Neutral Citation Number: [2022] EWHC 3108 (Admin)

Case No: CO/971/2021

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand
London,
WC2A 2LL

Double-click to add Judgment date

Before :

MRS JUSTICE COCKERILL

- -

Between :

WESTERN SAHARA CAMPAIGN UK	**Claimant**
- and –	
SECRETARY OF STATE FOR INTERNATIONAL TRADE	**First Defendant**
- and –	
HER MAJESTY'S TREASURY	**Second Defendant**
- and –	
SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	**First Interested Party**
- and –	**Second Interested Party**
CONFEDERATION MAROCAINE DE L'AGRICULTURE ET DU DEVELOPPEMENT RURAL ("COMADER")	

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Victoria Wakefield KC and Conor McCarthy (instructed by **Leigh Day**) for the **Claimant**
Sir James Eadie KC, Paul Luckhurst and Belinda McRae (instructed by **Government Legal Department**) for the **Defendants and First Interested Party**
Peter Turner KC and Jackie McArthur (instructed by **Freshfields Bruckhaus Deringer**) for the **Second Interested Party**

Hearing dates: 5, 6, 7 October 2022

- -

APPROVED JUDGMENT

Mrs Justice Cockerill:

INTRODUCTION

1. On 26 October 2019, Her Majesty's Government ("the Government") concluded an "Association Agreement" with Morocco ("the UKMAA") – a short form trade agreement designed to replicate EU association agreements from which the UK ceased to benefit at the end of the transition period following Brexit.

2. The UKMAA provides in terms for preferential tariffs to be applied to certain products originating in Western Sahara, the ("Joint Declaration":

> "This declaration is without prejudice to the respective positions of the United Kingdom with regard to the status of Western Sahara and of Morocco with regard to that region.
>
> Products originating in Western Sahara subject to controls by customs authorities of Morocco shall benefit from the same trade preferences as those granted by the United Kingdom to products covered by this Agreement."

3. The UKMAA is not the subject of this challenge.

4. The Treasury then made two instruments under s.9 of the Taxation (Cross-border) Trade Act 2018 ("the 2018 Act"). That section empowers the Treasury, on the recommendation of the Secretary of State, to make regulations to "*give effect*" to arrangements between Her Majesty's Government and the government of another country or territory, conferring a preferential rate of import duty. When exercising any function under the s.9 power, s.28 of the 2018 Act requires that the Treasury and the Secretary of State "*must have regard to international arrangements to which Her Majesty's government in the United Kingdom is a party that are relevant to the exercise of the function*".

5. The two instruments made by the Treasury and now challenged ("the Regulations") are the Customs Tariff (Preferential Trade Arrangements) (EU Exit) Regulations 2020 and the Customs (Tariff Quotas) (EU Exit) Regulations 2020. These brought into force a "Morocco Preferential Tariff" version 1.0 dated 7th December 2020 and a "Morocco Origin Reference Document" version 1.0, dated 7th December 2020.These documents (explained further below) extend the preferential rate of import duty to goods originating in Western Sahara subject to controls by customs authorities of Morocco.

6. The challenge to the Regulations is brought by WSCUK, which is an independent voluntary organisation. It campaigns on matters of public interest in relation to Western Sahara, a Non-Self-Governing Territory ("NSGT") over which Morocco claims sovereignty. WSCUK states that it works in solidarity with the Saharawi people to advance their right to self-determination and to promote their human rights. Its position is that, under international law, Morocco has no right to exercise sovereignty over Western Sahara or to exploit its resources unless acting with the consent of the people of that territory and for their exclusive benefit; which consent it says has not been obtained.

7. WSCUK brings this challenge to the regulations on the basis that the Government has acted outside the scope of its powers under s.9, or alternatively, that it acted inconsistently with the s.28 ("have regard") obligation when drawing up those regulations.

8. The application for permission to bring a judicial review was granted in part by Chamberlain J in June 2021. The judicial review application is opposed by the Secretary of State for International Trade and His Majesty's Treasury with the support of (as Interested Parties) the Foreign, Commonwealth and Development Office and the Confédération Marocaine de l'Agriculture et du Développement Rural ("COMADER") a Moroccan agricultural association whose members' economic activities in Western Sahara would be affected were the claim to succeed.

9. Although questions of justiciability might be said to logically come first, parts of those arguments overlap with issues of international law best dealt with as part of the substantive arguments. I will therefore deal with the issues in the following order:

BACKGROUND

The Position of Western Sahara

10. Western Sahara is a territory in north-west Africa which was colonised by the Kingdom of Spain at the end of the 19th century before becoming a province of

Spain; it was then added by the United Nations ("UN") to the list of non-self-governing territories for the purposes of Article 73 of the United Nations Charter, on which it still appears to this day.

11. On 14 December 1960, the General Assembly of the UN adopted Resolution 1514 (XV), entitled "*Declaration on the granting of independence to colonial countries and peoples*" ("Resolution 1514 (XV) of the General Assembly of the UN"), which states, inter alia, that "*all peoples have the right to self-determination [,] by virtue of [which] they freely determine their political status*", that "*immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire*", and that "*all States shall observe faithfully and strictly the provisions of the Charter of the United Nations … on the basis of respect for the sovereign rights of all peoples and their territorial integrity*".

12. On 20 December 1966, the General Assembly of the UN adopted Resolution 2229 (XXI) on the question of Ifni and Spanish Sahara, in which it "*reaffirm[ed] the inalienable right of the peopl[e] of Spanish Sahara to self-determination*" and invited the Kingdom of Spain, in its capacity as Administering Power, to determine at the earliest possible date, "*the procedures for the holding of a referendum under [UN] auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination*".

13. On 24 October 1970, the General Assembly of the UN adopted Resolution 2625 (XXV), entitled "*Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*", by which it approved that declaration, the wording of which is appended to that resolution. That declaration states in particular that "*every State has the duty to promote [the right to self-determination of peoples] in accordance with the provisions of the Charter*" and that "*the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles*".

14. On 20 August 1974, the Kingdom of Spain informed the UN that it proposed to organise a referendum in Western Sahara under the auspices of the UN.

15. On 16 October 1975, the International Court of Justice, in its capacity as the principal legal body of the UN, and following an application submitted by the General Assembly of the UN as part of its work on the decolonisation of Western Sahara, handed down an Advisory Opinion (Western Sahara, Advisory Opinion, ICJ Reports 1975, p. 12;), in paragraph 162 of which it found as follows:

> "The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the

> tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) [of the UN General Assembly] in the decolonization of Western Sahara and, in particular, of the principle of self- determination through the free and genuine expression of the will of the peoples of the Territory. ..."

16. At the conclusion of its assessment, the International Court of Justice answered as follows, in that Advisory Opinion, the questions which had been put to it by the General Assembly of the UN:

> "The Court decides, …that Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no-one (terra nullius).…that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in paragraph 162 of this Opinion;…"

17. In a speech delivered on the day of the publication of the Advisory Opinion, the King of Morocco took the view that "*the whole world [had] recognised that [Western] Sahara belonged*" to the Kingdom of Morocco and that it only remained for the Kingdom "*to peacefully occupy that territory*"; he called, to that end, for the organisation of a march, in which 350 000 persons took part.

18. On 6 November 1975, the UN Security Council adopted Resolution 380 (1975) on Western Sahara, in which it "*deplor[ed] the holding of the [announced] march*" and "*call[ed] upon [the Kingdom of] Morocco immediately to withdraw from the territory of Western Sahara all the participants in [that] march*".

19. On 26 February 1976, the Kingdom of Spain informed the UN Secretary-General that as of that date it was withdrawing its presence from Western Sahara and considered itself exempt from any responsibility of any international nature in connection with the administration of that territory.

20. In the meantime, an armed conflict had begun in the region between the Kingdom of Morocco, the Islamic Republic of Mauritania and the Front Polisario. On 10 August 1979, the Islamic Republic of Mauritania concluded a peace agreement with the Front Polisario under which it renounced any territorial claim to Western Sahara.

21. On 21 November 1979, the General Assembly of the UN adopted Resolution 34/37 on the question of Western Sahara, in which it "*reaffirm[ed] the inalienable right of the people of Western Sahara to self-determination and independence, in accordance with the Charter of the [UN] … and the objectives of [its] resolution 1514 (XV)*", "*deeply deplore[d] the aggravation of the situation resulting from*

the continued occupation of Western Sahara by Morocco", "*urge[d] Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara*" and "*recommend[ed] to that end that the [Front Polisario], the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara, in accordance with the resolutions and declarations of the [UN]*".

22. The conflict between the Kingdom of Morocco and the Front Polisario continued until, on 30 August 1988, the parties accepted, in principle, the proposals for settlement put forward, in particular, by the UN Secretary-General and providing, in particular, for the proclamation of a ceasefire and the organisation of a referendum on self-determination under UN supervision. To the present day, that referendum has still not been held and the Kingdom of Morocco controls the majority of the territory of Western Sahara, which a wall of sand constructed and guarded by the Moroccan army separates from the rest of the territory, controlled by the Front Polisario.

23. Western Sahara is therefore a "NSGT" for the purposes of Chapter XI of the UN Charter and it is listed as such by the UN. A specific legal regime applies in respect of such territories, as laid down in Chapter XI of the UN Charter. According to the ICJ, that regime is "*based on the progressive development of their institutions so as to lead the populations concerned to exercise their right to self-determination*" (*Chagos Advisory Opinion* [147]).

24. Article 73 of the UN Charter imposes obligations of "sacred trust" on an "Administering Power" in respect of a NSGT. Under the UN Charter, an Administering Power is a state "*which ha[s] or assume[s] responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government*".

25. As regards Western Sahara the position remains unclear. Morocco does not claim to be an Administering Power, nor act in accordance with Charter obligations in this regard. Neither the EU nor any of its Member States officially recognize Morocco's claims to the territory, nor do they recognize the Sahrawi Arab Democratic Republic. The UK's position is that the status of Western Sahara is undetermined and that Morocco is *de facto* the Administering Power. The UK does not recognise the Polisario Front.

The Association Agreements and the EU decisions

26. In March 2000, the EU Member States and the European Community entered into an Association Agreement with the Kingdom of Morocco ("the EUMAA"). Article 9 of that Agreement dealt with industrial products and stated that products originating in Morocco were to be imported into the Community free of customs duties and charges having equivalent effect. Article 17 related to agricultural and fishery products and referred to more detailed schemes of tariff-free entry into what became the EU set out in the protocols. Article 29 of the Agreement was common to all products and stated that the concept of originating products was set out in Protocol 4. Article 94 stated that it was to apply to the territory of the Kingdom of Morocco.

27. The EUMAA has not been uncontroversial. It has given rise to a good deal of litigation.

28. The starting point is the case of *C 104/16P Council v Front Polisario* [2017] 2 CMLR 28 ("*Polisario 1"*). That concerned a previous version of the EUMAA. It in essence took issue with the simple reference to the Kingdom of Morocco because the reference to the territory of the Kingdom of Morocco may have been understood by the Moroccan authorities as including Western Sahara. The ECJ concluded that because of the principle of self determination the wording cannot properly be interpreted as covering the territory of Western Sahara and must be interpreted, in accordance with the relevant rules of international law applicable to relations between the European Union and the Kingdom of Morocco, as meaning that it does not apply to the territory of Western Sahara.

29. Similar controversies arose in relation to a similar agreement in relation to fisheries, in the case of C266-16, *R (WSCUK) v. HMRC Court of Justice of the European Union (*"CJEU"*)* where the wording "territory of Morocco" for the purposes of determining what were "*waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco*" was under the spotlight. It concluded that waters adjacent to the territory of Western Sahara was not part of this Moroccan fishing zone.

30. It was against this background that amendments were made to the EUMAA to set out a rider that the agreement operates without prejudice to the position of Western Sahara.

31. But the controversy has not gone away. The General Court recently annulled Council Decisions implementing that version of the EUMAA on the basis of arguments very similar to those advanced in this claim: T-279/19 *Polisario v Council* ECLI:EU:T:2021:639 ("*Polisario 2"*) and T-344/19 *Polisario v Council* ECLI:EU:T:2021:640.

32. In the *Polisario 2* the General Court, noting at [276] that "*the EU Courts have jurisdiction to assess the compatibility of a decision concluding an international agreement with the rules if international law*", concluded at [391] that "*in adopting the contested decision, the Council did not take sufficient account of all the relevant factors concerning the situation in Western Sahara*" in particular as regards the steps it had taken to establish consent and consultation on the part of the Saharawi people.

33. That decision is currently under appeal. As matters stand the Council Decisions implementing the EUMAA have been declared annulled but remain in force pending the final outcome of the appeals process, which is still in a relatively early phase.

34. On 26 October 2019, the Government signed the UKMAA. It was a continuity agreement to succeed the EUMAA when that Agreement ceased to apply to the UK. It therefore intentionally mirrors the most recent version of the EUMAA – with the rider introduced following the *Polisario 1* case.

35. The UKMAA provides, at Annex E to Protocol 4, as follows:

> "1. This declaration is without prejudice to the respective positions of the United Kingdom with regard to the status of Western Sahara and of Morocco with regard to that region.
>
> 2. Products originating in Western Sahara subject to controls by customs authorities of Morocco shall benefit from the same trade preferences as those granted by the United Kingdom to products covered by this Agreement."

36. Two aspects of Annex E are emphasised by the Defendants and the First Interested Party ("the Departments"). Firstly that the paragraph 1 wording expressly preserves the position of the UK concerning the status of Western Sahara in the light of the fact that while the UK has consistently supported UN efforts to achieve a lasting and mutually acceptable political solution that provides for the self-determination of the people of Western Sahara, the Government regards the status of Western Sahara as undetermined and has publicly expressed that view.

37. Secondly the Departments says that it is significant that paragraph 2 is limited to conferring tariff preferences in respect of products originating from Western Sahara which are subject to controls by customs authorities of Morocco.

38. The UKMAA was laid before Parliament on 20 December 2019, along with an explanatory memorandum and a detailed parliamentary report explaining the treaty. The period of time for Parliamentary scrutiny required by s.20 Constitutional Reform and Governance Act 2010 was completed on 11 February 2020.

The Regulations

39. Section 9 of the 2018 Act enables international arrangements making provision "*for the rate of import duty applicable to goods, or any description of goods, originating from the country or territory*" to be given effect in domestic law:

> "Preferential rates: arrangements with countries or territories outside UK
>
> (1) If—
>
> (a) Her Majesty's government in the United Kingdom makes arrangements with the government of a country or territory outside the United Kingdom, and
>
> (b) the arrangements contain provision for the rate of import duty applicable to goods, or any description of goods, originating from the country or territory to be lower than the applicable rate in the customs tariff in its standard form,
>
> the Treasury may make regulations to give effect to the provision made by the arrangements (whether by amending the customs tariff or otherwise).
>
> […]

> (3) The power of the Treasury to make regulations under this section is exercisable only on the recommendation of the Secretary of State."

40. Section 28(1) of the 2018 Act, entitled "*Requirement to have regard to international obligations*", provides:

> "In exercising any function under any provision made by or under this Part—
>
> (a) the Treasury,
>
> (b) the Secretary of State, …
>
> must have regard to international arrangements to which Her Majesty's government in the United Kingdom is a party that are relevant to the exercise of the function."

41. The Treasury's position is that it gave effect to the relevant provisions in the UKMAA by the Regulations made on 16 December 2020 (SI 2020/1457).

42. The Regulations gave effect to "*The Morocco Preferential Tariff, version 1.0, dated 7th December 2020*" and "*The Morocco Origin Reference Document, version 1.0, dated 7th December 2020*" ("the Preferential Tariff Document" and the "Origin Reference Document" respectively), the operative parts of which were both simple and in materially identical form.

43. The Preferential Tariff Document provides at Part One, §4:

> "Without prejudice to the respective positions of the United Kingdom with regard to the status of Western Sahara and of Morocco with regard to that region, products originating in Western Sahara subject to controls by customs authorities of Morocco shall benefit from the same trade preferences as those granted by the United Kingdom to products covered by the Agreement."

44. The Origin Reference Document provides at Article 38:

> "1. This Article is without prejudice to the respective positions of the United Kingdom with regard to the status of Western Sahara and of Morocco with regard to that region.
>
> 2. Products originating in Western Sahara subject to controls by customs authorities of Morocco shall benefit from the same trade preferences as those granted by the United Kingdom to products covered by the United Kingdom-Morocco Agreement. …"

THE ISSUES

45. The issues between the parties relate to a single Ground concerning whether the Regulations do or do not achieve their aim. A lengthy and detailed List of Issues was arrived at, but the essence of the issues can be summarised as follows:

    i) Has the Government acted outside the scope of its powers under s.9 when drawing up those Regulations? It is said that in drawing up the Regulations the Defendants have misconstrued the requirements of the UKMAA interpreted in light of established principles governing the interpretation of treaties. In particular it is said that relevant interpretive principles include Article 53 of the VCLT ("the Vienna Convention"), which provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law (*jus cogens*) and that the principle of self-determination is such a norm. As a result, the regulations do not "*give effect to*" the UKMAA and are ultra vires.

    ii) Has the Government acted inconsistently with the s.28 obligation when drawing up those Regulations? It is said that contrary to this obligation, the Defendants have failed to take into account and/or have misdirected themselves as to relevant international obligations.

46. WSCUK had sought to challenge the Regulations on a second ground, namely that the Government misdirected itself as to the interpretation of the UK-Morocco AA because: (i) the UK-Morocco AA was intended to give continued effect to arrangements that applied in the UK under the EUMAA; and (ii) EU law required any EU agreement to be "entirely" consistent with international law.

47. Chamberlain J refused permission on Ground 2 ([2021] EWHC 1756 (Admin)); however it is fair to say that some shades of this argument have fed back in to the debate before me.

SUMMARY OF THE PARTIES' CASES

48. WSCUK submits in outline that:

    i) Parliament chose to delineate and circumscribe the s.9 vires by use of the words "*to give effect to*" international arrangements. This means that this Court must – in order properly to police that power – reach a view on the meaning of such arrangements. Otherwise, it cannot properly determine the scope of the power. In the present case, that means that the Court must interpret the UKMAA.

    ii) The Court must interpret the UKMAA (and domestic implementing legislation) using established rules of international treaty law (set out in the VCLT) which apply when interpreting a treaty. In particular, this requires interpreting "*the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31(1));* and taking into account "*any relevant rules of international law applicable in the relations between the parties*" (Article 31(3)(c)). Those relevant rules

of international law include the *pacta tertiis* principle by which a treaty "*does not create either obligations or rights for a third state without its consent*" and the principle of self-determination, which includes the entitlement of a people, recognized as such by international law, to freely determine the use of their natural resources. The result of that exercise is that the UKMAA does not, and cannot, apply to any goods originating in Western Sahara under the *de facto* control of Morocco.

iii) Since the Treasury only has power to introduce regulations which "*give effect to*" the international arrangements, the Regulations and the associated documents must be similarly limited, otherwise they would be ultra vires. The Defendants are therefore misinterpreting and misapplying the terms of the Regulations which incorporate the terms of the Joint Declaration.

iv) The task for the Court is to construe the UKMAA, since this is required by the primary legislation. However, even if the test were one of tenability, in which the Defendants set out their views on the proper interpretation of the UKMAA and the Court asks only whether those views are legally tenable, WSCUK says that it meets that test, i.e. the Defendants' submissions are untenable.

v) In any event, there has been a breach of s.28 of the 2018 Act. The Defendants' evidence is *"[w]hen implementing the UK-Morocco AA, the DIT had regard to the UK's rights and obligations under the agreements of the World Trade Organisation ("WTO"). … Otherwise, when making the Regulations, HMT and the DIT did not subject the UK-Morocco AA to any other assessment under public international law.*" That fails to comply with s.28, and accordingly the Defendants have exercised power under s.9 in breach of statutory duty.

vi) Finally, the Court is not precluded from considering this challenge by virtue of the doctrine of foreign act of State ("FAOS"). Insofar as the act of State rule is applicable, the claim falls within the public policy exception to that rule. Parliament has required the government to "*give effect to*" the trade agreements with third states and to take into account international law in so doing. The constitutional role of the courts in ensuring that the executive adheres to limits imposed on it by Parliament militates strongly in favour of the court exercising jurisdiction. Moreover, the rules of international law at issue – in particular (but not exclusively) the principle of self-determination, which is widely recognized as *jus cogens* and even on the Defendants' case is applicable *erga omnes* - fall firmly within the public policy exception to act of state, consistent with existing case law. The court is wellable to decide those issues of law, to the extent necessary, just as the ECJ and General Court have done. Reliance on the FAOS doctrine is, therefore, misplaced. In any event, it is not a complete answer to the claim. For example, in relation to s.28, the court could decide that the Defendants simply failed to take account of relevant international obligations or misdirected themselves as to the scope of the s.28 duty. The Defendants reliance on act of state is therefore overbroad.

49. The Defendants and First Interested Party (together, "the Departments") submit, in summary, as follows:

i) The starting point is that the Government's decision to conclude a treaty in the terms of the UKMAA cannot be challenged, directly or indirectly. This is because decisions to enter into treaties are the exclusive prerogative of the Government. Moreover, the Government's treaty-making decisions in relation to the UKMAA have already been scrutinised by Parliament through the procedures set out in the Constitutional Reform and Governance Act 2010 ("CRGA 2010").

ii) In light of the perfect symmetry between them, it is plain that the domestic instrument "*g[a]ve effect*" to the international arrangements and was thus necessarily within the enabling power in s.9 of the 2018 Act. It is equally plain that regard was had to the clear and unambiguous wording of the treaty provision being transposed when exercising the function of making the transposing regulations, in accordance with s.28 of the 2018 Act. The Claimant's primary argument must fail for these reasons.

iii) Further, there is no proper basis on which the Claimant's arguments about the effect of international law can be deployed in aid of its case on Ground 1. International law could only be relevant if, and to the extent that, a relevant domestic gateway were established, namely genuine ambiguity in the domestic regulations – in which case recourse might be had to international law to assist with the interpretation of the domestic provision. There is no such ambiguity in this case. The Claimant is therefore wrong to invoke s.9 as providing a means to circumvent these well-established rules.

iv) Even if the Claimant were to overcome those significant hurdles, its arguments on the merits of its international law arguments are not well-founded:

v) In a case such as this, the Court can, at most, inquire as to whether the Government's position reflects a "tenable view" of international law. This applies to the Government's view as to the meaning, scope and effect of the "*arrangements with the government of a country or territory"* that are to be given effect under s.9 of the 2018 Act and to any further "*international arrangements*" to which the Government was required to have regard under s.28 of the 2018 Act.

vi) It appears to be common ground that, under international law, it would be possible in principle to accord preferential tariff treatment to products originating in Western Sahara subject to controls by customs authorities of Morocco.

vii) The international law arguments that the Claimant puts forward in order to justify a "reading down" of the UKMAA are unfounded. They fall well short of demonstrating that it is untenable for the Government to be satisfied that the UK-Morocco AA grants preferential tariff treatment to those products.

viii) In particular, there is no basis in the provisions of the VCLT on which the Claimant relies (i.e., Articles 34, 53 and 71) or in customary international law ("CIL") to disapply the treaty in respect of products originating in Western Sahara. Nor does the principle of self-determination have the content and effect for which the Claimant contends.

ix) There is also no credible basis to establish an independent breach of s.28 of the 2018 Act. This argument depends on an unsustainably broad interpretation of that section requiring the Departments to have regard to the whole corpus of CIL when drawing up the relevant regulations. That interpretation should be rejected by the Court.

x) In any event, the claim is not justiciable pursuant to the FAOS doctrine. The core of the Claimant's case is that Morocco is in breach of international law because it has unlawfully occupied Western Sahara and is breaching aspects of the principle of self-determination of the people of Western Sahara. Even if there were a domestic gateway for such arguments, that contention falls squarely within the third rule of the FAS doctrine. The Claimant's answer to this is that its claim falls within the public policy exception to the FAOS doctrine because (i) the principle of self-determination is a peremptory norm of international law (*jus cogens*) engaging that exception and (ii) even if it does not qualify as a peremptory norm, it is enough that the principle is fundamental to the international legal system. Neither of these propositions is correct. The result is that the Court is precluded from determining the Claimant's claim in its entirety.

50. The Second Interested Party "COMADER" also resists the challenge. It contends that:

i) Both the ss. 9 and 28 arguments misinterpret the legislation authorising the Regulations, and the former asks the Court to decide issues that are inappropriate for an English court.

ii) The s. 9 argument depends on a so-called interpretation of the Joint Declaration that finds no support in the Joint Declaration's terms and goes beyond "reading down" – the Claimant effectively asks this Court to nullify the Joint Declaration, a step which the rules on treaty interpretation do not allow.

iii) The s. 9 argument advances a novel interpretation of the international law *pacta tertiis* rule, which an English court should not accept.

iv) The s. 9 argument makes submissions on the international law rights of self-determination and permanent sovereignty over natural resources, that are unsupported by authority and mischaracterise the UKMAA's effect.

v) As regards FAOS, COMADER aligns itself with the Departments. In addition however, it contends that the doctrine of State immunity also precludes consideration of the issues on the basis that the English court is precluded from exercising jurisdiction in proceedings that would require the Court to make a ruling that has direct consequences for a foreign

> sovereign's rights and obligations under international law, or a ruling on the lawfulness of a foreign sovereign's actions under international law.

THE BACKDROP: TREATIES AND DOMESTIC LAW

51. Before moving on to the issues a degree of backdrop is useful. This is because it is necessary to bear in mind what this challenge is not. It is not a challenge to the UKMAA. It is not a challenge to the UKMAA for good reason: such a challenge would not be permissible.

52. A decision of the Government to enter into a treaty is not reviewable by the Courts. It is non-justiciable. In *CCSU v Minister for the Civil Service* [1985] AC 374, Lord Roskill held at 418: "*Prerogative powers such as those relating to the making of treaties… are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded…*".

53. Similarly, in *J.H. Rayner Ltd v Department of Trade* [1990] 2 AC 418, Lord Oliver held at 499H: "*On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law…*".

54. Fundamentally this is because a decision to enter into a treaty is a matter exclusively for the Government, exercising the Royal Prerogative. This is clear from *Rustomjee v The Queen* (1876) 2 QBD 69, 74: "*throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts*".

55. A treaty is accordingly not a contract enforceable by a domestic court: *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 [76]. It is a "*fundamental principle of our constitutional law*" that an unincorporated treaty does not form part of the law of the UK [77, 91]. Such treaties "*cannot be the source of domestic rights or duties and will not be interpreted by our courts*": *Belhaj v Straw* [2017] AC 964 at [123]. The general "rule" is that "*our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties*": *R (SC)* [84].

56. This principle rests on dualist constitutional theory: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, [55]. The dualist system, which is "*based on the proposition that international law and domestic law operate in different spheres, is a necessary corollary of Parliamentary sovereignty*": *R (SC),* [78].

57. It follows that CIL cannot be relied upon to challenge legislation, since that would be inconsistent with domestic constitutional principles: see, e.g., *R (Hoareau) v SSFCA* [2021] 1 WLR 472 (CA), [143]; *R (Al-Saadoon) v Secretary of State for Defence* [2017] QB 1015, [200]. Nor can the Court entertain a challenge to the

Government's foreign policy on the grounds that it conflicts with CIL: see e.g. *R (Al-Haq) v SSFCA* [2009] EWHC 1910 (Admin) at [6, 10, 41-46].

58. As Chamberlain J noted, the primary duty of fidelity owed by the domestic courts is to Parliament. The forum for review of treaties is Parliament. It has processes for doing this. The laying of treaties before Parliament is given a legislative foundation in the CRGA 2010.

59. In brief, the CRGA 2010 provides that:

    i) A treaty that is subject to ratification (within the meaning of s.25 of the CRGA 2010) must be laid before Parliament for a period of 21 sitting days of both Houses before it can be ratified (CRGA 2010, s.20(1)-(2), (9)), save for exceptional cases (CRGA 2010, s. 22(1));

    ii) Either House of Parliament can vote to prevent ratification (CRGA 2010, s.20(1)(c)); and

    iii) A vote of the House of Commons cannot be overridden by Ministers (CRGA 2010, s.20(4)(b), (7)(b)).

60. As noted above the UKMAA was ratified by Parliament. The CRGA scrutiny process was followed between 20 December 2019 and 11 February 2020. The UKMAA was laid before Parliament on 20 December 2019, along with an explanatory memorandum and a detailed parliamentary report explaining the treaty. The EU Select Committee reviewed the treaty. As part of this process, the Committee consulted with the FCO (as it was then known) on the treaty's application to "*goods from Western Sahara*".

61. This therefore is the background to the issues which do arise.

ISSUE 1: DOES SECTION 9 OF THE 2018 ACT REQUIRE THE COURT TO INTERPRET THE RELEVANT INTERNATIONAL ARRANGEMENT?

62. WSCUK submits that because of the language chosen by Parliament in drafting s.9, the Court must consider the relevant international arrangement, as a necessary prerequisite for proper judicial review of the vires. It says that in order to ascertain whether the Government has acted within the scope of s.9 by "giving effect" to a treaty in domestic law, the Court must decide on the proper interpretation of that treaty as a matter of international law.

63. It naturally places considerable reliance upon the judgment of Chamberlain J granting permission: *"Unless the exercise of the [s.9] power was intended to be unreviewable, Parliament must have intended the court to consider the effect of the international arrangement. Without doing so, it is difficult to see how the court could measure whether the domestic instrument falls within the power conferred"*.

64. WSCUK says that the present case is in line with an orthodox, principled and constitutional approach, in which, where Parliament calls – expressly or by inference - upon the Courts to interpret and apply international law, the Courts do

so. It relies upon a number of authorities: *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777 [35]; *Pan-American World Airways Inc v. Department of Trade* [1976] 1 Lloyd's Rep 257 (CA) [261]; *Heathrow Airport Limited v Her Majesty's Treasury* [2021] EWCA Civ 783 [138]-[139]; *Reyes v Al-Malki* [2019] AC 735 [10].

65. However what WSCUK says glosses over what is really being sought to be done. Those authorities concern interpretation of international treaties to see whether domestic law gives proper effect to it. For example:

    i) In *Benkharbouche*, the Court was required to decide the content of the CIL of State immunity for the purposes of the compatibility of ss.4(2)(b) and 16(1)(a) of the State Immunity Act 1978 with Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights;

    ii) In *Pan-Am* the question concerned the variation of a permit issued pursuant to an Air Navigation Order enacted to give effect to an international air convention called the Chicago Convention;

    iii) In *Heathrow* the Government decided to abolish VAT free shopping in reliance on its understanding of the obligations imposed by certain provisions of the General Agreement on Tariffs and Trade;

    iv) In *Reyes*, the Vienna Convention on Diplomatic Relations had to be construed so as to ascertain whether the intended recipient of proceedings fell within or without the ambit of diplomatic immunity.

66. That must, as Chamberlain J noted, be possible – where it is necessary to do so. This, however, is not a case of looking at the international treaty to inform whether the domestic law gives proper effect to it. There is almost no room for doing this, because the wording of the domestic legislation is effectively identical to that of the treaty – and it is not suggested that this is not the case.

67. At the permission stage various arguments were addressed to the possibility that the UKMAA meant one thing and the Regulations, despite the identical wording, meant another. This possibility underpinned Chamberlain J's reasoning in granting permission. This was in focus because it was conceded that it was arguable that the UKMAA, properly construed, does not apply to goods originating in Western Sahara (effectively because of the effect of the EU decisions). But at this stage all the questions are looked at together and that possible argument would require to be addressed. That would have required (inter alia) the addressing of such questions as how, as a matter of statutory interpretation, that result was to be reached despite the fact that the wording was identical. That exercise was not done. As it turned out, before me the argument that the two documents properly construed might mean different things – the lynchpin of the permission argument - was no longer really pursued.

68. There is nothing in the authorities upon which WSCUK relies which really impinges on this fundamental problem or permits of a way around it.

69. WSCUK points to *Pan-American World Airways Inc v. Department of Trade* [1976] 1 Lloyd's Rep. 257 (CA) where Lord Scarman LJ held [261]:

> "There is also a well-known rule … that international conventions may be looked at when Parliament expressly requires it or when it is a proper inference that Parliament, even though no express words have been used, requires the Courts to do so. In such circumstances … it becomes the duty of our Courts to look at the international convention and to interpret the law or the words of the statute under consideration in the light of the convention".

70. But this is not a blank cheque. It must be read against the relevant juridical background; which is that international law may be relevant to the interpretation of legislation, but only in limited circumstances.

71. The principal threshold is ambiguity. This can be seen in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143-144:

> "… the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties … and any remedy for such a breach of an international obligation lies in a forum other than in Her Majesty's own courts. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings can reasonably be ascribed to the legislation is consonant with treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in the case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."

72. That passage has very recently been referenced with approval by the Supreme Court in *Reference by the Lord Advocate of Devolution Issues* [2022] UKSC 31 at [87] (a decision which emerged and was drawn to my attention after the hearing).

73. As for *J.H. Rayner Ltd v Department of Trade* [1990] 2 AC 418, relied on by WSCUK for the broad proposition that "*the courts have power to interpret the terms of a treaty which Parliament has sought to incorporate*": the judgment in *JH Rayner* in fact provides as follows at 481:

> "it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty, the terms of the treaty may have to be considered and, if

> necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute".

74. Again therefore the Court is not, as WSCUK would like to suggest, giving a blank cheque, but rather leaving the door open to perform necessary clarification. The need for doubt or unclarity as a trigger can also be seen in the judgment of Rix LJ in *R (Al-Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401 (CA) . There he expressly endorsed the rule in *Salomon* in the following terms: "*it is a general principle to construe domestic legislation which enacts treaty obligations in conformity with those obligations, if there is doubt about its true construction: see Salomon …*"

75. WSCUK says that this still requires the meaning of the international arrangements to be determined, otherwise the meaning of the domestic regulations would be unknown. That may be true at a macro level; but the fact that the meaning of the international arrangement (and hence of the domestic regulation mirroring it) may have to be known in some particular context does not mean that it requires to (or is appropriate to) determine that treaty's meaning as part of a judicial review of the domestic regulation directed at declaring that regulation ultra vires.

76. Faced with this difficulty WSCUK then submits that, even if the mirroring of language is exact - such that it is crystal clear that the treaty is being carried into effect - the Court should look at the underlying meaning and legality of the arrangement, because if the arrangement is unlawful there is nothing for the Regulations to give effect to. On this basis the Regulations would not be ultra vires, but would be a dead letter. I pause here to note that this does not, of course, cohere with the claim made and the relief sought.

77. Further as noted by Sir James Eadie KC for the Departments this is a radical and surprising interpretation of the function of s.9. Were this right, it would in effect place not just the legislature but also the prerogative under the effective scrutiny (and one might say supervision) of the Courts. That is a surprising proposition. It is not one which is supported by authority and I have no difficulty rejecting it.

78. It follows that the answer to the first question is that s.9 of the 2018 Act does not require the Court to interpret the UKMAA.

79. The reality of the situation is that where this argument inevitably goes is not to a challenge to the Regulations or even an ascertainment of their potentially "dead letter" status, but rather to a challenge to the UKMAA. That this is not overtly done is a tacit acknowledgement that this would not be appropriate, for the reasons explained in the Backdrop section. This means that there can be no public law challenge to the decision by the Government to enter into the UKMAA – whether by asserting that it is contrary to international law or otherwise. That question is impermissible.

80. The permissible question - as to whether the Regulations "give effect" to the UKMAA and are to that extent ultra vires - falls at the first fence.

ISSUE 2: THE PROPER INTERPRETATION OF THE UKMAA

81. This issue therefore does not arise. Had it done so I would have concluded that the answer to this question is clear, despite the ingenious arguments deployed for WSCUK. The UKMAA and the Regulations both cover goods originating in Western Sahara which are subject to controls by the customs authorities of Morocco. That conclusion is unaffected by potential arguments as to international law.

82. The reasoning leading to this conclusion is as follows.

83. WSCUK contends for an interpretation whereby "*products originating in Western Sahara subject to controls by customs authorities of Morocco shall benefit from [the preferential tariffs]*" should be taken to refer only to products originating in Western Sahara "*if the conditions imposed by international law for the exploitation of the resources of a Non Self-Governing Territory have been met*". This formulation was reflected in the written submissions and in the relief sought. In oral argument, bearing in mind the drafting of the Regulations and the need for a formulation geared to that, this was substituted with "*products originating in Western Sahara which are lawfully under the control of the Moroccan customs authorities*".

84. This argument reflects a reading of the Regulations/UKMAA which is subject to the following changes from the original drafting:

> "Products originating in Western Sahara ~~subject to controls by~~ <u>which are lawfully under the control of the</u> customs authorities of Morocco shall benefit from the same trade preferences as those granted by the United Kingdom to products covered by this Agreement."

85. The logic which WSCUK tries to suggest leads to this interpretation is faulty.

86. The starting point is Article 31 of the VCLT which lays down a specific regime for the interpretation of treaties. In particular Article 31(1) VCLT states that "*[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

87. WSCUK says that this passage cannot stand alone, but must be read subject to:

    i) Article 31(3)(c) which states *"[t]here shall be taken into account, together with the context: […] any relevant rules of international law applicable in the relations between the parties"*. WSCUK submits that here relevant international obligations include: the *pacta tertiis* principle; the principle of self-determination; and international law obligations applicable to a NSGT.

    ii) Article 53, which provides that *"a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law"*.

iii) Article 71, which obliges parties to such a treaty to *"bring their mutual relations into conformity with the peremptory norm of general international law"*.

88. The first point to note is that if one looks first at Article 31(1), WSCUK apparently faces an enormous hurdle. There is no reasonable way in which the interpretation for which it contends can be said to be in accordance with the ordinary meaning of the words. The highest WSCUK can go is to submit that the wording of the Joint Declaration can (with some effort – ie by the interpolation of the words above) accommodate the interpretation for which it contends. That is true – but it can do so only with that effort – either by a significant rewriting or reading down.

89. WSCUK has accepted that it is not the natural reading by its acceptance that "*it is an interpretation which is driven by other aspects of the interpretative exercise*". In other words, one or more of Article 31(3)(c), Article 53 and Article 71 are said to overcome the primary rule and natural reading.

90. While it is true that Article 31(1) makes clear that a treaty "*shall*" be interpreted in *"context*" and in light of its "*object*" and "*purpose*", the route taken by WSCUK is a very strained approach to construction. It is a route which goes via reference to Article 31(2) of the VCLT as making clear that "*context*" includes the text, preamble and annexes of a treaty, to Articles 53 and 71 and to Article 31(3)(c) which WSCUK then suggests creates *"a mandatory interpretative obligation"*. I conclude that that approach is too strained and not valid.

91. Article 31(1) is by positioning, by drafting and by authority the primary approach to interpretation. This is clear from *Reyes v Al-Malki* [2019] AC 735 at [10-11]:

> "10. It is not in dispute that, so far as an English statute gives effect to an international treaty, it falls to be interpreted by an English court in accordance with the principles of interpretation applicable to treaties as a matter of international law. That is especially the case where the statute gives effect not just to the substance of the treaty but to the text: *Fothergill v Monarch Airlines Ltd* [1981] AC 251, especially at pp 272E, 276—278(Lord Wilberforce), pp 281—282(Lord Diplock) and p 290B—D (Lord Scarman).
>
> 11. The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969):…. The principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions."

92. Once this primacy is acknowledged and given due weight - and with it the importance of the parties' intentions - WSCUK's approach hits difficulties immediately, because it makes no sense for the word "lawful" to be implied/interpolated as reflecting the parties' intentions when it is clear that the parties were completely alive to the controversies which had occurred, expressly referred to them, and decided that what should happen to them was that they should be "parked" by reference to the "without prejudice" wording of paragraph 1.

93. Further in practical terms, when one unpicks what would have to be done to comply with the term proposed (that products must originate in Western Sahara where a variety of conditions which cannot currently be met, are met) it becomes apparent that the effect would be that the agreement could not be used as regards products originating in Western Sahara at all. The revised wording would take a document which enabled trade in goods originating in Western Sahara to function and turn it into one under which it could not. It is simply obvious that (having gone to the trouble of negotiating and ratifying an agreement) that is not what the parties intended. (I note by way of parallel, in ordinary contractual terms where the parties' objective intentions are also in play: this argument in favour of implication would fail both the reasonable bystander and business efficacy tests.)

94. As an ordinary exercise of construction this is the end of the argument. WSCUK's construction flies in the face of the language of the treaty and in the face of the obvious intent to create a utile agreement.

95. One then turns to the provisions relied on by WSCUK to evaluate how they gain sufficient weight to displace the primary rule and natural reading. The answer is that they do not.

96. Article 31(3)(c) may well, as WSCUK says, be regularly applied by international courts and tribunals called upon to interpret treaty provisions. The principal example given was in *Oil Platforms (Iran v. United States*) ICJ Reports (2003) p. 161. There it was relied on in interpreting a treaty provision which permitted either party to take *"measures … necessary to protect its essential security interests"* to ascertain whether that covered the use of armed force, and if so whether in doing so it had to comply with international law. The ICJ held that it must be interpreted and applied in a manner consistent with customary international law which permits the use of force in self-defence. The ICJ found that the scope of the treaty provision was therefore circumscribed by customary international law on the use of force.

97. However, that is some considerable distance from Article 31(3)(c) being a mandatory interpretive obligation or a "trump card" which overrides or qualifies Article 31(1). In that case and the others to which reference was made the issue involved a genuine question of interpretation where the meaning was in genuine doubt – because there were two reasonably valid interpretations.

98. The other cases cited by WSCUK were as follows:

    i) *Saadi v. United Kingdom*, Grand Chamber, Merits, Application No. 13229/03. This concerned the interpretation of the words *"lawful …*

detention of a person to prevent his effecting an unauthorised entry into the country" in Article 5 of the ECHR;

ii) *US — Anti-Dumping and Countervailing Duties (China),* Appellate Body, 11 March 2011 [307]-[308], and [311]. This concerned arguments as to whether the imposition of duties by the US Government was contrary to an Agreement on Subsidies and Countervailing Measures ("the SCM Agreement") and the General Agreement on Tariffs and Trade 1994 ("GATT 1984");

iii) *Korea – Measures Affecting Government Procurement*, Panel, 1 May 2000. This case concerned questions of interpretation and clarification of the WTO agreements.

99. Article 31(3)(c) in my judgment provides a means for incorporating into the consideration as relevant background relevant rules of international law, but it does not displace or override Article 31(1). It is one of a number of supplemental provisions to Article 31(1). They include:

i) Article 31(2): A definition of the context *"for the purpose of the interpretation of a treaty … in addition to the text, including its preamble and annexes"*. It is perhaps worthy of note that the context is quite narrowly defined: *"agreement relating to the treaty" "made between all the parties in connection with the conclusion of the treaty"* and any other instrument accepted by all the parties as *"an instrument related to the treaty"*;

ii) Article 31(3)(a): Any subsequent agreements regarding the interpretation of the treaty;

iii) Article 31(3)(b): Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

100. Thus Article 31(3)(c) is some way down the pecking order and is simply one of a number of points to be considered where appropriate. By its positioning it is the last of the matters to be brought into account. It follows that it supplements (where appropriate); it does not trump.

101. Similarly in relation to the "peremptory norms" iteration of the argument by reference to Articles 53 and 71, I remain completely unpersuaded that these much later sections permit a departure from the ordinary meaning in the exercise of interpretation. This is consistent with p. 439 of the UN International Law Commission Commentary on the Articles on the Responsibility of States for Internationally Wrongful Acts, which says:

> "the exercise of interpreting rules of international law in a manner consistent with peremptory norms of general international law (jus cogens), the bounds of interpretation may not be exceeded. In other words, the rule in question may not be given a meaning or content that does not flow from the normal application of the rules and methodology of

> interpretation in order to achieve consistency with peremptory norms of general international law (*jus cogens*)."

102. This passage provides another perhaps unsurprising parallel with the domestic authorities on the implication of terms into contracts. See for example Aikens LJ in *Autoclenz v Belcher* [2009] EWCA Civ 1045 (approved by the Supreme Court at [2011] UKSC 41):

> "Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties."

103. True it is that Article 71 VCLT requires the parties to a treaty to "*bring their mutual relations into conformity with the peremptory norm of general international law*". But that does not in and of itself say anything about the interpretative exercise. Neither Articles 53 nor 71 VCLT naturally speak to the interpretative exercise at all. It cannot be said that they impose a strong obligation on the parties to a treaty to ensure that it is interpreted in a manner compatible with peremptory rules of international law in the first instance. The reality is that these Articles add nothing to Article 31(3)(c).

104. Further so far as Article 53 is concerned in context any such right arising out of international law would not lead to where WSCUK wants to go. Article 53 of the VCLT provides for any breach of international law to produce voidness (via Articles 65 to 68), not a change to the interpretation. These arguments therefore could not assist WSCUK in the context of a construction argument.

105. Pausing here it is worth noting this: if Articles 53 and 71 add nothing (as I have concluded, and as – at least in relation to Article 53 - WSCUK came close to conceding in reply), why have they been deployed? The answer seems likely to be to bolster a perceived lack in the Article 31(3)(c) argument. That elides with the lack which analysis demonstrates in the argument.

106. Thus it is true that the Court is required to "*take into account any relevant rules of international law applicable in the relations between the parties*" by virtue of Article 31(3)(c) VCLT. This would probably be, even absent Article 31(3)(c), a matter of interpretative logic. This can be seen in the *Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections* ICJ Reports 1957 (125) p. 142 which predates the Convention, where the ICJ held that "*[i]t is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing, and as intended to produce, effects in accordance with existing law and not in violation of it"*.

107. That interpretative rule is now made explicit by Article 31(3)(c). It may well also be that this applies *a fortiori* to, or has to be given particular weight in the context of, a peremptory norm of international law (see also *Oil Platforms (Iran v. United States)* ICJ Reports (2003) p. 161 [41] and Concurring Opinion of Judge Simma at p. 330. The latter emphasises the need for *"the provisions of any treaty ... to be interpreted and applied in the light of the treaty law applicable between the*

parties as well as of the rules of general international law "surrounding" the treaty" before moving on to say *"If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation."*

108. I do not consider that the further ECHR authorities first deployed on Day 2 of the hearing add anything to these arguments. *Al Adsani v UK* [2002] 34 EHRR 11 at [55-6], *Golder v UK* [23, 32] and *Hassan v UK* at [100] [102] merely echo the need to interpret treaties so far as possible in line with international law and the need not to interpret in a vacuum when there is relevant context. Each of them is entirely explicable in the light of its relevant context (*Al Adsani*: State immunity and its incompatibility with reliance on Article 6; *Golder*: access to court is a precondition to the right to a fair hearing; *Hassan*: the tensions between jurisdiction and military operations). None of them can fairly be read as authority for the proposition that Article 31(3)(c) permits the implication of words into international agreements which contradict the natural reading of that agreement.

109. The potential for a strong interpretative principle in some cases is certainly indicated by the UN International Law Commission in its Commentary on Article 26 of the Articles on the Responsibility of States for Internationally Wrongful Acts. The ILC said this [3]:

> "In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred. Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts".

110. However there is a limit to the interpretive function; in a situation where the language of a treaty is very clear, a peremptory norm may not be able to resolve the conflict – as this passage seems to acknowledge.

111. This is perhaps also tacitly acknowledged in WSCUK's suggestion that in this case the context bridges the gap. However that submission is not persuasive. WSCUK seeks to leverage the EU case law via a submission that:

    i) The UKMAA is a "short form" international trade agreement which, *mutatis mutandis,* carries over the rights and obligations of the EUMAA.

    ii) The EUMAA – and its Joint Declaration (replicated in the UK agreement) –was intended to be fully compliant with international law, as per Article 3(5) TFEU.

    iii) Article 3 of the UKMAA incorporates Article 2 of the EUMAA by which the parties commit to "*[r]espect for the democratic principles and*

fundamental human rights established by the Universal Declaration of Human Rights" noting that this shall constitute "*an essential element of this Agreement*".

iv) The UKMAA itself evinces an intention to comply with international law and the principles of the UN Charter. This provides the basis for the rewritten version of the Regulation, importing the word "lawful".

112. This essentially replicates the structure within the *Polisario* and *Western Fisheries* cases by which decisions were made that aspects of the EUMAA or its predecessors were unlawful; and WSCUK naturally places considerable weight on those decisions. However this exercise is effectively an entirely separate one to that of construction. It is also underpinned by an important jurisdictional distinction. As noted above, the CJEU is empowered to review international treaties for legality - and expressly noted that jurisdictional ability as part of its reasoning in the most recent *Polisario 2* case. This Court cannot take that approach. The mere fact that the EU Courts have reached a view which annuls the implementation of an international treaty would not enable this Court to follow suit, even if the decision were on the exact same treaty, which it is not.

113. If the EU authorities offered a clear route by way of a construction exercise, this Court might follow their thread through the labyrinth; but they do not. The judgment in *Polisario 2* has a number of strands. It is not always apparent that they are kept distinct. As regards Article 31(3)(c), the reasoning is short. There is no clear justification for the weight given to Article 31(3)(c) in the context of the rest of Article 31, and the materials cited above as to the primacy of Article 31(1) do not seem to be considered. I cannot therefore see a clear route which would persuade me to depart from the analysis set out above. I note that the judgment is not without its critics. Odermatt in "*Council of the European Union v Front Populaire"* (2017) AJIL 4028-4035 criticises the CJEU as having "*turned treaty interpretation on its head, taking broad principles of international law as the starting point for its analysis rather than the text of the treaty itself.*"

114. The result is that the EU authorities, though obviously tantalising for the Claimants, have no relevance to this court's review. The proper interpretation of the UKMAA and the Regulations is that they cover goods originating in Western Sahara which are subject to controls by the customs authorities of Morocco. Questions of international law cannot affect that construction.

ISSUE 3: IF MATTERS OF INTERNATIONAL LAW ARE RELEVANT, WHAT IS THE STANDARD OF REVIEW THAT APPLIES?

115. This point is about whether the current case falls within the range of circumstances in which the Court should properly limit itself to considering only whether the Government has acted on a "tenable view" of international law obligations: see in particular *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777, [35-36].

> "There are circumstances in which an English court considering the international law obligations of the United

> Kingdom may properly limit itself to asking whether the United Kingdom has acted on a "tenable" view of those obligations. …. Thus the court may in principle be reluctant to decide contentious issues of international law if that would impede the executive conduct of foreign relations. Or the rationality of a public authority's view on a difficult question of international law may depend on whether its view of international law was tenable, rather than whether it was right. Both of these points arose in Corner House. Or the court may be unwilling to pronounce upon an uncertain point of customary international law which only a consensus of states can resolve. As Lord Hoffmann observed in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1AC 270, para 63:
>
> 'it is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.'
>
> But I decline to treat these examples as pointing to a more general rule that the English courts should not determine points of customary international law but only the "tenability" of some particular view about them. If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer …
>
> 36. I do not read the Strasbourg court as having said anything very different in *Fogarty v United Kingdom* 34 EHRR 1 … In those circumstances they thought it sufficient that the United Kingdom had acted on a view of international law which, although not the only possible one, was within 'currently accepted international standards'. But this is not the same point as the one made by the Secretary of State, for it applies only if there is no relevant and identifiable rule of international law. If there is such a rule, the court must identify it and determine whether it justifies the application of state immunity."

116. This was a point which was specifically flagged as a potential issue by Chamberlain J at [22] of the permission judgment.

117. In the light of the determinations I have reached, the question of the standard of review does not arise – indeed it arises only on the double contingency of my being wrong about the first two points. I expressed the view in argument that I did not regard the point as likely to be of assistance and I do not propose to go much further than this.

118. The question of the "tenable view" test is plainly not without complications of its own. Its ambit is plainly controversial. My own view (imperfectly expressed in argument) is that there is a real difficulty in the concept that an international treaty could be found to be ineffective or unlawful by reference to an interpretation which is (i) contrary to the natural meaning of the words (ii) reached by a court

of a single country by deciding on arguable points of international law at all. I would expect such arguments as to unlawfulness only to be available where the specific international norms or rules (and not the macro building blocks of the norms) are clear and accepted. There is an analogy with interpretation of contracts by reference to factual matrix which is limited to (i) facts (ii) known or reasonably available to both parties. In both cases one is aiming to produce an interpretation which matches the parties' objective intentions. That cannot be done by reference to unclear or arguable matters. I also note that Judge Simma's opinion in *Oil Platforms* appeared to give some weight to the "undeniable" nature of the peremptory norms in focus in that case.

119. I therefore consider that the argument of the Departments that in a case such as the present, the Court should, at most, ask whether the Government's position is a "tenable view" of international law involves using a tool which is either not apt to these circumstances or runs the risk of overcomplication or confusion. The tenable view concept doubtless has its uses (for example where there are "*contentious issues of international law*" and it "*would impede the executive conduct of foreign relations*" so to decide), but here it seems to me that in this context it merely adds a layer of complication.

120. Having said that, it may of course be that the "tenability" standard elides with the approach I have suggested in cases where (as happens to be the case here) the Government is resisting an argument which strikes at the natural reading of a provision which argument is advanced by reference to international norms. There the existence of a tenable argument to the contrary would indicate that the consensus necessary to be significant when looking at the parties' intentions (the "undeniability" of the norm in question) is not established.

121. If international law were relevant, I would therefore incline to the view that were there relevant, clear and clearly demonstrated peremptory international norms which contradicted the natural reading of the relevant wording they would be admissible as context in the way contemplated by Article 31(3)(c)/Article 53. However for the reasons which I give briefly below I do not consider that relevant clear norms are demonstrated.

ISSUE 4(A): PACTA TERTIIS

122. I will start with Article 34/*pacta tertiis* which can be taken very briefly indeed. WSCUK's point is that Article 34 of the VCLT, which encapsulates this principle - *pacta tertiis nec nocent nec prosunt* (which means that a treaty provision which purports to create rights or obligations for a third party has no legal effect) – is applicable also as a rule of CIL to NSGT such as Western Sahara.

123. This argument runs via:

    i) Judgments by the courts (including the ICJ) that the rule reflects CIL;

    ii) The proposition via the VCLT between States and International Organisations or between International Organisations 1986 which codifies

an identical rule as regards international organisations that the rule extends still further;

iii) Recognition of the extension to Non-Self-Governing territories by the Grand Chamber and Chambers of the Court of Justice as well as the General Court. The example given is *Polisario* where the Grand Chamber held that "*the people of Western Sahara must be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties*".

124. The short point here is that there is an insufficient basis for concluding that the principle is applicable beyond states, in the context of non-self-governing territories. There is no such conclusion at the international level - or at least not sufficient State practice or *opinio juris* for this Court to decide that the customary law rule should be extended to non-self-governing territories. On its face Article 34 does not go so far. WSCUK would need to demonstrate a consensus extending this principle. The materials relied on simply do not do that. There is just not the material available to conclude that there is both a widespread, representative and consistent practice of States on the relevant rule and that that practice is undertaken on the basis of a legal obligation (i.e. *opinio juris*).

125. WSCUK of course points to the EU authorities and in particular *Polisario 2*, but they cannot in my judgment found the clear basis needed. The point is not even finally decided in the EU context, because *Polisario 2* is under appeal. I do not need to decide whether the conclusion reached thus far is correct or not, but I will go so far as to say that (i) the conclusion does not seem to be reached on the basis urged on me (ie that there is *opinio juris* in favour of the extension) and (ii) it is not apparent to me that the EU decisions align with the international approach – indeed the EU approach appears to go wider than previous authorities at the international level. I note the criticisms made by Odermatt (supra) and Kassoti "*The Council v Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Implementation"* in relation to this part of the *Polisario* judgment.

126. I also see force in the argument that there is a lack of logic in applying any such principle to such territories as Western Sahara when (i) the raison d'etre of the rule appears to lie in the principles of sovereignty and equality of states (ii) they could not themselves enter into treaties on any terms at all and (iii) the rule does not appear to create an invalidity but rather a state of (to use the words of Judge Crawford in *"The Creation of States in International Law"*, at p. 100) "non-opposability" – which Western Sahara and a NSGT would not be in a position to avail itself of.

127. This latter point also provides a separate issue for WSCUK; on its face the rule as expressed in the VCLT does not render a treaty void or unenforceable as between the parties to it – it is only not capable of being binding on a third party. Thus in the *Anglo-Iranian Oil Company (UK v. Iran)* (1952) ICJ Reports 93, the ICJ did not say the treaty was ineffective as between Iran and Denmark; it simply held that the UK could not bring a claim in reliance on a treaty which was *res inter alios acta* for the UK.

128. Consequently, were the question of *pacta tertiis vis a vis* NSGTs one which arose and which the Court had to decide, I would conclude that there is no such rule of CIL which is relevant here.

129. The question of the adequacy of the consultation exercise therefore never arises. In the circumstances I consider that this is an issue which it would be inappropriate for me to decide. I would however add two points. The first is that it is hard to see how consultation can be meaningfully achieved in relation to an NSGT, which lacks recognised structures for performing such an exercise. The point can easily be grasped by reference to the Court's analysis in *Polisario 2* [374] – [381]. The General Court there looked closely at whether the persons and organisations consulted by the Commission could be regarded as *"representative bodies of the people of Western Sahara".* While it concluded they could not, it did not do so by reference to any identified representative bodies which should have been consulted. Here there is another echo in the Supreme Court's decision in *Devolution Issues* looking at the structures which are meaningful in the context of devolution issues.

130. Further it is possible to see that the selection criteria applied by the Commission in that context were carefully thought through by reference to matters such as (a) whether the entity was present in Western Sahara or carried out activities there; (b) whether the entity carried out "socioeconomic activities" or activities related to human rights; and (c) the importance of the activity carried out and whether the body was recognized internationally. There is no sense that a more adequate consultation was easily identifiable. There is a real flavour that what is being asked is therefore impossible. This resonates with the points made above about the construction and its result in producing a dead letter treaty.

131. Secondly the concept of this Court deciding on such issues as the adequacy of the specific practical steps taken to consult or achieve consent within a territory which is not established and has no formal status is an uncomfortable one. Both these points therefore provide some reinforcement to the conclusion at which I have in any case arrived.

ISSUE 4(B) – SELF DETERMINATION (RESOURCES)

132. As for the right of self-determination, this is a principle which plainly attracts a good deal of general support. But there is a distinction between this and there being a peremptory norm. As COMADER has noted, the ICJ has had opportunities to identify the right to self-determination as a peremptory norm, and it has not done so. At best it has said that the right is one *erga omnes*. That is the way in which it has been approached in: *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90 at p 102 *("Portugal's assertion that the right of peoples to self-determination ... has an erga omnes character, is irreproachable"*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, p. 95.

133. An obligation *erga omnes* is not the same thing as a peremptory norm. It is a distinct legal concept. This is clear from *East Timor (Portugal v Australia*), at [29] where the relationship between *erga omnes* and consent to jurisdiction was considered. To similar effect is the decision in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at [88 and 155-156]. Such a distinction (or lack of ready elision), I note, sits well with the distinction between *erga omnes* rights and judgments *in rem* which I considered in *Deutsche Bank v Central Bank of Venezuela* [2022] EWHC 2040 (Comm) at [161 et seq].

134. Further the area where the views expressed seem to drift closest to seeing the right to self-determination as a peremptory norm is in connection with the right to determine political status (the need to pay regard to the freely and genuinely expressed will of the peoples who enjoy that right); while the right to permanent sovereignty over resources is recognised as a right which is corollary on self-determination. It does not follow that even if one element of the right to self-determination, political self-determination, reached peremptory norm status, the corollary right would reach that status also.

135. That status could of course be demonstrated independently. However the materials on which WSCUK relies do not come close to establishing that argument. The fact that there are UN Resolutions which identify the importance of self-determination does not make something a peremptory norm; indeed the need to legislate about it might be said to suggest the contrary. UN Resolutions might be evidence of progress along a road to establishment of a norm, but they are neither necessary nor sufficient. This point applies a fortiori to findings of UN human rights bodies.

136. As for Article 1(2) to the ICCPR and the ICESCR which states that: "*[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources …based upon the principle of mutual benefit, and international law*" - that has to be read in the context of the surrounding articles, which oblige an Administering Power to promote the economic development of that people. This provision cannot therefore establish even an unqualified right, still less an unqualified peremptory norm.

137. In those circumstances it cannot be said that there is a sufficient degree of consistent state practice for it to be possible to say that it is *opinio juris* that the right to self-determination is a peremptory norm. Still less can it be said that the relevant sub-rule which is in play here, namely a right of permanent sovereignty over economic resources, is itself a peremptory norm. I note also that while the argument arose somewhat differently the Supreme Court in *Devolution Issues* at [89] provides some support for a cautious approach to any use of the principle of even political self-determination as an interpretative tool.

138. Even if I were persuaded that the right contended for were a peremptory norm I would certainly favour the view that (i) the UKMAA plainly does not violate the primary part of the right (to choose a political organisation) and (ii) the UKMAA also does not violate the right to control natural resources - because the treaty has no effect on the control or even the use of resources, it merely affects (beneficially) the cost of trading those resources.

139. Again as with *pacta tertiis*, WSCUK wish to take the establishment of the right still a stage further by reference to the concept of consent. As with the earlier argument this point does not arise, but raises issues which seem to be ones which this court could not easily determine satisfactorily and should avoid unless it were established to be necessary to determine them.

ISSUE 5: SECTION 28

140. WSCUK contends that the Defendants failed to comply with the mandatory obligation imposed by S.28 of the Trade Act 2018. Section 28 provides:

> "In exercising any function under any provision made by or under this Part— (a) the Treasury […] must have regard to international arrangements to which Her Majesty's government in the United Kingdom is a party that are relevant to the exercise of the function."

141. It contends that on the evidence:

    i) The Treasury had regard to no international arrangements whatsoever. Accordingly, there was no compliance with s.28 so far as the s.9(1) function was concerned.

    ii) The Department of International Trade ("DIT") had regard only to WTO obligations. In this regard, there has been no disclosure of the relevant recommendation, if indeed such a recommendation was ever made. If it was not, then this too is in breach of the statutory regime. On the premise that DIT is to be taken as the "Secretary of State" under s.9, for the reasons set out below it was an error of law only to consider the WTO obligations.

142. On that basis it is contended that there has been a material error of law, and the Regulations are *ultra vires* on that free-standing basis.

143. The reality is that this s.28 argument relies for any traction on an analysis whereby such issues as consent and consultation have a substantive effect on the approach to be taken. On the approach which I have taken to the primary issues it adds nothing.

144. But in any event, I would conclude that it is an argument which cannot succeed. The argument, namely that that the reference to "international arrangements" requires the Government to have regard to the whole corpus of international law, including CIL, when producing the mirroring regulation, is contrary to the wording of the section, the Explanatory Notes and common sense.

145. The plain language refers to international arrangements. CIL is not an international arrangement – it is an accretion of consistent practice which becomes accepted as law or "*unwritten law deriving from practice accepted as law"*: International Law Commission ("ILC"), Draft Conclusions on Identification of Customary International Law, General Commentary [3] (Report of the ILC, 70th Session, UN Doc p 122). The obligation may not be limited to formal treaties, being capable of encompassing letters of understanding or similar

less formal arrangements; but that does not open the door to CIL which is not an arrangement of any sort – it is not "entered into".

146. The plain language also limits the necessary consideration to international arrangements which are relevant to the exercise of the particular power; again this makes plain that a general sweep of all international law is not called for. This is a focussed exercise; with the exercise of the particular power at its centre. The reasoning is fairly plainly demonstrated at ensuring that a new treaty or arrangement being given effect to in law does not cut across an old one. It is what one might think of as a "good housekeeping" provision.

147. Ultimately also the argument fails the test of good sense and practicality. That is because where this argument goes is towards a second scrutiny process which has the ability to undercut the primary treaty scrutiny process. That seems an unlikely outcome.

148. But in any event, unless one progresses further with the primary international law arguments such treaty-based obligations as Chapter XI of the UN Charter on Non-Self-Governing Territories and Article 1 of the ICCPR and ICESCR (on self-determination) would not be relevant matters to which to have regard.

149. The argument that if CIL cannot work in and of itself it can be brought back in by the back door via Article 31(3)(c) both repeats the problems already dealt with in that context, and also again neglects the need for a tie of relevance which is a contraindication for the imposition of a requirement to review CIL.

150. Overall given what the provision in question is there to do (to transpose the EUMAA via the UKMAA word for word) it is hard to see what kinds of international arrangements other than those two would be necessary to have regard to.

IS THE CHALLENGE JUSTICIABLE?

151. The final section of the debate relates to the justiciability of the claim. In the circumstances I will deal with this very briefly indeed, because the decision now proceeds on multiple contingencies.

Foreign Act of State

152. The Defendants and COMADER rely on the third rule of the Foreign Act of State (FAOS) doctrine, arguing that the Claimant's claim is non-justiciable.

153. The third rule concerns proceedings where determination of an issue would require adjudicating on the lawfulness of the conduct of a foreign state. That rule provides as follows (*Belhaj*, [123]):

> "The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not

> rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; 'Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory': per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237… Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs… This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels..."

154. WSCUK denies that the rule is engaged and says if it is, the present case falls within the public policy exception to that rule.

    i) The rules at issue are fundamental to the international legal system (and similarly fundamental to those established as falling within the exception).

    ii) Even if self-determination were not a peremptory norm, this is not determinative because the exception is not limited to *jus cogens* violations (*Belhaj* [168]). Moreover, its treatment as an *erga omnes* obligation indicates it should be given considerable priority. As a matter of substance, this is informative of English public policy, irrespective of whether it formally has *jus cogens* status.

    iii) *The Law Debenture Trust Corpn plc v Ukraine* [2019] QB 1121 establishes that the exception can apply to general rules rather than solely to applications of a rule vis-à-vis an individual. To the extent that Lord Mance suggests otherwise in *Belhaj* he is wrong to do so;

    iv) The breach of these rules by Morocco, on the Claimant's case, is serious; there is no basis under international law by which Morocco can control, and trade in, Western Sahara's resources and to do so is akin to expropriation.

    v) There is nothing inherently unmanageable as to the international obligations the Court is being asked to apply. The General Court and the ECJ have dealt with similar, or identical, issues on several occasions.

155. So far as this is concerned, I agree with the preliminary conclusion reached by Chamberlain J considering permission. The argument of WSCUK is fundamentally underpinned by an assertion that Morocco has breached obligations in a manner which is wrongful as a matter of international law. *Prima facie* this falls squarely within the FAOS doctrine.

156. When one moves on to consider the question of whether the exception is engaged I conclude that it is not:

    i) As I have already indicated, the right to self-determination is not a *jus cogens* norm.

    ii) This is certainly not a paradigm case for the application of the exception, concerning as it does a general rule, rather than an application of a rule vis-

à-vis an individual. Whatever may be said about the status of Lord Mance's dictum at [107] of *Belhaj* where he draws the distinction between individual and general rights the application of the exception has thus far been predominantly seen in this context;

iii) Whether one regards *Law Debenture* as establishing that the exception can apply to general rules or not, it appears to be the case that the exception is less likely to do so where no individual is in the picture. That being the case, the basis for the application of the exception must be capable of being clearly justified on the basis of the balancing exercise - bearing in mind the non-paradigm nature of the case.

iv) The balancing exercise does not disclose a basis for application of the exception. This is essentially a sovereign matter. There are strong comity factors. This is not a case of a State trying to take advantage of its own breaches of *jus cogens* norms. The breach comes nowhere near to the kind of circumstances seen in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5*) [2002] 2 AC 883 where what was in issue was the expropriation of Kuwaiti aircraft by Iraq in breach of sovereignty in the course of an invasion of Kuwait.

State Immunity

157. I deal finally (and for completeness) with the State immunity argument. It was contended for COMADER that English law should now recognise that State immunity applies also to preclude an English court from exercising jurisdiction in proceedings that would require the Court to make a ruling that has direct consequences for a foreign sovereign's rights and obligations under international law, or a ruling on the lawfulness of a foreign sovereign's actions under international law, or interpreting its rights under a treaty.

158. Although this is a very interesting argument and was skilfully made both in writing and orally I would not have been minded to accept it. It is an argument whose time may in due course come. But for now it rests on a slender foundation. The passage in Lord Mance's judgment in *Belhaj* upon which it is based has been to an extent taken out of context and the UN Convention relied on is not in force and has not been ratified by the UK. Given the other arguments available it may well be that the extension sought is one which is not needed. If it is to be made it should be made in a case where it is directly in point.

CONCLUSION

159. In the light of the above, the claim of WSCUK fails.