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INTERNATIONAL INVESTING

Oman Held Not Liable for Actions Of State-Owned Enterprise


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Foreign investors often deal with individuals or entities related to the government of the country in which they invest, rather than directly with government officials or arms of the state that have traditionally been regarded as state organs. In the event of a dispute related to their investment, foreign investors can hold a host state liable under international law (e.g., for breach of an investment treaty) only for those acts and measures that are attributable to the state. Therefore, whether the investor can establish that the state is responsible for the wrongful conduct of an individual or an entity can be an important threshold question in investor-state arbitrations.

The ILC Principles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) are generally accepted to reflect customary international law on the attribution of conduct to states. International arbitration tribunals often rely on the ILC Articles when deciding an attribution issue. Pursuant to the ILC Articles, a state can be held responsible for an individual's or an entity's wrongful conduct on at least one of the following grounds: (A) when the individual or the entity is a "State organ," whether legislative, executive, or judicial (Article 4); (B) when the individual or the entity is not a state organ but "is empowered by the law of that State to exercise elements of the governmental authority … [and] is acting in that capacity in the particular instance (Article 5);" or (C) when the individual or the entity "is in fact acting on the instructions of, or under the direction or control of, [a] State in carrying out the conduct" (Article 8).

Despite the guidance provided by the ILC Articles, the issue of attribution in investor-state arbitrations has been the subject of much controversy, and the jurisprudence is far from settled on certain parameters of attribution. The question of attribution should as a general matter be straightforward when an investor is complaining about the acts of traditional state organs, but it may become complicated and controversial when the dispute arises from actions of entities owned and controlled by the government or of entities otherwise closely related to the government.

In a recent investor-state arbitration under the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID), a tribunal decided that the actions of the Omani state-owned enterprise Oman Mining Company (OMCO) were not attributable to Oman, and therefore the state of Oman could not have breached its obligations under the U.S.-Oman Free Trade Agreement (FTA). *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015). In so holding, the tribunal applied the specific attribution provision in the U.S.-Oman FTA, and not customary international law principles on attribution. The U.S.-Oman FTA provided that the signatory states' obligations applied to state enterprises or individuals when exercising regulatory, administrative, or other governmental authority delegated to them by the state. Finding that no such authority was delegated to or exercised by OMCO, the tribunal refused to attribute OMCO's actions to the state of Oman.

'Al Tamimi' is one of the few decisions discussing the interaction of treaty language and the customary international law on attribution. The decision demonstrates that the question of attribution is a fact-specific inquiry that depends on the particular circumstances in each case.

Thus, in an award dated Nov. 3, 2015, the ICSID tribunal dismissed Adel A Hamadi Al Tamimi's breach of treaty claims against the Sultanate of Oman and ordered the investor to pay US$5.7 million to cover the respondent state's arbitration costs and expenses, including its legal fees.

Al Tamimi is one of the few decisions discussing the interaction of treaty language and the customary international law on attribution. The decision demonstrates that the question of attribution is a fact-specific inquiry that depends on the particular circumstances in each case. Further, the tribunal's holding suggests that the types of conduct attributable to a state in a given case can be limited (or indeed, extended) by the terms of an applicable investment treaty. However, the tribunal also observed that the relevant conduct of traditional state organs is attributable to the state under the broadly recognized principles of international law, even in the absence of an express provision on such attribution in the applicable investment treaty, but this observation ultimately did not save the claimant's position.

'Al Tamimi v. Sultanate of Oman'

This dispute arose out of the claimant's investments in the development and operation of a limestone quarry in Al Mahda, Oman. The claimant, Adel A Hamadi Al Tamimi, is a U.S. national, who invested through two Lease Agreements signed between his two companies—Emrock Aggregate & Mining and SFOH Limited—and the Omani state-owned enterprise OMCO. ¶¶46-49. After OMCO terminated the Lease Agreements, Al Tamimi initiated an ICSID arbitration against the Sultanate of Oman.

Al Tamimi asserted that various actions and conduct by OMCO, the Omani Ministry of Environment and Climate Affairs, the Royal Oman Police, the public prosecutor, and the housing ministry amounted to expropriation, denial of fair and equitable treatment, and denial of national treatment in breach of the U.S.-Oman Free Trade Agreement (FTA). ¶¶155. Al Tamimi sought damages in the amount of US$273 million, plus interest. ¶120.

For purposes of this article, we focus on Al Tamimi's claims based on OMCO's termination of the Lease Agreements and the related attribution issue. To hold the government of Oman responsible for alleged breaches of the FTA, Al Tamimi had to first attribute OMCO's actions to the state of Oman.

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OMCO is a state-owned enterprise, 99 percent owned by the Omani Ministry of Oil and Minerals. OMCO was established by Royal Decree No 11.81 in 1981 to facilitate the discovery, excavation, manufacturing, and marketing of minerals in Oman. ¶52.

Al Tamimi argued that the actions of OMCO were attributable to the state of Oman on two separate grounds: (1) OMCO is an organ of the Omani state; and (2) alternatively, the government influenced or pressured OMCO to terminate the Lease Agreements, thereby interfering with Al Tamimi's investment. ¶156.

Is OMCO a State Organ?

Al Tamimi argued that OMCO operated at all times as an arm of the Omani state, and exercised governmental authority. OMCO is 99 percent owned by the Omani Ministry of Oil and Gas. Further, pursuant to OMCO's bylaws, OMCO's board members acted at all times as representatives of the state. OMCO's mining activities were closely controlled by the Ministry of Commerce and Industry (MOCI), and the managers and board members of OMCO were usually directors and ex-employees of MOCI. ¶¶159-160. Therefore, according to claimant, OMCO is a state organ and its actions are attributable to the government of Oman under the U.S.-Oman FTA, as well as customary international law.

Respondent, on the other hand, contended that the terms of the U.S.-Oman FTA precluded attribution. According to respondent, the FTA effectively narrowed the grounds for attribution of state responsibility and allowed attribution only in circumstances where an entity exercises regulatory, administrative, or other governmental authority, and OMCO did not exercise any such authority in the termination of the Lease Agreements. ¶¶161-162.

The tribunal recognized that OMCO is a state-owned enterprise. ¶317. However, the tribunal also found that the United States and Oman had expressly limited the scope of attributable conduct. Article 10.1.2 of the FTA provides: "A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party." ¶318. This provision tracked only one ground of attribution under the ILC Articles—found in Article 5.[1] The tribunal concluded that, by including such a specific and narrow attribution test in the FTA, the broader principles under the ILC Articles were not applicable, that they were in effect displaced by Article 10.1.2 of the FTA. ¶321. The tribunal "accept[ed] the Respondent's submission that contracting parties to a treaty may, by specific provisions (lex specialis), limit the circumstances under which the acts of an entity will be attributed to the 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." Id.

Accordingly, the tribunal only considered whether OMCO met the attribution test under the FTA by exercising delegated regulatory, administrative, or other governmental authority. ¶¶316, 319. It was irrelevant for the tribunal's analysis whether or not the government exercised effective control or direction over OMCO through its 99 percent ownership, or through influence over its directors or managers. ¶¶320, 322.

The respondent argued that OMCO did not exercise governmental authority because it could not issue licenses, permits, or approvals for the Claimant's projects. Rather, governmental powers resided with the various ministries in Oman. ¶163.

The tribunal agreed with the respondent. The tribunal noted that the claimant had failed to identify any relevant law that specifically delegated governmental authority to OMCO. Rather, the tribunal found that OMCO was established "simply as a limited liability company" under the law, exercising ordinary commercial powers. The Decree establishing OMCO did not delegate to it any regulatory, administrative, or governmental powers. These powers resided with the relevant authorities of the Omani government, and OMCO itself was subject to the application of such governmental power. It was not OMCO, but rather the ministries, that issued regulatory warnings and imposed fines for the claimant's activities. The fact that the government issued warnings to OMCO, and OMCO paid the fines, was further evidence for the tribunal that OMCO was not exercising any governmental authority. ¶¶326-331.

In light of the requirements of Article 10.1.2 of the FTA, the tribunal did not consider that mere pressure from the Ministry would be a sufficient basis for attributing OMCO's otherwise entirely commercial conduct.

Finally, the tribunal considered it important that termination of the Lease Agreements, the specific conduct which formed the basis of Al Tamimi's claims, also did not reflect the exercise, or the purported exercise, by OMCO of regulatory, administrative, or governmental authority. The tribunal pointed out that, in the termination notices, OMCO did not invoke or rely upon any regulatory, governmental, or administrative authority. ¶332.

In sum, the tribunal concluded that OMCO's conduct in terminating the Lease Agreements was nothing more than a commercial response to the claimant's alleged breaches of contract. OMCO's role was, at most, to act as a commercial intermediary between the claimant's companies and the Omani authorities who were the ones exercising relevant governmental authority. Under the specific, narrow test of attribution in the U.S.-Oman FTA, OMCO's actions were not attributable to the state of Oman. ¶¶333-334.

As noted above, in addition to claims based on the conduct of OMCO, Al Tamimi also contended that the conduct of other entities—the government ministries, the Omani Public Prosecutor, and the Royal Oman Police—were wrongful and attributable to the state of Oman. The tribunal agreed that state organs such as ministries and the state police force operate as arms of the state, and that "[a]lthough State responsibility for the conduct of State organs is not directly expressed in the text of the U.S.-Oman FTA, the attribution of such conduct to the State is broadly supported in international law." ¶344. But these claims by Al Tamimi were also rejected on a number of other grounds.

Was OMCO Induced, Pressured?

The claimant's alternative argument for attribution relied on the position that its contractual counterparty, OMCO, was induced or pressured by the Ministry of Environment and Climate Affairs (MECA), to terminate the Lease Agreements. ¶156. In fact, this was the claimant's primary argument on attribution.

According to Al Tamimi, MECA pressured OMCO to force the claimant out of business, and out of Oman. Therefore, argued the claimant, Oman had in effect used its influence and sovereign power to force OMCO to invoke contractual provisions as a pretext for terminating the Lease Agreements. In sum, OMCO's purported lease terminations took place under coercive conditions created by the government, and nonpayment of fines or other alleged breaches were only a pretext. ¶¶157-158.

However, according to the tribunal, this argument by Al Tamimi as a basis for attribution was irrelevant because the narrow, specific test of attribution set forth in the U.S.-Oman FTA, which the tribunal believed governed the attribution question, precluded this argument. ¶337.

In fact, the tribunal acknowledged that the Ministry's alleged conduct, if proved, could support a case for indirect expropriation of the Lease Agreements based on the Ministry's own conduct as an organ of the state. Id. However, in light of the requirements of Article 10.1.2 of the FTA, the tribunal did not consider that mere pressure from the Ministry would be a sufficient basis for attributing OMCO's otherwise entirely commercial conduct. Id. The tribunal added, in dicta, that there was no evidentiary basis to support the contention that MECA exercised any influence over OMCO's decision to terminate the Lease Agreements, or that the non-payment of fines and other alleged breaches were pretextual grounds for termination. ¶¶338-340.

1. Since the test of attribution closely paralleled Article 5 of the ILC Articles (which provides that an entity must be empowered by the law to "exercise elements of the governmental authority" and must act "in that capacity in the particular instance"), Article 5 provided useful guidance for the tribunal. ¶323.