from submitting the same claims to a different CAFTA tribunal in any subsequent arbitration. [Footnote omitted]

25. With respect to the correction of the Interim Award, the Respondent agreed to its factual correction to reflect the factual developments submitted in the documents on 3 April 2017, adding that:

...Costa Rica, however, does not believe that any factual correction to the Interim Award would affect, and would require an amendment of, the Tribunal's legal analysis and conclusions. As Respondent stated in its April 7, 2017 letter, the Berkowitz Claimants were granted a higher value for Lot B1 by the first instance court than they were awarded in the administrative proceedings. That court judgment has been appealed by Costa Rica, and the legal proceedings are ongoing. None of these facts affects any of the Tribunal's analysis and conclusions in the Interim Award. Moreover, and importantly, the Berkowitz Claimants have not made and explicitly refuse to make any additional arguments in these proceedings with respect to the Tribunal's conclusion regarding Lot B1. Therefore, there is no pending matter before the Tribunal other than ensuring that the factual narrative is complete by reflecting the latest development. [Footnote omitted]

26. On 9 May 2017, the Tribunal informed the Parties that, having considered their correspondence of 1 May 2017, it was appropriate for the Tribunal to correct the Interim Award to reflect the developments of the Costa Rican Courts which were brought to its attention by the Respondent's correspondence of 3 April 2017. The Tribunal further informed the Parties that it would issue an Order terminating the arbitral proceedings (to be reflected in an Order on Correction and Termination) in which it would address any outstanding issues of costs.

**Costs**

27. Following the Tribunal's Termination Order of 10 February 2017, the ICSID Secretariat proceeded to refund to the Spence International Claimants the portion of unused funds deposited with the Secretariat for the purposes of the proceeding.

28. On 3 March 2017, the ICSID Secretariat informed the Parties that it had on hand US\$30,357.76 from the Respondent. Accordingly, after consultation with the President of the Tribunal, the Secretariat requested from the Claimants a fourth advance of US\$30,000 in order to cover the expenses of the proceeding for the following three to six months.

29. In its letter of 16 March 2017, the Tribunal reminded the Claimants of the funds requested from them, which remained outstanding. The Tribunal further noted "in this

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regard that fees and expenses have already been incurred by the Tribunal and the Secretariat in respect of various issues arising since the Interim Award, including as regards applications by the Berkowitz Claimants and relating to proceedings in contemplation in respect of their outstanding claims. The Tribunal notes that Article 43(4) of the UNCITRAL Arbitration Rules requires such payments to be made within 30 days after receipt of the request for funds.”

30. On 17 April 2017, the Claimants were reminded of the call for funds sent by ICSID on 3 March 2017 and their obligation under UNCITRAL Article 43. The Claimants were further requested to provide an update on the status of their payment by 21 April 2017.
31. On 8 May 2017, absent a response from the Claimants, ICSID sent a letter to both Parties informing them of the Claimants’ default and inviting either party to make the outstanding payment.
32. To date the requested payment remains outstanding.

**Decision**

33. The Tribunal has given careful consideration to the Parties’ arguments regarding the correction of the Interim Award and the request to terminate this proceeding.
34. Regarding the correction of the Interim Award, as stated above by the Tribunal in its letter of 20 March 2017, the developments noted in the Claimants’ letter of 15 March 2017, concerning Lot B1 and the developments noted in the Respondent’s communication of 3 April 2017, concerning Lots B1, B3, B5 and B8, were not before the Tribunal when it came to finalize its Interim Award. Nor were these developments brought to the Tribunal’s attention following the transmittal of the Interim Award on 25 October 2016, as requested pursuant to UNCITRAL Article 38 in the Award’s transmittal letter.
35. Although the Tribunal reached a decision on the question of its jurisdiction regarding Lot B1, it is not *functus officio* and remains seised of the matter. The decision of the Tribunal was expressly designated to be an “interim” award, not a “final” award. That Interim Award contemplated further proceedings involving all Claimants, including both the Berkowitz Claimants and Respondent. All parties thus remained subject to the arbitral jurisdiction of the Tribunal even after the Interim Award issued. Consequently, there has been no risk of the type of outside communication or unilateral influence affecting the conduct of the Tribunal against which the doctrine of *functus officio* is intended to protect.
36. Moreover, consistent with UNCITRAL Article 38, the Tribunal, in the letter transmitting the Interim Award, noting the heavy factual detail of the case, expressly

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invited the Parties to draw its attention to “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. As recounted above, the Parties failed to accurately respond to that invitation. If the information about Lot B1 developments had been submitted to the Tribunal in response to that invitation, the unintended mistake in treatment of that Lot would have been apparent on the face of the Interim Award, and subject to timely correction.

37. Having regard to the preceding, the Tribunal considers that it cannot be divested of its functions by virtue of the failure of the Parties to accurately respond to the Tribunal’s inquiry regarding material post-hearing developments. Insisting that the authority of the Tribunal could only be exercised within the time periods set out in Article 38 would, in those circumstances, be an abuse of right. “[I]n all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to “good faith” (“*bonne foi*”), “*détournement de pouvoir*” (misuse of power) or “*abus de droit*” (abuse of right).” *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, §169 (CAFTA-DR arbitration). See also UNCITRAL Article 32. That is particularly the situation where the Tribunal seeks, as it does here, to correct an inadvertent mistake and clarify a now-apparent ambiguity of possible inconsistent treatment within the Interim Award of Lot B1 that arose out of the Tribunal’s belief, in reliance on the record before the Tribunal and confirmed by statements from the parties, that no relevant developments had occurred with respect to the Lots after the hearings.
38. The Tribunal concludes that it has the authority, in the exercise of its inherent competence in respect of the administration of justice, see, e.g., Brown, *The Inherent Powers of International Courts and Tribunals*, LXXVI British Year Book of International Law 195 (20005), to correct an involuntary mistake resulting in potentially inconsistent treatment and to clarify the resulting ambiguity in its Interim Award once that error is finally disclosed to the Tribunal. As such, having considered the documents regarding Lot B1, as well as Lots B3, B5 and B8, the Tribunal has concluded, and so informed the Parties on 9 May 2017, that it is appropriate for it to correct the Interim Award to reflect the Costa Rican Court proceedings. The Tribunal hereby issues its corrected Interim Award, concluding with respect to Lot B1, the relevant part of the Decision of the Tribunal to read as follows:

308. ...

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

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judgments of the Costa Rican courts rendered after 10 June 2013 in respect of Lots B1, B5, B6 and B7.

39. Regarding the termination of the proceeding, the Tribunal takes note of the notification by the Claimants of their decision not to pursue their remaining claims with respect to Lots B1, B3 B5, B6 and B8 and of the Respondent's agreement to terminate the proceedings.
40. Regarding the costs of the proceeding, the Tribunal makes reference to UNCITRAL Articles 40(1) and 42. These articles establish the following:

Article 40

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.
41. Furthermore, the Tribunal refers to the Interim Award in which it established that until that point of the proceeding the Parties were to "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."
42. The issue of costs that requires decision by the Tribunal concerns those costs incurred following the Tribunal's 10 February 2017 Procedural Order Taking Note of the Termination of the Case with respect to certain Claimants. The developments in the proceedings since that date have been concerned with procedural matters, the Claimants' request for a stay of the proceedings, dismissed by the Tribunal Procedural Order of 28 February 2017, and issues engaged in the present Procedural Order going to the correction of the Interim Award.
43. As regards the last of these elements, of relevance to the matter of costs is that both Parties failed to inform the Tribunal of the factual developments in the Costa Rican

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proceedings that the Tribunal has concluded necessitates the correction of the Interim Award.

44. Also relevant to the matter of costs, the Tribunal notes (as set out above) that the Claimants are in default of their obligation to make the necessary contribution of funds first requested by the ICSID Secretariat by letter dated 3 March 2017. The consequence of this is that the funds held account of these proceedings by the ICSID Secretariat in respect of the current phase of the proceedings have been contributed by the Respondent alone.
45. Having regard to the preceding, the Tribunal decides that the appropriate order on costs is that (a) each Party shall bear their own costs, (b) the costs of the Tribunal and Secretariat shall be divided equally between the Parties, and (c) having regard to the Claimants' default on funds, that the Claimants shall pay to the Respondent 50% of the costs of the Tribunal and Secretariat incurred following the Tribunal's 10 February 2017 Procedural Order Taking Note of the Termination of the Case with respect to certain Claimants. For these purposes, the costs of the Tribunal and Secretariat incurred following the Tribunal's 10 February 2017 Procedural Order will be formally notified to the Parties by the ICSID Secretariat in a financial statement following the present Procedural Order.
46. In the light of the preceding, the Tribunal takes note of the decision of the Claimants to withdraw their remaining claims in this arbitration and orders the termination of the proceeding with respect to the Berkowitz Claimants and their remaining Lots B1, B3, B5, B6 and B8. On costs, the Tribunal decides that each Party shall bear their own costs, the costs of the Tribunal and Secretariat shall be divided equally between the Parties, and the Claimants shall pay to the Respondent 50% of the costs of the Tribunal and Secretariat incurred following the Tribunal's Procedural Order of 10 February 2017.

Done on 30 May 2017 in Washington, D.C.

*Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. the Republic of Costa Rica  
(UNCT/13/2)*

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[signed and dated]

[signed and dated]

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**Mark Kantor**

Arbitrator

Date:

**Raúl E. Vinuesa**

Arbitrator

Date:

[signed and dated]

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**Daniel Bethlehem**

Presiding Arbitrator

Date: