

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

Applicants (Claimants),

v.

REPUBLIC OF EL SALVADOR

Respondent.

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

DECISION ON EL SALVADOR'S APPLICATION FOR SECURITY FOR COSTS

Members of the ad hoc Committee:

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

Secretary to the ad hoc Committee:

Mr. Marco Túlio Montañés-Rumayor

Date of Dispatch to the Parties: September 20, 2012

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). 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 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 of the Applicants pursuant to Administrative and Financial Regulation 14(3)(d).
9. On December 15, 2011, the Applicants filed their Memorial on annulment.

10. On December 19, 2011, the ICSID Secretary-General moved that the Committee stay the proceeding pursuant to Administrative and Financial Regulations 14(3)(d) and (e). On the same day, the *ad hoc* Committee decided to stay the proceeding because of the non-payment of the required advances.
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 was 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 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 Applicants' request.
14. On June 22, 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 their ability to provide security for costs.
16. On July 10, 2012, the Committee decided to grant a one-time 10-day extension pursuant to which the Applicants had until July 20, 2012 to make the outstanding payment.
17. On July 23, 2012, the proceeding was resumed following payment of the required advance.
18. On August 3, 2012, the Committee fixed the procedural calendar, including a schedule for El Salvador's potential request for security for 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.

21. On August 21, 2012, the Committee decided to allow 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 for Security for Costs on August 27, 2012, and the Applicants filed their Rejoinder on El Salvador's Application for Security for Costs on September 5, 2012.

II. THE PARTIES' RESPECTIVE POSITIONS

A. The Respondent's Position

22. The Respondent requests that the Committee order the Applicants to post security corresponding to its estimated legal fees and costs as well as to the estimated fees, costs and expenses of ICSID and the Committee.
23. The Respondent argues that under the ICSID Rules, the Committee can order the posting of security for costs pursuant to the Committee's inherent powers to preserve the integrity of the proceeding. The Respondent considers that, in the circumstances of this case, the normal procedure for advance payments under the ICSID Administrative and Financial Rules is inadequate to guarantee the integrity of the proceedings.
24. The Respondent refers to the Committee's power to require the posting of security in connection with a stay of enforcement – for which, the Respondent explains, there is no express rule in the ICSID Convention – as an example of the inherent powers of the Committee.
25. The Respondent argues that, in the present case, the Committee should exercise its inherent powers because

“[u]nlike a tribunal facing a new case that does not wish to prejudge the case before hearing the evidence, here the Committee already has direct, uncontested evidence, [...] demonstrating Claimants' inability to fund this proceeding with the accompanying unfairness of making El Salvador, the Centre, and the Committee assume the risk of expending substantial resources to continue a proceeding that will either be abandoned or funded by a third party. Moreover, the request for security for costs justified by this evidence is unrelated to the merits of Claimants' application for annulment.”¹

¹ El Salvador's Application for Security for Costs, August 10, 2012, ¶ 33.

26. Indeed, the Respondent points out, the Applicants did not make the advance payment requested by the Centre on August 17, 2011 on time and the Applicants' failure to do so in the subsequent period led to the suspension of the proceeding on December 19, 2011, which lasted for nearly seven months.
27. The Respondent argues that the Applicants initiated an annulment proceeding that they cannot fund. It claims that evidence shows that the Applicants are in a very difficult financial situation and that they are seeking to obtain third-party financing. Accordingly, the Respondent contends, there is a risk that the Applicants will abandon the proceeding for lack of funding.
28. While in such circumstances the Respondent ought to be entitled to a reimbursement of its costs, the Applicants would be without funds to pay the costs and would therefore be able to ignore any order for costs rendered against them.
29. According to the Respondent, the amount of security to be posted should be sufficient to cover all of its fees, costs and expenses, as well as those of the Committee and ICSID at the end of the proceeding. The Respondent estimates that, in the circumstances of the case, this amount would be around US\$ 2 million. The Respondent requests that the Committee order that the Applicants post this amount as security within 30 days of its decision and, if the Applicants fail to do so, that it discontinue the proceedings.
30. The Respondent considers that the circumstances would justify discontinuance because the Applicants' initiation of annulment proceedings that they knew they could not fund constitutes an abuse of process. This is particularly so, according to the Respondent, since the Committee could have discontinued the proceedings after the time limit for the payment of the advance fees requested by the Centre elapsed on June 19, 2012.

B. The Applicants' Position

31. The Applicants contend that, with its application, the Respondent is asking the *ad hoc* Committee to create an economic bar to the annulment proceeding.
32. The Applicants first argue that ICSID Administrative and Financial Regulation 14 "provides a comprehensive mechanism to address the cost of annulment proceedings by making the applicant solely responsible for making advance payments for the

proceeding *upon the request of the Secretary-General*.² They submit that, given the availability of this mechanism, which includes the power to make supplementary advance payments, there is no need for the Committee to rely on its inherent powers to order security for costs.

33. The Applicants argue that the Respondent's application is a disguised application for provisional measures to safeguard the Respondent's own interests, because, they aver, the issue of "[s]ecurity for a party's legal costs is a question of the financial interests of one party and not the integrity of the proceeding".³ As such, the application should fail because pursuant to Article 52(4) of the ICSID Convention the Committee does not have the power to order provisional measures.
34. The Applicants note that the cases dealing with the subject of integrity of proceedings have typically addressed issues such as conflicts of interest, basic procedural fairness, respect for confidentiality and legal privilege, the right of parties to seek advice and to advance their cases freely and non-aggravation of the dispute. According to the Applicants, in those cases, "the overriding goal of the exercise of inherent powers was to ensure due process and facilitate the adjudication of claims".⁴ They submit that the circumstances of the present case do not merit an intervention of that kind.
35. The Applicants contend that "in circumstances like these security for a party's own costs has never been granted by an ICSID tribunal or *ad hoc* Committee".⁵ They argue that the Respondent has failed to provide any relevant precedent that supports its request. The Applicants refer to the *Libananco v. Turkey* arbitration, in which the Tribunal rejected Turkey's request for security for costs made pursuant to Article 47 of the ICSID Convention on provisional measures.

² Claimants' Response to El Salvador's Application for Security for Costs, August 17, 2012, ¶ 23 (emphasis in original).

³ *Ibid.*, 30.

⁴ *Ibid.*, ¶ 29.

⁵ *Ibid.*, ¶ 31.

36. The Applicants do not contest the fact that they are in a difficult financial situation, though they note that they “do not regard themselves as being insolvent”.⁶ They argue that the Respondent has contributed to their financial difficulties.
37. The Applicants insist that they have not acted in bad faith and that their actions do not constitute abuse of process. They note that they have paid the advance payment which was asked of them and that they “are, quite simply, doing their best with limited resources”.⁷
38. The Applicants request that the Respondent’s application is denied and that the costs and expenses associated with addressing the Respondent’s Application for Security for Costs are assessed against the Respondent.

III. THE COMMITTEE’S ANALYSIS

39. The Respondent has requested the Committee to issue an order requiring the Applicants to post security for the estimated costs of this annulment proceeding, including for the Respondent’s legal costs. The Respondent contends that this order should be made pursuant to the Committee’s inherent powers to protect the integrity of the proceeding.
40. While the parties agree that an international arbitral tribunal has the inherent powers to order measures to safeguard the integrity of the proceedings, they seem to disagree as to whether these powers include the ability to order, under the appropriate circumstances, that one party post security for the other party’s legal costs and/or other expenses.
41. In this connection, the Committee also takes note of the Applicants’ argument that the Respondent’s application seeks only to preserve the Respondent’s interests as opposed to the integrity of the proceeding as a whole and that, as such, its request is a “disguised” application for provisional measures and should accordingly be denied,

⁶ *Ibid.*, ¶ 7.

⁷ Claimants’ Rejoinder to El Salvador’s Application for Security for Costs, September 5, 2012, ¶ 15.

since Article 47 on provisional measures does not apply to annulment proceedings.⁸ At the same time, the Respondent has explicitly indicated that it is not asking for provisional measures.⁹

42. In light of the Respondent's assertion that it is not asking for provisional measures, the Committee will not determine whether or not it has the power to order or recommend provisional measures. The Committee will assess the Respondent's application only in the context of the Committee's inherent powers to safeguard the integrity of the proceedings.
43. First, as a preliminary matter, the ICSID Administrative and Financial Regulations (Regulation 14) and the ICSID Convention (Article 61(2)) establish mechanisms for the advance payment of expenses and for the apportionment of costs in arbitral and annulment proceedings. Accordingly, to the extent possible, any issue relating to the payment of fees or the apportionment of costs that might arise in annulment proceedings ought to be addressed through these mechanisms.
44. Second, the exercise of an international tribunal's inherent powers to safeguard the integrity of the proceedings is an extraordinary control and is to be resorted to only in compelling circumstances.¹⁰
45. As the guardian of the integrity of the proceeding, the Committee may, in the appropriate situation, use its inherent powers to order security for costs. However, the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced.
46. Indeed, in the context of applications for provisional measures, a number of ICSID tribunals have declined to order security for costs.¹¹ Thus, for example, in *Libananco*

⁸ Article 52(4) of the ICSID Convention provides: "The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee".

⁹ El Salvador's Application for Security for Costs, August 10, 2012, ¶ 4.

¹⁰ See, e.g., *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision of the Tribunal on the Participation of a Counsel of January 14, 2010, ¶¶ 14-16.

¹¹ See, e.g., *Emilio Agustín Maffezini v. Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (hereinafter "Pey Casado v. Chile") (ICSID Case No. ARB/98/2), Decision on Provisional Measures of September 25, 2001; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z.*

v. Turkey, the tribunal rejected Turkey's application for security for costs and noted that "it would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all".¹²

47. In the present circumstances, no extreme case presents itself.
48. The Applicants are experiencing financial difficulties and this they do not deny. These difficulties did cause them to struggle with meeting the deadline to advance the first payment as requested by the Centre and this in turn did lead to a stay of the proceeding. In the end, after having been granted an extension, the Applicants paid the first advance payment.
49. However, without more, it cannot be inferred from these facts that the integrity of the proceeding is endangered.
50. Further, the advance payments that the Applicants are obligated to make pursuant to Regulation 14 cover the fees and expenses of both the Committee and the Centre. At this stage, the costs of the proceeding are adequately covered.
51. The Committee also notes the Respondent's arguments that the Applicants are in a difficult financial position and that, if they abandon the proceedings, the Respondent might not be able to recover from the Applicants its legal costs, to which it considers it would be entitled in such circumstances.
52. At the same time, the Respondent's request, if granted, might seriously affect the Applicants' right to seek annulment of the award. The Committee does not find in the Respondent's arguments – which rest on several assumptions – a compelling reason to interfere with Applicants' right to seek annulment of the award.

Grynberg and RSM Production Corporation v. Government of Grenada (hereinafter "*RSM et al. v. Grenada*") (ICSID Case No. ARB/10/6), Tribunal's Decision on Respondent's Application for Security for Costs of October 14, 2010.

¹² *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of June 23, 2008, ¶ 57. Similarly, referring to the decision in *Pey Casado v. Chile*, the tribunal in *RSM et al. v. Grenada* noted that "it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award". See *RSM et al. v. Grenada*, Tribunal's Decision on Respondent's Application for Security for Costs of October 14, 2010, ¶ 5.19.

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.
54. At present, any issues relating to the costs associated with this annulment proceeding can be properly addressed by the mechanisms under Regulation 14 of the ICSID Administrative and Financial Regulations and under Article 61(2) of the ICSID Convention.

IV. DECISION

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.

Paris, France

September 20, 2012

[signed]

Professor Emmanuel Gaillard (President)

On behalf of the *ad hoc* Committee