

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

B-Mex, LLC and others

v.

United Mexican States (ICSID Case No. ARB(AF)/16/3)

PROCEDURAL ORDER NO. 9

Members of the Tribunal

Dr. Gaëtan Verhoosel, President
Prof. Gary Born, Arbitrator
Mr. Raúl Emilio Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Natalí Sequeira, ICSID

7 February 2021

1. The Tribunal has considered the application (the **QE Application**) by the Claimants represented by Quinn Emmanuel (the **QE Claimants**) dated 27 January 2021 as well as the related submissions by the QE Claimants dated 2 February 2021, Claimant Randall Taylor (**Mr Taylor**) dated 29 January and 4 February 2021, and the Respondent dated 29 January and 4 February 2021.
2. To recall, in the QE Application, the QE Claimants sought urgent interim relief, in terms “(1) ordering Mexico to not review any documents Mr. Taylor may produce to Mexico, if any, on January 29, 2021 or before April 16, 2021 until QEU&S has been able to review the documents and object to them on grounds of privilege, confidentiality and/or responsiveness; and (2) ordering Mr. Taylor to not produce any documents until the April 16, 2021 deadline for the production of documents ordered by the Tribunal, and until QEU&S has had an opportunity to review the documents and object to them on grounds of privilege, confidentiality and/or responsiveness” (emphasis added).
3. The Respondent has since confirmed that it has not yet received any documents from Mr Taylor and has undertaken not to review any such documents until and unless directed otherwise by the Tribunal.
4. The QE Application being predicated on a right of the QE Claimants to object to any part of the anticipated production of documents by Mr Taylor (the **Taylor Production**) on the basis of (i) lack of responsiveness, (ii) Mr Taylor’s confidentiality obligations under the B-Mex operating agreements (C-69 and C-70, the **Operating Agreements**), and (iii) privilege, the Tribunal will address the QE Application by examining each of those grounds. In doing so, the Tribunal will, as contemplated in Section 15.1 of PO1, be guided by the IBA Rules on the Taking of Evidence (the **IBA Rules**) and in particular Article 9.2 thereof, which the Tribunal considers reflects settled practice in international arbitration.

1. **Responsiveness**

5. Insofar as the QE Application is predicated on a right of the QE Claimants to object to the Taylor Production on the basis of non-responsiveness, it must be denied. Mr Taylor is a party to this proceeding, with all the concomitant procedural rights and obligations that entails. Subject to what is stated below as regards confidentiality and privilege, it is Mr Taylor’s prerogative to determine for himself which documents in his possession, custody or control are or are not responsive to document production requests by the Respondent. The Tribunal is not aware of any legal basis upon which the QE Claimants may curtail that prerogative of Mr Taylor.

2. **Privilege and Confidentiality**

6. Pursuant to Article 9.2 of the IBA Rules, the Tribunal shall exclude from production any document on the basis of “(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable” [and] ... (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling”.

7. A party is entitled to claim the protection of privilege or confidentiality within those bounds. By the same token, another party is entitled to test whether that privilege or confidentiality claim in fact falls within those bounds.¹
8. In the present circumstances, the most efficient procedural course that affords due process to all parties is to determine in a first step which document production requests are granted, subject only to objections on grounds of privilege or confidentiality; and then to resolve in a second step, in respect of only the documents that are responsive to those requests, any disputed objections on grounds of privilege or confidentiality.
9. The Tribunal accordingly directs the parties to proceed as follows:
 - a. By 12 February 2021
 - i. The parties shall enter in the relevant Redfern schedule their objections to requests on grounds other than privilege or confidentiality (e.g., overly broad, lack of relevance or materiality; unreasonably burdensome; etc.).
 - ii. The parties shall not produce any documents at this stage.
 - b. By 26 February 2021
 - i. The parties² shall enter in the relevant Redfern schedule their replies to objections to requests; and
 - ii. The parties shall provide the Redfern schedules thus completed to the Tribunal.
 - c. By 29 March 2021
 - i. The Tribunal shall issue its decision on the contested requests.
 - d. By 12 April 2021
 - i. The QE Claimants and Mr Taylor shall confer and:

¹ Without prejudice to its consideration of the confidentiality claims by the QE Claimants as they will be set out in their log, the Tribunal notes in this regard that the applicable standard—compelling grounds of commercial or technical confidentiality—will not be met by a bare reference to the fact that the QE Claimants and Mr Taylor have contractually bound one another to confidentiality. The opposite view would, when brought to its logical conclusion, lead to the absurd result that members of a group of claimants or respondents could avoid their document disclosure obligations by contractually requiring all members of the group not to share responsive documents with the adverse party, regardless of whether there are, in fact, “compelling” grounds of “commercial or technical” confidentiality. It may be that a group of claimants or respondents are able to assert a common interest privilege over certain documents shared between them, but that is a different matter.

² The Tribunal understands that Mr Taylor has made no document production requests of the Respondent, by way of a Redfern schedule or otherwise. This paragraph accordingly does not apply to him.

1. identify all the documents which either the QE Claimants or Mr Taylor identify as responsive to the Respondent's requests as granted by the Tribunal on 29 March 2021;
 2. within the universe of responsive documents thus identified, identify all the documents which either the QE Claimants or Mr Taylor claim can be withheld on the grounds of privilege or confidentiality;
 3. produce to the Respondent a single privilege/confidentiality log using the template in Annex A, listing all the documents identified as per (2) above and stating their respective positions on the claim of privilege or confidentiality where their positions differ; and
 4. produce to the Respondent all the documents that are responsive to the granted requests and over which neither of them claims privilege or confidentiality.
- ii. The Respondent shall produce to the Claimants:
1. a privilege/confidentiality log using the template in Annex A; and
 2. all the documents that are responsive to the granted requests and over which it does not claim privilege or confidentiality.
- e. By 23 April 2021
- i. The parties shall enter their challenges (if any) to the claims of privilege or confidentiality in the relevant log; and provide the logs thus completed to the Tribunal.
- f. By 21 May 2021
- i. The Tribunal shall issue its decision on the contested claims of privilege or confidentiality.³
- g. By 28 May 2021
- i. The parties shall produce all documents listed in their logs for which the Tribunal has not upheld the privilege or confidentiality claim.
10. This process strikes a fair balance between the right of all parties (including the QE Claimants) to the protection of meritorious claims of privilege and confidentiality and the

³ While none of the parties thus far have requested that the Tribunal instruct an independent privilege expert, it is within the Tribunal's powers to do so should it consider this appropriate.

right of all parties (including Mr Taylor) to challenge those claims, without purporting to adjudicate any contractual disputes between the QE Claimants and Mr Taylor.⁴

11. While the document production phase will end later than foreseen in the most recent iteration of the timetable, the Tribunal sees no need at this time for any further adjustments to the procedural timetable.

* * *

12. The decision on the costs relating to the QE Application is reserved for the final award.

On behalf of the Tribunal



A handwritten signature in black ink, appearing to read 'G. Verhoosel', is written over a horizontal line. The signature is contained within a rectangular frame defined by vertical lines on either side.

Dr. Gaëtan Verhoosel
President of the Tribunal
Date: 7 February 2021

Attached: Annex A (Privilege/Confidentiality Log Template)

⁴ Any dispute between Mr Taylor and the QE Claimants as to Mr Taylor's obligations under Article 22 of the Operating Agreements is to be resolved following the procedures set out in Articles 23.10, 23.11 and 23.12 of the Operating Agreements (Article 23.12.17 of which provides that "[i]n the event that any party ... evidences an intention to commit an intentional act in violation of this Agreement for which injunctive or other equitable relief would be the only reasonable remedy, the other party may disregard the provisions of this Section 23.12 and may file action in any court with jurisdiction in Colorado for purposes of enjoining such activity and to obtain specific performance of the terms of this Agreement"). The Tribunal does not have jurisdiction over any such dispute.

Annex A
Privilege/Confidentiality Log Template

Document log number	
<i>Requested Party</i>	Date
	Author(s)/Sender(s)
	Recipient(s)
	Non-confidential, non-privileged description of document
	Basis for privilege or confidentiality claim [in the case of the Claimants, the QE Claimants and Mr Taylor shall state their respective positions on the claim of privilege or confidentiality where their positions differ]
<i>Requesting Party</i>	Challenge of privilege or confidentiality claim, if any
<i>Tribunal</i>	Ruling

To be repeated for each document included in the Log.