

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. 13

Members of the Tribunal

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

Secretary of the Tribunal

Ms. Natalí Sequeira, ICSID

28 May 2021

1. The Tribunal refers to the Claimants' Joint Privilege/Confidentiality Log Over QEU&S Claimants' Documents and the Claimants' Joint Privilege/Confidentiality Log Over Randall Taylor Documents.
2. The Tribunal's rulings regarding the objections made in those logs are set out in the corresponding row for each log entry in Annexes A and B to this Procedural Order, subject to what is stated below in respect of the Claimants' Joint Privilege/Confidentiality Log Over Randall Taylor Documents.

Scope of the Claimants' Joint Privilege/Confidentiality Log Over Randall Taylor Documents

3. The QE Claimants state that Mr. Taylor produced to them a total of 2,332 documents, of which Mr. Taylor identified 324 documents as being responsive to the Respondent's requests for document production granted in full or in part in Procedural Order No. 10 dated 26 March 2021 (*PO10*). The QE Claimants say they have accordingly limited their privilege review to those 324 documents.
4. The Respondent considers that the QE Claimants should have conducted a privilege review of all 2,332 documents and that the Tribunal should now order Mr. Taylor to produce all of those documents, save only for those that can be withheld in accordance with the Tribunal's decision on the Claimants' Joint Privilege/Confidentiality Log Over Randall Taylor Documents (which is limited to the 324 documents identified by Mr. Taylor as responsive).
5. The Tribunal notes that Mr. Taylor has not disputed that he identified only the 324 documents as being responsive to the Respondent's requests for document production granted in full or in part in PO10. The Tribunal therefore understands that Mr. Taylor does not intend to produce the 2,008 documents that are not responsive to the Respondent's requests for document production granted in full or in part in PO10. The Tribunal considers that it was reasonable and appropriate in those circumstances for the QE Claimants to limit their privilege review to those 324 documents that had been identified as responsive to the Respondent's requests for document production granted in full or in part in PO10.

6. The Tribunal notes, however, that if Mr. Taylor had contested the QE Claimants' understanding that he identified only the 324 documents as responsive and had in fact proposed to produce additional documents, the same principles underpinning PO9 and PO11 would have applied to any further production by him: the QE Claimants would then have been entitled to conduct a privilege review of those additional documents. The Tribunal will entertain no course of action that tramples upon any party's legitimate privilege claims.

Appointment of a Privilege Expert

7. As indicated in Annex B, the Tribunal has been unable to resolve a number of the contested privilege claims (the *Outstanding Privilege Claims*) due to the conflicting descriptions or characterisations by the QE Claimants and Mr. Taylor of the documents in question. The Tribunal could resolve those Outstanding Privilege Claims by ordering the disclosure of the documents in question "for the Tribunal's eyes only". However, that is not the Tribunal's preferred course. The Tribunal is keen to avoid any perception by any party that such disclosure "for the Tribunal's eyes only" risks poisoning the proverbial well. As the Tribunal indicated in paragraph 9(f), footnote 3 of PO9, the preferred course is for the Tribunal to appoint a privilege expert, as provided for in Article 3(8) of the IBA Rules on the Taking of Evidence, and for that Privilege Expert to report to the Tribunal upon a review of the documents in question and the parties' comments.
8. The proposed terms of reference for the Privilege Expert are set out in Annex C to this Procedural Order. The parties are invited to review these and to provide any comments they may have by 4 June 2021.
9. Also by 4 June 2021, the parties are to confer and determine if they can agree on the name of the Privilege Expert, and report to the Tribunal on any agreement reached.
10. Absent such agreement by 4 June 2021, the Tribunal will propose on 7 June 2021 three candidates who are willing and able to serve as Privilege Expert and direct the parties to strike up to one candidate and rank the remaining two by 10 June 2021. In case of an *ex aequo* finish, the Tribunal will exercise discretion in selecting the Privilege Expert from the two remaining candidates.

11. By 25 June 2021, the Privilege Expert will issue a report to the Tribunal setting out their observations regarding the Outstanding Privilege Claims.
12. The Tribunal will issue its ruling on the Outstanding Privilege Claims by 2 July 2021.
13. The Claimants will complete their production relating to the Outstanding Privilege Claims by 9 July 2021.
14. The Claimants and the Respondent will be requested to advance the fees of the Privilege Expert in equal parts, without prejudice however to the allocation of costs in the final award, which will take into account all the relevant circumstances that necessitated the appointment of the Privilege Expert.

Procedural Timetable

15. The Tribunal recognizes that the Claimants' completion of their production will be delayed as a result. However, given that the Respondent will only receive the Claimants' Reply submission on 9 July 2021, the Tribunal discerns no prejudice to the Respondent as a result of that delay: the Claimants will have completed their production by 9 July 2021.
16. The Tribunal therefore does not consider that further changes to the Procedural Timetable are warranted at this time.



Dr. Gaëtan Verhoosel
On behalf of the Tribunal
Date: 28 May 2021