

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. 5

POST-HEARING BRIEFS

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

4 June 2018

The Tribunal sets out below a number of questions that it would like the parties to address in their post-hearing briefs. A few general observations:

- Some of the questions may more naturally call for a response by one party rather than both parties, but both parties are free to address all of them.
- The limited purpose of these questions is to ensure that the parties address *also* these topics in their post-hearing briefs; they are *not* however intended to exhaust the scope of the post-hearing briefs. In fact, the parties are encouraged to address any other matters for which they consider a summation of the evidence will assist the Tribunal—especially the evidence on record as regards the issue of ownership/control for purposes of Article 1117.
- Many of the issues raised by the questions will have been addressed by the parties, to a greater or lesser extent, in their pre-hearing briefs. The purpose of the questions is to elicit a summation of all the pertinent evidence on record today regarding those matters.
- None of the questions should be construed as reflecting a considered opinion by the Tribunal on matters in dispute. The members of the Tribunal have commenced their deliberation but at this juncture they continue to have an open mind in respect of all matters in dispute.
- None of the questions calls for either new assertions unsupported by evidence in the record or the introduction of new evidence.

A. INTERPRETATION OF RELEVANT NAFTA PROVISIONS

1. Article 1117

1. Article 1117 provides in terms that an investor may submit a claim to arbitration “on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly”.

- (i) Which is/are the relevant point(s) in time at which the investor must be able to prove ownership or control for the ownership/control requirement of Article 1117 to be met? Please refer to apposite authority. Please also address the application of the appropriate standard to the evidence on record.
- (ii) Can an investor claim on behalf of an enterprise in which it legally holds no ownership interest at all but which it can prove it in fact controls directly or indirectly? How, if at all, is Article 1139 relevant to this question? Article 1139 defines “investment *of* an investor of a Party” as “an investment *owned or controlled*

directly or indirectly by an investor of such Party". Does Chapter 11 of NAFTA extend its substantive protections to investments in which the "investor" holds no ownership interest but which it nonetheless controls? Is there any NAFTA or other authority directly answering the foregoing questions either in the affirmative or the negative?

- (iii) Please identify the NAFTA or other authorities addressing the question of whether a group of shareholders jointly holding a voting majority sufficient to exercise control over a company can be said to "control" that company even where no contractually binding instrument requires any of them to exercise their voting rights in any particular way or as a block.

2. Articles 1119 and 1120

- 2. Articles 1119 and 1120 in terms require: (i) delivery by the investor of a written notice of intent containing the information specified in Article 1119 at least 90 days before the submission of the claim to arbitration, and (ii) the lapsing of six months between the events giving rise to a claim and the submission of the claim to arbitration.

- (i) Does the principle of "*effet utile*" require the treaty interpreter to give meaning to the NAFTA Parties' choice to use the terms "conditions precedent" in Article 1121 and, by the same token, their choice *not* to use those terms in Articles 1119 and 1120? What principles of treaty interpretation as codified in the Vienna Convention on the Law of Treaties allow or require a treaty interpreter to disregard that choice?

- (ii) Articles 1119 and 1120 are stated in mandatory terms ("shall" and "provided", respectively) and, in accordance with the *effet utile* principle, those terms too must be given meaning. Assuming *arguendo* that Articles 1119 and 1120 cannot be construed to contain "conditions precedent" to a tribunal's jurisdiction where those terms are only used in Article 1121, what then are the consequences of an investor's/enterprise's failure to comply with those provisions? And what are the remedies to which the disputing Party is entitled when these provisions are not complied with?

3. Article 1121

- 3. Article 1121(1) and (2) in terms set out two "conditions precedent": the investor and the enterprise must (i) "consent to arbitration in accordance with the procedures set out in this Agreement", and (ii) "waive their right to initiate or continue" domestic proceedings. Article

1121(3) specifies that “[a] consent and waiver required by this Article shall be delivered in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration”.

- (i) It can be argued that “Conditions Precedent to Submission of a Claim to Arbitration” are requirements that condition a NAFTA Party’s consent to arbitration under Section B—and thus a tribunal’s jurisdiction. On that reading, would an investor’s/enterprise’s failure to meet the two conditions precedent not necessarily deprive a tribunal of jurisdiction?
- (ii) It can be argued that an investor/enterprise who gives a power of attorney to a legal representative to take all necessary steps to submit a claim to arbitration in accordance with NAFTA is necessarily consenting to the submission of the claim to arbitration in accordance with NAFTA. Can an investor/enterprise instruct their legal representatives to commence arbitration yet be deemed *not* to have consented to arbitration?
- (iii) Assuming *arguendo* that a valid power of attorney for the submission of a claim necessarily contains the principal’s consent to such submission, when an investor/enterprise attaches a written power of attorney to their notice of arbitration, can it be argued that they are delivering their consent “in writing” “to the disputing Party” and are “includ[ing] [it] in the submission of a claim to arbitration”? Which of those requirements would not be met and why?
- (iv) Does Article 1122(2) bear on the foregoing when it provides that the “consent given by [Article 1122(1)] *and the submission by a disputing investor of a claim to arbitration* shall satisfy the requirement of ... the Additional Facility Rules for written *consent* of the parties”?

4. Article 1122

4. Article 1122 (“Consent to Arbitration”), first paragraph, provides in terms that “[e]ach Party consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement*”. Articles 1121(1)(a) and 1121(2)(b) requires that the investor/enterprise similarly “consent to arbitration *in accordance with the procedures set out in this Agreement*”. Articles 1123 through 1138 (i.e., through the end of Section B) set out detailed procedural provisions governing any arbitration pursuant to Section B.

- (i) Is it appropriate to conclude that the phrase “in accordance with the procedures set out in this Agreement” modifies “arbitration” in each of Articles 1121 and 1122, considering the observations in (a) to (e) below?
- (a) It can be argued that the Agreement does not set out “procedures” for how an *investor* is to express its *consent* to arbitration where the only requirements imposed by Article 1121 (delivered in writing to the disputing Party and included with the notice of arbitration) can be reduced to a single (and simple) act, rather than a series of multiple consecutive steps—what can be said to be the ordinary meaning of “procedures”, especially when used in the plural.
 - (b) The Agreement does not set out any “procedures” for how a *disputing Party* is to express its *consent* to arbitration because Article 1122(1) records that consent.
 - (c) The Agreement does set out detailed “procedures” in respect of the *arbitration* itself, immediately following Article 1122, in Articles 1123-1138.
 - (d) It would not be incongruent for the NAFTA negotiators to have employed an identical phrase in two consecutive provisions to modify the same term also appearing in both those provisions—“arbitration”.
 - (e) That “procedures” in both Articles 1121 and 1122 should modify the term “*arbitration*” in those provisions may logically make sense: unless an investor and a disputing Party express their consent specifically to arbitration in accordance with those detailed procedures—as opposed to “arbitration”, full stop—no agreement to arbitrate in accordance with Section B could come into existence: NAFTA Parties have only extended their consent to arbitrations *conducted in accordance with the detailed procedures set out in Section B*.
- (ii) Alternatively, can it be argued that “in accordance with the procedures set out in this Agreement” modifies the “*submission of a claim*” in Article 1122, considering the observations in (a) to (b) below?
- (a) Article 1119 would not appear to contain such “procedures”. That provision by definition is not concerned with the submission of a *claim* but with the submission of a *notice of intent*. The distinction is legally relevant: a notice of intent does not legally commit an investor to submit a claim to

arbitration—it can freely choose not to pursue arbitration after filing such notice.

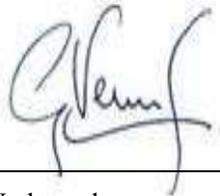
- (b) However, Article 1120—the sole provision titled “Submission of a Claim to Arbitration”—is indeed concerned with the *submission of a claim* and it requires the lapsing of six months, directs the investor to choose between different arbitral fora, and provides that the applicable arbitration rules shall govern save as modified by Section B. Can it be argued that Article 1122 records the disputing Party’s consent to arbitration but *only* when the claim is submitted in accordance with the “procedures” of Article 1120—to wit: the lapsing of 6 months; the selection of one of the available arbitral fora; and the acceptance of the applicable arbitral rules as modified by Section B?

B. MATTERS OF FACT AND EVIDENCE

- 5. Who has the *burden* of proof in matters of arbitral jurisdiction? Is it for the claimant to establish a *prima facie* case that jurisdiction exists and does the burden then shift to the respondent to refute the claimant’s evidence? Please refer to apposite authority.
- 6. What is the *standard* of proof in matters of arbitral jurisdiction? Please refer to apposite authority.
- 7. Please provide a summation of the evidence on record—without making new assertions unsupported by evidence on record—with relevant citations to the record regarding each of the following. Where possible please use graphical ownership charts to visualize your responses to the questions regarding the shareholding in the Mexican Companies. If the parties can submit agreed such charts, all the better.
 - (i) How was each of the Mexican Companies capitalized: by whom and when?
 - (ii) How (i.e., by whom: Original Claimants/Additional Claimants/Non-Parties) were the outstanding shares of each of the Mexican Companies held at (i) the time of the alleged breaches by Respondent; (ii) the time of the (original) Notice of Intent; and (iii) the time of the filing of the Notice of Arbitration with ICSID?
 - (iii) How (i.e., by whom: Original Claimants/Additional Claimants/Non-Parties) were the “B shares” in each of the Mexican Companies were held at (i) the time of the alleged breaches by Respondent; (ii) the time of the (original) Notice of Intent; and (iii) the time of the filing of the Notice of Arbitration with ICSID?

- (iv) There has been considerable debate and testimony about what Claimants had set out to achieve vis-à-vis SEGOB by engaging with Messrs. Chow and Pelchat and pursuing a transaction with their principals. What does the evidence on record today show was the intended purpose of their engagement with those two gentlemen and their principals?

On behalf of the Tribunal,



Dr. Gaëtan Verhoosel
President of the Tribunal
Date: 4 June 2018