

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. 7

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

23 November 2018

1. The Tribunal has made good progress towards an Award¹ and hopes to be in a position to issue an Award during the first quarter of 2019.
2. In the course of the Tribunal's work to date, a discrete question has arisen in respect of which the Tribunal wishes to invite the assistance from the parties and, if they so wish, the Non-Disputing Parties.
3. The inquiry relates to the Respondent's objection that the Claimants did not, at the relevant time(s), "own [] or control [] directly or indirectly" the Mexican Companies under Article 1117 of the Treaty. The Tribunal must determine the proper interpretation of that phrase, which is a point in dispute.
4. In deciding this question, the Tribunal will, as it must, apply the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties (*VCLT*). As the parties are well aware, Article 31 of the *VCLT* contains the "general rule of interpretation, which reads as follows:
 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
 3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

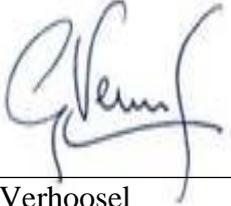
¹ The Tribunal observes that whichever way it decides on the preliminary objections, its decision will be an Award under Article 52 of the ICSID Additional Facility Rules.

- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
- 4. A special meaning shall be given to a term if it is established that the parties so intended.
- 5. In order to faithfully apply this general rule of interpretation, the Tribunal must satisfy itself that it has availed itself of *all* the interpretative tools that it is directed by this rule to apply.
- 6. Against this backdrop, the Tribunal wishes to seek the parties' (and, if they so wish, the Non-Disputing Parties') assistance in respect of the direction in Article 31(3)(c) that "[t]here shall be taken into account, together with the context, ... any relevant rules of international law applicable in the relations between the parties".
- 7. Specifically, the Tribunal invites the parties (and if they so wish, the Non-Disputing Parties) to file brief submissions—in accordance with the modalities set out in Paragraph 9 below—addressing the following question: which, if any, rules of international law exist that are (i) applicable in the relations between the three NAFTA Parties and (ii) relevant within the meaning of Article 31(3)(c), such that the Tribunal must ("shall") "take into account" any such rules when interpreting Article 1117?
- 8. By way of example only, what are the views of the parties (and, if they so wish, of the Non-Disputing Parties) as to whether or not Article XXVIII(n) of the General Agreement on Trade in Services (*GATS*, a treaty to which all three NAFTA Parties are also parties), which defines when a "juridical person" is "owned" and when it is "controlled" by a person of a WTO Member,² is a relevant rule of international law applicable in the relations between the NAFTA Parties?
- 9. While the submissions sought should not be confined to this example, they should not exceed the scope of the inquiry as circumscribed in Paragraph 7 above. The Tribunal already has the benefit of extensive submissions regarding the interpretation of Article 1117 more generally and will not be assisted by submissions that exceed that scope.

² See https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

Save for the documents, if any, that are alleged to contain a relevant rule of international law applicable in the relations between the NAFTA Parties, the submissions are not to be accompanied by exhibits or authorities. They must not exceed ten pages (using Times New Roman, font 12, normal margins, and 1.5 line spacing) and will be due by 7 December 2018 unless otherwise agreed by the parties.

On behalf of the Tribunal,

A handwritten signature in black ink, appearing to read 'Gaëtan Verhoosel', written over a horizontal line.

Dr. Gaëtan Verhoosel
President of the Tribunal
Date: 23 November 2018