

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ADEL A HAMADI AL TAMIMI V. SULTANATE OF OMAN  
(ICSID CASE No. ARB/11/33)**

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**PROCEDURAL ORDER No. 5  
RULINGS ON THE RESPONDENT'S REQUESTS NOS. 3-11 FOR PRODUCTION OF DOCUMENTS**

Professor David A. R. Williams QC, President of the Tribunal  
Judge Charles N. Brower, Arbitrator  
Mr. J. Christopher Thomas QC, Arbitrator

*Secretary of the Tribunal*  
Ms. Frauke Nitschke

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**Introduction**

1. In Procedural Order No. 4, the Tribunal ruled on the Respondent's First Request for the Production of Documents to the Tribunal of 8 January 2013 (**Respondent's Requests**). In particular, paragraphs 11-18 addressed the Respondent's Requests Nos. 3-11, all of which sought the disclosure of documents apparently relevant to the issue of whether the Claimant is able to establish that he is a qualified "Investor of a Party" as defined in Article 10.27 of the US-Oman FTA (**FTA**).
2. At paragraph 17 of Procedural Order No. 4 dated 5 February 2013, the Tribunal ordered both parties to file memoranda concerning the Respondent's Requests Nos. 3-11. The Tribunal asked the Respondent to state whether it intends to challenge the jurisdiction of the Tribunal or admissibility of the claim pursuant to the definition of "Investor of a Party" in Article 10.27 FTA, and if so the precise nature of that challenge and the relevance and materiality of the documents requested in the Respondent's Requests Nos. 3-11 to the challenge.
3. The Respondent delivered an undated memorandum on 15 February 2013 (**Respondent's submissions**); the Claimant's reply memorandum is dated 22 February 2013 and was delivered on that date (**Claimant's submissions**).
4. In this document, the Tribunal records its Rulings in respect of the Respondent's Requests Nos. 3-11.

**Respondent's Position**

5. The Respondent foreshadows two jurisdictional objections:
  - (a) the Claimant appears to be a US-UAE dual national who should be deemed to be an exclusive national of the UAE and therefore precluded from claiming under the US-Oman FTA (see Article 10.27 of the FTA below) ("**dual nationality objection**"); or

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(b) even if the Claimant lacks “official status” in the UAE, Oman may still submit a challenge because Mr Al Tamimi lacks a “genuine connection” to the US (“**lack of genuine connection objection**”).<sup>1</sup>

6. **Dual nationality objection:** this objection is based on the definition of “Investor of a Party” in Article 10.27 of the FTA:

**“Investor of a Party”** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality (underlining added).

7. The Respondent points to the following matters in support of its submission that the Claimant is likely to be a dual US-UAE national:

(a) The Claimant’s notice of intent states that, “*Mr Al Tamimi was a national of the United Arab Emirates*”.<sup>2</sup>

(b) Mr Al Tamimi was born in Ajman, which became one of the seven Emirates making up the UAE on independence from the UK in 1971. He held a passport issued from the Government of Sharjah between 1969 and 1971 (Sharjah was also one of the formative Emirates of the UAE in 1971). Oman asserts that UAE law provides that “*an ‘Arab settled in one of the Emirates during or before 1925’ will acquire citizenship by law.*” In other words, Oman says that the Claimant automatically became a UAE national when Sharjah joined the UAE. Oman notes that it continues to make enquiries as to whether UAE citizenship was automatic or required a formal registration.<sup>3</sup>

(c) The Sharjah passport presented by the Claimant as an exhibit to his witness statement expired in 1971.<sup>4</sup> That date precedes by 10 years the date when Mr Al Tamimi applied for citizenship in the US. In that intervening period on his

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<sup>1</sup> Respondent’s submissions, paragraph 2.

<sup>2</sup> Notice of Intent, paragraph 7.

<sup>3</sup> Respondent’s submissions, footnote 6.

<sup>4</sup> Al Tamimi witness statement, paragraph 7 and exhibit AT-001.

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own account, Mr Al Tamimi alleges that he received a degree from Victoria College in Baabda, Lebanon in 1972.<sup>5</sup>

(d) Mr Al Tamimi's petition to the United States for naturalization is ambiguous but arguably describes his nationality as the United Arab Emirates.<sup>6</sup>

8. Accordingly, the Respondent says that there is a real issue about the Claimant's nationality. If he is a dual national, then the Respondent submits that his dominant and effective nationality is at issue and Requests Nos. 3-11 are all relevant and material.

9. **Lack of genuine connection objection:** the Respondent's submissions say little about its second potential jurisdictional objection to Mr Al Tamimi's "*genuine connection*" to the US. In footnotes, the Respondent relies on the *Nottenbohm Case*<sup>7</sup> in which the ICJ had to determine whether Mr Nottenbohm had a genuine connection to Liechtenstein.<sup>8</sup> Further, the Respondent equates the terminology used in its Requests Nos. 3-11 of a "*real and effective nexus*" with the "*dominant and effective nationality*" terminology in Article 10.27 of the FTA. In this respect the Respondent relies on *Case No. A-18* in the Iran-US Claims Tribunal.<sup>9</sup>

10. The Respondent's argument appears to be that there is an overriding requirement of international law that a national of a contracting State must have a genuine connection or nexus with that State to be afforded the protection of a treaty to which that State is a party. The Respondent submits that as a result, Requests Nos. 3-11 are relevant to whether Mr Al Tamimi has a genuine connection with the United States.

**Claimant's Position**

11. The Claimant makes two principal points:

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<sup>5</sup> Al Tamimi witness statement, paragraph 6.

<sup>6</sup> Exhibit C-002.

<sup>7</sup> *Nottenbohm Case (Second Phase)*, Judgment of 6 April 1955, ICJ Reports 1955.

<sup>8</sup> Respondent's submissions, footnote 2.

<sup>9</sup> *Case No. A-18 Iran-USCTR* 251, 1984 WL 301280. See Respondent's submissions, footnote 11.

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- (a) The FTA does not contain a “genuine connection” or a “real and effective nationality” test;<sup>10</sup> and
- (b) Mr Al Tamimi is not a dual national.<sup>11</sup>
12. In relation to the first point, the Claimant submits that the test in clause 10.27 of the FTA is one of “dominant and effective nationality”, not “real and effective nexus”. The Claimant points out that these are fundamentally different tests, but in any event the “dominant and effective nationality” test is not relevant at all under clause 10.27 unless a natural person is a dual national. The Claimant submits that by reading a genuine connection or real and effective nationality test into the FTA for all persons whether or not they are dual nationals, would in effect create a new denial of benefits clause for individual investors. The denial of benefits clause in the FTA relates to enterprises, not individuals.
13. The Claimant distinguishes the *Nottenbohm* case and *Case No. A-18* as they each concern the determination of a person’s nationality as a matter of the international law of diplomatic protection. Neither case is authority for the proposition that a separate test of genuine connection or real and effective nationality ought to be implied into a treaty which contains specific rules for the determination of nationality. The Claimant submits that tribunals have expressly rejected the imposition of such a test in investment treaty cases.<sup>12</sup>
14. In relation to the threshold factual question of dual nationality, the Claimant asserts that he is not a dual national. He notes the Respondent’s equivocal view of what “appears” to be the relevant national law in the UAE. The Claimant refers to article 15 of UAE Federal Law No. 17 (the provision cited by the Respondent) and points out that it provides that UAE nationality shall be lost from any person who has adopted voluntarily nationality of another country, and that UAE nationality can be regained only if that person renounces the acquired nationality. Accordingly, the Claimant states, even if he automatically acquired the rights of a UAE national when Sharjah

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<sup>10</sup> Claimant’s submissions, paragraphs 2-6.

<sup>11</sup> Claimant’s submissions, paragraphs 7-10.

<sup>12</sup> Claimant’s submissions, footnote 9.

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joined the UAE in 1971, he lost that status by operation of the UAE law when he became a US citizen.

**Analysis**

15. The Respondent's Requests Nos. 3-11 are aimed at determining the jurisdiction to which the Claimant had the closest connection. None of the documents sought are arguably relevant and material unless either:
- (a) Mr Al Tamimi is a dual national of the United States and the United Arab Emirates; or
  - (b) There is a principle of customary international law which requires a claimant to show a genuine connection with his home state, regardless of the wording of a specific treaty.
16. Requests Nos. 3-11 are measured against these allegations in reverse order below.

**a. Lack of genuine connection objection**

17. The Tribunal has reservations about the ultimate merits of this prospective objection. The *Nottenbohm Case* concerned the extent of diplomatic protection; it was not an investment treaty case. Moreover, the Tribunal is not aware of a principle of international law, arising from *Nottenbohm* or otherwise, that requires a citizen of a State claiming treaty rights as a national of that State to prove more than citizenship, i.e. there is no further requirement of attachment, or genuine connection, or nexus, unless explicit in the relevant treaty.
18. While the Tribunal recognises that this objection has yet to be fully presented and remains open to further submissions on the point, on present material the Tribunal is not persuaded that this prospective jurisdictional objection is arguable and therefore the documents sought by Requests Nos. 3-11 are not sufficiently relevant nor material to the outcome of the case.

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**b. Dual nationality objection**

19. The argument regarding the Claimant's nationality is more complex. The Respondent is correct that on present material, the factual position as to Mr Al Tamimi's nationality as revealed by the Claimant's own material is not clear (emphases added in bold):

(a) The Notice of Intent dated 19 April 2011 states:<sup>13</sup>

"The investor in this dispute is Mr Adel A Hamadi Al Tamimi. He is a naturalized citizen of the United States of America. Prior to **obtaining his American citizenship in 1986, Mr Tamimi was a national of the United Arab Emirates** ("UAE"). Mr Al Tamimi no longer holds UAE nationality."

(b) The Claimant's memorial dated 16 November 2012 states:<sup>14</sup>

"Mr Al Tamimi was born in Ajman, a Trucial State, which gained its independence from the United Kingdom and became one of the seven Emirates making up the United Arab Emirates (UAE) in 1971. He moved to the United States in 1968 and **sought United States citizenship in 1980**. He has maintained his US citizenship consistently since then and is not a citizen of any other country."

(c) Mr Al Tamimi's witness statement deposes that he studied in Iran in 1965-66 and then briefly in Cairo, following which he obtained a student visa to study in the United States. At paragraph 5 he says "*at this time, my passport was issued by Sharjah, a neighbouring Trucial State of Ajman.*" At paragraph 6 Mr Al Tamimi says that **he arrived in the United States in 1968 and studied in Boston but ultimately completed his degree in civil engineering in Lebanon in 1972**. Thereafter he explains that instead of returning to the UAE he married a US citizen and following his marriage "*obtained a Green Card granting me permanent residence in the United States in 1974.*" He goes on to explain his business activities and residence in New England beginning in the 1970s. Mr Al Tamimi then states:

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<sup>13</sup> Notice of Intent, paragraph 7.

<sup>14</sup> Claimant's memorial, paragraph 12.

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**“I never applied to become a citizen of the United Arab Emirates,** which became an independent nation in 1971. I applied to become a naturalized citizen of the United States in 1980. I am still today a United States citizen. This is the only citizenship that I hold.”

- (d) Mr Al Tamimi has not annexed a passport valid between the expiry of the exhibited Sharjah passport in July 1971<sup>15</sup> and his exhibited United States passport issued on 25 April 2006.<sup>16</sup> Mr Al Tamimi must have had a passport post-July 1971 given his study in Lebanon and marriage, business dealings and residence in the US. As the Respondent notes, 1971 is a crucial date because it was also the year the UAE came into existence. Therefore, there must be a question as to what passport he held between 1971 and the year he became a citizen of the United States (1980 or 1986 on different accounts) and whether he continued to hold that nationality after gaining US citizenship.
20. Mr Al Tamimi is consistent that from some time in the 1980s he has been a US citizen and that he is not currently a UAE national. However, the Claimant’s material is equivocal about whether and, if so, when, he was ever a UAE national; when he became a US citizen (whether 1980 or 1986 is unclear); and what passports he held at various times, particularly between 1971 and 1980 or 1986. The Tribunal considers that whether the Claimant was a UAE national and, if so, whether, how and when he ceased to be UAE national are issues at large.
21. Some of these questions may be answered or deemed irrelevant depending on:
- (a) whether the reference to a “dual national” in clause 10.27 of the FTA is limited in its application to a situation where the investor is a dual national of the Contracting States; and
  - (b) the relevant law relating to UAE nationality.

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<sup>15</sup> The passport from the Government of Sharjah exhibited by Mr Al Tamimi (AT-001), was issued on 7 July 1969 and expired on 7 July 1971. This cannot have been the passport to which he refers at paragraph 5 of his statement being that which he travelled on during the years he was studying in Iran, Egypt and the United States between 1965 and 1968.

<sup>16</sup> The United States passport is exhibit AT-004. Mr Al Tamimi exhibits three US passports, all of which appear to be current.



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22. Neither party provided submissions on the first point. It is an open question whether the issue of the Claimant's UAE nationality (whatever his status is) has any relevance at all.
23. The parties' respective contentions in their memoranda about relevant UAE nationality law and how it applies to Mr Al Tamimi's situation are also unsatisfactory:
- (a) The Respondent suggests that Mr Al Tamimi may have automatically become a UAE national because UAE law states that "*an 'Arab settled in one of the Emirates during or before 1925' will acquire citizenship by law.*" It is unclear to the Tribunal how Mr Al Tamimi could be settled in one of the Emirates **during or before 1925**, because he was born in 1948. It is also unclear what is meant by the phrase "*will acquire citizenship by law*". The Respondent does not present this phrase as a direct quote from UAE legislation. It does not necessarily mean that UAE citizenship is acquired without a formal application. Indeed, the Respondent says in a footnote that it "*continues to make enquiries as to whether this process is automatic or requires a formal registration.*"<sup>17</sup> Accordingly, the Tribunal does not consider that the Respondent's submission<sup>18</sup> that "*Mr Al Tamimi automatically acquired the rights of a UAE national when Sharjah joined the UAE*" is well-founded on present information. Further, even if the Claimant was at one time a UAE national, the question of whether he retained UAE nationality and for how long is not addressed.
- (b) The Claimant's submissions concerning UAE law contend that UAE nationality is lost if a person adopts, voluntarily, the nationality of another country.<sup>19</sup> The Claimant then submits that "*even if Oman is correct that at some point in or after 1971 Mr Al Tamimi acquired UAE nationality by operation of law, he had lost that status by operation of the same law when he*

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<sup>17</sup> Respondent's submissions, footnote 6.

<sup>18</sup> Respondent's submissions, paragraph 5.

<sup>19</sup> Claimant's submissions, paragraph 7.

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*became a US citizen.*” The Claimant exhibits his current US passport.<sup>20</sup> If he is correct about the relevant UAE law, then he cannot be a dual national. However, a full explanation, particularly by an independent expert, as to the provisions and operation of relevant UAE law would be helpful. It is notable also that Mr Al Tamimi avoids explaining or clarifying whether or not he was a UAE national at any time; if so, whether and how he lost that status; and what passport(s) he held after 1971.

**Conclusion and Ruling**

24. The Tribunal concludes that it does not have enough information about: the relevance of the “dual national” reference in clause 10.27 FTA to dual nationals other than Oman-US dual nationals; Mr Al Tamimi’s nationality at various times; and relevant UAE law as to how UAE nationality is gained, retained and/or lost. Therefore, the Tribunal is not persuaded on present material that documents relevant to the Claimant’s dominant and effective nationality are relevant and material. Accordingly, the Respondent’s Requests Nos. 3-11 are denied.
25. There are two important reservations to this conclusion. First, the Tribunal is prepared to revisit the Respondent’s Requests Nos. 3-11 on better information as to relevant facts and law if such becomes available at an appropriate stage of the proceeding.
26. Secondly, the Tribunal is properly concerned to ensure that its jurisdiction is valid. The Claimant’s nationality, so far as this is a matter of fact, is one peculiarly within the knowledge of the Claimant. Yet the Claimant’s own material is inconsistent and incomplete in this regard. The Tribunal considers that a sufficient issue has been raised in relation to the Claimant’s possible status as a dual national that the Claimant’s travel documents for the years 1965 – 2012 ought to be disclosed.
27. Accordingly, subject to the process for objection set out below, the Tribunal orders the Claimant (to the extent he has not already done so) to disclose all passports held by him under any name between 1965 and 2012, or, to the extent, if any, that they

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<sup>20</sup> Al Tamimi witness statement paragraph 7 and exhibit AT-004.

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should not be available, other evidence of the official travel documents on which the Claimant traveled, or was permitted to travel, internationally between those years.

28. Surprisingly, the documents the Tribunal has ordered the Claimant to produce are not part of the Respondent's Request for Documents. The Tribunal therefore resorts to Rule 34(2)(a) of the ICSID Arbitration Rules that permits the Tribunal to, *inter alia*, call upon the parties to produce documents at any stage of the proceedings.
29. The Tribunal is also mindful of Articles 3 and 9 of the IBA Rules on the Taking of Evidence in International Arbitration 2010 (**IBA Rules**), which by agreement guide the Tribunal and parties regarding document production in this case.<sup>21</sup> Article 3.10 provides that at any time before the arbitration has concluded, the Tribunal may request any party to produce documents, provided that the party against whom the request is addressed may object to the request for any of the reasons set forth in Article 9.2. If an objection is made, it is dealt with according to the procedure set out in Articles 3.4 – 3.8 so far as applicable. As the Respondent did not request the documents now called for by the Tribunal, it is appropriate for the Claimant to have the opportunity to object to such disclosure.
30. Therefore, the Tribunal rules that the Claimant may object to the Tribunal's order in accordance with Article 3.10 on the basis of any of the reasons set out in Article 9.2 IBA Rules. Disclosure of the documents and/or any objection to disclosure must be delivered to the Tribunal and the Respondent within 13 days of the date of this Procedural Order No. 5, i.e. by **28 March 2013**. Any response to any objection by the Respondent must be delivered to the Tribunal and the Claimant 8 days thereafter, i.e. by **5 April 2013**.

[signed]

On behalf of the Tribunal  
Professor David A.R. Williams QC  
Date: 15 March 2013

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<sup>21</sup> Paragraph 15.1 of Procedural Order No. 1.