strictly literal approach or one too tightly bound by the rules of interpretation applied to purely domestic legislation. In the words of Lord Wilberforce, it is an approach "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation".[102] Courts will be inclined to apply a broader, purposive construction in light of the whole enactment, including the convention.[103]

To that end, the courts will apply the VCLT, taking particular account of Article 31 (good faith interpretation, ordinary meaning of the terms in context, in light of object and purpose). This, even though the VCLT is not implemented in the domestic legal system by Act. If authentic versions exist in other languages, expert evidence, dictionaries, and other reference material are also admissible to assist in determining the meaning.[104]

If the terms of the treaty are unclear or ambiguous, cautious regard may be had of the *travaux préparatoires*, commentaries or decisions of foreign courts.[105] In particular, Lord Wilberforce suggests accepting reference to the drafting history and *travaux préparatoires* on the two conditions that those materials are publicly available and that they clearly and indisputably point to definite legislative intention.[106] But in any event, all these are merely possible aids to construction, whose weight depends upon the circumstances.

English courts are not bound by nor constrained by the interpretations of a treaty by foreign courts.[107] Practically speaking, there is a limit to domestic understanding of foreign languages, foreign legal systems and practice, the role and position of national courts and consistency and coverage of law reporting. On principle, a treaty is an international agreement among various states, rather than "regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision."[108] Lord Steyn continues:

> In principle therefore there can only be one true interpretation of a treaty. ... In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in so doing it must search, untrammelled by notions of its national legal

[102] *J. Buchanan & Co v Babco Forwarding & Shipping* [1978] AC 141, 152. And see *Stag Line v Foscolo, Mango & Co* [1932] AC 328 (id).

[103] See, e.g., *Sidhu v British Airways* [1997] AC 430; *Adan v Sect. State Home Dept* [1999] 1 AC 293, 305 (per Lord Berwick).

[104] See, e.g., *Corocraft v Pan American Airways* [1969] 1 QB 616 (CA).

[105] *Fothergill v Monarch Airlines* [1981] AC 251; *Jindal Iron v Islamic Solidarity Shipping* [2005] 1 WLR 1363 (HL) (contractual redistribution of liability under the Hague–Visby Rules); *JI Macwilliam Co v Mediterranean Shipping* [2005] 2 AC 423 (interpretation of "bill of lading or any other similar document of title").

[106] *Fothergill v Monarch Airlines*, 278. Gardiner 1995 points to some of the unhappy results if the conditions are less than strictly observed.

[107] See, e.g., *Jindal Iron v Islamic Solidarity Shipping*; *JI Macwilliam Co v Mediterranean Shipping; Corocraft v Pan American Airways; R (Abbasi) v Sect. State Foreign and Commonwealth Affairs.*

[108] *R v Sect. State Home Dept Ex p. Adan* [2001] 2 AC 477, 515, 516–17, 518 (per Lord Steyn).

> culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.
>
> … Unanimity on all perplexing problems created by multilateral treaties is unachievable. National courts can only do their best to minimise disagreements. But ultimately they have no choice but to apply what they consider to be the autonomous meaning.

Thus the House of Lords overturned the decision of the Home Department to return certain refugee claimants travelling through France and Germany to those respective countries as safe third countries pursuant to the 1951 Refugee Convention and 1967 Protocol. Both France and Germany interpreted and applied the Convention and Protocol such that any asylum seeker could be returned (further) to a territory (here, Algeria and Somalia) where the asylum seekers feared persecution and breach of human rights. The House of Lords held that the government must consider only the "true and autonomous" interpretation of the Convention, which addressed the refugee claimant's legitimate fears, and not the views taken by the asylum state. Under the Convention, the approaches of France and Germany were "otherwise than in accordance with the Convention". A more cynical mind might be tempted to find in this ostensibly internationalist tinted approach the distinct resonance of an inescapable dualism, resulting from the real and practical application of law. That occurs within the national legal system which is intimately bound to a particular, individual social and political context. Hence *ex p. Adan* can be seen as less about applying an autonomous meaning and more about the judicial approval of relying on a national understanding of a treaty that is reasonably justifiable on its terms, without fear of being overturned for lack of necessary comity with other treaty states.

Where no settled or definitive meaning can be elucidated from these additional evidentiary sources of meaning, the UK courts are likely to resort to ordinary commercial reasonableness and the certainty of law afforded by long-standing (domestic) precedent and practice.[109] And as always, it is the intention of Parliament, as derived from its words of enactment, which govern the nature and scope of the law.[110]

The principles above address the situation where an Act clearly or explicitly seeks to incorporate an international convention. But it may not be clear on the face of an enactment that it purports to do so. What seems purely domestic legislation may touch directly or indirectly upon matters for which the UK has entered into international commitments. On the dualistic model, Parliament is not bound by those commitments, and may continue to prescribe what rules of law it sees fit, irrespective of treaty obligations. At the same time, a disregard for those engagements on internal law basis may put the government at a disadvantage in its dealings with other states ("embarrass the Crown" in other words) or equally work to the detriment of the Crown or nationals when dealing with foreign powers. Reciprocity and mutuality do lubricate peaceful interactions among state powers.

---

[109] *Jindal Iron v Islamic Solidarity Shipping*; *JI Macwilliam Co v Mediterranean Shipping.*

[110] Thus *In re State of Norway's Application (No.2)*[1990] 1 AC 723; *R (Mullen) v Sect. State Home Dept.* [2005] AC 1.

This practical consideration would encourage an interpretative approach which attends in some measure to reconciling national law with international commitments. Thus the courts' interpretative jurisdiction is engaged on a point of law antecedent to the general considerations above. Quite simply, it is to determine whether Parliament intended to implement or conform to (albeit indirectly) those international commitments in making national law.

Two situations may be distinguished: the specific and the general. In the first case, the evidence may show that upon ratification or accession by the UK, Parliament enacted certain legislation which tracked or gave word to the very treaty commitments lately concluded.[111] To a degree, the meaning of the legislation (and of course, be it primary or secondary) can only be properly understood when read with or subject to the international convention. In an example commonly cited, *Post Office v Estuary Radio*, the Court of Appeal could not construe the 1964 Territorial Waters Order in Council without regard to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, ratified in 1960 by the UK and in force 15 days before the Order in Council.[112] Diplock LJ held, for the Court, that the Order was intended to give effect (in and for the UK) to the Convention; the language in the Order tracked that of the Convention, and that the Order was not readily intelligible without reference to the Convention. At the same time, he noted that by the Convention the Crown was exercising its prerogative to claim an area as the territory of the UK. The courts were constitutionally bound to recognise and give effect to that declaration of territorial sovereignty. While this may have provided another route of entry for the Convention, it is a double-edged sword. If the Convention is to be understood as a declaration by the Crown on territorial sovereignty, it minimises its specific treaty character. (A like declaration, without the pomp and circumstance of a treaty, would accomplish the same.) By extension, the case stands less for the proposition of the direct incorporation of treaties concluded under the prerogative into domestic law, and more for mere judicial notice recognition of a prerogative act, howsoever evidenced.

A like attempt recurred in *Salomon v Commissioners of Customs and Excise*, again by the pen of Diplock LJ.[113] He found the inference "irresistible" that the section of the Customs and Excise Act in issue intended to embody the European Convention on the Valuation of Goods for Customs Purposes. The section was shown to have first come into being very shortly after the UK entered the Convention. Added to this, the terms of the statutory section and of the convention were almost identical, although the statute made no reference to the Convention. Yet Russell LJ expressed some reserve at this, finding the necessary interpretative

[111] See, e.g., *R (Mullen) v Sect. State Home Dept* (Sects. 133 Criminal Justice Act 1988 to give effect to Article 14(6) ICCPR, as shown in part by Ministers' statements to Parliament).

[112] *Post Office v Estuary Radio* [1968] 2 QB 740 (CA); see also *R v Kent Justices Ex p Lye et al.* [1967] 2 QB 153 (Div Ct.).

[113] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143–145 (CA).

stuff in the legislative history; whereas Denning LJ considered reference to the Convention admissible under the general rule.[114]

In the second case, it is an accepted general canon of construction, and to quote Lord Diplock, "too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not be inconsistent with it."[115] Taken from *Garland*, the case involved an allegation of discriminatory treatment relating to more limited retirement rights (concessionary rail travel) accorded women than men, and prohibited by the 1975 Sex Discrimination Act. It is not, however, strictly and simply an authority for that proposition. The Treaty at issue was the EEC Treaty, whose obligations had been given effect by the European Communities Act 1972, and the precise issue had been submitted by the House to the ECJ for a preliminary ruling.

The breadth of Lord Diplock's articulation of the rule must also be weighed against Lord Bridge's comments in *Ex p Brind*.[116] Where Parliament confers an administrative discretion without setting explicit limits within which that discretion must be exercised, it would be a usurpation of the legislative function for the courts to presume that any exercise must be subject to limits imposed by an unincorporated treaty (there, the EConvHR). To do so goes beyond the resolution of ambiguity by interpretation, for which the rule stands. Moreover, as a rule of construction, it does not therefore constitute the incorporation of international law into the domestic legal system. It is instead, as I suggest, a means of ensuring the effects of domestic legislation do not unreasonably interfere with international comity, abutting against the interests of foreign sovereigns to the detriment of the home state and its nationals.

A further consideration is articulated by Lord Hoffman in *R v Lyons*. Appearing in many other (perhaps more attractive) guises, the argument is advanced that the state—by its various extensions, judicial, executive, legislative—should speak with one voice on the international stage, and comply with its international obligations. Thus, the courts ought to interpret and apply the law internally in a way consistent and in accordance with what the state has promised externally. As an organ of state, the courts are obliged to give effect to treaty obligations (and customary international law, for that matter): a promise by one organ (the executive) to third parties binds the other organs. For Lord Hoffman, this represents a fallacy.[117] The internal distribution and application of power is determined by the constitutional separation of powers. The obligation of the courts is to give effect to the law as enacted by Parliament, a duty "entirely unaffected by international

[114] *Salomon v Commissioners of Customs and Excise,* 141 (Denning LJ); 152 (Russell LJ).

[115] *Garland v British Rail* [1983] 2 AC 751, 771; also *Salomon v Commissioners of Customs and Excise,* 143–144 (per Diplock LJ); and see *AG v Guardian Newspapers (No.2)* [1990] 1 AC 109 (Per Lord Goff).

[116] *Ex p Brind* [1991] 2 WLR, 747–48 (Lord Bridge).

[117] *R v Lyons*, 994–5; 1011 (Lord Millett agreeing).

law". And as such, this consideration also plays directly into the remarks of Lord Bridge in *Ex p. Brind* to form a consistent whole.

Another version of this "institutional continuity" argument arises in the form of a claim that official (UK) ratification to or accession to a treaty creates a legitimate expectation that all state organs will act in accordance with the commitments laid out in that treaty. In English administrative law, the representations or conduct of a public authority may give rise to a reasonable expectation that the public authority will follow the course of action so represented.[118] Those representations do not have an initial character of a (contractual) promise, or specific decision, or rule and regulation so as to be originally binding on the authority as a matter of law. Typically, the representations will involve a general policy statement, departmental guidelines and such like. These may, however, generate an expectation that the public authority will (in the circumstances expressed) follow a specified procedure to decide, or that in coming to its decision, it will confer a particular benefit. And it may be unfair to allow the public authority to pursue another course where an applicant or person has relied to his (resulting) detriment on the expectation that the public authority will act as originally represented. In those circumstances, the courts will hold that a legitimate expectation, rooted in the doctrine of fairness, prevents the public authority from acting otherwise.[119]

In the context of treaty obligations, the legitimate expectations argument would point to the ratification of or accession to a treaty as the positive act generating the necessary and sufficient grounds for reliance, thus to render the as yet unconverted international commitments domestically enforceable. Two decisions have accepted and applied this: *Ex p Ahmed* and *Ex p Adimi*.[120] Both concerned the prosecution of (in transit) asylum claimants for the possession of false travel documents under British law, despite the 1951 Convention on the Status of Refugees and its Protocol. Only Article 33 of the Convention had been directly incorporated into domestic law, and not Article 31 in particular, which would have provided an effective answer and defence. The grounds for an expectation were bolstered by, in the Courts' view, evidence of Ministerial statements of compliance with the Convention, English refugee practice tracking what was found in the Convention, and a "large measure of incorporation". That latter point drew upon the fact that the Asylum and Immigration Appeals Act 1993 provided that nothing in the

[118] See generally, Craig 2008, Chap. 20. The difference drawn in UK administrative law between legitimate expectations of substantive rights, and those going to procedural rights, as it may pertain to treaty obligations is not considered here.

[119] See, e.g., *R (Abbasi) v Sect. State Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 and *R (Al Rawi) v Sect. State FCO* [2008] QB 289 (CA).

[120] *R v Sect. State Home Dept ex p Ahmed and Patel* [1998] INLR 578 (CA); *R v Uxbridge Magistrates Court ex p. Adimi* [2001] QB 667 (Div Ct), both relying on *Min. Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HC Austr). See also *R v Sect. State Home Dept ex p. Behluli* (7 May 1998) (CA). *R (European Roma Rigts Cntr) v Immigration Officer Prague Airport* [2004] QB 811 (CA) rejects the application of the doctrine to unincorporated treaties. On appeal to the House of Lords [2005] 2 AC 1, the issue was not framed and pursued in that way.

Immigration Rules laid down any practice contrary to the Convention.[121] Albeit strictly speaking that pertained only to the Immigration Rules, and not to the entire UK statutory corpus. Moreover, in *Ex p. Adimi*, Newman J invoked *Thomas v Baptiste*[122] as conferring unanimous approval on the proposition that the doctrine of legitimate expectation applied to unincorporated treaties. But the Privy Council held only that, even if the doctrine could provide procedural protections, it could not confer itself, absent constitutional safeguards, any substantive rights. No binding rules of law were generated by legitimate expectations and the government could act in another manner as long as basic fairness was respected.

In response to the problems exposed in *Ex p. Adimi*, Parliament amended the Immigration and Asylum Act to incorporate defences based on Article 31 of the Convention for certain, listed offences. When an in-transit asylum seeker, Asfaw, was prosecuted on the same facts and grounds for two offences, only one of which was a listed offence, the question about legitimate expectations arose again.[123] Her conviction for the non-listed offence was quashed by the Law Lords, in line with a broad and purposive reading of the Convention defences incorporated into domestic law, and given the abuse of process of charging her with two separate but factually indistinguishable offences, for one of which there was an acquittal. In addition Asfaw also argued that she had a legitimate expectation that the UK would observe overall its Convention obligations. Both Lord Bingham and Lord Hope rejected these arguments out of hand.[124] The terms of the statute governed, and could be overridden by any such legitimate expectation. If there was a legitimate expectation to be found, it was that the statute would be enforced according to its terms. *A fortiori* a wholly unincorporated treaty cannot be understood to found or create legitimate expectations inconsistent with established law.

(ii) what you see is what you get?

Thus, in many ways, the truth of the matter is “what you see is what you get.” The modern starting point to the courts’ interpretative jurisdiction here is the ITC case.[125] Its statements of the general rule concerning treaties in English law and before the courts have been already been recited above. The case also serves as the focal point for any critique of a perceived narrowness to English judicial perspectives on legislative incorporation of international law.[126] The case turned on the respective liabilities of an insolvent international organisation, the

[121] See *R v Sect. State Home Dept ex p Sivakumaran* [1988] AC 958, 990 (Lord Keith).

[122] [2000] AC 1 (PC Trin. & Tob).

[123] *R v Asfaw* [2008] 1 AC 1061.

[124] *R v Asfaw*, 1088 (Lord Bingham), 1099 (Lord Hope). On the interpretation given to the Convention by Lords Rodger and Mance, the issue did not arise.

[125] *Rayner (Mincing Lane) Ltd v DTI* [1990] 2 AC 418.

[126] See Greenwood 1990, Sadurska and Chinkin 1990, and Mann 1991 (the ITC case “disastrous and injurious”), and see also Jennings 1990 (a constricted approach to international matters), Cunningham 1994, and Higgins 1993.

"International Tin Council" (ITC), and its constituent member states. The ITC was an international organisation constituted by agreement among a number of states, having the status of a treaty. By agreement with the UK, the ITC's principal office and headquarters was located in London. An Order made under the International Organisations Act 1968 conferred on the ITC "the legal capacities of a body corporate" and certain immunities and privileges, but did not incorporate the ITC headquarters agreement nor specify further those legal capacities in relation to the ITC Treaty. That treaty had not been brought into domestic law either. When the ITC became insolvent, creditors sought payment from the UK, claiming that upon due consideration of the ITC Treaty and allied international agreements, the constituent states were jointly and severally liable with the ITC for its debts. To succeed, the claimants had to advance an interpretation of the Order which denied the ITC the full status of a corporation in English law, contracting in its own name, and being fully and exclusively liable for its own debts. In other words, the ITC either contracted on behalf of member states, making them primarily liable under the contracts, or English law would recognise its contracts only as those of the member states, or as a matter of domestic or international law member states were jointly and severally liable for the debts of an international, representative organisation. The House of Lords rejected this approach. The Order was clear and certain on its terms: it conferred corporate personality upon the ITC which otherwise had no standing or status in English law. The Order did not qualify or limit that corporate status, to override in some way the ordinary principles of English law on the rights and liabilities of a corporation. Whether the ITC constituent treaty imposed other or greater obligations on the stakeholder states was irrelevant. Whatever the treaty might stipulate, the Order controlled the rights and obligations of the ITC as recognised in English law by English courts. And in any event, the ITC Treaty was not justiciable before the courts because it had not been brought into domestic law under the Order or otherwise. Finally, no rule of international law was shown to exist imposing joint and several liability on states constituting an international organisation.

What creates the perceived central problem to the ITC case is its confusing manner of expressing precisely what the status of the ITC was. It stems in large measure from the speech of Lord Templeman:

> But the Government of the United Kingdom had by treaty concurred in the establishment of the I.T.C. as an *international* organisation. Consistently with the treaty, the United Kingdom could not convert the I.T.C. into an *United Kingdom* organisation. In order to clothe the I.T.C. in the United Kingdom with legal personality in accordance with the treaty, Parliament conferred on the I.T.C. the legal capacities of a body corporate. The courts of the United Kingdom became bound by the Order of 1972 to treat the activities of the I.T.C. as if those activities had been carried out by the I.T.C. as a body incorporated under the laws of the United Kingdom.[127]

---

[127] *Rayner (Mincing Lane) Ltd v DTI*, 478 (emphasis in the original). The same differentiation appears in the other leading speech of the decision, that of Lord Oliver.

If the ITC were a body corporate constituted in international law, then the treaty ought to govern the interrelationships among stakeholders and entity. Yet limiting the legal appreciation of those relationships to what appears in the 1972 Order only, seems inconsistent with the statement that the ITC was not thereby converted into a UK organisation. The dualist nature of the English system would therefore be seen to produce a situation where an international organisation could enter contracts and effect various transactions in the UK without heed to its constituent international instruments.[128] It would have a dual status, and potentially conflicting or competing rights and obligations. This reading would follow from a (too) strict application of the separation of powers and constitutional rule in narrowest form: what you see is what you get. True as this may be, however, there is no principled reason why an unincorporated treaty ought to be held determinative in the place of a clear statutory prescription.[129] It is not for the courts to usurp the legislative power to create or recognise (new) entities and relationships in law.[130] Nor is it for the courts to correct or improve upon legislation or supplant a particular outcome for a result deemed to be more just at the time. That the creditors of ITC would receive a paltry recovery did disclose a problem and seeming injustice. But this did not originate (exclusively) from the 1972 Order. If anything, it would come from the international constituent instruments. The rights and liabilities of the member states, regarding the outstanding debts of the ITC, or any other international organisation for that matter, are questions properly for the interpretation of the international constituent instrument. That feature necessarily operates on the international plane, concerning the relationships between sovereign entities. Strictly speaking, it is not a matter before the courts inasmuch as the creditor–debtor relationships actually in issue arise from domestic legislation (here, the 1972 Order). The reading given in the ITC case may well be austere on the facts, but it is not thereby incorrect.

The full extent of the confusion aroused by the ITC decision revealed itself shortly thereafter in a further case involving an international commercial entity constituted by treaty: *Arab Monetary Fund v Hashim (No.3)*.[131] The AMF sued Hashim, its former director general, in England for misappropriating funds. He sought to strike the action, relying on the ITC case, on the basis that the AMF as an international organisation was not a body corporate duly constituted or recognised under English law. And the AMF Treaty was not part of English law. Nonetheless, the treaty creating the AMF had been duly ratified and incorporated into UAE law, where in Abu Dhabi it had its headquarters. In his dissent, Lord Lowry considered the ITC case to make good Hashim's objection. The question was not one of

[128] *Rayner (Mincing Lane) Ltd v DTI*, 500–01 (per Lord Oliver) "Which states have become parties to a treaty and when and what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts."

[129] See Lord Oliver, *Rayner (Mincing Lane) Ltd v DTI*, 512.

[130] See also Lord Bridge in *Ex p. Brind* [1991] 1 AC 696, 748 (HL).

[131] *Arab Monetary Fund v Hashim (No.3)* [1991] 2 AC 114 (161, 165 per Lord Templeman).

recognising a legal entity constituted under international law (untenable by virtue of the ITC case) but rather one of status of an entity constituted under international law and recognised by the domestic law of a foreign state. Following the distinction made by Lord Templeman recited above, Lord Lowry concluded that the recognition of the AMF had effect for the purposes of UAE law alone, and could not extend beyond that without undermining its status as an international organisation, and recharacterising it as a UAE corporation. In a sense, this is also an application of "what you see is what you get": once an international organisation, always an international organisation.

Lord Templeman disagreed. For the majority, he dismissed Hashim's objection on the basis that, "[a]lthough a treaty cannot become part of the law of the United Kingdom without the intervention of Parliament, the recognition of foreign states is a matter for the Crown to decide and by comity the courts of the United Kingdom recognise a body corporate created by the law of a foreign state recognised by the Crown." That this articulation of the rule is fully consistent with the constitutional arrangement of the separation of powers needs no further elaboration. The ITC case "reaffirmed that the English courts can only identify and allow actions by individuals, sovereign states, and corporate bodies." Hence the AMF as an international organisation created by sovereign states had no standing to sue in English courts. But the AMF as a body corporate created under UAE law did. Even if the other constituent states had recognised the AMF as a corporate body under relevant domestic legislation, this did not result in multiple, competing AMF corporate entities. Lord Templeman did not admit to any difficulty or hesitation in relying on the terms of the treaty to identify the headquarters state and offices of the AMF so as to identify in turn the true representative corporate entity. But nothing turned on rights and obligations deriving from the treaty, thus distinguishing the position of the AMF before the courts from that of the ITC.

The effect of competing foreign domestic legislation on the status of an international organisation in English law appeared in 1994. In *Westland Helicopters v Arab Organisation for Industrialisation*, the headquarters state, Egypt, sought by further domestic legislation to continue the AOI and preserve its current joint venture obligations after the rest of the constituent states declared their intention to wind up the AOI.[132] Westland, as one of the joint venture partners, sought to enforce its arbitration awards (for cancellation of contract) against AOI deposits held by banks in the UK. The Egyptian AOI entity objected, claiming that it was the proper owner of those deposits, and that its rejection of standing as the legitimate representative of AOI interests at the arbitration rendered the awards unenforceable. The difficulty facing the court was of course the two conflicting Egyptian statutes, the first made under the authority of and pursuant to the treaty, and the second, without the support of the other constituent members and in the face of their explicit desire to wind up the AOI. Ostensibly pursuing Lord

[132] *Westland Helicopters v Arab Organisation for Industrialisation* [1995] QB 282, 303–5, 307–308.

Templeman's logic, Colman J concluded that issues of meaning, effect, and operation of the AOI's constitution fell to be determined under the treaty and according to principles of public international law, and to rely on the Egyptian laws for that purpose would be to convert the AOI from an international organisation into a national, Egyptian one, contrary to the treaty and international comity. The proper law of the constitution and structure of an international organisation is public international law. The Egyptian AOI could not prove that it was the AOI contemplated by the treaty. Its claims thereon relied ultimately on demonstrating a breach in international law of the treaty by the other sovereign parties, and further, the lawfulness in international law of Egyptian countermeasures, all of which were issues beyond the jurisdiction of the English courts. Therefore its claim failed.

On its face, all this appears much closer to the reasoning of Lord Lowry dissenting in *AMF v Hashim*. True, the status of the original AOI was not before Colman J, only that of the purported successor to it. But to reject that claim for standing, Colman J had to limit the effect of the Egyptian laws recognising the AOI in the same way Lord Lowry would have restricted the effects of the UAE decree. Whatever may be said regarding private international law on this progression from the ITC case, through *AMF v Hashim*, to *Westland v AOI*, the cases remain consistent from a constitutional, or separation of powers perspective. That is, they disclose a resolute dualism, in which the underlying, unconverted treaties remained largely out of play in the determination of (domestic) legal rights within the domestic legal system. In the ITC case, domestic legislation (the 1972 Order) governed. In *AMF*, the court recognised and gave effect to uncontroverted foreign law, as required by the doctrines of comity and acts of state. In *Westland,* not only did those same doctrines prevented the court from pronouncing upon the relative merits and validity of inconsistent foreign law, but the determination of the rights of the Egyptian AOI depended upon international law and Egyptian law, beyond the jurisdiction of the UK courts. Insofar as resolving the issues requires the courts to find one or more sovereign treaty parties in breach of their treaty obligations or international law more generally, the principles of sovereign immunity and absence of justiciable standards will likely move the courts to recognise more quickly the limits to their jurisdiction.

(iii) accounting for the factual background

In contrast to the above, there exists in principle no bar to considering treaties as matters of fact, as part of the factual context to which rules of English law apply. Without entering into questions as to the validity of the treaty, or the precise working of the rights and obligations it stipulates, a court may nonetheless take notice of the existence of a treaty, and its role in delineating the relationship between the parties before it. Only in a very general and imprecise way might it be said that the courts are thereby enforcing or giving effect to treaties not incorporated into domestic law. The treaty terms are not supplanting domestic law. Rather, the treaty terms go to defining how the parties came to interact with one another and the nature of their relation-

ship.[133] Whether that interaction has legal significance, and what its precise import in law is, remains to be decided according to domestic law. English law (independent of the treaty) continues to prescribe whether, how, and to what extent the rights and obligations of the parties are enforceable. This can be understood to underlie a leading articulation of the rule in *CND v The Prime Minister*, that a court has jurisdiction "to interpret an international instrument which had not been incorporated into English law where it was necessary to do so in order to determine a person's rights and duties under domestic law."[134]

The classic example of this principle is *Philippson v Imperial Airways*.[135] A cargo of gold, consigned for transport from the UK to Belgium, was stolen en route. The contract for carriage, an IATA air consignment note, stipulated a number of general conditions which referred to the 1929 Warsaw Convention. At the time of the theft, 1935, only the UK had ratified the treaty and implemented it by 1932 statute, not Belgium. Imperial thus argued that Belgium was not a "High Contracting Party" within the meaning of the Convention, so that the carriage was not international, putting Philippson's action out of time. The House of Lords disagreed. The Convention, incorporated into a contract, stood not as a proposition of law, but as a matter of fact establishing the rights of the parties as a matter of contract. The case was simply one of the interpretation of a contract. Hence the UK statute incorporating the Convention was irrelevant. And who the "High Contracting Parties" were, was not to be determined by international law, but by the terms of the contract, including the Convention. The majority read the Convention to identify "High Contracting Parties" to be its signatories, Belgium included. The two dissenting Law Lords, Russell and Macmillan, understood the phrase not to be defined by the Convention *per se*, but as a commercial term meaning the parties contractually bound by the Convention—namely ratifying and acceding parties.

In an application to estop a party from relitigating an issue decided against him by a foreign or international arbitral panel, the courts may have regard to the treaties or international agreements underpinning the creation of the arbitral rights and panel: *Dallal v Bank Mellat*.[136] This international element goes to evidencing the valid existence of and tribunal for whose decisions the UK doctrine of comity would mandate recognition. Thus the UK doctrine of estoppel would apply to prevent a rehearing of an issue already decided by a recognised, competent authority. Dallal's claim against the Iranian bank was subject to a US treaty with Iran and a US Executive Order directing the resolution of disputes between

---

[133] Thus *Zoernsch v Waldock* [1964] 1 WLR 675 (CA) (whether the Human Rights Commission was an "organ" of the Council of Europe within the meaning of the International Organisations Immunities and Privileges Act 1950 was a question of fact to be resolved by considering the EConvHR and the Statute of Europe).

[134] *R (Campaign for Nuclear Disarmament) v The Prime Minister et al.* [2002] EWHC 2777 (Div. Crt.) (17 Dec. 2002).

[135] *Philippson v Imperial Airways* [1939] AC 332.

[136] *Dallal v Bank Mellat* [1986] QB 441.