School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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COMMERCE GROUP CORP AND SAN SEBASTIAN GOLD MINES, INC V. THE REPUBLIC OF EL SALVADOR (ICSID CASE NOS. ARB/09/17)

AWARD

Reported by Fabricio Fortese**
Edited by Ignacio Torterola ***

An award rendered on 14 March 2011 by an Arbitral Tribunal constituted in accordance with the ICISD Convention and Arbitration Rules, the Central American-Dominican Republic Free Trade Agreement and the El Salvador Foreign Investment Law.

Tribunal:	Professor Albert Jan van den Berg (President), Dr. Horacio A. Grigera Naón, Mr. J. Christopher Thomas, Q.C.
Claimant's counsel:	Mr. John E. Machulak, Mr. Eugene Bykhovsky, MACHULAK, ROBERTSON & SODOS, S.C.
Defendant's Counsel:	Mr. Luis Parada, Mr. Derek Smith, Mr. Tomás Solís, Ms. Erin Argueta, DEWEY & LEBOEUF LLP

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1. Facts of the Case

On 22 September 1987, Commerce Group Corp ("CGC") and San Sebastian Gold Mines ("SSGM") entered into a joint venture ("Commerce/Sanseb Joint Venture") registered in the U.S.A, to explore, develop, mine and produce precious metals in El Salvador.

CGC owns 82.5% of the authorized and issued stock of SSGM and 52% of the authorized and issued common shares in Mineral San Sebastian, S.A. de C.V. (the "Minsane"), an El Salvadoran corporation formed on 8 May 1960.

On 23 July 1987 the Government of El Salvador granted a concession license for the exploitation of the San Sebastian Gold Mine. At the same time, CGC and SSGM and Minsane entered into an agreement to lease 305-acres at the San Sebastian Gold Mine. In 1993, CGC and SSGM acquired two additional properties, the El Modesto Mine and the San Cristóbal Mill and Plant.

In August 2002, Claimants entered into negotiations with the local authorities in order to cancel their exploitation concession license for the San Sebastian Gold Mine in exchange for another exploitation license, to last for 20 to 30 years.

The environmental permits to mine and process gold ore at the San Sebastian Mine and San Cristóbal Mill and Plant were granted by the El Salvador Ministry of Environment and Natural Resources (the "MARN") on 20 October 2002 and 15 October 2002, respectively. Such permits would be renewed for a 3-year period as of 4 January 2006.

In addition, El Salvador granted Claimants two further exploration licenses, namely: (i) a new one encompassing the San Sebastian Mine and adjoining areas (the "New San Sebastian Exploration License"), on 3 March 2003; and (ii) encompassing eight former gold and silver mines (the "Nueva Esparta Exploration License"), on 25 May 2004.

On 13 September 2006, MARN revoked the environmental permits of the San Sebastian Gold Mine and the San Cristóbal Plant and Mine, thereby effectively terminating Claimants right to mine and process gold and silver.

On 6 December 2006, counsel for CGC and SSGM filed two petitions with El Salvador's Court of Administrative Litigation of the Supreme Court of Justice, one for each affected mine, seeking a review of the Ministry of the

Environment's revocation of the environmental permits and their reinstatement.

Furthermore, during 2006 and 2007, Commerce/Sanseb applied for (i) an environmental permit for the New San Sebastian Exploration License and the Nueva Esparta exploration license, and (ii) for the extension of the exploration licenses. The environmental permits requested were not granted, and, on 28 October 2008, the application was denied on the grounds that Commerce/Sanseb's failure to secure an environmental permit.

On 17 March 2009, Claimants served on El Salvador a written notice of their intent to submit a claim to arbitration (the "Notice of Intent"). This pursuant to the Central American-Dominican Republic Free Trade Agreement ("CAFTA")[1].

On 2 July 2009, CGC and SSGM filed their Notice of Arbitration (the "Request") before the ICSID[2], with grounds on the CAFTA[3] and the El Salvador Foreign Investment Law[4]. With their request of arbitration the Claimants also expressly waived their rights to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach under the Notice of Arbitration. This waiver was done according to the provisions of the CAFTA, Article 10.18.2(b)(ii).

On 29 April 2010, El Salvador's Court of Administrative Litigation of the Supreme Court of Justice notified its decisions of 18 March 2010 (Case No. 308-2006) and 28 April 2010 (Case No. 309-2006) with respect to these two complaints.

After several communications between the Secretary-General of the ICSID and the Parties, and having the arbitrators and president been appointed, on 01 July 2010, the Secretary-General informed the Parties that the Tribunal was deemed constituted and that the proceedings had begun.[5]

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[1] Article 10.16.2

[2] Convention on the settlement of investment disputes between States and Nationals of other States, Article. 36

[3] Articles 10.16(1), 10.16(1)(b) y 10.16(3)(a)

[4] Article 15(a)

[5] Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 6.

2. Legal issues discussed in the decision

The Arbitral Tribunal's Jurisdiction.

2.1. The CAFTA Waiver Provision.

Pursuant to CAFTA Article 10.18, "2. No claim may be submitted to arbitration (…) unless (…) (b) the notice of arbitration is accompanied . . .

> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant;s and the enterprise's written waivers
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."…

When interpreting such a provision, the Arbitral Tribunal understood that the same imposes a double formality. On the one hand Article 10.18 requires the Claimants to file a waiver ("formal requirement"), and on the other it requires the Claimants materially ensure that no other legal proceedings are initiated or continued ("material requirement").[6]

2.2. Have CGCand SSGM complied with the Waiver Provision?

There was no dispute between the parties with respect to the fulfilment of the formal requirement imposed by Article 10.18 of the CAFTA. However, it was questioned whether the material requirement was met.

In order to decide should such requirement was reached, the Tribunal had to determine the relevant date in which the same was to be observed by the Claimants. In that sense, bearing in mind the waiver provision is an issue of jurisdiction, the Tribunal examined whether the Claimants' conduct was in compliance with the required waiver on the date the Arbitration Request was filed (02.07.09) and not on the date the Tribunal was deemed constituted (01.07.10).

It was then observed that on the date the Arbitration Request was filed (02.07.09), the court proceedings before the El Salvador's Court of

[6] See ¶ 84 of the Award.

Administrative Litigation of Supreme Court of Justice were still pending. The decisions were there rendered on 18.03.10 y 29.04.10.

Furthermore, the Arbitral Tribunal understood that "the relevant 'measures' in this case and the El Salvador proceedings are the revocation of the environmental permits."[7]

For that reason, "Claimants were (…) under an obligation to discontinue those proceedings in order to give material effect to their formal waiver." And, CGC and SSGM's argument that they "acted in accordance with the waiver by not taking any positive action to continue those proceedings holds no weight, as the El Salvador proceedings continued with no positive action on Claimants' part to discontinue them, and ultimately resulted in two judgments."[8]

In light of this interpretations, the Tribunal decided that at the time of filing its Arbitration Request (02.07.09), CGC and SSGM should have waived the proceedings before the El Salvador's Courts and, having failed to do that, they did not complied with Article 10.18 of the CAFTA.

2.3. The Claim.

The Arbitral Tribunal considered that the CGC and SSGM's claim regarding the *de facto* mining ban policy was in fact part of their claim concerning the revocation of the environmental permits.

The effect of the revocations was, on the words of Claimants, to "effectively terminate Commerce/SanSeb's right to mine and process gold and silver."[9] It follows then that the intention of Claimants was to challenge the revocation of the environmental permits before the El Salvador courts in order to have such permits reinstated and to be able to mine again.

Finally, the Tribunal reasoned that if eventually the *de facto* mining ban policy and the revocation of the permits could be separated, the policy would not constitute a "measure" within the meaning of CAFTA. At most, the ban would constitute a policy of the Government and the revocation of the environmental permits would constitute a measure. It is that measure, adopted pursuant to a policy of the Government, that put an end to the mining and processing activities.

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[7] Award ¶ 101
[8] Ibid ¶ 102
[9] Ibid ¶ 111

2.4. Consequences of the Failure to Fulfil the Waiver Provision.

The waiver as provided by Article 10.18 is required as a condition to Respondent's consent to CAFTA. Having CGC and SSGM failed to terminate the proceedings before El Salvador's Court of Administrative Litigation of the Supreme Court, that consent did not exist.

As a consequence of the non-existence of Respondent's consent, the Tribunal decided that it had no jurisdiction over the Parties' CAFTA dispute.

2.5. The El Salvador Foreign Investment Law.

It was discussed in the proceedings whether the measures on which the CAFTA's claims were based should be understood as being also in violation of the El Salvador Foreign Investment Law. This was argued in order to allow the Arbitral Tribunal to find jurisdiction to settle de dispute beyond the CAFTA and its Waiver Provision.

In this respect, the Tribunal emphasized in the fact that in its Arbitration Request and Preliminary Objections, CGC and SSGM had only perfunctorily articulated some provisions of the Foreign Investment Law.

The Tribunal understood that (i) the lack of a specific reference to the provisions of the Foreign Investment Law; (ii) and having failed Claimants to give sound indications of how the facts of the case apply to those specific provisions, make the alleged claims subtle references to the Foreign Investment Law.

In view of that, the Tribunal decided that there were no claims to be heard under the Foreign Investment Law. Consequently, having the Tribunal dismissed the CAFTA claims, the entire case was dismissed.

3. Costs

To decide the portion of the costs to be borne by the Parties, the Tribunal resorted to Article 10.20.6 of CAFTA. According to that article "the tribunal shall consider whether either the claimant's claim or the respondent's objection were frivolous".

Although the case was entirely dismissed, the Tribunal did not find CGC and SSGM's claims frivolous or not serious. As a consequence, the Tribunal ordered the Parties to equally bear the costs of the arbitration, and each Party to bear its own legal fees and expenses.

4. The Decision

The Arbitral Tribunal:

(1) Determined that the dispute was not within its jurisdicción and competence pursuant to CAFTA;

(2) Ordered each side to bear one-half of the costs of Arbitration, and each Party to bear its own legal fees and expenses; and

(3) Dismissed all other claims or requests of relief.