

**COMMERCE GROUP CORP. &  
SAN SEBASTIAN GOLD MINES, INC.**

*Applicants (Claimants),*

v.

**REPUBLIC OF EL SALVADOR**

*Respondent.*

ICSID Case No. ARB/09/17  
(Annulment Proceeding)

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**ORDER OF THE COMMITTEE DISCONTINUING THE PROCEEDING AND  
DECISION ON COSTS**

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*Members of the ad hoc Committee:*

Professor Michael C. Pryles  
Professor Christoph Schreuer  
Professor Emmanuel Gaillard (President)

*Secretary to the ad hoc Committee:*

Mr. Marco Tulio Montañés-Rumayor

*Date of Dispatch to the Parties: August 28, 2013*

## **I. PROCEDURAL HISTORY**

1. On July 12, 2011, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received an Application for Annulment of the award rendered on March 14, 2011 in the arbitration proceeding of *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17) (“Award”). The application was brought by Commerce Group Corp. and San Sebastian Gold Mines, Inc., (the “Applicants” or “Claimants”) against the Republic of El Salvador (the “Respondent” or “El Salvador”).
2. On July 15, 2011, the Centre registered the Application for Annulment pursuant to Arbitration Rule 50(2)(a).
3. On August 8, 2011, the *ad hoc* Committee was constituted in accordance with Arbitration Rule 52(2) as follows: Professor Emmanuel Gaillard (French), President; Professor Michael C. Pryles (Australian); and Professor Christoph Schreuer (Austrian).
4. On August 17, 2011, the Centre requested the Applicants to pay US \$150,000.00 pursuant to Administrative and Financial Regulation 14(3)(e).
5. On September 26, 2011, the *ad hoc* Committee held a first session with the parties by telephone conference.
6. On October 24, 2011, the Centre informed the parties that it had not received the advance payment from the Applicants. In accordance with ICSID Administrative and Financial Regulation 14(3)(d), the Centre invited either party to pay the outstanding balance.
7. On November 17, 2011, the Applicants replied to the Centre’s letter of October 24, 2011. The Applicants stated that they were engaged in efforts to satisfy the request, but were unable to pay the advance at that time.
8. On December 15, 2011, El Salvador replied to the Applicants’ letter of November 17, 2011. It noted that it would not make the payment on behalf the Applicants pursuant to Administrative and Financial Regulation 14(3)(d).
9. On December 15, 2011, the Applicants submitted their Memorial on Annulment.

10. On December 19, 2011, the Secretary-General moved that the Committee stay the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e). On the same day, the *ad hoc* Committee decided to stay the proceeding due to non-payment of the required advance.
11. On May 22, 2012, the Centre informed the parties that five months had passed since the December 19, 2011 letter, without receipt of the outstanding payment. It also reminded the parties that if the proceeding were stayed for a consecutive period in excess of six months, the Secretary-General would move that the *ad hoc* Committee discontinue the proceeding.
12. On June 18, 2012, the Applicants replied to the Centre's letter of May 22, 2012 and requested a 60-day extension to secure the necessary financing and make the payment.
13. On June 21, 2012, El Salvador wrote to the ICSID Secretary-General to oppose the Applicant's request.
14. On June 22, 2012, the Applicants renewed their request for a 60-day extension.
15. On July 3, 2012, El Salvador noted that if the Secretary-General or the *ad hoc* Committee decided to grant the Applicants' request for additional time, El Salvador would request that the continuation of the annulment proceeding be conditioned on the Applicants' ability to provide security for costs.
16. On July 10, 2012, the *ad hoc* Committee decided to grant a 10-day extension, pursuant to which the Applicant had until July 20, 2012 to make the outstanding payment.
17. On July 23, 2012, following payment of the required advance, the proceeding was resumed.
18. On August 3, 2012, the Committee fixed the procedural calendar, including a schedule for El Salvador's potential request for security of costs.
19. On August 10, 2012, El Salvador filed its Application for Security for Costs.
20. On August 17, 2012, the Applicants filed their Response to El Salvador's Application for Security for Costs.

21. On August 21, 2012, the *ad hoc* Committee decided to allow (as per El Salvador's request) a second round of submissions regarding El Salvador's Application and fixed a schedule for this purpose. Pursuant to the schedule, El Salvador filed its Reply Application on August 27, 2012, and the Applicants filed their Rejoinder on September 5, 2012.
22. On September 20, 2012, the *ad hoc* Committee issued its Decision on El Salvador's Application for Security for Costs ("Decision on Security for Costs"), holding that:

"53. Overall, the Committee has not been provided with any incontrovertible evidence that the Applicants' conduct threatens the integrity of the proceedings, that their conduct amounts to abuse or that it is pursued in bad faith.

[...]

55. For the reasons above, the Respondent's application for security for costs is denied.

56. No decision on costs is made at this stage."
23. On October 19, 2012, El Salvador submitted its Counter-Memorial in Opposition to Claimants' Application for Annulment.
24. On October 25, 2012, the Centre requested the Applicants to pay US \$150,000.00 pursuant to ICSID Administrative and Financial Regulation 14(3)(e).
25. On November 23, 2012, the Applicants submitted their Reply Memorial in Support of Claimants' Application for Annulment.
26. On November 30, 2012, the Centre informed the parties that it had not received the advance payment from the Applicants. In accordance with Administrative and Financial Regulation 14(3)(d), the Centre invited either party to pay the outstanding balance by December 17, 2012.
27. On December 4, 2012, El Salvador requested an extension for the filing of its Rejoinder on Annulment, "in light of the default letter issued by ICSID ..., taking into account the potential stay of the proceeding that appears likely to follow, and the need to safeguard the procedural fairness of this annulment proceeding ..."

28. On December 11, 2012, the Applicants confirmed that they would not be able to make the payment by December 17, 2012.
29. On December 13, 2012, the Committee granted El Salvador's request. Accordingly, the procedural calendar was revised as follows:
  - El Salvador shall file its Rejoinder no later than two weeks from the date when the parties receive confirmation from the ICSID Secretariat that the Applicants have made the required payment, if the proceeding has not been stayed; or no later than two weeks after the proceeding resumes, if a stay has been ordered; but in any event no earlier than Friday, January 11, 2013.
  - The February 2013 hearing is canceled.”
30. On December 19, 2012, the Secretary-General moved that the *ad hoc* Committee stay the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e).
31. On December 21, 2012, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e), the proceeding was stayed for non-payment of the required advances.
32. On January 9, 2013, El Salvador requested that the *ad hoc* Committee reconsider its Decision on Security for Costs or “direct the issuance of a revised call for an advance payment to include more than sufficient funds to make sure that there will not be a new suspension after the hearing while the Committee is preparing its decision.”
33. On January 11, 2013, the Applicants replied to El Salvador's letter of January 9, 2013, informing the Committee that they “have been continuously engaged in discussions with potential sources of funds.”
34. On January 17, 2013, the Committee “denie[d] the Respondent's request to reconsider its application for security for costs of August 10, 2012 and direct[ed] the issuance of a revised call for an advance payment at the amount of US\$ 250,000, which would cover the remainder of the proceedings, including a hearing, the Committee's deliberations, and the drafting of the decision.”
35. On May 21, 2013, the Centre informed the parties that five months had passed since the December 21, 2012 letter notifying the parties of the stay of the proceeding. The Centre further informed the parties that the ICSID Secretary-General would move that

the *ad hoc* Committee discontinue the annulment proceeding if payment was not received by June 21, 2013.

36. On June 19, 2013, the Applicants requested an extension until July 17, 2013 to pay the advance. On the same date, El Salvador wrote to the Committee, opposing the extension request.
37. On June 21, 2013, the *ad hoc* Committee granted the extension, ordering the Applicants to make the outstanding payment by July 17, 2013.
38. On July 16, 2013, the Applicants informed the Committee that they had not been able to secure financing for the payment due before the July 17 deadline. They further attached supporting documents regarding the status of their endeavors to secure financing. Finally, the Applicants requested that the Committee consider alternatives to discontinuing the proceeding.
39. On July 17, 2013, El Salvador opposed the Applicants' request of July 16 and requested that the Committee discontinue the proceeding.
40. On July 18, 2013, the Applicants replied to El Salvador's letter of July 17, 2013 attaching a statement from a representative of an entity with which the Applicants stated they were working to secure funding.
41. On July 19, 2013, El Salvador replied to the Applicants' letter and attachment of July 18, reiterating its request to have the case discontinued.
42. On August 8, 2013, the *ad hoc* Committee noted that the 6-month deadline to make the outstanding payment pursuant to Administrative and Financial Regulation 14(3)(d) and (e) had expired on June 21, 2013. The Committee further noted that, despite the extension granted to the Applicants on June 21, 2013, the required payment remained outstanding. After due deliberation, the Committee decided not to grant the Applicants' requests and to recommend to the Secretary-General the discontinuance of the proceeding.
43. On August 9, 2013, the Acting Secretary-General of ICSID moved that the *ad hoc* Committee discontinue the annulment proceeding pursuant to Administrative and Financial Regulation 14(3)(d) and (e).

44. On the same day, El Salvador requested that the Committee “order the Applicants to bear all costs of this proceeding, including all expenses and fees of the Members of the Committee, the charges for the use of the facilities at the Centre, and El Salvador’s legal expenses in the amount of \$602,000” alleging that the “Applicants irresponsibly insisted on prolonging a proceeding that they admittedly could not fund ...”
45. On August 13, 2013, the Applicants wrote to the Committee, requesting an opportunity to respond to El Salvador’s letter of August 9, 2013.
46. On August 14, 2013, the Committee invited the Applicants to respond to El Salvador’s letter by August 16, 2013.
47. On August 16, 2013, the Applicants replied to El Salvador’s cost statement of August 9, 2013, as follows:

“The Applicants understand that they will bear all expenses and fees of the Members of the Committee and the charges for the use of the facilities at the Centre, and are advised that they have deposited a sufficient amount of money to cover these charges. The Applicants do not believe that the Committee should award El Salvador its legal expenses.”

48. The Applicants disagreed that the record bore out El Salvador’s allegation that they irresponsibly prolonged a proceeding that they could not fund.

## **II. DISCONTINUANCE OF THE PROCEEDING**

49. ICSID Administrative and Financial Regulation 14(3) reads as follows:

“(b) the Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made;

[...]

(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by

the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding;

(e) in the event that an application for annulment of an award is registered, the above provisions of this Rule shall apply *mutatis mutandis*, except that the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.”

50. The Committee notes that the 6-month deadline to make the outstanding payment pursuant to Administrative and Financial Regulation 14(3)(d) and (e) expired on June 21, 2013.
51. The Committee further notes that, despite the extension granted to the Applicants on June 21, 2013, the required payment remains outstanding.
52. Accordingly, the Committee has decided to discontinue the proceedings pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e).
53. In reaching its decision, the Committee has taken into account, in addition to the expiration of the 6-month deadline, the following issues.
54. First, due to non-payment of required advances, the proceeding has been stayed on two occasions: first, on December 19, 2011, and then on December 21, 2012.
55. Second, in both instances, after the expiration of the 6-month deadline, the *ad hoc* Committee granted the Applicants extensions to make the required payments (on July 10, 2012 and June 21, 2013, respectively).
56. Finally, more than two years have gone by since the date on which the Applicants initiated this proceeding, *i.e.*, July 12, 2011.



57. In light of the above, and after due deliberation, the Committee orders that this proceeding is hereby discontinued pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e).

### III. COSTS

58. Arbitration Rule 28, which, pursuant to Arbitration Rule 53 applies to this proceeding *mutatis mutandis*, provides as follows :

“(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.”

59. ICSID Administrative and Financial Regulation 14 (3)(e) further provides that:

“in the event that an application for annulment of an award is registered, the above provisions of this Rule shall apply *mutatis mutandis*, except that the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.”

60. As a preliminary matter, the Committee notes that, pursuant to Administrative and Financial Regulation 14(3)(e), the Applicants are “solely responsible for making the advance payments” to the Centre. The Applicants acknowledged this in their letter of August 16, 2013: “[t]he Applicants understand that they will bear all expenses and fees of the Members of the Committee and the charges for the use of the facilities at the Centre ...”

61. The Committee further notes that the Applicants’ financial commitment under Administrative and Financial Regulation 14(3)(e) is “without prejudice to the right of the Committee ... to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.”

62. In the circumstances of the case, the Committee considers that each party should bear its own legal expenses and costs, whereas the Applicants should bear the fees and expenses of the Members of the Committee and the charges of the Centre.
63. In reaching its decision, the Committee takes into account, *inter alia*, the following.
64. First, while the Tribunal ruled in favor of El Salvador, it noted that this did not mean that the Applicants' claims were "frivolous" and that it had not been presented with evidence that the Applicants "pursued this matter in bad faith" (Award, ¶ 137).
65. Second, the Applicants informed the Committee of their financial difficulties and their attempts to secure funding.
66. Third, the Applicants eventually paid the first payment requested by the Centre.
67. Fourth, El Salvador submitted an Application for Security for Costs, pursuant to which the parties filed two rounds of written submissions. After due deliberation, the Committee denied El Salvador's application.
68. Finally, the Committee recalls that, in the Decision on Security for Costs, it stated that it had not been provided with any evidence that the Applicants' conduct amounted to an abuse.
69. In light of the above, and in accordance with Arbitration Rule 28 and Administrative and Financial Regulation 14 (3)(e), the Committee decides that each party shall bear its own costs and legal expenses. The expenses and fees of the Members of the *ad hoc* Committee and the charges for the use of the facilities at the Centre shall be borne by the Applicants, the exact amount of which shall be subsequently notified by the Centre.<sup>1</sup> The Applicants shall be refunded any amount remaining in the case fund.

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<sup>1</sup> The ICSID Secretariat will provide the parties with a detailed financial statement of the case account as soon as all invoices are received and the account is final.

**IV. DISPOSITIVE PART**

70. For the above reasons, the *ad hoc* Committee:

- (a) Orders that this proceeding is hereby discontinued;
- (b) Decides that each party shall bear its own costs and legal expenses;
- (c) Decides that the expenses and fees of the Members of the *ad hoc* Committee and the charges for the use of the facilities at the Centre shall be borne by the Applicants. Any amount remaining in the case fund amount shall be refunded to the Applicants.

The *ad hoc* Committee

[signed]

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Prof. Michael C. Pryles  
Member

Date:

[signed]

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Prof. Christoph Schreuer  
Member

Date:

[signed]

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Prof. Emmanuel Gaillard  
President

Date: