

In The Matter Of An Arbitration Under
The Arbitration Rules of the
International Centre for Settlement of
Investment Disputes

ICSID Case No. ARB/09/17

COMMERCE GROUP CORP.

and

SAN SEBASTIAN GOLD MINES, INC.

Claimants

v.

REPUBLIC OF EL SALVADOR

Respondent

CLAIMANTS' APPLICATION FOR COSTS

30 November 2010

Before:
Professor Albert Jan van den Berg
(President)
Dr. Horacio A. Grigera Naón
Mr. J. Christopher Thomas, Q.C.

John E. Machulak
Eugene Bykhovsky
Machulak, Robertson & Sodos, S.C.
and
Professor Andrew Newcombe

I. APPLICATION FOR AWARD OF COSTS IN CONNECTION WITH RESPONDING TO THE RESPONDENT’S PRELIMINARY OBJECTION

1. The Claimants, Commerce Group Corp. and San Sebastian Gold Mines, Inc., hereby apply for an award of their costs, inclusive of attorneys fees and expenses, the fees and expenses of the Tribunal and associated ICSID administrative costs, in connection with their responding to the preliminary objection filed by the Respondent, Republic of El Salvador.

2. The Claimants and the Respondent, by their respective counsel, established and confirmed the authority of the Tribunal with respect to costs at the July 27, 2010 scheduling conference:

5.1. The parties confirmed that, in accordance with Article 44 of the ICSID Convention and CAFTA Article 10.16.5, the ICSID Arbitration Rules of 2006 will govern the arbitration, except to the extent modified by CAFTA.

3. Article 61(2) of the ICSID Convention provides the Tribunal with the authority to determine the costs of the arbitration and to decide on their allocation between the parties, in the following terms:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

4. It is generally accepted in international arbitration practice, that the broad term “expenses” includes fees, travel expenses and all disbursements incurred by counsel.

5. ICSID Arbitration Rule 28 authorizes the Tribunal to award a party costs incurred relating to a preliminary objection:

Cost of Proceeding

(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.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

Further, CAFTA, Article 10.20.6 expressly provides that the Tribunal may award costs related to opposing a preliminary objection:

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

6. CAFTA Article 10.20.6 reflects the principle generally accepted in the practice of international arbitration that the successful party should be paid its reasonable legal costs by the

unsuccessful party¹ or, failing a clear outcome, that the apportionment of costs should take into account the relative success of each party's claims. Tribunals have also considered that the award of costs should reflect the circumstances of the case as a whole, including notably the circumstances out of which the arbitration arose and the length and complexity of the proceedings.

7. Importantly, tribunals should also take into consideration the manner in which the parties prosecuted their respective cases. In particular, when a party has needlessly prolonged the length of the proceedings by raising unmeritorious preliminary objections, this should be taken into consideration by the tribunal in awarding costs.

8. The lack of merit to Respondent's preliminary objection relating to jurisdiction should be taken into account. Simply stated, the Respondent claimed that the Tribunal lacked jurisdiction because the Claimants failed to obtain the dismissal of pending domestic proceedings in the Republic of El Salvador before they filed a Notice of Arbitration with ICSID. However, the Respondent has failed to bring to the attention of the Tribunal any authority supporting this argument. Furthermore, the argument is at odds with the plain language of CAFTA.

9. Rather than acknowledging that there is no authority for its submission or that the argument is at odds with the language of the CAFTA, the Respondent persisted in suggesting otherwise in the context of two rounds of briefing and a full day of hearing before the Tribunal. The record before the Tribunal now shows that there is no legal authority supporting the

¹See, for example, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 533 (CL-21).

Respondent's argument that the Claimants were required to dismiss their domestic proceedings before filing their Notice of Arbitration under the CAFTA.

10. At times during this process the Respondent appeared to depart from its argument and suggest that there were other reasons why the Tribunal should find some other objection to jurisdiction, pointing to the fact that the domestic proceedings pending before the Supreme Court of El Salvador continued after the Claimants filed their Notice of Arbitration. However, not only did this argument depart from the position taken by the Respondent when it filed its preliminary objection, it was also inconsistent with letters sent by both the Attorney General of El Salvador and the law firm of Dewey & LeBoeuf in the months after the Claimants filed their Notice of Arbitration.

11. In particular, the Attorney General of El Salvador stated in an August 14, 2009 letter to the Secretary-General of ICSID dated 14 August 2009,² that the Claimants' Notice of Arbitration was manifestly outside the jurisdiction of ICSID because the Claimants' Waivers were defective. The Attorney General's letter went on to state that even "if claimants were to withdraw the legal proceedings still pending in El Salvador, claimants' failure to honor their waivers before submitting the request for arbitration to ICSID cannot be remedied."

12. Afterwards, on August 24, 2009, counsel for the Respondent wrote the Senior Counsel for ICSID asserting that the Claimants had failed to "comply with the jurisdictional

² Letter from Attorney General of El Salvador to Secretary-General of ICSID, 14 August 2009 (R-8).

requirements under CAFTA-DR³ invalidating their Notice of Arbitration and suggesting that the Claimants discontinue *the CAFTA arbitration*, as opposed to the domestic proceedings.

13. The import of these letters was that the claimed lack of jurisdiction could not be cured by dismissing the then pending domestic proceedings and that efforts to do so would be pointless.

14. For the above reasons and pursuant to CAFTA, Article 10.20.6, the Claimants hereby seek the reimbursement of:

- a. the fees and expenses of the arbitrators and ICSID administrative fees and costs incurred in relation to the preliminary objection (see section A below); and
- b. the reasonable costs of legal representation and assistance incurred in the pursuit of their claims (see section B below).

A. THE FEES AND EXPENSES OF THE ARBITRATORS AND THE ICSID ADMINISTRATIVE FEES

15. The Claimants have paid US \$85,000 for the filing fee and an advance of costs in relation to the arbitration, as shown on the attached schedule. A portion of this amount is to be allocated by the ICSID Secretariat to fees and expenses of the arbitrators and ICSID administrative fees incurred in relation to the Respondent's preliminary objection.

³ Letter from counsel for El Salvador to ICSID Senior Counsel, 24 August 2009 (R-10).

16. The Claimants therefore seek the reimbursement of the amounts allocated (or to be allocated in the future) to cover the arbitrators' and ICSID's fees and expenses in relation to the Respondent's preliminary objection.

B. THE COSTS FOR LEGAL REPRESENTATION AND ASSISTANCE INCURRED BY THE CLAIMANTS IN THESE PROCEEDINGS

17. The Claimants also seek reimbursement of the costs of legal representation and assistance incurred during the preliminary objection phase of these proceedings.

18. The Claimants seek reimbursement of the fees of their counsel, Machulak, Robertson & Sodos, S.C., and Professor Andrew Newcombe, their assistants, Claimants' support staff, and the reasonable disbursements incurred by counsel in representing the Claimants as stated on the attached schedule.

III. PRAYER FOR RELIEF

19. On the basis of the foregoing the Claimants respectfully submit that the entirety of the costs associated with the Respondent's preliminary objection should be paid by Respondent, and accordingly request that the Tribunal:

- a. ORDER Respondent to reimburse the Claimants for the Claimants' portion of the Tribunal's fees and expenses, along with ICSID's administrative fees and expenses, associated with the Respondent's preliminary objection; and,

- b. ORDER Respondent to reimburse the Claimants for US \$145,120.59, representing the attorney fees and expenses paid and/or incurred by Claimants, with interest at a rate to be determined by the Tribunal from the date of the Award until final payment.

30 November 2010

Respectfully submitted,

/s/ John E. Machulak

John E. Machulak, Esq.
Eugene Bykhovsky, Esq.
Machulak, Robertson & Sodos, S.C.

and

Professor Andrew Newcombe
on behalf of
Commerce Group Corp. and
San Sebastian Gold Mines, Inc.

SCHEDULE

CLAIMANTS' COSTS OF DEFENDING PRELIMINARY OBJECTION

Paid to ICSID (to be apportioned by Tribunal)

Filing fee (07/02/2009)	\$ 25,000.00
Deposit (08/18/2010)	60,000.00
	<u>\$ 85,000.00</u>

Claimants' attorney's fees and expenses for defending Preliminary Objection

Attorney's Fees (Machulak, Robertson & Sodos, S.C., and Professor Andrew Newcombe)	\$ 113,472.50
El Salvadoran Counsel	2,520.00
Litigation support	24,599.00
Travel, meals and lodging	3,733.04
Photocopying, long distance, delivery charges	796.05
	<u>\$ 145,120.59</u>