ICSID Tribunal dismisses investment treaty claims against Oman (Part I): The facts and jurisdictional claims

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Gordon Blanke (DWF (Middle East) LLP)

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By a Final Award dated 27 October 2015 (see ICSID Case No. ARB/11/33 – *Adel A Hamadi Al Tamimi v. Sultanate of Oman*), an international tribunal constituted under the International Convention for Settlement of Investment Disputes (ICSID), also commonly referred to as the Washington Convention, dismissed all claims brought by a US national against the Sultanate of Oman in relation to an investment under the Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, better known in shorthand as the US-Oman FTA, which entered into force on 1st January 2009. The ICSID Tribunal comprised of a set of eminent investment arbitration specialists (Judge Charles Brower from England and Canadian Dr. Christopher Thomas QC) under the presidency of Prof. David Williams QC from New Zealand.

The Award is instructive in more than one way and ultimately confirms that investors will not find it easy to enforce investment claims against Middle Eastern governments unless the claims are well founded and meet the relevant threshold criteria under the prevailing investment treaty instruments. Investors must remain alert that qualifying on jurisdiction will not necessarily mean that their claims will succeed on the merits. As a result, in the event that their claims fail, they may be exposed to considerable adverse cost awards. In this sense, the Award also demonstrates that international tribunals do not carry any bias against governments of the Middle East and rule entirely at arms' length irrespective of the individual investors' interests. Tribunals will pay deference to contractual and treaty interpretation in their determination of the merits of an investment dispute before them.

The facts

By way of background, in December 2011, Mr Abdel A. Hamidi Al Tamimi ("Mr. Al Tamimi"), the Claimant in the present proceedings, filed for ICSID arbitration against Oman on the basis of the US-Oman FTA. In essence, Mr. Al Tamimi brought a number of claims relating to his investment in the development and operation of a limestone quarry in Oman in excess of US$ 270 million, including more specifically (i) a claim for expropriation under Article 10.6.1 of the US-Oman FTA; (ii) a claim for failure to treat the Claimant's investment in accordance with the minimum standard of treatment under Article 10.5 of the US-Oman FTA, and (iii) a claim for breach of the national treatment standard prevailing with respect to domestic investments in Oman in accordance with Article 10.3 of the US-Oman FTA. Mr. Al Tamimi's investment was based on two separate, yet complementary lease agreements, each of them concluded between one of the Claimant's companies, i.e. Emrock

Aggregate & Mining LLC ("Emrock") and SFOH Limited ("SFOH"), on the one hand and Oman Mining Company LLC ("OMCO"), an Omani State-owned enterprise, on the other (each individually referred to as the "OMCO-Emrock Lease Agreement" and the "OMCO-SFOH Lease Agreement" or together as the "Lease Agreements"). In reliance on the Lease Agreements, Emrock also entered into a contractual arrangement with then Nakheel Properties for the annual supply of 15 million tons of rock for its construction requirements in Dubai for a period of ten years. In accordance with its obligations under the Lease Agreements, OMCO obtained all relevant permits and licenses for the development and operation of the quarry from the incumbent Omani authorities, including in particular the Omani Ministry of Commerce and Industry ("MOCI") and the Omani Ministry of Environment and Climate Affairs ("MECA"). Consequently, the Claimant commenced quarrying operations with effect from September 2007.

Following a deterioration of the relationship between the Claimant, OMCO, MOCI and MECA, OMCO sought to terminate the OMCO-Emrock Lease Agreement around February 2009. Further, OMCO notified the Claimant of the nullity and voidness of the OMCO-SFOH Lease Agreement given the Claimant's failure to register SFOH in accordance with Omani law. In addition, around May 2009, upon request of MECA, Omani police arrested the Claimant for operating and removing material from outside the licensed area. With effect from around January 2009, due to the economic downturn, Nakheel Properties suspended all services under its supply agreement with Emrock. Despite the termination of the OMCO-Emrock Lease Agreement, the Claimant continued quarry operations. As a result, the Claimant was arrested by Omani police in around May 2009 and only released upon delivery of an undertaking that Emrock would cease all quarry operations. In addition, the Claimant alleged that following his release, the physical infrastructure and machinery of his investment at the quarry site was wrecked, looted and dismantled at the direction or with the connivance of the Omani authorities. Finally, proceedings were brought against Mr. Al Tamimi in his capacity as Chairman of Emrock before the Omani Public Prosecutor for (i) theft and violation of Omani environmental law (in relation to taking limestone and sand from and pursuing quarry operations outside the licensed quarry area) and (ii) failure to pay fines imposed as a result of operating outside the licensed area. Mr. Al Tamimi was ultimately acquitted, inter alia, on grounds of *locus standi*. For the avoidance of doubt, none of the court proceedings dealt with the substance of the investment dispute brought before the present ICSID Tribunal.

Jurisdictional claims

In a first instance, the ICSID Tribunal was required to address the scope *ratione personae* of its jurisdiction and more specifically whether it had personal jurisdiction over the Claimant, Mr. Al Tamimi. The Tribunal rejected the Respondent's argument that Mr. Al Tamimi was prevented from relying on the investment protection of the US-Oman FTA on the basis of his nationality. Under the relevant provisions of the US-Oman FTA, the Tribunal was to have jurisdiction *ratione personae* provided that (i) Mr. Al Tamimi was a national of the United States in the terms defined in the US Immigration and Nationality Act (Article 10.27, US-Oman FTA: *"investor of a Party means a Party or a state thereof, of 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"*) and that (ii) he made (or attempted to make) an investment in Oman.

Personal jurisdiction

With respect to (i), the Claimant tendered in evidence a certificate of naturalization issued by the US government on 11 June 1980 together with a valid US passport. The Respondent failed to demonstrate that the Claimant's predominant US nationality was dislodged by the proposition that Mr. Al Tamimi was a dual US-UAE citizen. Even though born as a citizen of the Emirate of Sharjah, UAE,

pursuant to the prevailing provisions of the UAE Law Concerning Nationality, Passports and Amendments thereof, Mr. Al Tamimi forewent his UAE citizenship when voluntarily adopting US nationality and hence naturalising as a US citizen in 1980. In an important *obiter dictum*, the ICSID Tribunal held that *"as a matter of interpretation of Article 10.27 [of the US-Oman FTA], [...] the language of 'dominant and effective nationality' [was] [not] intended to prevent dual citizens of both the United States and a third-party State, such as the UAE, from invoking the US-Oman BIT – even where the nationality of the third-party State [was] predominant"* and that *"the provision [was] aimed at preventing claims by dual nationals of both State parties (ie the United States and Oman) from seeking to use the FTA to claim against their own State of dominant and effective nationality – thereby defeating the purpose of the FTA to apply investment protection only to 'investors of the other Party'."* (see ICSID Award, at para. 274; emphasis in the original)

Subject-matter jurisdiction

With respect to (ii), the ICSID Tribunal found that the Lease Agreements qualified as a "covered investment" within the meaning of the US-Oman FTA, which expressly included *"tangible and intangible, movable and immovable property, and related property rights, such as leases"* (see ICSID Award, at para. 278; emphasis in the original) and in addition exhibited *"the exemplary characteristics"* of a covered investment in the terms of Article 10.27, to wit *"the commitment of capital and other resources, the expectation of gain and profit, and the assumption of risk"* (*ibid.*). The Tribunal further found that the Claimant's physical infrastructure/assets at the quarry site also qualified as a "covered investment" under the same provisions. The Tribunal finally noted that the Claimant's *ius standi* was not affected by his minority shareholding in Emrock as the wording of Article 10.27 extending investment protection to assets *"own[ed] and control[led], directly or indirectly"* was sufficiently broad to cover Mr. Al Tamimi's claims. On this basis, the ICSID Tribunal concluded in favour of its jurisdiction ratione materiae.

Temporal jurisdiction

As a further preliminary matter, the ICSID Tribunal discussed its jurisdiction ratione temporis, taking in particular into account the entry into force of the US-Oman FTA as late as January 2009. The Tribunal found that there was no indication in the wording of the FTA of any of its provisions applying retroactively. In application to the Lease Agreements more specifically, the Tribunal found that SFOH's failure to register in the Omani Commercial Register contrary to prevailing requirements, which in turn was a pre-condition for entering into domestic contractual arrangements, rendered the OMCO-SFOH Lease Agreement null and void under Omani law; the OMCO-SFOH Lease Agreement therefore fell outside the proper scope of the Tribunal's jurisdiction. Further, so the Tribunal, the OMCO-Emrock Lease Agreement was terminated after the date of entry into force of the US-Oman FTA only; as a result, the Tribunal did have proper jurisdiction ratione temporis over the OMCO-Emrock Lease Agreement.

The issue of attribution

In response to the Claimant's contention of attribution, the ICSID Tribunal found that OMCO's actions were not attributable to the Respondent for the purposes of State responsibility under the US-Oman FTA. To the contrary, according to the Tribunal, to be attributable to the Respondent under the US-Oman FTA, OMCO's acts had to occur in the exercise of *"regulatory, administrative, or other governmental authority delegated to [it] by [Oman]"* (see Article 10.1.2, US-Oman FTA). In this context, the Tribunal also expressly acknowledged that the test under Article 10.1.2 may be more restrictive than the test for State responsibility under customary international law, such as, for example, set out in the International Law Commission (ILC) Articles on State Responsibility:

> "The Tribunal accepts the Respondent's submission that contracting parties to a treaty may, by specific provision (lex specialis), limit the circumstances under which the acts of an entity will be attributed to a State. To the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant.
>
> The effect of Article 10.1.2 of the US-Oman FTA is to limit Oman's responsibility for the acts of a [S]tate enterprise such as OMCO to the extent that: (a) the [S]tate enterprise must act in the exercise of 'regulatory, administrative or governmental authority'; and (b) that authority must have been delegated to it by the State. […]"

(ICSID Award, at paras 321-322; original footnotes omitted, italics in the original)

In the Tribunal's assessment, there was no evidence on the record of any form of delegation of the relevant authority from the government of Oman to OMCO: The mere fact that several OMCO board members had a ministerial background and the absence of any particular law that serve the delegation of the requisite authority were not sufficient to meet the test under Article 10.1.2 of the US-Oman FTA.

Conclusion

By way of conclusion, it is plain from the wording of the Tribunal's reasoning on matters of jurisdiction that the Tribunal's approach is one of strict contract/treaty interpretation (a notion entrenched in Middle Eastern jurisdictions under the doctrine of *pacta sunt servanda*), holding the parties to the deal they originally struck. An ICSID tribunal will subject to thorough examination any jurisdictional objections advanced by a counterparty, whether *ratione personae*, *materiae* or *temporis*. In particular, an ICSID tribunal will not lightly attribute responsibility to a government for acts of governmental entities unless fully supported in doing so by the wording of the underlying contractual, treaty and/or wider statutory framework. To the extent that the concerned governmental entities engage in commercial transactions in their own right, independently from any regulatory or administrative functions typically exercised by the government, and cannot be demonstrated to act as governmental agents, State responsibility will unlikely be imputable to corporates with governmental shareholding. Equally, issues of standing are influenced by the underlying contractual/ treaty wording, extending e.g. investment protection to individual investors to the extent that they fall within the language of "indirect" control used in the underlying investment agreement/treaty.

To be continued …