

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

**PROCEDURAL ORDER NO. 4
RULINGS ON THE RESPONDENT'S FIRST REQUEST 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 accordance with the procedures and timetables established by Procedural Order No. 1 dated 13 July 2012 and Procedural Order No. 3 dated 10 October 2012, the Respondent submitted its First Request for the Production of Documents to the Tribunal on 8 January 2013 (“**Request for Document Production**”).
2. As required by the relevant Procedural Orders, the Respondent’s Request for Document Production was comprised primarily of a completed Redfern Schedule setting out the parties’ positions with respect to each disputed request. In addition, the Respondent made supplementary submissions in its letter dated 8 January 2013 and the Claimant made a number of general comments in a document entitled Claimant’s Responses to Oman’s First Request for Documents and Information.
3. In this document, the Tribunal records its Rulings in relation to the Respondent’s Request for Document Production.

Applicable Principles

4. Paragraph 15.1 of Procedural Order No. 1 provides *inter alia* as follows:

“15.1. Articles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) may guide the Tribunal and the parties regarding document production in this case.”
5. Article 3(a)(ii) of the 2010 IBA Rules requires each request to refer to “a narrow and specific requested category of documents”. Article 9(2) provides, *inter alia*, that the Tribunal shall “exclude from [...] production any document [...] for any of the following reasons [...]”. The listed reasons in paragraphs (a), (c) and (g) of Article 9(2) are of particular relevance in this case. They provide as follows:
 - “(a) lack of sufficient relevance to the case or materiality to its outcome; [...]
 - (c) unreasonable burden to produce the requested evidence; [and,]
 - (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”

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6. In reaching its decisions, the Tribunal has carefully considered the parties' positions as set out in their various submissions and has been guided by the principles of Articles 3 and 9 of the 2010 IBA Rules referred to above.

Tribunal's Rulings

General Issues Raised by Parties

7. The Tribunal notes that, in its Responses to Oman's First Request for Documents and Information, the Claimant made a number of general comments regarding a number of alleged flaws in the Respondent's approach to document production.
8. In reply, the Respondent stated that due inquiry has been made from its relevant ministries and agencies, and represented that, to the best of its knowledge and belief, the additional documents sought are not currently in its possession. The Respondent is represented by an experienced and reputable law firm. The Tribunal therefore takes the view that, in the absence of evidence to the contrary, it may accept the representation of the Respondent and it does so.
9. As to the availability of any future opportunities to make requests for document production, the Tribunal notes that "Oman does not presently anticipate making a supplemental request before the Claimant submits his Reply" and therefore the issue is not ripe for the Tribunal's consideration.

Rulings on Disputed Document Requests

10. The Tribunal's Rulings with respect to the various disputed document requests contained in the Respondent's Redfern Schedule are set out below.

Respondent's Request	Tribunal's Decision
2.	Granted as to any documents evidencing loan or financing agreements between Claimant, Emrock or SFOH and another party or parties which were made in connection with the Lease Agreements, the Jebel Wasa Project or any equipment used in connection with the Jebel Wasa Project.

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Respondent's Request	Tribunal's Decision
3.	Ruling deferred. See paragraph 11 below.
4.	Ruling deferred. See paragraph 11 below.
5.	Ruling deferred. See paragraph 11 below.
7.	Ruling deferred. See paragraph 11 below.
8.	Ruling deferred. See paragraph 11 below.
9.	Ruling deferred. See paragraph 11 below.
10.	Ruling deferred. See paragraph 11 below.
11.	Ruling deferred. See paragraph 11 below.
12.	Denied for lack of sufficient relevance to the case or materiality to its outcome.
21.	Denied for lack of sufficient relevance to the case or materiality to its outcome.
22.	Denied for lack of sufficient relevance to the case or materiality to its outcome.
30.	Denied for lack of sufficient relevance to the case or materiality to its outcome.
42.	Granted as to documents evidencing money claims or money judgments by or in favour of third party consultants, creditors or suppliers, including Shell Oman Marketing Company SAOG, for non-payment in connection with the Jebel Wasa Project, and any settlements related to same.
43.	Denied for lack of sufficient relevance to the case or materiality to its outcome, and for imposing an unreasonable burden to produce in view of its insufficient relevance and materiality. In addition, the Respondent can cross-examine John T. Boyd on the validity of its assumptions.

Ruling in Respect of Respondent's Requests Nos. 3–11

11. Requests Nos. 3–11 appear to be directed 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 U.S. –Oman FTA notwithstanding the proviso to that Article:

“**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

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a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;” (underlining added)

12. The Tribunal uses the phrase “appear to be directed” since the proviso to Article 10.27 refers to “dominant and effective nationality” whereas the Respondent makes general references in its Request for Document Production to “real and effective nationality”. Moreover, the Respondent does not appear to contend that the Claimant was ever a national of Oman.
13. The Tribunal considers that there is difficulty here because:
- (i) Under ICSID Arbitration Rule 41 the party raising jurisdictional objections must do so “as early as possible in the proceedings” and, in any event, not later than in its Counter-Memorial;
 - (ii) Under the agreed Procedural Order, the Respondent is entitled to make an application for document disclosure before it has filed its Counter-Memorial (see paragraph 13.1.2–13.1.5 as to document disclosure and paragraph 13.1.6 indicating that the Counter-Memorial is not due until 23 April 2013).

The difficulty is that the Tribunal is being asked to make a ruling on document disclosure where relevance and materiality to the outcome of the case is a critical factor, but the pleadings are not yet at a stage where the Tribunal can authoritatively determine what are the relevant issues as to jurisdiction or admissibility, if any, flowing from Article 10.27 of the U.S. –Oman Treaty. Indeed, as noted above, the Respondent is justifying some of its Requests by reference to the question of whether the Claimant “shares a real and effective nexus” to the United States, which is not the language of the Treaty.

14. The Tribunal is uncomfortable with deciding the disclosure issues related to apparent questions of dual nationality at this stage, notwithstanding that the Request for Document Production is authorised by its Procedural Order No. 1. It seems that there are two possible ways of dealing with the matter. First, the Tribunal could request that the Respondent file a brief memorandum setting out its proposed jurisdictional

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objection. This would be without prejudice to a full articulation of the objection in the Counter-Memorial. Then the Tribunal would decide on the disputed document requests in this area (Requests 3–11). Alternatively, the Tribunal could defer ruling on the disputed document requests which relate to an apparent dual nationality objection until after the Counter-Memorial is filed.

16. To avoid undue delay in relation to the document disclosure process and the possible consequential disruption of the existing timetable, the Tribunal proposes to adopt the first alternative.
17. Accordingly, the Tribunal directs as follows:
 - (i) The Respondent is directed to file as soon as possible, but in any event no later than **Friday, 15 February 2013**, a brief Memorandum not exceeding three pages in length stating:
 - (a) Whether it intends in its Counter-Memorial to challenge the jurisdiction of the Tribunal or the admissibility of the claim relying on the definition of “Investor of a Party” in Article 10.27 of the Treaty; and, if so,
 - (b) What is the precise nature of that challenge; and,
 - (c) Explain why the documents requested in Requests Nos. 3–11 are said to be relevant and material to that challenge.

The Memorandum is without prejudice to the elaboration in its Counter-Memorial of any such challenge of the kind described in sub-paragraph (a) above.

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- (ii) The Claimant must then file a Memorandum in response as soon as possible, but in any event within seven days after receipt of the Respondents' Memorandum, again not exceeding three pages in length, commenting on the Respondents' Memorandum, including any assertions made in that Memorandum as to the relevance and materiality of the documents requested in Requests Nos. 3–11.
18. Thereafter the Tribunal will either rule on Requests Nos. 3–11 or defer its Rulings until after the Counter-Memorial is to hand.

General Rulings

19. The Tribunal notes that its decision on the Respondent's Requests for Document Production is not intended to provide an implied decision on any issue of interpretation of the U.S.–Oman FTA, any contract or on any other legal issue in dispute between the parties.
20. To the extent that requests for document production were denied, it is understood that such denial does not affect any documents already voluntarily produced or requested documents to which no objection has been taken.
21. Insofar as documents ordered are not produced or not fully produced as ruled in this Ruling, the Tribunal may take this into account in its evaluation of the respective factual allegations and evidence including a possible inference against the party refusing production.
22. The costs of, and incidental to, the Respondent's Request for Document Production, shall be reserved for later consideration, if necessary.
23. Leave is reserved for any party to apply in respect of any aspect of this Ruling.

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Claimant's Application of 11 January 2013

24. By letter to the Tribunal dated 11 January 2013, the Claimant sought leave to file a brief reply to certain statements made by counsel for the Respondent in its Request for Document Production ("**Application**"). In its Application, the Claimant contended that the Respondent had raised "whole new rationales" for its requests only after the Claimant had stated its objections.
25. The Respondent responded to the Claimant's Application by email to the Tribunal of 11 January 2013 ("**Response**").
26. Bearing in mind (i) the Tribunal's Rulings with respect to the various disputed document requests as set out at paragraph 10 above, and (ii) the Tribunal's general Ruling at paragraph 19 above, save for those filed in accordance with the directions made at paragraph 17 above, the Tribunal considers that it would be unnecessary and inefficient to receive further submissions from the parties on the question of document production at present.
27. Accordingly, the Claimant's Application is disallowed.

[signed]

On behalf of the Tribunal
Professor David A. R. Williams QC
President of the Tribunal
Date: 5 February 2013