ICSID Tribunal dismisses investment treaty claims against Oman (Part II): The substantive claims

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This is Part II of a previous blog, discussing a recent Award dated 27 October 2015 rendered in ICSID Case No. ARB/11/33 – *Adel A Hamadi Al Tamimi v. Sultanate of Oman* and dismissing all claims against Oman (see Part I of the blog). By way of reminder, the claims brought in these ICSID proceedings arose under the US-Oman FTA, which entered into force on 1st January 2009. This is hence one of the few cases (yet recently on the increase due to the widely-reported economic and financial ramifications of the Arab Spring) that involve Middle Eastern governments in investment treaty arbitration. Having successfully defended the majority of the Respondent's jurisdictional objections, Mr. Al Tamimi, the Claimant, 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. Every single one of these claims were eventually dismissed by the ICSID Tribunal,

essentially for lack of evidence. For the avoidance of doubt, the full facts as well as any definitions used in this blog have been introduced in the previous blog, unless stated otherwise.

The expropriation claim

In the Claimant's submission, a number of measures, both cumulatively and individually, including in particular (i) the termination of the Lease Agreements; (ii) Mr. Al Tamimi's arrest; (iii) the police-coerced signature by Mr. Al Tamimi of the undertaking to cease operations at the quarry site; (iv) the prosecution of Mr. Al Tamimi; and (v) the forced disposal of the Claimant's physical infrastructure and workforce from the quarry site, constituted an expropriation of his investment within the meaning of the US-Oman FTA.

In terms commonly provided for in bi-lateral investment treaties, the US-Oman FTA prohibits both direct and indirect expropriation (see Article 10.6.1, US-Oman FTA). In the Tribunal's assessment, following a determination as to whether a direct or an indirect expropriation had occurred, it had to satisfy itself that that expropriation was lawful in accordance with the following four cumulative criteria listed at Article 10.6.1 of the US-Oman FTA and as such had essentially occurred: (i) for a public purpose; (ii) in a non-discriminatory manner; (iii) on payment of prompt, adequate and effective compensation; and (iv) in compliance with due process of law. The US-Oman FTA also contained *"a shared understanding"* between the Parties to the effect that the definition of "expropriation" at Article 10.6.1 was to mirror customary international law on the subject-matter (see Annex 10-B 1., US-Oman FTA). The US-Oman FTA further defines "indirect expropriation" as a situation *"where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure"* (*ibid.*). In the terms of the FTA, a proper determination of whether a particular fact situation constitutes an indirect expropriation requires

> *"a case-by-case, fact-based inquiry that considers, among other factors:*
>
> *(i) the economic impact of the government action although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*
>
> *(ii) the extent to which the government action interferes with distinct,*

reasonable investment-backed expectations; and

(iii) the character of the government action." (see Annex 10-B 4(a), US-Oman FTA)

The FTA exempts from the scope of indirect expropriations *"non-discriminatory actions by a Party that are designed and applied to protect [...] the environment"* (see Annex 10-B 4(b), US-Oman FTA).

In the Tribunal's assessment, the Claimant's expropriation claim was cast in terms of *"a species of creeping indirect expropriation of the kind defined in Annex 10-B.4 of the US-Oman FTA."* (see ICSID Award, at para. 349). Notwithstanding, so the Tribunal, *"the central element of the expropriation claim [was] the termination of the OMCO-SFOH and OMCO-Emrock Lease Agreements [...] because the Claimant's investment right – that is, the right to operate a limestone quarry in Oman – derived directly from the companies' ownership of, respectively, the OMCO-SFOH Lease Agreement and the OMCO-Emrock Lease Agreement."* (see ICSID Award, at para. 351) In this context, the reader is reminded that the Tribunal found that it did not possess jurisdiction ratione temporis over the OMCO-SFOH Lease Agreement and that with respect to the OMCO-Emrock Lease Agreement, the acts of OMCO could not be attributed to the Respondent (see Part I of this blog). The Tribunal then continued in the following self-explanatory terms:

"Whether, therefore, OMCO's decision to terminate the OMCO–Emrock Lease Agreement was legally justified, or indeed proportionate, under the terms of the contract is not a dispute relating to a 'measur[e] adopted or maintained by a Party' cognizable under Chapter 10 of the US–Oman FTA, nor indeed 'an action [...] by a Party' within the meaning of Article 10.6.1 as interpreted by Annex 10-B.4. The legality of OMCO's termination of the OMCO–Emrock Lease Agreement must be resolved as a matter of private contractual law, not public international law. The Tribunal observes in this respect that under Article 11 of the OMCO–Emrock Lease Agreement, entitled 'Applicable Law and Jurisdiction', the parties agreed to submit any irreconcilable dispute regarding 'any aspect of the contractual relationship' to the exclusive jurisdiction of the Omani Arbitration Centre, whereby three arbitrators would determine the dispute pursuant to the Omani arbitration rules. The Tribunal must be concerned only with the fact that OMCO terminated the OMCO–Emrock Lease Agreement on 17 February 2009 –

which the Tribunal finds that it did.

It follows that the Claimant's claim under international law for expropriation of his primary investment in Oman – the right to operate a limestone quarry at the Jebel Wasa quarry site – must fail. The Claimant's investment was lost not as the result of a sovereign expropriation, but as the result of a contractual dispute with a private commercial actor. In the language of Annex 10-B.2, there can be no expropriation because there has been no relevant action or series of actions by Oman which interfered with a tangible or intangible property right at Jebel Wasa. Any alleged action taken by Oman after the termination of the OMCO–Emrock Lease Agreement on 17 February 2009 [...] cannot have interfered with the Claimant's right to mine because with the termination of the lease any such property right ceased to exist. The Claimant's expropriation claim must therefore fail." (see ICSID Award, at paras 353-354; original footnotes omitted)

In response to the Claimant's argument that completely independently of the issue of termination, Mr. Al Tamimi's expropriation claim comprised of a series of expropriatory measures taken by the Respondent that ultimately resulted in individually and collectively depriving the Claimant of his investment, the Tribunal held that these measures were taken after termination of the OMCO-Emrock Lease Agreement, hence at a time when the Claimant's covered investment had ceased to exist and could therefore not give rise to a claim for expropriation. In addition, according to the Tribunal, there was simply no evidence that any of the measures taken by the Respondent had an expropriatory effect.

The minimum standard of treatment claim

Under this head, the Claimant contended for the Respondent's failure to treat the Claimant's investment in accordance with the minimum standard of treatment in the terms of Article 10.5 of the US-Oman FTA. Article 10.5.1 imposes the standard prevailing under *"customary international law, including fair and equitable treatment and full protection and security"*. Annex 10-A of the US-Oman FTA further informs the customary international law minimum standard of treatment in the following terms:

"The parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 and Annex 10-B results from a general and consistent practice of States that they follow from a

> *sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect economic rights and interests of aliens",*

subject to the caveat that a Party shall not be *"prevent[ed] from adopting, maintaining, or enforcing any measure otherwise consistent with [Annex 10-A] that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."* (see Article 10.10, US-Oman FTA)

Discussing the content of the minimum standard of treatment under the US-Oman FTA, the ICSID Tribunal recognised the Parties' agreement that *"the minimum standard of treatment under the US-Oman FTA refer[red] to the customary international law standard and not an autonomous treaty standard."* (see ICSID Award, at para 380) According to the Tribunal, *"[t]hat conclusion [was] compelled by Article 10.5.2, which expressly provide[d] that the Treaty's standards of fair and equitable treatment and full protection and security 'd[id] not require treatment in addition to or beyond that which [was] required by [the minimum standard of treatment]'."* (*ibid*.) For the traditional customary law standard for minimum treatment in the present context, the Tribunal correctly relied upon that set out in the locus classicus of *Neer* (see *LFH Neer and Pauline Neer v. United Mexican States*, 4 Reports of International Arbitral Awards, 15 October 1926, 61-62), according to which *"the treatment of an alien [...] should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency"*, thus establishing a high threshold for breach. As a result,

> *"[i]n the Tribunal's view [...] to establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of*

a State's laws or regulations will meet that high standard. That is particularly so, in a context such as the US–Oman FTA, where the impugned conduct concerns the good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment."(SEE ICSID Award, at para. 390)

Upon further inspection, the ICSID Tribunal found that there was no evidence of bad faith on the part of any of the relevant Omani authorities in their treatment of the Claimant or his companies nor did any of the measures complained of occur after entry into force of the US-Oman FTA and did therefore not entitle the Claimant to rely on the FTA for investment protection in relation to them. In any event and irrespective of the foregoing, the Tribunal found that the damage sustained by the Claimant and/or his companies as a purported consequence of any of the acts taken by Omani authorities (whether before or after entry into force of the US-Oman FTA) was a result of *"the Claimant's own willful refusal to comply with the clear and consistent instructions given to him by OMCO and by Oman's ministries [in relation to the regulatory requirements for the Claimant's lawful exercise of his quarrying license] from 2007 onwards."* (see ICSID Award, at para. 402) For the avoidance of doubt and most significantly, the Claimant never obtained permission to engage in mining operations outside the licensed quarry area.

The national treatment standard claim

Finally, the Claimant alleged breach by the Respondent of the national treatment standard required by the US-Oman FTA by failing to accord the same treatment to the Claimant's investment as to investments of domestic investors. In the terms of Article 10.3.2 of the US-Oman FTA, *"[e]ach Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."* In application of this provision, the ICSID Tribunal held that *"[t]he Claimant [had to] show that the treatment he and his investment [had] received differed materially and substantially from that received by other domestic Omani investors or their investments."* (see ICSID Award, at para. 458)

More specifically, the Claimant contended that the Respondent was in breach of

Article 10.3 of the US-Oman FTA by discriminating between him and his investment and domestic investors, who purportedly engaged in the same activities as the Claimant without being exposed to the Omani government's purported prosecutory conduct. In the Tribunal's assessment, *"[a]gain, the Claimant's case [had to] fall at the first hurdle because his primary investment in Oman had ceased to exist by the time of the alleged measures comprising his national treatment claim."* (see ICSID Award, at para. 460) In the Tribunal's view, the Claimant had not been able to adduce evidence of a suitable comparator and in any event, so the Tribunal, *"[t]he Claimant's case appear[ed], on the evidence, to be sui generis."* (see ICSID Award, at para. 464)

Costs claim

In the presently prevailing circumstances, the ICSID Tribunal found it appropriate to allocate costs on the basis of the loser-pays principle. This being said, the Tribunal decided against awarding the Respondent its full arbitration and legal costs and fees taking account of the Respondent's unsuccessful challenge (i) to Mr. Al Tamimi's nationality and (ii) of the Tribunal's jurisdiction ratione temporis over the OMCO-Emrock Lease Agreement. With this in mind, the Tribunal ordered the Claimant to pay the Respondent a total of US$5,677,410.24, being a 75 percent share of the Respondent's aggregate costs of US$7,569,880.32.

Conclusion

The present ICSID case demonstrates that an ICSID tribunal will be resolute in its approach to assessing an individual's entitlement to investment protection under a bi-lateral investment treaty, such as the US-Oman FTA. The tribunal will conduct a thorough, in-depth assessment of each and every claim advanced by the individual investor, but will be little impressed with inflated claims that do not hold as a matter of treaty interpretation and/or are not borne out by the evidence before it. Equally, an ICSID tribunal will not be influenced by the nationality of the disputing parties and is very unlikely to show bias towards individual investors. In the present proceedings, the ICSID Tribunal demonstrated its impartiality by a cost award that – albeit based in essence on the loser-pays principle – did pay deference to the relative success of the Parties on preliminary jurisdictional claims. As one of the few first investment treaty cases involving a Middle Eastern jurisdiction, this case serves as an instructive example of the shape investment arbitration is likely to take in the Middle East of the twenty-first century.