R (Western Sahara Campaign UK) v The Commissioners for HMRC and the Secretary of State for the Environment, Food and Rural Affairs [2015] EWHC 2898 (Admin)

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Introduction

Article 3(5) of the Treaty on European Union (TEU) binds the Union to contribute *'to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.* Does this provision have teeth and can it be used to support the rights of those outside the Union who are affected by EU acts? In an action brought before the UK courts, the Claimants seek to challenge the validity of two EU agreements with Morocco, namely:

1) a 2000 Association Agreement establishing free trade between the EU and Morocco; and,

2) a 2006 Fisheries Partnership Agreement allowing EU fleets to fish in Moroccan waters.

Whilst making no explicit reference to Western Sahara, the agreements are in practice treated as applying without distinction between Morocco's internationally recognised territory and the disputed region of Western Sahara. As a result, goods from Western Sahara can enter the UK under the preferential tariff system accorded to the produce of Morocco. Equally, the UK could license vessels to fish in the waters off Western Sahara (in fact, it has not).

In each case, the Claimants contend that the measure is unlawful since, by not distinguishing between Morocco and Western Sahara, the agreements do not reflect the right of the Western Saharan people to self-determination. Such conduct is alleged to be unlawful in respect of the UN Charter, and principles of customary international law developed to give effect to the charter and also to amount to the EU aiding and abetting Morocco in the commission of an international wrongful act, namely the unlawful annexation of Western Sahara.

History of Western Sahara

The territory referred to as Western Sahara was formerly under Spanish colonial control. In 1960, Resolution 1514 of the UN General Assembly required immediate steps to be taken to accord the right of self-determination to such Non-Self-

Governing Territories (NSGTs). A census in 1974, established the population to be 74,000. However, neither that population nor its descendants have ever been granted a referendum to determine the future of Western Sahara. Instead, Morocco claimed that Western Sahara was part of its territory and in 1975 launched a Green March resulting in 350,000 Moroccan nationals moving into the territory. Spain ceded control of Western Sahara, the northern two thirds to Morocco and the southern third to Mauritania. Mauritania in turn lost control of its third in 1979 and Morocco took over the remaining territory.

The leading independence movement of Western Sahara is the Frente Polisario, founded in 1973. In 1976, they declared the existence of the Saharawi Arab Democratic Republic (SADR). The SADR was recognised by the Organisation of African Unity (the predecessor to the African Union) causing Morocco to leave the organisation. It has never re-joined.

Currently around 45 UN member states recognise the SADR while many others have withdrawn, frozen or suspended their recognition. Importantly for the case before the court, no EU (or other Western) country has recognised the SADR as a nation state. Whilst the Swedish Parliament adopted a motion urging its government to recognize Western Sahara in 2012, the government of the time did not comply. The current Swedish government is keeping the policy under review and is expected to report in February 2016.

Judgment

Ordering a reference

Under the principle in *Foto-frost*, national courts do not have the jurisdiction to rule that EU measures are invalid. They may however rule that challenges brought against them are unfounded (Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1988] 3 C.M.L.R. 57 at [13]-[14]). Accordingly, provided that the challenges were not unfounded, the Administrative Court could only make a reference under Article 267 TFEU to the CJEU. Blake J's approach is consistent with the case law and he sets out a useful list of reasons why an earlier reference may be preferable. Several considerations may apply more generally to those seeking a reference at first instance:

> *'…It seems to me that if there is a credible arguable challenge to the validity of the EU measures, it is preferable to make such a reference at first instance and promptly. There are no disputed facts that need to be determined by the national court; the outcome of the issue as to whether the EU measures are lawful is decisive of both applications; as between the national court and the CJEU, only the later has competence to decide the issues; the claimant is a voluntary organisation of modest means that litigates with the benefit of a protected costs order; if there*

is a sufficiently arguable case to make a reference, it is more efficient and cost effective to stay these proceedings pending the outcome of a reference.' (paragraph 5)

Test for compatibility of EU acts with Internatioal Law

In order to establish whether there was a credible challenge to the validity of the measures, Blake J next identified the standard to which EU laws must comply with international law. Article 3(5) TEU, as discussed, requires the Union to contribute *'to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'* but does not indicate the standard of review which the European court will apply to an assessment of whether EU institutions have complied with this obligation. For the answer, Blake J referred to Case C-366/10 Air Transport Association of America [2012] 2 CMLR 4. Paragraphs 107-110 set out a three part test for when principles of customary international law may be relied on to invalidate an EU act:

1) The principles of customary international law relied on are capable of calling into question the competence of the EU to adopt the act;

2) The act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard;

3) In adopting the act, the EU made manifest errors of assessment concerning the conditions for applying those principles.

The requirement of the second stage of the test is unclear, and it is noted that the Defendants allege that the Claimants do not meet it (paragraph 10). It is to be hoped that the CJEU will clarify whether the test requires the Claimant specifically to derive rights from EU law or whether it is enough that Western Saharans may have their rights under international law and the UN Charter affected if the EU institutions breach Article 3(5) TEU. The final stage of the test applies the widely used EU law test of a 'manifest error of assessment'. This is broadly equivalent to the domestic test of Wednesbury unreasonableness.[1] The latitude this tests grants to EU institutions in deciding what is required to satisfy obligations under international law reflects the less precise nature of customary *international law* in comparison with provisions of *international treaties* (see paragraph 110). It is worth noting, therefore, that a separate, more straightforward, test exists in the Air Transport judgment when the alleged violation is of an international treaty, rather than customary international law. In that case the test, set out at paragraphs 52-54, is:

[1] The equivalence of the concepts was recently reaffirmed by Coulson J in Woods Building Services v Milton Keynes Council [2015] EWHC 2011 at [13]-[17].

1) The EU is bound by the treaty rules;

2) The nature and broad logic of the treaty do not preclude the validity of the EU act from being reviewed in its light;

3) The provisions relied upon contain clear and precise obligations, not subject, in their implementation or effects, to the adoption of any subsequent measure.

In other words, the test for the compliance of an EU act with international treaties is very similar to the Van Gend & Loos test for the direct effect of EU treaties.

Logically therefore, a two stage process is required, first of all assessing whether the relevant provision of international law is a treaty obligation or an obligation of customary international law; and next applying the relevant test. However, in the instant case, it appears that reliance was being placed on obligations of customary international law and Blake J accordingly applied the standard of whether there had been a manifest error of assessment.

The provisions of International Law relied upon

The judgment predominantly focuses on two main sources of international law. The first is Article 73 of the UN Charter, which states:

> *Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:*
>
> *a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;*
>
> *b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;*

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply."

The second was the 2002 opinion of the then legal counsel to the UN Secretary General, Hans Corell. Mr Corell, in that opinion, was reviewing the compatibility with international law of oil exploration contracts entered into between Morocco and private corporations which would affect Western Sahara. Following an examination of Article 73 of the UN Charter, resolutions of the UN and the case law of the ICJ, he concluded that there was an opinio juris:

'where resource exploitation activities are concluded in Non-Self-Governing Territories for the benefit of the peoples of these territories, on their behalf, or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power, and in conformity with the General Assembly resolutions and the principle of "permanent sovereignty over natural resources" enshrined therein.' (para 24)

In other words, the key criteria for whether a commercial agreement is lawful is whether it works for the benefit of the people of the territories and whether their representatives are consulted.

However, other principles of international law are at play here which were not relevant to private oil companies and not discussed by Mr Corell. For example, the Claimants allege that by entering into such agreements, the EU is aiding and abetting an illegitimate occupation of Western Sahara, and that to do so breaches the principles of state responsibility for unlawful acts which violate the principle of self-determination (see paragraph 34 of the judgment).

Outcome

Having identified these principles of international law, Blake J applied the *Air Transport test.* At paragraph 43, he found that it was not a breach of international law simply to enter into agreements which allow for the exploitation of natural resources in an NSGT such as Western Sahara. He also recognised that the Commission must have a broad discretion to gauge the extent of any obligations to consult with and achieve benefits for the people of NSGTs. Nonetheless, he decided that there was an arguable case of manifest error for seven reasons set out at paragraphs 44-55 of his judgment:

1) The opinion of Hans Corell was not a judgment of the ICJ; accordingly his statement on the conditions for entering into lawful agreements affecting an NSGT was not definitive.

2) Even if correct, it remained to be decided whether the agreement had to be for the benefit of – and following consultation with – all the current residents of Western Sahara, or specifically the *pre-existing inhabitants* of the region (and their descendants) prior to the Green March;

3) If the benefits had to be enjoyed by the latter, Blake J considered that no agreement could be entered into with a body who did not recognise that obligation.

4) Statements made by the Commission showed that it may be misinterpreting Hans Corell's opinion and applying too low a standard regarding the extent to which the agreement needed to benefit the people of the territory. At paragraph 31, he cites in particular a statement of Baroness Ashton that the agreement should not be '*in disregard of the needs, interest and benefits of the people of that territory'*.

5) Consideration had to be given to the duty of states to cooperate to end serious breaches of customary international law. A trade agreement which does not distinguish between the original inhabitants and inhabitants arriving pursuant to an unlawful occupation may evidence a serious breach. Consideration had to be given also to the UN Convention on the Laws of the Sea. These matters were not discussed in Hans Corell's opinion.

6) There was some unease in the European Parliament and among Member States about the agreements, leading to a 2013 Protocol which sought to ensure that fish caught in Western Saharan waters were landed in Western Saharan ports. Denmark and Sweden opposed the protocol and the UK abstained.

7) Hans Corell himself had publicly stated disapproval of the Fisheries Agreement and the fact that his opinion had been cited in its support:

'I must confess that I was quite taken aback when I learnt about this agreement… I am sure that it would have been possible to find a formulation that would have satisfied both parties while at the same time respecting the legal regime applicable in the waters off Western Sahara. Any jurisdiction over those waters is subject to the limitations that flow from the rules on self-determination. It has been suggested that the legal opinion I delivered in 2002 has been invoked by the European Commission in support of the Fisheries Partnership Agreement. I do not know if this is true. But if it is I find it incomprehensible that the Commission could find any such support in the legal opinion, unless, of course, it had established that the people of Western Sahara had been consulted, and accepted the agreement, and the manner in which the profits from the activity were to benefit them… Under all circumstances, I would have thought that it was obvious that an agreement of this kind that does not make a distinction between the waters adjacent to Western Sahara and the waters adjacent to the territory of Morocco would violate international law."

For those reasons, there was a credible challenge to the validity of the measures and a reference to the Court of Justice was to be made.

Discussion

Whilst limited to an assessment of whether there is a credible challenge, the case offers a domestic judge a rare opportunity to exercise jurisprudence in relation to questions of international law. In that regard, the judgment is as interesting for the arguments it rejects as much as the arguments it accepts.

The Claimants, for example, had cited C -386/08 *Firma Brita GmbH v Hauptzolamt Hamburg-Hafen* [2010] ECR I-1289, a case concerning whether goods from Palestinian territories could benefit from preferential tariffs under an EU-Israel free trade agreement. The CJEU noted that there was a separate EC-PLO agreement establishing free trade with the Palestinian authorities. Accordingly, the Israel agreement could not apply to Palestinian territories without contravening the principle that treaties do not bind third parties (*pacta tertiis nec nocent nec prosunt*). The Claimants contended that it follows that agreements with Morocco cannot bind Western Sahara.

Blake J, paragraph 37, distinguished this judgment on the basis that (i) the EU does not recognise Western Sahara; (ii) no self-governing body exercises jurisdiction

over the territory; and (iii) the EU has not made any agreement with the Frente Polisario. The first of these reasons does not truly distinguish the situation: although recognising the status of the PLO as an authority, the European Community, on entering the EC-PLO agreement, was not recognising (and has never recognised) a nation state of Palestine. The second reason assumes that self-governance and the exercise of jurisdiction are pre-conditions to being able to benefit from the *pacta tertiis*. This has the effect of allowing a contracting state to side-step the pacta tertiis principle when the inability of a third party to exercise jurisdiction over the territory flows from its own violation of international law. As for the third reason, it cannot be the case that the PLO gained its status as a third party (and the benefit of the pacta tertiis principle) by fact of the EC-PLO agreement, since its ability to enter into such an agreement must be predicated on that status. The question then is perhaps whether it had sufficient status so as to be able to enter such an agreement in the first place. In that regard, the UN has encouraged Morocco and the Frente Polisario to engage in direct negotiations without preconditions, in order to resolve the four-decade-long dispute.[2] This implies that the Frente Polisario at least has some ability to enter into agreements affecting the sovereignty of Western Sahara. However, it is unclear what level of political legitimacy is required and what criteria must be met before the *pacta tertiis* principle applies. It is to be hoped that the CJEU judgment will cast more light on what the criteria are and whether the Frente Polisario or indeed the indigenous population of Western Sahara satisfies them.

The Defendants, in turn, relied on Case T-572/93 Odigitria AAE v *Council and Commission* EU:T:1995:131. In that case, fishery agreements entered into by the EU with, respectively, Guinea-Bissau and Senegal did not address a region of disputed water over which both nations claimed sovereignty. A Greek vessel sailing in that water under a Senegal licence was boarded by Guinea-Bissauan authorities and the master fined. He sought compensation from the EU for entering into agreements which made no mention of the territorial dispute and therefore contained 'hidden perils' for one operating under them. The Court rejected the argument that the EU, on entering a fisheries agreement, was required to take a stand on such questions as disputed territory: to do so would imperil the ability of the EU to enter into such agreements and the exclusion of such territories from the agreements would amount to interference in other states' internal affairs. Accordingly, the Defendants argued that the CJEU should decline jurisdiction in relation to the instant case.

Blake J, at paragraphs 39-40, distinguishes the case by contrasting the dispute in *Odigitria* which concerned only the limits of each state's sovereignty and the question raised in the present action which concerns whether Morocco can enter treaties binding the Western Sahara which (in spite of Morocco's claims to the

[2] M. Dawidowicz, 'Trading Fish or Human Rights in Western Sahara', in Statehood and Self-Determination, CUP (2013) at p.263.

contrary) is outside of Morocco's sovereign realm. In so doing, Blake J explicitly rejects Morocco's claims to sovereignty over the Western Saharan territory concluding that, prior to a free act of self-determination by the people of Western Sahara, it does not have a legitimate claim to sovereignty. If, Blake J's approach is followed by the CJEU, then, unlike in *Odigitria*, the court will be taking a stance on Morocco's claims to sovereignty (albeit with the assistance of a 1975 ICJ Advisory Opinion broadly rejecting Morocco's claims)[3] and asking on what basis the EU can deal with Morocco in relation to territory lying outside its sovereign realm, with the concomitant risk of harming relations between the EU and Morocco.

Whilst statements of the European Commission have made clear that the agreements are to be read as applying to Western Sahara,[4] the agreements themselves are silent on the matter, defining their scope of applicability simply in terms of the 'territory of Morocco' and waters 'falling within the sovereignty or jurisdiction of the Kingdom of Morocco'. If the CJEU finds that the agreements do violate the principle of self-determination and other international law, they may well require such terms to be construed, for the time being, so as not to include Western Sahara (see paragraph 25).

The exclusion of Western Sahara from the scope of trade agreements would not necessarily be fatal to the European Union's ability to enter into them. Whilst Swedish support for an independent Western Sahara has seen the interests of Swedish companies such as Ikea harmed in Morocco,[5] it appears that the United States, Switzerland and Norway were all able to enter into free trade agreements with Morocco on the basis that references to the territory or Morocco were to be interpreted as pertaining to the internationally recognised territory of Morocco and not covering Western Sahara.[6] Accordingly, the *realpolitik* objections to such an approach and claims that raising such questions would hinder the capacity of the EU to enter into treaties (arguments which find support in *Odigitria*) should not be overstated. However, if the CJEU does determine that there has been a manifest error such that the agreements do not bind Western Sahara, then, in order to restore the current practice which presumes that they do, the EU would need to renegotiate the deals. Those renegotiations would have to include sufficient safeguards for the rights of Western Saharans so as to satisfy the EU's obligations under international law. We await the outcome of the CJEU reference in order to discover the willingness of the CJEU to impose such obligations on the EU institutions and the level of protection they are required to ensure.

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[3] ICJ, Western Sahara, Advisory Opinion of 16 October 1975, para 162.

[4] Dawidowicz, idem, fn. 110 on p. 270, citing Reply from the European Commission to Written Question MARE-B-3/AMF D(2010), 23 June 2010, available at http://www.wsrw.org/files/dated/2010-06-24/letter_commission-wsrw_23.06.2010.pdf (accessed November 2015).

[5] 'Ikea Morocco opening 'halted over W Sahara row', BBC News Website, 29 September 2015: http://www.bbc.co.uk/news/world-africa-34396547.

[6] Dawidowicz, idem, p. 269, refers to ministerial statements made by the US at the time of 2004 US-Morocco Free Trade Agreement and Norway and Switzerland at the time of the 1997 EFTA-Morocco Free Trade Agreement.

Conor McCarthy, led by Kieron Beal QC, is acting for the Claimant in this matter. They were instructed by Leigh Day.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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