

Hofstra Law & Policy Symposium

Volume 2

Article 8

1-1-1997

Ther Personality of International Organisations in English Law

Geoffrey Marston

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlps>



Part of the [International Law Commons](#)

Recommended Citation

Marston, Geoffrey (1997) "Ther Personality of International Organisations in English Law," *Hofstra Law & Policy Symposium*: Vol. 2, Article 8.

Available at: <https://scholarlycommons.law.hofstra.edu/hlps/vol2/iss1/8>

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law & Policy Symposium by an authorized editor of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

THE PERSONALITY OF INTERNATIONAL ORGANISATIONS IN ENGLISH LAW

Geoffrey Marston*

I. INTRODUCTION.

In his judgment in *Arab Monetary Fund v. Hashim (No. 3)* in the Appellate Committee of the House of Lords, the highest judicial tribunal in the United Kingdom, Lord Templeman stated:

The *Tin Council* case reaffirmed that the English courts can only identify and allow actions by individuals, sovereign states and corporate bodies. The *Tin Council* case reaffirmed that the English courts cannot identify and allow actions by international organisations which sovereign states by treaty agree to bring into existence.¹

The *Tin Council* case² was the first of three decisions in the English courts within the last ten years which have directed attention upon the legal status of international organisations in English law with an intensity not previously seen. For many years previous to these decisions a large number of international organisations had operated without obvious difficulty within the British legal system.³ The purpose of this article is to trace in outline the history of this relationship, to see how it was put under strain by the three cases, and to consider whether there are any other areas of doubt which might one day lead to further litigation.

II. THE PERIOD UP TO 1940.

During the nineteenth century, the United Kingdom became a member of a number of organisations established by inter-State or inter-

* Fellow of Sidney Sussex College, University of Cambridge, Cambridge, England.

1. [1991] 2 A.C. 114, 165, 2 W.L.R. 729, 737 (H.L.).

2. J.H. Rayner (Mincing Lane) Ltd. v. Dept. of Trade and Industry, [1990] 2 A.C. 418 (H.L.).

3. This article is confined, out of caution, to the English legal system although it is not assumed that the Scottish legal system has a different approach in the matters treated below.

Government agreements.⁴

These organisations, which included the Rhine and Danube river commissions and public utility bodies like the International Telegraphic Union and the Universal Postal Union, had their administrative headquarters outside the United Kingdom and the question whether they were entitled to legal personality in English law does not seem to have arisen for determination. United Kingdom legislation was not usually needed to give effect to their status or activities. Even on the rare occasions when legislation was required - e.g. the Sugar Act of 1903⁵ to implement the determinations of the Sugar Commission under the Sugar Convention of 1902 - no provision was made to define the organisation's legal status within the United Kingdom.

The creation of the League of Nations by the Covenant forming an integral part of the Treaty of Peace in 1919 first caused legal thinking to turn to the domestic nature of the international body thus created. The Covenant did not expressly provide for the legal personality of the League, either in international law or in the laws of its member States. It did provide in its Article 7(3), however, that the representatives of the League's members and its officials when engaged in the business of the League were to enjoy "diplomatic privileges and immunities" and that the buildings and other property occupied by the League, its officials and by representatives attending its meetings were to be "inviolable".⁶ As the League's headquarters were established in London for the first year of its life some problems about its legal status might quickly have arisen but in fact none apparently did, although the League must have purported to enter into local contracts for such matters as premises, labour, goods and services. It was as late as 1938 when a question arose over the customs treatment of goods imported into the United Kingdom by the International Labour Organisation (ILO) in the name of the League. In an internal minute dated December 19, 1938, one of the legal staff of the Foreign Office, W.E. Beckett, wrote:

We might point out . . . that the Customs have some doubt as to whether the League of Nations as an entity and its property should be treated in the same way as the property of a foreign Government, and

4. For a brief account of nineteenth century international organisations, see DEREK W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 6-9 (4th ed. 1982).

5. Sugar Convention Act, 1903, 3 Edw. 7, ch. 21 (U.K.).

6. LEAGUE OF NATIONS COVENANT, Jan. 10, 1920, art. 7, para. 4, 5, in *ESSENTIAL FACTS ABOUT THE LEAGUE OF NATIONS* 15 (Information Section of the League of Nations Secretariat, 9th ed. 1938).

on this we should say that the League of Nations is an entity of which all the members are governments and financed entirely by governments, to treat all matters of State such as those that are treated between governments through diplomatic channels, and that we feel no doubt that this property must be treated in the same manner as the property of the governments who compose it.⁷

This advice was reflected in the Foreign Office's official response to the Board of Customs on January 12, 1939.⁸ It was still not clear, however, whether the League and the ILO were to be regarded as distinct legal personalities in English law.

The English courts had their first contact with international organisations when one Commander Godman asserted that he was owed money by the Inter-Governmental Committee for Refugees, established not by formal treaty but by a meeting of States at Evian, France, in 1938.⁹ Within the Foreign Office, Beckett wrote that the Committee was not a "corporate body" and so could not be sued as such; as for the possibility of suing the member governments, they would be immune, with the exception of the United Kingdom; as for the possibility of suing the individual persons constituting the Committee, they would be protected either by general diplomatic immunity if they were also foreign diplomats *en poste* in London or by "governmental immunity" if they were not.¹⁰ In the event, Godman sued four individual members of a sub-committee of the Committee. His statement of claim, however, was struck out by the Court of Appeal on the ground that the action was "one against sovereign States through their agent, the Inter-Governmental Committee".¹¹ It followed from the doctrine of absolute sovereign immunity then prevailing in the English courts that the action could not be maintained.

III. THE PERIOD FROM 1940 TO 1944.

So far, British executive and judicial practice was ambiguous on whether in English law an international organisation, established by treaty or otherwise, was more than a collectivity of its member States, and

7. See Geoffrey Marston, *The Origin of the Personality of International Organisations in United Kingdom Law*, 40 INT'L & COMP L.Q. 403, 406 (1991) (quoting letter from W.E. Beckett, Second Legal Advisor, *Foreign Office*, to the *Foreign Office* (Dec. 19, 1938)).

8. *Id.* at 406-07.

9. *Godman v. Winterton*, Ann. Dig. 205, 206 (Eng. C.A.) (Supp. 1919-1942) (Godman).

10. Marston, *supra* note 7, at 407.

11. *Godman*, *supra* note 9, Ann. Dig. at 207.

therefore possessed a separate legal personality of its own. The perceived need, as part of the war effort, to establish by treaty various international organisations operating within Allied States caused a more detailed scrutiny to be given to their national legal status. The first such body, proposed in a draft agreement of August 1942, was a United Nations Relief and Rehabilitation Organisation (UNRRA) with power to acquire, hold and convey property and to enter into contracts and undertake obligations.¹² Discussions began between officials in the United States and the United Kingdom as to how such an organisation could operate under the national laws of each country. The informal opinion of the United States officials was that:

. . . UNRRA will derive from the international agreement creating it the legal capacity to discharge the functions entrusted to it by the agreement and should be accorded in each country a capacity and status in respect of suit, the conclusion and discharge of obligations, the holding of property, etc. like unto that of individual foreign states. We are of opinion that under common law principles UNRRA will enjoy such capacity independently of any legislation defining its position since the effect of the international agreement is not to modify existing rules of law but to create as the agent of the signatory nations as a group a new legal person which would be entitled as such to exercise rights under the existing law.¹³

On receipt of the above views, the United Kingdom Attorney-General, Sir Donald Somervell, having consulted amongst others the Legal Advisor to the Foreign Office, Sir William Malkin, observed on October 14, 1943:

Apart from natural persons and corporations created by Royal Charter or under Act of Parliament, groups have only been recognised as legal personae under some specific statutory provisions. To recognise a group of Nations as a legal persona would be novel. The Common Law is however said to be an elastic system which should be able to move with the times.¹⁴

The Attorney-General was disinclined to advocate legislation unless it was necessary.

12. See Diplomatic Privileges (Extension) Act, 1944, 7 & 8 Geo. 6, ch. 44 (U.K.); Diplomatic Privileges (U.N.R.R.A.) Order, S.I. 1945, No. 79.

13. Marston, *supra* note 7, at 411 (quoting letter from Governor Lehman's Legal Advisors, to Leith-Ross (Oct. 7, 1943)).

14. *Id.* at 412 (quoting letter from Sir Donald Somervell to Leith Ross (Oct. 14, 1943)).

After the creation of UNRRA in November 1943, its Council recommended to the member governments that they should accord it the facilities, privileges, immunities and exemptions which they accorded each other and should grant immunity from legal process to the representatives of member governments and employees of the Administration in respect of official acts as well as exemption from taxation on official salaries. United Kingdom officials, including the Attorney-General, met in February 1944 to consider the above recommendations. The Attorney-General gave his provisional opinion that:

... even without an Act of Parliament, the British Courts, if faced by an association of Governments such as that formed by UNRRA, should accept this institution as a person having the necessary status to protect its rights. He thought there was no need to put anything in an Act of Parliament to protect these rights. Foreign governments possess immunity; and UNRRA consisted of governments. There[fore] UNRRA should have the same status as a foreign government.¹⁵

Notwithstanding this opinion, the meeting considered that legislation was advisable to avoid the ambiguities of the common law position particularly in respect of immunities. In July 1944 the Government introduced into Parliament the Diplomatic Privileges (Extension) Bill which had amongst its purposes:

... to make provision as to the immunities, privileges and capacities of international organisations of which Her Majesty's Government in the United Kingdom and foreign governments are members; to confer immunities and privileges on the staffs of such organisations and representatives of member governments and in respect of premises and documents of such organisations; . . .¹⁶

The Bill became law on November 17, 1944. It applied to, "any organisation declared by Order in Council to be an organisation of which His Majesty's Government in the United Kingdom and the government or governments of one or more foreign sovereign Powers are members".¹⁷

In essence, the Act enabled the executive, within limits specified in the Act, to establish by Order in Council a legal status for such organisations and to confer immunities and privileges upon them, their officials

15. *Id.* at 413 (quoting Sir Donald Somervell, (Feb. 2, 1944)).

16. Diplomatic Privileges (Extension) Act, 1944, 7 & 8 Geo. 6, ch. 44 (U.K.).

17. *Id.*

and representatives of member States. Section 1(2)(a) provided:

His Majesty may by Order in Council - (a) provide that any organisation to which this section applies . . . shall, to such extent as may be specified in the Order, have the immunities and privileges set out in Part I of the Schedule to this Act, and shall also have the legal capacities of a body corporate.¹⁸

The immunities and privileges envisaged were immunity from suit and legal process, inviolability of archives and premises, and exemption from rates and taxes, including exemption from taxes on the importation of goods when directly imported by the organisation for its official use in the United Kingdom.

Further provisions empowered the conferment on high officials of the organisation (other than British subjects) and on representatives of member governments to the organisation of the immunities and privileges accorded to the envoys of foreign States, and the conferment on other officials (including British subjects) of a certain functional immunity from suit and exemption from rates and taxes.

During the debate in the House of Commons on the final form of the Bill, which had been amended during its Parliamentary progress to add to the original formulation of what became section 1(2)(a) the words "and shall also have the legal capacities of a body corporate", the question was asked: "The Amendment proposes that these organisations shall have the legal capacity of a body corporate. Will that entitle them to take legal proceedings in this country against British citizens?" The Government Minister replied: "Yes, it will have that effect."¹⁹

Some important officials considered at this time that an international organisation might have legal personality in the United Kingdom, including immunities and privileges, even without the enactment of the legislation, on the basis that an organisation was an association, or partnership, of foreign sovereign States or governments. Thus the Attorney-General, Somervell, whose views in committee have been mentioned above, stated in the House of Commons:

"It may well be that, apart from Clause 1, our courts here would treat an association of foreign Governments in the same way as they treat a foreign Government; but it is desirable that the matter should be dealt with by legislation, first of all to remove doubts . . ."²⁰

18. *Id.*

19. 403 PARL. DEB., H.C. (5th ser.) 2771 (1944); Marston, *supra* note 7, at 421.

20. 403 PARL. DEB., H.C. (5th ser.) 349 (1944); Marston, *supra* note 7, at 418.

Beckett, in a briefing note for the Foreign Office Minister involved in steering the Bill through its later Parliamentary stages, wrote:

“As the Attorney-General said, it is probable that UNRRA and similar organisations would enjoy most or all of the privileges which it is the purpose of this Bill to provide at common law without legislation at all.”²¹

IV. FROM 1944 TO 1981: THE STATUTORY REGIME.

From the enactment of the 1944 Act, which was amended in 1946²² and 1950²³ and then consolidated,²⁴ Orders in Council were made concerning a large number of international organisations of which the United Kingdom was a member. The treaties setting up the early international organisations did not contain provisions expressly conferring personality on the organisation in international law although they specified or implied that the organisation was to have certain capacities in the territories of the member States. Thus, the UNRRA treaty provided that the Administration was to have the power amongst other things to acquire, hold and convey property, to enter into contracts and undertake obligations, and in general to perform any legal act appropriate to its objects and purposes. The Order in Council concerning UNRRA, made under the 1944 Act, conferred on it certain immunities and privileges and “the legal capacities of a body corporate”.²⁵

A special case was the United Nations. The Charter did not contain a provision expressly conferring international personality on the Organisation. But Article 104 provided that it “shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”,²⁶ while Article 105 (1) and (2) stipulated for necessary privileges and immunities in the territory of each of its members for the Organisation, its officials and representatives of its members.²⁷ The first Order dealing with the

21. Marston, *supra* note 7, at 421 (quoting Brief by W.E. Beckett, Second Legal Advisor, *Foreign Office*).

22. Diplomatic Privileges (Extension) Act, 1946, 9 & 10 Geo. 6, ch. 66 (U.K.).

23. Diplomatic Privileges (Extension) Act, 1950, 14 Geo. 6, ch. 7 (U.K.).

24. International Organisations (Immunities and Privileges) Act, 1950, 14 Geo. 6, ch. 14 (U.K.).

25. Diplomatic Privileges (U.N.R.R.A.) Order, S.I. 1945, No. 79.

26. U.N. CHARTER art. 104; IAN BROWNIE, *BASIC DOCUMENTS IN INTERNATIONAL LAW* 1 (4th ed 1995) (Brownlie).

27. *Id.*, art. 105.

United Nations was the Diplomatic Privileges (United Nations Organization and Preparatory Commission) Order in Council, in force on December 7, 1945.²⁸ This conferred specified immunities and privileges on the United Nations and its Preparatory Commission, and on specified officials of these bodies and representatives to them of member governments. The Order, however, did not expressly provide that the above bodies were to have the capacities of bodies corporate. The status to be enjoyed by the United Nations in the national legal systems of member States was later elaborated in the Convention on the Privileges and Immunities of the United Nations, approved in February 1946.²⁹ Article 1(1) of the Convention provides:

The United Nations shall possess juridical personality. It shall have the capacity -

- (a) to contract;
- (b) to acquire and dispose of immovable and movable property;
- (c) to institute legal proceedings.³⁰

The above status was given effect in United Kingdom law by the Diplomatic Privileges (United Nations and International Court of Justice) Order in Council 1947,³¹ promulgated pursuant to the 1944 Act which by this time had been amended by the Diplomatic Privileges (Extension) Act 1946 in order to accommodate the privileges and immunities contained in the above Convention.³² Its Article 2 read:

The United Nations shall have the legal capacity of a body corporate and, except in so far as in any particular case it has expressly waived its immunity, immunity from suit and legal process. No waiver of immunity shall be deemed to extend to any measure of execution.³³

It became usual in later treaties which established international

28. Diplomatic Privileges (United Nations Organization and Preparatory Commission) Order, S.I. 1945, No. 1539; *see also*, John William Bridge, *The United Nations and English Law*, 18 INT'L & COMP. L.Q. 689 (1969). The International Court of Justice advised in the *Reparations* Case that the United Nations had objective personality in international law. *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] I.C.J. 174.

29. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15.

30. *Id.* at 13.

31. Diplomatic Privileges (United Nations and International Court of Justice) Order, S.I. 1947, No. 1772.

32. Diplomatic Privileges (Extension) Act, *supra* note 22, §1(1), 2(b).

33. Diplomatic Privileges (United Nations and International Court of Justice) Order, *supra* note 33, art. 2.

organisations, however, for the member States to confer expressly on the organisation such a status as "juridical personality" or "international personality and legal capacity" or "legal personality". Whatever the words of the treaty, the corresponding United Kingdom Order in Council would confer a uniform status, namely "the legal capacity of a body corporate".

Although Orders in Council under the 1944 Act, as later consolidated in 1950, defined the legal position of the majority of international organisations in the United Kingdom during this period, there were a few organisations whose local status was conferred by or pursuant to a special Act of Parliament. One is the Commonwealth Secretariat, established not by a formal treaty but at a meeting of Commonwealth Prime Ministers in June 1965. The Commonwealth Secretariat Act 1966 confers on the Secretariat "the legal capacities of a body corporate" and gives it and its officials certain immunities and privileges.³⁴

In 1964, the International Headquarters and Defence Organisations Act 1964 was passed. It provided that, where in any arrangement for common defence to which the United Kingdom was a party and where it was proposed to establish a headquarters or defence organisation, Her Majesty might by Order in Council designate the headquarters or organisation and confer on it "the legal capacities of a body corporate" with immunity from suit and legal process and inviolability of official archives.³⁵

In 1968 the Government introduced an International Organisations Bill "to improve and bring up to date the legislation under which international organisations function in the United Kingdom".³⁶ In introducing the Bill in the House of Commons, the Government Minister emphasized that a particular aim of the Bill was to provide a legal framework which would encourage international organisations to establish headquarters in the United Kingdom. The Minister concluded:

... in broad terms the Bill is designed to enable us to treat international organisations and their staff as well as they are treated in other countries and in circumstances similar to those prevailing for the missions of other countries and their diplomats. Our immediate intention is to carry out our obligations to the one United Nations Specialised Agency in the United Kingdom [the International Maritime Consultative Organisation], and to regularise our relationship with the

34. Commonwealth Secretariat Act, 1966, ch. 10, §1(1) (U.K.).

35. International Headquarters and Defence Organisations Act, 1964, ch.5, §1(1) (U.K.).

36. 766 PARL. DEB. H.C. (5th ser.) 1264 (1968).

London Delegation of the Commission of the European Communities.³⁷

Like the earlier legislation, the 1968 Act enabled the executive to confer a legal status on an international organisation to which the United Kingdom and one or more foreign sovereign States were members, as well as privileges and immunities on it, its officials and representatives of its member States. The status specified in section 1(2)(a) of the Act was again "the legal capacities of a body corporate".³⁸ The 1968 Act went further than its predecessors in enabling the conferment of a similar status, privileges and immunities on the Commission of the European Communities³⁹ and on other international organisations to which the United Kingdom was not a member where, in the latter case, the organisation maintained or proposed to maintain an establishment in the United Kingdom.

The Act also contained provisions for the situation where a specialised agency of the United Nations was to have its headquarters in the United Kingdom. In practice, where it was intended that the headquarters of an organisation should be established in the United Kingdom, a headquarters treaty was concluded between the organisation and the United Kingdom under authority contained in the convention establishing the organisation. This headquarters treaty would specify the legal status and powers which the organisation was to enjoy in the United Kingdom. It would then be implemented by an Order in Council under the 1968 Act.

An example, worth singling out because it led to one of the cases mentioned at the beginning of this article, was that provided by the Fourth International Tin Agreement. Article 16(1), referring to the International Tin Council, read:

The Council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings.⁴⁰

Article 16(4) read:

The status, privileges and immunities of the Council in the territory of

37. *Id.* at 1264-65.

38. International Organisations Act, 1968, ch. 48 (U.K.).

39. The United Kingdom did not become a member of the European Communities until 1973.

40. Fourth International Tin Agreement, *in* United Nations Tin Conference, U.N. Doc. TD/TIN.4/7/Rev.1 (1970).

the host Government shall be governed by a Headquarters Agreement between the host Government and the Council.⁴¹

On February 9, 1972, a Headquarters Agreement was concluded between the United Kingdom Government and the ITC. Its Article 3 provided:

The Council shall have legal personality. It shall in particular have the capacity to contract and to acquire and dispose of movable and immovable property and to institute legal proceedings.⁴²

The Headquarters Agreement also provided for the inviolability of the ITC's premises (art.5) and archives (art. 4), its general immunity from jurisdiction (art. 8), taxes (art.9) and duties (art. 10), and for specific privileges and immunities for its Chairman (art. 17), staff members (art. 18) and experts (art. 19). It required that any formal contract between the ITC and a United Kingdom legal person should contain an arbitration clause and provided that immunity should not apply to the enforcement of an arbitration award (art. 23). On the same day, the International Tin Council (Immunities and Privileges) Order 1972, promulgated pursuant to the International Organisations Act 1968, came into force.⁴³ This stated in its Article 5, that "[t]he Council shall have the legal capacities of a body corporate."⁴⁴ It went on to confer the inviolability, immunities and privileges as set out in the Headquarters Agreement except with respect to the enforcement of an arbitration award.

The period following the enactment of the 1968 Act saw the promulgation of a considerable number of Orders in Council, some of them in association with headquarters agreements between the United Kingdom and the international organisation. The 1968 Act was amended by the International Organisations Act 1981 so as, amongst other things, to include organisations composed entirely of those States of the British Commonwealth which were excluded from the scope of the earlier legislation as they were not "foreign". Its scope was also widened to include international commodity organisations of a specified description to which the United Kingdom was not a member.

41. *Id.*

42. 1972 U.K. T.S. No. 38 (Cmnd. 4869).

43. *E.g.*, International Tin Council (Immunities and Privileges) Order, S.I. 1972, No. 120.

44. *Id.*

V. THE RELEVANT CONSTITUTIONAL PRINCIPLES OF ENGLISH LAW.

Quite apart from the difficulty in placing an international organisation in the scheme of legal persons known to English law, two non-justiciability principles of English law appear to cause further difficulties for international organisations, created as they are by dealings among sovereign States, usually by treaty.

1. The principle of the non-justiciability of questions of international law and relations.

As long ago as 1848, Lord Chancellor Cottenham stated in the House of Lords with regard to an instrument drawn up between two sovereigns:

It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not, we cannot inquire into it.⁴⁵

In 1859, it was stated by Lord Kingsdown in the Judicial Committee of the Privy Council in an appeal from a court in British India:

The transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they make.⁴⁶

This view was not confined to England. In 1897, a unanimous Supreme Court of the United States in *Underhill v. Hernandez* stated:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁴⁷

The doctrine returned across the Atlantic to England in *Buttes Gas*

45. *Brunswick v. Hanover*, 9 Eng. Rep. 993, 1000 (H.L. 1848).

46. *Secretary of State for India v. Kamachee Boye Sahaba*, 15 Eng. Rep. 9, 28-9 (P.C. 1859).

47. 168 U.S. 250, 252 (1897).

& *Oil Ltd. v. Hammer*.⁴⁸ Lord Wilberforce, in delivering the unanimous judgment of the House of Lords on the question of the justiciability in English courts of the extent of territory dispute between foreign sovereign States, considered whether there existed in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign States:

In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process.⁴⁹

After citing the above cases, amongst others, Lord Wilberforce described the issues relevant in the litigation before him:

It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass.⁵⁰

Diplock L.J. in the English Court of Appeal case of *Buck v. Attorney-General* supported the concept of non-justiciability in the above circumstances.⁵¹ He wrote of the rules of comity observed by the United Kingdom Government that apply between State and State and continued:

One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law.⁵²

2. The principle of the non-justiciability of treaties which have not been incorporated into English law, including those to which the United Kingdom is a party.

Treaties are supremely "transactions" between sovereign States and the principle of non-justiciability causes many issues concerning them to

48. [1982] A.C. 888; (Buttes); see David Lloyd Jones, *Act of Foreign State in English Law: The Ghost Goes East*, 22 VA. J. INT'L L. 433 (1982).

49. *Id.* at 932.

50. *Id.* at 938.

51. [1965] 1 Ch. 745 (Eng. C.A.).

52. *Id.* at 770.

be non-justiciable in the courts. Thus, English courts cannot determine whether a treaty has been broken,⁵³ or how it should be interpreted⁵⁴ or whether it should be enforced.⁵⁵ This is so regardless of whether the United Kingdom is a party to the treaty.

The first principle of non-justiciability discussed above is supported by considerations of public international law. The second principle of non-justiciability is supported by considerations of British constitutional law. These are (i) that the treaty-making power lies in the Crown as an incident of the foreign affairs prerogative, and the exercise of the prerogative by the Crown cannot be examined by the courts,⁵⁶ (ii) that the Crown cannot, without Parliamentary authority, alter the law of the land.⁵⁷ Thus, while under (i) the courts cannot determine whether the Crown should or should not enter into a treaty,⁵⁸ under (ii) the courts will not permit, without Parliamentary authority, a treaty entered into by the Crown to create new rights for individuals or to impose new legal obligations on individuals or to take away from individuals any legal right hitherto possessed. It was on the basis of (ii) that Sir Robert Phillimore gave his celebrated judgment in *The Parlement Belge* where a treaty between Great Britain and Belgium, not incorporated by Parliamentary legislation in Britain, provided for the exemption from detention in one State of mail-ships belonging to the Government of the other.⁵⁹ He observed:

If the Crown had power without the authority of parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrong-doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution.⁶⁰

In order for the terms of a treaty to be justiciable before English

53. *British Airways Bd. v. Laker Airways Ltd.*, [1985] 1 A.C. 58, 85-6.

54. *Id.*

55. *Rustomjee v. The Queen*, (1876) 2 Q.B.D. 69, 74.

56. *Id.*

57. *Id.*

58. *Blackburn v. Attorney Gen.*, [1971] 1 W.L.R. 1037, 1040 (Eng. C.A.).

59. (1879) 4 P.D. 129-36.

60. *Id.* at 154.

courts, the treaty has either to be expressly given the force of law through Parliamentary legislation⁶¹ or, where this is not done, a treaty text may still be examined in the case of an ambiguity in the legislation with the view to reconciling the ambiguity in favour of conformity with the United Kingdom's treaty obligation.⁶²

VI. THE LITIGATION.

By 1981, detailed primary legislation was in place enabling the legal position of international organisations in the United Kingdom to be defined. This statutory regime was applied in practice through the Orders in Council to an increasing number and variety of international organisations. Problems arising out of this regime, if there were any, rarely reached the English courts. One of the few cases which did was *Zoernsch v. Waldock and McNulty*.⁶³ There, the plaintiff claimed damages in the English courts from the first defendant, as President of the European Commission of Human Rights, and the second defendant, as secretary to the Commission, for "negligence and corruption" after the plaintiff's petition to the Commission, alleging a denial of justice in the courts of the Federal Republic of Germany, was rejected. The defendants claimed "immunity from legal process" under a provision in the Council of Europe (Immunities and Privileges) Order 1960⁶⁴ promulgated under the International Organisations (Immunities and Privileges) Act 1950.⁶⁵ The Court of Appeal held that as a matter of interpretation the provision applied to the facts of the case and dismissed the plaintiff's appeal. It is significant to note that the relevant Convention to which the United Kingdom was a member, the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, was not itself incorporated into United Kingdom law by statute or any other means.

The near absence of litigation which by the early 1980s characterised the implementation of the statutory regime in the United Kingdom was destined not to last. Three major pieces of litigation have caused a profound examination to be made of the status of international organisa-

61. *E.g.*, Carriage by Air Act, 1961, 9 & 10 Eliz. 2, ch. 27 (U.K.) (dealing with the 1929 Warsaw Convention and the 1955 Hague Protocol); *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251 (H.L. 1980).

62. *E.g.*, Customs and Excise Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 44 (U.K.); *Salomon v. Comm'r of Customs & Excise*, [1967] 2 Q.B. 116.

63. [1964] 2 All E.R. 256 (*Zoernsch*).

64. S.I. 1960, No. 442, pt.1 §2.

65. *Supra* note 24, art. 2.

tions in English law. In the first case the organisation was one of which the United Kingdom was a member and for which an Order in Council under the International Organisations Acts had been made. In the second and third cases, the United Kingdom was not a member of the organisations concerned, and no Orders had been made in their regard.

1. The International Tin Council Litigation ("Tin").

The International Tin Council ("ITC") was established by the first International Tin Agreement in 1956 and to this, and the five subsequent agreements, the United Kingdom was a party. At the time of the litigation the Sixth International Tin Agreement ("ITA6") was in force. It has already been described above how a headquarters agreement and an Order in Council in 1972 established the ITC in London with "the legal capacities of a body corporate".

One of the main functions of the ITC under ITA6, as under the earlier agreements, was to provide for adjustment between world production and consumption of tin and to prevent excessive fluctuations in the price of tin. To carry out this function the ITC operated a system of tin price stabilisation through the operation of a buffer stock of tin, financed by contributions and loans from the member States. The ITC purchased or sold tin, depending on the level of the market price, through contracts for immediate and forward delivery. The state of the market caused increasing intervention on the part of the ITC, usually through forward contracts, in an effort to support the tin price. This in turn increased the ITC's exposure to the risk that its available assets would not cover liabilities falling due. The worst happened on October 24, 1985 when the ITC announced that it could not meet its obligations falling due on the London Metal Exchange. The ITC's creditors in the United Kingdom - to a total of several hundred million pounds - consisted mainly of brokers, with whom it had concluded contracts to buy or sell tin, and banks which had advanced loans to it. The brokers' contracts contained arbitration clauses so that the creditors were able to obtain awards against the ITC, whereas the banks' contracts did not contain such clauses. The ITC, however, did not possess enough funds to meet the awards or settle the debts.

The insolvency of an international organisation was an unprecedented event. As it became obvious that the member States of the ITC were unable or unwilling to give the ITC the means of settling its debts, and the ITC itself had inadequate assets of its own to satisfy the claims, the creditors decided to obtain redress in the English courts from the ITC's

members which consisted at the time of the United Kingdom, twenty-two other sovereign States and the European Economic Community. Three different methods of recovery were tried by the creditors.

A. The winding-up action.

A broker who had obtained an arbitration award against the ITC sought to have it compulsorily wound up as an unregistered company within the scope of the Companies Act 1985, so that its liquidator might enforce the liability of the member States to contribute to paying the debts of the ITC. The ITC responded by asserting that it was not subject to the winding-up jurisdiction and that in any case it was immune under the 1972 Order. The action came before Millett J. in the Chancery Division of the High Court. He first held that the status, capacities and immunities of the ITC in English law were governed by the 1968 Act and the 1972 Order, and not by the treaties.⁶⁶ He went on:

Its existence is recognised by the 1972 Order, which has granted it the legal capacities of a body corporate, but it is not incorporated thereby, and it is not a statutory body. It is not incorporated in the United Kingdom or anywhere else. It is neither an English nor a foreign corporation, but the creation of treaty.⁶⁷

Millett J. then held that the court had no jurisdiction to wind up the ITC, since the Companies Act could not be interpreted as being applicable to an international organisation as otherwise the courts would have to interpret and enforce treaties. In the present case, the winding up of the ITC by the English courts would put the United Kingdom in breach of its own treaty obligations to the ITC and its other members. The judge continued:

Sovereign states are free, if they wish, to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of their number. But if they choose instead to carry it on through the medium of an international organisation, no one member state, by executive, legislative or judicial action, can assume the management of the enterprise and subject it to its own domestic law.⁶⁸

Finally, Millett J. held that a winding-up process against the ITC fell

66. *In re International Tin Council*, [1987] 1 Ch. 419, 442-43.

67. *Id.* at 443.

68. *Id.* at 452.

within the immunity from suit and legal process conferred on the ITC by the 1972 Order and did not fall within the exception to immunity which the Order provided "in respect of the enforcement of an arbitration award", since a winding-up procedure was not such an "enforcement".⁶⁹

The Court of Appeal dismissed the broker's appeal, being "in broad agreement" with the reasoning of Millett J.⁷⁰

B. *The receivership action.*

Another broker who had obtained an arbitration award against the ITC went one stage further and obtained leave from the court, under power in the Arbitration Act 1950, to enforce the award in the same manner as a judgment. The broker then applied to the court for the appointment of a receiver by way of equitable execution over what was argued to be the right of the ITC to be indemnified by or to demand contribution from its members for the purposes of satisfying the judgment. This case, too, came before Millett J. who rejected the application.⁷¹ He considered that for the application to succeed the ITC must have an arguable cause of action against the members capable of being taken over by the receiver and which the court can entertain.⁷² If there was such a cause of action it could only be derived from ITA6, a treaty which had not been made part of English law and whose terms were not enforceable in an English court.⁷³

The Court of Appeal dismissed the broker's appeal for reasons which were substantially similar to those of Millett J.⁷⁴ A difference, however, appeared among the members of the court on one point. Ralph Gibson L.J. held that any claim which a receiver might advance against the ITA members was non-justiciable in the English courts on the principles stated by Lord Wilberforce in *Buttes Gas & Oil v. Hammer*.⁷⁵ On the other hand, Kerr L.J., with whom Nourse L.J. agreed, was not convinced that the "act of state non-justiciability" as applied in *Buttes* extended to claims based on agreements concluded by States in a commercial context; if it were so extended, State immunity, abolished in commercial transactions by the State Immunity Act 1978, might "return

69. *Id.* at 454-56.

70. *In re International Tin Council*, [1989] 1 Ch. 309.

71. *Maclaine Watson & Co. Ltd. v. International Tin Council*, [1988] 1 Ch. 1.

72. *Id.* at 16.

73. *Id.* at 23.

74. *Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2)*, [1989] 1 ch. 286.

75. *Buttes*, *supra* note 48, at 931-32.

by the back door under the guise of act of state non-justiciability”.

An appeal was then dismissed by the House of Lords. Lord Oliver, supported by three of their Lordships, stated:

I agree with Millett J. and with the Court of Appeal that, however the matter is approached, any claim of the ITC against the member States for indemnity must ultimately rest upon ITA6. This is an issue which is not justiciable by your Lordships and it is therefore unnecessary to decide whether, in any event, any such claim would also be precluded by act of state non-justiciability.⁷⁶

The fifth member, Lord Templeman, dismissed the appeal on the ground that any indemnity obligation on the members of ITA6 “is a treaty obligation which cannot be enforced by the courts of the United Kingdom by the appointment of a receiver or otherwise because the obligation is not to be found in the Order of 1972”.⁷⁷

C. *The “direct” actions.*

The two methods of recovery already discussed constituted mere skirmishing in comparison with the third method tried. Eleven brokers and six banks sued the members of the ITC for damages for breach of tin contracts and loan contracts respectively. The defendants sought to have the claims struck out as disclosing no good cause of action or as being non-justiciable or, except for the United Kingdom, on the ground of the defendants’ immunity. The plaintiffs advanced the following three main submissions:

- (i) That in English law the ITC was not a legal person distinct from its members and that the latter could therefore be sued directly and collectively;
- (ii) That even if the ITC was a legal person distinct from its members the latter were liable concurrently with it or, alternatively, the members owed a secondary liability to creditors if the ITC failed to meet its debts. This submission was put on alternative grounds: (a) that under English law incorporation, and incorporation only, removes the liability of persons who had banded together to trade under a collective name; or (b) that under international law the members of an international organisation are liable for the organisation’s obligations to third parties and this rule must be applied by English courts under either the general

76. Appeal dismissed sub. nom. J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry, et al., [1990] 2 A.C. 418, at 522.

77. *Id.* at 482.

principles of English conflict of laws as the proper law of the organisation or under international law rules of automatic incorporation in English law under the doctrine expounded in cases such as *Trendtex Trading Corporation v. Central Bank of Nigeria*⁷⁸; or

(iii) That even if the ITC were a separate legal person in English law, the constitution of ITA6 established a general authority in the ITC to contract in respect of buffer stock operations as agents for each of its members.

In opposition to these submissions, the members submitted that the contracts had been made solely with the ITA as a legal person separate from the members, that there was no "constitutional agency" and that in any event the members, with the exception of the United Kingdom, were immune from suit under the State Immunity Act 1978. The plaintiffs' arguments were rejected by Staughton J. at first instance.⁷⁹

A separate claim by a broker against the United Kingdom Government alone was struck out by Millett J. in a later judgment in which he stated:

Staughton J. has held that 'whilst the ITC is not a corporation or a body corporate for the internal regulation of its affairs under the Companies Act, in its dealings with others, and in particular when considering the effect of contracts that it may make, it is to be treated as if it were a body corporate.' I would prefer simply to say that, by conferring on the ITC the legal capacities of a body corporate, Parliament has granted it sufficient legal personality to enable it to incur liabilities on its own account which are not the liabilities of its members.⁸⁰

Appeals from both judgments were dismissed by the Court of Appeal.⁸¹ In short, all three judges held that the ITC was a legal person in English law separate from its members and that the contracts had been made with the ITC and not with the members either directly or through the ITC as agent. In the course of reaching this conclusion, however, a difference emerged over the question whether the terms of ITA6 could be examined to help determine the nature of the ITC's legal personality and thereby whether its members could be liable to third parties if the

78. [1977] 1 Q.B. 529.

79. [1987] Butterworth's Company Law Cases 687.

80. *Maclaine Watson and Co. Ltd. v. Dep't of Trade and Industry*, [1987] Butterworth's Company Law Cases 707.

81. *J.H. Rayner (Mincing Lane) Ltd. v. Dept. of Trade and Industry*, [1989] 1 Ch. 72 (Eng. C.A.).

ITC defaulted on contractual obligations. Ralph Gibson L.J. considered that as ITA6 had not been incorporated into English law its terms could not be examined by the courts.⁸² Kerr and Nourse L.JJ., however, took a different view. Kerr L.J. observed of the doctrine of the non-justiciability of unincorporated treaties:

The constitutional reason underlying it is the historical predominance of Parliament over the executive in relation to the power to make laws. Viewed in that way, there seems no harm in permitting resort to ITA6 for the purpose of establishing who, on the plane of international law, is liable for the debts of the ITC; on the contrary, justice and good sense point to the contrary conclusion. Moreover, the claims of the doctrine of non-justiciability are particularly weak in cases such as the present, since the Order in Council of 1972 refers expressly to the Headquarters Agreement and ITA6 (to be read for ITA4). That appears to be an unprecedented hybrid situation between an incorporated and wholly unincorporated treaty.⁸³

Only Nourse L.J., however, found a sufficient basis for dissent. He considered that although in English law the ITC was a legal person separate from its members, there was sufficient support in international law for the members of an international organisation being liable to a third party for the debts of the organisation. He relied for this conclusion on the writings of certain jurists and in particular on passages in an International Chamber of Commerce arbitral award of 1984 between Westland Helicopters Ltd. and the Arab Organisation for Industrialisation, an entity established by a treaty concluded by Egypt, Saudi Arabia, Qatar and UAE.⁸⁴ Nourse L.J. concluded:

... I have come to the conclusion that, judged objectively, the intention of the states who were parties to ITA6 was that the members of the ITC should be liable for its obligations.⁸⁵

The Court of Appeal held that the member States of the ITC (other than the United Kingdom) would not have been immune from suit, if the plaintiffs had possessed a valid cause of action against them, since the plaintiffs' claims would fall within the exceptions to sovereign immunity laid down in the State Immunity Act 1978. Furthermore, the Court of Appeal held unanimously that the EEC - which was conceded not to be

82. *Id.* at 240.

83. *Id.* at 180.

84. 80 I.L.R. 596 (ICC, Ct. of Arbit. 1985).

85. J.H. Rayner (Mincing Lane) Ltd., [1989] 1 Ch. at 219.

a State and to be outside the scope of the State Immunity Act 1978 - was not entitled to sovereign immunity *ratione personae* in English common law, despite the acknowledgment of its personality in international law and the fact that its "legal personality" was embodied in Article 210 of the Treaty of Rome⁸⁶, a treaty incorporated into English law by s. 2 of the European Communities Act 1972.⁸⁷ Having considered that such immunity must depend on the recognition by the State of the forum of a *par in parem* relationship, Kerr L.J. stated: "In the present case there has been no recognition of any immunity of the EEC by anyone."⁸⁸

On appeal to the Appellate Committee of the House of Lords, the proceedings - which included the appeal on the receivership issue - occupied 26 days, one of the lengthiest appeals to the House in history.⁸⁹ The same range of arguments was deployed by the appellants (except that the question of the immunity of the EEC was left unargued) and all their arguments were unanimously rejected. Delivering the most detailed judgment, Lord Oliver, with whose reasons Lords Keith, Brandon and Griffiths agreed, considered at the outset the question of the justiciability or otherwise of ITA6 and the Headquarters Agreement in determining the rights of the parties. Having endorsed the general principle of the non-justiciability of the transactions of sovereign States, Lord Oliver also reiterated the principle that the Crown, under its treaty-making prerogative, could not alter the law without the intervention of Parliamentary legislation.⁹⁰ But he went on to consider that although a treaty was a fact and could be looked at where it was necessary to do so as part of the factual background, "the legal results which flow from [a treaty] in international law, whether between the parties inter se or between the parties and any of them and outsiders are not and they are not justiciable by municipal courts".⁹¹

Lord Oliver went on to hold (contrary to the assertion that ITC was not a legal personality) that the 1972 Order had created the ITC as a legal person separate from its members, even though it was not a body

86. Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, art. 210, in 2 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 45 (Stephen Zamora & Ronald A. Brand, eds., 1990).

87. European Communities Act, 1972, ch. 68, §2 (U.K.).

88. J.H. Rayner (Mincing Lane) Ltd., [1989] 1 Ch. at 200.

89. Reported as J.H. Rayner (Mincing Lane) Ltd. v. Dept. of Trade and Industry, et al., [1990] 2 A.C. 418.

90. *Id.* at 500.

91. *Id.* at 501.

corporate, and that the contracts had been made with it.⁹² Likewise, he rejected the contention that English law incorporation was needed to remove liability, on the ground that there was no evidence that it was intended that any person other than the ITC should be liable.⁹³

As to the international law assertion of member liability, Lord Oliver first held that it was United Kingdom legislation and not international law which created the entity which had entered into the contracts⁹⁴ and that the liability of the members, if it existed, could be based only on the terms of ITA6, the construction of which was non-justiciable in the English courts.⁹⁵ As for the sub-argument based on the direct incorporation of international law into English law, Lord Oliver considered that even if there was a rule in international law that member States were secondarily liable to third parties for an organisation's debts unless the treaty expressly excluded such liability - which on the evidence he was unable to accept - the courts would still be called upon to derive rights from an unincorporated treaty.⁹⁶

Finally, Lord Oliver rejected the "constitutional agency" argument, (C), since this would invite the court "to embark upon the exercise of interpreting the terms of the treaty and ascertaining, on the basis of that determination, the rights of the members in international law and the consequences in municipal law of the rights so determined".⁹⁷

A shorter and more forceful judgment was given by Lord Templeman, with whose reasons Lord Keith, Brandon and Griffiths likewise agreed. He maintained that the appellant's submissions, if accepted, "would involve a breach of the British constitution and an invasion by the judiciary of the functions of the Government and of Parliament".⁹⁸ Having stressed the non-justiciability of unincorporated treaties, he considered that the present case turned on a short question of construction, the meaning of the 1972 Order, and in particular the words "the Council shall have the legal capacities of a body corporate".⁹⁹ He rejected the lack of personality argument on the ground that the 1972 Order "brought into being an entity which must be recognised by the courts of the United Kingdom as a legal personality distinct in law from

92. *Id.* at 503.

93. *Id.* at 508.

94. *Id.* at 509-10.

95. *Id.* at 510.

96. *Id.* at 512.

97. *Id.* at 515.

98. *Id.* at 476.

99. *Id.* at 477-79.

its membership and capable of entering into contracts as principal".¹⁰⁰ Lord Templeman rejected the English law incorporation contention on the ground that sufficient evidence had not been found to displace the general proposition that in England no one is liable on a contract except the parties thereto.¹⁰¹ As for the argument for member liability under international law, Lord Templeman held that no plausible evidence had been produced for the existence of such a rule of international law. In his words, "the rule of international law could only be enforced under international law" and "Public international law cannot alter the meaning and effect of United Kingdom legislation."¹⁰² Finally, Lord Templeman rejected the ITC constitutional arguments by finding no ambiguity in the 1972 Order and being unable therefore to employ the provisions of the unincorporated ITA6 for the purpose of altering or contradicting the Order's provisions.¹⁰³

Shortly after delivery of the House of Lords decision, it was announced that the members of ITA6 had arrived at a financial settlement with the creditors of the ITC.

2. The Arab Monetary Fund Litigation ("AMF").

In the middle of the 1970s, concern had arisen in London banking circles as to whether loans could effectively be made to two banks, the International Bank for Economic Cooperation (IBEC) and the International Investment Bank (IIB), both established by treaty among the members of COMECON, an organisation whose members were States of the Communist bloc. The United Kingdom was not a member of COMECON, had not concluded any agreement with it or the banks, and there was no Order under the 1968 Act in respect of it or the banks. It appears that the treaties establishing the banks had provided for them to have legal personality in their member States, at least in the State where each had its seat or permanent location. Doubt arose over the legal status of the banks in English law, including the basic question of whether they were English legal persons at all, capable of suing and being sued in the English courts. Such a question was logically prior to the question whether, assuming they were legal persons, they had immunity to some

100. *Id.* at 479.

101. *Id.* at 479.

102. *Id.* at 480.

103. *Id.* at 481.

degree or another. In the end, no loans were made.¹⁰⁴ On April 21, 1978, the Deputy Chairman of the Bank of England, Sir Jasper Hollom, sought the advice of the Foreign and Commonwealth Office on two questions:

- (a) What position does the Foreign and Commonwealth Office take concerning the legal personality and capacity in English law of entities [of the above kind]?
- (b) If an English court were to consider it necessary to receive from the Foreign and Commonwealth Office a statement regarding the attitude of the Executive in relation to the question of the personality and capacity of such an entity, what would be your position?¹⁰⁵

On May 8, 1978, the Minister of State at the Foreign and Commonwealth Office, Mr F. Judd, gave the Government's view. As to question (a), he stated that such entities "would enjoy legal personality and capacity in this country, without any formal statement by or on behalf of Her Majesty's Government, in the same way and to the same extent as any other banking, commercial or other trading organisation established in a country other than the United Kingdom and enjoying legal personality and capacity in that country".¹⁰⁶ Such personality and capacity, would, it was considered, be acknowledged by the English courts. As to question (b), he replied that the capacity of such an entity to enter into a contract and to sue or be sued did not depend on recognition by the United Kingdom Government, but if the Government's attitude were sought the Foreign and Commonwealth Office "would be willing officially to acknowledge that the entity concerned enjoyed such legal personality and capacity", once satisfied that the entity had legal personality and capacity to enter into the particular transaction under the law of one or more of its member States or the State where it had its seat or permanent location.¹⁰⁷

Ten years after this exchange of letters, a relevant case came before the English courts. The Arab Monetary Fund (AMF) was established by

104. The factual background is gleaned from brief accounts in A. Lawyer, *The Problems of Lending to Someone Who Isn't Quite There*, EUROMONEY, Feb. 1978, at 64; see also, PHILIP WOOD, *LAW AND PRACTICE OF INTERNATIONAL TRADE* 39 (1980).

105. Letter from Sir Jasper Hollom, Deputy Chairman, *The Bank of England*, to the Foreign and Commonwealth Office (Apr. 21, 1978), reprinted in Geoffrey Marston (ed.), *United Kingdom Materials on International Law*, 1978 BRIT. Y.B. INT'L L. 329, 346-48.

106. Letter from F. Judd, Minister of State, *Foreign and Commonwealth Office*, to Sir Jasper Hollom, Deputy Chairman, *The Bank of England* (May 8, 1978), reprinted in Geoffrey Marston (ed.), *United Kingdom Materials on International Law*, 49 BRIT. Y.B. INT'L L. 329, 347 (1978).

107. *Id.* at 347-48.

an agreement in 1976 between twenty Arab States, together with "Palestine". The treaty provided that the AMF was to have "an independent juridical personality" and the right to sue, contract and litigate. Its headquarters were to be in Abu Dhabi, part of the State of the United Arab Emirates (UAE). By a UAE decree in 1977 which made binding the Articles of Association setting up the AMF in the UAE, the AMF was given legal personality and the right to sue and be sued in the UAE. The other member States acted similarly.

In 1988, AMF brought proceedings in the English courts for damages, tracing orders and other relief against Hashim, formerly its Director-General, members of his family, banks and other financial institutions over the alleged misappropriation by Hashim from the AMF of some \$50 million, and its subsequent "laundering".¹⁰⁸ The United Kingdom was not a party to the 1976 agreement and had not incorporated it in any way into United Kingdom law and the defendants argued that the AMF was the product of a non-justiciable treaty and was consequently not a legal person capable of bringing legal proceedings in England.

At first instance, before Hoffmann J., the AMF argued that (i) the English conflict of laws rules recognised the legal existence of entities created by public international law, where public international law was their proper law, or, alternatively, (ii) the AMF was entitled to be recognised as a legal person known to English law by virtue of the rule of conflict of laws expounded in *Dicey & Morris*, namely: "The existence . . . of a foreign corporation duly created . . . under the law of a foreign country is recognised in England."¹⁰⁹ These arguments had been advanced while the *Tin* appeals above were awaiting decision in the House of Lords and on delivery of that decision the AMF abandoned argument (i). In later giving judgment, Hoffmann J. stated that he would have been attracted to argument (i) observing:

Extending our conflicts rule to international organisations seems to me sensible and practical It is difficult to see why an entity created by treaty between two or more foreign states should be less entitled to recognition than an entity created under the sovereign authority of a single foreign state within its domestic system.¹¹⁰

He cited the Hollom-Judd correspondence as indicating that the

108. Arab Monetary Fund v. Hashim (No. 3), [1991] 2 A.C. 114, (AMF).

109. *Id.*; 2 DICEY & MORRIS, THE CONFLICT OF LAWS 1107-11 (12th ed. 1993).

110. AMF, *supra* note 106, at 119-20.

British Government did not consider that formal executive recognition was the key to legal personality in the United Kingdom. If such recognition were required then the correspondence showed that the Foreign and Commonwealth Office was prepared to give it in a form of which judicial notice would be taken.¹¹¹ However, passages from the judgment of Lord Oliver in the *Tin* case in which he had stated, amongst other things, that "without the Order in Council the ITC had no existence in the law of the United Kingdom" were considered by Hoffmann J. to "destroy the possibility of a common law conflict rule under which the courts can recognise the existence of an international organisation as such".¹¹²

On argument (ii), Hoffmann J. remarked:

. . . the consequence of the *Tin* case, as I see it, is that I ignore the treaty and regard the A.M.F. as constituted under Abu Dhabi law as a separate persona ficta. As such, it is entitled to recognition as a domestic entity under ordinary conflicts rules . . .¹¹³

Hoffmann J. acknowledged that if the AMF had been given legal personality under the laws of other member States, this would entail the existence of other emanations of the Fund and he added that "[t]his raises questions of trinitarian subtlety into which I am grateful that I need not enter."¹¹⁴

The Court of Appeal by a majority (Lord Donaldson M.R. and Nourse L.J.) allowed the defendants' appeal on the ground that the AMF remained the creation of a treaty non-justiciable in English law, and that as the UAE decree had given effect to the treaty solely within UAE territory it had not created a UAE entity capable of being recognised under the English conflicts rule.¹¹⁵ Lord Donaldson M.R. considered that without "the magic wand of an Order in Council" the AMF was not a person which English courts could see.¹¹⁶ Bingham L.J., dissenting, considered that comity required that the English courts should recognise the AMF, as the AMF was relying on personality conferred not by a non-justiciable treaty but by the UAE decree.¹¹⁷

On appeal to the Appellate Committee of the House of Lords, where

111. *Id.* at 112.

112. *Id.* at 123.

113. *Id.*

114. *Id.* at 124.

115. *Id.* at 134-35.

116. *Id.* at 133.

117. *Id.* at 137-43.

counsel for the AMF declined an invitation to re-open argument (i) above, the defendants argued that there was no longer any room for the application of the domestic conflicts rule where there was, as here, a statutory scheme in place.¹¹⁸ This was the International Organisations Act 1968-81 which had not been applied to the AMF - no Order in Council, therefore no legal personality in English law; furthermore, the AMF was created by a non-justiciable treaty and not by the UAE decree which had simply acknowledged an existing entity.¹¹⁹ By a majority, AMF's appeal was allowed.¹²⁰ Lord Templeman, with whom Lords Bridge, Griffiths and Ackner concurred, held that "when the AMF agreement was registered in the UAE by means of Federal Decree No. 35 that registration conferred on the international organisation legal personality and thus created a corporate body which the English courts can and should recognise";¹²¹ furthermore, the House of Lords' decision in the *Tin* case had not affected this possibility. Dealing with the "trinitarian subtlety" argument - namely that as the AMF had been created as a legal person in all the other member States it was impossible to determine which person's money had been misappropriated - Lord Templeman stated: "... though the Fund was incorporated by 21 States and has multiple incorporation and multiple nationality there is only one Fund with its head office in Abu Dhabi, one board of governors, one executive board of directors and one director-general".¹²² He then referred to the view of the British Government expressed in the Hollom-Judd correspondence. It had stated that a prior requirement for the Foreign and Commonwealth Office's "acknowledgment" of the legal personality and capacity of an international organisation in the United Kingdom was its enjoyment "under its constitutive instrument or instruments and under the law of one or more member states or the state wherein it has its seat or permanent location, [of] legal personality and capacity to engage in transactions of the type concerned governed by the law of the non-member State".¹²³ Lord Templeman added: "This requirement is necessary because the courts in the United Kingdom cannot enforce treaty rights but they can recognise legal entities created

118. *Id.* at 151-52.

119. *Arab Monetary Fund v. Hashim* (No. 3), [1991] 2 A.C. at 152-53.

120. *Id.* at 158.

121. *Id.* at 160.

122. *Id.* at 162.

123. *Id.* cited at 163.

by the laws of one or more sovereign states.”¹²⁴ On several occasions during his judgment, Lord Templeman stated that the UAE Decree had “created” the AMF as “a corporate body,” and referring back to *Tin* he also stated that the 1972 Order had “created” the ITC “a corporate body”.¹²⁵ Yet it was regarded as common ground in *Tin* that the Order had not “created” a body corporate or a corporation.¹²⁶ This use of words by Lord Templeman was to cause debate in the third litigation discussed below.

Dissenting, Lord Lowry considered that the AMF had not been “created” by the UAE decree but by the non-justiciable treaty; to permit it to sue in the English courts would be inconsistent with the policy of the International Organisations Act 1968-81.¹²⁷

3. The Arab Organisation for Industrialisation Litigation (“AOI”).

In the Court of Appeal proceedings in *Tin* (mentioned above) Nourse L.J. had relied in particular on passages in an International Chamber of Commerce arbitral award involving Westland Helicopters Ltd., a company incorporated in England, and the Arab Organisation for Industrialisation (AOI). The latter had been established by a treaty concluded in 1975 by Egypt, Saudi Arabia, Qatar and the UAE with “the juridical personality and all rights and powers to perform its activities within the participating States” and with its headquarters in Cairo, Egypt. The aim of the AOI was to create an Arab arms manufacturing industry, mainly for the confrontation with Israel. The executive bodies of AOI comprised representatives of the four member States. Pursuant to the treaty each member State passed implementing legislation giving legal personality to the AOI in each State but, in accordance with the terms of the treaty, excluding AOI from the application of local law. The AOI set up large industrial plants. It also deposited funds abroad, including accounts in six banks in London.

In 1978, the AOI entered into a contract with Westland - the “Shareholders’ Agreement” - for the manufacture and sale of helicopters in Egypt by a joint-venture Egyptian company. The agreement provided

124. *Id.*

125. *Id.* at 165.

126. *Maclaine Watson & Co.*, [1988] 1 Ch. at 16 (Millet, J.); *Maclaine Watson & Co.*, [1989] 1 Ch. at 167 (Kerr, L.J.); *J.H. Rayner Ltd.*, [1990] 2 A.C. at 501 (Lord Oliver).

127. *Arab Monetary Fund*, [1991] 2 A.C. 114, 167.

for International Chamber of Commerce (ICC) arbitration in the event of a dispute. When Egypt concluded the Camp David Agreements in 1978 and the Peace Treaty with Israel in 1979, the other three member States of the AOI considered that these actions were incompatible with the aims of the AOI. Those states withdrew their representatives from its executive bodies and set up a "liquidation committee" in Saudi Arabia to liquidate the AOI's assets pending the termination of the organisation. Egypt denounced these measures and responded in May 1979 by enacting Decree Law No. 30 under which the AOI was "to continue to enjoy its juristic personality" in accordance with the law of its seat, i.e. Egyptian law. The Decree also provided:

The AOI shall continue to perform its activities, recover its rights and discharge its obligations as a body corporate in Egypt and all other States.

There was no doubt that Decree Law No. 30 and subsequent Egyptian legislation purported to introduce changes to the constitution and representation of the AOI as laid down in its constitutive treaty instruments. For example, its High Committee now consisted exclusively of Egyptians.

In 1980, Westland, considering that its joint-venture arrangements had ended and having tried unsuccessfully to obtain compensation from the "liquidation committee" in Saudi Arabia, commenced an ICC arbitration in Geneva against, amongst others, the four member States and the AOI.¹²⁸ It asserted that the AOI against which it claimed was not the entity in Egypt but the body with offices in Saudi Arabia. Officers appointed pursuant to the 1979 Egyptian legislation sought to represent the AOI as respondent. In 1988 the Swiss courts, on appeal from the arbitral tribunal, held that the Egyptian body was not the entity against which Westland claimed and so could not be a party to the arbitration.¹²⁹ Finally, in 1993, the arbitral tribunal awarded Westland damages against the AOI of nearly £400 million together with interest.¹³⁰

Westland, which had already recovered some money by enforcement proceedings taken in New York against AOI's deposits, thereupon obtained from the English courts an order under the Arbitration Act 1975 to enforce in England the balance of the award in the same manner as a

128. See *Westland Helicopters Ltd. et al.*, 80 I.L.R. 596 (1989).

129. *AOI et al v. Westland Helicopters Ltd. et al.*, 80 I.L.R. 622 (1989).

130. See 80 I.L.R. at 390 (1989).

judgment, and to do this by garnishee attachment of some £318 million deposited at the six London banks in the name of the AOI.¹³¹ Officers appointed pursuant to the 1979 Egyptian legislation instructed lawyers to intervene in the Commercial Court in London in the name of the AOI. The AOI was said to be the true owner of the deposits, and once joined as a party, to apply to set aside the above order on the ground that the case fell within certain exceptions to enforcement laid down in the Arbitration Act, in particular that AOI had been denied a proper opportunity to present its case at the arbitration and that enforcement would be against public policy. Westland sought to strike out the application to intervene on the ground that those instructing the intervenor did not have the authority of the AOI to do so and so had no *locus standi* before the court. As Colman J. stated in the Commercial Court:

. . . before this court can consider the attack on the enforcement of that award, the Intervenor has to establish that it is the AOI, the party to the shareholders' agreement, the respondent to the arbitration and the judgment debtor. If it is not, it has no entitlement to intervene or to seek to set aside the order . . . giving leave to enforce the award as a judgment.¹³²

The intervenor argued that the existence, constitution and authority of the officers of the AOI were to be determined by Egyptian law, this being the law of AOI's headquarters and therefore of its domicile.¹³³ According to Egyptian law properly construed, there had been a continuation of the legal personality of AOI and consequently a valid appointment of those now seeking to act for it. Alternatively, if public international law was the proper law of AOI, the intervenor could still rely on the 1979 Egyptian legislation, since for Westland to argue that this legislation violated public international law would be to raise non-justiciable issues; even if such issues were justiciable, then the Egyptian legislation was a lawful counter-measure in public international law to the actions of the other three member States.¹³⁴

Westland argued that the proper law for determining the existence, constitution and representation of AOI was public international law and

131. *Id.*

132. *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation*, [1995] Q.B. 282, 291 (Q.B.).

133. *Id.*

134. *Id.* at 291-92

thus the Egyptian legislation was irrelevant.¹³⁵ For the intervenor to argue that the Egyptian legislation was a justifiable response to a breach of international law would raise a non-justiciable issue and therefore the intervenor could not prove that it had authority to act for AOI.

Colman J. struck out the application to intervene.¹³⁶ Relying in particular on Lord Wilberforce's observations in *Buttes* and Lord Oliver's in *Tin*, he concluded "that it is not open to the English courts to determine issues of public international law the result of which determination is likely to affect foreign sovereign States" and that "it is not open to the English courts to determine whether a foreign sovereign state has broken a treaty or effectively terminated it."¹³⁷ He was entitled, however, to examine the terms of the AOI's constitutive treaty, since this had been incorporated into the national legislation of Egypt in 1975, and thence to determine what changes the 1979 Egyptian legislation might have made to the treaty as incorporated. Colman J. then examined the judgment of Lord Templeman in *AMF* to see whether it was authority for the proposition, advanced by the intervenor, that where, as here, the international organisation had been given domestic legal personality in the law of more than one State, it was the law of the headquarters State, here Egypt, which had to be applied by an English court in determining questions of its representation. In particular, it was argued by the intervenor that Lord Templeman in stating that the UAE legislation had "created" the AMF "a corporate body" meant that it was thereafter a UAE corporation. Colman J. disagreed. He stated:

[Lord Templeman] was saying simply that, inasmuch as prior to the decree the fund was an entity which did not exist as a juridical person in UAE law, the decree had the effect of creating a juridical person in the eye of UAE law.

Lord Templeman was . . . clearly saying that the law of the UAE had created legal personality for the fund. He was not saying that the fund was a UAE corporation with all the legal attributes of such a body any more than the House of Lords in the *Tin Council* case was saying that the ITC was or had all the attributes of a company incorporated under the United Kingdom Companies Act.¹³⁸

Colman J. considered that implicit in Lord Templeman's judgment

135. *Id.* at 292

136. *Id.* at 313.

137. *Id.* at 292 and 294.

138. *Id.* at 297-98.

was the premise that where an international organisation is given legal personality in the laws of more than one foreign State, this did not change the status of the organisation: it remained a single international organisation and not a plurality of organisations. He went on:

In the case of an international organisation one looks to see whether it has been accorded the legal capacity of a corporation under the law of any of the member states or the state where it has its seat, if that state is not a member state. Where some or all of the member states have accorded to it the legal capacity of a corporation the English courts will also treat it as having the legal capacity of a corporation. The fact that several states have accorded to it that capacity under their law does not mean that there is more than one international organisation for the English courts to recognise, but merely that there is more than one factual basis upon which recognition can be accorded to the same organisation.¹³⁹

Having held that *AMF* did not compel him to apply the law of the seat State, here Egypt, to questions of the constitution, existence and representation of AOI, an issue which never had to be considered in *AMF*, Colman J. then rejected the alternative argument that he should apply Egyptian law by analogy with the English conflict of laws rule whereby such questions in respect of a foreign corporation are governed by the law of its seat or domicile. He held that an international organisation created by treaty was different from a foreign corporation in that the proper law governing such questions in respect of an international organisation was public international law and not the law of any of its member States, even that of its seat State. He stated that "[i]t is thus difficult to conceive of a course more obviously contrary to the comity of nations than the imposition as the governing law by the English courts of the domestic law of any one such member state, whether or not the seat of the organisation."¹⁴⁰ This was underlined by Article 8 of the 1975 treaty itself under which the AOI was stated expressly not to be subject to "the laws and systems in effect in the participating states".¹⁴¹ Colman J. had "no doubt whatever that the proper law governing the existence, constitution and authority of its officers to represent the AOI is public international law," and he did not find it a breach of the rule relating to unincorporated treaties to have regard to the terms of the

139. *Id.* at 299.

140. *Id.* at 303-304.

141. *Id.* at 304.

treaty in order to identify the precise nature of the entity.¹⁴²

Finally, Colman J. considered whether those claiming to represent AOI could trace their authority from the constitutive treaty alone and found that this was clearly not the case, since the basis for their authority was the 1979 Egyptian legislation which broke the line of authority flowing from the treaty.¹⁴³ The question whether or not the 1979 legislation was a justifiable counter-measure in public international law was a non-justiciable issue in the English courts and was itself based on the prior non-justiciable question whether or not the three member States had broken the treaty as against Egypt.¹⁴⁴

As in *Tin*, a financial settlement between the parties closely followed Colman J.'s judgment, thus avoiding what would have been almost inevitable appeals to the Court of Appeal and thence to the House of Lords.

VII. OUTSTANDING QUESTIONS.

An hitherto invisible international organisation, established by agreement between States of which the United Kingdom may or may not be one, is capable of being seen by the English courts and given the capacity to function as a legal person in England if it has had conferred on it at least one of the following:

1. legal personality by specific statutory provision (the Commonwealth Secretariat by the Commonwealth Secretariat Act 1966);
2. legal personality by Order in Council pursuant to the International Organisations Act 1968-81 (the ITC under the 1972 Order);
3. legal personality by the law of a sovereign State recognised by the United Kingdom (the "domestic conflict of laws" route).

In 1, it is possible for the statute to require that the international legal person should be an English, a Scottish, or a United Kingdom legal person. In the unlikely case that the agreement establishing the organisation requires or permits this, in practice such a drastic step will not be taken, since its effect would be to subject the organisation to national law and would thereby amount to a "hijacking" by one of its members. In 2 and 3, the international organisation remains a single international legal

142. *Id.* at 308.

143. *Id.* at 311-12.

144. *Id.* at 310-11

person irrespective of the terms of the foreign law. It is not regarded as a foreign legal person and, if it has personality under the national laws of more than one member State, it is not regarded as a number of foreign legal persons. Nor is it regarded as an English legal person even though it has personality in English law.

The years of expensive litigation in *Tin* ended with the conclusion that the ITC had personality in English law as a consequence of the words of the 1972 Order in Council. The ITC had also been accorded personality in the national laws of at least one of its other twenty-two member States, Australia, where regulations under Commonwealth legislation had constituted it in 1982 "a body corporate with perpetual succession".¹⁴⁵ Under the reasoning later used in *AMF*, this fact should have rapidly settled the disputed issue in favour of the defendants, since the ITC would have had personality in English law by the domestic conflicts route. It is remarkable, however, that this route to English personality was not taken by the defendants in their argument in *Tin*, possibly because they assumed, rightly or wrongly, that United Kingdom participation in the successive ITA agreements and the promulgation of the ITC Order under the 1968/81 Act meant that the legal status of the ITC in the United Kingdom had to be deduced from the Order alone.

It now remains to be seen whether there are any other routes by which an international organisation may acquire legal personality before English courts. Three possibilities come to mind: (A) a route whereby personality in international law automatically becomes personality in English law; (B) a route of executive recognition; (C) a residual "common law" route.

A. Automatic Personality.

Here, it was argued by the plaintiff organisation in *AMF* at first instance that the English conflict of laws recognises the existence of legal entities constituted under international law just as it recognises those constituted under foreign systems of domestic law.¹⁴⁶ The ITC, the AMF and the AOI were each stated in their respective constituent treaties to have personality in international law. But in *Tin*, Lord Oliver on several occasions referred to the ITC as a body which would not have existed in English law if it had been merely an international legal person.

145. International Tin Council (Privileges and Immunities) Regulations S.R. 1982, No. 155 (Commonwealth of Australia).

146. *AMF*, *supra* note 108 at 119.

Thus he described the ITC as a body "which, as an international legal persona, had no status under the laws of the United Kingdom".¹⁴⁷ Later in his judgment, he stated: "The ITC as a matter of English law owes its existence to the Order in Council. That is what created the ITC in domestic law . . ."¹⁴⁸ Likewise, he later remarked: "Without the Order in Council the ITC had no legal existence in the law of the United Kingdom and no significance save as the name of an international body created by a treaty between sovereign states which was not justiciable by municipal courts".¹⁴⁹ It was not surprising, therefore, that on delivery of the House of Lords' decision in *Tin* the first line of argument of the plaintiff in *AMF* was abandoned. In *AMF* in the House of Lords, Lord Templeman stated that "[t]he *Tin Council* case reaffirmed that the English courts cannot identify and allow actions by international organisations which sovereign states by treaty agree to bring into existence".¹⁵⁰

B. Executive Recognition.

This differs from (A) in that the recognition of the executive is required. At first instance in *AMF*, Hoffmann J., having stated that F.A. Mann had considered that an international organisation, like a foreign state, could be accorded legal capacity in the courts only if it was recognised by the executive,¹⁵¹ went on:

This qualification has not been universally accepted by other writers but seems to me logical. The recognition of an international organisation at the level of international law must be a matter for the Executive and it would be rather odd if the English courts recognised the existence in domestic law of an international organisation which Her Majesty's Government declined to recognise in international law.¹⁵²

But practice to support such a possibility is lacking. The British Government's view set out in the Hollom-Judd correspondence of 1978 (which was concerned only with the situation of an organisation set up by treaty to which the United Kingdom was *not* a member) envisaged not

147. Rayner *supra* note 87 at 506.

148. *Id.* at 507.

149. *Id.* at 510.

150. *AMF supra* note 108 at 165.

151. Frederick Alexander Mann, *International Corporations and National Law*, 42 BRIT. Y.B. INT'L L. 267-75 (1969).

152. *AMF, supra* note 108 at 119.

a power to recognise any such international organisation but only one which had been established in a foreign State recognised by the United Kingdom and which enjoyed "legal personality and capacity in that country", in other words, an entity complying with the domestic conflicts rule. This restrictive aspect of the 1978 statement was stressed by Lord Templeman in *AMF*.¹⁵³

As Hoffmann J. concluded in his judgment in *AMF* at first instance, the reasoning in *Tin* destroyed the organisation's first line of argument, whether based on executive recognition or otherwise. Likewise, *Tin* is equally incompatible with the existence of a doctrine that an organisation established by a treaty to which the United Kingdom is a party, and thus *ex hypothesi* recognised by the United Kingdom executive, thereby acquires personality in English law. As a corollary, however, a positive indication by the executive not to recognise an international organisation should not compel the English courts to refuse it personality if it satisfies the domestic conflicts test.

C. Residual "common law".

It might be argued that an international organisation is a collective emanation of its member States and that as each of the member States has legal personality in England, the organisation, too, must have personality in English law. Attorney-General Somervell seems to have thought along these lines before and at the time of the 1944 legislation and to have considered that the common law would regard an international organisation as being a legal person separate from its members rather than being merely a collective name for them. On the basis of this argument, an international organisation for which there had been no specific statute and no Order made under the 1968 Act would nevertheless have personality in English law.

Such a conclusion, however, is likewise inconsistent with the judgments in *Tin* and *AMF*. *AMF* was concerned with only one aspect of the personality of an international organisation in English law, although its most important one, namely the capacity of the organisation to sue - in more general terms, its *locus standi* in the courts. It can be deduced from the decision in that case that under the domestic conflict of laws rule the endowment of personality on an international organisation by the law of one or more of its member States, or additionally its seat State

153. *Id.* at 163.

where that State is not a member (e.g. Switzerland in respect of the United Nations), entails as its minimum effect in English law the consequence that the organisation may sue and be sued, and may have rights in property. But does it also acquire immunities and privileges, and if so which ones? Where the international organisation has been accorded its English law personality by a specific statute or by an Order in Council under the International Organisations Acts its immunities and privileges are those expressly conferred by the statute or the Order respectively. But where the organisation acquires its *locus standi* through the domestic conflict of laws route, the position is unclear. If, as would usually be the case, the member States, or at least the seat State, have accorded it in their national laws the immunities and privileges provided in the treaty, would an English court be obliged to hold that it had such immunities and privileges in England? And what would be the position if the various member States had accorded it different immunities and privileges in their respective territories? The suggested answer is that these domestic laws would have only local effect and could not confer on an international organisation particular attributes, or a cumulation of attributes, which English courts would be obliged to recognise under the domestic conflict of laws rule. If this were not the case, the "trinitarian subtlety" foreseen by Hoffmann J. would arise whenever different foreign States conferred different measures of immunities and privileges on the same international organisation.

A residual question remains: do international organisations, with *locus standi* in England under the domestic conflict of laws rule, have immunities and privileges at common law? There is persuasive authority for a negative answer. Writing in December 1981 before the ITC litigation was foreseen, the Legal Advisor to the Foreign and Commonwealth Office, then Sir Ian Sinclair, expressed the official view as follows:

The question whether an international organisation would enjoy immunity from suit, if such immunity were not accorded by an international agreement to which effect had been given in United Kingdom law by a Statutory Instrument or other legislative provision, has not been tested in the courts of the United Kingdom; but it is thought likely that a court would hold that there were no international customary rules on the subject and that the organisation would not

therefore be accorded immunity.¹⁵⁴

Likewise, in an early case arising out of the collapse of the International Tin Council, *Standard Chartered Bank v. International Tin Council*, Bingham L.J. remarked in an *obiter dictum*:

International organisations such as the ITC have never so far as I know been recognised at common law as entitled to sovereign status. They are accordingly entitled to no sovereign or diplomatic immunity in this country save where such immunity is granted by legislative instrument, and then only to the extent of such grant.¹⁵⁵

In the Court of Appeal judgments in *Tin*, Kerr L.J., with whom on this point the other two judges agreed, held that the EEC did not have immunity *ratione personae* at common law. As the EEC carries out functions which are much closer to those of a sovereign State than the functions of most other international organisations, one might fairly deduce that Kerr L.J. would have had no sympathy for a claim to a common law immunity by other organisations.

Despite the clarification brought to the law by the above three cases there is still the possibility that further questions will face the English courts. Two come immediately to mind: (i) following the domestic conflicts route, two - or even more - bodies, each claiming to be the *persona* of the one international organisation oppose each other in the English courts, (ii) rival groups, each claiming to be the authentic representative of the international organisation, oppose each other in the English courts, thus raising a problem which did not exist in *AOI* where only the Egyptian officials sought to intervene and not those in other member States. The question is to what extent may the English courts examine the constitutive instrument of the organisation - usually a treaty - to determine such disputes. If the terms of the treaty are so clear that a perfunctory glance will reveal that one of the claimants is an impostor, then it seems just that the English courts should examine the treaty and determine this. But would even a perfunctory glance amount to a non-justiciable "interpretation" of the treaty? Or could it be justified, as Colman J. indicated in *AOI*, as a necessary step in the interpretation of the foreign law on which the claimant relies? A practitioner experienced in these matters wrote after the House of Lords' decisions in *Tin* and

154. Quoted in Geoffrey Marston (ed.), *United Kingdom Materials on International Law*, 52 BRIT. Y.B. INT'L L. 361, 391 (1981).

155. *Standard Chartered Bank v. International Tin Council*, [1986] 3 All E.R. 257, 263 (Q.B.).

AMF, but before *AOI*:

But the total exclusion of international law in the manner now suggested by these two House of Lords decisions is misplaced, and damaging to the development of English law.¹⁵⁶

In Colman J.'s opinion, treaties may be perused, either "as a matter of fact" or "as a matter of the municipal law" of the incorporating State, provided that such perusal does not breach the "ring-fence" protecting issues of international law from being determined by English judges. Whether a breach would be so caused may be a difficult question for a judge in a particular case.

VIII. CONCLUSION.

The brief discussion above indicates that although the broad outline of the status of international organisations in English law has been defined by the cases mentioned above, there still remain some obscure areas within the frame. Furthermore, an international organisation which is not the subject of legislation in the United Kingdom and which has not been accorded personality in the laws of any of its member States is still invisible to the eyes of English courts. The arrival on the litigation scene in the early nineteenth century of States and governments separate from human monarchs caused English courts to doubt whether they could be legal persons.¹⁵⁷ Before long, the courts had side-stepped the doubt by

156. Jeremy Carver, *International Organisations After Arab Monetary Fund*, 2 BUTTERWORTH'S J. INT'L BANKING & FIN. L. 215, 218 (1987).

157. In *Edwards and Thomas v. The Government of Colombia*, the sum of £378,000, said to be the property of the Government of Colombia, then unrecognised by the British Government, and lying in the hands of Goldschmidt & Co. in London, was sought to be attached by one Thomas Edwards who claimed that the Government of Colombia was indebted in this sum to him and his assignee, Samuel Thomas, on bills of exchange. In the Mayor's Court in the City of London, it was argued by the garnishees, Goldschmidts', that not only should the attachment be set aside but the action of debt itself, directed as it was against the Government of the Republic of Colombia, should be set aside "as one wholly incapable of being maintained upon any principle of common law or common sense - a thing, in fact, amounting to a complete nullity". Counsel believed that it was "the first time that ever the Government of any country was made party to a suit of any kind; and it was still more extraordinary that a Government should be made a party to a personal action of debt". He went on to say:

In the case of a corporation, which might be considered somewhat analogous, the attorney for that corporation must be sued, and not the body itself. But, to sue a Government for money, struck him as one of the most palpable absurdities by which a commercial people could be deceived. What did government mean but the effect produced by the operation of the functions of the

adopting the doctrine of conclusive executive recognition.¹⁵⁸ It seems that in the United Kingdom of the late twentieth century the legislature and the courts are not yet prepared to make this particular solution applicable to international organisations.

governors towards the governed?

Counsel went on to state that "to sue a Government for money, struck him as one of the most palpable absurdities by which a commercial people could be deceived". The Recorder stated: "It was, indeed, a most extraordinary sort of proceeding to sue a Government. The plaintiff might as well sue a whole nation." He set all the proceedings aside. *See Attachment Upon the Property of the Colombian Government*, THE TIMES, Sept. 15, 1824, at 3.

158. *E.g.*, *The Colombian Government v. Rothschild*, 57 Eng. Rep. 514 (1826). By this time the British Government had recognised the Government of Colombia in April 1825 as the government of a independent sovereign State. Even so, the court held that the foreign State had to sue in the names of public officers entitled to represent the State.

