Tayeb Benabderrahmane v. The State of Qatar

ICSID Case No. ARB/22/23

Opinion of Lucinda A. Low,
President of the Tribunal

Concurring in Part and Dissenting in Part

1. I am in agreement with the decision of my co-arbitrators to grant only to a limited extent the Claimant's Application for Production of Documents (the "Application") with respect to the requests for documents of the Respondent (referred to by the Respondent as the First Set of Requests, consisting of Requests Nos. 1, 2, and 5-7), with the exception as to Request No. 2, that I would grant it with respect to an inventory of the seized assets, to the extent the documents previously voluntarily produced by the Respondent, and particularly the examination report, do not constitute such an inventory.[1] I consider the Application with respect to the First Set of Requests to represent a fishing expedition in their breadth and not necessary for the preparation of the Claimant's Statement of Claim, and therefore appropriate to grant only with respect to the documents reflecting the most basic measures taken by the Respondent against the Claimant. I cannot agree, however, with my co-arbitrators' decision regarding the Claimant's own documents (the Second set of Requests, consisting of Requests Nos. 10-18).

2. In my view, my co-arbitrators fail to fully consider and apply the relevant standard of decision, and this Tribunal's prior procedural order, and fail to adequately take into account the fundamental due process issues raised by the Claimant's Second Set of Requests. For that reason, I subscribe neither to their *ratio decidendi*, nor to their decision as to this Second Set of Requests, for the reasons more fully set out below. I also address a timeliness issue which the majority fails to explicitly address.

[1] Requests Nos. 3-4 and 8-9, which were originally part of this first set of requests, have been withdrawn by the Claimant. Hereinafter, references to the "First Set of Requests" shall be deemed to mean the remaining requests in items 1-9, namely those referenced in the text above.

I. Standard of Decision

3. Article 36(c) of the 2022 ICSID Arbitration Rules, which as determined by the Tribunal in its Procedural Order No.1 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 proceeding". The Tribunal thus has the power to grant an application at this stage if it deems appropriate. And in fact 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.

4. The criteria for the Tribunal's decision on such requests are set forth in Article 37 of the Rules, which provides as follows in mandatory language:

> **Rule 37: Disputes Arising from Requests for Production of Documents**
>
> In deciding a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall consider all relevant circumstances, including:
>
> (a) the scope and timeliness of the request;
>
> (b) the relevance and materiality of the documents requested;
>
> (c) the burden of production; and
>
> (d) the basis of the objection. [emphasis added.]

5. Two principal conclusions follow from a textual review of Rules 36 and 37: First, document production can be ordered by the Tribunal at any stage of the proceedings. There is no rule that limits when production must be sought. Second, the decision of the Tribunal should be based on a consideration of "all relevant circumstances", of which relevance and materiality are only one element.

6. Article 37 thus provides the rule of decision for this Tribunal on the Claimant's Application. The IBA Rules are guidance in these proceedings, but not mandatory.[2] In any event, like the ICSID rules, they do not preclude a preliminary application. They provide little guidance, however, for a preliminary request such as this.

II. Analysis

7. Apart from the point noted above regarding Request No. 2, I have no disagreement with my colleagues' decisions on the First Set of Requests. My analysis will therefore focus on the Second Set of Requests. To summarize this set, the requests therein represent documents seized from the Claimant by the Respondent in connection with the various repressive measures taken by Respondent against him in 2020. The Second Set of Requests is comprised of the Claimant's own documents, it requires consideration of a fundamentally different set of facts and circumstances than the First Set of Requests.

A. Scope; Timeliness; Relevance and Materiality

8. As to timeliness, as has already been noted, the rules governing the Tribunal's decision do not preclude a determination that early production of documents is possible. Plainly, they do not limit the time at which production can be made. Moreover, the test, as Rule 37 makes plain, is not just relevance and materiality as my colleagues' analysis emphasizes (*cf.* paras. 16, 19), but "all relevant circumstances", which they only briefly acknowledge but do not fully consider. Of course it is true that in most proceedings, document production does not occur until the Tribunal has before it at least one round of pleadings. But in the typical situation the claimant is already in possession when preparing his Statement of Claim of the basic corpus of evidence from which his affirmative claims may be set out. That is not the case here with respect to the Claimant's documents. Accordingly, the Application cannot be said to be untimely on this basis. (In Section III below, a procedural timeliness issue, which the majority does not explicitly address, is addressed.)

[2] PO2, Section 15.1 explicitly provides as follows: "Articles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2020) (the "IBA Rules") shall provide guidance for the Tribunal and the parties in this proceeding."

9. It is also important to recall at this juncture that this Tribunal's Procedural Order No. 2 granted to the parties the opportunity, prior to the filing of memorials, for preliminary applications to be made for the production of documents. This order is consistent with Rule 37 which as already indicated does not limit the time when such applications may be made.

10. As to scope, the majority appears to consider this Second Set of Requests to be overly broad and insufficiently specific (*cf.* para. 24), in other words, a "fishing expedition". Their view is misconceived.

11. It is not a fishing expedition for a claimant whose documents have been seized by a respondent to seek to have access to those documents for purposes of making his case before the tribunal adjudicating his claims. The Claimant is not seeking to find documents which may be helpful to his case of which he is not aware, but is seeking documents that are known to, presumably in many cases created, and/or previously held, by him, that reflect his business activities. Each Request in this Second Set, in contrast to the Requests in the First Set, is framed around a specified activity of the Claimant. That is not fishing. For this reason, the Second Set of Requests is in my view fundamentally different from the First Set of Requests.

12. Turning to relevance and materiality, which occupies center stage in the majority's decision, I disagree with my colleagues not only on the weight they ascribe to this element, but on their insistence on an unrealistic and inappropriate standard at a preliminary stage. If the Tribunal is not capable, as the majority says, of determining relevance and materiality at this stage, so, I would respectfully submit, neither is it in a position at this juncture to pronounce *ex cathedra* on what the Claimant may or may not need to make his case. (*cf.* para. 18) Whether the documents to which the Claimant seeks access (which we must recall are his own documents) go to jurisdiction, the merits, or damages, all of which he has the burden of proving in these proceedings, and most immediately in the Statement of Claim he is required to file 120 days from this Tribunal's decision on the Application, is for him to judge at this stage. The fact that he can pinpoint specific activities in which he may have engaged of the course of his business activities involving the Respondent does not mean he should be required to rest on his memory in that Statement of Claim, as the Respondent suggests and my colleagues appear to

accept.[3] He has a fundamental due process right to be heard, and has asked for access to his own documents for purposes of making his case. It is a poor, indeed, in my view unsatisfactory, answer to say that he can seek to prove his case on the basis of witness statements. It is also inefficient and inconsistent with the principle of equality of arms.

13. In my view, the Claimant has made a sufficient showing of relevance and materiality in the Application by linking his Requests in the Second Set to specific submissions in the Request for Arbitration, the document that initiated these proceedings.[4] Frankly, it is not clear to me what more the Claimant could do at this stage. There is no other document that is part of these proceedings to which he could turn to show relevance and materiality. Linking his requests to provisions in the Request for Arbitration in my view sufficiently demonstrates relevance and materiality at this stage, given the relevant circumstances.

14. Moreover, for the majority to rule that a party may make a preliminary application for production of documents but then to reject such an application involving the documents comprising the Second Set of Requests on the grounds that the requesting party has not made a sufficient showing of relevance and materiality is tantamount to saying that no preliminary application will ever be capable of succeeding. That approach cannot be reconciled with Rule 37, and would make a mockery of the Tribunal's decision permitting such applications in Procedural Order No. 2.[5]

---

[3] The majority has asserted, consistent with the Respondent's position, that the Claimant has not been sufficiently specific. But any cursory review of the requests in the second category show specificity. They also indicate how the Claimant intends to use the documents requested in his Statement of Claim. His specificity in making the requests—a necessary element--should not be turned on its head to argue that it shows he does not need the documents, as Respondent has submitted and the majority has apparently accepted.

[4] The Claimant also cites his Notice of Arbitration and the very general submissions made by the Claimant in the First Session of the Tribunal, when he made his first preliminary application. Neither of these is entitled to significant weight in relation to the Application, the latter as they were too general, and the former because it was prior to the initiation of these proceedings.

[5] Ordering the production of a handful of documents of Respondent in response to the first category of requests does not change this analysis. The majority characterizes these document of Respondent as "very basic" or "fundamental" (para. 21) which they accept that the Claimant should receive. And they are basic in the sense of reflecting the repressive measures taken by the Respondent against the Claimant that form the background of this case. But the fact of these basic measures is not in dispute, and these documents can hardly can be said to be necessary for the Claimant to make its case in the same way as the Claimant's own documents. Thus, while ordering production of a handful of the Respondent's documents may allow the majority to comfort themselves that they are not making a mockery of their own previous procedural order or the rules of decision, in my view this is but a fig leaf.

15. In saying this, I do not read Procedural Order No. 2 as mandating approval of a preliminary request. Rather, by permitting such preliminary applications, in my view PO No. 2 recognizes that early stage applications can lie in some circumstances. If that is the case, it necessarily implies that the approach that might be taken at a later stage must be adapted to fit the preliminary stage when the application is made.

16. It therefore seems to me correct, as the Claimant submits, that relevance and materiality should be judged for the purposes of this request on a *prima facie* basis, and that the specific links, with respect to each of the requests in the second group, to his Request for Arbitration, are sufficient at this stage to establish those criteria.

17. Having dealt with the elements of scope, timeliness, and relevance and materiality, the first two subparagraphs set forth in Rule 37, I will now turn to the remaining elements.

B. Custody, Control and Possession; Other Objections

18. I agree with my co-arbitrators that whether the Claimant provided all of his documents to the Respondent as part of the asset seizure, or retained some, is irrelevant to whether the requested documents in the second group are in the custody, control, or possession of the Respondent. The seizure is not in dispute. Indeed, the second of the four documents voluntarily produced by the Respondent, a report of the Respondent's authorities following an examination of the seized assets, makes it clear that documents were seized, and Respondent has not denied this.

19. I also agree with my co-arbitrators (*cf.* para. 19) that the Respondent's stated intention to make jurisdictional objections is not relevant to the decision on the preliminary application. The Respondent has not yet made such an objection, and no jurisdictional issues have been addressed by this Tribunal.

20. Finally, I agree with my co-arbitrators that the fact that the relief requested by the Claimant includes return of the seized assets does not preclude granting these requests, and does not require a provisional measures request. (*cf.* paras. 18, 23) Yes, the requested relief as formulated would include any seized documents as part of the broader group of assets seized.

But that overlap does not mean that a document request made for the purpose of making the Claimant's case in these proceedings cannot lie. And the fact that the Claimant could have made, but thus far has chosen not to make, a provisional measures request also does not preclude a request for production of documents which is aimed at enabling him to make his case. By the same token, an affirmative decision on a production application does not imply in any way a determination as to the lawfulness of the asset seizure or a prejudgment of the merits of the claims.

21. This purpose does mean that use of the documents by the Claimant for any other purpose would be proper. I would grant the Second Set of Request not for all purposes, but for the sole purpose of use by the Claimant in these proceedings to make his case. That is consistent with the nature of the Application, not as a provisional measures or final relief request, but as a document production application only. But given the majority's blanket, and in my view, wrong-headed, denial of the Claimant's requests for his own seized documents, that issue need not be reached.[6]

22. Respondent's objections on these grounds thus do not in my view defeat the Application with respect to the Second Set of Requests.

C. Conclusion

23. Having considered the specific objections and grounds set forth in Rule 37, when "all relevant circumstances" of this case are considered, and in particular the fundamental due process element of permitting the Claimant to make its case through having full access to his own documents, I would grant the Application as to the Second Set of Requests in full.

---

[6] As the majority decision notes, the Tribunal has been made aware of a judicial requisition for documents (or at least certain documents) produced in these proceedings. The requisition document as I read it seems to focus on the documents that reflect the measures taken by the Respondent against the Claimant (*toutes pieces en votre possession concernant la procedure dont vous auriez fait l'objet au Qatar et dans le cadre de laquelle vous auriez ete interpelle le 13 janvier 2020, puis incarcere jusqu'au 1er juillet et assigne a residence jusqu'au 31 octobre 2020)*. That would also be consistent with what the letter indicates are the claims in the French proceeding. It is therefore not clear to me that the order relates to the Second Set of Requests at all. Rather, it seems more relevant to the First Set of Requests, as to which the Tribunal is in agreement regarding their disposition. In any event the existence of this judicial requisition does not establish that the Application is in bad faith. The Claimant has a need to make his case in these proceedings and if he cannot his claims will fail. That provides a sufficient basis for the Second Set of Requests.

III. Procedural Issues

24. Finally, I note that the majority decision fails to explicitly address the timeliness of the Claimant's Application, a matter that is challenged by the Respondent.

25. The Claimant addressed the Respondent's objection to the timeliness of his Application in his letter of July 31, 2023. He observes that the provisions of the Preliminary Procedural Calendar need to be read in conjunction with the Procedural Order No. 2 itself, particularly Article 15 thereof dealing with the production of documents. Under this Article, the Claimant notes, before any application for production of documents is submitted to the Tribunal, a request should be made to the other party which, if opposed, can then give rise to an application.

26. The Claimant submits that he made its document request to the Respondent on May 11, 2023, and notes that the Respondent addressed its request in a letter of June 22, 2023. Because the Respondent indicated its intention to oppose any application that the Claimant might file, the Claimant then proceeded to submit the Application.

27. Annex B to Procedural Order No. 2, the Preliminary Procedural Calendar, stated as follows regarding preliminary applications for the production of documents:

> **Preliminary Applications**
>
> 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.

28. The Preliminary Procedural Calendar went on to establish that the deadline for the Claimant's Memorial would be "120 days from the date when the parties were directed to comply with a decision of the Tribunal on an application referred to above and absent any such application and decision, 120 days from the issuance of Procedural Order No. 2."

29. Procedural Order No. 2 also sets forth, in Article 15, provisions for the production of documents in general—*i.e.*, both preliminary applications, governed by the Preliminary Procedural Calendar, and the full Procedural Calendar (yet to be determined) that will govern the stages of these proceedings beyond that which is covered by the Preliminary Procedural Calendar.

30. If Procedural Order No. 2, including the Preliminary Procedural Calendar, were read to limit preliminary applications to 30 days from the date of the Order, then any application to the Tribunal for production of documents would have needed to be filed by May 11, 2023. As that was demonstrably not the case here, the Application would in fact be untimely. However, in my view, Procedural Order No. 2 should not be so narrowly construed, for several reasons.

31. First, the Claimant is correct that the document production process as envisioned by Article 15 of PO2 contemplates that application to the Tribunal for decision only be made after the parties have had an opportunity to engage on a request. This process has the benefit of potentially narrowing the issues that may be disputed and become the subject of an application (as in fact occurred here). Although the Preliminary Procedural Calendar speaks plainly of the filing of an application within 30 days of the Order, it would make no sense to bypass this initial *inter partes* stage, which is standard and contributes to efficiencies. In this case, although the direct request to the Respondent did not yield an extensive production, a few documents were produced by the Respondent with its June 22 letter.

32. There is a small discrepancy between the parties as to when the Claimant made his production request to the Respondent. The Claimant indicates in its more recent correspondence that it was on May 11, 2023; the Respondent indicates it received the request on May 12. The Claimant's letter to the Tribunal of July 12, 2023 refers to the date as being May 12, 2023, as does the Application itself. In any event the Tribunal, through the Secretariat, was notified by the Claimant of the request on May 11, 2023. Accordingly, I consider that the Application, growing out of a request that was filed 30 days from Procedural Order No. 2, was timely. I presume my colleagues do not disagree with this, as they have decided on the merits of the Application, thereby implicitly treating it as timely, but consider that the objection of the Respondent to timeliness should be explicitly addressed.

33. In any event the Preliminary Procedural Calendar contemplates the possibility of additional preliminary applications under the ICSID Rules or the Procedural Calendar once adopted. The Tribunal would thus have discretion under the Rules to permit an additional preliminary application.

34. For these reasons, the Respondent's objection to the timeliness of the Application is rejected.

35. In sum, I would grant the Application as to the Second Set of Requests based on the totality of the relevant circumstances of this case. I regret the need to dissent on this matter, but consider that my colleagues have not fully grappled with the standard of decision, have set a bar for preliminary applications that is virtually impossible to meet and that cannot be reconciled with the Tribunal's procedural order regarding the same, and is not sufficiently responsive to the fundamental due process issues that the Second Set of Requests presents.

[redacted]

Lucinda A. Low October 3, 2023