

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Tayeb Benabderrahmane

v.

The State of Qatar

(ICSID Case No. ARB/22/23)

PROCEDURAL ORDER NO. 3
Production of Documents

Members of the Tribunal

Ms. Lucinda Low, President of the Tribunal¹
Prof. Andreas Bucher, Arbitrator
Mr. Makhdoom Ali Khan, Arbitrator

Secretary of the Tribunal

Dr. Jonathan Chevry

October 3, 2023

¹ In dissent, as per “Opinion of Ms. Lucinda A. Low, President of the Tribunal, Concurring in Part and Dissenting in Part”, dated of October 3, 2023.

I. INTRODUCTION AND PARTIES

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the French Republic and the Government of the State of Qatar on the reciprocal encouragement and protection of investments (the “**BIT**”)² and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).
2. The Claimant is Mr. Tayeb Benabderrahmane, a national of Algeria and France (the “**Claimant**”), and the Respondent is the State of Qatar (“**Qatar**” or the “**Respondent**”). The Claimant and the Respondent are collectively referred to as the “**Parties.**”
3. The present order sets out the Tribunal’s analysis and decision on the issue of production of documents. Attached as Annex A is a Schedule, containing the decisions of the Tribunal on the specific requests. This Schedule is to be read with and forms a part of this Order.

II. THE RELEVANT PROCEDURAL STEPS

4. On April 11, 2023, the Tribunal issued Procedural Order No. 2 (“**PO2**”) which contained *inter alia* a preliminary procedural calendar. PO2 provided in relevant parts that:

The parties will be at liberty to file such applications for the production of documents as they may deem appropriate, and the Tribunal will pass such orders on these applications as it determines to be warranted after providing to the other party an opportunity to respond. Any such application that a party deems appropriate to file at this stage of the proceeding shall be filed within 30 days of the issuance of Procedural Order No. 2. Such filing will be without prejudice to any subsequent applications permitted under the Rules or by the Procedural Calendar once adopted.

² Signed at Doha on July 8, 1996.

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5. On May 11, 2023, the Claimant sent to the Centre a copy of a request for production of documents that he had earlier sent to the Respondent.
6. On July 12, 2023, the Claimant filed its application for the production of documents dated July 11, 2023 (the “**Application**”).
7. On the same date, the Claimant sent a separate letter requesting the Tribunal to confirm that “the date for the filing of the Claimant’s Memorial is no longer 120 days from the issuance of Procedural Order No. 2 but will be 120 days from the order to be rendered on the Claimant’s application” (the “**Claimant’s Letter**”).
8. On July 14, 2023, the Tribunal invited the Respondent to provide its comments to the Claimant’s Application and Letter by July 31, 2023.
9. On July 18, 2023, the Respondent provided initial observations on the Claimant’s Application and Letter, arguing that the Application was not compliant with the schedule provided in PO2 and requesting leave to submit comments on the Application by August 7, 2023.
10. On July 31, 2023, the Claimants responded to the Respondent’s observations of July 18, 2023, considering that the Application was filed in accordance with PO2.
11. On August 1, 2023, the Respondent submitted its comments on the Application (the “**Comments**”).
12. On August 16, 2023, the Tribunal informed the Parties that in accordance with PO2, the Claimant’s Memorial “will be due 120 days from the issuance of the Tribunal’s order in respect of its Application.”
13. On September 4, 2023, the Claimant informed the Tribunal that on June 22, 2023, the Respondent transferred to him four documents: (i) Arrest Warrant and Search Order dated 02.01.2020; (ii) examination Report dated 10.2.2020; (iii) Minutes of Sessions and Orders for Detention dated 10.2.2020; and (iv) Arrest Warrant dated 06.12.2020. The Claimant

further informed the Tribunal that the listed documents were part of a judicial requisition issued by Mr. Serge Tournaire, first vice-president of the Paris Court, to be provided by these documents and others relating to the proceedings against the Claimant in Qatar, under which he was arrested on January 13, 2020, and later imprisoned. In the instant case, the Tribunal concludes that the documents listed in the Claimant’s letter of September 4, 2023 have been produced and that, therefore, the corresponding request for the production of these documents is moot.

14. In its letter dated September 14, 2023, addressed to the Claimant and copied to the Tribunal, the Respondent submitted that the disclosure of documents before a French Judge was a “matter of considerable concern”, following a request issued by the Judge on July 25, 2023. This request is understood by the Respondent as covering, in broad terms, disclosure of all documents in the Claimant’s possession relating to the criminal proceedings.

III. THE APPLICABLE STANDARD

15. Article 36(c) of the ICSID Arbitration Rules, which as determined in PO1 of March 13, 2023, are the rules governing this arbitration, gives the Tribunal discretion to decide on applications for document production “at any stage of the proceedings”. This provision gives the Tribunal the power to grant an application at this stage if it deems appropriate. The Respondent does not appear to contest that the Tribunal has such power; rather, what it contests is the appropriateness of granting the Application in whole or in part at this early stage of the proceedings. However, the Tribunal recalls that it has ruled upon this issue in Annex B to PO No. 2, which is therefore moot for present purposes.
16. The criteria for the Tribunal’s decision on such requests are set forth in Article 37 of the Rules. The guidance provided by the IBA 2000 Rules on the Taking of Evidence reinforces the elements of relevance and materiality in the ICSID Rules. They are consistent with the ICSID Rule 37, which takes into account “all relevant circumstances”. Given the mandatory language of Rule 37, the Tribunal will examine in turn each of its identified

factors, to the extent relevant, as well as all other relevant circumstances, in reaching its decision on the Application.

IV. THE TRIBUNAL’S ANALYSIS

17. The Claimant puts emphasis on the exceptional nature of the case whereby he was arrested and dispossessed of all requested documents by the Respondent, and that this exceptional lack of access to documents makes it difficult to develop its case, a situation which serves as supporting the reasons that make a request for document production legitimate and necessary at the actual early stage of the proceedings (para. 15, page 16).
18. The Tribunal observes, however, that such exceptional circumstances should not be confused with the factual allegations to be included in the Claimant’s further submissions before this Tribunal. Such allegations can be made seriously and precisely, at least in large parts, on the basis of the Claimant’s and may be witnesses’ knowledge of facts pertinent to the Claimant’s case, albeit at a stage where the evidentiary process has not yet been put in motion by the Tribunal, including further applications to produce documents. Thus, it appears confusing when the return of properties constituting part of the Claimant’s alleged investments is claimed as a matter for the production of documents (such as files on allegedly seized computers, phones, hard drives and/or USB keys belonging to the Claimant, cf. Requests Nos. 10 to 18), while an order to return confiscated investments appears as one of the requests for relief listed in the Request for arbitration, subject to later supplements or revisions (para. 103[ii]). It appears equally confusing when requested documents are told to be material to assess the appropriate remedies that the Claimant is seeking, such remedies consisting of “the restitution and/or indemnification for the assets seized, which are the subject matter of the claim” (cf. Request No. 3, on the “Relevance and Materiality according to the Requesting Party”), thus disregarding the purely evidentiary purpose of the process to produce documents.
19. For instance, the Claimant argues that he was “extremely diligent” when preparing its request to produce documents, restricting these documents “to those strictly relevant and

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material to the present case” (para. 16, page 7). The Tribunal cannot know, at the present stage, whether this is true. However, the question whether an allegation of facts is “relevant and material to the present case” is an issue to be examined when the matter is dealt with in the parties’ forthcoming submissions and not yet at the preliminary stage where documents are requested before any submission has been filed with the Tribunal. However, there is no room for an objection that a particular request to produce documents made by the Claimant is “of no relevance to any jurisdictional issue”, as the Respondent puts it several times (cf. Respondent’s letter dated August 1, 2023, Requests Nos. 1[1], 5[1], 6[1], 7[1]). The Claimant has not raised a request of such a nature, given that the procedural situation is such that the matter of jurisdiction will have to be raised by the Respondent, not the Claimant.

20. In order to evaluate the relevance and materiality of the documents requested, the Claimant relies on the allegations of existence of several documents mentioned in his Request for Arbitration dated August 22, 2022. However, the purpose of such a Request is not to lay down the basis to justify the scope of a request to produce documents, as this is the option taken by the Claimant when withdrawing Requests No. 3, 4, 8 and 9, in reliance of the argument that the requested documents were not listed in his Request for arbitration.
21. Subject to the above-mentioned reservations, the Tribunal accepts that the Claimant should not be held in a position whereby he would stay incapable of providing even very basic documentary evidence the filing of which the Respondent denies, without arguing that such documents are not in its possession or under its control. Indeed, in various regards, the Claimant seeks to obtain from the Respondent an arrest warrant, documents proving his forced detention, incarceration in prison, and similar evidence. Considering the factual circumstances presented by the Claimant in its initial submissions (Notice of Dispute, Request for arbitration, pleadings at the First Session), it appears that these measures implying the use of force against the Claimant represent the very background of the Claimant’s case. The Claimant should have access to the relevant documentary evidence in this respect, to the extent available for the Respondent, in order to introduce with the

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force of actual evidence these important factual allegations. The production of such fundamental documents will also allow the Tribunal to be put in a position to understand at this early stage of the proceedings the seriousness of the events being debated between the parties. In general, the Respondent does not object to such production for reasons based on a lack of availability of such evidence. Moreover, for certain documents that are part of this category of documents requested by the Claimant, the Respondent accepts to produce those in a “spirit of cooperation” towards the Claimant. It appears therefore too short when the Respondent objects simply that “the Claimant is perfectly able to advance a case without the requested document production” (Respondent’s letter dated August 1, 2023, para. 27).

22. The Claimant’s requests for the production of documents are taken into consideration by the Tribunal as they have been defined in the Claimant’s first rubric labelled “Documents or Category of Documents Requested”, to which the Respondent directed its objections. The Tribunal disregards the further additional specifications the Claimant added on some occurrences under the heading “Reply to Objections to Document Request”, to which the Respondent was not invited to respond.
23. The Tribunal also observes that while some of the Claimant’s requests may appear as presenting the characteristics of interim measures, as the Respondent objects (cf. the letter dated August 1, 2023, paras. 7.1, 31-36, third objection to several requests as from No. 11[3]), this does not exclude that a measure securing evidence may overlap with a request to produce the relevant document. The Claimant submits solely such latter request.
24. The Tribunal will also not approve requests defined in overly broad and/or unspecific terms, such as those deemed to seek for “all files and records”, as this is the case with most when not with all requests submitted by the Claimant.
25. The Tribunal will further withdraw from the Application documents the Claimant identified in its letter dated September 4, 2023, as having been provided by the Respondent

(cf. above para. 13) and which are also listed in the Claimant’s Application, including a letter dated June 22, 2023, issued by the Respondent (para. 4).

26. Further, the Tribunal does not consider that the Respondent has raised any issue in respect of timeliness of the application. Such an item was raised as an “initial observation” through the Respondent’s letter dated July 18, 2023. It is, however, not mentioned in the Comments to the Application. It is obvious, therefore, that the Respondent has not pressed the issue. The Tribunal, therefore, is not inclined to address it. It will be a waste of ink, paper and time to address and reject an issue which in the view of the Tribunal has not been pressed.

V. ORDER

27. For the foregoing reasons the details for which are stated in the Schedule attached as an Annex to this Order the Application by the Claimant seeking production of documents is partly accepted and partly denied in the following manner:
- (i) Request No. 1: Granted to the extent that the Respondent shall provide the Claimant with the order to remand him in custody, it is dismissed in all other parts.
 - (ii) Request No. 2: Denied.
 - (iii) Request No. 3: Withdrawn by the Claimant.
 - (iv) Request No. 4: Withdrawn by the Claimant.
 - (v) Request No. 5: Granted to the extent that the Respondent shall provide the Claimant with document(s) regarding the decision(s) to detain the Claimant in an undisclosed detention facility between January 13, and February 1, 2020. Request No. 5 is dismissed in all other parts.
 - (vi) Request No. 6: Granted insofar as the Respondent shall provide the Claimant with the document(s) regarding the decision(s) to incarcerate the

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Claimant in the Salwa Road prison and to maintain his detention in this prison until 1st July 2020. The Request is dismissed in all other parts.

(vii) Request No. 7: Granted insofar as the Respondent shall provide the Claimant with document(s) regarding the decision(s) to place and maintain the Claimant under house arrest between July 1, 2020, and October 31, 2020. The Request is dismissed in all other parts.

(viii) Request No. 8: Withdrawn by the Claimant.

(ix) Request No. 9: Withdrawn by the Claimant.

(x) Requests Nos. 10 to 18: Denied.

28. The Respondent is ordered to produce documents responsive to those requests that have been granted within 15 days from the date of this Order.

29. Insofar as documents ordered are not produced or not fully produced as decided in this Order, the Tribunal may take this into account in its assessment of the respective factual allegations and evidence, including the possibility to draw the inferences it deems appropriate, taking into consideration all relevant circumstances.

30. The assessment and distribution of the costs relevant to this production of documents process will be ruled upon at a later stage of these proceedings.

On behalf of the Tribunal

[signed]
Prof. Andreas Bucher
Arbitrator

[signed]
Mr. Makhdoom Ali Khan
Arbitrator

Opinion of Ms. Lucinda Low, President of the Tribunal, Concurring in Part and Dissenting in Part.

Ms. Lucinda Low
President of the Tribunal

Date: October 3, 2023