

Index

More Information

INDEX

Abbreviations used in the index

ACHPR (African Charter on Human and Peoples' Rights (1981) (Banjul Charter))

ACtHPR (African Court on Human and Peoples' Rights)

ANPS (Airports National Policy Statement (26 June 2018) (UK))

CC (Civil Code)

CCA (Climate Change Act (2008) (UK))

CCC (Committee on Climate Change)

CCP (common commercial policy)

CERD (International Convention on the Elimination of All Forms of Racial Discrimination (1965))

CETA (EU-Canada Comprehensive Economic and Trade Agreement (2016))

CFSP (EU Common Foreign and Security Policy)

CIL (customary international law)

CJEU (Court of Justice of the European Union/CJEU Statute)

CPC (Civil/Criminal Procedure Code)

CRC (UN Convention on the Rights of the Child (1989)/Child Rights Committee)

DCO (development consent order)

ECHR (European Convention on Human Rights (1950))

ECtHR (European Court of Human Rights)

EIA (environmental impact assessment)

ESM (Treaty Establishing the European Stability Mechanism (2012))

FSIA (South African Foreign State Immunity Act 1981)

FTC (Financing of Terrorism Convention (1999))

GG (Basic Law (FRG))

GVG (Courts Constitution Act (FRG))

HCCP (Hague Convention on Civil Procedure)

HCIAJ (Hague Convention on International Access to Justice (1980))

ICC (International Criminal Court/ICC Statute)

ICCPR (International Covenant on Civil and Political Rights (1966))

ICJ (International Court of Justice/ICJ Statute)

ICSID (International Centre for Settlement of Investment Disputes)

ICTY (International Criminal Tribunal for the former Yugoslavia/ICTY Statute)

IHL (international humanitarian law)

ILC (International Law Commission/ILC Articles and Draft Articles)

ILC(SR) (ILC [Draft] Articles on State Responsibility for Internationally Wrongful Acts)

ISDS (investor-State dispute settlement)

JII (Joint Interpretative Instrument)

JISP (UN Convention on the Jurisdictional Immunities of States and their Property (2004))

JSC (Judicial Service Commission)

MA (Migration Act)

MDP (Maldivian Democratic Party)

MIT (multilateral investment tribunal)

MNDF (Maldives National Defence Force)

NC (Nuremberg Charter (1945))

NGO (non-governmental organization)

NIAC (non-international armed conflict)



Index

More Information

610 **INDEX**

NPS (national policy statement)

NSGT (non-self-governing territory)

OP (Optional Protocol)

PA (Planning Act (2008) (UK))

PCA (Permanent Court of Arbitration)

ROC (Rules of Court) ROP (Rules of Procedure)

SADR (Saharawi Arab Democratic Republic)

Schengen (Schengen Agreement (1985))

SCSL (Special Court for Sierra Leone)

Sea Directive (Council Directive 2001/42/EC on the assessment of the effect of certain plans and programmes on the environment)

TEC (Treaty establishing the European Community) (Treaty of Rome as updated by the Treaties of Amsterdam and Nice)

TEU (Lisbon Treaty on the European Union (2007))

TFEU (Lisbon Treaty on the Functioning of the European Union (2007))

UNC (UN Charter (1945))

UNCITRAL Model Law (UNCITRAL Model Law of International Commercial Arbitration)

UNGA (UN General Assembly)

VCDR (Vienna Convention on Diplomatic Relations (1961))

VCLT (Vienna Convention on the Law of Treaties (1969))

WGAD (Working Group on Arbitrary Detention)

WSC (Western Sahara Campaign UK)

ACHPR Protocol (1998)

reparation for breach: see reparation for breach of treaty (ACHPR Protocol 27(1))

act of State (foreign State acts)

Cherry Blossom case 511-15

comity as basis 511-12

as matter of municipal law/absence of international law obliging restraint 513-14

as non-justiciability/judicial restraint/abstention 511-15

access to court considerations 514-15

justiciability, timing of decision on 512-15

State immunity from jurisdiction distinguished 503-4

ACtHPR

jurisdiction/admissibility: see also admissibility (ACHPR 56 requirements); exhaustion of local remedies

ACtHPR as appeal court from national court, exclusion 126

consideration of compliance with international procedural standards and review of decisions of national courts distinguished 126

interpretation and application of the Charter, the Protocol and any other relevant human rights instruments ratified by the States concerned (ACHPR Protocol 3(1)) 125

preliminary examination of (ROC 39): see ACtHPR Rules of Court by rule, 39(1) (preliminary examination of competence: Court's right to request information/ documentation)

ratione loci (act on territory of Member State) 127

ratione materiae (disputes concerning the interpretation of the Charter, the Protocol and other relevant human rights treaties (ACHPR Protocol 3(1))), jurisprudence



Index

More Information

```
Abubakari 126
        Chacha 125-6
        Guehi 126
        Ivan 126
       Jonas 126
       Josiah 125-6
        Mtingwi 126
        Nguza 126
        Thomas 125-6
        Umuhoza 126
        Vedastus 125-6
     ratione personae (ACHPR Protocol 5(1)) 126-7
     ratione temporis (continuing wrong)
        Vedastus 127
        Zongo 127
ACtHPR Rules of Court by rule
  30 (costs) 139, 140
  39(1) (preliminary examination of competence: Court's right to request information/
          documentation) 125, 127-8
  40 (conditions for admissibility)
     text 127
  40(5) (exhaustion of local remedies) 128-9
  40(6) (filing within a reasonable time) 129-30
admissibility (ACHPR 56 requirements)
  exhaustion of local remedies: see exhaustion of local remedies, limitation of remedies to
          be exhausted to ordinary remedies (ACHPR 56(5))
  timeliness of application (ACHPR 56(6)/ROC 40(6))
     jurisprudence
        Guehi 130
       Ivan 129-30
Josiah 129-30
        .
Rashidi 129-30
        Thomas 130
        Vedastus 129-30
        Wangoko 130
       Zongo 129-30
     "reasonable period of time", relevant factors 130
Australia
  Human Rights (Parliamentary Scrutiny) Act 2011, statement of compatibility
          requirement (s 8) 330
  legitimate expectation
     jurisprudence
       obiter dicta rejection of the Teoh doctrine 326
        Ratu 325-8
        Teoh 325-8
     procedural fairness and 324-8
     treaty as source, effect of contrary indication by the legislature or executive
  Migration Act 1958 by section (including amendments up to and including 2011)
     501 (refusal or cancellation of visa on character grounds) 318
     501(1) (Minister's discretion to refuse a visa) 318
     501(2) (Minister's discretion to cancel a visa) 318
```



Index

More Information

612 INDEX

```
Australia (cont.)
     501(3) (enlivenment of discretion)
        national interest considerations 318
        reasonable suspicion that person does not pass the "character test" 318
     501(3A) (circumstances requiring cancellation of visa) 318
       text 318
     501(6) (character test) 318
     501(6)(a) ("substantial criminal record" as ground for failure to pass the character
     501(6)(e) (convictions relating to sexually based offences involving a child) 319
     501(7) ("substantial criminal record") 318-19
     501(7)(a) ("substantial criminal record": death sentence) 318-19
     501(7)(b) ("substantial criminal record": life sentence) 318-19
     501(7)(c) ("substantial criminal record": imprisonment for 12 months or more)
          318-19
     501CA (cancellation of visa (person serving sentence of imprisonment)), text 319
     501CA(4) (revocation of visa granted to person serving a prison sentence:
          requirements) 317-33
        text 319
  Migration Amendment (Character and General Visa Cancellation) Bill 2014
          (introduction of ss 501(3A) and 501CA into the Act)
     Statement of Compatibility with Human Rights 330
  procedural fairness
     jurisprudence
        DQU16 327-8
       Ratu 324-33
        SZBEL 327-8
        WZARH 331
     legitimate expectation and 324-8
Austria (1955- (Second Republic))
  Civil Procedure Code (ZPO) (Amended) 1983 by section
     41 (costs) 345
  employment contracts (locally engaged staff in diplomatic mission), State immunity
          from jurisdiction (CIL as codified in JISP 11) 340-4
```

Belgium

Čivil Code by article, 2262bis (statutory limitation in actions for damages for extracontractual liability) 285-6
 Criminal Procedure Code, Art. 26 (statute of limitations) 285
 torture (officials' entitlement to immunity ratione materiael functional immunity) 376

CERD (1965), dispute settlement provisions (CERD 22)

```
interpretation
in accordance with customary international law/VCLT 31-3 44-5
context (CERD 11-13) 45
object and purpose (preamble/CERD 2(1)/CERD 4/CERD 7) (rapid elimination of racial discrimination) 46
jurisprudence
Application of CERD (Georgia v. Russia) 44, 48-9
Application of FTC/CERD (preliminary objections) 53, 63-9
```



Index

More Information

```
"not settled by negotiation" 47-50
     futility/deadlock, determination of 69
     "or by the [CERD] procedures", whether cumulative or alternative requirements
          43-7
     ordinary meaning 44
  "procedures expressly provided for [in CERD 11-16]"
     ad hoc Conciliation Commission (CERD 12(1)(a)) 45-6
        challenged State's obligation to respond to Commission's recommendations
          (CERD 13(2)) 46
       report with recommendations (CERD 13(1)) 45-6
     State party's right to bring matter to attention of Committee (CERD 11(1)) 45
       right to bring matter back to the Committee (CERD 11(2)) 45
     "with a view to an amicable solution" (CERD 12(1)(a)/CERD13(1)) 45-6
  travaux préparatoires 68-9
     relevance in absence of ambiguity 46-7
CERD (1965) (obligations (CERD 2 and CERD 5))
  guarantee of right of equality before the law 41
  non-engagement in act or practice of racial discrimination 41
  prohibition and elimination of racial discrimination 41
  protection of Crimean Tatars and ethnic Ukrainians in Crimea 41
CETA (EU-Canada Comprehensive Economic and Trade Agreement) (2016):
          see Costello; and the Table of Treaties
CFSP (TEU 23-41)
  EU courts, exclusion of competence in relation to (TEU 24(1)/TFEU 275) 237
     exception (restrictive measures decisions (TFEU 215)) 238, 266
     Rosneft 238, 266
     Venezuela v. Council 237-8
Cherry Blossom: see Cherry Blossom case (request for an interim interdict) (background);
          Cherry Blossom case (request for an interim interdict) (Court's analysis and
          conclusions); Western Sahara
Cherry Blossom case (request for an interim interdict) (background)
  parties (applicants)
     arguments
        Cherry Blossom phosphate as part of the national resources of Western Sahara 493
        vindication action to keep phosphate within the court's jurisdiction 493
     Front Polisario, status 492
     SADR
        Constitution 17 ("public property") 492
        status 492
  parties (respondents opposing the rule nisi)
     arguments
        compliance with international law 493
        FSIA immunity (implication of laws of Morocco) 493
        Moroccan sovereignty/conduct of operations in compliance with Moroccan law 493
        non-justiciability under act of State doctrine 493
     OCP SA (OCP) 492
     OCP/Phosboucraa's independence of Morocco 504
     Phosboucraa 492-3
  source of phosphate subject of the case 492-3
  text of requested order (1 May 2017) 491-2
  Western Sahara, history, status and rights under international law: see also Western
          Sahara, history and status
```



Index

More Information

```
Cherry Blossom case (request for an interim interdict) (background) (cont.)
     events following Spain's departure (1976-2017) 494-5
     international law as the applicable law 495-6
     Morocco's claim to sovereignty, rejection by the international community 498-9
     ownership and exploitation of natural resources 499-501
     status/special features of the Saharawi people 493
     Western Sahara's right to self-determination 496-8
Cherry Blossom case (request for an interim interdict) (Court's analysis and
          conclusions) 501-18
  act of State/non-justiciability 503-4, 511-15
     access to court considerations 514-16
     comity as basis 511-12
     jurisprudence
        Belhaj 511, 513-14
Kirkpatrick 513
        Kuwait 1 512-13
        Swissborough Diamond Mines 511-12
        Van Zyl 512
     justiciability, timing of decision on 512-15
     as matter of domestic law/absence of international law obliging restraint 513-14
     as matter of judicial restraint 511-15
  Court's conclusions 516-18
  interim interdict, requirements
     a. prima facie right 501-2, 516
        SADR/Front Polisario's establishment of Western Sahara people's sovereignty over
          the phosphate 502
        Webster v. Mitchell 502
     b. apprehension of irreparable harm 501-2
     c. balance of convenience 501-2, 503
     d. absence of any other satisfactory remedy 501-2
  State immunity (bar to jurisdiction) vs act of State (justiciability) 503-4
  State immunity from jurisdiction/indirect impleading/risk of affecting foreign State's
     Court's conclusion (rejection of claim to immunity) 511
     JISP 6(2) 508-11
     jurisprudence
        Belhaj 511, 513-14
        East Timor 506-7
        Monetary Gold 506-7
Child Rights Convention (1989) (CRC), legitimate expectation of compliance with
          (Teoh) 323, 325-8
CJEU competence (TEU 19(1)/TEU 19(3)): see also EU Treaties, Member State
          infringement proceedings (TFEU 259)
  actions brought by a Member State, an institution or a natural or legal person (TEU
           19(3)(a))
     applicability 241-2
        annulment actions (TFEU 264) 241-2
        TFEU 259 inter-State actions for failure to fulfil an obligation under the Treaties
     "legal person": see judicial review/justiciability (EU law) (CJEU) (TFEU 263),
          standing ("[a]ny ... legal person" (TFEU 263(4))), relevant factors
     privileged/semi-privileged applicants distinguished 242 n. 54
```



Index

More Information

```
interpretation of provisions of international law
     agreements between Member States/some Member States and non-Member States
          167-71
     jurisprudence
       Aktiebolaget 170
        Commission v. Belgium (C-132/09) 166, 168-71, 207-8
        Commission v. Ireland 166
        Hv. Council and Commission 166
  obligation to "ensure that in the interpretation and application of the Treaties the law is
          observed" (TEU 19(1)) 166
CJEU, procedural matters
  appeals to from the General Court (CJEU 56-61)
    procedure in case of a successful appeal (CJEU 61) 277-82
  Commission's Legal Services opinion, use of
     access to document published without authorization via website link, effect
     jurisprudence
       Austria v. Council 163, 164, 165, 203
        Hungary v. Parliament 165, 201, 202, 203, 204
        Slovenia v. Croatia 154, 163, 164-6, 189, 200, 201-4, 212
        Sweden and Turco v. Council 165, 201, 204
     public interest considerations 164-5, 203-4
     risk of adverse repercussions on the interest of the institution concerned in seeking
          legal advice 165, 201, 204
     risk of circumventing procedures under Regulation No 1049/2001 (public access to
          EU documents) 165-6, 204
  Rules of Procedure (2012 as amended up to 2018)
     120 (content of the application) 154
     138(1) (costs: loser pays other party's costs) 189, 212
     151 (preliminary objections and issues) 154, 163
  Rules of Procedure (General Court) (2018)
     86 (modification of the application) 221-2, 264, 265
     130 (preliminary objections and issues) 221, 264
comity
  State's right of suit in third country 239, 241
common commercial policy (CCP) (TEU/TFEU)
  as exclusive EU competence (TFEU 3(1)(e)/TFEU 207)
     "foreign direct investment" (TFEU 207(1)) 445-9, 484-5, 486
common commercial policy (CCP) (TFEU 207(1))
  Costello 445-9, 484-5, 486
competences (TEU/TFEU)
  CETA, Chapter 8, Section F, exclusive vs shared competence 398-9, 427-8, 437, 444,
          445-56, 480-1, 484-5
  demarcation of Member State borders (Member State competence) (TFEU 77(4)) 181,
          185-6, 211
  exclusive competence (EU's right of pre-emption/de facto exclusive competence) (TFEU
          2(2)) 448, 450
  Member States' retained powers, constraints
     framing of powers theory 179-80
  sincere cooperation/good faith obligation (TEU 4(3))
     dependence on existence of EU obligation 178
     Slovenia v. Croatia 155-6, 172-3, 176-80, 208
```



Index

More Information

616 **INDEX**

Costello (CETA ratification (Ireland)) (legal background) 396-431

CETA procedural history in date order

Council authorization of EU signature (Decision 2017/37) (28 October 2016) 397

signature (30 October 2016) 396 provisional application pending ratification (CETA 30.7.3) (February 2017) 397

non-applicability to CETA provisions under consideration 397

Dáil tabling of resolution to ratify CETA (15 December 2020)/referral to Oireachtas Committees 397-8

state of play at time of Costello hearing 398

CETA Chapter 1, Section A (definitions and initial provisions)

1.1 (general definitions: parties) 398

CETA Chapter 8, Section A (definitions and scope)

8.1 (definitions)

"covered agreement" 402 "investment" 402-3

"measures", as "treatment" 404-5 "respondent" 414-15

8.2 (scope) 402

8.3 (non-applicability of Chapter VII to investors or investments covered by Chapter 13 (Financial Services)) 402

CETA Chapter 8, Section B (establishment of investments) 403-5

8.4 (market access) 403

8.5 (non-applicability of Chapter VIII to Canada-EU Air Transport Agreement (2009)) 402, 403

CETA Chapter 8, Section C (non-discriminatory treatment) 405-6

8.6.4 ("treatment no less favourable"/national treatment) 404-5

8.7.4 (MFN treatment: "treatment") 404-5 reciprocal nature of obligations 405

CETA Chapter 8, Section D (investment protection)

8.9 (investment and regulatory measures) 405-6

8.9.1 (examples of legitimate policy objectives) 405

8.9.2 (insufficiency of a change of law in itself to constitute a breach) 405-6 JII and 406

8.10 (treatment of investors and of covered investments) 406-7

8.10 (treatment of investors and of covered investments), jurisprudence

Cromane Seafoods 407

Glencar Explorations 407

Opinion 1/17 407

8.10.1 ("fair and equitable treatment") 406-7

8.10.2 (fair and equitable treatment: exhaustive list of measures constituting a breach)

dependence of claim on pointing to a CETA 8.10.2 element 497

non-discriminatory treatment (CETA 8.6/CETA 8.7) distinguished 406-7 potential for conflict with Irish law 407, 425

8.10.2(f) (breach of any elements of the fair and equitable treatment obligation adopted under CETA 8.10.3) 420

8.10.3 (regular review of the content of fair and equitable treatment) 420

8.11 (compensation for listed losses ("treatment no less favourable"/national treatment)) 408

8.12 (expropriation) 409-10

Annex 8-A 408-9

similarities to Irish law 409-10



Index

More Information

```
8.12.1 (permitted expropriation) 410
  8.12.1(c) ("non-discriminatory") 408
  8.12.4 (right to a prompt review/valuation) 401
  8.13 (transfers) 410
  8.14 (subrogation) 410
CETA Chapter 8, Section F (resolution of investment disputes between investors and
       States (ISDS mechanism))
  8.18 (scope) 410, 413
  8.18.1 (scope: right of investor to submit claim against a CETA signatory to
       Tribunal) 410
  8.19 (consultations) 411, 413
  8.20 (mediation) 411, 413
  8.21.1 (disputes with the EU/EU Member States: notification to the EU) 413
  8.22.1(f) (obligation to withdraw/discontinue claims in another forum) 413
  8.22.1(g) (waiver of right to initiate claims in another forum) 413
  8.23 (submission of a claim) 414
  8.23.2 (choice of rules: ICSID, ICSID Additional Facility, UNCITRAL or any other
       by agreement) 414
     effect on enforcement 414
  8.23.5 (hearing by sole member of the Tribunal) 414
  8.25.1 (respondent's consent to the settlement of the dispute by the Tribunal) 414-
     significance for Ireland 414-15
  8.27 (constitution of Tribunal) 410
  8.27.2 (composition of Tribunal) 411
  8.27.4 (Tribunal members' qualifications) 412
  8.27.9 (hearing by sole member of the Tribunal, procedure) 414
  8.27.14 (fees) 411
  8.28 (Appellate Tribunal) 410
  8.28.2 (grounds for appeal) 411
  8.29 (establishment of a multilateral investment tribunal (MIT) and appellate
       mechanism) 411-12
     non-automaticity of establishment of MIT 412
     "with other trading partners" 412
  8.30.1 (ethics: independence of Tribunal members) 412
  8.30.2 (ethics: conflict of interest challenge) 412
  8.30.3 (ethics: challenged member of Tribunal's decision not to resign) 412
  8.31 (applicable law and interpretation) 417, 421-2, 434
  8.31.2 (exclusion of jurisdiction to determine legality of a measure under domestic
       law) 434, 463
  8.32 (claims manifestly without legal merit) 415
  8.33 (claims unfounded as a matter of law) 415
  8.35 (discontinuance) 415
  8.36 (transparency) 415
  8.36.5 (public hearings) 415
  8.37 (information sharing) 415
  8.38.2 (non-disputing party: acceptance of oral or written submissions) 415
     implications for Ireland 415
  8.39.1 (final award)
     invalidation of offending measure, exclusion 416
     limitation to monetary damages and/or restitution of property 416
  8.39.4 (exclusion of punitive damages) 416
```



Index

More Information

618 INDEX

Costello (CETA ratification (Ireland)) (legal background) (cont.)

8.39.5 (costs) 416

8.41 (enforcement of awards) 416-17 Arbitration Act 2010 and 417

8.41.4 (enforcement: applicable law) 417

8.44.3(a) (recommendations for interpretations of CETA to the CETA Joint Committee) 418

CETA's lack of jurisdiction to interpret or rule on domestic law 422

law applicable to CETA (CETA interpreted in accordance with the rules and principles of international law) 422

procedures for adoption of proposed interpretation 418

Chapter 8 powers, exclusive vs shared competence 398-9, 427-8, 437, 444, 445-56, 480-1, 484-5

CETA Chapter 13 (financial services)

13.21(1) (applicability of CETA 8, Section F) 403

CETA Chapter 26 (administrative and institutional provisions)

26.1.1 (ČETA Joint Committee: composition and chairmanship) 417

26.1.3 (Joint Committee's overarching functions) 417-18

26.1.4 (Committee's mandatory functions) 417-18

26.1.4(a) (mandatory functions: supervision and facilitation of the implementation of the Agreement/furtherance of its general aims) 205-6

26.1.4(c) (mandatory functions: identification of ways to prevent problems/resolve disputes) 417-18

26.1.5 (Joint Committee's discretionary powers) 417-18

26.1.5(c) (discretionary powers: consideration/agreement on amendments) 417-18, 420

26.1.5(e) (discretionary powers: binding interpretations) 417-18, 420-1

26.2.1(b) (specialized committees: Committee on Services and Investments) 418

26.3 (Joint Committee's decision-making) 418-21

decisions as "laws" leading to breach of the exclusive law-making power of the Oireachtas (Constitution), whether 420-1, 437, 486

Member States' involvement in the decision-making process 419, 420

26.3.2 (binding nature of Joint Committee's decisions) 419, 420

as core of the dispute between the parties 419

"subject to the completion of any necessary internal requirements and procedures" 419-20, 486

CETA Chapter 30 (final provisions)

30.2.1 (amendments to the Agreement: agreement of parties) 419

30.2.2 (amendment of protocols and annexes: decision of the Joint Committee) 419, 420

exclusion of Chapter 8 annexes 20

role of the parties 419-20

30.6 (private rights) 422

exclusion of any direct effect of CETA 417, 422, 437, 473

30.6.1 (legislation conferring right of action against State as matter for that State) 422

30.7.1 (parties' approval of Agreement "in accordance with their respective internal requirements and procedures") 396, 398-9

CETA Joint Interpretative Statement (JII)

legitimate policy objectives 405-6

CETA Statement 36 (Commission and Council) (CETA's objective as "a major reform of investment dispute resolution") 397



Index

More Information

INDEX 619

| Constitution 1 (affirmation of inalienable, indefeasible and sovereign right to make own choices) 423, 424, 443-4 |
|---|
| 5 ("Ireland is a sovereign, independent, democratic State") 423-4 |
| 6 (Government powers) 423-4, 438, 443-4 |
| 15.2.1° (law-making powers: Oireachtas) 399, 419-20, 423-6, 429-30, 436-7, 482- |
| 5, 486 "laws for the State" 420, 423, 425-6, 429-30, 437, 486 |
| 28 (the Government) 444 |
| 28.4.1° (responsibility of Government to Dáil) 428-9 |
| 29 (international relations) 419-20, 423-6, 428, 429-30, 436-7, 444, 482-5, 486 29.1 (devotion to peace and friendly cooperation founded on international justice and morality) 445 |
| 29.2 (pacific settlement of international disputes) 445 |
| 29.3 (generally recognized principles of international law/customary international law) 445 |
| 29.4 (external relations: executive powers) 441 |
| 29.4.1° (exercise of Art. 28 executive power) 399-400 29.4.2° (international agreements: adoption of procedures used by other members of |
| a group or league of nations) 429-30 |
| 29.4.3° (authorization of accession to the European Communities) 427, 438-9 |
| 29.4.4°-20.4.9° (28th amendment insertion) 448 |
| 29.4.5° (ratification of the Treaty of Lisbon) 448 29.4.6° (non-invalidation of laws, act and measures necessitated by EU membership) |
| 427, 439, 481 |
| 29.4.7° (EU: exercise of options/discretions) 427 |
| 29.4.8° (State's right to agree to EU decisions, regulations and other acts) 427 29.4.10° (ratification of the Treaty on the Economic and Monetary Union (2012)) |
| 427 29.5 (international agreements) 427, 428-9 |
| 29.5.1º (international agreements: submission to Dáil) 399 |
| 29.5.2° (international agreements involving a charge on public funds) 399-400, 427, 439, 481 |
| 29.6 (international agreements: "as part of the law of Ireland (Republic)": |
| determination by Oireachtas) 399, 428-9, 432-4, 436 29.8 (extraterritorial jurisdiction) 429 |
| 34.1 (administration of justice: courts/judges) 399, 424-6, 436, 472-3, 484, 486 |
| 34.3.1° (High Court jurisdiction: determination of the issues) 472 |
| Court's conclusions summarized 485-6 |
| refusal of relief sought 487 |
| the issues alleged risk of CETA having direct effect 432-7 |
| ISDS mechanism (CETA Chapter 8, Section F), summary 400-1 |
| key issue (form of ratification for constitutional validity/need for a referendum) 397, 399, 423 |
| parties' arguments: Note: the parties' arguments have been dealt with in detail |
| throughout the judgment and are therefore not addressed in the index. |
| standard of review 430-2 "disregard test" 430-2 |
| presumption of constitutionality/plaintiff's burden of proof 430, 485 |
| Costello (CETA ratification (Ireland)) (Court's analysis and decision) 432-87 |

administration of justice/potential establishment of an MIT/Constitution 34.1 456-66



Index

More Information

```
Costello (CETA ratification (Ireland)) (Court's analysis and decision) (cont.)
     CETA Tribunal's right to award damages to an individual for breach of CETA,
          conflict with Irish law 461
     characteristic features
       CETA Chapter 8, Section F, compliance with (McDonald/McKechnie J test) 460-1
       McDonald 457
       Zalewski (McKechnie J dissenting) 457
       Zalewski (O'Donnell J concurring) 457-9
     close scrutiny requirement 458-9
     Constitution 34.1, scope 472-3, 486
     Court's conclusions
       Canadian investor's decision to claim under CETA rather than Irish law, absence
          of injury to Irish jurisdiction 473, 474
       non-justiciability in Irish courts of dispute determinable by CETA Tribunal 473,
     possibility of parallel actions in Irish courts and before the CETA Tribunal, effect on
          Irish jurisdiction 461-6, 486
       Opinion 1/17 462-6
  alleged risk of CETA having direct effect in breach of Constitution 29.6 (responsibility
          of Oireachtas for international agreements) 432-7
     absence of plans for incorporation, effect 432
     counter-indications
       applicability in jurisdictions where there is no Constitution 29.6 equivalent 434
       CETA 8.31.2 (exclusion of jurisdiction to determine legality of a measure under
          domestic law) 434, 485-6
       CETA 30.6 (exclusion of any direct effect) 433-4, 437, 473, 485-6
     Court's conclusions
       limitation of CETA's impact to the international level 436, 485-6
       non-violation of Constitution 15.2.1°/Constitution 34 436-7, 486
     jurisprudence
       Conway (Aarhus Convention) 432-3
       J. McĎ v. PL 434-5
       O Laighleis 434
     ratification, insufficiency in itself to have legal effect in Irish law 434, 485-6
       treaties creating rights for individuals, applicability of same rules 434
  alleged threat to Irish sovereignty 437-45
     jurisprudence
       Crotty 437-45
Pringle 439-40, 444
     pacific settlement of international disputes (Constitution 29.2)
       English and Irish texts compared 445
       "international" 445
       non-applicability to investor/State disputes 445
     technical and policy-making treaties distinguished 440-4
  CETA Tribunal's status under Constitution 37 474-6
     authorized by law" 474-5
     "limited functions and powers" 475-6
  competence of the EU/Member States 445-56
     CETA as a mixed agreement 445-6
       direct investment as an exclusive EU competence 446, 448-9, 480
       division of competences/CETA Chapters 8 and 36 as main disputed areas 446
       indirect investment as a shared competence 446, 448-9, 486
```



Index

More Information

```
jurisprudence
       AETR 451
        Opinion 2/15 ("Singapore Opinion") 449, 451-3
     TEU 5(2) (competences conferred on the EU, limitation of action to) 446
     TFEU 2 (competences explained) 446-8
        potential for EU to exercise shared competence, recognition (Constitution
          29.4.4-29.4.9) 448
        shared competence 447-8
     TFEU 2.2 (EU's exercise of shared competence, need for legally binding acts) 448,
          450
     TFEU 3(1)(e) (areas in which the EU has exclusive competence: CCP) 446
     TFEU 3(2) (third-country treaties) 451-2, 480-1
     TFEU 6 (EU competence to support, coordinate or supplement Member State
          actions) 449-50
     TFEU 63 (free movement of capital) 449-53
        general competence of EU in relation to Canadian investment in Ireland/
          repatriation of profits 449-50
     TFEU 136 (euro) 439
     TFEU 207(1) ("foreign direct investment") 448-9
     TFEU 216(1) (international agreements: conditions governing conclusion) 448
     TFEU 218 (international agreements: procedure for conclusion) 448, 452
     TFEU 288 (legal acts) 448
  enforceability
     Arbitration Act 2020 by section
        23 (enforceability of arbitral award other than those under s 25) 468
        25 (non-applicability to ICSID awards) 468-71
     CETA Tribunal's exercise of jurisdiction as administration of justice 471-2, 486
     justiciability issues 471-4
        McDonald/O'Donnell J 466
        Micula 469-70
        Zalewski (O'Donnell J) 472
  ratification of CETA, whether "necessitated" by EU membership (Constitution 29.4.6°)
          478-85, 486
     jurisprudence
        Crotty 479
        Meagher 482-3
        Opinion 1/17 479
        Opinion 2/91 479-80, 482
     "necessary" (Constitution 29.4.6°)
       TFEU 3(2)/TFEU 216(1), relationship with 481
       whether "mandatory" 481-4
     sincere cooperation duty (TEU 4(3)), effect 479, 481, 484
     hypothetical arguments (Cahill v. Sutton and Costello distinguished) 477-8, 485
     plaintiff's right as non-investor to challenge CETA's compliance with equality of
          treatment obligations 477-8, 485
costs (ACHPR): see reparation for breach of treaty (ACHPR Protocol 27(1))
costs (CJEU) (ROP 87) (pre-2012)
  unsuccessful party 189
Country X v. A
  background
     parties' arguments
```



Index

More Information

622 INDEX

```
Country X v. A___ (cont.) applicant 521-2
        respondent 521
  procedural history in date order
     initiation of arbitration (BIT 9) 520
     appellant's challenge to the jurisdiction (14 August 2017) 521
     respondent's request for appellant to pay security for potential costs (BGG 62(2))
     appellant granted leave to comment on the request for security (31 August 2017)
          521
     appellant's application for dismissal of request for security (18 September 2017) 521
     respondent's maintenance of his request (25 September 2017) 521
customary international law (CIL), formation/requirements
  Functional Immunity of Foreign Officials 370-1
Czech Republic (1992-)
  Civil Procedure Code (CPC) by section
     10a (Supreme Court as court of extraordinary appeal) 351, 360
     236(1) (extraordinary appeal as challenge to final decision of appellate court) 351,
     237 (admissibility of extraordinary appeal) 351-2, 360
     240(1) (extraordinary appeal: time limits) 351, 360
     243a (review without hearing) 361
     amendments (2017) 351
  International Private Law Act 2012 (in force until 13 December 2015)
     7(1) (State immunity in respect of official acts) 352, 361
        applicability to property 352
     7(2) (exceptions under CIL/treaty to State immunity) 352, 361
     7(4) (applicability of ss 7(1) and 7(3) to procedural acts including enforcement) 361,
          362-3
  State immunity: see also International Private Law Act 2012 (in force until 13 December
          2015) above
     State immunity from execution 357-65
     State immunity from jurisdiction
        development of functional concept 353
        JISP as generally accepted point of departure 352
        limitation to acta jure imperii 353
        Premises of a Diplomatic Mission 347-55
diplomatic functions/"consular activity" (VCDR 3(2)) 343
diplomatic functions/"diplomatic activity" (VCDR 3(1))
  ascertainment/reporting of conditions and developments in the receiving State (VCDR
          3(1)(d)) 343-4
  promotion of commercial and economic relations (VCDR 3(1)(e)) 343-4
diplomatic immunity from jurisdiction (VCDR 31)
  State immunity and
```

diplomatic premises, inviolability (including VCDR 22)

action for compensation for unjust enrichment, permissibility 348-55

"diplomatic premises" (VCDR 1(i)), residence of diplomatic agent/member of embassy

distinction 382

staff 354

State as party to dispute 382



Index

More Information

```
duty to protect (VCDR 22(2)) 354
  duty to refrain from entry (VCDR 22(1)) 354
  immunity from search, requisition, attachment or execution (VCDR 22(3)) 354-5
  Premises of a Diplomatic Mission Case: see Premises of a Diplomatic Mission Case
DRC v. Belgium
  background
     complaint (alleged breach of ECHR 6(1)/ECHR 13) 286
     relevant domestic law
        CC 2262bis (statutory limitation in actions for damages for extra-contractual
          liability) 285-6
        CPC 26 (statute of limitations) 285
     status of applicant (minority shareholder in DRC mining company/liquidation) 284-
  Court's analysis
     DRC as a natural person/group of individuals (ECHR 34), exclusion 286
     DRC as non-governmental organization, exclusion 286-7: see also ECtHR, individual
          applications ("victim" (ECHR 34 [25(1)])), non-governmental organization,
          classification as
     inter-State complaint (ECHR 33), exclusion 286
  Court's decision (inadmissibility of application for non-compatibility ratione personae
          (ECHR 35(3)(a)/ECHR 35(4))) 287
ECtHR, individual applications ("victim" (ECHR 34 [25(1)]))
  non-governmental organization, classification as
     decentralized State authorities, exclusion 287
     governmental organizations distinguished 286-7
     jurisprudence
        DRC v. Belgium 286-7
        Islamic Republic of Iran Shipping Lines 287
        Ljubljanska banka 287
        Radio France 286, 287
     legal persons exercising public power/managing a public service under the control of
          the authorities 286-7
       relevant factors 287
effective remedy before national authority, need for/examples (ECHR 13/ICCPR
          2(3))
  full reparation 314
  legislative changes to ensure conformity with obligations 314
  quashing of conviction 314
  restoration of political rights 314
embassy or consular bank account/funds, immunity from execution/attachment
  State Immunity from Enforcement 357-65
embassy or consular bank account/funds, purpose/use
  ambassador's affidavit/executive certificate, conclusiveness 364-5
employment contracts between a State and an individual for work in third State,
          exclusion of immunity (JISP 11)
  as customary international law 340-4
     jurisprudence
       Ahmed Mahamdia 342-3
        Cudak 342
        Sabeh El Leil 342
```



exclusion of immunity (JISP 11) (cont.)

Index

More Information

624

US Embassy Employee Case 335-45
recognition of its status as a codification
CJEU jurisprudence 342-3
ECtHR jurisprudence 342
legislative materials 342
exceptions (JISP 11(2))
determination of sovereign nature of assigned functions 343-4
VCDR 3(1)(d) (ascertainment/reporting of conditions and developments in the receiving State) 343-4
VCDR 3(1)(e) (promotion of commercial and economic relations) 343
VCDR 38(2) (non-interference obligation) 343

INDEX

employment contracts between a State and an individual for work in third State,

classification as 543-4
employment contracts (locally engaged staff in diplomatic or consular mission)
US Embassy Employee Case 335-45

JISP 11(2)(a) ("exercise of governmental authority") 343

EU common fisheries policy

maritime spatial planning (Directive 2014/89/EU/Implementing Regulation No 404/2011) 149-50, 156-7, 172, 187-8, 190-1, 194-5, 209

Regulation 1380/2013 (General rules on access to waters) 149, 172, 184-6, 208-9: see also Slovenia v. Croatia (TFEU 259 proceedings)

EU law

territorial scope of the Treaties (TFEU 355 [TEC 299]) 169-70, 180, 181, 183-4, 211

demarcation of Member State borders (TFEU 77(4)) 181, 185-6, 211

EU law, interpretation

applicable law

international law/VCLT 241

holistic and pragmatic approach 253-60

Kadi and Al Barakaat International Foundation 256 n. 86

EU legal order

autonomy/independence 241, 242

national courts' role in protecting/uniformity of interpretation across the EU 270

common values (TEU 2) as underlying principles

jurisprudence

Slovenia v. Croatia 176-80

link with TEU 7 (severe risk of a serious breach by a Member State of TEU values), dependence on existence of EU obligations 177

mutual trust/sincere cooperation (TEU 4(3)): see competences (TEU/TFEU), sincere cooperation/good faith obligation (TEU 4(3))

rule of law including dependence on link with TEU 19

applicability in TFEÜ 259 proceedings 176-7

applicability in TFEU 263(4) proceedings 246-7, 271-2

exclusion in proceedings ancillary to purported infringements of EU law 176

rule of law including dependence on link with TEU 19, jurisprudence

Associação Sindical dos Juízes Portugueses 176

Bank Refah Kargaran 272

Commission v. Poland (Independence of the Ordinary Courts) 177

Commission v. Poland (Independence of the Supreme Court) 176

Deficiencies in the system of justice 176



Index

More Information

```
Slovenia v. Croatia 176
        Venezuela v. Council 246-7, 271-2
  EU legislative acts, definition (TFEU 289(3)), status of treaties concluded by the EU
          450-6
  EU Regulations in date/number order
     1049/2001 (public access to EU documents) 165-6, 194
     1224/2009 (control system for ensuring compliance with the common fisheries
          policy rules) 156-7, 172, 184, 187-8, 195, 207, 209
     2017/2063 (restrictive measures (Venezuela)): see Venezuela v. Council
  international law, compliance obligation (TEU 3(5))
     customary international law as benchmark (ATA principles) 167-8
     limitation of obligation to
        CIL obligations 168, 174
        a convention in which the EU has assumed the powers previously exercised by the
          Member States in the relevant field 168, 174
        existence of obligations integral to EU law 168, 173-5
        incorporation of third-party obligations as an integral part of EU law 174-5
        international agreements concluded by the EU pursuant to the provisions of the
          Treaties 168
        summary 168
  international law, compliance obligation (TEU 3(5)), jurisprudence
     ATA 168
     Commission v. Germany (C-58/16) 167
     Commission v. Poland (Independence of the Supreme Court) (AG Tanchev) 167
     Commission v. United Kingdom (416/85, EU:C:1988:321) 167
     Front Polisario 168
     Poulsen and Diva Navigation 168
     Slovenia v. Croatia 167-8, 173-5
     WSC 167-8
EU Member States, rights and obligations under agreements entered into before
          accession/entry into force of the Treaty of Rome (TFEU 351)
  dependence of EU obligations under on full transfer of Member State powers to EU
EU Treaties, interpretation or application (TFEU 344/TEC 292) (exclusive
          jurisdiction): see also CJEU competence (TEU 19(1)/TEU 19(3)),
          interpretation of provisions of international law
  binding effect of Tribunal awards as "between the disputing parties and in respect of that
          particular case" (CETA 8.41.1) 466
  territorial scope: see EU law, territorial scope of the Treaties (TFEU 355 [TEC 299])
EU Treaties, Member State infringement proceedings (TFEU 259)
  admissibility (CJEU 21/ROP 120) 162-3
  jurisdiction
     failure to fulfil "an obligation under the Treaties" requirement 158-9, 167
       motivation, relevance 167
       secondary legislation, inclusion 167 "Treaties" 167
     obligations ancillary to separate dispute outside the Court's jurisdiction, exclusion
          157-8, 168-9, 207-8
     validity and effects of arbitration based on treaty not integral to EU law 158
  jurisprudence
     Austria v. Germany 146 n. 2
     Belgium v. Spain 146 n. 2
```



Commission v. Belgium 158, 168

Index

More Information

626

France v. UK 146 n. 2 Hungary v. Parliament 202, 203, 204 Slovenia v. Croatia (TFEU 259 proceedings) 145-212: see also Slovenia v. Croatia (TFEU 259 proceedings) Spain v. UK 146 n. 2 motive, relevance 167 EU treaties with third parties ("international agreements" (TFEU 216-19)) Community competence (pre-TEU/TFEU): see Costello EU exclusive competence to conclude/grounds (TFEU 3(2)/TFEU 216(1)) AETR principle (implied exclusive competence) 451 free trade agreements: see Costello jurisprudence Bosphorus Queen Shipping 168 Case C-13/00 Commission v. Ireland 453-4 Case C-246/07 Commission v. Sweden 454 Case C-266/03 Commission v. Luxemburg 454 Case C-433/03 Commission v. Germany 454 Costello: see Costello (CETA ratification (Ireland)) Opinion 2/15 (EUSFTA) 449, 451-3 *WSC* 168 executive certificate, conclusiveness in relation to foreign relations matters (Vedastus) 135-6 exhaustion of local remedies claim on behalf of national and alleged breach of treaty distinguished 52-3 customary international law (CIL) 52-3 limitation of remedies to be exhausted to ordinary remedies (ACHPR 56(5)) 128-9 as opportunity to redress wrong 85-7

INDEX

EU Treaties, Member State infringement proceedings (TFEU 259) (cont.)

fair and equitable treatment of alien

CETA $\vec{8}$.10 (treatment of investors and covered investments) 400-1, 406-7, 420, 425, 464-6

Costello 400-1, 406-7, 420, 425, 464-6

fair hearing (right to be heard) (ACHPR 7)

evidence

establishment of alibi 133-4

identification of suspect, safeguards 132-3

limitation of Court's role to 135

jurisprudence

Abubakari 132

Isiaga 132

Ivan 132, 133

Josiah 132

Vedastus 131-6: see also Vedastus v. Tanzania (ACtHPR)

legal aid/assistance, omission from ACHPR/ICCPR 14(3)(d) as alternative: see legal assistance/legal aid (ACHPR 7(1)(c))

manifest error/miscarriage of justice requirement 133, 134

margin of appreciation 132

fair hearing/rights of the accused (ICCPR 14)

competent tribunal, right to 311-12



Index

More Information

```
legal representation: see legal representation, right to (ICCPR 14(3)(b))
  prompt notification of charges (ICCPR 14(3)(a)) 311-12
Financing of Terrorism Convention (1999) (FTC)
  definition/elements of terrorism (FTC 2(1))
     "any person", State official as 31, 56-61, 100-1, 104-5, 111-13, 117
     "funds" (FTC 1(1)) 31, 72, 73
      "with the intention or in the knowledge" 32
  dispute settlement/submission to arbitration (FTC 24(1)) 24-37, 54-63
      which cannot be settled through negotiation" 32-6
        genuine attempt/relationship to the subject matter of the dispute/substantive
        provisions of the treaty 33-5 "within a reasonable time" 33-5
  object and purpose (effective measures for prevention/suppression of the financing of
          terrorism) 11-12, 30
  parties to
     Russia 23
     Ukraine 23
  State responsibility and
     acts other than State financing of terrorism 30-1
     exclusion of State financing of terrorism from Convention 30-1, 63, 110-11
        lawfulness of act distinguished 31
        travaux préparatoires 30-1
summary of provisions 30

Financing of Terrorism Convention/CERD Case (Ukraine v. Russia) (Preliminary
          Objections), background
  jurisdictional bases invoked by Ukraine
     CERD 22 9, 23-4
     FTC 24(1) 9, 23-4
  parties' positions (general) (Ukraine)
     claims (CERD)
        Application 14-15
        Memorial 16-17, 18-19
     claims (FTC)
        Application 13-14
        Memorial 14-16, 17-18
  procedural history in date order
     Application (Ukraine)/request for provisional measures (16 January 2017) 9
     appointment of ad hoc judges (20 January 2017) 9
     Order on provisional measures (19 April 2017) 9-10
     exchanges between the Court and the parties relating to the provisional measures
          (17 May 2017-29 March 2019) 9-10
     Ukraine's allegation of Russia's non-compliance with the provisional measures Order
          (19 April 2018) 10
     Russia's objections to jurisdiction and admissibility (12 September 2018) 11
     suspension of proceedings on the merits (17 September 2018) 11
     Court's agreement to making public certain of the written pleadings and documents
           (ROC 53(2)) 12
     Court's rejection of Qatar's request for copies of Ukraine's Memorial/Russia's
          preliminary objections (ROC 53(1)) 11
     public hearings (3-7 June 2019) 12
  subject matter of the dispute (Court's analysis and conclusion) 22
     determination, Court's responsibility for 20
```



Index

More Information

```
Financing of Terrorism Convention/CERD Case (Ukraine v. Russia) (Preliminary
Objections), background (cont.)
        issues not included in Ukraine's request 22
        relevant factors 20
     requirements
        "precise nature of claim" (ICJ 40(1)/ROC 38(1)) 20
         succinct statement of facts and grounds" (ROC 38(2)) 20
     whole dispute/separability of elements 21-2
  subject matter of the dispute (parties' positions)
     Russia 21
     Ukraine 20-1
Financing of Terrorism Convention/CERD Case (Ukraine v. Russia) (Preliminary
           Objections), Court's analysis and decision 24-55
  admissibility (exhaustion of local remedies)
     claim on behalf of national and alleged breach of treaty distinguished 52-3
     Court's conclusion 54
     parties' arguments
        Russia 50-1
        Ukraine 51-2
  jurisdiction ratione materiae (CERD 22) ("dispute with respect to the interpretation or
          application of this Convention")
     Court's analysis
        conclusion 46
        object and purpose (Preamble/CERD 2(1)/CERD 4/CERD 7) (rapid elimination
          of racial discrimination) 46
     parties' arguments
        Russia 37-8
        Ukraine 38-40
  jurisdiction ratione materiae (CERD 22) ("falling within the provisions" requirement
          (Oil Platforms test)) 41, 47-50
     conclusion 41
     Court's conclusion 50
     Crimean Tatars and ethnic Ukrainians in Crimea as ethnic groups protected by
          CERD 41
     cumulative or alternative requirements, whether 43-7
     futility/deadlock, determination of 50
     matters for potential consideration at the merits stage (purpose or effect of the
          measures alleged by Ukraine) 41
     obligations (CERD 2(1)/CERD 5) 41
     parties' arguments
        Russia 47
        Ukraine 47-8
     "procedures expressly provided for [in CERD 11-16]" 45-6
  jurisdiction ratione materiae (CERD 22) ("which is not settled by negotiation or by the
          procedures expressly provided for")
  Application of CERD (Georgia v. Russia) 48-9 jurisdiction ratione materiae (FTC 24(1)) (dispute concerning the interpretation or
          application of the FTC) 29-36
     Court's task
        "falling within the provisions" requirement (Oil Platforms test) 20-32
        limitation to consideration of questions of law and fact relevant to the objection to
          jurisdiction 30, 31-2
```



Index

More Information

```
matters for potential consideration at the merits stage 31, 32
     definition/elements of terrorism (FTC 2(1))
        "any person"/State official as 31
        "funds" 31
        "with the intention or in the knowledge" 32
     interpretation of FTC 24(1)
        applicability of normal rules (VCLT 31-3) 30
     parties' arguments
        Russia 24-7, 32-3, 35-6
        Ukraine 27-9, 33, 35-6
     State responsibility considerations 30-1
        lawfulness of act and exclusion from the Convention distinguished 31
     summary of FTC provisions 30-1
  jurisdiction ratione materiae (FTC 24(1)) ("which cannot be settled through
     negotiation") 33-5
Court's conclusion 36
     genuine attempt/relationship to the subject matter of the dispute/substantive
           provisions of the treaty 33-5
     "within a reasonable time" 33-5
Financing of Terrorism Convention/CERD Case (Ukraine v. Russia) (Preliminary
           Objections), separate opinions and declarations
  Cançado Trindade J (separate opinion) 70-96
     summary of the argument 94-6
     compromissory clause
        interpretation criteria 75-9
        in relation to a human rights convention 79-81
     concluding considerations 89-94
     Court's mechanical and outdated approach to jurisdiction 72-4
     exhaustion of legal remedies in relation to human rights protection, examples of
           misapplication
        Application of CERD (Georgia v. Russia) 81-4
Application of FTC/CERD (preliminary objections) 84-5
        as opportunity to redress wrong 85-7
     protection of the vulnerable/against arbitrariness 87-9
  Donoghue J (declaration) (jurisdiction and merits, importance/difficulty of maintaining
           distinction) 96-103
     "any person" (FTC 2(1)), State official as 100-1
     "falling within the provisions" requirement (Oil Platforms test) 96-102
  Pocar J (separate opinion) 110-15
      "any person" (FTC 2(1)), State official as 111-13
     exclusion of State financing of terrorism from FTC 110-11
     "falling within the provisions" requirement (Oil Platforms test) 110-13
     "funds" as matter for determination at the merits stage 113-15
  Robinson J (declaration)
      "any person" (FTC 2(1)), State official as 104-5
     State financing of terrorism, applicability of FTC 103-6
     terrorism, definition
        failure to agree on as impediment to comprehensive treaty 106-9
        FTC 2 offences, need for caution in describing as 108-9
     terrorism treaties, review of attempts to draft 106-9
     travaux préparatoires, need for caution in use of 103-6
  Skotnikov, judge ad hoc (dissenting) 115-20
```



Index

More Information

```
Financing of Terrorism Convention/CERD Case (Ukraine v. Russia) (Preliminary
Objections), separate opinions and declarations (cont.)
      'any person" (FTC 2(1)), State official as 117
     "by negotiation or by the procedures", whether cumulative or alternative
          requirements 119-20
     CERD claims, plausibility requirement 117-19
     exclusion of State financing of terrorism from FTC 117
"falling within the provisions" requirement (Oil Platforms test) 115-20
  Tomka J (separate opinion) 59-70
     jurisdiction ratione materiae (CERD 22)
        "by negotiation or by the procedures", whether cumulative or alternative
          requirements 64-9
        Court's cursory treatment of 63-4
        futility/deadlock of negotiations 69
        matters for determination at the merits stage 64
         procedures expressly provided for [in CERD 11-16]" 64-9
     jurisdiction ratione materiae ("falling within the provisions" requirement (Oil
          Platforms test)) 59-64
     jurisdiction ratione materiae (FTC 24(1))
        "any person" (FTC 2(1)), State official as 59-61
        Court's failure to establish whether the acts complained of fell within the FTC
           61-3
        "funds" as matter for determination at the merits stage 62, 63
     State responsibility for breach of a treaty vs breach of an obligation 69-70
        "breach of international obligation" as preferred term 69-70
  Xue VP (dissenting) (jurisdiction under FTC 24(1)) 55-9
      "any person" (FTC 2(1)), State official as 56-9
     jurisdiction ratione materiae, dependence on identification of subject of dispute 55-6,
     State responsibility considerations 56-8
     whole dispute/separability of elements 55-6
France, torture (officials' entitlement to immunity ratione materiae/functional immunity)
          376-7
freedom of movement (ICCPR 12)
  right to enter own country (ICCPR 12(4))
     arbitrary deprivation
        factors militating against classification as/parliamentary intentions 328-31
     jurisprudence
        Amohanga 327
        Nystrom 328-9, 330-1
        Ratu: see Ratu
freedom to provide services (TFEU 56)
   freedom to receive services as corollary 256 n. 84
     Dijkman and Dijkman-Lavaleije 256 n. 84
     Luisi and Carbone 256 n. 84
      Venezuela v. Council 256 n. 84
Friends of the Earth (UK Supreme Court) (climate change), background
   facts in date order
     adoption of the Climate Change Convention (14 June 1992) (CCC) 534
     Climate Change Act 2008 (26 November 2008) (CCA) 534
     Airports Commission: establishment/terms of reference (1 September 2012) 533,
          546-7
```



More Information

INDEX 631

alternatives: NWR Scheme/ENR Scheme/GDR2 Scheme 534

Aviation Policy Framework (March 2013) 546-7

Airports Commission: interim report (17 December 2013) 533-4

Airports Commission: Final Report (1 July 2015) 534

Paris Agreement: conclusion (December 2015) 534-5, 553

Government announcement on state of play of Airports Commission's options (14 December 2015) 534

intention to use NPS as mechanism for establishing policy framework 534

Ministerial statement on need to enshrine the Paris goal of net zero emissions in UK law (14 March 2016) 554

further Ministerial statement on need to enshrine the Paris goal of net zero emissions in UK law (24 March 2016) 554

CCC's conclusion that a new target would be needed "but not now" (16 September 2016) 554

CCC's Report: UK climate action following the Paris Agreement (13 October 2016)

"Do not set new UK emissions targets now" 554-5

Government's announcement of choice of Heathrow runway scheme (NWR) (25 October 2016) 535

launch of consultation on draft ANPS (2 February 2017) 535

Plan B Earth judicial review proceedings/dismissal (December 2017–22 January 2019) 555-6

Government's "A Green Future: Our 25 Year Plan to Improve the Environment" (11 January 2018) 556

"Beyond the Horizon: The Future of UK Aviation" (April 2018) 556-7

Government's announcement to Commonwealth Heads of Government Meeting of intention to seek CCC's advice on PA implications (17 April 2018) 556 publication of final "Appraisal of Sustainability: Airports National Policy Statement"

(June 2018) 535

UK's final comments on draft IPCC special report on the impacts of global warming (June 2018) 556

"Government response to the consultations on the ANPS: Moving Britain Ahead" (5 June 2018) 535

CCC exchanges with the Secretary of State about aviation emissions in the draft ANPS (14-20 June 2018) 557

résumé of evidence relating to before the Divisional Court 558-9

parliamentary vote on proposed ANPS (25 June 2018) 535, 557-8 Airports National Policy Statement (26 June 2018) (ANPS) 536, 558

IPCC special report on the impacts of global warming (8 October 2018) 556,

Government's Clean Growth Strategy (12 October 2018) 555

"Aviation 2050: The future of UK aviation" (DoT) (December 2018) 559-60

"International aviation and the Paris Agreement temperature goals" (Lee/DoT) (December 2018) 559-60

Parliamentary declaration of a climate and environmental emergency (1 May 2019)

CCC's "Net zero: The UK's contribution to stopping global warming" (2 May 2019)

Climate Change Act (2050 Target Amendment) Order 2019 (26 June 2019)

CCC advises bringing international aviation and shipping emissions formally within the UK's net-zero statutory 2050 target (24 September 2019) 560



Index

More Information

632 INDEX

Friends of the Earth (UK Supreme Court) (climate change), background (cont.)

CCC's 2020 Progress Report to Parliament ("Reducing UK emissions") (25 June 2020) 560

legislative instruments

EIA Regulations 2017 547

Infrastructure Planning (EIA) Regulations 2017 (SI 2017/572) by regulation

12 (publication of and consultation on preliminary environmental information) 541

Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) by rule 8 (timetable) 542

10 (written representations) 542

Planning Act 2008 (PA)

2007 White Paper as basis/outline of recommendations 538-9

Planning Act 2008 (PA) by section

5(3) (NPS: pre-designation appraisal of sustainability) 540

5(4) (NPS: pre-designation parliamentary scrutiny (AoS)) 540

5(5) (NPS: possible content) 551

5(5)-(8) (content of NPS), text 539-40

5(7) (NPS: inclusion of reasons for the policy) 540

5(8) (NPS: inclusion of explanation of relationship between the NPS statement and the Government's climate change policy) 540

7 (consultation and publicity), text (extracts) 540-1

9 (parliamentary requirements) 540

9(2) (parliamentary requirements: SoS "must lay the proposal before Parliament") 541

9(4) (parliamentary requirements: scrutiny of both Houses/resolutions) 541

9(8) (parliamentary requirements: SoS "must lay the proposal before Parliament") 541

10 (sustainable development), text (extracts) 540

10(3)(a) (NPS functions (PA 5/PA 6): need for regard to mitigating and adapting to climate change) 567

13(1) (NPS legal challenges: conditions (claim for judicial review/six-week time limit)) 544

31 (consent requirement) 541

37 (applications for DCOs) 541

37(3)(c) (applications for DCOs, requirements: consultation report) 541

42(c) (pre-application procedure: duty to consult Greater London Authority) 541

47 (pre-application procedure: duty to consult the local community) 541

48 (pre-application procedure: duty to publicize) 541

49 (pre-application procedure: duty to take account of responses to consultation and publicity) 541

55(3) (acceptance of applications: requirements) 541

55(4)(a) (acceptance of applications: regard to the s 37(3)(c) consultation report) 541

56 (notifying persons of accepted application) 542

60(2) (invitation to submit local impact report) 542

84(8) (Examining Authority's right to refuse to allow representations at hearing)

87(3) (Examining Authority's right to disregard representations) 543

98 (timetable for examining and reporting on application) 542

102(a) ("interested party") 542

104(2) (decision in cases where NPS has effect: materials to be considered) 542-3



Index

More Information

INDEX 633

| 104(3) | (ministerial | decisions: | requirement | to take I | NPS into | account) | 551 |
|--------|--------------|------------|-------------|-----------|----------|----------|-----|
| | | | .* . | | | | _ |

104(7) (ministerial decisions: where adverse effect would outweigh benefits) 551

106(1) (ministerial decisions: matters which may be disregarded) 543, 551

106(2) (matters which may be disregarded: including evidence) 543 120(1) (development orders: possible inclusion of requirements) 543

120(3) (development orders: inclusion of provisions relating/ancillary to development) 543-4

120(4) (potentially applicable provisions (Schedule 5, s 120(4))) 543-4

SEA Directive by article

Recital 1 (precautionary principle) 547

Recital 4 (environmental assessment) 548

Recital 9 (procedural nature of Directive) 548

Recital 17 (matters to be taken into account before submission to the legislative procedure) 548

1 (purpose: promotion of sustainable development) 548

2(b) (environmental assessment: definition) 548

2(c) (environmental report: required information) 549

3(1) (environmental assessment: scope) 548

3(2) (environmental assessment: plans and programmes to which applicable) 548

3(4) (environmental assessment: obligation to consider which additional plans and programmes might have environmental effects) 548

4(1) (environmental assessment: "during the preparation of a plan ... and before its adoption") 549

5(1)/Annex I (environmental report: required information) 549-51

5(2) (environmental report: information that may reasonably be required) 540, 550-1

5(3) (environmental report: information at other levels of decision-making or through other Community legislation) 550-1

8 (preparation of plan or programme: matters to be taken into account) 552

SEA Directive, jurisprudence Cogent Land 552

No Adastral New Town 552

SEA Regulations

4 (consultation bodies in England) 551

5(2) (requirement for a strategic environmental assessment) 540

12 (preparation of environmental report) 552-3

12(3) (preparation of environmental report: "such information as may be reasonably required") 553 13(2) (identification of public for purposes of consultation) 552

procedural history in date order

Plan B Earth judicial review proceedings/dismissal (December 2017–22 January 2019) 555-6

Divisional Court (19 May 2019) 536, 558-9, 561

Plan B Earth (Court of Appeal) (27 February 2020) 536-7, 561

Friends of the Earth (UK Supreme Court) (climate change), Court's analysis

Court's decision (to allow the appeal) 587

ground (i): PA 5(8) (NPS: need for reasons taking account of Government policy on climate change) 562-7

Court's conclusion

alleged risk of breach of ECHR 3-8, failure on procedural and substantive grounds 567

continuing evolution of Government policy as effective defence to the challenge 565-6



Index

More Information

```
Friends of the Earth (UK Supreme Court) (climate change), Court's analysis (cont.)
      "Government policy", criteria 562-4
        carefully formulated statement 563-4
        clear, unambiguous statement devoid of relevant qualification 563-4
        Court of Appeal's conclusion 562-3
        Divisional Court's conclusion 562
     ordinary language approach 563, 564 "Government policy", disqualification as
        ministerial statements of 14 and 24 March 2016 563-4, 566
        ratification of the Paris Agreement 564, 566
     parties' arguments
        FoE 562, 566
        HAL 565
  ground (ii): PA 10(3)(a) (sustainable development: mitigating and adapting to climate
          change) 567-82
     considerations relevant to the validity of a governmental decision
        considerations clearly excluded by statute 568
        considerations required expressly or implicitly by statute 568
        non-statutory considerations "so obviously material"/Wednesbury test 568-9
        optional considerations/margin of appreciation 568-9
     considerations relevant to the validity of a governmental decision, jurisprudence
        Baroness Cumberlege 569
        CCSU 569
        Corner House Research 568
        CREEDNZ 568
        Fewings 568
Findlay 568
        Hurst 568, 569
        Samuel Smith Old Brewery 568-9
        Tesco 569
     Court's analysis
        applicable law (EU/national public law principles) (Upjohn) 579
        Divisional Court/Court of Appeal endorsement of Blewett 577
        EIA requirements (Blewettl Wednesbury principles) 576-8
        information for inclusion in the AoS, ministerial discretion (SEA 5(2) and SEA
          5(3)) 576-81
        SEA and EIA requirements compared 574-5
     Court's conclusion (endorsement of Divisional Court's rejection of respondents'
          complaint) 581
     Court's decision
        correct exercise of discretion to take Paris Agreement into account beyond CCA
          2008 obligations 572-4
        rejection of Court of Appeal's decision 572-4
     Divisional Court/Court of Appeal (treatment of Paris Agreement as non-statutory
          consideration "so obviously material"), divergence of views 569-74
     jurisprudence
        Blewett 577-8, 580
Brown 577-8
        Edwards 578
        Shadwell Estates 577
        Walton 574-5
     parties' arguments
```



Index

More Information

```
FoE 567, 571-3
        FoE/Plan B Earth 575-6, 580-1
     Secretary of State 570-1
     summary of PA 10 567
  ground (iii): SEA environmental report vs EIA environmental statement/applicability of
           Wednesbury principle
     parties' arguments
        HAL 576
  ground (iv): post-2050 and non-CO<sub>2</sub> emissions, alleged failure to comply with PA
          10(2)/PA 10(3)
     Court of Appeal's position 581-2
     Divisional Court's position 581
     Secretary of State's margin of appreciation (Fewings/Wednesbury) 581-2
  ground (iv)(a): post-2050 emissions
     Court's analysis and conclusion 582-3
     parties' arguments
FoE 582
        HAL 582
  ground (iv)(b): non-CO<sub>2</sub> emissions
     ANPS approach to 585-6
     AoS acknowledgement of uncertainties/proposed approach to 584-5
        consistency of approach with CCC advice 585
     emissions causing concern/uncertainty about effects 583-4
     precautionary principle, relevance 586
        Court's decision/reasons for 586
Front Polisario: see Cherry Blossom case; Western Sahara
FSIA 1981 (South Africa) by section
  2 (entitlement: "except as provided for by Act")
     as customary international law 503
Functional Immunity of Foreign State Officials Case (German Federal Court of
          Justice)
  background (facts)
     NIAC status of Afghanistan/Taliban conflict 367, 369
     offences leading to appellant's conviction 367-9
        appellant's appeal on points of law 367
        crimes found to have been committed by the appellant 367
        Federal Prosecutor General's cross-appeal on conviction and sentence 367
        sentence (2 years' imprisonment) 367
  background (procedural history in date order)
     Munich Higher Regional Court finding of guilt (26 July 2019)
        suspension of execution of sentence pending appeals 367
  Court's analysis (functional immunity challenge to jurisdiction) 369-85
     Court's obligation to determine jurisdiction 370
        determination ex proprio motu 370
     Court's right to decide without prior ruling from the Federal Constitutional Court
          370, 383-5
     Court's universal jurisdiction (VStGB 1) 385, 387-8
        justification (status as the most serious crimes affecting the international
          community as a whole) 387-8
     international crimes, immunity of officials ratione materiae/functional immunity
          (customary international law (CIL)) 370-83
        academic writings 379-80
```



Index

More Information

636 INDEX

Functional Immunity of Foreign State Officials Case (German Federal Court of Justice) (cont.)

CIL (ICJ 38(1)(b)), requirements/State practice 370-1

CIL-based immunity, relevance (GG 25/GVG 20(2)) 370

civil and criminal proceedings distinguished 381-2

diplomatic immunity distinguished 382

functional immunity for natural persons as an emanation of State immunity distinguished 372

high-ranking State officials distinguished 380-2

State practice (absence of decisions confirming immunity) 372-4

State practice (international courts) 374-5

State practice (national courts) 375-7

Court's findings

concursus delictorum/treatment of all offences as a single act 389-91

facts unaffected by error 391

guilty verdict (errors of law in favour of the appellant) 386

gravity threshold ("substantial") 386-9

intent, limitation to factual circumstances underlying assessment of grave damage (VStGB 8(1)(9)) 389

primacy of torture as a war crime over degrading or inhumane treatment as a war crime 386

treatment of detainees as torture (*VStGB* 8(1)(3)/war crime (CIL)) 386 modification of guilty verdict/revocation of affected sentences 386, 391

sentence unaffected by error 386, 391-2

General Comments (HRC)

25 (ICCPR 25 (right to participate in public affairs))

interference with ICCPR 25 rights 313

Germany, Federal Republic (FRG)

Basic Law (GG) (including 2009 amendments) by article

25 (general rules/principles of international law as integral part of federal law) 370 100(2) (status and effect of international law: determination by Constitutional Court)

circumstances requiring a Constitutional Court decision 383-5

as opportunity for interpretation and concretization of general rules of international law 384

Courts Constitution Act (GVG) by section

20(2) (immunity of persons exempt under customary international law or treaty) 370

Crimes against International Law Code (VStGB) (Part 1 (general)) by section

1 (scope of application including jurisdiction over crimes committed abroad/universal jurisdiction) 385, 387-8

justification (status as the most serious crimes affecting the international community as a whole) 387-8

Crimes against International Law Code (VStGB) (Part 2, Chapter 2 (war crimes)) by section

7(1)(5) (torture as "intentional infliction of severe pain or suffering, whether physical or mental" (ICC 7(1)(f)) 387

8(1)(3) (torture, cruel or inhuman treatment of internationally protected person) gravity threshold ("substantial physical or mental harm or suffering") 386-9 torture or inhuman treatment as war crime (ICC 8(2)(a)(iii)) compared 386

8(1)(9) (gravely humiliating or degrading treatment of internationally protected person)



Index

More Information

INDEX 637

deceased persons as victims 392

intent, limitation to factual circumstances underlying assessment of grave damage

8(5) (reduced sentence in case of less serious offences) 388

Criminal Code (StGB) by section

7(2) (crimes committed abroad other than against internationally protected interests: punishability at place of commission) 385

international crimes, immunity of officials ratione materiae/functional immunity (customary international law (CIL)) 370-83

comments on ILC/UNGA Sixth Committee reports 379

functional immunity for natural persons as an emanation of State immunity distinguished 563-4

judicial treatment of 377

officials, entitlement to immunity ratione materiae/functional immunity: see Functional Immunity of Foreign State Officials Case

war crimes/crimes against humanity (treatment as ordinary crimes) 383

head of State/official immunity from criminal responsibility for war crimes/crimes against humanity

Nuremberg Military Tribunal (NC 7/NP III) 374

Nuremberg Principles (1950) (NP III) 374

HRC (UN Human Rights Committee)

interim measures: see provisional measures (HRC)

Rules of Procedure (ROP)

92 [86] (interim measures) 292

94(2) (joinder of communications) 292

humiliating or degrading treatment of internationally protected person as war crime (ICC 8(2)(b)(xxi))

Functional Immunity of Foreign State Officials 389-91, 392

immunity of officials ratione materiael functional immunity (customary international law (CIL)) 370

as secondary to torture as a war crime (VStGB 8(1)(9)) 389

ICCPR (1966), interpretation

"own country" (ICCPR 12(4)) 321, 323, 328

"country of nationality" distinguished 328 ICJ jurisdiction, basis (ICJ 36(1) ("matters specially provided for ... in treaties and conventions in force"))

as consent to the jurisdiction

Application of FTC/CERD (preliminary objections) 23-4

Immunities and Criminal Proceedings 23

"fall within the provisions" requirement (Oil Platforms test) 20-32, 41, 59-64, 96-102, 110-13, 115-20

interpretation

normal rules of treaty interpretation (VCLT 31-3), applicability 29-30

multilateral agreements (CERD 22) 23-4

treaty/compromissory clause agreement as determinant

"fall within the provisions" requirement, Court's obligation to determine compliance 29-30

jurisprudence



Index

More Information

638 INDEX

```
ICJ jurisdiction, basis (ICJ 36(1) ("matters specially provided for ... in treaties and
conventions in force")) (cont.)
       Application of FTC/CERD (preliminary objections) 29-32
        Certain Iranian Assets 29-30
ICJ procedural issues
  formalism, need to avoid/substance over form
     Certain German Interests in Polish Upper Silesia 69
     Mavrommatis Palestine Concessions 69
     Military and Paramilitary Activities 69
ICJ Rules of Court (1978 as variously amended) by rule
  43(1) (Court's directions on ICJ 63(1) notification) 11
  53(1) (copies of pleadings to State entitled to appear) 11
  53(2) (availability of documents to the public) 12
  69(3) (observations by international organization) 11
  79(1) (preliminary objections: time limits for lodging objection to jurisdiction/
          admissibility) 11
  79(7) (preliminary objections: statements of law and facts: limitation to matters relevant
          to objection) 30
ICSFT: see Financing of Terrorism Convention/CERD Case
independent and impartial tribunal (ICCPR 14(1))
  court competent to deal with all aspects of matter requirement 310-12
  impartiality, judges as close friends of the victim/previous involvement as witnesses 311-
  Nasheed 309-12
international crimes, immunity of officials ratione materiae/functional immunity
          (CIL) 370-82
  academic writings 379-80
  civil and criminal proceedings distinguished 381-2
  diplomatic immunity distinguished 382
  functional immunity for natural persons as an emanation of State immunity
          distinguished 372
  high-ranking State officials distinguished 380-2
  jurisprudence 370-83
  State practice (international courts)
     ICC 374-5
     ICTY 374-5
     Nuremberg Charter 7/Principles III 374
     SCSL 374-5
  State practice (national courts)
     Belgium 376
     crimes in the ex-Yugoslavia and Rwanda 353
     former members of the Iraqi army 353
     France 376-7
     Germany 376-7
     Israel 375
     Italy 376
     Netherlands 375-6
     Spain 376
     Switzerland 376
     WWII war crimes trials 353
international criminal law/procedure
```

concursus delictorum issues 389-91



Index

More Information

INDEX 639

```
"investment"
  CETA 8.1 402-3
  "foreign direct investment" (TFEU 207(1)) 449
Ireland, Republic of
  Acquisition of Land (Assessment of Compensation) Act 1919 409-10
  Arbitration Act 2010 by section
     23 (enforceability of arbitral award other than those under s 25) 468-71
     25 (non-applicability of s 23 to ICSID awards) 468-71
  CETA and: see Costello
  Constitution 1937 by article
     1 (affirmation of inalienable, indefeasible and sovereign right to make own choices)
          423, 424, 443-4
     5 ("Ireland is a sovereign, independent, democratic State") 423-4
     6 (Government powers) 423-4, 438, 443-4
     15.2.1° (law-making powers: Oireachtas) 399, 419-20, 423-6, 429-30, 436-7,
          482-5, 486
        "laws for the State" 420, 423, 425-6, 429-30, 437, 486
     28 (the Government) 444
     28.4.1° (responsibility of Government to Dáil) 428-9
     29 (international relations) 428, 444
     29.1 (devotion to peace and friendly cooperation founded on international justice and
          morality) 445
     29.2 (pacific settlement of international disputes) 445
        English and Irish texts compared 445
        "international" 445
        non-applicability to investor/State disputes 445
     29.3 (generally recognized principles of international law/customary international
          law) 445
     29.4 (external relations: executive powers) 441
     29.4.1° (exercise of Art. 28 executive power) 399-400
     29.4.2° (international agreements: adoption of procedures used by other members of
          a group or league of nations) 429-30
     29.4.3° (authorization of accession to the European Communities) 427, 438-9
     29.4.4°-20.4.9° (28th amendment insertion) 448
     29.4.5° (ratification of the Treaty of Lisbon) 448
     29.4.6° (non-invalidation of laws, acts and measures "necessitated" by EU
          membership) 427, 439, 478-85
        Costello 478-85, 486
        Crotty 479
        Lawlor 483-4
       Meagher 482-3
        Opinion 1/17 479
        Opinion 2/91 479-80
     29.4.7° (EU: exercise of options/discretions) 427
     29.4.8° (State's right to agree to EU decisions, regulations and other acts) 427
     29.4.10° (ratification of the Treaty on the Economic and Monetary Union (2012)) 427
     29.5 (international agreements) 427, 428-9
     29.5.1° (international agreements: submission to Dáil) 399
     29.5.2° (international agreements involving a charge on public funds) 399-400, 431-
     29.6 (international agreements: "as part of the law of Ireland (Republic)":
```

determination by Oireachtas) 399, 428-9, 432-4, 436



Index

More Information

640 INDEX

```
Ireland, Republic of (cont.)
     29.8 (extraterritorial jurisdiction) 429
     29.9 (ratification of ÍCC Statute) 427
     34.1 (administration of justice: courts/judges) 399, 424-6, 436, 472-3, 484, 486
        public hearings 399
     34.3.1° (High Court as court of first instance: jurisdiction) 472-3
     34.3.4° (Supreme Court: appellate jurisdiction) 475-6
     37.1 (exercise of limited functions by person or body duly authorized) 474-6
        CETA Tribunal, whether covered by 474-6, 486
     40.1 (equality before the law)
        standing to challenge CETA ratification 478
  expropriation (CETA 12 compared) 409-10
     An Blascaod Mór Teoranta 409
  judicial review/justiciability (foreign relations decisions/prerogative power of forum
          State)
     jurisprudence
        Boland 431
        Costello 430-2: see also Costello
        Horgan 431
     scope/standard of review/grounds/relevant considerations
        "clear disregard" 430-2
        constitutional compatibility, presumption of 430, 485
  legislation, interpretation
     bilingual English/Irish text, approach to 425-6, 444
  sovereignty, surrender
     CETA (Costello) 437-45
     ESM (Pringle) 429-30, 439-40, 444
     Single European Act (1986) (Crotty) 437-45
     technical and policy-making treaties distinguished 440-4
  standing (municipal courts)
     hypothetical arguments (Cahill v. Sutton/Costello distinguished) 477-8
     violation of the Constitution 476-7
  treaties: see also Constitution, Articles 15.2.1°, 28, 29, 34 above
     jurisprudence
        Costello 397, 399, 423: see also Costello
        Crotty 427-8, 437-9, 442-4, 479
     ratification, acceptance or approval (VCLT 14)
        EU treaties with third countries, duty of sincere cooperation (TEU 4(3)) and 478-85
        referendum, need for 397, 399, 423
JISP (Jurisdictional Immunities of States and their Property Convention (2004))
  customary international law (CIL) and
     JISP as generally accepted point of departure 353, 363
     US Embassy Employee Case 335-45
  employment contracts: removal of immunity subject to exceptions (JISP 11): see
          employment contracts between a State and an individual for work in third State,
          exclusion of immunity (JISP 11)
  "is not named as a party to the proceeding but the proceeding in effect seeks to affect
          ..." (JISP 6(2)(b)) 508-11
  post-judgment measures of constraint (JISP 19) 363-4
```

pre-judgment measures of constraint (JISP 18) 363-4



Index

More Information

```
protected property (JISP 21)
     bank account used for the functions of a diplomatic mission/consular post (JISP
          21(1)(a)) 363-4
  protection of property serving governmental purposes (JISP 19(c)) 363-4
judicial review (municipal law)
  reasonableness/rationality test (Wednesbury principle)
     considerations relevant to the decision-maker's task
        considerations clearly excluded by statute 568
        considerations required expressly or implicitly by statute 568
        non-statutory considerations "so obviously material" 568-9
        optional considerations/margin of appreciation 568-9
     "may reasonably be required" (SEA Directive 1 and Annex I) challenge, applicability
          to
        Friends of the Earth 552-3
        Plan B Earth 552-3
  reasonableness/rationality test (Wednesbury principle), jurisprudence
     CCSU 569
     Corner House Research 568
     CREEDNZ 568
     Fewings 568
     Findlay 568
     Friends of the Earth 567-74
     Hurst 568, 569
     Samuel Smith Old Brewery 568-9
     Tesco 569
judicial review/justiciability (EU law) (TFEU 263)
  action for annulment, availability for all EU measures intended to have legal effects
           278 - 9
     "interest in", dependence on annulment directly benefiting the applicant 278-9
  CJEU's competence ex proprio motulown motion 214, 225, 266, 277
  CJEU's responsibility for determining validity of EU acts (Inuit Tapiriit Kanatami) 281
  standing (an act of direct and individual concern/not entailing implementing measures
          requirement) (TFEU 263(4))
     cumulative nature of requirements (direct effect of lack of implementation discretion)
          222, 253, 274-5, 279
        failure to meet as absolute bar to proceedings/Court's right to decide ex proprio
          motu 225, 266
     determining factors (content, scope, substance and the legal and factual context)
          275-6
     "direct concern" 222-4, 248-60
        holistic and pragmatic approach 253-60
     direct effect on the legal situation, examples 255-6, 274-7
     direct vs indirect effects 222-4, 254-5, 257-8, 259
     limitation of the Regulation to the territory of Member States and persons subject to a
          Member State's jurisdiction, relevance 254-8, 276
     Regulation 2017/2063 222-4 "regulatory act" 280
  standing (an act of direct and individual concern/not entailing implementing measures
          requirement) (TFEU 263(4)), jurisprudence
     Almaz-Antey 219, 223-4, 248-9, 257-9, 273, 275
     Changmao Biochemical Engineering v. Distillerie Bonollo 274-5
     Commission v. Infront WM 254 n. 79
```



Index

More Information

```
judicial review/justiciability (EU law) (TFEU 263) (cont.)
     ECB v. TrastaKomercbanka 247, 274-5
     Esso Raffinage 266, 278
     Front Polisario 279
     Glencore Grain 253 n. 76
     Inuit Tapiriit Kanatami 245 n. 66, 281
     Kadi and Al Barakaat 256
     Makhteshim-Agan Holding 266
     NIOC v. Council 257
     PKK and KNK 248, 253-4
     Rosneft 256
     Venezuela v. Council 218-19, 221, 222-4, 232, 248-60, 272-7, 279
  standing ("[a]ny ... legal person" (TFEU 263(4))), jurisprudence
     Deutsche Bahn 271
     Engie Cartagena 270
     H v. Council 271
     Inuit Tapiriit Kanatami 245 n. 66
     Jobcenter Krefeld 270
     Nederlandse Antillen 271
     PKK and KNK 250, 253-4, 271
     Região autónoma dos Açores 271
     Regione Toscana 271
     Uniwersytet Wrocławski and Poland 271
     Venezuela v. Council 238-48
  standing ("[a]ny ... legal person" (TFEU 263(4))), relevant factors
     absence of TEU/TFEU definition 242
     alleged limitation to private actors or individuals
        Commission v. Nederlandse Antillen 246
        Inuit Tapiriit Kanatami 245
        Regione Siciliana v. Commission 246
        Stichting Woonlinie v. Commission 245
     distinguishability from legal concept in Member States/as autonomous EU concept
     ECHR 33/ECHR 34 distinguished 240-1
     "legal personality", relevance 244-6

PKK and KNK 245
     public international law 238-41
        DRC v. Belgium (ECtHR) 240
       Jurisdictional Immunities 239-40
       right of sovereign State to sue and be sued 238-9
        Sabbatino (right of suit) 238-9
     sovereign State status, sufficiency 241, 272
        State immunity/act of State 238-40
     third State as (jurisprudence (CJEU)): see also Venezuela v. Council (appeal against the
          General Court's decision)
       Apple Sales International 245 n. 65
        Attey 245 n. 65
        Chris International Foods 245
        Switzerland v. Commission 243-4
     third State as (jurisprudence (General Court))
        Cambodia and CRF v. Commission 242
        Poland v. Commission 242-3
```



legal assistance/legal aid (ACHPR 7(1)(c))

Index

More Information

```
applicant's obligation to request 136
  jurisprudence
     Onyachi 135
     Thomas 135
     Vedastus 135-6
  right to legal aid (ICCPR 14(3)(d)) 135-6
legal representation, right to (ICCPR 14(3)(b))
   'adequate time and facilities for preparation of defence" 311-12
  "of his own choosing" 311-12
legislation, interpretation (multilingual texts) 425-6, 444
legitimate expectation
  treaty as source, effect of contrary indication by the legislature or executive 327-8
legitimate expectation, jurisprudence
  Amohanga 327
  Jacob v. Utah Construction and Engineering 326
  Lam 326, 331
  Plaintiff S10/2011 326
  Ratu 323, 324-8
  Teoh 321
   Western Export Services Inc. v. Jireh International 326
   WZARH 326
Maldives: see also Nasheed v. Maldives (ICCPR 14/ICCPR 22/ICCPR 25)
  Clemency Act 2010 by section
     7 (period of appeal for clemency) 304
     29(c) (President's power to grant clemency) 304
  Constitution (2008) by article
     109(f) (presidential qualifications: effect of a criminal conviction/imprisonment) 304-5
        incompatibility with ICCPR 25 (right to political participation) 312-14
        text 304 n. 22
     141(a) (judicial power) 294
     157(a) (establishment of the JSC) 294 n. 3
     159 (JSC responsibilities and powers) 294 n. 3
     223(3) (Prosecutor General's responsibilities and powers: criminal proceedings) 302,
          305-6
  Criminal Code by article
     81 (illegal arrest as abuse of power) 289, 294, 298-300, 310-12, 313-14
       text 293 n. 293
  Decentralization Act 2010 294
  Judicature Act 2010
     requirement for a fair, just, impartial and transparent manner 295-6
  Judicial Service Commission Act 2008 by section
     21 (Commission's responsibilities and powers) 294 n. 3
  Presidential Elections Act 2008 304
  Prevention of Terrorism Act 1990 by article
     2(b) (kidnapping or abduction) 296, 307, 311-12
  Prison and Parole Act, Bill on Amendment to (2015) by section 304
     63 (disqualification from holding political office/engaging in political activity) 297,
          300, 301, 304-5, 308, 312-13
       text 297 n. 5
```



Index

More Information

644 **INDEX**

Maldives (cont.)

Prosecutor General's Act 2008 by section

15 (Prosecutor General's responsibilities and powers) 302

Nasheed v. Maldives: see Maldives; Nasheed v. Maldives (ICCPR 14/ICCPR 22/ICCPR 25) (background including parties' arguments); Nasheed v. Maldives (ICCPR 14/ICCPR 22/ICCPR 25) (Committee's Views); Nasheed v. Maldives (ICCPR 14/ICCPR 25) (Committee's Views) (conclusion and remedies)

Nasheed v. Maldives (ICCPR 14/ICCPR 22/ICCPR 25) (background including parties' arguments) 292-309

background

author/allegations 292

facts as submitted by the author in date order

author as head of MDP/election as president (2008) 292

multiparty parliamentary elections/former president supporters secure a majority (2009) 292

reappointment of 191 out of 197 judges and magistrates appointed under the former president (2010) 293

detention of Chief Justice of the Criminal Court in Malé (16 January 2012)/effects

facts as submitted by the author (Communication No 2270/2013) in date order forced resignation of author (7 February 2012) 293

author's arrest for abuse of power (9 October 2012) 293

establishment of special Magistrates' Court 294

proceedings initiated by the author challenging legality of the Magistrates' Court/requesting judicial review (4 November 2012) 294

parallel proceedings challenging the competence and legality of the Magistrates' Court/Supreme Court's confirmation of legality (5 December 2012) 294 rejection of author's request for adjournment/arguments on legitimacy (10

February 2013) 295

arrest of author (5 March 2013) 295

refusal of author's request for adjournment of trial (6 March 2013) 295 author's renewed request for adjournment of trial (24 March 2013) 295

adjournment of trial pending determination of the legality of the composition of the Magistrates' Court (31 March 2013) 295

suspension of criminal proceedings against the author (July 2013) 295-6 author narrowly loses presidential elections (November 2013) 296

facts as submitted by the author (Communication No 2851/2016) in date order withdrawal of suspended criminal charges (16 February 2015) 296

detention of author on charges of terrorism (22 February 2015) 296

author's trial/criticisms of (23 February 2015) 296-7

withdrawal of author's lawyers on professional responsibility grounds (8 March 2015) 296-7

Court's failure to provide trial record in timely fashion rendering author unable to meet time limits for appeal (24 March 2015) 297

adoption of Bill on Amendment to the Prison and Parole Act preventing prisoners from political participation (30 March 2015) 297

submission of author's case to WGAD (April 2015) 297

WGAD's findings/recommendations (September 2015) 297

appeals to the Supreme Court/confirmation of conviction (September 2015)



Index

More Information

INDEX 645

```
release on medical grounds/travel to the UK (January 2016) 298
        grant of political asylum in the UK (19 May 2016) 298
     joinder of communications 2270/2013 and 2851/2016 (ROP 94(2)) 292
     rejection of request for interim measures (ROP 92) 292
  complaint (alleged violations)
     IĈCPR 14(Ĭ) (independent and impartial tribunal) 298-9
     ICCPR 22 (freedom of association) 301
     ICCPR 25 (right to participate in public affairs) 299-300
  State party's failure to cooperate with procedure (Communication No 2270/2013) 308-
  State party's observations (rejection of author's allegations as factually incorrect/
          justification for detention/restrictions on rights to political participation) 301
     alleged breach of ICCPR 14(1) (fair trial)
        arrest in accordance with the law 302
        author's failure to observe appeal time limits 303-4
        barring of lawyers as consequence of their failure to register 302-3
        independence of court 302
     justification for limitations on political participation/association 304-5
     rejection of WGAD's findings which formed basis of ICCPR 22/ICCPR 25
          allegations 302
     resignation as a voluntary act 301
     Supreme Court's rulings
        author's failure to appeal in time 302
        fairness of the legal proceedings 302
        justification for refusal of leave to the Prosecutor General's appeal 302
  State party's observations, author's comments on 305-8
Nasheed v. Maldives (ICCPR 14/ICCPR 22/ICCPR 25) (Committee's Views) 309-14
  admissibility (ROP 93) 309-10
     exhaustion of all effective domestic remedies (OP 5(2)(b)) 309
     "matter is not being examined" (OP 5(2)(a)) 309
     sufficient substantiation of author's claims
        declaration of admissibility 310
        ICCPR 14 309-10
        ICCPR 22/ICCPR 25 310
  merits (alleged violation of ICCPR 14 rights)
     alleged abuse of power and illegal detention of Chief Justice/requalification as
          terrorism 311
        State party's justifications 311
     alleged violation in initial criminal proceedings
        arbitrary constitution of the bench 310-11
        concerns about the lack of judicial independence and the politicized composition
          of the JSC 310-11
        political motivation 310
        special Magistrates' Court as not legally competent and independent 310-11
        State party's failure to comment 311
     Committee's finding (violation of ICCPR 14(1)/ICCPR 14(3) right to a fair trial)
  merits (alleged violation of ICCPR 22 rights), Committee's decision not to pursue given
          findings on ICCPR 2 314
     failure to rebut allegations of lack of judicial independence and impartiality 311-12
        insufficient time to prepare defence 311
```

lack of explanation for requalification of charge 311



Index

More Information

```
Nasheed v. Maldives (ICCPR 14/ICCPR 22/ICCPR 25) (Committee's Views) (cont.)
  merits (alleged violation of ICCPR 25 rights)
     author's allegations 312
     State party's arguments 312
  merits (alleged violation of ICCPR 25 rights), Committee's review
     Committee's findings
        arbitrary nature of conviction and sentence 213-14
        State party's failure to refute allegations that judicial proceedings were politically
          motivated 313-14
        violation of right to a fair trial 213-14
     right of every citizen to participate in public affairs/vote and stand for election/public
          service 312-13
     suspension/exclusion of rights, counter-indications
        conviction that is arbitrary or a manifest error or a denial of justice 313
        violation of right to fair trial 313
     suspension/exclusion of rights, requirements
        General Comment 35 313
        grounds established by objective and reasonable laws 313
        political affiliation, exclusion 313
        proportionality 313
Nasheed v. Maldives (ICCPR 14/ICCPR 25) (Committee's Views) (conclusion and
          remedies)
  conclusion
     violation of ICCPR 14(1), ICCPR 14(3) and ICCPR 25 314
  obligation to provide author with effective remedy (ICCPR 2(3)(a)) (full reparation)
     new trial if appropriate ensuring all fair trial guarantees 314
     quashing of author's conviction 314
     restoration of right to stand for office including that of President 314
     review of charges taking Committee's views into account 314
     review of legislation to ensure restrictions on the right to stand for office are
          reasonable and proportionate 314
     steps to avoid similar future violations 314
  reporting obligation/dissemination of Committee's views 314
natural resources
  non-self-governing territories' right to: see non-self-governing territories
  UNGA Resolution 1803 (XVII) (Permanent Sovereignty over Natural Resources)
          499-501
negotiation as means of dispute settlement
  definition
     protest falling short of attempt to engage in negotiation distinguished 48
  exhaustion of established processes/duty to negotiate in good faith to achieve equitable
          solution requirement
     "exhaustion"
        futility/deadlock, determination of 50, 69
     jurisprudence
        Application of CERD (Georgia v. Russia) 34, 46-9
        Application of FTC/CERD (preliminary objections) 32-6, 47-50, 69
        Obligation to Prosecute or Extradite (Belgium v. Senegal) 49
     requirements
        "meaningful" negotiations/genuine attempt 33-5
        relevance to subject matter of treaty containing compromissory clause 34,
          49-50
```



Index

More Information

```
NGOs (general)
  classification as
     governmental organizations distinguished 286-7
     jurisprudence
        DRC v. Belgium 286-7
        Islamic Republic of Iran Shipping Lines 287
        Ljubljanska banka 287
        Radio France 286, 287
     legal persons exercising public power/managing a public service under the control of
          the authorities 286-7
        decentralized State authorities, exclusion 287
        relevant factors 286-7
  standing
     ECHR 34 286-7
non-international armed conflict (NIAC), applicability of IHL
  Additional Protocol II and TFEU 273 distinguished 159
non-self-governing territories (UNC 73-4) (UNC Chapter XI Declaration regarding)
          (NSGT)
  Cherry Blossom case 496-501, 502, 508, 510-11, 514: see also Cherry Blossom case; self-
          determination, right of
  natural resources, entitlement (including UNGA resolutions 1515 (XV), 1514 (XVI),
          1803 (VII) and 61/123) 499-501
Paris Agreement (2015): see also Friends of the Earth
  conclusion/parties to (COP-21) 534-5, 553
  measures to achieve balance between anthropogenic emissions (greenhouse gases) and
          sustainable development/eradication of poverty (PA 4(1)) 553
     absence of specific legal obligation 553
  purposes and principles (PA Preamble)
     mobilization of a stronger and more ambitious climate action by all actors 553
     urgency of the situation 553
Permanent Court of Arbitration (PCA)/PCA tribunals
  decisions as "legal facts" 181
Polisario Front: see Cherry Blossom case; Western Sahara
precautionary principle
  Friends of the Earth 586
preliminary injunction (municipal courts): see also Cherry Blossom case
  balance of hardships/equities 501-2, 503
  prima facie case 201-2
preliminary objections (ICJ/PCIJ) (ICJ ROC 79ter 4 [79(9)]/PCIJ ROC 62)
  jurisdiction and merits distinguished/importance of maintaining distinction
     consideration of questions of law and fact relevant to the objection to jurisdiction,
          limitation to 30, 31-2, 41
     difficulty of drawing the line/review of the jurisprudence (Application of FTC/CERD
          (preliminary objections)) (Donoghue J) 96-103
Premises of a Diplomatic Mission Case (Czech Republic), procedural history
  District Court proceedings (15 January 2015)
     parties' arguments (defendant (2)) 349
     parties' arguments (plaintiff) 348-9
  District Court proceedings (2016)
     Court's decision (finding of immunity) 349
```



Index

More Information

```
Premises of a Diplomatic Mission Case (Czech Republic), procedural history (cont.)
  Municipal Court proceedings (17 February 2017) (confirmation of lower court's finding
          of immunity) 350
Premises of a Diplomatic Mission Case (Czech Republic), Supreme Court proceedings
          (6 December 2017)
  admissibility (CPC 236) 351-2
  applicable law
     International Private Law Act 2012 352
     JISP as generally accepted point of departure 352
  Court's decision (annulment of lower courts' rulings/remand to the District Court)
          348
  diplomatic premises
     duty to protect (VCDR 22(2)) 354
     duty to refrain from entry (VCDR 22(1)) 354
     immunity from search, requisition, attachment or execution (VCDR 22(3)) 354
     inviolability (VCDR 22)
        action for compensation for unjust enrichment, permissibility 354-5
     residence of diplomatic agent/member of embassy staff as (VCDR 1(i)) 354
  parties' arguments
     defendant (2) 351
     plaintiff 350-1
  State immunity
     development of functional concept 353
     limitation to jure imperii activity 352-5
presumption of innocence (ACHPR 7(1)(b)) 134
provisional measures (HRC)
  Special Rapporteur on New Communications and Interim Measures 292
public affairs, right to participate in (ICCPR 25)
  entitlement under national law to stand for office/Presidency 312-14
  justified restrictions
     "necessary and proportional" 312-14
"not unreasonable" requirement 312-14
  Nasheed 312-14
  right to vote and be elected (ICCPR 25(b)) 312-14
Ratu (ICCPR 12(4) (right to enter own country)) (background)
  appellant's status (Certain Unlawful Non-Citizens (Class AG Subclass 833) visa)
          317
  facts in date order
     sentence of appellant to 16 years' imprisonment for murder (2001) 318
     decision not to cancel appellant's visa (13 February 2012) 320
     release from prison (2016) 318
     14 months' imprisonment for occasioning bodily harm (2018) 318
     cancellation of appellant's visa (MA 501(3A)) (21 May 2018) 318
        representations seeking revocation of the cancellation decision (MA 501CA(3)(b))
     decision not to revoke cancellation of visa (22 July 2020) 318
     dismissal of application for judicial review of non-revocation decision (11 December
          2020) 318
  Minister's decision 319-21
     absence of representations on the application of ICCPR 12(4) 321
```



Index

More Information

```
conclusion
        absence of "another reason" for revoking the cancellation decision 321
        unacceptable risk of harm to Australian community outweighing other
          considerations 321
     grounds considered (MA 501CA(4)(a) ("substantial criminal record"/failure to pass
          the "character test")) 319-20
     grounds considered (MA 501CA(4)(b) ("another reason"))
        appellant's "very serious" criminal conduct following release from prison in 2016
          320
        best interests of the appellant's minor children (CRC 3(1)) 320
        emotional and physical hardship appellant might suffer if returned to Fiji without
          his family 320
        risk of re-offending 320
        strength, nature and duration of the appellant's ties to Australia 320
  primary judge proceedings (grounds raised by the appellant)
     1 (Minister's alleged failure to give proper consideration to appellant's prospects in
          Fiji) 321
     2 (alleged denial of procedural fairness)
        Australia as appellant's "own country" (ICCPR 12(4)) 231
        failure to notify appellant of the possibility of a decision in breach of ICCPR 12(4)
  primary judge proceedings (judgment)
     dismissal of appellant's application for judicial review 322
     ground 1 (rejection) 321
     ground 2 (procedural fairness)
        incompatibility of MA 501(3A) with ICCPR 12(4)/exclusion of submissions on in
          MA 501CA(4) cases 322
        indirect notification to appellant of possible decision not conformable with ICCPR
          12(4) 322
        mandatory nature of the cancellation decision (MA 501(3A)) 322
  relevant legislation
     MA 501 (refusal or cancellation of visa on character grounds) 318
     MA 501(1) (Minister's discretion to refuse a visa) 318
     MA 501(2) (Minister's discretion to cancel a visa) 318
     MA 501(3) (enlivenment of discretion)
        in case of reasonable suspicion that person does not pass the "character test" 318
        national interest considerations 318
     MA 501(3A) (circumstances requiring cancellation of visa) 318
        text 318
     MA 501(6) (character test) 318
     MA 501(6)(a) ("substantial criminal record" as ground for failure to pass the character
          test) 318
     MA 501(6)(e) (convictions relating to sexually based offences involving a child) 319
     MA 501(7) ("substantial criminal record") 318-19
     MA 501(7)(a) ("substantial criminal record": death sentence) 318-19
     MA 501(7)(b) ("substantial criminal record": life sentence) 318-19
     MA 501(7)(c) ("substantial criminal record": imprisonment for 12 months or more)
           318-19
     MA 501CA (cancellation of visa (person serving sentence of imprisonment)), text
Ratu (ICCPR 12(4) (right to enter own country)) (Federal Court)
  Court's considerations (Ground 1: Denial of procedural fairness) 324-33
```



Index

More Information

650 INDEX

Ratu (ICCPR 12(4) (right to enter own country)) (Federal Court) (cont.) appellant's premises (1) legitimate expectation (Teoh ratio) 324 (2) legitimate expectation (*Teoh ratio*), continuing validity of that *ratio* 324 (3) absence of any contrary intention in respect of MA 501CA(4) decisions 324 (4) Minister's decision not to revoke the cancellation decision as breach of ICCPR 12(4) 324 (5) effect on the decision of Minister's failure to give appellant opportunity to comment on the departure 325 "arbitrary deprivation" of right to leave "own country" "arbitrary" (*Nystrom*) 328-9, 330-1 "own country" 328 Court's conclusion 333 legitimate expectation (Teoh) 325-8 the issues 325 limitation of decision to CRC 3(1) (best interests of the child) obligation 326-8 the opinions of the Court 325-6 subsequent obiter dicta rejection of the legitimate expectations doctrine 326 legitimate expectation/treaty as source contrary indication by the legislature or executive, qualifying effect 327-8 jurisprudence 326, 331 procedural fairness and 324-8 review of MA 501(3A)/MA 501CA(4) 328-33 as cognate provisions 325 inconsistency with any Ministerial obligation to draw ICCPR 12(4) to relevant person's attention 329-32 jurisprudence 330-2 limitation of right of cancellation (MA 501(3A)) to period of imprisonment 331-2 Minister's duty to notify person concerned of ICCPR 12(4)/take representations into account, absence 332 Parliament's perception of provisions as rational, necessary, confined, reasonable, proportionate, and not arbitrary/inconsistent with ICCPR 12(4) 331 Statement of Compatibility with Human Rights 330 Court's considerations (Minister's failure to take into account a mandatory relevant consideration) exclusion of unenacted international obligations 333 Court's disposition (dismissal of appeal) Court's dismissal 333 jurisprudence 333 parties' submissions (appellant) ground 1 (Minister's failure to put the appellant on notice of possible decision in breach of ICCPR 12(4)) 322-3 legitimate expectation argument (Teoh) 323 procedural fairness in the light of contrary indication in the statute or Government statement 323 ground 2 (ICCPR 12(4) as a mandatory relevant consideration not taken into account) 323 parties' submissions (Minister) ground 1 (Minister's failure to put the appellant on notice of possible decision in

rejection of *Teoh* legitimate expectation argument as out of date 323 ground 2 (ICCPR 12(4) as a mandatory relevant consideration not taken into

breach of ICCPR 12(4))

account), rejection 324



Index

More Information

```
reparation for breach of treaty (ACHPR Protocol 27(1))
  costs and expenses
     parties to bear own 139
  general issues
     burden/standard of proof 137
     possible measures 137
     requirements, causal link 137
  jurisprudence
     Abubakari 137
     Konaté 137
     Mtikila 137
     Nganyi 137
     Thomas 137
     Umuhoza 137
     Vedastus 136-9
  non-pecuniary reparation/satisfaction
     release in "special and compelling" circumstances 138-9
  pecuniary reparation for non-pecuniary damage/moral prejudice
     moral prejudice, burden of proof 137
  pecuniary reparation for pecuniary damage/material prejudice
     evidence, need for 137
  restitutio in integrum principle (Chorzów Factory/ILC(SR) 31(1)) 136-7
res judicata/non bis in idem principle (including double jeopardy rule)
  fundamental right within the European Community
     link with TEU 7 (severe risk of a serious breach by a Member State of TEU values),
          dependence on existence of EU obligations 177
rule of law: see EU legal order
SADR: see Western Sahara
Saharawi Arab Democratic Republic (SADR): see Western Sahara
security for costs/cautio judicatum solvi
grounds/justification 527-8
  Hague Convention on Civil Procedure (1905)
     States as "nationals"/application of HCCP 17 to 522-3
        HCCP (1954) 17, indistinguishability 523-4
        HCIAJ (1980) 14, addition of "legal entities", effect 524
self-determination, right of: see also non-self-governing territories (UNC 73-4)
  entitlement/"people
NSGT 496-8
     Western Sahara 496-8
sincere cooperation obligation (TEU 4(3)): see competences (TEU/TFEU), sincere
          cooperation/good faith obligation (TEU 4(3))
Slovenia v. Croatia (TFEU 259 proceedings): see Slovenia v. Croatia (TFEU 259
          proceedings) (background); Slovenia v. Croatia (TFEU 259 proceedings)
          (analysis (AG Pikamäe)); Slovenia v. Croatia (TFEU 259 proceedings) (analysis
          (Court))
Slovenia v. Croatia (TFEU 259 proceedings) (background)
  introduction (AG Pikamäe) in date order 146-7
     declarations of independence (Slovenia and Croatia) (25 June 1991) 151
     Croatia and Slovenia's attempts to fix bilateral land and maritime boundaries (1992-
          2001) 151
```



Index

More Information

```
Slovenia v. Croatia (TFEU 259 proceedings) (background) (cont.)
     Slovenia's accession to the EU (1 May 2004) 151
     signature of arbitration agreement (4 November 2009) 151
     entry into force of the arbitration agreement (29 November 2010) 151
     appointment of president and two members of the arbitral tribunal (17 January 2012)
          151
     establishment of arbitral tribunal (2012) 152
     tribunal proceedings: written proceedings (11 February 2013) 152
     Croatia's accession to the EU (1 July 2013) 151
     tribunal proceedings: oral proceedings (2-13 June 2014) 152
     tribunal proceedings: procedural issue relating to Slovenia's nominated arbitrator
          (2015) 152
     tribunal proceedings: Croatia's request for the suspension of (24 July 2015) 152
     appointment of new arbitrators (3 August 2015) 153
     tribunal's invitation to parties to make written and oral submissions on the legal
          implications of Croatia's letters (1 December 2015) 152-3
     hearing on the legal implications of Croatia's letters (17 March 2016) 153
        non-participation of Croatia 153
     tribunal's partial award on the procedural question (30 June 2016) 153
     tribunal's final award determining the land and maritime boundaries of the two States
          (29 June 2017) 154
        Croatia's rejection of tribunal's award as invalid 154
     Slovenia commences TFEU 259 procedure with complaint to the Commission alleging Croatia's breach of EU law (16 March 2018)
        Commission's failure to issue a reasoned opinion 154
     Slovenia commences action with document lodged at the Court Registry (13 July
          2018) 154
        parties' arguments 154
     referral of case to the Grand Chamber (14 May 2019) 154
     CJEU's request to Commission for response to questions relating to Regulation No
           1380/2013 154
        Commission's reply (28 June 2019) 155
     hearing attended by both parties (8 July 2019) 155
        Slovenia maintains request for termination of infringements 155
     Croatia's objection to the jurisdiction and admissibility 146
     Slovenia's application (alleged breach of TEU 2 and TEU 4(3)) 146
  facts/procedural history in date order
     Croatia submits objection to admissibility (ROP 151) (21 December 2018) 154
  legal context (EU primary law)
     Act of Accession (Croatia) by article
        15 (adaptation of acts listed in Annex III) 148, 194
        Annex III.5 (adaptations to be made to the regulation on the common fisheries
          policy) 148-9
  legal context (EU secondary law)
     (a) Regulation (EU) No 1380/2013 (General rules on access to waters) by article
        5 (equal access to waters) 149, 194
        Annex I (Access to coastal waters within the meaning of Article 5(2)) 149-50
     (b) Schengen Borders Code by article
        4 (compliance with Union law including international law obligations) 150, 196, 207
        13(1) (prevention of unauthorized border crossings) 150, 196
        13(2)-(5) (surveillance arrangements) 150
        17 (cooperation obligation) 150, 196-7, 207
```



Index

More Information

INDEX 653

(c) Directive 2014/89/EU (maritime spatial planning) by article

Recital 7 (purpose of "spatial planning") 150-1

2(4) (sovereign rights and jurisdiction/maritime delimitation, absence of impact on) 151

11(1) (cooperation obligation) 151

legal context (international law)

Croatia-Slovenia Arbitration Agreement (2009) by article

Preamble, recital 3 (peaceful settlement of disputes (UNC 33)) 146-7

1 (establishment of arbitral tribunal) 147, 192

2 (composition of arbitral tribunal/procedure for appointment and replacement of members) 147, 151, 192

2(1) (appointment of president and members of the tribunal) 151, 192

2(2) (appointment of members of the tribunal) 151, 152, 192

3(1)(a) (tribunal's task: determination of the course of the Croatia/Slovenia boundary) 147, 192

3(1)(b) (tribunal's task: determination of Slovenia's junction to the high sea) 147, 192

3(1)(c) (tribunal's task: determination of the regime for the use of the relevant maritime areas) 147, 192

3(3) (tribunal's task: to render an award) 147, 192

3(4) (procedure for determining subject matter of the dispute) 147, 192

4(a) (applicable law (rules and principles of international law)) 147, 192

4(b) (applicable law (international law, equity and the principle of good neighbourly relations to a fair and just result by taking into account all relevant circumstances))147, 192-36(2) (applicability of PCA Optional Rules for Arbitrating Disputes between Two

States) 147, 152, 193

6(4) (expeditious decision on all procedural matters by majority of its members) 147, 193

(expeditious issue of award after due consideration of all relevant facts) 147,
 193

7(2) (final and binding effect of award) 147, 193

7(3) (parties' implementation obligations) 147, 193

9(1) (date of entry into force) 148, 193

11(3) (Slovenia's obligation to lift reservations on opening of EU negotiations) 147-8, 193

VCLT

60(1) (termination or suspension of operation of treaty as a consequence of its breach) 148, 191-2

65 (validity, termination, withdrawal or suspension of a treaty) 192 parties' arguments (admissibility)

Croatia 154, 162-3

Slovenia 162-3

parties' arguments (Croatia) (challenge to the jurisdiction)

1. ancillary nature of Slovenia's claims 157-8, 205

2. interpretation and applicability of treaty not an integral part of EU law, exclusion $158,\,208$

validity and effects of arbitration based on 158

3. purported termination of treaty not an integral part of EU law, exclusion 158, 205

4. TFEU 273 distinguished 159

5. absence of any question of the interpretation of EU law 159

6. hypothetical nature of any findings 159



More Information

654 **INDEX**

Slovenia v. Croatia (TFEU 259 proceedings) (background) (cont.)

parties' arguments (Croatia's request for removal of the Commission's Legal Service's opinion from the proceedings) (ROP 151(2)) (grounds) 163

adverse effects on the proper functioning of the Commission and on the requirements of a fair hearing 201

risk to requirements for a fair hearing 201

parties' arguments (Croatia's request for removal of the Commission's Legal Service's opinion from the proceedings) (ROP 151(2)) (responses to) 163, 202 Slovenia

Croatia's failure to demonstrate how retention of the impugned legal opinion would undermine protected interests 202

Croatia's lack of standing to request 201

irrelevance of Sweden and Turco/Hungary v. Parliament 201

[unauthorized] availability of opinion online 201

parties' arguments (Slovenia) (allegations of breach)
1. TEU 2 (Union values) 155, 190, 208

2. TEU 4(3) (sincere cooperation) 155-6, 190, 208

- 3. common fisheries policy through failure to respect the arbitration award (Regulation No 1380/2013) 156, 190, 208-9
- 4. common fisheries policy implementation (Regulation No 1224/2009/ Implementing Regulation No 404/2011) 156-7, 190-1, 209

5. Schengen Borders Code 4, 13 and 17 157, 191

6. Directive 2014/89 (maritime spatial planning), Articles 4(1), 8 and 11(1) 157, 190 - 1

parties' arguments (Slovenia) (response to Croatia's challenge to the jurisdiction)

- 1. Croatia's misinterpretation of application/countervailing arguments 160-1
- 2./3. Croatia–Slovenia border as matter of fact/arbitral tribunal's decision as evidence of 161, 206-7

rejection of alleged ancillary nature of the claims 206

- 4. direct applicability of the tribunal's award 161 as matter for the merits 207
- 5. alleged hypothetical nature of any CJEU decision 162
- 6. existence of a dispute concerning the interpretation or application of EU law, relevance 162
- 7. Croatia's alleged misrepresentation of the subject matter of the action 205
- 8. Court's jurisdiction where the facts of an alleged infringement of EU law are covered by both EU law and international law 205
- 9. irrelevance of bilateral dispute over validity and effects of the arbitration award 206
- 10. limitation of Slovenia's TFEU 259 application to complaints derived from primary EU law and a set of acts of secondary law 206

Slovenia v. Croatia (TFEU 259 proceedings) (analysis (AG Pikamäe)) 163-89

AG's conclusion (CJEU's lack of jurisdiction) 163-4, 188-9

AG's recommendations 189

costs 189

a. admissibility (Croatia's request for the removal of the Commission's Legal Service's opinion from the proceedings) 164-6

jurisprudence considered

Austria v. Council 164, 165

Hungary v. Parliament 165

Sweden and Turco v. Council 165

public policy considerations 164, 165



Index

More Information

INDEX 655

recommendation (agreement to Croatia's request for removal) 166 risk of adverse repercussions on the interest of the institution concerned in seeking legal advice 165 risk of circumventing procedures under Regulation No 1049/2001 (public access to EU documents) 165-6 b. jurisdiction AG's preliminary remarks on 166-71 b.1: Court's jurisdiction over actions for failure to fulfil obligations (TEU 19) 166-7 failure to fulfil "an obligation under the Treaties" requirement 167 motivation, relevance 167 obligation to "ensure that in the interpretation and application of the Treaties the law is observed" (TEU 19(1)) 166 secondary legislation, inclusion 167 "Treaties" 167 b.2(a): scope ratione materiae of EU law where legal instruments of international law are involved 167-8 Commission v. Belgium 168-9 customary international law as benchmark for determining/requirements (ATA principles) 167-8 lack of any evidence suggesting that the political condition for Croatia's accession to the EU (resolution of boundary dispute) had been incorporated into EU law limitation of EU obligation to respect CIL to situations within the EU's competence 174 b.2(b): ancillary nature of the claims relating to obligations under EU law 168-9 b.3: territorial scope of EU law 169-70 territorial scope of the Treaties (TFEU 355 [TEC 299]) 169-70 c. subject matter of the action 171-88 c.1: Slovenia's specific complaints (overview) alleged infringement of primary law (TEU 2/TEU 4(3)) 172-3 alleged non-compliance with the arbitral award as breach of rule of law (TEU 2) including principles of sincere cooperation and res judicata 172-3 alleged non-compliance with the arbitral award as breach of sincere cooperation principle (TEU 4(3)) by jeopardizing the attainment of the EU's objectives 172 - 3alleged infringement of secondary law common fisheries policy (Regulation No 1380/2013, Regulation No 1224/2009 and Implementing Regulation No 404/2011) 172 maritime spatial planning arrangements (Directive 2014/89) 172 Schengen Borders Code 172 c.1: Slovenia's specific complaints alleged infringement of secondary law presumed determination of the Croatia/Slovenia border by the arbitration award c.2: Slovenia's specific complaints alleging infringement of primary law 173-80 c.2(a): failure of the arbitration agreement/award to qualify as a situation in which the EU is bound by international law 173-5 absence of any transfer of powers from Member States to the EU under a convention

non-applicability of EU law 173-4

AG's conclusion 175

relating to the arbitration agreement 174

c.2(b): alleged infringement of the rule of law principle (TEU 2)



Index

More Information

```
Slovenia v. Croatia (TFEU 259 proceedings) (analysis (AG Pikamäe)) (cont.)
     AG's conclusion 178
     dependence on
        existence of EU obligation 177
        link with TEU 7 (severe risk of a serious breach by a Member State of TEU values)
        link with TEU 19 (non-applicability in TFEU 259 proceedings) 176-7
  c.2(c): alleged infringement of the principle of sincere cooperation (TEU 4(3)) 178-80
     AG's conclusion 179-80
     dependence on existence of EU obligation 178
     Slovenia's arguments 178
  c.3: complaints based on secondary law 180-8
     exclusion of arbitration and agreement as EU matters 160
     territorial scope of the Treaties as predetermined (TEU 52/TFEU 355) 180
  c.3(a) status of arbitration award (non-self-executing/unimplemented)
     acceptability of decision of a recognized international court as a legal fact 181-2
     AG's conclusion 184
     conferral powers (TEU 4(1)/TEU 5(2)), exclusive effect 181
     determination of inter-State boundaries as exclusively a matter for Member States
          (TFEU 77(4)) 181, 185-6
        applicable law, public international law 181
     disputed nature of the arbitral award
        Croatia's notification of termination of the agreement 182
        Croatia's objection to its applicability and validity 181-2
     non-implementation of award/non-self-executing status 183-4
  c.3(b): alleged infringement of Regulation No 1380/2013
     AG's decision 186
     applicability of reciprocal access regime to Croatia and Slovenia, dependence on full
          implementation of the arbitration award 185-6
     inclusion of reference in the Regulation to the "forthcoming" award, effect 184-5
  c.3(c): Slovenia's remaining complaints
     AG's conclusion (lack of jurisdiction in absence of an implemented arbitration award)
     alleged infringement of Directive 2014/89 187-8
     alleged infringement of Regulation No 1224/2009 and Implementing Regulation No
          404/2011 187
     alleged infringement of the Schengen Borders Code 187
Slovenia v. Croatia (TFEU 259 proceedings) (analysis (Court))
  a. Croatia's request for the removal of the Commission's Legal Service's opinion from
          the proceedings
     alleged public status of document 201
     Court's decision (grant of Croatia's request for removal of impugned document) 204
     Court's findings
       non-applicability of EU law 173-4
        public interest considerations 202-4
        risk of adverse repercussions on the interest of the institution concerned in seeking
          legal advice 203-4
        risk of circumventing procedures under Regulation No 1049/2001 (public access
          to EU documents) 204
       status of document under consideration 202
     jurisprudence considered
       Austria v. Council 203
```



Index

More Information

```
Hungary v. Parliament 202, 203, 204
        Sweden and Turco v. Council 201, 204
  b.1: jurisdiction (introduction)
     Court's lack of jurisdiction in respect of
        international agreement not integral to EU law (Commission v. Belgium) 207
        obligations ancillary to separate dispute outside the Court's jurisdiction 207-8
     summary of Slovenia's claims 207
  b.2: jurisdiction (Slovenia's complaints (alleged consequences of Croatia's non-
          compliance with the arbitral award))
     i. breach of rule of law (TEU 2) including principles of sincere cooperation and res
          judicata 208
     ii. breach of sincere cooperation principle (TEU 4(3)) by jeopardizing the attainment
          of the EU's objectives 208
     iii. breach of common fisheries policy (Regulation No 1380/2013) 208-9
     iv. breach of common fisheries policy (Regulation No 1224/2009 and Implementing
Regulation No 404/2011) 209
     v. breach of the Schengen Borders Code 209
     vi. breach of maritime spatial planning arrangements (Directive 2014/89) 209
  b.3: jurisdiction (Court's findings)
     ancillary nature of alleged infringements of EU law/dependence on the existence of
          EU obligation 210-11
     failure of arbitration agreement to qualify as an integral part of EU law 210
        relevance of reference in Act of Accession 210
     lack of jurisdiction 211-12
        parties' continuing sincere cooperation obligation to strive to resolve their dispute
          (TEU 4(2)) 211-12
     territorial scope of the Treaties (TFEU 355) 211
  Court's decision
     Court's lack of jurisdiction 212
     removal of Commission's Legal Service's opinion from the case file 212
South Africa
  act of State
     jurisprudence
        Belhaj 506-11
        Cherry Blossom case 503-4, 511-14
        Kirkpatrick 513
        Kuwait 1 512-13
        Swissborough Diamond Mines 511-12
        Van Zyl 512
     as matter of domestic law/absence of international law obliging restraint 513-14
  Constitution Act 108 of 1996 (including amendments) by section, Chapter 14 (general
          provisions)
     232 (customary international law as law in the Republic) 496, 505, 511
  customary international law "as part of" municipal law
     conflict with legislation and 496
  interim injunction: see Cherry Blossom case
  State immunity from execution/attachment, purpose of proceedings
     safeguarding/conservatory measures
        Cherry Blossom case: 503-11: see also Cherry Blossom case
  State immunity, theory/doctrine including the basis/reasons for
     Belhaj 506, 507-10
```



Index

More Information

```
State immunity
  classification of act as jure imperii or jure gestionis
     developments in law relating to 353
     lease of residential diplomatic premises 348-55
  immunity of officials from foreign criminal jurisdiction (ILC's divided views (2008-20))
  indirect impleading/risk of affecting foreign State's interests ("is not named as a party to
           the proceeding but the proceeding in effect seeks to affect ..." (JISP 6(2)(b)))
           508-11
     Belhaj 506-11
     Cherry Blossom case 505-11
     East Timor 506-7
     Monetary Gold 506-7
  right of suit in "defendant" State's courts
     reciprocity requirement, relevance in relation to proceedings in EU courts 247,
State Immunity from Enforcement Case (Czech Supreme Court)
  procedural background
     admissibility 360-2 lower courts' discontinuation of proceedings for lack of jurisdiction 358-9
     parties' arguments (creditor) 359
     parties' arguments (debtor) 359-60
  State immunity (Court's reasoning)
     applicable law
        International Private Law Act 2012, ss 7(1) and 7(4) 361-3
        JISP as generally accepted point of departure 363
     development of functional concept 361-2
     limitation to jure imperii activity 361
     post-judgment measures of constraint (JISP 18)
        bank account used for the functions of a diplomatic mission/consular post
           (JISP 21(1)(a)) as protected property 363-4
        protection of property serving governmental purposes (JISP 19(c)) 363-4
     pre-judgment measures of constraint (JISP 18) 363-4
     State immunity from jurisdiction and execution distinguished 362-3
  for breach of treaty/consequences of implementation of treaty
     breach of international obligation derived from treaty as basis of
          obligation 69-70
     FTC provisions, applicability to 30-1
     lawfulness of act distinguished 31
  for conduct of State organ/agency (ILC(SR) 4) applicability to "person" (FTC 2(1)) 31, 56-61, 100-1, 104-5, 111-13, 117
"subject of the dispute", obligation to indicate in Application (ICJ 40(1)/ROC 38(2))
  determination, responsibility for
     basis of decision
        application including in particular the basis of the claim 20
     "framing" by applicant State, importance 20
     as obligation of the Court to determine on an objective basis 20
  determination, responsibility for, jurisprudence
     Application of FTC/CERD (preliminary objections) 20
   precise nature of claim" (ICJ 40(1)/ROC 38(1)) 20
  "succinct statement of facts and grounds" (ROC 38(2)) 20
```



Index

More Information

```
whole dispute/separability of elements
     Application of FTC/CERD (preliminary objections) 21-2, 55-6
     Certain Iranian Assets 21
     Obligation to Negotiate Access 21
Switzerland
  Federal Supreme Court Act 2005 (BGG) by article
     62(2) (security for costs/cautio judicatum solvi) 521-7
  security for costs/cautio judicatum solvi: see also Country X v. A_
     grounds/justification 527-8
        insolvency/unwillingness to pay distinguished 527-8
terrorism, difficulty of definition as impediment to adoption of comprehensive
          terrorism treaty 106-9
torture (customary international law (CIL)), immunity of officials: see international
          crimes, immunity of officials ratione materiae/functional immunity (customary
          international law (CIL))
torture, definition/classification as (IHL)
  exposure to others being tortured 389-90
  gravity threshold/"substantial" 386-9
torture or inhuman treatment as war crime
  gravity threshold/"substantial" 386-9
  \overline{ICC} 7(1)(5) (torture as "intentional infliction of severe pain or suffering, whether
          physical or mental" (ICC 7(1)(f))) 387
  priority of torture over inhuman treatment (VStGB 8(1)(9)) 389
torture, State immunity and
  officials, entitlement to immunity ratione materiael functional immunity
     customary international law rule, whether 370-82: see also international crimes,
          immunity of officials ratione materiae/functional immunity (customary
          international law (CIL))
travaux préparatoires as supplementary means of interpretation (VCLT 32)
  ambiguity of treaty, relevance 46-7
  common consent/understanding of parties requirement 103-6
  legitimate expectation arising from 327-8
  in respect of
     CERD 22 46-7, 68-9
     FTC 30-1
treaties and municipal law (including implementing legislation/incorporation/
          unincorporated treaties)
  Costello 432-8
  implementing legislation/incorporation, examples of treaties requiring
     CETA (2016) 432-7
  unincorporated treaty
     as evidence of government policy 564, 566
treaties, ratification, acceptance or approval (VCLT 14)
  effect on municipal law 564, 566
treaty interpretation (VCLT 31(2)) (context)
  grammatical structure
     conjunctive vs disjunctive "or" 44-7
  treaty as a whole/holistic approach (relevant materials)
     EU law including EU Treaties 253-60
```



Index

More Information

```
UN Human Rights Committee: see HRC (UN Human Rights Committee)
United Kingdom
  Climate Change Act 2008 (CCA) by section
     1 (2050 "carbon target") 534, 545
       statement of Government policy for purposes of PA 5(9), whether 565
     2(1) (power to amend s 1 target) 545
     2(2) (power to amend s 1 target: grounds) 545
     3(1) (requirement for advice from the CCC) 545
     4 (carbon budgets for the UK) 534
     10(2) (carbon budgets: matters to be taken into account) 546
     10(2)(i) (carbon budgets: matters to be taken into account: international aviation and
          shipping) 546
     24 (targeted greenhouse gases) 546
     30(1) (emissions from international aviation or international shipping: exclusion as
     emissions from UK sources) 546
32 (Climate Change Committee (CCC)) 545
  Climate Change Act 2008 (CCA) (2050 Target Amendment) Order 2019 (amendment
          to CCA 2050 target) 545
  "Government policy", criteria 562-7
     carefully formulated statement 563-4
     clear, unambiguous statement devoid of relevant qualification 563-4
     jurisprudence
        Friends of the Earth 562-4
        Gaines-Cooper 563-4
        MFK 563
        Miller 564
     ordinary language approach 563, 564
     Paris Agreement, need for incorporation (2015) 553-86
     ratification, effect 564, 566
     unincorporated treaty
        as evidence of Government policy 564, 566
universal jurisdiction, applicability
  Functional Immunity of Foreign State Officials 385, 387-8
  international crimes 385, 387-8
US Embassy Employee Case (background and procedural history)
  facts (plaintiff's employment history)
     appointment to the US embassy in Vienna (1974) (telephonist/secretariat) 335
        termination of employment (17 March 2017) 335
     initial employment as a telephone operator and in the secretariat 336
     transfer to the Commercial Service (subject specialist for the IT-telecom, tourism and
          Aviation industries) 336
        Control Officer for Department of Commerce visitors 337
        job description (2003) 336-7
        member of the Visit USA Committee 337
       role of the Commercial Service 337
  parties' claims
     plaintiff 337-8
     respondent 338
  procedural history
     appeal to the Supreme Court as decision a departure from its previous case law
```



Index

More Information

INDEX 661

```
court of appeal (reversal of lower court's decision) 338-9
       applicability of JISP as codification of CIL 338-9
       JISP 11 (employment contracts) 339
       plaintiff's role in promoting economic relations as core embassy function (VCDR
          3(1)(e)) 339
     court of first instance (rejection of claim to immunity/lack of jurisdiction) 338
US Embassy Employee Case (Supreme Court's legal reasoning) 339-44
  applicable law (CIL)
     in the absence of a treaty 340-1
    as codified in JISP 340-4
  Court's decision
     costs (award against plaintiff) 335, 345
     dismissal of appeal 335, 345
  review of the Court's jurisprudence (denial of immunity for private law transactions)
     Seidl-Hohenveldern's criticism of 340
  sovereign authority, State's right to claim immunity in respect of functions in the
          exercise of (JISP 11(2)(a)) 342-3
     non-interference obligation (VCDR 38(2)) 343
  sovereign nature of assigned functions, determination of
    ascertainment/reporting of conditions and developments in the receiving State
          (VCDR 3(1)(d)) 343-4
     consular activity (VCDR 3(2)) 343
     content of activities/functional connection with the diplomatic or consular duties
     promotion of commercial and economic relations (VCDR 3(1)(a)) 343-4
```

Vedastus v. Tanzania (ACtHPR)

```
background
  parties 123
  parties' positions (applicant)
     alleged breaches 124
     prayers 124
  parties' positions (respondent)
     applicant's response to 125
     prayers 124-5
  procedural history in date order
     conviction and 30-year prison sentence for rape of a 12-year-old minor (20
       December 2005) 123
     appeal to High Court/dismissal of (11 October 2006) 123
     appeal to Court of Appeal/dismissal of (13 August 2014) 123
     application for review of Court of Appeal's decision/rejection (2014) 123
     seizure of ACtHPR (2 October 2015) 123
     summary of procedure before ACtHPR (2015-18) 124
Court's decision 139-40
  respondent's reporting obligation on implementation 140
jurisdiction/admissibility 125-6
  admissibility (conditions not in contention) 130-1
  admissibility (exhaustion of local remedies (ROC 40(5)))
     Court's analysis and conclusion 128-9
     parties' arguments 128
```



Index

More Information

```
Vedastus v. Tanzania (ACtHPR) (cont.)
     admissibility (timeliness of application (ACHPR 56(6)/ROC 40(6)))
       parties' arguments 129
        reasonable period of time", Court's analysis/decision 130
     exhaustion of local remedies (ACHPR 56(5)/Protocol 6(2)/ROC 40(5))
       parties' arguments 128, 129
     jurisdiction ratione locil ratione temporis 126-7
     jurisdiction ratione materiae (disputes concerning the interpretation of the Charter,
          the Protocol and other relevant human rights treaties (ACHPR Protocol 3(1)))
       Court's analysis 125-6
       Court's decision 126
  merits (alleged breach of ACHPR 2 (non-discrimination)/ACHPR 3 (equality before the
          law/equal protection of the law), applicant's failure to demonstrate/substantiate
          claims) 136
  merits (alleged breach of ACHPR 7 (fair trial)) 131-6
     alibi defence (Court's analysis and decision)
       alibi, role as defence 134
       presumption of innocence (ACHPR 7(1)(b)) 134
       right to be heard (ACHPR 7(1)) 134
     alibi defence (parties' arguments)
       applicant 133
       respondent 133
     free legal aid, right to (Court's analysis and decision)
       absence of specific provision (ACHPR 7(1)(c))/interpretation in accordance with
          ICCPR 14(3)(d)) 135
       applicant's failure to ask for, relevance 135
       Court's decision (finding of breach of ACHPR 7(1)) 136, 140
       as inherent in the right of defence 135
     free legal aid, right to (parties' arguments)
       applicant 134
       respondent 134-5
     identification of suspects (Court's analysis and decision)
       Court's decision (no manifest error of judgment) 133, 140
       margin of appreciation 132
       safeguards 132-3
     identification of suspects (parties' arguments)
       applicant 131
       respondent 131-2
  reparations (ACHPR Protocol 27(1))
     burden/standard of proof 137, 138
     costs (ROC 30) (parties to pay own) 139, 140
     non-pecuniary reparation/satisfaction (absence of "special and compelling"
          circumstances justifying release) 138-9, 140
     obligation to remedy the violation including fair compensation or reparation option
          136-7
     pecuniary reparation for non-pecuniary damage/moral prejudice 137
       award for respondent's failure to offer free legal assistance 138, 140
     pecuniary reparation for pecuniary damage/material prejudice 137
     restitutio in integrum principle (Chorzów Factory/ILC(SR) 31(1)) 136-7
Venezuela v. Council (appeal against the General Court's decision): see Venezuela v.
          Council (appeal against the General Court's decision) (background); Venezuela
          v. Council (appeal against the General Court's decision) (Judgment of the Grand
          Chamber); Venezuela v. Council (appeal against the General Court's decision)
          (Opinion (AG Hogan))
```



Index

More Information

```
Venezuela v. Council (appeal against the General Court's decision) (background)
  introduction (AG Hogan) 218-19
     key issue (Venezuela's standing)
        challenged measures as measures of direct concern (TFEU 263(4)) 218, 219
       status as a legal person (TFEU 263) 218, 219
     political and economic situation in Venezuela
        EU sanctions on the sale, supply, transfer or export of certain military and other
          equipment 217-18
        extension to the provision of related technical, brokering or financial services
          218
       possibility of travel bans 218
     summary of General Court's decision 218-19, 264-5
        Venezuela's arguments 219
  General Court's decision ("direct concern" (TFEU 263(4))) 222-4, 264
     conclusion (no direct effect) 224
     cumulative nature of requirements 222
     direct vs indirect effect of Regulation 2017/2063 222-4
  legal context (Regulation 2017/2063 concerning restrictive measures in view of the
          situation in Venezuela) 219-20, 261-4
     Preamble (TFEU 215 as legal basis) 218 n. 3, 219, 230, 237, 257, 261, 266, 281,
          374
        recital 1 (EU concern about situation in Venezuela) 261
     2 (prohibition on the provision of technical assistance, brokering services, financing or
          financial assistance and certain other services to or for use in Venezuela) 219-
          20, 261
     3 and Annex I (prohibition on the sale, supply or export of equipment which might
          be used for internal repression) 220, 262
     4 (authorized derogations) 220, 262
     6 (prohibition on the sale, supply or export of Annex II equipment, technology or
          software to or for use in Venezuela) 220, 263
     6(2) (prohibition on the authorization of the sale, supply or transfer of equipment,
          technology or software which might be used for internal repression) 220
     7 (prohibition on the provision of technical assistance or brokering services related to
          Annex II equipment, technology or software to or for use in Venezuela) 220,
     7(2)(c) (prohibition on the provision to the Venezuelan authorities of
    telecommunication, Internet monitoring or interception services) 220 8-11 and Annex IV and V (freezing of financial assets) 220-1
     17(4) (regular review of Annex IV and V) 221
     20 (applicability of the Regulation) 221, 222-4, 254-8, 263-4, 275, 278
     Decisions 2017/2074 and 2018/1656 (enabling Decisions) 261
  "legal person" (TFEU 263(4)), third State as
     Latvia 268
     Member States' arguments 230-6
        Belgium 231-2, 268-9
       Bulgaria 232, 268-9
Estonia 232-3, 268-9
        Germany 235-6, 268-9
        Greece 232, 268
        Lithuania 232, 268-9
        Netherlands 234, 268-9
        Poland 230-1, 268
        Slovakia 233-4, 268
        Slovenia 231, 268
```



Index

More Information

664 INDEX

```
Venezuela v. Council (appeal against the General Court's decision) (background)
(cont.)
        Sweden 234-5, 268
     parties' arguments 226-30
       Commission 236-7, 269
        Council 228-30, 267
        Venezuela 226-8, 266-7
  procedural history in date order
     action before the General Court for annulment of the Regulation (6 February 2018)
          221, 264-5
     Council's admissibility objection (3 May 2018) 221, 264
     Venezuela's comments on objection (27 June 2018) 221
     Venezuela's adaptation of application (adding Decision 2018/1656 and
          Implementing Regulation 2018/1653) (17 January 2019) 221-2, 264, 265
     oral hearing (8 February 2019) 222
     Judgment of the General Court (20 September 2019) 222-5, 264
     Judgment of the Grand Chamber (22 June 2021) 260-82
Venezuela v. Council (appeal against the General Court's decision) (Judgment of the
          Grand Chamber)
  background/overview
     competence of EU courts in relation to CFSP (TFEU 215/TFEU 75) 266
     failure to meet TFEU 263(4) conditions as absolute bar, Court's right to decide ex
          proprio motu 266
     General Court's decision (summary)
        issues of admissibility raised by the Council 264
        limitation to consideration of "direct concern" (TFEU 263(4))/dismissal of
          objection 264-5
     the issue/scope of the appeal 263, 265-6
     parties' claims 265
  Court's decision
     referral of case back to the General Court for judgment on the merits 282
     reservation of costs 282
     setting aside of General Court's dismissal of action for annulment of Articles 2, 3, 6
          and 7 of Council Regulation (EU) 2017/2063 282
  Court's final judgment on admissibility (TFEU 263(4))
     alleged absence of an interest in bringing proceedings
        availability of action for annulment for all EU measures intended to have legal
          effects 278-9
        Commission v. Council (C-425/13) 278
        Court's rejection of Council's claim 279
       Esso Raffinage 278
        Front Polisario 279
        need for requested annulment to directly benefit the applicant 278-9
        parties' arguments 278
     automaticity of implementation requirement 279-81
        Court's finding of compliance 281
        direct effect of Regulation 2017/2063, Articles 2, 3, 6 and 7 279-81
        parties' arguments 280
       status of Regulation 2017/2063 as a "regulatory act" 281
  "legal person", Venezuela's status as 277
"direct concern" (TFEU 263(4)) (Court's analysis and conclusion) 273-7
```

applicability of Regulation 2017/1963 to Venezuela and emanations of the State 276



Index

More Information

```
Court's decision (appeal upheld) 277
     criteria
       automaticity 274-5
       cumulative nature 273
       direct effect on Venezuela's legal situation 274-5
     determining factors (purpose, content, scope, substance and the legal and factual
          context) 275-6
     General Court's findings 275-7
     jurisprudence
       Changmao Biochemical Engineering v. Distillerie Bonollo 274-5
        Trasta Komercbanka 274-5
     limitation of the Regulation to the territory of Member States and persons subject to a
          Member State's jurisdiction, relevance 276
    parties' arguments
Council 273-4
       Venezuela 272-3
  jure gestionis/jure imperii nature of transactions, relevance 276
  "legal person" (TFEU 263(4)), third State as (Court's analysis and conclusion) 270-2
    conclusion (sufficiency of Venezuela's international legal personality to establish as a
          "legal person" under TFEU 263(4)) 272
     reciprocity of right of suit in "defendant" State's courts, relevance 272
     rule of law (TEU 2, TEU 21 and TEU 23), applicability to TFEU 263(4)
          proceedings 271-2
Venezuela v. Council (appeal against the General Court's decision) (Opinion (AG
          Hogan))
  competence of EU courts in relation to CFSP, exclusion (TFEU 215/TFEU 75) 237
     exception of decisions providing for restrictive measures against natural or legal
          persons (TFEU 215) 238
  "direct concern" (TFEU 263(4)) (AG's analysis and conclusion) 253-60
     applicability of Regulation 2017/1963 to Venezuela and emanations of the State
     automaticity of implementation requirement 253
     cumulative nature of requirements 253
    determining factors (purpose, content, scope, substance and the legal and factual
          context) 253
     direct effect on Venezuela's legal situation, examples 255-6
       inclusion of persons or entities subject to restrictive measures in a list 256-8
     direct vs indirect effect of Regulation 2017/2063 254-5, 257-8, 259
     holistic and pragmatic approach 253-60
     jurisprudence
       Almaz-Antey 257-9
       Dijkman and Dijkman-Lavaleije 256
       Infront WM 254
       Kadi & Al Barakaat 256
       Luisi and Carbone 256
       PKK and KNK 253-4
       Rosneft 256
     limitation of the Regulation to the territory of Member States and persons subject to a
          Member State's jurisdiction, relevance 254-8
     naming of person in the main body of Regulation or in an Annex, relevance 258-9
     review of General Court's judgment 253-60
  "direct concern" (TFEU 263(4)) (parties' arguments)
```



Index

More Information

```
Venezuela v. Council (appeal against the General Court's decision) (Opinion (AG
Hogan)) (cont.)
     Council 249-53
     Venezuela 248-9
  "legal person" (TFEU 263(4)), third State as (AG's analysis and conclusion) 237-
          48
     interpretation of EU law
        applicability of international law/VCLT 241
        autonomous meaning at the level of EU law 241
        comity, applicability 241
        purposive interpretation 246
     public international law 238-41
       applicability 241
        DRC v. Belgium (ECtHR) 240
       Jurisdictional Immunities 239-40
        right of sovereign State to sue and be sued 238-9
        Sabbatino 239
        sovereign State status, sufficiency 240-1
        State immunity/act of State 238-40
     reciprocity of right of suit in "defendant" State's courts, relevance 247
     third-State standing, applicability of AG's conclusion to case under consideration
          246-8
        lack of a right to reciprocal access, relevance 247
        purposive interpretation of TFEU 263(4)/EU jurisprudence 246
        recognition of third-State standing in principle/need for compliance with other
          standing criteria 248
        respect for rule of law/principle of effective judicial protection (TEU 19(1))
          246-7
     third State's standing before EU courts 241-8
        absence of TEU/TFEU definition of "legal person"/treatment as an autonomous
          concept 242
        annulment actions (TFEU 264) 241-2
        ECHR 33/ECHR 34 distinguished 240-1
        EU jurisprudence 242-6
        privileged/semi-privileged applicants distinguished 242 n. 54
  order for Venezuela to bear the costs 225
  procedure before the Grand Chamber
     legal issue (TFEU 263(4)) (standing)
        an act of direct and individual concern/not entailing implementing measures
          requirement (TFEU 263(4)) 225
        CJEU's competence ex proprio motulown motion 225
        Court's request to the parties, the Commission and the Member States for
          views on the status of a third State as a legal person under TFEU 263(4)
          225-6
        cumulative nature of requirements 225
     parties' claims (Council)
        dismissal of appeal 225
        setting aside of dismissal of action as inadmissible 225
     parties' claims (Venezuela)
        declaration of admissibility/referral to General Court for ruling on the merits
          225
```



Index

More Information

INDEX 667

order for Council to bear the costs 225 recommendation (General Court's error in law/remittal to the Court for adjudication)

war crimes/crimes against humanity, jurisdiction

treatment as ordinary crimes 383

Western Sahara, history and status

Front Polisario

Note: "Front Polisario" is known alternatively as "Polisario Front". To avoid splitting the relevant material for purposes of the index, "Front Polisario" is the preferred

as a national liberation movement 492

objectives 492

UN recognition as representative of the people of Western Sahara in relation to their right to self-determination (UNGA 34/37) 492

Mauritania and 495

Morocco's actions in

substantial settlement of Moroccans in 494

Morocco's status, possibilities

administering power 504

sovereignty, international community's rejection of claim 498-9

Front Polisario 499

Western Sahara 499

Western Sahara Campaign UK 498-9

as NSGT (UNC 73(e)) 492, 497

incompatibility of Morocco's claim to sovereignty 498-9

self-determination, right to 496-8

SADR

Constitution by article

17 ("public property") 492

proclamation as a sovereign State (27 February 1976) 492

recognition by members of the UN 492

Saharawi people, features of

distinct culture and language 494

as the indigenous population of Western Morocco 494

as nomadic people now often in refugee camps in Algeria 494

Western Sahara, history and status in date order

1884 (colonization by Spain) 494

1960 (UNGA resolution 1514 (XV)) 499-500

1966 (UNGA Resolution 2229 (XXI) (Ifni and the Spanish Sahara)) 494, 497

1973 (creation of Front Polisario) 492

1974 (proposed referendum) 492, 494

continuing failure to hold 494

1975 (Green March) 494

1975 (Western Sahara) 497 1976 (proclamation of SADR as a sovereign State) 492

1976 (Spanish withdrawal/relinquishment of administering power status) 494

1979 (Mauritania's renunciation of claims to Western Sahara) 494

1979 (UNGA Resolution 34/37 (right to self-determination)) 492

1980-2020 (building in stages of wall through the middle of Western Sahara) 494

1982 (admission of SADR to the OAU/Moroccan withdrawal from) 492



Index

More Information

668 **INDEX**

Western Sahara, history and status in date order (cont.)

1988 (ceasefire/establishment of MINURSO) 495

1991 (UN-brokered ceasefire) 495

2002 (Corell Report) (finding of State's inability to transfer sovereignty to Morocco and

Mauritius/Western Sahara's continuing status as an NSGT) 497
2008 (Corell's lecture in Pretoria on "The legality of exploring and exploiting natural resources in Western Sahara") 500-1
2015 (adoption of SADR Constitution (December 2015)) 492