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Case No: CO/1032/2015
CO/1034/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2015

Before:

THE HON MR JUSTICE BLAKE

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Between:

THE QUEEN on the application of WESTERN SAHARA CAMPAIGN UK	**Claimant**
- and -	
THE COMMISIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants**
- and -	
THE SECRETARY OF STATE FOR THE ENVIRONMENT FOOD AND RURAL AFFAIRS	

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Kieron Beal QC and Conor McCarthy (instructed by **Leigh Day**) for the **Claimant**
Brian Kennelly (instructed by **HMRC Solicitors Office and Government Legal Department**) for the **Defendants**

Hearing dates: 14-15 July 2015

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Approved Judgment

The Honourable Mr Justice Blake:

Introduction

1. The claimant is an independent voluntary organisation founded in 1984 with the aim of supporting the recognition of the right of the Saharawi people of Western Sahara to self-determination and independence and to raise awareness of the unlawful occupation of the Western Sahara. It brings two related claims against each defendant pursuant to permission granted by Walker J on 23 April 2015.

2. Both claims contend that each defendant is acting unlawfully by applying provisions of EU law to matters within their jurisdiction. The Commissioners for Her Majesty's Revenue and Customs (HMRC) are the defendants in the first application where what is challenged is the preferential tariff given on import to the United Kingdom of goods that are classified as being of Moroccan origin but in fact originate from the territory of Western Sahara. The second challenge is brought against the Secretary of State for the Environment and Rural Affairs (DEFRA) in respect of the intended application of the EU-Morocco Fisheries Partnership Agreement to policy formation relating to fishing in the territorial waters of Western Sahara.

3. Both decisions challenge acts of the European Union in making agreements with Morocco with respect to customs tariffs and fisheries that do not distinguish between goods and activities arising in the sovereign territory of Morocco and the territory of Western Sahara over which Morocco has exercised jurisdiction, in whole or in part, since November 1975. The claimant contends that Morocco has annexed the territory of Western Sahara and claims it as part of its sovereign territory despite decisions of the United Nations and the International Court of Justice (ICJ) that the people of Western Sahara have the right to self determination. Accordingly it is said that Morocco's occupation is in breach of the principles of international law and the Charter of the United Nations.

4. It is common ground that only the Court of Justice of the European Union (CJEU) has competence to determine the legality of the disputed EU measures. The claimant therefore seeks a reference for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU). The defendants oppose such a reference primarily because they submit that the issues raised by the claimant are matters of public international law that the CJEU will decline to adjudicate on in the present circumstances and the claims should accordingly be dismissed.

5. It is further common ground that this court has the power to make the reference, although as it is not a final court within the domestic UK system it is not obliged to do so. 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.

6. The defendants' detailed grounds also raised the question of delay as a reason to refuse relief. Delay was only faintly argued by Mr Kennelly for the defendants in opposition to the claim. In my judgment, it affords no bar to making a reference, if that is otherwise considered to be the appropriate course, for a number of reasons. Permission has been granted without the question of whether the claims were made out of time being reserved, applying the principle in R v CICB ex p A [1990] 2 AC 330 as explained by the Court of Appeal in R (on the application of Lichfield Securities Ltd) v Lichfield DC [2001] EWCA Civ 304 delay should normally only remain an issue if there are good grounds for the refusal of relief pursuant to s.31 (6) of the Senior Courts Act. It is not contended that making a reference would cause substantial hardship, or prejudice to the rights of anyone or be detrimental to good administration. No licence has yet been granted has yet been granted to anybody in the UK to fish in the waters of Western Sahara, and the second defendant suggests that in some respects the challenge is premature and it would be appropriate to see how revised measures more recently adopted bilaterally between the EU and Morocco work out before any court should endeavour to adjudicate on the issues. In respect of the importation of goods, this is an allegation of a continuing breach of international and EU law and not a challenge to a historic specific import. The outcome of the proceedings if successful would not prevent goods being imported from Western Sahara but would merely for the future prevent those goods receiving preferential tariffs on the basis that they are Moroccan goods. In any event, if the issue of the timeliness of these applications were still live today, I would grant an extension of time given the significance of the issues, the factors mentioned above and the history of the issue to which further consideration will be given elsewhere in this judgment.

7. The defendants' principal objection, that for short hand I will label 'justiciability', is altogether more substantial. There is little doubt that if the present challenge was solely based on common law rules, a domestic court might dismiss a claim that depends on an assessment of the legality of actions of a foreign sovereign: see Buttes Gas v Hammer (No 3) [1982] AC 888 per Lord Wilberforce at 931-2; Shergill v Khaira [2015] AC 359 at [42]. The developing exceptions to this rule, where the fundamental human rights of an individual are in issue, would have no application in the present case: see Lloyd-Jones LJ in Belhaj v Straw [2014] EWCA Civ 1394 at 114- 121.

8. Mr Beal QC for the claimants contends, however, that the common law rules have no application to challenges to EU acts taken before the CJEU. He points out that Article 3 (5) of the consolidated Treaty of the European Union (TEU) states that in its relations with the wider world the Union shall uphold and promote its values and shall contribute to the strict observance and the development of international law including respect for the principles of the United Nations Charter. The CJEU has stated that the EU must respect international law including customary international law. Thus in Case C-366/10 Air Transport Association of America and others v Secretary of State for Energy and Climate Change [2012] 2 CMLR 4 the CJEU noted :

> 101. Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union (see, to this effect, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 10, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraphs 45 and 46).

> 102. Thus, it should be examined first whether the principles to which the referring court makes reference are recognised as forming part of customary international law. If they are, it should, secondly, then be determined whether and to what extent they may be relied upon by individuals to call into question the validity of an act of the European Union, such as Directive 2008/101, in a situation such as that in the main proceedings.

9. A little later the Court observed:

> 107. The principles of customary international law mentioned in paragraph 103 of the present judgment may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act (see Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193, paragraphs 14 to 18, and Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraphs 11 to 16) and, second, the act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard.
>
> …..
>
> 110. However, since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles (see, to this effect, *Racke*, paragraph 52).

10. The defendants contend that this statement of the law does not assist the claimant:-

    i) It has no rights under EU law that it is asserting.

    ii) There is a respectable legal opinion from counsel to the Secretary General of the United Nations that exporting goods from and exploiting the natural resources of an occupied territory is not inherently unlawful if the occupying power complies with the legal obligations on such a power to promote the welfare of the population of the territory.

    iii) The EU has never recognised that the Western Sahara is part of Morocco but is not required to specify what the limits of Moroccan territory are in entering agreements with it.

    iv) The EU and its institutions have had proper regard to the principles of international law in its dealing with Morocco and it cannot be said to have arguably made any manifest error in its examination of the issue.

11. With this brief introduction to the issues in dispute, this judgment will now examine:

    i) the status of the Western Sahara;

    ii) the terms of the EU agreements in question;

iii) the respective arguments as to why it is contended that the agreements do or do not breach international law.

The status of Western Sahara

12. In 1884 Spain was recognised as the colonial power of a defined territory of the Western Sahara that was considered a *res nullius* despite there being an indigenous population resident there. In 1960 the UN General Assembly in Resolution 1514 recognised the right of peoples to self-determination and required:

> "5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
>
> 6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.
>
> 7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."

13. In 1963, pursuant to what the UN regarded as a legal obligation to de-colonise, the Special Committee on Decolonisation declared the Western Sahara a non-self-governing territory to be decolonised. In 1965 the General Assembly adopted a resolution requesting Spain to decolonise. And from 1966 to 1973 the General Assembly requested that Spain organise a referendum on independence. In 1974 a census revealed a population of nearly 74,000 people in Western Sahara.

14. Morocco claimed that prior to Spanish colonisation there were historical ties linking the territory to the spiritual and political leadership of Morocco. In an Advisory Opinion delivered in October 1975, the International Court of Justice declared that that there were no ties of a nature to affect the application of the principle of decolonisation and the principle of the free and genuine expression of the will of the people of the territory.

15. Despite this decision, no referendum on the political future of Western Sahara has ever been held. In November 1975 Morocco launched a Green March, whereby some 350,000 Moroccan nationals moved into the territory of Western Sahara. Shortly afterwards Spain signed an agreement with the states of Morocco and Mauritania ceding control of the territory as to the northern two thirds to Morocco and as to the southern one third to Mauritania. Moroccan troops arrived in Western Sahara in December 1975 and have been present ever since.

16. The Frente Polisario was founded in April 1973 for the purpose of gaining independence for the Western Sahara. It declared itself the legitimate representative of the people of Western Sahara and engaged in armed conflict with the government of

Morocco from December 1975 until a cease-fire agreement was reached under UN auspices in September 1991. An earlier cease-fire agreement reached with Mauritania in 1979 led that nation to abandon its claims to any part of the territory and Morocco promptly moved into this part of the territory. In February 1976 the Frente Polisario proclaimed the existence of the Saharawi Arab Democratic Republic (SADR). In 1982 SADR was admitted to membership of the Organisation of African Unity, which led Morocco to at first suspend and subsequently withdraw its membership of that body.

17. Since 1985 there have been efforts under the auspices of the UN to adopt a peace settlement that would resolve the armed conflict between the Frente Polisario and Morocco, lead to a referendum on the political future of the territory and a resolution of the status of the territory. In January 2000 a committee of the UN Mission charged with drawing up an electoral register identified a provisional list of 250,000 inhabitants of the Sahara, of whom 86,425 were deemed eligible to vote in an independence referendum. The electoral list was never finalised and there has been impasse in achieving a durable peaceful settlement of the issue ever since. There are allegations of serious human rights abuses by the Moroccan authorities against the indigenous members of the Saharan population. Significant sections of that population have moved out of the Morocco administered towns and ports. Some have gone into the desert in refugee camps near Tindoeuf, Algeria, located outside the sand barrier built by the Moroccan armed forces that extends throughout most of the territory of Western Sahara. There are also reports of discrimination in the field of business and employment and political expression against indigenous Saharans in favour of Moroccan nationals who have moved into the territory since 1975. These reports, or some of them, are disputed by Morocco which has claimed the territory as an integral part of its Kingdom.

18. According to the review of events by Martin Dawidowicz[1], the UN General Assembly twice in 1979 and 1980 characterized Morocco's presence as belligerent occupation, but later resolutions do not repeat this language. The author observes that this is not decisive as belligerent occupation is largely a matter of fact dependent on effective authority and control over a territory to which the occupying state holds no legal title. Subsequent reports and resolutions from the UN recognise that Morocco *de facto* administers the territory but neither the UN, the OAU, the Member States of the EU, nor the Union itself recognise that Morocco has a *de jure* claim to sovereignty or rights of occupation. Indeed it appears that as late as 2011 the UN still regarded Spain as the sole administering power for the purpose of the UN Charter[2].

19. The UN accordingly regards the Western Sahara as a non-self governing territory where the process of self–determination remains to be completed. Article 1 of the UN Charter of 1945 identifies the purposes of the United Nations as:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law,

[1] 'Trading Fish or Human Rights in Western Sahara' published as chapter 10 in 'Statehood and self Determination' ed Duncan French CUP 2013 at p 272.
[2] Ibid at 271 citing Report of the Secretary General 8 March 2011 UN Doc A/66/65

adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

20. Article 73 of the Charter 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."

21. In 2002 the then legal counsel to the UN Secretary General, Hans Corell, was asked to provide an opinion on the legality of a number of contracts for oil reconnaissance and evaluation activities entered into by the Government of Morocco and a number of foreign companies.

22. He noted:-

i) Morocco was not listed as administering power with the United Nations and has therefore not transmitted reports to the Secretary General under Article 73 (e) (paragraph 7).

ii) Nevertheless, given the status of the territory as non-self governing, it would be appropriate to have regard to the principles applicable to the powers and responsibility of an administering power in the matter of mineral resources (paragraph 8).

iii) There was nothing in Article 73 or subsequent decisions of the General Assembly that prohibited the exploitation of mineral resources by an administering power; but any such acts must be done to promote to the utmost the interests and well-being of the inhabitants of the territory. Such acts could be done pending the discharge of the obligation of the administering power to assist the inhabitants to exercise their rights to self-determination and were subject to the duty to safeguard the inalienable rights of the people of the territory to control their natural resources according to their wishes (paragraphs 10 to 14).

iv) The limited evidence of the practice of states in such circumstances included the fact that in 1975 Spain assured the UN Visiting Mission that the revenues expected to accrue from the exploitation of the significant phosphate resources of the Western Sahara would be used solely for the benefit of the local people after recoupment of any investment made to explore such resources. In the case of Namibia the General Assembly had condemned as illegal contracts for the exploitation of uranium entered into the by the administering power after its continued presence in the territory was itself declared illegal (paragraphs 18 to 20).

v) This led the author to conclude that state practice is illustrative of an *opinio juris* that resource exploitation is lawful if conducted :

> 'for the benefit of the peoples of these territories on their behalf and in consultation with representatives' (paragraph 24).

vi) Further, at the time of the opinion no exploitation had yet taken place and while the author concluded that the contracts themselves were not unlawful he added:

> 'if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self governing Territories" (paragraph 25).

The EU Agreements

23. In March 2000 the Member States of the European Union and the European Community entered into an Association Agreement with the Kingdom of Morocco (OJ l/70/2 18 March 2000). Article 9 of that Agreement deals with industrial products and states 'products originating in Morocco shall be imported into the Community free of customs duties and charges having equivalent effect'. Article 17 of the Agreement relates to agricultural and fishery products and refers to more detailed schemes of tariff free entry into what is now the European Union set out in the protocols. Article 29 of the Agreement is common to all products and states that concept of originating products is set out in Protocol 4.

24. Article 94 of the Agreement states that it shall apply to 'the territory of the Kingdom of Morocco'. Article 6 (4) of Protocol 4 to the Agreement states that 'the terms Morocco and the Community shall also cover the territorial waters which surround Morocco and the Member States of the Community'.

25. On the basis of these provisions, it is, in my judgment, arguable that this agreement refers to products that originate in Morocco and Morocco means the internationally recognised sovereign territory of Morocco and its associated territorial waters on the one hand and the similar territories of the Member States on the other.

26. Case C -386/08 Firma Brita GmbH v Hauptzolamt Hamburg-Hafen [2010] ECR 1-1289 concerned whether goods originating from areas occupied by Israel but outside its internationally recognised borders could benefit from the EU Israel-Association Agreement. Advocate General Bot in his opinion at [113] records that the Council took the view that a reference to the territory of the State of Israel and its territorial waters meant its internationally recognised territory in accordance with UN Security Council resolutions. As we shall see below (at [36]) the Court reached its decision in this case on a different basis.

27. In 2006 the European Community and the Kingdom of Morocco reached a Fisheries Partnership Agreement (OJ L 141/4 29 May 2006) enabling fishing vessels of the EU Member States to fish in the Moroccan fishing zone in exchange for a significant financial payment by the Community. Article 2 of the Agreement states that 'Moroccan fishing zone means the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco'. Article 11 of the Agreement states that its area of application is 'the territory of Morocco and to the waters under Moroccan jurisdiction.' Detailed regulations assign fishing quotas to the Member States and applications for a licence within the allocated quota are determined by the national authority (in the instant case the Marine Management Organisation or relevant devolved fisheries administration, but pursuant to policy made by the second defendant). The United Kingdom has been assigned a quota but has not yet issued any licences.

28. Whatever the terms 'territory of Morocco' and 'waters under Moroccan jurisdiction' mean, there is undisputed evidence that agricultural products originating from the

territory of Western Sahara have been imported into the United Kingdom tariff-free on the basis of a declaration that they originate from Morocco. Despite being made aware of this state of affairs, HMRC, as the responsible national authority has never exercised its powers to investigate and query the stated place of origin of these products. It contends that EU and international law permits exporters to make the declarations concerned.

29. Equally, it is undisputed that where Member States have issued licences to vessels within its jurisdiction to fish in the Moroccan fishing zone, such fishing has taken place within the territorial waters of the Western Sahara and catches have been landed and port fees paid to the Moroccan authorities in ports located within the territory of Western Sahara.

30. There has been debate between the European Parliament, or some members thereof, and the European Commission as to whether an agreement that permits vessels from EU Member States to take fish from the waters of Western Sahara is in accordance with international law. The material before this court includes exchanges between Parliament, the Legal Service and the Commission and on this issue since at least February 2006.

31. The response of the Commission to the various queries raised by members of the European Parliament is reflected in a joint written answer given by the High Representative, Baroness Ashton, on behalf of the European Commission in June 2011. It states:

> "According to the United Nations position on the subject, which the EU adheres to, Western Sahara is considered a 'non-self governing territory' and Morocco its de facto administering power. To the extent that exports of products from Western Sahara are 'de facto' benefitting from the trade preferences, international law regards activities related to natural resources undertaken by an administering power in a non self governing territory as lawful as long as they are not undertaken in disregard of the needs, interest and benefits of the people of that territory. The 'de facto' administration of Morocco in Western Sahara is under a legal obligation to comply with these principles of international law. The same applies to the envisaged Agreement on the liberalisation of trade on agricultural and fisheries products, which would modify the trade chapter of the Association Agreement. The Association Agreement establishes formal bodies which aim to ensure follow-up on the implementation of the Agreement and give each contracting party the opportunity to raise issues and facilitate discussions of policies implemented by the parties."

32. This statement and the legal opinions on which it is based, in substance refer back to the opinion of Hans Corell[3], although without any reference to the concomitant duty of the administering authority to promote self-determination, or the need to consult the representatives of the people of the territory. It may be debatable whether the need to demonstrate that actual exploitation is used for the benefit of the Saharawi people is sufficiently reflected in the observation made in the words quoted that the needs of the people of the territory should not be disregarded.

[3] See also reply of European Commission 23 June 2010 cited in Dawidowicz at p.270 footnote 110.

33. In 2013 a further Protocol was agreed between the Commission and Morocco to establish a Joint Committee to monitor how revenues generated by the agreements were to be spent and the minutes of the early meetings of that Committee have been placed before the court.

The claimant's contentions on conflict with international law

34. In the course of his written and oral submissions, Mr Beal contends that the EU and the Commission, in entering into these agreements with Morocco, have acted on a mistaken and erroneous understanding of international law. A vague expression of intent by Morocco to benefit the local population by these agreements is insufficient to make them lawful agreements by an administering power pending the expression of self-determination by the people of the territory concerned. In particular:

    i) Morocco has never acknowledged that it is an administering power or has an obligation to promote the self-determination of Western Sahara. On the contrary, it claims the territory as its own sovereign territory because of historic links, despite the opinion of the ICJ to the contrary. It has thus not merely failed to report to the UN on the progress being made to self determination but has refused to accept peace proposals based on a referendum, of the original population of Western Sahara in 1975 and their descendants and at the most has accepted the possibility of limited self-government within the auspices of Moroccan sovereignty.

    ii) Neither the Saharawi people nor their legitimate representatives have been consulted as to how natural resources should be exploited and they have not consented to such exploitation. The Frente Polisario itself is opposed to these agreements as it perceives them as a means where Morocco legitimises its occupation of the country and can use the resources generated by them for the general purposes of benefitting the Moroccan people as a whole and not (or not just) the people of Western Sahara in particular. Further by moving its own nationals into the territory and assigning land and commercial licences to such nationals, Morocco has ignored the principle that the indigenous inhabitants of the territory should determine the fate of its natural resources. For a state to rely on the approval of people transferred to the occupied territory after the unauthorised assertion of jurisdiction is inevitably to legitimise such occupation that was, at inception, and remains, illegal in international law.

    iii) Whilst the 2013 Protocol and its Committee may be a good faith endeavour to ensure that fish caught in Western Saharan waters are landed at Western Saharan ports and landing fees paid there, that is no guarantee that the benefit of the agreements goes exclusively to the people of Western Sahara. There is nothing in the Agreements or the Protocol or the terms of references of the Committee to require Morocco to do so and its own statements about the projects developed with the EU are that this is part of a general economic expansion of Morocco.

    iv) Morocco has in fact exercised administrative control of the territory as a result on the location of its armed forces there, in violation of the principles of the UN Charter and respect for the right to determination. Despite the cease-fire, Morocco has not proceeded to legitimise its exercise of authority by arranging

for a free expression by the people of Western Sahara as to the arrangements for their future governance.

v) In such circumstances it is wrong for Member States, let alone an international body such as the EU, that abides by the principles of international law and the UN Charter, to aid and abet what is in effect an illegitimate occupation of the Western Sahara. Such assistance is in breach of emerging principles of state responsibility for unlawful acts that violate the principle of self-determination.

Discussion

35. In addition to the Air Transport case (cited at [8] above) the advocates placed particular reliance at the oral hearing on three further authorities.

36. Mr Beal submitted that Brita was precisely a case where certification of goods from the West Bank as Israeli was declared unlawful applying principles of international law. The ratio of the Court's decision at [44] to [52] was the principle that in entering a bi-lateral treaty a state cannot impose obligations on a third state and a fortiori where the third state (the Palestinian authority) has entered its own Association Agreement with the Commission. The Court therefore concluded at [52]:

> "Accordingly, to interpret Article 83 of the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, '*pacta tertiis nec nocent nec prosunt*', as consolidated in Article 34 of the Vienna Convention"

37. I am not persuaded by Mr Beal's submission that the situation is analogous here. Western Sahara is not recognised by the European Union and its Member States as an independent territory. No self-governing body exercises jurisdiction over the agricultural land and fishing area of Western Sahara. There has been no agreement entered into between the Community and the Frente Polisario in respect of these matters. Applying the Morocco Agreement to all areas where the state of Morocco exercises authority would thus not conflict with the rights of a third state or state-like entity.

38. Mr Kennelly relied on case T-572/93 Odigitria AAE v Council of the European Union and Commission of the European Communities. The Community had entered agreements with the states of Guinea-Bissau and Senegal for licensed operators to fish in their territorial waters. The precise boundary between the two states was disputed. The Association Agreement did not define what the boundary was or exclude the disputed area from the agreement. A Greek vessel that had a national quota and authority from Senegal was fishing in the disputed zone when it was boarded by the authorities of Guinea Bissau, its cargo confiscated and the master fined for fishing without a licence. The vessel brought an action for damages against the Council and the Commission for negligent discharge of their duties in making Agreements that provided a hidden peril for those who relied on them. The claim was dismissed and the General Court explained (at [38]):

> "As regards the content of that agreement, it must be observed that the Community institutions enjoy a wide discretion in the field of the Community's external economic relations, as in the corresponding internal field of the common agricultural policy. In concluding the agreements and protocols with the two States in question, the Council and the Commission did not go beyond the limits of the discretion which they have in this matter and did not in any case adopt a measure manifestly inappropriate in relation to the objective which they were pursuing. The Council and the Commission could not have asked for the zone in dispute to be excluded from those agreements without taking a position on matters forming part of the internal affairs of non-member States. If the Community opposed the claims of the States concerning the zones over which they claim to have jurisdiction or opposed the exercise of that jurisdiction when a dispute exists, those non-member countries would very probably refuse to conclude such agreements with the Community. Moreover, if the Community asked for zones to which other States lay claim to be excluded, that move would certainly be interpreted as interference by the Community in those disputes. The exclusion of such zones at the Community's request would also have the effect of weakening the claim of the non-member State in question to have the right to exercise such jurisdiction. The fact that such disputes are submitted to arbitration or are the subject of legal proceedings strengthens that argument, since, where proceedings are pending before the ICJ, it is not appropriate for the Community to take a position on disputes between non-member States."

The judgment was upheld on appeal by the CJEU but the discussion there focused on different issues.

39. I accept that if there is an unresolved territorial dispute between two states, the Commission is not obliged to endeavour to resolve it before entering Association Agreements with either state. It does not follow that the Commission is always entitled to be indifferent to where the sovereign borders of a state end, particularly where there is an unlawful occupation of territory of another. Such a submission would be contrary to the principles of the UN Charter and the principles that bind the European Union, however wide the discretion may be with respect to foreign affairs. Further it would be contrary to the decision in Brita, for the Union to accept one state's *de facto* assertion of jurisdiction with respect to the origin of goods, where it would conflict with another state's rights. The dispute between Senegal and Guinea-Bissau was not about whether one state could claim jurisdiction outside its sovereign territory but where the limits of its sovereign territory in fact lay.

40. The present position is different. Morocco may claim Western Sahara to be part of its sovereign territory but the international community generally and the European Union, in particular, does not recognise that claim. Indeed, the Western Sahara is one of the few pieces of disputed territory where a claim by a neighbouring state to sovereignty has been examined by the International Court of Justice. In my judgment, Morocco's claim to the territory must be based on:

i) the pre-existing links before 1975 that it relied on its submissions to the International Court; or

ii) the November 1975 agreement with the former colonial power; or

iii) its military occupation in December 1975; or

iv) a free act of self-determination by the people of Western Sahara.

However, the first basis of claim was considered and rejected by the Court in its Advisory Opinion of 16 October 1975 (Western Sahara Advisory Opinion ICJ Reports 1975 p.12 at [162]). The second and third bases would unambiguously conflict with the principles of the UN Charter. A colonial power cannot gift an occupied territory to a neighbouring state for some reason of diplomatic advantage, particularly where it has been directed by the UN to supervise the process whereby the 72,000 odd people of the Western Sahara should express their right to self-determination. Equally, unauthorised military occupation cannot found the basis for legitimate territorial claims. The fourth potential basis of sovereignty has not come to pass; despite long engagement by the UN no free expression of the will of the Saharawi people has yet been undertaken. In these circumstances, I am of the view that this is not a dispute as to where the sovereign territory of Morocco extended; this was at all times clear. Rather the issue is whether it is legitimate for a body respecting the principles of the UN Charter to make an agreement with an administering power in respect of territory outside its recognised boundaries. The principle in Odigitria is accordingly directed to a different issue and does not resolve the present problem.

41. Mr Kennelly then drew attention to the ICJ judgment in the case of East Timor (Portugal v Australia) Judgment ICJ 1995 p 90. East Timor was a colonial possession of Portugal. Portugal sought to fulfil its obligations as a colonial power by affording the people of East Timor the right to self-determination. The neighbouring state of Indonesia asserted sovereignty over the territory, moved its armed forces into the territory and an armed conflict ensued. Portugal brought proceedings against Australia for agreements to exploit the resources of East Timor when it was under Indonesian jurisdiction. If the judgment had proceeded to a hearing on the merits it might well have been informative as to the state of customary international law on the present question. It did not do so, however, as the Court accepted one of Australia's arguments that the nature of Indonesia's occupation could not be determined without the participation in the proceedings of the state of Indonesia, applying the principle established in the Monetary Gold case (see [29]). Mr Kennelly submits that a similar conclusion would follow here if Morocco declined to participate in the proceedings. Mr Beal submits that the rules of the CJEU would permit Morocco to make representations to the CJEU if it wished to; in East Timor the ICJ was applying its rules of procedure rather than a rule of customary international law that would prevent the CJEU considering the nature of Morocco's claim to jurisdiction in the Western Sahara.

42. It seems to me that this is a matter that the CJEU may have to consider if otherwise a reference is made. I cannot ascertain from the report whether the state of Israel was party to the proceedings in Brita, where Advocate General Bot had little difficulty in deciding where Israel's sovereign borders were (at [111] to [112] of his opinion). The CJEU may take the view that it would reduce the efficacy of the reference to the Charter of the UN in the TEU, if every time there was a serious issue as to violation of the Charter by a state which is not a member of the EU, the Court would be obliged to decline jurisdiction. The subject of the present case is the actions of the Commission in reaching the Agreements, rather than an internationally binding declaration as to the nature of Morocco's exercise of jurisdiction in the Western Sahara.

43. In the end, the best prospects of Mr Kennelly dealing a knock out blow to making a reference lay in the combination of the Hans Corell opinion and the application of the test of manifest error identified in the Air Transport case (at [9]) above. I accept that in the light of the state of the learning and the submissions made to me, it would not be a manifest error for the Commission to conclude that the fact of Morocco's continued occupation of the territory of the Western Sahara did not preclude, as a matter of international law, the making of any agreements for the exploitation of the natural resources of the territory in question. If so, I also recognise that it is but a short step to say that what agreements can be reached and whether the benefit of the agreements is being given to the people of the region is a matter of judgment for the Commission rather than adjudication for the CJEU. I recognise that there is a real possibility that this is an approach that will find favour.

Conclusions

44. In the end, I am not persuaded that I can with complete confidence decline to make a reference on the basis that the claimant's arguments are bound to fail (see R v International Stock Exchange ex parte Else [1993] QB 534 at 551D per Sir Thomas Bingham). My reasons on this part of the argument are as follows.

45. First, whilst I recognise the eminence and expertise of the author, the Hans Corell, the opinion is an opinion of a legal adviser on a difficult topic and not a judgment of the ICJ.

46. Second, there are issues that arise in these proceedings that were not considered in Mr Corell's opinion, in particular, who it is who must benefit from the exploitation of Western Sahara's natural resources: the whole population of the territory, assessed in 2000 to be some 250,000 or so, or the 86,000 original inhabitants and their descendants then assessed to be eligible to vote. This seems to be rather central to the principle of self-determination reflected in the Charter and emphasised in Mr Corell's opinion. No learning on the topic has been directed to me, but I can see why Mr Beal's submissions, that I have summarised at [34] above, may well find favour.

47. Third, the answer to who represents the people for the purpose of self-determination may prove decisive to the question of the relevance and sufficiency of the Commission's efforts to ensure that the financial benefits of the Agreements are felt in territory of the Western Sahara. It may be that the benefits need to be directed specifically to the indigenous population. If this cannot be achieved as a matter of political practicality then no agreement should be entered with an administering power that:

    i) does not recognise that this is its status and

    ii) does not act in accordance with all the obligations imposed by Article 73 of the Charter,

    iii) and in particular does not acknowledge the obligation to promote the self-determination of the people of Western Sahara.

48. Fourth, Mr Corell's opinion was cautious in tone and addressed the making of a contract, in principle, between Morocco and a commercial enterprise not itself bound

by public international principles (contrast the Member States and the Commission itself). Some of the legal opinions and statements made on behalf of the Commission, seem wide-ranging and unqualified in scope; they may suggest that it is appropriate to contract with an occupying administering power as long as *some* benefit is created for the region generally. It seems to me that that there are good reasons why the CJEU may take a narrower view.

49. Fifth, the non-state nature of the commercial companies who made exploration agreements with Morocco meant no consideration was given to the status of the International Law Commission's 2001 Document on the Responsibility of States for Internationally Wrongful Acts (see Chapter III Articles 40 to 41 and the duty on states to cooperate to end serious breaches of a peremptory norm of international law). If such an obligation is now part of customary international law, it is possible that a failure by an administering power to promote self-determination will be considered such a serious breach. Equally, the fact that trade agreements are made that benefit the population of the occupied territory generally without regard to the fact that some of the population are said to be present in the territory as a result of the original unlawful act may be evidence of a serious breach of international law. Further, no consideration was given in the Corell opinion to the UN Convention on the Law of the Sea.

50. Sixth, it is clear that the status of these agreements have been controversial, not merely within the European Parliament but also in respect of declarations made by Member States to the 2013 Protocol (see for example the declarations of Denmark and Sweden opposing the Protocol, the United Kingdom in abstaining and the expressions of concern by the Netherlands and Finland). There would appear to be a strong public interest in ascertaining what the CJEU has to say on the question, thereby clarifying the limits of the Commission's broad powers in the sensitive arena of international relations.

51. Seventh, it is pertinent to note that amongst public expressions of concern about the legality of these agreements are writings by scholars. Reference has already been made (at [18] above) to the essay by Martin Dawidowicz 'Trading fish or human rights in Western Sahara?' that is critical of the agreements made by the Commission. His is not a lone voice. Of particular interest to the present proceedings is that Hans Corell himself authorised publication of a paper he delivered as a private individual at a conference in Western Sahara at the University of Pretoria in December 2008. In the paper he makes a number of points about the limited nature of the issues on which he had been asked to advise and the caution he expressed in reaching them. He further noted that as Morocco did not have the status of an administering power, the application of Article 73 by analogy had to be examined with the utmost sensitivity. He continues:

> "If the principle is that the interest of the peoples of Non-Self-Governing Territories are paramount, and their well being and development are the sacred trust of their respective administering powers, this principle had to be applied with an extra margin in the present case. To what extent had the people of Western Sahara been involved in the process of granting the contracts? I believe that the fact the situation obtaining in the territory for so many years and the fact that the question was raised in the Security Council, are a clear indication that there might be a problem here."

52. Noting the final paragraph of his opinion (summarised at [22] (vi) above) he added:

> "From this sentence it follows that Morocco would have to engage in proper consultations with persons authorised to represent the people of Western Sahara before such activities would be allowed as was done by the United Nations in East Timor."

53. Of particular relevance are his comments on the Fisheries Agreement.

> "I must confess that I was quite taken aback when I learnt about this agreement. Without doubt, good relations between Europe and Morocco are of the greatest importance. And there is also a mutual interest in the fisheries off the coast of western Africa being effectively managed and supervised. But 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"

Having then examined the text of the agreement and noting the absence of delimiting factors he reaches the conclusion:

> "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."

54. Mr Kennelly invites me to disregard this expression of opinion altogether. I recognise that caution should be exercised when considering the weight to be attached to remarks made informally in a private capacity at a conference in Africa, where the position of the OAU is markedly different from that of other states. However, although no longer holding a position as Legal Counsel to the Secretary General, Mr Corell remains a distinguished expert in this field of law. In January 2015 he was appointed Co-Chair of the International Bar Association's Human Rights Institute, and the biographical details then provided demonstrate that after his 10 years service with the UN he has been active in this field as a judge, legal adviser and scholar. His 2008 remarks precisely address some of the concerns I have had with the Commission's reliance on the UN Charter to justify its actions. They are reflected in Mr Beal's submissions about the absence of any evidence of consultation and consent to these agreements by the Saharawi people or their recognised representatives.

55. I conclude that there is an arguable case of a manifest error by the Commission in understanding and applying international law relevant to these agreements.

56. I recognise that the claimant is not an exporter of goods or applicant for a fishing licence whose commercial rights have been infringed by the decision in question. The claimant has standing in English law to bring this challenge and relies on the principles of international law as applied in the EU to do so. I consider that the challenge is real and genuine. I cannot conclude that the CJEU would decline to

answer these questions simply because an individual Saharawi or any one else with commercial interests affected by the Agreements have not been joined as co-claimant.

57. I accordingly conclude that I should make a reference to the CJEU as the relevant criteria to do so have been established. I will give the parties an opportunity to agree the questions pursuant to a timetable to be agreed at the handing down of this judgment. At present, I consider that there may be a difference between the issues with respect to the Fisheries Partnership Agreement 2006 where the text refers to waters 'falling within the sovereignty or jurisdiction of the Kingdom of Morocco' and the customs tariff point under the Association Agreement of 2000 where the reference is simply to the territory of Morocco. It may be as a matter of simple interpretation that this excludes produce from territories outside of Morocco's recognised border. Otherwise, the core issues seem to me to be whether the Commission was able to make the agreements it has done and remain in conformity with international law and the UN Charter without the consultation and consent of the Saharawi people and their recognised representatives first having been obtained.