

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. 22

Members of the Tribunal

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

Secretary of the Tribunal
Ms. Natalí Sequeira, ICSID

17 June 2022

I. SUMMARY OF PARTIES' SUBMISSIONS

1. On 6 June 2022, the QE Claimants applied to the Tribunal for leave to submit two new pieces of evidence into the record of this arbitration (the *Application*). The first is an audio recording of a news interview by Mr. Miguel Ángel Osorio Chong, the Respondent's then-Secretary of the Interior, dated 25 April 2014 (the *Audio Recording*), and the second is a website advertising the Corazón Cabo Resort & Spa in Cabo, Mexico (the *Website*).
 - a. In relation to the Audio Recording, the QE Claimants contended *inter alia* that it confirms that the Respondent closed the Claimants' casinos "because it considered Claimants' independent permit to have been granted in an irregular and illegal fashion at the end of the Calderón PAN administration, as demonstrated by the public and private statements of Ms. Marcela González Salas, and because it believed Claimants were political allies with that administration." Accordingly, the QE Claimants submitted, it "is responsive to, and contradicts, Mexico's representations in its Rejoinder that it closed Claimants' casinos pursuant to court orders."
 - b. In relation to the Website, the QE Claimants contended *inter alia* that it "shows the Corazón Cabo Resort & Spa to be almost identical to Claimants' mockup of their own planned casino resort in Cabo" and thus "responds to Mexico's assertions in its Rejoinder that Claimants had not made an investment in a planned hotel and casino in Cabo that would have come to fruition if not for Mexico's unlawful closure of Claimants' casinos."
2. On 10 June 2022, the Respondent responded to the Application and submitted that both requests should be denied.
 - a. In relation to the Audio Recording, the Respondent contended *inter alia* that (i) it predates the filing of the Claimants' Memorial and Reply by at least six years, and (ii) the Respondent's argument that it closed Claimants' casinos pursuant to court orders had already been made in the Counter-Memorial and was not a new argument.
 - b. In relation to the Website, the Respondent contended *inter alia* that it had been publicly available since 2021 and therefore that the QE Claimants had the opportunity to submit it into evidence with their Reply. The Respondent also contended that the timing of the Application was belated as six months had elapsed since the filing of the Reply.
3. On 10 June 2022, the Tribunal directed that the Parties would be afforded up to ten minutes each to address the Tribunal on the Application at the Case Management Conference to be held on 14 June 2022 (the *CMC*).
 - a. At the CMC, the QE Claimants acknowledged that the Respondent's argument that it closed Claimants' casinos pursuant to court orders was not new, and rather that the

Respondent had “doubled down” and “elaborated” on this argument in the Rejoinder. The QE Claimants however submitted that the Audio Recording also relates to Ms. Salas’ evidence filed with the Rejoinder (her second witness statement) that her comments about the illegality of the Claimants’ permit were made only in response to interest by the press on the subject.¹ This point, according to the QE Claimants, was new. In relation to the Website, the QE Claimants submitted at the CMC that the version of the Website that it seeks to introduce into the record was in fact not available until some time between January-April 2022 (i.e., after the submission of the QE Claimants’ Reply).

- b. At the CMC, the Respondent emphasized in relation to the Audio Recording that its argument that it closed Claimants’ casinos pursuant to court orders was not a new argument in the Rejoinder and had already been made in the Counter-Memorial. The Respondent further contended, in relation to both pieces of new evidence, that the belated nature of the Application was prejudicial to the Respondent as it would require the Respondent to respond in the short time left before the hearing.

II. THE TRIBUNAL’S DECISION

4. Pursuant to paragraph 16.3 of Procedural Order No. 1, “[n]either party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, except with leave from the Tribunal, to be granted upon a showing of good cause.”
5. Pursuant to that rule, the Tribunal considers that if the new evidence (i) addresses allegations already made in or evidence already introduced with the Counter-Memorial *and* (ii) was already in existence by the time the QE Claimants filed their Reply, the Tribunal must find that no good cause has been shown and that the new evidence cannot be admitted this close to the hearing.

A. Audio Recording

6. The Tribunal finds that the QE Claimants have not made the requisite showing of good cause in relation to the Audio Recording.
7. As to the first argument made by the QE Claimants—that the evidence is responsive to the Respondent’s position in its Rejoinder that it closed the Claimants’ casinos pursuant to court orders—it is clear and now uncontroverted that the Respondent had already stated that same position in its Counter-Memorial. If the QE Claimants wanted to introduce the Audio

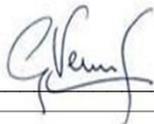
¹ Second Witness Statement of Marcela González Salas, 18 May 2022, para 8.

Recording in response to that statement, they could and should have done so with their Reply Memorial.

8. As to the second argument—first raised at the CMC—that the Audio Recording is also responsive to Ms. Salas’ most recent evidence with the Rejoinder regarding *her reasons for publicly commenting on the permit’s illegality* (i.e., due to press interest), the Tribunal has no basis to conclude that this is in fact so. The Audio Recording may well, as the QE Claimants first contended, relate to *the Respondent’s stated reasons for closing the casinos* (i.e., because of court orders). But that statement is not new and it is distinct from the new statement by Ms. Salas as to *her reasons for publicly commenting on the permit’s illegality* (i.e., due to press interest). Again, therefore, the Tribunal considers that no good cause has been shown to admit the Audio Recording at this time.

B. Website

9. The Tribunal finds that the QE Claimants have made the requisite showing of good cause in relation to the Website.
10. The Tribunal is satisfied that the version of the Website that the QE Claimants wish to introduce was not in existence until after they filed their Reply memorial. While the QE Claimants could have sought leave sooner, the Tribunal does not consider that this alone is so prejudicial as to justify its exclusion. Rather, the proper remedy pursuant to Section 16.3 of Procedural Order No. 1 is to grant the Respondent an opportunity to introduce new evidence of its own in response to the Website and to submit in writing any observations they may have (but not exceeding 10 pages) regarding the Website.
11. The Tribunal accordingly orders that:
 - a. The Application is dismissed insofar as it relates to the Audio Recording;
 - b. The Application is granted insofar as it relates to the Website; and
 - c. The Respondent is granted leave to make any written observations (not exceeding 10 pages) and/or file any rebuttal evidence regarding the Website by 30 June 2022.



On behalf of the Tribunal
Dr. Gaëtan Verhoosel QC
President of the Tribunal
Date: 17 June 2022