

**BRANCH 30
BAYOMBONG, NUEVA VIZCAYA**

**OCEANAGOLD (Philippines) INC.,
Petitioner,**

-versus-

SCA No. 134

**PROVINCE OF NUEVA VIZCAYA,
MUNICIPALITY OF KASIBU, et.al.,
Respondents.**

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Resolution

For consideration is the ancillary prayer for the issuance of a writ of preliminary injunction in connection with the petition for certiorari, prohibition and mandamus filed by petitioner.

Petitioner, Oceana Gold Philippines Incorporated (OGPI) is a domestic corporation engaged in large-scale exploration, development and utilization of mineral resources. On June 20, 1994, a Financial Technical Assistance Agreement (FTAA) was executed between the Republic of the Philippines and OGPI's predecessor in interest, Climax-Arimco Mining Corporation, then Arimco Mining Corporation, pursuant to Article XII, Section 2 of the 1987 Constitution which is to expire on June 20, 2019. On June 25, 2019, the Governor of Nueva Vizcaya issued an order directing the other respondents, the Provincial Environment and Natural Resources Office of Nueva Vizcaya, the Philippine National Police (Nueva Vizcaya Provincial Office), the Municipality of Kasibu and Barangay Didipio to restrain any operations of OGPI for which a blockade which prevented the entry of vehicles providing supplies as well as the movement of trucks containing copper concentrate from the Didipio Mine to OGPI's shipment port was enforced. Thus, the instant petition with prayer for preliminary injunction.

OGPI alleges that it is entitled to the writ of preliminary injunction against the respondents and all other persons acting under their control, supervision or instruction for executing or enforcing the assailed Order dated June 25, 2019 issued by Provincial Governor Carlos M. Padilla and

Resolution No. 59 (Series of 2019) dated June 21, 2019 issued by the Sangguniang Barangay of Barangay Didipio, Kasibu, Nueva Vizcaya as the unlawful issuances of the same have already seriously compromised the operations at the high-grade underground gold and copper mine in Barangay Didipio, Kasibu, Nueva Vizcaya to the extent that critical supplies for mining in a safe and responsible manner are no longer being delivered; ground stability and other safety controls can no longer be implemented; there is now serious concern for the health and safety of employees; management has been constrained to commence preparing the plan on retention that would adversely affect OGPI's more than 1,500 employees and contractual personnel; and mining operations are expected to completely stop by mid-July.

OGPI alleges that it is entitled to injunctive relief grounded on the following:

1. Clear and unmistakable right to be protected, that is a right in esse;

According to OGPI, it has a clear and unmistakable right to continue mining operations in the Didipio Mine. OGPI alleges that no less than the Mines and Geosciences Bureau (MGB), the government agency responsible for the conservation, management, development and proper use of the country's mineral resources has confirmed in writing through the June 20 MGB Letter that OGPI is permitted to continue its operations beyond the initial 25-year term under the FTAA pending the National Government's confirmation of the renewal of the said agreement. It is authorized to continue its mining operations in the Didipio Mine by virtue of its timely delivery of the Notice of Renewal to the Government on March 14, 2018 banking on the Hold-over Provision in the Administrative Code quoted to wit: "Section 18. Non-expiration of License.- Where the licensee has made timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license shall not expire until the application shall have been finally determined by the agency." OGPI claims that while the FTAA is not denominated as a license or permit, it nevertheless embodies a form of permission to explore, develop and utilize the mineral resources in the contract area, which is an activity of a continuing nature. Further, that OGPI is allowed by the National Government to continue operating under a valid and subsisting FTAA is confirmed by the fact that the FTAA is included in the "List of Existing FTAA's" as of June 30, 2019 released by the MGB's Mining Tenements Management

Division and the fact that the "FTAA is not included in the "List of Cancelled FTAA's."

2. Material and substantial invasion of such right;

The Respondents' acts and issuances- the Order, the Advisory, the Resolution, the blockade and the PNP's inaction on the matter which are all aimed at stopping the Didipio Mine's Operations, all constitute a material and substantial violation of OGPI's right to continue mining operations resulting in continuing irreparable damage to the same. The assailed Order is null and void for being issued by the Governor in clear disregard of the limits of his power to issue executive orders whereby the Local Government Code empowers the Provincial Governor to issue executive orders to enforce only laws and ordinances "relative to the government of the province" and its power to enforce mining laws is limited to small-scale mining and even then, must be made pursuant to national policies and subject to the supervision, control and review of the DENR. The Provincial Governor cannot supervise large-scale mining operations and direct provincial entities to stop a mining project of the National Government without arrogating unto himself a function that is solely the National Government to exercise. The Provincial Governor has no authority to order the summary closure or suspension of a large scale mining project of the National Government and a private contractor, especially when the National Government itself has confirmed thru the MGB, the right of the private contractor to continue operations pending the confirmation of the renewal. OGPI stands to suffer grave and irreparable injury as a result of the stoppage of the Didipio Mine operations.

3. An urgent need for the writ to prevent irreparable injury to OGPI, its personnel and employees and the community

The Respondents cannot be allowed to continue the existing blockade lest OGPI and its employees suffer irremediable damages to their health and safety, supplies, equipment, operations and livelihood. OGPI loses critical time, materials, machinery and provisions and stands to lose millions of dollars with every day that the blockade is allowed to exist. If the respondents are not restrained from blocking OGPI's mining operations, the damage on OGPI's revenue stream, credit rating and share price which all depend on OGPI's timely fulfillment of very important agreements will be

beyond repair.

4. OGPI has no other ordinary, speedy and adequate remedy in the ordinary course of law to prevent the infliction of grave and irreparable injury caused by the Respondents' acts of attempting to close, suspend, otherwise interfere with OGPI's mining operations.

The Respondents did not give OGPI an opportunity to be heard- the assailed issuances were not preceded by any notice to OGPI of the suspension of its operation, and any hearing for OGPI to air its side. The Respondents' unauthorized acts of summarily suspending OGPI's operations constitute a manifest violation of OGPI's due process rights necessitating a resort to a petition for certiorari.

In its counter-argument, the Respondents represented by the Provincial Legal Office (PLO) of Nueva Vizcaya raised the following:

1. The right of Petitioner is not clear. It is doubtful if not, it has no right at all and as such, there is no invasion of such inexistent right.

According to the Respondents thru counsel, the Financial and Technical Assistance Agreement (FTAA) which is the basis of the operation of the Petitioner has expired and terminated on June 20, 2019 or 25 years from June 20, 1994, the date of its execution. There is no provision in the FTAA which governs provisional authority or hold-over clause for Petitioner to continue operation even if it applied for or while its renewal is pending approval by the President. Thus, when the term of the agreement expired specifically on June 20, 2019, there is no basis for Petitioner to continue its operations, unless its FTAA is renewed by the President.

2. Petitioner cannot seek refuge on the June 20, 2019 letter of the Acting Director of the Mines and Geosciences Bureau (MGB) to justify that it has a clear and unmistakable right to continuously operate after the expiration of its FTAA on June 20, 2019.

The position taken is merely an opinion of the MGB for the consideration of the DENR Secretary. It does not represent the position of the National Government and therefore cannot be a source of a right or authority for petitioner to continuously

operate.

An FTAA is primarily governed by the Constitution particularly Article XII, Section 2 which provides that:

“Section 2. xxxxxxxx The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large scale exploration, development and utilization of minerals, petroleum and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. xxxx

From the foregoing Constitutional provision, the task to deal with FTAA is lodged with the President except in cases when the alter ego doctrine applies. In the case of the Petitioner however, the MGB Acting Director is not considered an alter-ego of the President and as such, his June 20, 2019 letter is not an act of the President which will effectively bind the State.

3. In the absence of a hold-over provision in the FTAA, Petitioner cannot invoke the “hold-over” provision in the Administrative Code to justify its continued operation in the absence of an FTAA.

The hold-over provision under Section 18 of Executive Order No.292 (EO 292) is not applicable in this case as what governs the right of the petitioner to operate the Didipio Mine is the FTAA which is terminated effective June 20, 2019. EO 292 speaks of Administrative Procedure which specifically defines a license and expressly provides licensing procedure. License is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority granting it and the person whom it is granted. Section 18 of said EO applies only to licenses and does not cover the FTAA simply because the latter is an agreement and not a license. An FTAA is a contract which signifies meeting of minds as clearly embodied in Article XII, Section 2 of the Constitution when it uses the term agreement and contract and not license. In addition, Republic Act 7942 or the Mining Act of 1995 likewise defined an FTAA as a contract involving financial or technical assistance for large-scale exploration, development and utilization of natural resources. As a contract, an FTAA shall be negotiated by the DENR and must be executed and approved by the President. This means that there should be negotiation before there can be meeting of the minds of the parties and ultimately the execution of the contract and the approval of the President definitely leads to a

conclusion that an FTAA is an agreement or a contract and not merely a license.

4. In the absence of any legal right to continuously operate upon expiration of its FTAA, Petitioner has no basis in claiming that it suffered irreparable injury upon issuance by the Respondents of the assailed order, advisory and resolution.

Assuming that there was damage on the part of the petitioner, there was no legal injury committed against it by the Respondents when they issued the assailed order and resolution for the obvious reason that Petitioner has no right to continue its operations without a valid and renewed FTAA. In issuing the Order, the Governor acted within the bounds of his authority under the Local Government Code and the Environmental Code of Nueva Vizcaya to enforce the laws against petitioner who is illegally operating in Didipio, Kasibu, Nueva Vizcaya without a valid and renewed FTAA. Thus, although the act of Respondents may result in damage to Petitioner, such damage is not compensable as no legal right has been invaded nor injured.

5. There are other available and adequate remedies in the ordinary course of law available to the Petitioner.

The proper, speedy and adequate remedy available to Petitioner is to wait for the positive action of the President to its application for the renewal of its FTAA and not the filing of this petition or in the alternative, if the Petitioner wants to clarify the provisions of the FTAA on the expiration of its term and the issue on the absence of a hold-over provision in the FTAA, then its recourse is to enforce the Arbitration Clause under Section XVII of its FTAA.

The acts sought by OGPI to be restrained include, without limitation, blockading the roads to and from the Didipio Mine Site, or cancelling in whole or in part, any and all permits of OGPI, including its Mayor's Permit and all other permits and licenses related to the conduct of its business and/or its mining operations.

In accordance to Section 5, Rule 58 of the 1997 Rules of Civil Procedure, the court conducted a summary hearing on the Petitioner's request for preliminary injunction and Petitioner presented Atty. Joan D. Adaci-Cattiling, Ryan Gantalao and Russel John Graham to support their position

while respondents did not present any witnesses.

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ISSUE:

1. Whether or not Oceana Gold Philippines, Incorporated is entitled to an injunctive relief?

COURT'S RULING:

In resolving the prayer for the preliminary injunction, this court is amply guided by the uniform rule that the evidence that is submitted by the contending parties, testimonial and documentary, need not be conclusive or complete, it need only be a sampling intended merely to give the court an idea of the justification for the preliminary injunction pending the decision of the case on the merits. (Olalia v. Hizon, 274 Phil 66, 77 (1991) (Per J.Cruz, First Division).

The petition for injunctive relief is DENIED.

For a preliminary injunction to succeed, the following must be present, to wit:

1. The applicant has a clear and unmistakable right to be protected;
2. There is material and substantial invasion of such right;
3. There is an urgent need to issue the injunctive writ in order to prevent irreparable injury to the applicant; and
4. No other ordinary, speedy and adequate remedy exists to prevent the infliction of irreparable injury.

First, the applicant has a clear and unmistakable right to be protected.

Upon a careful consideration of the evidence and the arguments raised by the parties, the court at this point finds that the OGPI was not able to present sufficient evidence to prove that it has a clear and unmistakable right to be protected.

Section 19 of the FTAA on Termination states:

"This agreement shall be terminated and the parties shall be relieved of their respective obligations:

19.1 On expiration of the term, or extension thereof as provided elsewhere herein."

Section 3 on Term of Agreement provides:

"3.1. The initial term of this Agreement shall be twenty-five (25) Contract Years from the effective Date renewable for another period of twenty-five (25) years under the same terms and conditions. Xxxxx"

Article II, Section 2 of the 1987 Constitution states and quoted:

"All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna and other natural resources are owned by the State. Xxxxx The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture or production-sharing agreements with Filipino Citizens, or corporations or associations atleast sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty five years, ad under such tems and conditions as may be provided by law.xxxxxxx

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The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development and utilization of minerals, petroleum and other mineral oils.xxxxxx

It is clear from the above stated terms of the FTAA that the said agreement shall terminate after twenty (25) years from the date of its effectivity. Since the FTAA took effect on June 20, 1994, the agreement terminated on June 20, 2019. As such, the right from which OGPI derives its authority to conduct mining operations ceases to exist.

The counsel for the Petitioner strongly argues that the letter of the Acting Director of the MGB addressed to OGPI dated June 20, 2019 confirmed that said company is permitted to continue its operations beyond the initial 25 year term under the FTAA, pending the National Government's confirmation of the renewal of the same. The letter of MGB Acting Director Wilfredo G. Moncano to the Chairman of the Board Jose P. Leviste, Jr. of OGPI Philippines is worded as follows:

"XXXXXXXX

Please be informed that thru the Memorandum of the same date to the DENR Secretary, this office has taken its position that OGPI is permitted to continue its operation pending the approval of the renewal of the FTAA No. 001xxx". (Exh. G-Cattiling)

From the wording of the aforesaid letter, it appears that the MGB Acting Director was merely informing the company of the position of their bureau which he communicated to the DENR Secretary; that his statement is merely recommendatory in nature awaiting the action of the DENR Secretary or the President relative to his recommendation. There is no sufficient evidence on record to support that OGPI is indeed authorized to continue mining operations pending the renewal by the President of the FTAA which would establish an unmistakable right warranting the issuance of an injunctive relief.

In a long line of cases, the Supreme Court stated, *"Injunction should not issue except upon a clear showing that the applicant has a right in esse to be protected, and that the acts sought to be enjoined are violative of such right. A preliminary injunction should not determine the merits of a case or decide controverted facts, for, being a preventive remedy, it only seeks to prevent threatened wrong, further injury, and irreparable harm or injustice until the rights of the parties can be settled."*

With the foregoing, the court finds it unnecessary to discuss further the other elements of preliminary injunction. The other issues raised will be best threshed out in a full blown trial.

WHEREFORE, with the OGPI not having clearly proven, at this point, its clear and unmistakable right to be protected,

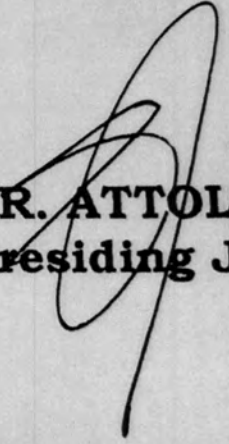
the prayer for preliminary injunction is denied without prejudice to the outcome of the petition for certiorari, prohibition and mandamus.

The respondents having filed their answer to the petition, the Clerk of Court is directed to set the Pre-Trial Conference of the parties to any available calendar date.

Let copies of this order be furnished the parties.

SO ORDERED.

Bayombong, Nueva Vizcaya, July 25, 2019.


PAUL R. ATTOLBA, JR.
Presiding Judge