INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON DC

In the arbitration proceeding between

ADEL A HAMADI AL TAMIMI

Claimant

– and –

SULTANATE OF OMAN

Respondent

ICSID Case No ARB/11/33

AWARD

Members of the Tribunal

Professor David A R Williams QC, President
Judge Charles N Brower, Arbitrator
Mr J Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Ms Aïssatou Diop

Date of dispatch to the Parties: 3 November 2015

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I. GLOSSARY OF DEFINED TERMS

ABBREVIATION	DEFINITION
Submissions	
Notice of Intent	Notice of Intent to Submit a Claim to Arbitration under Chapter Ten Of The United States–Oman Free Trade Agreement dated 19 April 2011.
Request	Request for Arbitration dated 5 December 2011.
Claimant's Memorial	Claimant's Memorial dated 16 November 2012.
Oman's Counter-Memorial	Oman's Counter-Memorial dated 5 June 2013.
Claimant's Reply	Claimant's Reply Memorial dated 1 November 2013.
Oman's Rejoinder	Oman's Rejoinder dated 11 March 2014.
Claimant's Pre-Hearing Skeleton	Claimant's Pre-Hearing Skeleton of Argument dated 14 April 2014.
Oman's Pre-Hearing Skeleton	Oman's Pre-Hearing Skeleton dated 14 April 2014.
Claimant's Post-Hearing Answers	Claimant's Post-Hearing Answers to the Tribunal's Questions dated 30 June 2014.
Oman's Post-Hearing Answers	Oman's Response to the Tribunal's Post-Hearing Questions dated 30 June 2014.
US Submission	Submission of the United States of America dated 22 September 2014.
Claimant's Response to US Submission	Claimant's Response to the Submission of the United States of America dated 31 October 2014.
Oman's Response to US Submission	Oman's Memoranda [sic] in Response to the Submission of the United States of America dated 31 October 2014.
Claimant's (Corrected) Submission on Costs	Claimant's Submission on Costs dated 6 March 2015 (as corrected by Claimant's Submission on Costs dated 9 March 2015).
Oman's Submission on Costs	Oman's Costs Submission (by letter dated 6 March 2015, including Respondent's Statement of Costs).
Claimant's Reply on Costs	Claimant's Reply to Respondent's Costs Submission dated 16 March 2015.
Oman's Reply on Costs	Oman's Reply to the Claimant's Submission on Costs (by letter dated 16 March 2015).
Claimant's Updated Submission on Costs	Claimant's Updated Submission on Costs dated 22 September 2015
Dramatis personae	
Al Azri, Dr	Dr Hilal Al Azri, Chairman of OMCO until late 2008; also former Director-General of Minerals, Ministry of Commerce and Industry (MOCI).
Al Bulushi, Mr	Yasser Al Bulushi, Head of Government Affairs, Emrock.
Al Busaidi, H E	H E Hamoud Al Busaidi, former Minister of Environment and Climate Affairs (MECA).
Al Dheeb, H E	H E Ahmed Al Dheeb, Chairman of OMCO from late 2008; also Under-Secretary, MOCI.
Al Hinai, H E Dr	H E Dr Abdullah Bin Ali Al Hinai, Director-General of Industry, MOCI.
Al Maimani, H E	H E Al Maimani, Undersecretary for Administrative & Financial and Region Affairs at MOCI.

Al Muharrami, Mr	Mohammed Al Muharrami, Director-General of Environmental Affairs, MECA.
Al Rushdi, Dr	Dr Ghaleb Al Rushdi, Director of Legal Department, MECA.
Al Tamimi, Mr	Adel A Hamadi Al Tamimi, otherwise known as "the Claimant".
Al Waily, Mr	Ali Al Waily, General Manager, OMCO.
Emrock	Emrock Aggregate & Mining LLC, a company incorporated in the UAE of which 49% of the shares are owned by the Claimant.
GEO-Resources	GEO-Resources LLC, environmental consultants who assisted the Claimant with the obtaining of environmental approvals from MECA.
Gupta, Mr	Subodh Gupta, Manager of Mining and Director of Operations, Emrock.
Guzman, Mr	Jaime Guzman, Business Development Manager, OMCO.
Ibrahim, Mr	Saad Ibrahim, Chief Engineer and Manager of Rock Procurement, Nakheel Properties.
Maqbool Bin Ali Sultan, H E	H E Maqbool Bin Ali Sultan, former Minister of Commerce and Industry.
MECA	Omani Ministry of Environment and Climate Affairs (also used for convenience herein to refer to the Ministry's predecessor, the Ministry of Regional Municipalities, Environment and Water Resources – see also entry for MRMEWR.
MOH	Omani Ministry of Housing, Electricity and Water.
MOCI	Omani Ministry of Commerce and Industry.
MRMEWR	Ministry of Regional Municipalities, Environment and Water Resources (predecessor before September 2007 to the Ministry of Environment and Climate Affairs, MECA).
Nakheel Properties	Nakheel Company LLC, a real estate development company wholly owned by the Dubai government.
Oman	Sultanate of Oman, otherwise known as "the Respondent".
OMCO	Oman Mining Company LLC, an Omani state-owned enterprise.
Rahman, Mr	Mamoun Al-Zubair Abdul Rahman, a survey engineer from MOH.
Ralutin, Mr	Francisco Pine Ralutin, scale bridge operator and assistant accountant, Emrock, and later Site Office Manager, Emrock.
Royal Oman Police	State police force of Oman.
SFOH	SFOH Limited, a company incorporated in the UAE of which the Claimant owns a 100% stake.
Van der Wiele, Mr	Adriaan Hendrick Van der Wiele, Principal, GEO-Resources.
Witness Statements	
Al Dheeb Witness Statement	Witness Statement of His Excellency Ahmed Al Dheeb dated 11 March 2014.
First Al Rushdi Witness Statement	Witness Statement of Dr Ghalib bin Abdullah Al Rushdi dated 4 June 2013.

Second Al Rushdi Witness Statement	Supplemental Witness Statement of Dr Ghalib bin Abdullah Al Rushdi dated 11 March 2014.
First Al Tamimi Witness Statement	Witness Statement of Adel A Hamadi Al Tamimi dated 15 November 2012.
Second Al Tamimi Witness Statement	Second Witness Statement of Adel Al Tamimi dated 1 November 2013.
First Al Waily Witness Statement	Witness Statement of Ali Al Waily dated 5 June 2013.
Second Al Waily Witness Statement	Supplemental Witness Statement of Ali Al Waily dated 11 March 2014.
First Gupta Witness Statement	Witness Statement of Subodh Gupta dated 16 November 2012.
Second Gupta Witness Statement	Second Witness Statement of Subodh Gupta dated 1 November 2013.
Maqbool Bin Ali Sultan Witness Statement	Witness Statement of His Excellency Maqbool bin Ali Sultan dated 5 June 2013.
Rahman Witness Statement	Witness Statement of Mahmoun Al-Zubair Abdul Rahman dated 11 March 2014.
Ralutin Witness Statement	Witness Statement of Francisco Pine Ralutin dated 24 August 2012.
First Van der Wiele Witness Statement	Witness Statement of Adriaan Hendrik Van der Wiele dated 5 June 2013.
Second Van der Wiele Witness Statement	Supplemental Witness Statement of Adriaan Hendrik Van der Wiele dated 6 March 2014.
Expert Reports	
Archibald Expert Report	Expert Report of Robert D Archibald, dated 1 November 2013.
First Boyd Expert Report	John T Boyd Company, *Independent Review*, dated November 2012.
Second Boyd Expert Report	John T Boyd Company, *Independent Review*, dated November 2013.
Elite Media Expert Report	Elite Media, *Expert Report: Economic and construction industry conditions in the UAE as of June 1, 2009*, dated March 2014.
MEED Expert Report	MEED Insight, *Limestone Market Study as of June 1, 2009*, dated 1 November 2013.
First Navigant Consulting Expert Report	Expert Report of Brent C Kaczmarek, CFA, Navigant Consulting, dated 5 June 2013.
Second Navigant Consulting Expert Report	Second Expert Report of Brent C Kaczmarek, CFA, Navigant Consulting, dated 11 March 2014.
First RPM Expert Report	Expert Report of RPM (RungePincockMinarco) dated 5 June 2013.
Second RPM Expert Report	Supplemental Expert Report of RPM (RungePincockMinarco) dated 11 March 2014.
Relevant Law	
CCL	Commercial Companies Law (Oman), Royal Decree No 4/1974 (RLA-052).
CRL	Commercial Register Law (Oman), Royal Decree No 3/1974 (RLA-049).
CRLA	Commercial Register Amendment Law (Oman), Royal Decree No 88/1896 (RLA-048).
FCIL	Foreign Capital Investments Law (Oman), Royal Decree No 102/1994 (CLA-049).
Immigration and Nationality Act	Immigration and Nationality Act, 8 USC § 1101 (2010) (RFA-CLA-005; CLA-045).

Law on Conservation of the Environment and Prevention of Pollution	Law on Conservation of the Environment and Prevention of Pollution (Oman), Royal Decree No 114/2011 (RLA-055).
Regulations for Crushers, Quarries and Transport of Sand from Coasts, Beaches and *Wadi*s	Ministerial Decision No 200/2000, Issuing Regulations for Crushers, Quarries and Transport of Sand from Coasts, Beaches and *Wadi*s (RLA-050).
Royal Decree 6/89	Royal Decree 6/89, Regulating the Relationship between Landlords and Tenants of Dwellings, Commercial and Industrial Premises and the Registration of Lease Agreements relating thereto, dated 5 January 1989 (CLA-003).
Royal Decree 11/81	Royal Decree 11/1981 (establishing OMCO) (CLA-002).
UAE Law Concerning Nationality, Passports and Amendments thereof	Federal Law No 17 for 1972 Concerning Nationality, Passports and Amendments thereof (UAE) (Exhibit J-003).
US–Oman FTA	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, which entered into force on 1 January 2009 (Exhibit J-001).
General	
AEP	Application for an Environmental Permit, in this context referring to the Application for an Environmental Permit submitted by the Claimant/OMCO to MECA in November 2006 (Exhibit J-077).
Certificate of Quarry Operation	Certificate for the Issuance of License No 1/1/39/2007 to establish (quarry for rock extraction), dated 4 June 2007 (Exhibit J-103).
DCF	Discounted cash flow, a valuation methodology.
EIA	Environmental Impact Assessment, in this context referring to the Environmental Impact Assessment (version 6) prepared by the Claimant/OMCO in September 2006 (Exhibit J-074).
EMP	Environmental Management Plan, in this context referring to the Environmental Management Plan (version 2) prepared by the Claimant/OMCO in August 2006 (Exhibit J-070).
ICSID	International Centre for Settlement of Investment Disputes.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966.
ICSID Rules	ICSID Rules of Procedure for Arbitration Proceedings, which entered into force on 10 April 2006.
ILC Articles	International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, 2001 (CLA-005).
Jebel Wasa	A mountain range located in the municipality of Mahda, Oman.

Joint Production Agreement	Agreement for Production of Limestone Quarrying and Crushing Project between SFOH and Emrock dated 15 January 2007 (Exhibit J-087).
krooki	Omani term for a site plan or plat issued by MOH relating to land in Oman.
MoU	Memorandum of Understanding.
OMCO–Emrock Lease Agreement	Agreement of Lease for Limestone Quarrying Project between OMCO and Emrock dated 8 April 2006 (Exhibit J-048).
OMCO–SFOH Lease Agreement	Agreement of Lease for Limestone Quarrying Project between OMCO and SFOH dated 25 May 2006 (Exhibit J-058).
UAE	United Arab Emirates.
WACC	Weighted average cost of capital.
wadi	Arabic term referring to a dry riverbed containing water only during times of heavy rain, in this context referring to the *Wadi Sumayni*, a riverbed plain adjacent to the Jebel Wasa range.

II. THE PARTIES AND THEIR REPRESENTATIVES

Representing Adel A Hamadi Al Tamimi:

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III. PROCEDURAL HISTORY

A. ARBITRAL PROCEDURE

1. On 5 December 2011, Adel A Hamadi Al Tamimi ("**Al Tamimi**" or "**the Claimant**") submitted a Request for Arbitration dated 5 December 2011 (the "**Request**") against the Sultanate of Oman ("**Oman**" or "**the Respondent**").

2. The Request for Arbitration was submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**") on the basis of 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 (the "**US–Oman FTA**"), which entered into force on 1 January 2009, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"), which entered into force on 14 October 1966.

3. The Request, as supplemented by the Claimant's letter dated 20 December 2011, was registered by the Secretary-General of ICSID pursuant to Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Institution Rules on 23 December 2011. The Secretary-General notified the Parties of the registration on the same day. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.

4. On 26 March 2012, the Claimant informed ICSID that Claimant's counsel had moved from the law firm of Crowell & Moring LLP to the law firm of Weil, Gotshal & Manges LLP. The Claimant informed ICSID on 21 November 2012 that Mr Peter Mansour of Hamad Al Sharji, Peter Mansour & Co. would also be acting for the Claimant in this arbitration. On 5 June 2013, the Claimant informed ICSID that the law firm of Debevoise & Plimpton LLP had been appointed to replace the law firm of Weil, Gotshal & Manges LLP as counsel for the Claimant in the arbitration.

5. Pursuant to Article 37(2)(a) of the ICSID Convention, the Claimant appointed Judge Charles N Brower, a US national, and the Respondent appointed Mr J Christopher Thomas QC, a Canadian national, as arbitrators. The Parties agreed on the appointment of Professor David A R Williams QC, a national of New Zealand, as the third and presiding arbitrator. The Tribunal was constituted on 25 April 2012 in accordance with ICSID Arbitration Rule 6.

6. Ms Aïssatou Diop, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal. The Parties were subsequently informed on 27 September 2012 that Ms Diop would be replaced as Secretary of the Tribunal by Ms Frauke Nitschke, ICSID Legal Counsel. The Parties were informed on 6 August 2013 that Ms Nitschke would be replaced as Secretary of the

Tribunal by Mr Monty Taylor, also ICSID Legal Counsel. On 24 March 2015, the Parties were informed that Ms. Diop would return as Secretary of the Tribunal.

7. The Tribunal held a First Session with the Parties via telephone conference on 18 June 2012. The Parties confirmed that the Tribunal was properly constituted and that no Party, as of that date, had any objection to the appointment of any Member of the Tribunal. It was agreed (*inter alia)* that the applicable ICSID Arbitration Rules would be those in effect as of April 2006 and that the procedural language would be English. The Parties also confirmed their agreement that the legal place of the arbitration is the seat of ICSID in Washington DC. The agreement of the Parties was embodied in Procedural Order No 1 signed by the President of the Tribunal on 13 July 2012 and circulated to the Parties.

8. On 25 September 2012, the Claimant requested that the Tribunal issue an order directing the Respondent to grant Claimant's industry and damages experts immediate access to the former quarry site (such site being the subject of this arbitration). The Claimant sought this access so as to allow its experts to inspect the site in connection with the completion of their expert reports.

9. On 27 September 2012, the Respondent filed observations on the Claimant's request. The Claimant filed a response to those observations on 28 September 2012.

10. On 28 September 2012, the Tribunal issued Procedural Order No 2 concerning the Claimant's application for access to conduct a site inspection. Relevantly, the Tribunal allowed the Claimant's application for a site visit (in general terms), and made directions with a view to the Parties arranging a site visit as soon as possible after 8 October 2012.

11. The following day, on 29 September 2012, the Claimant filed a request for the Tribunal to reconsider the timing aspects of Procedural Order No 2. On 29 September 2012, the Tribunal rejected the Claimant's request and confirmed the directions contained in that order.

12. On 10 October 2012, the Tribunal issued its Procedural Order No 3 concerning the procedural calendar. This order revised sections of the Tribunal's earlier Procedural Order No 1 relating to the schedule for submission of the Parties' pleadings, and to the dates of the final Hearing.

13. The Claimant filed its Memorial on jurisdiction and the merits on 16 November 2012. With its Memorial, the Claimant also filed (relevantly): (a) a Witness Statement of Mr Adel A Hamadi Al Tamimi dated 15 November 2012; (b) a Witness Statement of Mr Subodh Gupta dated 16 November 2012; (c) a Witness Statement of Mr Francisco Pine Ralutin dated 24 August 2012; and (d) an Expert Report of John T. Boyd Company dated 15 November 2012.

14. Following exchanges between the Parties, on 8 January 2013 the Respondent submitted a request for the Tribunal to decide on the production of certain document categories disputed between the Parties. The Tribunal ruled upon the Respondent's request in its Procedural Order No 4, Rulings on the Respondent's First Request for Production of Documents, dated 5 February 2013.

15. Although the Tribunal ruled upon certain document requests in its Procedural Order No 4, it also deferred its ruling with respect to certain categories of requested documents. Such categories appeared to relate to a possible *ratione personae* objection not yet articulated by the Respondent. As such, in order to rule on those specific categories, and in particular, to determine whether those requests were relevant and material to the outcome of the case, the Tribunal directed the Respondent to file a brief memorandum indicating (among other things) the precise nature of its *ratione personae* challenge, should it intend to make such a challenge in its Counter-Memorial. The order also directed the Claimant to file a short memorandum in response to the Respondent's note.

16. In accordance with Procedural Order No 4, on 15 February 2013 the Respondent filed its memorandum, and on 22 February 2013 the Claimant filed its reply observations.

17. The Tribunal ruled upon the outstanding document requests made by the Respondent in its Procedural Order No 5 dated 15 March 2013. Those requests were denied, although certain reservations were made to this rejection, including that the Tribunal was prepared to revisit the Respondent's requests on better information as to relevant facts and law if such became available at an appropriate stage of the proceeding. The Tribunal also ordered the Claimant to disclose certain official travel documents.

18. On 18 March 2013, the Tribunal issued its Procedural Order No 6 concerning the procedural calendar for the arbitration.

19. The Respondent filed its Counter-Memorial on 5 June 2013, which included its objections to jurisdiction. With its Counter-Memorial, the Respondent also filed: (a) a Witness Statement of Dr Ghalib bin Abdullah Al Rushdi dated 4 June 2013; (b) a Witness Statement of Mr Ali Al Waily dated 5 June 2013; (c) a Witness Statement of H E Maqbool Bin Ali Sultan dated 5 June 2013; (d) a Witness Statement of Mr Adriaan Hendrick "Henk" Van der Wiele dated 5 June 2013; (e) an Expert Report of Mr Brent Kaczmarek, of Navigant Consulting Inc, dated 5 June 2013; and (f) an Expert Report of RungePincockMinarco dated 5 June 2013.

20. Following exchanges between the Parties, on 5 August 2013 the Claimant filed a request for the Tribunal to decide on the production of documents. The Tribunal ruled on these requests by

order dated 21 August 2013, entitled "Rulings on Claimant's Requests for Production of Documents".

21. The Claimant filed its Reply on jurisdiction and the merits on 1 November 2013. The Claimant's Reply was filed with the following witness statements and expert reports: (a) a Second Witness Statement of Mr Adel A Hamadi Al Tamimi dated 1 November 2013; (b) a Second Witness Statement of Mr Subodh Gupta dated both 20 October 2013 and 1 November 2013; (c) an Expert Report of Mr Sari Alabdulrazzak, of MEED Insight, dated 1 November 2013; (d) an Expert Report of Mr Robert D Archibald, of Archibald Consulting Group, dated 1 November 2013; and (e) a Second Expert Report of John Boyd Co, dated 1 November 2013.

22. On 11 February 2014, the Tribunal issued its Procedural Order No 7 concerning the procedural calendar.

23. The Respondent filed its Rejoinder on 11 March 2014 together with: (a) a Supplemental Witness Statement of Mr Ali Al Waily; (b) a Supplemental Witness Statement of Dr Ghalib bin Abdullah Al Rushdi; (c) a Supplemental Witness Statement of Mr Adriaan Hendrick "Henk" Van der Wiele dated 6 March 2014; (d) a Witness Statement of H E Ahmed Al Dheeb; (e) a Witness Statement of Mr Mamoun al Zubair Abdul Rahman; (f) a Supplemental Expert Report of Mr Brent Kaczmarek, of Navigant Consulting Inc, dated 11 March 2014; (g) a Supplemental Expert Report of RungePincockMinarco dated 11 March 2014; and (h) an Expert Report of Ms Delia Meth-Cohn, of Elite Media Inc, dated 10 March 2014.

24. In accordance with Procedural Order No 7, on 14 April 2014 both the Claimant and the Respondent filed a Pre-Hearing Skeleton. On 15 April 2014, the Parties filed an agreed chronology. On the same day, each of the Parties also filed with the Tribunal a list of issues.

25. The Tribunal held a Pre-Hearing Organisational Meeting with the Parties by telephone conference on 16 April 2014.

26. The Tribunal issued Procedural Order No 8 and Procedural Order No 9 on 18 April 2014. The first issued order (Procedural Order No 8) concerned an expert report of JAJ Consultants LLC dated 10 November 2012. This report, which had been prepared on instructions from the Claimant, was attached to the Expert Report of John T Boyd Company dated 15 November 2012 (filed with the Claimant's Memorial). The Respondent had requested on 15 April 2014 that this report should remain on the record, and in its order, the Tribunal granted the Respondent's application by consent. As to the second order (Procedural Order No 9), this provided the Tribunal's rulings on the Claimant's additional requests for production of documents dated 24 March 2014.

27. Also on 18 April 2014, the Claimant sought the Tribunal's permission to submit certain specified documents to the record. At the invitation of the Tribunal, on 23 April 2014 the Respondent submitted observations on the Claimant's request. The Tribunal ruled upon the request in its Procedural Order No 10 dated 24 April 2014.

28. A Hearing on jurisdiction and the merits took place at the International Dispute Resolution Centre in London, United Kingdom, from 28 April to 8 May 2014. In addition to the Members of the Tribunal, the Secretary of the Tribunal, the assistant to Mr J Christopher Thomas QC, Ms Yvette Anthony of the NUS Centre for International Law, the court reporter and the interpreters, present at the Hearing were:

For the Claimant:

Counsel	
Mr David W Rivkin	Debevoise & Plimpton LLP
Mr Mark W Friedman	Debevoise & Plimpton LLP
Mr Carl Micarelli	Debevoise & Plimpton LLP
Ms Floriane Lavaud	Debevoise & Plimpton LLP
Mr Clay H Kaminsky	Debevoise & Plimpton LLP
Ms Raafia M Lari	Debevoise & Plimpton LLP
Ms Corina Gugler	Debevoise & Plimpton LLP
Support Personnel	
Ms Mary Grace McEvoy	Debevoise & Plimpton LLP
Mr Malte Ernsting	Debevoise & Plimpton LLP
Mr Jeff Isler	Infographics Inc
Parties	
Mr Adel A Hamadi Al Tamimi	Emrock Aggregate & Mining LLC
Ms Alia Fadili	Daughter of Adel Al Tamimi
Mr Jeff Karll	Associate of Adel Al Tamimi
Ms Merwin (May) Canlas	Associate of Adel Al Tamimi
Factual Witnesses (subject to sequestration)	
Mr Subodh Gupta	Formerly of Emrock Aggregate & Mining LLC
Experts	
Mr Sari Alabdulrazzak	MEED Insight
Mr Robert D Archibald	The Archibald Consulting Group
Mr Michael F Wick	John T Boyd Company
Mr Joseph G Jandrasits	John T Boyd Company

For the Respondent:

Counsel	
Mr Stanley McDermott III	DLA Piper LLP (US)
Ms Kiera Gans	DLA Piper LLP (US
Mr Bruce Mullins	DLA Piper LLP (US)
Ms Sarah Al-Moosa	DLA Piper LLP (US)

Support Personnel	
Ms Vivian Hoffman	DLA Piper LLP (US)
Mr David Webb	DLA Piper LLP (US)
Ms Sara Tumey	DLA Piper LLP (US)
Parties	
Mr Khalid Saeed Al Shuaibi	Director General International Organisations & Committees, Ministry of Commerce and Industry
Mr Faisal Al-Nabhani	Senior Legal Researcher, Ministry of Legal Affairs
Factual Witnesses (subject to sequestration)	
Dr Ghalib Al-Rushdi	Director of Legal Department, Ministry of Environmental and Climate Affairs
Mr Ali Al-Waily	General Manager, OMCO
Mr Adriaan Hendrick Van der Wiele	Managing Director and Principal Environmental Consultant, GEO-Resources
H E Ahmed Al Dheeb	Undersecretary, Ministry of Commerce and Industry
Mr Mahmoun Al-Zubair Abdul Rahman	Survey and Planning Department, Al Buraimi Directorate General of Housing, Ministry of Housing
Expert Witness	
Ms Delia Meth-Cohn	Elite Media
Mr Brent C Kaczmarek	Navigant Consulting
Mr Tim Swendseid	RungePincockMinarco
Mr Gerard Maglio	Navigant Consulting
Mr Andrew Preston	Navigant Consulting

29. At the oral Hearing, the Tribunal heard from the following fact and expert witnesses:[1]

(i) Called by the Claimant:

Mr Adel A Hamadi Al Tamimi [x T2.11, xx T2.14, xxx T3.104];
Mr Subodh Gupta [x T3.172, xx T3.190, xxx T4.80];
Mr Sari Alabdulrazzak [x T6.2, xx T6.25, xxx T7.2];
Mr Michael F Wick and Mr Joseph G Jandrasits [x T7.36, xx T7.56, xxx T7.163; fxx T7.187]; and
Mr Robert D Archibald [x T7.188, xx T7.204].

(ii) Called by the Respondent:

Mr Ali Al-Waily [x T4.106, xx T4.107, xxx T5.60, fxx T5.67];
Mr Adriaan Hendrick Van der Wiele [x T5.69, xx T5.70, xxx T5.91];
Dr Ghalib Al-Rushdi [x T5.100, xx T5.101];
Mr Mahmoun Al-Zubair Abdul Rahman [x T5.119, xx T5.120, xxx T5.126];
H E Ahmed Al Dheeb [x T5.128, xx T5.129, T5.145];
Ms Delia Meth-Cohn [x T7.226, xx T7.227, xxx T7.268];
Mr Tim Swendseid [x T8.1, xx T8.2, xxx T8.80]; and
Mr Brent C Kaczmarek [x T8.103, xx T8.105, xxx T8.194].

[1] Key: "T#" denotes transcript day; "x" denotes examination-in-chief; "xx" cross-examination; "xxx" re-direct examination; and "fxx" further-cross-examination.

30. A verbatim daily transcript of the oral Hearing was prepared by professional stenographers. This transcript was later issued, as corrected and approved by the Parties on 6 June 2014 and as confirmed by the Tribunal on 21 August 2014.

31. On 26 May 2014, the Tribunal issued its Procedural Order No 11 concerning certain post-Hearing procedural matters. Relevantly, the order scheduled a list of questions and issues to be addressed by the Parties. In accordance with the Tribunal's direction, on 30 June 2014 each Party filed its respective answers to the Tribunal's list of questions and issues.

32. On 22 September 2014, the United States of America filed a written submission as a non-disputing State Party pursuant to the US-Oman FTA, Article 10.19.2, on two issues of treaty interpretation. On 24 September 2014, the Claimant objected to the submission on the grounds that: (a) it was untimely; and/or (b) it exceeded the United States' permitted scope of participation under the FTA. Claimant also sought leave to respond substantively to the submission. On 26 September 2014, the Respondent submitted that the Tribunal should accept the submission, arguing that: (a) allowing the submission would cause no prejudice to the Claimant; and (b) the submission was directed to issues of treaty interpretation only. The Respondent opposed the Claimant's request to respond to the submission, submitting that it was not necessary for either party to respond. By letter dated 29 September 2014, the United States argued that its submission was neither untimely nor outside the scope of Article 10.19.2.

33. On 14 October 2014, the Tribunal issued Procedural Order No 12 admitting the United States' submission into the record, finding, with respect to the issue of timing, that the submission was filed within a reasonable time. With respect to the issue of scope, the Tribunal directed the parties to exchange memoranda discussing: (a) whether the submission fell within the scope of Article 10.19.2; and (b) the substance of the submission and its relevance, if any, to this case. The Tribunal ruled that it would undertake the question of what weight, if any, to give to the United States' submission at the time of its deliberations. On 31 October 2014, each party filed its response to the submission of the United States.

34. Regarding the Parties' submissions on costs, the Tribunal announced at the conclusion of the Hearing that it would defer submissions on this matter until a later date.[2] The Tribunal reiterated this position in Procedural Order No 11. By letter of 4 February 2015, the Tribunal invited the parties to file submissions on costs by 4 March 2015. The parties later agreed to extend that time by two days, as approved by the Tribunal.

[2] See Transcript, Day 9 at 226:16.

35. The parties filed simultaneous submissions on costs on 6 March 2015. On 9 March 2015, the Claimant filed a corrected submission on costs. The same day, the Parties agreed to submit replies to each other's submissions, as approved by the Tribunal. On 16 March 2015, the Parties filed simultaneous reply submissions on costs.

36. On 15 September 2015, the Tribunal requested that the Parties file updated submissions on costs strictly limited to updating the quantum of costs. On 16 September 2015, the Respondent informed the Tribunal that it had no further updates in this regard. On 22 September 2015, the Claimant filed its updated submission on costs.

37. The proceeding was closed on 19 October 2015.

B. THE PARTIES' CLAIMS FOR RELIEF

38. The Tribunal here records the Parties' formal claims for relief made to the Tribunal through the successive stages of this arbitration.

39. *Claimant's Request for Arbitration*: para 105 (pages 54–55) relevantly states: "*Without prejudice to his rights to amend, supplement, or restate the relief to be requested in arbitration, Mr Al Tamimi respectfully requests that the Tribunal grant him the following relief*:

    (i) *A declaration that the Sultanate of Oman has breached its obligations under the US-Oman Free Trade Agreement;*

    (ii) *Compensation in an amount 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;*

    (iii) *Moral damages;*

    (iv) *Costs associated with these proceedings, including all professional fees and disbursements;*

    (v) *Pre-award and post-award interest at a rate to be fixed by the Tribunal; and*

    (vi) *Such further relief that counsel may advise and that the Tribunal may deem appropriate*".

40. *Claimant's Memorial*: para 290 (pages 141–142) states: "*Without prejudice to his rights to amend, supplement, or restate the relief requested, Mr Al Tamimi respectfully requests that the Tribunal grant him the following relief:*

(i) *A declaration that the Sultanate of Oman has breached its obligations under the US-Oman Free Trade Agreement;*

(ii) *Compensation in an amount no less than USD 226.8 million for the damages caused by Oman's failure to provide Mr Al Tamimi national treatment, fair and equitable treatment, and its expropriation of Mr Al Tamimi's investment;*

(iii) *Moral damages in an amount no less than USD 10 million;*

(iv) *Costs associated with these proceedings, including all professional fees and disbursements;*

(v) *Pre-award and post-award interest at a rate to be fixed by the Tribunal; and*

(vi) *Such further relief that counsel may advise and that the Tribunal may deem appropriate".*

41. *Claimant's Reply*: para 304 (page 138) states: "*Without prejudice to his rights to amend, supplement, or restate the relief requested, Claimant respectfully requests that the Tribunal grant him the following relief:*

(a) *A declaration that the* [sic] *Oman has breached its obligations under the FTA;*

(b) *Compensation of not less than US$273 million for injuries caused by Oman's failure to provide Claimant national treatment and fair and equitable treatment, and its expropriation of Claimant's investment, consisting of at least US$263 million in economic damages and at least US$10 million in moral damages;*

(c) *Costs associated with these proceedings, including all professional fees and disbursements;*

(d) *Pre-award and post-award compound interest at a commercial rate to be fixed by the Tribunal; and*

(e) *Such other or further relief that counsel may advise and that the Tribunal may deem appropriate*".[3]

42. *Oman's Counter-Memorial*: para 500 (page 165) states: "*For the reasons stated above, Oman respectfully requests that the Tribunal:*

(a) *Dismiss Mr Al Tamimi's claims in their entirety; and*

(b) *Award Oman all costs incurred in connection with these proceedings, including legal fees, experts' fees, and other costs, and Oman's share of the fees and expenses of the Tribunal*".

43. *Oman's Rejoinder*: para 238 (page 83) states: "*For the reasons stated above, Oman respectfully requests that the Tribunal:*

(a) *Dismiss Mr Al Tamimi's claims in their entirety; and*

(b) *Award Oman all costs and expenses incurred in connection with these proceedings, including all legal fees, experts' fees, hearing costs and Oman's share of the Tribunal's fees and expenses*".

44. *Oman's Pre-Hearing Skeleton of Argument*: para 36 (page 15) provides as follows: "*Oman respectfully requests that the Tribunal (a) dismiss Mr Al Tamimi's claims in their entirety and (b) award Oman all costs and expenses incurred in connection with these proceedings, including all legal fees, experts' fees, hearing costs and its share of the Tribunal's fees and costs*".

[3] The Claimant's plea for relief is repeated in summary form at para 80 of the Claimant's Prehearing Skeleton.

IV. SUMMARY OF RELEVANT FACTUAL BACKGROUND

45. The following summary is intended to provide a general overview of factual background to the dispute between the Parties. It is not intended to be an exhaustive description of all facts considered relevant by the Tribunal. Further relevant factual material will be addressed in the context of the Tribunal's analysis of the issues in dispute below.

46. The Claimant, Mr Adel A Hamadi Al Tamimi,[4] is a US citizen born in Ajman, one of the seven emirates which make up the present United Arab Emirates ("**UAE**"). Mr Al Tamimi is a civil engineer who, since the 1970s, has worked in construction management and real estate development, primarily in New England in the United States.

47. The Respondent, the Sultanate of Oman, is a country located on the southeast coast of the Arabian Peninsula, bordered by the UAE, the Kingdom of Saudi Arabia, and the Republic of Yemen.

48. This proceeding arises 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. Mr Al Tamimi's interest in quarrying in Oman was reportedly sparked by the discovery that Nakheel Properties, a real estate development company owned by the Dubai government, was looking for quarry operators to help fill its demand for large quantities of limestone, and had been negotiating with the Omani government to establish a hard rock quarry near the UAE–Oman Border.[5]

49. The Claimant'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**").

50. Emrock was established and registered in Oman pursuant to the laws of Dubai, UAE on 14 June 2006.[6] The Claimant served as both General Manager and Chairman of Emrock. The Claimant owned a 49% shareholding in the Company and was apparently entitled to 80% of the profits

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[4] Also previously known as Adel Abdul-Amir Fadili: see First Al Tamimi Witness Statement at [3].

[5] Claimant's Memorial at [37].

[6] Memorandum of Association of Emrock Aggregate & Mining LLC among Eurogulf LLC and Atlas Capital Limited, dated 14 June 2006 (**Exhibit J-063**).

generated by Emrock by virtue of Emrock's Memorandum of Association.[7] The Claimant is said to have exercised sole decision-making power on behalf of Emrock as its General Manager.[8]

51. SFOH was established on 15 May 2006 pursuant to the laws of the Jebel Ali Free Zone in Dubai, UAE.[9] SFOH was owned and controlled entirely by the Claimant, who held 100% of the shares in the company.[10]

52. OMCO was established by Royal Decree No 11/81 in 1981.[11] It is a State-owned enterprise, owned almost entirely by the Omani Ministry of Oil and Minerals, established to facilitate the discovery, excavation, manufacturing and marketing of minerals in Oman. OMCO's Board of Directors comprises five members. Mr Ali Al Waily served as OMCO's Executive Manager from 2005 to 2009. Dr Hilal Al Azri, Director-General of Mining at the Omani Ministry of Commerce and Industry ("**MOCI**"), served as Chairman of OMCO until late 2008. H E Ahmed Al Dheeb succeeded Dr Al Azri as Chairman of OMCO in late 2008.[12]

53. The Claimant entered into negotiations with OMCO regarding the Jebel Wasa site after being introduced to Mr Al Waily of OMCO by the Chief Engineer and Manager of Rock Procurement of Nakheel Properties, Mr Saad Ibrahim, in 2005.[13] OMCO subsequently wrote to MOCI on 23 November 2005 requesting "*authorisation for drilling activities*" for limestone in the Jebel Wasa area.[14]

54. Emrock and OMCO executed a conditional lease agreement for the Jebel Wasa quarry site on 12 December 2005, pending the approval of OMCO's Board of Directors. OMCO's Board approved the agreement on 13 February 2006, and the final agreement (the "**OMCO–Emrock Lease Agreement**") was concluded on 8 April 2006.[15] SFOH and OMCO executed a lease agreement for the Jebel Wasa quarry site on 25 May 2006 which was virtually identical in its

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7 **Exhibit J-063**; Amendment to the Memorandum of Association of Emrock Aggregate & Mining (LLC) between Mr Mashaal Sediq Abdullah, Mr Adel A Fadili and Atlas Capital Limited, dated 16 April 2007 (**Exhibit J-094**). A portion of Mr Al Tamimi's shares in Emrock were held indirectly through another company, Atlas Capital Limited, fully owned by Mr Al Tamimi.

8 See **Exhibit J-063**, Art 11.1.

9 Memorandum of Association of SFOH Limited, dated 15 May 2006 (**Exhibit J-054**).

10 Claimant's Memorial at [21].

11 Royal Decree No 11/81 (**CLA-002**).

12 Oman's Counter Memorial at [172].

13 Request at [22]–[23]; Claimant's Memorial at [39].

14 Letter from Mr Al Waily to Mr Al Azri, dated 23 November 2005 (**Exhibit J-035**).

15 Agreement of Lease for Limestone Quarrying Project between Oman Mining Company LLC and Emrock Aggregate & Mining LLC, dated 8 April 2006 (**Exhibit J-048**).

terms to the Emrock-OMCO Lease Agreement (the "**OMCO–SFOH Lease Agreement**"), with the exception that under the terms of the latter agreement an area of 4km^2 of the Jebel Wasa quarry site was demised to SFOH, rather than the 2km^2 area demised to Emrock.[16]

55. The OMCO–Emrock and OMCO–SFOH Lease Agreements each provided that OMCO would use its "*best endeavors*" to obtain the requisite environmental and operating permits for the quarry.[17] The Lease Agreements further provided that they would each come into force upon the obtaining of all permits, licences and access in respect of the Jebel Wasa quarry site.[18] Emrock and SFOH agreed under the Lease Agreements to comply with all obligations imposed by the relevant permit, and agreed to indemnify OMCO "*at all times*" against any claims, demands and liability in respect thereof.[19] Emrock and SFOH further agreed to comply with all environmental, mining and crushing requirements and all other laws of the Sultanate of Oman.[20] The Lease Agreements provided for termination by either party in case of substantial breach, and provided for the "*exclusive jurisdiction*" of the Oman Arbitration Centre in the event of a dispute between the parties relating to "*any aspect of the contractual relationship*".[21]

56. The Lease Agreements required Emrock and SFOH each to pay OMCO a royalty of 5% of gross revenue.[22] The Lease Agreements also required the payment of monthly lease payments by each company to OMCO.[23] The term of each Lease Agreement was ten years, renewable for three additional terms of five years each.[24] The purpose of the Lease Agreements was stated to be for "*limestone and other stone materials quarrying and crushing operations*".[25]

57. Emrock and SFOH subsequently entered into an Agreement for the Production of Limestone Quarrying and Crushing on 15 January 2007 (the "**Joint Production Agreement**").[26] Under the terms of the Joint Production Agreement, Emrock undertook general responsibility for quarrying

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16 Agreement of Lease for Limestone Quarrying Project between Oman Mining Company LLC and SFOH LLC, dated 25 May 2006 (**Exhibit J-058**). See also fn 791 below for further discussion on this point.

17 **Exhibit J-048**, Art 4(ii); **Exhibit J-058**, Art 4(ii).

18 **Exhibit J-048**, Art 9(iii); **Exhibit J-058**, Art 9(iii).

19 **Exhibit J-048**, Art 8(iii); **Exhibit J-058**, Art 8(iii).

20 **Exhibit J-048**, Art 9(vii); **Exhibit J-058**, Art 9(vii).

21 **Exhibit J-048**, Arts 10(iii), 11; **Exhibit J-058**, Arts 10(iii), 11.

22 **Exhibit J-048**, Art 6(ii)(a); **Exhibit J-058**, Art 6(ii)(a).

23 **Exhibit J-048**, Art 6(ii)(b); **Exhibit J-058**, Art 6(ii)(b).

24 **Exhibit J-048**, Art 3; **Exhibit J-058**, Art 3.

25 **Exhibit J-048**, Preamble; **Exhibit J-058**, Preamble.

26 Agreement for Production of Limestone Quarrying and Crushing Project between SFOH and Emrock Aggregate & Mining LLC, dated 15 January 2007 (**Exhibit J-087**).

and crushing operations, while SFOH undertook responsibility to prepare the site,[27] and to provide for necessary materials and permits for the quarry's operation.[28]

58. On 1 April 2006, Emrock entered into a Memorandum of Understanding ("**MoU**") with Nakheel Properties to supply it with 15 million tonnes of rock annually for 10 years for the purpose of "*various projects in Dubai*".[29]

59. In or around November 2006, OMCO, on behalf of Emrock and SFOH, submitted an Application for an Environmental Permit for the Jebel Wasa quarry site ("**AEP**"), along with an Environmental Impact Assessment ("**EIA**") and Environmental Management Plan ("**EMP**"), to the Omani Ministry of Environment and Climate Affairs ("**MECA**").[30] These documents, which had been prepared with the assistance of environmental consultancy firm GEO-Resources, addressed the anticipated environmental impacts of the proposed quarrying project and mitigating measures to be implemented.[31]

60. On 8 January 2007, OMCO wrote to inform Emrock and SFOH that MOCI had given permission for the quarrying operation to begin, pending the issuing of an environmental permit by MECA.[32] Emrock and SFOH subsequently began making necessary purchases, preparations and plans for the operation of the quarry site, including designing and establishing drilling and blasting benches, cutting out and building internal roads, and constructing the camp site and supporting facilities.[33]

61. On 3 March 2007, MECA wrote to MOCI to advise that MECA had no objection to the proposed quarry provided it did not exceed a total area of 2km x 2km.[34] On 5 March 2007, the Omani Ministry of Housing ("**MOH**") issued to OMCO a usufruct contract containing a map ("*krooki*") of the concession comprising a total area of 14.7 km^2. On 25 April 2007, MECA issued an initial

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27 **Exhibit J-087**, Art 8.

28 **Exhibit J-087**, Art 5.

29 Memorandum of Understanding between Nakheel Properties and Emrock Aggregate & Mining LLC, dated 1 April 2006 (**Exhibit J-047**). A later Supply Contract entered into between Emrock and Nakheel Properties on 9 September 2007 reduced the supply to a minimum of 1.5 million tonnes of rock per annum: Agreement of Purchase and Supply and Rock, Art. 1.1 (**Exhibit J-113**).

30 Prior to September 2007, MECA formed part of a larger Ministry of Regional Municipalities, Environment and Water Resources ("**MRMEWR**"). For convenience's sake, the two entities shall herein be referred to only as MECA, but such reference should be understood to refer to MRMEWR prior to September 2007.

31 See discussion below at fn 843 regarding the various versions of the EIA documents prepared by the Claimant.

32 Letter from OMCO to Emrock, dated 8 January 2007 (**Exhibit J-083**); Letter from OMCO to SFOH, dated 8 January 2007 (**Exhibit J-084**).

33 Request at [35]; Claimant's Memorial at [58].

34 Letter from Mr Al Muharammi to MOCI, dated 3 March 2007 (**Exhibit J-089**).

environmental permit to OMCO for the Jebel Wasa quarry.[35] On 29 May 2007, the municipality of Mahda confirmed to OMCO that it had no objection to the Claimant's quarrying activities.[36] On 31 May 2007, OMCO provided to the Claimant a Quarrying Agreement issued by MOCI, along with a Certificate of Quarry Operation (also referred to as a "*quarry license*"), to establish the limestone quarry at Jebel Wasa.[37]

62. On 22 August 2007, having received the initial environmental permit from MECA and the Certificate of Quarrying Operation from MOCI, OMCO instructed Mr Al Tamimi by letter that Emrock and SFOH could begin quarrying operations on 1 September 2007.[38] The letters from OMCO to Emrock and SFOH of 22 August 2007 also reminded Mr Al Tamimi that he was authorised to mine only "*Quarry strata seams and beds of* ***limestone***" and that he was limited to the "*exploitation of limestone rock products only*".[39] The Claimant accordingly commenced quarrying operations at the Jebel Wasa quarry on 1 September 2007.[40]

63. Very quickly, however, the relationship between the Claimant, OMCO and MECA and MOCI deteriorated. This situation culminated in the decision of OMCO to terminate the OMCO–Emrock Lease Agreement by letter of 20 July 2008.[41] In addition, OMCO informed the Claimant on 2 June 2008 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.[42] A second termination letter from OMCO to Emrock followed on 17 February 2009.[43] Ultimately, on 23 May 2009, the Royal Oman Police arrested the Claimant at the request of MECA for allegedly conducting operations outside of his permitted boundaries, operating without the necessary permits, and removing material from the dry riverbed to the west of the Jebel Wasa mountain range (the "*Wadi Sumayni*", hereinafter "***wadi***").[44]

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35 MRMEWR, Initial Environmental Approval, Project No 9353/ZH, dated 25 April 2007 (**Exhibit J-095**).

36 Letter from Mayor Shemsi to OMCO, dated 29 May 2007 (**Exhibit J-100**).

37 Certificate for the Issuance of License No 1/1/39/2007 G to Establish (Quarry for Rock Extraction) and License Contract for the Establishment of a Quarry, effective 27 May 2007 (**Exhibit J-103**).

38 Letter from Mr Al Waily to Mr Al Tamimi (Emrock), dated 22 August 2007 (**Exhibit J-108**); Letter from Mr Al Waily to Mr Al Tamimi (SFOH), dated 22 August 2007 (**Exhibit J-109**).

39 **Exhibit J-108**; **Exhibit J-109** (original emphasis).

40 Request at [39]; Memorial at [71].

41 Letter from Mr Al Azri to Mr Al Tamimi, dated 20 July 2008 (**Exhibit J-199**).

42 Letter from Mr Al Waily to Mr Al Tamimi, dated 2 June 2008 (**Exhibit J-182**).

43 Letter from Mr Al Waily to Mr Al Tamimi, dated 17 February 2009 (**Exhibit J-250**).

44 See Oxford English Dictionary (2nd ed, 1989) at 795–796 (wadi, wady [Arab.: wādī]*:* "*In certain Arabic-speaking countries, a ravine or valley which in the rainy season becomes a watercourse; the stream or torrent running through such a ravine*") (**CLA-082**).

64. Prior to these events, MOCI and MECA had issued a number of complaints, warnings and fines against OMCO/Emrock, beginning before the Claimant's quarrying operations had even formally begun, and continuing until Mr Al Tamimi's ultimate arrest in May 2009. The reasons behind the complaints and orders were varied and included, but were not limited to, the Claimant's alleged unauthorised use of equipment, excavation of material from the *wadi*, operating outside of the boundary of the permit, and blasting outside of the concession area.[45]

65. On 8 August 2007, for example, MECA issued a complaint pertaining to Emrock's use of a screen.[46] On 28 August 2007, OMCO wrote to Mr Al Tamimi alleging that Emrock was in "*clear violation*" of the OMCO–Emrock Lease Agreement by "*processing material originating in the alluvial deposits located in the area's streams*".[47] On 22 September 2007, MOCI issued a notice to OMCO that its experts had observed during a site visit that the Claimant was working beyond the borders of the delimited site.[48] On 29 September 2007, OMCO wrote to Mr Al Tamimi advising that Emrock was engaging in blasting outside the perimeters of OMCO's concession.[49] MECA issued further infringement notices to OMCO on 7 October 2007 and 24 October 2007.[50] On 25 December 2007, MECA issued an infraction report and fined OMCO RO 2,000.[51]

66. Subsequently, the Director-General of Industry at MOCI, H E Dr Al Hinai, wrote to OMCO, in a letter dated 12 November 2007, stating that the quarry boundary was that specified in the Quarry Agreement and Certificate of Quarrying Operation issued by MOCI.[52] In February 2008, a meeting took place between the Claimant, the Director-General for Environmental Affairs at MECA, H E Al Maharrami, the OMCO Chairman, Dr Hilal Al Azri, and the Managing Director of GEO-Resources.[53] It was agreed that OMCO would "*apply* [for] *and obtain permission for extension of the mining concession area incorporating the location of the screen plant and wadi area for the production of wadi products*".[54] In a letter dated 17 February 2008, OMCO asked

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45 Claimant's Memorial at [4].

46 Letter from OMCO to Mr Gupta, dated 8 August 2007 (**Exhibit J-106**).

47 Letter from Mr Al Waily to Mr Al Tamimi, dated 28 August 2007 (**Exhibit J-110**).

48 Letter from H E Dr Al Hinai to OMCO, dated 22 September 2007 (**Exhibit J-115**).

49 Letter from Mr Al Waily to Mr Al Tamimi, dated 29 September 2007 (**Exhibit J-117**).

50 Letter from MECA to Mr Al Waily, dated 7 October 2007 (**Exhibit J-123**) and Letter from MECA to OMCO, dated 24 October 2007 (**Exhibit J-127**).

51 Infraction Report, Serial No 03640, dated 25 December 2007 (**Exhibit J-138**).

52 Letter from H E Dr Al Hinai to Mr Al Waily, dated 12 November 2007 (**Exhibit J-128**).

53 Claimant's Memorial at [84].

54 Letter from Mr Al Waily to Mr Al Tamimi, dated 17 February 2008 (**Exhibit J-157**).

MOCI for an extension of the worksite and for "*approval to produce sand materials*".[55] The Claimant subsequently continued quarrying activities at Jebel Wasa, but on 22 April 2008 OMCO wrote to Mr Al Tamimi again alleging that he had engaged in the unauthorised excavation of *wadi* materials and warning that if he did not cease this activity within one week, OMCO would terminate the OMCO–Emrock Lease Agreement.[56]

67. On 21 April 2008, MOCI issued a RO 10,000 fine against OMCO for alleged failure to "*observe the boundaries of the leased site as previously determined*" and demanded that the Claimant cease such operations immediately.[57] Mr Al Tamimi has claimed that he voluntarily ceased all production in the *wadi* at this time.[58] OMCO paid the RO 10,000 fine and sought reimbursement from Mr Al Tamimi. Mr Al Tamimi offered to reimburse OMCO, but only if it would provide him with copies of the permits it had obtained to date.[59] Mr Al Tamimi additionally sought a meeting with the Minister of Commerce and Industry, H E Maqbool Bin Ali Sultan, to discuss matters. This meeting took place on 12 June 2008, attended by, *inter alia*, H E Maqbool Bin Ali Sultan, Mr Al Tamimi, Dr Al Azri, Chairman of OMCO, and H E Dr Al Hinai, Director-General of Industry at MOCI. Mr Al Tamimi has alleged that he was informed by Dr Al Hinai following this meeting that OMCO was responsible for payment of fines, and that Emrock should not reimburse OMCO for the RO 10,000 fine of April 2008.[60]

68. On 22 June 2008, however, OMCO wrote to Mr Al Tamimi demanding reimbursement of the fine on or before 24 June 2008, stating that failure to comply would be deemed to constitute grounds for termination of the OMCO–Emrock Lease Agreement.[61] By letter of 13 July 2008 headed "*Long Overdue Payments*", Mr Al Waily demanded that Mr Al Tamimi "*settle all outstanding amounts overdue to OMCO*" within five days, or else OMCO would "*be forced to exercise their right as per the contract terms*".[62] Mr Al Tamimi did not reimburse OMCO for the fine, instead referring OMCO to the advice he said had been earlier given to him by Dr Al Hinai and requiring that he first receive copies of OMCO's permits.[63]

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55 Letter from Mr Al Waily to MOCI, dated 17 February 2008 (**Exhibit J-158**).

56 Letter from Mr Al Azri to Mr Al Tamimi, dated 22 April 2008 (**Exhibit J-171**).

57 Letter from Mr Al Waily to Mr Al Tamimi, dated 30 April 2008 (**Exhibit J-176**).

58 Claimant's Memorial at [89].

59 Letter from Mr Al Tamimi to Mr Al Waily, dated 14 July 2008 (**Exhibit J-195**).

60 First Al Tamimi Witness Statement at [142]–[143].

61 Letter from OMCO to Mr Al Tamimi, dated 22 June 2008 (**Exhibit J-190**).

62 Letter from Mr Al Waily to Mr Al Tamimi, dated 13 July 2008 (**Exhibit J-194**).

63 See First Al Tamimi Witness Statement at [144]; **Exhibit J-195**.

69. On 20 July 2008, OMCO purported to terminate the OMCO–Emrock Lease Agreement for failure by Emrock to comply with payment obligations, including, *inter alia*, failure to indemnify OMCO for the RO 10,000 fine which had been levied by MOCI in April 2008.[64]

70. In addition, on 2 June 2008, OMCO informed the Claimant that it considered the OMCO–SFOH Lease Agreement to be "*null and void*", because SFOH had failed to register in Oman as required by OMCO's letter of 22 August 2007.[65]

71. Despite the purported termination of the OMCO–Emrock Lease Agreement on 20 July 2008, the Claimant continued operations in the Jebel Wasa quarry site. On or around 28 July 2008, the Claimant met with H E Al Maimani, Undersecretary for Administrative & Financial and Regional Affairs at MOCI.[66] The Claimant says that he was told by H E Al Maimani that he could continue to operate at the Jebel Wasa quarry.[67] H E Ahmed Al Dheeb, Undersecretary for MOCI, also wrote to H E Dr Al Azri, Chairman of OMCO, on 10 August 2008 stating that the Ministry believed the OMCO–Emrock Lease Agreement should continue.[68] The OMCO Board of Directors subsequently decided to reconsider its decision to terminate the OMCO–Emrock Lease Agreement, and met with the Minister of Commerce, H E Maqbool Bin Ali Sultan, on 23 September 2008 to discuss the decision to terminate.[69]

72. MECA issued additional citations against OMCO on 8 October 2008[70] and 11 October 2008.[71] A further fine of RO 1,000 was attached to the infraction report of 11 October 2008.[72]

73. On 5 November 2008, Nakheel Properties engaged the *force majeure* clause of its supply agreement with Emrock and reduced its daily requirements of limestone from Emrock to 3,000 tonnes per day.[73] On 20 November 2008, that amount was further reduced to 1,500 tonnes per

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64 Letter from Mr Al Waily to Mr Al Tamimi, dated 20 July 2008 (**Exhibit J-198**).

65 **Exhibit J-182**.

66 Oman's Counter-Memorial at [153].

67 Claimant's Memorial at [101].

68 Letter from H E Al Dheeb to H E Dr Al Azri, dated 10 August 2008 (**Exhibit J-204**). The Respondent says that, although nominally from H E Al Dheeb, the letter was in fact approve by H E Al Maimani, as H E Al Dheeb was away on leave (Oman's Counter-Memorial at [158]).

69 Oman's Counter-Memorial at [159]–[164].

70 Warning, Serial No 05928, issued to OMCO and Emrock, dated 8 October 2008 (**Exhibit J-216**).

71 Infraction Report, Series No 12901, dated 11 October 2008 (**Exhibit J-218**).

72 **Exhibit J-218**.

73 Letter from Nakheel to Mr Al Tamimi, dated 5 November 2008 (**Exhibit J-226**).

day.[74] On 30 December 2008, Nakheel Properties informed Emrock that all works under its supply agreement with Emrock would be suspended from 16 January 2009 until further notice.[75]

74. The US–Oman FTA came into force on 1 January 2009. In early February 2009, MECA issued a number of further citations against OMCO in respect of Emrock's alleged actions in taking material from the *wadi*, operating machinery without necessary permits, failure to obtain permits for housing, and uprooting trees.[76] The fines attached to these citations totalled RO 12,500. Following the issuing of these citations, OMCO again instructed Emrock to cease *wadi* production and, on 17 February 2009, purported again to terminate the OMCO–Emrock Lease Agreement on a variety of grounds, including that Emrock had failed to comply with payment obligations allegedly totalling RO 35,440.435.[77] OMCO additionally sent Emrock a "*demobilization plan*" of the same date, requiring that the Claimant immediately cease operations at the Jebel Wasa quarry site and "*remove all their equipments* [sic]*, installations and accommodations*" from the site.[78]

75. On 15 March 2009, OMCO wrote to inform Emrock that it considered Emrock's continued presence at the quarry site to be illegal and stated that Emrock had 30 further days to vacate the premises.[79] A further letter to this effect followed on 18 March 2009.[80] On 19 April 2009, after the expiry of the 30-day period, OMCO again wrote to Emrock reiterating that it considered that Emrock remained on the quarry site illegally and instructed Mr Al Tamimi to contact the Public Prosecutor in connection with Emrock's alleged breaches of Oman's environmental laws.[81]

76. Meanwhile, on 8 April 2009, Mr Al Tamimi wrote to H E Hamoud Al Busaidi, Minister for Environment and Climate Affairs, asking him to intervene on Emrock's behalf.[82] Shortly thereafter, on 13 April 2009, Dr Al Rushdi, Director of the Legal Department at MECA, visited the quarry site for an inspection.[83] On 19 May 2009, Mr Al Muharrami, Director-General of Environmental Affairs at MECA, contacted the Royal Oman Police to request that they intervene

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74 Letter from Nakheel to Mr Al Tamimi, dated 20 November 2008 (**Exhibit J-228**).

75 Letter from Nakheel to Mr Al Tamimi, dated 30 December 2008 (**Exhibit J-236**).

76 Letter from Mr Al Waily to Mr Al Tamimi, dated 3 March 2009 (**Exhibit J-257**).

77 **Exhibit J-250**.

78 Second letter from Mr Al Waily to Mr Al Tamimi, dated 17 February 2009 (**Exhibit J-249**).

79 Letter from Mr Al Waily to Mr Al Tamimi, dated 15 March 2009 (**Exhibit J-266**).

80 Letter from Mr Al Waily to Mr Al Tamimi dated 18 March 2009 (**Exhibit J-268**).

81 Letter from Mr Al Waily to Mr Al Tamimi, dated 19 April 2009 (**Exhibit J-277**).

82 Letter from Mr Al Tamimi to H E Al Busaidi, dated 8 April 2009 (**Exhibit J-274**).

83 First Al Rushdi Witness Statement at [28]–[29].

to stop operations at Jebel Wasa quarry "*in order to force the Company to comply with the laws and environmental requirements till the competent judicial authority issue* [sic] *a decision*".[84]

77. Mr Al Tamimi was arrested at the Jebel Wasa quarry site by the Royal Oman Police on 23 May 2009. He was held at a local police station for several hours, where he was photographed, fingerprinted and questioned by police. He was also taken to meet with a local prosecutor. Mr Al Tamimi was ultimately informed that he would be released from custody provided he submitted his US passport, posted RO 5,000 as bail, and signed an undertaking regarding future quarry operations.[85] Mr Al Tamimi agreed to sign this undertaking, and was released by police after promising to provide the bail money and his passport the following day. Mr Yasser Al Bulushi, Emrock's head of government affairs, subsequently delivered the bond payment and passport to police.[86] Mr Al Tamimi's passport was later returned to him by the Public Prosecutor at the request of his lawyers.[87]

78. A criminal trial was subsequently commenced against Mr Al Tamimi in the Mahda Court of First Instance. By virtue of his position as Chairman of Emrock, Mr Al Tamimi was tried and convicted by the Court on 8 November 2009 on two misdemeanour counts: (a) stealing sands and stones without a permit; and (b) violating Omani environmental law by engaging in quarrying and crushing operations without the requisite permissions.[88] The Claimant was sentenced to imprisonment for a term of three months and fined RO 3,050. While the Court ordered that the fine should be collected, Mr Al Tamimi's sentence of imprisonment was suspended.

79. Mr Al Tamimi subsequently filed an appeal with the Ibri Court of Appeal against his conviction by the Mahda Court of First Instance. On 6 June 2010, the Ibri Court of Appeal issued a judgment overturning Mr Al Tamimi's conviction on both misdemeanour counts. The decision of the Ibri Court of Appeal was not appealed to the Omani Court of Cassation.

80. Meanwhile, on 26 September 2009, while the first decision of the Mahda Court of First Instance was still pending, MECA filed four additional statements of claim with the Public Prosecutor relating to outstanding violations and fines against Emrock. Those four claims were also subsequently tried by the Mahda Court of First Instance, in separate proceedings from the first

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84 Letter from Mr Al Muharrami to Colonel Al Naaemi, dated 19 May 2009 (**Exhibit J-292**).

85 Request at [59]. See Receipt of Payment, No 19280, dated 25 May 2009 (**Exhibit J-302**); Confirmation of Official Document Confiscation, Case No 74/Q/2009, dated 23 May 2009 (**Exhibit J-296**); Undertaking, Sultanate of Oman Police, dated 23 May 2009 (**Exhibit J-297**).

86 Claimant's Memorial at [124].

87 First Al Tamimi Witness Statement at [191].

88 Mahda Court of First Instance, Judgment No 114/2009 in Case No 74/2009 (**Exhibit J-327**).

criminal trial against Mr Al Tamimi. In its ruling of 25 April 2010, the Court found Mr Al Tamimi, again in his capacity as Chairman of Emrock, liable on all charges, and fined him RO 1,500.[89] This decision was not appealed to the Ibri Court of Appeal.

81. In March 2009, MECA also laid three claims with the Public Prosecutor against OMCO for violations of environmental laws.[90] On 28 July 2009, the Mahda Court of First Instance ruled on these claims, finding that the claims should have been filed against Emrock as the independent party in control of the Jebel Wasa quarry site and not against OMCO.[91]

82. According to the Claimant, production of limestone at the Jebel Wasa quarry site permanently ceased on the date of his arrest, 23 May 2009.[92] Emrock continued, however, to sell surplus inventory to buyers, who brought their trucks to the site to collect the limestone.[93] The Royal Oman Police allegedly intervened on repeated occasions to stop this process, claiming that Emrock had no legal right to continue to occupy the Jebel Wasa quarry site.[94]

83. These police interventions allegedly made it difficult for Emrock to continue any operations at the quarry site. Over time, Emrock's staff were suspended and left the quarry site. Emrock's creditors reportedly seized much of the equipment remaining at the quarry site.[95] Mr Francisco Ralutin, Site Office Manager for Emrock, tendered his resignation on 1 March 2010.[96] By April 2010, according to the Claimant, none of Emrock's staff remained on the quarry site.[97]

84. Mr Al Tamimi commenced proceedings against Oman by filing a Request for Arbitration on 5 December 2011.

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89 Letter from Sultanate of Oman Public Prosecution Office to MECA, dated 15 May 2010, attaching Judgment of Case Nos 147, 148, 149 and 150 (**Exhibit J-353**).

90 Statement of Claim of Lawsuit No 223, dated 3 March 2009 (**Exhibit J-258**); Statement of Claim of Lawsuit No 224, dated 3 March 2009 (**Exhibit J-259**); Statement of Claim of Lawsuit No 225, dated 7 March 2009 (**Exhibit J-262**).

91 Mahda Court of First Instance, Judgment No 33/C/A/2009 in Case No 224/2009 (**Exhibit J-315**); Mahda Court of First Instance, Judgment No 34/C/A/2009 in Case No 225/2009 (**Exhibit J-316**); Mahda Court of First Instance, Judgment No 32/C/A/2009 in Case No 223/2009 (**Exhibit J-317**).

92 Claimant's Memorial at [136].

93 Claimant's Memorial at [137].

94 See eg Ralutin Witness Statement at [33].

95 Claimant's Memorial at [139], [184].

96 Letter from Mr Ralutin to Mr Al Tamimi, dated 1 March 2010 (**Exhibit J-344**).

97 Claimant's Memorial at [138].

V. SUMMARY OF THE PARTIES' ARGUMENTS

A. JURISDICTION

85. The Respondent submits that the Tribunal lacks jurisdiction to hear the claims raised by Mr Al Tamimi in this proceeding. The Tribunal sets out the Parties' arguments below with respect to the Respondent's objections.

(a) Jurisdiction *ratione personae*

(i) Respondent's position

86. In its Counter-Memorial, the Respondent submits that the Claimant may be a dual national of the US and UAE, and as such may not qualify as an investor for the purposes of the US–Oman FTA.[98] The Respondent did not present oral argument on this objection at the Hearing, but confirmed at the Hearing that the objection had not been withdrawn.[99] As such, the Tribunal will address and determine this objection on the basis of the Parties' arguments set out in their written submissions.

87. In short, the Respondent submits that, as Mr Al Tamimi appears to be a US–UAE dual national, the Claimant should be deemed an exclusive national of the UAE for the purposes of Article 10.27 of the US–Oman FTA, and as such should be precluded from claiming under that agreement.

88. Article 10.27 relevantly defines an "*investor of a Party*" as follows: "[…] *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*". The Respondent contends that, as Mr Al Tamimi had previously stated that he was a national of the UAE,[100] and as it remains unclear whether Mr Al Tamimi has lost or still retains that citizenship, he may be deemed an exclusive national of the UAE and hence not a covered "*investor of a Party*" for the purposes of the US–Oman FTA.

(ii) Claimant's position

89. The Claimant takes a different view of this issue. The Claimant contends that, even if he had become a UAE national involuntarily when the UAE was formed in 1971 (the Claimant was born

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[98] Oman's Counter-Memorial at [263]–[266]. The objection was first raised by the Respondent in its initial Request for Documents and Information dated 8 January 2013, and then considered by the Tribunal in its Procedural Order No 5 dated 15 March 2013 for the limited purpose of determining the Respondent's document requests.

[99] Transcript, Day 5 at 224; further confirmed in Oman's Post-Hearing Answers, Answer A.1.

[100] Notice of Intent at [7].

a citizen of the Emirate of Sharjah and, according to the Claimant, did nothing to claim UAE citizenship when the UAE was formed), he lost that nationality as a matter of both US and UAE law when he became naturalised as an American citizen on 11 June 1980.[101] The Claimant contends that the documents conclusively establish that he was (and is) a US citizen and that at all relevant times he held himself out as such;[102] in the latter respect the Claimant notes that his nationality is listed uniformly and unconditionally as "*American*" in all registration documents filed with the UAE and Omani authorities.[103]

90. The Claimant also argues that, in the event that he is a dual citizen of the US and the UAE (which is denied), he would nonetheless be entitled to the protection of the US–Oman FTA as his "*dominant and effective*" nationality (for the purposes of Article 10.27 of the FTA) is clearly American.[104] In this respect, the Claimant refers to his residency in the US since 1968, his centre of business interests and family ties in Massachusetts and the New England region of the US, and his involvement in the local community in Wakefield, Massachusetts.[105]

(b) Jurisdiction *ratione materiae*

(i) Respondent's position

91. The Respondent submitted in its Counter-Memorial that the Claimant does not have a "*covered* investment" under the US–Oman FTA, because the Claimant's alleged investments fail to meet the fundamental requirement that they be in existence on or after the date on which the US–Oman FTA came into force.[106]

92. As to the reasons why the Respondent says that the Claimant had no investment in existence by the time of the coming into force of the US–Oman FTA, those submissions are summarised below under the "*Jurisdiction ratione temporis*" heading.

(ii) Claimant's position

93. The Claimant has submitted that his investments in Oman, made through Emrock and SFOH, comprised the OMCO–Emrock Lease Agreement and the OMCO–SFOH Lease Agreement as

[101] Claimant's Reply at [125]–[129].

[102] Claimant's Pre-Hearing Skeleton at [39]. See also Claimant's Memorial at [148] and [156]; Claimant's Post-Hearing Answers, Answer A.1.

[103] Claimant's Reply at [131].

[104] Claimant's Reply at [133]–[139].

[105] Claimant's Reply at [135]–[138].

[106] Oman's Counter-Memorial at [267]–[268]; see also Oman's Rejoinder at [67].

well as "*tens of millions of dollars*" spent implementing those agreements, including building a road to the quarry site, designing a modern quarrying operation, developing the site, employing and training hundreds of labourers, creating a market presence, and leasing and purchasing equipment.[107]

94. The Claimant has submitted that the Tribunal does have jurisdiction *ratione materiae* in the present case on the basis that: (i) the Claimant is an investor of "*the other Party*" as defined in the US–Oman FTA; (ii) he has a "*covered investment*"; (iii) his allegations of breach under Chapter 10 of the US–Oman FTA pertain to measures adopted or maintained by Oman relating to the Claimant and/or his covered investment; and (iv) he has alleged loss or damage by reason of, or arising out of, the breaches he has alleged.[108]

95. The Claimant's investments are "*covered investments*", the Claimant has submitted, because they were in existence as of the date of entry into force of the US–Oman FTA on 1 January 2009. The present dispute, moreover, concerns measures adopted or maintained by Oman on or after 1 January 2009 relating to the Claimant and his covered investments, which the Claimant alleges caused him to suffer loss.[109] As to why the Claimant submits that his investments continued in existence as of the date of entry into force of the US–Oman FTA, again see the summary under the "*Jurisdiction ratione temporis*" heading below.

(c) Jurisdiction *ratione temporis*

(i) Respondent's position

96. The Respondent contends that the OMCO–Emrock and OMCO–SFOH Lease Agreements are not "*covered investments*" for the purposes of the US–Oman FTA.

97. The Respondent notes that the US–Oman FTA relevantly provides that a "*covered investment*" under that instrument requires that the purported investment comport with Omani laws and be "*in existence as of the date of entry into force of*" the FTA (ie 1 January 2009).[110] Oman claims that the Claimant's alleged investments fail to meet this requirement.[111]

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[107] Request at [19]–[30].

[108] Claimant's Memorial at [159].

[109] Claimant's Memorial at [160]–[161].

[110] Oman's Counter-Memorial at [267].

[111] Oman's Counter-Memorial at [268]; Oman's Pre-Hearing Skeleton at [27].

98. Dealing first with the OMCO–SFOH Lease Agreement, the Respondent alleges that such agreement never came into force because SFOH was never registered in Oman.[112] Such registration was allegedly required both under (a) Omani law, and (b) the terms of the agreement.[113]

99. The Respondent submits that Omani law does not recognise the existence of companies not registered in Oman, or the contracts those companies enter into.[114] Despite being subject to this registration requirement under Omani law, and despite being reminded by OMCO of that obligation, the Claimant did not register SFOH.[115] On 22 August 2007, OMCO told the Claimant that the OMCO–SFOH Lease Agreement would be void if he failed to register SFOH in Oman by 30 November 2007.[116] The Respondent contends that, as he did not do so, the OMCO–SFOH Lease Agreement was a nullity as of 30 November 2007, namely thirteen months before the US–Oman FTA took effect.[117]

100. As to the OMCO–Emrock Lease Agreement, the Respondent claims that this is not protected by the US–Oman FTA because OMCO had terminated that agreement before the FTA came into force.[118] The Respondent submits that OMCO terminated the OMCO–Emrock Lease Agreement under cover of letter dated 20 July 2008, and that (although its reasons for doing so are not properly in issue before this Tribunal[119]) OMCO acted within the terms of the agreement in exercising its right to terminate.[120] The Respondent refers to a history of correspondence between OMCO and the Claimant (commencing on 30 April 2008) in which OMCO sought reimbursement of the RO 10,000 fine that OMCO paid to MOCI owing to Emrock's unauthorised operations outside the Jebel Wasa; the Respondent submits that the Claimant's failure to make this payment (and other overdue payments under the agreement) entitled OMCO to terminate

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[112] Oman's Counter-Memorial at [269]; Oman's Rejoinder at [68].

[113] Oman's Counter-Memorial at [269], [276]; Oman's Rejoinder at [68].

[114] Oman's Counter-Memorial at [270]–[273]; Oman's Rejoinder at [74]. To the extent that the Claimant contends that the OMCO–SFOH Lease Agreement did not require compliance with Omani law, the Respondent notes that, while this is denied, it does not matter in any event: the obligation to register is not created by contract, but rather by Omani law, and the lease agreement merely repeated that obligation (Oman's Rejoinder at [70]).

[115] Oman's Counter-Memorial at [274].

[116] Oman's Counter-Memorial at [275].

[117] Oman's Counter-Memorial at [275]. The Respondent notes that, subsequently on 2 June 2008, OMCO reconfirmed that the lease agreement had been rendered null and void (Oman's Counter-Memorial at [280]).

[118] Oman's Counter-Memorial at [283]; Oman's Rejoinder at [76].

[119] The Respondent notes that any complaint as to the grounds for OMCO terminating the agreement (and further, OMCO's right to terminate the agreement) could only properly be considered in an arbitration commenced under the OMCO–Emrock Lease Agreement, not under the US–Oman FTA (Oman's Rejoinder at [65]–[66] and [85]; Oman's Pre-Hearing Skeleton at [10] and [20]).

[120] Oman's Counter-Memorial at [284]–[285]; Oman's Rejoinder at [91]–[94].

the OMCO–Emrock Lease Agreement pursuant to Article 10(iv) thereof.[121] Again, as this termination was effected on 20 July 2008, the Respondent contends that the Claimant had no "*covered investment*" as of the date the US–Oman FTA came into force on 1 January 2009.[122]

101. The Respondent also contends that the purported termination by OMCO on 20 July 2008 was valid under Omani law.[123] The Respondent submits that, contrary to the Claimant's position, Omani law did not require OMCO to obtain a judicial decree from an Omani court authorising the termination of the OMCO–Emrock Lease Agreement in order to validly terminate that agreement.[124] In this respect, the Respondent contends that the Claimant's reliance upon RD 6/89 is misplaced, as that law governs only "*residential unit[s] or commercial or industrial or professional shops and its leased extensions*".[125]

102. The Respondent rejects the Claimant's submission that OMCO rescinded its July 2008 termination of the OMCO–Emrock Lease Agreement.[126] The Respondent contends that there is no evidence that OMCO's Board of Directors ever acted to vacate the July 2008 termination or to reinstate the Agreement.[127] According to the Respondent, the fact that OMCO did not take immediate steps following termination to evict the Claimant from the site of the project does not mean that the Agreement was not effectively terminated on 20 July 2008.[128] In this same connection, the Respondent contends that OMCO's further February 2009 termination of the OMCO–Emrock Lease Agreement does not mean that OMCO had reinstated that agreement after 20 July 2008;[129] rather, the Respondent explains that this reaffirmation of the decision to terminate was compelled by the Claimant's refusal to acknowledge the end of the OMCO–Emrock Lease Agreement.[130]

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[121] Oman's Rejoinder at [76]–[79], [88] and [93].

[122] Oman's Counter-Memorial at [283]; Oman's Rejoinder at [76] and [79].

[123] Oman's Counter-Memorial at [287]–[288]. The Respondent also notes that international law does not diminish OMCO's right to terminate the OMCO–Emrock Lease Agreement, and in such respect argues that the doctrine of proportionality invoked by the Claimant has no application here (Oman's Rejoinder at [100]–[101]).

[124] Oman's Rejoinder at [95]. In this respect, the Respondent notes that this makes common sense: if every party seeking to terminate a lease were required first to obtain a court judgment to do so, the Omani courts would be inundated with claims to that end (Oman's Rejoinder at [99]).

[125] Oman's Rejoinder at [95].

[126] Oman's Counter-Memorial at [291]–[299].

[127] Oman's Counter-Memorial at [291]; Oman's Rejoinder at [80]–[84]; Oman's Pre-Hearing Skeleton at [18].

[128] Oman's Counter-Memorial at [294].

[129] Oman's Counter-Memorial at [297]; Oman's Rejoinder at [80].

[130] Oman's Rejoinder at [80].

103. According to the Respondent, the reaffirmation of the decision was only delayed until after 1 January 2009 (ie after the US–Oman FTA came into force) because of a change in leadership in OMCO: Dr Al Azri, the Chairman of OMCO, stepped down from that position in late 2008, and the OMCO Board of Directors decided to defer issuing the notice to the Claimant until after H E Al Dheeb was installed as the new Chairman in early 2009.[131]

(ii) Claimant's position

104. The Claimant submits that it had valid leases on the date the US–Oman FTA came into force and thereafter, and notes that the leases are captured by the definition of "*investment*" in Article 10.27 of the US–Oman FTA.[132] The Claimant notes that the Ibri Court of Appeal found on 6 June 2010 that the OMCO–Emrock Lease Agreement was in force and not validly terminated,[133] and that although that court's judgment did not address the OMCO–SFOH Lease Agreement, such agreement was also never validly terminated.[134]

105. Addressing the OMCO–Emrock Lease Agreement, the Claimant contends that the lease was in force on 1 January 2009. The Claimant submits that OMCO's purported termination letter of 20 July 2008 had no effect, and that the second attempted termination in February 2009 demonstrates its understanding that the earlier letter was ineffective.[135] The Claimant submits that the second letter was also ineffective in this respect.[136]

106. The Claimant raises a number of arguments as to why the 20 July 2008 letter was ineffective in purporting to terminate the OMCO–Emrock Lease Agreement. First, the Claimant alleges that the purported termination of a multimillion dollar agreement for the alleged non-reimbursement of a comparatively small fines totalling only RO 10,000 (about US$26,000) was an evident pretext (rather than a legitimate reason) for terminating the lease.[137] The Claimant notes that Emrock had not failed to pay any legitimate amounts due to OMCO, and that (as found by the Ibri Court of Appeal) OMCO had obtained the proper permits for Emrock, and Emrock was operating the

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[131] Oman's Rejoinder at [81]; Oman's Pre-Hearing Skeleton at [18].

[132] Claimant's Memorial at [149] (referring specifically to Art 10.27(h) of the US–Oman FTA); Claimant's Reply at [87]–[122].

[133] The Respondent submits that the Ibri Court of Appeal made no such finding, and that the court had not been asked to consider (and did not consider) the issues surrounding OMCO's termination of the OMCO–Emrock Lease Agreement (Oman's Rejoinder at [19], [32] and [34]; Oman's Pre-Hearing Skeleton at [24]; Oman's Post-Hearing Answers, Answer C.20).

[134] Claimant's Reply at [16] and [88]; Claimant's Post-Hearing Answers, Introduction and Answer A.20.

[135] Claimant's Reply at [89]–[110].

[136] Claimant's Reply at [110].

[137] Claimant's Reply at [89].

quarry within the concession area.[138] To the extent that proper permits had not been obtained, this was a breach of OMCO's own obligations under the OMCO–Emrock Lease Agreement, for which OMCO could not seek an indemnity from Emrock.[139]

107. Second, the Claimant contends that OMCO's purported termination did not comply with the provisions of the OMCO–Emrock Lease Agreement.[140] The purported termination was made under Article 10(iv) of the lease, which relevantly states that the lessor has a right of termination if the tenant is "*not complying with the term of payment under this agreement*".[141] According to the Claimant, that provision could not apply to the present case, as the alleged failure to reimburse OMCO for fines was not Emrock's responsibility under the lease agreement.[142]

108. The Claimant posits that OMCO's correspondence with Emrock demonstrates that OMCO understood that Article 10(iv) did not apply.[143] OMCO, in its 22 June 2008 letter to Emrock, first relied upon the "*substantial breach*" provision in Article 10(iii) of the OMCO–Emrock Lease Agreement (rather than Article 10(iv)); the "*substantial breach*" clause required OMCO to allow Emrock 60 days to remedy the alleged breach.[144] However, the lease was purportedly terminated only 28 days later, in reliance (for the first time) upon Article 10(iv) of the lease as the grounds for termination, and without the required 60-day notice of Article 10(iii).[145] As submitted by the Claimant, Article 10(iv) does not apply here, and the inconsistent grounds for termination articulated by OMCO further demonstrates that its stated reasons were a pretext.[146]

109. Third, the Claimant observes that Omani law requires that a judicial decree be obtained before a lease agreement for real property may be terminated.[147] The Claimant submits that, as OMCO

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[138] Claimant's Reply at [90].

[139] Claimant's Reply at [90]–[91]. In this respect, the Claimant observes that the fines were assessed by MOCI against OMCO, not Emrock (Claimant's Reply at [92]).

[140] Claimant's Reply at [94]–[98].

[141] Claimant's Reply at [95].

[142] Claimant's Reply at [95]. To the extent that Emrock did have responsibility to pay those fines (which is denied by the Claimant), such responsibility would not be part of the "terms of payment under this agreement" but rather part of a separate obligation to indemnify (Claimant's Reply at [95]).

[143] Claimant's Reply at [96].

[144] Claimant's Reply at [96].

[145] Claimant's Reply at [96].

[146] Claimant's Reply at [97].

[147] Claimant's Reply at [99]. To the extent that Oman contends that RD 5/81 applies to the OMCO–Emrock Lease Agreement, the Claimant submits that this is incorrect, as that decree only addresses termination of usufructs of state-owned land (rather than leases of unimproved land, which is the case here). The Claimant submits that the issue of termination of the OMCO–Emrock Lease Agreement is instead governed by general Omani principles of landlord-tenant law, under which court approval is required for termination (Claimant's Reply at [102]).

did not use the proper legal channels to seek redress by applying for a termination, Oman cannot rely upon OMCO's meaningless declaration of termination.[148] Even had a judicial decree been sought, the Claimant contends that it would not have been granted, as Emrock had not breached the lease, and even if it had (which is denied), Oman offers no reason to think that any reasonable Omani judge would have permitted OMCO to seize on non-payment of a few thousand dollars to terminate a lease worth hundreds of millions.[149]

110. Finally, the Claimant submits that, even if non-reimbursement of a small amount of fines constituted grounds for termination under the OMCO–Emrock Lease Agreement, the termination of a lease worth hundreds of millions of dollars on that basis would violate basic requirements of proportionality.[150] In this respect, the Claimant notes that Omani courts enforce principles of proportionality in considering applications to terminate a lease or other contract, and that proportionality is a principle of customary international law.[151]

111. Turning to OMCO's second purported termination letter of 17 February 2009, the Claimant maintains that this letter was also ineffective to terminate the OMCO–Emrock Lease Agreement.[152] Further, by the fact of sending the second letter, the Claimant contends that OMCO demonstrated its understanding that the lease was still in effect at that time (namely, over a month after the US–Oman FTA came into force).[153]

112. The Claimant notes that the second letter relevantly provides that OMCO "*hereby terminate[s] EMROCK with immediate effect because EMROCK has not complied with making payments to* [OMCO]."[154] The Claimant submits that this language clearly reflects OMCO's understanding that the lease was still in place as of 17 February 2009 (the date of the second letter), as the lease could not be terminated "*with immediate effect*" had it already been terminated in July 2008.[155] Further, the Claimant contends that subsequent statements by OMCO also confirm OMCO's understanding that the lease agreement was not terminated until after the US–Oman FTA

[148] Claimant's Reply at [100].

[149] Claimant's Reply at [100].

[150] Claimant's Reply at [104].

[151] Claimant's Reply at [104].

[152] Claimant's Reply at [110].

[153] Claimant's Reply at [107].

[154] Claimant's Reply at [108].

[155] Claimant's Reply at [108]. The Claimant also submits that, in any event, the OMCO Board of Director's specification of a 2009 effective date waives the effect (if any) of any earlier purported termination (Claimant's Reply at [108]).

entered into force: in various communications made by OMCO in 2010, OMCO referred to the OMCO–Emrock Lease Agreement having been cancelled/terminated since March 2009.[156]

113. As to the effectiveness of the second purported termination, the Claimant submits that this is irrelevant to the Tribunal's jurisdiction, as this alleged termination (in February or March 2009) occurred after the US–Oman FTA came into force.[157] In any event, the Claimant contends that the 17 February 2009 letter suffers from the same flaws as the 20 July 2008 letter, as it is a disproportionate sanction for a minor alleged non-payment of an amount that was actually OMCO's responsibility, it failed to comply with the lease, and it did not receive judicial approval.[158]

114. With respect to the OMCO–SFOH Lease Agreement, the Claimant maintains that such agreement was in force on 1 January 2009 and that (contrary to the Respondent's submission) SFOH was not under an obligation (under either Omani law or the lease agreement itself) to register in Oman.[159] The Claimant notes that the Respondent has not cited any provision of the OMCO–SFOH Lease Agreement to support the proposition that the agreement required registration by SFOH.[160] The Claimant also submits that the Omani laws requiring registration of foreign entities do not apply to SFOH, as SFOH carried out no mining or other relevant business operations in Oman itself; rather, it acted only through Emrock pursuant to the Agreement for Production of Limestone and Crushing Project dated 15 January 2007.[161]

115. The Claimant also submits that, even had registration been required, SFOH's failure to register would not have resulted in the OMCO–SFOH Lease Agreement being automatically null and void.[162] It is the Claimant's contention that, under applicable Omani law, the penalty for failure to register a company doing business in Oman is a small monetary fine.[163] The Claimant submits that nothing in that law declares contracts void as a consequence of non-registration.[164] Further, to the extent that the Respondent argues that Omani law does not recognise the existence of companies not registered in Oman, the Claimant submits that this is inconsistent with the

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[156] Claimant's Reply at [109].

[157] Claimant's Reply at [110].

[158] Claimant's Reply at [110].

[159] Claimant's Reply at [112]–[115].

[160] Claimant's Reply at [112]; Claimant's Pre-Hearing Skeleton at [45].

[161] Claimant's Reply at [114].

[162] Claimant's Reply at [116].

[163] Claimant's Reply at [116]–[117].

[164] Claimant's Reply at [117]. The Claimant submits that OMCO had conceded that the OMCO–SFOH Lease Agreement was not automatically void from its inception, as OMCO had threatened that it would treat the agreement as void if SFOH had not registered by 30 November 2007 (Claimant's Reply at [119]).

imposition of fines on those companies by Oman for non-registration: ie if such companies were treated as non-existent, Oman could not fine them.[165]

116. The Claimant also notes that OMCO never attempted to terminate the OMCO–SFOH Lease Agreement on the basis of SFOH's alleged failure to register.[166] Instead, OMCO only stated in its 22 August 2007 letter that the lease would be treated as "*null and void*" if SFOH did not register by 30 November 2007; it never issued a notice of substantial breach under that lease and a 60-day opportunity to cure.[167] Even if the 22 August 2007 could be construed as a notice of substantial breach, the Claimant observes that no actual notice of termination was subsequently issued (as required under the lease) and no judicial decree of termination was obtained (as required under Omani law).[168]

117. Finally, the Claimant submits that OMCO acquiesced in SFOH's non-registration, as it never replied to the Claimant's letter of 4 July 2008 which explained why OMCO was incorrect in believing that SFOH was required to register.[169] As OMCO did not object or respond to that letter, the Claimant argues that is evident that OMCO was satisfied with Mr Al Tamimi's response, or at least gave him ground to believe that it was.[170]

B. MERITS

(a) Overview

118. The Claimant submits that the question of Oman's liability cannot be disputed, as the Respondent is bound by the decision of its own appellate court, which is a part of the Omani state.[171] That court judgment, according to the Claimant, relevantly held that the Claimant was operating within the boundaries allotted to him by a valid and existing lease, and that he had not committed the environmental violations of which he was accused.[172] It so follows that Oman had no justification

[165] Claimant's Reply at [118].

[166] Claimant's Reply at [120].

[167] Claimant's Reply at [120].

[168] Claimant's Reply at [120].

[169] Claimant's Reply at [121].

[170] Claimant's Reply at [121].

[171] Claimant's Pre-Hearing Skeleton at [2].

[172] Claimant's Pre-Hearing Skeleton at [2].

for its coercion (through its environmental authorities and police) of Mr Al Tamimi to undertake to stop operating the quarry as a condition for being released from jail pending trial.[173]

119. Even if the appellate court's decision were to be disregarded, the Claimant maintains that the facts indisputably establish that the court's conclusions were correct.[174] In this respect, the Claimant notes that Oman had provided Mr Al Tamimi with multiple conflicting coordinates of where he was allowed to mine, and also notes that the environmental citations issued to the Claimant's quarry had little (if any) basis in fact.[175]

120. The Claimant presents three questions of liability under the US–Oman FTA for determination by this Tribunal, namely: expropriation, denial of fair and equitable treatment, and denial of national treatment.[176] As compensation for these breaches, the Claimant claims damages in the amount of US$273 million plus interest, attorneys' fees and other costs of the arbitration.[177]

121. The Respondent opposes the Claimant's arguments with respect to liability and submits that the Claimant has not presented any evidence discharging his obligation to prove that Oman breached the US–Oman FTA.[178] The Respondent submits that the Claimant seeks to transform a conventional breach-of-contract case against OMCO (whose acts are not attributable to Oman) into a treaty claim based on actions allegedly taken by Oman.[179]

122. The Respondent contends that the Claimant has no treaty claim with respect to the actions of OMCO, as that entity did not exercise any regulatory, administrative or other governmental authority on the part of Oman.[180] As such, OMCO's termination of the OMCO–SFOH Lease Agreement and the OMCO–Emrock Lease Agreement cannot be attributed to Oman[181] (in any event, and as discussed above, the Respondent maintains that OMCO terminated these agreements, and hence any investment the Claimant might have had, before the US–Oman FTA took effect[182]). If the Claimant had wished to challenge OMCO's actions with respect to the

[173] Claimant's Pre-Hearing Skeleton at [2].

[174] Claimant's Pre-Hearing Skeleton at [3].

[175] Claimant's Pre-Hearing Skeleton at [3].

[176] Claimant's Pre-Hearing Skeleton at [4].

[177] The Claimant's pleas for relief are set out in full above at [38]–[41].

[178] Oman's Pre-Hearing Skeleton at [9].

[179] Oman's Pre-Hearing Skeleton at [2].

[180] Oman's Pre-Hearing Skeleton at [6].

[181] Oman's Pre-Hearing Skeleton at [6].

[182] Oman's Pre-Hearing Skeleton at [5].

OMCO–Emrock Lease Agreement, the Respondent submits that the proper remedy was in accordance with the arbitration provisions of that agreement, not under the US–Oman FTA.[183]

123. To the extent that the Claimant complains of actions attributable to Oman, the Respondent submits that those actions were not in breach of the US–Oman FTA. According to the Respondent, Mr Al Tamimi's arrest by the Royal Oman Police was inconsequential, as it occurred long after he had lost his investment and any right to occupy the quarry site.[184] Further, the Respondent contends that the Claimant had been trespassing on the quarry site and operating in violation of Omani environmental regulations by excavating sand and gravel material from areas outside the Jebel Wasa (the Respondent notes that his authorisations only covered the quarrying of hard limestone rock in the Jebel Wasa), and that such actions led to his arrest.[185] The Respondent submits that the Claimant had been repeatedly told to stop his activities and that the Claimant knew he never had authorisation to excavate *wadi* material from outside the Jebel Wasa.[186]

124. The Respondent also argues that the Ibri Court of Appeal judgment cannot sustain the Claimant's treaty claims.[187] The Respondent submits that the Claimant mischaracterises the court's findings, and that in any event, his US–Oman FTA claims are not tied to whether he was guilty of the criminal charges he faced following his 23 May 2009 arrest.[188]

125. The Respondent contends that the Claimant's claims should be dismissed in their entirety with costs.[189]

(b) The Ibri Court of Appeal judgment

(i) Claimant's position

126. The Omani Court of Appeal's judgment forms a central pillar of the Claimant's case on liability.[190] The Claimant submits that the court relevantly found that the Claimant was operating lawfully

[183] Oman's Pre-Hearing Skeleton at [10].

[184] Oman's Pre-Hearing Skeleton, at [3].

[185] Oman's Pre-Hearing Skeleton at [2], [8], [12] and [29].

[186] Oman's Pre-Hearing Skeleton at [8], [22] and [29].

[187] Oman's Pre-Hearing Skeleton at [8].

[188] Oman's Rejoinder at [16].

[189] The Respondent's pleas for relief are set out in full above at [42]–[44] above.

[190] The judgment is also relevant to the Claimant's position on jurisdiction, as the Claimant submits that the court found that the OMCO–Emrock Lease Agreement was in effect on the date of Oman's alleged US–Oman FTA violations in May 2009 (see above at [105]–[113]).

when Oman shut down his quarry: first, he was operating within the approved concession area for mining (namely, the 14.7 km^2 area identified in the Housing Ministry's *krooki*[191]), and second, OMCO had received all of the required environmental approvals in order for the Claimant to operate his crushers and quarry.[192]

127. As to operation within site boundaries, the Claimant alleges that, among other evidence, the Ibri Court of Appeal considered the testimony of Mr Mamoun Al-Zubair Abdul Rahman, a survey engineer from Oman's Ministry of Housing, Electricity and Water, who had visited Emrock's site on 4 May 2013.[193] The Claimant submits that Mr Abdul Rahman testified that the Emrock encampment was within the boundaries of Emrock's approved area and that "*there was no work taking place outside the western side, and likewise there was no exploitation on the northern side of the site*".[194] The court, after reviewing all the evidence (including Mr Abdul Rahman's testimony), concluded that the evidence proved that Emrock was operating within the authorised area.[195]

128. As to the question of environmental approvals, the Claimant submits that the Ibri Court of Appeal held that the documents in the record established that OMCO "*obtained all the required government licenses for the quarrying and crushing operations in addition to the requisite authorisations for carrying out this activity*".[196] The court accordingly declared Mr Al Tamimi innocent of the charge of operating quarries and crushers without the proper permits.[197]

129. Noting that investment arbitration tribunals have found in appropriate cases that national court decisions are determinative of facts underlying an investor's international law claims,[198] the Claimant contends that the Ibri Court of Appeal determined in his favour the key factual components that underpin his substantive claims against Oman in this arbitration (namely, operation within site boundaries and compliance with environmental permit requirements).[199] The

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[191] Claimant's Post-Hearing Answers, Introduction and Answer A.20.

[192] Claimant's Reply at [12]–[13] and [17]–[19]; Claimant's Post-Hearing Answers, Introduction and Answer A.20.

[193] Claimant's Reply at [18].

[194] Claimant's Reply at [18], quoting Judgment No 214/2009 M, issued by the Ibri Court of Appeal, Criminal Appeal Division, 6 June 2010 at 3 (**Exhibit J-354**).

[195] Claimant's Reply at [18].

[196] Claimant's Reply at [19], quoting **Exhibit J-354** at 4.

[197] Claimant's Reply at [19].

[198] Claimant's Reply at [29].

[199] Claimant's Reply at [29].

Claimant submits that the facts determined by the Ibri Court of Appeal establish Oman's liability in this proceeding.[200]

130. The Claimant submits that Oman cannot contradict the binding judgment of the Omani state itself, acting through its courts, in a proceeding that the Omani prosecutors brought against the Claimant.[201] In this respect, the Claimant argues that the decision of the Ibri Court of Appeal is attributable to Oman under basic principles of state responsibility.[202]

131. To the extent that the Respondent may wish to challenge the findings of the Ibri Court of Appeal, the Claimant argues that such judgment is entitled to *res judicata* effect against Oman in this arbitration.[203] In so doing, the Claimant submits that the principle of *res judicata*, including the subsidiary doctrine of "*collateral estoppel*", applies in both international arbitration and under Omani law.[204] Applying such principle, as a result of the Ibri Court of Appeal judgment, the Claimant contends that the Respondent cannot challenge in this arbitration the lawfulness of Mr Al Tamimi's operations.[205]

132. The Claimant also submits that the 25 April 2010 judgment of the Mahda Court of First Instance is entitled to no weight in this arbitration.[206] The Claimant argues that this judgment was not the result of a "*civil*" proceeding against Mr Al Tamimi, but rather was (like the proceeding before the Ibri Court of Appeal) a criminal proceeding.[207] Relevantly, the Claimant notes that the Ibri Court of Appeal's judgment resolved substantially the same issues as the 25 April 2010 judgment of the Mahda Court of First Instance, and as the Ibri Court of Appeal is a higher court, and as its judgment was later in time, such judgment must supersede that of the Mahda Court of First Instance.[208]

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[200] Claimant's Reply at [40].

[201] Claimant's Reply at [20]; Claimant's Post-Hearing Answers, Introduction and Answer A.20. The Claimant notes that the Respondent had an opportunity to appeal the Ibri Court of Appeal judgment to the Omani Court of Cassation but chose not to (Claimant's Reply at [29]).

[202] Claimant's Reply at [21]; Claimant's Post-Hearing Answers, Answer A.20.

[203] Claimant's Reply at [26].

[204] Claimant's Reply at [26]–[27]; Claimant's Post-Hearing Answers, Answer A.20. In respect of Omani law, the Claimant relevantly refers to Art 280 of the Penal Procedure Law, promulgated in SD No 97/99 (Claimant's Reply at [27]).

[205] Claimant's Reply at [40].

[206] Claimant's Reply at [33]–[39].

[207] Claimant's Reply at [34].

[208] Claimant's Reply at [35]. The Claimant also observes that he was not provided with proper notice of the proceedings that led to the 25 April 2010 judgment of the Mahda Court of First Instance, and that the judgment was rendered *in*

(ii) Respondent's position

133. The Respondent, on the other hand, submits that the Claimant seriously mischaracterises the Ibri Court of Appeal judgment.[209] The Respondent contends that the judgment is irrelevant to this proceeding, as the Claimant's substantive claims under the US–Oman FTA do not rise or fall on whether Mr Al Tamimi was guilty of the two misdemeanour counts with which he was charged following his 23 May 2009 arrest.[210] On the Respondent's case, the issues relevant to Mr Al Tamimi's claims under the US–Oman FTA were not before the Ibri Court of Appeal, and its decision has no conceivable *res judicata* or "*collateral estoppel*" effect in this proceeding.[211]

134. As to the findings of the Ibri Court of Appeal as characterised by the Claimant, the Respondent submits that the court did not find that (a) Mr Al Tamimi or Emrock had the requisite environmental permits to operate outside the area in the Jebel Wasa leased from OMCO, or (b) Mr Al Tamimi had previously been operating only within permitted areas.[212]

135. First, the Respondent contends that Mr Al Tamimi had not asked the Ibri Court of Appeal to decide the question of whether he or Emrock had the requisite environmental permits.[213] Rather, his defence to the second count against him (namely, concerning violation of environmental regulations) was that he could not be justly accused of failing to obtain the requisite licences and approvals when it was OMCO that was required to obtain them under the OMCO–Emrock Lease Agreement.[214] The court acquitted Mr Al Tamimi of this count, and in doing so simply noted the approvals initially obtained by OMCO; the Respondent submits that the court did not, as the

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absentia (as recited in the judgment itself) (Claimant's Reply at [36]; Claimant's Post-Hearing Answers, Answer A.21).

209 Oman's Rejoinder at [16].

210 Oman's Rejoinder at [16]; Oman's Pre-Hearing Skeleton at [24].

211 Oman's Rejoinder at [17] and [37]–[40]; Oman's Pre-Hearing Skeleton at [24]; Oman's Post-Hearing Answers, Answer C.20. To the extent that the Claimant relies upon Art 280 of Oman's Penal Procedure Law (promulgated in SD No 97/99) as authority for the application of *res judicata* and collateral estoppel principles under Omani law, the Respondent submits that this article is irrelevant. Article 280, according to the Respondent, provides that the *res judicata* effect of a criminal judgment concerns only "*the occurrence of the crime, its legal description, and its connection to its perpetrator*", which simply means that in a subsequent civil or criminal case no party could rightfully claim that Mr Al Tamimi had committed the offences of which he had been acquitted by the Ibri Court of Appeal. The Respondent contends that there is no sensible connection between Art 280 and the Claimant's submission that a criminal acquittal precludes the parties from re-litigating the same factual issues in a civil case, even if the underlying claim is different. Put another way, the Respondent submits that, under Omani law, the principle of *res judicata* does not apply as the Claimant contends, and the principle of collateral estoppel does not apply at all (Oman's Rejoinder at [37]–[40]; Oman's Pre-Hearing Skeleton at [24]; Oman's Post-Hearing Answers, Answer C.20).

212 Oman's Rejoinder at [20]–[21], [28], [33]–[36]; Oman's Post-Hearing Answers, Answer C.20.

213 Oman's Rejoinder at [20], [33], and [36]; Oman's Pre-Hearing Skeleton at [24]; Oman's Post-Hearing Answers, Answer C.20.

214 Oman's Rejoinder at [20] and [33].

Claimant contends, find that OMCO had received all of the environmental approvals required in order for the Claimant to operate his crushers and quarry (in particular, those approvals required in order to excavate *wadi* materials from locations outside the Jebel Wasa).[215]

136. Second, the Respondent contends that the Ibri Court of Appeal did not find that all of Mr Al Tamimi's operations were within the OMCO concession area, and that such issue was not presented to the court.[216] The Respondent contends that the Claimant mischaracterises the evidence of Mr Abdul Rahman, the Ministry of Housing, Electricity and Water surveyor who attended the site and gave evidence before the Ibri Court of Appeal.[217] On the Respondent's case, and also on Mr Abdul Rahman's own evidence in this arbitration, Mr Abdul Rahman inspected the site on only one occasion for the purpose of marking the boundary points of the concession granted to OMCO, not for determining where the Claimant was conducting mining or excavation activities.[218]

137. The Respondent also argues that the 25 April 2010 judgment of the Mahda Court of First Instance is relevant to this proceeding.[219] In its judgment, the Mahda Court of First Instance convicted Mr Al Tamimi of four environmental charges, including the claim that Mr Al Tamimi was excavating *wadi* material beyond the western boundaries of the Jebel Wasa without authorisation.[220] Relevantly, the Respondent claims that, while the judgment is not dispositive of the Claimant's treaty claims, it does reveal Mr Al Tamimi's unauthorised operations outside the Jebel Wasa.[221]

138. The Respondent submits that, despite the Claimant's contention otherwise, the Ibri Court of Appeal did not resolve substantially the same issues as the Mahda Court.[222] For the Respondent, the Ibri Court of Appeal judgment could not and did not absolve the Claimant of the environmental violations for which he was charged and for which the Mahda Court of First Instance imposed penalties.[223] The Respondent relevantly argues that the charges in the Ibri Court of Appeal

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[215] Oman's Rejoinder at [20], [33], and [36]; Oman's Post-Hearing Answers, Answer C.20.

[216] Oman's Rejoinder at [21] and [35]; Oman's Pre-Hearing Skeleton at [24]; Oman's Post-Hearing Answers, Answer C.20.

[217] Oman's Counter-Memorial at [351]; Oman's Rejoinder at [21], [35] and [57]; Oman's Pre-Hearing Skeleton at [24]; Oman's Post-Hearing Answers, Answer C.20.

[218] Oman's Rejoinder at [21], [35] and [57]; Oman's Pre-Hearing Skeleton at [24]; Oman's Post-Hearing Answers, Answer C.20; Witness Statement of Mahmoun Al-Zubair Abdul Rahman at [2]–[6].

[219] Oman's Rejoinder at [41]–[44].

[220] Oman's Counter-Memorial at [231]–[232]; Oman's Rejoinder at [41].

[221] Oman's Rejoinder at [43].

[222] Oman's Counter-Memorial at [389]; Oman's Rejoinder at [44].

[223] Oman's Post-Hearing Answers, Answer C.21.

proceedings resulted from the Claimant's 23 May 2009 arrest, whereas the claims leading to the Mahda Court judgment were based on earlier site inspections by MECA officials.[224]

139. The Respondent also observes that the Claimant never contested the decision of the Mahda Court of First Instance, and that it is groundless for Mr Al Tamimi still to claim that he was not aware of the proceedings at that time.[225] In the latter respect, the Respondent notes that, before a decision had been rendered by the Mahda Court, Mr Al Tamimi had asked the Public Prosecution Authority in Muscat to intervene to stop the Public Prosecutor in the Al Buraimi Government from continuing with the charges against him.[226]

(c) Emrock's operations

(i) Claimant's position

140. Notwithstanding the binding effect of the Ibri Court of Appeal judgment, the Claimant submits that the facts prove that Emrock was operating inside the OMCO concession area and with the proper permits.[227]

141. First, the Claimant submits that, under the two Lease Agreements, Emrock's and SFOH's activities were not confined to any particular area within the concession area.[228] On the Claimant's case, Oman's allegation that Mr Al Tamimi was operating outside the concession area or in the *Wadi Sumayni* ignores the geography of the site.[229] In this respect, the Claimant refers to Oman's allegation that the Claimant had unlawfully extracted materials in the *Wadi Sumayni*.[230]

142. The Claimant notes that Emrock's operations were fully within OMCO's concession area, and that the *Wadi Sumayni* is far outside it.[231] In this regard, the Claimant submits that he was entitled to quarry up to 6 km^2 anywhere within OMCO's concession area, which was the entire 14.7 km^2 described by the Omani Housing Ministry's *krooki*.[232] The Claimant notes that a flat plain with

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[224] Oman's Rejoinder at [44]. See also Oman's Post-Hearing Answers, Answer C.21.

[225] Oman Counter Memorial at [232]; Oman's Rejoinder at [44].

[226] Oman Counter Memorial at [242]–[248]; Oman's Rejoinder at [44].

[227] Claimant's Reply at [41]; Claimant's Post-Hearing Answers, Introduction.

[228] Claimant's Pre-Hearing Skeleton at [15].

[229] Claimant's Reply at [41]–[62].

[230] Claimant's Reply at [42].

[231] Claimant's Reply at [44].

[232] Claimant's Post-Hearing Answers, Introduction, Answers A.2–A.4, A.6, A.9 and A.11.

deposits of sand and gravel, known as the *Sayh Sumayni*, lies between the Jebel Wasa mountain (the limestone deposit that was at the core of the Claimant's operations) and the *Wadi Sumayni*; OMCO's concession area boundary runs through that sand and gravel plain, so that the plain lies partly within and partly outside the concession site.[233] The Claimant does not dispute that Emrock excavated sand and gravel from the *Sayh Sumayni* beside the mountain, which was within its concession area,[234] but contests that any such materials were excavated from the *Wadi Sumayni*.[235]

143. To the extent that the Respondent alleges that the Claimant was operating a "*crusher in the Wadi* [Sumayni] *to excavate sand and gravel from the Wadi*", the Claimant submits that this defies common sense.[236] The Claimant asks why he would have travelled several kilometres to the *Wadi Sumayni* to obtain sand and gravel which was already available within the concession area in the *Sayh Sumayni*.[237] Further, the Claimant notes that he did not possess an "*alluvial crusher*", which he is alleged by Oman to have used in the *Wadi Sumayni*.[238]

144. Second, the Claimant claims that, notwithstanding Oman's allegation otherwise, the Claimant was not required to obtain any additional environmental permits.[239] The Claimant submits that it was OMCO, not the Claimant, which was responsible for obtaining all the required permits (both under the Lease Agreements and under Omani law),[240] and in this respect, OMCO had confirmed to the Claimant on 22 August 2007 that OMCO had fulfilled its obligations under the Lease Agreements by obtaining all necessary permits.[241]

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[233] Claimant's Reply at [45].

[234] The Claimant contends that this use of sand and gravel from a quarry site is common and expected in limestone quarrying operations, and also that such use was anticipated in OMCO's environmental permit application (Claimant's Reply at [51]). The Claimant submits that he was authorised to excavate sand and gravel pursuant to the Lease Agreements and the Environmental Impact Assessment (Claimant's Post-Hearing Answers, Answer A.15).

[235] Claimant's Reply at [51]. In this way, the Claimant argues that Oman confuses the mining of so called "w*adi materials*" (which, in the quarrying and construction industries in the Middle East, is commonly used to refer to natural sand and gravel eroded from a mountain, which may or may not have literally been excavated from a *wadi*, that is, a dry watercourse) with mining "*in the Wadi* [Sumayni]" (Claimant's Reply at [50]).

[236] Claimant's Reply at [59].

[237] Claimant's Reply at [59].

[238] Claimant's Reply at [61].

[239] Claimant's Reply at [63]–[79].

[240] Claimant's Reply at [64]; Claimant's Post-Hearing Answers, Answers A.5 and A.17.

[241] Claimant's Reply at [65]; Claimant's Post-Hearing Answers, Answers A.5 and A.17.

145. The Claimant submits that, as a matter of fact, OMCO's representation was accurate as OMCO had obtained all of the permits required for the project to proceed.[242] To the extent that Oman alleges that OMCO required a separate permit for crushers, the Claimant notes that OMCO's applications specifically stated in numerous places that the quarry would use "*crushers*" to process excavated limestone,[243] and that the temporary permit subsequently granted by MECA did not exclude the use of crushers or say anything about a separate permit for crushers being required.[244] In any event, if a permit for a crusher was required, the Claimant contends that the burden is on Oman to explain why its state-owned mining company did not apply for that permit (as the leases and Omani law required), and why the permit would not have been granted if OMCO had applied for it at that time.[245]

146. Third and finally, the Claimant submits that Oman's allegation that he was operating outside the approved area for mining is contrary to the facts.[246] To the extent that RPM, Oman's expert, argues that the Claimant's quarrying operations were beyond the boundary described by the coordinates in MECA's initial environmental approval (even if within the OMCO concession boundaries), the Claimant notes that this mining boundary was different from the boundary identified in OMCO's application.[247] The Claimant alleges that the mining boundary in the approval, although roughly the same size as that identified in OMCO's application, was square and had been moved slightly to the southeast.[248]

147. The Claimant submits that neither Oman nor RPM has identified any reason as to why MECA shifted the boundary without giving any explanation.[249] Also, the Claimant suggests that there is nothing on the record to suggest that MECA ever discussed the boundary shift with the applicant (OMCO), and that neither OMCO nor MECA ever discussed the reason for the shift with the Claimant.[250] The Claimant submits that the most obvious explanation for the change is that the

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[242] Claimant's Reply at [66].

[243] Claimant's Reply at [66]–[67]; Claimant's Post-Hearing Answers, Answers A.5, A.9 and A.15.

[244] Claimant's Reply at [68]–[69]; Claimant's Pre-Hearing Skeleton at [29]. The Claimant also notes that OMCO's 3 November 2006 application to MECA anticipated Emrock's crushers being located in the *Sayh Sumayni* and also the impact of the crushers' operation upon that plain and other minor *wadis* and streams. The Ministry did not indicate that its approval of the project in any way carved out operations impacting *wadi* plains or sand and gravel at the site, or the operation of crushers in those areas (Claimant's Reply at [74]–[77]).

[245] Claimant's Reply at [73].

[246] Claimant's Reply at [80]–[86].

[247] Claimant's Reply at [80].

[248] Claimant's Reply at [80].

[249] Claimant's Reply at [80].

[250] Claimant's Reply at [81].

new coordinates were an error in description in the licence, or that the boundary was only intended to be a rough approximation of the general area of quarrying.[251]

148. To the extent that RPM's report alleges that the Claimant's limestone drilling and blasting extended beyond the approved mining area, but still within the OMCO concession area, the Claimant notes that this allegation was rejected by the Ibri Court of Appeal.[252] In any event, even had he extended beyond that area, the Claimant notes that he can hardly be faulted for not knowing precisely where he was supposed to mine, given that Oman itself could not determine what the proper coordinates were.[253]

(ii) Respondent's position

149. The Respondent submits that, as a matter of fact, the Claimant was operating outside the approved area and without the requisite permits.[254] The Respondent notes that, in the Claimant's submissions, Mr Al Tamimi elides the distinction between the concession area awarded to OMCO (consisting of around 14.7 km^2) and the smaller area within that concession leased to Emrock for hard-rock mining.[255] The Lease Agreements did not afford him the right to excavate *wadi* material throughout the entire concession area, and further, he had not obtained approval from the Omani authorities to do so.[256]

150. For the Respondent, the distinction drawn by the Claimant between the *Sayh Sumayni* and the *Wadi Sumayni* is irrelevant, as the Claimant was not permitted to excavate *wadi* materials (ie sand, gravel and boulders) from either area: the Claimant was only permitted to drill, blast, and extract hard rock from within the 4 km^2 area of the Jebel Wasa leased from OMCO for that purpose.[257] The Respondent also contends that Mr Al Tamimi did not at the time draw the

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[251] Claimant's Reply at [81].

[252] Claimant's Reply at [85].

[253] Claimant's Reply at [85]. The Claimant also notes that Oman offers no reason why that deviation (if it had in fact occurred) would have been significant from an environmental perspective (Claimant's Reply at [85]; Claimant's Post-Hearing Answers, Answer A.19).

[254] Oman's Rejoinder at [9]–[13] and [45]–[64].

[255] Oman's Rejoinder at [12] and [45].

[256] Oman's Rejoinder at [9]–[12] and [46]; Oman's Post-Hearing Answers, Answer B.15a. The Respondent contends that the initial Environmental Impact Assessment submitted for approval to the Ministry of Regional Municipalities, Environment and Water Resources (the predecessor of MECA) sought approval only to mine hard rock in a 4 km^2 area of the Jebel Wasa leased from OMCO, and did not seek approval to excavate *wadi* material from outside the Jebel Wasa (Oman's Rejoinder at [10] and [12]–[13]; Oman's Pre-Hearing Skeleton at [13]; Responses to Post-Hearing Questions, Answer B.9; Second Van der Wiele Witness Statement at [3]–[10]).

[257] Oman's Rejoinder at [9]–[13], [45] and [47]; Oman's Pre-Hearing Skeleton at [12]; Oman's Post-Hearing Answers, Answers B.2, B.3 and B.15a. The Respondent argues that the distinction drawn by the Claimant is incorrect, as there is no "*bright-line*" separation as imagined by the Claimant between the two areas (Oman's Rejoinder at [47]).

distinction between the *Sayh Sumayni* and the *Wadi Sumayni* that he draws today.[258] Rather, Mr Al Tamimi was aware that the relevant distinction was between hard rock mining in the 4 km^2 area of the Jebel Wasa, and his unauthorised operations to excavate *wadi* material from outside that area.[259]

151. With that distinction in mind, the Respondent notes that OMCO had made efforts to extend Mr Al Tamimi's area of operations: on 17 February 2008, OMCO applied to MOCI for approval to allow the excavation of *wadi* material within the OMCO concession area.[260] The Respondent submits that Mr Al Tamimi was aware of these efforts by OMCO (in particular, the Respondent notes that Mr Al Tamimi was present at a 17 February 2008 meeting which resulted in the decision that OMCO would make the application for approval to extend operations outside the Jebel Wasa, and also notes a letter from the Claimant to OMCO's then chairman dated 28 April 2008 referring to the "*request of the extension/permitting*" filed by OMCO "*in regard to the wadi production*"[261]), and as such, that he knew he was not authorised to excavate *wadi* material outside the Jebel Wasa.[262] Despite MOCI not granting OMCO's request, the Claimant continued to excavate the *wadi* material he knew he was not authorised to excavate.[263]

152. The Respondent submits that the alleged difference between the concession boundaries plotted in OMCO's application and in MECA's initial environmental approval is without significance.[264] First, moving the coordinates was within that Ministry's discretion, and second, the exact location of the 4 km^2 quarrying area was not the source of the Ministry's censure: it was the Claimant's operations outside the Jebel Wasa.[265]

153. Apart from the distinction between the *Sayh Sumayni* and the *Wadi Sumayni* being irrelevant (and not a distinction that the Claimant drew at the relevant times), the Respondent also submits

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[258] Oman's Rejoinder at [48].

[259] Oman's Rejoinder at [48].

[260] Oman's Rejoinder at [49]–[50].

[261] Oman's Rejoinder at [49]–[52]; quoting a letter from Mr Al Tamimi to Dr Al Azri dated 28 April 2008 (**Exhibit J-175**). The Respondent also refers to a memo dated 1 May 2008 from the Claimant to Mr Gupta, Emrock's operations manager. The subject of the memo was "*STOP WADI OPERATION*", and relevantly provided that Emrock had to remove all equipment "*from the wadi area*" within 48 hours (Oman's Rejoinder at [52]–[53]; Oman's Pre-Hearing Skeleton at [16]; Oman's Post-Hearing Answers, Answer B.18c; Memorandum from Mr Al Tamimi to Mr Gupta, dated 1 May 2008 (**Exhibit J-177**)).

[262] Oman's Rejoinder at [49]–[55].

[263] Oman's Rejoinder at [50], [52] and [55]; Oman's Pre-Hearing Skeleton at [16]; Oman's Post-Hearing Answers, Answers B.13 and B.18c.

[264] Oman's Rejoinder at [62].

[265] Oman's Rejoinder at [62]. See also Oman's Post-Hearing Answers, Answer B.15b.

that the Claimant's contention that his operations did not take place in the *Wadi Sumayni* is incorrect.[266] The Respondent argues that Mr Al Tamimi repeatedly excavated *wadi* material from the *Wadi Sumayni*, and in this respect the Respondent relevantly refers to the evidence of an OMCO surveyor who plotted the area(s) within the *Wadi Sumayni* where Mr Al Tamimi had excavated *wadi* material.[267] The Claimant's focus on the boundaries relating to OMCO's concession area ignores that excavations were conducted outside Emrock's permitted area for mining and in the *Wadi Sumayni*, which the Claimant concedes to be out of OMCO's concession.[268]

154. The Respondent also contends that, notwithstanding the Claimant's submission otherwise, the Claimant was operating without the requisite permits.[269] The Claimant's authorisations were limited to the quarry project in the Jebel Wasa, and as the Claimant knew at the time, in February and April 2008, he was not authorised to excavate *wadi* material at any location falling within the OMCO concession area.[270] The Respondent notes that OMCO's obligations under the OMCO–Emrock Lease Agreement were limited to the hard-rock mining project in the Jebel Wasa: under that lease, OMCO was not required to seek authorisation on the Claimant's behalf from MOCI to excavate *wadi* material outside the Jebel Wasa, although it did so in February 2008.[271] As noted above, the Ministry did not grant that authorisation.[272]

[266] Oman's Rejoinder at [13], [45] and [56]–[59].

[267] Oman's Counter-Memorial at [225]; Oman's Rejoinder at [13], [45] and [56]–[59]; Map of Emrock Limestone Concession (**Exhibit J-273**); Email from Said Al Shary Law Office to Mr Al Tamimi (**Exhibit J-304**). To the extent that the Claimant contends that unrelated third parties were responsible for the excavations plotted by OMCO outside the OMCO concession area (Claimant's Reply at [53]), the Respondent submits that this is incorrect as the map identified areas excavated by the Claimant while the project was in progress (Oman's Rejoinder at [56]; Second Al Waily Witness Statement at [15]).

[268] Oman's Rejoinder at [57], fn 100. The Respondent also notes that the Claimant's distinction between the types of equipment he situated outside the Jebel Wasa is irrelevant, as he had no right to operate any equipment, regardless of its type, outside the Jebel Wasa (Oman's Rejoinder at [59]).

[269] Oman's Rejoinder at [60]–[64].

[270] Oman's Rejoinder at [61]. See also Oman's Post-Hearing Answers, Answers B.11, B.12, B.14 and B.18(d).

[271] Oman's Rejoinder at [60].

[272] Oman's Rejoinder at [50], [55] and [60]; Oman's Pre-Hearing Skeleton at [16].

(d) Attribution

(i) Claimant's position

155. The Claimant submits that the actions of OMCO can be attributed to Oman under the US–Oman FTA.[273] The Claimant however notes that, as MECA, the Housing Ministry, Public Prosecutor, and Royal Oman Police were all closely involved in the activities that led to the destruction of the Claimant's investment, the Respondent's submission that OMCO's acts are not attributable to Oman does not detract from the Claimant's claims.[274]

156. The Claimant makes two main arguments on this issue. First, it contends that, regardless of OMCO's status, MECA's actions precipitated the purported lease termination.[275] Second, it submits that OMCO is in fact an organ of the Omani State.[276]

157. As to its first submission, the Claimant alleges that Oman intervened to use its influence or sovereign power for its own purposes to force OMCO to use OMCO's contractual right as a pretext for terminating the underlying agreement.[277] The Claimant submits that OMCO's purported lease termination was motivated by governmental pressure, and that in such respect the purported termination for non-payment of minimal fines was nothing more than a pretext.[278]

158. The Claimant contends that the evidence shows that MECA had been putting pressure on OMCO to force Emrock and SFOH out of business (and out of Oman), including by bringing criminal charges against OMCO and Mr Al Waily.[279] According to the Claimant, the termination notice sent to Emrock in 2009 was largely motivated by a desire to placate MECA in the hope of ending Mr Al Waily's prosecution.[280] To that end, the Claimant refers to a 3 May 2009 letter from OMCO's attorneys, Trowers & Hamlins, to Mr Al Muharrami of MECA.[281] That letter, according to the Claimant, reveals the strategy of OMCO's lawyers: namely, to cast blame on Emrock, assure Mr Al Muharrami that they were cooperating with him in stopping Emrock's operations, and to ask

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[273] Claimant's Memorial, at [147]; Claimant's Reply at [206]–[218]; Claimant's Post-Hearing Answers, Answers A.17, A. 22 and A.23.

[274] Claimant's Reply at [206].

[275] Claimant's Reply at [207]–[212].

[276] Claimant's Reply at [213]–[218]; Claimant's Post-Hearing Answers, Answer A.17.

[277] Claimant's Reply at [207].

[278] Claimant's Reply at [208].

[279] Claimant's Reply at [209].

[280] Claimant's Reply at [210].

[281] Claimant's Reply at [210]; Letter from Trowers & Hamlins to Mr Al Muharrami, dated 3 May 2009 (**Exhibit J-285**).

Mr Al Muharrami to withdraw the prosecution of Mr Al Waily on that basis.[282] For the Claimant, the letter makes clear that the purported termination of the lease took place under coercive conditions created by Mr Al Muharrami of MECA.[283]

159. As to its second argument, the Claimant alleges that OMCO operates at all times as an arm of the Omani State.[284] In so doing, the Claimant contends that OMCO exercises governmental authority under Article 10.1.2 of the US–Oman FTA, and that in any event, responsibility for OMCO is attributable to Oman under principles of customary international law.[285]

160. The Claimant relevantly notes that the Omani Ministry of Oil and Gas is the 99% shareholder of OMCO, and that, pursuant to OMCO's bylaws, OMCO's board members act at all times as representatives of the shareholders.[286] The Claimant also submits that OMCO's mining activities are closely controlled by MOCI, and in that respect observes that the managers and board members of OMCO are usually directors and ex-employees of MOCI.[287] For that reason, according to the Claimant, MOCI exercises effective control over the activities and decision-making process of OMCO and its business.[288]

(ii) Respondent's position

161. The Respondent's position is that the question of attribution constitutes a fatal flaw in the Claimant's case.[289] Specifically, the Respondent submits that the relevant actions allegedly causing the Claimant's losses, namely the termination of the Lease Agreements, were undertaken by OMCO, whose actions are not attributable to Oman under the US–Oman FTA.[290]

162. The Respondent notes that the State Parties to the US–Oman FTA purposefully narrowed the grounds for attribution of state responsibility, as the wording of the FTA only tracked one ground

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[282] Claimant's Reply at [210].

[283] Claimant's Reply at [211].

[284] Claimant's Reply at [215]; Claimant's Post-Hearing Answers, Answer A.17. The Claimant notes that the Ibri Court of Appeal recognised that OMCO is a "*government company that is subject to the oversight of the Ministry of Commerce and Industry*" (Claimant's Reply at [213], quoting **Exhibit J-354** at 3).

[285] Claimant's Reply at [215].

[286] Claimant's Reply at [215].

[287] Claimant's Reply at [216].

[288] Claimant's Reply at [217]. In this respect, the Claimant relevantly notes Oman's admission that OMCO's Board of Directors "*reconsidered*" Mr Al Waily's purported termination of Emrock's lease at the direction of the Commerce Ministry (Claimant's Reply at [217], quoting Oman's Counter-Memorial at [159] and [161]–[165]).

[289] Oman's Rejoinder at [104].

[290] Oman's Rejoinder at [104].

for attribution under the International Law Commission's Articles on State Responsibility.[291] In so doing, the Respondent submits that the US and Oman intentionally limited the circumstances that might result in Host State responsibility to those situations in which: (a) the State delegated governmental authority to a state enterprise, and (b) the enterprise exercised the governmental authority delegated to it.[292] The Respondent submits that such a situation does not exist here.[293]

163. The Respondent argues that there is no evidence that Oman delegated to OMCO any governmental authority, much less in connection with the OMCO–Emrock Lease Agreement.[294] In this respect, the Respondent notes that OMCO could not even issue licences, permits, or approvals for the Claimant's projects, as that authority resided with the Omani ministries.[295] The Respondent also submits that there is no evidence that OMCO in fact exercised any governmental authority.[296]

164. Insofar as the Claimant alleges that MOCI exerted "effective control" over OMCO, the Respondent submits that this test for attribution does not apply under the FTA and that, in any event, the test is not made out.[297] In the latter regard, the Respondent contends that the evidence proves that MOCI did not control OMCO.[298]

165. The Respondent claims that Mr Al Tamimi's characterisation of the facts is not supported by the record.[299] To the extent that the Claimant alleges that MECA was putting pressure on OMCO to force Emrock and SFOH out of business and out of Oman, the Respondent relevantly notes that the Claimant does not refer to any document from MECA to OMCO suggesting that OMCO should terminate the Lease Agreements.[300] Further, the evidence to which the Claimant does

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[291] Oman's Counter-Memorial at [301]–[302]; Oman's Rejoinder at [105]–[106].

[292] Oman's Counter-Memorial at [303]; Oman's Rejoinder at [106].

[293] Oman's Counter-Memorial at [305]; Oman's Rejoinder at [105] and [107]–[109]; Oman's Pre-Hearing Skeleton at [6].

[294] Oman's Counter-Memorial at [306]–[311]; Oman's Rejoinder at [107]. To the extent that the Claimant refers to OMCO's ownership structure and Board of Directors, the Respondent submits that OMCO's shareholding and leadership, without more, prove nothing (Oman's Counter-Memorial at [304] and [311]; Oman's Rejoinder at [108]). The Respondent also contends that the Claimant's reference to the Ibri Court of Appeal judgment does not assist his case, as that court had not been asked to decide, and did not consider, whether OMCO had been delegated governmental authority under Omani law and then exercised that authority (Oman's Counter-Memorial at [312]).

[295] Oman's Counter-Memorial at [309]; Oman's Rejoinder at [107].

[296] Oman's Counter-Memorial at [315]–[318]; Oman's Rejoinder at [109].

[297] Oman's Rejoinder at [110]–[111].

[298] Oman's Rejoinder at [112].

[299] Oman's Rejoinder at [113]–[116].

[300] Oman's Rejoinder at [113].

refer (namely, various citations issued by MECA) demonstrates that there is no correlation between those citations and OMCO's termination of the OMCO–Emrock Lease Agreement.[301] In this respect, the Respondent notes that the citation letters (except for one) were all sent by MECA after (a) OMCO delivered its 20 July 2008 notice terminating the OMCO–Emrock Lease Agreement, and (b) the 30 November 2007 date on which OMCO told the Claimant the OMCO–SFOH Lease Agreement was void.[302]

166. The Respondent also submits that the Claimant's characterisation of the 3 May 2009 letter from OMCO's attorneys to Mr Al Muharrami suffers from a similar defect.[303] The letter refers to a 15 April 2009 conversation between OMCO and MECA officials, which took place months after OMCO's Board had approved its actions with respect to Emrock, including the further 17 February 2009 termination of the OMCO–Emrock Lease Agreement.[304]

(e) Expropriation

(i) Claimant's position

167. The Claimant argues that Oman's actions constitute a breach of Article 10.6 of the US–Oman FTA.

168. The Claimant notes that expropriation includes not only open and deliberate transfers of property but also "*covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected benefit of property even if not necessarily to the obvious benefit of the Host State*".[305] The Claimant contends that Oman's actions through its police (according to the Claimant, the Omani police stopped mining operations at the quarry and subjected Emrock's workers at the site to harassment, threats of arrest, and other measures that had the effect of forcing them to leave the site permanently) are a clear case of expropriation.[306]

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[301] Oman's Rejoinder at [113].

[302] Oman's Rejoinder at [113].

[303] Oman's Rejoinder at [114].

[304] Oman's Rejoinder at [114]. For the same reason, The Respondent contends that there is no connection between the termination of the OMCO–Emrock Lease Agreement and the prosecution of Mr Al Waily, as the three claims filed against OMCO, and the basis of the prosecution of Mr Al Waily, were filed in March 2009, namely after OMCO had further terminated the OMCO–Emrock Lease Agreement (Oman's Rejoinder at [115]).

[305] Claimant's Pre-Hearing Skeleton at [48], quoting the tribunal in *AIG Capital Partners Inc and CJSC Tema Real Estate Company v Republic of Kazakhstan* (ICSID Case No ARB/01/6), Award, 7 October 2003, at [10.3.1].

[306] Claimant's Pre-Hearing Skeleton, at [48].

169. The Claimant submits that he did not voluntarily abandon his investment, as contended by the Respondent, but rather was effectively ejected from the quarry site by the Omani police.[307] The Claimant notes that, on 23 May 2009, Omani police and MECA representatives attended at the Claimant's site, ordered him to stop quarrying operations, and arrested him.[308] In order to secure his release from jail, the Claimant claims that he was coerced by Omani police to make an undertaking that he would stop operating both of his crushers and screen; the effect of which was to require the Claimant to shut down limestone production, as without this equipment he could not produce limestone for sale.[309] The Claimant submits that the Respondent expropriated his investment by forcing him to sign that undertaking which gave up his contractual rights in return for his release from jail.[310]

170. According to the Claimant, the Omani police then enforced the closure of the entire quarry, not just operations at specific locations and not just operations of crushers and screens.[311] Although Emrock ceased its production activities immediately following Mr Al Tamimi's arrest (as the restrictions imposed by police prevented any production), the police stopped Emrock from conducting any operations at all.[312] The Claimant submits that the Omani police prevented Emrock employees from (*inter alia*) loading trucks, selling limestone, and even cooking food, and progressively forced Emrock's employees to leave the site entirely.[313] The Claimant contends that, in light of these facts, it is incorrect for Oman to allege that Mr Al Tamimi voluntarily abandoned his investment.[314]

171. The Claimant also alleges that the Omani police's actions ensured that he could never return to the site.[315] To the extent that the Respondent submits that there was no expropriation because the Ibri Court of Appeal judgment did not prevent the Claimant from returning to the site or pursuing claims against OMCO, the Claimant submits that this argument disregards key facts: by forcing Emrock's employees from the quarry site and then allowing Emrock's infrastructure and equipment to be looted and destroyed, the Omani police ensured that Emrock would not be

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[307] Claimant's Reply at [142]–[149].

[308] Claimant's Reply at [143]. To the extent that Oman contends that the Claimant was arrested for unlawfully operating a crusher in the *Wadi Sumayni*, the Claimant again refutes this (Claimant's Reply at [143] and [145]).

[309] Claimant's Reply at [144]–[145]. See also Claimant's Post-Hearing Answers, Answer B.6.

[310] Claimant's Pre-Hearing Skeleton at [5]. See also Claimant's Memorial at [179].

[311] Claimant's Reply at [146].

[312] Claimant's Reply at [146]. See also Claimant's Post-Hearing Answers, Answer B.6.

[313] Claimant's Reply at [147]–[148]; Claimant's Post-Hearing Answers, Answer B.6; Ralutin Witness Statement at [30] and [35].

[314] Claimant's Reply at [142]–[149].

[315] Claimant's Reply at [150]–[156].

able to return the quarry to operation after the Ibri Court of Appeal judgment.[316] Further, the Claimant notes that Oman has not identified a basis on which he may have pursued claims against OMCO for the wrongful acts of the Omani police.[317]

172. The Claimant also contests Oman's argument that its actions were a valid exercise of its right to enforce its environmental laws under the "*police powers*" doctrine (as incorporated in Annex 10-B of the US–Oman FTA).[318] The Claimant notes that Annex 10-B relevantly provides that regulatory takings are shielded only when they are "*non-discriminatory*" and are "*designed and applied*" for "*legitimate*" public purposes.[319] In this way, the Claimant submits that Oman's actions were not designed and applied for legitimate purposes and were discriminatory.[320]

(ii) Respondent's position

173. The Respondent argues that it did not expropriate Mr Al Tamimi's investment.[321] To the extent that the Claimant complains of OMCO's termination of the OMCO–Emrock Lease Agreement, the Respondent submits that OMCO's actions cannot be attributed to Oman (as discussed above) and that, even if they could, Mr Al Tamimi's expropriation claim sounds only in contract.[322] The Respondent submits that the Claimant has not demonstrated that OMCO's allegedly wrongful termination of the OMCO–Emrock Lease Agreement constitutes both a breach of contract and of the US–Oman FTA, and as such, the only available remedy against OMCO's actions was in accordance with the arbitration provisions of the OMCO–Emrock Lease

[316] Claimant's Reply at [150]–[156]; Claimant's Post-Hearing Answers, Introduction and Answer B.6. The Claimant notes that by the time the Ibri Court of Appeal rendered its ruling more than a year after his arrest and the forced shutdown of quarry operations, Emrock's workforce had been dispersed by police harassment and no one remained at the site to safeguard Emrock's property (Claimant's Reply at [153]). The police did not safeguard the site either, and equipment and infrastructure were vandalised and looted (Claimant's Reply at [155]; Second Al Tamimi Witness Statement at [116]–[117]).

[317] Claimant's Reply at [150].

[318] Claimant's Reply at [157]–[167]; Claimant's Pre-Hearing Skeleton at [49].

[319] Claimant's Reply at [158].

[320] Claimant's Reply at [159]–[167]; Claimant's Pre-Hearing Skeleton at [49].

[321] Oman's Rejoinder at [118]–[157].

[322] Oman's Counter-Memorial at [323]–[338]; Oman's Rejoinder at [118]; Oman's Pre-Hearing Skeleton at [28].

Agreement.[323] The Respondent notes that the Claimant did indeed retain lawyers in 2009 to claim against OMCO under those provisions, but the claim was subsequently abandoned.[324]

174. On the other hand, insofar as the Claimant complains of his arrest and its alleged aftermath, the Respondent submits that Mr Al Tamimi had no investment capable of being expropriated as of the date of his arrest (23 May 2009).[325] As explained above, the Respondent submits that Mr Al Tamimi's investments in Oman were tied to the Lease Agreements, which ended long before 23 May 2009.[326]

175. The Respondent also contends that Mr Al Tamimi's property rights were not impacted by his arrest or prosecution.[327] The Respondent notes that Mr Al Tamimi's undertaking was tied to the pending charges against him, namely that he was operating outside the Jebel Wasa, and that such undertaking did not prevent him from conducting limestone quarrying activities in the Jebel Wasa (although the Respondent contends that he no longer had any right to do so under the Lease Agreements).[328] Further, the Respondent argues that there is no credible evidence that anyone, including the Omani police, ever sought to enforce the undertaking in the manner contended by the Claimant.[329]

176. The Respondent contests the Claimant's allegations with respect to the actions of Oman's police.[330] The Respondent relevantly notes that the Claimant has not produced any contemporaneous evidence of an arrest or detention involving Emrock's staff, and that, rather

[323] Oman's Counter-Memorial at [338]; Oman's Rejoinder at [119] and [124]; Oman's Pre-Hearing Skeleton at [10]. The Claimant submits that this argument is baseless. According to the Claimant, the Omani government engaged in a series of actions, through the Environmental Ministry, the Royal Oman Police, and OMCO, which individually and collectively deprived the Claimant of his investment; the fact that one of the actions in that series (OMCO's purported termination) also happened to be a breach of contract does not absolve Oman of its independent obligations under the US–Oman FTA (Claimant's Reply at [202]–[203]). In any event, even when viewed in isolation, the Claimant maintains that OMCO's purported termination was in breach of both the contract and the US–Oman FTA (Claimant's Reply at [204]; Claimant's Memorial at [182] and [184]; Claimant's Post-Hearing Answers, Introduction).

[324] Oman's Rejoinder at [124]; Oman's Pre-Hearing Skeleton at [10].

[325] Oman's Counter-Memorial at [339] and [342]; Oman's Rejoinder at [125]; Oman's Pre-Hearing Skeleton at [28].

[326] Oman's Rejoinder at [125].

[327] Oman's Rejoinder at [126]–[135].

[328] Oman's Counter-Memorial at [343]; Oman's Rejoinder at [127]; Oman's Pre-Hearing Skeleton at [28].

[329] Oman's Rejoinder at [128]. The Respondent also observes that nothing in the judicial proceeding prevented Mr Al Tamimi from returning to the quarry following his brief detention (Oman's Counter-Memorial at [340]; Oman's Rejoinder at [129]).

[330] Oman's Rejoinder at [130]–[132]; Oman's Pre-Hearing Skeleton at [28].

than being forced from the site by the police, Emrock's employees were dismissed in stages by Emrock in 2009 and 2010.[331]

177. The Respondent also submits that the Claimant cannot undercut Oman's reliance on the "*police powers*" doctrine.[332] The Respondent argues that the application of existing environmental laws lies at the core of a State's police power, and that any application of those laws that leads to the loss of property constitutes a non-compensable regulatory action as opposed to a compensable taking.[333]

178. The Respondent points to Annex 10-B of the US–Oman FTA as underscoring Oman's right to exercise police powers.[334] The Respondent also refers to Article 10.10 of the US–Oman FTA, by which the State Parties were explicit that neither Party should be constrained from "*enforcing any measure* […] *it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environment concerns*".[335] Oman submits that, in accordance with the police power doctrine and contrary to the Claimant's allegations, the actions of its police and prosecutors were *bona fide* and taken for a legitimate purpose.[336]

179. Relevantly, the Respondent notes that the number of violations issued throughout the history of the Claimant's project makes clear that the Claimant's arrest was undertaken for a legitimate purpose rather than on account of the alleged ill-motives of one person (Mr Al Muharrami).[337] According to the Respondent, the legitimacy of the police actions is further confirmed by a number of independent findings, including those findings made against the Claimant by the Mahda Court of First Instance in its 8 November 2009 and 25 April 2010 decisions.[338] Oman also

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[331] Oman's Rejoinder at [130]–[131].

[332] Oman's Rejoinder at [136]–[157].

[333] Oman's Counter-Memorial at [340] and [347]–[348]; Oman's Rejoinder at [13]; Oman's Pre-Hearing Skeleton at [28].

[334] Oman's Counter-Memorial at [349]; Oman's Rejoinder at [138].

[335] Oman's Counter-Memorial at [349]; Oman's Rejoinder at [138].

[336] Oman's Counter-Memorial at [350]–[352]; Oman's Rejoinder at [138]–[144].

[337] Oman's Rejoinder at [139]. To the extent that the Claimant alleges that Oman, specifically Mr Al Muharrami, knew that the Claimant was operating lawfully but falsely accused him of operating outside the OMCO concession (see Claimant's Reply at [161]), the Respondent submits that this claim is spurious and should be disregarded (Oman's Rejoinder at [151]–[153]).

[338] Oman's Counter-Memorial at [352]; Oman's Rejoinder at [141] and [143]. The Respondent also refers to the findings of independent experts that Emrock was operating outside the authorised areas (in particular, Dar El Handasah: the independent expert hired by the Mahda Court of First Instance, and RPM, experts appointed by the Respondent in this arbitration) (Oman's Counter-Memorial at [351]; Oman's Rejoinder at [142] and [144]).

submits that the exoneration of the Claimant before the Ibri Court of Appeal does not prove that the arrest or the decision to prosecute constituted improper regulatory actions.[339]

180. The Respondent submits that the Claimant cannot rely upon the doctrine of *res judicata* to avoid the application of the "*police powers*" doctrine.[340] In this respect, the Respondent relevantly observes that it is accepted that international tribunals do not apply *res judicata* to domestic judgments,[341] and that the ruling of the Ibri Court of Appeal does not suggest that either the police or the Omani prosecution authorities were acting for an illegitimate purpose.[342] Oman submits that the only issue before the court was the legality of the Claimant's actions under Omani law, not that of the police or prosecutor under international law standards.[343]

(f) Minimum standard of treatment

(i) Claimant's position

181. The Claimant alleges that Oman has breached its obligation under the US–Oman FTA to provide the minimum standard of treatment to the Claimant's investment. The Claimant notes that Article 10.5 of the US–Oman FTA relevantly provides as follows:

> *1. Each Party shall accord to covered investments in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investors. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*[344]

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339 Oman's Counter-Memorial at [350].

340 Oman's Rejoinder at [145]–[150].

341 Oman's Rejoinder at [147]–[148].

342 Oman's Rejoinder at [149]–[150].

343 Oman's Rejoinder at [149].

344 Claimant's Memorial at [195]; Claimant's Reply at [169], quoting from *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* (**CLA-009**).

182. The Claimant also refers to the text of Appendix 10-A to the US–Oman FTA:[345]

> *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.*

183. The Claimant alleges that Oman's conduct violated the most basic notions of fair and equitable treatment and full protection and security.[346] The Claimant notes that the Respondent, through its provision of conflicting coordinates, made it impossible for the Claimant to know where he was permitted to operate.[347] The Claimant also submits that Oman never explained consistently what additional permits Mr Al Tamimi was required to have (and why).[348] In this context, the Claimant characterises the Royal Oman Police's actions as extraordinary and in breach of Article 10.5: the police arrested him, forced him to sign an undertaking to stop operations at the quarry, then enforced that undertaking to shut down the quarrying operations entirely and force Emrock's remaining employees from the site.[349]

184. The Claimant submits that throughout 2009 the Respondent arbitrarily and repeatedly harassed Mr Al Tamimi, asserting without any basis that Emrock was violating environmental regulations and the terms of its lease agreement by operating in the *Wadi Sumayni*.[350] In this respect the Claimant contends that the Ibri Court of Appeal judgment demonstrated that Emrock was not violating the law,[351] and in any event, the Claimant argues that Oman has not provided any legitimate basis on which it could genuinely believe that Emrock was violating the law.[352] The

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345 Claimant's Reply at [169], quoting from **CLA-009**.

346 Claimant's Reply at [179]–[190].

347 Claimant's Reply at [181]–[182].

348 Claimant's Reply at [184]–[186]; Claimant's Pre-Hearing Skeleton at [51]. The Claimant relevantly notes that, even if there had been a defect in the Claimant's permits, it was not responsible for such defects: under Omani law, OMCO held that responsibility as the site owner (Claimant's Reply at [186]).

349 Claimant's Pre-Hearing Skeleton at [51]. The Claimant also submits that Oman violated the full protection and security standard by forcing Emrock off the quarry site and then allowing Emrock's equipment and buildings to be looted and destroyed (Claimant's Reply at [189]).

350 Claimant's Reply at [180]. See also Claimant's Memorial at [207] and [209ff].

351 Claimant's Memorial at [211]; Claimant's Reply at [179] and [187].

352 Claimant's Reply at [187].

Claimant submits that it follows that Oman was harassing the company arbitrarily and without reason.[353]

185. In particular reliance upon the arbitral tribunal's award in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*[354], the Claimant submits that proportionality is a principle of customary international law.[355] The Claimant further contends that, as the principle of proportionality falls within the set of "*all customary international law principles that protect the economic rights and interests of aliens*" (for the purposes of Appendix 10-A to the US–Oman FTA), it was a component of Oman's duty to provide the Claimant with fair and equitable treatment under Article 10.5 of the US–Oman FTA.[356]

186. The Claimant maintains that, in light of the above, the Respondent cannot argue it is not in breach of the US–Oman FTA because the Claimant contravened Oman's environmental laws.[357] First, the Claimant contends that the factual premise of that argument is contrary to both the Ibri Court of Appeal judgment and the evidence on the record in this proceeding.[358] Second, and in any event, the Claimant submits that a breach of local law does not give the Host State *carte blanche* to violate basic principles of fair and equitable treatment: under the principle of proportionality an investor may prove a breach of fair and equitable treatment by showing that the Host State's conduct was disproportionate to the investor's infractions.[359]

187. The Claimant claims that the police's actions were disproportionate to the alleged wrongdoing, and in this regard notes that Oman normally treated the alleged offences in question as trivial.[360] The Claimant submits that the alleged environmental violations were punishable only by small fines under Omani law, and relevantly notes that Oman has presented no evidence that other quarries at the time were shut down for similar alleged violations.[361]

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353 Claimant's Reply at [187].

354 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador* (ICSID Case No ARB/06/11), Award, 5 October 2012 (**CLA-038**).

355 Claimant's Reply at [174], relevantly citing *Occidental Petroleum* at [402]–[409], [412]. See also Claimant's Post-Hearing Answers, Answer B.1.

356 Claimant's Memorial at [205]; Claimant's Reply at [174].

357 Claimant's Reply at [176].

358 Claimant's Reply at [176].

359 See Claimant's Reply at [176], and the authorities cited therein.

360 Claimant's Pre-Hearing Skeleton at [53]. See also Claimant's Memorial at [227]–[230].

361 Claimant's Pre-Hearing Skeleton at [53]. The Claimant observes that other quarry operators in Oman who operated beyond their boundaries were allowed to continue operating once they paid for the additional land (Claimant's Reply at [188]).

(ii) Respondent's position

188. The Respondent submits that the Claimant has not demonstrated that the doctrine of proportionality has become an element of the minimum of standard of treatment under customary international law.[362] Although Oman does not dispute that the doctrine of proportionality has been endorsed by international tribunals, it contends that such endorsement alone is insufficient proof that the doctrine has attained the status of customary international law.[363] In this respect, the Respondent submits that the Claimant is required to provide evidence that a general practice has been accepted as law, which is generally determined based on: (a) the general practice of States and (b) what States have accepted as international law.[364] The Respondent submits that this demanding standard has not been satisfied here.[365]

189. As with its arguments regarding expropriation, the Respondent contends that the Claimant has failed to demonstrate that his claims rise beyond ordinary contract claims.[366] In this way, the Respondent submits that Mr Al Tamimi has not established a violation which Oman has committed in the exercise of its sovereign power, because he has not demonstrated that OMCO acted as a sovereign authority.[367]

190. To the extent that the Claimant complains of actions by the Omani State itself, the Respondent argues that proper investigation by the State does not constitute regulatory harassment or an actionable wrong but instead qualifies as justified regulatory action.[368] The Respondent submits that it fairly and consistently applied its pre-existing laws.[369]

191. The Respondent contends that the Claimant's focus upon discrepancies in the coordinates is irrelevant, as there was no confusion concerning Mr Al Tamimi's unauthorised excavation of *wadi* material outside the Jebel Wasa.[370] Likewise, there was no ambiguity in the repeated directives that Mr Al Tamimi was given by Omani authorities (and by his own consultant, GEO-Resources)

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362 Oman's Counter-Memorial at [369]; Oman's Rejoinder at [159].

363 Oman's Rejoinder at [160].

364 Oman's Counter-Memorial at [367]; Oman's Rejoinder at [159], in reliance upon *Glamis Gold Ltd v United States of America* (UNCITRAL), Award, 8 June 2009 (**RLA-021**). See also Oman's Post-Hearing Answers, Answer F.1.

365 Oman's Counter-Memorial at [369]; Oman's Rejoinder at [159].

366 Oman's Counter-Memorial at [404]–[408]; Oman's Rejoinder at [161].

367 Oman's Counter-Memorial at [390] and [405]–[406]; Oman's Rejoinder at [161].

368 Oman's Counter-Memorial at [375]–[377]; Oman's Rejoinder at [162].

369 Oman's Counter-Memorial at [378]–[403].

370 Oman's Counter-Memorial at [382]; Oman's Rejoinder at [165] and [169]–[171].

that he could not excavate that material outside the Jebel Wasa unless he was granted authorisation to do so by MOCI.[371]

192. As to permits, the Respondent contends that the Claimant's effort to deflect blame to OMCO is to no end.[372] The Respondent notes that OMCO had only assured the Claimant that it had obtained the necessary approvals to operate a hard-rock quarry, not screens, crushers, or other equipment outside the Jebel Wasa.[373] Irrespective of which entity was responsible for obtaining the permits, the Respondent submits that Emrock was obliged to comply with the permits it had; Emrock's failure to do so risked the scrutiny of the regulators charged with enforcing Oman's environmental laws, and the consequences flowing from that failure are solely the fault of the Claimant.[374] The Respondent contends that, notwithstanding the Claimant's serial disregard of the relevant environmental approvals, Oman treated the Claimant and his investments fairly and equitably.[375]

193. The Respondent also submits that its treatment of the Claimant's investment was not disproportionate (without prejudice to its primary submission that the Claimant has not demonstrated that the doctrine of proportionality has attained the status of customary international law).[376] First, the Respondent notes that the other quarry operators referred to by the Claimant, and unlike the Claimant, were only permitted to continue *after* they had brought their operations into compliance with the law.[377] Second, the Respondent submits that Oman's actions in response to Emrock's improper conduct did not result in the shut-down of Emrock's operations: the Claimant's arrest had no effect on either the Lease Agreements, as these had ended long before, or on the operations on Emrock, as Emrock no longer had the right to conduct such operations on the site.[378]

194. With respect to the Claimant's full protection and security argument, the Respondent submits that the Claimant has not demonstrated that Oman instigated or had to protect him against

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[371] Oman's Counter-Memorial at [383]; Oman's Rejoinder at [166].

[372] Oman's Rejoinder at [172].

[373] Oman's Counter-Memorial at [397]–[400]; Oman's Rejoinder at [168] and [172]. The Respondent contends that there is no evidence on the record of any assurance whereby Mr Al Tamimi was told he had obtained the permits required to engage in extracting *wadi* materials from outside the Jebel Wasa or operating an alluvial crusher (Oman's Counter-Memorial at [396]).

[374] Oman's Rejoinder at [172].

[375] Oman's Counter-Memorial at [378].

[376] Oman's Rejoinder at [173]–[174].

[377] Oman's Rejoinder at [173].

[378] Oman's Counter-Memorial at [409]–[411]; Oman's Rejoinder at [174].

isolated acts of vandalism long after his investment had expired.[379] The Respondent observes that there is no evidence that Oman encouraged, fostered or contributed to the vandalism alleged by the Claimant, which is the test to be met under this standard,[380] and that in any event, the vandalism which took place (if at all) occurred more than a year after the Claimant's investment had ended and after he and Emrock had abandoned the site.[381] In light of this, the Respondent submits that the Claimant's allegation is not made out.[382]

(g) National treatment

(i) Claimant's position

195. The Claimant submits that, in breach of Article 10.3 of the US–Oman FTA, Oman treated the Claimant less favourably than it treats domestic investors in like circumstances.[383]

196. In order to establish the discrimination prohibited by Article 10.3, the Claimant submits that he bears the initial burden to establish a *prima facie* case that local competitors in like circumstances received more favourable treatment than he did.[384] The Claimant contends that, once he has done so, the burden shifts to Oman to establish either the absence of like circumstances or a credible justification for its disparate treatment.[385]

197. In this proceeding, the Claimant submits that he has made out a *prima facie* case of both "*like circumstances*" and more favourable treatment.[386] As to "*like circumstances*", the Claimant and Mr Abdul Rahman have identified limestone quarry owners who, as their quarries all operated in Oman and under Omani law, were in "*like circumstances*" to the Claimant for the purposes of Article 10.3 of the US–Oman FTA.[387] The Claimant contends that, as Omani laws regarding quarrying and environmental regulations do not distinguish between quarries based on physical

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379 Oman's Rejoinder at [175]–[179].

380 See Oman's Rejoinder at [176]–[179], and the authority cited therein.

381 Oman's Rejoinder at [179].

382 Oman's Rejoinder at [175]–[179].

383 Claimant's Memorial at [232]–[250]; Claimant's Reply at [191]–[201]; Claimant's Post-Hearing Answers, Answer A.19.

384 Claimant's Reply at [193], in reliance upon *Marvin Roy Feldman Karpa v United Mexican States* (ICSID Case No ARB(AF)/99/1), Award, 16 December 2002 at [177] (**CLA-020** / **RLA-016**) and *Total SA v Argentine Republic* (ICSID Case No ARB/04/1), Decision on Liability, 27 December 2010 at [212] (**RLA-043**).

385 Claimant's Memorial at [244]; Claimant's Reply at [193], in reliance upon **CLA-020** / **RLA-016** at [177].

386 Claimant's Reply at [194]–[198].

387 Claimant's Memorial at [237] and [249]; Claimant's Reply at [197]; First Al Tamimi Witness Statement at [199]. With respect to Mr Abdul Rahman, the Claimant refers to his testimony before the Court of Appeal (Defense Closing Statement to the Buraimi Court of Appeal, Appeal No 43/J/A/2009, dated 9 May 2010 (**Exhibit J-352**)).

attributes or other features, the Jebel Wasa quarry should be understood as being in "*like circumstances*" with all limestone quarries in Oman (and their respective owners should be understood as being in "*like circumstances*" with each other).[388]

198. The Claimant submits that the Respondent's argument regarding "*like circumstances*" (namely, that the identified quarries were not in "*like circumstances*" because some had permits while Emrock did not) actually supports the Claimant's argument concerning more favourable treatment: Emrock did have the required permits, and the fact that some of those other companies did not have permits, yet were still permitted to operate, demonstrates disparate treatment.[389]

199. As to more favourable treatment, the Claimant submits that the actions Oman took against him were unprecedented and out of all proportion to how Oman treated environmental violations by Omani-owned companies.[390] In this respect, the Claimant relevantly notes that Mr Abdul Rahman's testimony before the Ibri Court of Appeal observed that other quarries that had operated outside of their concession limits were able to settle the matter by paying additional amounts, while Mr Al Tamimi alone was wrongfully prosecuted for theft.[391] The Claimant also refers to the evidence of Mr Subodh Gupta, who relevantly testified that Omani-owned neighbouring quarries were operating crushers and extracting sand and gravel, apparently without the permits that Mr Al Muharrami claimed Mr Al Tamimi was required to have.[392] Mr Gupta also testified that, unlike Emrock, the competing quarries did not have any trouble from MECA based on the lack of permits.[393]

200. The Claimant submits that the burden has now shifted to Oman.[394] On the Claimant's case, the Respondent has not met this burden.[395] In this respect, the Claimant contends that the witness

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388 Claimant's Memorial at [237].

389 Claimant's Reply at [197].

390 Claimant's Memorial at [232]; Claimant's Reply at [191], [194] and [198]; Claimant's Pre-Hearing Skeleton at [55]. The Claimant notes, however, that the Ibri Court of Appeal had found that the Claimant had not committed any environmental violations (Claimant's Reply at [191]).

391 Claimant's Memorial at [249]; Claimant's Reply at [194]; **Exhibit J-352**.

392 Claimant's Reply at [195]; Second Gupta Witness Statement at [27]–[28].

393 Claimant's Reply at [195]; Second Gupta Witness Statement at [27]–[28]. The Claimant also refers to a press report and his own evidence in support of his position on more favourable treatment (with respect to the press report, see Claimant's Reply at [196]; "Illegal Quarrying in Oman Filling Mining Firm Coffers – Report", *Gulf News*, 30 June 2012 (**Exhibit J-367**); with respect to the Claimant's evidence, see Claimant's Memorial at [246]–[248]; First Al Tamimi Witness Statement at [199]).

394 Claimant's Reply at [199].

395 Claimant's Reply at [200]–[201]; Claimant's Pre-Hearing Skeleton at [55].

statement of Dr Al Rushdi, Director of the Legal Department at MECA, is phrased in generalities and does not show that Oman did not treat the Claimant more harshly than Omani quarry owners.[396] The Claimant also argues that the Respondent's reference to the prosecution of Mr Al Waily (OMCO's General Manager) does not assist Oman's case: first, his prosecution only confirms the disparate treatment of Emrock, as Mr Al Waily's prosecution was in connection with Emrock's operations, not any competing quarry.[397] Second, Mr Al Waily, unlike the Claimant, only received a small fine for the alleged environmental violations.[398]

(ii) Respondent's position

201. The Respondent argues that the Claimant has cited no evidence to substantiate his claim under Article 10.3 of the US–Oman FTA.[399] In order to establish a successful *prima facie* case, the Respondent contends that a claimant must (a) identify a local subject for comparison, (b) demonstrate that he is in like circumstances with that local subject, and (c) prove that he was subjected to less favourable treatment in comparison to the local subject.[400] The Respondent submits that the Claimant has not established any of these elements.[401]

202. In considering the Claimant's argument with respect to "*like circumstances*", the Respondent submits that it is not sufficient to identify alleged comparators that are in the same economic group.[402] According to the Respondent, identifying quarries that operate in Oman and under Omani law is not sufficient to meet the Claimant's burden.[403] The Respondent submits that, rather, the Claimant must establish that the comparative quarries he seeks to rely upon are "*in all material respects*"[404] the same as Emrock's, and that they are in like circumstances "*in light of the regulatory treatment being challenged*".[405]

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396 Claimant's Reply at [200].

397 Claimant's Reply at [201].

398 Claimant's Reply at [201].

399 Oman's Rejoinder at [180]; Oman's Pre-Hearing Skeleton at [30].

400 Oman's Counter-Memorial at [413]; Oman's Rejoinder at [182], in reliance upon, relevantly, *Total SA v Argentine Republic* at [212] (**RLA-043**).

401 Oman's Rejoinder at [193].

402 Oman's Counter-Memorial at [414]; Oman's Rejoinder at [182].

403 Oman's Counter-Memorial at [419] and [421]; Oman's Rejoinder at [184].

404 Oman's Rejoinder at [182], in reliance upon (**RLA-043**) at [210].

405 Oman's Counter-Memorial at [415]; Oman's Rejoinder at [182], in reliance upon A. Newcombe & Paradell, *Law and Practice of Investment Treaties*, Chapter 4 at 164 (**RLA-088**).

203. The Respondent submits that, as the Claimant admits that many of the quarries he identifies had been given the requisite permit for excavating *wadi* material, those quarries cannot serve as adequate local comparators because they were not operating under the same authorisations as Emrock.[406]

204. Turning to the Claimant's discrimination claim, the Respondent submits that the evidence relied upon by the Claimant does not meet his burden of proof.[407] The Respondent contends that Mr Abdul Rahman's evidence before the Ibri Court of Appeal did not provide proof that other quarries held by domestic operators were treated more favourably than Emrock.[408] The Respondent argues that the evidence of Mr Subodh Gupta is also ineffectual, as he does not provide any specific information as to what permits the identified quarries possessed or any information suggesting whether those quarries were involved in operations contrary to their permits.[409]

205. The Respondent contends that the evidence of H E Ahmed Al Dheeb, Undersecretary of MOCI, dispels any grounds for inferring that Oman discriminates between local and foreign companies.[410] The Respondent notes that his evidence provides that the "*vast majority*" of companies which were found by MOCI to have violated the applicable permits and regulations were Omani companies owned and managed by Omani individuals.[411]

206. The Respondent also submits that the Claimant's argument with respect to Mr Al Waily's prosecution is without merit.[412] The Respondent notes that the charges directed to OMCO and Mr Al Waily demonstrate that the Claimant was not singled out by Oman: despite his nationality, Mr Al Waily received the same treatment as Mr Al Tamimi.[413]

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406 Oman's Counter-Memorial at [423]; Oman's Rejoinder at [184].

407 Oman's Counter-Memorial at [425]–[428[; Oman's Rejoinder at [185]–[193].

408 Oman's Rejoinder at [186]. In so arguing, the Respondent notes that there is no transcript of Mr Rahman's testimony (Oman's Rejoinder at [186], fn 350).

409 Oman's Rejoinder at [187]. The Respondent also submits that the newspaper article cited by the Claimant does not assist his case, as it makes no distinctions based on nationality. Additionally, the Respondent submits that the article (among others) undermines the Claimant's discrimination claim because it demonstrates Oman's efforts to regulate the mining sector and punish unlawful conduct, regardless of nationality (Oman's Rejoinder at [188]–[189]).

410 Oman's Rejoinder at [190]; Oman's Pre-Hearing Skeleton at [30].

411 Oman's Rejoinder at [190]; Al Dheeb Witness Statement at [27].

412 Oman's Rejoinder at [192].

413 Oman's Counter-Memorial at [428]; Oman's Rejoinder at [192].

C. DAMAGES

207. With respect to damages, the Claimant seeks compensation of not less than US$273 million for injuries caused by Oman's breaches of the US–Oman FTA, consisting of at least US$263 million in economic damages and at least US$10 million in moral damages (a full record of the relief sought by the Claimant in the successive phases of this arbitration is set out above).[414] The Respondent opposes this claim, submitting that the Claimant's purported investment was worthless as of late 2008, and in any event, that he has not discharged his burden to prove that any alleged breach caused actual losses. In this section, the Tribunal will address the Parties' arguments with respect to the monetary damages sought by the Claimant, both economic and moral.

(a) Economic damages

(i) Claimant's Position

The Standard for Compensation

208. In accordance with Article 10.6 of the US–Oman FTA, the Claimant alleges that the appropriate measure of compensation for expropriation is the fair market value for his investment at the time of expropriation.[415] The Claimant also submits that the standard of compensation for the other alleged treaty violations (ie denial of fair and equitable treatment and denial of national treatment) is the fair market value of Emrock at the time of the loss.[416]

The Condition of the Claimant's Business

209. Although Oman submits that the Claimant's investment had no value when the US–Oman FTA came into force, the Claimant contends that this submission is without support.[417] According to the Claimant, Emrock was a robust and growing young business at that time, and at the time of breach.[418] The Claimant notes that Mr Al Waily himself described the Claimant's project as a "*mega quarry and crushing project with a very large scale operation*".[419]

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[414] Claimant's Reply at [304]; Claimant's Pre-Hearing Skeleton at [80].

[415] Claimant's Reply at [219]. See also Claimant's Memorial at [252]; Claimant's Pre-Hearing Skeleton at [56].

[416] Claimant's Memorial at [254]; Claimant's Reply at [221].

[417] Claimant's Reply at [220].

[418] Claimant's Reply at [220].

[419] Claimant's Pre-Hearing Skeleton at [59]; Letter from Mr Al Waily to the Ministry of Oil and Gas, dated 1 August 2007 (**Exhibit J-105**).

210. The Claimant submits that the Emrock quarry had a substantial value at the time Oman terminated Emrock's business at the end of May 2009: not only had the Claimant constructed tangible assets on site (and constructed a high-quality road connecting that site to the highway), he had also substantially developed the limestone-mining areas.[420] According to the Claimant, Emrock's larger-than-usual capital expenditure at the outset would have facilitated lower long-term cost and would have allowed ramp-up production at a higher than usual rate.[421] Indeed, the Claimant contends that Emrock was able to ramp-up production unusually quickly, noting that Emrock had reported a profit in only its second year of operation, that it had begun to make inroads into the lucrative market for export of limestone to India for chemical use, and that Emrock had at least 130 customers, including one major customer (Nakheel Properties).[422]

211. To the extent that the Respondent alleges that Emrock was experiencing extreme financial distress and illiquidity by year end 2008, the Claimant submits that such allegation is contradicted by the evidence.[423] The Claimant notes that Emrock realized a profit in 2008, and generally that Oman fails to take account of the Claimant's ongoing profits and the extremely valuable Lease Agreements with OMCO.[424]

212. The Claimant submits that Oman significantly overstates the significance of the Nakheel contract, as Nakheel was not Emrock's only customer: by June 2009, Emrock had made sales to at least 130 customers, including large volume sales to Maher Rahal.[425] The Claimant also notes that Nakheel never cancelled its contract with Emrock, but rather only temporarily suspended it.[426]

213. The Claimant submits that the Respondent cannot dismiss Mr Al Tamimi's project as an untried start-up venture, as Emrock already had substantial sales, an established customer base, and was showing a profit.[427] To the extent that the Respondent alleges liquidity problems at Emrock, the Claimant notes that this is disputed, but that in any event these alleged problems could have been remedied by an additional investment from Mr Al Tamimi or an outside investor.[428] The

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[420] Claimant's Reply at [223]; Claimant's Pre-Hearing Skeleton at [61]; Archibald Expert Report.

[421] Claimant's Reply at [223]; Archibald Expert Report at [24].

[422] Claimant's Reply at [8] and [224]; Claimant's Pre-Hearing Skeleton at [62]; Second Boyd Expert Report, at [5.2.5], [5.3.4] and [6.2.4].

[423] Claimant's Reply at [235].

[424] Claimant's Reply at [235]. See also Claimant's Pre-Hearing Skeleton at [60].

[425] Claimant's Reply at [237]. See also Claimant's Post-Hearing Answers, Answer B.4.

[426] Claimant's Reply at [238].

[427] Claimant's Pre-Hearing Skeleton at [64].

[428] Claimant's Reply at [241]; Claimant's Pre-Hearing Skeleton at [66].

Claimant contends that the Respondent cannot argue that Mr Al Tamimi's long-term rights to mine over one billion tonnes of limestone, together with the infrastructure that had been constructed at the site, would have been worthless to a reasonable buyer at arm's length.[429]

The State of the Market

214. As to the state of the market, in reliance upon the MEED Expert Report, the Claimant submits that Emrock was well positioned to sell into a huge market with substantial unmet demand and significant potential for long-term growth.[430] MEED's report shows that, even during the slowdown in the Dubai real estate industry in late 2008 and early 2009, there was still a substantial gap between demand and supply of limestone in the region.[431]

215. The Claimant also notes that, because of its location in Oman, Emrock had a number of advantages over other local quarries to capture that market gap.[432] In this respect, the Claimant points to, among other advantages, the high quality of limestone sold by Emrock, Emrock's superior geographical location, its access to roads, a longer concession period than any of its competitors in the UAE, and Emrock's ability to grow rapidly to meet demand.[433] The MEED Expert Report also suggests that the demand for limestone in the UAE as a whole continued to grow in 2009, and the expectation in June 2009 was that the slowdown would be short-lived.[434]

216. Addressing the Respondent's submissions concerning the prevailing macroeconomic conditions, the Claimant argues that Oman and Navigant Consulting Inc (one of the Respondent's experts) greatly overstate the extent of the slowdown in the Gulf region in late 2008 and early 2009.[435] To that end, the Claimant submits that Navigant's analysis makes the macroeconomic outlook seem worse than it was because it focuses its analysis on the real estate construction market in Dubai to the exclusion of oil-rich Abu Dhabi and other markets.[436] Navigant also relies heavily on Nakheel's default on obligations in November 2009 as a further indicator of the state of the

[429] Claimant's Pre-Hearing Skeleton at [67].

[430] Claimant's Reply at [225]; Claimant's Pre-Hearing Skeleton at [63].

[431] Claimant's Reply at [225] and [239]; Claimant's Pre-Hearing Skeleton at [70]; MEED Expert Report at [13]–[14] and [166].

[432] Claimant's Reply at [225]; Claimant's Pre-Hearing Skeleton at [70]; MEED Expert Report at [14] and [144]–[161].

[433] Claimant's Reply at [244]; MEED Expert Report at [147]–[161]; Archibald Expert Report at [24].

[434] Claimant's Reply at [8]–[9], [225], [231] and [257]; Claimant's Pre-Hearing Skeleton at [69]; MEED Expert Report at [13] and [36]–[54].

[435] Claimant's Reply at [230]; Claimant's Pre-Hearing Skeleton at [69].

[436] Claimant's Reply at [232]; MEED Expert Report at [43]–[44].

economy at the end of May 2009, but MEED notes that Nakheel's default was unforeseen in early 2009.[437]

The Valuation of Emrock

217. The Claimant alleges that, based on the conclusions of the Second Expert Report of John T Boyd Company, the fair market value of his expropriated assets as of 1 June 2009 was US$292 million.[438] Boyd concludes that US$263 million, or 90% of US$292 million, represents Mr Al Tamimi's share of that value.[439]

218. Boyd's valuation is based on projections through 1 September 2032, namely the date on which the Lease Agreements would have terminated after the initial term of ten years and three extensions of five years each.[440] Boyd applies the discounted cash flow ("**DCF**") methodology in reaching its valuation, and uses the Weighted Average Cost of Capital ("**WACC**") to calculate and apply a discount rate of 10 percent to the projected net after tax cash flows.[441]

219. The Claimant submits that Boyd's valuation remains in many ways conservative.[442] Among other examples, the Claimant notes that Boyd relies upon pricing for armour rock and aggregate which, as shown by MEED's research, is substantially discounted from the market price for Emrock's products.[443] The Claimant also notes that Boyd assumes a 12% rate of tax on the entire operation after expiration of the 10-year tax exemption, even though Mr Al Tamimi might have been able to structure the business to redirect profits to SFOH, which is based in a tax-free zone.[444] Further, Boyd assumes a slow ramp-up to full production, and assumes that production would end eight months prior to the end of the Lease Agreements to allow sufficient time for site reclamation activities.[445]

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[437] Claimant's Reply at [233]; MEED Expert Report at [44].

[438] Claimant's Reply at [11] and [222]. Second Boyd Expert Report at [2.2]. The First Boyd Expert Report calculated the fair market value of those assets at US$252 million, but this figure was revised in the Second Expert Report in light of, primarily, updated market data and an updated mine plan (Claimant's Reply at [11] and [222]).

[439] Claimant's Reply at [227] and [273]–[274]; Claimant's Pre-Hearing Skeleton at [65].

[440] Claimant's Memorial at [259].

[441] Claimant's Memorial at [259]; Claimant's Pre-Hearing Skeleton at [77].

[442] Claimant's Reply at [226] and [256]; Claimant's Pre-Hearing Skeleton at [79].

[443] Claimant's Reply at [226]; Claimant's Pre-Hearing Skeleton at [79]; Second Boyd Expert Report at [7.4.2.4].

[444] Claimant's Reply at [227]; Second Boyd Expert Report at [7.7.11.1].

[445] Claimant's Memorial at [265]; Claimant's Reply at [226]; Claimant's Pre-Hearing Skeleton at [79]; First Boyd Expert Report, Section 8.1; Second Boyd Expert Report at [6.3.7] and [7.1.1].

220. To the extent that the Respondent asserts that it is flawed for Boyd to rely upon a 25-year term of investment (ie its maximum term under the Lease Agreements), the Claimant submits that this is justified under the plain terms of the Lease Agreements and well-established principles of damages.[446] The Claimant contends that, in the valuation context, tribunals analyse renewal options in light of legitimate expectations, often based on the terms of the contract.[447] In this respect, the Claimant observes that the Lease Agreements made renewal available at the option of Emrock and SFOH, and that those agreements do not place any conditions or requirements on renewal, but merely state that the agreements are "*extendable*".[448] Even if OMCO's consent to renew were required, the Claimant submits that it would be in OMCO's interest to renew a contract that was generating ongoing royalties for OMCO as the parties' 25-year plan contemplated.[449]

221. The Claimant also notes that the business dealings between Emrock, SFOH and OMCO indicate that all parties expected the Lease Agreements would be renewed for their full 25-year term.[450] The Claimant submits that he had a legitimate expectation that he would exercise his rights to renew, and that calculating damages based upon that expectation is necessary to restore the Claimant to the rightful position he would have enjoyed but for the wrongful acts of Oman.[451]

222. The Claimant argues that, contrary to Oman's suggestion, the fact that Boyd limited its analysis to a project cash flow approach does not undermine Boyd's valuation.[452] The Claimant notes that the DCF is the most commonly implemented valuation methodology, especially in the valuation of mineral entities, because the unique and local nature of the industry and the different reserve life spans of each entity make comparable sales or EBITDA (earnings before interest, taxes, depreciation and amortization) multiples difficult.[453] In this respect the Claimant contends that Navigant's use of an EBITDA multiplier is flawed: the companies Navigant used for the purposes of comparison are not similarly situated to Emrock, and in any event, an EBITDA multiplier is not

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[446] Claimant's Reply at [246]; Claimant's Pre-Hearing Skeleton at [76].

[447] Claimant's Reply at [247]–[248]. The Claimant also notes that tribunals have routinely awarded damages based on an expectation of renewal of a lease term (Claimant's Reply at [247] and [254], relevantly citing *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia* (ICSID Case No ARB/83/2), Award, 31 March 1986, as rectified 10 June 1986 (**CLA-072**).

[448] Claimant's Reply at [249]; Claimant's Pre-Hearing Skeleton at [76].

[449] Claimant's Reply at [255]; Second Boyd Expert Report at [7.4.1.5].

[450] Claimant's Reply at [250]; Claimant's Pre-Hearing Skeleton, at [76].

[451] Claimant's Reply at [255].

[452] Claimant's Reply at [258].

[453] Claimant's Pre-Hearing Skeleton at [77].

a first-line valuation method for a mining concession, because value depends primarily on available reserves, which do not necessarily relate to past earnings.[454]

223. As a part of the DCF approach, Boyd's valuation of Emrock includes the application of an appropriate discount rate.[455] Boyd makes projections through 1 September 2032, then discounts the projected net after tax cash flows to present value applying a discount rate of 10 percent.[456] It derived that rate using the WACC typical for large multinational building materials companies of the type likely to be interested in buying the Jebel Wasa quarry (ie the WACC a likely buyer would apply in valuing the quarry).[457]

224. To the extent that the Respondent alleges that the 10 percent discount rate in Boyd's analysis is too low, the Claimant observes that Boyd chose the discount rate based on direct data evidencing the discount rate that a likely buyer would use to value the assets.[458] According to the Claimant, in the presence of actual empirical observations of the discount rates used by buyers in the market, it is not necessary or appropriate to resort to a theoretical construct (as Navigant suggests Boyd should have done) to try to reconstruct what such a buyer might pay.[459]

225. The Claimant also notes that it is reasonable for Boyd to have assumed that Emrock would not be subject to income tax for ten years.[460] Boyd provides in its first report that the assumption was based upon both statements from Mr Jaime Guzman of OMCO and the terms of the Lease Agreements:[461] Mr Guzman had written to the Claimant on 19 September 2005 that Oman routinely "*awards exemption of the corporate income tax for a period of five years from the beginning of production, with a possible extension for an additional five years*",[462] and the Lease Agreements expressly required OMCO to "*apply its best endeavors*" in order to obtain the tax exemption of the income and corporate taxes pursuant to the provision of the tax law provided for a foreign company registered in Oman.[463]

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[454] Claimant's Reply at [259]–[260].

[455] Claimant's Memorial at [276].

[456] Claimant's Memorial at [259]; Claimant's Reply at [264].

[457] Claimant's Memorial at [276]; First Boyd Expert Report at [11.1.2].

[458] Claimant's Reply at [264]; Second Boyd Expert Report at [8.2.10]–[8.2.16].

[459] Claimant's Reply at [264]; Second Boyd Expert Report at [8.2.5]–[8.2.6]. See also Claimant's Pre-Hearing Skeleton at [78].

[460] Claimant's Reply at [265].

[461] Claimant's Reply at [265]; First Boyd Expert Report at [10.3.10.2].

[462] Claimant's Reply at [265]; **Exhibit J-035**.

[463] Claimant's Reply at [265]; **Exhibit J-048**, Art 8(iv) and **Exhibit J-058**, Art 8(iv).

226. Beyond the fair market value methodology applied by Boyd, the Claimant also defends Boyd's determination of fair market value:

(a) First, the Claimant submits that Boyd's determination regarding the quality of the limestone contained in the concession area is fully supported, and in doing so notes that Boyd reviewed several testing samples which confirmed the high quality of limestone contained throughout the concession area.[464]

(b) Second, Boyd's projection that Emrock could ramp-up production to reach 25 million tonnes in 2022 is, on the Claimant's case, entirely realistic.[465] The Claimant notes that this projection is consistent with the conclusions in the Archibald Expert Report and also with OMCO's own description of the project as a "*mega quarry and crushing project with a very large scale operation*".[466]

(c) Third, the Claimant argues that Boyd's assumed product mix is reasonable given the market demand for armour rock, aggregate and chemical stone, and notes in this respect that Emrock did not need an additional permit to excavate limestone-based sand and gravel within the concession area.[467]

(d) Fourth, Boyd's assumption that Emrock would have diversified its product mix to include chemical stone is fully supported by the facts.[468] The Claimant observes that Emrock was in the process of doing so at the time Oman shut it down, and in this regard points to ArcelorMittal (a major steelmaker) contacting Emrock in 2008 in order to establish what it called a "*long term relationship*" for the supply of chemical stone.[469] Boyd explains that, had Emrock's business continued, it was reasonable to assume that it would have sold chemical stone in the Indian market.[470]

(e) Fifth, MEED's projection that Emrock could capture 29 percent of the total unmet limestone demand did not require Emrock to compete with existing players' own market

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[464] Claimant's Reply at [267]–[268]; Claimant's Pre-Hearing Skeleton at [73]; Second Boyd Expert Report at [4.2.4]–[4.2.14].

[465] Claimant's Reply at [269]; Second Boyd Expert Report at [7.3.1.1]. This projection is roughly five million tonnes higher than the production requirement in the First Boyd Expert Report, and has been amended in the Second Boyd Expert Report in light of the updated mine plan (Second Boyd Expert Report at [7.3.1.1]).

[466] Claimant's Reply at [269]; Archibald Expert Report at [4], [9] and [29]; **Exhibit J-105**.

[467] Claimant's Reply at [270]; Second Boyd Expert Report at [7.1.7].

[468] Claimant's Reply at [271].

[469] Claimant's Reply at [271]; Second Boyd Expert Report at [6.2.7]; Boyd Ref [9-28].

[470] Claimant's Reply at [271]; Second Boyd Expert Report at [6.3.2].

share.[471] In any event, even if Emrock had to compete with other players, the Claimant notes that Emrock had a number of competitive advantages, in particular its geographic location.[472] As the MEED Expert Report notes, Emrock's location provides a "*shorter distance*" to the main centres of limestone consumption in the Emirates of Dubai and Abu Dhabi.[473]

(f) Finally, the Claimant submits that it is reasonable (even conservative) for Boyd to assume that the Claimant would be entitled to 90 percent of the overall project value.[474] The Claimant notes that he owned 100 percent of Emrock's dividends and 80 percent of SFOH's dividends; assuming a 50/50 percent production split between Emrock and SFOH (as anticipated in the environmental applications), the Claimant is therefore entitled to 90 percent of the overall project.[475]

(ii) Respondent's Position

227. The Respondent submits that, even if Mr Al Tamimi were to meet his burden of demonstrating that Oman violated the US–Oman FTA and directly caused him harm, he would not be entitled to the compensation he seeks because his purported damages model is "*incurably flawed and inflated to an extent that is entirely fanciful*".[476] The Respondent contends that the Claimant's project had no value as of 1 January 2009 when the US–Oman FTA came into effect, much less on 1 June 2009, the Claimant's purported valuation date.[477]

228. The Respondent first addresses the standard to be applied. In the event that Oman breached Article 10.6 of the US–Oman FTA (ie the prohibition against expropriation), the Respondent submits that the relevant standard for compensation is equivalent to the "*fair market value of the expropriated investment immediately before the expropriation took place*".[478] As to non-expropriatory breaches, the Respondent submits that fair market value is not the proper measure

[471] Claimant's Reply at [272]; MEED Expert Report at [21].

[472] Claimant's Reply at [272].

[473] Claimant's Reply at [272]; MEED Expert Report at [151].

[474] Claimant's Reply at [273].

[475] Claimant's Memorial at [256] and [278]; Claimant's Reply at [227] and [273].

[476] Oman's Counter-Memorial at [22] and [453].

[477] Oman's Counter-Memorial at [22], [454] and [460]; Oman's Rejoinder at [205] and [220]; Oman's Pre-Hearing Skeleton at [2] and [7].

[478] Oman's Counter-Memorial at [455], quoting the US–Oman FTA, Art 10.6.1(c).

of damages, but rather, the more appropriate standard is loss "*adequately connected to the breach*" of the specific provision of the US–Oman FTA.[479]

229. The Respondent observes that while, in principle, a claimant is entitled to recoup all "*financially assessable damage including lost profits*", that right is confined to instances when the claimant can demonstrate that the lost profits claim has "*sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable*".[480] The Respondent contends that when damages are too remote or uncertain, the claim must be denied.[481]

230. The Respondent also notes that, as a general matter, damages must not put a claimant in a better position than he would have been absent the breach, but must instead compensate the claimant only for the losses actually incurred as a result of the wrongful act.[482] To achieve this objective, a party must demonstrate a sufficient link between the wrongful act and actual provable damages directly caused by the wrongful act.[483]

231. Turning to the valuation provided by the Claimant's expert, the Respondent refers to Navigant's opinion that the Claimant's project was insolvent and worthless as of 1 June 2009.[484] As Navigant explains, "*none of the evidence provided by Claimant or its three (now conflicting) experts changes* [its] *opinion that the Project failed as an unfortunate consequence of macroeconomic and commercial reasons rather than Oman's actions*".[485]

232. The Respondent submits that the global economic crisis that began to unfold in the fall of 2008 severely depressed economic growth in the Gulf region, and relevantly for this case, caused the real estate and construction sectors to collapse.[486] The Respondent contends that, by the end of 2008, the Claimant's project had significant inventories of rock, three months of unpaid

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[479] Oman's Counter-Memorial at [456]; Oman's Rejoinder at [208], relevantly citing **CLA-020** / **RLA-16** at [194]. The Claimant submits that this is simply another way of saying that the treaty breach must have caused the damages claims, and it provides no standard for how the amount of the provable loss should be determined (Claimant's Pre-Hearing Skeleton at [57]).

[480] Oman's Counter-Memorial at [458]; Oman's Rejoinder at [207], relevantly citing J Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, 2002, Art 36, Commentary 27 (**RLA-065**).

[481] Oman's Counter-Memorial at [457]; Oman's Rejoinder at [206], citing *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1), Award, 30 August 2000 at [115] (**RLA-029**).

[482] Oman's Counter-Memorial at [459].

[483] Oman's Counter-Memorial at [459], citing *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22), Award, 24 July 2008 at [785] (**RLA-004**).

[484] Oman's Rejoinder at [220].

[485] Oman's Rejoinder at [220]; First Navigant Consulting Expert Report at [12].

[486] Oman's Counter-Memorial at [461]; Second Navigant Consulting Expert Report at [12] and [83]–[84].

receivables with Nakheel (which cancelled its supply contract with Emrock around that same time), and spiralling obligations to equipment providers and banks that Emrock would never pay.[487] As explained by Navigant, Emrock's financial statements reveal that by year end 2008 the Claimant's project was experiencing financial distress and illiquidity.[488] The Respondent contends that the Claimant's project did not have realistic market prospects as of 1 January 2009 or 1 June 2009.[489]

233. The Respondent also submits that Boyd's valuation cannot assume the Lease Agreements would be renewed for the maximum renewal period.[490] The Respondent notes that, as explained by Navigant, Boyd's updated model assumes that 81 percent, or US$236,964,429 of the project's value, would be derived from cash flows arising after the expiration of the initial 10-year term of the Lease Agreements on 1 September 2017.[491] The Respondent submits that there is no evidence suggesting the remotest possibility that OMCO would have renewed the Lease Agreements, and as such those damages are entirely speculative.[492]

234. The Respondent first observes that the Lease Agreements could not later be renewed because they had ceased to exist: the OMCO–SFOH Lease Agreement was null and void, and OMCO had terminated the OMCO–Emrock Lease Agreement on 20 July 2008 and 17 February 2009.[493] Second, even if the agreements were still in force and effect, the Respondent submits that renewal was not available at the sole option of Emrock and SFOH.[494] Rather, the express wording of those Lease Agreements demonstrates that renewal was conditional and wholly dependent upon the approval of both parties.[495] The Respondent notes in this respect that each of the three possible extensions was far from certain: OMCO and Emrock/SFOH demarcated

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[487] Oman's Counter-Memorial at [461]; First Navigant Consulting Expert Report at [12] and [120]–[130].

[488] Oman's Counter-Memorial at [462]; First Navigant Consulting Expert Report at [120].

[489] Oman's Counter-Memorial at [463]. The Respondent also submits that the Claimant has not demonstrated that Emrock had any discernible geographic or logistical advantage over competitor quarries to permit it to capture sufficient business to develop a significant market share in Abu Dhabi. In this respect, the Respondent notes that Mr Al Tamimi was dependent upon Nakheel, and that he had no serious connections in the construction industry elsewhere in the region (Oman's Counter-Memorial at [465]; First Navigant Consulting Expert Report at [103]–[117]).

[490] Oman's Counter-Memorial at [467]–[476]; Oman's Rejoinder at [209]–[219].

[491] Oman's Rejoinder at [209]; Second Navigant Consulting Expert Report at [146].

[492] Oman's Rejoinder at [209].

[493] Oman's Rejoinder at [211]. See also Oman's Counter-Memorial at [467] and [472].

[494] Oman's Counter-Memorial at [368]; Oman's Rejoinder at [212].

[495] Oman's Rejoinder at [212].

several different points in time when the parties could reassess matters and determine whether to renew the Lease Agreements in light of the then prevailing circumstances.[496]

235. The Respondent also contends that, contrary to the submission of the Claimant, the parties' business dealings do not give rise to a legitimate expectation that OMCO would have renewed the Lease Agreements.[497] Rather, the Respondent submits that the parties' actual performance and the history of their business dealings prove the opposite, and in this respect refers to OMCO's termination of the OMCO–Emrock Lease Agreement and the substantial evidence showing OMCO's displeasure with Mr Al Tamimi and his project's performance.[498] The Respondent relevantly notes that both the SFOH and Emrock business plans considered investment horizons in line with the initial terms of the Lease Agreements (namely, 10 years), and that both business plans did not anticipate long-term capital investment: the SFOH business plan did not expect additional capital investment after the first year, and the Emrock plan assumed that investment would occur over a five year period.[499]

236. The Respondent submits that *LETCO v Liberia* is inapposite, as in that case the claimant had a unilateral right to renew the agreement at issue for an additional period of 15 years.[500] As argued by the Respondent, no such unilateral right exists in this case.[501] Rather, the case facts here bear close resemblance to those in *CMS Gas Transmission Co v Argentina*[502] and *Gemplus v Mexico*,[503] where the right to renew the relevant agreement in each case was conditional: in *CMS*, the right of renewal was dependent on the claimant's compliance with performance requirements (as is the case in this proceeding), and in *Gemplus*, any renewal of the relevant licence agreement required approval from the respondent country and the claimant's full

[496] Oman's Counter-Memorial at [474].

[497] Oman's Rejoinder at [214].

[498] Oman's Rejoinder at [215].

[499] Oman's Counter-Memorial at [476]; Oman's Rejoinder at [214]; Second Navigant Consulting Expert Report at [139] and [142]–[143].

[500] Oman's Rejoinder at [213] and [217]; **CLA-072**.

[501] The Respondent also notes that in *LETCO* the tribunal recognised the claimant's "*past compliance*". In this case, however, Mr Al Tamimi has not demonstrated "*past compliance*" with the terms of the Lease Agreements (Oman's Rejoinder at [217]).

[502] *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8), Award, 12 May 2005 (**CLA-025**).

[503] *Gemplus SA, SLP SA and Gemplus Industrial SA de CV v United Mexican States* (ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4)), Award, 16 June 2010 (**RLA-019**).

compliance with the conditions specified in the agreement.[504] In each of those cases, the tribunal rejected a damages claim based on the possible renewal of the relevant agreement.[505]

237. The Respondent also notes that Navigant has confirmed that it "*was highly questionable whether a hypothetical buyer and seller would include the Lease Agreements' three five-year extensions in a calculation of the fair market value of the Project*".[506]

238. In addition to Boyd's assumption with respect to the renewal of the Lease Agreements, the Respondent submits that the updated valuation in the Boyd Second Expert Report contains certain serious flaws, including the following:

(a) Boyd relies upon a post-hoc business plan that does not accord with the reality of the project and otherwise relies on an inflated and unsubstantiated view of the market and the project's market potential.[507] The Respondent submits that Boyd incorrectly adopts MEED's conclusions that there was a limestone supply deficit in the UAE and Oman (which there was not) and that the project was positioned and capable of supplying it (which it was not).[508]

(b) Boyd uses assumptions about resource quantity and quality that were not derived in accordance with accepted industry practice and which are otherwise unsound and unreliable.[509]

(c) Boyd assumes that Emrock would have become a major exporter and producer of chemical limestone, despite the fact that Emrock had never sold chemical limestone to a single customer (and lacked any long-term relationships with potential customers) and had not confirmed the location or existence of such materials within the Jebel Wasa.[510]

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[504] Oman's Rejoinder at [216]; **CLA-025** at [199]; **RLA-019** at [4]–[48]. The Claimant seeks to distinguish these cases on various grounds, including that they concern conditional or uncertain renewals, which the Claimant submits is not the case with respect to the Lease Agreements (Claimant's Reply at [251]–[253]).

[505] Oman's Counter-Memorial at [470]–[471]; **CLA-025** at [199]; **RLA-019** at [12]–[49].

[506] Oman's Rejoinder at [218]; Second Navigant Consulting Expert Report at [139].

[507] Oman's Counter-Memorial at [480]; Oman's Rejoinder at [222]; Second Navigant Consulting Expert Report at [94].

[508] Oman's Rejoinder at [222].

[509] Oman's Counter-Memorial at [482]; Oman's Rejoinder at [223]; First RPM Expert Report, Section 5.2.3; Second RPM Expert Report, Sections 6.1 and 6.2.

[510] Oman's Counter-Memorial, at [485]; Oman's Rejoinder at [224]; First RPM Expert Report at [84]; Second Navigant Consulting Expert Report at [147].

(d) The valuation is rendered invalid because Boyd's assumptions concerning the volumes of limestone to be mined, extracted, and sold require unfounded assumptions concerning transportation logistics.[511] According to RPM and Navigant, those transportation logistics are impossible.[512]

(e) Boyd discounts projected cash flows at the WACC rather than the cost of equity for the project.[513] Navigant opines that the correct discount rate is the cost of equity capital, given the nature of the Claimant's investment in the project.[514] By incorrectly using the WACC, Navigant explains that Boyd wrongly lowers the discount rate and thereby increases its valuation.[515]

(f) Boyd purports to have calculated the Enterprise Fair Market Value of the project (ie the value of equity and debt), instead of the value of the Claimant's shareholding in the project.[516] The Respondent notes that the distinction is significant, because Mr Al Tamimi did not directly invest in or own the Jebel Wasa quarry.[517] As he only indirectly invested in the quarry through his equity shareholdings in Emrock and SFOH, he could expect to receive cash flows from the project only through dividends paid by those companies.[518] As such, on the Respondent's case, the approach of Boyd and the Claimant ignores the capital structure of the project.[519]

(g) Boyd grounds its analysis in MEED's assessment of macroeconomic conditions in the region, but as shown by Elite Media in its expert report, MEED's assessment is entirely too optimistic.[520] The Respondent submits that, in reliance upon the reports of Navigant

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[511] Oman's Rejoinder at [225].

[512] Oman's Rejoinder at [222]; Second Navigant Consulting Expert Report at [166]–[168]; Second RPM Expert Report at [53]–[70].

[513] Oman's Rejoinder at [226]; Second Navigant Consulting Expert Report at [171]–[172].

[514] Second Navigant Consulting Expert Report at [172]. By "*the nature of Claimant's investment in the Project*", Navigant refers to the Claimant's shareholding in Emrock and SFOH, which gave him a claim to 80 percent of Emrock's residual cash flows and 100 percent of SFOH's residual cash flows. Navigant also notes that the Claimant's nephew (Mr Al Gergawi) had a claim to 20 percent of Emrock's residual cash flows, and that debt holders owned an interest in the project as of the valuation date (Second Navigant Consulting Expert Report at [171]).

[515] Second Navigant Consulting Expert Report at [172].

[516] Oman's Rejoinder at [227]; Second Navigant Consulting Expert Report at [175].

[517] Oman's Counter-Memorial at [478]; Oman's Rejoinder at [227].

[518] Oman's Rejoinder at [227]; Second Navigant Consulting Expert Report at [175]–[180].

[519] Oman's Counter-Memorial at [478].

[520] Oman's Rejoinder at [228]; Elite Media Expert Report.

and Elite Media, any conceivable market for limestone had dried up as a result of deteriorating macroeconomic conditions.[521]

(b) Causation

(i) Claimant's position

239. In reliance upon the tribunal's award in *Lemire v Ukraine*,[522] the Claimant submits that there are two "*aspects*" to causation: one, that the State party's actions led to the aggrieved party's losses, and two, that no intervening or superseding factor broke the chain of cause and effect.[523] The Claimant contends that both aspects are satisfied here.[524]

240. The Claimant submits that there can be no serious doubt that Oman's actions were at least a cause of Mr Al Tamimi's losses.[525] In this respect, the Claimant notes that Oman arrested the Claimant and enforced an order that the quarry stop all production; without any income, the Claimant's companies became insolvent.[526] The Claimant also observes that Omani police then forced the Claimant's employees from the quarry site, after which they allowed the site to be looted and destroyed.[527] As a result, so the Claimant submits, Oman's actions destroyed Claimant's value in his investment.[528]

241. As to the second aspect, the Claimant contends that no other factors (in particular, external market forces, the Claimant's own alleged wrongdoing, and OMCO's purported termination of the Lease Agreements) caused the Claimant's losses.[529] With respect to market forces, the Claimant submits that Oman's suggestion that Emrock closed, or inevitably would have closed, for economic reasons is contrary to the facts.[530] The Claimant argues that Emrock was a

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[521] Oman's Rejoinder at [25].

[522] *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18), Award, 28 March 2011 at [153]–[214] (**CLA-035** / **RLA-025**).

[523] Claimant's Reply at [277]–[290].

[524] Claimant's Reply at [278]–[290].

[525] Claimant's Reply at [279].

[526] Claimant's Reply at [279].

[527] Claimant's Reply at [279].

[528] Claimant's Reply at [279].

[529] Claimant's Reply at [280]–[290].

[530] Claimant's Reply at [229]–[244] and [281].

promising and well-positioned business that would have achieved significant success but for Oman's treaty violations.[531]

242. Insofar as the Respondent submits that the Claimant's alleged misconduct caused his losses, the Claimant repeats his earlier arguments on this subject.[532] First, the Claimant submits that SFOH was not required to register in Oman, and even if it had been, the legal consequence for such failure would have been a small fine.[533] Second, late payment by Emrock to OMCO was not a cause of the Claimant's loss, as Emrock had timely rendered all payments due to OMCO under the OMCO–Emrock Lease Agreement.[534] Further, in the event that a payment had been late, OMCO never obtained a judicial decree terminating the Lease Agreement on that basis.[535] Finally, the Claimant did not operate outside the concession area, without proper permits, or without a valid license.[536]

243. The Claimant also submits that the purported termination of the OMCO–Emrock and OMCO–SFOH Lease Agreements did not cause his losses.[537] As argued in the context of jurisdiction, the Claimant contends that OMCO never effectively terminated the Lease Agreements.[538] Additionally, as argued in the context of the merits of his case, the Claimant submits that OMCO's purported termination of the OMCO–Emrock Lease Agreement was itself a breach of the US–Oman FTA.[539]

(ii) Respondent's position

244. The Respondent, on the other hand, contends that the Claimant has not proved that Oman's actions caused the Claimant's alleged losses, and as such, he is precluded from recovering damages in this proceeding.[540] The Respondent submits that the Claimant has not met the 'test' set out in *Lemire v Ukraine*.[541]

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[531] Claimant's Reply at [283].

[532] Claimant's Reply at [284]–[287].

[533] Claimant's Reply at [285].

[534] Claimant's Reply at [93] and [286].

[535] Claimant's Reply at [99]–[102], [110] and [279].

[536] Claimant's Reply at [287].

[537] Claimant's Reply at [288]–[290].

[538] Claimant's Reply at [89]–[122] and [289].

[539] Claimant's Reply at [204]–[218] and [290].

[540] Oman's Rejoinder at [194].

[541] Oman's Rejoinder at [195].

245. The Respondent submits that the Claimant's losses, if any, were caused by: (i) external commercial and market forces, including the financial decline of Nakheel; (ii) the Claimant's own wrongdoing; and (iii) OMCO's termination of the Lease Agreements.[542]

246. The Respondent contends that the loss in December 2008 of Nakheel, Mr Al Tamimi's only customer for the hard rock mined in the Jebel Wasa quarry, owing to the economic crisis that swept the Gulf region, spelled the end of the Claimant's project in Oman.[543] Although there were numerous causes for the project's decline, the Respondent submits that the Claimant would not have been able to overcome the loss of Nakheel even if the project had not otherwise been crippled by Mr Al Tamimi's actions.[544] The Respondent notes that the Claimant had no other long term customers at the time of Oman's alleged FTA breach, and any claim that he could secure additional customers is belied by the relevant macroeconomic conditions.[545]

247. The Respondent also submits that the Claimant's own actions materially contributed to his alleged losses.[546] The Respondent in particular points to Mr Al Tamimi's insistent unauthorised actions outside the approved area for mining; his failure to register SFOH; his failure to make timely payments under the OMCO–Emrock Lease Agreement; and his failure to obtain the required approvals and authorisations.[547] The Respondent contends that these failures (Nakheel aside) were fatal to the viability of the Claimant's purported investment.[548]

248. Finally, the Respondent submits that any losses suffered by the Claimant were caused by the end of the OMCO–Emrock and OMCO–SFOH Lease Agreements.[549] As the acts of OMCO are not attributable to Oman under the US–Oman FTA, the Claimant cannot show that any breach

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[542] Oman's Counter-Memorial at [21] and [440]–[450]; Oman's Rejoinder at [197]–[204].

[543] Oman's Counter-Memorial at [441]; Oman's Rejoinder at [197]; Oman's Pre-Hearing Skeleton at [31]–[33]. The Respondent relies on the First Navigant Consulting Expert Report and the Second Navigant Consulting Expert Report in support of its submission (Navigant explains that macroeconomic factors and Nakheel's withdrawal from the supply contract with Emrock caused the Claimant's investment in his project to become worthless: First Navigant Consulting Expert Report at [133] and [134]; Second Navigant Consulting Expert Report at [10]). The Respondent also relies upon certain alleged concessions by the Claimant that he was unable to meet his ongoing obligations due to Nakheel's decision to declare *force majeure* under its contract with Emrock (Oman's Counter-Memorial at [444]; Oman's Rejoinder at [198]).

[544] Oman's Counter-Memorial at [441].

[545] Oman's Rejoinder at [199], citing in support the Elite Media Expert Report at [15] and [22], and the Second Navigant Consulting Expert Report at [108].

[546] Oman's Counter-Memorial at [445]–[449]; Oman's Rejoinder at [202].

[547] Oman's Counter-Memorial at [448].

[548] Oman's Counter-Memorial at [449].

[549] Oman's Counter-Memorial at [450]; Oman's Rejoinder at [203]–[204].

of the FTA by Oman was the proximate cause of any loss he might have suffered after 1 January 2009.[550]

(c) Moral damages

(i) Claimant's position

249. In addition to economic damages, the Claimant also seeks moral damages of US$10 million.[551] The Claimant submits that he has suffered both material and non-material damages as a result of Oman's wrongful actions, and argues that compensation only for material damages will fall short of wiping out all of the consequences of Oman's violations of the US–Oman FTA.[552] In this respect, the Claimant contends that "*[t]he constant interference with his business, the repeated harassment by agents of the Omani government including ministry agents and police, the false criminal and civil allegations against him by the Omani ministries, police, state prosecutor, and OMCO, his detention, eviction, and ultimate destruction of his business represent moral damages which must be compensated*".[553]

250. The Claimant observes that, pursuant to Article 10.21 of the US–Oman FTA, this arbitration is governed by "*applicable rules of international law*".[554] The Claimant submits that a well-settled principle of customary international law is that a State must "*make full reparation for the injury caused by* [its] *internationally wrongful act*".[555] The Claimant contends that such principle requires both compensation for economic loss but also for moral damage caused by the State's internationally wrongful act.[556]

251. The Claimant notes that international courts and tribunals have awarded damages for a wide range of non-material injuries such as shame, degradation and reputational harm.[557] Referring

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[550] Oman's Counter-Memorial at [450].

[551] Claimant's Memorial at [251], [279]–[287] and [290]; Claimant's Reply at [11], [291]–[302] and [304]; Claimant's Pre-Hearing Skeleton at [57] and [65].

[552] Claimant's Reply at [294].

[553] Claimant's Reply at [294].

[554] Claimant's Memorial at [279].

[555] Claimant's Memorial at [279]; Claimant's Reply at [292], quoting International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Art 31(1) (**CLA-005**).

[556] Claimant's Memorial at [251] and [279]; Claimant's Reply at [292], relevantly citing **CLA-005**, Art 31(2). See also the cases cited in support at Claimant's Memorial at [279], fns 407–409.

[557] Claimant's Reply at [293].

to the rulings in *Desert Line*[558] and *Diallo*,[559] the Claimant submits that tribunals examine several factors when considering whether to award moral damages, including whether the conduct complained of involved: (a) physical detention, suffering or duress; and (b) damage to reputation, stress, humiliation, or shame.[560] In terms of the calculation of moral damages, the Claimant notes that this rests on equitable principles and, as such, the Tribunal must look at the circumstances of the case before it to make a reasonable determination.[561]

252. Mr Al Tamimi contends that his situation is analogous to that of the claimant in both *Desert Line* and *Diallo*.[562] Moral damages were awarded in both of those cases. The Claimant relevantly notes that:

(a) As in *Desert Line*, where the claimant's personnel were confronted, threatened, detained, and the claimant was coerced into a settlement, Mr Al Tamimi suffered physical intimidation, detention, humiliation and reputational harm and was forced to close his quarry or face indefinite detention for vague, unsubstantiated reasons.[563]

(b) As in *Diallo*, Mr Al Tamimi incurred psychological stress from an arbitrary arrest and suffered reputational damage caused by the Respondent in forcing him to leave Oman and sever his business ties.[564]

253. The Claimant notes that, as in *Desert Line* and *Diallo*, the award of moral damages in addition to economic damages is necessary in this case to fully compensate the Claimant for the anxiety, reputational damage and humiliation inflicted upon him by Oman.[565]

(ii) Respondent's position

254. The Respondent, however, describes Mr Al Tamimi's claim for moral damages as "*baseless*", and submits that he has not satisfied (and cannot satisfy) the extraordinary tests required for

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[558] *Desert Line Projects LLC v Republic of Yemen* (ICSID Case No ARB/05/17), Award, 6 February 2008 (**CLA-031** / **RLA-011**).

[559] *Ahmadou Sadio Diallo (Guinea) v Democratic Republic of Congo* (International Court of Justice), Judgment, General List No 103, IIC 552, 19 June 2012 (**CLA-036** / **RLA-001**).

[560] Claimant's Memorial at [280]; **CLA-031** / **RLA-011** at [194], [286] and [289]–[291].

[561] Claimant's Memorial at [286], relevantly citing **CLA-036** / **RLA-001** at [24].

[562] Claimant's Memorial at [283].

[563] Claimant's Memorial at [283]; **CLA-031 / RLA-011**at [40]–[43], [194] and [289].

[564] Claimant's Memorial at [285]; **CLA-036** / **RLA-001** at [21].

[565] Claimant's Memorial at [284] and [285]; **CLA-031** / **RLA-011** at [289]; **CLA-036** / **RLA-001** at [25].

moral damages.[566] By reference to, relevantly, the awards in *Lemire v Ukraine* and *Europe Cement v Turkey*,[567] the Respondent notes that moral damages are exceptional and permitted only in the most egregious circumstances.[568] In this regard, the Respondent observes that international tribunals have routinely rejected claims for moral damages in investment treaty cases.[569]

255. To the extent that the Claimant relies upon *Desert Line* and *Diallo*, the Respondent submits that those cases are not analogous to the facts of this proceeding, and that they do not depart from the rigorous standard required for the award of moral damages.[570] In seeking to distinguish the facts of those cases, the Respondent notes that in *Desert Line* the claimant was subject to a siege of heavy artillery and an armed assault, and that its executives "*suffered stress and anxiety of being harassed, threatened, and detained by the respondent and armed tribes*" and the respondent's actions impacted their physical health.[571] In *Diallo* the claimant had been detained for a total of 72 days, accused of unsubstantiated crimes, and then had been wrongfully expelled from the country.[572] The Respondent also questions the relevance of the ruling in *Diallo* given that the case involved the standards for assigning moral damages in the context of human rights violations.[573]

256. The Respondent submits that Mr Al Tamimi's claims do not reach the exceptional standards set forth in *Desert Line* or *Diallo*.[574] In doing so, the Respondent contends that there is no evidence that the Claimant was mistreated by the Omani police, or that he or his staff was subject to any excessive use of force, physical intimidation, harassment or assault.[575] The Respondent also

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[566] Oman's Counter-Memorial at [489] and [499]; Oman's Rejoinder at [229] and [237].

[567] *Europe Cement Investment & Trade SA v Republic of Turkey* (ICSID Case No ARB(AF)/07/2), Award, 13 August 2009 (**RLA-015**).

[568] Oman's Counter-Memorial at [490]–[491]; Oman's Rejoinder at [231]–[234]; **CLA-035** / **RLA-025** at [333]; **RLA-015** at [181]. The Claimant submits that the Respondent's characterisation of the standard for moral damages is artificially heightened and without support (Claimant's Reply at [291] and [295]). The Claimant also seeks to distinguish *Lemire* and *Europe Cement* from the circumstances of this case (Claimant's Reply at [297]–[298]).

[569] Oman's Counter-Memorial at [490]; Oman's Rejoinder at [230].

[570] Oman's Counter-Memorial at [494]; Oman's Rejoinder at [235]–[236].

[571] Oman's Counter-Memorial at [495]; Oman's Rejoinder at [235]; **CLA-031** / **RLA-001** at [146], [286] and [290].

[572] Oman's Counter-Memorial at [496]; Oman's Rejoinder at [235]; **CLA-036** / **RLA-001** at [21]. The Claimant submits that the Respondent, in highlighting the severity of the relevant state action in *Desert Line* and *Diallo*, mistakenly conflates the existence of compensable damages with their severity (Claimant's Reply at [299]–[301]).

[573] Oman's Counter-Memorial at [496]; Oman's Rejoinder at [235].

[574] Oman's Counter-Memorial at [497]; Oman's Rejoinder at [236].

[575] Oman's Counter-Memorial at [497]; Oman's Rejoinder at [236].

submits that Mr Al Tamimi's claims as to reputational damage and humiliation are also unsupported by evidence.[576]

D. US SUBMISSION AND PARTIES' RESPONSES

(a) US Submission

257. Among the questions scheduled by the Tribunal in Procedural Order No 11 are the following two:

> *Footnote 1 of Chapter 10, requires that Art 10.5, the Minimum Standard of Treatment clause be interpreted in accordance with Annex 10-A. 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?*
>
> *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 s A of that Chapter. 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?*

258. In response, as noted above, the United States of America (the "***United States***"), a non-disputing party, exercised its right under Article 10.19.2 of the FTA by filing a submission (the "***US Submission***") on 22 September 2014. The US Submission addressed the following two points: (1) the burden to establish the content of customary international law; and (2) the governing law clause in Article 10.21.

259. With respect to the first point, the United States argued that "*[t]he burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law that is not otherwise incorporated expressly in the text of Art 10.5*" (internal citation omitted). In support of its argument, the US Submission relied on the arbitral decisions in *Cargill Inc v Mexico, ADF v United States*, *Glamis Gold v United States* and *Methanex v United States* which, the United States contended, place the burden of establishing the content of customary international law on the claimant.

260. The criteria for a claimant to establish the existence of a rule of customary international law, the United States submitted, are listed in Annex 10-A. The same are recognised by the International Court of Justice. The decisions of arbitral tribunals interpreting fair and equitable treatment and

[576] Oman's Counter-Memorial at [498].

full security and protection provisions that fall outside the scope of customary international law cannot be used as evidence of the content of the customary international law standard found in Art 10.5 and Annex 10-A.

261. Moreover, the minimum standard of treatment under customary international law, the United States submitted, does not include a general obligation of proportionality. Proportionality is not a self-standing obligation. Once customary international law has been established, the claimant must show that the State has engaged in conduct that has violated it. The breach must be established in light of the high measure of deference that international law gives to States when it comes to regulating matters within their borders.[577]

262. With respect to the governing law clause in Article 10.21, the second point addressed in the US Submission, it requires the Tribunal to apply international law when interpreting the provisions of Chapter 10.A and when deciding claims of breach of Chapter 10.A. Article 10.21 limits the Tribunal's jurisdiction to claims of breach of the obligations found in Chapter 10.A.

(b) Claimant's response

263. In its submission of 31 October 2014 in response, the Claimant made the following three-part argument: (i) the matters addressed in the United States Submission are either irrelevant or beyond the scope of Article 10.19.2 of the FTA; (ii) the United States does not dispute that proportionality is relevant to claims of expropriation and denial of national treatment, or even claims of violation of the minimum standard of treatment; and (iii) the requirement of proportionality is well established as a component of the minimum standard of treatment under customary international law. Each of these points is summarised below:

a. First, according to the Claimant, the United States' view on questions of treaty interpretation are consistent with those of the Parties and need not be decided by the Tribunal. These views are: (i) that Article 10.5 and Annex 10-A incorporate customary international law standards rather than "an autonomous treaty-based standard"; and (ii) that the governing law clause in Article 10.21 does not extend the Tribunal's jurisdiction to include claims arising outside the FTA or undo the requirements of the Annex 10-A. However, the United States' views on questions of customary international law are improper under Article 10.19.2 for two reasons, and the Tribunal is entitled to ignore the US Submission in this regard. The burden of proof and the weight to be given to various evidence of customary international law are evidentiary and procedural matters that are neither addressed by the FTA

[577] *SD Myers v Canada*, NAFTA/UNCITRAL, First Partial Award, 13 November 2000 at [263].

nor are they issues of treaty interpretation. Moreover, the US submission goes further than addressing the burden of proof by commenting on the sufficiency of the evidence and the content of customary international law.

b. Second, on the issue of proportionality, the US Submission is not inconsistent with the Claimant's position. The United States concedes that proportionality may be "*one factor in a discussion of expropriation*". In this regard, the Claimant's argument is that for Oman to be found not to have expropriated the Claimant's investment, it has to show *prima facie* that its shutdown of the quarry was a justified exercise of its police power and was not a disproportionate response to the alleged environmental irregularities. Moreover, the United States does not dispute that disproportionate treatment is relevant to the Claimant's national treatment claim. Here, the Claimant's argument is that it was treated with disproportionate harshness compared to local Omanis, so Oman had to prove that it had reasonable grounds for such differential treatment. Finally, the United States does not argue that proportionality is irrelevant to the Claimant's argument on the minimum standard of treatment. The United States only argues that proportionality is not an independent source of obligation within the minimum standard of treatment. The FTA is explicit that the minimum standard of treatment includes fair and equitable treatment and full protection and security. Fair and equitable treatment "*necessarily implies that a state has an obligation not to apply penalties or restrictions that are seriously disproportionate to the violation that the state seeks to penalize or the harm the state seeks to prevent*".[578]

c. Third, according to the Claimant, arbitral tribunals have recognised, contrary to the United States' arguments, that proportionality is a part of the minimum standard of treatment under customary international law. Also, the views of the United States are not binding on the Tribunal under Article 10.19.2 of the FTA and the United States does not contend so. This is in contrast to Articles 10.21.3 and 19.2.3(b) which establish procedures for adopting binding interpretations of the FTA.

d. In addition, the US Submission assumes, in error, that the burden of proof applies to questions of law. However, numerous courts and tribunals have held that the doctrine of *jura novit curia* applies to questions of law, thus the Tribunal is free to determine questions of customary international law. The United States relies on *Glamis Gold*, *Cargill*, and several other cases. *Glamis Gold* gives little reasoning to support its conclusion that the Claimant has the burden of proving customary

[578] Claimant's Response to US Submission at [15].

international law. The tribunal in *Cargill* acknowledged that its view, that the claimant has the burden of proof of change of customary international law, was a departure from the views of other tribunals. The other cases relied upon by the Claimant, ie *ADF Group*, *Methanex*, and *North Sea Continental Shelf*, do not decide the question of burden of proof. The United States cited yet other cases, none of which support its position.

e. In any event, if the Claimant has the burden of proof, it has met it. Tribunals have recognised proportionality as a freestanding requirement of fair and equitable treatment under the minimum standard of treatment. The United States, in arguing that the Claimant bears the burden of proving the content of customary international law, does not dispute that arbitral decisions may constitute sufficient evidence, especially since the United States itself relies on such decisions to support its arguments. What the United States disputes is relying on awards decided under autonomous treaty standards, rather than customary international law. However, tribunals have found no difference between fair and equitable treatment based on treaties versus customary international law, and proportionality has been found to be a part of the minimum standard of treatment in either instance.

(c) Respondent's response

264. The Respondent makes two main arguments in its submission of 31 October 2014: (i) the US Submission addresses issues of treaty interpretation; and (ii) the US submission has reaffirmed accepted rules of law. These are summarised below:

a. First, the Respondent argued that the United States offers its general views on the nature and scope of the obligations to which it has agreed, and by implication not agreed. The substance or content of the minimum standard of treatment obligation is what defines the signatory parties' obligations under the FTA. The Claimant's burden "*to establish the existence and applicability of a relevant obligation under customary international law that is not otherwise incorporated expressly in the text of Art 10.5*" is precisely the type of issue on which the signatory parties are expected to provide their views. The United States made a similar submission in *Railroad Development Corp v Guatemala*.

b. Second, the Respondent submitted that there is abundant authority supporting the view that the party seeking to rely on customary international law bears the burden of proving the existence and content of that law. Disagreeing with the Claimant, the Respondent added that the four decisions in *Cargill*, *ADF*, *Glamis Gold*, and

Methanex all support its view. It is a two-part test based on consistent State practice and an understanding that the practice is required by law. Here, Mr Al Tamimi has failed to carry his burden to prove, based on either, that the doctrine of proportionality is part of customary international law cognisable under the FTA.

c. In addition, the Respondent submitted that the Claimant's interpretation of the doctrine of *jura novit curia* is flawed in that the doctrine allows a tribunal to take judicial notice of certain legal authorities or pre-existing laws and regulations to ascertain and apply the governing law. The Respondent cited a number of decisions that it claimed support this view. For example, in *Glamis Gold* the tribunal found that "*the inquiry as to whether particular rules have become part of customary international law is 'necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions'*".[579] In *Patrick Mitchell v Democratic Republic of Congo*, the annulment committee found that "*while tribunals may have jura novit curia powers, they are not obliged to exercise them*".[580] The tribunals in *CME Czech Republic BV v Czech Republic* and *Cargill* reached similar conclusions.

d. The question whether a particular rule has attained the status of customary international law cannot be answered by looking to arbitral tribunals' decisions. Such decisions interpreting certain provisions do not constitute evidence of the content of customary international law required by Article 10.5 and Annex 10-A.

e. The Respondent argued that many of the cases cited by the Claimant do not support his claims of proportionality. Notably, the reference to *Occidental* cannot, without more, satisfy the burden of proving that the doctrine of proportionality has become a part of the minimum standard of treatment under customary international law, because the decision is not grounded in the type of evidence necessary to prove State practice and *opinio juris*.

f. According to the Respondent, the Claimant's proportionality claim is that OMCO acted disproportionally when it terminated the OMCO-Emrock Lease Agreement for relatively small sums Emrock owed to OMCO. However, OMCO's actions are not attributable to Oman, which precludes an investment treaty claim based on the termination. In addition, OMCO had a unilateral right to terminate the Agreement based on Emrock's non-payment, without regard to the amount due or the duration

[579] *Glamis Gold Ltd v United States* (NAFTA/UNCITRAL), Award, 8 June 2009 at [607].
[580] *Patrick Mitchell v Democratic Republic of Congo* (ICSID Case No. ARB/99/7), Decision, 9 February 2004 at [57].

of the debt. Principles of customary international law would be applicable here only if Oman had exercised its sovereign power to direct OMCO's action, which was not the case.

g. Similarly, the Claimant's claims that the doctrine of proportionality should have a bearing on the Tribunal's assessment of Mr Al Tamimi's arrest as well as the police shutdown of the project site are both unfounded.

h. Lastly, the Respondent contended that the United States' submission correctly confirms that the governing law clause does not expand the Tribunal's jurisdiction, which is limited to breaches of the obligations listed in Chapter 10 of the FTA.

VI. TRIBUNAL'S ANALYSIS

A. JURISDICTION

(a) Jurisdiction *ratione personae*

265. The first issue to be considered is whether the Tribunal has jurisdiction *ratione personae* over the Claimant, Mr Al Tamimi. The question can be dealt with briefly, both because the answer is clear and because the Respondent has not actively pursued its challenge to Mr Al Tamimi's nationality.[581] The Tribunal finds that there is no evidential basis for the Respondent's suggestion that Mr Al Tamimi is unable to rely on the US–Oman FTA by virtue of his nationality.

266. Chapter 10 of the US–Oman FTA,[582] headed "*Investment*", applies only to measures adopted or maintained by a Party relating to the covered investments of "*investors of the other Party*".[583] Article 10.27 defines "*investor of a Party*" in the following terms:

> ***investor of a Party*** *means a Party or state enterprise thereof, or 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.*

267. The meaning of "*national* […] *of a party*" is defined in Article 1.2 of the FTA:

> ***national*** *means:*
>
> *(a) with respect to Oman, any person who is a citizen within the meaning of its domestic laws governing nationality; and*
>
> *(b) with respect to the United States, "national of the United States" as defined in Title III of the Immigration and Nationality Act;*

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[581] As noted above, the Respondent did not present argument on this issue at the hearing, nor in its Rejoinder or Pre-Hearing Skeleton. At the Hearing, however, the Respondent indicated that its objection to the Tribunal's jurisdiction *ratione personae* had not been withdrawn: Transcript, Day 9 at 224:12–22 (Oman's closing address). The Respondent confirmed in its Post-Hearing Answers that it "*has not abandoned this defense*", again without making any further submissions: Respondent's Post-Hearing Answers at 1. The Tribunal must therefore rely solely on the submissions made in respect of this issue in the Respondent's Counter-Memorial at [263]–[266].

[582] **Exhibit J-001**.

[583] **Exhibit J-001**, Art 10.1.

268. The ICSID Convention also defines the meaning of "*national of another Contracting State*" for its purposes under Art 25(2), relevantly including:[584]

> […] *any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered* […]

269. The Tribunal will thus have jurisdiction *ratione personae* over Mr Al Tamimi only if it can be established that: (a) he is a national of the United States, as defined in Title III of the Immigration and Nationality Act; and (b) he has made, or has attempted to make, an investment in the territory of Oman. The second limb will be discussed in further detail in the context of the Tribunal's jurisdiction *ratione materiae* below; it suffices for now to observe that the Respondent has not disputed the Tribunal's jurisdiction *ratione personae* based on this latter criterion.

270. In respect of the first limb, the Respondent has not provided a factual basis for a finding that Mr Al Tamimi is anything other than a national of the United States as defined in Title III of the Immigration and Nationality Act. That provision provides that a person may become a citizen of the United States of America either through birth or through naturalisation. Mr Al Tamimi has tendered in evidence his US government–issued Certificate of Naturalization, which shows that he became a naturalised US citizen within the meaning of Title III on 11 June 1980.[585] Mr Al Tamimi is also the bearer of a current US passport.[586] The Respondent has not contested the validity of either of these documents.

271. Rather, the Respondent has suggested that Mr Al Tamimi "*appears*" also to be a national of the United Arab Emirates, and that pursuant to Article 10.27 his "*dominant and effective nationality*" is Emirati rather than American.[587] The Tribunal finds that there is insufficient evidence to conclude Mr Al Tamimi is a dual national. Mr Al Tamimi has acknowledged that he was born as a citizen of the Emirate of Sharjah, which now constitutes part of the UAE.[588] However it seems clear that, pursuant to Article 15 of the UAE Law Concerning Nationality, Passports and Amendments thereof, Mr Al

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[584] ICSID Convention, Regulations and Rules, April 2006, Art 25(2) (**CLA-010**).

[585] United States of America Certificate of Naturalization of Adel A Hamadi Al Tamimi (**Exhibit J-006**).

[586] United States of America Passport, issued to Adel A Fadili on 25 April 2006 and 26 September 2008 and United States of America Passport, issued to Adel A Hamadi Al Tamimi on 20 October 2009 (**Exhibit J-004**).

[587] See Respondent's Counter-Memorial at [263].

[588] See Claimant's Reply at [126].

Tamimi lost whatever Emirati citizenship he previously possessed when he voluntarily adopted the nationality of the United States in 1980. That provision states that:[589]

> *Article (15)*
>
> *Nationality of the country shall be lost from any person enjoying such nationality in the following cases:*
>
> […]
>
> *C. If he has adopted, voluntarily, a nationality of another country.*

272. This has been the position taken by the Claimant since his Notice of Intent dated 19 April 2011:[590]

> *The investor in this dispute is Mr Adel A Hamadi Al Tamimi. He is a naturalized citizen of the United States of America. Prior to obtaining his American citizenship in 1986, Mr Al Tamimi was a national of the United Arab Emirates ("UAE"). Mr Al Tamimi no longer holds UAE nationality.*

273. Mr Al Tamimi has given evidence that since his naturalisation as a US citizen he has not applied for, obtained or claimed nationality or citizenship in any other country.[591] The Respondent has not produced any evidence to the contrary.[592] Indeed, all documents relevant to this arbitration, filed with the UAE and Omani authorities, list Mr Al Tamimi's nationality exclusively as "American".[593] The Tribunal therefore finds on the evidence presented to it that Mr Al Tamimi is a national of, and only of, the United States of America for the purposes of Chapter 10 of the US–Oman FTA.

274. In any event, as a matter of interpretation of Article 10.27, the Tribunal does not consider that the language of "*dominant and effective nationality*" is intended to prevent dual citizens of both the United

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589 Federal Law No (17) for 1972, Concerning Nationality, Passports and Amendments thereof, Art 15(C) (**Exhibit J-003**). The Claimant has further submitted, citing the wording of the US Oath of Allegiance, that renunciation of his Emirati citizenship was also a requirement of his US nationalisation: see Claimant's Reply at [127]–[128]; 8 USC § 1448(a)(2) (**CLA-045**). However, it is not clear on the evidence what effect in practice the taking of the US Oath of Allegiance has on the continuance of existing citizenships.

590 Claimant's Notice of Intent at [7]. In response, the Respondent has said that "*[i]t seems that it is not uncommon for UAE citizens to have UAE passports despite becoming citizens of the US or other countries*": Oman's Counter-Memorial at [266]. It has, however, produced no evidence to support this assertion.

591 Second Al Tamimi Witness Statement at [24].

592 Indeed, even if Mr Al Tamimi had sought Emirati nationality since 1980, it appears that under UAE law Mr Al Tamimi would only be able to regain his Emirati nationality if he first renounced his American citizenship: **Exhibit J-003**, Art 17.

593 See eg **Exhibit J-054** at 13; Memorandum of Association of Emrock Aggregate & Mining (LLC) among Eurogulf LLC and Atlas Capital Limited and Mr. Mashal Sadek Abdullah Algrgawi and Mr. Abdul A Fadili dated 16 April 2007 (**Exhibit J-093**) at 1; Certificate of Commercial Registration of Emrock, dated 2 May 2007 (**Exhibit J-088**) at 2.

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 is predominant. Rather, the Tribunal considers 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*". However, it is unnecessary for the Tribunal to definitively determine this interpretative point because the evidence does not disclose that Mr Al Tamimi is a national of any country other than the United States.

(b) Jurisdiction *ratione materiae*

275. Pursuant to Art 10.1, the investment protections contained in Chapter 10 of the US–Oman FTA apply only to "*covered investments*".[594] The meaning of "*covered investment*" is defined under Article 1.3:

> ***covered investment*** *means, with respect to a Party, an investment, as defined in Article 10.27 (Definitions), in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter;*

276. Similarly, Article 25(1) of the ICSID Convention provides in relevant part that:[595]

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State* […] *and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*

277. The meaning of "*investment*" is relevantly defined in Article 10.27 of the US–Oman FTA:

> ***investment*** *means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:*
>
> *(a) an enterprise;*
> *(b) shares, stock, and other forms of equity participation in an enterprise;*
> *(c) bonds, debentures, other debt instruments, and loans;*
> *(d) futures, options, and other derivatives;*

[594] **Exhibit J-001**, Art 10.1

[595] **CLA-010**, Art 25(1).

> *(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
> *(f) intellectual property rights;*
> *(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and*
> *(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;*

278. Mr Al Tamimi has framed his claim on the basis that his primary investment in Oman consisted of the two Lease Agreements signed between his companies, Emrock and SFOH, and OMCO: namely, the OMCO–Emrock Lease Agreement and the OMCO–SFOH Lease Agreement.[596] The Tribunal is satisfied that these Lease Agreements meet the requirements of Articles 1.3 and 10.27 of the US–Oman FTA for protection under the Treaty. Article 10.27(h) specifically includes within the scope of covered investments "*other tangible or intangible, movable or immovable property, and related property rights, **such as leases*** […]".[597] The two Lease Agreements also exhibit the exemplary characteristics described in Article 10.27 above: the commitment of capital and other resources, the expectation of gain or profit, and the assumption of risk. Accordingly the Tribunal finds that it has jurisdiction *ratione materiae* in respect of the OMCO–Emrock and OMCO–SFOH Lease Agreements, out of which a dispute between the Claimant and Respondent directly arises.

279. The Claimant has also referred to physical infrastructure and equipment at the quarry site as forming part of his investment: "*equipment, machinery, spare parts, and services that he purchased to make the [q]uarry operational*".[598] The Claimant has submitted that these physical assets cost him "*tens of millions of dollars*".[599] They too form part of Mr Al Tamimi's claims against Oman: in 2009, Mr Al Tamimi has alleged, the physical infrastructure and equipment at the quarry site was "*wrecked, looted, and dismantled with the aid of heavy equipment*", either at the direction of the Omani authorities or at their sufferance.[600]

280. The Tribunal is satisfied that these physical assets additionally meet the test for a covered investment under Articles 1.3 and 10.27. They too fall within the Article 10.27(h) definition of "*other tangible or intangible, movable or immovable property*", and involve the commitment of capital, the expectation

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[596] See Request at [77]–[78].

[597] Emphasis added.

[598] Request at [79].

[599] Request at [79]. See also Claimant's Memorial at [184] ("*[v]ery expensive quarrying equipment*"); Claimant's Reply at [8] ("*[t]he infrastructure and equipment at the quarry reflected millions of dollars of investment of Claimant's own money*"); First Gupta Witness Statement at [27]–[43].

[600] Claimant's Reply at [1], [150]–[155].

of gain or profit and the assumption of risk. Although intimately tied to the two Lease Agreements, by virtue of which the Claimant was permitted to establish physical infrastructure and equipment at the quarry site, the Tribunal is satisfied that these physical assets constitute an independent investment in their own right, out of which a dispute additionally arises for the purposes of the ICSID Convention.

281. Finally, the Tribunal considers it worthy of note that Mr Al Tamimi was not in fact the direct owner of the investments in respect of which he now claims protection. Rather, Mr Al Tamimi invested in Oman through the corporate vehicles of Emrock and SFOH. Mr Al Tamimi owns only 49% of the shares in Emrock (a requirement under UAE law),[601] although he claims sole executive decision-making authority over the company.[602] Mr Al Tamimi owns 100% of the shares in SFOH.[603]

282. The Respondent has not challenged Mr Al Tamimi's entitlement to bring the present proceedings in respect of assets owned and controlled by him only indirectly. The Tribunal therefore does not consider it necessary to make a direct ruling on this issue. It suffices to observe that although recent ICSID tribunals have reached varying positions on the standing ("*ius standi*") of parties to bring investment protection claims in respect of assets held or controlled only indirectly, the language of Article 10.27 ("*owns or controls, directly or indirectly*") is sufficiently broad to encompass Mr Al Tamimi's claims.

(c) Jurisdiction *ratione temporis*

283. The US–Oman FTA came into force on 1 January 2009. There is no suggestion in the language of the Treaty that the investment protections of Chapter 10 were intended to apply with retrospective effect.[604] Indeed, the definition of "*covered investment*", cited at [275] above, stipulates that in order to qualify for the purposes of Chapter 10 an investment must be either "*in existence as of the date of entry into force of this Agreement*" or else established thereafter. Equally, Article 10.1 provides that Chapter 10 will apply only to measures "*adopted or maintained*" by a party affecting an investment, which presupposes the existence of an investment after 1 January 2009.[605] The Claimant has

[601] See Claimant's Reply at [130].

[602] See Request for Arbitration at [20]. The remaining 51% of shares in Emrock is owned by Mr Al Tamimi's nephew: see Request for Arbitration, fn 11.

[603] Request for Arbitration at [21]; Claimant's Memorial at [21].

[604] See Vienna Convention on the Law of Treaties, Art 28 (**CLA-001**) ("*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*").

[605] **Exhibit J-001**, Art 10.1.

acknowledged that the effect of Article 10.1 is that investment protection can apply only to measures taken or maintained against an investment after the Treaty entered into force.[606]

284. As previously noted, Mr Al Tamimi's primary investment in Oman comprised the OMCO–Emrock and OMCO–SFOH Lease Agreements. The Respondent has argued that both agreements ceased to have effect prior to the entry into force of the US–Oman FTA on 1 January 2009: the OMCO–Emrock Lease Agreement, it says, was terminated by OMCO on 20 July 2008, while the OMCO–SFOH Lease Agreement 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.[607]

285. The Tribunal finds below that the OMCO–Emrock Lease Agreement was not terminated until after 1 January 2009, with the result that the Tribunal has jurisdiction *ratione temporis* over that agreement. In respect of the OMCO–SFOH Lease Agreement, however, the Tribunal finds that as a result of SFOH's failure to register in Oman that agreement was rendered null and void prior to 1 January 2009. The Tribunal therefore has no jurisdiction *ratione temporis* over the latter agreement.

(i) The OMCO–Emrock Lease Agreement

286. OMCO first purported to terminate the OMCO–Emrock Lease Agreement on 20 July 2008, when it sent Mr Al Tamimi, in his capacity as Chairman of Emrock, a letter declaring termination under Article 10(iv) for "*non-compliance with payment obligations*".[608] The Respondent has said that this breach was triggered by Mr Al Tamimi's failure to reimburse, *inter alia*, a RO 10,000 fine which OMCO had paid to the Ministry of Commerce on Emrock's behalf.[609] The termination notice of 20 July 2008 declared that "*we* [OMCO] *hereby terminate* [the OMCO–Emrock Lease Agreement] *with immediate effect*".[610]

287. The termination notice was sent on 20 July 2008, many months before the coming into force of the US–Oman FTA on 1 January 2009. If this letter had the effect of ending the OMCO–Emrock Lease Agreement, then the Tribunal can possess no jurisdiction *ratione temporis* over that investment.

288. The evidence shows, however, that the parties did not act in a manner consistent with the termination of the OMCO–Emrock Lease Agreement at that date. Most significantly, on 17 February 2009,

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606 Claimant's Memorial at [171]–[172] ("*to be clear, Mr Al Tamimi does not allege that the pre-entry-into-force conduct of Oman constitutes a breach of obligations under the FTA, and he is not seeking an award of damages for that conduct*").

607 Oman's Counter-Memorial at [11].

608 **Exhibit J-199**.

609 See Oman's Counter-Memorial at [146]–[148].

610 **Exhibit J-199**.

OMCO sent Mr Al Tamimi a second termination notice. That second notice referred again to Article 10(iv) and Emrock's purported "*non-compliance with payment obligations*", and again stated that "*we* [OMCO] *hereby terminate* [the OMCO–Emrock Lease Agreement] *with immediate effect because EMROCK has not complied with making payments to us*".[611]

289. It is true, as the Respondent has submitted, there is no evidence that the OMCO Board of Directors ever expressly rescinded or otherwise vacated the termination notice of 20 July 2008. Equally, however, the language and intent of the second termination notice of 17 February 2009 demonstrate that this second notice was not intended as a mere reaffirmation of the 20 July 2008 notice. The use of the wording "*we* ***hereby*** *terminate*" and "*with* ***immediate*** *effect*" in the second notice, for instance, indicates that OMCO did not consider that the OMCO–Emrock Lease Agreement had already been terminated.[612] The schedule of late payments attached to the second termination notice, on which OMCO relied as its ground for termination, was additionally updated in the second termination notice to 13 February 2009.[613] As the Claimant has submitted, "*Oman's assertion that the 2009 termination notice was just a reiteration or confirmation of the 2008 notice is inconsistent with the language of the 2009 notice itself*".[614]

290. Moreover, subsequent communications between OMCO and Emrock, as well as communications between OMCO and the Omani government, plainly indicate OMCO's understanding that the lease was not terminated until 2009.[615] The Respondent has submitted that the reaffirmation of OMCO's decision to terminate the lease was delayed until after 1 January 2009 only because of a change in leadership at OMCO.[616] Yet in the Tribunal's view, the fact that the OMCO Board of Directors determined to defer issuing the second termination notice until after the installation of its new Chairman, H E Al Dheeb, strongly suggests that the Board did not consider its earlier termination notice to have been effective. Rather, the Board wished to wait for the input of its new Chairman before deciding whether finally to terminate Emrock's lease. The Respondent's submissions have effectively acknowledged this point:[617]

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611 **Exhibit J-250**.

612 Emphasis added. For a contrast, see the language of the letter sent by OMCO to Mr Al Tamimi in his capacity as Chairman of SFOH on 2 June 2008, cited below at [294], which clearly described the purpose of the notice merely "*to reiterate*" OMCO's earlier determination that the OMCO–SFOH Lease Agreement would be treated as null and void after 30 November 2007 if SFOH failed to register in Oman.

613 **Exhibit J-250**.

614 Claimant's Pre-Hearing Skeleton at [43].

615 **Exhibit J-340, Exhibit J-341**, **Exhibit J-342**.The Tribunal is not persuaded by the Respondent's argument that these references all resulted from the same repeated typographical error: see Rejoinder at fn 162.

616 Oman's Rejoinder at [81]; Oman's Pre-Hearing Skeleton at [18].

617 Oman's Rejoinder at [81].

> *The OMCO's Board's willingness to reconsider the matter culminated in the Board's meeting with H E Maqbool in September 2008, when H E Maqbool said it was up to the Board to proceed with the termination of the OMCO–Emrock Lease Agreement if it believed it had legal justification for doing so.* […] *But for the fact that OMCO's Chairman, Dr Al Azri, stepped down from that position in late 2008, the Board would have reaffirmed the decision to terminate the OMCO–Emrock Lease Agreement before 1 January 2009.*

291. In the meantime, between July 2008 and February 2009, OMCO continued to allow Emrock to operate at the site.[618] Although OMCO had advised Mr Al Tamimi in July 2008 to "*stop quarrying, processing and removal of materials from our site at Jebel Wasa*", it does not appear that this instruction was ever directly followed up or enforced prior to February 2009.[619] Indeed, as the above-quoted passage from the Respondent's submissions makes clear, the OMCO board had decided to "*reconsider*" the termination of the OMCO–Emrock Lease Agreement in August 2008, and met with Minister of Commerce H E Maqbool in September 2008 for that purpose.[620] Mr Al Tamimi has also alleged that he received contrary messages from government officials at this time as to the validity of OMCO's termination of the lease agreement.[621] Although the evidence shows that by December 2008 OMCO's management and the necessary majority of the company's existing board members continued to support terminating the Emrock contract,[622] it would not have been, in the Tribunal's view, unreasonable for Mr Al Tamimi to assume before February 2009 that the termination had at the very least been put on hold, if not rescinded, by OMCO.

292. In light of this evidence, the Tribunal finds that the second termination notice of 17 February 2009 must be taken to have superseded the earlier notice of 20 July 2008, with the effect that the earlier notice was rendered ineffective. In other words, the specification of a 2009 termination date in the

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618 Claimant's Memorial at [102]; Claimant's Pre-Hearing Skeleton at [41].

619 See **Exhibit J-198**; Letter from Dr Al Azri to Mr Al Tamimi, dated 27 July 2008 (**Exhibit J-202**).

620 Oman's Counter-Memorial at [159]–[164].

621 Mr Al Tamimi gave evidence that he was informed by Dr Hilal, the chairman of OMCO, by telephone around 29 July 2008 that he should ignore the first termination notice, and that H E Maimani, Undersecretary for Administrative & Financial and Regional Affairs at MOCI, also told him to ignore OMCO's termination notice at a meeting on 28 July 2008: First Al Tamimi Witness Statement at [156]–[157], although there is no contemporaneous written evidence of these events. There is, however, a letter on the record addressed from H E Ahmed Al Dheeb, Undersecretary for MOCI (although the Respondent says the letter was in fact approved by H E Al Maimani: see Oman's Counter-Memorial at [158]), to H E Dr Al Azri, Chairman of OMCO, dated 10 August 2008, in which H E Al Dheeb expressed the Ministry's view the OMCO–Emrock Lease Agreement should continue: **Exhibit J-204**.

622 Letter from Mr Al Waily to MOCI, dated 16 December 2008 (**Exhibit J-230**). In that letter, OMCO referred to a "[d]raft letter for termination" prepared by its lawyers, Trowers & Hamlin, and noted that it had still been receiving legal advice on the decision to terminate in November 2008.

second termination notice ("*we hereby terminate* […] *with immediate effect*") effectively waived the earlier purported termination date.

293. The Tribunal accordingly finds that it possesses jurisdiction *ratione temporis* over the OMCO–Emrock Lease Agreement, which remained in existence as of 1 January 2009.

(ii) The OMCO–SFOH Lease Agreement

294. The Respondent has further claimed that the OMCO–SFOH Lease Agreement was rendered "*null and void*" prior to 1 January 2009 because SFOH was never registered in Oman.[623] It is, indeed, common ground that SFOH – a company established in the UAE[624] – was never registered in Oman.[625]

295. The OMCO–SFOH Lease Agreement was signed on 25 May 2006.[626] On 11 September 2006, Mr Jaime Guzman of OMCO wrote to Emrock and SFOH reminded those companies that as a "*crucial* […] *necessary and mandatory first step*" they each needed to register in Oman.[627] Mr Van der Wiele too informed Mr Al Tamimi by email 17 October 2006 that Emrock and SFOH needed to apply to register before seeking environmental approval from MECA.[628]

296. On 22 August 2007, OMCO wrote to Mr Al Tamimi, in his capacity as Chairman of SFOH, indicating that it would consider the OMCO–SFOH Lease Agreement "*null and void*" if he failed to complete the necessary documentation to register SFOH in Oman by 30 November 2007.[629] Mr Al Tamimi did not do so. Six months later, on 2 June 2008, OMCO therefore purported to determine that the OMCO–SFOH Lease Agreement had been rendered null and void:[630]

> *Despite repeated requests from Oman Mining Company LLC (OMCO), you have failed to submit any documentation to show the Registration of SFOH LLC in the Sultanate of Oman. In particular, by our letter dated 22nd August 2007, OMCO gave*

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623 See eg Oman's Counter-Memorial at [269ff].

624 **Exhibit J-054**.

625 See Oman's Counter-Memorial at [269]; Claimant's Reply at [112]. Emrock, in contrast, was registered in Oman as operating company Emrock Oman Branch LLC: **Exhibit J-088**.

626 **Exhibit J-058.**

627 Email from Mr Guzman to Mr Gupta, dated 11 September 2006 (**Exhibit J-073**).

628 Email from Mr Guzman to Mr Gupta, dated 17 October 2006 (**Exhibit J-076**). Mr Al Tamimi's contention that in June 2008, H E Maqbool, the Minister of Commerce and Industry, represented to him that he did not need to register SFOH is not supported by any contemporaneous documentation or other evidence: First Al Tamimi Witness Statement at [148].

629 **Exhibit J-109**.

630 **Exhibit J-182**.

you a deadline of 30 November 2007 to remedy this failure, failing which the agreement shall be treated as null and void.

Since you have failed to submit the requested documentation, this notice is to reiterate as null and void the Lease Contract between OMCO and SFOH dated 25 May 2006.

297. The question for the Tribunal is whether Mr Al Tamimi's failure to register SFOH in Oman had the legal effect for which OMCO, and latterly the Respondent, has contended.

298. Extensive submissions were made by the parties as to whether the OMCO–SFOH Lease Agreement required registration of SFOH in Oman under its own contractual terms. The OMCO–SFOH Lease Agreement, however, simply affirms that SFOH must comply "*with all obligations* […] *and laws for the time being in force or any statutory modifications or re-enactment thereof*".[631] As the above-quoted passage from OMCO's letter of 2 June 2008 makes clear, OMCO did not purport to terminate the OMCO–SFOH Lease Agreement for breach of that agreement's contractual provisions. Rather, OMCO had determined to treat the lease as "*null and void*" because SFOH had failed to establish a legal presence in Oman in alleged breach of Oman's statutory company laws. Thus the relevant question is more fundamental: did SFOH's failure to register in Oman render that company, as well as the lease agreement into which it entered with OMCO, null and void as a matter of Omani law?

299. The Commercial Companies Law ("**CCL**") of Oman provides for the legal regulation of companies in Oman in six different forms, including limited liability companies.[632] Article 2 of the CCL provides that a company is "*null and void*" unless it "*adopts one of the types listed*".[633] Article 136 of the CCL confirms the mandatory requirement to register a limited liability company in Oman: the owners of a limited liability company "*shall register the limited liability company in the Commercial Register pursuant to the law*".[634] Article 140(c) of the CCL provides that a "*limited liability company shall not be deemed finally constituted*" until "*[r]egistration of the company in the Commercial Register*" has occurred.[635]

300. Registration in the Commercial Register is thus clearly central to the existence of a company's separate legal personality under Omani law. Additionally, Article 4 of the CCL provides that "*[a]ll*

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631 **Exhibit J-058**, Art 8(iii).

632 Oman Chamber of Commerce and Industry, The Commercial Companies Law, No 4/1974, Art 2 (**RLA-052**). The six different forms are: General Partnerships, Limited Partnerships, Joint Ventures, Joint Stock Companies, Limited Liabilit[y] Companies and Holding Companies.

633 **RLA-052**, Art 2.

634 **RLA-052**, Art 136.

635 **RLA-052**, Art 140(c).

contracts, receipts, notices and other documents issued by commercial companies shall indicate the company's name, its form, its principal place of business ***and the number and place of its registration in the Commercial Register***".[636] Similarly, Article 9 of the Commercial Register Law ("**CRL**") stipulates that "*[a]ny commercial company whose main center of operations is located in Oman must be registered in the Commercial Register of the region where such center is situated*".[637]

301. It is clear from the above provisions, especially when they are considered together, that in order to have a legal presence in Oman – including the ability to conduct business and enter into contracts as a legal entity – a limited liability company must be registered in the Omani Commercial Register.

302. In addition to these requirements, foreign investors wishing to conduct business in Oman are subject to the Foreign Capital Investments Law ("**FCIL**").[638] Under the FCIL, non-Omanis (whether natural or juridical persons) may not conduct a "*commercial, industrial or tourism*" business in Oman unless they first obtain a license from MOCI.[639] The same requirement, indeed, applies under the CRL: Article 3 of the Commercial Register Law Amendment ("**CRLA**") requires that "*any natural or legal person*" must obtain a "*license from the Ministry of Commerce and Industry*" before "*exercising commerce in the Sultanate*".[640]

303. In order for a non-Omani to obtain a license to operate under the FCIL, Article 2 first requires that the proposed business must be "c*onducted by an Omani company with a capital of not less than RO 150,000*", of which the foreign shareholding may be no more than 49% (or up to 65%, with the approval of the Foreign Capital Investment Committee and MOCI).[641] An annex to the FCIL, entitled "*Instruction for Establishment of Omani Companies Subject to Commercial Companies Law and Foreign Business and Investment Law*" sets out the process for incorporation of an Omani company to satisfy the requirements of Article 2 of the FCIL, including obtaining a certificate from the Omani Commercial Register, preparing the company's articles of association, and establishing a corporate capital of no less than RO 150,000.[642]

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[636] **RLA-052**, Art 5 (emphasis added).

[637] Commercial Register Law, No 3/74, Art 9 (**RLA-049**).

[638] See eg **RLA-052**, Art 7 ("*Commercial companies with non-Omani partners, whether such partners are natural or juristic persons, shall comply with the foreign capital investment law*").

[639] Foreign Capital Investment Law, Art 1 (**CLA-049**).

[640] Amendments Made in the Commercial Register Law No 3/74, Art 3 (**RLA-048**).

[641] **CLA-049**, Art 2.

[642] **CLA-049** at 14.

304. Again, reading these legal requirements together, it is clear to the Tribunal that Omani law requires that any "*commercial, industrial or tourism*" business conducted in Oman must be carried out by a local company registered in the Commercial Register.

305. The Claimant, however, has submitted that SFOH was not subject to these requirements because it was not "*conduct[ing] any commercial, industrial or tourism business in Oman*".[643] Under the terms of the Joint Production Agreement executed between Emrock and SFOH on 15 January 2007, the Claimant says, SFOH carried out no mining activities but merely held a real property lease.[644] The Respondent, in return, has argued that SFOH cannot rely on a private contract such as the Joint Production Agreement to circumvent registration requirements imposed by domestic law.[645]

306. The Tribunal accepts the Respondent's submission that SFOH was not exempt from the registration requirement merely because Emrock and SFOH agreed under the Joint Production Agreement that Emrock would be responsible for day-to-day quarrying and crushing operations at the quarry site. The CRL contains a list of relevant "*business activities*" which includes "*[o]il, gas and mineral resources investment*".[646] The terms of both the OMCO–SFOH Lease Agreement and the Joint Production Agreement reveal that the carrying out of such activities was precisely SFOH's purpose.[647] Under the terms of the OMCO–SFOH Lease Agreement, SFOH committed to "*contribute any or all investment in the plant, equipment and working capital necessary to establish and maintain the quarrying and crushing operation, as appropriately reviewed by both parties, particularly in regard to the periodic production schedule*", as well as being "*responsible for the day-to-day technical and financial management and administration of the project*".[648]

307. Similarly, the Joint Production Agreement provided that Emrock and SFOH would "*establish a business relation* […] *the principal objectives of which shall be the Quarrying of Natural Stone, sale and distribution of products*".[649] In that role, SFOH agreed with Emrock to secure all necessary permits and approvals for quarrying and crushing, provide necessary materials such as diesel and explosives, and obtain visas and working permits.[650] SFOH additionally undertook to "*prepare the*

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643 Claimant's Reply at [113].

644 Claimant's Reply at [114]. See **Exhibit J-087**.

645 Oman's Counter-Memorial at [277].

646 **RLA-049**, Art 5(11).

647 One might also consider that pursuant to the SFOH Memorandum of Association dated 15 May 2006, it was stated that "*the objects for which the Company is established are to engage in general trading*", although the company was prohibited from carrying out business with persons in the UAE: see **Exhibit J-054**, Art 4.

648 **Exhibit J-058**, Art 5.

649 **Exhibit J-087** at 2.

650 **Exhibit J-087**, Art 5.

site", including the provision of explosives storage (with necessary permits), diesel and water storage tanks, a power generator, a graded and paved road from the quarry to the main road, and a mobile camp for 100 residents with kitchen, dining area and bathrooms.[651] SFOH also assumed a monthly obligation under the Joint Production Agreement to pay Emrock for tonnage of material shipped out of the quarry (as well as 70% of stockpiled material if less than an average of 25,000 MT was picked up every month).[652]

308. That SFOH would be directly involved in the Claimant's quarrying operations at Jebel Wasa was also the position represented externally to the Omani authorities. In its AEP submitted to MECA, for example, SFOH had stated that "*SFOH will operate its own quarry and share crushing and other infrastructure with Emrock LLC* […] *Each Company will produce 15 million tonne per annum (mpta) limestone product for a combined total of 30 mpta*".[653]

309. The Tribunal therefore rejects the Claimant's submission that SFOH "*act[ed] only through Emrock*".[654] Rather, as a matter of law and practice, SFOH was intended to operate in Oman in its own right. As a non-Omani entity conducting business in Oman, SFOH was required to register on the Commercial Registry of Oman and obtain a license from MOCI. Indeed, it appears that at one point the Claimant held the intention of doing just that: in the AEP submitted by SFOH to MECA, when asked for SFOH's commercial or industrial registration number, the application stated "*[c]ommercial registration applied for and pending*".[655] Mr Van der Wiele of GEO-Resources, who assisted with preparing the AEP, gave evidence that "*Mr Al Tamimi informed me that he would in fact be registering SFOH in Oman. It is for this reason that we later provided a statement to that effect in our draft Application for Environmental Permit*".[656]

310. What, then, was the legal consequence of SFOH's failure to do register in Oman? The Claimant has submitted that the "*legal consequence for such a failure would have been a small fine*", and not the nullification of the OMCO–SFOH Lease Agreement, correctly noting that under Art 17 of the FCIL, the penalty for conducting business without a license is a fine of no less than RO 5,000 and no more

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[651] **Exhibit J-087**, Arts 5 and 8.

[652] **Exhibit J-087**, Art 5. In his Memorial, the Claimant also stated that "*[f]or accounting purposes, Mr Al Tamimi expected to treat sales to Nakheel as coming from Emrock and sales to all other customers as coming from SFOH*": Claimant's Memorial at fn 101.

[653] Letter from Mr Al Waily to MRMEWR, dated 3 November 2006, attaching the Application for Environmental Permit (**Exhibit J-077**).

[654] Claimant's Reply at [114].

[655] **Exhibit J-077** at 3.

[656] First Van der Wiele Witness Statement at [18].

than RO 10,000.[657] However, as a matter of Omani law the consequences of SFOH's failure to register clearly run deeper. The provisions of the CCL cited above indicate that a company has no legal presence in Oman unless registered. Article 2 of the CCL, it will be recalled, provides that a company is "*null and void*" unless it "*adopts one of the types listed*".[658] Article 4 of the CCL, moreover, provides that "*[a]ll contracts, receipts, notices and other documents issued by commercial companies shall indicate the company's name, its form, its principal place of business and the number and place of its registration in the Commercial Register*".[659] The Tribunal accepts the Respondent's submission that the effect of Article 4 is to "*requir[e] an Omani registration number to meet the threshold requirement of having a legal presence in the jurisdiction. Accordingly, registration is a condition precedent for any agreement entered into by the company to become effective*".[660]

311. Without legal personality, SFOH had no capacity to enter into contracts such as the OMCO–SFOH Lease Agreement. The Tribunal therefore finds that OMCO was entitled to treat the lease agreement as null and void owing to SFOH's failure to register and obtain a business license in Oman. This consequence finds additional support in the wording of the OMCO–SFOH Lease Agreement: Article 2 provides that the lease agreement would only commence and come into effect "*upon* […] *the issuance of* ***all relevant licenses****, permits and approvals from the relevant authority at the Sultanate of Oman*".[661] There is no evidence that OMCO "*acquiesced*" in SFOH's non-registration, as the Claimant has contended.[662]

312. The Tribunal accordingly finds that it has no jurisdiction *ratione temporis* over the OMCO–SFOH Lease Agreement.

(iii) Physical infrastructure and equipment

313. As noted above, the Claimant has also referred to other physical assets (mining infrastructure and equipment) as constituting part of his investment. Those physical assets remained at the quarry site after 1 January 2009, as permitted under the extant OMCO–Emrock Lease Agreement. For the avoidance of doubt, therefore, the Tribunal finds that it has jurisdiction *ratione temporis* over that investment.

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657 Claimant's Reply at [284]; **CLA-049**, Art 17.

658 **RLA-052**, Art 2.

659 **RLA-052**, Art 4.

660 Oman's Counter-Memorial at [272].

661 **Exhibit J-058**, Art 2 (emphasis added).

662 Claimant's Reply at [121].

B. ATTRIBUTION

(a) Attribution of OMCO's conduct

314. The Claimant has, as set out above, submitted that the actions of OMCO can be attributed to the Respondent for the purposes of State responsibility under the US–Oman FTA. Investment protection under Chapter 10 of the US–Oman FTA, of course, applies only to "*measures adopted or maintained **by a Party***".[663] Attribution of OMCO's conduct is therefore necessary for the Claimant to claim against the Respondent in respect of OMCO's purported termination of the OMCO–Emrock Lease Agreement in February 2009.[664]

315. The Claimant has effectively made a two-fold argument as to attribution. He has argued:[665] (a) that OMCO is an organ of the Omani State by virtue of its being a governmental company exercising "*governmental authority*" under Article 10.1.2 of the US–Oman FTA; and/or (b) that OMCO acted pursuant to the directions of MECA in terminating the OMCO–Emrock Lease Agreement, relying on Emrock's alleged non-payment of overdue fines as mere "*pretext*" to conceal a politically-motivated decision.[666]

316. The Tribunal finds that the actions of OMCO are not attributable to the Respondent. Simply put, OMCO does not meet the test under the US–Oman FTA for attribution. There is no evidence that in making the decision to terminate the OMCO–Emrock Lease Agreement, OMCO was exercising, or indeed would have been authorised to exercise, any regulatory, administrative or governmental authority. There is, furthermore, no evidence that OMCO acted under direction from MECA, and the Tribunal is not satisfied in any event that this would meet the narrow test for attribution under the US–Oman FTA. The Tribunal elaborates on each of these points below.

(i) Attribution under the US–Oman FTA

317. There is no dispute that OMCO is a state-owned enterprise. Indeed, OMCO was expressly established as such in 1981 pursuant to Royal Decree 11/81.[667] To that end, 99% of the shares in OMCO are owned by the Omani Ministry of Oil and Minerals,[668] its directors are appointed by royal

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[663] **Exhibit J-001**, Art 10.1 (emphasis added).

[664] Attribution would also, of course, be relevant to the nullification of the OMOC–SFOH Lease Agreement, but this lease need not be discussed further in light of the Tribunal's finding as to jurisdiction *ratione temporis* above.

[665] See eg Claimant's Reply at [206]–[218].

[666] Claimant's Reply at [208].

[667] **CLA-002**.

[668] Articles of Association of Oman Mining Company, Art 6 (**Exhibit J-378**). The remaining 1% is held by the Oman Development Bank.

decree,[669] and its board of directors has included current and former ministers in the Omani government.[670]

318. However, Article 10.1.2 of the US–Oman FTA sets out a relatively narrow test for the circumstances under which the actions of a state enterprise may be attributed to the State:[671]

> *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****.*

319. For the purpose of attribution under the US–Oman FTA, therefore, the fact that OMCO is a state enterprise is insufficient. To be attributable to the Respondent, OMCO's conduct must occur in the exercise of "*regulatory, administrative, or other governmental authority delegated to it*" by Oman.

320. This test under Article 10.1.2 may be narrower in some respects than the test for State responsibility under customary international law – as described, for example, in the ILC Articles on State Responsibility ("**ILC Articles**"), which set out a number of grounds on which attribution may be based. The ILC Articles suggest that responsibility may be imputed to a State where the conduct of a person or entity is closely directed or controlled by the State,[672] although the parameters of imputability on this basis remain the subject of debate.[673]

321. 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 the State.[674] 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.

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669 **Exhibit J-378**, Art 12.

670 According to the Claimant, OMCO's board of directors from 2005–2008 included directors from MOCI, the Ministry of Finance, the Ministry of Oil and Gas, the Ministry of National Economy and the Oman Development Bank: Memorial at [26]. Mr Al Waily also gave evidence that "*a senior MOCI official customarily serves as the chairman of OMCO's Board of Directors*": First Al Waily Witness Statement at [9].

671 **Exhibit J-001**, Art 10.1.2 (emphasis added).

672 **CLA-005**, Art 8.

673 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, United Nations, 2008 at 47–48 (**CLA-081**) ("*Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5.*")

674 See eg *United Parcel Service of America Inc v Canada* (UNCITRAL), Award and Separate Statement, 24 May 2007, at [59], [62], for a similar analysis in relation to the similarly drafted provisions in NAFTA, Chapter 15 (**RLA-046**).

322. The effect of Article 10.1.2 of the US–Oman FTA is to limit Oman's responsibility for the acts of a state enterprise such as OMCO to the extent that: (a) the state 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.[675] The Respondent is therefore correct in its submission that, whether or not the Ministry of Oil and Minerals exercised "*effective control*" over OMCO through its 99% shareholding, or through influence over its directors or managers, as the Claimant submits,[676] this is not relevant to the test for attribution under Article 10.1.2 of the US–Oman FTA.[677]

323. The US–Oman FTA does not define what is meant by "*regulatory, administrative or governmental authority*". The Respondent has submitted, however, that in this respect the "*requirement for attribution in the FTA closely parallels that in Article 5 of the ILC Articles*".[678] Under Article 5 of the ILC Articles, a person or entity which is not an organ of the State must be empowered by the law of that State to "*exercise elements of the governmental authority*" and must act "*in that capacity in the particular instance*".[679] The conduct at issue must be "*governmental*" or sovereign in nature (*acta jura imperii*). Purely commercial conduct (*acta jure gestionis*) cannot be attributed to the State under Article 5.[680]

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675 This is significantly narrower than the several grounds of attribution provided under the ILC Draft Articles on State Responsibility, which also include situations where, for instance, the relevant entity merely acts under the control or direction of the State: see **RLA-065** at 101.

676 See eg Claimant's Post-Hearing Answers at 4. The Tribunal does not find, in any event, that the Claimant's submissions that "*[t]he Commerce Ministry vetoed OMCO's first attempt to terminate its contracts with Mr Al Tamimi*" and that the second termination required formal approval from MOCI itself (Claimant's Post-Hearing Answers at 42, 44) is adequately supported by the evidence. Rather, it appears largely to have been Mr Al Tamimi who attempted to arrange for MOCI to intervene in OMCO's termination decision. Indeed, a letter from Dr Al Azri to Mr Al Tamimi dated 27 July 2008, after the issuing of the first termination notice, stated that "*[w]e would remind you again, Emrock had a contract with Oman Mining Company and not with any other authority in the Sultanate of Oman*": **Exhibit J-202**. Even the letter sent from H E Al Dheeb to Dr Al Azri dated 10 August 2008, on which the Claimant places significant reliance, stated only that the Ministry was "*of the view*" that the Lease Agreement should not be terminated, provided the agreement was reviewed by the relevant ministries: **Exhibit J-204**. The only recorded formal approval of the second termination notice came from the OMCO Board: Revised Minutes of Board of Directors Meeting Held on 14 February 2009, Meeting No 01/2009, at 3 (**Exhibit J-307**).

677 The Claimant has also suggested that OMCO might be considered not as a state enterprise but as a state organ. It is clear to the Tribunal, however, for the same reasons set out below in discussing OMCO's lack of "*regulatory, administrative or governmental authority*", that OMCO is not an organ of the Omani State.

678 Oman's Counter-Memorial at [302].

679 **RLA-065** at 100. The latter requirement is also imposed under Art 10.1.2 through use of the word "*when*".

680 **RLA-065** at 101. See also *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7), Decision on Objections to Jurisdiction, 25 January 2000 at [89] (**RLA-027**); *Jan De Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award, 6 November 2008 at [165]–[173] (**RLA-024**). Crawford in his Commentary provides instructive examples of the possible exercise of governmental powers by a private or state-owned entity: private security firms, for instance, which exercise delegated powers in the operation of a prison, or a private or state-owned airline which exercises delegated powers in relation to immigration or quarantine: **RLA-065**, at 100.

324. Given the specific test laid out by the State parties under Article 10.1.2, the criteria of Article 5 of the ILC Articles are not directly applicable to the present case. Indeed, there may be points of divergence between the test under Article 5 and the test under Article 10.1.2 of the US–Oman FTA: Article 10.1.2 refers to the exercise of "*regulatory*" and "*administrative*" authority in addition to "*governmental*" authority.[681] But Article 5 nevertheless provides a useful guide as to the dividing line between sovereign and commercial acts.

325. There is, quite simply, no evidence that OMCO exercised any delegated "*regulatory, administrative or governmental authority*" in any of its dealings with Emrock, much less in its decision to terminate the OMCO–Emrock Lease Agreement. The Claimant has emphasised that OMCO's board of directors comprised ministers from various governmental departments, placing particular emphasis on the dual role of Dr Hilal Al Azri as both Director-General of Minerals for MOCI and Chairman of OMCO's Board of Directors.[682] Yet the mere fact that a number of OMCO's board members also served as government ministers does not by itself demonstrate that OMCO exercised regulatory, administrative or governmental powers, or that the ministers sitting on OMCO's board exercised any such powers when sitting in their capacity as directors of OMCO.[683]

326. Most significantly, the Claimant has been unable to identify any relevant law that specifically delegates any regulatory, administrative or governmental authority or powers to OMCO. As previously noted, OMCO came into existence in 1981 pursuant to Royal Decree 11/81. That decree makes expressly clear that OMCO was established simply as a "*limited liability company*" under the CCL, exercising ordinary commercial powers.[684] The Royal Decree delegates no regulatory, administrative or governmental powers to OMCO.

327. Pursuant to Article 16 of OMCO's bylaws, moreover, OMCO's board of directors is empowered to act only as necessary "*to implement the company goals*", with its powers restricted by law and the company's Agreement of Association.[685] OMCO's "*company goals*" are set out at Article 5 of the Agreement of Association (and repeated in Article 5 of the bylaws). They too contain nothing to

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[681] The Tribunal does not find it necessary in this instance to determine what, if any, is the relevant distinction to be drawn between "*governmental*" and "*regulatory*" or "*administrative*" powers, because it is clear that OMCO exercised none of these types of powers.

[682] Claimant's Memorial at [25]–[26].

[683] Crawford in his Commentary emphasises that what matters is not whether governmental powers were exercised generally, but whether they were exercised in the relevant instance: it is not enough, for example, that a railway company has been delegated certain police powers by the State if the impugned conduct involves only the commercial sale of tickets or the purchase of rolling-stock: **RLA-065** at 101.

[684] **CLA-002**, Art 3.

[685] See **Exhibit J-378**, Art 16.

suggest that OMCO is intended or empowered to conduct any regulatory, administrative or governmental functions. Rather, OMCO's company purposes are limited to:[686]

a. "*exploration and drilling for minerals* […] *excavating mines and establishing all equipments* [sic] *required for operating same and for collecting and fusing the produced raw materials*";

b. "*[m]arketing produced raw materials*"; and

c. "*[m]anufacturing raw materials and marketing manufactured materials*".

328. In his Memorial, the Claimant acknowledged that "*OMCO was established to search for minerals, construct and drill mines for the collection and production of minerals, and marketing and manufacturing of minerals*", without reference to the exercise of any regulatory, administrative or governmental authority.[687] Rather, the Claimant recognised in his Memorial that other organs of the Omani State exercised administrative and regulatory control over his investment:

a. "*[m]ining activities of OMCO are controlled, monitored and licensed by the Ministry of Commerce*";[688]

b. "*Oman's Ministry of Environment and Climate Affairs* […] *enforces Oman's laws pertaining to the environment and pollution controls*" and is "*responsible for issuing certain permits a quarry operator must have in order to excavate and process limestone*";[689] and

c. "*the Ministry of Housing has the power to record all land rights and grant land ownership rights*" and is "*responsible for zoning lands in Oman for residential, commercial and industrial uses*".[690]

329. That it was indeed these Omani ministries, rather than OMCO, which exercised the relevant regulatory, administrative or governmental powers is fully supported by the record of evidence. The OMCO–Emrock Lease Agreement, for instance, described OMCO simply as a "*State-owned company which has been awarded mining concession[s] in the Jebel Wasa in the Sultanate of Oman by the Ministry of Commerce & Industry*", one of which concessions it intended to "*demis[e]*" to

686 **Exhibit J-378**, Art 5.

687 Claimant's Memorial at [25].

688 Claimant's Memorial at [31].

689 Claimant's Memorial at [32].

690 Claimant's Memorial at [33].

Emrock.[691] The agreement did not grant the Claimant any regulatory or administrative approval to operate the quarry: rather, the agreement expressly contemplated that it would only "*come* [into] *effect upon* […] *the issuance of all relevant license, permits and approvals* ***from the relevant authority at the Sultanate of Oman***".[692]

330. It is apparent from this wording that the parties understood that OMCO itself exercised no regulatory authority to grant licenses, permits or approvals. Those powers resided with the relevant authorities of the Omani government, and the record shows that OMCO itself was subject to their application. OMCO committed under the lease agreement only to using its "*best endeavours in obtaining of the necessary environmental and operating permits*", conditioned on Emrock's operational and environmental management plans meeting the "*satisfaction of the relevant authorities*".[693] It was, of course, to these relevant Omani authorities that the parties subsequently turned in order to obtain the necessary regulatory approvals.

331. There is no evidence that OMCO ever acted, or purported to act, during the relevant period in any capacity other than as commercial lessor of the quarry concessions which had been awarded to it by the Omani government. When concerns were raised about Emrock's compliance with Omani law in conducting its quarrying activities, it was not OMCO but MECA and MOCI which issued regulatory warnings and later imposed fines. That these warnings were issued by MECA and MOCI to OMCO, and the fines paid by OMCO in the first instance, provides further evidence of the arm's-length regulatory relationship which existed between OMCO and the relevant Omani authorities. The Claimant's repeated claims that it was OMCO's obligation to pay the fines imposed by the relevant Omani ministries is also inconsistent with his argument that Oman had delegated "*regulatory, administrative or governmental authority*" to OMCO in respect of the operations at the Jebel Wasa quarry site.

332. Finally, and most significantly, the evidence relating to OMCO's termination of the OMCO–Emrock Lease Agreement – the specific conduct which forms the basis of Mr Al Tamimi's claim under the US–Oman FTA – equally discloses no evidence that OMCO was acting, or purporting to act, in the exercise of any regulatory, administrative or governmental authority. In the second termination notice, sent on 17 February 2009 from OMCO to Mr Al Tamimi in his capacity as Chairman of Emrock,[694] OMCO did not purport to invoke or rely upon any regulatory, governmental or administrative authority to terminate the OMCO–Emrock Lease Agreement. Rather, it expressly

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[691] **Exhibit J-048**, Preamble.

[692] **Exhibit J-048**, Art 2 (emphasis added).

[693] **Exhibit J-048**, Arts 4, 7.

[694] It will be recalled that the Tribunal has found that events before 1 January 2009, such as the first termination notice, do not fall within the scope of its jurisdiction under the US–Oman FTA.

relied on its perceived contractual entitlement under Article 10(iv) to terminate the agreement on the basis of Emrock's non-compliance with payment obligations. OMCO observed in the termination notice that Mr Al Tamimi was "*well aware of this provision*" and that "*we are always having to chase you for payments* […] *this situation is intolerable*".[695]

333. As the Respondent has submitted, the terms of OMCO's second termination notice make it plain that "*OMCO was acting like any other commercial party, enforcing its view of its contractual rights pursuant to a negotiated private agreement*".[696] OMCO did not purport to – and nor could it – terminate the lease agreement in exercise of any extra-contractual regulatory, administrative or governmental powers. The Tribunal finds that OMCO's conduct in terminating the OMCO–Emrock Lease Agreement was nothing more than what it was expressed to be: a commercial response to Emrock's alleged various and repeated breaches of contract.

334. In short, there is no evidence that OMCO ever acted in the exercise of any regulatory, administrative or governmental authority delegated to it by the Omani State. The lease agreement into which it entered with Emrock was a simple commercial lease. The parties acknowledged in that agreement that OMCO would use its "*best endeavors*" to obtain the necessary permits from the authorities. It was those same relevant governmental authorities which responded when concerns arose regarding Emrock's compliance with the regulatory approval Emrock had been granted. OMCO's role was, at most, to act as a commercial intermediary between Emrock and the Omani authorities exercising relevant governmental authority. The termination of the OMCO–Emrock Lease Agreement is entirely consistent with this understanding of OMCO's role. OMCO did not seek to rely on any sovereign power to terminate the lease agreement, but only its express contractual rights. The fact that OMCO was a State-owned entity does not suffice.

335. It follows that OMCO's conduct does not meet the test for attribution to Oman under Article 10.1.2 of the US–Oman FTA.

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[695] **Exhibit J-250**. The termination notice further set out a variety of additional alleged breaches by Emrock – persistence in illegal activity, failure to meet a 35% Omanisation requirement, failure to rent all equipment from Omani sources, failure to maintain third-party insurance, failure to give timely information about limestone production and sales figures, and failure to provide verifiable data regarding *wadi* material extracted and sold – although it is not expressly clear from the text of the letter whether OMCO relied upon these additional grounds of breach alternatively (or cumulatively) in terminating the lease.

[696] Oman's Counter-Memorial at [317].

(ii) Influence of MECA

336. The Claimant has additionally submitted, effectively in the alternative, that OMCO's conduct should nevertheless be attributed to the State because OMCO was influenced or pressured by MECA to terminate the OMCO–Emrock Lease Agreement.[697]

337. The difficulty with this argument is that the relevant test under Article 10.1.2 effectively precludes such a basis for attribution. It is conceivable that the Ministry's alleged conduct, if proven, might support a case for indirect expropriation of the OMCO–Emrock Lease Agreement, based on the Ministry's ***own*** conduct as an organ of the Omani State. But in light of the requirements of Article 10.1.2, the Tribunal does not consider that mere pressure from MECA would be a sufficient basis for attributing OMCO's otherwise entirely commercial conduct as a state enterprise to the Omani State.

338. In any event, the Tribunal finds that there is no evidential basis to support the contention that MECA exercised any influence over the decision made by OMCO to terminate its lease with Emrock. The Claimant has not been able to produce any hard evidence to show that MECA so much as suggested in advance to OMCO that it should terminate the OMCO–Emrock Lease Agreement. There is no evidence to support the Claimant's suggestion that OMCO's decision to terminate on the basis of non-payment of fines was merely "*pre-textual*", intended to conceal some manner of broader political scheme into which OMCO had been coerced by MECA. As already noted, the evidence shows OMCO's decision to issue the second termination notice of 17 February 2009 to have been a purely commercial one, driven by OMCO's frustration with an "*intolerable*" situation in which it was "*always having to chase* [the Claimant] *for payments*".[698]

339. The letter of 3 May 2009 sent from OMCO's lawyers, Trowers & Hamlins, to Mr Al Muharrami of MECA, relied upon by the Claimant, discloses no evidence of any ministerial pressure.[699] The letter, coming roughly three months after OMCO's second termination notice of 17 February 2009, simply updated the Ministry regarding OMCO's termination of the OMCO–Emrock Lease Agreement and requested that the criminal charges brought against OMCO and Mr Al Waily be withdrawn, on the basis that OMCO was "*not responsible for Emrock's crimes*".[700] Those charges were not filed by MECA until March 2009, after the OMCO–Emrock Lease Agreement had been terminated. Thus the Claimant's submission that MECA used this prosecution as a means of "*putting pressure on OMCO*

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[697] See eg Claimant's Reply at [208]–[212].

[698] **Exhibit J-250**.

[699] **Exhibit J-285**.

[700] **Exhibit J-285** at 3. The letter further noted that OMCO had "*written numerous times to Emrock demanding it desist from the illegal activities*" and that "*Emrock should be the party prosecuted for the environmental violations as it is the party that is trespassing into the wadi and illegally mining there*".

to force Emrock and SFOH out of business and out of Oman all together [sic]", and that OMCO terminated the lease agreement in order "*to placate Mr Al Muharrami of the Environmental Ministry in the hopes of ending the prosecution of Mr Al Waily*", is implausible.[701] The timing of events simply does not support an inference that the Ministry sought to use its authority to bring criminal charges against OMCO in order to influence the latter's commercial decision-making.

340. In respect of the citations and fines issued by MECA against OMCO prior to the second termination notice,[702] the Tribunal finds there is no evidence that these citations were issued other than in good faith and pursuant to Omani law. The citations were issued in furtherance of the Ministry's role to regulate and supervise compliance with Oman's environmental laws, as well as the terms of the environmental permits that MECA had previously issued to OMCO/Emrock.[703] There is no evidence that MECA sought to use these powers for any political or sovereign purpose in order to pressure OMCO into terminating its relationship with Emrock. The citations issued by MECA did not seek to compel OMCO's termination of the lease agreement – rather, on their express terms, they sought only to bring Emrock's quarrying operations into regulatory compliance.[704]

341. In summary, even if the Tribunal were to find that it constituted a separate ground for attribution under the US–Oman FTA, the Claimant's suggestion that OMCO was pressured by MECA (or any other organ of the Omani government) to terminate the OMCO–Emrock Lease Agreement simply finds no support in the evidence.

342. It follows that there is no basis on which OMCO's conduct in respect of the Claimant and his investments may be attributed to the Respondent.

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[701] Claimant's Reply at [209]–[210].

[702] The Claimant has cited, for instance, **Exhibit J-115**, **Exhibit J-218**, **Exhibit J-257**, Infraction Report, dated 7 February 2009 (**Exhibit J-242**) and Infraction Report, dated 11 February 2009 (**Exhibit J-245**): see Claimant's Reply at [209].

[703] Of relevance here is Art 10.10 of the US–Oman FTA, which provides that "*[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*". Also of indirect significance is Chapter 17 of the US–Oman FTA on "*Environment*", Art 17.2.1 of which, for instance, provides that "*[n]either Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement*". These provisions are discussed in more detail in the Tribunal's analysis of the Claimant's minimum standard of treatment claim below.

[704] **Exhibit J-258**; **Exhibit J-259**.

(b) Attribution of other Omani entities

343. In addition to his claim in respect of the conduct of OMCO, the Claimant has also submitted that the relevant conduct of other entities within Oman – namely (a) MECA; (b) MOCI; (c) MOH; (d) the Omani Public Prosecutor; and (e) the Royal Oman Police – may also be attributed to Oman.[705]

344. For the avoidance of doubt, the Tribunal confirms that the relevant actions of these entities may be attributed to the Respondent. There is no question that State organs such as government ministries and the State police force operate as arms of the State, and indeed – unlike OMCO – such entities are characterised by their exercise of "*regulatory, administrative or governmental*" authority. Although State responsibility for the conduct of State organs is not directly expressed in the text of the US–Oman FTA, the attribution of such conduct to the State is broadly supported in international law.[706]

C. BREACH

(a) Expropriation

(i) Expropriation under the US–Oman FTA

345. Expropriation is addressed by Article 10.6.1 of the US–Oman FTA. That article provides that:

> *1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:*
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate and effective compensation; and*
>
> *(d) in accordance with due process of law and Article 10.5.1 through 10.5.3.*

346. Of further significance is Annex 10-B to the US–Oman FTA. By virtue of footnote 2 to the title of Article 10.6 ("*Expropriation and Compensation*"), the Tribunal is required to apply Annexes 10-A and 10-B when interpreting Article 10.6.[707] Annex 10-B reads as follows:

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[705] Claimant's Reply at [206].

[706] See eg Art 4 of the ILC Articles: **CLA-081** at 40.

[707] Fn 2 states in mandatory terms: "*Article 10.6 shall be interpreted in accordance with Annexes 10-A and 10-B*." Annex 10-A states: "*The Parties confirm their shared understanding that 'customary international law' generally and*

ANNEX 10-B

EXPROPRIATION

The Parties confirm their shared understanding that:

1. Article 10.6.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 10.6.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 10.6.1 is indirect expropriation, 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.

(a) The determination of whether an action or series of actions by a Party, in a specific 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

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." See further discussion on Annex 10-A in the context of the Claimant's minimum standard of treatment claim at [378ff] below.

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

347. Accordingly, the first question for the Tribunal must be whether an expropriation has occurred, either directly (as defined in Annex 10-B.3) or indirectly (as defined in Annex 10-B.4). If the Tribunal is satisfied that a direct or indirect expropriation has occurred, it must determine whether the expropriation is lawful according to the four listed criteria under Article 10.6. The four criteria for a lawful expropriation are, of course, conjunctive rather than disjunctive: that is, all four criteria must be satisfied before an expropriation may be considered lawful.

(ii) Alleged expropriation of the Claimant's investment

348. The Claimant has submitted that the unlawful expropriation of his investment took place through a series of measures carried out by the Respondent which ultimately "*culminated*" in the expropriation of his entire investment on 23 May 2009.[708]

349. In this manner, the Claimant has effectively framed his expropriation claim as a species of creeping indirect expropriation of the kind defined in Annex 10-B.4 of the US–Oman FTA. Relying on the analysis of the Tribunal in *AIG v Kazakhstan*,[709] the Claimant has submitted that Oman's continued interference with the use of his property had the "*effect of depriving* [him] *in whole or in significant part of the use or reasonably to be expected benefit of property even if not necessarily to the obvious benefit of the Host State*".[710] The result, the Claimant has submitted, is that "*Oman, through OMCO and other instrumentalities of the Omani government, has plainly and completely deprived Mr Al Tamimi of his investment in the Quarry*",[711] and rendered him "*unable to exercise any of the mining or leasehold rights he had acquired and invested in so heavily*".[712]

[708] Claimant's Memorial at [172].

[709] *AIG Capital Partners Inc and CJSC Tema Real Estate Company v Republic of Kazakhstan* (ICSID Case No ARB/01/6), Award, 7 October 2003 (**CLA-051**).

[710] Claimant's Pre-Hearing Skeleton at [48].

[711] Claimant's Memorial at [181].

[712] Claimant's Memorial at [183].

350. The measures said by the Claimant, individually and cumulatively, to have constituted the expropriation of his investment are:[713]

a. Termination of the OMCO–Emrock and OMCO–SFOH Lease Agreements;

b. The arrest of Mr Al Tamimi;

c. The police coercion of Mr Al Tamimi to sign an undertaking to refrain from further production at the Jebel Wasa quarry;

d. The prosecution of Mr Al Tamimi; and

e. The forced dispersal by the police of Mr Al Tamimi's workforce and physical assets.

Primary investment: the right to operate at Jebel Wasa

351. Notwithstanding that the Claimant has framed his case for expropriation as a series of cumulative or creeping measures by the Respondent which deprived him of his property rights, it is clear that the central element of the expropriation claim is the termination of the OMCO–SFOH and OMCO–Emrock Lease Agreements.[714] That must be so, because the Claimant's investment right – that is, the right to operate a limestone quarry in Oman – derived directly from his companies' ownership of, respectively, the OMCO–SFOH Lease Agreement and the OMCO–Emrock Lease Agreement. Indeed, the Claimant has acknowledged that "*the termination of the Emrock Lease Agreement* […] *by itself would have destroyed Mr Al Tamimi's investment*".[715]

352. In respect of the former agreement, the Tribunal has found that it has no jurisdiction *ratione temporis*. The lease agreement had ceased to exist before the entry into force of the US–Oman FTA on 1 January 2009. In respect of the latter agreement, the Tribunal has found that the conduct of OMCO, including its commercial decision to terminate the OMCO–Emrock Lease Agreement on 17 February 2009, cannot be attributed to the Respondent. OMCO did not exercise the necessary regulatory, administrative or governmental authority for its actions to be considered those of the Omani State.[716]

353. 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

[713] Claimant's Memorial at [179], [182].

[714] See Claimant's Post-Hearing Answers at 70: "*[t]he property interest that Oman expropriated was Mr Al Tamimi's right to conduct quarrying operations at the OMCO concession site*".

[715] Claimant's Memorial at [184].

[716] OMCO's termination of the OMCO–Emrock Lease Agreement was confirmed in a letter from OMCO's lawyers, Trowers & Hamlins, to Mr Al Tamimi's lawyers, Said Al Shary Law Office, on 29 April 2009 (**Exhibit J-283**).

"*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.[717] 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.[718] 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.[719]

354. 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.[720]. 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 (the alleged conduct listed at (b)–(e) in [350] above) 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.

Decision of the Ibri Court of Appeal

355. The Claimant has argued that OMCO's second termination of 17 February 2009 did not have the effect of terminating the OMCO–Emrock Lease Agreement, and that it was the Respondent's further

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[717] See *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3), Decision on Jurisdiction, 22 April 2005 at [260] (**RLA-023**): "*In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary party could adopt. Only the State in the exercise of its sovereign authority ('puissance publique'), and not as a contracting party, may breach the obligation assumed under the BIT*". In the present case, of course, the Tribunal has found that the acts of OMCO cannot be attributed to the Omani State at all.

[718] **Exhibit J-048**, Art 11. The Claimant has acknowledged that "*the Tribunal is not empowered to make an award based solely on breach of contract*": Claimant's Post-Hearing Answers at 61.

[719] See [292] above.

[720] In this respect, the present case is different from *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador* ("*Occidental II*") (**CLA-038**) cited by the Claimant: see Claimant's Memorial at [186]–[187]. In *Occidental II*, the conduct in question was a sovereign act (the issuing of a "*Caducidad* Decree") carried out by Ecuador's Ministry of Energy and Mines, an organ of the State, independent from the breach of contract: see [418].

conduct (as listed at (b)–(f) in [350] above) which caused the loss of his investment.[721] In support of this claim, the Claimant has referred many times to the decision of the Ibri Court of Appeal of 6 June 2010, which acquitted Mr Al Tamimi of the two misdemeanour criminal charges on which he had previously been convicted by the Mahda Court of First Instance.[722] The Claimant says that the decision of the Ibri Court of Appeal compels the conclusion that OMCO did not in fact terminate the OMCO–Emrock Lease Agreement in February 2009.[723]

356. The logic of this argument is somewhat difficult to sustain. If the Tribunal accepts the Claimant's argument that the Ibri Court of Appeal decision shows that the OMCO–Emrock Lease Agreement was still on foot in June 2010, then it is difficult to understand how a case for expropriation could be made out, given that the Claimant's property rights would thus have been preserved (unless, perhaps, the Claimant was in practice prevented from exercising those property rights by Oman's conduct).[724]

357. In any event, the Tribunal does not accept the Claimant's submission that the Ibri Court of Appeal decision shows that the OMCO–Emrock Lease Agreement remained on foot after 17 February 2009.

358. First, the Tribunal does not accept that the doctrine of *res judicata* (or indeed any form of "*collateral estoppel*" defence) has any application to these proceedings on the specific issues relevant to the alleged breaches. An international tribunal is generally not bound by the decision of any local court as to the determination of a dispute under international law.[725] A local court decision which rules

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[721] See eg Claimant's Memorial at [179ff]; Reply at [141ff]; Claimant's Post-Hearing Answers at 62 ("*In addition, of course, Claimant has pled and proven violations of the FTA by other organs of the Omani government, including the prosecutors, the Environmental Ministry and the Commerce Ministry*").

[722] It will be recalled that the decision of the Ibri Court of Appeal related only to an appeal against the first relevant decision of the Mahda Court of First Instance, rendered on 8 November 2009, which found Mr Al Tamimi guilty of two misdemeanour criminal charges. The separate, second decision of the Mahda Court of First Instance, rendered on 25 April 2010, which found Mr Al Tamimi liable on four additional charges filed by MECA, was not the subject of appeal to the Ibri Court of Appeal: see [78]–[80] above.

[723] See eg Claimant's Reply at [20ff]; Claimant's Pre-Hearing Skeleton at [44]; Claimant's Post-Hearing Answers at 54.

[724] The submissions of the Claimant have been unclear on this point. In his Post-Hearing Answers, the Claimant said only that the judgment of the Ibri Court of Appeal showed that the Lease Agreement was "*still in full force and effect, **at least as of the date of his arrest***": Claimant's Post-Hearing Answers at 54 (emphasis added).

[725] See eg *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic* (ICSID Case No ARB/07/26), Decision on Jurisdiction, 19 December 2012 at [191] ("*a decision rendered by a domestic court has no res judicata effect on an arbitral tribunal notwithstanding compliance with the test that would otherwise cause res judicata effect to attach under the domestic law of the Host State*") (**RLA-085**); *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7), Decision on Objections to Jurisdiction at [29] ("*the international tribunal rather than the domestic court has the final say on the meaning and scope of the international obligations—in this case the BIT—that are in dispute*") (**RLA-027**). See also *Robert Azinian*, *Kenneth Davitian & Ellen Baca v United Mexican States* (ICSID Case No ARB(AF)/97/2), Award, 1 November 1999 at [86] ("*it would be unfortunate if potential claimants under NAFTA were dissuaded from seeking relief under domestic law from national courts, because such actions might have the salutary effect of resolving the dispute without resorting to investor-state arbitration* […]") (**RLA-003**).

directly on a matter – such as the validity of the termination of the OMCO–Emrock Lease Agreement – might, of course, provide more or less compelling evidence as to the existence of a relevant fact or domestic state of affairs. But it does not have the "*preclusive effect*" contended for by the Claimant.[726]

359. In the present case, the Tribunal finds that the termination or otherwise of the OMCO–Emrock Lease Agreement has not been determined as a matter of local Omani law, because: (a) the Ibri Court of Appeal delivered its judgment in its criminal jurisdiction, whereas the lease agreement granted exclusive jurisdiction over the determination of all aspects of the contractual relationship to the Omani Arbitration Centre (which jurisdiction has not been exercised); (b) under Omani law a penal judgment has binding effect on civil courts only insofar as it relates to "*the occurrence of the offence, its legal description and its attribution to the offender",* not the incidental determination of any matters of civil law;[727] and (c) the Ibri Court of Appeal in any event made no direct finding as to validity of OMCO's termination of the OMCO–Emrock Lease Agreement.[728] Indeed, the judgment of the Ibri Court of Appeal did not refer to OMCO's first or second termination notices at all. OMCO and Emrock – the two parties to the OMCO–Emrock Lease Agreement – were not parties to Mr Al Tamimi's criminal trial. In short, the Court of Appeal judgment overturned Mr Al Tamimi's prior conviction as a matter of Omani criminal law, but it did not deal with the key issues in dispute in this proceeding.

360. As the Claimant has acknowledged, the Ibri Court of Appeal focused on specific questions relevant to the criminal charges, such as whether Mr Al Tamimi was a "*thief*" as defined, whether his activities fell within the coordinates laid down by the Oman's Ministry of Housing, and whether he had permits from OMCO to operate a crusher.[729] The Court did not engage in any detail with the nature or status of the OMCO–Emrock Lease Agreement. Any *res judicata* finding based on the Claimant's exoneration by the Ibri Court of Appeal would also have to contend with the separate, second decision of the Mahda Court of First Instance of 25 April 2010 (not subject to the Ibri Court of Appeal's

[726] See Claimant's Post-Hearing Answers at 4. Whether, as the Claimant has submitted (see Claimant's Reply at [20ff]), the conduct of the Ibri Court of Appeal as a State organ is attributable to the State is, in the Tribunal's view, an entirely different question from whether this Tribunal is bound by that Court's findings of fact.

[727] The local case authority cited by the Claimant in this respect indicates only that a criminal acquittal may act as a shield under Omani law against later accusation of wrongdoing on the same grounds as were "*necessary*" or indispensable to the original acquittal: see Sultanate of Oman Commercial Court, Collection of Legal Rules Decided by the Court in its Thirteenth Judicial Year (1996) at 304 (**CLA-058**); Sultanate of Oman Authority for Commercial Disputes Settlement, Collection of Legal Rules Decided by the Authority in Judicial Year 11 (1994—1995) at 437 (**CLA-056**); Sultanate of Oman Commercial Court, Compilation on Legal Rules Decided by the Court in its Fifteenth Judicial Year (1998–1999) at 349 (**CLA-052**).

[728] The Penal Procedure Law, Royal Decree No 97/99, Art 280 (**RLA-060**).

[729] Claimant's Pre-Hearing Submissions at [27]; Claimant's Post-Hearing Answers at 27, 60–61.

ruling on appeal) which found Mr Al Tamimi guilty of four substantially similar offences, and against which Mr Al Tamimi has not appealed.[730]

361. There is thus no basis on which the Ibri Court of Appeal can be said to have ruled OMCO's termination of the OMCO–Emrock Lease Agreement to be ineffective.

Requirement of a judicial decree

362. The Claimant has further submitted, citing the terms of Royal Decree 6/89, that the OMCO–Emrock Lease Agreement cannot be taken to have terminated on 17 February 2009, because OMCO failed to obtain a judicial decree authorising termination of the contract.

363. Once again, the Tribunal reiterates that it does not have the jurisdiction to rule on the legality of OMCO's private commercial decision to terminate the lease agreement, especially when the Claimant has not challenged that decision according to the process stipulated by the OMCO–Emrock Lease Agreement itself. The Tribunal observes, however, that it seems implausible that the lease of vacant and unimproved land conveyed to the Claimant under the OMCO–Emrock Lease Agreement would fall within the definition of "*dwellings and commercial and industrial premises*" under Royal Decree 6/89.[731] Thus the Tribunal does not consider that a judicial decree was required to lawfully terminate the OMCO–Emrock Lease Agreement in accordance with the express termination provisions contained in the lease.[732]

364. In any event, all that matters for present proceedings is that the Tribunal is satisfied that the OMCO–Emrock Lease Agreement was terminated by OMCO, in accordance with its express termination provisions, on 17 February 2009.

Post-termination measures

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[730] That is, theft of stones and breach of Oman's environmental laws: see **Exhibit J-327**. The Claimant has submitted that this decision "*does not warrant attention when compared to the Court of Appeal's decision*", primarily because it was rendered *ex parte*: Claimant's Post-Hearing Answers at 61.

[731] **RLA-058**, Art 1. See also Sultanate of Oman, Court of Commercial Disputes, Collection of Legal Rules Resolved by the Court During its Ninth Judicial Year (1992–1993) at 310 ("*[T]he provisions that regulate the relationship between the landlord and tenant under Royal Decree No 6/89 apply – in line with Article 1 of these provisions – solely to lease agreements under which Lessor enables Lessee to use residential, commercial or industrial premises for a specific period in return for a fixed amount,* ***these provisions do not apply to lease agreements pertaining to vacant lots****, even if these lots were earmarked for industrial purposes, or the purpose of the lease agreement was to establish residential, commercial or industrial facilities* […] *[W]hat is important is the situation of the leased lot when the agreement was made, and it is the situation that was considered by the contracting parties at the time of concluding the agreement*") (emphasis added) (**CLA-057**).

[732] Again, see **CLA-057** at 311 (stating that under the general rules governing lease agreements in Oman, "*[t]he Court may accept or reject the request of Lessor* [to terminate a lease] ***unless there is an explicit provision in the agreement that automatically terminates the agreement without the need for a notice or court judgment*** *in case Lessee breaches its obligation to pay the rent*") (emphasis added).

365. The Claimant has argued that it is not fatal to his expropriation claim that termination of the OMCO–Emrock Lease Agreement is not attributable to the Respondent, because his claim covers a series of expropriatory measures engaged in by the Respondent that individually and collectively deprived the Claimant of his investment. However, it is plain from the list set out at [350] above that the additional constituent elements of the Claimant's creeping expropriation claim occurred after the termination of the OMCO–Emrock Lease Agreement on 17 February 2009. Any measures taken by Oman that allegedly affected the Claimant's ability to operate at the Jebel Wasa quarry site after that date – the arrest of Mr Al Tamimi, the alleged coerced undertaking to cease operations at the quarry site, the subsequent prosecution of Mr Al Tamimi, the alleged police harassment of Emrock employees at the quarry site – can in practice have had no expropriatory effect on the Claimant's already-defunct investment. After 17 February 2009, the Claimant simply had no "*covered investment*" for the purposes of Chapter 10 (except, perhaps, for some physical infrastructure and equipment remaining at the quarry site, to be considered further below).[733]

366. For instance, the Claimant has submitted that "*[t]he Omani police effectively ejected Claimant from the quarry* site" on 23 May 2009 (the date of his arrest and the date on which he fixes the culmination of the Respondent's expropriation) and "*required him to shut down his production of limestone*".[734] The Claimant has alleged that the police subsequently prevented Emrock employees from carrying out operations at the quarry site, and progressively forced Emrock to leave the site entirely.[735] Yet by that time any right to carry out operations at Jebel Wasa previously held by the Claimant had ceased to exist. The Claimant's submission that the undertaking allegedly coerced from him by the Royal Oman Police during his brief detention forced him to surrender his investment rights in return for his release from jail is similarly unavailing, because by that time the Claimant had no rights in respect of the Jebel Wasa quarry left to surrender. The Claimant has submitted that "*Oman has not even begun to articulate a plausible justification for shutting down Mr Al Tamimi's quarry*".[736] However, in the Tribunal's view the answer is very plain: to the extent that the police did enforce the closure of the Claimant's quarry (of which there is no direct evidence), the "*plausible justification*" was that Mr Al Tamimi no longer possessed any legal right to operate at Jebel Wasa.

367. By the same measure, whether or not the prosecution of Mr Al Tamimi was fair or justified in the circumstances – questions to be considered in greater depth in the Tribunal's analysis of the minimum standard of treatment claim below – it is clear that it did not constitute or contribute to the

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[733] Under cross-examination, expert Mr Michael Wick, called by the Claimant, acknowledged that "*[i]f the lease is invalid, there's absolutely no value*": Transcript, Day 7 at 137:16–17 (Wick).

[734] Claimant's Reply at [142], [145]. See also Claimant's Post-Hearing Answers at 5.

[735] Claimant's Reply at [147]–[148].

[736] Claimant's Post-Hearing Answers at 3.

loss of the Claimant's right to operate at the Jebel Wasa quarry, and accordingly did not permanently deprive the Claimant of any property rights. Even if Mr Al Tamimi had retained a covered investment at the time of his arrest or prosecution, it would be difficult to understand the basis on which he has alleged that he was permanently enjoined from operating at Jebel Wasa as a result of that arrest and/or prosecution. Mr Al Tamimi was immediately granted bail after his arrest.[737] Even the three-month sentence of imprisonment later imposed by the Mahda Court of First Instance in its judgment of 8 November 2009 was imposed as a suspended sentence (and ultimately lifted on acquittal).[738] The Respondent is correct to observe that these events did nothing to prevent Mr Al Tamimi from pursuing a contractual claim against OMCO if he believed that his rights in respect of the OMCO–Emrock Lease Agreement had been wrongfully terminated.[739]

368. In short, the Tribunal has concluded that the Claimant's case largely puts matters into reverse perspective. While the Claimant has submitted that the Respondent's actions after 17 February 2009 constituted measures that led to the loss of his investment rights, in truth it was the Claimant's persistence in operating at Jebel Wasa after the loss of those investment rights that led to the actions of which he now complains. After 17 February 2009, the Claimant had no primary investment capable of being expropriated. Any claim for indirect expropriation based on the Respondent's actions after 17 February 2009 would also have to confront the express stipulation in Annex 10-B.4(b) of the US–Oman FTA that non-discriminatory regulatory actions by a State designed and applied to protect legitimate public welfare objectives, including protection of the environment – and, the Tribunal infers, the enforcement of Omani private property laws – do not constitute indirect expropriations.

369. It follows that the Claimant has not established a claim against Oman for expropriation of his primary investment.

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[737] Mr Al Tamimi has also acknowledged that the Public Prosecutor returned his passport to him at the request of his lawyers a few weeks after his arrest, permitting him to travel freely: First Al Tamimi Witness Statement at [191].

[738] See **Exhibit J-327**.

[739] Indeed, it appears from the evidence that the Claimant may have taken initial steps to pursue this avenue of redress: on 27 May 2009 Mr Al Tamimi's lawyers at Said Al Shary Law Office gave formal notice to OMCO that it was referring seven listed disputes to arbitration, including "*the purported termination of the Agreement by OMCO*": Letter from Said Al Shary Law Office to Trowers & Hamlins, dated 27 May 2009 (**Exhibit J-303**). In that letter, the Claimant recognised that "*[i]n clause 11, the parties agreed to submit all disputes, if not resolved, to arbitration in Oman and under the laws of Oman*". A further letter was sent on behalf of Emrock by another legal counsel on 26 July 2009, rejecting OMCO's termination of the OMCO–Emrock Lease Agreement and appointing a local arbitrator on behalf of Emrock: Letter from Mohammed Al Murtadha & Co to Mr. Al Waily, dated 26 July 2009 (**Exhibit J-314**). It appears, however, that Mr Al Tamimi/Emrock took no subsequent steps to pursue that arbitration. For this reason, the Tribunal rejects the Claimant's contention that "*the actions of the Omani police that resulted in the shutdown of the quarry without affording Mr Al Tamimi an opportunity to contest the validity of the termination constituted an additional violation of the FTA's requirements*": Claimant's Post-Hearing Answers at 4–5.

Vestigial investment: infrastructure and equipment

370. For completeness, the Tribunal has also considered whether the evidence discloses any potential claim of direct or indirect expropriation in respect of Respondent's treatment of the physical infrastructure and equipment which remained at the Jebel Wasa quarry site after the termination of the OMCO–Emrock Lease Agreement on 17 February 2009. The Claimant has alleged that the Royal Oman Police permitted the looting and destruction of Emrock's infrastructure and equipment at the Jebel Wasa quarry site, thereby "*ensur[ing] that Emrock would not be able to return the quarry to operation*".[740]

371. The immediate difficulty for such a claim is that the Claimant possessed no legal right to retain property or staff at the quarry site, nor indeed to remain on the site himself, without the property rights formerly bestowed by the Lease Agreements.[741] On 17 February 2009, the same date that OMCO sent its second termination notice, OMCO also issued Mr Al Tamimi with a "*demobilization plan*", requiring OMCO to remove all "*equipment, installations and accommodations*" within two weeks, and one further week to tidy the site before handover back to OMCO.[742] When Emrock did not vacate the site as instructed, OMCO sent repeated letters to Mr Al Tamimi observing that his continued presence at the site was "*illegal*" and demanding that Emrock cease operations and remove equipment as required. The Claimant's apparent response to this series of increasingly frustrated letters from OMCO – such as OMCO's letters dated 3 March 2009,[743] 15 March 2009,[744] 18 March 2009[745] and 19 April 2009[746] – was simply to defy OMCO's instructions.

372. In that context, it is unsurprising that the Royal Oman Police took steps after February 2009 to enforce demobilisation of the Claimant's operations at the Jebel Wasa quarry site. The Claimant's submission that the actions of the police after February 2009 had the effect of ending operations at the quarry

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740 See eg Claimant's Memorial at [179]; Claimant's Reply at [150]–[156] ("*By these actions, Oman rendered Claimant completely unable to resume the work that it had wrongfully ordered him to cease*.")

741 Notwithstanding this fact, it appears that Mr Al Tamimi continued to operate at the quarry site until his arrest on 23 May 2009, and indeed Emrock continued to sell surplus limestone inventory from the site for months even after Mr Al Tamimi's arrest: see Ralutin Witness Statement at [24], [31]; First Gupta Witness Statement at [69]; Second Gupta Witness Statement at [22]–[23] ("*we continued to liquidate our stockpile of previously quarried limestone materials, which had already been sold to our customers under supply contacts* […] *it took about six months to liquidate the stockpile*"). See also Letter from Mr Al Tamimi to Nakheel, dated 9 December 2009 (**Exhibit J-329**); Quotation for Limestone Material from Emrock to Mr Ali Bilal, dated 15 June 2010 (**Boyd Exhibit 9-20**). A letter from OMCO's lawyers, Trowers & Hamlin, to MECA dated 7 November 2010 suggests that even as late as October 2010 an Emrock employee remained on site selling limestone (**Exhibit J-357**).

742 **Exhibit J-249**.

743 **Exhibit J-257**.

744 **Exhibit J-266**.

745 **Exhibit J-268**.

746 **Exhibit J-277**.

and ultimately forcing Emrock to abandon the quarry site is entirely consistent with the Respondent's exercise of its police powers to act against those who by this time must in law have been trespassers.[747] Mr Ralutin's account, for example, that the police repeatedly showed up at the quarry site after February 2009 to remind Mr Al Tamimi and his staff "*that they were not allowed to be operating at all*" simply discloses, in the Tribunal's view, an accurate understanding by the police of the prevailing legal situation.[748]

373. The Claimant has alleged that as a result of Emrock being forced to abandon the quarry site, "*Emrock's buildings were vandalized and looted, and its business records at the site were lost or destroyed*" and that "*the police allowed local residents to come in and take what they wanted*".[749] There is no evidence, however, that the Royal Oman Police seized, permitted to be seized, or otherwise expropriated any physical property from the Jebel Wasa quarry site. Indeed, the evidence presented by the Claimant as to the fate of the vestigial infrastructure and equipment at the quarry site has been ambiguous at best. While in his Reply the Claimant alleged that the Omani police "*allow[ed] Emrock's infrastructure and equipment to be looted and destroyed*",[750] in his earlier Memorial the Claimant acknowledged that after termination of the OMCO–Emrock Lease Agreement, "*Mr Al Tamimi was left with only inventory that either had already been sold or that had to be sold, and very expensive quarrying equipment that was quickly sold off or repossessed by and for creditors*".[751] Similarly, Mr Gupta gave evidence that he understood that infrastructure such as the tank and pumps at the site were in fact dismantled and removed by Shell Oil Company pursuant to that company's agreement with Emrock.[752]

374. As to the vandalism which the Claimant says did occur at the quarry site, after Emrock and its employees had permanently left the site, the evidence is even more insubstantial.[753] The Claimant, for example, has submitted that Emrock's scale bridge was "*removed from its foundation and carted*

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[747] See eg UNCTAD, Series on Issues in International Investment Agreements II, "Expropriation: A Sequel" (2012) at 79 ("*According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation.* […] *For example, if confiscation of property is effected as a sanction for a violation of domestic law by the property owner, this would not be an expropriation. The same would be the case if an establishment is shut down for violations of environmental or health regulations*") (**RLA-063**).

[748] Ralutin Witness Statement at [33].

[749] Claimant's Reply at [155].

[750] Claimant's Reply at [150].

[751] Claimant's Memorial at [184]. See also Claimant's Memorial at [139] ("*As a result of the termination of quarrying operations, Emrock was not able to generate the revenue necessary to pay creditors, and creditors in turn seized the equipment remaining at the Quarry site*").

[752] First Gupta Witness Statement at [74].

[753] Claimant's Reply at [155].

away",[754] but has presented as evidence only a photo showing its absence, without any additional evidence as to who took it, or when, or why.[755] Similarly, the Claimant's submission that its business records were destroyed is supported only by Mr Ralutin's witness statement that he "*heard*" that this had occurred – "*after Emrock had abandoned* [the quarry site]".[756]

375. The Tribunal finds that there is insufficient evidence to show that Oman expropriated any of the Claimant's physical infrastructure or equipment at the Jebel Wasa quarry. Despite the Claimant having no legal right to remain at the quarry site, the Royal Oman Police permitted Mr Al Tamimi and his equipment to remain on the site for many months after the termination of the OMCO–Emrock Lease Agreement – and indeed apparently permitted Emrock for a time to sell off its surplus inventory.[757] That the Claimant was forced to carry out a private sale of inventory and equipment as a result of the demise of his commercial venture, and forced to allow repossession of certain equipment by creditors, does not disclose any relevant State conduct which might amount to an expropriation.

Conclusion

376. The Tribunal accordingly finds that no expropriation under Article 10.6.1 of the US–Oman FTA has been established. The Claimant is unable to elevate a private contractual dispute with OMCO into an expropriation under international law. Any State conduct taking place after 17 February 2009 cannot have had any effect on the Claimant's primary investment, which after that date had ceased to exist. There is no evidence that the Respondent's actions expropriated any of the vestigial infrastructure or equipment which remained on the property after that date. Taking into account Article 10.6.1 and Annex 10-B.2, the evidence discloses no conduct attributable to the State which deprived the Claimant of the value of his investment. The Tribunal accordingly dismisses this claim.

(b) Minimum standard of treatment

377. The Claimant's second claim of breach against the Respondent alleges that the Respondent failed to treat the Claimant's investment according to the minimum standard of treatment imposed by Article 10.5 of the US–Oman FTA. Article 10.5 provides that:

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[754] Claimant's Reply at [155].

[755] Photograph of the Scale House without Weighbridge (**Exhibit J-390**). See also Ralutin Witness Statement at [28] (even after May 2009, "*customers were still coming onto the site with their own trucks to pick up orders for limestone that had already been pre-sold. At first, the number of trucks coming through to pick up their orders was not affected by the fact that we had stopped operations.*").

[756] Ralutin Witness Statement at [37].

[757] See Claimant's Reply at [151].

> 1. *Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> 2. *For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investors. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*

378. As with Article 10.6, the title of Article 10.5, "*Minimum Standard of Treatment*", contains a footnote which mandates the Tribunal to interpret the article in accordance with an annex, namely Annex 10-A. Annex 10-A further clarifies the meaning of "*customary international law*" for the purposes of the US–Oman FTA:

> ***ANNEX 10-A***
> ***CUSTOMARY INTERNATIONAL LAW***
>
> *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.*

379. Also of relevance to the present claim is Article 10.10 of the US–Oman FTA, which provides as follows:[758]

> *Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*

[758] **Exhibit J-001**, Art 10.10.

(i) Content of the minimum standard

380. The parties accept that the minimum standard of treatment under the US–Oman FTA refers to the customary international law standard and not an autonomous treaty standard.[759] That conclusion is compelled by Article 10.5.2, which expressly provides that the Treaty's standards of fair and equitable treatment and full protection and security "*do not require treatment in addition to or beyond that which is required by* [the minimum standard of treatment]".[760]

381. The precise standard of treatment requirement by the minimum standard, however, became a significant point of contention between the parties during proceedings. It also received the attention of a State party submission from the United States Government pursuant to Article 10.19.2 of the US–Oman FTA, which provision authorises the non-disputing State party to make submissions regarding the interpretation of the Agreement.[761] Thus the Tribunal considers that a brief discussion of the scope of the minimum standard of treatment under customary international law is warranted before it considers the standard's application in the present circumstances.

Minimum standard principles

382. It is broadly accepted that the minimum standard of treatment under customary international law imposes a relatively high bar for breach. In *SD Myers v Canada*, for instance, a NAFTA/UNCITRAL decision, the tribunal said that a finding that the minimum standard has been breached "*must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*".[762] A strict "*minimum standard of treatment*" provision such as Article 10.5, particularly when considered in the light of Annex 10-A in the present case, cannot be interpreted in the expansive fashion in which some autonomous fair and equitable treatment or full protection and security provisions of other treaties have been interpreted. Indeed, the language of Article 10.5.2 makes very clear that Article 10.5 does "*not require treatment in addition to or beyond*" that required by the minimum standard of the treatment of aliens under customary international law.

383. The traditional customary law standard for the minimum treatment of foreign persons was that set out in the *Neer* decision, in which it was said that "*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*

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[759] See eg Claimant's Response to US Submission at [7].

[760] **Exhibit J-001**, Art 10.5.2.

[761] **Exhibit J-001**, Art 10.19.2. The US Submission was accepted by the Tribunal in Procedural Order No 12, dated 14 October 2014. As the Respondent has noted, a tribunal is not bound by the views expressed in such a non-disputing Party submission, but may give them persuasive weight where appropriate.

[762] *SD Myers, Inc v Canada* (NAFTA/UNCITRAL), First Partial Award, 13 November 2000 at [263] (**RLA-039**).

short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[763] Although a number of subsequent arbitral decisions have acknowledged that with the passage of time the standard has likely advanced beyond these basic requirements,[764] tribunals have continued to employ descriptions which emphasise the high threshold for breach. As was noted by the tribunal in *Glamis Gold* (which invoked *Neer*), the customary international law minimum standard of treatment sets only a ***minimum*** standard: "*It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community*".[765] Customary international law applies to all States and across the whole spectrum of international circumstances: the minimum standard of treatment must be understood in this context only as the conduct expected of all States as a bare, invariable minimum.

384. Breach of the minimum standard of treatment thus requires more than a minor derogation from the ideal standard of perfectly fair and equitable treatment. The Claimant, for instance, has cited the description of the minimum standard from *Waste Management II*, endorsing its description of the relevant standard.[766] In that case, the minimum standard was said to require "*arbitrary, grossly unfair, unjust or idiosyncratic*" conduct by a State party, or a "*complete lack of transparency and candour*", or "*a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings*".[767] As other tribunals have noted, adjectives such as "*gross*" and "*manifest*" indicate the acknowledged stringency of the standard.[768]

385. Other Tribunals have confirmed a similar standard. In *International Thunderbird*, for instance, it was said that:[769]

> *Notwithstanding the evolution of customary law* […] *the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence* […] *For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of*

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[763] *L F H Neer and Pauline Neer v United Mexican States*, 4 Reports of International Arbitral Awards (15 October 1926) at 61–62.

[764] See Claimant's Reply, fn 291, in which the Claimant references the *Mondev* and *ADF* tribunals' support for the argument that the minimum standard is no longer "*confined to the outrageous treatment referred to in the Neer case*": *Waste Management, Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3), Award, 30 April 2004 at [93] (**CLA-022**).

[765] **RLA-021** at [615]. The tribunal discussed *Neer*'s relevance at different points in its award: see [21]–[22] and [60ff].

[766] See Claimant's Memorial at [202]–[204]; Claimant's Reply Memorial at [175]; Claimant's Pre-Hearing Skeleton at [50].

[767] **CLA-022** at [98].

[768] See **R-021** at [617].

[769] Cited in Oman's Counter-Memorial at [370] (emphasis added).

treatment […] *as those that, weighed against the given factual context, amount to a* ***gross denial of justice or manifest arbitrariness falling below acceptable standards****.*

386. The Tribunal does not accept the Claimant's contention,[770] citing *Tecmed v Mexico*, that the standard will be breached merely if a State fails to act "*in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor*".[771] That standard may be consistent with an "*autonomous*" treaty standard for fair and equitable treatment, which was the relevant standard before the Tribunal in *Tecmed*.[772] The minimum standard of treatment in customary international law, to which Article 10.5 is expressly linked by virtue of Article 10.5.2, as well as Annex 10-A, imposes a higher threshold for breach.[773] The language of Article 10.5.2 makes it very clear that the State Parties intended to impose only the minimum standard of treatment under customary international law. Whether other treaties impose a different standard of requisite treatment is not the concern of the present Tribunal. The same logic applies to the Claimant's reliance on the *MTD v Chile* and *Metalclad* decisions.[774]

387. Moreover, as already noted, the US–Oman FTA places a high premium on environmental protection.[775] It is uncontroversial that general principles of customary international law must be applied in the context of the express provisions of the Treaty. In the present case, Article 10.10 expressly qualifies the construction of the other provisions of Chapter 10, including Article 10.5. The wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is "*undertaken in a manner sensitive to*

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[770] See eg Claimant's Memorial at [201].

[771] *Tecnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2), Award, 29 May 2003 at [154] (**CLA-021**).

[772] **CLA-021** at [152] and [155] ("*the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described* [...] *is that resulting from an autonomous interpretation* […]").

[773] See eg **RLA-021** and *Cargill v Mexico* (cited by US Submission at [6]). To the extent necessary, the Tribunal disagrees with the finding of the Tribunal in *Biwater Gauff* that the autonomous fair and equitable ("**FET**") standard and the minimum standard of treatment are "*not materially different*": **RLA-004** at [592], [602].

[774] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No ARB/01/7), Award, 25 May 2004 (**CLA-023**); Metalclad Corporation v United Mexican States (ICSID Case No ARB(AF)/97/1), Award, 30 August 2000 (**CLA-018**). The latter award predated the NAFTA Free Trade Commission's 31 July 2001 Note of Interpretation, which clarified that NAFTA's minimum standard of treatment provision applied the customary international law standard. As already discussed, Art 10.5 of the US–Oman FTA applicable in the instant case expressly incorporates the customary international law standard.

[775] See Respondent's Post-Hearing Answers at 54 ("*In entering into the FTA Oman emphasized the importance of environmental protection, providing in Chapter 17 (Environment) that each State Party should "encourage high levels of environmental protection" within their respective territories. In so doing, the US and Oman are among the very few countries that have declared in a very concrete way their intention to balance the protections afforded to investors with the rights of States (here Oman and the US) to enact regulations protecting the environment*") (citation omitted).

environmental concerns", provided it is not otherwise inconsistent with the express provisions of Chapter 10.

388. Moreover, Chapter 17 of the US–Oman FTA entitled "*Environment*", although it does not fall directly within the Tribunal's jurisdiction, provides further relevant context in which the provisions of Chapter 10 must be interpreted.[776] Article 17.2.1, for instance, records the Parties' understanding that:

> *(a) Neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.*
>
> *(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.*

389. The very existence of Chapter 17 exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws. It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws – indeed, Article 17.2.1 compels each State to ensure the effective enforcement of environmental laws.[777] Article 17.2.1(b), moreover, acknowledges that environmental law enforcement is not inherently consistent in its application.[778] The Tribunal in *SD Myers v Canada* acknowledged that tribunals "*do not have an open-ended mandate to second-guess government*

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[776] Both parties agreed that Chapter 17 provided relevant interpretive context for the Tribunal in considering and applying the provisions of Chapter 10: see Claimant's Post-Hearing Answers at 67, Respondent's Post-Hearing Answers at 54–55. Their view is consistent with Art 10.21, "*Governing Law*", which states in relevant part that: "*the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*". Thus, while the Tribunal's jurisdiction is limited to determining an alleged breach of those obligations specified in Art 10.15, "*Submission of a Claim to Arbitration*", and no other provisions of the Agreement, the Tribunal must, in interpreting and applying the provisions of Chapter 10, read them in the context and purpose of the Agreement as a whole (cf **CLA-001**, Art 31).

[777] See also the Preamble to the US–Oman FTA, which includes as one of the Treaty's objectives the desire to "*strengthen the development and enforcement of environmental laws and policies, promote sustainable development, and implement this Agreement in a manner consistent with the objectives of environmental protection and conservation*": a further clear indication by the State parties that the Treaty is to be interpreted to give effect to the objectives of environmental protection and conservation.

[778] It will be clear that this issue is also of relevant to the Claimant's national treatment claim, considered further below.

decision-making",[779] and this must particularly be the case in light of the express terms of the present Treaty relating to environmental enforcement. When it comes to determining any breach of the minimum standard of treatment under Article 10.5, the Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty.

390. In the Tribunal's view, therefore, 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.

Proportionality and the minimum standard

391. The Claimant has argued that the minimum standard of treatment under customary international law must be understood to include a standalone requirement of proportionality of State conduct.[780] The Respondent has submitted that the Claimant has failed to demonstrate as a matter of fact that the doctrine of proportionality has become an element of the minimum standard of treatment under customary international law.[781] This topic was also addressed by the non-disputing State party submission filed by the United States Government.[782]

392. The question of the proportionality of the Respondent's conduct has been raised by the Claimant in two contexts: (a) the proportionality of OMCO's termination of the OMCO–Emrock Lease Agreement; and (b) the proportionality of the conduct of the Royal Oman Police (and/or other State organs) in arresting and prosecuting Mr Al Tamimi for alleged violations of Oman's environmental laws. It will be recalled, however, that the Tribunal has found that: (a) OMCO's decision to terminate the OMCO–Emrock Lease Agreement is not attributable to the Respondent; and (b) the conduct of the Royal

[779] **RLA-039** at [261].

[780] See Claimant's Reply at [174]; Claimant's Post-Hearing Answers, Answer B.1.

[781] See Oman's Rejoinder at [159]–[160].

[782] See US Submission at [9].

Oman Police (or other State organs) at the time of Mr Al Tamimi's arrest cannot have affected the Claimant's investment at Jebel Wasa, the investment by that time having ceased to exist.

393. Accordingly, this is not the appropriate case for discussion of the concept of proportionality as a standalone criterion under the minimum standard of treatment. That question is better left for a case in which the issue of proportionality actually arises for determination on the facts.

(ii) Alleged breach of the minimum standard

394. The Claimant has based his case for alleged breach(es) of the minimum standard of treatment on a variety of actions and events occurring between 2006 and 2009 (the Claimant, however, recognises that only measures taken or continued by Oman in 2009 can be directly relevant to his claim[783]). For clarity's sake, the Tribunal considers that the Claimant's submissions can be effectively understood as alleging three series of measures undertaken by the Respondent:[784]

a. Oman's allegedly inconsistent, non-transparent and unfair conduct through its various regulatory agencies and instrumentalities – including but not limited to MECA, MOCI and OMCO – which began in 2006/2007 through the provision of multiple "*conflicting coordinates*" for the Claimant's worksite, and which continued and intensified in 2009, with the effect of impeding the operation and development of the Jebel Wasa quarry (the "**conflicting coordinates claim**");

b. Oman's allegedly disproportionate and unfair conduct in 2009 through OMCO and other regulatory agencies and instrumentalities – including MECA and the Royal Oman Police – in forcing the Jebel Wasa quarry to cease operations entirely, including the arrest, detention and subsequent prosecution of Mr Al Tamimi, the undertaking allegedly extracted from Mr Al Tamimi not to continue work at the Jebel Wasa quarry, and the alleged harassment of Emrock's staff and their quarry site operations by the Royal Oman Police (the "**State harassment claim**"); and

c. Oman's alleged failure to provide full protection and security at the Jebel Wasa quarry site, with the effect that much of the quarry infrastructure and equipment was allegedly vandalised, looted and destroyed, including Emrock's buildings, business records and a valuable scale bridge[785] (the "**quarry vandalism claim**").

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[783] See eg Claimant's Memorial at [7], [208].

[784] See eg Claimant's Memorial at [197]–[198], [207]; Claimant's Reply at [150]–[156].

[785] See Claimant's Reply at [155].

395. It bears repeating that the US–Oman FTA does not apply with retroactive effect.[786] Measures taken by Oman prior to 2009, whether constituting a breach of the minimum standard or not, cannot be the subject of the Tribunal's consideration. Article 13 of the ILC Articles on State Responsibility confirms that an act of State will not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.[787] The Claimant has acknowledged that "*[w]hile Oman and its instrumentalities engaged in conduct prior to January 1, 2009 that was at times similar to that described in category one, that prior conduct (while undoubtedly a breach of Omani law) is not challenged as a breach of the FTA, which was not in force prior to that date*".[788]

396. On the other hand, it is clear from the language of Article 10.1 that the Chapter 10 protections can apply in respect of measures ***maintained*** by Oman after 1 January 2009. Thus the fact that a course of conduct began prior to the entry into force of the FTA will not in itself preclude State responsibility under Chapter 10, provided the measure was maintained by the State after that date. Thus the Claimant has alleged that Oman's actions during 2006–2008 formed "*part of a course of conduct*" that continued into 2009.[789] For this reason, the Tribunal begins below with an inspection of events occurring prior to 2009, in order to ascertain the nature of the State conduct which the Claimant alleges continued after the entry into force of the US–Oman FTA on 1 January 2009.

1. Conflicting coordinates claim

Conflicting advice given: 2006–2007

397. The Tribunal accepts that as early at 2006, when Mr Al Tamimi (through OMCO) first submitted an EIA to MECA, inconsistencies arose between the advice given by Oman's State organs as to the scope and location of the quarrying work permitted: "*multiple conflicting coordinates*", as the Claimant has described them.[790] It is clear that this ongoing inconsistency as to the permissible scope of work must have left the Claimant and his companies in some considerable confusion as to the boundaries of what was allowed. For instance:

a. The Lease Agreements signed between OMCO (although it bears repeating that OMCO's conduct is not attributable to the State) and Emrock and SFOH in April/May 2006 conveyed a total concession area to the Claimant's companies of six square

[786] See [283] above.

[787] **CLA-005**, Art 13.

[788] Claimant's Memorial at [208].

[789] Claimant's Memorial at [7].

[790] Claimant's Pre-Hearing Skeleton at [3].

kilometres (two square kilometres to Emrock and four square kilometres to SFOH[791]), although a site plan attached, contemporaneously or subsequently, to the two Lease Agreements gave the impression that the total concession area constituted approximately 20 km^2.[792] It appears that this larger 20 km^2 area was the total concession area which had earlier been requested from MOCI by OMCO.[793] Although the Claimant has claimed that the parties had agreed that "*Emrock and SFOH were not confined to any particular area within the concession area*",[794] the Claimant has also indicated that he understood that his total quarry area was limited to 6 km^2: "*it was Mr Al Tamimi's understanding that he now had rights to operate a quarry covering an area of six square kilometers within the approximately 20km^2 territory that had been represented to him as OMCO's concession*".[795]

b. On 3 March 2007, Mr H E Al Maharrami, Director-General of Environmental Affairs at MECA, advised MOCI that MECA would authorise the quarry project in a "*total area exploited for the mining operation* [that] *does not exceed 2 km x 2 km*".[796] The Ministry did not specify where this approved 4 km^2 area would be located, but invited OMCO to contact the Ministry to supply coordinates.[797]

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[791] There has been some controversy around which company was intended to receive which parcel of land: see eg Respondent's Post-Hearing Answers at 1–6. For present purposes, and because it ultimately makes no difference to the Tribunal's findings, the Tribunal is content to accept the language of the two Lease Agreements at face value: see **Exhibit J-048**, Art 2; **Exhibit J-058**, Art 2.

[792] **Exhibit J-048**.

[793] **Exhibit J-035**.

[794] Claimant's Pre-Hearing Skeleton at [15].

[795] Claimant's Memorial at [51]. See also Claimant's Post-Hearing Answers at 1 ("*Mr Al Tamimi was entitled to quarry up to 6km^2 anywhere within OMCO's concession area*") and 7 ("*[t]he mining/quarrying area set out in the Emrock and SFOH Lease Agreements was OMCO's entire concession area*"). The Claimant's contention that he was entitled to mine anywhere inside OMCO's concession requires disregard of the "*blocks*" delineated in the Site Plan attached to the OMCO–Emrock and OMCO–SFOH Lease Agreements, which the Claimant has described as merely "*vestigial*": Claimant's Post-Hearing Answers at 2. The Tribunal is not persuaded that these demarcated blocks were entirely without significance. The Respondent's contention that Emrock's 4 km^2 quarry area was meant to correspond to the block labelled "Jebel Wasa-3" is certainly plausible: Respondent's Post-Hearing Answers at 1, 4–9. But given the ambiguity surrounding this issue, including whether the Site Plans were even attached to the Lease Agreements (Mr Al Waily, for instance, in his first Witness Statement stated that the Lease Agreements "*did not list specific coordinates delineating either OMCO's concession or the permitted lease areas in the Lease Agreements*": First Al Waily Witness Statement at [24]; see also Transcript, Day 4 at 186:11–16 (Al Waily)), the Tribunal does not place significant weight on the demarcation of these blocks in the Site Plans.

[796] **Exhibit J-089**.The total area authorised by MECA was clear: the Tribunal rejects the Claimant's submission that "*[b]ecause the Ministry approved the* [AEP] *without noting any need for modification, the entire concession area was approved*" or that the "*entire 14.7km^2 area must be regarded as an additional area approved by the Environmental Ministry*": Claimant's Post-Hearing Answers at 19, 28.

[797] Earlier, it seems, in response to a 2005 request from the Ministry of Commerce for environmental approval of the proposed Jebel Wasa quarry, the Ministry of Environment had indicated it would approve a quarry of only 500 m x

c. On 5 March 2007, MOH issued a usufruct contract to OMCO, granting it the right to establish a quarry within a 14.7 km^2 area. This area was defined in the site plan or plat (known locally as a "*krooki*") attached to the contract.[798] This 14.7 km^2 area represented a significant reduction from the previous 20 km^2 concession area which OMCO had sought.[799] This 14.7 km^2 land area was also the basis on which the municipality of Mahda (the region in which the Jebel Wasa site is located) subsequently recorded its approval.[800] Both the Claimant and OMCO accepted this change.[801]

d. On 24 April 2007, MECA granted OMCO an initial environmental approval, based on the AEP and EIA previously submitted by OMCO/Emrock, for a limestone quarry covering a designated area of apparently around 2.25 km^2 in total.[802] That area was clearly much smaller than the total 6 km^2 area that had been the subject of the OMCO–Emrock and OMCO–SFOH Lease Agreements. It was also only a small portion of the total revised concession area of 14.7 km^2 granted to OMCO under the *krooki*, although the area subject to the initial environmental approval does appear to have fitted within MOH's 14.7 km^2 concession area as plotted in the *krooki*. When the initial environmental approval was subsequently renewed by MECA on 15 July 2008, the coordinates remained the same.[803]

500m: see Letter from MRMEWR to Mr Al Azri, dated 8 March 2006 (**Exhibit J-044**). This discussion, however, was not disclosed to the Claimant: Claimant's Memorial at [43].

798 Template Contract for Concession "Usufruct" of State-Owned Land between Oman and OMCO (**Exhibit J-090**).

799 See **Exhibit J-054**.

800 **Exhibit J-100**.

801 See Claimant's Pre-Hearing Skeleton at [16]; Claimant's Post-Hearing Answers at 8–9 ("*Mr Al Tamimi understood the reduction had been made to accommodate local tribal leaders but that it would not interfere with his quarrying operations*"). On 15 March 2008, MOH issued a second *krooki* which appears again to have shifted the coordinates of the concession somewhat, although retaining the 14.7km^2 land area: Ministry of Housing Site Plan, signed 15 March 2008 (**Exhibit J-164**). It does not appear to the Tribunal that the 2008 amendment of the *krooki* had any practical effect on the parties' rights.

802 **Exhibit J-095**; **Claimant's Map 8**. The Claimant has suggested that the "*coordinates*" listed in the initial environmental approval did not sufficiently identify whether they defined the area approved for mining/quarrying: Claimant's Post-Hearing Answers at 28. The Tribunal does not accept this argument. It is clear that the coordinates were intended to identify the relevant permitted area. The Claimant's recognition that the coordinates "*remained the same*" in MECA's renewal of the permit on 15 July 2008 seems implicitly to acknowledge that these coordinates were in fact controlling: see Claimant's Post-Hearing Answers at 34. The fact that these coordinates did not precisely overlap with the parties' intended site for the quarry (eg the "*Jebel Wasa-3*" block set out in the parties' earlier Site Plan) may well be explained by the fact that no site plan appears to have been submitted to MECA along with the Claimant's AEP: see Respondent's Post-Hearing Answers at 11–12.

803 Initial Environmental Approval: First Extension, Project No 9353, issued 15 July 2008 (**Exhibit J-196**); Claimant's Post-Hearing Answers at 34.

e. On 31 May 2007, OMCO provided Mr Al Tamimi with a Quarry Agreement issued by MOCI "*related to the area where you are working at Jebel Wasa*", which authorised the establishment of a quarry "*which surface area is 4 square kilometres*".[804] At the same time MOCI issued to OMCO a "*Certificate of Quarry Operation*",[805] sometimes referred to as a quarry license, granting OMCO permission to quarry in an area defined by a set of coordinates which did not correspond to the approximately 2.25 km^2 area demarcated in MECA's initial environmental approval.[806] The Certificate of Quarry Operation coordinates also did not correspond precisely to the total 6 km^2 area that had been the subject of the OMCO–Emrock and OMCO–SFOH Lease Agreements. Once again, the area authorised by the Certificate of Quarry Operation was only a small portion of the total revised concession area of 14.7 km^2 granted by MOH to OMCO under the *krooki*, although again the area does appear to have fitted within the 14.7 km^2 concession area plotted in the *krooki*.[807]

f. As the Claimant has observed, it is clear that the area of overlap between the area defined by MOCI's Certificate of Quarry Operation and the area as defend by MECA's initial environmental approval is very small: approximately 1.63 km^2.[808]

g. Thus by mid-2007, a substantial degree of inconsistency had arisen between:

   i. The area of 14.7 km^2 granted to OMCO by MOH under the *krooki*;

   ii. The area of 6 km^2 granted by OMCO to Emrock and SFOH under the terms of their respective Lease Agreements;

   iii. The area of approximately 2.25 km^2 authorised for quarrying by MECA in its initial (and renewed) environmental approval;

   iv. The area of 4 km^2 authorised by MOCI in its Certificate of Quarry Operation.

398. The Tribunal finds, on the basis of this evidence, that there is substance in the Claimant's submission that during 2006–2007 the relevant Omani authorities had seemingly proceeded "*along parallel*

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[804] **Exhibit J-103**.

[805] **Exhibit J-103**.

[806] The Quarry License appears to have expired in May 2008 (see **Exhibit J-103**), but none of the parties seem to have noticed or done anything to address this situation: see Oman's Post-Hearing Answers at 31.

[807] See **Claimant's Map 9**. MOCI subsequently insisted that its coordinates were the ones to be relied upon, and not those of any other agency such as MOH's *krooki*: **Exhibit J-128**.

[808] Claimant's Memorial at [67].

tracks, without proper coherence or coordination among government agencies and instrumentalities, and without clear and proper communication to Mr Al Tamimi".[809] As the Claimant has submitted, Oman appears never to have given a clear explanation to Mr Al Tamimi of where the correct boundaries for the quarry site lay and why that location had been chosen.[810]

399. The standard of consistency and transparency provided to the Claimant by the Respondent as to the permitted scope and location of the quarry project thus certainly left something to be desired.[811] But the Tribunal is not persuaded that this conduct reaches the level of "*manifest arbitrariness*" or "*complete lack of transparency and candour*" required for a breach of the minimum standard of treatment.[812] There is no evidence – aside from the Claimant's repeated assertion that the Respondent was operating under "*pretext*" – that MECA or MOCI acted in bad faith. It appears to the Tribunal that the Respondent's regulatory failures in this respect arose through mismanagement rather than malice.

400. In any event, the primary problem is that the above-listed actions occurred prior to 1 January 2009, and thus are not directly the subject of the Tribunal's inquiry. These events could only be relevant if the Tribunal accepts the Claimant's contention that this prevailing climate of regulatory confusion was "*maintain[ed]*" after 1 January 2009, in that this confusion led to the series of complaints, citations and fines raised against Mr Al Tamimi and Emrock prior to and during 2009, and, perhaps, to OMCO's ultimate decision to terminate the OMCO–Emrock Lease Agreement because of Emrock's failure to reimburse the fines which had been imposed upon OMCO by MECA.

401. The Tribunal finds, however, that none of the relevant events taking place after the entry into force of the US–Oman FTA on 1 January 2009 – in particular, (a) the February 2009 citations and fines imposed by MECA; and (b) the overall state of affairs which prompted OMCO to terminate the OMCO–Emrock Lease Agreement on 17 February 2009 – are, when examined closely, causatively connected with the inconsistency in the advice given by the various Omani ministries in 2006–2007 listed above.[813] In other words, even if the Tribunal accepted *arguendo* that the inconsistent

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[809] Claimant's Memorial at [68].

[810] Claimant's Pre-Hearing Skeleton at [12].

[811] There also appears to have been a degree of confusion about the renewal of the initial environmental permit: although the permit was renewed on 15 July 2008, on 11 October 2008 MECA issued an infraction report citing, *inter alia*, OMCO's failure to renew the preliminary approval or apply for a final approval. Again, a degree of inconsistency in State conduct is evident. The renewal dispute, however, took place in 2008, and there is no evidence that it continued after the entry into force of the US–Oman FTA on 1 January 2009.

[812] **CLA-022** at [98].

[813] Because the Claimant has framed a separate claim for breach of the minimum standard in respect of the actions of the Respondent following the termination of the OMCO–Emrock Lease Agreement (eg his arrest and prosecution), those alleged breaches will be treated separately below: see Claimant's Memorial at [197]–[198]. For now, it suffices

instructions given by the Respondent's various ministries during 2006–2007 might have constituted a breach of the minimum standard, that breach was not the reason for the damage suffered by the Claimant's investment after the FTA came into force in 2009.

402. Rather, the Tribunal finds that the series of events which occurred in 2009 and caused damage to the Claimant's investment – including, of course, the termination of the OMCO–Emrock Lease Agreement discussed in the context of the expropriation claim above – came about largely as the result of the Claimant's own wilful refusal to comply with the clear and consistent instructions given to him by OMCO and by Oman's ministries from 2007 onwards. Most significantly, the evidence shows that the Claimant interpreted his permitting arrangements as allowing him to do something he was very clearly not permitted to do: process alluvial material from the *wadi* riverbed to the west of the Jebel Wasa mountain ridge that formed the basis of his permitted quarry site.

Dispute arises: 2007–2008

403. In his Memorial, the Claimant acknowledged that he was "*aware* [at the time] *of some of the site coordinate discrepancies between different agencies*", but claimed that "*[h]is understanding, based on the Lease Agreements from April and May 2006, was that he was permitted to operate in a six square kilometre area within the larger OMCO concession area described in the site plan attached to each of the Lease Agreements*".[814] It was on this basis that the Claimant began operations at the Jebel Wasa quarry site in September 2007. Yet the Claimant must have been aware from the beginning that the regulatory approvals provided by MECA and MOCI expressly did not permit this. The approvals from those respective ministries could not simply be ignored in favour of what Mr Al Tamimi considered to be his contractual entitlement under his Lease Agreements with OMCO.[815] As the Respondent has submitted, "*[t]he area that OMCO leased to Emrock was not* […] *the area that Emrock would necessarily have the* ***right*** *to mine* […] *the actual mining site would depend on the approvals and licenses if any later granted by the responsible ministries of the Omani government*".[816]

404. If the regulatory approval the Claimant had obtained did not match what had been promised to him under the Lease Agreements with OMCO, then that was a contractual matter to be addressed with

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to observe that the same issue of causation arises – the evidence does not disclose that the Respondent's actions caused Mr Al Tamimi any identifiable loss.

[814] Claimant's Memorial at [68].

[815] Mr Al Tamimi's evidence makes clear that he understood the need to obtain the requisite environmental approvals/permits for the conduct of operations at Jebel Wasa: see First Al Tamimi Witness Statement at [52], [60], [114]. Indeed, under cross-examination Mr Al Tamimi acknowledged that his rights under the Lease Agreements were to be "*co-extensive with the approvals that had then been granted both by the Ministry of the Environment and the Ministry of Commerce*": Transcript, Day 2 at 80:12–17 (Al Tamimi).

[816] Oman's Post-Hearing Answers at 3 (original emphasis).

OMCO.[817] Indeed, the evidence shows that Mr Al Tamimi met with OMCO representatives in February 2008 for that exact purpose. Following that meeting, which Mr Al Tamimi himself described as "*heated*",[818] OMCO wrote to MOCI on 17 February 2008, requesting an expansion of the permitted area.[819] OMCO wrote to MOCI again on 3 May 2008, noting that Emrock had routinely "*exceeded the permitted area*" in a "*volume of trespassing*" attracting "*remarks and warnings* […] *from several authorities*" and again requesting an expansion of the permitted area.[820] Mr Al Tamimi himself has described this application for additional permits as permits "*to cover the areas where we are operating, and to cover our wadi operations*" – thereby acknowledging that he understood that operating where he did, particularly in the *wadi* zone, was not covered by his existing permits.[821]

405. Such an expansion of the permitted area was never granted. Although MOCI proposed an alternative set of coordinates to "*reduc[e] the complaints*", no such expansion was ever ratified, nor approved by MECA.[822] The fact that no extensions of the permitted area were ever granted did not entitle Mr Al Tamimi to proceed on the basis that they had been granted.[823] Mr Al Tamimi must have known that if he proceeded to work so far outside the limits of the regulatory approval actually granted to him – notwithstanding that they may have conflicted with the terms of his contracts with OMCO – then he ran the risk of being found in regulatory breach.

406. The first complaint against Emrock's activities in the Jebel Wasa, for instance, occurred in August 2007, before OMCO's declaration by letter of 22 August 2007 that the project could begin on 1 September 2007 had even come into effect.[824] Indeed, the very letter of 22 August 2007 from OMCO authorising commencement of operations warned Mr Al Tamimi that Emrock was permitted by the

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[817] For instance, the Claimant has suggested that OMCO breached its contractual obligation under Art 4(i) to contribute the "*unrestricted*" use of its concession: Claimant's Post-Hearing Answers at 7. That is not a matter on which this Tribunal can rule, although the Tribunal observes that the Lease Agreements also recognise that the Claimant's right to mine would depend upon obtaining approvals and licenses from the relevant authorities of the Omani government: **Exhibit J-048**, Arts 4(ii), 5(ii). See also Transcript, Day 2 at 80:12–17 (Al Tamimi) ("*Q. Will you agree, Mr Tamimi, that your rights, commencing as of September 1st, 2007, were to be co-extensive with the approvals that had then been granted both by the Ministry of the Environment and the Ministry of Commerce? A. The answer is yes*").

[818] First Al Tamimi Witness Statement at [119].

[819] Letter from Mr Al Waily to MOCI, dated 17 February 2008 (**Exhibit J-156)**.

[820] Letter from Mr Al Waily to MOCI, dated 3 May 2008 (**Exhibit J-178**).

[821] First Al Tamimi Witness Statement at [119].

[822] Letter from MOCI to Mr Al Waily, dated 13 May 2008 (**Exhibit J-179**). There is no suggestion or evidence that, as a matter of Omani law, the Respondent was obliged to issue any such permit upon request.

[823] This point was firmly explained to Mr Al Tamimi in a letter from OMCO dated 22 April 2008: **Exhibit J-171** ("*It has been repeatedly explained to you that the utilization of this wadi material is not permitted by the pertinent Omani authorities, including the Ministries of Environment, Commerce & Industry, and Housing. This notwithstanding our application for operating permits in order to process the wadi materials, which have not been responded by the Ministry of Commerce & Industry*").

[824] **Exhibit J-108**.

terms of the OMCO–Emrock Lease Agreement, as well as the "*environmental and operating permits issued by the relevant authorities in the Sultanate of Oman*", to mine only "*strata seams and beds of* ***limestone***", and that the mining concessions were to be used "*for the exploitation of limestone rock products only*".[825]

407. Yet almost immediately, on 28 August 2007, OMCO again wrote to Mr Al Tamimi to say that it had been brought to OMCO's attention, and indeed confirmed by Mr Al Tamimi in a meeting of 23 August 2007, that Emrock was already "*processing material originating in alluvial deposits located in the area's streams*" – material that did not come from the primary limestone deposits contained in the Jebel Wasa seams and beds, but from the nearby *wadi* riverbed.[826] OMCO observed that this action was in "*clear violation*" of the terms and conditions of the environmental permits as well as the OMCO–Emrock Lease Agreement, and warned that persistence in processing alluvial stream materials would render Emrock liable for "*fines and penalties that the governing authorities may impose on OMCO for such violations of the indicated environmental permits*" as well as giving OMCO a right to terminate the lease agreement for substantial breach.[827]

408. The evidence shows that the Claimant understood these circumstances very well. On 1 May 2008, in a letter to Mr Gupta headed "*STOP WADI OPERATION*", Mr Al Tamimi wrote that:[828]

> *Please be advised that we received a notice from Oman Mining Company to stop Wadi Operation and not to remov[e] any material outside the concession area that permitted* [sic] *and you must provide the exact location for the crusher operation. For crushing and screening material that produce from the mountain area* [sic].
>
> *In addition, you must remove all the equipment from the wadi area within the next 48 hours.*

409. The references to Emrock's "*Wadi Operation*", concerning the removal of material from "*outside the concession area*", shows just how well the Claimant understood that his activities were unauthorised. The Tribunal therefore finds unconvincing the distinction now drawn by the Claimant between the

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[825] **Exhibit J-108** (original emphasis). The Claimant's submission that OMCO's letter of 22 August 2007, announcing that Emrock could begin operations at the quarry site, led him to believe that he had all the necessary permits for his operations, wherever they might take place, is therefore unavailing: see Claimant's Reply at [65], [186].

[826] **Exhibit J-110**.

[827] **Exhibit J-110**.

[828] **Exhibit J-177**. See also the letter from Mr Al Tamimi to Mr Al Waily of OMCO dated 27 April 2008, in which Mr Al Tamimi acknowledged that he had ordered "***the stop of our wadi production***" while "*waiting for the decision of the Ministry Authority for the request of the extension/permitting that has been filed by Mr Ali Al Waily*": **Exhibit J-175** (emphasis original).

"*Wadi Sumayni*" and the *"Sayh Sumayni*".[829] It is clear from the evidence that the Claimant knew at the time that any activity in the plain to the west of the Jebel Wasa mountain area, off the Jebel escarpment, was unauthorised by the terms of his permits.[830] The Claimant was told on many occasions that he was not permitted under the terms of his approvals to process alluvial *wadi* material from anywhere outside his permitted quarry site.[831]

410. Similarly, although the Claimant has argued that he believed he had obtained all necessary permits to operate crushers and screens at Jebel Wasa,[832] it is again clear that what Mr Al Tamimi had no authority to do was operate crushers or screens – or indeed equipment or any nature – to process alluvial material in the *wadi* plain. This was the source of the Omani ministries' concerns, not the Claimant's operation of crushers generally.[833]

411. The Claimant has also attempted to place responsibility for any breaches on OMCO, arguing: (a) that it was OMCO's responsibility under the Lease Agreements to obtain all relevant approvals and permits; and (b) that OMCO failed properly to advise the Claimant as to his relevant obligations under Omani environmental law.[834] The first issue, a question of compliance with a private contractual obligation, again falls under the jurisdiction of the local Omani Arbitration Centre as a dispute going to an "*aspect of the contractual relationship*" between OMCO and Emrock.[835] OMCO's failure to obtain the permits sought by the Claimant, however, if indeed there was any such failure, cannot absolve the Claimant of responsibility to operate within the boundaries of the law.[836]

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[829] See Claimant's Reply at [41ff]. The Claimant nevertheless acknowledges that the "*Sayh Sumayni*" he describes comprised a "*plain of limestone-based sand and gravel*", as opposed to the Jebel Wasa limestone deposit "*that was at the core of Claimant's operations*": Claimant's Reply at [47].

[830] Claimant's Reply at [19]–[31]; Second Al Tamimi Witness Statement at [66]–[68].

[831] See [418] below.

[832] See eg Claimant's Post-Hearing Answers at 16–17. The operation of crushers was indeed referred to in the EIA approved by MECA: see GEO-Resources Consultancy, Environmental Impact Assessment V 6, dated 17 September 2006 at 24 ("*The primary and secondary crushers and product stockpiles will be developed at the foot of Jabal Wasa*") (**Exhibit J-074**).

[833] See eg **Exhibit J-257**; Letter from Mr Al Waily to Mr Al Tamimi, dated 7 October 2007 (**Exhibit J-122**); **Exhibit J-138**; MECA Violation Photographs (**Exhibit J-244**); Transcript, Day 4 at 142:13–16 (Al Waily) (the problem with Mr Al Tamimi's operation of a crusher "*wasn't because he* [was] *operating the crusher*", but that he was "*operating the crusher in the wrong place*").

[834] See Claimant's Memorial at [218]–[222]; Claimant's Post-Hearing Answers at 13, 38–41. The Claimant relies in this respect upon the decision in *Biloune and Marine Drive Complex v Ghana Investments Centre and Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989 (**CLA-088**).

[835] **Exhibit J-048**, Art 11.

[836] The Tribunal observes in this respect that under Art 4(ii) OMCO committed only to "*use its best endeavours in obtaining of the necessary environmental and operating permits*" – a guarantee as to process, not outcome: **Exhibit J-048**, Art 4(ii).

412. On the second issue, the claim that OMCO failed to advise the Claimant is simply not sustainable in light of the evidence that the Claimant knew very well that he was not authorised to extract alluvial material from the *wadi* plain.[837] Whatever the regulatory confusion caused by the inconsistent advice of Oman's ministries in 2006–2007, it is clear to the Tribunal that none of the authorisations gave Emrock permission to engage in the mining of alluvial deposits to which OMCO referred in its letter of 28 August 2007. Mr Al Waily had written to Mr Al Tamimi as early as 22 August 2007, eight days before the beginning of operations at Jebel Wasa, to remind him that he was authorised to quarry "*limestone rock products only*".[838] Indeed, although the Claimant has argued that the Lease Agreements did not limit him to a "*hard rock*" quarry,[839] he has also acknowledged that "*the Lease Agreements did not constrain the Ministries, which were not parties to those agreements, when acting in their regulatory capacities*".[840]

413. Furthermore, it cannot be said that the Claimant reasonably relied upon OMCO to obtain whatever permits he desired, when OMCO's obligation under Article 4(ii) of the Lease Agreements to use its best endeavours to obtain the necessary environmental and operating permits was expressly "*based on and subject to the operations plans and environmental management plan prepared by*" the Claimant.[841] The initial environmental approval granted by MECA, for example, expressly stated at Article 1.1 that it was granted on the basis of Emrock's AEP, which "*must be accurate and* [represent] *the project that you will be operating*" and the Ministry must be notified "*of any changes you intend to introduce. This approval shall be null and void in case of failure to obtain the Ministry's prior approval of any changes you make*".[842] When one examines the terms of the Claimant's AEP, as well as the scope of the Claimant's EIA,[843] it is clear that the processing of alluvial material was not

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[837] Such a claim is inconsistent, for example, with Mr Al Tamimi's knowledge that OMCO had applied on 17 February 2008 to MOCI for an extension to mine in the *wadi*, because Emrock lacked an existing right to do so: see **Exhibit J-156**; **Exhibit J-178**; First Al Tamimi Witness Statement at [119].

[838] **Exhibit J-108**; **Exhibit J-109**.

[839] See Claimant's Post-Hearing Answers at 12.

[840] Claimant's Post-Hearing Answers at 15. For that reason, it makes no sense for the Claimant to say that "*Mr Al Tamimi was authorized to excavate sand and gravel pursuant to the Lease Agreements and the EIA*", as those documents were not regulatory authorisations: see Claimant's Post-Hearing Answers at 37.

[841] **Exhibit J-048**, Art 4(ii).

[842] **Exhibit J-095**. The Claimant has acknowledged that MECA's environmental approval was based on the project as described in the AEP and EIA: see Claimant's Post-Hearing Answers at 2, 21 ("*the scope of proposed operations and lease concession area were detailed in the EIA (J-74)*").

[843] There is some confusion as to which version of the EIA prepared by the Claimant's consultants GEO-Resources was actually submitted to the Ministry of Environment. Even at the end of the hearing, it remained an open question which version of the EIA was actually submitted. While Mr Al Tamimi took the position that Version 6 had been submitted by him to OMCO personally (see Transcript, Day 2 at 55:16–23 (Al Tamimi)), the Respondent submitted that there is "*no hard and fast evidence*" of what OMCO or Emrock actually submitted to the Ministry of Environment: see Respondent's Post-Hearing Answers at 14. What is clear is that the final version, Version 7, was never submitted to MECA, because according to Mr Van der Wiele of GEO-Resources the seventh and final version was "*waiting in* [Geo-Resource's] *office for collection and for submission*" but was never picked up by any Emrock

an activity for which the Claimant had sought approval from MECA. Rather, the only activity for which approval was sought – and correspondingly granted – was the operation of a hard rock quarry using open-face mining techniques to drill and blast limestone.[844]

414. Additionally, in terms of the project's location, the Claimant's AEP and EIA make it clear that quarrying activities would occur on the "*jebel escarpment and adjacent Salalah plains area* […] *No area of the quarry will be visible from plains area due to the quarry being located behind the jebel front*".[845] The area of operation was described in the AEP as "*a quarry area of up to 75 Ha of principally denuded steep jebel slope*".[846] These documents disclose no intention by the Claimant – and accordingly no authorisation by the Respondent – to process any *wadi* materials from the alluvial areas west of the Jebel Wasa.[847] The only activity expressly anticipated to take place near the *Wadi Sumayni* – and accordingly permitted by MECA as such – was the construction of a labour camp and quarry access road.[848]

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representative: Transcript, Day 5 at 96:4–21 (Van der Wiele). The Tribunal has proceeded on the basis that Version 6 (**Exhibit J-074**) represents the most likely version on the basis of which MECA assessed the Claimant's application for an environmental permit (see also Transcript, Day 4 at 130:7–131:19 (Al Waily)).

[844] The AEP referred to a single "*open-face quarry*", with a "*shared crusher comprising a single primary crusher and two secondary crushing lines of a nominal 750 tonne per hour capacity*". The subject of the project was described as "*[c]onstruction grade limestone*". The project, it was said, "*will involve the engineering, design, procurement, construction, commissioning and operation of all the elements of a* ***hard rock quarry*** […] *Product will comprise approximately one half run of quarry stone and a quarter each of armour stone and crushed aggregate of a total of 15.0 mpta capacity* […] ***Open-face mining techniques*** *are proposed to be adopted to obtain limestone* […]". There followed a detailed description of the technique for quarrying the limestone materials: "*Quarry stone will be fractured by drill and blast and as required mechanically broken using drill pneumatic chisel. There may be an option of adopting alternative blasting techniques to maintain the gradation of crusher feed, should market requirements dictate*" (**Exhibit J-077**) (emphasis added).

[845] **Exhibit J-077** at 9.

[846] **Exhibit J-077** at 3.

[847] Mr Gupta gave evidence that an additional AEP was submitted by OMCO in April 2007, referring to Exhibit J-092. That document, however, similarly provides that the "*subject of this project*" is "*[c]onstruction grade limestone* […] *from the Jebel Wasa*" and that "*[q]uarry stone will be fractured by drill and blast and as required mechanically broken using pneumatic drill chisel*": Application for Environmental Permit, dated 1 April 2007, Sections 1(E) and 2(H) (**Exhibit J-092**).

[848] Thus the only reference to the *wadi* in the AEP comes in the description of "*[c]onstruction of a mine haul road, secondary crusher and camp*", which it was said would "*impact on about 52 Ha of sand and gravel landforms, gravel dominated minor wadi channels and wadi plain*": **Exhibit J-077** at 4. It was further noted that "*[a] camp to accommodate 100 persons will be constructed adjacent to the Wadi Wasa exiting the crusher site*": **Exhibit J-077** at 8. See also **Exhibit J-074** at 2, 12, 20, 24, 41, 45. The EIA made clear that the "*quarry workings and crushing plant will be located behind the jebel front and not be visible*": **Exhibit J-074** at 50. See also the Environmental Management Plan ("**EMP**"), which the Claimant submitted had also been submitted to MECA: Transcript, Day 9 at 50:20–51:2 (Claimant's closing address); Claimant's Post-Hearing Answers at 23. The EMP states that the quarry would consist of "*two open cut quarr[y] faces*" which would be "*worked by open cut using drill and blast techniques followed by pneumatic breaking if necessary*", that operations would occur "*behind the jebel escarpment and adjacent piedmont area*", and that although the "*haul road and camp will be located on the piedmont plain at the channel of the Wadi Wasa* […] *the initial quarry workings and crushing plant will not be visible*": GEO-Resources Consultancy, Environmental Impact Assessment V 2, dated 1 August 2006 at 2, 7 (**Exhibit J-070**).

415. Significantly, Mr Van der Wiele of GEO-Resources, the consulting company who worked with the Claimant to prepare the EIA, gave evidence on behalf of the Respondent that the EIA sought approval only to mine hard rock limestone at Jebel Wasa. The Tribunal has found the evidence of Mr Van der Wiele, as the project's own consulting expert, to be valuable, and thus his evidence is worth quoting at some length:[849]

> *Our understanding, provided by Mr Al Tamimi, was that Emrock (and subsequently Emrock and SFOH) intended to mine construction grade limestone, rock armour and core stone to supply requirements for the Crescent and Palm Islands, which were then being built in the UAE. The proposal was to build and operate a hard-rock quarry and to use road licensed heavy haulage vehicles to truck the rock to the UAE.*
>
> […]
>
> *Mr Al Tamimi never suggested, nor did we understand, that he had the contractual right or even intent to excavate and transport what are referred to as "wadi materials." Wadi materials are distinctly different materials from limestone although they may have had the same genesis. A wadi is a dry watercourse found in valleys or drainage channels. Wadi soils are weathered products of source rock and are generally deeper and support a higher density and range of flora and fauna, often meriting higher levels of environmental protection. Accordingly, had the excavation of sand and gravel from the wadi adjacent to the Jebel Wasa been the subject of the intended Project, then it would have significantly changed our scope of work and we would have made explicit reference to it in the documents we prepared for Mr Al Tamimi.* […] *[W]e did not do so because Mr Al Tamimi expressed an intention only to operate a hard-rock quarry.*
>
> […]
>
> *The clear and obvious implication* [from the EIA as prepared by GEO-Resources] *was that Emrock and SFOH intended to quarry rock which was still in the original geological formation (i.e., the steep jebel), not excavate sand and gravel from a wadi.*
>
> […]

[849] First Van der Wiele Witness Statement at [12]–[13], [15], [25], [33].

[A] contractor seeking to excavate sand and gravel in a wadi and to use an alluvial crusher to do so must obtain the express environmental approvals required for that purpose.

[…]

Indeed, as best I can recall, during our initial site meeting as we walked down the wadi in question, I specifically explained to Mr Al Tamimi that he needed to find a way to access the basin (the part of the quarry where operations would take place) without disrupting the wadi. As part of this discussion, I made clear that wadi areas are protected and that he could not excavate or quarry wadi materials without express permission from the competent authorities. I have no doubt that Mr Al Tamimi understood what I told him, and the advice could not be more clearly stated.

416. In short, it is clear to the Tribunal that the relevant issues which arose between the Claimant and the Omani ministries related not to the precise boundaries of the Claimant's authorised worksite, but to the Claimant's wholesale disregard for the terms of his approvals. Specifically, Mr Al Tamimi proceeded from 2007–2009 to undertake two activities he had never been authorised to do:

    a. operate in the *wadi* area, outside the concession boundaries (as well as all permitted boundaries); and

    b. process *wadi* alluvial materials (sand and gravel) in addition to hard rock limestone.

Consistent regulatory warnings: 2006–2008

417. It was this conflict which continued into 2009, and not, the Tribunal finds, any issue resulting from regulatory uncertainty as to the precise boundaries of the Claimant's concession.[850] There is no

[850] The Tribunal thus finds that the earlier "conflicting coordinates" confusion had no enduring effect after the entry into force of the US–Oman FTA on 1 January 2009. The Tribunal is strengthened in this conclusion by the observation that, in any event, a breach generally cannot be considered "*maintain[ed]*" if only its ***effects*** endure after the entry into force of the relevant Treaty (see eg the Claimant's description of the FET breach in its Post-Hearing Answers that "*the **confusion** remained when the FTA came into force on 1 January 2009, and it certainly had **substantial impacts** after that date*": Claimant's Post-Hearing Answers at 3 (emphasis added). The Crawford Commentary to Art 14 of the ILC Articles supports the view that "*[a]n act does not have a continuing character merely because its effects or consequences extend in time*": **CLA-081** at 60. Similarly, the cases cited by the Claimant make clear that a breach may only be found where the violation itself is of a "*continuing or composite character*" (*Iona Micula et al v Romania* (ICSID Case No ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008 at [157] (**CLA-041**)), or a "*constituting part, concurrent factor or aggravating or mitigating element of conduct*" (**CLA-021** at [68]). In the words of the tribunal in *Mondev International v USA*, "*it must still be possible to point to conduct of the State after that date which is itself a breach*" (*Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2), Award, 11 October 2002 at [70] (**CLA-074**)). Ultimately, however, the Tribunal need not make any

evidence that the Omani authorities took action adverse to the Claimant owing to the confusion between the boundaries of the quarry site authorised by MECA and MOCI. In clear contrast, as the Respondent has submitted, there was no confusion or ambiguity about Mr Al Tamimi's unauthorised excavation of alluvial material from the *wadi*.[851]

418. Indeed, if there was any issue on which the Respondent's ministries were very consistent and very transparent, it was that the Claimant was not permitted to carry out alluvial processing in the *wadi*. Mr Al Tamimi was repeatedly advised, either directly or in face-to-face meetings or through official communications sent to OMCO and forwarded by it to Emrock, that MECA and MOCI both considered that he was not entitled to conduct alluvial processing outside of the area permitted by the Environmental Permit (MECA) and the area permitted by the Certificate of Quarry Operation (MOCI). It suffices to list a brief summary of this evidence for contextual purposes:[852]

- On 22 September 2007, MOCI wrote to OMCO alleging that operations were being conducted "*beyond the borders of the delimited site for operations*".[853]

- On 29 September 2007, Mr Al Waily of OMCO wrote to Mr Al Tamimi to say that pursuant to OMCO's fax of the previous day, the processing of "*material originating in the alluvial deposits located in the area's streams*" was "***in violation of our Lease agreement and the environmental permits***". OMCO noted that Mr Al Tamimi had already been informed twice of this issue and stated that Emrock had until 31 October 2007 to stop its *wadi* operations or OMCO would "*deem the agreements terminated and shall seize the property and its premises through physical occupation*".[854]

- On 7 October 2007, Mr Al Waily forwarded Mr Al Tamimi a letter from MECA, noting that "*[w]e have received a serious complaint from the Environment & Climate Affairs authorities as per copy of letter dated 7th October 2007 attached, which needs to be addressed immediately*". The letter, issued by the Director-General of Environmental Affairs and

definitive determination on this point – any such finding would, strictly speaking, be only an *obiter* finding, and the issue was not thoroughly canvassed by the parties in their submissions.

[851] Oman's Counter-Memorial at [382].

[852] Again, although these pre-2009 citations are not directly at issue under Art 10.5, it is worth bearing in mind the controlling injunction under Art 10.10 of the US–Oman FTA that "*[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*".

[853] **Exhibit J-115**.

[854] **Exhibit J-118** (emphasis added).

Nature Conservation at MECA, notified OMCO that Emrock was using a crusher in the *wadi* without the necessary approvals.[855]

- On 12 November 2007, MOCI wrote to OMCO, in a letter subsequently passed on to Mr Al Tamimi, emphasising that the project should take place within the coordinates issued by the Ministry in its quarrying contract and that the license "*is only for limestone mining*".[856]

- On 28 January 2008, Mr Al Waily forwarded a letter from MECA dated 21 January 2008 and notified Mr Al Tamimi that "*the permit issued* […] *by the Environmental authority and Ministry of Commerce & Industry only cover* [sic] *the Drilling and Blasting of the Limestone within the boundaries of our concession and that* ***no permit has ever been issued for processing wadi material and screening, which is being the case under your current operation*** […] ***screening of wadi material must be stopped henceforth***".[857]

- On 21 April 2008, MOCI wrote to Mr Al Waily noting that after "*repeated visits by the Ministry officials to the site* […] *it was revealed that the company's operations are not confined to the specified sites despite repeated letters addressed to the company to stop operation outside the specified coordinates of the quarry*" and demanded immediate suspension of all operations outside the site specified in the license and payment of a fine of RO 10,000.[858]

- On 22 April 2008, OMCO wrote to Mr Al Tamimi demanding that Emrock cease unauthorised extraction of *wadi* material, noting that "*[w]e have personally verified that you are still carrying out this activity as recently as Saturday 19th April, 2008*" and that "***[i]t has been repeatedly explained to you that the utilization of this wadi material is not permitted*** *by the pertinent Omani authorities, including the Ministries of Environment, Commerce & Industry, and Housing*" [859]

- On 8 October 2008, MOCI issued a further warning to OMCO and Emrock objecting to Emrock's installation of a "*screen for the production of sand and gravel*".[860]

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[855] **Exhibit J-122**.

[856] **Exhibit J-128**.

[857] Letter from Mr Al Waily to Mr Al Tamimi, dated 28 January 2008 (**Exhibit J-148**) (emphasis added).

[858] Letter from MOCI to Mr Al Waily, dated 21 April 2008 (**Exhibit J-170**).

[859] **Exhibit J-171** (emphasis added).

[860] **Exhibit J-216**.

- On 27 October 2008, OMCO sent to Mr Al Tamimi an infraction report issued by MOCI dated 11 October 2008. That infraction report imposed a further fine of RO 1,000 on OMCO owing to Emrock's unauthorised operation of a crusher to excavate sand and gravel.[861]

419. Thus it is clear to the Tribunal that by the time the US–Oman FTA came into effect on 1 January 2009, the enduring dispute between the Claimant and OMCO/MECA/MOCI concerned Emrock's unauthorised mining of alluvial materials on the *wadi* plain adjacent to the Jebel Wasa concession, and did ***not*** arise from any ongoing confusion or inconsistency as to the precise boundaries of Emrock's worksite. Indeed, the evidence shows that on only one occasion did OMCO raise concerns about Emrock's conducting of blasting (ie non-alluvial) operations outside the concession zone.[862] There is no evidence that the earlier confusion between MOCI and MECA as to the boundaries (or overlap of boundaries) controlled by their respective permits was the operative cause of any of the conduct or events which took place in 2009. The real source of the Claimant's continuing problems with OMCO, MECA and MOCI was his unauthorised exploitation of *wadi* materials in an area not permitted by any of the relevant permits. This point was made by Mr Al Waily during his cross-examination: Mr Al Tamimi, he said, was "*mainly focused on the wadi*" rather than on the hard-rock quarrying operation behind the Jebel Wasa.[863]

420. The Claimant's submission that "*the issue in this case is whether Oman's behaviour complied with the requirements of the Free Trade Agreement, not whether Mr Al Tamimi made any mistakes*" and that "*[t]he question of* [his] *full compliance with environmental laws, regulations and permits is not before the Tribunal*"[864] cannot get around the fact that Mr Al Tamimi was largely the author of his own misfortune in respect of the events of 2009 of which he now complains.[865] The Claimant, indeed, made a significant admission on this point in his Pre-Hearing Submission, stating that if the Respondent was concerned he was "*allegedly operating outside the boundary in an uninhabited area*", this could have easily been dealt with simply by "*an additional land purchase, a swap of one parcel of land for another, or, at worst, preventing only the operations that were allegedly out of bounds*".[866]

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[861] Letter from OMCO to Mr Al Tamimi, dated 27 October 2008 (**Exhibit J-224**).

[862] **Exhibit J-117**.

[863] Transcript, Day 4 at 200:24 (Al Waily).

[864] Claimant's Pre-Hearing Skeleton at [11]; Claimant's Post-Hearing Answers at 46.

[865] Claimant's Pre-Hearing Skeleton at [8]. See also Claimant's Post-Hearing Answers at 3 ("*Even if Mr Al Tamimi had committed some violations of environmental law, Oman's actions would still be a gross violation of the customary international law principle of proportionality*").

[866] Claimant's Pre-Hearing Skeleton at [8]. See also Claimant's Post-Hearing Answers at 49 ("*[t]he alleged environmental infractions for which Oman forcibly closed Claimant's quarry were not serious in nature or degree*"). See also Claimant's Reply at [51] ("*Claimant does not dispute that Emrock excavated sand and gravel (so-called*

421. The Claimant has again relied upon the decision of the Ibri Court of Appeal to support his claim that he was not operating outside the scope of his permits.[867] The Tribunal reiterates that it does not consider itself bound by the fact-finding of the Ibri Court of Appeal.[868] In any event, the Tribunal does not consider the Court to have "*definitively*" determined this issue as the Claimant has suggested. Rather, the Court of Appeal's decision merely confirmed the uncontested facts that Emrock had been operating pursuant to a lease agreement with OMCO, and that OMCO had obtained an environmental approval from MECA.[869] The Court did not directly address whether the scope of the environmental approval granted to Mr Al Tamimi permitted him to process alluvial materials from the *wadi* riverbed. At most, the Court's decision indicates that the requisite elements of the specific criminal charges brought against Mr Al Tamimi had not been proven. To the extent that such a finding could be read as implicitly suggesting, as the Claimant has submitted, that Emrock was operating at all times exclusively within the scope of its regulatory approvals, this Tribunal respectfully disagrees.

422. The Claimant has relied on the evidence given to the Ibri Court of Appeal by Mr Abdul Rahman, field surveyor for MOH, which the Claimant submits proved that that his "*operations were wholly inside the OMCO concession boundary*".[870] Putting to one side the fact that this would not, in any event, entitle the Claimant to disregard the terms of his approvals from MECA and MOCI, Mr Rahman himself gave evidence to this Tribunal on behalf of the Respondent that he marked only two of the five boundaries of the OMCO concession, and was not asked to assess whether Mr Al Tamimi or Emrock had been operating inside the OMCO concession boundaries. Mr Rahman affirmed in his Witness Statement that:[871]

> *I do not know anything about the concession granted to Oman Mining Company and I do not know anyone at Oman Mining Company or at the Ministry that granted the concession to Oman Mining Company.*
>
> [...]

'wadi materials') from within its concession area, primarily in order to pave access roads when it was building the site, and also sold some to customers").

867 See eg Claimant's Reply at [183].

868 See [358]–[361] above.

869 **Exhibit J-354** at 4–5.

870 Claimant's Reply at [5].

871 Rahman Witness Statement at [6], [8]–[9].

I had gone to the site as instructed only to mark the boundary angles of the site and not for any other reason. I have no knowledge of anything concerning the site other than what I did on 4 May 2009 to mark the two boundary angles.

[...]

As to the testimony I provided to the Court, it was only about the duties of my position and what I did on 4 May 2009 to determine the boundary marks.

Events of 2009

423. Between 7 and 11 February 2009, MECA issued a further four separate citations against OMCO in respect of Emrock's conduct at the Jebel Wasa quarry site.[872] The fines it imposed in relation to these citations totalled RO 12,500 (approximately USD 32,509.75).[873] The alleged offences included taking material (gravel and sand) from the *wadi*, operating crushers without the necessary permit, failure to obtain permits to construct housing for labourers, and uprooting trees.[874] The imposition of these fines was clearly closely causatively connected with the earlier 2007–2008 dispute over Emrock's processing of *wadi* materials, for which the previous fines had been issued. The fines were not, however, causatively connected with the prior "*conflicting coordinates*" issue.

424. In the first paragraph of a letter dated 3 March 2009, forwarding the MECA citations to Mr Al Tamimi, OMCO stated that:[875]

You state that you have undertaken no illegal activity. This is of course wholly untrue. Please find attached, for instance, the latest fines resulting from your illegal activity. This is in addition to all the earlier fines which are irrefutable documentary proof of your wrongdoing.

425. The letter of 3 March 2009 went on to say that:[876]

You suggest we had an obligation to get you permits to process wadi material originating in the alluvial deposits. This is of course incorrect and we have not breached Clause 4. The contract makes it clear that you only ever had a right to

[872] **Exhibit J-257**.

[873] Claimant's Memorial at [107].

[874] **Exhibit J-257**.

[875] **Exhibit J-257**.

[876] **Exhibit J-257**.

exploit limestone resources. We got you all the permits necessary to enable you to perform the subject matter of the contract.

426. The first infraction report, dated 7 February 2009, cited breaches including "*[p]roduction of stones and sand from the River stream*" and "*[i]nstalling a new crushing machine (screening and crushing unit) inside the River quarry*".[877] This was clearly not a dispute about the scope of MECA's environmental permit – indeed, the Ministry apparently considered the infractions so unrelated to the work actually permitted that it listed the relevant environmental permit as "*none*".[878] The further MECA infraction reports dated 8 February 2009 and 11 February 2009 concerned both related and unrelated violations, including "*[o]perating a crushing and screening unit for stones and sand production* […]" and "*using* [materials] *for stones and sand production* […] *without the obtaining* [sic] *Environmental permit*", as well as alleged infractions related to uprooting trees and plants and failure to obtain construction permits for construction work at the quarry.[879]

427. The infraction allegations thus related predominantly, if not exclusively, to the Claimant's wilful infringements of his existing permits, and not to the Respondent's previous provision of conflicting site coordinates. It does not avail the Claimant to say that these violations "*affected only a portion of Mr Al Tamimi's operations*" or that "*Oman has never identified any harm caused or threatened by alleged violations at Mr Al Tamimi's quarry site*".[880] Quite simply, the evidence discloses no connection between these infraction complaints and the earlier 2006–2007 conduct by which the Omani ministries gave inconsistent instructions regarding the scope of the authorised worksite. It cannot be said that the 2009 issues arose as a result of the Respondent's alleged FET breach in 2006–2007.

428. Similarly, OMCO's decision ultimately to terminate the OMCO–Emrock Lease Agreement on 17 February 2009 – which, as already indicated, brought an effective end to the Claimant's investment in Oman – cannot be said to have arisen as a result of the Respondent's allegedly inconsistent or non-transparent conduct during 2006–2007. As previously noted, the actual decision made by OMCO to terminate the OMCO–Emrock Lease Agreement is not the proper subject of the Tribunal's consideration. Even if it were accepted that the Respondent could be liable for having brought about the circumstances in which OMCO felt compelled to terminate the lease agreement, the Tribunal

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877 **Exhibit J-257**.

878 **Exhibit J-257**.

879 **Exhibit J-257**. Although the Claimant has criticised these additional citations (such as the uprooting of trees) as "*demonstrably false*" (Claimant's Post-Hearing Answers at 38), he has not in the Tribunal's view laid an evidential foundation to demonstrate why that is so, or how the issuing of such citations might therefore constitute a breach of the minimum standard of treatment by the Respondent.

880 Claimant's Pre-Hearing Skeleton at [53].

does not consider that there is any causal connection between the Respondent's conduct and OMCO's decision to terminate.

429. OMCO's decision to terminate the OMCO–Emrock Lease Agreement was expressly predicated upon Emrock's failure to make contractual payments to OMCO as required. In its second termination notice of 17 February 2009, OMCO alleged a balance due of RO 35,440.435 (approximately USD 92,000).[881] The payments were itemised in a schedule attached to the termination notice, and included overdue payments relating to the submission of the AEP, rental for water wells, lease payments for November–December 2007 and January–April 2008, and office space rental from January–December 2008. Only one overdue payment item concerned a fine, and the schedule made clear that this was a penalty levied against OMCO in 2008 for Emrock's conduct in "*[c]arrying Wadi Material from Project Site*".[882] Only two days before the second termination notice, on 15 February 2009, OMCO had written to Emrock noting yet again Emrock's "*continuing to transport sand from the wadi neighbouring the quarry*" as well as "*the presence of screen in an area without a license*".[883]

430. In sum, the Tribunal considers that the Claimant's contention that the Respondent's provision of conflicting coordinates in 2006–2007 somehow caused or created the context whereby the Claimant was subject to ongoing fines and sanctions in 2009, or whereby OMCO was compelled to terminate the OMCO–Emrock Lease Agreement, cannot withstand close scrutiny. Whatever the position in 2006–2007, it therefore cannot be said that the actions of MECA and MOCI caused loss to the Claimant's investment after 1 January 2009. Rather, the conclusion of the Tribunal is aptly summarised by Mr Van der Wiele in his first Witness Statement:[884]

> *Mr Al Tamimi's understanding seemed to be that once he had received the temporary environmental approval granted by* [MECA] *on 25 April 2007, he could do whatever he wanted. This was plainly not the case* […] .

431. Accordingly, no breach of the minimum standard of treatment under Article 10.5 has been established in this respect.

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[881] **Exhibit J-250**.

[882] **Exhibit J-250**. The Claimant acknowledges that he never paid these fines: see eg Claimant's Post-Hearing Answers at 50.

[883] Letter from OMCO to Mr Al Tamimi, dated 15 February 2009 (**Exhibit J-246**).

[884] First Van der Wiele Witness Statement at [37].

2. State harassment claim

432. The Claimant has additionally submitted that the Respondent breached Article 10.5 through its conduct following the termination of the OMCO–Emrock Lease Agreement on 17 February 2009. This, he has claimed, arises from Oman's actions, through OMCO and other instrumentalities, including MECA and the Royal Oman Police, in forcing the Jebel Wasa Quarry to cease operations, including the arrest and subsequent prosecution of Mr Al Tamimi. The Claimant has submitted that the result was that Oman "*arbitrarily and discriminatorily enforced a permanent closure of the Claimant's limestone quarry*".[885]

433. This claim confronts the immediate challenge that the Claimant retained no legal right to occupy the Jebel Wasa quarry site – and indeed no primary investment in Oman – after 17 February 2009. If the Claimant felt that his lease had been improperly terminated, it was, as previously noted, open to him to pursue his contractual entitlement under Article 11 of the OMCO–Emrock Lease Agreement to refer his dispute with OMCO to the local Arbitration Centre in Oman.

434. It follows that the Claimant cannot bring a claim against the Respondent for breach of the minimum standard of treatment in respect of an investment which no longer existed. The Tribunal finds that government instrumentalities, such as MECA and the Omani Royal Police, were properly entitled to treat the Claimant's investment as having ended, and therefore to require that Emrock cease operations. When interpreting evidence such as Mr Ralutin's account that the police repeatedly showed up at the quarry site to remind Mr Al Tamimi and his staff "*that they were not allowed to be operating at all*", the obvious response is that after 17 February 2009 they were perfectly entitled to do so.[886] It is an ineluctable fact that from 17 February 2009, Mr Al Tamimi and his staff remained at the quarry site without a lease and therefore only at the sufferance of OMCO and the Omani authorities, who were thus within their rights to insist that he cease activity and remove his equipment from the site. Mr Al Tamimi himself recognised this as early as April 2009 (shortly before his arrest in May 2009), writing to Mr Al Waily that "*[i]t is quite obvious now, that the situation appears hopeless*" and that OMCO would "*be hearing directly*" from his lawyers.[887]

435. Thus, far from the Respondent's conduct being "*extrajudicial and unjustified*", it was the Claimant who remained at the quarry without lawful basis. Indeed, on Mr Ralutin's account it appears that the police permitted Emrock to continue trading limestone from existing stockpiles with local buyers long

[885] Claimant's Post-Hearing Answers at 1.

[886] Ralutin Witness Statement at [33].

[887] Letter from Mr Al Tamimi to Mr Al Waily, dated 22 April 2009 (**Exhibit J-280**) (original emphasis).

after Emrock's lease had been revoked.[888] There is no evidence that the Emrock's employees were "*dispersed by police harassment*" as the Claimant has asserted.[889]

436. In a similar vein, the Claimant's submissions of breach of the minimum standard in relation to his arrest and prosecution (including the undertaking required from him by the Royal Oman Police)[890] cannot be said to have affected the Claimant's ability to operate a limestone quarry at the Jebel Wasa, because that right (bestowed as a matter of private contract by OMCO) had by that time ceased to exist.

437. Notwithstanding that his lease with OMCO had been terminated for more than three months by the time of his arrest on 23 May 2009, Mr Al Tamimi apparently continued to operate a quarry at Jebel Wasa without legal right. Dr Al Rushdi, Director of the Legal Department at MECA, gave evidence that when he carried out an inspection of the Jebel Wasa quarry site on 13 April 2009,[891] he found Mr Al Tamimi continuing to operate in the very *wadi* area from which he had been expressly forbidden on so many previous occasions. According to Dr Al Rushdi's evidence:[892]

> *When I entered the work site, I immediately noticed that despite MECA's numerous demands that the prohibited operations in the Wadi cease, the work in the Wadi had in fact continued. I raised this concern directly with Mr Al Tamimi, explaining politely that the operations in the Wadi were not authorized, and were being conducted in spite of numerous prior demands that work in the Wadi stop. I also informed Mr Al Tamimi that he could not continue to operate a crusher and transport sand if he had not yet secured the approval to do so.*
>
> *Mr Al Tamimi responded rudely and aggressively, claiming among other things that he would have to study at Omani universities to understand Oman's laws and regulations. Mr Al Tamimi seemed to feign ignorance of the nature of problems even though our Ministry had made clear for months what those problems were, but it seemed to me that Mr Al Tamimi was all too aware that he was not authorized*

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[888] Ralutin Witness Statement at [28] and [30] ("*customers were still coming onto the site with their own trucks to pick up orders for limestone that had already been pre-sold. At first, the number of trucks coming through to pick up their orders was not affected by the fact that we had stopped operations. I was still seeing around the same number of trucks during my shift*", notwithstanding that "*the government authorities kept advising that Emrock should not load any trucks or sell any limestone*"). See also Claimant's Pre-Hearing Skeleton at [35].

[889] Claimant's Reply at [153].

[890] Claimant's Memorial at [198]; Claimant's Reply at [144].

[891] Dr Al Rushdi's site inspection appears to have been partly precipitated by Mr Al Tamimi's own letter to H E Al Busaidi, the Minister of Environment and Climate Affairs, seeking assistance with his case, as well as by the non-payment of many of the fines levied by MECA: First Al Rushdi Witness Statement at [28].

[892] First Al Rushdi Witness Statement at [30]–[31].

to do what he was doing, exploiting and transporting Wadi material, and using a crusher in the Wadi. Mr Al Tamimi sarcastically added that he would stop working only if he was provided 150 million dollars' compensation and that he had received permission to run at least 20 crushers.

438. Dr Al Rushdi's account of events is confirmed by the contemporaneous Field Visit Report prepared by him and dated 13 April 2009.[893] Mr Al Tamimi was reportedly again caught excavating *wadi* materials when the Royal Oman Police carried out a site inspection on 23 May 2009, at which point he was arrested.[894] There is no evidence to support the Claimant's recent contention that Dr Al Rushdi invented this story after the fact because Mr Al Tamimi refused to pay him a bribe, an accusation which Dr Al Rushdi has strongly denied.[895]

439. In that context, even if the Claimant had retained an investment capable of being affected after February 2009, the Tribunal finds nothing in the evidence to suggest that the Respondent acted in breach of the minimum standard of treatment. There was certainly nothing "*extrajudicial*" about the actions taken by MECA, MOCI and the Royal Oman Police.[896] Far from having "*no legitimate basis in law*",[897] Mr Al Tamimi's arrest and prosecution took place within the lawful bounds of the Respondent's exercise of its police powers to ensure compliance with its laws, including its environmental laws and regulations.[898] Mr Al Tamimi's arrest appears to have been precipitated by a request to the police from Mr Al Muharrami, Director-General of MECA, in response to Dr Al Rushdi's discovery of the Claimant's ongoing unauthorised activities in the *wadi*. In a letter of 19 May 2009, Mr Al Muharrami simply asked the Royal Oman Police to intervene "*to stop all trucks carrying materials out of the worksite, in order to force the Company to comply with the laws and environmental requirements till the competent judicial authority* [sic] *issue a decision*".[899] By that stage, charges against the Claimant (and OMCO) were already pending.[900]

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[893] Field Visit Report, dated 13 April 2009 (**Exhibit J-275**).

[894] Oman's Counter-Memorial at [214]. See also Royal Oman Police Department of Criminal Evidence, Photographs relating to Case No 74/J/2009, dated 23 May 2009 (**Exhibit J-300**); Al-Rawdha Police Station, Checking Report, dated 23 May 2009 (**Exhibit J-301**).

[895] Second Al Rushdi Witness Statement at [3].

[896] Claimant's Pre-Hearing Skeleton at [5].

[897] Claimant's Pre-Hearing Skeleton at [5].

[898] Again see eg **RLA-063** at 79 ("*According to the doctrine of police powers, certain acts of State are not subject to compensation under the international law of expropriation. Although there is no universally accepted definition in a narrow sense, this doctrine covers State acts such as (a) forfeiture or a fine to punish and suppress crime* […]").

[899] **Exhibit J-292.**

[900] Two claims were filed by MECA against OMCO on 3 March 2009. A third claim was filed on 7 March 2009. Although the charges were directed against OMCO as the responsible party, the Mahda Court of First Instance subsequently

440. There was nothing *per se* unlawful (at domestic or international law) in MECA forming the view that the Claimant was engaged in unlawful activities and requesting a public prosecutor to file misdemeanour charges. Nor was there anything *prima facie* unlawful about Mr Al Muharrami's request for police intervention upon discovering that Mr Al Tamimi continued to flout Oman's environmental regulations. Indeed, Mr Al Muharrami's letter to the police of 19 May 2009 made specific reference to both Oman's Law on Conservation of the Environment and Prevention of Pollution[901] as well as its Regulations for Crushers, Quarries and Transport of Sand from Coasts, Beaches and *Wadi*s.[902] In the Tribunal's view, this is precisely the kind of environmental regulatory enforcement that the Parties sought to protect through the inclusion of Article 10.10 (as well as Chapter 17) in the US–Oman FTA.

441. In terms of the arrest itself, Mr Al Tamimi does not claim that any physical violence was involved in his arrest or detention. Although the police initially sought to place Mr Al Tamimi in a holding cell with forty other individuals, they acceded to his objections and subsequently let him sit in a policeman's office.[903] Nor was Mr Al Tamimi detained for an unduly lengthy amount of time: his arrest and detention took the Claimant away from the quarry site for only a few hours.[904] Indeed, the Respondent has submitted (and the Claimant has presented no evidence to compel an alternative conclusion) that Mr Al Tamimi's very prompt release from police custody "*was the only event of that day that departed from standard police and prosecutorial practice*".[905]

442. In addition, the Claimant has alleged that he was coerced into signing an undertaking to cease operations at the quarry site. However, it seems clear from the language of the undertaking that it restricted him from doing no more than operating machinery unlawfully outside his permit area (the police may have been unaware at this stage of the fact that OMCO had already terminated the lease agreement).[906] The Tribunal thus accepts the Respondent's submission that the undertaking "*would not have prevented Mr Al Tamimi from drilling, blasting, and extracting limestone from the Jebel*

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accepted OMCO's defence that it should not be held accountable for the offences committed by Emrock: see **Exhibit J-315**; **Exhibit J-316**; and **Exhibit J-317**.

901 Royal Decree No 114/2001 Issuing the Law on Conversation of the Environment and Prevention of Pollution (**RLA-055**).

902 Ministerial Decision No (200/2000) Issuing Regulations for Crushers, Quarries and Transport of Sand from Coasts, Beaches and Wadis (**RLA-050**). See also the letter written by H E Al Busaidi, Minister of Environment and Climate Affairs, to H E Maqbool, Minister of Commerce and Industry, dated 25 April 2009, setting out MECA's list of concerns with Mr Al Tamimi's conduct (**Exhibit J-281**).

903 First Al Tamimi Witness Statement at [189].

904 Request at [59].

905 Oman's Counter-Memorial at [221].

906 The Claimant asserted in his Pre-Hearing Submission that the undertaking was only later "*interpreted*" by the police as requiring the complete shutdown of the quarry: Claimant's Pre-Hearing Skeleton at [5].

Wasa had he still a right to do so under his Lease Agreements", which he did not.[907] Additionally, the basis for the Claimant's assertion that the Royal Oman Police "*progressively forced Emrock's employees to leave the quarry site*" under the "*pretext*" of enforcing the undertaking is not clear to the Tribunal.[908] There was, it is clear, no right for Emrock's employees to continue to remain there at all. Moreover, there is no evidence that the Respondent removed any employees from the quarry site: in his evidence, Mr Gupta observed that "*[o]n 31 May 2009, I instructed Emrock's accounts department to suspend all staff at the quarry site due to the stoppage of Emrock's activity by the Government authority* […] *on August 20, 2009, based on Mr Al Tamimi's instruction, I sent a memo to Emrock's site personnel and operators announcing a lay-off due to the stoppage of our operations by OMCO and other Omani authorities*".[909]

443. The fact that the Claimant was subsequently prosecuted and convicted by the Mahda Court of First Instance, followed by his acquittal by the Omani Court of Appeal, does not in itself disclose any breach of the minimum standard (particularly when one bears in mind the high threshold for breach applied under that standard, as discussed above). It is certainly not the case that every protected foreign investor detained by a State under suspicion of unlawful act(s) is entitled to compensation, even if ultimately acquitted. Mr Al Tamimi was prosecuted for two offences: (a) a misdemeanour charge of ordinary theft for removing *wadi* materials (sand and stones) without the requisite approvals; and (b) the misdemeanour charge of violation of the Environmental Conservation and Pollution Prevention Law by operating quarries and crushers without requisite the approvals.[910] On the basis of the facts outlined at [403]–[431] above, it is clear to the Tribunal that very reasonable grounds existed for the suspicion that such offences might have been committed.

444. Although the Claimant was ultimately acquitted of these charges by the Ibri Court of Appeal on 6 June 2010, it does not follow that the Royal Oman Police or the Omani judicial system committed a breach of international law in bringing a prosecution against Mr Al Tamimi. A State must be permitted to take a legal position in relation to the alleged or perceived violation of its existing laws, even if that position turns out ultimately to be wrong, provided it does so in good faith and with appropriate due process.[911] To impose international liability in such a context would significantly undermine States'

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[907] Oman's Rejoinder at [127].

[908] See Claimant's Reply at [148].

[909] First Gupta Witness Statement at [71] and [73]. See also Ralutin Witness Statement at [29] ("*About two months after Mr Al Tamimi's arrest, Mr Gupta and Mr Balushy directly asked most of our staff to go home, temporarily, advising that that* [sic] *they would reach out when the quarry could re-start production*"). Mr Ralutin himself resigned on 1 March 2010: **Exhibit J-344**.

[910] Rawdha Police Station Referral Order, Case No 74/G/2009, dated 14 June 2009 (**Exhibit J-308**).

[911] See eg *Eastern Sugar BV v Czech Republic* (UNCITRAL), SCC No 088/2004, Partial Award, 27 March 2007 at [272] ("*a BIT may* […] *not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a*

long-recognised right to reasonably exercise their police powers to enforce existing laws. As the Respondent has observed, "*[t]aken to its logical conclusion, Mr Al Tamimi's position is that any criminal case resulting in acquittal would thereby substantiate claims of prosecutorial misconduct or police malfeasance*".[912] There must be more than the fact of a mere acquittal, the Tribunal finds, to impose liability for law enforcement or prosecutorial conduct under international law.[913]

445. That principle is given even greater force in the present context by Article 10.10 of the US–Oman FTA, which, it will be recalled, provides specifically that neither party shall be constrained from "*enforcing any measure* […] *it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*".[914] While even an express provision such as Article 10.10 will not protect a State from liability for measures that are carried out in bad faith, or in violation of the expected standards of basic fairness or due process, in the present case there is no evidence that MECA, the police or the courts acted against Mr Al Tamimi in bad faith, or for an ulterior purpose, or in a procedurally unfair manner. There is only the Claimant's assertion, which the Tribunal finds to be unsustainable on the evidence, that charges were brought against Mr Al Tamimi as a mere "*pretext*" in order for the Respondent to destroy his investment.[915] The Tribunal agrees with the Respondent's submission that the number of environmental citations previously issued against the Claimant make plain that both his arrest and prosecution were undertaken by the State authorities for a legitimate purpose, rather than the furtherance of a covert political agenda.

446. That the Claimant was ultimately acquitted by the Court of Appeal reveals no more *per se* than that the Court did not consider the criminal charges brought against Mr Al Tamimi to be proved to the requisite standard. There is nothing to suggest "*manifest failure of natural justice in judicial proceedings*" as described in *Waste Management II*,[916] and indeed the Claimant has not sought to

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degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT") (**RLA-013**).

[912] Oman's Rejoinder at [150]. See also **RLA-063** at 93 (if the State makes a *prima facie* case, then the burden falls on the investor "*to demonstrate that the measure is in fact mala fide, fails to pursue a genuine public purpose, is discriminatory, violates the due-process requirement or is otherwise irregular*").

[913] In his Post-Hearing Answers, the Claimant took issue with the fact that the Respondent has not proven actual environmental damage arising from the Claimant's actions: Claimant's Post-Hearing Answers at 48. In the Tribunal's view, there is no legal basis for the Claimant to assert that the Respondent bears the burden in this proceeding of proving actual environmental damage, including for the purposes of Art 10.10 (the language of which protects State regulatory action which the State "***considers appropriate*** *to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*" (emphasis added)).

[914] **Exhibit J-001**, Art 10.10.

[915] See **RLA-063** at 93 (cited by the Claimant's Post-Hearing Answers at 49) (if the State makes a *prima facie* case that a measure is justified, then the burden falls on the investor "*to demonstrate that the measure is in fact mala fide, fails to pursue a genuine public purpose, is discriminatory, violates the due-process requirement or is otherwise irregular*").

[916] **CLA-022** at [98].

impugn the integrity of the court processes.[917] Nor does the Claimant's acquittal prove that his arrest or the decision to prosecute him was so grossly arbitrary, unfair or unjust as to constitute a breach by the Respondent of the minimum standard of treatment.[918] Even if the Tribunal had found that a principle of proportionality exists as a standalone criterion under the minimum standard of treatment – which question the Tribunal has not found it necessary to consider – any such claim would again have to confront the Respondent's margin of discretion in exercising its police powers to enforce its existing laws, as well as the express protection afforded to the State parties for this purpose under Article 10.10.

447. In short, the evidence shows only that Mr Al Tamimi was (peacefully) arrested, (briefly) detained and (ultimately unsuccessfully) prosecuted by the Omani authorities on misdemeanour charges for breach of the State's environmental laws and regulations. Even if these actions could be considered to be linked to whatever vestigial remnants of his investment the Claimant retained at this point – which the Tribunal considers they cannot – the evidence discloses no breach of the minimum standard of treatment.

3. Quarry vandalism claim

448. Finally, there remains to consider the Claimant's contention that the Respondent breached the minimum standard of treatment – including the obligation to provide full protection and security – in allegedly permitting the theft of equipment and other property from the Jebel Wasa quarry site.[919]

449. As already noted above in discussion of the Claimant's expropriation claim, there is no direct evidence that the Claimant's infrastructure and equipment was "*wrecked, looted and dismantled*".[920] To summarise that previous discussion: in his Memorial the Claimant acknowledged that after termination of the OMCO–Emrock Lease Agreement, much of his inventory "*had already been sold"* and that his "*expensive quarrying equipment*" was "*quickly sold off or repossessed by and for creditors*".[921] In his Reply, the Claimant suggested that any vandalism or looting at the quarry site

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[917] See Claimant's Reply at [30] ("*Contrary to Oman's supposition, Claimant is* ***not*** *asserting a denial-of-justice claim*") (original emphasis, citation omitted). Rather, as previously noted, the Claimant has relied extensively upon the decision of the Ibri Court of Appeal for its purported *res judicata* effect.

[918] Indeed, in one sense the Claimant's acquittal by the Ibri Court of Appeal effectively served to vindicate his liberty interest. It is for this reason that denial of justice claims generally first require the reasonable exhaustion of domestic appeal processes: see Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2006) at 100 ("*States are held to an obligation to provide a fair and efficient* ***system*** *of justice* […]") (**RLA-068**) (original emphasis).

[919] See eg Claimant's Reply at [150]–[156].

[920] Claimant's Reply at [150].

[921] Claimant's Memorial at [184].

could have taken place only after Emrock and its employees had permanently left the quarry site.[922] The Claimant's submission that important paper records at the site were destroyed is supported only by Mr Ralutin's witness statement that he "*heard*" that this had occurred after Emrock had already "*abandoned*" the site.[923] The Claimant's submission that the scale bridge was stolen is supported only by a photo indicating that it no longer remains at the site.[924]

450. The scope of a State's full protection and security obligations under the minimum standard simply cannot extend to providing physical protection in perpetuity to an investment that has been expressly "*abandoned*" by its owners (and over which all property rights have long been extinguished). As the International Court of Justice stated in the *ELSI* case:[925]

> *[T]he provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.*

451. There has, in short, been no credible evidence presented to the Tribunal that the Respondent was responsible for any loss or damage to any property at the Claimant's quarry site, or otherwise failed to act reasonably to protect the Claimant's property. There is no evidence that Oman encouraged or fostered any looting or vandalism at the quarry site. To the extent that the Claimant was willing to abandon his property, he cannot equally assert that the Respondent failed to take steps to preserve it. The Tribunal also recalls the evidence that on and after 17 February 2009, OMCO had repeatedly informed the Claimant that he was to remove all equipment and installations from the site within weeks, given that after 17 February 2009 the Claimant and all his property remained at the site illegally.[926]

452. The Tribunal therefore finds no breach of the minimum standard in this regard.

Conclusion

453. In summary, the Tribunal considers that no case for breach of the minimum standard of treatment by the Respondent has been made out. This claim is accordingly dismissed.

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[922] Claimant's Reply at [155].

[923] Ralutin Witness Statement at [37].

[924] **Exhibit J-390**.

[925] Case Concerning Elettronica Sicula SpA (ELSI) (International Court of Justice), Judgment of 20 July 1989 at [108] (**RLA-014**).

[926] See [371] above.

(c) National treatment

454. Finally, the Claimant has submitted that the Respondent breached the national treatment requirements of the US–Oman FTA by failing to treat the Claimant and his investment in the same manner as it did other domestic investors in Oman.

(i) National treatment under the US–Oman FTA

455. Article 10.3 of the US–Oman FTA states in relevant part that:

> *1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each 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.*

456. The Claimant has submitted, citing the decision in *Feldman v Mexico*,[927] that under Article 10.3 he need only establish a *prima facie* case of unequal treatment, after which the burden shifts to Oman to show the absence of unfair discrimination.[928]

457. The Tribunal in *Feldman v Mexico*, however, did not purport to lay down a special "*prima facie*" test for national treatment claims. Rather, the Tribunal simply described the general burden of proof in international law, by which responsibility for establishing a claim rests, first and foremost, on the party who asserts it.[929] As with the other provisions of Chapter 10, Oman is not required to disprove the existence of a breach of Article 10.3 in advance. If evidence of disparate treatment is produced by a claimant, then it will certainly be for the responding party to justify or negate that evidence of disparate treatment. But the principle does not obviate the need for a claimant to provide at least some relevant evidence to support his or her claim. Mere assertion will not suffice.

458. It bears repeating that Article 10.10 and Chapter 17 of the US–Oman FTA establish that a high threshold must be breached in the enforcement of a State's environmental laws and regulations before it can be considered a violation of Chapter 10. The enforcement of environment laws and

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[927] **CLA-020**.

[928] Claimant's Pre-Hearing Skeleton at [54].

[929] **CLA-020** at [177].

regulations, as Article 17.2.1(b) acknowledges, may not always be precisely uniform, involves the exercise of prosecutorial discretion and allocation of limited governmental resources, and ultimately may not reveal differential treatment based on anything other than the particular circumstances of the alleged offender and the infraction alleged.[930] The Claimant must show that the treatment he and his investment received differed materially and substantially from that received by other domestic Omani investors or their investments.

(ii) Alleged breach of the national treatment standard

459. The Claimant says that Article 10.3 has been breached as a result of the Respondent's *de facto* discrimination, because although local investors were undertaking essentially the same activities as his quarry, their permits were not interpreted to forbid such activities, and they were not arrested, forced to sign an undertaking to avoid pre-trial incarceration, or permanently shut down on the basis of environmental breaches.[931]

460. Again, the Claimant's case must 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. As noted above, Mr Al Tamimi's arrest and prosecution can have had no practical effect on his investment in Oman, both because: (a) he was detained only for a brief period of time, and even the sentence imposed on him at first instance was suspended; and (b) by this time, OMCO had already terminated the OMCO–Emrock Lease Agreement, meaning that he had no substantive investment left.

461. In any event, the Tribunal does not find that a claim for national treatment would be made out. The Claimant relies primarily on the evidence from Mr Gupta of Emrock, who visited a neighbouring quarry and apparently learned that other quarries in the area were operating crushers without a separate crusher permit, as well as reportedly extracting sand and gravel without any special "*wadi*" permit.[932] In his first Witness Statement, Mr Gupta merely concluded that:[933]

> *In my years working in Oman, until this day, I have known quarry operators to have fines imposed on them, and I have also seen situations where the Environmental*

[930] Art 17.2 provides in its subparagraph 1(b) that: "*[t]he Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a)* [*vis* the duty not to fail to effectively enforce its environmental laws] *where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources"*. Regarding the relevance of Chapter 17 to the Tribunal's interpretation of the provisions of Chapter 10, see the discussion above at [388]–[389].

[931] Claimant's Memorial at [232], [240]; Claimant's Pre-Hearing Skeleton at [55].

[932] Claimant's Pre-Hearing Skeleton at [31].

[933] First Gupta Witness Statement at [76].

Ministry complained about various issues affecting operations in the quarrying areas. But I have never seen an instance like the one that Mr Al Tamimi faced, in which a quarry operator is arrested, accused of stealing and incarcerated and eventually forced to give up his investment.

462. In his second Witness Statement, Mr Gupta provided a somewhat greater degree of specificity, stating that he had previously talked to operators at two neighbouring quarries, the Al Zubaidi quarry and the Al Turki Enterprises quarry, and from those encounters did not "*believe*" that those quarries held a special permit for operating crushers.[934] Further, he considered, the Al Turki quarry had never had "*major problems*" with the Omani authorities, and had received only a "*few citations*".[935]

463. Such purely anecdotal evidence proves very little on its own. The Claimant has not adduced any objective or quantifiable evidence to show that his quarry was treated in a manner different from that accorded to domestic investors in "*like circumstances*".[936] The Claimant has correctly observed that in undertaking a comparison between similarly-situated domestic investors, "*the mere existence of some particular difference does not defeat the existence of like circumstances*".[937] However, to provide a relevant comparison for a national treatment claim, any comparator investor must still be in ***materially*** the same circumstances as the Claimant. The Tribunal does not accept the Claimant's submission that "*the Jebel Wasa Quarry should be understood as being in like circumstances with all limestone quarries in Oman*".[938] The Claimant must point to evidence that a domestic operator which possessed the same or substantially similar approvals as the Claimant, and carried out the same or substantially similar material conduct (including the Claimant's repeated violations of the terms of those approvals) was treated less harshly or according to a different standard.

464. Given the long history of citations and fines imposed against OMCO/Emrock, there may in fact be no directly relevant comparator, and the Claimant has not been able to adduce evidence of one. The Claimant's case appears, on the evidence, to be *sui generis*. The Claimant has submitted, relying on the evidence of Mr Abdul-Rahman of the Housing Ministry, that the prosecution of Mr Al Tamimi was unprecedented: "*[a]s far as Mr Abdul-Rahman was aware, only Mr Al Tamimi had been prosecuted for theft*".[939] Yet as H E Al Dheeb, Chairman of OMCO from late 2008 and Undersecretary at MOCI, observed in his evidence, in most instances there would be no need to prosecute an operator

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934 Second Gupta Witness Statement at [27]–[28].

935 Second Gupta Witness Statement at [27]–[28].

936 **Exhibit J-001**, Art 10.3.

937 Claimant's Memorial at [235].

938 Claimant's Memorial at [236].

939 Claimant's Pre-Hearing Skeleton at [33].

because a warning, or at most a fine, would be sufficient to bring an operator into voluntary compliance.[940]

465. The comparative examples actually cited by the Claimant are clearly not materially analogous.[941] The Claimant's reference to the Omani-owned quarry Emaar, which the Claimant says was permitted to "*excavate large amounts of materials from the Wadi Sumayni*",[942] overlooks the fact that Emaar sought – and was granted – approval to do exactly that.[943] The same is true of the Al Turki quarry[944] and the Al Ahlia quarry.[945] The Claimant's argument that other quarries were permitted to continue operating "*once they had paid for the additional land*"[946] is unavailing, because in the Claimant's case a boundary extension, although sought by OMCO, was never granted.[947] Similarly, although Mr Gupta notes that the Al Zubaidi and Al Turki operations were never required by Oman to "*shu[t] down* [their] *complete operations*", there is no suggestion that those quarries, unlike the Claimant's, had had all their contractual rights to operate terminated by their contractual counterparty.

466. The Respondent has, in any event, pointed to evidence that the Claimant is not the only operator in Oman to be investigated by the Omani authorities for quarrying violations: according to one news 2013 report, 193 cases had been referred to the public prosecutor's office, including cases where operators were investigated for "*extending the areas that were allocated to them*", failing to pay fees, and operating stone crushers without a license.[948] Another news report noted that "*dozens of sites*"

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[940] Al Dheeb Witness Statement at [25].

[941] See eg First Al Tamimi Witness Statement at [199].

[942] Claimant's Memorial at [246]–[247]; Claimant's Post-Hearing Answers at 3.

[943] See Initial Environmental Approval of Enmaar Mahada Company, Project No 1266/Z H, issued 27 August 2008 (**Exhibit J-205**) (which the Claimant describes as "*[a]pproving Emaar's application to excavate and crush materials from the Wadi Sumayni*": Claimants Post-Hearing Answers at 49). Whether Emaar or any other quarry received an environmental approval without prior submission of an EIA or EMP – an inference which the Claimant seeks to draw from the Respondent's failure to discover any such documents in its files – is not, strictly speaking, a relevant comparison for the purposes of the Claimant's national treatment claim: see Claimant's Post-Hearing Answers at 3. In any event, there are serious doubts about the extent of the material which the Claimant himself supplied to MECA for permitting purposes: see fnn 843 and 848 above.

[944] Application for Environmental Permit of Al Turki Cement Products, undated (**Exhibit J-406**).

[945] Application for Environmental Permit of Al Ahlia, dated 16 August 2000 (**Exhibit J-412**).

[946] See Claimant's Reply at [188].

[947] See [405] above. The Claimant has also relied on the testimony of Mr Abdul Rahman, a surveyor at MOH, before the Ibri Court of Appeal to the effect that other quarries had been permitted to operate outside their concession limits by paying additional amounts: Claimant's Post-Hearing Answers at 49–50. Again, however, such evidence is unspecific, indirect (the Claimant relies on the summary of Mr Rahman's testimony which appeared in the defence closing address to the Ibri Court of Appeal) and appears to be disavowed by Mr Rahman himself: see Rahman Witness Statement at [8]–[9].

[948] Mohamed Ali al-Balushi, "The Public Prosecution Office Investigates the Violations of Stone Crushers and the Grant Lands in Duqm", available at avb.s-oman.net (**Exhibit J-370**). See also "Two Quarries Ordered Shut in Dhahirah", *Times of Oman*, 19 February 2014 (**RLA-89**); "Oman Government Toughens Stance on Mining Industry", *Gulf*

allotted for quarrying and crushing had been shut down by the government for operating "*beyond the limits set by their licenses*".[949] Indeed, media reports indicate that in 2013 the Omani government declared a "*moratorium on the issuance of new permits for quarrying and crushing activities, coupled with an extensive review of practices in the mining and quarrying industry*", including the appointment of a "*pan-sectoral committee*" to address the issue of mining violations.[950] The Claimant has suggested that this "*supposed crackdown on quarries*" was promoted by the government in 2013 in anticipation of Oman facing a national treatment claim in this arbitration.[951] Such a claim is implausible.

467. There is no evidence, furthermore, that the Claimant was treated in a particular manner because of his nationality. Indeed, the fact that citations and fines were imposed in the first instance against OMCO, a state-owned enterprise, and that OMCO's Mr Al Waily, an Omani citizen, was prosecuted along with Mr Al Tamimi,[952] points strongly away from the Claimant's assertion that he was targeted because of his foreign nationality. As the Respondent has submitted, it is plain that the Claimant was targeted not because of his nationality but because, rather than adhering to the terms of his permits, he "*decided to embark on a materially different operation outside the Jebel Wasa*".[953]

468. The Tribunal therefore dismisses the Claimant's national treatment claim.

D. COSTS

469. Both parties have sought costs in this proceeding, if successful. The Claimant has claimed US$15,530,714.93 in costs, including attorney's fees and disbursements for the four law firms variously involved in his case, as well as expert witness and consultants' fees and ICSID payments.[954] The Respondent has claimed US$7,569,880.32 in costs, also including attorney's fees and disbursements, expert witness and consultants' fees and ICSID payments.[955]

News, 26 April 2013 (**RLA-090**); "Two Quarry Units Shut Down for Violating Norms", *Times of Oman*, 19 February 2014 (**RLA-091**).

[949] **RLA-090**. It bears repeating in this context that the Tribunal has found that the Emrock quarry was never shut down by Oman – it lost its right to operate only as a result of OMCO's private termination of the OMCO–Emrock Lease Agreement.

[950] **RLA-090**.

[951] Claimant's Pre-Hearing Skeleton at [34].

[952] Mr Al Waily was ultimately acquitted by the Mahda Court of First Instance because it found that Emrock, and not OMCO, was the entity actually responsible for control of the quarry site: **Exhibit J-315**; **Exhibit J-316**; **Exhibit J-317** ("*the Public Prosecution shall bring the real accused to trial*").

[953] Oman's Rejoinder at [191].

[954] See Claimant's Updated Submission on Costs.

[955] See Respondent's Statement of Costs.

470. Article 10.25.1 of the US–Oman FTA provides in relevant part that in making its Award:[956]

> *A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.*

471. The "*applicable arbitration rules*" include Article 61(2) of the ICSID Convention. Article 61(2) of the ICSID Convention provides that:[957]

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

472. Rule 47(1)(j) of the ICSID Rules additionally provides that the Tribunal shall include in its Award "*any decision of the Tribunal regarding the cost of the proceeding*".[958]

473. Under the US–Oman FTA and the ICSID Convention, therefore, the Tribunal has a broad discretion to determine "*how and by whom*" the expenses of this arbitration, including attorney's fees, should be paid. The rule that costs follow the event (otherwise known as the "*loser pays*" rule) has received growing support in many investment arbitrations.[959] The Tribunal finds that, in the circumstances of this particular arbitration, the application of this principle is appropriate. Both parties have made claims for costs on that basis.[960] The Claimant's alternative submission that, in the event that Oman were to prevail, "*it would be inequitable for the Tribunal to force Mr Al Tamimi to pay any of Oman's costs, given that Oman incurred those costs to defeat Mr Al Tamimi's efforts to seek justice for the mistreatment that he suffered at Oman's hands*" is not convincing.[961]

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[956] US–Oman FTA, Art 10.25(1).

[957] ICSID Convention, Art 61(2).

[958] ICSID Arbitration Rules, Rule 47(1)(j).

[959] See eg *Gold Reserve v* Venezuela (ICSID Case No ARB(AF)/09/1), Award, 22 September 2014, cited in Claimant's Submission on Costs at fnn 1 and 2; *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15), Award, 3 March 2010 (**RLA-077**); *International Thunderbird Gaming Corp v United Mexican States* (NAFTA Ch 11 Arb Trib), Award, 26 January 2006, cited in Respondent's Submission on Costs at fn 4; *EDF (Services) Ltd v* Romania (ICSID Case No ARB/05/13), Award, 8 October 2009, (**RLA-076**); *Methanex v United States of America* (UNCITRAL/NAFTA)), Award, 3 August 2005 (**CLA-073**); *GEA Group Aktiengesellschaft v Ukraine* (ICSID Case No ARB/08/16), Award, 31 March 2011, cited in Respondent's Submission on Costs at fn 4.

[960] See Claimant's Submission on Costs (as corrected 9 March 2015) at [3]–[7]; Claimant's Reply to Respondent's Cost Submission at [12]–[13]; Respondent's Submission on Costs at 2–6.

[961] Claimant's Submissions on Costs (as corrected 9 March 2015) at [10]. See also Claimant's Reply to Oman's Cost Submission at [11].

474. The Tribunal has dismissed all claims for breach of the US–Oman FTA brought by the Claimant. As such, the Tribunal accepts the submission that Oman has been required to defend itself against claims that have ultimately proven to be entirely unmeritorious. In particular, the Tribunal considers that it should have been clear to the Claimant prior to commencing proceedings that the rule against the retroactive application of treaties, as well as the narrow scope of attribution under Article 10.1.2 of the US–Oman FTA, posed serious barriers to the overall viability of the Claimant's suit. The Tribunal has also borne in mind that the evidence, as outlined extensively above, shows Mr Al Tamimi largely to have been the author of his own misfortune through his wilful disregard of Oman's environmental laws.

475. In light of these findings, the Tribunal considers that the Claimant should be required to cover a substantial proportion of both the costs of this arbitration and the Respondent's legal and other professional costs, including expert and consultancy fees.

476. The Claimant has submitted that the Respondent's conduct unnecessarily increased the cost of this arbitration, and that "*apart from the merits*", he should be awarded costs on this basis.[962] The Claimant has submitted that the Respondent's conduct during the early phases of proceedings, and in particular its refusal to permit the Claimant to carry out a site visit with his experts until ultimately ordered to do so by this Tribunal, added to the Claimant's legal costs.[963] The Claimant has also submitted that the Respondent prolonged proceedings by maintaining its unmeritorious claim regarding Mr Al Tamimi's nationality.[964]

477. On the former issue, the Tribunal does not consider that these procedural issues should alter its finding as to costs. Although the Claimant ultimately prevailed on his request for a site visit, it will be recalled that the Tribunal considered that the eleventh-hour nature of his request had not been adequately explained, and therefore declined his request for an immediate inspection.[965] In short, the Tribunal does not consider that the Respondent has acted in these proceedings in an unprofessional manner as the Claimant has alleged. The outcome of minor procedural disputes does not alter the fact that the Claimant has put the Respondent to the expense of defending a series of claims that have ultimately proven unsuccessful.

478. On the latter issue, however, the Tribunal agrees that the Respondent's challenge to Mr Al Tamimi's nationality was vaguely and equivocally articulated, and ultimately unsuccessful. The Respondent

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[962] See Claimant's Reply to Oman's Cost Submission at [2ff].

[963] See Claimant's Reply to Oman's Cost Submission at [5ff].

[964] See Claimant's Reply to Oman's Cost Submission at [3].

[965] Procedural Order No 2, 28 September 2012.

was also unsuccessful as to its challenge of the Tribunal's jurisdiction *ratione temporis* regarding the OMCO–Emrock Lease Agreement. Considering the circumstances as a whole, the Tribunal finds that the Claimant should reimburse the Respondent for 75% of the Respondent's total costs.

479. As noted above, the Respondent has claimed total costs of US$7,569,880.32, which sum comprises attorney's fees and disbursements of US$5,335,095.52, expert witness and consultancy fees of US$1,784,819.90 and ICSID payments totalling US$449,965.00. The Tribunal has examined these claimed costs and found them to be reasonable in the circumstances, particularly when considered in the context of the Claimant's own claimed fees and expenses.

480. Accordingly the Tribunal shall order that the Claimant pay to the Respondent the sum of US$5,677,410.24, being a 75% share of its total costs of US$7,569,880.32.

481. Post-Award interest shall be payable on these costs as from 60 days after the date of the issue of this Award. Interest shall be calculated at the 91-day US Treasury Bill rate and compounded quarterly.

VII. OPERATIVE PART

For all of the foregoing reasons, and rejecting all claims and submissions to the contrary, the Tribunal HEREBY FINDS, DECLARES AND AWARDS as follows:

1. The Tribunal rejects all of the Claimant's requests for declaratory and compensatory relief.

2. The Tribunal orders that the Claimant shall pay to the Respondent forthwith the sum of US$5,667,410.24, which comprises the Respondent's reasonable costs and expenses incurred in connection with this arbitration, including the cost of their legal representation, expert witness and consultants' fees, disbursements associated with this proceeding, and the Respondent's share of the ICSID arbitration costs and lodging fees paid.

3. Interest shall be payable on the costs listed at 2 above from 60 days after the date of issue of this Award, calculated at the 91-day US Treasury Bill rate and compounded quarterly.

Date: 27 October 2015

[signed]

Judge Charles N Brower
Arbitrator

[signed]

Mr J Christopher Thomas QC
Arbitrator

[signed]

Professor David A R Williams QC
President of the Tribunal