**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case number: 1487/17

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| In the matter between: |  |
|  |  |
| **THE SAHARAWI ARAB DEMOCRATIC REPUBLIC** | First Applicant |
| **THE POLISARIO FRONT** | Second Applicant |
|  |  |
| and |  |
|  |  |
| **THE OWNER AND CHARTERERS OF THE****MV “NM CHERRY BLOSSOM”** | First Respondent |
| **THE MASTER OF THE MV “NM****CHERRY BLOSSOM”** | Second Respondent |
| **THE PURCHASER OF THE CARGO LADEN ON****BOARD THE MV “NM CHERRY BLOSSOM”** | Third Respondent |
| **OCP SA** | Fourth Respondent |
| **PHOSPHATES DE BOUCRAA SA** | Fifth Respondent |
| **THE MINISTER OF INTERNATIONAL****RELATIONS AND COOPERATION** | Sixth Respondent |

**FOURTH AND FIFTH RESPONDENTS’ HEADS OF ARGUMENT**

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2. **INTRODUCTION**
3. This application concerns both the current and the future status of Western Sahara under international law and the laws of foreign States. It asks this Court to determine not merely a territorial dispute with no connection to South Africa, but to stand judgment upon the very capacity of foreign States to act as sovereign powers: to make laws that are recognised by the community of nations. And above all, it asks this Court to interfere and attempt to resolve, through domestic law and judicial *diktat*, a current and pressing international dispute with significant regional entailments, which for that reason, even now, is serving before the United Nations (“*UN*”) Security Council.
4. No South African court – indeed, as shall be shown below, no court in all the world – has ever determined a claim of the type brought by the Applicants. And in those cases which most closely resemble this matter, the courts have correctly deferred political judgments to political bodies, and have dismissed the applications.
5. This Court should follow their example. The Fourth and Fifth Respondents (referred to herein as “*Phosboucraa*” or the “*Respondents*” as appropriate) submit that this application should be dismissed with costs.
6. The issues that are sought to be raised by the Applicants, namely the laws, acts and interests of a foreign State in foreign territory, are non-justiciable before this Court, should not be determined in light of the act of state doctrine, and are barred by principles of sovereign immunity.
7. These heads of argument deal with:
	1. The nature of the issues raised in this matter;
	2. The importance of determining this Court’s capacity to determine this matter now rather than at any future trial;
	3. Western Sahara as a non-self-governing territory and Phosboucraa’s activities under international law;
	4. The UN Security Council process, including its incorporation of the topic of natural resources, to determine the final, political future of Western Sahara;
	5. Non-justiciability and the doctrine of act of state;
	6. Sovereign immunity and the Foreign State Immunities Act 87 of 1981 (“*FSI Act*”); and
	7. Conclusion and costs.
8. The Respondents fully support the principle enshrined in Moroccan law that the territory known in the Kingdom of Morocco (“*Morocco*”) as the Southern Provinces are part of Moroccan territory.[[1]](#footnote-2) In addressing this Court, however, except where explicitly stated, the legal arguments herein are framed in the terms utilised by the UN Security Council-led negotiating process between the Second Applicant and Morocco, as well as the consolidated legal framework on natural resource activities in non-self-governing territories established by the UN.
9. The Applicants attempt to divert this Court from the material issues and facts with irrelevant and vexatious attacks on Morocco, which is not party to this proceeding.[[2]](#footnote-3) The Respondents have resisted this provocation by the Applicants in order to focus on relevant argumentation, but the Respondents’ election not to waste this Court’s time with such matters should not be taken as agreement thereto.
10. **THE NATURE OF THE ISSUES RAISED IN THIS MATTER**
11. In this application, the Applicants seek an interim interdict.[[3]](#footnote-4) But for purposes of establishing their claim, they require this Court to determine **now** the following key issues as recorded in their founding affidavit:

**“At the outset, it is necessary that Morocco’s status in Western Sahara be defined”.[[4]](#footnote-5)**

1. The Respondents agree. It is necessary to define Morocco’s status in Western Sahara, as the first (but not only) determinant of who has title to the Cargo[[5]](#footnote-6) depends on which State may make laws for Western Sahara.[[6]](#footnote-7) As the Applicants put it in their founding affidavit:

**“It follows that under international law (and South African law), Morocco was not entitled to appropriate the phosphate at Bou Craa, nor allocate rights to the phosphate to OCP and Phosboucraa, and title in the Cargo has thus not vested in any of Morocco, OCP, Phosboucraa or IPL.”**

1. And in their replying affidavit:

**“First, this Court is not required to make any finding other than that the Bou Craa mine is not located within Moroccan sovereign territory. Once the Court has made this finding, it follows that OCP and Phosboucraa may not rely upon Moroccan law to justify the misappropriation of the Cargo.”**

1. Thus, at its heart, what this Court is being asked to do is determine the status of Western Sahara and the scope and lawfulness of Morocco’s sovereign administrative authority. This issue cannot be evaded, and it affects not merely the Cargo, but all legal rights, duties, claims and transactions that arise from or are affected by Moroccan law in Western Sahara.
2. Having secured those determinations from this Court, they tell the Court that they *then*“*intend instituting a vindicatory action in respect of the Cargo*.”**[[7]](#footnote-8)** The vindicatory action is stillborn without the injunctive relief. And hence the question of jurisdiction is to be established now. That is the Applicants’ case in their founding papers, despite their efforts to row away therefrom in reply.
3. Even assuming (*arguendo*) the veracity of the Applicants’ averments, on their own version, this case is exceedingly complicated: It asks this Court to determine issues and making findings that no domestic South African court has ever been asked to deal with before and for which this Court does not have jurisdiction. And this issue is, for the reasons set out below, not something this Court either can, or should, seek to determine.
4. But even that by itself is not sufficient for this application to succeed, and indeed raises multiple other questions that the Court must necessarily answer: Is Western Sahara, as recognised by the UN, a non-self-governing territory? How is this territory defined? Which government may make laws in non-self-governing territories? What does international law say about the extraction of natural resources from non-self-governing territories, and specifically from Western Sahara? Do the activities of Phosboucraa meet the standards of international law? If yes, does this – as the Respondents submit – mean that the activities of Phosboucraa in mining and selling the Cargo are lawful notwithstanding the on-going dispute over Western Sahara? Who are the inhabitants of Western Sahara whose interests must be considered in the utilisation of Western Sahara’s natural resources? Who represents these inhabitants? Can the Second Applicant claim to represent these persons outside of the political process before the UN Security Council? Can the sovereignty of the inhabitants of Western Sahara only be expressed via independence (external sovereignty) or does international law recognise that sovereignty can be expressed within a State (internal sovereignty)?[[8]](#footnote-9) On what basis can the Applicants claim ownership of the Cargo, as opposed to the much more general right of self-determination (which is, as the United Nations Security Council has most recently confirmed as of last month, a right whose contours and implications in this context remains to be determined as between the parties and under the aegis of the Secretary General)?
5. Most obviously, can or should the Court determine any of these issues when they are the subject of political negotiations and discussions over the future of Western Sahara that encompass the topic of natural resources and which are currently proceeding before the UN Security Council, to which the Polisario and Morocco are parties?
6. In the event that any of the above questions go against the Applicants, their claim cannot succeed.
7. It is for the Applicants to demonstrate to the Court that these questions have been answered in their favour, in accordance with the general principle that he or she who asserts must prove.[[9]](#footnote-10)
8. Fatal to the Applicants’ case[[10]](#footnote-11) is that they failed to disclose to this Court (and Revelas J, in the *ex parte* application brought on 1 May 2017), that last month on 10 April 2017 the Secretary General of the UN confirmed that he and his Special Envoy were seized with this matter, and recorded that the Second Applicant recognizes this process, is a party to the process, has accepted to participate in the process and has expressed its “*eagerness*” for the process to progress.[[11]](#footnote-12) Also not disclosed to the Court is that the UN Security Council, on 28 April 2017, endorsed the Secretary General’s report, and “*stressed*” the “*importance of a commitment by the parties to continue the process of negotiations through the United Nations-sponsored talks*”,[[12]](#footnote-13) emphasizing “*the importance of the parties’ commitment to continue the process of preparation for a fifth round of negotiations*”,[[13]](#footnote-14) and requested the “*Secretary General to brief the Security Council on a regular basis, and at least twice a year, on the status and progress of these negotiations under his auspices, on the implementation of this resolution*”.[[14]](#footnote-15)
9. The Respondents submit, however, that the Court cannot and should not even address these questions because this case as a whole is inappropriately brought before this Court. The above questions are political, internationalised and polycentric (in the most acute sense of that word), and not subject to judicial or manageable standards. This is why the process currently before the UN Security Council should be respected.
10. **THE IMPORTANCE OF DECIDING THIS CASE NOW**
11. The Applicants seek to gloss over the weaknesses in their case by submitting that it is for the trial court, not this Court “*at this interlocutory stage*”,[[15]](#footnote-16) to determine the issues of justiciability and sovereign immunity raised below.
12. This submission is unsustainable. No South African authority is cited in support thereof,[[16]](#footnote-17) no doubt because South African case law points firmly towards the opposite conclusion. In *Ferreira*,[[17]](#footnote-18) Streicher J held:

**“It has, up to now, been accepted that in order to establish a prima facie right entitling an applicant to an interim interdict, an applicant has to make out a case that he is entitled to final relief.** **If on the facts alleged by the applicant and the undisputed facts alleged by the respondent a court would not be able to grant final relief, the applicant has not established a prima facie right and is not entitled to interim protection”.[[18]](#footnote-19)**

1. The Respondents submit that even on the facts as alleged by the Applicants (together with the undisputed facts of the Respondents) this Court cannot grant the relief that the Applicants seek.
2. In *Geyser*,[[19]](#footnote-20) it was held:

**“Against this background I am of the view that a legal issue should only be decided at the interlocutory stage of the proceedings if it would result in the final disposal of either the matter as a whole or a particular aspect thereof. Such an approach I consider is both practical and sensible and has the advantage of curtailing costs.”[[20]](#footnote-21)**

1. In this matter, deciding the legal issues raised below will finally dispose of this matter as a whole.
2. The Applicants rely[[21]](#footnote-22) on the United Kingdom case of *Kuwait (No 1)*,[[22]](#footnote-23) in which Lord Goff held that justiciability “*should be considered only after the issues in the action have been properly defined on the pleadings*”.[[23]](#footnote-24)
3. But in this matter, in contrast to *Kuwait (No 1)*, the pleadings are defined. The Court and the parties know the nature of the Applicants’ claim, which is not going to change between now and any eventual trial. The evidence at the trial may differ, but that is, firstly, irrelevant as what the Court is asked to do now is determine a pure legal issue, and, secondly and in any event, this Court (unlike the House of Lords in *Kuwait (No 1)*) has the benefit of evidence on affidavit.
4. There is thus no doubt as to what the legal issues in dispute between the parties are, and this Court should – must – proceed to determine them.
5. This is the correct position in principle, because in law elements such as standing, jurisdiction, and justiciability are by their nature distinct from the merits of a claim (notably, in an interim interdict, the element of a *prima facie* right). They must be established by every litigant, including an applicant for interim relief.
6. It is also practical, just and equitable, as it would defy reason for this matter to proceed to trial – with the immense costs and difficulties of arranging discovery, witnesses, expert witnesses, evidence on Morocco’s history dating back decades, and so on – only, at the start of the trial, for the entire matter to be dismissed on a fundamental technical issue that can and should be decided now.
7. Furthermore, it is imperative that the issue of justiciability be determined now, to avoid any intended or unintended consequences for the ongoing UN Security Council Process that could arise between now and the trial. The parties are currently, “*in good faith*”, and “*without preconditions*”[[24]](#footnote-25) meant to be engaging with the Secretary General of the UN to resolve the very issues that the Applicants now seek to have determined by this Court. The potential for embarrassment for South Africa, of interference in a peace process under the aegis of the Security Council, of allowing parties to rely on the continued proceedings in courts in South Africa as a potential bargaining chip in those negotiations, and the risks for heightened regional security concerns, are factors that weigh heavily towards the necessity of deciding the justiciability issues now.
8. **THE UN SECURITY COUNCIL PROCESS**
9. With all respect, the future of Western Sahara and the implicated questions of sovereignty and title will not be determined in any South African court. The disposition of this case would require a determination of territorial disputes that are generally considered of international significance and politically sensitive. The complexity and delicacy of the questions arising are accordingly – and appropriately – the province currently of the highest political forum in the world: the UN Security Council. One cannot separate the question of title in Western Sahara from the UN political process. It is paramount in the consideration of the political question at the base of the Applicants’ claim.
10. The Applicants give a misleadingly short account of the negotiations that have taken place under the auspices of the Secretary General, and contend that an impasse has been reached.[[25]](#footnote-26) On the basis of that pleading, they argue that there is no other option available to the SADR and the Second Applicant but this Court. They contend effectively, in the words of the House of Lords in *Buttes* (to which we return later), that this Court should assume that these “*matters have now passed into history, so that they now can be examined with safe detachment*”.[[26]](#footnote-27)
11. They are not only wrong in this regard. They have also made these claims by failing to disclose, in an urgent *ex parte* case where the law on disclosure is clear,[[27]](#footnote-28) the UN Secretary General’s Report of 10 April 2017,[[28]](#footnote-29) and the UN Security Council Resolution of 28 April 2017.[[29]](#footnote-30)
12. The ongoing negotiations authorized by the United Nations Security Council under the auspices of the Secretary-General is the proper and sole venue to determine the political question posed by the Applicants. Indeed, the Second Applicant has achieved a certain limited status internationally as a result of its participation in this negotiating process. In the European Court of Justice, the Opinion of Advocate General Wachelet was that the Second Applicant has some capacity in political matters due to its participation in the UN-led process, but specifically not in connection with economic and social affairs:

 **“[T]he Front Polisario is recognised by the UN as the representative of the people of Western Sahara only in the politicalprocess for the resolution of the question of the self-determination of the people of that territory . . . [T]he Front Polisario’s role does not relate at all to economic and social affairs.”[[30]](#footnote-31)**

1. The UNSC Process has further been recognized internationally by the General Assembly as the venue for resolving the political status of the territory, which is a regional concern also involving neighbouring countries in Western Sahara.
2. The Applicants point out that the disputes over Western Sahara have served before UN bodies for decades,[[31]](#footnote-32) but misconstrue the nature of the ongoing UNSC process describing the process as concerning “*matters such as the conduct of the SADR and Morocco in the buffer zone, and the holding of a referendum in Western Sahara*”[[32]](#footnote-33). This description simply does not reflect the reality. Much has changed over the last forty years, and particularly in the past two months.
3. The Applicants’ founding affidavit traverses history from 1884, starting with Spain’s colonization of Western Sahara. Even on the Applicants’ (incomplete) version of the history, the UNSC-led peace process has shifted significantly over time from language that centred on the organization of a referendum, to an open negotiating process “without preconditions” that has expanded its scope to include natural resources:
	1. Between 1991[[33]](#footnote-34) and 2001[[34]](#footnote-35) the UN process and specifically the language of the Security Council spoke directly of a settlement that included the organization of a referendum.
	2. Between 2001 and 2003, the Security Council continued to speak of a referendum but considered alternatives[[35]](#footnote-36) that would not involve a referendum in determining the final status of the territory, broadening the discussion.
	3. Between 2003 and 2004, the Security Council moved away from its language formally supporting a referendum, but urged the parties to consider a plan which contained a referendum as part of the solution. [[36]](#footnote-37)
	4. In 2006, the Special Envoy of the Secretary-General stressed the importance of considering “political reality” in approaching the situation [[37]](#footnote-38) and the Secretary-General suggested the launch of broader negotiations without preconditions.[[38]](#footnote-39)
	5. In 2007, the Security Council adopted this approach[[39]](#footnote-40) and since 2007 has endorsed the negotiating process without preconditions. [[40]](#footnote-41) Ahead of the launch of these negotiations the parties submitted their proposals for a solution. The Second Applicant’s proposal involved the holding of a referendum.[[41]](#footnote-42) Morocco for its part put forward another solution based on the autonomy of the region under Moroccan sovereignty.[[42]](#footnote-43) Both have been discussed as part of the negotiations, but not as a condition for the process.
	6. The negotiating process since 2007 itself has shifted several times, moving from formal face-to-face negotiations (2007-2008),[[43]](#footnote-44) to informal face-to-face negotiations (2009-2012),[[44]](#footnote-45) to shuttle diplomacy conducted by the Secretary-General’s Personal Envoy (2012-2016)[[45]](#footnote-46). These shifts have also seen a further broadening of the negotiating process to encompass the discussion of concrete subjects, including natural resources.[[46]](#footnote-47) In 2017, the Secretary-General, after discussions with the parties, announced the relaunching of the negotiating process with a new dynamic.[[47]](#footnote-48) This was endorsed by the Security Council on 28 April 2017 in Resolution 2351.[[48]](#footnote-49)
4. This is not merely a process meant to resolve cease-fire violations or the holding of a referendum, as the Applicants misleadingly frame it. It is a broad and dynamic process that is intended to resolve the political issue at the heart of this matter, including the legal status of the territory and its natural resources.
5. The Applicants thus incorrectly assert that “*[t]hese processes do not concern the question of who owns the natural resources of Western Sahara*”.[[49]](#footnote-50) The Applicants further assert that alleged ownership of the Cargo stems from the right of self-determination.[[50]](#footnote-51)
6. However, and as noted by the Applicants themselves,[[51]](#footnote-52) the UNSC process seeks to reach “*a mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations*.”[[52]](#footnote-53) Self-determination is therefore central to the ongoing UN-led process and the very assumption by the UN bodies is that “*the nature and form of the exercise of self-determination*”[[53]](#footnote-54) remains to be determined.
7. Furthermore, since 2007, natural resources specifically have been addressed as part of the negotiating process:
	1. In the course of the formal discussions in 2007-2008,[[54]](#footnote-55) the Secretary-General’s Personal Envoy incorporated talks on concrete matters including natural resources.
	2. Natural resources were also a feature of the informal discussions between 2009-2012 as a means of broadening the negotiation process.[[55]](#footnote-56) Beyond their inclusion in face-to-face negotiations, the parties held discrete expert-level technical talks regarding natural resources following an agreement to hold such talks in the course of informal negotiations.[[56]](#footnote-57)
8. The Applicants allege that they cannot “*reasonably be expected to refrain from taking steps to protect their legal rights while the interminable negotiations persist*”[[57]](#footnote-58). But the Second Applicant is a key party to the UN process. The Security Council has called upon the parties “*to show political will and work in an atmosphere propitious for dialogue in order to resume negotiations*” and “*to resume negotiations under the auspices of the Secretary-General without preconditions and in good faith, taking into account the efforts made since 2006 and subsequent developments*”[[58]](#footnote-59). Importantly, the Secretary General has called upon all Member States, including South Africa, to lend appropriate assistance to the process.[[59]](#footnote-60)
9. Avoiding the UN-led process to which they have joined and committed themselves to use a domestic court to seek determinations of the very issues that are the central subject of the UN process shows no such political will or good faith. This Court should not aid its attempt to circumvent the internationally-recognized process within which these issues are being addressed, or to use this Court and the intended action as a bargaining tool before the Secretary General.
10. The Applicants also misconstrue the applicable UN legal framework. They refer to Morocco as acting within the territory “*as an unlawful occupying power*”[[60]](#footnote-61) and that Moroccan law “*does not apply in Western Sahara, and may not be relied upon to justify conduct in Western Sahara*”.[[61]](#footnote-62)
11. They further state that natural resource activity in the territory “*without the consent and benefit of the people of the territory, offends the international community’s most fundamental standards*.”[[62]](#footnote-63)
12. Morocco is not an occupying power no matter how many times the Applicants repeat it. The actions of Phosboucraa are entirely consistent with international law, as we show below. And to find otherwise, would involve this Court making determinations of sovereignty, title, and the UN legal framework, that it not only is unsuited to making, but which are currently at the heart of the UN Security Council process.
13. **THE STATUS OF WESTERN SAHARA & ITS NATURAL RESOURCES**
14. The UN has developed a clear legal framework outlining under what conditions economic and natural resources may be lawfully utilized. It is important to clarify what these conditions are, and their application to Western Sahara and its resources.
15. The notion of “*non-self-governing territories*” derives from the UN Charter. Article 73 of the UN Charter explains that these are “*territories whose peoples have not yet attained a full measure of self-government*” (emphasis added). These are territories whose ultimate political status has yet to be determined. It is the responsibility of UN Members “*which have or assume responsibilities for the administration*” of these territories to act in consideration of the future ultimate political status and the development thereto as well as for the “*the well-being of the inhabitants of these territories*”[[63]](#footnote-64) that live there in the present.
16. Western Sahara is considered by the UN to be a non-self-governing territory, not a State.[[64]](#footnote-65) The SADR is not recognised by the UN.[[65]](#footnote-66)
17. It is in this overall context that the United Nations has established a legal framework governing economic and natural resource activities in these territories through the United Nations Charter and annual resolutions of the General Assembly, particularly under the agenda item *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories.*[[66]](#footnote-67)
18. It is stressed that the above UN framework does not render the utilisation of natural resources in a non-self-governing territory as *per se* illegal. On the contrary, the UN framework permits natural resource-related and economic activities in non-self-governing territories under certain conditions.
19. This was the exact issue examined by the UN Under-Secretary-General for Legal Affairs,[[67]](#footnote-68) Mr Hans Corell, in his Legal Opinion issued in 2002 (the “*Corell Opinion*”),[[68]](#footnote-69) and referenced extensively in the Applicants’ affidavits.[[69]](#footnote-70)
	1. Mr Corell was asked, as the Under-Secretary-General for Legal Affairs, by the UN Security Council for an opinion on the legality under international law of contracts entered into by Morocco regarding the “*exploration of mineral resources in Western Sahara*”.[[70]](#footnote-71)
	2. His opinion analyzed the question “*by analogy as part of the more general question of whether mineral resource activities in a Non-Self-Governing Territory by an administering Power are illegal, as such, or only if conducted in disregard of the needs and interests of the people of that Territory*”[[71]](#footnote-72).
	3. The Legal Counsel determines that mineral resource activities in non-self-governing territories, and specifically Western Sahara, are permitted so long as they meet certain conditions. The Legal Counsel could not come to such a conclusion if Morocco was, as alleged by the Applicants, an occupying power.
	4. Contrary to the Applicants’ claims,[[72]](#footnote-73) these conditions do not include a requirement to engage in consultation. Paragraphs 24-25 of the Corell Opinion read in full:

**“The recent State practice, though limited, is illustrative of an *opinio juris* on the part of both administering Powers and third states: where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power and in conformity with the General Assembly resolutions and the principle of ‘permanent sovereignty over natural resources’ enshrined therein.**”**[[73]](#footnote-74)**

 (Emphasis added.)

1. The practice of the UN General Assembly further follows the UN Office of Legal Affairs in presenting consultation in non-mandatory terms.[[74]](#footnote-75) In 2013 the UN Office of Legal Affairs confirmed this standard established by the 2002 Legal Opinion.[[75]](#footnote-76)
2. It follows that insofar as the Applicants incorrectly state that “*[i]nasmuch as the Cargo was mined and sold . . . without the consent of the Saharawi people, and without consulting them, this transaction is illegal under international law”*,[[76]](#footnote-77) they are simply reading in requirements which do not exist under international law.
3. Phosboucraa’s operations and activities meet the UN standards for economic and natural resource activities in non-self-governing territories, not as stated by the Applicants, but as defined by the UN itself. Contrary to the Applicants’ assertion that such activity is “*destructive*”, Phosboucraa’s responsible operations benefit the territory and its inhabitants, while maintaining non-discriminatory working conditions, in a sustainable and reasonable manner that is not detrimental to interests while ensuring continued viability and growth far into the future.
4. To mention but a few of the facts evidencing Phosboucraa’s lawful and ethical methods of production and investment in Western Sahara:
	1. As a policy, no dividends from Phosboucraa’s activities are distributed to OCP, with all profits retained and reinvested locally within Western Sahara.[[77]](#footnote-78) Indeed, Phosboucraa only became financially profitable in 2008.[[78]](#footnote-79)
	2. Phosboucraa is the largest employer in Western Sahara with 76% of its total workforce from Western Sahara. The number of local employees in top management has increased from 1 in 2003 to 19 today.[[79]](#footnote-80)
	3. Phosboucraa is investing approximately USD2 billion into Western Sahara, including funding new educational opportunities for local inhabitants.[[80]](#footnote-81)
	4. Phosboucraa’s modern “mining city” provides apartments for its employees and their families, including a health centre, a cultural centre, and outdoor green space.[[81]](#footnote-82)
	5. Phosboucraa has also made home ownership among its employees a priority, implementing a home ownership facilitation programme that spent approximately USD52 million between 2011 and 2013.[[82]](#footnote-83)
	6. Phosboucraa has built three leisure centres for retirees as well as employees for a total of USD 50 million.[[83]](#footnote-84)
	7. In the region of 55 thousand local persons have benefited from Phosboucraa’s training programmes, through the Phoboucraa Foundation, in agriculture, health care, entrepreneurial skills, humanities, and science and technology.[[84]](#footnote-85)
	8. And with many other investments in its employees, the local population, and the environment of Western Sahara,[[85]](#footnote-86) Phosboucraa’s role in Western Sahara is manifestly positive, providing employment, skills, education, health care, care for the elderly, and more.
	9. Education is a central focus in Phosboucraa’s major social development investment program. Phosboucraa has begun developing a major project to establish a technopole in the Region that will include a preparatory school, a research & development center, a technological hub focused on arid and Saharan regions, a business incubator, hospital, housing, and the Mohammed VI Polytechnic University (UMVIP) that will greatly expand educational and professional opportunities for the local community.[[86]](#footnote-87)
	10. Phosboucraa and OCP’s USD 2 billion capital investment campaign - along with Morocco’s larger USD 8.1 billion commitment to improving the Region’s education, health and infrastructure – are intended to ensure that Phosboucraa will be an ongoing source of wealth and prosperity for the Region.[[87]](#footnote-88)
5. The Court should ask itself whether injunctions that would undermine Phosboucraa are truly “*for the benefit*” of the people in Western Sahara, as required by the Corell Opinion. Far from constituting a “*flagrant violation of international law*”[[88]](#footnote-89) or being “*inconsistent with fundamental principles of public policy and a serious violation of international law*”[[89]](#footnote-90) as alleged by the Applicants, Phosboucraa’s operations and activities meet the high standards established under international law within the UN framework.
6. They are therefore lawful even if one adopts the position of the UN that Western Sahara is a non-self-governing territory. The Applicants effectively ask this Court to determine the case in their favour by finding that a) under Moroccan or international law there has never validly been the issuance of any title to mine or sell property in Western Sahara; b) under the UN framework, no such title to mine or sell exists. But clearly the Applicants are wrong in this regard. Such title to mine or sell has been asserted by Phosboucraa, and is recognized as valid under the UN framework.
7. In effect then, the Applicants ask the Court to determine that those rights under Morocccan law and/or the UN framework are invalid simply because they occur in Western Sahara. But that then raises the question of the lawfulness of a state’s acts in its dealings with other states and their subjects, and here the act of state doctrine applies wherever the relevant act of the foreign state occurs. We turn now to consider the Act of State doctrine more closely.
8. **THE APPLICANTS’ CASE CANNOT BE DETERMINED**
9. The Respondents raise two primary bases for why this application should be dismissed, which to some extent are interlinked. First, it is evident from the case sought to be made by the Applicants in their papers (as discussed above) that the issues raised by the Applicants are non-justiciable (and/or should not be determined) by this Court. Second, in addition, the Court is not entitled to exercise such jurisdiction as it may have to determine the issues raised by the Applicants because the Court is precluded from doing so by the rules of state immunity.
10. The act of state doctrine is a common law rule of non-justiciability, accepted in South Africa, whereas state immunity is a customary international law rule. However, these distinct legal grounds for dismissing the application (non-justiciability of the claim and state immunity) do overlap, since they both can be seen to flow, directly and indirectly, from the fundamental principle of the independence and equality of sovereign states. The concepts of equality and of independence of sovereign nations are expressed by the Latin maxim, *par in parem non habet imperium* (‘one cannot exercise authority over an equal’),[[90]](#footnote-91) which draws on the notion of equality of States and links this to legal independence of States from one another.
11. We will deal first with non-justiciability and the act of state doctrine, and then with the applicable principles of state immunity.
12. **NON-JUSTICIABILITY AND THE DOCTRINE OF ACT OF STATE**
13. South African courts accept that issues in relation to the actions of foreign states may not be justiciable in domestic South African courts, or should not be adjudicated.
14. The key principles are sometimes referred to as the act of state doctrine or judicial restraint, or as the principle of non-justiciability. The label is not what matters. What is important is that South Africa courts, like other domestic courts, recognise that they must be astute not to violate foundational principles of sovereignty and equality of states by sitting in judgment on the actions of a foreign state.[[91]](#footnote-92)

***The nature and recognition of the principles by South African courts***

1. In the seminal case of *Swissborough*,[[92]](#footnote-93) Joffe J, after considering the development of the principles of act of state and judicial restraint in the US and the UK, held that:

“**The basis of the application of the act of State doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA and England. The comity of nations is just as applicable to South Africa as it is to other sovereign States. The judicial branch of government ought to be astute in not venturing into areas where it would be in a judicial no-man's land. It would appear that in an appropriate case, as an exercise of the Court's inherent jurisdiction to regulate its own procedure, the Court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it having jurisdiction to do so, in view of the involvement of foreign States therein.**

**In the present matter it is apparent that decisions have to be made in regard to the alleged unlawful conduct of GOL [the Government of the Kingdom of Lesotho] in Lesotho and the control of GOL and its relationship with the RSA. As far as the latter is concerned there can be little doubt that this is not an area for the judicial branch of government. It belongs to international law. As was held in Buttes Gas (supra), the Court would be in judicial no-man's land. It would have no judicial or manageable standards by which to judge the issue. It clearly is a matter in respect of which this Court should exercise judicial restraint. As far as the former is concerned the matter appears to be even more complex.”[[93]](#footnote-94)**

1. *Swissborough* has been consistently referred to and approved by our Courts. In particular, using *Swissborough* as authority, the Supreme Court of Appeal has held that “*Courts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign States.*”[[94]](#footnote-95)
2. As made clear in *Swissborough* the principle of the act of state doctrine is predicated on comity (which is itself predicated on the principle of state sovereignty and equality of states). For instance in the decision in the *Campaign for Nuclear Disarmament* decision, the UK Court held that “*The general rule is that, in the interests of comity, domestic courts do not rule on questions of international law which affect foreign sovereign states*.”[[95]](#footnote-96)
3. Similarly, in the Constitutional Court decision of *Kaunda*,[[96]](#footnote-97) Ncgobo J (as he then was), pointed out that “*comity compels States to respect the sovereignty of one another; no State wants to interfere in the domestic affairs of another*.”[[97]](#footnote-98) In the same case Chaskalson CJ also emphasized the recognition of state sovereignty in limiting the territorial scope of South African laws, holding that “*[f]or South Africa to assume an obligation that entails its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign State and its officials meet not only the requirements of the foreign State’s own laws, but the rights that our nationals have under our Constitution, would be inconsistent with the principle of State sovereignty*”.[[98]](#footnote-99)
4. In *Kolbatschenko[[99]](#footnote-100)* the Cape High Court (comprising Thring J and Van Heerden J) made a number of broad findings in relation to when certain matters are non-justiciable, and recognised the basis for this being the equality of sovereign states (relying *inter alia* on *Swissborough*). In particular, the Court held that:

**“South African Courts have refused to evaluate decisions or actions in the realm of foreign relations involving issues of a 'high executive nature'. Thus, for example, matters such as the recognition by the South African Government of a foreign State or of a foreign government, or of the status of diplomatic representatives of a foreign State, have generally been regarded as non-justiciable (see, for example, *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Moçambique*1980 (2) SA 111 (T) at 117D - G). Such decisions usually involve the relationship between the South African state and the foreign State concerned, directly affecting the interests of such States *as States*, and are often of so 'political' a nature that the Courts have 'no judicial or manageable standards' by which to judge them (*per* Joffe J in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others (supra* at 334F - G), citing the judgment of Lord Wilberforce in *Buttes Gas and Oil Co v* J *Hammer and Another (Nos 2 and 3)*; *Occidental Petroleum Corpn and Another v Buttes Gas and Oil Co and Another (Nos 1* A *and 2)* [1981] 3 All ER 616 (HL) at 633*a - f*).”[[100]](#footnote-101)**

(Emphasis added.)

1. In understanding the relevant scope and application of the principles of non-justiciability, it is important to note that the Courts in *Swissborough* and *Kolbachenko* both referred to the UK House of Lords decision of *Buttes*. They rely on *Buttes* as authority for the proposition that a domestic court will not determine a matter where there are “no judicial or manageable standards”.
2. In considering when there will be no such standards, it is therefore helpful to consider the circumstances that the House of Lords considered to give rise to such instances.
3. Similarly to the present matter, *Buttes* involved the Court being required to determine complex questions of international law in relation to territorial disputes by foreign states in, purportedly, private law claims (the counter-claims by Occidental against Buttes for damages for conspiracy and libel).
4. In finding that the counter-claims made in that case were non-justiciable, the House of Lords paid particular attention to Occidental’s earlier attempts to bring private claims in US courts, based on similar allegations to those before the UK courts. The US claims had been dismissed due to the US courts’ invocation of the act of state doctrine.
5. In considering the approach taken in the US, the House of Lords set out, with approval, the detailed view expressed by the US state law advisor which had served before the US Court of Appeals. This usefully gives an overview of the issue that would have to be determined and why they should not be determined:

**“[T]he disposition of this case would require a determination of the disputed boundary between Umm al Qaiwain on the one hand and Sharjah and Iran on the other at the time Umm al Qaiwain granted the concession in issue to Occidental. It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here. The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate. Even arrangements for the peaceful settlement of territorial differences are often a matter of continued sensitivity. These conditions are applicable to the question of Umm al Qaiwain's sovereignty over the continental shelf surrounding Abu Musa at the time of the concession to Occidental and to the subsequent arrangements worked out among the affected states. … We believe that the political sensitivity of territorial issues, the need for unquestionable US neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a US court to determine such issues, are compelling grounds for judicial abstention. We do not believe that this judicial self ­restraint should turn on such analytical questions as whether the so­called act of state doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from settling the extent of Umm al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.”[[101]](#footnote-102)**

1. Furthermore, the House of Lords pointed out that the US Court of Appeals in dismissing Occidental’s appeal (the District Court having dismissed its federal suit), held that *“[t]he issue of sovereignty is political not only for its impact on the executive branch, but also because judicial or manageable standards are lacking for its determination. To decide the ownership of the concession area it would be necessary to decide (1) the sovereignty of Abu Musa, (2) the proper territorial water limit and (3) the proper allocation of continental shelf. A judicial resolution of the dispute over Abu Musa between Iran and Sharjah is clearly impossible*.”[[102]](#footnote-103)
2. This of course gives a clear example of how issues of sovereignty, territorial status and claims, and consequent thereon, the determination of specific property rights (in that case the concession area), are all interlinked, and make, as in the present case before this Court, it impossible for the Court to determine the dispute.
3. The House of Lords, then went on, for similar reasons, to find that Occidental’s claims in the UK could not be dealt with because for it to succeed it would be required to bring to trial non-justiciable issues (in relation to the actions of foreign states). In particular it held that:

“**It would not be difficult to elaborate on these considerations, or to perceive other important interstate issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues on which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said have not been drawn to the attention of the court by the executive), there are, to follow the Fifth Circuit Court of Appeals, no judicial or manageable standards by which to judge these issues, or, to adopt another phrase (from a passage not quoted), the court would be in a judicial no man's land: the court would be asked to review transactions in which four foreign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law. I would just add, in answer to one of the respondents' arguments, that it is not to be assumed that these matters have now passed into history, so that they now can be examined with safe detachment.”[[103]](#footnote-104)**

1. It is therefore clear from *Buttes*, which is the foundation for the South African court’s development of the act of state doctrine, that at the very heart of the type of case that will not be justiciable (or where the Court should exercise judicial restraint), because they have no judicial or manageable standards, is a case such as this one: requiring a domestic court to determine issues of disputed territory and sovereignty between foreign states and the proper application and consequences of international law in relation thereto.
2. Moreover, as the House of Lords held, one of the considerations in this regard, was that the relevant disputes had not passed into history “*so that they now can be examined with safe detachment*”. Indeed, in the present cases, far from being historical issues long settled, the very issues sought to be put before this Court are currently the subject of a detailed negotiation process under the auspice of the Security Council, involving the Second Applicant and Morocco.
3. In this regard, it is also worth noting, the House of Lords made plain that merely because a case may not necessarily embarrass the government of the State hearing the case, does not mean it will be justiciable. The Court held that “*I appreciate also the argument of counsel for Occidental that no indication has been given that Her Majesty's government would be embarrassed by the court entering on these issues. But, the ultimate question is what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, on an appreciation of the nature and limits of the judicial function*.”[[104]](#footnote-105)
4. Of course, the fact that foreign disputes implicating issues of sovereignty should not be determined in the domestic courts of a third state is well recognised in most jurisdictions. For instance, in the *Arab Republic of Syria v Arab Republic of Egypt*, the Supreme Court of Brazil held that the courts of a third state could not exercise jurisdiction in a matter essentially of state succession between two other states even where the immovable property was within its jurisdiction.[[105]](#footnote-106) Such authority is *a fortiori* applicable in the present matter, where the UN does not even recognise SADR, who seeks to bring the claim, as a state, and when negotiations before the Security Council are currently taking place to resolve the dispute over the legal status of Western Sahara and scope of Morocco’s legal authority in Western Sahara.

***Given these principles the Applicants’ case is non-justiciable***

1. The nature of the Applicants’ case and the legal and factual issues that this Court will be required to be determined are fully set out above. In summary, for the Applicants’ claim to be successful, this Court will have to determine at least (but not limited to) the following:
	1. The status of Morocco in Western Sahara;
	2. The nature and extent of Western Sahara’s peoples’ claim to self-determination;
	3. The scope of Morocco’s legal authority in Western Sahara;
	4. The applicability of Morocco’s laws in Western Sahara;
	5. The validity of specific mining rights under Moroccan law in Western Sahara;
	6. The validity of specific contracts for minerals mined by Moroccan companies in Western Sahara, *inter alia*, with reference to the UN Framework;
	7. How minerals already extracted at the costs of the Moroccan private companies are to be treated;
	8. Whether any right or claim to such minerals would be as against compensation for the costs incurred in their extraction; and
	9. The rights of the Applicants to claim the property.
2. None of these issues is clearly or easily determinable either as a matter of fact or law. They are matters of legal and political contestation. They are therefore rightly the subject of a detailed diplomatic process which the Security Council is already seized of (as discussed above).
3. Therefore, this Court is asked to resolve intricate issues in relation to territorial sovereignty and the application of international law and disputes that are still being considered and dealt with and which are intimately implicated for resolution in the Security Council process to which the Second Applicant and Morocco are parties.
4. To echo the words of the UK Court in *CND*, in a slightly different context (in relation to pronouncing upon the proper interpretation of a Security Council resolution), were this Court to assume jurisdiction in this matter in the face of the Security Council process, “*‘[h]ow could [its] assumption of jurisdiction here be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?*”[[106]](#footnote-107)
5. Given the authorities considered above which are applicable, no South African court has ever determined, nor should determine, the type of issues that the Applicants wish this Court to determine. The claim with which this Court is faced is unprecedented: One foreign entity (the status of which would itself be open to determination), effectively seeks a finding by a domestic South Africa court that a foreign state that controls and applies its laws in a disputed foreign territory, has in doing so acted in violation of international law, and its own actions and laws must be considered invalid, so that minerals already mined by a foreign company, at the foreign company’s cost, and on-sold, should simply be given to the entity not recognised by the UN as a state (the First Applicant), and a political organisation which is not recognised for purposes of making property claims on behalf of any inhabitants of Western Sahara (the Second Applicant). The extent and nature of these claims – and which this Court has been asked to determine to found the applicants’ case for an interdict – is, quite simply, staggering.
6. Therefore, it is clear that the Applicants’ interdictory claim to the Cargo is non-justiciable before South African courts and/or South African courts should refuse to determine the claim.

***No applicable exception recognised in domestic or foreign law***

1. In an attempt to avoid what the Applicants recognise is an insuperable problem for their case, namely the act of state and/or non-justiciability doctrines, they have been driven to seek refuge in a limited set of cases where domestic courts have found exceptions to the principles discussed above.
2. However, all these cases are sharply and fundamentally distinguishable from the present case.
3. For instance, in the Applicants’ replying affidavit they refer to the *Earthlife* decision as an example of where a South African court has determined matters involving the conduct of foreign sovereign states.[[107]](#footnote-108) This is a mischaracterisation of *Earthlife*; the Western Cape Division, Cape Town restated the principles in *Swissborough* (while demonstrating why the principles were not implicated in the matter before it). In *Earthlife*,[[108]](#footnote-109) the Court was called upon to determine whether the Minister of Energy’s tabling of an intergovernmental agreement with Russian (the Russian IGA) before Parliament in terms of section 231(3) of the Constitution (which did not require Parliamentary approval), instead of section 231(2) (which did require such approval), was unconstitutional.[[109]](#footnote-110) The Respondents raised the argument that the Russian IGA was non-justiciable, with reference to *Swissborough* as it involved determining the true agreement between two states. The Court set out the principles of *Swissborough* (as discussed above), with clear approval, but found that these did not apply in the case before it, which related to the domestic lawfulness of the South Africa Minister’s actions in tabling the IGA.[[110]](#footnote-111) In particular:
	1. The challenge brought by the applicants in *Earthlife* was brought against a domestic government respondent (the Minister of Energy) who had failed to comply with a domestic constitutional requirement (to table the IGA before the South African Parliament under a specific section, which would have required Parliament’s approval to make the agreement binding).
	2. If the IGA had been tabled under the incorrect provision of the Constitution, section 172(1)(a) of the Constitution required the Court to declare this unconstitutional;
	3. The Court was not being asked to consider the lawfulness or actions of Russia. It was simply considering whether the domestic actions of the South African government were in compliance with the procedural requirements of section 231 of the Constitution, for tabling international agreements.
	4. Indeed, the Court made clear that it had “*not been asked to determine whether the IGAs [with Russia, South Korea and the US] are valid as a matter of international law at the international level*”, and it was only due to this in fact (that the validity of the international agreements was not be determined) that the Court found that the foreign states had no legal interest in the matter.[[111]](#footnote-112)
4. The present matter is fundamentally different, as the Applicants’ own pleadings lay bare. Here the Applicants’ case is directly based on finding that Morocco’s laws are invalid and its conduct unlawful in international law.
5. The foreign decisions that the Applicants seek to rely on are clearly distinguishable.
6. The *Kuwait Airways[[112]](#footnote-113)* case, which the Applicants rely on, involved a tort claim in relation to the claimant’s aircrafts seized by Iraq in its invasion of Kuwait. While the House of Lords declined to give effect to the Iraqi resolution purporting to validate the seizure, this was specifically since the UN Security Council had formally and bindingly determined that the relevant actions by Iraq were in breach of international peace and security. The UN Security Council therefore issued, under Chapter VII of the UN Charter, resolutions which were binding on all UN member states, including Kuwait, Iraq and the UK (and its Courts), that required non-recognition of any indirect aspects of Iraqi annexation of Kuwait (which included the seizure of the aircrafts). As Lord Steyn summarised the position “*On 2 August 1990 the United Nations Security Council adopted Resolution 660 which condemned the invasion of Kuwait as a breach of international peace and security. This was followed by a series of supplementary Security Council resolutions which decreed that the annexation of Kuwait was null and void; called on member states to give no recognition directly or indirectly to any aspect of the annexation; and required all states to impose sanctions on Iraq. These measures were duly taken under Ch VII of the United Nations Charter.*”[[113]](#footnote-114)
7. The contrast with the current matter could not be more stark:
	1. The UN Security Council has not issued any binding resolution under its Ch. VII powers, requiring any non-recognition of the relevant mining activities by Moroccan mining companies in Western Sahara;
	2. In fact, as discussed above, the Corell Opinion accepts that Moroccan law and contracts pursuant thereto in relation to mineral resources are valid and continue to be legal so long as certain conditionalities are met (they are – and for this Court to determine that those conditions are not met, would itself implicate the Court in deciding matters that are non-justiciable);
	3. Moreover, in the present matter, the UN Security Council is currently and actively seized with resolving the long-running dispute between Morocco and the Second Applicant;
	4. Thus, the only guidance this Court could take from the UN Security Council, is that the present matter is part of a detailed and ongoing process of international political and diplomatic negotiation and dispute settlement. There are no set and certain principles upon which this Court could adjudicate.
8. The Applicants also refer to the *Belhaj* case, the most recent UK Supreme Court decision to consider issues of act of state and issue of state immunity by indirect impleading.[[114]](#footnote-115)
9. Far from supporting the Applicants’ case, the Supreme Court’s restatement of the principles applicable to the act of state doctrine (as discussed above, including in particular the *Buttes* case), and the doctrine of state immunity (as discussed in the next section), directly favours the Respondents’ submissions that this Court should dismiss the application, and none of the exceptions to the principles find applicable in the current matter.
10. In *Belhaj* the claimants sought to bring claims in tort against the UK government and certain officials for alleged complicity in their rendition and mistreatment at the hands of foreign States. It was that “*domestic foothold*”[[115]](#footnote-116) which allowed for the exception’s application in the first place. Importantly, neither the foreign States nor their officials nor any foreign companies were sued, since such a claim would certainly have been barred by state immunity and the act of state doctrine.
11. In its judgment, the Supreme Court recognized, that in English law, there were three grounds of act of state. It held, firstly, that a UK court would normally treat a foreign State’s legislation as valid insofar as it affects movable or immovable property within the foreign State’s jurisdiction, and secondly, a UK court would not normally question the validity of a foreign governmental act in respect of property within the foreign State’s jurisdiction.
12. It was the scope of the third type of foreign act of state that was principally in issue, and which is applicable in this case. This is the rule of non-justiciability or judicial abstention whereby a domestic court will not adjudicate upon sovereign acts committed by a foreign State abroad, which was developed in *Buttes* as discussed above – and which Lord Sumption styled as an “*international act of state*”.[[116]](#footnote-117) Such a situation may arise, inter alia, where: a court cannot properly hear a claim due to a lack of judicial or manageable standards, or as a function of the separation of powers, where a court considers that it should not hear a claim since it is outside the proper bounds of its constitutional functions, particularly where the question arising – as in this case – is the lawfulness of a state’s acts in its dealings with other states and their subjects.
13. Therefore, the differences with the present matter are again telling:
	1. Belhaj was brought not in relation to any foreign property interests or territorial title, nor, as the Supreme Court found were any foreign states’ legal interests affected (unlike in the present matter). Rather the case was squarely focused on the lawfulness of the UK government’s and its officials’ actions, and repeatedly the judgments of the House affirmed the principles – applicable on the facts of this case – in *Buttes*.
	2. The present matter has nothing to do with the lawfulness or otherwise of any South African person or entity, whether private or public.
14. The Applicants also argue for a public policy exception to the act of state doctrine, and claim that such exemption would apply in the current case. However, this is incorrect for the following reasons:
	1. Even in the UK case law, which the Applicants rely on, public policy appears to be relevant only when the issue is the specific recognition or non-recognition of foreign law, and public policy limits the scope of the act of state doctrine only in exceptional cases.[[117]](#footnote-118)
	2. When the act of state doctrine has been dealt with by South African court, in particularly *Swissborough*, *Kolbachenko,* and *Earthlife*, there has been no express recognition that any domestic public policy would negate the non-justiciability principle.
	3. This is not surprising, given that when, as in this case, a key issue is that there are significant international disputes in relation to contested issues in relation to the status and administration of a foreign territory, and there are no judicial or manageable standards (what *Belhaj* recognises as the third category of act of state), then public policy considerations could not transform the case into one that a domestic court could deal with.
	4. In any event, it is clear that public policy, if it is applied to negate the application of the act of state doctrine, would only do so where there was a clear and certain violation of fundamental international law, which was determined, and determinative, of all the issues before the Court.
	5. That is certainly not the case in the present matter, for the reasons discussed above.
	6. It is instructive to consider the exceptional and rare instances, where the UK has allowed a public policy exception. The primary example relied on by the UK Supreme Court in *Belhaj* of when public policy might limit the scope of the act of state doctrine, is the *Kuwait Airways* case. We have discussed the matter above, and it is wholly distinguishable from the present case. In particular, the Security Council had expressly resolved that member states, such as the UK, should not give effect to Iraqi unlawful actions in annexing Kuwait and all incidences thereof.
	7. The Applicants also refer to, and seek to rely on, the case of *Oppenheimer v Cattermole*,[[118]](#footnote-119) which is one of the other limited and exceptional cases where the UK courts have indicated that foreign law might not be recognised on the grounds of public policy. In this case one of the issues was whether an English court should recognise a Nazi decree of 1941 (made in the middle of World War II) which deprived Jews of their German nationality and property. Importantly, the issue (and others) arose in a clearly domestic context: whether Mr Oppenheimer (a British national) subject to UK income tax laws, was entitled to an exemption in relation to his German pension. Relevant to the exemption was whether Mr Oppenheimer was a German national at certain relevant times. In the House of Lords, Lord Cross, with whom Lord Hodson and Lord Salmon agreed, held that although the case was decided on other grounds, had the point arisen the Nazi decree would have been disregarded. Lord Cross’s view was based on the fact that “*a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.*’[[119]](#footnote-120)
	8. The case is clearly distinguishable. Most obviously, the Nazi law in question and legal system that it was part of was universally condemned and part of a genocidal system that was accepted to be fundamentally in violation of international law. As the Applicants know, there is no equivalence with the present matter. For the reasons set out above, there is no determination by the international community that Morocco’s authorizing of mining in Western Sahara is invalid or unlawful. Rather it is accepted that Morocco’s administration of Western Sahara and the mining authorized pursuant thereto are lawful, in so far as they comply with the terms of the UN Framework on non-self governing territories. Moreover, the authorizing of the mining and administration of Western Sahara has certainly not been found to be a grave infringement of human rights. Indeed, in the Corell Opinion, far from holding that Moroccan law administering Western Sahara was not to be considered as law at all, it was confirmed that Moroccan contracts for the exploration and exploitation of natural resources in Western Sahara ***were valid***.
	9. Furthermore, unlike in *Oppenheimer*,the present matter involves particularly complicated issues and disputes in international law in relation to the status of Western Sahara and its natural resources, which are ongoing, and which directly implicate issues of state sovereignty. This is not a case of domestic tax liability which the Court can easily determine, nor is it required to determine the issue because it is compelled to impose a particular domestic law on a person/citizen within South Africa.
	10. In any event, public policy certainly does not require this Court to determine this matter; quite the opposite, it would require this Court **not** to determine the matter. In the present case, there is currently a process underway before the UN Security Council to determine how to deal with the status of Western Sahara, and its natural resources. In view of this process and the ongoing dispute in relation to a foreign territory, South African public policy certainly would not require this Court to determine this matter. This is clear from the position taken by the Constitutional Court in *Kaunda*. In that case the Court accepted that given particularly the principles of state sovereignty, it was not possible to demand that the Government assert its laws abroad to come to the assistance, in the form of diplomatic protection, to persons facing serious violations of their fundamental rights in foreign territory.
	11. The Applicants invoke the right to self-determination, and the view that it should be recognised as a peremptory norm, to bolster their public policy argument.[[120]](#footnote-121) However, the mere fact that the right of self-determination is implicated in the current matter (and the UN Security Council process) is in no way determinative of whether Morocco’s administration of Western Sahara and authorization of mining in Western Sahara is lawful or can simply be held to be void, so as to allow minerals that have been mined by the Respondents to be seized by the Applicants. Importantly, as noted above, the question of self-determination is central to the ongoing UN Security Council process which seeks “*a mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara*”, and the UN accepts that “*the nature and form of the exercise of self-determination*”[[121]](#footnote-122) remains to be determined. Thus, the nature and the form of self-determination and how this is to be expressed in Western Sahara is the subject of ongoing resolution before the UN-led process. Furthermore, as confirmed by the Corell Opinion, natural resource activities in Western Sahara carried out within the UN legal framework for non-self-governing territories are “*in conformity with the General Assembly resolutions and the principle of ‘permanent sovereignty over natural resources’ enshrined therein*.”
	12. It is for these reasons, that the fact that there is a right to self-determination in relation to Western Sahara, cannot create a public policy basis for a domestic South African court to simply ignore Morocco’s administration of Western Sahara, which the UN has not found is unlawful. In fact, quite the opposite, the ongoing need to resolve the issues of self-determination, is precisely why public policy, to the extent it was relevant, would speak against this Court seeking to determine the Applicants’ claim to the Cargo.
	13. Finally, in further seeking to bolster their public policy exception the Applicants allege that “*in this matter, there is a high degree of international consensus that exploiting the natural resources of a non-self-governing territory is illegal when it is without the consent and not for the benefit of the people of that territory*” (emphasis added).[[122]](#footnote-123)
	14. The Applicants mischaracterize the relevant principle. As discussed above, the Corell Opinion and the annual resolutions of the UN General Assembly establish criteria for the legal exploitation of natural resources in non-self-governing territories which do not require consent and demand benefits to the territory and its inhabitants, non-discriminatory working conditions, and that such activities are not to the detriment of the interests of the peoples of those territories.
	15. Of course, it should be noted that this framework seeks to move non-self-governing territories towards their ultimate political status in a reasonable and responsible way that ensures the prosperity and development of the territory during the transitional period while preserving its opportunities in the future.
	16. Nevertheless, the Applicants’ point is wrong for another reason. They accept, implicitly, that if exploitation does comply with the relevant requirements (although they misstate these), then it would be lawful. Therefore, they accept that far from there being a clear case where Morocco’s administration and laws regulating the mining in Western Sahara would be invalid and demonstrably unlawful, rather Morocco’s administration and contracts entered into pursuant thereto (as found by the Corell Opinion), would be valid provided the requirements of the UN framework are met.
	17. And, as is clear from what has been set out above, Phosboucraa’s activities meet the standards of the UN non-self-governing legal framework for economic and natural resource activities in non-self-governing territories.

***Conclusion on act of state***

1. In their summary of the issues that this Court will consider in determining the act of state doctrine,[[123]](#footnote-124) the Applicants have conveniently mischaracterized those issues, and avoided the very disputes and uncertainty which are currently the subject of the UN-led process, and which no domestic court can simply resolve. It is for this reason, that this is a preeminent case where there are no judicial and manageable standards. Therefore:
	1. **Because** there is a current and ongoing political process under the authority of the UN Security Council to find a mutually acceptable political solution;
	2. **Because** the Second Applicant is a party to that process and is according to the Secretary General meant to be engaged therein in “good faith” and “without preconditions”;
	3. **Because** a determination in this matter would necessarily involve judgment of the sovereign acts of a foreign state;
	4. **Because**, Morocco’s status in, and extent of its right to administer, Western Sahara is not settled, and certainly cannot and should not be settled by a foreign domestic court, when Morocco is not even before this Court;
	5. **Because** natural resource activity in Western Sahara within the confines of the UN legal framework for natural resource activities in non-self-governing territories has been found to be legal by the UN Under-Secretary-General for Legal Affairs;
	6. **Because** Phosboucraa’s operations and activities meet the standards of the UN Legal framework for natural resource activities in non-self-governing territories

this Court must dismiss the Applicants’ inappropriate attempt to have a foreign domestic court adjudicate upon an international dispute which is currently the subject of an internationally recognized peace process.

1. In short, the extensive indeterminacy involve issues of complicated international relations and diplomacy that no-domestic Court could hope to resolve, nor should it have been encouraged to arrogate to itself the power to try and resolve those issues.
2. Therefore, for the Court to decline to determine the matter is not, as the Applicants would emotively have it, to turn a blind eye. Rather it is to recognise the proper limits of a domestic court’s competence and jurisdiction. Domestic courts will – with both eyes open – always be astute to avoid sitting in judgment of foreign sovereign disputes which involve intricate international politics and implicate the status of a foreign territory. Rightly, no South African court has ever exercised jurisdiction to determine such matters. Indeed, to do otherwise, would be for a domestic South African court to set itself up as a World Court.
3. As we will discuss in the next section, even the International Court of Justice, the preeminent venue for the judicial settlement of international disputes, has found that it cannot exercise jurisdiction to determine very similar issues, because of the absence of the foreign state whose actions are sought to be found to be in violation of international law.
4. **STATE IMMUNITY**

***Introduction***

1. Not only does the subject matter and issues to be determined in the Applicants claim mean that it is non-justiciable or should not be adjudicated upon, even if it were justiciable, this Court would be precluded from determining it by the principles of state immunity.

***The customary international law position***

1. State (or sovereign) immunity is a fundamental principle of international law. One of the seminal authorities on state immunity, Lady Fox QC, emphasises the importance of the principle, “*Immunity protects the independence and equality of states from unacceptable subordination to the jurisdiction of the courts of another state*.”[[124]](#footnote-125)
2. In the *Al Bashir[[125]](#footnote-126)* case the Supreme Court of Appeal recently explained the nature of the customary international rule of state immunity, as accepted in South African law, as follows *“[t]his immunity is available when it is sought to implead a foreign state, whether directly or indirectly, before domestic Courts****,*** *and also when action is taken against state officials acting in their capacity as such*.”[[126]](#footnote-127)
3. Therefore, as the Supreme Court of Appeal has recognised, state immunity protects a foreign state from indirectly being impleaded in a matter. The Supreme Court of Appeal gave as an example of such impermissible indirect impleading of state “*a civil action against an individual in respect of actions on behalf of a foreign state,* ***where permitting an action against the individual would circumvent the state’s immunity***.”[[127]](#footnote-128)
4. Therefore, a foreign state will be indirectly impleaded in a matter and state immunity will bar the claim, *inter alia*, when “*some relevant interest of that state is directly engaged.*”[[128]](#footnote-129)
5. This principle is codified in 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (“*UN Jurisdiction Convention*”), article 6(2)(b) of which provides that: “*A proceeding before a court of a State shall be considered to have been instituted against another State if that other State….. is not named as a party to the proceeding but the proceeding* ***in effect seeks to affect the property, rights, interests or activities of that other State****”* (emphasis added).
6. The Convention has not yet come into force.[[129]](#footnote-130) However, at least in so far as the Convention recognises that state immunity prevents indirect impleading of a foreign state which (while the state is not named as a party) would effectively affect the property or legal rights and interests of the foreign State (for instance by making determinations in relation thereto), this should be accepted as being representative of the position in customary international law.[[130]](#footnote-131)
7. In the present matter, in order for the Court to find that the Applicants are the owners of the property, this Court will be called upon, as the Applicants make plain, to first determine that under international law “*Morocco was not entitled to appropriate the phosphate at Bou Craa, nor allocate rights to the phosphate to OCP and Phosboucraa, and title in the Cargo has thus not vested in any of Morocco, OCP, Phosboucraa or IPL*.”[[131]](#footnote-132)
8. In order to make these determinations, the Court would, inter alia, have to determine the legal status of Morocco actions in Western Sahara, its competence to make laws applicable in Western Sahara, and the validity of its laws.
9. This matter is therefore a prime example of impermissible indirect impleading. Determining the Applicants’ claim to the Cargo would require this Court to make findings that directly affect Morocco’s rights and legal interests, *inter alia*, in property, and therefore to allow the claim to precede would directly circumvent Morocco’s immunity.
10. This would violate the customary international law principle of state immunity, as recognised in *Al Bashir*. This applies in South Africa by virtue of section 232 of the Constitution.
11. Therefore, it is submitted that this Court must dismiss this application in order to give effect to Morocco’s state immunity.

***The statutory position***

1. The customary international law position discussed above in relation to indirect impleading, is given domestic expression to by section 2 of the Foreign State Immunities Act 87 of 1981 (“*FSI Act*”).
2. Section 2 provides in relevant part:

**“(1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.**

**(2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question.”**

1. It is apparent from section 2(2) that a foreign State’s immunity applies even where the State is not cited as a party in the matter.[[132]](#footnote-133) This is a recognition of the customary international law principle precluding the indirect impleading of a foreign State.
2. The Applicants have not claimed that:
	1. Morocco has waived its immunity;[[133]](#footnote-134) or
	2. Morocco’s conduct and/or laws impugned in this matter are of a commercial nature only;[[134]](#footnote-135) or
	3. Morocco’s immunity is otherwise not applicable in terms of the FSI Act.[[135]](#footnote-136)
3. It thus follows that Morocco is “*immune from the jurisdiction*” of this Court and this Court “*shall give effect to [this] immunity*” by refusing to entertain the questions raised by the Applicants for determination, which determinations **in effect seek to affect the property, rights, interests or activities of Morocco**, inter alia by requiring this Court to determine the applicability of Moroccan law in Western Sahara.

***The Applicants’ flawed attempt to deal with the immunity point***

1. The Applicants answer by contending that:

**“The interim relief is sought against the possessors of the Cargo and the parties who purported to buy and sell the Cargo. Morocco is not a party to the Proceedings.”[[136]](#footnote-137)**

1. In other words, they contend that the rules of state immunity do not apply as this is a private lawsuit between private parties. Morocco, it is contended, is not a party and is not impleaded by virtue of its interests in the issues at stake.
2. But this is an unsustainable fiction and does not meet the requirements of indirect impleading. As the Applicants themselves continue:

**“Morocco’s conduct is only indirectly relevant insofar as it provides a basis for such title as may be asserted by Phosboucraa and/or Balance.”**

1. This is precisely the point.
2. Phosboucraa’s title to, and its right to mine and sell, the Cargo derive directly from Moroccan law.[[137]](#footnote-138) Therefore, for the Applicants to succeed in their claim they would require this Court to make determinations as to the status of Morocco in Western Sahara (and on the Applicants’ case that Morocco has violated international law), and the validity of Moroccan law.
3. Indeed, as noted earlier, the Applicants already recognise this, since they make clear in their founding affidavit, that this Court would need to determine that under international law “*Morocco was not entitled to appropriate the phosphate at Bou Craa, nor allocate rights to the phosphate to OCP and Phosboucraa, and title in the Cargo has thus not vested in any of Morocco, OCP, Phosboucraa or IPL*.”[[138]](#footnote-139)
4. This Court would undoubtedly be required to make findings that affect Morocco’s legal rights and interests. This would circumvent state immunity of Morocco (which is not a party and has not consented to this Court determining the issues).
5. In this regard, it is helpful to consider the case of *East Timor*,[[139]](#footnote-140) before the International Court of Justice (“*ICJ*”). In terms of a UN Resolution, East Timor had been placed under Portugal’s administration as a non-self-governing territory. Internal disturbances in East Timor, lead to the eventual withdrawal of the Portuguese authorities and the entry of the armed forces of Indonesia. Thereafter the Security Council passed various resolutions. As the ICJ noted “*Security Council resolution 384 (1975) of 22 December 1975 called upon "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination*"; called upon "***the Government of Indonesia to withdraw without delay all its forces from the Territory***"; and further called upon "*the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination*".”[[140]](#footnote-141) Moreover, “*In resolution 31/53 of 1 December 1976, and again in resolution 32134 of 28 November 1977, the General Assembly rejected "the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence"*.”[[141]](#footnote-142)
6. Nevertheless, thereafter Australia recognised the fact that East Timor was part of Indonesia “*but not the means by which this was brought about*”.[[142]](#footnote-143) A number of years later, Australia negotiated a Treaty with Indonesia, to create a “*Zone of Cooperation*” in “*an area between the Indonesian Province of East Timor and Northern Australia*”. Portugal claimed that, in entering into this Treaty, Australia had acted unlawfully and in violation of the obligation to respect the status both of Portugal as the administering power and of East Timor as an area under such administration. The ICJ accepted the *erga omnes* character of the relevant obligation, but declined jurisdiction to rule on the lawfulness of Australia’s conduct because Indonesia had not consented to the exercise of jurisdiction. The ICJ held that *“[I]n the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court . . . However, the Court considers that the erga omnes character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked,* ***the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State [being Indonesia] which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right erga omnes***.”[[143]](#footnote-144)
7. The ICJ stressed that, “***the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor****. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent*".[[144]](#footnote-145)
8. The principle that the Court refers to is predicated, as is state immunity in a foreign domestic forum, on the state’s sovereignty.
9. Therefore, it is highly relevant that the same type of issues (the lawfulness of Morocco’s actions in Western Sahara, and the concomitant extent of its powers to make law applicable to and administer Western Sahara) are directly to be determined in the Applicants’ claim to the Cargo. *A fortiori*, where the claim is brought before a foreign domestic court, the principles of state immunity, would similarly not allow the Applicants’ claim to the Cargo to be determined without Morocco waiving its immunity by consenting to the Court exercising its jurisdiction.
10. Morocco has not waived its immunity or consented to this Court determining the case.
11. We also note, for the sake of completeness, and as should be clear from the *East Timor* case, that the characterization of a civil claim as involving alleged violation of obligations *erga omnes* or *jus cogens* obligations, does not create any exception to the obligation for domestic courts to uphold state immunity.[[145]](#footnote-146) In *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)[[146]](#footnote-147)* the ICJ affirmed state immunity as a core principle of international law, stemming from the sovereignty of states. The ICJ upheld the customary international law obligation to respect state immunity in civil cases before foreign courts, including in cases involving the perpetration of gross violations of human rights and international humanitarian law, which were peremptory norms of international law (*jus cogens*). The ICJ rejected the argument that such considerations necessitate exceptions to sovereign state immunity.
12. Therefore, for the reasons set out above this Court is precluded by the principles of state immunity from determining the Applicants’ case. This is a fatal defect both to the application and any proposed action that the Applicants may seek to institute.
13. **CONCLUSION AND COSTS**
14. For all of the above reasons, this application should be dismissed.
15. Bearing in mind the novelty and complexity of the issues raised and the urgency with which papers had to be prepared, it is submitted that the Applicants should pay the Respondents’ costs, such costs to include the costs of three counsel.

**MAX DU PLESSIS**

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Chambers, Durban and Cape Town

16 May 2017

1. R: 366, answering affidavit, at para 6. [↑](#footnote-ref-2)
2. See for example the references to alleged torture referred to in paragraph 7 of the Applicants’ heads. [↑](#footnote-ref-3)
3. Concerning the principles applicable to interim interdicts generally, see *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (“*OUTA*”) at paras 41-47. *OUTA* also reiterates at paras 44 and 47 the principles that:

**“The common law annotation to the *Setlogelo*test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.**

**. . . .**

**The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.”**

 (Emphasis added.)

These principles apply *a fortiori* by analogy to the attitude this Court should take to the executive actions of foreign States. [↑](#footnote-ref-4)
4. R: 67 para 214. [↑](#footnote-ref-5)
5. The “*Cargo*” refers to the phosphate cargo loaded on board the MV “NM Cherry Blossom” (the “*Ship*”) [R: 367 paras 8-9]. [↑](#footnote-ref-6)
6. See for example the Applicants’ averments at R: 87 para 307:

**“In the circumstances, the applicants submit that Morocco is an occupying power in Western Sahara, and as such did not gain proprietary legal title to the natural resources of Western Sahara, nor did Morocco acquire the right to pass title to others.”** [↑](#footnote-ref-7)
7. R: 13, founding affidavit, paras 47-50. [↑](#footnote-ref-8)
8. C.f. *Reference Re Secession of Quebec* [1998] 2 SCR 217 (SCC). [↑](#footnote-ref-9)
9. *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA) at para 46. [↑](#footnote-ref-10)
10. *Schlesinger v Schlesinger*1979 (4) SA 342 (W) (“*Schlesinger*”) at 349B:

**“(1) in *ex parte*applications all material facts must be disclosed which *might*influence the Court in coming to a decision;**

**(2) the non-disclosure or suppression of facts need not be wilful or *mala fide*to incur the penalty of rescission (ie of the order obtained *ex parte*); and**

**(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.”**

*Schlesinger*, and specifically the above three rules, were confirmed by the Supreme Court of Appeal in *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) (“*Basson*”) at para 21. [↑](#footnote-ref-11)
11. Report of the Secretary-General on the situation concerning Western Sahara (S/2017/307), 10 April 2017 [R: 404, annexure OBS3, at para 26]. [↑](#footnote-ref-12)
12. Security Council Resolution 2351 (2017) [R: 420, annexure OBS4]. [↑](#footnote-ref-13)
13. Security Council Resolution 2351 (2017) [R: 421, annexure OBS4 at para 5]. [↑](#footnote-ref-14)
14. Security Council Resolution 2351 (2017) [R: 422, annexure OBS4 at para 10]. [↑](#footnote-ref-15)
15. Applicants’ heads at para 22. [↑](#footnote-ref-16)
16. C.f. Applicants’ heads at paras 59-65. One may also query whether the interdict sought by this Court would genuinely be interim in nature. The Cargo is in transit to purchasers who cannot wait years – which would be the period before which any eventual trial would be concluded – to receive their goods. Accordingly, even if an eventual trial court dismisses the action, the Cargo no longer be sought in New Zealand and may remain indefinitely in South Africa. [↑](#footnote-ref-17)
17. *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1995 (2) SA 813 (W) (“*Ferreira*”). [↑](#footnote-ref-18)
18. *Ferreira* at 817G (on a point which was not in any way rejected as being incorrect by the majority). See also *Olympic Passenger Service (Ptv) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383 and the similar arguments advanced by Herbstein & Van Winsen The Civil Practice of the High Court of South Africa (5th ed.) at 1461-1462. [↑](#footnote-ref-19)
19. *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) (“*Geyser*”). [↑](#footnote-ref-20)
20. *Geyser* at para 9. [↑](#footnote-ref-21)
21. Applicant’s heads at para 62. [↑](#footnote-ref-22)
22. *Kuwait Airways Corp v Iraqi Airways Co and Others* [1995] 2 All ER 694 (HL) (“*Kuwait (No 1)*”). [↑](#footnote-ref-23)
23. *Kuwait (No 1)* at 715E. [↑](#footnote-ref-24)
24. Report of the Secretary-General on the situation concerning Western Sahara (S/2017/307), 10 April 2017 [R: 413, annexure OBS3, at para 81]. [↑](#footnote-ref-25)
25. R: 53, founding affidavit, para 158. [↑](#footnote-ref-26)
26. *Buttes Gas and Oil Co. v Hammer and Another (Nos 2 & 3); Occidental Petroleum Corporation and Another v Buttes Gas and Oil Co. and Another (Nos 1 & 2)* [1981] 3 All ER 616 (“*Buttes*”)at 633E. [↑](#footnote-ref-27)
27. *Schlesinger* at 348E-349B; *Basson* at para 21. [↑](#footnote-ref-28)
28. R: 400, annexure OBS3. [↑](#footnote-ref-29)
29. R: 419, annexure OBS4. [↑](#footnote-ref-30)
30. European Court of Justice, Opinion of Advocate General Wachelet, *Council of the European Union v. Front Populaire pour la liberation de la saguia-el-hamra et du rio de oro (Front Polisario)* (Case C-104/16P), 13 September 2016, at paras 185-209. [↑](#footnote-ref-31)
31. R: 433, replying affidavit, at para 18.4.3. [↑](#footnote-ref-32)
32. R: 433, replying affidavit, at para 18.4.1. [↑](#footnote-ref-33)
33. SeeUN Security Council Resolution 690 (1991) (S/RES/690), 29 April 1991, at para 2: “2. *Expresses its full support for the efforts of the Secretary-General for the organization and the supervision, by the United Nations in cooperation with the Organization of African Unity, of a referendum for self-determination of the people of Western Sahara, in accordance with the objectives mentioned in his report.*” [↑](#footnote-ref-34)
34. UN Security Council Resolution 1349 (2001) (S/RES/1349), 27 April 2001, preamble and para 1: “*Reiterating full support for the continued efforts exerted by the United Nations Mission for the Referendum in Western Sahara (MINURSO) to implement the Settlement Plan and agreements adopted by the parties to hold a free, fair and impartial referendum for the self-determination of the people of Western Sahara.*”, “*1. Decides to extend the mandate of MINURSO […] with the expectation that the parties, under the auspices of the Secretary-General’s Personal Envoy, will continue to try to resolve the multiple problems relating to the implementation of the Settlement Plan and try to agree upon a mutually acceptable political solution to their dispute over Western Sahara.*” [↑](#footnote-ref-35)
35. In 2001, the Secretary-General’s Personal Envoy James Baker proposed a so-called Framework Agreement which did not include a referendum. The Security Council expressed support for the Secretary-General and his Personal Envoy’s efforts “*to find a political solution to this long-standing dispute*”, and called upon “*all the parties and the States of the region to cooperate fully with the Secretary-General and his Personal Envoy*”. UN Security Council Resolution 1429 (2002), (S/RES/1429), 30 July 2002, preamble, at paras 1-2. [↑](#footnote-ref-36)
36. In 2003, the Secretary-General´s Personal Envoy proposed a so-called “Peace plan for self-determination of the people of Western Sahara” which included a referendum. Report of the Secretary-General on the situation concerning Western Sahara (S/2003/565), 23 May 2003, Annex 1.

See UN Security Council Resolution 1495(2003), (S/RES/1495), 31 July 2003. preamble, at para 1: "*Reaffirming its commitment to assist the parties to achieve a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations, and noting the role and responsibilities of the parties in this respect*,¨; "*1. Continues to support strongly the efforts of the Secretary-General and his Personal Envoy and similarly supports their Peace plan for self-determination of the people of Western Sahara as an optimum political solution on the basis of agreement between the two parties*." [↑](#footnote-ref-37)
37. Report of the Secretary-General on the situation concerning Western Sahara (S/2006/817), 16 October 2006 at para 15: “[M]*y Personal Envoy also made an effort to clarify his position on the relationship between international legality and political reality. In his briefing of 18 January, he had remarked that the Security Council naturally had to observe international law, but that it also had the responsibility to take account of political reality*.” [↑](#footnote-ref-38)
38. Report of the Secretary-General on the situation concerning Western Sahara (S/2006/817), 16 October 2006 at para 61: “*I would like to recommend that the Security Council call on the two parties, Morocco and the Frente Polisario, to enter into negotiations without preconditions, with a view to achieving a just, lasting and mutually acceptable political solution that will provide for the self-determination of the people of Western Sahara.*” [↑](#footnote-ref-39)
39. UN Security Council Resolution 1754 (2007), (S/RES/1754), 30 April 2007, at para 2: “2. *Calls upon the parties to enter into negotiations without preconditions in good faith, taking into account the developments of the last months, with a view to achieving a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara.*” [↑](#footnote-ref-40)
40. United Nations Security Council Resolutions 1783 (2007), 1813 (2008), 1871 (2009), 1920 (2010), 1979 (2011), 2044 (2012), 2099 (2013), 2152 (2014), 2218 (2015), 2285 (2016). . [↑](#footnote-ref-41)
41. UN Security Council, Letter dated 16 April 2007 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council (S/2007/210), 16 April 2007, Annex. [↑](#footnote-ref-42)
42. UN Security Council, Letter dated 11 April 2007 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council (S/2007/206), 13 April 2007, Annex. [↑](#footnote-ref-43)
43. Report of the Secretary-General on the situation concerning Western Sahara (S/2007/619), 19 October 2007, paras. 4-9; Report of the Secretary-General on the situation concerning Western Sahara (S/2008/45),25 January 2008, paras 2-7; Report of the Secretary-General on the situation concerning Western Sahara (S/2008/251), 14 April 2008, paras 11-13. [↑](#footnote-ref-44)
44. Report of the Secretary-General on the situation concerning Western Sahara (S/2010/175),6 April 2010, paras. 9-13, 16-18.; Report of the Secretary-General on the situation concerning Western Sahara (S/2011/249),1 April 2011, paras. 29-39; Report of the Secretary-General on the situation concerning Western Sahara (S/2012/197), 5 April 2012, paras. 11-15, 22-25. [↑](#footnote-ref-45)
45. Report of the Secretary-General on the situation concerning Western Sahara (S/2013/220), 8 April 2013, para. 111; Report of the Secretary-General on the situation concerning Western Sahara (S/2014/258), 10 April 2014, paras. 13-31; Report of the Secretary-General on the situation concerning Western Sahara (S/2015/246), 10 April 2015, paras. 15-21; Report of the Secretary-General on the situation concerning Western Sahara (S/2016/355), 19 April 2016, paras. 19-27. [↑](#footnote-ref-46)
46. At the second round of formal negotiations (10-11 August 2007) the parties “*heard presentations by United Nations experts and participated in discussions on subjects related to natural resources and local administration*.” October 2007 Report of the Secretary-General, paras 7, 12. This broader discussion was continued at the third (7-9 January 2008, focusing on administration and organs related to administration) and fourth (16-18 March 2008, discussing administration, competences, justice and resources) rounds of formal negotiations. January 2008 Secretary-General Report, para 5; April 2008 Secretary-General Report, para 12. & Annex 1. [↑](#footnote-ref-47)
47. Report of the Secretary-General on the situation concerning Western Sahara (S/2017/307), 10 April 2017, at para 83: “*On the basis of consultations with the parties and neighbouring States, members of the Group of Friends on Western Sahara and the Security Council, as well as other important stakeholders, I intend to propose that the negotiating process be relaunched with a new dynamic and a new spirit that reflect the Council’s guidance, with the aim of reach a mutually acceptable political solutions that includes resolution of the dispute over the legal status of Western Sahara, including through agreement on the nature and form of the exercise of self-determination*.” [↑](#footnote-ref-48)
48. R: 421, annexure OBS4, at para 7. [↑](#footnote-ref-49)
49. R: 433, replying affidavit, at para. 18.4.1. [↑](#footnote-ref-50)
50. See for example R: 433, replying affidavit, at para 18.4.2: “*It follows from the right to self-determination that permanent sovereignty in the natural resources of the territory vests in the people of Western Sahara*.” [↑](#footnote-ref-51)
51. R: 433, replying affidavit, at para 18.4.2: “*Indeed, in the recent resolutions relied upon by OCP and Phosboucraa […] the UN Security Council and the UN General Assembly ake clear that the processes underway are designed to ‘provide for the self-determination of the people of Western Sahara’*.” [↑](#footnote-ref-52)
52. UN Security Council Resolution 2351 (2017), (S/RES/2351), 28 April 2017 at para 7 [R: 421, replying affidavit]. [↑](#footnote-ref-53)
53. UN Secretary General’s Report 10 April 2017 at para 83 [R: 414]. [↑](#footnote-ref-54)
54. April 2008 Secretary-General Report, para 12. & Annex 1. [↑](#footnote-ref-55)
55. At the sixth round of informal negotiations (7-9 March 2011) the Secretary-General’s report explains: “*With regard to subjects to be discussed, the parties agreed to examine two proposals: the demining programme and the natural resources of Western Sahara and their use*.” 2011 Secretary-General Report, para. 39.

At the seventh round of informal negotiations (5-7 June 2011) the parties requested assistance from the UN Secretariat to propose “*a framework for reflection for future exchanges on natural resources*”. 2012 Secretary-General Report, para. 12. This was followed by an agreement at the eighth round of informal negotiations (19-21 July 2011) “*on holding an expert-level meeting in Geneva on natural resources and to begin building a common database of existing natural resources and how they are being exploited*.” 2012 Secretary-General Report, para. 14. At the ninth (final) round of informal negotiations (11-13 March 2012) the parties discussed demining and “*natural resources and the environment*” confirming “*their intention to provide the United Nations not only with focal points but also with all available information on natural resources and the statute of the environment*.” The purpose was to allow the United Nations Environmental Programme “*to begin building a database as a foundation for future discussions on the state of the environment and natural resources, including an examination of the legal aspects of current exploitation*.” 2012 Secretary-General Report, para. 23. [↑](#footnote-ref-56)
56. From 8 to 11 November 2011, the Personal Envoy co-chaired a technical meeting of the parties on natural resources. At the meeting the Moroccan experts “*gave detailed presentations on the status of selected resources such as fisheries, water and minerals, as well as on environmental topics such as climate change and pollution*”. The Polisario Front expert “*described contracts, awarded to a variety of international companies for exploration of oil and mineral resources, that were contingent upon a settlement of the Western Saharan conflict that would lead to independence*.” At the meeting, Morocco “*affirmed that the income obtained from such exploitation benefited the local population and was sustainable*”. The Polisario Front “*strongly disagreed with both statements and stressed the illegality of the unsustainable exploitation of the resources of a non-self-governing territory*”. The parties discussed “*next steps that could be taken on the topic during the next informal meeting*”. 2012 Secretary-General Report, paras. 19-20. [↑](#footnote-ref-57)
57. R: 434, replying affidavit, at para 18.4.3. [↑](#footnote-ref-58)
58. R: 421, annexure OBS4, at paras 6-8. [↑](#footnote-ref-59)
59. R: 413, annexure OBS3, at para 81. [↑](#footnote-ref-60)
60. R: 436, replying affidavit, at para 27. [↑](#footnote-ref-61)
61. R: 430, replying affidavit, at para 17.1. [↑](#footnote-ref-62)
62. R: 448, replying affidavit, at para 82. [↑](#footnote-ref-63)
63. UN Charter, Article 73. [↑](#footnote-ref-64)
64. R: 68-69, founding affidavit, paras 222-223. [↑](#footnote-ref-65)
65. R: 368, answering affidavit, para 15. [↑](#footnote-ref-66)
66. For the most recent see UN General Assembly Resolution 71/103, *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories* (A/RES/71/103), 6 December 2016. In summary, this Resolution draws a clear distinction between obligations owed to “inhabitants and territories” and those owed to “peoples”. Positive obligations are owed to the inhabitants of non-self-governing territories or to the territories themselves to: (a) promote the economic advancement of the territory and its inhabitants; (b) ensure that there are not discriminatory working conditions in the territory and that there is a fair wage system for all inhabitants; and (c) take measures to stop corporate actors in non-self-governing territories whose activities detrimental to the interests of the inhabitants of the territory.

The Resolution also provides for negative obligations related to the peoples of non-self-governing territories, to: (a) Promote the economic advancement of the territory and its inhabitants; (b) Result in a fair system of wages for inhabitants of the territory and not produce discriminatory working conditions in the territory; and (c) Not be to the detriment of the interests of the peoples of the territory. [↑](#footnote-ref-67)
67. The Applicants suggest [R: 46 fn 52] that the Corell Opinion should be read together with statements made by Mr Corell after he left office. That cannot be so. Such comments are made in a private capacity. It is the Corell Opinion alone which has received subsequent support from the UN General Assembly – see further below. [↑](#footnote-ref-68)
68. R: 142-147, annexure RSB13; United Nations Security Council, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council* (S/2002/161), 12 February 2002. [↑](#footnote-ref-69)
69. SeeR: 37-38 para 106; R: 45-47 paras 134-136; R: 86 paras 301-302 (founding affidavit); R: 436-437 paras 29-30; R: 443 para 56 (replying affidavit). [↑](#footnote-ref-70)
70. Corell opinion at para 1. Paragraph 24 of the Corell opinion presents a two-step test for determining whether foreign economic activities are legal: 1) whether the activities are conducted “*for the benefit of the peoples*”; and 2) whether the activities are performed “*on their behalf*” or “*in consultation with their representatives*”. Rather than creating a new requirement, paragraph 25 restates the same two-step test in the negative: 1) natural resource activities may not disregard the interests of the peoples (i.e. they must be for their benefit); and 2) these activities may not proceed in disregard of the peoples’ wishes. [↑](#footnote-ref-71)
71. Corell opinion at para 21. [↑](#footnote-ref-72)
72. R: 75, founding affidavit, paras 256-257. [↑](#footnote-ref-73)
73. R: 147, founding affidavit, annexure RSB13. [↑](#footnote-ref-74)
74. UN General Assembly Resolution 71/103, Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories (A/RES/71/103), 6 December 2016. The series of General Assembly resolutions under the agenda item *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories* speaks of investment “*undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes*”, but it does so in distinctly non-mandatory terms. The General Assembly here merely “*affirms the value*” of such activities which is to be distinguished from its other mandatory language in the resolution such as “*reaffirms the responsibility”, “reaffirms the need*”, or “*calls upon the administering Powers*” that appears elsewhere. [↑](#footnote-ref-75)
75. United Nations Department of Public Information, “Daily Press Briefing by the Office of the Spokesperson for the Secretary-General”, 18 April 2013 (<http://www.un.org/News/briefings/docs/2013/db130418.doc.htm>): *it is our view that principles of international law described above establish a two-limb test with respect to the carrying out of foreign economic activities in Non-Self-Governing Territories: first, such activities must be for the benefit of the people of those Territories; and second they must be carried out on their behalf, or in consultation with their representatives*.” [↑](#footnote-ref-76)
76. R: 87, founding affidavit, at para 310. [↑](#footnote-ref-77)
77. R: 377, answering affidavit, at para 41. [↑](#footnote-ref-78)
78. R: 377, answering affidavit, at para 41. [↑](#footnote-ref-79)
79. R: 377, answering affidavit, at para 42. [↑](#footnote-ref-80)
80. R: 378, answering affidavit, at para 43. [↑](#footnote-ref-81)
81. R: 379, answering affidavit, at para 47. [↑](#footnote-ref-82)
82. R: 379, answering affidavit, at para 47. [↑](#footnote-ref-83)
83. R: 380, answering affidavit, at para 47. [↑](#footnote-ref-84)
84. R: 378, answering affidavit, at para 44; R: 380, answering affidavit, at para 48. [↑](#footnote-ref-85)
85. R: 380, answering affidavit, at para 49. [↑](#footnote-ref-86)
86. R: 378, answering affidavit, at para 43. [↑](#footnote-ref-87)
87. R: 378, answering affidavit, at para 43. [↑](#footnote-ref-88)
88. R: 430, replying affidavit, at para 17.3. [↑](#footnote-ref-89)
89. R: 432, replying affidavit, at para 18.2. [↑](#footnote-ref-90)
90. See I Sinclair, ‘The Law of Sovereign Immunity: Recent Developments’ (1980) 167 Recueil des Cours 113, 121. [↑](#footnote-ref-91)
91. See generally Shaw International Law (7th ed) at 129. [↑](#footnote-ref-92)
92. *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) (“*Swissborough*”). [↑](#footnote-ref-93)
93. *Swissborough* at 334. [↑](#footnote-ref-94)
94. *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 at para 5. [↑](#footnote-ref-95)
95. *The Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom and Others* [2002] EWHC 2759 (QB) (“*CND*”) atpara 38. [↑](#footnote-ref-96)
96. *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) (“*Kaunda*”). [↑](#footnote-ref-97)
97. *Kaunda* at para 172. [↑](#footnote-ref-98)
98. *Kaunda* at para 44. [↑](#footnote-ref-99)
99. *Kolbatschenko v King NO and Another* 2001 (4) SA 336 (C) (“*Kolbatschenko*”). [↑](#footnote-ref-100)
100. *Kolbatschenko* at 356H-357C. [↑](#footnote-ref-101)
101. *Buttes* at 631G-632B. [↑](#footnote-ref-102)
102. *Buttes* at 632C. [↑](#footnote-ref-103)
103. *Buttes* at 663. [↑](#footnote-ref-104)
104. *Buttes* at 632F. [↑](#footnote-ref-105)
105. *Arab Republic of Syria v Arab Republic of Egypt* 91 ILR 288 at 305-6. [↑](#footnote-ref-106)
106. *CND* at para 37. [↑](#footnote-ref-107)
107. R: 441, replying affidavit, at para 46. [↑](#footnote-ref-108)
108. *EarthLife Johannesburg & Another v Minister of Energy & Others* [2017] ZAWCHC 50 (26 April 2017) (“*EarthLife*”). [↑](#footnote-ref-109)
109. The Constitution of the Republic of South Africa, 1996 (“*the Constitution*”). [↑](#footnote-ref-110)
110. *EarthLife* at paras 101-105. [↑](#footnote-ref-111)
111. *EarthLife* at para 90. [↑](#footnote-ref-112)
112. *Kuwait Airways Corporation v. Iraq Airways Co. (Nos. 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 (“*Kuwait Airways*”) (this is a later iteration – technically, *Kuwait (No 3)* –of *Kuwait (No 1),* referred to above). [↑](#footnote-ref-113)
113. *Kuwait Airways* at para 107. [↑](#footnote-ref-114)
114. Applicants’ heads at para 50; *Belhaj and Another v Straw and Others; Rahmatullah v Minister of Defence and Others* [2017] UKSC 3 (17 January 2017) (“*Belhaj*”). [↑](#footnote-ref-115)
115. As Lord Sumption put it: see *Belhaj* at para 226. [↑](#footnote-ref-116)
116. *Belhaj* at paras 234 onwards. [↑](#footnote-ref-117)
117. *Belhaj* at para 37. [↑](#footnote-ref-118)
118. *Oppenheimer* v *Cattermole (Inspector of Taxes)* [1975] 1All ER 538 (HL) (“*Oppenheimer*”). [↑](#footnote-ref-119)
119. *Oppenheimer* at 567. [↑](#footnote-ref-120)
120. Applicants’ heads at para 95. [↑](#footnote-ref-121)
121. R: 414, annexure OBS3, at para 83. [↑](#footnote-ref-122)
122. Para 102 [↑](#footnote-ref-123)
123. See para 104 of the Applicants’ heads. [↑](#footnote-ref-124)
124. H Fox, ‘Enforcing Human Rights’ SJ, 19 August 1994, 854-5.  [↑](#footnote-ref-125)
125. *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) (“*Al Bashir*”). [↑](#footnote-ref-126)
126. *Al Bashir* at para 66. Emphasis added. [↑](#footnote-ref-127)
127. See *Al Bashir* at para 66 footnote 41, emphasis added, with reference to *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL). [↑](#footnote-ref-128)
128. *Belhaj* at para 186. [↑](#footnote-ref-129)
129. Only 21 out of the required 30 States Parties have ratified the Convention. [↑](#footnote-ref-130)
130. See *Belhaj at* paras 24-31. [↑](#footnote-ref-131)
131. R: 73-74, founding affidavit, at para 245. [↑](#footnote-ref-132)
132. See also the article 6 of the UN Jurisdiction Convention and the customary international law position as discussed above. In terms of section 233 of the Constitution, the Court is required to prefer an interpretation of section 2 that is in accordance with international law. [↑](#footnote-ref-133)
133. As permitted by section 3 of the FSI Act. [↑](#footnote-ref-134)
134. Section 4 of the FSI Act. [↑](#footnote-ref-135)
135. In terms of sections 5 to 9 of the FSI Act. [↑](#footnote-ref-136)
136. R: 440, replying affidavit, at para 44. [↑](#footnote-ref-137)
137. R: 367, answering affidavit, para 8. [↑](#footnote-ref-138)
138. R: 246, founding affidavit, at para 246. [↑](#footnote-ref-139)
139. *Case concerning East Timor (Portugal v Australia)* (judgment of 30 June 1995) ICJ Reports 1995 (“*East Timor*”) at 90. [↑](#footnote-ref-140)
140. *East Timor* at para 15 (emphasis added). [↑](#footnote-ref-141)
141. *East Timor* at para 15. [↑](#footnote-ref-142)
142. *East Timor* at para 17. [↑](#footnote-ref-143)
143. *East Timor* at para 29. [↑](#footnote-ref-144)
144. *East Timor* at para 34 (emphasis added). [↑](#footnote-ref-145)
145. See e.g. *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL). [↑](#footnote-ref-146)
146. *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) (International Court of Justice, General List No 143, 3 February 2012). [↑](#footnote-ref-147)