Trade and Investment Agreements in Disputed Territories: The case of Western Sahara

Kluwer Arbitration Blog
April 4, 2017

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Please refer tot his post as: Kate Parlett, 'Trade and Investment Agreements in Disputed Territories: The case of Western Sahara', Kluwer Arbitration Blog, April 4 2017, http://arbitrationblog.kluwerarbitration.com/2017/04/04/reserved-for-4-april-kate-parlett-on-western-sahara/

The long-standing dispute over the territory of Western Sahara has been the subject of a treaty, an advisory opinion of the International Court of Justice, an armed conflict, a United Nations-brokered ceasefire, and several General Assembly and Security Council resolutions. It has also recently come to the fore in several cases before the EU and English courts, raising questions about the legality of the EU's trade and other international agreements with Morocco being applied to Western Sahara. These cases have brought into focus the need for treaty parties to take account of potential human rights implications in the application of trade and investment agreements, particularly where there are issues concerning the right to self determination. Over time, this consideration of human rights has the potential to result in more explicit human rights protection being built into the text of these treaties, and may in due course form the basis of claims and arguments before investment arbitration tribunals. Moreover, human rights impact assessments – which are likely to be performed more frequently in advance of concluding treaties – will potentially form part of the *travaux préparatoires* which could be a useful interpretive tool for arbitrators deciding claims under investment treaties.

An area of some 100,000 square miles in the north-west coast of Africa, with nearly 700 miles of coastline and a population of around half a million, two-thirds of Western Sahara territory is currently occupied by Morocco. The international community has repeatedly emphasized the right of self-determination for the indigenous Saharawi people. The UN has recognised the Front Polisario (from the Spanish acronym for *Frente Popular de Liberación de Saguía el Hamra y Río de Oro*) as the legitimate representative of the Saharawi people and in the peace negotiations with Morocco.

In 2012, the Front Polisario commenced proceedings before the General Court of the European Union, seeking annulment of the decision of the EU Council adopting a 2010 trade agreement with Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products.[fn]Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco (OJ 2012 L 241, p 2, 8 March 2012).[/fn] The 2010 Agreement is a development of the existing free-trade agreement between the EU and Morocco: the 2000 Association Agreement[fn]Association Agreement between the European Union and the Kingdom of Morocco (OJ 1/70/2, 18 March 2000).[/fn] and it applies to the same area, specified to be the "territory of the Kingdom of Morocco." The Front Polisario complained that the 2010 Agreement was being applied by Morocco to the territory of Western Sahara, facilitating the export to the EU of agricultural products grown in Sahrawi land and fish caught in Sahrawi waters, violating the rights of

the Sahrawi people to self-determination and to permanent sovereignty over their natural resources. It argued that this was in violation of EU fundamental rights, as well as international law, including the right to self-determination.

In December 2015, the General Court upheld the challenge to the EU Council's adoption of the 2010 Agreement. It noted that although neither the 2010 Agreement nor the 2000 Agreement expressly stated that they applied to the territory of Western Sahara, the EU was aware that the Moroccan authorities had applied the 2000 Agreement to parts of Western Sahara for an extended period of time, and the EU institutions had not opposed this practice.[fn]Case T-512/12, *Front Polisario v Council of the European Union*, 10 December 2015, paras 99 and 102.[/fn] Before the Court, the Commission conceded that the Agreements were in practice applied to products originated in Western Sahara [fn]See Case C-104/16P, *Council of the European Union v Front Polisario*, Opinion of Advocate-General Wathelet, 13 September 2016, para 65.[/fn], and a significant number of listed approved Moroccan exporters were based in that territory.[fn]Case T-512/12, *Front Polisario v Council of the European Union*, 10 December 2015, para 84.[/fn]

While the General Court noted that there is no "absolute prohibition" on the EU concluding an agreement which may be applied to disputed territory, if it does so, the EU must consider whether the agreement will be applied to the detriment of the population of that territory, or in breach of their fundamental rights, including those set out in the EU Charter of Fundamental Rights. [fn]Case T-512/12, *Front Polisario v Council of the European Union*, 10 December 2015, paras 227-228.[/fn] In approving the 2010 Agreement, the EU Council had not conducted that analysis, and it followed that the decision approving the 2010 Agreement was annulled insofar as it applied to the territory of Western Sahara.[fn]Case T-512/12, *Front Polisario v Council of the European Union*, 10 December 2015, paras 247-248.[/fn]

A year later, the Grand Chamber of the Court of Justice overturned the decision, but in doing so it confirmed that neither the 2000 Agreement nor the 2010 Agreement apply to the territory of Western Sahara. The Grand Chamber considered that the question was one of legal interpretation of the Agreements, rather than their application in practice. It held that the principles of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties, taken together with the customary principle of self determination, precluded an interpretation of the "territory of the Kingdom of Morocco" as including Western Sahara.[fn]Case C-106/16P, *Council of the European Union v Front Polisario*, 21 December 2016, paras 88-92.[/fn] It therefore concluded that the General Court had erred in finding that the Agreements applied to the territory of Western Sahara, and as a consequence, the Front Polisario did not have standing to seek annulment of the Council decision approving the 2010 Agreement.[fn] Case C-106/16P, *Council of the European Union v Front Polisario*, 21 December 2016,126, 131.[/fn] So formally the claim by the Front Polisario was dismissed, but in substance the Grand Chamber concluded that the EU trade Agreements are not applicable to the territory of Western Sahara.

In parallel to the proceedings before the EU courts, an NGO, "Western Sahara Campaign UK", has brought proceedings before the English courts against the UK, claiming that the UK's application of EU law implementing the 2000 Association Agreement and a 2006 Fisheries Partnership Agreement between the European Community and Morocco is unlawful. The 2006 Agreement has been quite controversial: it provides for the issuance of licences to fish in the waters within Morocco's territory or jurisdiction, and under that Agreement EU Member States have issued licences to vessels to fish in the Moroccan fishing zone, and such fishing has taken place in the territorial waters of Western Sahara. [fn]Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ l 141/4 29 May 2006). See The *Queen on the application of Western Sahara Campaign UK v The Commissioners for Her Majesty's Revenue and Customs and The Secretary of State for the Environment Food and Rural Affairs* [2015] EWHC 2898 (Admin), paras 28-29.[/fn] In May 2016, the

English High Court referred several questions for a preliminary ruling by the ECJ. These included (1) whether the 2000 Association Agreement applies to products originating in Western Sahara; and (2) whether the 2006 Fisheries Partnership Agreement is valid, having regard to the principles of international law.[fn]Case C-266/16, *Reference for a preliminary ruling by from the High Court of Justice (England & Wales), made on 13 May 2016 – Western Sahara Campaign UK v Commissioners of Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*.[/fn] Following the Grand Chamber's Judgment in December 2016, the High Court has withdrawn the first question, on the basis that the Grand Chamber's Judgment establishes that the 2000 Agreement does not apply to Western Sahara. The question of the validity of the 2006 Fisheries Agreement remains pending for preliminary ruling by the ECJ, and is likely to be given later this year, with a final judgment from the English High Court to follow.

The decisions of the EU courts in the Front Polisario cases suggest that there are limitations on the EU concluding trade and investments which will be applied to territory that is disputed, and in certain circumstances the EU will be precluded from doing so.

The decisions also suggest that where there are human rights concerns with trading partners, including concerns about the right to self-determination, a prior human rights impact assessment will be required. A commitment to conclude such assessments was incorporated in the 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy, (available here), and the European Ombudsman recently found that the European Commission's failure to carry out a prior human rights impact assessment for the free trade agreement between the EU and Vietnam without valid reasons constituted maladministration.[fn]Case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, 26 February 2016, available here, para 28.[/fn] These human rights impact assessments will potentially form part of the *travaux préparatoires*, which may eventually feature in tribunals' considerations of claims in arbitration under investment treaties.

As to circumstances in which the EU will be precluded from entering into trade and investment agreements which are likely to have adverse impacts on human rights, the position is unclear. The General Court implied that any agreements which are likely to entail breaches of fundamental rights would be not be permissible, but the Grand Chamber did not address the issue. Advocate-General Wathelet, in an opinion preceding the Grand Chamber's judgment, suggested a more restrictive approach than that taken by the General Court, which would require the EU's institutions and its Member States only to ensure compliance with *jus cogens* and *erga omnes* obligations, and not with the full range of fundamental rights.[fn] Case C-104/16P, *Council of the European Union v Front Polisario*, Opinion of Advocate-General Wathelet, 13 September 2016, para 276.[/fn]

Since 2013, the EU and Morocco have been negotiating a Deep and Comprehensive Free Trade Area, which is anticipated to cover both trade and investment. In late 2013, the European Commission commissioned an independent trade sustainability impact assessment in relation to the Comprehensive Agreement, which identified several human rights issues in relation to Western Sahara (available here). Given the divergent opinions about the extent to which the EU may be constrained by human rights considerations in negotiating trade and investment agreements, it is likely that these issues will be contested in the context of those ongoing negotiations with Morocco. This is likely to give the EU – both its institutions and its courts – an opportunity to bring much-needed clarity to the relationship between trade and investment and human rights, and in that respect it is to be welcomed.