Extrait de l'Annuaire de droit international Session de Lisbonne – vol.66-I, Paris, Pedone, 1995 p 251 et s.

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# Les conséquences juridiques pour les États membres de l'inexécution par des organisations internationales de leurs obligations envers des tiers

# *The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties*

*Cinquième Commission* *

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# Preliminary Exposé and Draft Questionnaire

*June 1989*

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# I. Introductory

The purpose of this Report is to provide a preliminary study of the international law issues in determining the legal consequences of member states of the non-fulfilment by international organizations of their obligations towards third parties. When the question of such non-fulfilment of obligations is litigated before domestic courts, various considerations of domestic law will come into play. The personality of the international organization on the domestic plane may be thought to have relevance, for example. This Report does not purport to examine issues of domestic law. Further, the substantive determinations of municipal tribunals on our topic has been severely curtailed through the operation of immunities from jurisdiction on the one hand, and the concept of non-justiciability on the other. While an international organization may be liable for certain acts and omissions on the domestic level, it may often be protected from the consequences of the liability by virtue of having certain immunities from suit and/or execution. That of itself should be irrelevant to the question of whether member states are themselves liable for the obligations of the organization. But insofar as the answer is said to rest upon provisions in the treaty estabhishing the organization, it may be contended that this is a non-justiciable issue for the local courts (perhaps because the treaty is not part of the local law, or because the matter involves relations between international actors that are felt inappropriate for local determination). Further, a claim that the member states are liable for the obligations of an international organization to which they belong may be met by the assertion by the states concerned of state immunity from local jurisdiction.

I have not in this preliminary report dealt in any detail with substantive domestic law considerations, nor with questions of immunity and non-justiciability, though they are constantly in the background and have, for example, played a very important part in the recent tin litigation. I have assumed that the " legal consequences for member states " with which our Commission is concerned are the legal consequences at international law.

The necessary starting point in determining the legal consequences for member states of the non-fulfilment by international organizations of their obligations towards third parties is the concept of personality. We may simply say that, if an international organization has no distinct legal personality, cannot itself be legally liable for obligations even if incurred in its name ; and it is likely that the liability will rather be that of the member states.

While separate personality may be a prerequisite for the liability of the

organization, it is not necessarily sufficient to establish whether there is liability on the part of the members, of a concurrent or secondary nature. This requires many further questions to be addressed. Is the organization to be regarded as having acted as the agent of its members ? Is the method by which the organizational decisions were taken that led to the obligation to a third party a relevant factor ? Does a host state retain special liabilities vis-à-vis the conduct of an organization headquartered on its territory – and indeed, are the general principles of state responsibility illuminating in regard to the problem before us ? We will also need to consider whether considerations of *vires* on the part of the international organization can affect the answer to the question of state liability.

This preliminary report endeavours to address all of these closely interrelated issues, by reference to judicial and arbitral decisions, treaties and state practice, learned writings, and what we may term argument of principle.

## II. Direct liability to third parties

### Legal consequences for member states and the legal personality of organizations

#### a) International bodies possessing no separate personality

It appears to be widely accepted that an entity without legal personality cannot be the bearer of either rights or duties. This may be deduced from the fact that the issue of whether an entity itself has rights and obligations in international law has invariably been regarded as synonymous with whether it has international legal personality. This has been true both for those early writers who insisted that only states could have international legal personality, and for those who saw, even by 1930, that [1] :

> " the exclusive possession of the field of international law by states is being broken down by the invasion of bodies which are neither states nor individuals, nor combinations of states or individuals, but right-and duty bearing international creations, to which for the want of a better name the title of 'international body corporate', *'personne juridique internationale'* may perhaps be accorded **".**

[1] See also, C.W. Jenks, " The Legal Personality of International Organizations " 22 *BYIL (1945),* pp. 11-72 and the vast international literature gathered in footnote 11 thereof.

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(Sir John Fischer Williams, " The Legal Character of the Bank for International Settlements ", 24 *A.J.I.L.* (1930) 665 at 666).

Equally, the International Court of Justice found that, to say that the United Nations was an international person means that it is " capable of possessing international rights and duties " *(Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ *Reports* 174 at 179). Indeed, without deviating into an analysis of the arcane question of whether personality is something other than a compendium of capacities, we may safely say that one of the *indicia* of international personality is that the entity concerned can bring claims or have claims brought against it. This necessarily implies liability (though without determining whether it has some liability).

In international associations which have no separate legal personality, it is the states members and not the association which will be liable for unfulfilled obligations entered into in the name of the association. An international association lacking legal personality, and possessing no *volonté distincte* (Alexander Nekam, *The Personality Conception of the Legal Entity.* W.S. Hein, 1978), remains the creature of the states members who are thus liable for its acts.

While there is little debate today on the legal consequence for member states of acts of organizations not having separate legal personality, there is still some controversy on how one ascertains whether organizations do have such separate personality. The view is taken by Seidl-Hohenveldern that an international organization is only a subject of international law insofar as its rights are of a *jure imperii* quality. More precisely, he is of the view that :

> " an international organization will be a subject of international law if it has been established by a meeting of the wills of its member states for activities which, if pursued by a single state, would be *jure imperii* activities and if the member states have enabled the organization to have rights and duties of its own under international and domestic law and to express a will not necessarily identical with the will of each of them, such will to be expressed by an organ not subject to instructions of any single member state **".**
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> *Corporations In and Under International Law* (1988 at p. 72). See also *Das Recht der Internationaler Organisationen,* p. 4.

Classifying international bodies engaged in activities *jure gestionis* as interstate enterprises rather than as international organizations (see also Valticos, I.D.I. *Annuaire* 57 (1977-I), Paris, Pedone, p. 13), Seidl-Hohenveldern finds that they lack international personality and draws the conclusion that member states may not escape liability for debts incurred by the interstate enterprise. He finds that

> " just as a state cannot escape its legal responsibility under international law by entrusting to another person the fulfilment of its international obligations, the partners of a common interstate enterprise are jointly and severally responsible in international law for the acts of the enterprise ". *(Corporations In and Under International Law* at p.12l).

In the view of this writer liability for international bodies that have no legal personality and are merely a vehicle for interstate cooperation, remains that of the members. However, the implication of SeidlHohenveldern's position is that even if an organization has under its constituent instrument been granted its own rights and duties, and can express a *volonté distincte* through organs not subject to the instructions of a single member state, it still has no personality or liability of its own if its functions are those that would be described as *jure gestionis* if carried out by a state. This is more controversial and will require further study.

The relationship between activities *jure gestionis* of an international body and its separate legal personality has been in issue in one facet of the International Tin Council litigation. In the Court of Appeal Judgment in the *Direct Action* cases the question of separate personality (and the consequences for members' liability) was concerned in significant part with whether any international personality had been carried into English law. (Both the Sixth International Tin Agreement (ITA6) and the Headquarters Agreement (HQA) provided in terms that the ITC should have legal personality). The pertinent statutory instrument (which did not purport to give effect to the ITA6 but was directed to giving effect to relevant provisions of HQA) merely stated that the ITC should " have the legal capacities of a body corporate ". The Court decided that this formula (which was a standard one used in English statutory instruments under the International Organizations Act 1968)

> " was not merely to enable the members of an international organization, in most cases sovereign states, to function within the framework of English law under a collective name as individual legal entities. The objective must also have been to give recognition to the fact that all the members, including the United Kingdom itself, intended that the international organization shall have legal personality. "
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> *(Maclaine Watson v. Dept. of Trade* [1988] 3 *A.E.R. 257* at 296 C.A.).

It has been suggested to the Court of Appeal that the *Reparation for Injuries Case* and other authorities dealing with international legal personality were concerned only with the United Nations and that the same consequences should

not be drawn for an organization acting *jure gestionis*[2]. The Court of Appeal had also studies Seidl-Hohenveldern' approach to common interstate enterprises. In its judgment it said

> " Of course, the constitutional objectives of the United Nations are wholly different from those of more commonplace international organizations such as the ETC. But the fact that the ITC is largely designed to conduct trading activities in order to achieve its objectives, whereas the United Nations will presumably enter into contracts mainly for administrative and similar purposes only, is no reason for differentiating between them as legal entities ".
> ([1988] 3. A.E.R. 257 at 297).

Thus, even though the ITC was engaging in trading, it was help to be an international legal person and not merely a collective name for its members ; and was itself liable for its acts, for contracts entered into[3] and liable on awards and judgments.

There is some diverse practice, at the level of domestic courts, as to whether a distinction *jure gestionis* and *jure imperii* should be made in the case of international organizations, for the purpose of interpreting the immunity to be granted. This is a topic which is beyond the scope of this paper[4], where we

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[2] I do not here need to deal with the question of whether every international organization that is trading is *ipso facto* an organization which functions *jure gestionis* rather than *jure imperii*. The contending parties took different position on this in the *Direct Action* in the Tin Case and the Court of Appeal satisfied itself with saying that the ITC was " 'largely' designed to conduct trading activities in order to achieve objectives ". It undoubtedly also had a few *imperii* type activities too *;* and whether the stabilisation of international tin prices is an objective *imperii* or *gestionis* is perhaps open to argument. Seidl-Hohenveldern, in his remarks on OPEC, accepts that an international body which has functions some of which are *gestioni* but others of which are *imperii*, cannot be considered a common inter-state enterprise but rather an international organization.
*Corporations In and Under International Law*, p. 111.

[3] The claim for contract was summarised thus : " The ITC has no legal personality distinct from its members. The members are an unincorporated association who agreed to trade, and traded in the name of the TTC. The plaintiffs' contracts, although made nominally with the TTC, were accordingly made directly with the members, and the members are accordingly jointly or severally liable as trading partners ".
[1988] 3 *A.E.R.* at 274.

[4] See, for example, *Branno v. Ministry of War*, 22 *I.L.R.* 756. In all these cases matters internal to the organization, *i.e.* concerning the relationship of the staff to the organization, have been held to be *jure imperii* and/or immune from local jurisdiction. For a rehearsal of the arguments supporting absolute immunity of international organizations, see Morgenstern, *Legal Problems of International Organizations* (1986) at 6, who includes " the fact that the capacity of international organizations is directly related to their public functions seems to

address only the issue of whether an international organization established by treaty to engage in trading activities is necessarily devoid of international personality (and is thus not responsible for debts incurred in its name).

More generally, the Court of Appeal found that, although the ITC was not a body corporate in terms of English law (but had only been given the capacities of a body corporate in English law) it was recognised in English law as a legal entity separate from its members.

b) International organizations possessing their own legal personality

While the possession of separate legal personality is a necessary precondition for an organization to be liable for its own obligations, it does not follow that separate personality is necessarily determinative of whether member states have a concurrent or residual liability. The contention that there existed such liability on the part of members, notwithstanding the personality of the organization, was the second of three[5] arguments on liability advanced by the plaintiffs before the Court of Appeal in the *Direct Action* in tin. This required the Court of Appeal to regard the ITC as :

" analogous to that of bodies in the nature of quasi-partnerships wellknown in the civil law systems, where both the entity and the members are liable to creditors, or the members are in any event secondarily liable for the debts of the entity. This concept is exemplified in the United Kingdom by a Scottish partnership, in France by a *société en nom collectif* and in Germany by a *Kommanditgesellschaft auf Aktien* ".

([1988] 3 *A.E.R.* at 274.

This argument was advanced as one applicable both from the perspective of international law and domestic law. It was claimed that the nature of the ITC in international law was that of such a mixed entity ; and that English law merely conferred capacities on the ITC (through the 1972 Order in Council) but did not purport to change its legal character. And it was further argued that the association of the members for purposes of trade, taken together with the absence of any limitation of their liability meant that the members, as well as

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imply that, as a matter of principle, the problems of acts *jure gestionis* should remain unimportant ". She asks, " Would, for instance, the sweeping denial of immunity for contracts for the supply of goods under the United Kingdom State Immunity Act, 1978, be suitable for application to purchases by an organization for technical cooperation projects ? ".

[5] The first argument was that the ITC had no legal personality distinct from its members ; and that contracts with the ITC were in fact contracts made directly with members, who were accordingly jointly and severally liable as trading partners. The third argument was that, even if the ITC has separate legal personality, in contracting with third parties it acted as agent for its members as undisclosed principals.

the organization, was liable for debts.

The Court of Appeal found that the concept of secondary liability of members in the face of the separate personality of an association had not been developed in English law :

" The interposition of a legal entity between an unincorporated group of persons on the one hand, and third parties who enter into contracts with the legal entity on the other, has the consequence under the common law that the members of the group have no liability for the contracts made by the entity ".

([1988[] 3 *A.E.R.* at 301).

The Court of Appeal therefore turned to deal with the issue of what it termed " secondary liability via the route of international law "[6]. This it did partly by an examination of the particular constituent instrument (finding that ITA6 " nowhere envisages any liability by the members to anyone other than the Council or the members *inter se.* There is nothing which points to the assumption of any obligation to any creditor of the Council. On the contrary, everything points in the opposite direction ", *ibid.* at 304) and partly by reference to the general principles of international law.

In seeking to identify the pertinent rules of general international law, the Court of Appeal heard extensive submissions on the writings of leading jurists and on international case law. Lord Justice Kerr, writing the majority opinion for the Court of Appeal, found on the basis of these sources that there was no :

" basis for concluding that it has been shown that there is any rule of international law, binding on the member states of the ITC, whereby they can be held liable, let alone jointly and severally, in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name ".

*(Ibid.,* p. 307).

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[6] To be able to address this question as a matter of substance, the Court of Appeal had first to be able to dispose of the contention that the matter was non-justiciable, because any argument on secondary liability required reliance on ITA6, which had not been incorporated into English law. Kerr and Nourse LJJ (but not Ralph Gibson LJ) found that although unincorporated treaties are not part of English law, and no rights or obligations arising under them can provide a basis for a claim in English law, " there seems no harm in permitting resort to the Sixth International Tin Agreement for the purpose of establishing who, on the plane of international law, is liable for the debts of the ITC... "
[1988] 3 *A.E.R.* at 303.

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## The Case law

The Court of Appeal judgment in the *Direct Action* in tin is of course itself one of the judicial decisions to which one must now look to identify the international law on this matter[7]. (Article 38 of the Statute of the ICJ, the reference to judicial decisions as a subsidiary source not being limited to international judicial decisions). Accordingly, it should be noted that while a majority of the Court (Kerr LJ and Ralph Gibson LJ) rejected the submission of a concurrent or secondary liability on the part of members, they did so on significantly different grounds, at least so far as international law was concerned[8]. Lord Justice Ralph Gibson bases himself not so much on a conviction that general international law did not contain any rule of separate liability, but rather on arguments of nonjusticiability. In his view the transactions of members within the ITC – even directed to buffer stock trading and borrowing – were transactions between foreign sovereign states (and the EEC) and non-reviewable by the English courts :

> " the actions of the members in conducting their international purposes through the means of the ITC, on which they conferred international legal personality, and for which they sought and obtained legal personality under our law for the purposes of its trading activity, show, in my judgment, that the intention of the members was to prevent their actions as members within the organization from being subjected to the jurisdiction of our courts ".
> ([1988] 3 *A.E.R.* at 348).

By contrast, the starting point for Lord Justice Nourse was that " in international law the attribution of legal personality to an international organization does not necessarily free its members from liability for its obligations ". From that point he reasoned that when states engage in extensive participation and control in the affairs of an international organization, the presumption is of liability for its obligations. Nor should the liability be limited to fault on the part of member states " because that would make third parties' rights of recovery against the members precarious and dependent on circumstances outside their knowledge and control ". Members could still limit

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[7] However, appeals on this judgment are now (June 1989) being heard before the House of Lords.

[8] As to municipal law, Lord Justice Ralph Gibson agreed with Lord Justice Kerr that " the rules of law of England and Wales including the 1972 Order " did not lead to the secondary liability on the part of the members notwithstanding the separate legal personality of the ITC.

or exclude their liability by expressly so providing in the relevant treaty. Nor should liability be excluded for *acta jure imperii,* because a third party dealing with an international organization should be in no worse a position than if the organization were acting *jure gestionis (ibid.*, pp. 332-3).

The present writer believes that the only real reliance placed by Nourse LJ on substantive international law was the finding that legal personality of an organization does not necessarily free his members from liability. Lord Justice Nourse pointed to policy reasons why, in his view, the protection of third parties made desirable the secondary liability of states. In an uncertain area policy factors are not to be discounted as irrelevant, and we later offer our views as to preferred policy considerations. Lord Justice Nourse also thought (ahthough again he pointed to no specific international law that addressed the matter) that extensive participation and control by members in the affairs of an international organization " points strongly towards their liability for its obligations ". At the level of domestic law, we may note that the members of associations often continue to have an important role in the decision-making of the association without being liable for its obligations : their liability depends upon the nature of the association rather than their institutional interest in its affairs.

At the international level this leads one into the area of *dédoublement fonctionnel,* the role of the members not being as individual states, but rather as members of the relevant decision making organ. Nearly all international organizations with separate personality have a secretariat, and one or more organs on which all, or some, of the member states are represented. But if an international organization is really the creature of the states members, it will be an interstate enterprise without a *volonté distincte.* Where the organization has a *volonté distincte* the continuing role of states members *qua* organs should be regarded as neutral as regards the issue of members' liability for the acts of the international organization. There are other considerations which lead in the same direction. If 'continuing involvement and control' were the test for member states' liability, would it be argued that states would be liable for decisions taken in organs in which they are represented (even if they did not vote for them) but not in organs in which they are not represented ? Is it to be argued that states are liable for, *e.g.*, decisions made in a plenary organ or organ of limited representation, but not, *e.g.* for embezzlement by a secretariat member ? International organizations are of course an integral whole, and not interstate organs on the one hand and 'real' international organizations *(i. e.* secretariats) on the other.

Other case law remains of limited value in determining the problem of members' liability. The question arose in the ICC arbitration, *Westland Helicopters Ltd. v. Arab Organization for Industrialisation,* 5 March 1984, 23 *ILM* (1984) 1071. The claimant, the AOI, had entered into certain contracts. Prior to this the Higher Committee of the AOI (ministers delegated by the four states members) had signed with the United Kingdom a memorandum of understanding guaranteeing performance by the four states of AOI commitments. Difficulties arose within the AOI as a result of Egypt's role in the Camp David Agreements and consequential problems led the claimant to seek arbitration. The issue of personality of AOI and liability of members arose indirectly, in the context of the need of the Tribunal to decide whether an arbitration agreement had been entered into only with AOI, or with the states parties also (notwithstanding that they were not signatories to the arbitration agreement). The Tribunal decided that this question was " exactly the same " as whether the obligations generally of the AOI under the Shareholders Agreement were obligations attributable to the members.

We should treat this finding as specific to the case. So far as separate legal personality of AOI is concerned, the Tribunal noted that it was not subject to any national law and that its legal status was established by treaty. The Tribunal took no further the analysis of whether the AOI really had international legal personality, because it took the view that, in deciding whether the states were bound by obligations undertaken by it, " One must... disregard any question relating to the personality of the AOI. The possible liability of the 4 states must be determined by directly examining the founding documents of the AOI in relation to this problem ". But the documents were silent on the matter and the Tribunal was left to make inferences from such silences[9]. It found that the

[9] This interim award is not satisfactorily addressed in the Court of Appeal *(Direct Action)* judgment in tin. That the award had been successfully challenged in part in the Swiss courts should not have affected any inherent value in the analysis it provides (the challenge being on other grounds). But its lack of value as "a satisfactory precedent" (not the test that international law would apply in assessing a case as a relevant source) was what was emphasised. Kerr LJ found that as the award was made in an international arbitration pursuant to an international arbitral agreement "its reasoning cannot simply be transposed to found an acceptance of obligations to the creditors of the ITC at the level of municipal law" [1988] 3 *A.E.R.* at 307. But the exercise being undertaken by the Court of Appeal was not to found an acceptance of obligations under municipal law, but to identify general principles of international law, to see if there was secondary liability " via the route of international law " (p. 301). Ralph Gibson LJ accepted that the tribunal was applying general principles of international law, but said he would not " apply that decision " (which was never in issue ; what was involved was trying to identify general international law on the subject at hand). His reason was that " where the contract has been made by the organization as a separate

express attribution of legal personality does not allow one " to deduce an exclusion of the liability of the 4 states ". Further :

> " One could perhaps infer that the 4 states' liability is secondary, in that they could not be proceeded against so long as AOI performed its obligations**...** but it does not follow that the 4 states would have no liability whatsoever for obligations entered into by AOI ".

The Tribunal continued :

> " In the absence of any provision expressly or impliedly excluding the liability of the 4 states, this liability subsists since, as a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow there from. In default by the 4 states of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability ".

This was said by the Tribunal to be a " rule " which " flows from general principles of law and from good faith ". We can make several brief observations. The " general principles of law " seemed to consist of analogizing " commercial organizations " to partnerships in English or United States law, or *société en nom collectif* under French, Swiss or German law. The present writer believes this approach to be question-begging and inappropriate. International organizations fall ultimately to be understood and analyzed within their own terms. The Tribunal also referred to the states engaging in transactions of an economic nature : again, this begs the question of whether it was they, or the AOI, which so engaged. Nor was there any analysis as to whether contracts for the provision of arms entered into by an international organization established for this very purpose are or are not necessarily to be regarded as *jure gestionis* ; or the legal consequences that might be said to flow from an affirmative conclusion[10]. Above all, the Tribunal seemed to assume that there was an a *priori* liability on the part of members which they had failed to exclude : this reasoning appeared in the specific case to flow from the technique of analogizing to certain private law entities ; for the " limited personality " conferred by the constituent instruments ; and from the fact that " one must admit that in reality, in the circumstances of this case, the AOI is one with the states ".

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legal personality, then, in my view, international law would not impose such liability on the members, simply by virtue of their membership, unless on a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability had been assumed by the members " (p. 353). Ralph Gibson LJ does not identify the sources of international law by reference to which he arrives at this view.

[10] Which we have briefly alluded to above, pp. 254-255.

In the opinion of this writer the analysis lacks a certain rigour, and even on its own terms can be said to rest on a scepticism about the 'real' independent personality of the AOI, which was really to be identified with the states.

In the circumstances (and leaving entirely aside the status of the Interim Award, which has been challenged for other reasons in certain jurisdictions : we are here concerned with the realm of intellectual analysis rather than precedent or authority in any other sense) the *Westland Helicopters* case does not carry the matter forward.

In seeking to identify relevant judicial decisions, reference must properly be made to the *Case of Reparation for Injuries Suffered in the Service of the United Nations,* ICJ *Reports* (1949) 174 ; the *Case of Certain Expenses of the United Nations,* ICJ *Reports* (1962) 151 ; and the *Namibia Case,* ICJ *Reports* (1971), though, as will be seen, they do not really address the issue before us. *The Reparation for Injuries Case* addresses the issue of powers to be implied to international organizations possessing international legal personality, notably the power to bear rights and obligations ; it is not directed to the liability of its members for the obligations of the organization. The Namibia Case does of course make clear that when a decision by the Security Council has been made under Article 24 of the UN Charter, it is binding on the membership as a whole. But the fact that, under a constituent instrument, decisions validly taken by one organ may bind those who did not take part in the decision, and indeed even those who voted against the decision, does not greatly illuminated our problem. What is the relationship between being " bound by " the decision of an international organization and being " liable for " such a decision ? To be bound by a decision means that one cannot deny its validity or binding force ; or the consequences of it so far as it requires conduct or abstention from conduct on the part of members. Thus in the Namibia Case the decision of the Security Council in resolution 276 required members to desist from trade with South Africa in respect of Namibia. In the case of tin, once tin contracts were made by the ITC, the members were not free to denounce them or to act in a way on the tin markets that would undermine the actions agreed upon by the ITC (even this analogy is not quite correct, because tin trading contracts were not in fact entered into by organs on which the states were represented ; rather, specific contracts were entered into under delegated powers, by the Buffer Stock Manager, an international civil servant. For a real analogy between the Namibia Case and our problem to arise, the following scenario would have had to occur : the UN acting *intra vires*[11] its powers, engaged in action that resulted

[11] The extent to which the trading in 1988 was *intra vires* ITA6 has received some passing

in loss and damage to third parties, and it was claimed that the members, rather than (or as well as) the UN was liable. It will readily be seen that, by contrast, in the *Namibia Case,* the question was not whether the members were liable to third parties for action taken by the UN, but rather whether they themselves were free to engage in acts (which has no loss to third parties, other than Namibia itself) in the face of UN decisions which bound them.

So far as the general question is concerned – that is to say, whether the members of international organizations are liable for the obligations of the international organization – the Advisory Opinion of the International Court of Justice in the case of *Certain Expenses of the United Nations* is also of limited authority. The Court was asked whether certain expenditures authorised in specific General Assembly resolutions constituted " expenses of the Organization ". The question was not formulated so as to ask the Court in terms whether members were obliged to pay for these expenditures. This was because, in the particular cases of UNEF and ONUC, there was controversy as to whether they had each been established in accordance with the provisions of the Charter. Further, the Court was asked whether the expenditures constituted expenses of the Organization " within the meaning of Article 17, paragraph 2 of the Charter of the United Nations " ; and Article 17, paragraph 2 itself provides : " The expenses of the Organization shall be borne by the members as apportioned by the General Assembly ". It might thus seem that the identification of expenditures as an expense of the organization necessarily answered the question as to the obligation of members to bear them, given the particular treaty provisions of the Charter. In the way that the matter was handled by the Court, however, the matter was not quite so clear. The Court stated that three questions arose under paragraph 2 of Article 17, the first being what constituted the expenses of the Organization ; the second concerning apportionment by the General Assembly ; " while a third question might involve the interpretation of the phrase " 'shall be borne by the members'. " *(Certain Expenses,* Advisory Opinion, 20 July 1962, p. 158). The Court stated that these second and third questions directly involved the financial obligations of the members, " but it is only the first question which is posed by the request for the advisory opinion ". *(Ibid).* This is difficult to follow. If there had been any controversy about questions of apportionment, or about the interpretation of

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attention only (in part because of the reluctance of English courts to interpret complicated provisions of an unincorporated treaty : though Kerr LJ has limited this doctrine to two circumstances *;* (1) no private rights or obligations can be derived from such treaties and (2) such treaties cannot be enforced by the English courts.
*Maclaine Watson v. Dept. of Trade,* [1988] 3 *A.E.R.* at 291.

the phrase " borne by the members", the question put to the Court *("* Do the expenditures... constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2 of the Charter of the United Nations ? *")* would necessarily have encompassed responses on these other elements in Article 17, paragraph 2. In the event, the United Nations certainly took the view that, once the Court had determined that the expenditures were expenses, it necessarily followed that, by virtue of Article 17(2), they were to be borne by the membership, as apportioned by the Assembly.

The separate opinion of Judge Sir Gerald Fitzmaurice seems equally unclear as to the extent that the Court was, by necessary implication, deciding on financial obligation as well as on the identification of expenses. Having stated (at p. 198) that the Court has taken the view that it is only required to say whether specified expenditures are expenses, and not to declare what are the financial obligations of members, he elsewhere says (p. 207) that " because the Court has proceeded on the basis that once it is established that certain expenditures constitute 'expenses of the Organization', it follows necessarily and automatically that every member state is obliged to pay its apportioned share of these expenses *in all circumstances* ". Sir Gerald does not identify where in its Opinion the Court adopts this position. The view Fitzmaurice stated at p. 198 of his separate Opinion seems the more correct.

Much of the Court's Advisory Opinion is of course directed towards the specific question of financial obligation, in accordance with specific treaty terms, in the face of possible *ultra vires* commitments entered into by the organization. (We return to the question of *vires* below). Leaving this aspect aside, the *Expenses Case* is very limited authority for our purposes. The states were, in a sense, obliged to put the UN in funds so that the UN could meet its obligations to, *inter alia,* third parties, regarding expenses incurred for peacekeeping. But this is because under the UN system states are obliged to pay their apportioned share of the expenses of the Organization : and obligations incurred *inter alia* to third parties were deemed to be such expenses.

Concurrent or secondary liability of the UN members directly to these third parties was simply not in issue. The matter becomes in issue in an international organization in which only a fixed capital sum is required under the constitutive instrument to be paid by the members (rather than an open-ended commitment to pay legitimate expenses, to the organization itself, without a ceiling being imposed). What is apparent from the Opinion is that the duty of the UN to honour its debts to third parties operates as a presumption too make decisions incurring such debts *intra vires.* But that is not the same as a finding that the

importance that other organizations (differently structured from a financing point of view) should honour their debts to third parties, operates as a presumption that states have a direct secondary liability for such debts. Nor is it even the same as a finding that, where a fixed contribution is payable and in the absence of a clause requiring expenses to be apportioned among the members, the members must " make the organization good " for debts that it occurs beyond what can be met by the fixed contributions due.

**The writings**

The simplest statement of principle is offered by Schermers, *International Institutional Law* (1980) at 780, who says :

> " Under a general principle of law, an organization, as well as a natural person, is responsible for its own legal acts and therefore liable if such acts cause damage to others…
>
> …Under national legal systems, companies can be created with restricted liability. An express provision thus enables natural persons to create, under specific conditions, a new legal person in such a way that they are no longer personally liable for the acts of the new person.
>
> In international law no such provisions exist. It is therefore impossible to create international legal persons in such a way as to limit the responsibility of the individual members. Even though international organizations, as international persons, may be held liable under international law for the acts they perform, this cannot exclude the secondary liability of the member states themselves. When an international organization is unable to meet its liabilities the members are obliged to stand in, according to the amount by which each member is assessed for contributions to the organizations' budget ".

This view naturally has attracted a great deal of attention in the course of the tin litigation. The opinion here stated covers three separate elements : (1) that states are, as a matter of general principle, liable for the debts of international organizations ; (2) that this is true not only in the face of silence of the constituent instrument, but generally, because international organizations cannot be created in such a way as to limit or exclude liability ; (3) that the liability is proportionate to the contributions due for the organization's budget.

While these pronouncements are of the greatest interest, no authority is cited for any of them ; nor does the distinguished author make clear the analytical basis of his views. It would *seem* that his starting point *is* analogy with the national company, with liability resting with those establishing it unless

excluded. We may question whether the analogy is apposite, and thus also whether the right starting point *is* the assumption of liability unless specifically excluded. As to the " impossibility " of creating, in specific terms, international organizations that exclude liability, we know (since the time that Professor Schermers wrote his study) that there exist many treaties which expressly disclaim liability on the part of member states : we comment on these below. (We may note at this juncture that Nourse LJ in the Court of Appeal accepted Schermers's view in favour of the liability of members on the basis that " international law would surely presume that states which were willing to join together in such an enterprise would intend that they should bear the burdens no less than the benefits ". However, Nourse LJ rejected Schermers's view that it is impossible for members of international organizations to exclude or limit their liability for its obligations : [1988] 3 *A.E.R.* at 333.

Kerr LJ appears to accept that, as a matter of international law alone, " on the available material the better view may well be that the characteristics of an international organization are those of a mixed entity [entailing the secondary liability of members] rather than of a body corporate, unless, of course, there is an express disclaimer of liability " *(op. cit.,* supra, 307). But he acknowledges that those who have written on this topic are relatively few, and " their views, however learned, are based on their personal opinions ; and in many cases they are expressed with a degree of understandable uncertainty. As yet there is clearly no settled jurisprudence about these aspects of international organizations ". *(Ibid.* 306).

Interestingly, however, Kerr LJ finds that Schermers's views are consistent with an application on the plane of international law alone. In other words, he believes that though Schermers might be saying that, if an international organization defaults, then a secondary regime of liability on the part of its members applies as a matter of international law – but that he is not necessarily to be understood as saying that there is a rule of international law whereby such members can be held liable in any national court for debts assumed by an organization in its own name. Ralph Gibson LJ believes that the Schermers passage, read as a whole, posits a liability of the members to the organization, but not secondary liability to creditors (p. 351*).* It may well be that either of these interpretations is a correct reading of Schermers, and further elucidation from the author will be helpful for our work.

But what does it mean to say that there is no international law rule whereby a member (if secondarily liable at international law) can be held liable in a domestic court ? Is this not to posit a non-question, to raise an irrelevancy ?

Whether such a member would be liable in a domestic court is surely not a matter for which an international law permissive rule would need to be sought. If secondary liability at international law were to be established, then liability in a domestic court, *as a matter of international law,* would rather be a matter of whether international law *precluded,* for reasons of international public policy, such liability being upheld on the domestic plane. If such considerations are to be addressed, they would normally be so by reference to the concepts of non-justiciability or immunity[12].

The matter of state liability for the obligations of international organizations has been commented on by Professor H.-T. Adam, *Les organismes internationaux specialises : contribution à la théorie générale des établissements publics internationaux (1965).* Some of his most important comments are directed to the relationship of state liability to the absence of third-party recognition of international personality : we return to this aspect below (pp. 30-32). More generally, he suggests that the control which states exercise over an organization (even one with separate legal personality *(" peut, par application des principes généraux de droit, donner prise à cette responsabilité, dont l'étendue et la portée resteront évidemment imprécises, faite de législation internationale en la matière "*[13].

Kerr LJ, in the Court of Appeal in the *Tin Direct Action,* found Adam (together with the other writers) important but inconclusive on the point – a view shared by Nourse LJ who said in his judgment that Adam's views were such that they were relied on by both sides, and were :

> " on the whole inconclusive ; see in particular para. 110. On the one hand, he instances the control which the member states exercise over the organization as pointing towards liability. On the other hand, he questions whether there can be liability independent of fault ; and, while he is disposed to regard provisions limiting the members' liability to contribute to capital as being equivocal, he reminds us that the obligations of states are to be interpreted restrictively, particularly as regards third parties ".
> [1988] 3 *A.E.R.* at 327.

[12] Kerr LJ also seemed influenced by the fact that an action for the liability of members of an association with distinct legal personality (not being a body corporate) is not available under English law, and that for there to be an international law rule that there should be such a liability in the English courts " would be tantamount to legislating on the plane of international law ". This analysis starts, as we have indicated, from the wrong point.

[13] Para. 110, *Les organismes internationaux*... The footnote which Adam cites in this passage seems to indicate that Adam is here speaking of what SeidlHohenveldern has described as an interstate enterprise, *i.e.* an association which has no real *volonté distincte.*

Extrait de l'Annuaire de droit international Session de Lisbonne – vol.66-I, Paris, Pedone, 1995 p 251 et s.

Extract from Institut of International Law – Yearbook, volume 66- I, Paris, Pedone 1995, p. 251 et s.

Professor Seidl-Hohenveldern has recently written at length on *Corporations In and Under International Law* (1987). In a significant passage he makes his starting point the " generally accepted principle[s] of the conflict of laws " that the respective responsibilities of a corporate entity and its members is determined by " the national law of that entity " (pp. 119-120). But this does not lead Seidl-Hohenveldern to analyze international law generally, as " the national law " of an international organization ; rather, he goes straight to the constitutive instrument, saying :

> " If the treaty establishing the enterprise does not contain any such rules, the member state will be jointly and severally responsible for its acts, as general international law does not contain any rules comparable to those which, in domestic law, limit the responsibility of the member of a corporation for the latter's act ".

Seidl-Hohenveldern denies that the member states may " hide behind this veil at all in order to escape liability for debts incurred by their common state enterprise ", and continues :

> " Just as a state cannot escape its responsibility under international law by entrusting to another legal person the fulfilment of its international obligations, the partner states of a common interstate enterprise are jointly and severally responsible in international law for the acts of the enterprise " (p. 121).

These comments are made in the context of a discussion on what the author terms " interstate enterprises ", viz. those international associations which act *jure gestionis* and are not, in his view, international organizations properly so-called (on which facet, see above, pp. 17-18). This much is clear both from the terminology employed and from the fact that it is treated in the chapter dealing with interstate enterprises and not in that dealing with international organizations (Chapter 9). This is noted also by Nourse LJ in the Court of Appeal judgment, who draws no conclusion from that fact save to observe that the ITC was a trader in tin even if, in contrast to any ordinary trader, it did not seek a profit. Kerr LJ, who finds no rule of international law indicating state liability that can be sued upon in an English court, nonetheless finds the location of Seidl-Hohenveldern's comments in the section on interstate enterprises as without significance. No doubt our distinguished colleague can elucidate for us whether his remarks were intended to be limited to interstate enterprises in his sense of the term.

Dr. Shihata, touching on both the position vis-à-vis third parties, the factor of control and the relationship of any liability to fault, writes as follows :

> " A question usually raised in this respect is whether the members of an international company can be held liable to third parties for its acts. It has been argued that since the company has an independent personality, the states

constituting it will not be answerable to its creditors unless some misconduct or negligence can be imparted to them in the exercise of their supervision over its activities. Influenced by the same logic, some writers suggested that only the state exercising control over the company *(l'Etat-tuteur)* assumes an unlimited liability. Others, having found no rule of limited liability in international law, concluded that all member states are liable beyond the limits of the value of their shares. My point here is that we cannot conclude a rule of unlimited liability merely from the absence of a rule of limited liability in international law. All relevant provisions and circumstances must be studies to ascertain what was intended by the parties in this respect and the extent to which their intention was made known to third parties dealing with the enterprise. Present general rules of international law cannot, in my opinion, be quoted as a basis of the unlimited liability of the parties to an international corporation for its acts or omissions unless of course the corporation is considered, despite its independent personality, an organ of the state establishing it ".

of Law in Economic Development : The Legal Problems of International Public Ventures ", 25 *Revue égyptienne de droit international* (1969) 119 at 125.

Dr Shihata's entire study is in terms addressed to " joint enterprises to achieve common economic objectives " (p. 122) : one imagines that his remarks would be *a fortiori* in the case of an international organization properly so-called. Again, no doubt our distinguished colleague can elaborate on this assumption.

The present writer concludes this section by saying that for the moment the writings seem sufficiently diffusely targeted (duties *inter se ;* liability to third parties ; fault ; type of liability) and written in sufficiently different organizational contexts, and sufficiently expressions of personal opinion, to make any consensus of principle unascertainable. This situation may of course change in the course of the preparation of our study.

**State practice : the specific exclusion or limitation of liability in the constitutive instruments of international organizations**

Whereas the great majority of international organizations, including the United Nations and its specialized agencies, have no provisions at all in their constitutive instruments about any liability of the members, this is not true of the constitutions of all international organizations. About sixteen such treaty-constitutions (mostly providing for development activities or price stabilization techniques) make specific provision for the exclusion of liability of members. The practice is conveniently gathered and clearly explained in the judgment of

Ralph Gibson LJ in the Court of Appeal judgment in the *Direct Action* in tin :

> " in a number of instances, states are shown to have set up organizations, in which they are to be members by constituent treaties which provide not only that the organization shall have legal personality but also for exclusion of liability of the members. The clauses appear in two general forms : first, in the provisions dealing with the subscription of capital, 'liability on shares shall be limited to the unpaid portion of the issue price of the shares' ; and, second, and also in the provisions dealing with membership and capital, 'no member shall be liable by reason of its membership for obligations of the organization'. In some instances both forms of clause appear together. In others there is a special provision about responsibility for borrowing ".
>
> [1988] 3 *A.E.R.* at 354.

Using this classification, we may note that limitation of 'liability on shares' is provided for in the International Bank for Reconstruction and Development 1945 and the African Development Bank. Exclusion of liability by reason of membership is provided for in the International Finance Corporation 1955, International Development Association 1960, African Development Fund 1972, International Institute for Cotton 1966 and Common Fund for Commodities 1981.

Both forms of clause together are provided for in Asian Development Bank 1965, Caribbean Development Bank 1969, East African Development Bank 1967 and Caribbean Food Corporation 1975.

Provisions that there should be no liability on members in respect of borrowing by the organization appear in the International Sugar Organization 1968 (provision inserted in agreement of 1977 when powers of borrowing were included and dropped in 1984 when the borrowing power was deleted) ; and the International Cocoa Organization 1972 (provision for no responsibility for repayment of buffer stock loans inserted in 1980 and omitted in 1986 when power to borrow was excluded). Provisions providing that there will be no liability with reference to borrowing appear also in the International Seabed Authority 1982 and International Atomic Energy Agency 1956[14] .

Finally[15], the International Natural Rubber Agreement of 1987 (concluded after the crash of the International Tin Council) provided in article 48(4) :

> " General obligations and liability of members : The liability of members arising from the operation of this agreement, whether to the organization or to

[14] And see Szasz, *Legal Practices of the IAEA* (1970), Chapter 29 " Liability ".

[15] Going beyond this classification, we may also note the more general disclaimer by members in the ITU Convention, Art. 21.

> third parties, shall be limited to the extent of their obligations regarding contributions to the administrative budget and to financing of the buffer stock ".
>
> (See [1988] 3 *A.E.R.* at 306).

The existence of such provisions leads one to enquire whether they indicate an understanding among states that they are liable unless liability is specifically excluded. Neither Kerr LJ or Ralph Gibson LJ (who formed the majority in the Court of Appeal judgment on the *Direct Action* in tin) were prepared to deduce this conclusion. Kerr LJ was less than clear as to whether he thought such treaties slowed that members accepted secondary liability as a matter of international law (he rather emphasized that it could not be assumed that there was any such acceptance by members " within the framework of municipal systems of law " *(op. cit.,* supra, p. 307). Ralph Gibson LJ put it in the following clear terms :

> " Such terms [excluding members' liability] are consistent with the acceptance by the states concerned that liability of members would arise if no such terms were included ; but they are also, as I think, consistent with a state of uncertainty as to the rules of public international law and with a desire to declare what the states regarded as the consequences in international law of the existence of separate legal personality and of stated limits on members' contributions to the organization. There was, no doubt, further an intention to warn those dealing with the organization. I am unable to accept that the practice shown in these treaties can fairly be regarded as recognition by the states concerned of a rule of international law that absence of a non-liability clause results in direct liability, whether primary or secondary, to creditors of the organization in contrast to the obligation to provide funds to the organization to meet its liabilities. Nothing is shown of any practice of states as to the acknowledgement or acceptance of direct liability by any states by reason of the absence of an exclusion clause. The only decision shown to us is the arbitration award in the *Westland Helicopters* case which does not persuade me of the existence of a rule of international law "

Nourse LJ, while finding that the members of the ITC may be jointly and severally liable, directly and without limitation, for the debts of the ITC to the extent that they were not discharged by the ITC itself, did not rely on the provisions of these treaties in reaching this conclusion.

It would seem to me that the weight to be given to these treaty provisions cannot be finally resolved without a detailed examination of the *travaux préparatoires* of each and every one of them (a task not yet undertaken) to see what legal purpose it was felt such a clause served. The second task would then be to see the degree of overlap between the membership of these organizations and other organizations, so that any appropriate inference about silence in those

constitutions could be drawn. That analysis is for the moment lacking.

Mention may also be made of the fact that certain constitutive instruments *(e.g.* the IAEA) also make clear that the *host state* shall not be liable for any claims brought against the international organization. The same question arises as to whether the absence of such a provision would evidence an understanding that the host state would generally be liable. We have answered this below in the negative, by reference to the general law of state responsibility.

By contrast, there are also various technical assistance treaties whereby the host state specifically accepts responsibility for the acts of the organization on their territory while providing such technical assistance. This takes the form of an acceptance of responsibility for dealing with claims from third parties and a promise to " hold harmless " the organization and its experts (save where it us agreed that the organization or its experts have acted with gross negligence or wilful misconduct). See, *e.g.* Article 1, para. 6 of the Agreement of 21 May 1968 between Australia and the UN, ILO, FAO, UNESCO, ICAO, UNO, ITU, WMO, IAEA, UPU, IMCO, and UNIDO, for the provision of technical assistance to Papua and New Guinea. In its Report to the General Assembly the International Law Commission correctly observed :

" it is not at all a matter of attributing the conduct of others to the territorial state, but simply of that state assuming, by virtue of a special agreement, the consequences of conduct which is not its own but that of the organization ". *YB ILC* 1975, Vol. II, p. 89[16].

[16] An interesting footnote, though strictly irrelevant for our present purposes, is the recent action of the United Nations itself in limiting its own liability. This was done by Resolution 41/210, 1986, concerning limitation of damages in respect of acts occurring within the Headquarters District ; and by the adoption of Regulation N°4. It has been pointed out (Paul Szasz, 81 *AJIL*. (1987) 739-744) that the UN has been able to do this because of specific provisions within the Headquarters Agreement between the United States and the United Nations. It has thus not been necessary to answer whether, as a general principle of international law, the United Nations can limit the assessment of liability. From the perspective of our topic, we may simply note that during the discussions leading to Resolution 41/210 and Regulation N°4, there is no suggestion that any liability could be that of the member states. The clear implication was that the liability was that of the UN alone, which in the current circumstances of huge insurance premiums would need to seek a way to limit its liability.

Extrait de l'Annuaire de droit international Session de Lisbonne – vol.66-I, Paris, Pedone, 1995 p 251 et s.

Extract from Institut of International Law – Yearbook, volume 66- I, Paris, Pedone 1995, p. 251 et s.

**Particular problems related to the position of third parties vis-à-vis the organization**

We may posit this related proposition for discussion (without necessarily agreeing with it). While the unique situation of the United Nations, with its near universal membership, may invest it with objective legal personality, this should not be presumed to apply to all international organizations. Treaties establishing such organizations may provide them with legal personality so far as the states parties to the constitutive treaty are concerned ; such personality may be given effect to on the domestic plane by various acts of host state (or directly, if the host state automatically " receives " treaties into its domestic law). But nothing in the *Reparation for Injuries* case provides for objective legal personality for each and every international organization. Therefore, in such other cases, third parties are not obliged to recognise the personality of the organization and car insist that any liability incurred in its name is still that of its members. Put differently, any arrangements states make to confer separate personality (insofar as it is concluded that operates to exclude state liability) or in terms to exclude or limit states' liability, can only operate *inter se*. It has no effect on third states, being for them *res inter alios acta*.

This argument has been advanced by various of the plaintiffs in the tin action in the Court of Appeal ; and is echoed in some of the literature. See, for example, Schwarzenberger, *International Law*, Vol. 1, 3rd ed (1957), pp. 128-30 ; Bindschedler, " Die Anerkennung im Völkerrecht ", IX *Archiv des Völkerrechts* (1961-2) 387-8 ; SeidlHohenvelden, " Die Völkerrechtliche Haftung fur Handlungen internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten ", XI *Österreichische Zeitschrift für öffentliches Recht* (1961) 497-506 ; and " Recentsbeziehungen zwischen Internationalen Organisationen un den einselnenstaaten ", IV *Archiv des Völkerrechts* (1953-4) 33 ; Mosler, " Réflexions sur la personnalité juridique en droit international public ", *Mélanges offerts à Henri Rolin* (1964) ; Wengler, *Actes officiels du Congrès international d'études sur la Communauté européenne du charbon et de l'acier* (1958) Vol. III, pp. 10-13 and 318-9 ; and others cited by Seyersted, *Indian Journal of International Law* (1964), pp. 233-5 ; and elsewhere.

Professor Seyersted, in his study on this matter, in both the *Indian Journal of International Law* (entitled " Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non Members ? *")* and in *Objective International Personality of Intergovernmental Organizations* (1963) 62-107, analyses the views taken by these and other writers, noting variations

that occur between them. He notes that most writers taking this view share two starting points, namely (1) that an international organization has international personality only if and to the extent that it follows from its constitution and the intention of its drafters, and (2) that the constitution of an international organization cannot bind states that lave not acceded to it. Seyersted further notes that Seidl-Hohenveldern, while sharing these positions, in his *Österreichische Zeitschrift* study bases himself primarily " on the general principal of law that a creditor is not obliged to accept a new debtor in lieu of the old one " *(Indian Journal*, p. 241). Seyersted rejects the appropriateness of this principle to the matter at hand. He further finds that :

> " It is not possible, on the basis of the principle that a creditor is not obliged to accept a new debtor in lieu of the old one, to hold the member states responsible for acts of the organization which involve no delegation of powers from these states ".
>
> *Objective Personality...* at p. 70.

Seyersted has here expressed the view that a general delegation of powers occurs only in supranational organizations such as the EEC ; and that some of the writers insisting upon the liability of states members are in fact writing about such organizations.

The critical aspect of Seyersted's analysis is that international organizations exist when there are international organs not subject to the jurisdiction of any one state and which assume obligations otherwise than on behalf of the states members. In his view these factors are the basis of their objective existence, and thus the fact that the treaty which forms the constitutive instrument is *res inter alios acta* third parties is irrelevant.

The present writer agrees with the view that the objective existence of an organization on the international plane is not simply a matter of widely shared participation in the founding treaty (as in the case of the UN), but of an objective reality. Insofar as third parties deal with the organization in contract, they by implication accept this reality (and the onus would be on them to show that at all times they thought they were, and indeed were, contracting with the member states). The objective existence of the organization, occasioned by its constituent instrument, but not simply a matter of participation in its constituent instrument, leads to the same conclusion so far as non-contractual liability is concerned – that is to say, duties under general international law. There exist throughout the world associations and bodies that a claimant is not called upon to " recognise ". Nor, if the shareholders or directors of such bodies are not liable under the applicable govering law for the failures of the association, can a claimant insist upon such liability because it was not a party to the

arrangements establishing the association. The fact that international organizations are established by treaty rather than by, *e.g.* articles of association, does not change the position and introduces no relevant element of *res inter alios acta.*

This approach accords with reality. Thus the Court of Appeal noted (albeit while pronouncing upon a different point) that " in a recent decision of the Supreme Court of the State of New York, *International Tin Council v. Amalgamet Inc.* (1988) 524 *N. Y.S.* 2d 971, the court clearly took it for granted that the ITC is a legal entity " (per Kerr LJ 3 *A.E.R.* [1988] at 297. This was so notwithstanding that the United States was not a party to the Sixth International Tin Agreement and that there was no domestic United States legislation recognising the existence and status of the ITC.

**The question of *vires***

Although not central to our theme, some reference must be made in our final report to the legal consequences for member states regarding any liability they might have for the acts of international organizations, should those acts be *ultra vires.*

As has been pointed out in an important contribution to this topic (E. Lauterpacht, " The Legal Effed of Illegal Acts of International Organizations " in *Essays in Honour of Lord McNair* (1965) although the International Court in its Advisory Opinion on the IMCO Case, ICJ *Reports,* 1960, p. 150, found that the Maritime Safety Committee was not constituted in accordance with the constitutive Convention, it has no occasion (because of the form of the question put to it) to pronounce on the legal consequences of this finding. States members took different views (partly obfuscated by the fact that the Assembly was not legally obliged to accept the Opinion of the Court). Eventually the measures taken by the Maritime Safety Committee were " adopted and confirmed " by the Assembly, notwithstanding that the majority of the Assembly also accepted the Court's advice of the illegal constitution of the Committee. The legal basis is thus obscure and the response of the Assembly was no doubt conditioned by a desire to avoid the complications of an insistence on all acts of the Committee as null and void.

In the case of *Certain Expenses,* the pleadings revealed a wide measure of agreement (among states otherwise taking different positions) that there was no authority to apportion expenses arising out of *ultra vires* action (see, *e.g.,* the Soviet, Czech and United Kingdom views, Pleadings, pp. 402, 242 and 336

respectively ; conveniently gathered and analyzed in Lauterpacht, *op.cit. supra*, pp. 106-109). The United States, focusing on the implications for third parties, contended rather that the validity of the action was irrelevant : what was relevant was the fact that the expense had been incurred and that third parties dealing with the organization were entitled to rely on the resolution as valid *(Pleadings*, p. 416). As is well known, the court in its Advisory Opinion, linked the question of *vires* to that of purposes, stating :

> "… when the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization ".
> (ICJ *Reports*, p. 168).

The Court continued to state that if the act was *ultra vires* by reason of it having been taken by the wrong organ, it could still bind the UN to a third party. Although it is not entirely clear, the Court here appears to refer to an act that is *ultra vires* only by reason of being taken by the wrong organ. Presumably (though this can only be deduced from the Opinion as a whole, and is not made explicit), an act that is *ultra vires* by reason of being beyond the competence of the organization as a whole (and here the question of implied powers would need to be addressed) contrary to its purposes, would be without effect and thus not binding vis-à-vis third parties. Nevertheless, as has been correctly observed (Lauterpacht, p. 112), several judges giving separate or dissenting opinions took the view that lawful expenditures could only be incurred by *intra vires* action, in the sense of action validly taken by the appropriate organs. The refinements of these different views must be beyond the scope of our present examination. But see Lauterpacht, *op.cit.* ; and Osieke, " *Ultra Vires* Acts in International Organizations ", *BYIL* (1977) at 259 ; and generally, Jennings, " Nullity and Effectiveness in International Law " in *Essays in Honour of Lord McNair*.

The question of presumption of *intra vires* was affirmed by the Court in the Namibia Case, ICJ *Reports*, 1971 at 22.

We may conclude this briefest of résumés with the following conclusions : the question of *vires* is neutral so far as the question of legal consequences for members is concerned. The concept of *vires* goes to the validity of the act. If an act, by reference to the concept of *vires* as it applies to international organizations, is valid, and causes harm to a third party or entails a failure to meet an obligation made to a third party, it is an act which binds the organization vis-à-vis that third party. But that tells us nothing about the legal

consequences for the member states of the organization. And if an act is *ultra vires* in the sense indicated by the Court in the *Expenses Case (i.e. ultra vires* on the internal plane, but still in accordance with the purposes of the organization) then the position is the same. And if an act is fundamentally *ultra vires* (either by being beyond the purposes of the organization, or, in the view of certain dissenting and minority judges in the *Expenses Case,* by being invalidly adopted), then it will not bind the organization and no question of liability of members could even arise.

**Analogy to the problem raised for member states by the conclusion of treaties by an international organization to which they belong**

It has been suggested in various quarters that the legal problem facing us is in essence the same as that concerning the effect of a treaty to which an international organization is party with respect to the member states of the organization. Assuming that the organization possesses full competence to enter into treaties *eo nomine,* the analogy is in my view precise ; and brief reference to the issue is appropriate.

The question was addressed in considerable detail by the International Law Commission in its consideration of the proposals of the Special Rapporteur on the Question of Treaties concluded between States and International Organizations. The original draft of the famous Article 36 bis provided (see *YB ILC* 1977, Vol. I at p. 134) :

> " 1. A treaty concluded by an international organization gives rise directly for member states of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effect to the treaty.
>
> 2. When on account of the subject matter of a treaty concluded by an international organization and the assignment of the area of competence involved in that subject-matter between the organization and its member states, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member state for
>
> (i) rights which the member state is presumed to accept, in the absence of any indication of intention to the contrary ;
>
> (ii) obligations when the member state accepts them, even implicitly ".

This proposal was to go through various forms (conveniently summarised at *YB ILC* 1978, Vol. II, Pt. 2, p. 134 ; *YB ILC* 1981, Vol. 1, p. 170 ; *YB ILC* 1982, Vol. II, p. 43) ; and, as the Commentary (1982, Vol. II, p. 43) observes, was the issue " that has aroused most comment, controversy and difficulty, both in and

outside the Commission ". However, certain brief comments may be made.

In more of the versions was it suggested that a treaty entered into by an international organization *ipso facto* binds members vis-à-vis third parties, whether for reasons of *res inter alios acta* or otherwise. The Special Rapporteur, Professor Reuter, clearly believed that the general rule was otherwise and at all times emphasised a distinction to be drawn between the obligations of members to the organization, and their obligation to third parties in respect of the treaty. With regard to the former, they would be under an obligation not to act in a manner so as to thwart the effectiveness of the treaty. In that sense they were " affected by " the treaty concluded by the organization – but this was a matter between the organization and the members. With regard to the latter, members would not be bound by a treaty made by the organization unless the constituent treaty so provided, or consent was expressly given, or the subject matter so dictated, and the states members impliedly agreed and the other parties negotiated or this basis. In order to meet the concerns of members of the ILC, the element of consent hardened, rather than weakened, in the drafting changes.

The reasons for rejection of the proposed Article 36 bis were clearly *not* that some members of the ILC believed that members incurred obligations under treaties made by international organizations of which they were members. Those members who opposed Article 36 bis simply felt that it had no place in the treaty being drafted ; that is dealt with " representational issues " beyond the scope of the proposed convention ; that it undercut the clear insistence on non-liability already clearly to be found in articles ; and that its major purpose was to deal with the problem of a supranational organization, the EEC. There was a high degree of consensus on the basic principle (that in principle the conclusion of a treaty by an international organization incurs no obligation for the states members) ; but deep division on the desirability of including the issue and on drafting any qualification to the general principle.

The view of the Special Rapporteur were summarized thus :

> " if it is recognized that [an international organization has the right to negotiate], the organization commits itself alone, and its partners deal with it alone. This is indeed one of the more indisputable consequences of legal personality. It in no way prejudges the obligations that member states may incur under the constituent charter of the organization…
>
> …more often than not, the organization lacks the financial and human resources to ensure the effective performance of its own obligations. In the circumstances, it is fairly natural that both the partners of the organization and the member states would want member states to be associated with the

obligations of the organization.

> There are technical mechanisms for obtaining this result. The simplest is the mechanism whereby the organization and its member states act side by side as parties to a treaty… " *[YB ILC* 1977, Vol. II, Part One, p. 126].

Although the final decision in Article 74 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was " not [to] prejudge any question that may arise in regard to the establishment of obligations and rights for states members of an international organization under a treaty to which that organization is a party " ; we may conclude both that this was arrived at for reasons indicated above, and that the general opinion was that member states did not in fact incur such obligations.

These provisional conclusions are not incompatible with the *Rapport définitif* prepared by Professor René-Jean Dupuy for the Institute, on " *L'Application des règles du droit international général des traités aux accords internationaux conclus par les organisations internationales* "[17]. The Report and the responses of Commission members to the questionnaire are certainly pertinent to our present study. Professor Dupuy concluded that states members were not to be considered parties to treaties concluded by the organization[18] ; but that these treaties had legal consequences for them in the sense that, at least within the UN system, they could require members to participate in various activities within the remit of the UN ; and thus may have financial implications for the members. The legal personality of an organization does not result in members being " third parties " to such agreements ; agreements entered into by an international organization are opposable to states members. They may not act in a manner to thwart the execution of such treaties. Because Dupuy's report this study was not directed to the problem of non-fulfilment of obligations of international organizations, the proposed recommendations did not make a linkage between these findings and any legal consequences for members of non-fulfilment of obligations to third parties.

### Application of principles of state responsibility

There appears in the law of state responsibility to be no general concept whereby states retain a responsibility under international law for the acts of

[17] *Annuaire* de l'Institut de Droit international. Volume *55* (1973), Paris, Pedone, p. 358-378.

[18] Special considerations could apply when a treaty is entered into jointly by the organization and its members, as is the case concerning certain agreements of the EEC.

international organizations to which they belong, when those organizations have separate legal personality. There is no evidence that states continue in any general sense to retain legal responsibility for the bodies they have created ; nor that state responsibility arises through international organizations properly being perceived as the agents of the members.

Indeed, it is rather striking that from the earliest moment that the International Law Commission decided to include an article on international organizations[19], the question has been addressed in quite different terms. Draft Article 12(1) has remained essentially unchanged and uncontested over the years :

> " The conduct of an organ or another state of an international organization acting in that capacity in the territory of a state shall be considered as an act of that state under international law ".

This draft article is directed at the question of the responsibility of the host state for the conduct of an international organization on its territory. No special consideration has been given to the fact that the host state is also likely to be a member of the organization concerned. The problem was seen as potentially arising from a state's responsibility for certain acts occurring on its territory, not from its membership of an organization.

The discussion did however range rather more widely than the text suggests. Generally, members of the ILC made a connection between responsibility and international personality : if an organization had personality, conduct would be attributable to the organization itself, rather than to its member states. (See, *e.g.*, Reuter, *YB ILC* 1975, Vol. 1, p. 45, para. 29 ; El Erian, *ibid.*, p. 46, para. 35 : "An international organization which had the capacity to enter into a contract or a treaty with a state in which its organ was to operate, would clearly be responsible for the acts of that organ "). Some, however, thought that the answer might not always be clear when the injurious act was that of an armed force of the organization composed of contingents of states (Ushakov, *ibid.*, p. 47, paras. 5-6). Members clearly wished to avoid getting deeply embroiled in definitions of either insurrectional movements (responsibility for which is also dealt with in draft Article 12) or international organizations (see *e.g.*, Vallat, *ibid.*, p. 51, para. 7) ; and the comment of Tammes, *ibid.*, p. 53 at para. 20, that " the conduct of an insurrectional movement was inherently foreign to the territorial state since, like an international organization, such a movement

[19] Special Rapporteur Garcia Amador initially thought that the question of responsibility for the acts of international organizations was not yet ripe for development See *YB ILC*, Vol, I, 1956, p. 232.

existed independently of the State").

The Special Rapporteur, Mr Ago, indicated that Article 12 was not meant to settle the question of " when the responsibility of an international organization or its member states could be engaged or what cases might possibly involve joint liability" *(ibid.*, 1315th meeting, p. 59, para. 347).

The Commentary made in the ILC's Report to the General Assembly went beyond the issue of host-state responsibility in this comment :

> " it is not always sure that the action of an organ of an international organization acting in that capacity will be purely and simply attributable to the international organization as such rather than, in appropriate circumstances, to the states members of the Organization "
> *(YB ILC* 1975, Vol. II, at p. 87).

However, the Commentary continues by drawing attention to the fact that, in relation to a variety of claims for compensation arising out of UN peacekeeping activities, it was the UN which accepted international responsibility, both in internal law and under international law. The Commentary concludes that there is no liability upon the host state (but does not return to the question, *obiter* to its consideration, of member states' liability).

We may conclude that the work to date on state responsibility deals only with the distribution of responsibility between international organizations and lost states (who will not be responsible unless they failed to exercise due diligence) ; but that there was no inclination to suggest that a host state might still be responsible for the acts of an international organization through another route, viz. through membership thereof. One could either say that that possibility did not occur to those considering the issue or was regarded as irrelevant to the issue before them.

It seems clear, notwithstanding the caveat of Article 74 of the 1986 Vienna Convention (itself not widely ratified) that under international law the acts of an international organization with separate personality would not be attributable to the member states. This is so ever if the acts are those of organs comprised of representatives of member states ; and *a fortiori* if the acts are those of international civil servants acting, within the authority of the constitutive treaty, in the rame of the organization.

The concept of attributability in international law is to an extent matched by notions of what we may term " factual agency " in domestic legal systems (so far as contractual matters are concerned) or " directing, procuring or authorizing " certain acts to be done (so far as tortious liability is concerned). In

the tin litigation these aspects *(i.e.* " factual agency " and " tortious liability ") have been dealt with separately from the so-called *Direct Action,* in litigation before Evans J.[20]. Just as questions of state responsibility have not beer at all addressed to the *Direct Action* (though to an international lawyer they would seem a relevant consideration), so attributability in international law receives small consideration in the judgment of Evans J. The plaintiffs (creditors) contended that each trading contract, though made by the Buffer Stock Manager, entailed a representation that the ITC's debts would be met as they became due ; and that, having authorized the representations, the member states were liable as tort feasors insofar as the representations were false or reckless. The judgment addresses this by analogy between a limited company and its directors, and not by reference to international law. Because the trading contracts were made under English law, much of the argument revolved around English law concepts of fraud and recklessness. It was also claimed by the plaintiffs that " by their participation in the affairs of the Council " the states directed or procured the representations. The defendants denied that the individual member states could be said to have authorized any representations, merely by reason of membership of the ITC generally, or the Buffer Stock Committee specifically.

Evans J. held that the member states *did* authorise the implied representations made by or on behalf of the ITC to the plaintiffs " but their liability, apart from sovereign immunity, depends upon proof that through their representatives they acted fraudulently, whether knowingly or recklessly, in that regard " (Judgment transcript).

All questions of representation and fraud and duty of care to third parties were pursued as a matter of English law. Evans J. concludes :

" If the member states authorised the ITC to make the contracts which gave rise to the implied representations, and if the representations were false, then I can see no reason of policy or otherwise why the defendants should not be liable for the misrepresentation… "

From the perspective of international law, however, it was not " the member states " which authorised the making of the contracts, but rather the appropriate organ of the ITC (which happened to be composed of member states). And this authorization is provided for in the structure of the treaty itself, and should be

[20] Still awaiting publication in the Law Reports. No date has yet been set for appeal of this judgment.

appreciated as a matter of international, rather than English, law – even though the substance of the contracts is governed by English law.

## III. A duty to put the organization in funds

Our brief survey of the international law relating to the conclusion of treaties by international organizations suggests that, while states are not parties to such treaties, neither are they " third parties ", in the sense that they may not engage in acts that run counter to the effective implementation of such treaties. If the obligation of an international organization is engaged through contract, or a duty of care, the legal consequences for a member state entail a requirement to put the organization in funds to meet such obligations.

The Receivership Actions in the Tin Case have been centred on this issue : see *Maclaine Watson & Co. Ltd. v. ITC* [1987] 3 *AER* 789 (Millett J.) and [1988] 3 *AER* 364 (Court of Appeal). There it was claimed that the High Court should appoint a Receiver to collect sums owing to the ITC, including sums allegedly due from member states under a duty to " make good " the ITC to meet its obligations. This necessarily entailed determining whether the ITC had such a cause of action against its members[21]. The judge of first instance (Millett J.) found that there was no arguable cause of action which the ITC might have against its members other than under the Sixth Tin Agreement (ITA6) which, being unincorporated, could not of itself found a cause of action in English law. In the Court of Appeal the points of claim were amended so as to suggest a claim running from the ITC to its members, which was not based solely on ITA6. This was based or the right to contribution/indemnity in English law.

The Court of Appeal accepted the argument of the ITC that all the claims were non-justiciable – either because they emanated from ITA6 or because they involved transactions that were acts of state[22] or because " the object of appointing a receiver, and his task, would be the enforcement by him, in the name of the ITC, of any extant rights which the ITC may have against its members [but these are] contractual or similar rights derived from agreements

[21] The ITC itself had never claimed such a cause of action. The claim on behalf of the ITC was formulated by the creditors.

[22] This was the ground offered by Ralph Gibson LJ, who applied the English act of state doctrine under *Battes Gas and Oil Co. v. Hammer* [1982] A.C. 931.

made on the plane of international law[23].

The Court of Appeal has thus clearly not purported to make any determination on the substantive international law question facing us.

The view of the present writer is that, where a constitutive instrument requires members to pay their assessed share of " expenses " allocated for *intra vires* purposes, the members have a legal obligation to pay their share of expenses if a failure to pay such " extra " sums would entail a failure of an obligation to a third party *(Case of Certain Expenses).* But there is no principle of general international law beyond this. In respect of constitutive instruments not based on assessed share of expenses, it is necessary to look at the precise terms to see if such obligation is incumbent upon members, as a matter of treaty obligation rather than general international law.

## IV. Concluding thoughts : some questions of principle

Our provisional conclusion is that, by reference to the accepted sources of international law, there is no norm which stipulates that member states bear a legal liability to third parties for the non-fulfilment by international organizations of their obligations to third parties. The treaty practice which specifically excludes liability does not create a presumption to this effect in respect of treaties which are silent. The matter has not been addressed in international judicial decisions ; and the limitations of the analysis in the *Westland Helicopters* arbitration lave been commented on. The writers dealing with this matter hold different opinions – and the opinions they hold must be understood in context : sometimes the issue of liability is raised in reference to inter-state enterprises rather than international organizations properly so-called. The domestic case law in the Tin litigation is consistent with this provisional conclusion.

This conclusion raises a series of further questions.

1) Is the position that the absence of a specific norm (which some would term a positive rule) determining state liability means that there is no liability ? Or is the correct position that, unless states can be shown to have excluded or limited their liability, the liability must be presumed to exist ? The latter view

[23] Kerr LJ and Nourse LJ doubted the application of the act of state doctrine to the facts of the tin case, preferring to base their finding on non-justiciability on different grounds.

can only be correct if international law will presume obligations to be incumbent upon states unless the contrary is proved. But this seems to run counter to well established principles : " The rules of law binding upon states… emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law " *(Lotus Case*, PCIJ Judgment N° 9, 1927, Series A, N° 10). Put differently, obligations resulting from norms of law (rather than from treaty or other agreement) must be shown to exist by reference to the normal sources of international law. The absence of a norm stipulating liability is, on this basis, determinative of the matter, in the sense that obligations will not be attributed to states in the absence of a clear requirement of international law.

2) But should we look at the situation differently, and say rather than international law fails to address the issue, with the result that there is simply a *non liquet* which must be filled by reference to general principles ? This is closely related to the question of whether it is appropriate to rely on private law analogies to seek an answer to whether states are liable for the non-fulfilment by international organizations of their obligations. The tin litigation has been replete with efforts to rely on private law analogies (mot so much as a permitted technique of international law, but rather because most counsel and judges in the case have been more familiar with institutions of domestic law rather than of international law[24].

It is by now accepted that it is permissible to fill the jurisprudential gaps in regard to new situations by applying general principles of law. In turn, these general principles of law have frequently been general principles of private law. Such invoked general principles often have concerned what we may term ethical considerations : good faith, the requirement of clean hands, the provision that no-one shall be judge in his own cause, the duty to make reparation (see *e.g.*, the *Chorzow Factory Case*, PCIJ, Series A, N$^0$ 17, p. 29). A second grouping of general principles drawn from domestic law concerns

[24] The international lawyers in this litigation have sat through very many days of argument whereby the International Tin Council was analogised variously to a company under English law, a *société en nom collectif*, a Scottish partnership, an English trade union, etc. Regardless of their varying professional interests in this case, international lawyers are in this context likely to welcome the comment of Kerr LJ [1988] 3 *AER* at 269 that : " It would be inappropriate to consider [the legal issues] ... solely by reference to English law in isolation. They concern all international organizations operating in similar circumstances and require analysis on the plane of public international law and of the relationship between international law and the domestic law of this country ".

essentially procedural issues : admission, waiver, estoppel, prescription (see *e.g.,* the *Barcelona Traction Case,* ICJ *Reports* 1970 ; the *Russian Indemnity Case,* Scott, *Hague Reports* 297). Reliance on private law analogies have also been relevant, at a certain period, for the formulation of international law criteria on the measure of damages. But there have been occasional cases in which more substantive matters have been resolved by reliance on private law analogies *(e.g.* the *Fabiani Case,* La Fontaine, *Pasicrisie,* at 344-69, responsibility of the state for the acts of its agents ; *Venezuelan Preferential Claim Case,* issues of bankruptcy). For a general survey, see H. Lauterpacht, *Sources of Law in the International Community* at 115-9 ; and " Private Law Sources and Analogies " in E. Lauterpacht, *International Law, Collected Papers of Hersch Lauterpacht,* Vol. 2, Pt. I, esp. at 208-212).

My present feeling is that our problem cannot properly be resolved by reference to private law analogy, for two reasons. First, in a case such as the *Barcelona Traction Case,* where answers were required under international law in relation to a domestic phenomenon (a municipal law company), it might be though appropriate to seek to discover general principles of municipal law. But in our study we have no domestic phenomenon : international organizations of the type under study are definitionally the creation of international law. Thus, second, we would need to find a private law analogy to the relevant legal phenomenon (international organization) and then seek to identify general private law principles in relation thereto. This not only seems too remote as a source of law, but also leads inexorably to the reality that there is no clear " correct " private law analogy to an international organization. Further, the evidence is that, in the nearest analogies known under the various legal systems (partnerships, companies, *sociétés en nom collectif),* different consequences flow under the various municipal systems for the liability of the members of such bodies. No 'general principle' could be found.

3) Can considerations of equity or policy resolve the matter ?

Without here analysing the usefulness or otherwise of equity as a principle of customary law (but see, *e.g.,* Brownlie's critical view in *Recueil des Cours* 1979-I at 288), we may note that, especially in the matter of delimitation, the notion has been used of a result-oriented principle which emphasises the interest of the international community in finding a peaceful solution. It also serves to ensure that the full complexity and variety of circumstances are taken into account, rather than the strict application of a single rule : and flexibility is thereby introduced. Insofar as it is a concept directed at ensuring that the peculiarity of each case be acknowledged, in all its relevant circumstances, it is

unlikely to point the way to general answers to our problem.

What then of the policy considerations ? The relevant policy factors are, on the one lard, the efficient and independent functioning of international organizations, and second, the protection of third parties from undue exposure to loss and damage, not of their own cause, in relationships with such organizations. It has been suggested from time to time in the tin litigation that the functional approach provides no contra-indication to secondary liability on the part of member states. This seems to me to be doubtful : if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership. So far as the protection of third parties is concerned, the lesson of recent events indicate that a variety of protective measures should properly be taken – whether insurance, or the demand of specific *ad hoc* guarantees from members, or other measures. These are obviously extremely complicated matters. While I would regard it as entirely appropriate to look at policy considerations, it is not clear to me that they necessarily lead in one direction rather than another.

**Cases**

1. *Rayner v. DTI and ITC, Butterworths Co. Law Cases [BCLC]* [1987] 667 *(*" Direct Action " against the states and ITC).

2. *The ITC* [1987] 2 *W.L.R.* 1229 ; [1987] 1 *A.E.R.* 890 ; [1987] Ch. 419 *(*" Winding up action ").

3. *Maclaine Watson v. ITC* [1987] 1 *W.L.R.* 1711, [1987] *BLC* 707 *(*" Receivership action ")

4. *Rayner DTI, Maclaine Watson v. ITC, RE IT,* [1988] 3 *W.L.R.* 1033, [1988] 3 *A.E.R.* 257. Court of Appeal judgments on appeals in each of 1-3 above.

5. *AMT v. DTI,* Financial Times Law Reports, February 28, 1989, *(*" Factual agency and claims in tort ").

Extrait de l'Annuaire de droit international Session de Lisbonne – vol.66-I, Paris, Pedone, 1995 p 251 et s.

Extract from Institut of International Law – Yearbook, volume 66- I, Paris, Pedone 1995, p. 251 et s.

## Draft Questionnaire

1. Does the distinction between activities *jure imperii* and *jure gestionis* have relevance for the existence of international legal personality in an international organization ?

2. Are any relevant rules relating to liability of general international law, or provisions contained in the constitutive treaty, opposable to third parties to whom an obligation may be owed ?

3. So far as the legal consequences for member states are concerned, what is the significance of their participation in the decisions of the organization *qua* constituent elements of relevant organs ?

4. What is the relevance of fault to the attribution of any liability to members ?

5. If there were liability attributable to members, would this be liability proportionate to the contributions due to the budget, or joint and several ?

6. What are the legal implications, in terms of sources of law and burden of proof, if there exists no ascertainable positive provision of international law on the direct liability of member states for obligations owed by an international organization to third parties ?

7. What is the relevance, if any, of the question of *vires ?*

8. What significance is to be attached to the practice in certain constitutive instruments or excluding or limiting the liability of member states / host states ?

9. How relevant is the analogy to the legal consequences for states of treaties concluded by international organizations ?

10. How relevant and appropriate are private law analogies in seeking answers to the problem before us ?

June 1989

Extrait de l'Annuaire de droit international Session de Lisbonne – vol.66-I, Paris, Pedone, 1995 p 251 et s.

Extract from Institut of International Law – Yearbook, volume 66- I, Paris, Pedone 1995, p. 251 et s.

Observations and answers to questionary are publish in Yearbook of Institut of International Law Volume 66 Part I, Session of Lisbon, 1995, Paris, Pedone, 1995

The resolution adopted in English version is to :

http://www.idi-iil.org/idiE/resolutionsE/1995_lis_02_en.pdf

Les observations et réponses au questionnaire sont publiées dans l'Annuaire de l'Institut de droit international, volume 66 Partie I, Session de Lisbonne, 1995, Paris, Pedone, 1995.

La résolution adoptés en version française est disponible à l'adresse :

http://www.idi-iil.org/idiF/resolutionsF/1995_lis_02_fr.pdf