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THE ROLE OF STATE IMMUNITY AND ACT OF STATE IN THE *NM CHERRY BLOSSOM* CASE AND THE WESTERN SAHARA DISPUTE

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Abstract In early 2018, the Polisario Front and the Saharawi Arab Democratic Republic (SADR) obtained a favourable ruling from the South African Courts, granting the SADR ownership over a cargo of phosphate aboard the *NM Cherry Blossom* originating from a mine in the Moroccan-controlled part of the Western Sahara. Although hitherto largely unnoticed in legal circles, the *Cherry Blossom* case raises important questions concerning the outer bounds of State immunity and the scope of the act of State doctrine. In addition, the case holds potentially far-reaching ramifications for the international legal order if other domestic courts were to follow suit.

Keywords: act of State, public international law, public policy, self-determination, State immunity, Western Sahara.

I. INTRODUCTION: LAWFARE OVER THE WESTERN SAHARA

The situation in the Western Sahara remains one of the main outstanding disputes stemming from the colonial era.[1] While the region was added to the United Nation's list of non-self-governing territories in 1963, the lion's share of the Western Sahara has been under the control of Morocco ever since the mid-1970s (following Spain's withdrawal). An armed conflict between the Polisario Front[2] and the Kingdom of Morocco raged on until 1991, when the two parties agreed to a ceasefire that was to enable the organization of a UN-supervised referendum on self-determination (which, after 30 years, remains to be organized). Since 2006, the political status of Western Sahara has been the subject of a negotiating process authorized by the UN Security

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[1] For a useful overview of the legal background, see General Court of the EU, *Front Polisario v Council of the EU*, Judgment of 10 December 2015 in Case T-512/12, ECLI:EU:T:2015:953 [1]–[16].

[2] The Polisario Front defines itself as a national liberation movement. It has previously been recognized by the UN General Assembly as 'the representative of the people of the Western Sahara'. UNGA Res 34/37, 'The Question of Western Sahara (21 November 1979) [7].

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Council under the auspices of the UN Secretary-General.[3] While the ceasefire has by and large been observed, in recent years, the Polisario Front and the so-called Saharawi Arab Democratic Republic (SADR)[4] have shifted their strategy from warfare to 'lawfare'.[5]

In particular, the dispute has resulted in a number of high-profile procedures before the EU Courts. First, the Polisario Front lodged an action for annulment against a Council Decision of 2012 on the conclusion of an EU–Morocco Association Agreement inasmuch as it applied to the Western Sahara. In a nutshell, the General Court held that the Polisario Front was directly and individually concerned so that the action was admissible.[6] As to the merits, the Court accepted that EU institutions 'enjoy a wide discretion as regards whether it is appropriate to conclude an agreement with a non-member State which will be applied on a disputed territory'.[7] At the same time, having regard *inter alia* to the 2002 Legal Opinion by UN Legal Counsel Hans Corell[8] (to which we shall return below), the Court held that the Council failed to satisfy itself 'that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights'.[9] For this reason, the Council Decision was partially annulled insofar as it approved the application of the Association Agreement to the Western Sahara. Upon appeal, however, the Court of Justice of the EU (CJEU) arrived at a completely opposite result and ultimately set aside the judgment of the General Court. The Court relied in particular on three overlapping, yet autonomous, rules of international law, namely, (1) the customary principle of self-determination,[10] (2) the customary rule codified in Article 29 of the Vienna Convention on the Law of Treaties (VCLT), which provides that, unless a different intention appears from the treaty or is otherwise established, that treaty is binding upon each party in respect of its entire 'territory',[11] and; (3) the principle of the relative effect of treaties

[3] Negotiations on the region's final status indeed continue under UN auspices (coordinated in particular by the UN Secretary-General's Personal Envoy for Western Sahara). For the most recent UN resolutions, see (nn 104 and 105).

[4] The SADR was proclaimed by the Polisario Front in 1976. It exercises control over some 20–25 per cent of the territory it claims. It is currently recognized as a State by some 45 UN Members and is a formal member of the African Union.

[5] On this concept, see eg OF Kittrie, *Law as a Weapon of War: Lawfare* (Oxford University Press 2016).

[6] *Front Polisario v Council* (n 1) [114].

[7] ibid [223].

[8] Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc S/2002/161 (hereafter the '2002 UN Legal Opinion').

[9] *Front Polisario v Council* (n 1) [241].

[10] Court of Justice of the EU (Grand Chamber), *Council of the EU v Front Polisario*, Judgment of 21 December 2016 in Case C-104/16P, ECLI:EU:C:2016:973 [88]-[93] (finding that '[i]n view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State', the words 'territory of the Kingdom of Morocco' in the Association Agreement could not be interpreted in such a way that the Western Sahara was included within the territorial scope of that agreement.

[11] ibid [94]–[99].

(Article 34 VCLT).[12] On the basis of the foregoing rules, the CJEU found that the Association Agreement could not apply to the Western Sahara. The other side of the coin was that the Polisario Front lacked the required standing to seek annulment of the contested Decision.[13]

Second, Western Sahara UK, a UK-based voluntary organization, initiated two separate procedures before the High Court of Justice for England and Wales pertaining to the application of the Fisheries Partnership Agreement concluded between the EU and Morocco and the concomitant 2013 Protocol. The procedures resulted in a request for a preliminary ruling on the validity of the underlying EU instruments adopting the treaties. Following its prior reasoning, the CJEU concluded that neither the Fisheries Partnership Agreement nor the 2013 Protocol were applicable to the waters adjacent to the territory of the Western Sahara. According to the Court, any agreement between the EU and Morocco extending to the Western Sahara would be contrary to the principle of self-determination and the principle of the relative effect of treaties.[14]

A separate action for annulment targeting the 2013 Fisheries Protocol was declared inadmissible by the General Court on similar grounds on 19 July 2018.[15] Two further applications for annulment lodged by the Polisario Front remain currently pending before the General Court.[16]

Whereas the recent procedures before the CJEU have attracted considerable academic attention (and criticism),[17] also inviting excursions into the CJEU's earlier case law in *Brita* and *Anastasiou*,[18] other court procedures initiated by the Sahrawi Arab Democratic Republic or the Polisario Front have largely remained below the radar. In particular, in two separate procedures, the SADR and/or the Polisario Front have sought to attach cargos of phosphate that had been mined in the Moroccan-controlled part of the Western Sahara, sold to third companies, and shipped overseas. Importantly, phosphate (used

[12] ibid [100]–[108] (holding that 'the people of Western Sahara must be regarded as a "third party"' within the meaning of art 34 VCLT, implying that the implementation of the Association Agreement required their consent.

[13] ibid [133].

[14] Court of Justice of the EU (Grand Chamber), *Western Sahara Campaign UK*, Judgment of 27 February 2018 in Case C-266/16, ECLI:EU:2018:118 [63].

[15] General Court, *Front Polisario v Council*, Order of 19 July 2018 in Case T-180/14, ECLI:EU:T:2018:496.

[16] See Cases T-376/18 (*Front Polisario v Council*) and T-275/18 (*Front Polisario v Council*). These applications reportedly target a Council Decision authorizing the Commission to reopen negotiations with a view to modifying the Fisheries Partnership Agreement with Morocco, on the one hand, and a civil aviation agreement with Morocco, on the other hand.

[17] For particularly insightful critique, see J Odermatt, 'Council of the European Union v Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)' (2017) 111 AJIL 731.

[18] Court of Justice of the EU, *Brita*, Judgment of 25 February 2010 in Case C-386/08, ECLI:EU:C:2010:91; Court of Justice of the EU, *Anastasiou (1)*, Judgment of 5 July 1994 in Case C-432/92 ECLI:EU:C:1994:277; Court of Justice of the EU, *Anastasioiu (2)*, Judgment of 4 July 2000 in Case C-219/98, ECLI:EU:C:2000:360. Further: S Talmon, 'The Cyprus Question before the European Court of Justice' (2001) 12 EJIL.

primarily to produce fertilizer) is the main export product of the Western Sahara.[19] Against this background, the court procedures constitute part of a broader campaign by the Polisario Front and the SADR to deter companies from purchasing, transporting or trading phosphate mined in the Western Sahara (a campaign that has not been without result), so as to raise pressure on the Moroccan authorities to meet their demands.

One attempt to attach the 55,000-tonne phosphate shipment aboard the *M/N Ultra Innovation* and destined for Canada proved unsuccessful. On 5 June 2017, the *Primer Tribunal Marítimo de Panamá* dismissed the SADR's complaint of unjust enrichment.[20] The Court held that it lacked jurisdiction because the plaintiff (SADR) could not demonstrate that the cargo belonged to it. The Court stressed that the SADR's claims essentially required it to rule on a political/diplomatic dispute concerning the extraction of materials from a territory that two nations claim belong to them and which was foreign to the defendants.[21] Whether the cargo was extracted from one state or another and whether it was extracted lawfully, however, were questions which fell beyond the competence of the maritime courts.

A similar claim before the South African Courts met with greater success. In the *Cherry Blossom* proceedings, the SADR and the Polisario Front sought to attach a 55,000-tonne cargo sold by the Moroccan State-owned phosphate company OCP (the world's largest phosphate producer) and its subsidiary Phosboucraa to the New Zealand-based farmers' cooperative Balance Agri-Nutrients. As of 1 May 2017, the cargo was detained aboard the *NM Cherry Blossom* in South Africa's Port Elizabeth. In its Order of 15 June 2017[22]—issued a mere ten days

[19] See also on the region's phosphate reserves, and, more generally, on the vast phosphate reserves within the Kingdom of Morocco itself: IFDC (International Fertilize Development Center), 'World Phosphate Rock Reserves and Resources' (September 2010) available at <https://pdf.usaid.gov/pdf_docs/Pnadw835.PDF>.

[20] Primer Tribunal Marítimo de Panamá, *Sahrawi Arab Democratic Republic v La Darién Navegación & Ors* (5 June 2017) on file with the author. Note: the temporary arrest of the vessel following a Court Order in May (and until the posting of a bond) did negatively affect the share price of Agrium, the Canadian-based purchaser of the phosphate and the main importer of phosphate mined in the Western Sahara (M Shaw, 'Territorial Dispute Halts Phosphate Rock Shipment from Morocco' *Investing News* (18 May 2017)). Already in 2016, Agrium—now Nutrien Ltd.—commissioned an audit which ultimately concluded that the company was 'not causing or contributing to potential or actual negative human rights impacts in the Western Sahara' through its supplier relationship with OCP/Phosboucraa. Norton Rose Fulbright, 'Human Rights Assessment Report: Agrium Phosphate Rock Supply from Western Sahara' (2016) available at <https://www.nutrien.com/sites/default/files/uploads/2018-01/NRF_Human%20Rights%20Assessment%20Report%202016.pdf> 12. Early 2018, however, Nutrien announced its intention to halt imports from the Western Sahara. Western Sahara Resource Watch, '"Biggest Importer" of Phosphate Rock Is Pulling out' (29 January 2018) available at <http://wsrw.org/a105x4051>.

[21] Original text: '*que el tribunal se pronuncie sobre una pugna político/diplomática por la extracción de un material de un territoria que dos naciones dicen le pertenece y en el cual las demandadas son personas ajenas*.'

[22] High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, *The Saharawi Arab Democratic Republic and The Polisario Front v owner and charterers of the MV 'NM Cherry Blossom' & Ors* [2017] ZAECPEHC 31; 2017 (5) SA 105 (ECP), Order of 15 June 2017 (hereafter the 'Cherry Blossom Order').

after the abovementioned Panamanian Court Order—the High Court found that the SADR and the Polisario Front had a plausible claim to ownership of the cargo and agreed that the claim could proceed to trial on the merits. In particular, referring to applicable international law, chiefly the right of self-determination and the principle of permanent sovereignty over natural resources, as well as the ICJ's 1975 *Western Sahara* Opinion[23] and the 2002 UN Legal Opinion of Hans Corell, the Court held that it was *prima facie* established that sovereignty over the cargo was vested in the people of Western Sahara. At the same time, the Court also observed that it was disputed between the parties whether the exploitation of the phosphate was compatible with the UN framework as laid down in the 2002 UN Legal Opinion.[24] At the same time, the Court dismissed the procedural defences of OCP and Phosboucraa. First, the Court held that Morocco was not directly or indirectly impleaded, so that State immunity rules did not come into play. Second, as it remained allegedly unclear at the interlocutory stage what precise issue the trial court would be called upon to adjudicate, the Court decided to formally postpone the question as to the possible implications of the Act of State doctrine to the merits stage.

Following the Order of 15 June 2017, OCP and Phosboucraa halted their further participation in the proceedings. Eventually, on 23 February 2018,[25] following a 299-day detention of the cargo, the High Court issued an Order granting the SADR's claims. The (two-page) Order is remarkable for its brevity: not a word on the Act of State doctrine, nor on the (in)compatibility of phosphate exploitation in the Western Sahara with the UN framework. Instead, the High Court identifies the SADR as the owner of the cargo. In turn, '[o]wnership in the phosphate was never lawfully vested in [OCP and Phosboucraa], and they were, and are, not entitled to sell the phosphate to [Ballance Agri-Nutrients Ltd.]'. In the wake of the February Order, the High Court set up an auction to sell the cargo. After no buyer came forward, the cargo was reportedly purchased for a symbolic dollar (USD 1) by the operator of the *NM Cherry Blossom*, who—eager to free the vessel—agreed to cover the auctioneer's costs and ultimately returned the cargo to the OCP Group.[26]

[23] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

[24] *NM Cherry Blossom* (n 22) [54].

[25] High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, *The Saharawi Arab Democratic Republic and The Polisario Front v owner and charterers of the MV 'NM Cherry Blossom' & Ors*, Order of 23 February 2018, available at <http://wsrw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf>.

[26] See 'UPDATE 1 - Seized Western Sahara cargo released from South Africa after auction - OCP' (9 May 2018) available at <https://af.reuters.com/article/westernSaharaNews/idAFL8N1SF7CE> (the release suggests that other potential buyers were reluctant to participate in the auction).

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II. STATE IMMUNITY: 'INDIRECT IMPLEADING' AS A FATA MORGANA?

Unsurprisingly, the outcome of the *Cherry Blossom* procedure was heralded as a major victory by the SADR and the Polisario Front. The importance and unique nature of the case is hard to ignore. One would indeed be hard pressed to find another example of a State, a people, or an entity claiming statehood, using the domestic courts of a third State to assert proprietary rights over natural resources under the control of yet another State—the present author in any case is not aware of any example where such attempt was successful. Whether the ruling of the High Court is legally convincing, however, is a different matter altogether.

This short comment does not seek to pronounce on the legality of phosphate mining operations in the Western Sahara under international law (whether tested against the UN framework[27] or against international humanitarian law[28]). Instead, we will focus on the two defences raised in the *Cherry Blossom* proceedings (State immunity and act of State) and present a critique of the High Court's treatment of them.

As to State immunity, the High Court in its Order of 15 June 2017 acknowledged that such immunity is triggered, not only when proceedings are instituted against a foreign State, but also where it is impleaded *indirectly*, as was also previously recognized by South Africa's Supreme Court of Appeal.[29] Absent further South African authority on the concept of 'indirect impleading', the High Court turned to customary international law for guidance, drawing in particular from the recent *Belhaj* judgment of the UK Supreme Court.[30]

On the one hand, the High Court accepted that international law regards a claim against a State's *property* as being tantamount to a claim against the State for purposes of the law of State immunity.[31] It found, however, that OCP and Phosboucraa were incorporated legal entities wholly separate from

[27] Note: some companies have expressed their conviction that phosphate mining in the Western Sahara complies with the UN Framework as spelled out in the 2002 UN Legal Opinion. See eg, Ravensdown, 'Ravensdown's Position on Western Sahara' available at <https://www.ravensdown.co.nz/services/product-availability/phosphate-rock-supply> (referring *inter alia* to the employment and investment resulting from the mining activities). See also above (n 20), for the report commissioned by Agrium, now Nutrien. See, however, for a more critical account the contributions by Smith, Zunes and Saul in the special edition of 27(3) *Global Change, Peace & Security* (2015) on 'Western Sahara: The Role of Resources in Its Continuing Occupation'.

[28] While Morocco is rarely described as an occupying power (see also below n 90), some have argued that the law of belligerent occupation (including the principle of usufruct) is applicable to Morocco's control over the Western Sahara. Further: B Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' (2015) 27(3) *Global Change, Peace & Security* 301.

[29] South Africa, Supreme Court of Appeal, *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* (2016) (3) SA 317 (SCA) [66].

[30] UK Supreme Court, *Belhaj and Rahmatullah (No 1) v Straw & Ors* [2017] UKSC 3.

[31] *NM Cherry Blossom* (n 22) [68].

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the State of Morocco and that Morocco itself did not have a proprietary interest in the matter.[32]

On the other hand, having regard to the language of Article 6(2)(b) of the UN Convention on State Immunity (UNCSI, not in force),[33] the Court appeared to accept that indirect impleading may equally occur where proceedings in effect seek to affect not the property, but rather the 'interest or activities', of a foreign State. At the same time, citing extensively from the opinions of Lord Sumption and Lord Mance in *Belhaj*, the High Court held that the reference to 'interests or activities' in Article 6(2)(b) UNCSI ought to be construed restrictively. Specifically, it was insufficient that proceedings affected another State's 'political or moral interests'.[34] What was required was instead a 'specifically legal effect'—which the Court eventually found to be missing. In essence, considering that Morocco was 'not a party to the proceedings' and was 'accordingly not bound by' the outcome, the Court concluded that '[a] finding by a domestic forum that OCP's and Phosboucraa's exploitation of minerals in Western Sahara does not comply with the UN framework and is illegal … can have no effect upon the legal rights of Morocco'.[35]

Upon closer scrutiny, the reasoning of the High Court fails to convince.[36] In particular, it is difficult to escape the feeling that, although the Court pays lip-service to Article 6(2)(b) UNCSI, its actual application of it all but renders moot the concept of 'indirect impleading'.

It is true that the inclusion of Article 6(2)(b) UNCSI was primarily inspired by 'actions involving seizure or attachment of public properties or properties

[32] ibid [75], [83]–[84].

[33] 'A proceeding before a court of a State shall be considered to have been instituted against another State if that other State: … (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.' Note: the High Court did not take a position as to whether art 6(2)(b) UNCSI was reflective of customary international law, although it did cite Lord Sumption's position that the UNCSI represents 'an authoritative statement … on the current understanding of the limits of state immunity in civil cases' [77]. It may be noted that the UK Court of Appeal in *Belhaj* previously held that art 6(2)(b) UNCSI could not be considered reflective of a rule of customary international law (UK Court of Appeal (civil division), *Belhaj*, 30 October 2014, [2014] EWCA Civ 1394, [47]). The customary status of the provision (or lack thereof) was not, however, addressed explicitly in the subsequent judgment of the UK Supreme Court, albeit that Lord Mance did appear to raise doubts in this respect. *Belhaj* (n 30) [25] (Lord Mance).

[34] *NM Cherry Blossom* (n 22) [85].

[35] ibid [83]–[84].

[36] It has been suggested that the High Court's approach may have been driven by ulterior motives. In particular, Angelet emphasizes the fact that South Africa had recognized the SADR as a sovereign State and suggests that the Court may have been reluctant to apply the rules of State immunity (or, possibly, the act of State doctrine (on which, see further below)) to the detriment of another sovereign State. N Angelet, 'Immunity and the Exercise of Jurisdiction: Indirect Impleading and Exequatur' in T Ruys and N Angelet (eds), *The Cambridge Handbook on Immunities and International Law* (Cambridge University Press) (forthcoming – on file with the author). Be that as it may, the recognition of the SADR by South Africa is not mentioned as a relevant factor in the Court's treatment of the State immunity defence (or the act of State defence). On a different note, it is observed that the recognition of the SADR by Panama did not prevent the Panamanian Court from concluding it had no jurisdiction in the case concerning the *M/N Ultra Innovation* (n 20).

belonging to a foreign State or in its possession or control',[37] in particular by actions *in rem* or in admiralty against State-owned or State-operated vessels.[38] On the other hand, in line with the *effet utile* principle, the additional reference to proceedings affecting the 'rights', 'interests' or 'activities' of a foreign State, strongly suggests that these terms carry autonomous meaning and stretch the concept of 'indirect impleading' beyond proceedings involving goods over which a foreign State holds a (direct) proprietary title.[39]

Admittedly, the ILC preparatory works reveal that the language of draft Article 6(2)(b) was changed *inter alia* to avoid 'too loose a relationship between the proceeding and the consequences to which it gave rise for the State in question'.[40] Legal doctrine similarly agrees that the notion of 'indirect impleading' 'cannot encompass all actions however ancillary or incidental their relation to a State'.[41] Grant, for instance, emphasizes that Article 6(2)(b) UNCSI presupposes 'a specifically legal effect', 'as distinguished from a social, economic, or political effect'.[42] In a similar vein, Fox and Webb assert that the notion of 'interests' in the provision should be 'limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings'.[43]

Still, the High Court's bold assertion that Morocco's legal interests were not affected in the present case appears difficult to sustain. A number of observations can be made in this respect.

First, the High Court relied heavily on the *Belhaj* case, where the UK Supreme Court ultimately found that claims holding UK authorities liable for complicity in various torts including unlawful detention and torture—allegedly committed by officials of third States in various overseas jurisdictions post 9/11, did not indirectly implead those third States

[37] ILC, Draft articles on Jurisdictional immunities of States and their property, with commentaries, UN Doc A/46/10, reproduced in (1991) YbILC Vol. II, Pt Two, 13, 25.

[38] Famous cases include the seminal *Schooner Exchange* case before the US Supreme Court (1812) or the *Parlement Belge* in the UK (1879). A remnant of this case law can be found in section 11 of the South African Immunities Act (Act No 87, 1981) pertaining to Admiralty proceedings. At the same-time, relevant case-law pertaining to indirect impleading is not limited to actions involving ships and their cargo. The ILC Commentary also identifies several examples pertaining, for instance, to visiting forces, ammunitions and weapons and aircraft. Other cases concern proprietary or possessory rights over gold bars or monies (ibid 25).

[39] According to Angelet, for instance, 'Article 6.2 is capable of encompassing a wide range of situations where the third State is not a party to the proceedings, beyond the hypothesis of ex parte proceedings regarding its rights or legal interests in the domestic legal order of the forum State'. Angelet (n 36).

[40] ibid 25 [13].

[41] TD Grant, 'Article 6' in R O'Keefe, CJ Tams and A Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary* (Oxford University Press 2013) 110. Note: while Lord Sumption 'would not altogether rule out the possibility that litigation between other parties might directly affect interests of a foreign state other than interests in property', he stressed that 'it is not easy to imagine such a case'. *Belhaj* (n 30) [196] (Lord Sumption).

[42] Grant (n 41) 111.

[43] H Fox and P Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013) 310.

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themselves, since a finding of UK liability 'would in no way constrict the exercise'[44] by the foreign States concerned of their legal rights. The perceived parallel with the *Cherry Blossom* case, however, seems a far stretch. Clearly, *Belhaj* had nothing to do with States' interests in, and/or control over, property, which the concept of 'indirect impleading' is traditionally associated with. In the *Cherry Blossom*, the very essence of the dispute ultimately related to the exercise of sovereign authority over territory, as well as the exercise of jurisdiction over assets (specifically natural resources) under the control of a foreign State. Curiously, the *Cherry Blossom* Order recognizes as much, by asserting, for instance, that '[t]he essence of the case for the SADR and the Polisario Front is that the phosphate … is part of the national resources of Western Sahara and belongs to its people' (read: as opposed to Morocco).[45] To paraphrase Lord Sumption, the action of the SADR and the Polisario Front ostensibly sought 'to assert a proprietary right in assets under the control of a state' (viz. the phosphate mine(s) in the part of the Western Sahara under Moroccan control), which necessarily constitutes 'a mode of impleading that State'.[46]

One might also consider drawing a parallel to *Buttes Gas*,[47] where the UK House of Lords examined a claim for damages for slander lodged by Buttes Gas. The immediate cause for this claim were public accusations by Dr Hammer that Buttes Gas had used improper methods and colluded with the Ruler of Sharjah to backdate a decree extending the territorial waters of Abu Musa to 12 nautical miles from the island's coast so as to secure the rights to the exploitation of an offshore oil deposit—rights which allegedly belonged to Occidental Oil Company. Here too, Lord Wilberforce held that the relevant sovereigns were not impleaded directly or indirectly[48]—albeit that no further explanations were given. Importantly, however, Occidental did not seek to assert rights or control over the oil-bearing deposit and itself insisted that a decision upon the title to the location was not necessary for the conspiracy claim[49]—these features again distinguish the case from the *Cherry Blossom* case.

If parallels with prior cases that were deemed *not* to indirectly implead a foreign State fail to convince, support for the view that the *Cherry Blossom* proceedings *did* indirectly implead Morocco can be derived from an analogy to the case law of the ICJ pertaining to the *Monetary Gold* principle, according to which the Court cannot exercise (contentious) jurisdiction where a dispute affects the legal interests of a third State that did not consent to jurisdiction and where those interests 'form the very subject-matter of the

[44] *Belhaj* (n 30) [197] (Lord Sumption).
[45] *NM Cherry Blossom* (n 22) [13].
[46] ibid [190] (Lord Sumption).
[47] UK House of Lords, *Buttes Gas and Oil Co v Hammer* [1982] AC 888.
[48] Note, however, that the case was deemed non-justiciable on other grounds. ibid 938 (and see further below on the act of State doctrine).
[49] ibid 926.

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decision'.[50] In particular, the *Cherry Blossom* case reveals a striking resemblance to the *East Timor* case, where the ICJ held that it could not rule on Portugal's claim that Australia had infringed the right to self-determination of the people of East Timor by concluding a treaty with Indonesia pertaining to the joint exploitation of the resources of the 'Timor Gap'.[51] In accordance with the *Monetary Gold* principle, the Court found that Indonesia's rights and obligations 'would … constitute the very subject-matter' of the judgment. Since Indonesia had not consented, no jurisdiction could be exercised by the Court. The parallels with the *Cherry Blossom* case are striking. As in *East Timor*, the 'very subject-matter' of the case related to the legality under international law of the conduct of a State that was not directly named as a party to the proceedings and that had not consented to those proceedings. As in the latter case, more specifically, the key question was whether the (non-consenting) State's presence in a non-self-governing territory and its activities in that territory were compatible with the right of self-determination of the people concerned and with that people's right of permanent sovereignty over the territory's natural resources. In *East Timor*, the very subject-matter was whether Indonesia, which exercised control over East Timor even if it was not the 'administering Power' by UN standards, could lawfully conclude an agreement pertaining to the exploitation of natural resources in its continental shelf, having regard to East Timor's right of self-determination and permanent sovereignty over natural resources. In *Cherry Blossom*, the very subject-matter of the case was whether Morocco, which has control over (most of) the Western Sahara even if it is not formally the 'administering Power' in the sense of the UN Charter, could lawfully grant a concession agreement pertaining to the exploitation of a phosphate mine in the Western Sahara, having regard to the right of self-determination of its people and this people's right of permanent sovereignty over the territory's natural resources.

[50] *Case of the Monetary Gold Removed from Rome in 1943* (Italy v France, UK and USA) [1954] ICJ Rep 19, 32. Note also the contrast with the ICJ's *Western Sahara* Opinion, where the Court dismissed Spain's objection that it could not deliver the requested opinion absent Spain's consent, on the basis of the following reasoning: '[t]he issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization. The settlement of this issue will not affect the rights of Spain today as the administering Power … '[T]he questions … do not … relate to a territorial dispute … between the interested parties … . The Court finds that the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory.' *Western Sahara* (n 23) [42]–[43].

[51] *Case concerning East Timor* (Portugal v Australia) [1995] ICJ Rep 90 [19]. Note, however, the Dissenting Opinion of Judge Skubiszewski ([1995] ICJ Rep [224]), who thought that the Court overextended the principle established in the *Monetary Gold* case. In essence, Judge Skubiszewski believed that the Court was not required to determine the rights and obligations of an absent third party (Indonesia), since those rights and obligations had been previously established by relevant UN resolutions. See eg at [85]: 'By now taking judicial notice of the relevant United Nations decisions the Court does not adjudicate on any claims of Indonesia nor does it turn the interests of that country into the "very subject-matter of the dispute".'

In sum, if the legal interests of Indonesia were affected by, and at the heart of, the *East Timor* proceedings, then surely the same must *mutatis mutandis* be true for the legal interests of Morocco in the *Cherry Blossom* case …?

Critics might object that the *Monetary Gold* principle relates to the exercise of *international* jurisdiction, an issue that is distinct from questions of State immunity before domestic courts—a point also underscored in the *Cherry Blossom* Order.[52] True as this may be, the parallel between the concept of State immunity as a corollary of the sovereign equality of States and the *Monetary Gold* principle is hard to ignore.[53] According to Jennings, the two are 'the obverse and reverse of the same coin'.[54] In a similar vein, Crawford regards the *Monetary Gold* principle as 'the nearest direct analogue in international law to the rule of State immunity'.[55] The link between the two concepts was also recognized implicitly by Lord Mance in *Belhaj*.[56] While Lord Mance eventually refused to apply the *Monetary Gold* principle, this was because he found the facts in *Belhaj* to be fundamentally different from the *East Timor* case, which was a case about 'the right to administer' a non-self-governing territory and 'an issue about territorial title'.[57] Yet, since this was precisely 'the very subject-matter' of the *Cherry Blossom* case, one could argue *a contrario* that the analogy should have led the High Court to conclude that the claims of the SADR and the Polisario Front did indirectly implead the Kingdom of Morocco.

It is moreover submitted that the underlying State conduct possessed a sovereign character. In particular, case law and legal doctrine affirm that the regulation by a State of the exploitation of natural resources in the territory

[52] *NM Cherry Blossom* (n 22) [71].

[53] Interestingly, Angelet construes art 6(2)(b) UNSCI along the lines of the *Monetary Gold* principle. Angelet suggests that the crucial question is whether *« l'appréciation de la légalité de l'acte de l'Etat tiers (ou de l'organisation internationale) constitue une simple préalable à sa décision sur une affaire qui relève par ailleurs de sa compétence naturelle, ou s'il s'agit au contraire de l'objet véritable du litige*. » N Angelet, 'Les juges belges face aux actes des organisations internationales' in A Lagerwall (ed), *Les juges belges face aux actes adoptés par les Etats étrangers et les organisations internationales – quel contrôle au regard du droit international ?* (Larcier 2017) 27, [31]. See also Angelet (n 36) ('*Monetary Gold* and the Ensuing Jurisprudence of the World Court May Also Assist in Delimitating the Immunity of the Absent State.').

[54] R Jennings, *The Place of the Jurisdictional Immunity of States in International and Municipal Law* (Europa-Institüt 1988) 3–4.

[55] J Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYBIL 80. See also J Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75 AJIL 856.

[56] *Belhaj* (n 30), [27] (Lord Mance): 'In the courts below, Leggatt J … distinguished [East Timor and Monetary Gold] as cases about international jurisdiction, required in the case of the International Court to be based on consent, in contrast with which domestic courts exercise compulsory jurisdiction over those within their reach. That is correct as far as it goes, but states' domestic jurisdiction also depends on consent in contexts where state immunity otherwise exists. The situation is therefore nuanced.'

[57] Ibid. [28].

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under its control is quintessentially a matter of sovereign authority[58]—the same is true, more generally, for acts of expropriation (even beyond the State's own territory).[59] It follows that, inasmuch as Morocco was indirectly impleaded, its immunity from jurisdiction should normally have prevented the case from proceeding to the merits.

A final objection could be that the mining and subsequent sale of the phosphate by OCP broke the chain of causation between Morocco's own conduct and the exercise of sovereign authority, implying that the defendants in the *Cherry Blossom* case were not themselves exercising sovereign authority, but were instead engaging in commercial activities, which are not as such covered by State immunity. Such was indeed the reasoning employed by the UK House of Lords in *Kuwait Airways (No. 1)*.[60] In particular, the House of Lords agreed that the taking of aircraft and their removal from Kuwait during the Iraqi invasion of Kuwait constituted an exercise of governmental power by the state of Iraq and that, in so doing, Iraqi Airways Company (IAC) was acting in the exercise of sovereign authority. Yet, the majority held that IAC's subsequent retention and use of the aircraft as its own did not qualify as sovereign acts and were accordingly no longer covered by State immunity.[61]

While it is hard to contest that the operation of commercial aircraft or the sale and transport of phosphate does not of itself possess a sovereign character, the idea that one can simply separate the latter acts from the underlying State conduct, the international legality of which is ultimately at stake, so as to set aside immunity rules, is problematic. Interestingly, *Kuwait Airways (No. 1)*—which preceded the adoption of the UNCSI—contains no reference whatsoever to the notion of indirect impleading. It is also worth noting that two judges dissented,[62] arguing that State immunity should apply (a position previously

[58] Confirming that such conduct is of a *jure imperii* character, see eg Fox and Webb (n 43) 404 (referring to 'the exercise of regulatory control by the State as in … expropriation, nationalization, … regulation by the State of the exploitation of natural resources'); US District Court for the Central District of California, *International Association of Machinists and Aerospace Workers v OPEC* I 477 F.Supp.553 (C.D. CAL 1979), 18 September 1979 (regarding the control over oil resources as a sovereign function, and funding support for this position in UNGA Res 1803(XVII) according to which 'a sovereign state has the sole power to control its natural resources').

[59] In this sense: Fox and Webb (n 43) 404, 430–1; X Yang, *State Immunity in International Law* (Cambridge University Press 2012) 298ff. As both works observe, acts of expropriation or nationalization constitute an exercise of sovereign authority. The only country applying an exception denying immunity in respect of claims relating to expropriation of property contrary to international law is the United States (no such exception exists, for instance, in the South African Immunities Act). The scope of the US exception is moreover limited to the nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law, as well as takings which are arbitrary or discriminatory in nature. It also requires a territorial nexus with the US, in particular in the form of commercial activity in the US.

[60] UK House of Lords, *Kuwait Airways Corp v Iraqi Airways Co and others* (*Kuwait Airways (No. 1)* [1995] 3 Amm ER 694.

[61] For an insightful discussion of the case, see eg MD Evans, 'When the State Taketh and the State Giveth' (1996) 45(2) *International and Comparative Law Quarterly* 401.

[62] *Kuwait Airways* (n 60) 718 (Lord Mustill), 721 (Lord Slynn of Hadley). Further: Evans (n 61) 405–6.

subscribed to by the Court of Appeal[63]). Furthermore, some case law arrives at the exact opposite conclusion as compared to *Kuwait Airways (No. 1)*. In *Société v Sempac*,[64] for instance, the French Court of Cassation granted immunity to an Algerian company to which had been transferred two French companies that had been nationalized, without compensation, by the Algerian authorities. The Court found that the Algerian company had come into possession of the undertakings by virtue of a sovereign act of the Algerian State, so that the action of the French companies was in reality directed against the Algerian State itself. It must be recalled in this context that the very essence of the notion of 'indirect impleading' is precisely to prevent claimants from circumventing a State's immunity from jurisdiction 'by instituting proceedings which, although implicating the State by affecting its property or other interests, did not name the State as respondent'.[65] Contrary to what the High Court appears to suggest, the fact that the State of Morocco was not itself a party to the proceedings and would accordingly not be bound by the resulting judgment is indeed insufficient to conclude to the non-applicability of State immunity. This is all the more true inasmuch as the case is related, not to a (one-off) act of expropriation of a foreign company, but challenges the very exercise of administrative control by a State over the exploitation of natural resources.

In conclusion, it is difficult to see what remains of the concept of 'indirect impleading' under the approach of the High Court. One might ultimately argue that the interpretation of that concept is not all that relevant since domestic courts are still required to consider the act of State doctrine (as *Kuwait Airways* and *Buttes Gas*, for instance, illustrate (see below)). That argument, however, is hardly convincing. First, while the act of State doctrine is also inspired, at least in part, by the principle of sovereign equality, it is fundamentally different from immunity law in that it is essentially a municipal law rule, rather than one rooted in customary international law. As the High Court observed, there is 'no public international law principle which *obliges* a domestic court to refrain to adjudicate a matter involving a foreign act of state'.[66] The act of State doctrine is applied in countries such as the UK and South Africa. It is, however, unknown to many other (especially civil law) jurisdictions—albeit

[63] UK Court of Appeal (Civil Division), *Kuwait Airways Corp v Iraqi Airways Co and others* [1995] 1 Lloyd's Rep 25 (see in particular at 37 (Simon Brown LJ)). Consider also H Fox, 'A "Commercial Transaction" under the State Immunity Act 1978' (1994) 43 ICLQ 199.

[64] France, Court of Cassation (First Civil Chamber), *Société algérienne de Commerce Alco & Ors v Sempac and Ors* (2 May 1978) (1978) 65 ILR 73–5. But see France, Court of Cassation (First Civil Chamber), *Société internationale de plantations d'Hévéas v Lao Import Export Company & Ors* (20 October 1987) (1983) 80 ILC 430–2.

[65] Grant (n 41) 107.

[66] *Cherry Blossom* (n 22) [95]. In a similar vein: UK *Belhaj* (n 30) [200] (Lord Sumption) (international law 'does not require [States] to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. The foreign act of state doctrine is at best permitted by international law.').

that partial analogues exist in the 'local procedural *patois*'[67] of most jurisdictions, eg, in the form of the *forum non conveniens* doctrine, or the principle that the exercise of jurisdiction is subject to a rule of reason or considerations of proportionality, and albeit that echoes of such limitations can also be found in international case law.[68] On a different note, even in States that apply the act of State doctrine, the modalities may differ strongly. Importantly, while the prevalent position is that State immunity (as a procedural bar) operates irrespective of the gravity of the alleged breach and/or its peremptory character,[69] the act of State doctrine is oftentimes subject to a 'public policy' exception that would exceptionally permit domestic courts to examine a foreign act of State in case of grave breaches of international law (see further below). Accordingly, it potentially matters a great deal whether a dispute is approached through the angle of the State immunity framework or that of the act of State doctrine.

Our next section turns to the application of the act of State doctrine to the *Cherry Blossom* proceedings.

III. THE ACT OF STATE DOCTRINE – SCOPE OF APPLICATION

In its Order of 15 June 2017, the High Court confirms the application in South African law of the act of State doctrine, as 'a municipal law rule which derives from common law principles as developed in Anglo-American courts' and 'founded upon the principle of mutual respect of equality of sovereign states, the principle of comity'.[70] The Court goes on to recall prior South African case law asserting that the judicial branch should 'not ventur[e] into areas where it would be in a judicial no-man's land',[71] and that courts should 'act

[67] Paraphrasing I Brownlie, (1989) 63-I Annuaire I.D.I. 17.

[68] See eg, *Case concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), [1970] ICJ Rep 3 [93], and see the Separate Opinion of Judge Fitzmaurice ([1970] ICJ Rep. 64) [70] (referring to 'an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element'). See also Angelet (n 36), who suggests that the divergence between the common law and the civil law approach is perhaps overstated: 'That the act of State doctrine originated in domestic law does not at all mean that common law courts could adjudicate cases typically falling within the realm of the doctrine, without violating international law. Rather, the application of the act of State doctrine pursuant to domestic law dispenses the courts from considering the international law limits to their powers.'

[69] This position is affirmed in particular in *Jurisdictional Immunities of the State* (Germany v Italy; Greece intervening) [2012] ICJ Rep 99 [94] ('The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.'), [97] ('[t]he Court concludes that even on the assumption that the proceedings … involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected.'); ECtHR, *Case of Jones and Others v The United Kingdom* App Nos 34356/06 and 40528/06 (14 January 2014) [198].

[70] *NM Cherry Blossom* (n 22) [86].

[71] *Swissborough Diamond Mines (PTY) LTd and others v Government of the Republic of South Africa and others* (12 December 1997) 1999 (2) SA 279 (T), 334D-F.

with restraint when dealing with allegations of unlawful conduct ascribed to sovereign states'.[72]

In the remainder of the Order, however, the Court finds that 'it is not entirely clear precisely what the act of a foreign state is that OCP and Phosboucraa rely upon which may render the matter non-justiciable'.[73] The Court continues as follows:

> OCP and Phosboucraa contend for title upon the basis that Moroccan law applies in the territory and that their mining operations are lawful in accordance with that law. That may perhaps be the necessary issue to determine. Equally, the question of compliance with the UN framework regulating the exploitation of mineral resources in a non-self-governing territory … may prove the central issue for adjudication. Whether that is so will depend upon the full proper ventilation of the issues on the pleadings in the vindicatory action. If indeed the latter issue is the central dispute to be determined, then it is difficult to conceive on what basis it could be contended that the dispute is non-justiciable before this court.

In the end, the Court concludes that the question need not be decided at the interlocutory stage of the proceedings and that 'there is no reason of high policy' to hold otherwise.[74] Accordingly, the issue is postponed to the merits stage for determination.

As will be further explained below, the Court's reasoning appears internally contradictory, and, more importantly, at odds with the understanding of the 'act of State' doctrine in the case law of common law jurisdictions (particularly with UK case law, which has served as inspiration for South African courts). Even more disturbing than the flawed reasoning in the interlocutory Order is the complete absence of any discussion of the act of State doctrine in the Order of 23 February 2018—after OCP and Phosboucraa withdrew from the case—, where the High Court held that the *Cherry Blossom*'s phosphate cargo belonged to the SADR.

Upon closer scrutiny, while one could debate whether the case lent itself to the application of the 'municipal act of State' doctrine,[75] the *Cherry Blossom* proceedings appear to be a straightforward illustration of a case falling under the 'international act of State' strand (sometimes referred to in more general terms as the 'non-justiciability' doctrine), according to which domestic courts will not adjudicate upon the acts of foreign states—even beyond their own territory—that are done on the plane of international law.[76] This is so for a number of reasons.

[72] *Van Zyl v Government of the Republic of South Africa* [2008] (3) SA 294 (SCA) [5].
[73] *NM Cherry Blossom* (n 22) [97]. [74] ibid [100].
[75] This is so because the scope of the 'municipal act of State' is often limited to acts of a State which take place or take effect within the territory of that State (eg *Belhaj* (n 30), [121]–[122](Lord Neuberger), [228] –[229] (Lord Sumption), and because of the unsettled status of the Western Sahara.
[76] For a detailed discussion of the various strands of the 'act of State' doctrine, compare the (slightly divergent) approaches of Lord Mance and Lord Neuberger, on the one hand, and Lord

First, and as already observed,[77] the South African courts were clearly called to rule upon the validity or lawfulness of the sovereign conduct of a foreign State (Morocco)—as opposed to mere commercial transactions or other acts of a private law character[78] (recall that the qualification of conduct as an exercise of sovereign powers is not dependent on its intrinsic legality and is not as such limited to conduct within the State's own boundaries).

Second, as in *Buttes Gas*[79] and in *Belhaj*,[80] the question of the validity or legality of the sovereign conduct of the foreign State—ie, Morocco's exercise of control over the Western Sahara, and its concomitant measures pertaining to the exploitation of natural resources within that territory—was not merely an 'incidental' matter.[81] Rather, as the High Court acknowledges in passing in its Order of 15 June 2017, Morocco's exercise of control was in fact 'at the heart of the dispute'.[82]

Third, the application of the 'international act of State' doctrine is not subject to any territorial limitations—contrary to what may be the case for other strands of the act of State doctrine.[83] The implication is that the particular status of the Western Sahara does not impede the application of the former doctrine, on account of the allegedly extraterritorial nature of Morocco's conduct at stake.

Fourth, the validity or lawfulness of Morocco's conduct was challenged, not on the basis of a rule or rules of *domestic* law (whether South African or Moroccan), but rather on the basis of public international law. In particular, the applicants' claims related to (1) questions of title over territory; (2) the right of self-determination of the people of the Western Sahara, and (3) the principle of permanent sovereignty over natural resources under international law—all questions that squarely fall within the realm of public international law. As to the latter principle, the claims seemingly required the South African courts to pronounce on the legal relevance and application of the 2002 UN Legal opinion.[84] The Legal Opinion was drafted in 2002 by then UN Legal Counsel Hans Corell at the request of the UN Security Council. Building upon ICJ case law and—admittedly limited—State practice, the opinion finds that activities pertaining to the exploration and exploitation of

Sumption, on the other hand, in *Belhaj*. The 'municipal act of state' essentially entails that domestic courts will not adjudicate upon the lawfulness or validity of a State's sovereign acts (as opposed to acts of a private law character) within its own territory, irrespective of whether they constitute legislative or executive acts of the latter State. *Belhaj* (n 30) [7], [11], [34–38] (Lord Mance), [120]ff (Lord Neuberger), [228]ff (Lord Sumption).

[77] See (n 58).

[78] Asserting that the act of State doctrine is limited to acts *jure imperii*, see eg *Belhaj* (n 30) [199] (Lord Sumption).

[79] *Buttes Gas* (n 47).

[80] *Belhaj* (n 30) [242] (Lord Sumption).

[81] The act of State doctrine normally does not apply where a dispute might merely 'incidentally' disclose that a State has acted unlawfully. See eg US Supreme Court, *W.S. Kirkpatrick & Co., Inc., et al., Petitioners v Environmental Tectonics Corporation, International* (17 January 1990) 493 U.S. 400 (110 S.CT. 701), 406 (Justice Scalia).

[82] *Cherry Blossom* (n 22) [58]. Consider also ibid [13].

[83] See in particular the reasoning of Lord Wilberforce in *Buttes Gas* (n 47) 931–2, 935–6. In a similar vein: *Belhaj* (n 30) [90] (Lord Mance), [123], [147], [165] (Lord Neuberger), [227], [234] (Lord Sumption).

[84] 2002 UN Legal Opinion (n 8).

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mineral resources in non-self-governing territories are not automatically contrary to international law, as long as they are conducted 'for the benefit for the peoples of those Territories, on their behalf or in consultation with their representatives'.[85] The interlocutory order of the High Court discusses the content of the opinion at length, while also noting the parties' contrasting views on the opinion's application to phosphate mining in the Western Sahara.[86] Curiously, the final Order of February 2018 does not contain the slightest trace of this discussion.

Fifth and last, it is evident that the underlying dispute belongs to the realm of 'high politics'. As a reminder, the status of the Western Sahara and its people's right of self-determination has long been, and continues to be, on the agenda of the United Nations (see also further below), and negotiations continue between the main protagonists under the auspices of the UN Secretary-General. Interestingly, the General Court of the EU previously observed that 'the definitive international status of [the Western Sahara] has not yet been determined and must be determined in UN-led negotiations between the Kingdom of Morocco and, specifically, the Front Polisario'.[87] In the case concerning the *M/N Ultra Innovation*, the Maritime Court of Panama found it had no jurisdiction to rule on a political/diplomatic dispute concerning the extraction of materials from a territory claimed by two nations.[88] Paradoxically, in the interlocutory order in the *Cherry Blossom* case, the High Court acknowledged that the case touched upon matters 'that concern the international community at the highest levels', while nonetheless concluding there was 'no reason of high policy' to apply the act of State doctrine.[89] The better view, it seems, would have been to acknowledge that the claimants called upon the South African courts to pronounce on issues that are—to paraphrase Lord Neuberger in *Belhaj*—'only really appropriate for diplomatic or similar channels',[90] and possibly for (consent-based) judicial determination at the international level.

In all, it seems difficult to escape the conclusion that the *Cherry Blossom* proceedings should have triggered the 'international act of State' doctrine, as it has been developed in *Buttes Gas* and subsequent case law, and as adopted in South African case law. The more relevant question—ultimately ignored by the High Court—would accordingly be whether there was nonetheless cause to set aside the latter doctrine for public policy reasons. This is the question—admittedly hypothetical, but nonetheless of significant legal interest—we will now turn to.

[85] ibid [24]
[86] *NM Cherry Blossom* (n 22) [48].
[87] *Front Polisario v Council* (n 1) [110].
[88] *Sahrawi Arab Democratic Republic v La Darién Navegación* (n 20).
[89] *NM Cherry Blossom* (n 22) [100].
[90] *Belhaj* (n 30) [123] (Lord Neuberger).

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IV. THE PUBLIC POLICY EXCEPTION

In the words of Lord Nicholls of Birkenhead, 'the "non-justiciable" principle [does not] mean that the judiciary must shut their eyes' to a breach of 'an established principle of international law …'.[91] Several precedents indeed illustrate that the act of State doctrine is at times set aside on 'public policy' grounds. Well-known examples include, the aforementioned *Belhaj* case[92] and its Australian counterpart *Habib v Commonwealth*[93]—both involving in particular allegations of torture by foreign officials—as well as *Oppenheimer v Cattermole*, where the UK House of Lords refused to recognize a Nazi decree-law depriving Jews resident outside Germany of their German nationality and confiscating their property.[94] Another illustration is the *Kuwait Airways (No. 5)* case,[95] where the House of Lords applied the public policy exception to a decree-law of the Iraqi government (Resolution 369) extinguishing the existence of Kuwait as an independent State and expropriating its assets, including in particular aircraft belonging to Kuwait Airways Corporation which were then located in Iraq.

An argument could be made that the *Chery Blossom* proceedings also lent themselves to the application of the public policy exception, since (like *Belhaj*, for instance), the case involved alleged breaches of a fundamental human right, in particular of the right of self-determination of the people of the Western Sahara, as well as the concomitant right of permanent sovereignty over natural resources. It is recalled that the right of self-determination is part and parcel of customary international law, and is moreover a right *erga omnes* and one of the essential principles of international law.[96] It has also been considered to be a norm of *jus cogens*, for example, by the International Law Commission.[97]

Upon closer scrutiny, however, several elements militate against the application of the 'public policy' exception in the *Cherry Blossom* scenario. As a preliminary remark, the peremptory character of the alleged breach does not automatically entail that the exception applies.[98] Indeed, some of the 'core examples of issues upon which domestic courts should refrain from adjudicating' precisely involve 'core examples of jus cogens', such as the prohibition on the use of armed force.[99] More fundamentally, precedents make clear that the public policy exception must be construed narrowly, as

[91] UK House of Lords, *Kuwait Airways Corporation v Iraqi Airways Company & Ors* (No. 5) [2002] UKHL 19 [26].
[92] *Belhaj* (n 30).
[93] Federal Court of Australia, *Habib v Commonwealth of Australia* (25 February 2010) [2010] FCAFC 12. See esp [119] (Jagot JJ).
[94] UK House of Lords, *Oppenheimer and Cattermole* [1976] AC 249, 277 (Lord Cross of Chelsea).
[95] *Kuwait Airways* (n 91).
[96] *East Timor* (n 51) [29] and case law cited; *Council v Front Polisario* (n 10) [88].
[97] ILC, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law', 18 July 2006, UN Doc. A/CN.4/L.702, [33].
[98] Eg, *Belhaj* (n 30), [107] (Lord Mance), [257] (Lord Sumption).
[99] *Belhaj* (n 30), [107] (Lord Mance).

applying only in respect of breaches of 'established principle[s] of international law', 'when the breach is plain and, indeed, acknowledged', and where '[t]he standard being applied by the court is clear and manageable, and the outcome not in doubt'.[100] By contrast, 'where there is any room for doubt, judicial restraint must be exercised'.[101]

It is worth contrasting in this context the unique features of the *Kuwait Airways (No.5)* case —also emphasized in *Belhaj*[102]—with the *Cherry Blossom* case. First, much emphasis was placed in *Kuwait Airways (No. 5)* on the existence of several binding UN Security Council (UNSC) resolutions expressly condemning the Iraqi invasion of Kuwait; condemning the seizure by Iraq of public and private property in Kuwait and holding Iraq accountable therefore, and; regarding both the annexation of Kuwait as well as Iraqi acts contrary to UNSC resolutions to be 'null and void'.[103] By contrast, in respect of the Western Sahara, the UN Security Council never expressly condemned Morocco's presence in, and exercise of control over, the Western Sahara, or explicitly labelled it as a breach of international law.[104] Instead, it has authorized an ongoing negotiating process under the auspices of the UN Secretary-General and has repeatedly called upon the parties to negotiate in good faith 'with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of the Western Sahara'.[105] Similar resolutions, also 'welcom[ing] the commitment of the parties' to negotiate, have been adopted in recent years by the UN General Assembly.[106]

Second, while the *Kuwait Airways* case found its origins in the invasion of one sovereign State by another, in flagrant contravention of the UN Charter, and giving rise to 'almost universal condemnation'[107] of Iraq's behaviour, the picture of the Western Sahara dispute is less straightforward. Indeed, the Western Sahara is regarded by the UN as a non-self-governing territory

[100] *Kuwait Airways No. 5* (n 91) [26] (Lord Nicholls of Birkenhead).

[101] ibid [140] (Lord Hope of Craighead). See also Canadian Supreme Court, *Kazemi Estate v Islamic Republic of Iran* (10 October 2014) 2014 SCC 62, [150] (Le Bell J).

[102] Eg *Belhaj* (n 30), [80], [86] (Lord Mance); *Belhaj* (n 30) [88]–[89].

[103] See eg *Kuwait Airways No. 5* (n 91) [20] (Lord Nicholls of Birkenhead). See in particular UNSC Res 662 (9 August 1990) UN Doc S/RES/662; UNSC Res 664 (18 August 1990) UN Doc S/RES/664; UNSC Res 670 (25 September 1990) UN Doc S/RES/670.

[104] This also distinguishes the Western Sahara dispute from the dispute over South Africa's presence in Namibia, which was expressly condemned by the Security Council (UNSC Res 276 (30 January 1970) UN Doc S/RES/678), a distinction expressly referred to in the 2002 UN Legal Opinion ((n 8) [19]). It is noted, however, that the General Assembly has in two resolutions deplored Morocco's 'occupation' of Western Sahara, in resolutions in 1979 and 1980 ('The Question of Western Sahara, UNGA Res 34/37 (21 November 1979) and UNGA Res 35/19 (11 November 1980)), albeit that it has not repeated such characterization in the 38 years since previous resolutions referred to the 'continued occupation of Western Sahara by Morocco'.

[105] eg, UNSC Res 2351 (28 April 2017) UN Doc S/RES/2351, [8]; UNSC Res 2414 (27 April 2018) UN Doc S/RES/2414, [3].

[106] eg, The Question of Western Sahara, UNGA Res 72/95 (7 December 2017) [2]–[3].

[107] *Kuwait Airways No. 5* (n 91) [29] (Lord Nicholls of Birkenhead).

(which is *de facto* administered by Morocco), rather than a State. While some (currently 45) UN Members (including both Panama and South Africa) have recognized the SADR as a State, most have not, and differences of opinion remain as to the Western Sahara's definitive status, and whether such status should ultimately take the form of an independent sovereign State.[108] Furthermore, while some seemingly regard Morocco's economic activities in the Western Sahara as illegal by nature,[109] it must be emphasized that this is not the position set forth in the 2002 UN Legal Opinion. Indeed, as mentioned above, the 2002 Opinion concludes that mineral resource exploitation in the Western Sahara is compatible with international law as long as it is 'conducted for the benefit of the peoples of these territories, on their behalf, or in consultation with their representatives'.[110] The same position is copied in several legal opinions produced at the EU level.[111] Interestingly, the 2002 Opinion also acknowledges that 'the exact legal scope and implications' of the principle of permanent sovereignty over natural resources 'are still debatable'[112]—a finding that sits uneasily with the above-mentioned case law pertaining to the application of the public policy exception (eg, in the context of the prohibition against torture).[113] More

[108] See eg 'U.S. Supports Moroccan Autonomy Plan for Western Sahara' *Reuters* (19 March 2016).

[109] eg African Union, Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission, 'Legal Opinion on the Legality in the Context of International Law, Including the Relevant United Nations Resolutions and the OAU/AU Decisions, of Actions Allegedly Taken by the Moroccan Authorities or Any Other State, Group of States, Foreign Companies or Any Other Entity in the Exploration and/or Exploitation of Renewable and Non-Renewable Natural Resources or Any Other Economic Activity in Western Sahara' (2015) available at <https://au.int/sites/default/files/newsevents/workingdocuments/13174-wd-legal_opinionof-the-auc-legal-counsel-on-the-legality-of-the-exploitation-and-exploration-by-foreign-entities-of-the-natural-resources-of-western-sahara.pdf>. Note: the Opinion appears to simultaneously take the view (1) that any exploitation of natural resources by Morocco in the Western Sahara is by definition contrary to international law and (2) that exploitation of natural resources in the Western Sahara must be for the benefit of the people of the Western Sahara and in accordance with their wishes—without, however, examining whether Morocco's activities in the Western Sahara meet the framework spelled out in the 2002 UN Legal Opinion. Apart from the internal inconsistency of the Legal Opinion, it may, however, be observed that, even if the situation in the Western Sahara is regarded as one of belligerent occupation, this does not make resource exploitation absolutely prohibited. Further: Saul (n 28).

[110] 2002 UN Legal Opinion (n 8) [24].

[111] See eg European Parliament, Legal Service, 'Legal Opinion – Re: Protocol between the European Union and the Kingdom of Morocco Setting out the Fishing Opportunities and Financial Contribution Provided for in the Fisheries Partnership Agreement in Force between the Two Parties – 2013/0315(NLE)' (4 November 2013) SG-0665/13 [18]. See also the answer by Vice-President Mogherini on behalf of the European Commission to a parliamentary question, dated 8 July 2015. Doc E-004499/2015 (citing the conclusion of the 2002 UN Legal Opinion). See also New York City Bar (Committee on United Nations), 'Report on Legal Issues Involved in the Western Sahara Dispute: Use of Natural Resources' (April 2011), available at <http://www.nycbar.org/pdf/report/uploads/20072089ReportonLegalIssuesInvolvedintheWesternSaharaDispute.pdf>.

[112] 2002 UN Legal Opinion (n 8) [14].

[113] Consider eg the position of Jagot JJ in *Habib* (n 93) [119], stressing that there are 'clear and identifiable standards' with regard to the prohibition of torture.

recently, explaining why the Opinion did not address the legality or illegality of specific contracts, former UN Legal Counsel Hans Corell stated that[114]

> A deeper examination of this question would have raised a host of issues that would have been completely unmanageable for the Office of Legal Affairs. … To engage in such an activity would probably have raised more legal questions than answers.

In conclusion, without taking a stance on the application of the UN framework to contemporary mining operations in the Western Sahara, the *Cherry Blossom* case differs, for instance, from *Kuwait Airways*, in that there was no 'plain and, indeed, acknowledged' breach of a fundamental norm of international law not leaving 'any room for doubt', as would be required for purposes of applying the public policy exception. Quite the contrary, the better view is that the *Cherry Blossom* proceedings raised 'a host of issues that [are] completely unmanageable' for a domestic court in a third State and that put the domestic judge in a 'judicial no man's land' (to use the wording of Lord Wilberforce). In conclusion, it is suggested, first, that the 'international act of State' should have been deemed applicable in the present case, and, second, that the act of State doctrine should not have been set aside on account of an alleged public policy exception.

V. CONCLUDING OBSERVATIONS

Some may greet the *Cherry Blossom* Order as an important victory which increases pressure on the Moroccan authorities to meet the demands of the SADR and the Polisario Front and settle the long-standing dispute over the Western Sahara. Others may object that a 'lawfare' strategy that threatens to grind to a halt the export of phosphate—and possibly other goods, such as fish—from the Western Sahara is unlikely to benefit the people of the Western Sahara, given its impact on the region's economy. Whatever one makes of this, the present author submits that the High Court's ruling is legally flawed and sets a worrisome precedent.

First, while the case raises important questions as to the outer bounds of the application of State immunity rules, the Court's reasoning that Morocco was not indirectly impleaded in the case since its legal interests were allegedly not impacted is unconvincing, especially when comparing the case to the ICJ's *East Timor* judgment. In particular, one cannot help but feel that the Court all but renders moot the notion of 'indirect impleading'. Second, even if one were to agree with the Court that the proceedings did not trigger the rules on State immunity, the High Court's treatment of the act of State doctrine is puzzling. Although the *Cherry Blossom* procedure would appear a straightforward

[114] H Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' in N Botha, ME Olivier and D Van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (Verloren Van Themaat Centre 2010) 239.

illustration of the 'international act of State' or the non-justiciability doctrine, the High Court instead chose to ignore the latter doctrine and venture into a 'judicial no man's land'.

Against the background of the above analysis, it is moreover worth pausing an instant at the possible ramifications if other domestic courts were to follow the precedent set, allowing the SADR and/or the Polisario Front to confiscate phosphate shipments mined in, or fish caught in the waters off, the Western Sahara—irrespective of the identity and interests of the seller and purchaser of the cargo. One could imagine the precedent also being copied elsewhere, not only in respect of goods coming from other non-self-governing territories (including the Falklands and French Polynesia?),[115] but also in respect of a variety of other theatres where a State is *de facto* in control of certain territory, but where its title over the territory concerned is contested. Reference can be made to (alleged) cases of unlawful occupation and/or annexation, but also to a far broader range of territorial disputes (eg, border disputes between neighbouring countries) as well as maritime disputes. From Tibet to Crimea, to the South China Sea, etc: potential examples are rife.

In spite of the fact that international law does not at present contain any requirement that States prohibit the import of goods originating in non-self-governing, occupied, or otherwise disputed territories,[116] the *Cherry Blossom* case suggests that States and non-State groups may seize domestic courts in import or transit countries, on the basis of the right of self-determination and the principle of permanent sovereignty over natural resources, with a view to securing ownerships of goods exported by companies operating in the former territories and sold to purchasers/customers in third countries.

Clearly, such approach creates a slippery slope potentially bringing a broad range of political, highly sensitive international (and possibly inter-State) disputes before the domestic courts of third States—disputes that are normally appropriate only for diplomatic negotiations or for consensual judicial dispute settlement at the international level. Such approach is hard to reconcile with the principle of sovereign equality which informs both the customary law of State immunity and the (essentially domestic) act of State doctrine. It also creates considerable legal uncertainty for private parties

[115] It is recalled that Argentina previously initiated criminal proceedings against the executives of several UK oil companies in respect of allegedly unlawful exploratory drilling in the disputed waters around the Falklands Islands eg 'Argentina Launches Legal Action against UK Oil Groups in the Falklands' *Financial Times* (17 April 2015) available at <https://www.ft.com/content/7693840a-e505-11e4-8b61-00144feab7de>.

[116] Consider eg J Crawford, 'Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories' (24 January 2012) available at <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> eg at [91]. See in a similar vein the answer by Vice-President Mogherini on behalf of the European Commission in reaction to a parliamentary questions on the CJEU judgment in Case C-266/16, asserting that the ruling 'did not impose any import ban on products originating in Western Sahara, but determined that at present the Association agreement contains no legal basis for granting tariff preferences to products coming from Western Sahara'. Doc E-000150/2018.

selling or purchasing goods from disputed maritime or territorial areas.[117] Yet, one of the reasons for the development of the rules on State immunity and the act of State doctrine is precisely to avoid such uncertainty, and to avoid 'render[ing] uncertain titles in foreign commerce', whereby 'one buying expropriated goods would not know if he could safely import them into [a third] country'.[118]

Surely, States can and must take into account international law in their dealings with non-self-governing, occupied, and other disputed territories. The obligation not to recognize situations that breach peremptory norms,[119] may, for example, prohibit States from entering into treaties that would imply a legal recognition of annexation.[120] Exceptionally, private companies commercial activities in, for instance, occupied territories may also create a risk of individual criminal responsibility, or a risk of civil liability if they contribute to human rights violations.[121] States may also decide to simply ban the import of goods originating in a certain area, whether as a form of reprisal or as a 'countermeasure'.[122] It is, however, one thing for the Council of the EU to ban the import of goods originating in Crimea.[123] It is quite another for domestic courts to confiscate imported goods stemming from a non-self-governing, occupied, or otherwise disputed territory, and to assert

[117] It is striking to note in this context that other potential buyers ostensibly refrained from participating in the auctioning of the *Cherry Blossom* cargo. See (n 25).

[118] US Supreme Court, *Banco Nacional de Cuba v Sabbatino* (23 March 1964) 376 U.S. 398 (1964) 433. See also the Judgment of the Hanseatisches Oberlandesgericht Hamburg of January 2005 (1 W 78/04) cited in *Belhaj* (n 30) [69] (Lord Mance).

[119] Further: D Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017).

[120] The obligation not 'recognize as lawful a situation created by a serious breach' of jus cogens is enshrined in art 41(2) of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (for text and commentaries, see (2001) YbILC Vol. II, Pt Two, 114–16. Among other things, the obligation of non-recognition—which operates on the intergovernmental plane—prevents States from entering into treaty relations with other States in respect of unlawfully acquired territory, or from sending diplomatic missions to regimes that result from a breach of jus cogens. The non-recognition principle also restricts the extent to which States can enter into economic and other forms of relationship concerning unlawfully acquired territory, albeit that some flexibility is introduced by the so-called *Namibia* exception, where non-recognition of certain acts would ultimately be to the detriment of the inhabitants of the territory concerned. An in-depth analysis of the obligation of non-recognition is beyond the scope of our analysis (see: Costelloe ibid; Crawford (n 116) 18–22, 31 ff). Suffice it to note that it implicitly follows from the ICJ's *Jurisdictional Immunities* case (n 61) that the obligation of non-recognition cannot override the rules of State immunity. The obligation of non-recognition does not feature in the cited judgments of the EU Courts pertaining to the Western Sahara.

[121] See eg Saul (n 28); Crawford (n 116) [99]ff.

[122] Of course, this may raise questions as to the permissibility of such ban under WTO law, or as to the legality of third-party countermeasures—questions which are far beyond the remit of this short contribution. See eg M Dawidowicz, *Third-party Countermeasures in International Law* (Cambridge University Press 2017).

[123] As part of 'the EU's non-recognition policy of the illegal annexation of Crimea and Sevastopol', the EU has imposed '[a] ban on imports of goods originating in Crimea or Sevastopol unless they have Ukrainian certificates'. EEAS, 'The EU Non-Recognition Policy for Crimea and Sevastopol: Fact Sheet' (12 December 2017) available at <https://eeas.europa.eu/headquarters/headquarters-Homepage/37464/eu-non-recognition-policy-crimea-and-sevastopol-fact-sheet_en>.

the ownership of one party to the underlying dispute on the basis of principles of international law. Such approach is indeed at odds with the current regime of State immunity[124] as well as with the principle that domestic courts ought to exercise restraint 'in cases having a foreign element'. In the end, as Lady Fox warned some 15 years ago in connection with the *Kuwait Airways* case:[125]

> It may be an ultimate goal for national courts to exercise jurisdiction and apply judicial standards to the determination of such international disputes but, in the present divided state of the world, to do so is idealistic, premature, inevitably partisan, and runs the risk of the generation of more, rather than less, abuse of legal process.

[124] This is so even if one embraces an expropriation exception to State immunity, which currently only the United States does in its FSIA.

[125] Fox (n 63) 202.

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