

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Omega Engineering LLC and Oscar Rivera

v.

Republic of Panama

(ICSID Case No. ARB/16/42)

PROCEDURAL ORDER No. 2

DECISION ON CLAIMANTS' APPLICATION OF 9 DECEMBER 2019

Members of the Tribunal

Mr. Laurence Shore, President of the Tribunal

Dr. Horacio A. Grigera Naón, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

18 December 2019

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I. Background

The Tribunal has considered Claimants' letters dated 9 and 13 December 2019, and Respondent's letter dated 12 December 2019.

1. The gravamen of Claimants' 9 December 2019 application is that Respondent's latest submission (in particular, Respondent's Expert, R. Pollitt) (a) relied on documents from criminal investigation files and had "access to the *entirety* of those files" [emphasis in the original], and (b) "reviewed and/or relied on other factual materials" that Respondent has not produced or even identified.
 - Claimants state that they requested these materials in the document production phase, but Respondent replied that it could not access the criminal investigation files. It is now clear, Claimants say, that Respondent did have access to the files, and this creates a fundamental disadvantage to Claimants and their expert. Claimants also argue that from Respondent's latest submission it is clear that Respondent has failed to meet their production obligation pursuant to the Tribunal's previous Order regarding Request No. 42.
 - Claimants therefore request that the Tribunal order Respondent to produce "all documents or other materials reviewed by and/or relied upon by Mr. Pollitt in rendering his report." Absent such an order, Claimants contend that there would be a "significant violation" of Claimants' due process rights. Claimants further request an order of immediate production.
2. In opposition, 12 December 2019, Respondent first quotes Request No. 42 and the Tribunal's Order regarding Request No. 42, and states that Panama "has fully complied with that request." Respondent then contends that Claimants are actually pursuing a "different and new request," which is production of all documents in Mr. Pollitt's file, "all" meaning both documents relied on and those not relied on.
 - Respondent states that all documents relied on by Mr. Pollitt have been produced.
 - As for documents reviewed but not relied on, Respondent states that there was no prior request for such documents and no "rule of procedure or evidence requiring a party-appointed expert to produce all documents received by or reviewed by it in the course or preparing a case. Respondent cites, for support, to the IBA Rules on the Taking of Evidence in International Arbitration and Procedural Order No. 1 (section 14.1).
 - Respondent concludes that Claimants have no basis to request, "and the Tribunal has no grounds to order," documents that Mr. Pollitt did not rely on. Respondent

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adds that Mr. Pollitt did not have access to the entirety of the criminal investigation files, “but only to relevant portions, of which he has produced the items on which he relied.”

3. In reply, 13 December 2019, Claimants make, *inter alia*, the following points:

- Respondent, previously, successfully opposed documents request on the grounds that Panamanian law precludes access to criminal investigation files from “parties that did not directly participate in the investigation.” However, it is now clear that Respondent not only had access but also provided access to its expert witness. The expert did not “directly participate” in the investigations and therefore should never have had access. Thus, either Respondent’s previous arguments to avoid production were untrue or Respondent has violated its own law.
- Respondent has not complied with Request No. 42, since Mr. Pollitt has given the “clear impression” that he reviewed the entirety of the investigation files and relied on the information in the investigations “*writ large*” [emphasis in the original].
- In any event, all the materials provided to Mr. Pollitt are “*by definition*” [emphasis in the original] documents that fall into the Request No. 42 category.
- Respondent thus has been able to produce documents that are only helpful to it by referring to grounds of legal impediment. This is “pure gamesmanship.”
- Equality of arms and due process of law are fundamental principles that cannot be dismissed.
- Claimants reiterate that Respondent should be ordered to immediately produce all documents and other materials provided to Mr. Pollitt, which should have been produced under Request No. 42.

II. Tribunal’s Decision

There are three “production” issues implicated in the current application: (i) whether Respondent has complied with Request No. 42; (ii) possibly separately from Request No. 42, an expert’s obligation (or the obligation of her/his appointing party) to produce with the expert’s report all documents relied on (or, on Claimants’ case in part, reviewed if not relied on); and (iii) ICSID Arbitration Rule 34(2)(a): “*The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts.* [referenced at Section 16.4 of Procedural Order no. 1].”

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The Tribunal considers that resolving point (ii) is the first step, and may render other issues moot. In resolving point (ii), the first question is *what* Mr. Pollitt arguably relied on in reaching his opinions. This may also moot the ‘relied on/reviewed’ distinction advanced by Respondent.

In its 9 and 13 December letters, Claimants point to certain passages in Mr. Pollitt’s Report, at pages 1-2, 23, 27, 28, 29-30 34-35, which, Claimants say, give the impression that Mr. Pollitt reviewed the entirety of the investigation files, and, further, show that he relied on this “‘information” in reaching his (incorrect) conclusion that Mr. Rivera committed bribery and money laundering.”

In addition to the passages referenced by Claimants, the Tribunal notes that at pages 1-2 of his Report, Mr. Pollitt states that, in connection with his assignment, he reviewed materials collected by “both Panama’s National Assembly and Prosecutor’s Office as they relate to the unjust enrichment and corruption scheme; with a particular focus on Oscar Rivera, Omega US and Omega Panama, in order to assess whether those materials support a conclusion of illicit activity by Mr. Rivera and any of the Omega companies.” He also reviewed (i) “additional information identified as part of Exiger’s independent investigation and conclude whether Oscar Rivera, Omega US, or Omega Panama engaged in money laundering and corrupt behavior”; and (ii) the expert report of Alison Jimenez. Mr. Pollitt then refers to his review of “case materials ... produced both during the investigation of former Justice Moncada Luna and the subsequent International Arbitration”; interviews with key figures; and investigative research.

In his concluding paragraph at page 35, Mr. Pollitt states as follows: “Based on my review of the documents and my experience investigating construction related bribery schemes, I believe that JR Bocas Investments was an entity set up by Ms. Reyna to help her do her job – which was to launder funds as requested by her co-conspirators.”

In view of the passages cited by Claimants and the passages identified above, the Tribunal considers that Mr. Pollitt does not himself clearly distinguish the files he “relied on” in reaching his opinions from those that he merely ‘reviewed’ but did not rely on. The opening sentence of Mr. Pollitt’s conclusion at page 34, quoted by Claimants (“Having conducted a detailed review of the documents generated during the investigations conducted by both the National Assembly and the Public Prosecutor’s office, . . .”), is an example of an ‘all-inclusive’ approach; his review of all files provided to him assisted him in reaching his opinions.

Absent a clear identification by the expert witness of documents reviewed but not relied on – and the Tribunal sees no basis for assuming in this instance that the only documents relied on are those specifically cited in the expert’s report – **the Tribunal determines that under Article 3(1) of the IBA Rules on the Taking of Evidence in International Arbitration (“each Party shall submit . . . all Documents available to it on which it relies”)** (referred to in Section 15.1 of Procedural Order No. 1), and ICSID Arbitration Rule 24, all documents provided to and reviewed by Mr. Pollitt shall be expeditiously produced to Claimants. In particular, the

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investigatory files (National Assembly and Public Prosecutor) provided to Mr. Pollitt shall be expeditiously produced to Claimants.

In reaching this decision, the Tribunal does not reach – and does not need to reach – any determination *or express or form any view* concerning alleged non-compliance with Request No. 42 or any other argument advanced by Claimants in their application for documents reviewed by Mr. Pollitt (and, as the Tribunal has found, such documents arguably helped him form his opinions). Moreover, the Tribunal need not reference ICSID Arbitration Rule 34(2)(a) in this instance.

The Tribunal thanks the Parties for their excellent submissions on this matter.

[signed]

Laurence Shore
President of the Tribunal
Date: 18 December 2019