

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

ANNEX C

Terms of Reference of the Privilege Expert

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

[#DATE]

1. At paragraph 7 of Procedural Order No. 13 dated 28 May 2021 (**PO13**), the Tribunal directed that a privilege expert be appointed to resolve a number of contested privilege claims (the **Outstanding Privilege Claims**) in the Claimants' Joint Privilege/Confidentiality Log Over Randall Taylor Documents (the **Taylor Log**), which is Annex B to PO13.
2. These Terms of Reference lay out the terms and procedure for the privilege expert and have been accepted by [#Name] (the **Expert**), the Tribunal and the Parties.

1. Procedure

3. Immediately upon signature of these Terms of Reference, the Claimants shall:
 - (i) provide to the Expert (with the Respondent and the Secretary in copy) a copy of PO13 (including Annexes A and B); and
 - (ii) provide only to the Expert all of the documents that are the subject of the Outstanding Privilege Claims.
4. By **25 June 2021**, the Expert shall issue a report to the Tribunal (with the Parties and the Secretary in copy) setting out, for each of the Outstanding Privilege Claims the Expert's recommendation as to whether or not the document, in whole or in part, attracts the privilege that has been claimed.
5. In issuing the report, the Expert shall take into consideration the Parties' submissions in the Taylor Log in respect of the Outstanding Privilege Claims. The Expert may, exceptionally, seek clarification from any party on matters arising from their written submissions in the Taylor Log. If the Expert considers it necessary, the Expert may also give the other parties an opportunity to respond to any clarification provided under this paragraph. The Expert shall copy all Parties and the Secretary on any requests for clarification made to any party.
6. The Expert's recommendations must be sufficiently reasoned so as to enable the Tribunal to make a ruling on the Outstanding Privilege Claims.

7. By **2 July 2021**, the Tribunal shall issue its ruling on the Outstanding Privilege Claims, taking into consideration the recommendations in the Expert's report.

2. Confidentiality

8. The Expert agrees to maintain as confidential and not to disclose to any person who is not a participant in this proceeding the fact of their engagement, any materials received pursuant to this Terms of Reference, and the substance of all or part of any such materials received.
9. Further, two months following the submission of the Expert's report to the Tribunal, unless otherwise directed by the Tribunal, the Expert shall destroy: (1) any materials received pursuant to this Terms of Reference (save that any Party may direct that any materials provided by them be returned to them instead); (2) any copies, notes, drafts, or other documents that the Expert may have prepared in the course of performing their review (including those that reflect the contents of any of the documents received pursuant to these Terms of Reference); and (3) confirm that they have done so in writing to the Parties and the Secretary.
10. For the avoidance of doubt, all communications to and from the Expert shall be copied to the all other Parties and the Secretary, except for the documents that are the subject of the Outstanding Privilege Claims.
11. Neither Party shall be entitled to cross-examine the Expert or otherwise solicit information from the Expert relating to the role undertaken pursuant to these Terms of Reference.
12. The disclosure of documents to the Expert in accordance with these Terms of Reference shall not affect any privilege that may exist in respect of such documents. Each Party agrees that it shall be unable to rely on any other Party's disclosure of documents to the Expert in accordance with these Terms of Reference as constituting a waiver, whole or partial, of any privilege that may exist in respect of such documents. Further, it is the intention of the Parties and the Tribunal that the disclosure of the documents to the Expert hereunder shall not constitute a waiver of any privilege or immunity from disclosure in any other proceeding.

3. Fees and Expenses

13. The Expert will be compensated at a rate of [#] per hour.
14. The Expert will address their invoices to the Secretary, who shall forward them to the Tribunal and to the Parties. Upon approval, the Expert shall be paid from the advances on costs held by ICSID in relation to this Arbitration.
15. Pursuant to paragraph 14 of PO13, this Section of the Terms of Reference is without prejudice to the Tribunal's final allocation of costs in this proceeding.

4. Independence, impartiality, and availability of the Expert

16. The Expert shall act expeditiously and shall make best endeavours to submit their report to the Tribunal, copying the Parties and the Secretary, in accordance with paragraph 4 above.
17. The Expert confirms that, on the basis of the information presently available to them, they can devote the time necessary to conduct the document review diligently, efficiently, and in accordance with the deadline in paragraph 4 above (subject to any amendments granted by the Tribunal).
18. By executing these Terms of Reference, the Expert confirms that, subject to any disclosures made prior to the execution of these Terms of Reference, they are independent and impartial of the Parties, their counsel, and the members of the Tribunal, and intends to remain so for the remainder of their appointment as Expert in this proceeding.
19. Save for matters already disclosed, the Expert confirms that, to the best of their knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that they should disclose because they might be of such a nature as to call into question their independence in the eyes of any of the Parties.

5. Disputes

20. Any dispute that may arise in respect of these Terms of Reference shall be referred to the Tribunal, whose decision shall be final and binding.

21. Subject to the limits of the applicable law, it is understood and agreed that the liability of the Expert for any and all claims of any kind arising out of this engagement, whether in contract, tort or otherwise, shall be limited to the total value of their fees.

6. Counterparts

22. These Terms of Reference may be signed in counterparts, collectively forming one composite signed document.

[#Name of Expert]

Date:

Dr. Gaëtan Verhoosel
On behalf of the Tribunal

Date:

[#Name]
On behalf of QEU&S Claimants

Date:

Mr. Randall Taylor

Date:

[#Name]
On behalf of the Respondent

Date: