HOUSE OF LORDS JUDGMENT OF 21.2.91: ARAB MONETARY FUND (APPELLANTS) v. HASHIM AND OTHERS (RESPONDENTS)

Lord Bridge of Harwich, Lord Templeman, Lord Griffiths, Lord Ackner and Lord Lowry

Lord Bridge of Harwich

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Templeman. I agree with it and for the reasons he gives I would allow the appeal and restore the order of Hoffmann J.

Lord Templeman

My Lords,

An Agreement ("the AMF Agreement") dated 27 April 1976 to which 20 Arab states and Palestine were signatories established an Arab organisation known as "the Arab Monetary Fund" for the purpose of laying the monetary foundations of Arab economic integration and accelerating the process of economic development in all Arab countries. The official English version Articles of Agreement of the AMF Agreement included the following:

1. . . . there shall be established an Arab organisation named "The Arab Monetary Fund," hereinafter referred to as "the Fund." 2. The Fund shall have an independent juridical personality and shall have, in particular, the right to own, contract and litigate. 3. The Head Office of the Fund shall be located in Abu Dhabi city of the United Arab Emirates, and it may establish agencies and offices under a decision issued by the Board of Governors. . . .

12(*a*) The authorised capital of the Fund shall be equivalent to 263 [sic] million Arab dinar units of account. . . . (*c*) The capital shall be divided into 5,000 shares each having the value of 50,000 Arab dinar units of account. 13(*a*) Subscription to the capital shall be made in accordance with the Schedule attached to this agreement. . . .

29. The Fund shall be composed of the Board of Governors, the Board of Executive Directors, the Director-General/President of the Board of Executive Directors, the Loans and Investments Committees and the employees and experts required to carry out the work of the Fund. 30(*a*) The Board of Governors shall consist of one Governor and one Deputy Governor appointed by each member of the Fund . . . (*b*) The Board of Governors shall be regarded as the General Assembly of the Fund and shall hold all the administrative powers. It may delegate to the Board of Executive Directors, the authority to exercise any of its powers with the following exceptions:

1. Admission of new members; 2. increase of capital; 3. determining the distribution of the net income of the Fund; 4. appointing auditors and approving the final accounts; 5. settling

disputes concerning the interpretation of the provisions of this agreement; 6. suspension of a member; 7. definitive suspension of the operations of the Fund and the liquidation of its Funds; 8. amendment of this agreement.

31(*a*) For the purpose of voting at the Board of Governors' meetings, each member shall have 75 votes, regardless of the number of shares it holds, plus one vote for each share held by the member. . . . 32(*a*) The Board of Executive Directors shall exercise the powers vested in it by the Board of Governors and may delegate therefrom to the Director-General, such powers as it deems fit. (*b*) The Board of Executive Directors shall be composed of the Director-General as Chairman and of eight resident Members of the Board . . . elected by the Board of Governors from among the citizens of member States. . . . 33(*a*) The Board of Governors shall appoint a Director-General of the Fund from among individuals other than the Governors or Executive Directors or their deputies. . . . (*e*) The Director-General is the head of the staff of the Fund and is responsible to the Board of Executive Directors for all the work of the Fund. He shall be in charge of the technical and administrative organisation of the Fund and will have the right to appoint and dismiss the staff and experts in accordance with the regulations of the Fund. . . . 34. The Director-General shall set up committees on loans and investments to make recommendations with respect to loan and investment policies and shall examine these policies and submit proposals on them to the Board of Executive Directors. . . .

48(*a*) A member shall not be responsible, by virtue of its membership, for liabilities of the Fund which are not within the limits prescribed in this agreement. . . .

53. Legal action may be brought against the Fund in a court of competent jurisdiction in the state where its head office is located. . . .

The United Arab Emirates ("the UAE") is an independent sovereign federal state. By the constitution of the UAE dated 18 July 1971, a treaty entered into by the UAE becomes binding on and within the UAE after confirmation of the treaty by the Council of Ministers and ratification by decree of the Supreme Council, followed by signature and promulgation of the decree by the President, and publication of the decree in the Official Gazette. The AMF Agreement was duly confirmed and ratified by decree. The decree was duly signed and promulgated and was published on 16 April 1977 in the Official Gazette as Federal Decree No. 35 for 1977 with the Articles of Agreement of the AMF Agreement attached. All these matters were the subject of uncontradicted expert evidence given in an affirmation by Mr Hamza, legal advisor to the Ministry of Foreign Affairs of the UAE He concluded that the Fund:

. . . had conferred on it by publication of Federal Decree No. 35 independent legal personality and the capacity to sue and be sued in U.A.E. law.

Thus the Fund was created a corporate body by the UAE and corresponds roughly to an English company limited by shares with the member states as the shareholders, a board of governors which represents the shareholders, a board of executive directors and a director-general corresponding to a managing director.

I am unable to agree with my noble and learned friend, Lord Lowry, that Federal Decree No. 35 only recognised an international organisation and did not create a corporate body. When the promoters of a company enter into an agreement to incorporate a company and the agreement takes the form of a memorandum and

articles of association of the company, that agreement does not create a corporation. When the memorandum and articles are registered under the Companies Act of 1985, that registration does not recognise a corporation but creates a corporation. Similarly, when sovereign states enter into an agreement by treaty to confer legal personality on an international organisation, the treaty does not create a corporate body. But when the AMF Agreement was registered in the UAE by means of Federal Decree No. 35 that registration conferred on the international organisation legal personality and thus created a corporate body which the English courts can and should recognise. The expert evidence which I have quoted states that Federal Decree No. 35 conferred legal personality on the Fund and in the face of that evidence I cannot agree with Lord Lowry that the effect of the decree was only to recognise an international organisation.

The AMF Agreement came into force on 13 February 1977 and the headquarters of the Fund were duly established at Abu Dhabi in the UAE. The first respondent to this appeal, Dr Hashim, was appointed Director-General of the Fund and occupied that position between 1977 and 1982. For the purposes of this appeal it must be assumed, as the Fund alleges, that while acting as Director-General of the Fund Dr Hashim stole about US $50m from the Fund and that the respondent banks enabled him to launder a substantial part of the money through numbered accounts. By a statement of claim served on 25 January 1989, the Fund sought to recover from the respondents the sums embezzled by Dr Hashim or the assets representing those sums. Dr Hashim, his wife and two sons, a Liechtenstein Anstalt which is the alter ego of Dr Hashim and the respondent banks applied to strike out the statement of claim. On 14 November 1989, Hoffmann J dismissed the applications. On 9 April 1990, the Court of Appeal (Lord Donaldson of Lymington MR and Nourse LJ, Bingham LJ dissenting) struck out the statement of claim "on the ground that the plaintiff lacked capacity to sue." The Fund now appeals.

Although a treaty cannot become part of the law of the United Kingdom without the intervention of Parliament, the recognition of foreign states is a matter for the Crown to decide and by comity the courts of the United Kingdom recognise a corporate body created by the law of a foreign state recognised by the Crown.

As early as 1728 in an action begun by the Dutch West India Company, the defendants argued unsuccessfully in this House:

> . . . that no recognisance in England could be given to this generalis privilegiata Societas Belgica ad Indos Occidentales negotians, for that the law of England does not take notice of any foreign corporation, nor can any foreign corporation in their corporate name and capacity maintain any action at common law in this kingdom, and therefore the recognisance was void in law: *Henriques and others* v. *The Dutch West India Co* (1728) 2 Ld Raym 1532 at 1535.

In that case judgment was recovered by the Dutch company by producing in evidence the proper instrument whereby according to the law of Holland they were effectually created a corporation there. In the present case the Federal Decree with the Articles of Agreement annexed suffices to prove incorporation of the Fund in the UAE.

In *Lazard Bros* v. *Midland Bank* [1933] AC 289, Lord Wright said at p. 297:

English courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations.

In *Gasque* v. *CIR* [1940] 2 KB 80, Macnaghten J held that a limited company was capable of having a domicile. Its domicile is the place of its registration and that domicile clings to it throughout its existence. In the present case the domicile and residence of the Fund were clearly in the UAE at the headquarters of the Fund from which the Fund operated.

In *Kuenigl* v. *Donnersmarck* [1955] 1 QB 515, McNair J at p. 535 accepted that the domicile of a limited company was the place of registration or the country in which it was incorporated and that "in so far as nationality can by analogy be applied to a juristic person, its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality: . . ."

In *Chaff and Hay Acquisition Committee* v. *J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375, a committee of four persons created under a statute of South Australia to acquire property in its collective name and to sue and be sued in its collective name, was held by the High Court of Australia not to be a corporation but though unincorporated it was a legal entity in South Australia and as such was entitled to recognition outside the state in accordance with the principle of the comity of nations. McTiernan J said succinctly at p. 390: "The courts of one country give recognition, by a comity of nations, to a legal personality created by the law of another country." The courts of the United Kingdom can therefore recognise the Fund as a legal personality created by the law of the UAE.

It was submitted on behalf of the respondent banks that the Fund was created a legal personality not only by the UAE but also by the other 20 states who were parties to the AMF Agreement. Therefore, it is said, there are 21 legal personalities and it is not clear whether Dr Hashim embezzled the money of the UAE Fund or the money of a Fund established by some other Arab state. My Lords, though the Fund was incorporated by 21 states and has multiple incorporation and multiple nationality there is only one Fund with its head office in Abu Dhabi, one Board of Governors, one Executive Board of Directors and one Director-General. The domicile and residence of the Fund are in the UAE and nowhere else. Dr Hashim was appointed by the Board of Governors of the Fund as Director-General of the Fund and stole the money belonging to the Fund. It was argued that the Fund as incorporated in Iraq, for example, might be different from the Fund as incorporated in the UAE and that the Iraqi Fund might even sue the UAE Fund. But there is only one Fund to which each of the member states accorded legal personality. No one can bring an action to recover the money of the Fund in any part of the world except the one duly authorised Director-General. The Articles of Agreement which were annexed to the federal decree of the UAE and which thus became part of the law of the UAE are no different from the memorandum and articles of a limited liability company established under the law of England.

It is beyond dispute that if the Fund had been incorporated in the UAE and nowhere else the Fund would have been recognised in this country as a legal personality. If the Fund has been incorporated not only in the UAE but also in a number of friendly

foreign states recognised by the government of this country, it still has legal personality and is capable of suing in this country.

The evidence by affirmation of Dr Faquih, the present Director-General of the Fund, is that the Fund holds assets and has incurred liabilities in its own name in every part of the world. The Fund has in its own name deposits in the London market which at 30 June 1989 exceeded US $235m. The Fund has brought proceedings in different parts of the world. It may safely be assumed that no one except Dr Hashim and the other respondents has doubted that the Fund is a separate corporate entity or has conceived the fanciful notion of the existence of more than one Fund.

The deposits of US $235m must belong to someone entitled to sue for them and recognisable by the English courts. The deposits cannot belong to an unincorporated association composed of Arab states and cannot belong to Arab states jointly and severally consistently with the AMF Agreement which is part of UAE law. The deposits do not belong to the individuals who made the deposits in the name of the Fund. Deposits do not belong to 21 different Funds; they belong to the one and only Fund. It would be perverse of the English courts to pretend that there is any insuperable difficulty in identifying and recognising the Fund which owns the deposits of US $235m and is entitled to recover from Dr Hashim the money which he has embezzled.

In 1978 (see *The British Yearbook of International Law 1978*, pp. 346–348) the advice of Her Majesty's Government was sought with regard to the status of:

> . . . banks and other financial entities set up by a group of foreign sovereign states by a treaty (to which the United Kingdom is not a party), empowering them, expressly or by implication, to engage in banking, financial or other trading activities in member and non-member states and conferring on them, by virtue of the treaty, any related agreements and any necessary implementing legislation, legal personality in one or more states outside the United Kingdom, and, in particular, under the law of one or more member states or the state wherein the entity concerned has its seat or permanent location.

The reply from the Foreign and Commonwealth Office was that:

> In these circumstances, and on the assumption that the entity concerned enjoys, under its constitutive instrument or instruments and under the law of one or more member states or the state wherein it has its seat or permanent location, legal personality and capacity to engage in transactions of the type concerned governed by the law of a non-member state, the Foreign and Commonwealth Office, as the branch of the executive responsible for the conduct of foreign relations, would be willing officially to acknowledge that the entity concerned enjoyed such legal personality and capacity, and to state this.

It seems to me that it would be unthinkable for the courts of the United Kingdom applying the principles of comity to reach any other conclusion. It will be observed that the reply of the Foreign and Commonwealth Office stipulates that the international organisation for which recognition is sought must have acquired legal personality and capacity under the laws of one or more member states or the state wherein it has its seat or permanent location. This requirement is necessary because the courts of the United Kingdom cannot enforce treaty rights but they can recognise legal entities created by the laws of one or more sovereign states. A treaty cannot create a corporation

but a sovereign state which is party to a treaty can, in pursuance of its obligations accepted under the treaty, create a corporation which will be recognised in the United Kingdom. A member state can create a corporation by signing and ratifying the treaty if in that member state a treaty is self-executing and becomes part of domestic law on signature and ratification. Another member state, such as the UAE, can only create legal personality by the legislative process which was adopted in the case of the AMF Agreement. In the present case the Fund was given legal personality and capacity by the law of the state wherein it has its seat or permanent location. There is every reason why the Fund should be recognised as a legal personality by the courts of the United Kingdom and no reason whatsoever why recognition should be withheld.

Hoffmann J rejected the arguments advanced on behalf of the respondents and said this:

> Extending our conflicts rule to international organisations seems to me sensible and practical. The rule as it applies to entities created by foreign domestic laws is based on the inconvenience of having legal entities which exist in one country but not in another. International organisations set up by foreign states do exist in fairly substantial numbers, trade with this country and bank in the City of London. They are invariably recognised as juridical entities by the domestic systems of the parties to the treaty as well as by many other countries. [[1990] 1 All ER 685 at 688]

Bingham LJ in his dissenting judgment in the Court of Appeal reached the same conclusion and commented:

> In suing as a juridical person the AMF does not depend on a status derived from a non-justiciable treaty but on a status conferred by the law of a friendly foreign sovereign.

The majority of the Court of Appeal would, I think, have been disposed to accept the same result, but felt inhibited by observations made in this House in *Rayner* v. *Department of Trade* [1990] 2 AC 418 ("the *Tin* case"). That case concerned the International Tin Council ("ITC"), an international organisation established by a treaty to which the United Kingdom Government was a party. The treaty provided that the ITC should have legal personality including the capacity to contract, to acquire and dispose of property and to institute legal proceedings. The headquarters of the ITC were established in the United Kingdom. An Order in Council made pursuant to the International Organisations Act 1968 expressly conferred on the ITC "the legal capacities of a body corporate." The ITC became insolvent and some of the creditors sued the United Kingdom and other member states who had been parties to the treaty, alleging, on a variety of grounds, that the member states were liable for the debts of the ITC. This House held that the member states were not liable for the debts of the ITC. The Order in Council had created the ITC in English law as a separate legal person. Under English law the members of a corporation or other separate legal person are not liable for the debts of the corporation or other legal person unless statute so provides. There was no such statutory provision relating to the ITC. The treaty was not effective to impose on the United Kingdom or other member states an obligation to pay the debts of the ITC because a treaty cannot alter English law and because the English courts have no power to enforce treaty obligations. The *Tin* case left untouched the

principle that the recognition of a foreign state is a matter for the Crown and the principle that, if a foreign state is recognised by the Crown, the courts of the United Kingdom will recognise the corporate bodies created by that state. In the *Tin* case the Tin Council was created a corporate body by the Order in Council. The USA were not a party to the ITC Treaty and did not altogether approve of its functions. But the USA nevertheless recognised the ITC as a corporate body once it had been created by the United Kingdom.

I have read the extracts from the speeches in the *Tin* case which are cited by Lord Lowry. I can find nothing in those extracts which support the argument that Federal Decree No. 35 only recognised an international organisation and did not create the Fund a corporate body. In my opinion the decision in the *Tin* case is inconsistent with the argument. The *Tin* case reaffirmed that the English courts can only identify and allow actions by individuals, sovereign states and corporate bodies. The *Tin* case reaffirmed that the English courts cannot identify and allow actions by international organisations which sovereign states by treaty agree to bring into existence. The *Tin* case decided, however, that the international organisation called the ITC had been created a corporate body by the English Order in Council. No one disputed the right of the ITC based on the English Order in Council to bring an action. In the present case the English courts cannot identify and accept the right to sue of an international organisation which sovereign states by the AMF Treaty agreed to create. But the English courts can identify and accept the right to sue of a corporate body created by a sovereign state pursuant to the obligations accepted by that state in the treaty. In the *Tin* case there was the ITC Treaty, followed by the Order in Council which created the ITC a corporate body. In the present case there is the AMF Agreement, followed by Federal Decree No. 35 which created the Fund a corporate body. Her Majesty's Government, through the Foreign and Commonwealth Office, has expressed its willingness to recognise an international organisation which has been incorporated by a foreign sovereign state. In my opinion there is every reason why the English courts should take the same course.

In his judgment in the present case, declining to recognise the Fund as a legal entity, Lord Donaldson of Lymington MR cited [1990] 2 All ER 769 at 774, the following passage from my speech in the *Tin* case [1990] AC 418 at 478:

> Consistently with the treaty, the United Kingdom could not convert the I.T.C. into a *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 . . . a body incorporated under the laws of the United Kingdom.

In the *Tin* case there was UK legislation which clothed the ITC with legal personality. In the present case the federal decree clothed the Fund with legal personality. Lord Donaldson also cited passages from the speech of Lord Oliver of Aylmerton [1990] AC. These passages extracted and amassed from a lengthy speech deal with different issues and different facts. Lord Oliver was only concerned to rebut the contention that the member states were liable for the debts of the ITC; he concluded that any such

liability could only derive from the treaty and that English courts could not enforce treaty rights and obligations. It is true that Lord Oliver parenthetically referred to the ITC "which, as an international legal persona, had no status under the laws of the United Kingdom." But no argument based on incorporation by one or more foreign member states was relevant or canvassed in the *Tin* case.

Lord Donaldson relied on passages from the speech of Lord Oliver of Aylmerton at [1990] AC 418 at pp. 503A, 505D-E, 506C-E, 510B and 510F-511A. The passages at pp. 503, 505 and 506 dealt with the meaning and construction of the Order in Council not relevant for present purposes. The passages at 509, 510–511 dealt with the arguments that the Order in Council only recognised the ITC as an existing international entity created by treaty, that the treaty could be examined to discover whether the member states had accepted liability for the debts of the ITC and that any such discovered liability could be enforced by the English courts. This argument was based by analogy on the accepted rule that the English courts will recognise a foreign corporate body and refer to the law of the state which created the foreign corporate body. It was argued that the Order in Council recognised an international corporate body and that the English courts could refer to the treaty which created the international corporate body. Lord Oliver rejected these arguments because the Order in Council created and did not merely recognise the ITC as a legal entity and the courts could not enforce a liability of the member states created by treaty. The ITC is not a body "which owes its existence to a foreign system of law but one which is created by the United Kingdom legislation;" [509G]. "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" the treaty; [510H]. In the present case the Fund does owe its existence to a foreign system of law, namely, UAE law and was not created by UK legislation. The AMF Agreement has been made part of UAE law. In those circumstances the English courts can recognise the Fund as a foreign corporate body.

There is no uniform practice with regard to international organisations in this country. In some cases, as in the *Tin* case, the organisation is given corporate capacity by means of an Order in Council issued under the International Organisations Act 1968 or its predecessors. In other cases provisions of the treaty agreeing to the establishment of the international organisation are declared by Parliament to have the force of the law. This was done, for example, by the Bretton Woods Agreements Act 1945 and the Bretton Woods Agreements Order in Council 1946. In other cases, principally, but not exclusively, cases where the United Kingdom is not a party to the Treaty, no legislative steps are taken in the United Kingdom but this does not debar Her Majesty's Government from recognising the international organisation and does not debar the courts of the United Kingdom from recognising the international organisation as a separate entity by comity provided that the separate entity is created not by the treaty but by one or more of the member states. This is the position of the Fund.

The majority of the Court of Appeal acknowledged that the conclusion which they reached was profoundly unsatisfactory and invited Parliament in effect to overrule them. My Lords, a decision of this House that the assets of the Fund do not belong to a body recognisable in the United Kingdom would cause great dismay

and uncertainty. The decision would affect other international organisations. The enactment of legislation could not repair the damage caused by the decision.

Dr Hashim did not venture to appear in the Court of Appeal or before this House. The respondent banks, through counsel, claim that Dr Hashim is invulnerable and that the Fund does not exist in the United Kingdom. Nevertheless, the banks contend, the Fund had employed Dr Hashim in the UAE, he has been sued by the Fund in the UAE and Switzerland and elsewhere for embezzlement and it was not now open to 21 Arab states or 21 Funds to sue him in this country for the same embezzlement: *Chaplin* v. *Boys* [1971] AC 356. No one, it is said, can sue him and retrospective legislation could not and would not affect his invulnerability.

My Lords, I see no reason for concluding that no one can sue Dr Hashim or the other respondents in this country. The status of an organisation incorporated by a foreign state is recognised by the courts of the United Kingdom. The status of an international organisation incorporated by at least one foreign state should also be recognised by the courts of the United Kingdom. I would allow the appeals and restore the order of Hoffmann J. The respondents must pay the costs of the Fund in the Court of Appeal and before this House.

Lord Griffiths

My Lords,

For the reasons given in the speech of my noble and learned friend, Lord Templeman, with which I agree, I would allow the appeal and restore the order of Hoffmann J.

Lord Ackner

My Lords,

I have had the advantage of reading in draft the speech my noble and learned friend, Lord Templeman, and for the reasons he gives I would allow the appeal and restore the order of Hoffmann J.

Lord Lowry

My Lords,

The Arab Monetary Fund ("the Fund") is, as Hoffmann J said ([1990] 1 All ER 685, 687h), an international banking organisation with its headquarters in Abu Dhabi, which is a part of the federation known as the United Arab Emirates ("UAE"). The Fund was established by a treaty signed on 27 April 1976 by 20 Arab states, including the United Arab Emirates, and Palestine (the status of which country need not for present purposes be considered). I refer to the English version of certain of the Articles of the treaty which formed the constitution of the Fund:

2. The Fund shall have an independent juridical personality and shall have, in particular, the right to own, contract and litigate.

3. The Head Office of the Fund shall be located in Abu Dhabi city in the United Arab Emirates, and it may establish agencies and offices under a decision issued by the Board of Governors.

41. (a) All properties and assets of the Fund, wheresoever located and by whomsoever held in the member countries, shall enjoy immunity against all types of precautionary measures pending issue of a final legal judgment against the Fund by a body of competent jurisdiction under the provisions of Article 53.

(b) The properties and assets of the Fund, wheresoever located and by whomsoever held in the member countries, shall enjoy immunity against search, requisition, confiscation, expropriation, or similar coercive measures by executive or legislative authority.

(c) The papers, records and documents of the Fund, wheresoever located and by whomsoever held, shall enjoy immunity in member States.

48. (a) A member shall not be responsible, by virtue of its membership, for liabilities of the Fund which are not within the limits prescribed in this agreement.

53. Legal action may be brought against the Fund in a court of competent jurisdiction in the state where its head office is located. . . .

From January 1977 until May 1982 Dr Jawad Hashim was the director general of the Fund, which commenced proceedings in the Chancery Division of the High Court against Dr Hashim based on the alleged misappropriation by him of over US $50 m from the Fund. His co-defendants included his wife and two sons and four banks with whom he is alleged to have deposited the money. The defendants applied to strike out the statement of claim on the ground that the Fund lacked the capacity to sue in an English court. Hoffmann J dismissed the application but the Court of Appeal by a majority (Lord Donaldson of Lymington MR and Nourse LJ, Bingham LJ dissenting) reversed him and struck out the action. The Fund has appealed with the leave of the Court of Appeal.

Before Hoffmann J the Fund put its case in two ways. The first was that English conflict of law rules recognise the existence of legal entities constituted under international law just as it recognises those constituted under foreign systems of domestic law. The second was that the Fund had been constituted under a system of domestic law, namely that of its headquarters in the state of Abu Dhabi (or that of the UAE—I think the distinction is immaterial) and should therefore be recognised as an ordinary foreign juridical entity. Initially the judge was more attracted by the Fund's first point. He reserved judgment pending the delivery of judgment by your Lordships' House in *Rayner (JH) (Mincing Lane) Ltd* v. *The Department of Trade and Industry* [1990] 2 AC 418 ("the *Tin* case") and after hearing further argument, which included a concession by counsel for the Fund (with which the judge agreed) that the *Tin* case judgments made the first point untenable, held that the Fund's second submission succeeded and dismissed the defendants' application.

Mr Pollock, for the Fund, has at each subsequent stage of the litigation resolutely adhered to his concession, and rightly so, in my opinion. Accordingly, if I refer to the state of the law affecting the first point, it will be for the purpose of illustrating and supporting my view of the second point, on which the Fund succeeded before Hoffmann J but were defeated in the Court of Appeal.

The governing principle is expressed in the form of Rule 171 in Dicey and Morris, *Conflict of Laws*, 11th edition at p. 1128:

The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England.

The question is whether, in the events which have happened, the Fund is a foreign corporation duly created under the law of the UAE. It is necessary to look at the facts and also at the evidence about the law of the UAE which is itself a question of fact.

I go first to the affirmation of Taj Elsir Hamza who, as appears from paragraph 1, has the highest legal qualifications and has been since July 1972 Legal Adviser in the Ministry of Foreign Affairs of the UAE and is responsible for all legal work concerning the Ministry including constitutional and international matters, especially matters relating to treaties, conventions and protocols. He states that he has no doubt that the Fund "has separate independent personality under th law of the U.A.E.". The UAE is a federation of seven Arab emirates, including the emirate of Abu Dhabi, to all of which the Provisional Constitution has applied since 10 February 1972. Article 120 of the constitution provides that the federal authorities shall have exclusive legislative and executive authority in respect of the foreign affairs of the UAE. Under the constitution treaties made by the UAE become binding on and within the UAE after (a) confirmation by the Council of Ministers, (b) ratification by decree by the Supreme Council (c) signature and promulgation of the decree by the President, and (d) publication of the decree. All these steps have occurred, with the result that:

The provisions of the Articles of Agreement became binding within the U.A.E. (see article 44 of the Constitution), obliging the U.A.E. authorities, including the Judiciary and all U.A.E. inhabitants, to observe and give effect to those provisions (including Article 2 of the Articles of Agreement). By that means the A.M.F. had conferred on it by publication of Federal Decree No. 35 independent legal personality and the capacity to sue and be sued in U.A.E. law.

The decree ("Decree No. 35") provided:

1. The Arab Monetary Fund Agreement which was signed in the City of Rabat in the Kingdom of Morocco on the day of Tuesday the 27th of the month of Rabi El-Akhar the year of 1396H corresponding to 27th of Nisan "April" 1976 was approved. The text is attached to this Decree.

2. All Ministers in so far as each is affected shall implement this Decree and it shall be published in the Official Gazette.

Your Lordships will have noted Mr Hamza's statement that the Fund:

. . . had conferred upon it by publication of Decree No. 35 independent legal personality and the capacity to sue and be sued in U.A.E. law.

That, I suggest, is the result which one would expect from the steps which Mr Hamza has described and is something not consistent with the Fund's being a foreign corporation duly created under the law of UAE I proceed to examine this proposition.

When Hoffmann J tackled the problem, the first question which he asked himself (at p. 688a) was "Does the Fund exist?". Describing the creation of the Fund, he observed that Article 2 of the Treaty constituted the Fund as a legal entity in international law and obliged the parties to accord it juridical personality in their domestic systems. Having reviewed the arguments relating to the recognition of the Fund as an international entity with a juridical personality and having observed that the *Tin* case, as my noble and learned friend Lord Templeman had said, raised "a short question of construction of the plain words of a statutory instrument", the judge found that "the reasoning of their Lordships [in the *Tin* case] is inconsistent with the first submission of counsel for the Fund." He then drew attention to observations made by Lord Oliver of Aylmerton, who had said ([1990] 2 AC 418, 506C) that the effect of the 1972 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". The further cited observations of Lord Oliver were:

(1) at p. 510AB:

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 1972 Order in Council.

and (2) at p. 510D:

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.

Hoffmann J remarked, "These passages destroy the possibility of a common law conflict rule under which the courts can recognise the existence of an international organisation as such." He then considered the Fund's second submission, that the Fund should be recognised as an entity constituted under Abu Dhabi domestic law and said, "This route did not at first attract me because *the Fund is not an Abu Dhabi entity*. It is an international entity which had been accorded legal personality under Abu Dhabi law, . . ." (emphasis added). The judge's reasoning emerges at p. 691h:

But the consequence of the *International Tin Council* case, as I see it, is that I ignore the treaty and regard the fund as constituted under Abu Dhabi law as a separate persona ficta. As such, it is entitled to recognition as a domestic entity under ordinary conflicts rules: *cf. Chaff and Hay Acquisition Committee* v. JA *Hemphill & Sons Pty Ltd* (1947) 74 CLR 375. I am able to reach this conclusion because the United Arab Emirates happens to have passed legislation conferring juridical personality on the Fund.

(The words "conferring juridical personality" should be noted.)

The defendants argued that, in the case of an international organisation, the

legislation *conferred* personality under the law of a member state. The judge met that point by saying at p. 692b:

But since the international entity *has no existence*, (emphasis supplied) I do not see how I can take it into account as a ground for refusing recognition to what is plainly a legal entity under the law of Abu Dhabi.

The appeal from Hoffmann J is reported at [1990] 1 All ER 769.

The reasoning of Bingham LJ on the second point is also worthy of notice. First, he did not think that the ruling of this House in the *Tin* case required the court to ignore the Fund agreement altogether. Then he accepted part of the defendants' submission, namely, that the effect of the evidence of UAE law was not that the Fund as an international organisation had "no existence" in the UAE, nor that the UAE created a domestic entity distinct from it, nor that the constitution of the Fund was governed by UAE law. He also observed at p. 781h:

But the evidence is clear and uncontradicted that the decree (not, be it noted, the Arab Monetary Fund Agreement) *conferred on the Fund legal personality* (emphasis added) and the capacity to sue and be sued in the law of the United Arab Emirates. The effect of the decree was, I think, similar to that of the 1972 order which the House of Lords considered in the *International Tin Council* case: in each case a municipal instrument authorised by its local constitutional arrangements conferred legal personality on a body which in English law (and, it would seem, the law of the United Arab Emirates) would otherwise have been regarded as lacking independent existence because the creature of a non-justiciable treaty.

The Lord Justice continued at p. 781j:

The false analogy on which the judge was said to have relied was in treating the Fund, by virtue of the decree, as a domestic entity of the United Arab Emirates when (it was said) the House of Lords had not treated the 1972 order as converting the International Tin Council into a domestic United Kingdom entity. I accept that their Lordships did not treat the 1972 order as creating a domestic United Kingdom entity.

He then referred to what Lord Templeman had said in *Tin* at [1989] 3 WLR 969, 982. I quote from [1990] 2 AC 418, 478:

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. (Emphasis added.)

He also referred to what Lord Oliver of Aylmerton had said at [1989] 3 WLR 969, 1007. I quote from [1990] 2 AC at p. 505:

But there were also, as [Kerr L.J.] 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 existence*. (Emphasis added.)

The Lord Justice continued at p. 782a:

In those passages their Lordships were concerned to rebut an argument that, if Parliament had intended to incorporate the International Tin Council, the familiar language of incorporation would have been used. But it would not of course be acceptable for one sovereign state, party to an international treaty, to hijack an organisation to which it and other states had given birth and subject it (contrary to the treaty terms) to its own domestic jurisdiction. The House of Lords were at pains to point out that the 1972 order had not purported to do that. Nor, as I think, did the decree purport to do that.

Continuing the discussion, the Lord Justice then said at p. 782d:

Neither the 1972 order nor the decree created a domestic corporation but each was effective to confer legal personality in its respective municipal law on a body which would otherwise have lacked it.

A little further on (at p. 782j) having referred to rules 171 and 174 of Dicey and Morris, he concluded his judgment:

It is of course true that the fund is not an ordinary domestic entity, indeed not (for the reasons already given) a domestic entity properly so called at all. But in suing as a juridical person the fund does not depend on a status derived from a non-justiciable treaty but on a status conferred by the law of a friendly foreign sovereign. Comity would seem to require that the United Kingdom recognise the fund by virtue of Decree No. 35 as the United Kingdom would doubtless wish the United Arab Emirates to recognise the International Tin Council by virtue of the 1972 order (as, it appears, the Supreme Court of the State of New York did, although the United States was not a party to the Sixth Tin Agreement: see the *International Tin Council* case [1988] 3 All E.R. 257, at 297, [1989] Ch. 72 at 172). If the fund is to be held disentitled to sue as a juridical person, it must be by virtue of some exception to rule 174. It is not suggested that any such exception now exists. I do not think legal principle points towards making such an exception. If policy considerations are relevant, they point strongly against making such an exception. These policy considerations were discussed in the 1978 correspondence already referred to, and they seem to me no less powerful today. Her Majesty's government, who have (we are told) been fully informed of this litigation, have not sought to qualify or correct the statements made in 1978. Given the importance of the City of London as a financial and commercial centre, I would regret it if I were obliged to hold that the fund as a juridical person could not sue and be sued in respect of transactions into which it had entered as such. Happily, and despite the contrary view of Lord Donaldson M.R. and Nourse L.J., which I have considered with care, I do not feel myself so obliged.

In my judgment the banks' challenge to the decision of Hoffmann J. fails. I would for my part dismiss this appeal.

(The reference to Her Majesty's Government recalls the correspondence between the deputy governor of the Bank of England and the Minister of State, Foreign and Commonwealth Office, which is set out by Hoffmann J at [1990] 1 All ER p. 690 but which does not purport to be a statement of the law.)

Before looking at the judgments of the majority in the Court of Appeal it may be helpful to record three points:

(1) At common law, with due respect to learned writers who have sought to maintain a different view, international organisations set up by treaty are not recognised as having legal status in our courts. Parliament's response to the emergence of such organisations was to pass a series of Acts starting with the Diplomatic Privileges (Extension) Act 1944. Statute law now recognises international organisations as having juridical personality in three instances. The International Organisations Act 1968, in regard to an organisation of which the United Kingdom and any other sovereign power are members, and also in regard to an organisation of which two or more sovereign powers (but not the United Kingdom) are members and which maintains or proposes to maintain an establishment in the United Kingdom, gives power to Her Majesty by Order in Council to *"confer on the organisation the legal capacities of a body corporate"* and also to confer certain privileges and immunities (consisting, in regard to the second type of organisation, of exemption from tax). I draw attention to the words which I have emphasised above: see sections 1(2)(a) and 4(a) of the 1968 Act. A third recognised class consists of those international organisations which have been the subject of special Acts such as the Bretton Woods Agreements Act 1945 and the International Sugar Organisation Act 1973. Viewed as an international organisation, the Fund belongs to a fourth class, which continues to have no legal standing.

(2) The commentary on Rule 171 in Dicey and Morris begins as follows (p. 1128):

A corporation duly created in a foreign country is to be recognised as a corporation in England, and accordingly foreign corporations can both sue and be sued in their corporate capacity in the courts. Whether a corporation has been dissolved must be determined by the law of its place of incorporation for *the will of the sovereign authority* which created it can also destroy it. (Emphasis added.)

(3) Rule 174 in Dicey and Morris is as follows:

(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.

In the Court of Appeal Lord Donaldson of Lymington MR observed at p. 774b that the *Tin* case was concerned with the extent to which the 1972 Order in Council had invested the ITC with a separate personality distinct from its constituent members (the members being the sovereign states which had set up the ITC). He cited the passage already mentioned from Lord Templeman's speech at [1990] 2 AC 478, but began a few words earlier than Bingham LJ:

Consistently with the treaty, the United Kingdom could not convert the I.T.C. into a *United Kingdom* organisation.

He cited the same passage as Bingham LJ from the speech of Lord Oliver of Aylmerton at [1990] 2 AC 505 and added without direct comment further quotations from pp. 506 and 510 to which I shall refer below. He then said (at p. 775 e,f):

As I see it, absent an Order in Council, an international organisation is something which, in the eyes of English law, is as much a fact as a tree, a road or a hill. But it is not a person and the law can only deal in the rights and liabilities of persons. Once it is touched by the magic wand of the Order in Council it becomes a person, but one which is quite unlike other persons. Self-evidently it is not a natural person. But equally it is not a United Kingdom juridical person; nor is it a foreign juridical person. It is a person *sui generis*, which has all the capacities of a United Kingdom juridical person, but is not subject to the controls to which such a person is subject under United Kingdom law.

And, having cited the material portion of Hoffmann J's judgment, he continued at p. 776j:

The basic fallacy of this judgment, as I see it, is that Hoffmann J. thought that the judgment in the *International Tin Council* case required him to ignore the treaty. Lord Oliver in the *International Tin Council* case [1989] 3 All E.R. 523 at 545, [1989] 3 W.L.R. 969 at 1002 stated an exactly contrary proposition. Treaties may be looked at where they are incorporated into English law by Act of Parliament, where an Act of Parliament is enacted in order to give effect to the United Kingdom's obligations under a treaty and where parties have entered into a domestic contract in which they have chosen to incorporate the terms of a treaty. What the courts cannot do is to have regard to a treaty as a source of rights and obligations.

It seems to me to be wholly consistent with Lord Oliver's approach to have regard to the Arab Monetary Fund Agreement, not as creating rights and obligations enforceable by the English courts, but as casting light on, and indeed determining, the true nature of the independent juridical personality which exists under the laws of the signatory states, including Abu Dhabi and the United Arab Emirates, and under the laws of any other states which adopt the same approach as Swiss law. It was common ground that the recognition of the fund by Swiss law as a juridical person formed no basis for the English courts to treat it as such in accordance with r 171 in *Dicey and Morris*. I can see no reason why the English courts should adopt a different attitude towards the Abu Dhabi and United Arab Emirates manifestation of the fund and a "manifestation" is what it is: a persona ficta designed solely to give tangibility and visibility to something which would otherwise be intangible and invisible in the eyes of the law. This is wholly different from a foreign municipal juridical person whose existence is fully recognised under English law.

Nourse LJ, concurring, pointed out that, as long as the majority judgment of the Court of Appeal in the *Tin* case held sway (but, in my respectful view, not before or since) the Fund could have got home on Hoffmann J's first point. He conceded, however, that the Fund could now only succeed on the second point, if at all, and then found himself obliged, but "without enthusiasm", to reject that solution also, because (p. 778h):

It would be inconsistent with what the House of Lords has held to be the policy of our law

if we were to recognise an international organisation constituted as a persona ficta under some other municipal law when, without such a constitution, we cannot recognise it for itself.

Other extracts from Lord Oliver's speech in the *Tin* case, on which I shall comment presently, are as follows:

p. 506C

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.

p. 510B

Those contracts were effected by the separate persona ficta which was created by the Order in Council.

p. 510D-H

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 person 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.

Mr Sumption's main argument for the respondents, put in skeleton form (I hope I do justice to his clear submissions) is this:

(1) English law as the lex fori determines what kind of bodies may sue here. Foreign law (in this case UAE law) is relevant only for the purpose of discovering whether the Fund is such a body: Dicey and Morris pp. 176–7.
(2) In English law only a legal person (natural or fictional) may sue: *Lazards* v. *Midland Bank* [1933] AC 289, 296–7.

(3) The question here is not the Fund's capacity to sue, as viewed in the UAE. It needs to be a permissible plaintiff in the UK according to the lex fori. Rule 174 is irrelevant. See also *Von Hellfeld* v. *Rechnitzer* [1914] 1 Ch. 748.
(4) The relevant principle is Rule 171. To sue here, the Fund needs to have been created under UAE law.
(5) The court here cannot take notice of international law and the law of the UAE did not create the fund. That is why (in a case which fits into its provisions) the International Organisations Act 1968 is needed.
(6) Bingham LJ wrongly considered that the question is concerned with the Fund's capacity and that the respondents were contending for an exception to Rule 174. He failed to ask whether UAE law had created the fund; if he had asked that question, it appears that he would have answered No.
(7) His conclusion could be right only if there were a principle that English courts are bound to recognise the existence of a separate juridical persona when another law (in this case UAE law) has *recognised* it, regardless of whether that other law has *created* it; that proposition is contrary to both principle and authority: *Banque de Petrograd* v. *Goukassow* [1923] 2 KB 682.

I accept those arguments, and I will also attempt my own analysis of the material which I have set out above.

When the principle of Rule 171 was first stated, it was dealing with corporations created in a foreign state in the ordinary way. One must therefore scrutinise critically the proposition that the Fund, originally created by an international agreement as an international organisation, is covered by Rule 171 (which of course is a common law principle, and not an ordinance). The argument (or at least *an* argument) that the Fund is so covered is that, despite being an international organisation to which the treaty or agreement gives an independent juridical personality and the right to own, contract and litigate, the Fund had no legal existence in the law of the UAE without Decree No. 35. Therefore, says the plaintiff, that decree *created* in the eyes of UAE law a juridical corporate person where before the decree there was nothing, even though in ordinary language there was, and still is, an entity known as the Fund which had already been brought into existence by the treaty.

I have adverted in some detail to the judgment of Hoffmann J. It may fairly be said that he turned to the advantage of the plaintiff the proposition extracted from the *Tin* case (which disposed of the plaintiff's first point) namely, that, being an international organisation, the ITC had no status under UK law. Your Lordships will recall that the judge, referring to the plaintiff's second point, said, "This route did not at first attract me because the Fund is not an Abu Dhabi entity. It is an international entity which has been accorded legal personality under Abu Dhabi law . . . the consequence [of the *Tin* case], as I see it, is that I ignore the treaty and regard the Fund as constituted under Abu Dhabi law as a separate persona ficta . . . I am able to reach this conclusion because the [UAE] happens to have passed legislation conferring juridical personality on the Fund." And when the defendants relied on the fact that UAE law *conferred* personality on the Fund, the judge, as I have reminded your Lordships, said:

But since the international entity has no existence, I do not see how I can take it into account as a ground for refusing recognition to what is plainly a legal entity under the law of Abu Dhabi.

I respectfully concur in Lord Donaldson's view (which I have referred to above) that it was fallacious to think that this House's judgment in the *Tin* case required the judge in this case to ignore the treaty and the existence of the Fund as an international entity.

Since the point is closely related, I now come back to the observations (which were noted both by Hoffmann J and by Lord Donaldson) of Lord Oliver of Aylmerton in the *Tin* case at pp. 506C, 510B and 510D, (1) 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"; (2) speaking of the ITC's contracts, "Those contracts were effected by the separate persona ficta which was created by the 1972 Order in Council"; (3) that recognition [of the ITC] was "of no consequence in domestic law unless and until it is accompanied by the creation of a legal persona." Bingham LJ referred to another extract from Lord Oliver's speech in the *Tin* case at p. 505 where he spoke of "the expedient of creating a domestic corporation".

It would be easy to found on this language, coupled with the so-called "non-existence" of the international organisation, a theory that the entity in Abu Dhabi is a corporation *created* under Abu Dhabi law. But the facts which I have set out and the judicial comments thereon which I have noted show, in my opinion, the unsoundness of such a theory in its application to the Fund and also to the ITC.

Mr Hamza's evidence, it will be remembered, was that the Fund "*had conferred on it*" by publication of Decree No. 35 independent legal personality and the capacity to sue and be sued in UAE law. Bingham LJ observed that the decree "conferred on the Fund legal personality and the capacity to sue and be sued in the law of the [U.A.E.]." And at p. 782j he said:

It is of course true that the Fund is not an ordinary domestic entity, indeed not (for the reasons already given) a domestic entity properly so called at all.

When I consider the history of the ITC and what was said about it, the situation is similar. It was, like the Fund, an international organisation. Bingham LJ accepted that your Lordships' House in the *Tin* case did not treat the Order in Council as converting the ITC into a domestic entity or as creating a domestic United Kingdom entity. I have referred to what my noble and learned friend Lord Templeman said in the *Tin* case at p. 478:

Consistently with the treaty, the United Kingdom could not convert the I.T.C. into a United Kingdom organisation . . . Parliament conferred on the I.T.C. the legal capacities of a body corporate. The courts . . . 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.

And, speaking of the ITC, Lord Oliver said at p. 505:

. . . 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.*

Bingham LJ commented that it would not be acceptable for one sovereign state, party to an international treaty, to *hijack* an organisation to which it and other states had given birth and subject it (contrary to the treaty terms) to its *own domestic jurisdiction*. He added:

> The House of Lords were at pains to point out that the 1972 order had not purported to do that. Nor, as I think, did the decree purport to do that.

and continued:

> Neither the 1972 order nor the decree *created* a domestic corporation but each was effective to *confer* legal personality in its respective municipal law *on a body* which would otherwise have lacked it. (Emphasis added.)

It will not be forgotten by your Lordships that the power given to Her Majesty by the 1968 Act was by Order in Council to "*confer* on the organisation the legal capacities of a body corporate".

Against this background I suggest that the references in the *Tin* case to *creation* of a legal persona do not assist the plaintiff. When Lord Oliver said at p. 506c that "the effect of the Order in Council was to create the I.T.C. . . . a legal person in its own right", the object of the verb "create" was "the I.T.C.". One might as well have said that the effect was to *make* the ITC a legal person; in either case the primary sense of the word gives way in the context to the secondary sense, as when an existing person is "created a peer" or "made a judge".

Compared with the verbal usages I have noted, it is of paramount importance that neither the courts of the United Kingdom nor, I suggest, the courts of the UAE could wind up or dissolve the body on which the state had conferred legal status. As the commentary in Dicey and Morris shows (on the authority of *Lazard Bros* v. *Midland Bank Ltd* [1933] AC 289, 297), "the will of the sovereign authority which created [a corporation] can also destroy it." Therefore the status of both the ITC and the Fund is out of harmony with Rule 171.

I would now draw your Lordships' attention to another parallel between the ITC (whose seat was to be in London) and the Fund (whose headquarters were to be in Abu Dhabi). Article 16.4 of the Tin Agreement made between the member states provided that the status, privileges and immunities of the council in the territory of the host government were to be governed by a Headquarter Agreement between the host government and the ITC. The Headquarters Agreement was duly made: see [1990] 2 AC p. 493. Article 2 provided for interpretation of the Agreement "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 . . .". Article 3, entitled "Legal Personality", provided:

> The council shall have legal personality. It shall in particular have the capacity to contract, etc.

Article 8 provided generally for the council's *immunity from jurisdiction*. Paragraph (2) read:

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 also foreshadowed exemptions, privileges and immunities which were embodied in the schedule to the 1968 Act and in due course conferred (together with the legal capacities of a body corporate) by the Order in Council on the ITC, an existing international organisation, as I suggest must be obvious.

On 1 August 1977, *after* the decree had conferred legal personality on it, the Fund made an agreement with the UAE, known as the Protocol, which had an effect very similar to that of the Headquarters Agreement and the 1972 Order in Council. Its terms, only a few of which I shall mention, are typical of an agreement between an existing international organisation and a host government, and certainly do not put me in mind of a corporation created under UAE law. Article (2) protects the inviolability of the Fund's headquarters. By Article (4) the Government is to grant the Fund all facilities required to realise its objectives. Under Article (6) the resources of the Fund are not subject to search or confiscation. By Article (7) the Fund is not subject to any financial restrictions, legal laws or suspension of debt payment, or control of the right to transfer money from one country to another. There is complete exemption from tax and customs duties and diplomatic immunity. By Article (9) the Fund enjoys the Government treatment due to any governmental international organisation, including its diplomatic missions. By Article (13) employees of the Fund enjoy immunity from legal process and exemption from tax. Article (21) provides that: "Stipulations in this Protocol are explicated and applied in accordance with the international convention with respect to the privileges and immunities specified for international organisations and their employees." There is also provision for arbitration between the Fund and the Government and, failing agreement, for appointment of the arbitrators by the President of the International Court of Justice.

My Lords, I think it is clear that both ITC and the Fund, having started as international organisations created by agreements made under international law, continue as such with the addition of a legal personality and capacity which have been conferred on them by one or more member states. Like the ITC, the Fund is not a new creation under the law of the headquarter state; it is still an international organisation with a conferred capacity in that state. I also agree with the point made by Millett J. ([1987] Ch 419, 452D, cited at [1989] Ch 309, 330G):

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

Having said that, I am not much impressed by the respondents' argument that, if the plaintiff is right, there will be many potentially conflicting manifestations of the

Fund in different countries. The identity of the Fund's management, objects and assets ensures that this difficulty is not a real one. But I believe that the discussion on multiplicity highlights another point which helps the respondents: there *is* only one Fund (and one ITC), an international organisation which *may* have juridicial personality conferred on it in more than one state.

Despite the favourable reception accorded to the ITC in the State of New York, which I am not equipped to discuss, in my opinion it would not be correct to say that, by virtue of the 1972 Order in Council the ITC, in the absence of special legislation, can sue and be sued in a country (other than the UK) where the English common law is the lex fori.

I deal shortly with two authorities. The plaintiff relied on *Chaff and Hay Acquisition Committee* v. *J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375. There the High Court of Australia held that the courts of New South Wales should recognise the Committee as a judicial person created by the law of South Australia, notwithstanding that the Committee was not a corporation. But the Committee clearly *was* a domestic entity created under the law of South Australia and the problem confronting your Lordships did not arise.

I have already mentioned *Lazard Bros* v. *Midland Bank Ltd* [1933] AC 289. That case gives no support to the plaintiff. Quite the opposite, in fact, if one reads the observations of Lord Wright at p. 297.

I am unable to reconcile the plaintiff's proposition that the Fund can sue in the UK with the policy inherent in the International Organisations Act 1968, which not only restricts the classes of international organisations that can have legal personality conferred on them but makes the conferment subject to executive discretion and Parliamentary approval.

Before 1944 no international organisation, whatever its assets or trading interests might have been, would have enjoyed legal status in the courts of the United Kingdom. Now, by virtue of the legislation at present represented by the International Organisations Act 1968, the position has altered. But, even if regrettable, it need not be a matter for surprise if our legislation has not moved far enough or fast enough to embrace every international organisation. If the Fund cannot sue here and if that is an unacceptable result, it appears to me that the remedy is by way of legislation to amend the 1968 Act.

I would affirm the order of the Court of Appeal and dismiss the appeal with costs in this House.