ICSID REJECTS CLAIMS UNDER US-OMAN FTA AND ORDERS CLAIMANT TO PAY COSTS

Introduction

On 3 November 2015, an ICSID tribunal handed down a decision in which it rejected claims for expropriation, and breaches of minimum standard of treatment and equal treatment, and ordered the Claimant to pay 75% of Oman's costs on the basis that the "serious barriers" to a successful claims should have been clear to the Claimant before proceedings were commenced.

Background

The Claimant, Mr Al Tamimi, is a US citizen born in Ajman, one of the seven emirates which make up the present United Arab Emirates. The Claimant was the Sultanate of Oman.

The proceedings arose out of the Claimant's investment in the development and operation of a limestone quarry in the Jebel Wasa mountain range, located in the municipality of Mahda, Oman. The Claimatn's investment was created through two Lease Agreements signed between, respectively, his companies Emrock Aggregate & Mining LLC ("Emrock") and SFOH Limited ("SFOH"), and the Omani state-owned enterprise Oman Mining Company LLC ("OMCO").

Subsequently, the relationship between OMCO and the Claimant deteriorated, and OMCO sought to terminate the OMCO-Emrock Lease Agreement and declared that it regarded the OMCO–SFHO Lease Agreement as "null and void", as a result of the Claimant's failure to register SFOH in accordance with the laws of Oman. The Claimant was later arrested by the Omani authorities and convicted of various offences relating to the quarry – this conviction was overturned by the Court of Appeal and was not appealed to the Omani Court of Cassation.

On 5 December 2011, the Claimant filed a request for arbitration based on the US-Oman Free Trade Agreement ("FTA") in which he sought compensation of approximately $560 million for the damages caused by Oman's failure to provide Mr Al Tamimi national treatment, fair and equitable treatment, and full protection and security and its expropriation of Mr Al Tamimi's valuable interest in unrestricted mining concessions, which sum includes profits Mr Al Tamimi reasonably could have expected to receive had the Government of Oman not deprived him of the opportunity through its breaches and indirect losses, along with moral damages, costs and interest.

The Respondent challenged the jurisdiction of the Tribunal on the grounds that the claimant was a dual US/UAE national and therefore could not take advantage of the Oman/US FTA; the Claimant's alleged investments failed to meet
the fundamental requirement that they be in existence on or after the date on which t he US–Oman FTA came into force; and that the relevant Lease Agreements were not "covered investments" for the purposes of the US–Oman FTA. The Respondent also denied

that the Claimant was entitled to any relief on the merits.

Decision

The Tribunal (comprising Professor David A R Williams QC as President, along with Judge Charles N Brower and Mr J Christopher Thomas QC) delivered a decision on both the jurisdictional objections and (to the extent that claims were subject to the jurisdiction of the Tribunal) on the merits.

Jurisdiction:

The Tribunal dismissed the Respondent's objection on the ground of the claimant's dual nationality failed – on the evidence, the Tribunal found that the claimant was a national only of the US. However, the Tribunal also held that even if the claimant had held dual nationality, and his "dominant and effective nationality" (as that term was defined in the FTA) was that of a third state, this would not have prevented him invoking the FTA. The Tribunal considered that the provision is 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".

Further, the Tribunal found that the lease agreements constituted "covered investments" for treaty purposes.

As to whether the investments were in existence on or after the date on which the US-Oman FTA came into force, the Tribunal held that it had jurisdiction over the dispute relating to the OMCO–Emrock Lease Agreement but not the OMCO–SFOH Lease Agreement.

- On the OMCO-Emrock Lease Agreement, the Respondent's position was that it was terminated by OMCO on 20 July 2008. The Tribunal disagreed. Although Oman had purported to terminate the OMCO-Emrock Lease Agreement before the US-Oman came into force, the evidence showed that the parties had not acted in a manner consistent with termination on that date and it appeared that the Lease Agreement was not terminated until after the US-Oman FTA came into force.
- On the OMCO–SFOH Lease Agreement, the Respondent's position was that it was rendered "null and void" by 2 June 2008 at the latest, owing to SFOH's failure to register in Oman as required by Omani law. The Tribunal agreed.

Merits

On the merits, the Tribunal found as follows:

- Expropriation: the Claimant's claim for expropriation failed, on the basis that 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. There could be no expropriation because there had been no relevant action or series of actions by Oman which interfered with a tangible or intangible property right.
- Minimum standard: The Tribunal rejected the claim in respect of breach of minimum standard of treatment. The Claimant had failed to 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 required 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, willful or otherwise egregious, to protect a foreign investor's basic rights and expectations. General principles of customary international law had to be applied in the context of the express provisions of the Treaty.

- National treatment: The Tribunal dismissed the Claimant's claims.

On costs, the Tribunal held that it should have been clear to the Claimant prior to commencing proceedings that there were "a number of serious barriers to the overall viability of the Claimant's suit" and accordingly the Claimant should be required to cover a substantial proportion – ultimately 75% - of both the costs of this arbitration and the Respondent's legal and other professional costs, including expert and consultancy fees.

1 December 2015