

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Tayeb Benabderrahmane

v.

The State of Qatar

(ICSID Case No. ARB/22/23)

**PROCEDURAL ORDER NO. 1
DECISION ON APPLICABLE ARBITRATION RULES**

Members of the Tribunal

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

Secretary of the Tribunal

Dr. Jonathan Chevry

March 13, 2023

CONTENTS

I.	INTRODUCTION AND PARTIES	3
II.	THE RELEVANT PROCEDURAL STEPS	3
III.	THE TRIBUNAL’S ANALYSIS	5
	A. Analysis	5
	B. Decision.....	10
IV.	ORDER.....	11

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**”)¹ 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. Subsequent to its constitution, the arbitral tribunal in this case (the “**Tribunal**”) noted that the Parties disagreed on the issue of the arbitration rules applicable to the proceeding. The Claimant considers that the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the “**2006 ICSID Arbitration Rules**”) should apply to this case, while the Respondent considers that it should be instead the 2022 ICSID Rules of Procedure for Arbitration Proceedings (the “**2022 ICSID Arbitration Rules**”).
4. The present order sets out the Tribunal’s analysis and decision on this issue.

II. THE RELEVANT PROCEDURAL STEPS

5. On September 14, 2022, the acting Secretary General of ICSID registered the Request for Arbitration filed by the Claimants on August 22, 2022, as supplemented by information contained in a letter from the Claimant to ICSID dated September 9, 2022, in accordance with Article 36(3) of the ICSID Convention. The Centre notified the Parties of the

¹ Signed at Doha on July 8, 1996.

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

registration. In the notice of registration, the Centre referred to the 2006 ICSID Arbitration Rules.

6. By letter of January 9, 2023, the Respondent indicated that it considered the 2022 ICSID Arbitration Rules to be applicable to this case, in lieu of the 2006 ICSID Arbitration Rules. The Respondent argued that this was because the Claimant consented to arbitration in his Request for Arbitration on August 22, 2022, and not when the Claimant filed a notice of dispute (in French a “*Demande de Règlement Amiable*”) to Qatar on November 15, 2021 (the “**Notice**”).
7. By letter of January 12, 2023, the Claimant indicated that the 2006 ICSID Arbitration Rules should apply to the dispute. The Claimant argued that pursuant to Article 8 of the BIT, the provision of a notice of dispute is a mandatory prerequisite to the submission of a dispute to arbitration. Therefore, the Claimant submitted that he “expressly indicat[ed] in his Notice the prerequisite and claim[ed] the right, if no amicable agreement was reached within six months, to initiate proceedings.” The Claimant therefore concluded that, as he had already indicated to ICSID in his correspondence prior to the registration of his Request for Arbitration, he gave his consent to ICSID Arbitration when he filed his Notice, on November 15, 2021.²
8. By letter of January 12, 2023, the Centre took note of the Parties’ respective submissions and indicated that the Centre had referred to the 2006 ICSID Arbitration Rules further to the registration of the Claimant’s Request for Arbitration based on the information contained in the Claimant’s Request for Arbitration, and in the Claimant’s letter of September 9, 2022, supplementing his Request for Arbitration. The Centre also indicated it would continue referring to the 2006 ICSID Arbitration Rules for the purpose of constituting the Tribunal. The Centre reminded the Parties, however, that this reference to the 2006 ICSID Arbitration Rules for the purpose of constituting the Tribunal should be

² Letter from the Claimant to the Centre, dated January 12, 2023. *See also* Letter from the Claimant to the Centre, dated September 9, 2022.

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

made without prejudice to the powers and functions of the Tribunal to decide on this issue in the event the Parties continued to disagree on the arbitration rules applicable to these proceedings following the constitution of the Tribunal.

9. The Parties did not comment on this letter of January 12, 2023 and made no further observations on the issue of the applicable rules.
10. On January 26, 2023, in accordance with the relevant provisions of the ICSID Convention, and with Rule 6(1) of the 2006 ICSID Arbitration Rules, the Secretary-General notified the Parties that Ms. Lucinda Low, appointed by the Chairman of the ICSID Administrative Council, Mr. Makhdoom Ali Khan, appointed by the Respondent, and Professor Andreas Bucher, appointed by the Claimant, had all accepted their appointments, and that the Arbitral Tribunal was deemed to have been constituted on that date. Dr. Jonathan Chevry, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. By letter of February 8, 2023, the Tribunal noted that it had reviewed the Respondent's letter of January 9, 2023, the Claimant's letter of January 12, 2023, and the ICSID letter of January 12, 2023, on the applicable arbitration rules to this proceeding, and indicated that it intended to rule on the matter before holding the first session. The Tribunal therefore invited the Parties to provide additional comments on the issue of the applicable rules.
12. On February 23, 2023, the Parties sent their additional comments on the issue of the applicable rules.
13. The Tribunal has carefully considered the Parties' submissions on this issue and, having deliberated, sets forth below its analysis and decision.

III. THE TRIBUNAL'S ANALYSIS

A. ANALYSIS

14. Article 44 of the ICSID Convention states in pertinent part as follows:

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section, and except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration.

15. Inasmuch as the parties have not “otherwise agree[d]”, this provision makes the date of the Parties’ consent to arbitration the determinative factor with respect to the applicable rules.
16. While the Tribunal is aware that the Respondent has reserved its right to make jurisdictional objections, including on the entry into force of the BIT, the consent of the State in this case is not in dispute, at this stage, as it is reflected in the standing offer contained in the BIT under which the claim is brought. The issue is when the Claimant’s acceptance of that offer, through its provision of consent to arbitration, took place.
17. The Parties agree that under either the 2006 or 2022 the ICSID Arbitration Rules, the date of such consent cannot be any later than the filing of the Request for Arbitration, but they also agree that a claimant’s acceptance and consent can take place earlier.³ The Tribunal notes that this agreement is in accord with the view that other tribunals and authorities have taken in such matters.⁴

³ See Claimant’s Memorandum on Applicable Arbitration Rules, dated February 23, 2023, para. 5; Letter from the Respondent to ICSID, dated February 23, 2023, p. 2.

⁴ See, e.g., amongst the cases cited by the Parties, *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, para. 446; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, September 3, 2013, para. 221; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, December 30, 2016, paras. 359-360; *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal dated December 8, 1998, para. 44; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction dated July 17, 2003, para. 98; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction dated August 6, 2003, paras. 30-32; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction dated December 8, 2003, paras. 1, 56; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated April 27, 2006, para. 36; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections to Jurisdiction dated July 27, 2006, paras. 1, 37-38; *ADC Affiliate Limited and ADC & ADMC*

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

18. The Parties disagree, however, as to the factual question whether the notice of dispute that the BIT required be given, in this case, at least six months prior to the filing of the Request for Arbitration, contained such an acceptance and therefore can form the basis for consent. The Respondent submits that such an acceptance, being unusual, must be clearly manifested in the event it is deemed to have been made prior to the submission of the Request for Arbitration.⁵ The Claimant submits that the BIT's requirement for the submission of a notice of dispute effectively precludes its consent being given at the time of the submission of the Request for Arbitration.⁶
19. In the Tribunal's view, no special standard of proof should apply to the factual issue of whether and when consent has been given. The Claimant as the moving party on this issue bears the burden of proof of its position that its consent was reflected in the Notice and that the 2006 ICSID Arbitration Rules therefore apply.
20. Examining the evidence of consent as reflected in the documents before it, the Tribunal has concluded that it does not sufficiently establish that the Claimant consented to arbitration in the Notice.
21. Although the BIT requires the submission of a notice of dispute as a prerequisite to the commencement of arbitration, and establishes a six-month waiting period, the Tribunal understands that this notice is to put the host State on notice of potential claims and to provide an opportunity to have such claims resolved amicably, without arbitration. Indeed, Article 8(1) of the BIT specifies that :

Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal dated October 2, 2006, paras. 15, 363; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award dated December 8, 2008, paras. 10-11.

⁵ Letter from the Respondent to ICSID, dated February 23, 2023, p. 4.

⁶ Claimant's Memorandum on Applicable Arbitration Rules, dated February 23, 2023, para. 17.

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

“tout différend de nature juridique...entre l’une des Parties contractantes et un investisseur de l’autre Partie contractante est réglé à l’amiable entre les deux Parties concernées.”

22. To that end, the *Demande* section of the Claimant’s Notice stated in paragraph 51 that:

“En l’espèce, M. Benabderrahmane entend, par la présente, engager avec l’État de Qatar, la procédure de règlement amiable prévue à l’Accord afin de solliciter la restitution de l’ensemble des biens confisqués et, a default, le paiement par cet Etat de l’indemnité.”

23. The Claimant goes on to reiterate his availability to meet the representatives of the Respondent to reach an amicable resolution of this matter.⁷

24. The Claimant relies on paragraph 61, the final paragraph of the Notice, as the basis of his acceptance of the State’s offer to arbitrate in the BIT and therefore his consent. Paragraph 61 states in full as follows:

“Conformément aux dispositions de cet article, la notification de la présente demande fera courir un délai d’une durée de six mois afin de régler le différend à l’amiable et, dans l’hypothèse où le différend ne serait pas réglé dans ce délai, Monsieur Benabderrahmane indique qu’il se réserve, d’ores et déjà, le droit de soumettre ce différend à l’arbitrage.”

25. In particular, the Claimant points to the reservation of rights to submit the dispute to arbitration, at the end of that paragraph, as implicitly reflecting his acceptance and consent to arbitration.⁸

26. The Tribunal, however, considers the language ambiguous. While the Claimant’s reservation of rights could potentially be viewed as a present consent to arbitration, it could also equally be viewed as a reservation of the right to consent to arbitration in the future, should the efforts to reach an amicable settlement fail. This latter reading would be consistent with the possibility that settlement efforts (the very context of the Notice) may

⁷ Notice, dated November 15, 2021, para. 60.

⁸ Claimant’s Memorandum on Applicable Arbitration Rules, dated February 23, 2023, para. 14; *see also* Request for Arbitration, para. 58 (quoting this paragraph).

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

succeed, rendering any recourse to arbitration proceedings unnecessary. The Tribunal, therefore, interprets this language as the Claimant making clear to Qatar that he is not waiving any rights to pursue arbitration should the effort at an amiable resolution fail. Reading this reservation of rights as a non-waiver only is consistent with the plain text as well as the context in which the reservation was made.

27. The Tribunal appreciates that paragraph 58 of the Request for Arbitration, submitted on 22 August 2022, expresses the view that Claimant “has already consented” to Respondent’s offer to arbitrate in its Notice.⁹ That subsequent assertion is not dispositive of the issue of whether the Notice in fact reflected such consent, however. Moreover, that paragraph goes on to state that “Qatar has refused to even engage in attempting an amicable solution, therefore Mr. Benabderrahmane states that he accepts Qatar’s consent to the submission of the present dispute to [ICSID] pursuant to Article 8 of the BIT.”
28. While this latter clause may have been intended to function as “belt and suspenders” from the Claimant’s perspective, it presents a useful contrast to the ambiguous language in the Notice, expressing in unambiguous terms the consent that the Tribunal has found lacking in the Notice.
29. The Tribunal observes that a number of the cases in which other tribunals have found consent of the investor to have been given prior to the submission of the request for arbitration involve factual scenarios in which the consent was explicitly given in a separate instrument (such as a letter or a power of attorney), prior to the filing of the request for arbitration.¹⁰
30. For these reasons, the Tribunal concludes that Claimant’s acceptance of Qatar’s offer to arbitrate in the BIT took place on 22 August 2022, at the time of its filing of the Request

⁹ Request for Arbitration, para. 58.

¹⁰ See authorities cited at pp. 3-4 of the letter from the Respondent to ICSID, dated February 23, 2023.

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

for Arbitration. Both parties having consented to arbitration as of that date, Article 44 of the ICSID Convention requires the application of the 2022 ICSID Arbitration Rules.

31. The Tribunal does not consider that the BIT's requirement of a notice of dispute precludes the consent of an investor to arbitration at the time of the Request for Arbitration. For that to be the result, in its view, the BIT would need to be considerably more prescriptive regarding the effect of such a notice than it is. The Tribunal also notes that many of the cases referenced earlier appear to have involved similar waiting periods.
32. Given the Tribunal's conclusion that the reservation of rights in the Notice did not constitute consent of the investor, the Tribunal does not need to reach the Respondent's argument regarding Article 25(1) of the ICSID Convention.¹¹

B. DECISION

33. For these reasons, the Tribunal has concluded that Claimant's consent to arbitration was given in its Request for Arbitration of August 22, 2022, and that the 2022 ICSID Arbitration Rules therefore apply to these proceedings.

¹¹ Letter from the Respondent to ICSID, dated February 23, 2023, p. 5.

Procedural Order No. 1
Decision on the Applicable Arbitration Rules

IV. ORDER

34. On the basis of the decision set forth in the preceding paragraph, the Tribunal orders that these proceedings shall go forward on the basis of the 2022 ICSID Arbitration Rules.

On behalf of the Tribunal

[signed]

Ms. Lucinda Low
President of the Tribunal
Date: March 13, 2023