29 I.L.M. 670 (1990)
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UNITED KINGDOM: HOUSE OF LORDS JUDGMENT IN AUSTRALIA & NEW ZEALAND BANKING GROUP LTD., ET AL. V. AUSTRALIA, ET AL. (INTERNATIONAL TIN COUNCIL DEFAULTS; LIABILITY OF MEMBERS)

October 26, 1989

***670** Reproduced from the text provided to International Legal Materials by the House of Lords.

I.L.M. Content Summary

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define the status, privileges, and immunities of the ITC]; United Kingdom legislation [Regarding the capacities, privileges, and immunities of the ITC]; The litigation [Substantive and procedural background of the case]; The issues [Contentions of the appellants: (A) the ITC is simply a collective trading name under which the members found it convenient to trade; (B) Even if the ITC is a separate legal entity, the members are guarantors or indemnitors; (C) the ITC had authority to contract as an agent for its members]; The principle of non-justiciability [Description of the principle under UK law, basis of rejecting Submissions A through C and the request for an equitable receivership]; Submission A [The ITC is a legal person, separate from its members]; Submission B(1) [There is no authority to suggest that the members were meant to be liable for the ITC's contractual obligations]; Submission B(2) [There are no treaty provisions suggesting that the members shall be liable for the ITC's debts]; Submission C [Neither the constitution of the ITC nor the form contracts of the London Metal Exchange suggest that an agency existed]; The receivership appeal [Because of non-justiciability, no equitable receivership can be constructed]

***671** Judgment: 26.10.89

HOUSE OF LORDS

AUSTRALIA & NEW ZEALAND BANKING GROUP LTD. BANQUE INDOSUEZ HAMBROS BANK LTD. TSB ENGLAND AND WALES ARBUTHNOT LATHAM BANK LTD. KLEINWORT BENSON LTD. (APPELLANTS)

v.

COMMONWEALTH OF AUSTRALIA AND 23 OTHERS (RESPONDENTS)

AMALGAMATED METAL TRADING LTD. & OTHERS J.H. RAYNER (MINCING LANE) LIMITED (APPELLANTS)

v.

DEPARTMENT AND TRADE AND INDUSTRY (REPRESENTING THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND) AND OTHERS (RESPONDENTS)

MACLAINE WATSON & COMPANY LIMITED (APPELLANTS)

v.

DEPARTMENT OF TRADE AND INDUSTRY (RESPONDENTS) (CONJOINED APPEALS)

MACLAINE WATSON & COMPANY LIMITED (APPELLANTS)

v.

INTERNATIONAL TIN COUNCIL (RESPONDENTS)

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LORD KEITH OF KINKEL

My Lords,

I have had the opportunity of considering in draft the speeches prepared by my noble and learned friends Lord Templeman and Lord Oliver of Aylmerton. I am in entire agreement with the reasoning there set out and there is nothing ***672** which I can usefully add. I would accordingly dismiss all these appeals.

LORD BRANDON OF OAKBROOK

My Lords,

For the reasons given in the speeches of my noble and learned friends Lord Templeman and Lord Oliver of Aylmerton I would dismiss all these appeals.

LORD TEMPLEMAN

My Lords,

These appeals raise a short question of construction of the plain words of a statutory instrument. The trial judges (Staughton J. and Millett J.) and the Court of Appeal (Kerr, Nourse and Ralph Gibson L.JJ.) rightly decided this question in favour of the respondents. Losing the construction argument, the appellants put forward alternative submissions which are unsustainable. Those submissions, if accepted, would involve a breach of the British constitution and an invasion by the judiciary of the functions of the Government and of Parliament. The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.

A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

The Sixth International Tin Agreement ("I.T.A.6") was a treaty between the United Kingdom Government, 22 other sovereign states and the European Economic Community ("the member states"). I.T.A.6 continued in existence the International Tin Council ("the I.T.C.") as an international organisation charged with regulating the world-wide production and marketing of tin in the interests of producers and consumers. By article 16 of I.T.A.6, the member states agreed that:

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"1. The Council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of moveable and immoveable property and to institute legal proceedings."

***673** Pursuant to the provisions of I.T.A.6, an Headquarters Agreement was entered into between the I.T.C. and the United Kingdom in order to define "the status, privileges and immunities of the Council" in the United Kingdom. Article 3 of the Headquarters Agreement provided that:

"The Council shall have legal personality. It shall in particular have the capacity to contract and, to acquire and dispose of moveable and immoveable property and to institute legal proceedings."

No part of I.T.A.6 or the Headquarters Agreement was incorporated into the laws of the United Kingdom but the International Tin Council (Immunity and Privileges) Order 1972 (S.I. 1972 No. 120) made under the International Organisations Act 1968 provided in article 5 that: "the Council shall have the legal capacities of a body corporate."

The I.T.C. entered into contracts with each of the appellants. The appellants claim, and it is not disputed, that the I.T.C. became liable to pay and in breach of contract has not paid to the appellants sums amounting in the aggregate to millions of pounds. In these proceedings the appellants seek to recover the debts owed to them by the I.T.C. from the member states.

The four alternative arguments adduced by the appellants in favour of the view that the member states are responsible for the debts of the I.T.C. were described throughout these appeals as submissions A, B(1), B(2) and C.

Submission A relies on the fact that the Order of 1972 did not incorporate the I.T.C. but only conferred on the I.T.C. the legal capacities of a body corporate. Therefore, it is said, under the laws of the United Kingdom the I.T.C. has no separate existence as a legal entity apart from its members; the contracts concluded in the name of the I.T.C. were contracts by the member states.

Submission A reduces the Order of 1972 to impotence. The appellants argues that the Order of 1972 was only intended to facilitate the carrying on in the United Kingdom of the activities of 23 sovereign states and the E.E.C. under the collective name of "the International Tin Council." Legislation is not necessary to enable trading to take place under a collective name. The appellants suggested that the Order of 1972 was intended to enable the member states to hold land in the United Kingdom in the name of a nominee. Legislation is not necessary for that purpose either. The appellants then suggested that the Order of 1972 was necessary to relieve the member states from a duty to register the collective name of the I.T.C. and from complying with the other provisions of the Registration of Business Names Act 1916. This trivial suggestion was confounded when, at a late stage in the hearing, the Act of 1916 (now repealed) was examined and found not to apply to an international organisation established by sovereign states. The Order of 1972 did not confer on 23 sovereign states and the E.E.C. the rights to trade under a name and to hold land in the name of the I.T.C. The Order of 1972 conferred on the I.T.C. the

legal capacities of a body corporate. The appellants submitted that if Parliament had intended to do more than endow 23 sovereign states and the E.E.C. trading in this country with a collective name, then Parliament would have created the I.T.C. a body corporate. But the Government of the United Kingdom had by treaty concurred in the establishment of the I.T.C. as an international organisation. Consistently with the ***674** treaty, the United Kingdom could not convert the I.T.C. into an United Kingdom organisation. In order to clothe the I.T.C. in the United Kingdom with legal personality in accordance with the treaty, Parliament conferred on the I.T.C. the legal capacities of a body corporate. The courts of the United Kingdom became bound by the Order of 1972 to treat the activities of the I.T.C. as if those activities had been carried out by the I.T.C. as a body incorporated under the laws of the United Kingdom. The Order of 1972 is inconsistent with any intention on the part of Parliament to oblige or allow the courts of the United Kingdom to consider the nature of an international organisation. The Order of 1972 is inconsistent with any intention on the part of Parliament that creditors and courts should regard the I.T.C. as a partnership between 23 sovereign states and the E.E.C. trading in the United Kingdom like any private partnership. The Order of 1972 is inconsistent with any intention on the part of Parliament that contracts made by the I.T.C. with metal brokers, bankers, staff, landlords, suppliers of goods and services and others, shall be treated by those creditors or by the courts of the United Kingdom as contracts entered into by 23 sovereign states and the E.E.C. The Order of 1972 conferred on the I.T.C. the legal capacities of a body corporate. Those capacities include the power to contract. The I.T.C. entered into contracts with the appellants.

The appellants submitted that if there had been no Order of 1972, the courts would have been compelled to deal with the I.T.C. as though it were a collective name for an unincorporated association. But the rights of the creditors of the I.T.C. and the powers of the courts of the United Kingdom must depend on the effect of the Order of 1972 and that Order cannot be construed as if it did not exist. An international organisation might have been treated by the courts of the United Kingdom as an unincorporated association if the Order of 1972 had not been passed. But the Order of 1972 was passed. When the I.T.C. exercised the capacities of a body corporate, the effect of that exercise was the same as the effect of the exercise of those capacities by a body corporate. The I.T.C. cannot exercise the capacities of a body corporate and at the same time be treated as if it were an unincorporated association. The Order of 1972 brought into being an entity which must be recognised by the courts of the United Kingdom as a legal personality distinct in law from its membership and capable of entering into contracts as principal. None of the authorities cited by the appellants were of any assistance in construing the effect of the grant by Parliament of the legal capacities of a body corporate to an international organisation pursuant to a treaty obligation to confer legal personality on that organisation. In my opinion the effect is plain; the I.T.C. is a separate legal personality distinct from its members.

The second argument of the appellants, which is known as submission B1, accepts that the I.T.C. enjoys a separate legal existence apart from its constituent members but contends that a contract by the I.T.C. involves a concurrent direct or guarantee liability on the members jointly and severally. This liability is said to flow from

a general principle of law, that traders operating under a collective name incur a liability to third parties which can only be excluded by incorporation; the I.T.C. has not been formally incorporated and therefore, it is said, the member states are liable concurrently. No authority was cited which supported the alleged general principle. On the contrary, there is ample authority for the general proposition that in England no one is liable on a contract except the parties thereto. The only parties to the contracts between the appellants and the I.T.C. ***675** were the appellants and the I.T.C. Members of a body corporate are not liable for the debts of a body corporate because the members are not parties to the corporation's contracts. The member states are not liable for the debts of the I.T.C. because the members were not parties to the contracts of the I.T.C. It was said on behalf of the appellants that under the laws of Scotland, Germany, France, Puerto-Rico and Jordan and elsewhere, recognition is accorded to "mixed entities" a description of associations which are legal entities but whose engagements, notwithstanding the separate legal personality of the associations involve some form of liability of the members. Authorities were produced which demonstrate that by custom or by legislation the members of some corporations in some countries are not free from personal liability. But no such custom exists in the United Kingdom as a general rule and section 4 of the Partnership Act 1890 which preserves for a Scottish partnership some of the benefits of incorporation and some of the attributes of an unincorporated association, does not prove the existence of any general custom in any part of the United Kingdom that members of a corporation or of a body analogous to corporations shall be liable for the debts of the corporation. Parliament, of course, may provide that members of a corporation shall bear liability for or shall be bound to contribute directly or indirectly to payment of the debts of the corporation to a limited or to an unlimited extent in accordance with express statutory provisions. The history of the Companies Acts illustrates the power of Parliament, if it pleases, to impose some liability on shareholders as a condition of the grant of incorporation. Parliament could have imposed some liability for the debts of the I.T.C. on the member states. But Parliament passed the Order of 1972 which imposed no such liability. The Order of 1972 conferred on the I.T.C. the capacities of a body corporate. Those capacities included the power to enter into contracts. In the absence of express parliamentary provision a contract entered into by the I.T.C. does not involve any liability on any person who was not a party to the contract.

The third argument described as submission B(2) is that a rule of international law imposes on sovereign states, members of an international organisation, joint and several liability for the default of the organisation in the payment of its debts unless the treaty which establishes the international organisation clearly disclaims any liability on the part of the members. No plausible evidence was produced of the existence of such a rule of international law before or at the time of I.T.A.6 in 1982 or thereafter. The appellants submitted that this House was bound to accept or reject such a rule of international law and should not shrink from inventing such a law and from publishing a precedent which might persuade other states to accept such law.

My Lords, if there existed a rule of international law which implied in a treaty or imposed on sovereign states which enter into a treaty an obligation (in default

of a clear disclaimer in the treaty) to discharge the debts of an international organisation established by that treaty, the rule of international law could only be enforced under international law. Treaty rights and obligations conferred or imposed by agreement or by international law cannot be enforced by the courts of the United Kingdom. The appellants concede that the alleged rule of international law must imply and include a right of contribution whereby if one member state discharged the debts of the I.T.C., the other member states would be bound to share the burden. The appellants acknowledge that such right of contribution could only be enforced under international law and could not be made the subject of an order ***676** by the courts of the United Kingdom. This acknowledgment is inconsistent with the appellants' submission B(2). An international law or a domestic law which imposed and enforced joint and several liability on 23 sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice. If the present appeal succeeded the only effective remedy of the appellants in this country would be against the United Kingdom. This remedy would be fully effective so that in practice every creditor of the I.T.C. would claim to be paid, and would be paid, by the United Kingdom the full amount and any interest payable to the creditor by the I.T.C. The United Kingdom Government would then be embroiled, as a result of a decision of this House, in negotiations and possibly disagreements with other member states in order to obtain contribution. The causes of the failure of the I.T.C. and liability for its debts are disputed. Some states might continue to deny the existence of any obligation, legal or moral, municipal or international, to pay the debts of the I.T.C. or to contribute to such payment. Some states might be willing to contribute rateably with every other state, each bearing one-twentythird. A state which under I.T.A.6 was only liable to contribute one per cent. of the capital of the I.T.C. might, on the other hand, only be prepared to contribute one per cent. to the payment of the debts. The producing states which suffered more from the collapse of the I.T.C. than the consuming states might not be willing to contribute as much as the consuming states. Some member states might protest that I.T.A.6 shows an intention that member states should only be liable to contribute to the activities of the I.T.C. a buffer stock of metal and cash intended to be worth pounds sterling500m. and lost as a result of the fall in tin prices on the metal exchanges which the I.T.C. strove to avoid and which resulted in the collapse of the I.T.C.

The courts of the United Kingdom have no power to enforce at the behest of any sovereign state or at the behest of any individual citizen of any sovereign state rights granted by treaty or obligations imposed in respect of a treaty by international law. It was argued that the courts of the United Kingdom will construe and enforce rights and obligations resulting from an agreement to which a foreign law applies in accordance with the provisions of that foreign law. For example, an English creditor of a Puerto-Rican corporation could sue and recover in the courts of the United Kingdom against the members of the corporation if, by the law of Puerto Rico, the members were liable to pay the debts of the corporation. By analogy, it was submitted, an English creditor of an international organisation should be able to sue in the courts of the United Kingdom the members of the international organisation if by international law the members are liable to pay the debts of the organisation. But there is no analogy between private international law which enables

the courts of the United Kingdom to resolve differences between different laws of different states, and a rule of public international law which imposes obligations on treaty states. Public international law cannot alter the meaning and effect of United Kingdom legislation. If the suggested rule of public international law existed and imposed on a state any obligation towards the creditors of the I.T.C., then the Order of 1972 would be in breach of international law because the Order failed to confer rights on creditors against member states. It is impossible to construe the Order of 1972 as imposing any liability on the member states. The courts of the United Kingdom only have power to enforce rights and obligations which are made enforceable by the Order.

The fourth argument, described as submission C, asserts that by I.T.A.6 the I.T.C. was only authorised to contract as agent for ***677** the member states. Even if this assertion were correct, I.T.A.6 could only be considered by the courts of the United Kingdom for the purpose of resolving any ambiguity in the meaning and effect of the Order of 1972. There is no ambiguity. The Order of 1972 authorised the I.T.C. to contract as principal because the Order of 1972 conferred on the I.T.C. the legal capacities of a body corporate without limitation. The treaty, I.T.A.6, has not been incorporated into the laws of the United Kingdom and the provisions of I.T.A.6 cannot be employed for the purpose of altering or contradicting the provisions of the Order of 1972.

Finally, one of the appellants appealed against the refusal of the courts below to appoint a receiver. The appellant is a judgment creditor of the I.T.C. and seeks the appointment of a receiver by way of equitable execution. The receiver is intended to receive and enforce a chose in action belonging to the I.T.C. The chose in action is an alleged right vested in the I.T.C. to be indemnified by the member states against the debts payable by the I.T.C. and incurred as a result of carrying out the instructions of the member states contained in I.T.A.6. My Lords, in English law the members of a corporation are not liable to indemnify the corporation against debts incurred by the corporation. The Order of 1972 made no provision for the member states to indemnify the I.T.C. No doubt the debts of the I.T.C. were incurred in exercise of powers which by I.T.A.6 the member states agreed between themselves should be exercisable and which they instructed the I.T.C. to exercise. However, powers contained in I.T.A.6 are treaty powers and any indemnity obligation expressly or impliedly imposed on the member states by virtue of I.T.A.6 is a treaty obligation which cannot be enforced by the courts of the United Kingdom by the appointment of a receiver or otherwise because the obligation is not to be found in the Order of 1972.

Your Lordships were urged to discern or invent and 'apply some rule of municipal law or international law which would render the member states liable to discharge the debts of the I.T.C. because, so it was said, the member states have behaved badly. These proceedings cannot however be decided by criticism of the conduct of the member states for establishing the I.T.C., or by attaching blame to the member states for the failure of the I.T.C. to prevent the recurring glut and scarcity of tin metal or by condemning the management of the I.T.C. by the member states or by attributing to the operations of the metal exchanges the fall in tin prices which

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bankrupted the I.T.C., inflicted a loss of up to (L)500m. on the member states and caused poverty and unemployment to the producing states. The courts possess neither the evidence nor the authority to pronounce judgment on these matters. International diplomacy and national policy will decide whether the debts of the I.T.C., an international organisation established by treaty, shall be discharged by the member states and, if so, in what manner the burden should be shared. English judges cannot meddle with unincorporated treaties. The result of these appeals follows inexorably from the fact that the appellants contracted with the I.T.C. which by the Order of 1972 had been clothed with the legal capacities of a body corporate. In Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22, Lord Halsbury L.C. pointed out at p. 30:

"once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

***678** Since Salomon's case, traders and creditors have known that they do business with a corporation at their peril if they do not require guarantees from members of the corporation or adequate security. At all times the rights of the appellants, who do not lack legal advice, have been governed in the United Kingdom by the Order of 1972 which offers no foundation in law for proceedings against the member states. These appeals must be dismissed.

For the conduct of these appeals, there were locked in battle 24 counsel supported by batteries of solicitors and legal experts, armed with copies of 200 authorities and 14 volumes of extracts, British and foreign, from legislation, books and articles. Ten counsel addressed the Appellate Committee for 26 days. This vast amount of written and oral material tended to obscure three fundamental principles - that the capacities of a body corporate include the capacity to contract, that no one is liable on a contract save the parties to the contract and that treaty rights and obligations are not enforceable in the courts of the United Kingdom unless incorporated into law by statute. In my opinion the length of oral argument permitted in future appeals should be subject to prior limitation by the Appellate Committee.

LORD GRIFFITHS

My Lords,

I have had the advantage of reading the speeches of Lord Templeman and Lord Oliver of Aylmerton. I agree that for the reasons they give the appellants can obtain no redress through English law and that these appeals must be dismissed. I reach this conclusion with regret because in my view the appellants have suffered a grave injustice which Parliament never envisaged at the time legislation was first enacted to enable international organisations to operate under English law.

If during the passage of the Diplomatic Privileges (Extension) Bill through Parliament the Minister of State had been asked by a member what would happen if an international organisation refused to honour a contract on the ground that it had no money I believe that the answer would have been that such a state of affairs would be unthinkable because the governments that had set up the organisation would

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provide the funds necessary to honour its obligations. We do not, as yet, have resort to the parliamentary history of an enactment as an aid to statutory interpretation and I quote the following passage from the Minister of State on the second reading of the Diplomatic Privileges (Extension) Bill not for that purpose but to support my views of the answer that the Minister of State would have given to such a question:

"Hon. Members were very fearful less an organisation such as U.N.R.R.A. or any international organisation, would enter into a contract and repudiate that contract and then the contractor, who in this case would be a British subject, would have no redress in the courts, and therefore no redress at all. I would like to assure the House that that is simply not the case, and that it is inconceivable that things should work out in that way.

I have tried to explain that immunity from legal process is essential to organisations of this kind but I would like to add that the Government fully recognise that there are classes of cases where it is necessary to provide for the ***679** settlement of legal disputes between private citizens in this country and organisations which are operating here, and that an organisation obviously must have the power to conclude contracts. The Attorney-General told the House on Second Reading that he had satisfactory assurances from U.N.R.R.A. as regards cases of this kind. U.N.R.R.A. will insert in all its contracts - we have that promise - arbitration clauses which have been approved by the Law Officers of the Crown. If a dispute arises out of one of these contracts, U.N.R.R.A. will arbitrate in accordance with those clauses, and if, as sometimes happens, it is desired to have recourse to the Courts for the determination of points of law, or other similar matters, U.N.R.R.A. will not prevent such recourse to the courts by relying on its general immunity from suit. If, at the end of the legal process or arbitration, if there is one, U.N.R.R.A. is found liable to pay, U.N.R.R.A. will comply with the award. It is our intention, if we make an Order in Council to cover any other international organisation that may be set up, to obtain from it exactly those assurances, and I have not the faintest doubt that those assurances will be given purely as a matter of course. Of course, it is possible to argue that even with those assurances an organisation might break its word, but in that case I can assure the House that His Majesty's Government would not be without resources to deal with the situation which would arise, and the House really need have no qualms at all on that point."

I can only hope that the assurance given on behalf of the Government in 1944 still holds true because it seems to me that the obvious just solution is that the governments that contributed to the buffer stock should provide it with funds to settle its debts in the same proportion that they contributed to the buffer stock. But this end must be pursued through diplomacy and an international solution must be found to an international problem; it can not be solved through English domestic law.

LORD OLIVER OF AYLMERTON

My Lords,

These appeals arise from the failure of the International Tin Council ("the I.T.C.") in 1985 to meet the substantial obligations which it had incurred during

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that year in dealings on the London Metal Exchange conducted with a view to supporting the world price of tin. The circumstances in which the claims of the individual appellants arose differ in certain material respects, but the principal question raised by all the appeals is the same, that is to say, can the members of the I.T.C. be held responsible in law for the debts which the I.T.C. has incurred? Although, therefore, it will be necessary to indicate in relation to each of the appeals how the matter comes before your Lordships' House, it will be convenient, first, to say something about the history and constitution of the I.T.C. since these are fundamental to the question which requires to be answered.

History and constitution of the I.T.C.

The I.T.C. is one of a number of international organisations established by treaties entered into after the Second World War in ***680** an endeavour to regulate the market in relation to particular commodities. It has been the subject of a series of treaties commencing with the First International Tin Agreement (I.T.A.1) which was signed on 1 March 1954 and came into operation on 1 July 1956. Although your Lordships are concerned primarily with the Sixth International Tin Agreement (I.T.A.6) it is not irrelevant to consider some of the terms of the earlier treaties in particular in relation to the borrowing powers conferred on the I.T.C. I.T.A.1 was entered into for a period of five years from its entry into force and was effected for the broad purposes of avoiding the difficulties likely to arise from maladjustments between supply of and demand for tin, of stabilising tin prices, of ensuring adequate supplies at reasonable prices and generally of promoting the economic production of tin. Article IV established an International Tin Council and provided for its seat to be in London. Participating countries were divided into producing countries and consuming countries according to their election at the time of ratification, acceptance or accession and each contracting government was to be represented on the Council by a delegate. Provision was made for an equality of voting power between delegates of the consuming countries and those of the producing countries, the votes being distributed in agreed proportions. Article IV.21. provided:

"The Council shall have in each participating country, to the extent consistent with its law, such legal capacity as may be necessary for the discharge of its function under this agreement."

Initial finance was to be provided in the same way as is provided in the I.T.A.6, to whose provisions it will be necessary to refer in some detail. It is only necessary, at this stage, to note the broad framework of the financial provisions. Although the individual participating members were made responsible for the expenses of their own delegates to the Council, the administration and office expenses of the Council, including the remuneration of the various officers and staff appointed for the purposes of the agreement, were to be a collective responsibility and were to be brought into a separate account ("the administration account") which was to be fed by contributions from the participating governments as determined annually by the Council in proportion to the votes held by them respectively.

The critical part of the agreement, for present purposes, is to be found in articles VIII and IX which contained the essential machinery for fulfilling the objects

of the agreement by the establishment and operation of a buffer stock of tin which was to be made the subject matter of a separate account, was to be under the control of a manager and was to be financed by fixed contributions in cash or in tin by the producing countries, although provision was also made for voluntary contributions by any participating country. Broadly the manager's function was to employ the buffer stock as the machinery for stabilising tin prices by buying or selling in accordance with a formula devised by reference to the price of cash tin on the London Metal Exchange, for which initial floor and ceiling prices were set by article VI of the agreement, such prices to be reviewable from time to time by the Council during the currency of the agreement. A noticeable feature of these provisions is that although the buffer stock manager was expressly authorised to buy or sell forward, the agreement conferred no power to borrow either upon him or upon the Council. The Council was empowered to authorise the manager, if his funds proved inadequate to meet operational expenses, to sell tin out of the stock in order to meet current ***681** operational expenditure, but the possibility that the fixed contributions to the buffer stock provided for in the agreement might not be adequate and that the buffer stock account might go into deficit does not appear to have been contemplated. Indeed, the provisions for the liquidation of the buffer stock on the termination of the agreement were framed on the basis that there would always be a surplus of value in cash or in tin, so that any outstanding obligations could, if necessary, be met out of sales from stock.

I.T.A.2 was concluded on 1 September 1960, was to endure for a further five years and came into force on 1 July 1961. It followed broadly the same pattern as the I.T.A.1 There was, however, one significant difference. Article VIII, which established the buffer stock, contained a provision conferring on the Council the power to borrow in the following terms:

"6(a) The Council may borrow for the purposes of the buffer stock and upon the security of tin warrants held by the buffer stock such sum or sums as it deems necessary, provided that the maximum amount of such borrowing and the terms and conditions thereof shall have been approved by a majority of the votes cast by consuming countries and all the votes cast by producing countries and further provided that no obligation shall be incurred by any consuming country in respect of such borrowing.

"(b) The Council may by a two-thirds distributed majority make any other arrangements as it thinks fit for borrowing for purposes of the buffer stock, provided that no obligation shall be laid upon any participating country under this subparagraph without the consent of that country."

The "two-thirds distributed majority" referred to was defined in this, as in all other agreements, as a two-thirds majority of the votes cast by the producing and consuming countries respectively counted separately. Once again, the provisions for the liquidation of the buffer stock on termination of the agreement were framed on the basis that any cash required to meet outstanding obligations would be met by sales of tin from stock and that there would be a surplus value for distribution to the contributing countries. I.T.A.3, which came into force on 1 July 1966, followed the same pattern save that, instead of establishing a new I.T.C. as had been done by I.T.A.2, it provided for the continuation in being of the existing I.T.C., a feature which was thereafter reproduced in each successive agreement. It is unnecessary to

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refer to any of the provisions of this agreement or of I.T.A.4 or I.T.A.5 , which followed a similar pattern, save to note that I.T.A.4 contained a new provision relating to the seat of the Council. This was contained in article 14 and was in the following terms:

"(d) The member in whose territory the headquarters of the Council is situated (hereinafter referred to as the host member) shall, as soon as possible after the entry into force of the agreement, conclude with the Council an agreement to be approved by the Council relating to the status, privileges and immunities of the Council, of its executive chairman, its staff and experts and of representatives of members while in the territory of the host member for the purpose of exercising their functions."

Pursuant to this provision a Headquarters Agreement was entered into between the United Kingdom and the I.T.C. on 9 February 1972, to the terms of which it will be necessary to refer in a little more detail.

***682** Sixth International Tin Agreement

The operative agreement with which your Lordships are concerned is I.T.A.6 which was signed in New York in 1981 and 1982 following the United Nations Tin Conference of 1980. As will appear, one of the questions much debated before your Lordships is that of the extent to which (if at all) it is open to your Lordships to take account of the terms of this treaty in considering the rights and obligations of the parties to this litigation, but, on any analysis, it forms part of the essential background to these appeals and it will be convenient at the outset to refer to its material provisions. It is not, I think, necessary for present purposes to refer to the preamble or to article 1 which sets out in extenso the objectives of the treaty, which simply reflect in rather more detail those set out in the previous agreements. Article 2 contains a number of definitions of which, at this point, it is necessary to note only that a "member," is defined as a country whose government has ratified, accepted, approved or acceded to the treaty or as an organisation meeting the requirements of article 56. That article, in terms, applies the term "government" to include, inter alia, the European Economic Community. Article 3 continues the I.T.C. established under the previous I.T.A.s and provides that, unless otherwise determined by the Council by a two-thirds distributed majority, the seat of the Council should be in London. Article 4 provides that the Council shall be composed of all the members and that each member shall be represented in the Council by one delegate. Article 5 provides for the categorisation of members as producing or consuming members. The powers and functions and procedures of the Council are contained in articles 7 and 8 which, so far as material, provide as follows:

"Article 7.

"The Council: (a) shall have such powers and perform such functions as may be necessary for the administration of this agreement; (b) shall have the power to borrow for the purposes of the administrative account established under article 17, or of the buffer stock account in accordance with article 24; (c) shall receive from the executive chairman, whenever it so requests, such information with regard to the holdings and operation of the buffer stock as it considers necessary to fulfil its function under this agreement . . . . (e) shall establish buffer stock operational rules which shall include, inter alia, financial measures to be applied to members

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which fail to meet their obligations under article 22; (f) shall publish after the end of each financial year a report on its activities for that year; (g) shall publish after the end of each quarter, but not earlier than three months after the end of that quarter, unless the Council decides otherwise, a statement showing the tonnage to tin metal held in the buffer stock at the end of that quarter; . . . .

"Article 8.

"The Council: (a) shall establish its own rules of procedure . . . . (c) may at any time: (i) by a two-thirds distributed majority, delegate to any of the subsidiary ***683** bodies referred to in article 9 any power which the Council may exercise by a simple distributed majority, other than those relating to: - assessment and apportionment of contributions under articles 20 and 22 respectively; - floor and ceiling prices under articles 27 and 31 . . . ."

Article 9 provides for the continuation of various subsidiary bodies established under the previous treaties, the composition and terms of reference of which are determined by the Council. These include a Buffer Stock Finance Committee. Articles 11 and 12 provide for the appointment of an executive chairman and two vice-chairmen, for the holding of four sessions of the Council annually and for the calling of additional meetings. Article 13 provides for the administration and operation of the agreement by the executive chairman and is, so far as material in the following terms:

"1. The executive chairman appointed under article 11 shall be responsible to the Council for the administration and operation of this agreement in accordance with the decisions of Council. . . . . 3. The Council shall appoint a buffer stock manager (hereinafter referred to as the manager) and a secretary of the Council (hereinafter referred to as the secretary) and shall determine the terms and conditions of service of those two officers. 4. The Council should give instructions to the executive chairman as to the manner in which the manager is to carry out his responsibilities laid down in this agreement. . . . . 7. In the performance of their duties, neither the executive chairman nor the members of the staff shall seek or receive instructions from any government or person or authority other than the Council or a person acting on behalf of the Council under the terms of this agreement. They shall refrain from any action which might reflect on their position as international officials responsible only to the Council. Each member undertakes to respect the exclusively international character of the responsibilities of the executive chairman and the members of the staff and not to seek to influence them in the discharge of their responsibilities. 8. No information concerning the administration or operation of this agreement shall be revealed by the executive chairman, the manager, the secretary or other staff of the Council, except as may be authorised by the Council or as is necessary for the proper discharge of their duties under this agreement."

Voting at sessions of the Council is regulated by article 14 which provides for producing members and consuming members respectively to have 1,000 votes, such votes to be distributed between them in proportion to percentages of production and consumption specified in tables established by the Council. The status, privileges and immunities of the I.T.C. are regulated by article 16 which requires to be set out in full and is in the following terms:

"Article 16

"Privileges and Immunities

"1. The Council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of moveable and immoveable property and to institute legal proceedings. 2. The Council shall have in the ***684** territory of each member, to the extent consistent with its law, such exemption from taxation on the assets, income and other property of the Council, as may be necessary for the discharge of its functions under this agreement. 3. The Council shall be accorded in the territory of each member such currency exchange facilities as may be necessary for the discharge of its functions under this agreement. . . . 4. The status, privileges and immunities of the Council in the territory of the host government shall be governed by a Headquarters Agreement between the host government and the Council."

Part II of the treaty contains provisions dealing with accounts, currency of payments and audit. As in the previous treaties a clear distinction is drawn between the administration account and the buffer stock account.

Article 17 provides:

"1(a) There shall be kept two accounts - the administrative account and the buffer stock account - for the administration and operation of this agreement. (b) The administrative expenses of the Council, including the remuneration of the executive chairman, the manager, the secretary and the staff, shall be entered into the administrative account. (c) Any expenditure which is solely attributable to buffer stock transactions or operations, including expenses for borrowing arrangements, storage, commission and insurance, shall be entered into the buffer stock account by the manager. (d) The liability of the buffer stock account for any other type of expenditure shall be decided by the executive chairman."

So far as the administrative account is concerned, article 20 provides for the approval by the Council of a budget for administration expenses, the assessment by the Council of the members' contributions and a sanction of deprivation of rights on any member which fails to provide its assessed contribution. The critical provisions, however, in the context of these appeals are those related to the establishment, financing and operation of the buffer stock. These differ to some extent from the provisions of the previous agreements, in particular by departing from the previous principle of compulsory contributions only from producing members. They are contained in articles 21 to 30 and are, for relevant purposes, as follows:

"Article 21 . . .

"In order to achieve the objectives of this agreement there shall be established, inter alia, a buffer stock consisting of a normal stock of 30,000 tonnes of tin metal to be financed from government contributions, and an additional stock of 20,000 tonnes of tin metal to be financed from borrowing, using as security stock warrants and, if necessary, government guarantees/government undertakings."

The reference in this article to "government guarantees/government undertakings" is significant in the light of the appellant's submissions. This expression is defined in article 2 of the treaty as follows:

"'Government guarantees/government undertakings' means the financial obligations to the Council which are committed by members as security for financing the ***685** additional buffer stock in accordance with article 21. They may, when relevant, be

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provided by the appropriate agencies of members concerned. Members shall be liable to the Council up to the amount of their guarantees/undertakings."

"Article 22

"1. The financing of the normal buffer stock shall at all times be shared equally between producing and consuming members. Such financing may, where relevant, be provided by the appropriate agencies of the members concerned. 2. An initial contribution amounting to the cash equivalent of 10,000 tonnes of tin metal shall be due on entry into force of this agreement. Subsequent contributions amounting to the cash equivalent of the remaining 20,000 tonnes of tin metal shall become due on such date or dates as the Council may determine. 3. The contributions referred to in paragraph 2 of this article shall be apportioned by the Council among members in accordance with their respective percentages of production or consumption as set out in the tables established or revised by the Council in accordance with paragraph 3 or paragraph 4 of article 14 which are in effect at the time of the apportionment of contributions. 4. The amounts of the contributions referred to paragraph 2 of this article shall be determined on the basis of the floor price in effect at the date when the contributions are called. 5. The initial contribution of a member due in accordance with paragraph 2 of this article may, with the consent of that member, be made by transfer from the buffer stock account held under [I.T.A.5]. 6. If at any time the Council holds cash assets in the buffer stock account the total amount of which exceeds the cash equivalent of 10,000 tonnes of tin metal at the prevailing floor price, the Council may authorise refunds out of such excess to members in proportion to the contributions they have made under this article. At the request of a member the refund to which it is entitled may be retained in the buffer stock account. . . . ."

"Article 23 . . .

"1. If a member does not fulfil its obligations to contribute to the buffer stock account by the date such contribution becomes due, it shall be considered to be in arrears. A member in arrears for 60 days or more shall not count as a member for the purpose of a decision by the Council under paragraph 2 of this article." (Paragraph 2 contains provisions for suspending the voting rights of a member who is in arrears). 3. The Council may call for coverage of arrears by other members on a voluntary basis."

"Article 24 . . .

"1. The Council may borrow for the purposes of the buffer stock and upon the security of tin warrants held by the buffer stock such sum or sums as it deems necessary. The terms and conditions of any such borrowings shall be approved by the Council. 2. The Council may, by a two-thirds distributed majority, make any other arrangements it sees fit in order to supplement its resources. 3. All charges connected with these borrowings and arrangements shall be assigned to the buffer stock account."

***686** Article 27 provides for the fixing of floor and ceiling prices in the same way as in the previous treaty and article 28 regulates the way in which the buffer stock is to be operated. The manager is to be responsible to the executive chairman and the article goes on to provide for what he is to do in the event of the market price of tin reaching the ceiling price or falling below the floor price. Since the

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insolvency of the I.T.C. resulted from operations undertaken to support the price of tin after it had fallen below the floor price, paragraphs 3(e) and 5 of article 28 should be set out in full:

"3. If the market price of tin . . . (e) is equal to or less than the floor price, the manager shall, unless instructed by the Council to operate otherwise, if he has funds at his disposal and subject to articles 29 and 31, offer to buy tin on recognised markets at the market price until the market price of tin is above the floor price or the funds at his disposal are exhausted. . . . 5. The manager may engage in forward transactions under paragraph 3 of this article only if these will be completed before the termination date of this agreement or before some other date after the termination of this agreement as determined by the Council."

Articles 29 and 31 referred to in article 28(3)(c) confer on the Council power to restrict or suspend forward transaction or operations of the buffer stock generally. Again, one finds in article 30, the assumption that any shortage in liquid cash in the Buffer Stock Account will be capable of being met out of the proceeds of the sale of tin held to the account. That article provides:

"2. Notwithstanding the provisions of articles 28 and 29, the Council may authorise the manager, if his funds are inadequate to meet his operational expenses, to sell sufficient quantities of tin at the current price to meet expenses."

Article 32 enables the Council in certain circumstances to control the export of tin. These provisions do not need to be referred to in any detail, but article 32(4) is of some significance. It provides:

"It shall also be the duty of the Council to adjust supply to demand so as to maintain the price of tin metal between the floor and ceiling prices. The Council shall also aim to maintain available in the buffer stock tin metal and cash adequate to rectify discrepancies between supply and demand which may arise."

Finally, in relation to the fasciculus of articles dealing with the buffer stock there should be noted the provisions of article 26 relating to the liquidation of the buffer stock account. So far as material, these are:

"1. On the termination of this agreement, all buffer stock operations under article 28, article 29, article 30 or article 31 shall cease. The manager shall thereafter make no further purchase of tin and may sell tin only as authorised by paragraph 2, paragraph 3 or paragraph 8 of this article. 2. Unless the Council substitutes other arrangements for those contained in this article, the manager shall, in connection with the liquidation of the buffer stock, take the ***687** steps set out in paragraphs 3,4,5,6,7,8 and 11 of this article. 3. As soon as possible after the termination of this agreement, the manager shall set aside from the balance remaining in the Buffer Stock Account a sum which, in his estimation, is sufficient to repay any borrowings which may be outstanding under article 24, and to meet the total expenses of liquidation of the buffer stock in accordance with the provisions of this article. Should the balance remaining in the Buffer Stock Account be inadequate for these purposes, the manager shall sell sufficient tin over such period and in such quantities as the Council may decide in order to provide the additional sum required. 4. Subject to and in accordance with the terms of this agreement, the share of each member in the buffer stock shall be refunded to that member."

The steps set out in paragraphs 5,6,7,8 and 11 relate to the ascertainment of the value of the stock and of the members' contributions and a distribution according to

whether that value exceeds or is less than the members' contributions. It contains no provisions regulating the position which might arise should obligations to third parties exceed the value of the buffer stock.

The only other articles of the treaty to which reference needs to be made are articles 41 (which deals with the general obligations of members) and article 60 (which deals with the procedure on termination). Paragraphs 1 and 2 of article 41 provide:

"1. Members shall during the currency of this agreement use their best endeavours and co-operate to promote the attainment of its objectives. 2. Members shall accept as binding all decisions of the Council under this agreement."

Article 60 is of some relevance inasmuch as, in contradistinction to the provisions relating to the buffer stock account, it both contemplates and provides for the possibility that there may be outstanding obligations on the administrative account which cannot be met out of funds in the account. So far as relevant it provides as follows:

"1. The Council shall remain in being for as long as may be necessary for the carrying out of paragraph 2 of this article, for the supervision of the liquidation of the buffer stock and any stock held in accordance with article 39 and for the supervision of the due performance of conditions imposed under this Agreement by the Council or under the Fifth Agreement; the Council shall have such of the powers and functions conferred on it by this Agreement as may be necessary for the purpose. 2. On termination of this agreement: (a) The buffer stock shall be liquidated in accordance with the provisions of article 26; (b) The Council shall assess the obligations into which it has entered in respect of staff and shall, if necessary, take steps to ensure that, by means of a supplementary estimate the administrative account raised in accordance with article 20, sufficient funds are made available to meet such obligations; (c) After all liabilities incurred by the Council, other than those relating to the buffer stock account, have been met, the remaining assets shall be disposed of in the manner laid down in this article . . . ."

***688** Headquarters Agreement

As has already been mentioned, a Headquarters Agreement was executed by the United Kingdom pursuant to I.T.A.4 It continued in force for the purposes of I.T.A.5 and 6. Its purpose was recited as being that of defining "the status, privileges and immunities of the Council." Article 2 provides:

"This agreement shall be interpreted in the light of the primary objective of enabling the Council at its Headquarters in the United Kingdom fully and efficiently to discharge its responsibilities and fulfil its purposes and functions."

Article 3 is entitled "Legal Personality" and provides:

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

Articles 4 and 5 provide for the inviolability of the Council's archives and premises. Article 8 provides for its immunity from jurisdiction and is, so far as material, in the following terms:

"(1). The Council shall have immunity from jurisdiction and execution except: (a) To the extent that the Council shall have expressly waived such immunity in a

particular case . . . . (c) In respect of an enforcement of an arbitration award made under either article 23 or article 24. (2). The Council's property and assets wherever situated shall be immune from any form of requisition, confiscation, expropriation, sequestration or acquisition. They shall also be immune from any form of administrative or provisional judicial constraint . . . ."
The agreement goes on to provide for exemption from duties and taxes and for the privileges and immunities of officials and staff and the only other articles which require mention in the context of these appeals are articles 23 and 24. Article 24 provides for submission to arbitration of disputes arising from non-contractual responsibilities and article 23 is in the following terms:

"Where the Council enters into contracts (other than contracts concluded in accordance with staff regulations) with a person resident in the United Kingdom or a body incorporated or having its principal place of business in the United Kingdom and embodies the terms of the contract in a formal instrument, that instrument shall include an arbitration clause whereby any disputes arising out of the interpretation or execution of the contract may at the request of either party be submitted to private arbitration."

United Kingdom legislation

The establishment, towards the end of the Second World War and thereafter, of substantial numbers of international organisations to which the United Kingdom became a party and which were invested in international law with legal personality distinct from that of the constituent members necessitated the enactment of domestic legislation to regulate the immunities, privileges and capacities of such bodies. The Diplomatic Privileges (Extension) Act 1944 made provision for immunities and privileges scheduled to ***689** the Act and section 1(1) applied its provisions "to any organisation declared by Order in Council to be an organisation to which His Majesty's Government in the United Kingdom and the government of one or more foreign powers are members." Section 1(2)(a) empowered His Majesty, by Order in Council, to provide that any such organisation "shall, to such extent as may be specified in the Order, have the immunities and privileges set out in Part I of the Schedule to this Act, and shall also have the legal capacities of a body corporate." An amending Act in 1946 (the Diplomatic Privileges (Extension) Act 1946) conferred the same powers in relation to the United Nations. The power to confer immunities and privileges by Order in Council was somewhat curtailed by the Diplomatic Privileges (Extension) Act 1950 and the legislation was then consolidated in the International Organisations (Immunities and Privileges) Act 1950. This reproduced in substance the provisions of section 1(1) and (2)(a) of the Act of 1944 and was the Act in force at the date of I.T.A.1. The provision in that agreement that the Council should have in every participating country "such legal capacity as may be necessary for the discharge of its functions under this agreement" was met by an Order in Council (the International Organisations (Immunities and Privileges of the International Tin Council) Order 1956 (S.I. 1956 No. 1214)) which provided that the Council "shall have the legal capacities of a body corporate." In 1968, the Act of 1950 was repealed and replaced by the International Organisations Act 1968, the long title of which described it as "An Act to make new provision . . . as to privileges, immunities and facilities to be accorded in respect of certain international organisations . . ." Section 1(1)

applied the Act, as in the previous legislation, to any organisation declared by Order in Council to be an organisation of which the United Kingdom, or Her Majesty's Government in the United Kingdom and one or more foreign sovereign powers or the government or governments of one or more such powers, are members. Section 1(2) provides:

"Subject to subsection (6) of this section, Her Majesty may by Order in Council made under this subsection specify an organisation to which this section applies and make any one or more of the following povisions in respect of the organisation so specified (in the following provisions of this section referred to as 'the organisation'), that is to say - (a) confer on the organisation the legal capacities of a body corporate; (b) provide that the organisation shall, to such extent as may be specified in the Order, have the privileges and immunities set out in Part I of Schedule I to this Act . . ."

Subsection (6) imposes a limitation on the grant of privileges and immunities of no relevance in the context of these appeals. Section 3 empowers Her Majesty by Order in Council to make, in relation to the Commission of the European Communities, any such provision as could have been made under section 1(2) as if the Commission were an organisation to which that section applies. Section 10 provides that no recommendation shall be made to Her Majesty in Council to make an Order under the Act other than an Order under section 6 (which is irrelevant to the present appeals) unless a draft Order has been laid before Parliament and approved by a resolution of each House.

I.T.A.4, in contradistinction to its predecessors, provided in terms, in article 14, that the I.T.C. was to have legal personality and legal capacity in the same terms as article 16 of I.T.A.6. This provision and the provisions of the Headquarters Agreement ***690** were given effect to by the International Tin Council (Immunities and Privileges) Order 1972 (S.I. 1972 No. 120) made under the Act of 1968 which provided, in article 5, in the same terms as the previous Order in Council, simply that "the Council shall have the legal capacities of a body corporate." Article 6(1) reflected the provisions of the Headquarters Agreement by providing that the Council should have immunity from suit and legal process except:

"(a) to the extent that the Council shall have expressly waived such immunity in a particular case . . . (c) in respect of the enforcement of an arbitration award made under article 23 or article 24 of the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council."

This Order continues to regulate the capacities, privileges and immunities of the I.T.C. under I.T.A.6.

The only other legislative provision which it is convenient to refer to at this stage is the State Immunity Act 1978, which confirms the common law rule that a sovereign state is immune from the jurisdiction of the courts of the United Kingdom but establishes a number of important exceptions. For present purposes the relevant exception is that contained in section 3(1) which provides:

"A state is not immune as respects proceedings relating to - (a) a commercial transaction entered into by the state; or (b) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed

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wholly or partly in the United Kingdom."
Section 9(1) provides:
"Where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

The litigation

So much for the conventional and legislative background and I turn to the history of the litigation giving rise to these appeals.

On 24 October 1985, when the I.T.C. announced that it was unable to meet its obligations, it had incurred debts running into many millions of pounds. Some arose out of contracts entered into with ring-dealing members of the London Metal Exchange ("the brokers") for the purchase or sale of tin, others out of loans made to the I.T.C. by various banks to enable it to conduct buffer stock operations. On 9 July 1986, one of the brokers, J. H. Rayner (Mincing Lane) Ltd., having obtained an arbitration award against the I.T.C. which remained unsatisfied, commenced proceedings in the Commercial Court for recovery of the amount of the award (some pounds sterling16m.) against the Department of Trade and Industry (representing the United Kingdom) and the 23 other members of the I.T.C., including the Commission of the European Economic Community, representing the Community (the "E.E.C.").

On 12 December 1986, other brokers, Maclaine Watson, issued parallel proceedings in the Chancery Division against the Department of Trade and Industry alone ("the D.T.I."), representing ***691** the United Kingdom, claiming a sum of some pounds sterling6m. awarded to them against the I.T.C. and for which they had obtained leave to enter judgment. On 9 December 1986, in the action against the I.T.C. on the award, they moved for the appointment of a receiver by way of equitable execution.

Also in December 1986, Arbuthnot Latham Bank Ltd. and five other banking organisations which had lent money to the I.T.C., each commenced separate proceedings ("the six banks actions") in the Commercial Court against the 24 members of I.T.A.6, claiming repayment of the sums due to them respectively from the I.T.C. These actions differed from the Rayner action in an important respect. Contrary to the provisions of article 23 of the Headquarters Agreement, none of the loan contracts, with one exception, contain an arbitration clause, so that the claim had to be based on a direct liability which was not capable of being pursued against the I.T.C. itself. The one exception was the agreement with Kleinwort Benson, whose loan contract did contain an arbitration clause but in respect of which no arbitration proceedings had been prosecuted.

In the meantime, on 12 November 1986, a broking concern, Amalgamated Metal Trading Ltd., which had obtained an arbitration award in a sum of some pounds sterling5m., petitioned to wind up the I.T.C. as an unregistered company. That petition was struck out by Millett J. on 22 January 1987 and on 3 February 1987 the petitioner and eight other brokers commenced an action ("the multi-brokers' action") in the Commercial Court directly against the 24 members of the I.T.C. and the I.T.C. itself basing themselves, as in the Rayner action, on arbitration awards.

The defendants in the Rayner action issued a summons under R.S.C., Ord. 12, r. 8 to set aside service and, so far as the D.T.I. is concerned, also under Ord. 18, r. 19 to strike out the points of claim. A date for the hearing having been fixed before Staughton J., application was made for similar summonses to be issued in the six banks action and the multi-brokers actions to be heard before Staughton J. at the same time. That application was acceded to but only on the footing that the issues to be dealt with were confined to those raised on the summonses in the Rayner action. An application to amend in order to widen those issues by raising also factual issues raised in the six banks and multi-brokers actions was granted by Staughton J. but his further decision to permit the scope of the issues to be addressed at the hearing to be widened by including those raised in the amendments was subsequently reversed by the Court of Appeal.

On 24 June 1987, Staughton J. set aside service on the member states of the I.T.C. and on the E.E.C. and struck out certain paragraphs of the points of claim as against the D.T.I. as disclosing no reasonable cause of action. Allegations not struck out related to claims in tort and to claims based upon an assertion that certain contracts had been entered into by the I.T.C. as agent for some or all of the member states with their express authority. The hearing before Staughton J. was not concerned with these allegations, which were made the subject matter of separate applications and they do not figure in the present appeals. Leave to appeal was granted to all the plaintiffs.

A summons to strike out was likewise issued in the Maclaine Watson action before Millett J. On 29 July 1987, Millett J. made an order striking out the statement of claim and dismissing the action with costs. Prior to this, on 13 May 1987, he had ***692** dismissed the application for the appointment of a receiver against the I.T.C. on the ground of non-justiciability.

Appeals against the judgment of Staughton J. and against Millett J.'s judgments in the Maclaine Watson action, in the receivership application and in the winding up petition, were heard together and dismissed by the Court of Appeal on 27 April 1988. From those dismissals (save for that in relation to the winding-up petition, against which there is no further appeal) the appellants now appeal to this House.

The issues

Before addressing in detail the arguments advanced by the appellants, it is, I think, convenient to set out in outline the three principal submissions upon which the appellants' cases rest.

The primary submission is that, so far as English law is concerned, the I.T.C. is simply a collective trading name under which the members found it convenient to trade. It has no separate existence as a legal entity apart from its members and the buffer stock manager was, therefore, simply acting as the agent of the members who are thus jointly and severally liable for the obligations entered into in the name of the I.T.C. At the hearing before your Lordships, this has been referred to, for the sake of convenience, by the same description as that by which it was referred to in the Court of Appeal, that is to say, "submission A."

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Should that submission be rejected, the appellants fall back on an alternative submission (submission B) that, even accepting that the I.T.C. enjoys a separate legal existence apart from its constituent members, its legal personality is such as to involve a concurrent secondary direct or guarantee liability on the members, jointly and severally, in respect of all the engagements of the I.T.C. This is supported in two ways, conveniently referred to as submission B(1) and submission B(2).

Submission B(1) looks entirely to English law and is itself put in two different ways. First, it is said that persons who band together as an organisation and trade in England in a collective name incur a direct joint and several liability to third parties which can be excluded only by incorporation. The Order in Council of 1972 confers legal capacities but it does not actually incorporate the I.T.C., even though it is accepted for the purposes of the submission that it confers legal personality. Accordingly, the argument runs, nothing has occurred to displace the basic starting position that the members of the organisation remain liable on the organisation's engagements, either primarily or secondarily. Secondly, and in any event, it is said that English law recognises as a jurisprudential possibility the existence of what Kerr L.J. in the Court of Appeal called, "mixed entities" (that is to say, entities whose engagements, notwithstanding their separate legal personality, involve a concurrent secondary liability of the members). It is then submitted that there can be deduced from the circumstances in which the Order in Council was made and from its terms a parliamentary intention that the Order should create a mixed entity of this type.

Submission B(2) which, although adopted by the other appellants, was advanced primarily on behalf of the banks, seeks to arrive at the same result by a different route. What is said that there is an established and recognised general principle of ***693** international law that when there is established by treaty an international organisation which has a separate legal persona in international law and which is contemplated as entering into engagements with third parties, then, in the absence of an express and clear provision in the treaty exonerating the member states from liability or limiting their liability, they are and remain, jointly and severally liable in international law by way of guarantee for the organisation's obligations to third parties. English Private International Law, it is said, recognises that where a persona ficta constituted abroad enters into engagements subject to English law, an English court will attach to those engagements the same incidents as are attached thereto by the law of the place in which that persona is constituted. Thus, by analogy, the court will attach to the domestic engagements of an international organisation constituted by treaty the same incidents as are attached thereto in international law. It follows that since I.T.A.6, which constitutes the I.T.C., contains no limitation of liability of the member states, those states are secondarily liable in English law for the obligations of the I.T.C.

Submission C is alternative to and independent of submissions A and B and it proceeds on the postulate that the I.T.C. is a separate legal persona which is solely liable on contracts into which it enters unless it can be demonstrated that it also contracted on behalf of its members as undisclosed principals. The appellants contend that the constitution of the I.T.C. is such that there can be deduced from its

terms a general authority in the I.T.C. to contract as agent for its members and each of them in the conduct of buffer stock operations.

It will be necessary to consider each of these submissions in a little detail, but before embarking upon this there is the preliminary question, which to some extent affects all three submissions, of how far (if at all) it is open to your Lordships to take into account the terms of I.T.A.6 and the Headquarters Agreement in determining the rights of the parties. The question of justiciability is not only relevant to submissions A and B(1) but lies at the very threshold of submissions B(2) and C and of the appeal in the receivership application. It is, therefore, convenient, I think, that some consideration should be given to it as this stage.

The principle of non-justiciability

There is, as indeed there can be, little contest between the parties as to the general principles upon which that which has been referred to as the doctrine of non-justiciability rests, though they approach it in rather different ways. The contest lies not so much as to the principle as to the area of its operation.

It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in Cook v. Sprigg [1899] A.C. 572 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in Secretary of State in Council of India v. Kamachee Boye Sahaba (1859) 13 Moo. P.C.C. 22, 75.

"The transactions of independent states between each other are governed by other laws than those which municipal ***694** courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they make."

On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see Blackburn v. Attorney General [1971] 1 W.L.R. 1037. The Sovereign acts

"throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts." Rustomjee v. The Queen (1876) 2 Q.B.D. 69, 74, per Lord Coleridge C.J.

That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive

rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty, the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called upon to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance, Philippson v. Imperial Airways Ltd. [1939] A.C. 332.

Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in Zoernsch v. Waldock [1964] 1 W.L.R. 675) or the very rare case in which the exercise of the Royal Prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in Post Office v. Estuary Radio Ltd. [1968] 2 Q.B. 740.

***695** It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts.

How this very limited competence of the court to take cognisance of and to construe treaty obligations entered into by the United Kingdom is to be applied in the context of the issues raised by these appeals is perhaps best dealt with as each separate issue falls to be considered. But generally and by way of introduction it can be said that there are two fundamental questions which require to be answered. These are:

(1) On the true construction of the Order in Council of 1972 is the I.T.C. as a matter of English domestic law invested with a separate personality distinct from

its constituent members?

(2) If it is, to what extent (if at all) does liability, whether primary or secondary, for the I.T.C.'s obligations attached to its constituent members?

In relation to the first question, the sole issue is the correct construction of the Order in Council and the principle of non-justiciability becomes relevant only in relation to the extent to which it is either necessary or convenient to refer to I.T.A.6 and the Headquarters Agreement as aids to construction. In relation to the second, the competence of your Lordships to consider and construe the treaties lies at the very threshold of the bank's case under submission B and of submission C.

Submission A

This has already been stated in outline. More specifically it reduces to four propositions, viz.:

(1) Persons who join together in trade in the United Kingdom are, prima facie, jointly and severally liable for the debts which they incur and they cannot exclude this liability by agreement between themselves.

(2) States engaging in collective trading are no different from other traders.

(3) Their prima facie liability can be displaced only by incorporation (either by statute or by charter), by express statutory provision or by demonstrating the creation of an association under foreign law having a status which excludes liability of the membership.

(4) The Order in Council does not incorporate the I.T.C. but merely confers capacities and immunities.

Thus the contention is advanced that I.T.C. is no more than a trading name under which the member states trade in their own ***696** right so that they incur direct and primary liability for the debts and obligations incurred in the name of the I.T.C.

It is common ground that the status of the I.T.C. in the United Kingdom depends upon the true construction and the effect of the Order in Council of 1972 and it is also common ground that that Order did not create the I.T.C. as a corporation in the technical sense of that term. The contest is as to whether it nevertheless created what, for want of a compendious expression may be described as a persona ficta having a legal personality apart from its members.

Article 5 of the Order of 1972 provides in terms that the I.T.C. "shall have the capacities of a body corporate" and, speaking for myself and without resort to any extraneous aids, I find difficulty in seeing what possible purpose Parliament could be thought to be serving by conferring in terms the widest capacities available to any artificial legal persona if there was to be no single legal persona capable of exercising them. I am, therefore, in agreement with my noble and learned friend, Lord Templeman, that purely as a matter of construction of the Order standing alone, submission A must be rejected.

But if there is any equivocation or obscurity in the terms of the Order, it is, as it seems to me, entirely dispelled when reference is made, as indeed the Order in Council invites if it does not compel, to the terms of I.T.A.6 and the Headquarters Agreement. The Order in Council was brought into being to give effect to the United

Kingdom's treaty obligations and whatever else may be unclear in relation to the application of the principle of non-justiciability of an international treaty, it is entirely clear and it is not disputed that it may be referred to to explain any obscurity in domestic legislation intended to implement the treaty obligations see Salomon v. Commissions of Customs and Excise [1967] 2 Q.B. 116. The status of the I.T.C. in international law is clearly established by article 16(1) of I.T.A.6 (reproducing the substance of the earlier corresponding provision in article 14 of I.T.A.4) which provides: "The Council shall have legal personality" and goes on in article 16(4) to provide that (inter alia) the status of the I.T.C. in the territory of the host government shall be governed by a Headquarters Agreement between that government and the Council. These provisions were given effect to in the Headquarters Agreement article 3 of which reproduced article 16(1) of I.T.C.6. It is relevant to note that in this article that which is to have legal personality is also to have "in particular" the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings, which are thus described merely as facets of legal personality. Such was the obligation assumed by Her Majesty's Government and it was to give effect to this obligation that the Order in Council was made. To construe it so as to produce the effect that no legal personality was conferred has the result that the United Kingdom is and has ever since 1972 been in breach of its treaty obligations. That, of course, is not an impossible conclusion if the court is compulsively driven to reach it, but it is not one which should be embraced with any enthusiasm if a contrary construction is open.

Your Lordships have been presented with a lengthy and ingenious series of arguments in support of the appellants' central and primary submission that all that the legislature was seeking to do by the Order in Council was to provide a convenient framework within which the member states could trade in partnership under the collective name of the I.T.C. I hope that I may be forgiven ***697** if I rehearse them only in summary form, for with deference to the labour and research which went into their formulation and the earnestness and ability with which they were pursued, I was, for myself, left in the end in no doubt at all that both Millett J. and Staughton J. at first instance, and all three members of the Court of Appeal, were entirely correct in concluding that the effect of the grant of the legal capacities of a body corporate was that, in United Kingdom law, the I.T.C., though not formally incorporated, was invested with a legal personality distinct from its members, with the consequence that, when it entered into engagements, it and not the membership was the contracting party.

The appellants' primary argument is based on article 2 of the Headquarters Agreement which, it is said, indicates the exclusive purpose of the Order in Council. This, it will be recalled, designates the "primary objective" of the agreement as that of "enabling the Council . . . fully and efficiently to discharge its responsibilities and fulfil its purposes and functions." For this purpose, it is argued, it was no doubt necessary to provide a convenient method of, for instance, engaging in legal proceedings, but this could conveniently be done by conferring on the unincorporated members in association certain capacities so as to enable them to function in the name of the I.T.C. It was not necessary to invest the I.T.C. with a separate legal persona. But there are a number of difficulties in the way of the suggestion

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that article 5 did no more than confer capacities on the members. In the first place, the members were sovereign states recognised in English law and having already capacities as such, so that an Order in Council which conferred on them capacities (for instance, to contract, to hold property or to engage in litigation) served no useful purpose. That objection is not answered by saying that it conferred capacities to act in a collective name. That simply does not fit with the wording of article 5, which does not purport to confer a capacity on member states to act in a collective name, but confers capacities directly on the recognised international organisation itself. More importantly, such a construction necessarily involves the conclusion that, in making the Order in Council, Parliament was intending to produce a result which did not accord with its treaty obligations to confer legal personality on the organisation as such. It is no answer to this to say that "legal personality" in the Headquarters Agreement mean legal personality in international law (which had already been conferred by article 14 of I.T.A.4) for the purpose of the Headquarters Agreement was to regulate the status of the I.T.C. in the territory of the host state, that is, as a matter of the domestic law of that state. Nor is it an answer to say - as is the fact - that the earlier Orders in Council made under the Act of 1950 to give effect to I.T.A.1, 2 and 3, used precisely the same formula even though there was no express requirement in those agreements that the I.T.C. should have legal personality and no requirement of a Headquarters Agreement. The formula was, it was argued, a familiar one, sanctioned by a series of statutes prior to 1968 and nothing can be deduced from its use to give effect to this particular treaty. That the formula is one which is sanctioned by the relevant statutes for use, as it were, "off the shelf" in appropriate cases, is indisputable, but the significance lies in the fact that it is one which has been devised and used over a number of years, without amendment to the statutory provisions, to provide not only for those cases where treaties do not provide in terms for particular international organisations to enjoy legal personality but also for a substantial number of treaties that do so provide. The legislative history is admirably set out in the judgments of Kerr L.J. and Ralph Gibson L.J. in the Court of ***698** Appeal, and I do not propose to take time by repeating it. Perhaps, however, in ascertaining Parliament's intention in devising this formula, the most significant feature is that, although initially the Act of 1944 was passed at a time when there were no relevant treaties in which the United Kingdom came under an express obligation to confer legal personality, when it came to amend the Act in order to provide for the privileges and immunities in domestic law of the United Nations (the Convention governing which provided in terms that the United Nations should possess "juridical personality,") Parliament used exactly the same formula. It is quite clear from this that Parliament regarded the formula as sufficient to enable the Crown to confer legal personality on international organisations.

Then, it is said, that in according this effect to the Order in Council, the courts below and Millett J. in particular, have confused status with capacity. Your Lordships' attention was directed to a number of jurisprudential works in which the distinction is drawn and explained. Speaking again entirely for myself, it was not for lack of interest that I did not find this discursus helpful. It was unhelpful not because the distinction does not exist as a matter of jurisprudential theory and

analysis. Clearly it does. A minor has status but he lacks certain capacities. It was unhelpful simply because it did not meet the point which was being made by the respondents that the undoubted existence of capacities may lead and, in some circumstances, must lead to a necessary inference of the status of the person upon whom they are conferred. Whether that is expressed, as Millett J. expressed it, by saying that the status is the sum total of the capacities or that the status may be deduced from the capacities, is really a question of purely academic interest and does affect the ultimate result.

In this context, reliance was placed by the appellants upon the passages in the speech of Lord MacDermott in Bonsor v. Musicians Union [1956] A.C. 104, a case in which this House, by a majority, concluded that a trade union did not, by virtue of the Trade Union Act 1871, constitute a legal entity apart from its members despite being invested by the legislature with some of the characteristics of the legal person. But, as was pointed out by Millett J. in his judgment in the Maclaine Watson action, the powers and capacities conferred on a trade union by the Act of 1871 were extremely limited and, for my part, I do not think that any useful lesson can be learned from Bonsor's case in the context of a case where the legislature has conferred upon a body the fullest possible legal capacities, including the capacity to contract in its own right as a principal and the capacity to hold a legal estate in land. A mere trading name cannot hold a legal estate. Yet the holding of a legal estate in land is undoubtedly one of the capacities of a body corporate and for my part I think that the status of a legal personality, separate from the members, is a necessary corollary of the unlimited capacities which are conferred by the Order.

"A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation." Chaff and Hay Acquisition Committee v. J. A. Hemphill & Sons Proprietary Ltd. (1947) 74 C.L.R. 375, 385, per Latham C.J.

But, it is asked forensically, if Parliament intended to confer a legal personality on international organisations, why ***699** did it refrain from conferring on the Crown the power to invoke the well-established method of incorporation? Reliance is placed upon the judgment of Atkin L.J. in Mackenzie-Kennedy v. Air Council [1927] 2 K.B. 517, where the Court of Appeal declined to infer incorporation from the powers and capacities conferred by statute on the Air Council. Atkin L.J. observed, at p. 534:

"If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated."

For my part, I cannot find any useful parallel between this case and the present. To begin with, Atkin L.J.'s conclusion was expressed as a provisional view only, reached without the benefit of full argument and in the context of the purely domestic body in respect of which there was no discernible policy reason why, if it wished to confer legal personality, Parliament should not have adopted the formula of expressing corporation which it had already adopted in the case of other departments of state to which Atkin L.J. referred. Here, by contrast, there was not only what Kerr L.J., in the course of his judgment ([1989] Ch. 72, 169E) referred to as a

"consistent parallelism" between treaties creating international organisations on the one hand and the consequential domestic statutes and Orders in Council on the other. But there were also, as he remarked, good reasons why Parliament should not have thought it right to resort to the expedient of creating a domestic corporation as opposed merely to the conferment of separate legal personality. These organisations are organisations of sovereign states and one can readily understand a reluctance to submit the internal workings of such a body to the domestic jurisdiction of one of the member states and to subject the body to a domestic winding up jurisdiction.

All other considerations apart, the entire framework of the Order in Council, read as a whole, militates against the conclusion that the I.T.C. was to be regarded in law simply as an association of the member states having no separate legal existence. The difficulties in the way of such a conclusion become particularly apparent when reference is made to article 6 and consideration is given to the results if the appellants are correct in their contentions. Article 4 contains the declaration (rendered necessary by section 1(1) of the Act of 1968) that the I.T.C. is an organisation "of which the United Kingdom and the governments of other sovereign powers are members," so that right from the outset a distinction is made between the organisation and its members. Article 5 confers the capacities of a body corporate on "the Council," not on the members, while article 6 likewise confers immunity from suit and legal process not on the members but on the Council. If the immunity is to be waived it is to be waived by the Council not by the members. This is to be contrasted with article 14 which deals with the immunity of representatives of "the member countries of the Council and of inter-governmental organisations participating in the International Tin Agreement" and provides for the immunity to be waived by "the member country or by the inter-government organisation whom they represent." That apart, article 6 has to be looked at in the context of the law as it sood when the Order in Council was made. The modification to the doctrine of sovereign immunity contained in the Act of 1978 had not yet been introduced, so that the member states enjoyed at that time complete immunity from legal process. ***700** Thus, if the appellants are right, the effect of article 6(1), qualifying (in sub-paragraph (c)) the immunity in respect of an arbitration award, was to diminish the sovereign immunity of member states in relation to contracts made by them in the name of the I.T.C. whilst, at the same time, it conferred on the United Kingdom an immunity in relation to such contracts which, having regard to the provisions of the Crown Proceedings Act 1947, it did not previously enjoy. That Parliament could have intended to bring about such consequences without any express words and without any apparent necessity to do so trascends the bounds of credibility.

For all these reasons, I conclude that the effect of the Order in Council was to create the I.T.C. (which, as an international legal persona, had no status under the laws of the United Kingdom) a legal person in its own right, independent of its members. In engaging in the contracts on which the claims of the brokers and the banks are based, it was the contracting party. Its members were not. It was to the I.T.C. and not to its members that credit was extended and it is elementary that the only persons liable and entitled under a contract, in the absence of trust or agency, are the parties to the contract. The decision of this House in Salomon v. A. Salomon &

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Co. Ltd. [1897] A.C. 22 is as much the law today as it was in 1896. I am left in no doubt, therefore, that submission A was rightly rejected in the courts below and that if a contractual claim against the member states is to be established, it has to be found either by postulating a concurrent primary or secondary liability either arising by independent contract (or possibly as a matter of law) or through the doctrine of agency.

Submission B(1)

The appellant's submissions under this head accept that the Order in Council created the I.T.C. as an independent legal persona but go on to assert that the legal persona is one which, as a matter of law, is of such a nature that, in entering into engagements, it imposes liability, whether primary or secondary, on its constituent members or, alternatively, does not exclude such liability. Taking the latter of these alternatives first, the argument starts from the same initial proposition as submission A, namely, that persons (including states) engaging in activities in the nature of trade in the United Kingdom in association are liable jointly and severally for the debts incurred in the name of the association. Granted, it is said, that the I.T.C. was invested with legal personality, it was not a legal personality of a type, such as a company incorporated under the Companies Acts, which excludes the liability of the constituent members. The object of conferring personality was merely to enable the I.T.C. to carry out its functions and it was unnecessary for this purpose to exclude the liability attaching to the member states in engaging in business transactions in association. Accordingly, it is argued, the mere creation of a legal personality without incorporation does not displace the prima facie liability which arises from the engagement of member states collectively in transactions in the nature of trade.

This argument, as Mr. Pollock Q.C. has pointed out, falls down at two points. In the first place, the proposition from which it starts, that an activity in the nature of trade engaged in in the name of an unincorporated association results in the joint and several liability of all the members of the association, is not only unsupported by authority but is demonstrably inaccurate as a ***701** general proposition. That, of course, may be the result if a partnership is established but the result then flows from the equitable rule that each partner is the agent for the other partners in matters within the scope of the partnership business. But, secondly, and more importantly, it fails because it assumes what it seeks to demonstrate, namely that there is an existing state of liability and that the only question to be answered is whether that is affected by the creation of the legal personality brought into being by the Order in Council. That is simply not the case. The I.T.C. as a matter of English law owes its existence to the Order in Council. That is what created the I.T.C. in domestic law and it was the I.T.C. which entered into the relevant contracts. It is simply a matter of identifying the contracting party and it is idle to inquire what the position would have been if the member states had chosen to engage in activities as an unincorporated association and otherwise than through the I.T.C. They did not do so or, to be more accurate, it is certainly not demonstrated that they ever did at any time material to these appeals.

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It is argued, however, that there is no necessary reason why, in law, there should not be created a legal entity one of the incidents of which is that there is imposed on its members a secondary liability for its obligations. Such bodies exist in the law of the United Kingdom and the example is cited of the Scottish partnership which, both at common law and by statute (the Partnership Act 1890, section 4(2)), enjoys a legal personality as a firm, apart from the partners, who nevertheless remain jointly and severally liable for the firm's debts. Such bodies did, indeed, once exist in English law for section 25 of the Joint Stock Companies Act 1844 expressly provided for the corporators to be liable for the company's debts. There is no reason, therefore, why, if it chose to do so, Parliament should not create such a "mixed entity."

That, of course, is irrefutable, but the question is, did it do so by article 5 of the Order in Council? Various grounds are advanced for suggesting that it did. First, it is said that the Act of 1968 is a United Kingdom statute and positing that section 1 of the Act was intended to enable the Crown to confer legal personality, it should not be assumed that Parliament necessarily had in mind a legal personality analogous to that of an English body corporate. There is, it is said, a presumption against an interpretation which would confer on the members an immunity from liability of the legal entity without safeguards for the creditors. Thus, it is argued, the likelihood is that Parliament, in enacting section 1 of the Act of 1968, had in mind the creation of an entity analogous to a Scottish partnership, since the object of the section was purely the functional one of enabling international organisations to function in the United Kingdom. An alternative route to the same result is suggested by reference to the presumed intention of the member states in entering into I.T.A.6. The concept of a legal entity accompanied by a secondary liability in the natural persons who compose it is one which is well known in continental systems of law - for instance, the societe en nom collectif in the law of France. In providing in I.T.A.6 that the I.T.C. should have legal personality, it is, so it is said, "probable" that the members were contemplating a legal personality of this type. In entering into the Headquarters Agreement the parties contemplated the creation of a legal personality of the same type as that contemplated in I.T.A.6 and, since the Order in Council was made to give effect to the Headquarters Agreement, there ***702** must be attributed to Parliament the intention to provide for that type of personality.

My Lords, neither of these arguments appears to me to be in the least tenable. Once given the existence of the I.T.C. as a separate legal person and given that it is that legal person which was the contracting party in the transactions upon which the appellants claim - the postulate from which these submissions start - there is no room for any further inquiry as to what type of legal person the contracting party is. The persons who can enforce contracts and the persons against whom they can be enforced in English law are the parties to the contract and in identifying the parties to the contract there are no gradations of legal personality. The I.T.C. as the contracting party is the only person liable on the contract, unless there can be found some positive provision in the law imposing liability on somebody else. The presumption upon which the appellants rely against an interpretation which does not provide for liability of the members is entirely unsupported by authority. Indeed,

the very analogy relied upon in support of the submission - that is to say, section 25 of the Act of 1844 - in fact demonstrates the fallacy of it. As a legal personality the joint stock company created under the Act was the sole contracting party in the engagements into which it entered and it was necessary for the legislature to impose liability on the corporators by express statutory provision. By the Order in Council, Parliament conferred on the I.T.C. the capacities of a body corporate, not the capacities of a Scottish partnership. One searches in vain for anything in the Order which would even suggest the imposition of liability for the I.T.C.'s engagements on the member states and, speaking for myself, I find it fanciful that such want can be supplied by reference to the "probabilities" of the members' intentions in entering into I.T.A.6 and the United Kingdom's intentions in entering into the Headquarters Agreement. Quite apart from the fact that the argument involves directly founding individual rights in domestic law upon the intentions of sovereign states in entering into the treaty and so infringes the principle of non-justiciability, the appellants were unable to point any provision of I.T.A.6 or of the Headquarters Agreement which remotely suggested any such intention and, indeed, there are numerous indications pointing to an entirely opposite conclusion.

Submission B(1) has met with universal rejection both at first instance and in the Court of Appeal. I would likewise reject it.

Submission B(2)

Submission B(2), which is the primary submission of Mr. Burnton Q.C. on behalf of the banks but which was adopted and expounded also as a secondary submission by Mr. Aikens Q.C. for Maclaine Watson, seeks to arrive at the same result but by the route of public international law. The starting point is the principle established in English Private International Law that the liability of members of a foreign corporate body for the debts of the corporation is to be determined by the law of place of incorporation. The principle is encapsulated in rule 174 of Dicey & Morris, The Conflict of Laws, 11th ed. (1987), vol. 2, p. 1134:

"(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question. (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

***703** The "matters concerning the constitution of a corporation" extend, according to the comment which follows (p. 1136), to an "an individual's liability for the debts or engagements of the corporation."

The next step in the argument is the submission that the Order in Council of 1972, by articles 4 and 5, did no more than recognise the existing international entity known as the I.T.C. and confer upon it the capacities and domestic status of a legal persona. It does not purport to define the attributes of the personality thus conferred and for those one has to look, in accordance with rule 174 already referred to, to the law of the I.T.C.'s creation, i.e. international law. That, it is submitted, is a legitimate and, indeed, a necessary exercise for a municipal court to undertake and an examination of the provisions of I.T.A.6, when considered in the light of international law, demonstrates that the I.T.C. is a body so constituted as

to involve a direct liability of its members (either concurrent or secondary) for the I.T.C.'s debts to third parties.

These submissions were rejected by Kerr L.J. and Ralph Gibson L.J. in the Court of Appeal, albeit on different grounds, but were accepted by Nourse L.J. who would have held the respondents liable in the Maclaine Watson, Rayner and multibrokers' actions. They have been exhaustively and attractively put by Mr. Burnton and Mr. Aikens and appeared to me initially to offer not only the only possible but also a sustainable route to the appellants' goal. In the end, however, I have been persuaded that, however attractive, they do not bear close examination and cannot succeed.

The authorities cited in Dicey & Morris, The Conflict of Laws, for the starting proposition on which the argument is founded are, as Kerr L.J. remarked, somewhat exiguous but the proposition is, I think, a logical one and can be accepted. At any rate, for present purposes, it can be assumed to be correct. The first difficulty, however, is in applying it to a case where the body concerned is not one which owes its existence to a foreign system of law but one which is created by the United Kingdom legislation. No doubt, for instance, a Jordanian company whose constitution provides for the personal liability of its general partners will, by its contracts in England, engage the liability of those persons if it chooses to trade here: see Johnson Matthey & Wallace Ltd. v. Alloush (1984) 135 N.L.J. 1012. But the same result would not, of course, follow if, instead of trading here as a Jordanian company it established a limited company under the Companies Acts and traded through the medium of that company. There is then no room for looking at the constitution of the foreign entity and one is concerned only with the liabilities incurred by the entity which is created under English law.

That is the initial difficulty. Let it be assumed, for the moment, that the international entity known as the I.T.C. is, by the treaty, one for the engagements of which the member states become liable in international law, that entity is not the entity which entered into the contract relevant to these appeals. Those contracts were effected by the separate persona ficta which was created by the Order in Council. The appellants seek to overcome this difficulty by the submission that all that the Order in Council does is to recognise an entity which has already been created on the plane of international law by I.T.A.6 and to confer on it the capacities of a corporation. That, it is said, tells us nothing about the nature of the body and the liability of its members. For that ***704** one has to go back to the instrument of creation of the I.T.C. in international law and, when one does, one finds that the constitution of the I.T.C. as an international body is such as to engage the liability of the member states. Accordingly, that constitutional consequence is imported into English law by the principle of private international law enshrined in rule 174 of Dicey & Morris, The Conflict of Laws.

Speaking for myself, I have not felt able to accept even the initial step of this submission. Whilst it is, of course, not inaccurate to describe article 4 of the Order as one which "recognises" the I.T.C. as an international organisation, such "recognition" is of no consequence in domestic law unless and until it is accompanied

by the creation of a legal persona. Without the Order in Council the I.T.C. had no legal existence in the law of the United Kingdom and no significance save as the name of an international body created by a treaty between sovereign states which was not justiciable by municipal courts. What brought it into being in English law was the Order in Council and it is the Order in Council, a purely domestic measure, in which the constitution of the legal persona is to be found and in which there has to be sought the liability of the members which the appellants seek to establish, for that is the act of the I.T.C.'s creation in the United Kingdom.

But even if this can be surmounted, there is, in my judgment, an even more compelling reason why the submission cannot succeed. Whether it is said that Parliament, in creating the legal persona of the I.T.C. by the Order in Council intended to create, on the domestic plane, a legal persona of the same type and having the same attributes in all respects as the legal persona created in international law, or whether it is said, as the appellants argue, that Parliament, in conferring capacities on a domestic legal persona, merely recognised and received into English law the international persona brought into existence by the treaty made between sovereign states, the result is the same, namely, that the rights and liabilities arising as a matter of English law in and against the member states are founded, created and regulated in and can be ascertained only by reference to I.T.A.6.

It is at this point that the members of the Court of Appeal diverged, Kerr L.J. and Nourse L.J. taking the view that justice and good sense dictated a reference to the treaty and that the principle of non-justificability must give way, Ralph Gibson L.J. holding (as Staughton J. had held in the court below) that such a reference was direct infringement of the principle and was impermissible. For my part, I am persuaded that Ralph Gibson L.J. and Staughton J. were correct.

As previously mentioned, the consequence in English law of the creation of an artificial person, separate from the members who compose it, is that that artificial person alone is answerable for the debts which it incurs in its own name and for its own benefit. Agency apart, there is nothing in English law which imposes liability on the members. If the member states and the Crown in right of the United Kingdom are to be made liable on the engagements into which the I.T.C. has entered, that liability arises solely from the provisions of I.T.A.6 as it falls to be construed in international law, so that the English private law rights and obligations of the creditors and the member states will be directly altered and new rights and obligations not otherwise existing created by the provisions of an international treaty which have never been incorporated into English law.

***705** Both Kerr L.J. and Nourse L.J. felt able to contemplate the derivation of rights and the imposition of obligations in this way because of internal references in the Order in Council, although they relied upon difference provisions. Nourse L.J. discerned in article 4, which recites simply that the I.T.C. is an international organisation, a mandatory requirement to consider the nature of the I.T.C. in international law and thus, in effect, the incorporation of I.T.A.6 into English law. Kerr L.J., by contrast, deduced from the express references of the I.T.A. in articles 2 and 14 (which refer respectively to the "official activities undertaken pur-

suant to" I.T.A.4 and to membership of inter-governmental organisations under article 50 of that agreement) and from the express references to the Headquarters Agreement in articles 1 and 6(c) that this was an unprecedented hybrid situation between an unincorporated treaty and an expressly incorporated treaty which justified a departure from the principle of non-justiciability. For my part, I have not felt able to accept either approach. Article 4 imposes no necessary or mandatory requirement to jettison the general rule of non-justiciability of an unincorporated treaty and to consider the nature of the I.T.C. in international law. It is merely the formal declaration rendered necessary by section 1(1) of the Act of 1968 as the condition precedent to the making of the provisions envisaged in section 1(2) and it entails no more than a recognition that there is an international organisation, created by treaty, of which the United Kingdom is a member. As regards the references to the treaty provisions, these are made for the very limited purposes of defining the official activities of the I.T.C. and the inter-governmental organisations whose representatives are qualified for the immunities conferred by the Order. It cannot be deduced from this that Parliament was opening the door for the reception into English law of all the terms of the treaty and the creation, sub silentio, of rights and duties not grounded upon domestic law but created solely by the treaty provisions.

It is argued, however, that if one supposes, for example, that I.T.A.6 contained an express declaration that the member states agreed to underwrite all the liabilities of the I.T.C., it would be absurd that no cognisance of such a provision should be taken by a domestic court. For my part, I do not think so and, indeed, this is an excellent example of the operation of the non-justiciability principle. If the treaty contained such a provision and Parliament had not seen fit to incorporate it into municipal law by appropriate legislation, it would not be for the courts to supply what Parliament had omitted and thus to confer on the Crown a power to alter the law without the intervention of the legislature. The remedy, if there be one, lies in international law, not in the domestic courts.

It is said that it is illogical to permit reference to the terms of the treaty in order to resolve an ambiguity in domestic legislation passed to give effect to it but to deny it for the purpose of ascertaining the nature in international law of the body to which the legislation relates. I do not in fact think that there is any ambiguity in the legislation but, in any event, there is a world of difference between seeking to construe what the legislature has said and seeking to supply provisions of which the legislation contains not the slightest hint on the basis of a preconceived notion that such rights "ought" to be there.

A third avenue of approach to the appellants' objective is the suggestion that international law is "part of English law" see Triquet v. Bath (1764) 3 Burr. 1478, per Lord Mansfield C.J.; ***706** Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B. 529, 554, per Lord Denning M.R. It is contended that there is a rule of international law that where sovereign states by treaty bring into being an international organisation which is intended to engage in commercial transactions, the member states are liable, secondarily, for the organisation's debts to third parties (whether states or individuals) unless (a) the treaty expressly excludes such liab-

ility and (b) the exclusion is brought to the notice of third parties. Now assuming that such a rule could be established, I can see that it might be said that it forms part of English law and that reference to the treaty would not be precluded by the non-justiciability rule inasmuch as such reference would be solely for the purpose of seeing whether it contained an express exclusion of liability and thus of determining whether the rule - on this hypothesis now part of domestic law - applies. Such an argument cannot run, nor indeed has it, I think, been advanced in precisely these terms. If such a rule exists, it is at highest a rule of construction, and however the matter is looked at, the question of liability or no liability stems from an unincorporated treaty which, without legislation, can neither create nor destroy rights under domestic law.

I accordingly concur in the reasoning of Ralph Gibson L.J. and would hold that submission B(2) falls at the first hurdle. But even if this were wrong, I am clearly of opinion that the majority of the Court of Appeal were right to reject it for the other reasons which they gave.

First and foremost, the "authorities" to which your Lordships were referred, which consisted in the main of an immense body of writings of distinguished international jurists, totally failed to establish any generally accepted rule of the nature contended for. Such writings as tended to support the supposed rule were in publications taking place since the affairs of the I.T.C. came before the courts in 1986 and express simply the views of particular jurists about what rule of international law ought to be accepted. They were, in any event, unclear as to whether the liability suggested was primary or secondary, whether it was joint or several, and whether it was to be contributed to equally or in some other proportions. It was indeed submitted that it was not only open to your Lordships but was your Lordships' duty to decide these points as, indeed, Nourse L.J. had opined in the Court of Appeal. For my part, I cannot accept this. A rule of international law becomes a rule - whether accepted into domestic law or not - only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.

In an endeavour to establish acceptance of the supposed rule, attention was drawn to some 16 treaties establishing international organisations which contained provisions expressly excluding liability on the part of the members, but there was a very large number of similar treaties which did not and the Court of Appeal found it impossible to make any useful deduction from them. So do I.

Equally - although for the reasons given I do not think that the question arises - I have been unable to accept the suggestion that there can be found in the terms of the treaty itself indications of an intention that the member states should assume ***707** liability for the I.T.C. debts. Indeed, such indications as there are seem to me to point in the contrary direction and to indicate that any liability assumed was merely to the I.T.C. itself and existed only to the extent prescribed. In relation

to the buffer stock, the assumption is throughout that any commitments will be met out of cash or sales of tin (see particularly article 26) whilst articles 60 and 21 (read in conjunction with the definition of "government guarantees/government undertakings" in article 2) are concerned with defining and limiting the obligations of the member states to the I.T.C. itself. For all these reasons, I am left in no doubt that submission B(2) must be rejected.

Submission C

This submission, which was ably advanced by Mr. Sumption Q.C. on behalf of the multi-brokers, relies upon the provisions of I.T.A.6 as establishing that, as a matter of the constitution of the I.T.C., it acted and was so constructed as to act as the agent of the member states as undisclosed principals. This has been referred to as "constitutional agency" and it does not rely upon the proof of any facts as to an authority expressly conferred by the members upon the buffer stock manager. There are allegations in the proceedings of such an express authority but they are not the subject matter of the striking out applications from which these appeals arise and your Lordships are not concerned with them. The distinction is, however, important because it has, I think, a bearing on the application of the non-justiciability principle which constitutes the first hurdle that Mr. Sumption has to surmount. As has already been mentioned, the existence and terms of the treaty are matters of fact and I can well understand that if there be a contest as to whether A, B and C have expressly authorised D to act as their agent, the fact that, in a contract to which D was not a party, A, B and C had agreed that they would so employ him might well be powerful evidence in support of an allegation that that is precisely what they did. What is said - and as I read their judgments both Kerr L.J. and Ralph Gibson L.J. were prepared to entertain the submission on this basis - is that the existence of an authority constituting the legal relationship of principal and agent is a matter of fact. If such a relationship exists, then it gives rise to certain justiciable consequences in domestic law and it is therefore permissible, without infringing the principle of non-justiciability, to have regard to the terms of I.T.A.6 in order to see whether, as a matter of fact, the legal relationship existed. In the end, the answer to the question does not, in my opinion, matter so far as concerns the result of these appeals, because I am left in no doubt at all that the agency submission fails on other grounds which are fully dealt with in the judgments under appeal. I have, however, found myself unable, with deference, to concur in the reasoning of the Court of Appeal in relation to this issue. The justiciable issue of the consequences in domestic law of the creation of the relationship of agency between the member states and the I.T.C. arises and arises only if there is first determined as a matter of law what are the rights between the member states and the I.T.C. The mere fact that the respondents are members of the I.T.C. and that the I.T.C. has entered into engagements creates of itself no rights against the members in creditors of the I.T.C. The rights of creditors against the members, if any, depend solely on the creation between the members and the I.T.C. of the rights and duties which, in domestic law, are created by the authority which, as a matter of law, is conferred on the I.T.C. Now whether one says that the rights and duties arising from that relationship arise from a contract stricto sensu between principal and agent or ***708** whether one treats them as arising by implication of law from the

fact of an authority conferred, the effect, if the submission is accepted, is that, as a matter of domestic law, a person who is not a party to a domestic contract is subjected to the liabilities arising out of it. The obligations thus imposed and the rights thus created in the other party to the contract are created by a document or act in the law which is relied upon as creating the authority - in this case I.T.A.6. It is that which defines the scope of the authority conferred and it is that which alters the legal position in domestic law of the alleged principal and agent. However one approaches the problem, the obligations sought to be imposed on the respondents by this argument stem from the treaty and have no separate existence in domestic law without it. Again, Mr. Pollock was presented with the logical consequence, which Kerr L.J. in particular felt unable to accept, that even if the treaty between the member states had said in terms that they agreed to the organisation which they were creating acting as their agent, a domestic tribunal would be precluded by the non-justiciability principle from taking cognisance of it as the source of the obligation asserted. Mr. Pollock accepted this consequence and, in my judgment, he was right to accept it, however startling it may at first appear. One has only to envisage a dispute, possibly between the member states and the I.T.C. or possibly between the member states inter se, as to the scope and consequence of the authority so agreed to be granted. This must necessarily be a question of the effect of the treaty on the plane of international law and a domestic court has not the competence so to adjudicate upon the rights of sovereign states. That, of course, is not this case. The submission here is that when the provisions of I.T.A.6 are examined, it can be seen that the provision for the constitution and management of the I.T.C. and the way it is envisaged that it will conduct its operations have the effect of constituting it the agent for the members. Thus your Lordships are invited directly to embark upon the exercise of interpreting the terms of the treaty and ascertaining, on the basis of that determination, the rights of the members in international law and the consequences in municipal law of the rights so determined. I see no escape from Mr. Pollock's submission that this directly infringes the principle of non-justiciability. For my part, therefore, like Staughton J., I would reject submission C on the short and simple ground that it raises an issue which is not justiciable by an English court.

Even were it open to your Lordships to entertain the submission, however, I find myself entirely persuaded by the reasoning of the Court of Appeal in rejecting it on the merits. Once given the creation of a separate legal personality by the Order in Council, there appears to me to be no escape from the principle established by this House in Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22, where the suggestion that Salomon & Co. Ltd. carried on business as agent for the corporators was firmly and decisively rejected. Mr. Sumption has sought to distinguish the case on the ground that the I.T.C. was brought into existence to carry out the purposes of its members and not for its own purposes and that it is "composed" of its members and operates under their immediate direction. An analysis was made of the provisions of articles 4 to 8, article 13 and articles 21 and 28 of I.T.A.6 in order to support the suggestion that, unlike a board of directors, the Council owes no duties to the I.T.C. but acts entirely for its own benefit. From this it was argued that the I.T.C., as a body, was simply the agent of the members. It is, perhaps, enough for me to say

that, speaking for myself, I can find no relevant distinction here between the governance of a ***709** limited company and the governance of the I.T.C. That they are differently constituted is irrelevant. As Kerr L.J. pointed out in the course of his judgment [1989] Ch. 72, 189, whether a corporation acts directly on the instructions of its members, who constitute the directorate, or indirectly because of the members' control in general meeting, makes no difference in principle. The existence of a board of directors in Salomon's case played no part in the decision. An examination of the constitution of the I.T.C., even if permissible, does not support the suggestion of "constitutional agency."

So far as the brokers' actions are concerned, the claim fails in any event on the further ground, accepted by Staughton J. and upheld by the Court of Appeal, that the terms of the standard form B contract of the London Metal Exchange, which governs the transactions sued upon, preclude any suggestion of agency. These terms unambiguously specified that the contract is between "ourselves and yourselves as principals" and the words which follow - "we alone being liable to you for its performance" - cannot reasonably be construed as importing that the words "as principals" refer only to the "ourselves" (the brokers) and not also to the "yourselves" (the I.T.C.) Mr. Sumption's further submission that "as principals" does not mean "as sole principals" was described by Kerr L.J. as commercialy implausible. With that I agree.

It follows from what I have said that submission C must suffer the same fate as submissions A and B and I would accordingly dismiss these appeals. I would add only this. The rejection of the underlying submissions which form the whole basis of the appellants' case makes it unnecessary to consider the respondents' further objections - and in particular the question of immunity which the respondents raised in the courts below and which were necessarily dealt with by the Court of Appeal. In particular, that court heard and rejected arguments on behalf of the E.E.C. that it was, in any event, entitled to immunity in the same way as a sovereign state. Your Lordships found it unnecessary to trouble Mr. Eder, who appeared for the E.E.C., at the stage of the appeals in which the main arguments were presented, but reserved to him liberty to address his submissions at a later stage should your Lordships' decision on the principal points render such a course necessary. In the event, it has not proved necessary but it should, I think, be stressed, in fairness to Mr. Eder's clients, that they desired to submit (as their printed case states) that the Court of Appeal, in rejecting the claim to immunity, had misunderstood the argument upon which that claim was based. Their Lordships have not heard the argument and have not therefore had the occasion to form or express any view as to correctness or otherwise of the Court of Appeal's decision. It should also be mentioned that Mr. Eder would, had he been heard, have wished to submit that the issue of the E.E.C.'s immunity is one which might require to be referred, pursuant to article 177 of the E.E.C. Treaty, to the European Court of Justice. In the event, that does not arise.

The receivership appeal

I turn finally to the appeal of Maclaine Watson against the dismissal in the proceedings against the I.T.C. of their application for the appointment of a receiver.

The basis of this claim is that the I.T.C. is possessed of an asset in the form of a right to be indemnified by the respondents in the direct action appeals against the liabilities incurred by the I.T.C. buffer stock manager in the name of the I.T.C. and that a receiver by way of equitable ***710** execution ought to be appointed for the purpose of pursuing that claim in the name of the I.T.C. Your Lordships are not concerned on this appeal with the question whether, assuming that the appellants can demonstrate a justiciable cause of action against the members of the I.T.C., a receiver by way of equitable execution ought, as a matter of the court's discretion, to be appointed. Your Lordships are concerned only with the question - or rather the two questions - upon which the claim foundered in the courts below, namely, (i) does the I.T.C. have any cause of action against the member states arising out of the transactions of the buffer stock manager, and (ii) if so, is it a cause of action which is justiciable by an English court?

Millett J. held that there was no arguable cause of action in the I.T.C. against its members which did not involve a reliance upon I.T.A.6 and accordingly he dismissed the application on the ground of non-justiciability. In the Court of Appeal, a number of issues argued before Millett J., which had been defined in points of claim prior to the hearing before him, had dropped away and the appeal was argued, as it has been argued before your Lordships, on the basis of amended points of claim to which it may be convenient to refer at this stage.

After setting out the establishment of the I.T.C. and the history of the proceedings leading to the entry of judgment against the I.T.C., the nub of the case is pleaded in paragraphs 21 to 24. Paragraph 21, which rests upon the absence of juridical personality in the I.T.C., is now no longer material and I can confine myself to paragraphs 22 to 24 which are in the following terms:

"22. Further or alternatively, the I.T.C. is entitled to be indemnified by the member states jointly and severally upon the ground that the I.T.C. entered into the contracts at the express or implied request of the member states and having incurred a liability is entitled by implication of law to be indemnified by the said member state jointly and severally in respect of such liability.

"23. Further or alternatively, the plaintiffs will if necessary contend that the trading being carried out by the buffer stock manager of the I.T.C. (the 'B.S.M.') at all material times in 1985, of which the contracts form part, although carried out with the full knowledge, authority and at the request of the member states, was outside the scope of the Sixth International Tin Agreement 1981 ('I.T.A.6'), in that it involved the creation of a buffer stock far in excess of the 50,000 tonnes provided for in article 21 of I.T.A.6.

"24. In support of the contentions in paragraphs 21, 22 and 23 above the plaintiffs will rely inter alia on the matters pleaded in the particulars in the schedule hereto."

The particulars are of some importance. They plead that the I.T.C. entered into contracts through its officers, who were, by the articles of the I.T.C. there enumerated, authorised to manage the I.T.C.'s buffer stock under the supervision of the executive chairman who, in turn, was responsible to the Council; that the Council was composed of the members and decisions taken by simple distributed majority. Paragraph 4 is important and is in the following terms (with emphasis supplied):

"Further, the members acting in Council did in fact know and approve of, and authorise the actions of the I.T.C. ***711** officers including the making of contracts for the purchase of tin in particular the contracts referred to in paragraph 3 above (referred to in these particulars as 'the Maclaine Watson contracts'). Further or alternatively, the same were adopted, ratified and acquiesced in by the members in Council. The best particulars the plaintiffs can give prior to discovery or discovery in proceedings brought by the receiver are as follows . . ."
There then follow lengthy particulars in 16 sub-paragraphs directed to establishing that the I.T.C.'s financial position was known to the members through reports rendered pursuant to Buffer Stock Operational Rules made pursuant to I.T.A.6 and that they were aware of and allowed a continuation of trading despite warnings that a continuation of trading was a gamble which would lead to disaster. Sub-paragraph (xvi) and paragraph 5 are in the following terms:

"(xvi) Nonetheless the members acting through the Council ordered and/or allowed the I.T.C. officers to continue to trade in tin until 24 October 1985.

"5. The court will be invited to infer from the above facts that the member states expressly or impliedly authorised and/or requested the I.T.C. officers to enter transactions including the Maclaine Watson contracts of their behalf."
I have stressed the way in which the case is pleaded because these allegations (which must, for present purposes, be assumed to be true) demonstrate that throughout the members are not alleged to have acted individually but are alleged to have acted only as and through the Council of the I.T.C.

Basing themselves on these pleadings, the appellants argue that there is a general principle of English law (to be found in the submissions of Mr. Cave in Dugdale v. Lovering (1875) L.R. 10 C.P. 196, 197, and approved by this House in Sheffield Corporation v. Barclay [1905] A.C. 392) that

"when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."
That right, it is argued, may arise without the necessity for any pre-existing agreement between the parties and is a right governed by English law which is justiciable in an English court.

This contention was met by Lord Alexander Q.C. on behalf of the respondent, in two ways. Speaking for myself, I confess to more than a few reservations with regard to the question of whether a principle enunciated in the context of a request by A to B to carry out an act which turns out to be tortious or otherwise wrongful and so subjects B to a liability in damages can be applied to the case of a body which enters into a contract for its own purposes at the instance of its directorate. Directors of limited companies would be both astonished and alarmed to learn of such a hitherto unsuspected peril which they might have thought to have been successfully laid to rest years ago by Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22. But your Lordships need not ***712** take up time on this, for, as I understand it, Lord Alexander is content to concede that, given the facts pleaded, there might at least be an arguable case for the establishment of such a liability. He takes his stand on the two different facets of non-justiciability. Adopting the reasoning of Ralph Gibson

L.J. he argues, that, supposing that such a liability can theoretically exist, the pleadings demonstrate that everything that was done was done in purported pursuance of the provisions of I.T.A.6 by sovereign foreign states in circumstances in which it could not possibly be contended with any colour of conviction that their transactions were to be submitted to the jurisdiction of the municipal courts of this country.

He adopts and accepts - although he submits that it is strictly unnecessary to decide the point - the primary ground relied upon by Ralph Gibson L.J. for rejecting the appellant's claim, which may be described as the act of state limb of the principle of non-justiciability and which may be summarised simply by saying that issues arising from such transactions between sovereign states are not issues upon which a municipal court is capable of passing. It is neither competent nor equipped to do so. To quote from the speech of Lord Wilberforce in Buttes Gas & Oil Co. v. Hammer (No.3) [1982] A.C. 888, 938:

"Leaving aside all possibility of embarrassment in our foreign relations . . . there are . . . no judicial or manageable standards by which to judge these issues, or to adopt another phrase . . . the court would be in a judicial no-man's land. . . ."

The creation and regulation by a number of sovereign states of an international organisation for their common political and economic purposes was an act jure imperii and an adjudication of the rights and obligations between themselves and that organisation or, inter se, can be undertaken only on the plane of international law. The transactions here concerned - the participation and concurrence in the proceedings of the Council authorising or countenancing the acts of the buffer stock manager - were transactions of sovereign states with and within the international organisation which they have created and are not to be subjected to the processes of our courts in order to determine what liabilities arising out of them attached to the members in favour of the I.T.C. In the Court of Appeal both Kerr L.J. and Nourse L.J. entertained reservations upon the question whether, in relation to a claim based upon agreements concluded by sovereign states in a commercial context, it was right to decline to adjudicate upon such a claim on the ground of what was conveniently described by Kerr L.J. as "act of state non-justiciability." But both Lords Justices were at one with Ralph Gibson L.J. in rejecting the appellant's application on the same ground as that relied upon by Millett J. at first instance, that is to say, that I.T.A.6 is an unincorporated treaty and there is simply no way in which the case can be put for a claim by the I.T.C. against its members for an indemnity or contribution which does not, in the ultimate analysis, involve a reliance upon and the interpretation of its provision, so that the claim is equally incapable of adjudication under this limb of the principle of non-justiciability. If this is right, then it really matters very little, save on a purely academic level, whether the appellants' claim is equally incapable of adjudication in a municipal court by virtue of act of state non-justiciability and it is unnecessary for your Lordships to resolve or reconcile the views of the members of the Court of Appeal on this aspect of the case.

***713** Since the ground expressed by Millett J. for his decision represents Lord Alexander's primary submission, it will be convenient to examine this first. The gen-

eral principle of indemnity expounded in Dugdale v. Lovering, L.R. 10 C.P. 196 is advanced by the appellants as the route by which they can avoid reliance upon the provisions of I.T.A.6 and thus escape the difficulty created by the principle of non-justiciability. In essence, this submission is that in exercising the capacities conferred upon it by the Order in Council the I.T.C. becomes subject to municipal principles of common law and equity and that those principles govern the right of the I.T.C. against its members. If, it is argued, English municipal law confers, as the automatic result of an English law transaction, a right of indemnity against the persons (be they states or individuals) at whose instance the transaction was undertaken, it matters not what private or public agreement there may be between the latter and the person effecting the transaction, the right attaches as an incident of English municipal law and involves no necessary resort to the terms of that agreement. To say, the appellants argue, that acts are done because of a treaty is not the same as saying that they are done under a treaty, so that the mere existence of the treaty as a background or even a motivating factor in the transaction provides no reason why a claim by the actor against the instigator of the act should be regarded as resting on the treaty and so be non-justiciable. It was expressed thus by Mr. McCombe Q.C. in the course of an able and helpful argument:

"The instructions of the state to the buffer stock manager of the I.T.C., which are in review in the present case, though they would not have taken place had there been no I.T.A.6, are far removed from the category of transactions which by reason of being part of, or in performance of, an agreement between states, are withdrawn from the jurisdiction of the municipal courts."

I feel two difficulties about accepting this argument in the context of the present appeal. In the first place, it ignores what I apprehend to be the basis for the general principle relied upon, which is implied contract and nothing but implied contract. Secondly, it ignores the pleaded case upon the basis of which your Lordships are invited to find an arguable claim.

It is quite clear from the authorities which have been drawn to your Lordships' attention as establishing or supporting the general principle of indemnity upon which the appellants rely that indemnity is not the automatic consequence of a request to do an act. Such a right of indemnity arises only where the circumstances justify the implication of a contract to indemnify. The necessity for the implication of a contractual obligation to indemnify is stated in Dugdale v. Lovering, L.R. 10 C.P. 196, itself, by this House in Sheffield Corporation v. Barclay [1905] A.C. 392, and in subsequent cases in which the principle has been applied: see Yeung Kai Yung v. Hong Kong and Shanghai Banking Corporation [1981] A.C. 787; the "Naviera Mogor S.A. v. Societe Metallurgique de Normandie (the "Nogar Marin") [1988] 1 Lloyd's Rep. 412. Now it is elementary that where the relationship between the parties is regulated by express agreement, there is no room for implication save for some term necessary for giving business efficacy to their agreement. Thus, whilst it may be that in the absence of some governing document regulating the terms upon which a particular transaction or series of transactions is undertaken, the law will, according to the circumstances, imply an obligation in one party to indemnify another, where there is such a ***714** governing document there simply is no room for that implication. Whichever way one looks at it, the existence of the governing doc-

ument in the form of I.T.A.6 has to be faced and is indeed faced in the pleading on which the appellants rely. Whence, then, do the appellants derive the implied contract upon which they necessarily have to rely to support their case?

I have already drawn attention to the points of claim and to the particulars and I stress again that these are particulars of the acts of the members "acting in Council" and that the constitutional basis for the members to act in Council and for the officers of the I.T.C. to act under the supervision of the Council is set out in paragraphs 1 to 3 of the pleading. So that one is thrown back immediately to I.T.A.6 and the request of the member states which forms the foundation of the claim in paragraph 5 is one which, throughout, is to be inferred from that which was done or omitted by the Council of the I.T.C. acting under its constitutional document, I.T.A.6. There is here no room for any implication and if an obligation to indemnify is to be found, it is to be found only in or after consulting the terms of I.T.A.6. That involves the municipal court immediately in interpreting I.T.A.6 in order to see whether it contains provision for such an indemnity or whether, within its terms, there is room for one to be implied. The ascertainment and enforcement of such an indemnity is not a justiciable issue.

It is, of course, true that the I.T.C., although the creation of the treaty on an international level, is not itself a party to the treaty, but that cannot, in my judgment, make any difference in principle. I do not feel that I can express it better than it was expressed by Millett J. in the course of his judgment [1988] Ch. 1, 23:

> "Mr. Littman submitted that the I.T.C.'s rights of indemnity or contribution from its members cannot derive from the Agreement because the I.T.C. is not a party to the treaty, and because in fact no such rights can be found in it. The Agreement is, of course, not only the agreement between the members which established the I.T.C., but also the I.T.C.'s constitutional instrument. Whether it creates rights between the members only, or whether it creates rights also between the I.T.C. and the members, and if so whether its express provisions need to be augmented by further implied terms, are questions upon which, as a judge of the national courts of one of the member states only, I have no authority to pronounce. But let it be assumed that, for whatever reason, no right of indemnity or contribution, express or implied, is given to the I.T.C. by the treaty. What follows? What follows is not that the right must derive from some other source, but that there is no such right."

It is argued that, if one postulates first of all a claim based on a request to the buffer stock manager and the implication of a purely domestic contract to indemnify arising from that request, I.T.A.6 is brought into the issue only by way of defence. The respondents cannot, it is said, have it both ways. If I.T.A.6 cannot be referred to for the purpose of supporting the direct actions, it equally cannot be referred to by way of defence by the I.T.C. Accordingly, it is said, it is the I.T.C. which is seeking to rely upon the treaty as a defence to a justiciable claim in domestic law. A non-justiciable defence is no defence. This ***715** argument has a certain attraction, but it is specious because it misunderstands the respondents' submission. I.T.A.6 is not relied upon as a defence. This is a striking out application and it is for the appellants to establish an arguable case. The case which they

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seek to establish is one which requires an implied contract in pleaded circumstances in which the express terms of I.T.A.6 are themselves relied upon as part of the essential background giving rise to the very implications sought to be made. Within the confines of the pleaded case, the implication cannot be made in vacuo and as if I.T.A.6's constitutional provisions did not exist. If an implication is to be made at all, it has to be made within the framework of I.T.A.6 and it is the terms of I.T.A.6 which have to be referred to and construed in order to found the implied contract upon which the claim rests.

I agree with Millett J. and with the Court of Appeal that, however the matter is approached, any claim of the I.T.C. against the member states for indemnity must ultimately rest upon I.T.A.6. This is an issue which is not justiciable by your Lordships and it is therefore unnecessary to decide whether, in any event, any such claim would also be precluded by act of state non-justiciability. I would accordingly dismiss this appeal also.

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