

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. 11

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
Mr. Monty Taylor

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Post-Hearing Directions

1. With reference to the Hearing transcript on Thursday, 8 May 2014 T225, L15 – T226, L3, the Tribunal recalls that the parties were requested to apply for any corrections to the hearing transcript no later than **Thursday, 29 May 2014** (21 days from 8 May 2014). The Tribunal looks forward to receiving any such applications.
2. As to Post-Hearing briefs the parties did not favour them. Subject to the satisfactory provision of written answers to the specific questions posed in the Memorandum provided to the parties on 6 May 2014 (see Transcript Day 8 T214-215 and paragraph 3 below) the Tribunal is at this stage inclined to the view that there is no need for Post-Hearing briefs.
3. The Tribunal requires the parties to answer formally each of the specific questions contained in the Memorandum Questions/Issues to be Addressed in Closing Submissions, of Thursday 8 May 2014. This is necessary because not all of those questions were addressed in the closing submissions on Thursday 8 May 2014, and, where they were commented on, the responses in several cases were not sufficiently detailed. These questions are set out again in Schedule A. Following the deliberations of the Tribunal after the hearing, the parties are also requested to respond to the additional questions attached as Schedule B. In their answers to all of the Tribunal's questions the parties should refer appropriately to witness statements, relevant passages in the transcript, or relevant documents. The Memoranda containing the answers to all of the questions should be lodged with the Tribunal as soon as possible, but in any event no later than Monday, 30 June 2014.
4. The Tribunal will address the question of submissions on costs at a later date.
5. The Tribunal is not yet ready to formally close the proceedings.

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[signed]

On behalf of the Tribunal
Professor David A. R. Williams QC
President of the Tribunal
Date: 26 May 2014

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Schedule A: Questions contained in Memorandum of 6 May 2014

A JURISDICTION

1. Jurisdiction, Claimant's Issue 2.1: Does Respondent pursue this challenge to jurisdiction? (not pursued in cross examination and not in Respondent's List of Issues). I.e. are we still presented with the issue of whether Claimant's dominant and effective nationality is that of the United States or rather of the third State of which he has been alleged to be a national?

B PERMITTING MATTERS

2. What, if any, was the mining/quarrying area set out in the Emrock and SFOH lease agreements?
3. What, if any, was the significance of the Blocks 1-4 designations in the Plans annexed to the two lease agreements?
4. What, if any, was the significance of the demising provision in article 2 of both contracts in terms of the area to be quarried pursuant to each contract?
5. What is the relationship between any of Emrock's and SFOH's contractual rights vis-à-vis OMCO and the permitting measures taken by the authorities?
6. What, if any, was the mining/quarrying area for which approval was specifically sought in the Application for Environmental Permit of 1 April 2007 (Exhibit J92)?
 - a. Was any plan of the proposed mining/quarrying area attached to or accompanying the Application (Exhibit J92)? If so, is it in the Record? [See Transcript 2 May 2014 cross examination of Mr. Ali Al Waily T5 Line 23 – T6 Line 6 which appears to be to the effect that there was no such plan].
 - b. If there was no such plan of the proposed mining/quarrying area, are there any words used in the Application which should reasonably be taken as indicating

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or defining the proposed mining/quarrying area?

7. What mining/quarrying area, if any, was referred to in the Environmental Management Plan of August 2006 (Exhibit J70)?
8. What is the evidence as to whether Exhibit J70 was in fact submitted to the Ministry of Environment?
9. What mining/quarrying area, if any, was referred to in the Environmental Impact Assessment of September 2006 (Exhibit J74)?
10. What is the evidence as to which of the three versions in Exhibit J74 was actually submitted to the Ministry of Environment?
11. Was the area (or areas) set out alongside the word “coordinates” on the first page of the Initial Environmental Approval of 25 April 2007 (Exhibit J95) the only area or areas approved for mining/quarrying by that approval?
12. What relevance, if any, do the areas described in the Agreement of Lease (Exhibits J37, J41, J48, J87) have in relation to Issues 6, 7, 9, and 11?
13. Is there any evidence that that when seeking the renewal of the Environmental Permit, any of Emrock, SFOH or OMCO requested a different set of coordinates from those specified in MECA’s Initial Approval?
14. What significance, if any, should be attached to the fact that MECA’s renewal of the Environmental Permit contained the same coordinates as specified in the Initial Approval?
15. Beyond the question of the precise areas that were leased to Claimant’s companies by OMCO is the question of what Claimant’s companies lawfully were permitted to do within that area either by Omani environmental law and regulations per se or by permits granted by Omani environmental authorities. Please clarify precisely what

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permissions or rights in that regard the Claimant's companies had and at what times.

16. Does the record before us contain copies of all of the environmental laws and regulations that governed Claimant's companies' operations at Jebel Wasa?
17. It is argued by the Respondent from the lease agreements between OMCO and the Claimant's companies that it was the companies' responsibility to obtain all necessary environmental permits, though OMCO was obligated to use its best efforts in support of Claimant's companies in that regard. Having regard to the fact that until 1 January 2009, the Free Trade Agreement could not be the source of any obligation on the part of Oman, during the period 2006-31 December 2008, whose responsibility was it to ensure that Claimant's companies knew or learned of all the applicable environmental requirements? Were the companies "on their own" in that regard, i.e., are we to assume that it was up to them to learn themselves all that needed to be done in that regard, or to what extent did OMCO have a responsibility to inform them what was needed?
18. How, if at all, does the entry into force of the FTA affect the pre-existing state of the permitting situation?
19. Does Claimant have the burden of proof to demonstrate that his companies operated in full compliance with all applicable environmental law, regulations and permits, or does Respondent have the burden to prove the contrary?

C COURT OF APPEAL ISSUES

20. In paragraph 2 of its Pre-Hearing Skeleton of Argument, Claimant asserts that "Oman is bound by the decision of its own appellate court, which is part of the Omani State". In Claimant's opening oral submissions at T24-25 Claimant says, as to the appellate court judgment, "you can give it effect as collateral estoppel" and "it is proper to rely on this as a matter of res judicata, and Oman's law on res judicata effective criminal judgments distinguishes between acquittals for actual innocence and acquittals for

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insufficient evidence but it gives them both the same res judicata effect.” The parties are requested to comment on Omani law in this respect and Claimant is requested to elaborate on paragraphs 27-29 of its Reply Memorial.

21. Does the Court of Appeal judgment on which Claimant relies absolve Mr. Al Tamimi of all alleged environmental violations specified in the charges laid by the public prosecutor, or only of some of them; if the latter, which ones?

D CONTRACTUAL ISSUES

22. Does the FTA vest the Tribunal with jurisdiction to decide contractual disputes between OMCO and Emrock and SFOH, respectively?
23. How, if at all, does the entry into force of the FTA affect the then extant state of contractual relations between OMCO and Emrock and OMCO and SFOH?

E DAMAGES

24. Does Respondent argue, in the alternative, that if Claimant establishes liability on his Treaty claims there should nevertheless not be a full recovery but instead a deduction for Claimant’s contributory negligence: see Counter-Memorial paragraphs 445-447.

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Schedule B: Additional Questions

1. Footnote 1 of Chapter 10, requires that Article 10.5, the Minimum Standard of Treatment clause be interpreted in accordance with Annex 10-A.¹ Under Annex 10-A, does a claimant bear the burden of proving the existence of an applicable rule of customary international law that is claimed to be breached by a respondent?
2. Article 10.15(1)(a)(i) of the FTA permits the Tribunal to determine whether there has been a breach of any obligation set forth in Section A of that Chapter.² Article 10.21, Governing Law, requires the Tribunal to “...decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” What is the relationship between the Tribunal’s subject-matter jurisdiction and the Governing Law clause?
3. Further to Question 2, Chapter 17, Environment, of the FTA deals with a party’s enforcement of its environmental laws. To what extent, if at all, does Chapter 17 bear on any legal issues falling within the Tribunal’s jurisdiction? In particular, comment on the relevance, or not, of Articles 17.1 and 17.1(2)(b) to the present case.
4. What precisely is the evidence that after the date as of which the Claimant claims his investment was expropriated, Emrock/SFOH were selling to customers from stockpiles at the mine site and also issuing a quote or quotes for future delivery of future production of chemical limestone from the mine site?
5. To the extent that there is the evidence to which reference is made in (4) above what is the effect of that on the Claimant’s claim of expropriation?

¹ CLA-009. Annex 10-A states further that: “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 the economic rights and interests of aliens.”

² As far as the Tribunal is aware from a review of the Memorial and the Reply, the Claimant does not allege a breach of either an “investment authorization” or an “investment agreement” as defined in Article 10.27.

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6. Precisely when did Emrock/SFOH cease all mining operations at the mine site?