

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. 16

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

15 September 2021

1. The Tribunal refers to the Claimants' Second Joint Privilege/Confidentiality Log Over Additional Taylor Documents (the *Second Privilege Log*).

The Tribunal's rulings

2. The Tribunal's rulings regarding the objections made in the Second Privilege Log are set out in the corresponding row for each log entry in Annex A to this Procedural Order.

The Respondent's request that the QE Claimants specify the attachments to a communication

3. In its preliminary observations and general challenges, the Respondent noted that the QE Claimants "have treated parent emails and attachments as separate documents, and to the extent that they are confidential and/or privileged, are identifying them under distinct log numbers". According to the Respondent, Mr. Taylor takes the position that "often the transmittal email provides context to the attachments and therefore both the email and the attached documents should be produced as one document". The Respondent thus requested that the Tribunal order the QE Claimants to specify which documents were attached to which communications in a separate document, on the basis that such information "provides important context that is necessary to properly assess the objection and to determine what the document demonstrates".
4. The Tribunal notes that, in his responses, Mr Taylor has already identified the attachments to documents in the Second Privilege Log. The Tribunal thus does not consider it necessary to order the QE Claimants to do so in a separate document to properly assess the QE Claimants' objections.
5. For the avoidance of doubt, attachments to a document are a part of the document. Thus, any reference to a "document" in the Tribunal's orders in the Second Privilege Log includes all attachments to that document.

Documents disclosed in American Arbitration Association Case No. 01-19-0001-3949: B-Mex; B-Mex II v Taylor; Ponto (the AAA Arbitration)

6. The QE Claimants made a general objection to the production of all documents exchanged in the AAA Arbitration, asserting *inter alia* that "the parties expressly designated most of the documents exchanged in the proceedings as either

‘CONFIDENTIAL’ or ‘HIGHLY CONFIDENTIAL’ and that those documents were subject to a protective order which prohibited the disclosure of these documents to anyone that was not a party to the AAA Arbitration and also expressly required that the recipient of the documents delete the documents after the case was concluded.”

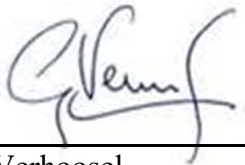
7. In his response, Mr Taylor asserted that “[a] review of the orders regarding confidentiality in the AAA arbitration does not reveal ... any protective order regarding the documents submitted in the referenced arbitration that survives the closure of that arbitration, with the exception of one document produced in that arbitration. If there exists such an order from the Arbitrator declaring the above referenced AAA arbitration confidential or if there exists an Agreement between the parties declaring the above referenced AAA arbitration confidential, Claimant Taylor requests QEU&S Claimants produce [the] same as he is unaware of any such document.” Mr Taylor further submitted that permitting the QE Claimants to withhold production of the documents exchanged in the AAA Arbitration “would allow for discovery gamesmanship of the highest order”. According to Mr Taylor, given that the AAA Arbitration was filed after the Request for Arbitration in the present arbitration, “B-Mex and B-Mex II would have every incentive in the AAA arbitration to produce every damaging document in their possession related to this arbitration and to seek to have Taylor and Ponto produce every damaging document in their possession related to this arbitration, and then claim all of those produced documents confidential”. The Respondent concurred with both submissions by Mr Taylor.
8. On 31 August 2021, the Tribunal ordered the QE Claimants to produce the protective order in the AAA Arbitration to which it referred in its general objection. The QE Claimants disclosed the protective order on 1 September 2021. Mr Taylor immediately sought leave to disclose two further orders by the tribunal in the AAA Arbitration. On 2 September 2021, the Tribunal granted leave. On 3 September 2021, Mr Taylor disclosed an Order Regarding Confidentiality Designations dated 16 September 2019 and an Order Regarding Claimants’ Motion to Maintain Designations dated 11 November 2019.
9. In the Tribunal’s view, the orders by the tribunal in the AAA Arbitration are clear. The Order Regarding Confidentiality Designations dated 16 September 2019 denied the

claimants' motion to maintain the highly confidential and confidential designations over documents disclosed or to be disclosed in discovery in the AAA Arbitration. The Order Regarding Claimants' Motion to Maintain Designations dated 11 November 2019 also denied the claimants' motion to maintain highly confidential and confidential designations over exhibits in the AAA Arbitration, save for one exhibit. Mr Taylor has confirmed that this exhibit is not listed in the Second Privilege Log.

10. On the record before it, the Tribunal thus discerns no basis to sustain the QE Claimants' general objection that all documents disclosed in the AAA Arbitration are shielded from disclosure in this proceeding. In any event, the Tribunal also agrees with Mr Taylor and the Respondent that it would be incongruent if the QE Claimants could render otherwise discoverable documents undiscoverable simply by making them part of the record in an arbitration commenced subsequently to this proceeding by two of the QE Claimants against one other Claimant and one member of a QE Claimant. The Tribunal therefore rejects the QE Claimants' general objection on the basis of any confidentiality of the AAA Arbitration, and to the extent the documents in that record are not otherwise privileged (as to which, see immediately below), they must be produced.
11. However, contrary to Mr. Taylor's further submission that "by producing documents in a non-confidential forum that they themselves initiated [i.e., the AAA Arbitration], B-Mex has waived the privilege as to those documents", it does not necessarily follow from the foregoing that the claimants in the AAA Arbitration have also waived any applicable privilege over documents that became part of the record in that proceeding. To the extent the documents disclosed in that proceeding between two of the QE Claimants and two of their members also included such privileged documents, the claimants did make clear their intent, and took affirmative steps, to avoid an inference that they were waiving such privilege outside of the AAA Arbitration, by agreeing to a protective order and by designating those documents as "Confidential" or "Highly Confidential". While the tribunal in the AAA Arbitration subsequently dismissed claimants' motion to maintain these confidentiality designations (and disclosure in this proceeding could therefore not be resisted on the basis of confidentiality of the AAA Arbitration), the Tribunal is satisfied that the claimants in the AAA Arbitration did take sufficient steps to avoid a finding that they must be deemed to have waived any privilege that attached to the documents disclosed.

Decisions reserved pending issuance of a report by the Privilege Expert

12. The Tribunal has been unable to resolve a number of the contested privilege claims (the *Outstanding Privilege Claims*), either because the QE Claimants and Mr. Taylor have provided conflicting descriptions or characterisations (which the Tribunal cannot resolve with presuming veracity in favour of one or the other), or, in some cases, because there appear to be inconsistent descriptions within the QE Claimants' log entries. Consistent with its rulings in respect of the Claimants' Joint Privilege/Confidentiality Log Over Randall Taylor Documents, and for the reasons set out in paragraph 7 of Procedural Order No. 13, the Tribunal's preferred course is to reserve its decision until the Privilege Expert has reported to the Tribunal upon a review of the documents in question and the parties' comments. The terms of reference for the Privilege Expert agreed and signed by the parties shall continue to apply.



Dr. Gaëtan Verhoosel
On behalf of the Tribunal
Date: 15 September 2021