OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 1 June 1989 *

Mr President,
Members of the Court,

1. The action for damages brought by Maclaine Watson & Company Limited (hereinafter referred to as 'Maclaine Watson') against the European Community arose from an apparently unprecedented situation: [1] the suspension of payments by an international organization, the International Tin Council (hereinafter referred to as 'the ITC').

2. On 24 October 1985 the Executive Chairman of the ITC decided to suspend the operations of the buffer stock because no more resources were available. That action brought about the collapse of the market in tin. The London Metal Exchange (hereinafter referred to as 'the LME') was obliged to suspend quotation of prices for tin which to this day appears not to have been resumed. (However, *The Times* of 1 June 1989 (p. 24), under the headline 'LME returns to tin trading', reported that trading is being resumed). The ITC's debts allegedly amounted at that time to some UKL 900 million.

3. From the information now available it appears that various attempts to reach an amicable settlement between the ITC and its members, on the one hand, and the ITC'S creditors, on the other, foundered in the months following the ITC's suspension of operations. The applicant, Maclaine Watson, a brokerage firm in the LME, had concluded 154 contracts with the ITC which to this day have not been performed.

4. Intensive litigation ensued between, on the one side, the various creditors of the ITC and, on the other, the ITC and the members thereof. [2] Without examining the various disputes in detail, it should be pointed out that until now — since the House of Lords has not yet delivered judgment on the question — the English courts have taken the view that the members of the ITC were not bound by its contractual debts having regard to the ITC's distinct legal personality. The Court of Appeal considered incidentally that for its part the Community could not claim immunity in that action.

5. Maclaine Watson obtained an arbitration award against the ITC. [3] It brought against the United Kingdom alone an action for payment of that sum which was dismissed on the ground that the ITC has distinct personality. [4] It also asked for a receiver [5] to be appointed, but the petition was dismissed, first by Judge Millett [6] and then by the Court of Appeal, [7] on the

* Language of the case: French.

1 — See, however, the decision of the Arbitration Tribunal of the International Chamber of Commerce of 3 March 1984, in the case of *Westland* v *Arab Organization for Industrialization, Arab Republic of Egypt and Other States*, ILM XXIII (1984), p. 1082; see also some of the examples given by I. Seidl-Hohenveldern in 'Responsibility of Member States of an international organization for acts of trust organization', studies in honour of Roberto Ago, Vol. III, 1987, pp. 427 to 428.

2 — A list of the main decisions to date is annexed.

3 — It would appear that Maclaine Watson obtained another arbitration award on 24 March 1986 which the ITC complied with on 21 April 1986.

4 — Judgment of 29 July 1987 *Maclaine Watson & Co. Ltd* v *Department of Trade and Industry and Others*, upheld by the Court of Appeal on 27 April 1988; the case is now pending before the House of Lords.

5 — Translator's note in other language versions — does not apply in English version.

6 — In a judgment of 13 May 1987.

7 — Judgment of 27 April 1988.

ground that the ITC's rights *vis-à-vis* its members resulted from the Sixth International Tin Agreement, which is outside the jurisdiction of the English courts. An appeal is pending before the House of Lords. Maclaine Watson did, however, obtain a court order[8] to the effect that the ITC should disclose full particulars of all its assets within the United Kingdom. Maclaine Watson has also obtained various orders freezing ITC's assets. At the hearing, finally, Maclaine Watson indicated to the Court that it had abandoned all its actions against the Community before the English courts.

6. It was during the period of application of the Sixth International Tin Agreement (hereinafter referred to as the 'Sixth Agreement') that the ITC suspended payments. The International Tin Agreements are multilateral agreements intended to provide for adjustment between world production and consumption of tin and to prevent excessive fluctuations in the price of tin. They are part of the Integrated Programme for Commodities adopted by the United Nations Conference on Trade and Development (Unctad).[9]

7. The two principal means provided in order to attain the objectives of those agreements are:

(a) intervention in the market by means of a buffer stock, financed by the members of the ITC and intended to keep the rates within a 'bracket' between a floor and a ceiling price set by the ITC;

(b) the possibility of imposing export controls on producing States.

8. The ITC was established in 1956 under the First International Tin Agreement and has been responsible ever since for the implementation of the various successive agreements.

9. Within the Council each member holds a fixed number of votes to which is added a number of votes in proportion to its production or consumption. It should be pointed out that Article 15 provides that in principle decisions are to be adopted by a simple distributed majority.[10]

10. The Council designates by a two-thirds distributed majority an independent Executive Chairman responsible to the Council and it is to him that the Manager of the Buffer Stock is responsible. The latter is appointed by the Council.

11. Article 16(1) of the Sixth Agreement provides as follows: 'The [ITC] shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings'. Moreover, a Headquarters Agreement relating to the status and privileges and immunities of the ITC was concluded between the ITC and the United Kingdom on 9 February 1979.

8 — 9 July and 18 December 1987, upheld by the Court of Appeal on 27 April 1988.

9 — See Opinion 1/78 of the Court of Justice of 4 October 1979, [1979] ECR 2871, on the International Agreement on Natural Rubber, in paragraphs 4 and 5 of which the Court examined the Integrated Programme and its objectives which are principally to improve market structures in international trade in commodities of importance to developing countries.

10 — That is to say by a simple majority of both the producing countries group and the consuming countries group.

12. There were 23 States [11] signatories to the Sixth Agreement, amongst which were the 10 States which were members of the European Economic Community at the time. The Community itself was also a signatory.

13. That joint participation is the result of the decision that the financing of the buffer stock fell to the Member States and not to the Community, thus requiring the participation of the former in accordance with Opinion 1/78 of the Court of Justice on the International Agreement on Natural Rubber in which the Court stated:

'The question of the exclusive nature of the Community's powers depends in this case on the arrangements for financing the operations of the buffer stock which it is proposed to set up under that agreement ... *If ... the charges are to be borne directly by the Member States that will imply the participation of those States in the agreement together with the Community.*' [12]

14. It should be noted that Article 56(1) of the Sixth Agreement provides expressly for the participation of 'intergovernmental organizations' and states that 'in the case of voting on matters within their competence, such organizations shall cast the number of votes equal to the total number of votes attributable ... to their member States, which in this case shall not cast their votes individually'.

15. The Sixth Agreement was negotiated during the conference on tin organized under the auspices of the United Nations between 1980 and 1981 and opened for signature on 3 August 1981.

16. The Council Decision on the signature and notification of provisional application of the Sixth Agreement was adopted on 31 March 1982. [13]

17. It should be pointed out that Article 55 of the Sixth Agreement provided that the definitive entry into force of the Agreement was conditional on the deposit, by 1 July 1982, of instruments of ratification, acceptance, approval or accession by governments of producing countries accounting for at least 80% of total production and by governments of consuming countries accounting for at least 80% of total consumption. [14]

18. Article 55(2) indicated that if, on the said date, the Agreement had not entered into force definitively, it was to enter into force provisionally if governments of producing countries and consuming countries accounting for 65% of total production and 65% of total consumption had deposited instruments of ratification, acceptance, approval or accession, or had given notification that they would apply the Agreement provisionally.

19. Finally, Article 55(3) provided that in the event that on 1 June 1982 the percentages required under Article 55(1) and (2) were not met, the Secretary-General of the United Nations was to invite those governments which had deposited instruments of ratification (etc.) to meet to decide whether the Agreement should enter into force definitively or provisionally among themselves, in whole or in part, on such date as they might determine.

11 — Australia, Indonesia, Malaysia, Nigeria, Thailand and Zaire, producing countries; Canada, Finland, India, Japan, Norway, Sweden, Switzerland and the 10 Member States of the Community, consuming countries.

12 — Cited above in footnote 9, at p. 2920, emphasis added.

13 — OJ L 342, 3.12.1982, p. 1.

14 — The percentages taken into account here are set out in Annex A to the Agreement (OJ L 342, 31.12.1982, p. 30).

20. According to Maclaine Watson, which was not contradicted on the point, by 1 June 1982 countries accounting for 82.24% of the total production of tin had signed the Agreement, but only countries accounting for 50.31% of total consumption.

21. It was thus on the basis of Article 55(3) of the Agreement that the decision was taken to bring the Sixth Agreement provisionally into force from 1 July 1982.

22. Much has been written [15] on the subject of the ITC crisis in an attempt to throw light on its deep-rooted causes. Maclaine Watson has prepared a study which it is essential to summarize the better to situate its legal arguments in context.

23. The Sixth Agreement was negotiated and concluded first of all against a structural background of overproduction of tin. Furthermore, during the course of 1980-81 speculative operations by a 'mystery' buyer caused a steep but artificial rise in prices and a consequent revision upwards of the ITC's floor and ceiling prices.

24. Consequently, by the date on which the Sixth Agreement entered into force provisionally, the ITC had already imposed export controls and built up a considerable stock of tin and it had substantial bank borrowings. Despite those measures, market prices for tin were below the floor price in London.

25. Furthermore, neither the United States, the world's major consumer, which also held considerable stocks available for sale on the market, nor major producing countries such as Bolivia and Brazil were signatories to the Sixth Agreement.

26. Hence export controls were bound to be ineffective since the producing countries party to the Sixth Agreement, which were the only producers bound by those controls, represented only 50 to 60% of world production. Such controls, while in any case liable to be circumvented by 'smuggling', reduced the export earnings of the ITC members concerned without affecting those of the non-member countries. Furthermore, under the Agreement, the ITC did not adopt measures to control production in consuming member countries [16] and the EEC opposed any decision of that sort.

27. In addition the Malaysian ringgit had been chosen to express the floor and ceiling prices, [17] although the ITC's operations on the LME were conducted in sterling. According to Maclaine Watson that meant that the efficacity of the ITC's operations was exposed to exchange-rate fluctuations which were clearly foreseeable when the

15 — See in particular 'Crise du Conseil international de l'étain et insolvabilite d'une organisation intergouvernementale', P. M. Eisenmann, AFDI, 1986, p. 781; Anderson, Gilbert: 'Commodity agreements and commodity markets; the lesson from tin', *The Economic Journal*, Cambridge, Vol 98, No 389, March 1988, pp 1 to 15; I Marques and P. N Giraud 'Tin the end of an agreement', Natural resources forum, London, Vol 11, No. 3, August 1987, pp. 207 to 218, Eric Mc Fadden 'The collapse of tin; restructuring a failed commodity agreement', *American Journal of International Law*, Vol 80, No 4, October 1986, p 811 to 830; B S. Chimni: 'International commodity agreements: a legal study', Croom Helm, 1987, Chapter 10, p. 197, U. Wasserman. 'Tin and other commodities in crisis', JWTL, Vol 20, 1986, p. 233

16 — Some countries, although consuming members of the ITC, also produce tin; the example is cited of the United Kingdom.

17 — Article 27(1) of the Agreement.

Sixth Agreement was negotiated. The ITC has never at any time exercised its power to alter the currency in which the floor and ceiling prices are expressed.

28. The Sixth Agreement was thus inherently defective when it came into force.

29. While the Agreement was in force, the ITC continually sought to maintain a floor price that was too high and could but attract more tin onto the market and thus reinforce the downward trend of market prices.

30. In those circumstances the buffer stock had a particularly heavy burden of responsibility to bear. It was, however, not granted the means to fulfil its task. First of all, quite apart from the fact that the resources provided for under the Sixth Agreement were inadequate, the full amounts had not been paid into the buffer stock because of the non-participation of some States in the Sixth Agreement. Finally, the majority of contributions to the stock had been made in the form of tin, not cash.

31. Additional funds should therefore have been made available to the buffer stock. On several occasions the Buffer Stock Manager drew the Council's attention to the risk of the total collapse of the ITC. In March 1984 he indicated that resources by way of contributions had been exhausted and that the stock could continue to operate only on borrowed money. In that regard the Community and Japan were opposed to the payment of additional contributions proposed by other members. The ITC had in fact adopted a policy of continued temporizing.

32. Hence the absence of adequate cash resources made recourse to extensive borrowing inevitable. But since the borrowing was chiefly on the security of tin warrants, the ITC found itself simultaneously obliged to maintain high prices on the market in order to prevent a reduction in the value of the security for the borrowing.

33. Consequently the Buffer Stock Manager found himself attempting to control more tin than the resources available to him permitted by means of a complicated system of transactions whose compatibility with the Sixth Agreement was doubtful; those transactions were entered into in particular with brokers and were intended to create an appearance of greater demand than supply in order to maintain market prices at the level of the artificially inflated floor price.

34. In that connection, by using 13 different brokers the Buffer Stock Manager was able to conceal from them the extent of the operations. In addition, he indicated that he held sufficient resources and vigorously denied any suggestions that the financial stability of the ITC was questionable.

35. The members of the ITC had considerable knowledge of the Buffer Stock Manager's operations and their effect on the financial position of the ITC, although it is unclear how much detailed information they possessed. In that connection, the United Kingdom, alerted to the Buffer Stock Manager's operations, attempted to obtain more detailed information to enable it to judge whether or not he was acting outside his mandate. That initiative, in the form of an EEC paper, did not gain the support of the other ITC members. The producing countries and the Buffer Stock Manager were opposed to it, the latter relying in

particular on the operating rules of the buffer stock. There was no further Community initiative.

36. Maclaine Watson further points out that the ITC neglected to ensure that the Buffer Finance Committee met frequently enough in order to carry out its supervisory function over such operations.

37. Hence, if the members' lack of knowledge stemmed from the terms of the Sixth Agreement itself, that demonstrates the defects of that Agreement when the Community acceded to it and decided to bring it into force. On the other hand, if their lack of knowledge cannot be attributed to such defects, it resulted from the negligence of the ITC's members, among them the Community, which failed to support the United Kingdom's initiatives.

38. However the ITC's members' lack of knowledge related only to the precise date on which the ITC would default. They knew enough to have surely appreciated that a default was inevitable.

39. The foregoing gives a very simplified outline of Maclaine Watson's account which is based on numerous documents, mainly from the ITC, and many statements made by officials and ex-officials, production of which before the courts is opposed both by the defendant institutions and by the United Kingdom. It is certainly not for me, at least at this stage, to examine the appositeness of Maclaine Watson's exposition. I would merely point out that — in addition to certain factors it raises — some commentators have also drawn attention to the role played by LME brokers in the development of the crisis. [18]

40. The Court has decided that, while no formal request to this effect has been made by the defendant institutions, it will first examine the admissibility of the application.

41. Although it is not for me to comment on the way in which the parties have put forward their claims and arguments in defence, I would nevertheless point out that they do not lighten the task of the Court, which is rendered extremely difficult by the very complexity of the facts and legal questions at issue.

42. For while Maclaine Watson has cast its 'net' extremely wide, in view of the number of submissions it makes, the defendant institutions have countered with a generalized objection of inadmissibility from which it is often hard to determine the precise submissions it applies to. The United Kingdom, intervening in support of the Community on whose arguments it expounded, showed greater consideration for the Court by attempting to provide a more precise analytical framework.

43. Maclaine Watson's legal arguments relate to the conduct of the Community in regard to the negotiation, entry into force and implementation of the Sixth Agreement. That gives only a very general indication of its submissions, however, since the wealth of detail and sometimes the manner in which they are presented makes them difficult to summarize.

18 — See Eisenmann, op. cit., in particular at p. 737, Chimni, op. cit., in particular at p. 201.

44. With the foregoing in mind, it would appear finally that Maclaine Watson is putting forward respectively the following nine submissions:

(1) the Community is liable for the acts of the ITC which, before its collapse, contracted debts which were beyond its means to honour; if the ITC does not have legal personality, its wrongful acts are directly imputable to its members; if, on the other hand, it should be treated as having legal personality, its members are liable in application of the general principles common to the laws of the Member States which govern the liability of directors of commercial companies;

(2) the Community neglected to warn Maclaine Watson of the risk involved in dealing with the organization and, more generally, failed to discharge its duty of care;

(3) the Community has acted unlawfully in signing the Sixth Agreement and participating in the decision to bring it provisionally into force in view of the fact that it was inherently defective and incompatible with the EEC Treaty;

(4) the Community failed to exercise its full powers in relation to the negotiation of and participation in the Sixth Agreement and, more specifically, it failed to require the Member States to respect its right to decide on matters falling within its exclusive competence;

(5) at no time did the Council and the Commission consult the European Parliament, even though this would have been of assistance because public exposure of the defects of the Agreement would have resulted in the Community, like the USA and Bolivia, declining to participate;

(6) the Commission failed to take steps to ensure that all the Member States of the Community ratified the Sixth Agreement and made their contributions to the buffer stock, including the payment of additional contributions; in so acting, the Member States were in breach of Article 5 of the EEC Treaty whereupon it was open to the institutions to take appropriate steps, such as, in the case of the Commission, opening proceedings under Article 169 of the Treaty;

(7) given the number of votes it had, the Community was liable in law for the 'acts and defaults' of the ITC because of the influence it possessed within that organization which it failed to exercise in the interest of the Community and so as to control the ITC's operations;

(8) the Community was at fault in failing to prevent the abuse of a dominant position constituted by the ITC's activities;

(9) irrespective of any unlawful conduct, the Community must make good the loss suffered by Maclaine Watson because of the risk involved in the making of the Sixth Agreement and in the activities of the ITC.

45. In answer to that impressive list of claims the Commission and the Council, supported by the United Kingdom, put forward an objection of inadmissibility on the basis of three distinct submissions:

(i) the application is inadmissible because it refers to acts and transactions of the Community concerning the *conduct of international relations*;

(ii) the application constitutes a *misuse of the remedy provided for in Article 215*, in particular because it is in fact seeking satisfaction from the Community for the ITC's contractual liability, the annulment of numerous decisions taken by the Community, by the ITC or by its members, and to impose on the Community liability incurred by the ITC which is not within the jurisdiction of the Court;

(iii) the application is *moot and premature*, inasmuch as it is asking the Court to rule regarding a principle of merely hypothetical and conditional liability at a time when it is not certain that the proceedings pending against the ITC before the English courts will ultimately fail.

46. I shall deal first with that last argument for the application's inadmissibility which, after I have examined it briefly, I shall recommend should be dismissed.

I — The moot or premature nature of the application

47. It is contended that, having regard to the actions brought by Maclaine Watson against the ITC still pending before the English courts, the alleged damage is purely hypothetical. The applicant is unable to adduce evidence to show that the ITC has taken a definitive decision not to pay its debts. In those circumstances the application is inadmissible because it is asking the Court for a decision as to liability in the abstract.

48. In the first place, whether damage has been suffered constitutes, in my opinion, a question which goes to the merits. Of course, the Court has in the past sometimes held that actions to establish liability were premature, but I would point out that the Court has also stated that:

'The Council's objections in fact concern . . . the substantive pre-conditions for liability on the part of the Community, namely the *existence of damage. They will therefore be considered when the substance of the case is examined.*' [19]

49. At all events it seems to me highly debatable whether the damage alleged to have been suffered here is contingent in character. What is uncertain, in my view, given the length of time that has elapsed since 24 October 1985, is whether the ITC's debts will be paid.

50. In addition I would point out that the Court has in fact held that applications 'for a declaration that the Community is liable' are admissible, following the example of the solution adopted in the legal systems of several Member States, stating that:

'Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed.' [20]

51. *A fortiori* the same should hold true if the damage is patent but could be made

19 — Judgment of 17 December 1981 in Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmuhle* v *Council and Commission* [1981] ECR 3211, paragraph 12, emphasis added

20 — Judgment of 2 June 1976 in Joined Cases 56/74 to 70/74 *Kampfmeyer* v *Commission and Council* [1976] ECR 711

good by a payment which the circumstances of the case indicate is unlikely.

52. Finally, in the *Granaria* case,[21] the Court pointed out that it could be led to

'give a decision at an early stage of the proceedings on the question whether the conduct of the institutions has been such as to entail the liability of the Community, reserving consideration of questions relating to causality, as well as those concerning the nature and extent of the damage, for a later stage.'[22]

53. It is not insignificant, in my opinion, that in holding the application to be admissible the Court stated:

'In this case *the problem of the legal basis of liability is particularly appropriate for separate treatment* in accordance with that practice'.[23]

54. Undoubtedly that is equally the case here. I would therefore suggest that that submission of inadmissibility should be rejected.

II — Judicial control and the Community's external relations

55. Close examination of the Court's case-law will reveal that this is not in fact the first time that the Community institutions have asked the Court to hold that an application brought against measures concerning the Community's external relations is inadmissible.

56. Thus, in the first *Fediol* judgment[24] the Court had to decide on an objection of inadmissibility raised by the Commission concerning an application directed against a refusal to initiate an investigation with regard to Brazil in the context of anti-subsidy proceedings. It was claimed that the assessments made in that sphere fell within the exercise of powers of a political nature which were not subject to review by the Court.

57. The Court dismissed that argument, referring to specific procedural rights enjoyed by Community industry under the rules applicable. The Court held that the Commission's attitude was 'excessive' inasmuch as it was aimed at precluding any action in principle. The Court pointed out that it is bound under the terms of Article 164 of the Treaty to ensure that the law is complied with and to undertake a review appropriate to the nature of the powers reserved to the Community institutions on the subject.

58. The Court stated that

'the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned regulation'.[25]

and defined the minimum extent of its powers of review in that connection. That position was confirmed in the *Timex* judgment.[26]

21 — Judgment of 28 March 1979 in Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081.

22 — Paragraph 6 of the decision.

23 — Ibid., emphasis added.

24 — Judgment of 4 October 1983 in Case 191/82 [1983] ECR 2913.

25 — Paragraph 30 of the decision.

26 — Judgment of 20 March 1985 in Case 264/82 [1985] ECR 849, paragraph 16.

59. In the *Adams* case [27] the Commission again relied on its sovereign discretionary powers in the conduct of external relations with regard to a complaint by the applicant in respect of the Commission's failure to refer the matter to the Joint Committee set up under the Free Trade Agreement concluded between Switzerland and the Community. But it was as a *submission on the substance* that the argument was put forward and the Court examined it as such in rejecting the application, holding that

'the decision whether or not to refer the matter to the Joint Committee may not be taken except for purposes which have to do exclusively with general interests of the Community, following an assessment which is essentially political and which cannot be challenged before the Court by an individual'. [28]

60. Moreover, on several occasions the Court has had to examine measures adopted by the Community in the sphere of external relations without any objection of inadmissibility being raised. I will give some examples.

61. In the *Faust* case [29] a German importer of Chinese mushrooms sought damages from the Community for the imposition of quotas on imports from Taiwan following a commercial agreement concluded with the People's Republic of China.

62. After examining the applicant's claims concerning in particular breach of the principle of protection of legitimate expectation with no objection of inadmissibility being raised, either by the Commission or by the Court itself, the Court stated:

'since Community institutions enjoy a margin of discretion in the choice of the means needed to achieve their policies, traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained'. [30]

63. The judgment in the case concerning special aid for Turkey [31] also appears to me to be significant. As will be recalled, that decision was in an action brought by the Hellenic Republic against a decision of the Council relating, in substance, to aid to Turkey. It is clear that that was a matter of external relations and the political dimensions of the case are self-evident. No reference at all was made to any limit to the Court's power of review.

64. The *Clemessy* case [32] gave rise to scrutiny of the substance of the charges made against the Commission with regard to its intervention in the award of a public works contract for the construction of a building for the Somali Pharmaceutical Institute. No claim was made that the application was inadmissible on the ground that it concerned the Community's external relations.

65. Finally, and above all, mention must be made of questions to which I shall return later, namely the Court's jurisdiction [33] as concerns both prior review of external agreements and the references to *ex post facto* review contained in Opinion No 1/75 of the Court. [34]

27 — Judgment of 7 November 1985 in Case 53/84 *Adams* v *Commission* [1985] ECR 3595

28 — Paragraph 15.

29 — Judgment of 28 October 1982 in Case 52/81 *Faust* v *Commission* [1982] ECR 3745.

30 — Paragraph 27 of the decision.

31 — Judgment of 27 September 1988 in Case 204/86 *Hellenic Republic* v *Council* [1988] ECR 5323.

32 — Judgment of 24 June 1986 in Case 267/82 *Developpement SA et Clemessy* v *Commission* [1986] ECR 1907

33 — Second subparagraph of Article 228(1).

34 — 11 November 1975 [1975] ECR 1355.

66. In view of the importance of the point of principle at issue, it is undoubtedly appropriate to examine what solutions have been adopted by the laws of the Member States to the question of the judicial control of external relations.

67. In Italian law, Article 113 of the Constitution provides in general terms for the legal protection of individuals against acts of the public authorities.[35] But Article 28 of the law concerning the Corte Costituzionale provides that that court's power of control does not include any political assessment of the discretionary power of Parliament. Moreover, no action before the Consiglio di Stato lies if governmental measures have been adopted in the exercise of its political power.

68. The conclusion and ratification of international treaties and, generally, measures relating to international relations, are regarded as 'political measures' which, as the corte di cassazione has very plainly indicated, enjoy absolute immunity.

'La responsabilità degli organi di governo per gli atti internazionali si pone sul piano politico, e può essere fatto valere non dinanzi a gli organi della giurisdizione, ma con i mezzi ed attraverso gli istituti nei quali si concreta il controllo politico sull'attività di governo'.[36]

(The responsibility of the organs of government for international acts is political and cannot be raised before the courts but only using the means and institutions for the implementation of political control of acts of the government.)

69. Finally, there is evidence of a marked tendency to circumscribe the scope of 'political measure' by using the term 'high-level administrative measure' which is in all respects subject to judicial control.

70. In Danish law it is an open question whether an individual may bring an action against a measure relating to powers conferred directly on the government by the Constitution, such as the establishment of an embassy or the recognition of a State. It would seem that the obstacles to such an action stem from the general conditions for bringing proceedings, thus, in the case of an action for damages, the requirement that the would-be plaintiff has a legally protected right. On the other hand, the view among writers is that measures concerning diplomatic protection of a Danish national abroad may be called in question either by means of an action for annulment or an action for damages. Finally, it would seem that in no circumstances may a private individual call for judicial review of or found an action for damages on the conclusion of a treaty.

71. Although German courts and legal theorists would seem to be divided as regards the existence of 'acts of the government' (*Regierungsakte*) or 'non-justiciable acts' (*justizfreie Hoheitsakte*), the two views do not in reality lead to very different results. An action brought by an individual will be admissible only if the act complained of harms his personal rights and major policy-making acts will rarely have such an effect.

72. In addition the Bundesverfassungsgericht has pointed out that the exercise of the judicial function presupposes the

35 — For an application of this article, see for example the case *Governo della Gran Bretagna* v *Guerrato*, where the Constitutional Court declared a decree unconstitutional because it precluded any action against decisions of the Minister of Justice in respect of seizure of goods belonging to foreign States; the Constitutional Court stated: 'Il fatto invero che tale esame possa in determinati casi riuscire delicato e financo difficile, non esclude che si tratta sempre di un accertamento di dati di fatto e giuridici che non può essere sottrato al sindacato giurisdizionale' (Although such an examination may in certain cases prove to be delicate or actually difficult, it always remains a question of establishing the facts and the law which cannot be removed from the ambit of review by the courts), 13 July 1963, *La giurisprudenza costituzionale in materia internazionale*, 1976, Starace-De Caro, p. 126, in particular at p. 131.

36 — *Rivista di diritto internazionale*, Vol. II, 1969, p. 583, especially at p. 586.

existence of legal rules. One illustration is a decision dismissing an action against a declaration of a state of military alert on the ground of lack of any relevant legal criteria.[37] According to legal theorists[38] the Bundesverfassungsgericht took an analogous approach in its judgment of 16 December 1983[39] concerning the decision of the Federal German Government to authorize the installation of Pershing missiles. Although that court held that certain claims could not give rise to judicial review because of the margin of discretion enjoyed by public authorities in the conduct of defence policy, it nevertheless examined whether there existed a general principle of international law within the meaning of Article 25 of the Grundgesetz prohibiting the possession and use of nuclear arms but concluded that there was no such principle. It has been said that, in so doing, the court was refusing to make use of 'the way out offered by the theory of act of the government'[40] and opting for 'an approach which combines political wisdom and realism with the desire to keep the activities of public authorities within constitutional bounds. If such bounds exist, as they do in Article 25 of the Grundgesetz, the court will fulfil its function and scrutinize the contested act in the light of highly regarded rules'.[41]

73. In a general way, the margin of discretion that public authorities are recognized as possessing in the field of external relations is considerable, because the Federal German Government must in particular be in a position to take the reactions of its international partners into consideration when adopting decisions.

74. The law of the United Kingdom has frequently been cited by the parties who do not seem to agree on the exact position in this connection. In fact it would appear that two types of situation should be distinguished.

75. On the one hand, there are political acts involving the relations of the Crown with other States, such as the conclusion and performance of treaties and declarations of war: any action before the courts which questions the validity of such acts is precluded.[42] As far as actions for the establishment of liability are concerned, it would seem that the decisive criterion is whether the act was committed outside or within British territory. The effect of *Buron* v *Denman* (1848) 2 Exch. 167 was to preclude actions brought by aliens in respect of an act perpetrated against them outside British territory.[43] The question whether the same holds true in the case of a British national has not been settled.[44] However, if the act has been committed within British territory, it cannot be relied on as a defence against any plaintiff.[45]

76. On the other hand, English courts have sometimes adopted a position of 'judicial restraint' in the case of actions *between private individuals* which indirectly put in issue the conduct of foreign sovereign States. Reference was made to the *Buttes* case, in which Lord Wilberforce stated: 'Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable

37 — *Bundesverwaltungsgericht*, 12 October 1962, BVerwGE 15, pp. 63 and 65.

38 — R. Ergec: 'Le contrôle juridictionnel de l'administration dans les matières qui se rattachent aux rapports internationaux: actes de gouvernment ou réserve du pouvoir discrétionnaire', *Revue de droit international et de droit comparé*, 1986, p. 72, in particular at p. 77.

39 — *Archiv des Völkerrechts*, 1984, p. 220.

40 — Ergec, op. cit., p. 78.

41 — Ibid.

42 — *Rustomjee* v *The Queen* [1876] 2 QBD69, 73, CA.

43 — That would be an 'Act of State', but as Lord Wilberforce points out in *Buttes Gas and Oil Co.* v *Hammer* [1982] AC 888, at pp. 930 and 931, the term 'Act of State' may also refer to cases where the court is called upon to adjudicate on the applicability of foreign municipal legislation within its own territory.

44 — *Attorney General* v *Nissan* [1970] AC 179 HL.

45 — Ibid.

standards by which to judge these issues, or to adopt another phrase, the court would be in a judicial no man's land'. [46]

77. It should be pointed out in this connection that the United States courts have adopted similar solutions as part of the 'act of State' doctrine: courts 'abstain' in cases between private individuals in which the conduct of third States is put in issue. Such decisions are expressly based on the exclusive power of the executive in the area of external relations. [47] The doctrine [48] does not apply if the State Department has expressly indicated that its application to the case in point would not serve the foreign policy interests of the United States. [49]

78. Reference may also usefully be made here to the American doctrine of 'political questions', which can lead to the court's abstention when dealing with a case to which it believes there is no legal solution. [50] It should merely be pointed out that the existence of legal criteria of assessment [51] constitutes one of the determinant factors [52] as regards the court's jurisdiction.

79. French law precludes any challenge in the courts to acts involving the relations of the government with a foreign State or an international organization which covers, in particular, all acts concerning the negotiation, conclusion and implementation of international agreements. [53] More generally, the activity of the French authorities in the conduct of foreign relations is not subject to judicial control. [54] For the French courts, those are acts which by their nature are not justiciable, or acts of the government. However, the scope of that 'immunity' is tending to shrink as a result of a twofold development:

(i) the theory of 'detachable acts', which means that such acts can be adjudicated

46 — *The law reports*, 1982, p. 938.

47 — *Underhill* v *Hernandez* [1897] 168 US 250, 252 laid down the principle: 'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves'.

48 — Legal theorists draw a distinction between 'Act of the government' and 'Act of State': 'the doctrine of Act of State is a legal concept of mainly common-law origin, and consists in precluding assessment by the courts of the legality of "sovereign acts" of foreign States, whereas the concept of "act of the government" refers to acts of the State of the court seised. The doctrine of Act of State is mainly concerned with public international law and private international law, whereas act of the government arises mainly in the sphere of domestic public law' (Ergec: 'Le contrôle juridictionnel de l'administration dans des matières qui se rattachent aux rapports internationaux', *Revue de droit international et de droit comparé*, 1986, p. 73, in particular at p. 74). Similarly, it has been said that Act of State is a 'secondary conflict of laws rule', Falck, quoted by Brazyova in 'Reflections on immunity of States from the point of view of international law', *Questions of International Law*, Vol. 3, Dordrecht, 1986, p. 46.

49 — In the *First National City Bank* case, Rehnquist J. stated: 'It would be wholly illogical to insist that such a rule [Act of State], fashioned because of fear that adjudication would interfere with the conduct of foreign relations, be applied in the face of an assurance from that branch of the Federal Government that conducts foreign relations that such a result would not obtain', p. 483.

50 — On the whole question see K. Lenaerts: *Le juge et la constitution aux États-Unis d'Amérique et dans l'ordre juridique européen*, p. 98 *et seq.* and the references cited, pp. 104 and 105.

51 — In ruling out application of the doctrine in *Baker* v *Carr*, Brennan J. stated: 'Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking', 369 US 186, p. 691.

52 — But not exclusive, see the list of conditions given by Brennan J. in *Baker* v *Carr*, cited above, p. 691; See also Lenaerts, op. cit.

53 — A consistent line of case-law; see for example Conseil d'État (CE), 5 February 1926, *Dame Caraco*, p. 125; CE, 16 March 1962, *Prince Sliman Bey*, p. 179; CE, 13 July 1979, *Cofarex*, p. 319.

54 — Suspension of navigation in a maritime safety zone in order to conduct nuclear tests (CE, 11 July 1975; *Paris de la Bollardière*, p. 423); intervention with a foreign State to protect the goods or interests of a French national (CE, 2 March 1966, *Cramennel*, p. 157); refusal to take proceedings before an international court (CE, 9 January 1952, *Geny*, p. 17); refusal to communicate to a union proposals addressed to an international body (CE, 10 February 1978, *CFDT*, p. 61).

on by the courts 'if the French authorities have some independent choice with regard to the procedure by which they perform their international obligations and can themselves take the initiative as regards the means by which they comply with those obligations';[55] in that connection I would refer to the decisions concerning deportation and the extradition of aliens;

(ii) acceptance of the principle of the liability without fault of the State arising from a duly published international agreement[56] provided that the alleged damage is abnormal and special and that reparation is not precluded by the agreement itself;[57] this principle has not yet been extended to acts and conduct in the context of external relations.

80. It must, moreover, be pointed out that the 'act of the government' doctrine has been subjected to severe criticism,[58] but it has also been defended as simply the expression of the courts' lack of jurisdiction to deal with governmental activity as distinct from administrative activity.[59]

55 — Opinion delivered by Odent in the Tribunal des conflits, 2 February 1950, *Radiodiffusion française*, RDP, 1950, p. 423, in particular at p. 427.

56 — Some writers maintain that 'Whilst international treaties obviously concern the relations of the French State with foreign States, they are not acts of the government. Apart from the fact that they are not acts of municipal law, since they do not emanate from the French Government alone, the rules applying to them are "completely different from those applying to acts of the government".' Chapus, *Droit administratif général*, 1985, p. 618 and 619.

57 — Conseil d'État, *Compagnie générale d'énergie radio-électrique*, 30 March 1966, Rec. Lebon, p. 257; on that judgment see AJDA, 20 June 1966, Chronique Puissochet et Lecat, p 349; the decision marks the extension to international agreements of no-fault liability arising from laws

58 — It has been said that 'act of the government' should be banished from the 'systems of public law of all civilized countries', Duguit, *Traite de droit institutionnel*, 3rd ed., III 1930.

59 — Chapus: 'L'acte du gouvernement, monstre ou victime?', D 1958, Chr p. 5; other authors consider that the courts' lack of jurisdiction is a consequence of the mixed character of the act: Virally 'L'introuvable acte de gouvernement', RDP 1952, p 338

81. In some relatively old cases[60] the Luxembourg Conseil d'État has applied the concept of 'act of the government' as recognized in French law. It is clear that as the law now stands only the sovereign's relations with a foreign State[61] could enjoy legal immunity.

82. In Greek law the concept of act of the government does exist and means that any review of the lawfulness of the act is excluded. That applies in particular to the case of the conclusion of international treaties. As far as actions for damages are concerned, legal theorists are divided on the problem of the admissibility of such actions, which does not seem to have been resolved in the courts.

83. In Belgium there is debate on the question whether the theory of act of the government has been accepted by domestic courts. A recent and very detailed study[62] on judicial control of the administration's activities in the area of international relations has tended rather to discern in the case-law a reservation in respect of discretionary powers.

84. In any event, it is appropriate to cite certain passages from those judgments. In a case concerning the independence of the Congo, the cour d'appel, Brussels, held that 'the claim is directed, if not at the legislative power, then at the executive, whose sovereign decisions are not subject to censure by the courts'.[63] In an action for damages brought by an individual against

60 — Conseil d'État, 20 January 1876, *Mangin*; Conseil d'État, 26 April 1933, *Pasicrisie* VIII 108, see A. Bonn: *Le contentieux administratif en droit luxembourgeois*, p 144, No 157, and F Schockweiler. *Le contentieux administratif et la procédure administrative non-contentieuse en droit luxembourgeois*, p. 28, No 74

61 — F. A. Schockweiler, op cit

62 — Ergec, op. cit.

63 — 4 December 1963, JT 15 December 1963, p 782, see also Civ. Brussels, 23 September 1964, JT 25 October 1964, p. 600.

the Belgian State and the United Nations regarding the intervention in Katanga, the same court held that 'the courts have no power to assess diplomatic action taken by the executive'. [64]

85. In the *Pittakos* case, the tribunal de Bruxelles, asked by the plaintiff to rule on alleged wrongful acts in connection with the grant of independence to the Congo without previously arranging for transfer to the new State of the colony's debts, held that the Belgian State 'has *rightly* objected that this new submission . . . is in any case unfounded, the grant of independence being an "act of the government" which is not subject to judicial control'. [65]

86. Finally, in the area of commercial agreements, the Conseil d'État has held that 'it is not open to the applicant to question the appropriateness of the conclusion of commercial agreements'. [66]

87. Netherlands law does not appear to treat as inadmissible actions for damages brought by individuals in respect of acts in the field of external relations.

88. However, the wide discretionary powers vested in the government in this area lead to the courts' exercising very considerable restraint in their review of such acts. Nevertheless, it is not impossible that an action could succeed if misuse or abuse of powers was clearly shown.

89. As far as the specific area of the negotiation and conclusion of international treaties is concerned, it should be pointed out that the President of the Arrondissementsrechtbank of The Hague [67] dismissed an application for a form of prohibitory injunction directed against a treaty between the Netherlands and the Federal Republic of Germany on the ground that such an injunction would offend against the system of division of public powers in the Netherlands. Mention should also be made of the dismissal of an action in which the court was asked to verify whether a treaty between the Netherlands and the United States of America concerning the installation of Pershing missiles complied with international law, on the basis that the court had no competence to rule on the drawing up of an international agreement. [68]

90. Finally, the Hoge Raad [69] has decided that an act directly affecting a person's life and liberty cannot be countenanced, despite the very wide margin of discretion accorded to the State in giving effect to a treaty, which, in the case in point, was the agreement between the Netherlands and Indonesia concerning the evacuation of Netherlands soldiers of Indonesian origin.

91. The adoption of the Spanish Constitution of 1978 [70] has abrogated the immunity enjoyed by political acts before administrative courts pursuant to Article 2(b) of the Law of 27 December 1956. In

64 — 15 September 1969, *Pasicrisie belge*, p. 247, in particular at p. 249.

65 — 14 January 1963, JT 27 January 1963, p. 64, in particular at p. 66.

66 — 14 December 1973, Recueil des arrêts, p. 955.

67 — 21 May 1984, KG 1984, 168.

68 — President Rechtbank Den Haag, 5 November 1985, KG 1985, p. 376.

69 — 2 March 1951, NJ 51.217.

70 — In particular Article 24(1) thereof, according to which 'any person shall be entitled to effective protection by the courts in the exercise of his legitimate rights and interests and in no case shall such protection be denied to him'.

any event, that article did provide for compensation to be ordered by the court in respect of the acts in question. The judgments of the Tribunal Supremo granting compensation to individuals for damage resulting directly or indirectly from the exercise by the State of diplomatic protection in their regard merit special attention.[71]

92. As far as I can ascertain, since 1922 Irish law has not applied a concept equivalent to 'act of State' or 'prerogative act'. It would, moreover, appear that an individual may bring proceedings to obtain compensation for financial loss suffered[72] and that there would be no justification under the constitution for State immunity in the area of foreign affairs.[73]

93. In Portuguese law, Article 4(1) of the Estatuto dos Tribunais Administrativos e Fiscais (ETAF) precludes any proceedings directed against political acts. Undoubtedly diplomatic acts and in particular the negotiation and approval of international agreements fall into that category. However, the question remains of how to reconcile the above statute with Article 20 of the Constitution, which accords to each person the protection of the courts against any act affecting 'his lawfully protected rights and interests'.

71 — 29 December 1986, REDI 1988, No 2, Note by Castro-Rial Garrone, see also, 16 November 1974, Aranzadi, Jurisprudencia, 1974, No 4510; see in connection with that decision 'Discrecionalidad en el ejercicio de la proteccion diplomatica y responsabilidad del Estado en el orden interno', M Paz Andres Saenz de Santa Maria, ADI, Vol III (1976), p 321

72 — *Byrne* v *Ireland* 1972 I R 241

73 — *Crotty* v *An Taoiseach* [1987] 2 CMLR 657, in which it was held that the applicant was entitled to bring an action putting forward claims relating to the constitutionality of the Single European Act

94. What conclusions may be drawn from this examination?

95. In my opinion it would be a manifest overstatement to suggest that the inadmissibility of actions for damages in respect of acts by the State in the field of international relations is one of the 'principles common to the laws of the Member States'.

96. But, on the other hand, the extremely narrow confines of judicial control in this area indubitably constitute the thread running through this brief survey of the law of the Member States.

97. For my part, I would not recommend that the Court adopt a concept analogous to 'act of the government' which would render inadmissible in principle actions for damages in respect of acts of the institutions in the field of external relations. That, in my opinion, would prove difficult to reconcile with the Court's case-law. It would lead to the introduction of an additional requirement for the admissibility of direct actions brought by individuals, because there is no doubt that the solution adopted regarding the Community's liability would then be transposed to cases concerning the legality of measures, which, in my view, already face enough obstacles as the case-law stands at present.

98. Moreover, the concept could not truly purport to derive from a principle common to the laws of the Member States but would be carrying too far the frequently criticized doctrine of 'act of the government' whose scope is tending to be considerably narrowed in some legal systems where it was formerly most rigourously applied.

99. Nevertheless, the role of the courts is to *ensure that the law is observed.* There are certain acts that are based on assessments which positive law does not enable the court to review because it would be substituting its own decision for that of the institution whose conduct was in question. That is, as we have seen, the analysis expressly adopted, in particular, by the German Bundesverfassungsgericht.[74] I believe that the Court itself has on occasion adopted an analogous approach.[75]

100. But such refusal by the court to adjudicate — or more appropriately, the impossibility for the court to do so — ensues only from an examination of the substance of the claims put forward;[76] it must, as it were, 'look over the wall'. Hence I would propose that the Court should, as far as this submission of inadmissibility is concerned, either reject it or at least reserve judgment thereon until after examination of the merits. The latter solution appears more appropriate in the present circumstances. It might seem an overlegalistic approach to hold the application to be admissible at this stage only to dismiss it subsequently on the ground

'that the decision . . . may not be taken except for purposes which have to do exclusively with general interests of the Community, following an assessment which is essentially political and which *cannot be challenged before the Court* by an individual'.[77]

101. Is that conclusion invalidated in so far as Maclaine Watson's arguments relate in part to the incompatibility of the Sixth Agreement with the EEC Treaty?

102. The 'thorny'[78] question of *ex post facto* review of external agreements has been the subject of exhaustive comment by legal writers, of which I shall just give a broad outline.

103. The principle of *ex post facto* control has been disputed on the ground that the existence of a prior review procedure precludes any subsequent application to the Court even in a case where it had not been requested to give its opinion.[79] The counterargument has been raised that it would enable the institutions and Member States 'to circumvent the revision procedure by simply refraining from consulting the Court'.[80] Hence, it is said, the Court ought to be able to 'hold that an irregular agreement is inoperative where it is relied on before the Court either directly or as the basis of a disputed regulation or internal decision'.[81]

74 — See also the judgment of the French Conseil constitutionnel of 15 January 1975 on voluntary termination of pregnancy: 'Article 61 of the Constitution *does not confer on the Conseil constitutionnel a general power of assessment and decision identical* to that of Parliament, but merely gives it jurisdiction to rule on the conformity with the Constitution of laws submitted to it for examination', Decision 74.54, Rec DC 19 (emphasis added); the approach of the United States Supreme Court might also be recalled here.

75 — See the judgment in Case 377/87 *Council* v *Parliament* [1988] where it was stated that although the Court is bound to ensure that the institutions which constitute the budgetary authority *observe the limits of their powers, it is not for the Court to intervene in the negotiating process between the Council and the Parliament which must result, those limits having been observed,* in the establishment of the general budget of the Communities (emphasis added); see in addition Lenaerts, op. cit., who refers also to the judgment of 22 November 1978 in Case 93/78 *Mattheus* v *Doego* [1978] ECR 2203, in which the Court held that it had no jurisdiction to decide on the substance of a question concerning the conditions of accession of Spain and Portugal.

76 — I would refer in this connection to Advocate General Van Gerven's very recent Opinion in Case 70/87; after rejecting the objection of inadmissibility raised by the Commission on the ground that the rules on measures to counter illicit trade practices gave the applicant only limited legal protection, Mr Van Gerven pointed out, *when examining the merits of the case,* that there does exist discretionary power of a political nature which is not reviewable by the courts if the principles to which that power is subject are not *legally definable* (paragraph 18).

77 — Case 53/84 *Adams,* cited above, paragraph 15, emphasis added.

78 — O. Jacot-Guillarmod: *Droit communuataire et droit international public,* Geneva, 1979, p. 237.

79 — Catalano: *Manuel de droit des Communautés européennes,* Paris, 1965, p. 73, who is in favour of excluding the possibility of any *ex post facto* review.

80 — P. Pescatore: *Les relations extérieures des Communautés européennes,* 1961, p. 129.

81 — Ibid., p. 128.

104. As regards the basis of the Court's jurisdiction on this question, it has been observed that it would be impossible to describe as a 'unilateral act'[82] of the institutions an agreement that is the product of a 'meeting of minds' with a party not subject to the Court's jurisdiction[83] and therefore cannot form the subject-matter of an application for annulment before the Court.[84]

105. Moreover, the consequences of the annulment of an international agreement simply cannot be envisaged from the legal point of view.[85] Finally, the appropriateness of such control is strongly disputed 'on the grounds of legal certainty, the protection of third parties and the political credibility of the Community'.[86]

106. However, notwithstanding that line of reasoning, which is not without some force, the Court has held, on the one hand, that an agreement concluded by the Council constituted '*as concerns the Community, an act of one of the institutions of the Community*' and as such was subject to interpretation by the Court[87] and, on the other, more importantly, that

'The question whether the *conclusion of a given agreement is within the power of the Community* and whether, in a given case, *such power has been exercised in conformity with the provisions of the Treaty* is, in principle, a question which may be submitted to the Court of Justice, either *directly, under Article 169 or Article 173 of the Treaty*, or *in accordance with the preliminary procedure*, and it must therefore be admitted that the matter may be referred to the Court in accordance with the preliminary procedure of Article 228.'[88]

107. Hence the principle of *ex post facto* review has been unreservedly upheld by the Court.[89]

108. The Court has, moreover, reviewed the legal basis for a Council decision on the conclusion of an international agreement even though, as has been seen, some legal writers have urged that such a measure should be classed as an act of the government.[90]

109. But what is the extent of the Court's powers of review in this case? First of all, is the exercise of any control in respect of a mixed agreement, such as the Sixth Agreement, in principle impossible? Some writers[91] have maintained resolutely that that is the case, pointing out that the

82 — The 'Council's decision' adopted for the purpose of concluding the agreement constituted in that respect an 'act of the government' not reviewable by the Court, and in any event not detachable from the agreement; see Kovar: 'Les accords liant les Communautés européennes', RMC, 1974, p. 345, particularly at p. 358; Melchior: 'La procédure de conclusion des accords externes de la CEE', *Revue belge de droit international*, 1965, p 187

83 — See Kovar, op. cit., p. 357.

84 — See in addition, for arguments against review of validity by means of Article 177, Kovar, JDI, 1976, p. 197; Simon, RTDE, 1975, p. 454; see also Barav, ELR, 1977, p. 8.

85 — According to O. Jacot-Guillarmod, a declaration that an agreement was void (Article 174 of the Treaty) would be a 'legal aberration', annulment of the Community act approving it 'would have the same catastrophic result' and to claim that the agreement itself was unaffected would be, in the latter case, 'dualist inconsistency' because the two acts are inseparable, op cit , p 240

86 — See Denys Simon: 'Quelques problèmes des relations extérieures des Communautes européennes', RTDE, 975, p 454.

87 — Judgment of 30 April 1974 in Case 181/73 *Haegemann* v *Belgium* [1974] ECR 449, in particular p 459, paragraphs 3, 4, 5 and 6 (emphasis added)

88 — Opinion 1/75, cited above (emphasis added).

89 — Reference has been made to the 'paradoxical contrast' between that position and the attitude taken by the Court as regards review at national level of the constitutionality of legislation approving the Treaties; Joliet: 'Le droit institutionnel des Communautés européennes, les institutions, les sources', 1983, p. 252.

90 — Judgment of 27 September 1988 in Case 165/87 *Commission* v *Council* [1988] ECR 5545

91 — Melchior, op. cit.; Joliet, op. cit., who states: 'From the Community's point of view, it is the procedure of the first subparagraph of Article 228(1) of the EEC Treaty which will be followed; from the point of view of the Member States it is the normal procedure for concluding international treaties which will be used. The procedure for concluding a mixed agreement thus closely resembles the amendment procedure of Article 236, especially if the basis chosen is, for the Community, Article 238 of the EEC Treaty which necessitates consultation with the European Parliament. The question arises as to the relationship (is there a hierarchy or are they on a footing of equality) between the EEC Treaty itself and the mixed agreement', p. 237; 'it is hard to see how the Court of Justice of the European Communities could arrogate to itself the power to assess the validity of a treaty signed and ratified by the Member States', p 251

procedure in such a situation is identical in substance to that of the amendment procedure under Article 236. Elsewhere it has been observed that 'the Member States are regarded as having participated (in the agreement) only as regards matters that fall within their competence, not as regards matters falling within the competence of the Community. The possibility of review by the Court is thus intact as far as the provisions falling within that latter area of competence are concerned'. [92]

110. Consideration of the merits of those two points of view is outside the scope of these observations. At all events, the first does not seem to me to be tenable in the case of agreements concluded, as in this instance, on the basis of Article 113, because in this case the procedure applicable is fundamentally different from that of Article 236, in particular in so far as consultation of the European Parliament is not required.

111. In the case in point, however, the main difficulty to be resolved relates to the question whether the total absence of Article 178 from the list of actions laid down by the Court suffices to preclude actions for damages. Great prudence is no doubt needed in this regard, but it seems to me dangerous to hold up that absence as meaning that such actions are precluded. It should be noted in this respect that an action to establish the Community's liability, seeking the *award of damages*, is no more problematical than the review of the legality of external agreements and the Court rejected those problems in the abovementioned Opinion.

112. However, even if it were in the context of an action to establish the Community's liability, it would seem to be excluded that the Court could examine the alleged wrongful nature of decisions on external agreements in so far as those decisions involve *strict assessments of what is appropriate* [93] which are not subject to review by the Court pursuant to any provision of the Treaty. It seems to me that this fits squarely within the analysis set out above. I would therefore maintain my view and propose that the Court reserve judgment on the submission of inadmissibility until its decision on the merits.

III — Misuse of the remedy provided for in Article 215

113. Let it be said quite plainly: the objection of inadmissibility raised by the defendant institutions in this respect is not always wholly to the point.

114. I would suggest first of all that two of the defendants' arguments merit only brief examination and should be rejected.

115. On the one hand the defendants maintain that if the Court were to hold that the application was admissible, it would be required to conduct an *ex post facto* reappraisal of policy decisions in order to determine to what extent, if at all, the defendants were at fault.

116. The Court will note that this is once again an attempt to plead the legal immunity of the Community. As to the reference to the difficulty of assessing allegedly wrongful past conduct, it is

92 — J.-V. Louis: *L'ordre juridique communautaire*, 4th Ed., p. 84.

93 — M. Melchior, (op. cit., p. 209), in connection with the extent of the Court's control in the framework of opinions under Article 228, emphasizes that such control can only relate to legality, not appropriateness; *a fortiori* a similar solution must apply in the context of litigious proceedings, including actions for damages.

evidence of some consideration for the Court but does not constitute a ground of inadmissibility.

117. On the other hand, they argue, the application would 'in effect require the Court to order the Community institutions to act now in certain ways which are consistent with the applicant's view of what the Community should have done as a participant in the Sixth International Tin Agreement, notwithstanding that even had the Community so acted the result for the applicant would not necessarily be different'. That argument relates in part to the causal link, thus going to the substance of the case, and is a further reference to the issue of the limits of the Court's control.

118. Then it is said that in fact the application seeks to have the Court undo 'numerous decisions' of the ITC and its members, including the Community. Inasmuch as it concerns acts or conduct which do not fall within the jurisdiction of the Court, this submission merges into the submission to be examined later in which the Court is asked to rule on the ITC's liability.

119. Let us confine ourselves to assessing the relevance of this argument of inadmissibility in so far as it relates to acts or omissions of the Community.

120. In my view it cannot be disputed that Maclaine Watson's application seeks 'a declaration of subjective rights'[94] against the Community. That the action for damages is an independent remedy in relation to the action for annulment[95] and action for failure to act[96] is firmly established in the Court's case-law and, moreover, accepted by the defendant institutions in their observations. Those principles are applicable to this case, including in my opinion, the claim that the Commission did not take 'appropriate steps' against the Member States of the EEC, if appropriate by commencing proceedings under Article 169 of the EEC Treaty, with a view *inter alia* to compelling them to fulfil their financial obligations with regard to the ITC,[97] and to the submission concerning the failure to prevent the abuse of the dominant position that allegedly resulted from the ITC's activities.

121. That argument as to inadmissibility should therefore be dismissed.

122. The defendant institutions further contend that the present application is inadmissible inasmuch as it in fact seeks to bring before the Court an action to establish the contractual liability of the Community for the debts of a third party. Maclaine Watson is attempting to impose upon the Community the role of guarantor or insurer.

94 — Opinion of Mr Advocate General Dutheillet de Lamothe in Joined Cases 9 and 11/71 *Compagnie d'approvisionnement v Commission* [1972] ECR 411, judgment of 13 June 1972

95 — Joined Cases 9 and 11/71, cited above; judgments of 2 December 1971 in Case 5/71 *Zuckerfabrik Schoppenstedt v Council* [1971] ECR 975, of 24 October 1973 in Case 43/72 *Merkur v Commission* [1973] ECR 1055, of 4 October 1979 in Case 238/78 *Ireks-Arkady v Council and Commission* [1979] ECR 2955, of 4 October 1979 in Joined Cases 241, 242, 245 to 250/78 *DGV v Council and Commission* [1979] ECR 3017, of 4 October 1979 in Joined Cases 261 and 262/78 *Interquell Stärke-Chemie v Council and Commission* [1979] ECR 3045, of 12 December 1979 in Case 12/79 *Wagner v Commission* [1979] ECR 3657, of 12 April 1984 in Case 281/82 *Unifrex v Commission and Council* [1984] ECR 1969, and of 17 December 1981 in Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle v Council and Commission* [1981] ECR 3211

96 — Judgments of 28 April 1971 in Case 4/69 *Lütticke v Commission* [1971] ECR 325, and of 2 July 1974 in Case 153/73 *Holtz and* Willemsen v *Council* [1974] ECR 675

97 — See Robert Lecourt in *Mélanges Teitgen*, 'Le rôle unificateur du juge dans la Communauté', p 223, in particular, p 229, see also Opinion of Mr Advocate General Dutheillet de Lamothe in Case 4/69, cited above 'I therefore think that the fact that the action for damages in this case is based on a failure to have regard to the second paragraph of Article 97 or of Article 169 of the Treaty is of very great importance as regards the substance of the case but . has no effect on the admissibility of the action for damages', at p 343

123. *From an economic point of view* the damage suffered by Maclaine Watson obviously originated in ITC's failure to fulfil its obligations. But, as Maclaine Watson quite rightly points out, the intervention of a third party may have led to the non-performance of a contract. The action brought by a creditor against the perpetrator of the harmful act will nevertheless still be seeking to establish non-contractual, delictual or quasi-delictual liability.

124. Maclaine Watson states that it is not asking the Court to order the Community to honour the ITC's contracts, but to make good the damage caused by the Community's own conduct.

125. In any event, however, serious reservations exist as to the admissibility of one of Maclaine Watson's submissions, namely that concerning the Community's liability without fault. I myself would not oppose the recognition of such liability in Community law, although I would point out that the definition of the rules governing it would certainly give rise to serious difficulties in view of the rules laid down by the Court on the subject of fault liability.

126. However, it appears that in the present case Maclaine Watson, in relying on that submission, is in reality seeking to make the Community liable for the debts of the ITC. Let us recall the arguments put forward in this connection. Maclaine Watson notes that in its case-law the Court has been careful never to exclude the principle of liability without fault and requests the Court to declare that the Community is obliged to make good the damage caused to Maclaine Watson on such a basis, pointing out that the making of the Sixth Agreement by the Community and the participation by the Community in the ITC have resulted in the imposition on Maclaine Watson of a loss which exceeds by far the degree of loss which it normally risks in carrying on business. Although, on a market such as the LME, a dealer may run risks because of fluctuations in market prices and defaults by trading partners on their obligations, the default of the ITC does not fall within the limits of the risks inherent in operating on the LME. Since it arose only because of the making of the Sixth Agreement and the way in which the ITC was allowed to operate, the entire risk should not be imposed solely on Maclaine Watson (and others who had direct dealings with the ITC). Thus, if the public interest justified the Community's accession to the Sixth Agreement and its membership of the ITC, the harmful consequences should be borne by the Community as a whole rather than by a few individuals.

127. That reasoning appears to me to be nothing more than an ingenious way of 'dressing up', in an action to establish non-contractual liability, an action which seeks to make the Community liable, as a member of the ITC, for the latter's contractual debts. According to Maclaine Watson itself, the act imputable to the Community stemmed from its accession to the Sixth Agreement and its status as a member of the ITC. The risk that the defendant should make good is that 'involved in the making of the Sixth Agreement and the consequent operation of the ITC'. Perhaps I could put it in a less abstract way and say that the 'risk' is identifiable as simply the risk of the ITC's insolvency. The only link between the ITC's liabilities and the Community is the fact that the Community is a member of the organization.

128. Therefore the question whether Maclaine Watson — and the 'other persons and undertakings having direct dealings with the ITC' — should alone bear that entire risk, or whether the Community as a whole is bound to pay compensation, is aimed precisely at obtaining the Court's judgment, by way of an action to establish the Community's non-contractual liability,

on the *question of the obligations of the members of the ITC, as such, towards the creditors of the organization.* Consequently that submission is a surreptitious attempt to bring before the Court an issue which, point for point, is identical with the claim that Maclaine Watson itself indicated did not form part of this action. It was at pains to inform the Court of what it describes as its 'primary claim', namely that the members of the ITC are liable 'in contract' to satisfy the debts of that organization, which is at present being pursued before the English courts.[98] It should be noted that this submission is in fact seeking to raise the same issue before the Court.

129. The Community institutions maintain that the application seeks to impose on the Community, by virtue of its participation in the ITC, an alleged liability of that organization and to bring the dispute before the Court of Justice, which is a court to whose jurisdiction the ITC is not subject.

130. Let us first recall Maclaine Watson's line of argument. It states that the basis of its action is not the unlawful conduct of the ITC but the conduct of the Community itself. *As a member of the ITC*, whether or not the latter has legal personality, the Community is liable for the ITC's wrongful acts and omissions. The Community is 'responsible in law' for the many wrongful acts and omissions in the management of the ITC because of the influence it possessed in the ITC given the number of votes it held, which would have enabled it to ensure that a responsible attitude was adopted.

131. Let me say right away that those two submissions are inadmissible:

(i) the first because the mere fact of the Community's being a member of the ITC does not, in view of the ITC's separate personality, enable the wrongful acts and omissions of the ITC to be imputed to the Community;

(ii) the second because an attempt to render the Community liable for what is said to be its own conduct within the ITC requires in any event a prior finding of mismanagement on the part of the ITC and, more generally, of its liability therefor; however, such an assessment is outside the jurisdiction of the Court.

Let us consider those two points in greater detail:

132. According to Maclaine Watson, the ITC continued operating although its financial situation was hopeless, as any serious analysis would have shown. In such circumstances, the Community is liable in its capacity as a member. If the ITC does not have legal personality, its wrongful acts and omissions are directly imputable to its members. On the other hand, if it does have separate legal personality, the general principles governing the liability of directors of

98 — See paragraph 5 of the application; I would again point out that Maclaine Watson indicated at the hearing that it had abandoned all its actions against the Community before the English courts.

commercial companies should apply with regard to the question of the members' liability.

133. It is necessary first of all to determine whether the ITC has personality distinct from that of its members. It does not suffice, in my opinion, to rely on Article 16 of the Sixth Agreement which concerns the '*civil*' personality of the organization.[99]

134. The question arising here is whether the ITC may be regarded as an 'independent legal entity'[100] in relation to its members, that is an entity separate from the latter. It was precisely that question of international personality that the International Court of Justice was called upon to examine in respect of the United Nations in its Opinion on 'Reparations for injuries suffered in the service of the United Nations' in which the International Court of Justice stated: 'The Charter has not been content to make the Organization created by it merely a centre for "harmonizing the actions of nations in the attainment of these common ends" ... It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the organization by requiring them to give it every assistance in any action undertaken by it, and to accept and carry out the decisions of the Security Council'.[101] Those criteria, laid down in order to circumscribe the personality of the United Nations in its relations with its Member States, would seem to be amply fulfilled in the case of the ITC.

135. First, the International Tin Council, when implementing the Sixth Agreement, is charged with pursuing the attainment of the latter's objectives: namely, essentially to ensure world-wide equilibrium in the market in tin. It is not limited to 'harmonizing' the members' efforts in this respect, but in any event carries out the task itself, using means that are its own. In so doing, the Council exercises its own decision-making power distinct from that of the members who make up the organization, in so far as essential decisions are adopted on the basis of a *majority* vote, either simple or qualified as the case may be, dealing with:

(i) determination of the floor and ceiling prices,

(ii) borrowing to satisfy the needs of the buffer stock,

(iii) export controls.

Secondly, the position of the members in relation to the ITC is defined inasmuch as they are *bound* by all decisions of the Council (Article 41(2)) and must use their best endeavours to promote the attainment of the Agreement's objectives. It will be noted that these are principles analogous to those contained in the United Nations Charter, which, it should be recalled, the International Court of Justice has described as *defining 'the position of the Members in relation to the Organization* by requiring them to give it every assistance in any action undertaken by it ..., and to accept and carry out the decisions of the Security Council'. Finally, the Chairman of the ITC is a genuine organ of the organization. It is to that *independent chairman*, appointed by a two-thirds majority of members, that the Buffer Stock Manager is responsible. In addition, the Chairman has his own powers, such as the power to limit or suspend the operations of the buffer stock when the Council is not in session.

99 — As to the distinction between civil personality and international personality, and the two aspects of the latter, see Pescatore: *Les relations extérieures des Communautés européennes*, p. 32 *et seq.*

100 — Denys Simon: *L'interprétation judiciaire des traités d'organisations internationales*, Pedone, 1981, p. 639.

101 — Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 178.

136. Consequently, it does appear that the ITC is an entity distinct from its members vested with its 'own decision-making power'. Its conduct may not therefore be imputed to one of its members without ignoring the 'individualization' of the organization in relation to the latter. In those circumstances, the reference to solutions adopted in the field of private law concerning the liability of persons running commercial companies has no relevance whatsoever. No guidance can be derived from the judgment of the International Court of Justice in the *Barcelona Traction* case, [102] for instance. That court did indeed consider that the concept of the lifting of the 'corporate veil' might apply in international law, but there it was precisely a question which concerned *private commercial companies*. As regards an international organization, as has been shown, 'it is necessary to rule out any analogy — which could only be wrong — with the mechanisms of commercial law'. [103]

137. Although that reflection deals with the liability of the members of the ITC for its debts, [104] *a fortiori* it must apply to the question of *imputing* the ITC's conduct to its members. The fact that it is impossible to impute the conduct of an international organization to one of its members ensues from its possession of separate legal personality, even though it is thought by some that the existence of that legal personality leaves open the principle of liability for the debts of the legal person.

138. In consequence the Court should declare the submission imputing the wrongful acts and omissions of the ITC to the Community merely by virtue of its being a member of the organization inadmissible.

139. Let us now proceed to examine the submission which seeks to impose liability on the Community for its alleged conduct within the ITC concerning the mismanagement of the ITC. It will be recalled that, according to Maclaine Watson, the Community failed generally to exercise its influence to ensure that the ITC acted in a financially responsible manner. In particular, it did not support the United Kingdom's efforts to clarify the situation of the buffer stock and opposed an increase in the financial contributions and any control on production. The 'blocking minority' allegedly at the disposal of the Community thus constitutes the ground on which the case is brought before the Court.

140. It should be recalled that the number of votes held by the Community, more than half of those attributed to consuming countries, does not make it possible to impute the ITC's conduct to the defendant, *that is to say to attribute that conduct to the defendant*, given the separate personality of the organization.

141. On the other hand, may the defendant be held liable without a prior finding of wrongful conduct on the part of the ITC itself? I do not think so. It must be

102 — Order of 5 February 1979, ICJ Reports 1970, p. 1, particularly p. 39.

103 — 'Crise du Conseil international de l'étain', P. Eisenmann, op cit., p. 730.

104 — The separate personality of the organization and the liability of its members are two distinct problems; that is what gives rise to all the discussion regarding the question of the members' liability for the ITC's debts, which is not at issue in these proceedings. The English courts have until now considered that the existence of legal personality excludes any liability on the part of the members for the organization's debts. A considerable numer of writers believe that it is essential in this connection to examine whether the organization's statutes have provided clearly for the exclusion of the members' liability (see in particular F. A. Mann: 'International corporations and national law', BYIL. 1967, p. 145, particularly pp. 160 and 161; Schermers: 'Liability of international organizations', 1 L. JIL (1988), p. 3, particularly pp. 8 and 9; Chimni, op. cit., p. 208; for an argument maintaining that there is liability, at least secondary liability, of the members for the organization's indebtedness, see Seidl-Hohenveldern, op. cit., particularly p. 423 *et. seq.*; see in this connection the decision of the Arbitration Tribunal of the International Chamber of Commerce in the Westland case, contra, Eisenmann, op cit.)

pointed out in this connection that the Community's liability for having failed to prevent wrongful conduct on the part of the ITC necessarily presupposes that such wrongful conduct has been established and that it did cause the damage for which Maclaine Watson seeks compensation. The whole edifice of the arguments submitted to the Court on this point is based on the enumeration of a very large number of examples of wrongful conduct on the part of the ITC [105] which the Community did not attempt to prevent or correct and on occasion perhaps even facilitated. The damage alleged is constituted, logically, in the first place by the wrongful acts and omissions of the ITC for which the Community is said to be liable. In other terms, although the present action carefully avoids being more explicit, the mass of references to the ITC's wrongful acts and omissions refer ineluctably to the ensuing liability of the organization as a result of its own management. [106]

142. However, the attempt to impose liability on the members of the ITC, including the Community, although the alleged damage arose from the acts and omissions of the organization, requires a prior finding on the issue of the wrongful conduct on the part of the ITC and an examination of whether that conduct caused the damage alleged. I say 'a prior finding' because it is clear that in the event, for example, that the wrongful acts and omissions could not be regarded as causing the damage, quite obviously it would not be possible to hold the Community liable for conduct consisting of not preventing those wrongful acts and omissions. That is a condition precedent for any liability on the part of the Community for its alleged conduct within the ITC.

105 — See paragraph 164 of the application.

106 — If reference is made to the application in Case 19/89, as Maclaine Watson requested at the hearing, the Court will note that there is an explicit mention of the non-contractual liability of the ITC.

143. The Court cannot, however, make a finding on the prior question of the ITC's liability for its mismanagement. The Court's jurisdiction is confined to the *powers which have been conferred upon it.* That jurisdiction does not enable it to rule on the alleged mismanagement by the ITC in connection with the Sixth Agreement. Examination of the submission in question presupposes that the Court should *first* arrive at a decision in this regard, thus exceeding its jurisdiction. I therefore conclude that this submission is inadmissible.

144. That conclusion raises, I believe, a more fundamental question. When accepting Maclaine Watson's premise that the participation of the Community in the ITC is distinct from the activities of the organization itself, I pointed out that a prior finding in respect of the wrongful conduct on the part of the ITC was inescapable. Is that impasse not a result, however, of the fact that the alleged 'conduct' of the Community is in reality an integral part of the internal decision-making process of that organization? It is quite clear that if the Court were to consider that the participation of one of its members in the activities of the ITC could not be 'detached' from the activities of the organization, then Maclaine Watson would be found to be asking the Court to examine *exclusively* the conduct of the ITC itself.

145. However, the submission concerning breach by the Community of its 'duty to give sufficient warning' and its 'duty of care' to Maclaine Watson does not by any means presuppose that the Court should first make a finding on the ITC's liability. An examination of that submission would involve first of all determining whether the Community was bound by such duties in the context of the Sixth Agreement. It must therefore be assessed with the substance of the case.

146. The submission based on the allegation that the Community did not prevent the abuse of a dominant position constituted by the activities of the ITC raises, in my view, an issue which is not quite the same as that of examination of the conformity of the Sixth Agreement with the EEC Treaty. It poses the question whether the Community institutions could have relied on, or indeed *applied*, Community law against the ITC. In other words, is the relationship between the ITC and its members subject to the law of one of those members? That is the form in which I suggest the Court should examine the question, with the substance, since the substantive aspect and the admissibility of this submission are so closely bound up with each other.

147. Consequently I propose that the Court should:

(1) reserve for consideration with the substance of the case the question of the admissibility of the submissions concerning

(i) the breach by the Community of its duty to give sufficient warning and of its duty of care with regard to the applicant;

(ii) the wrongful acts and omissions of the Community in signing the Sixth Agreement and participating in the decision to bring it provisionally into force in view of the Sixth Agreement's inherently defective character and its incompatibility with the EEC Treaty;

(iii) the failure of the Community to exercise its exclusive competence in the negotiation of the Sixth Agreement and its participation in the latter;

(iv) the failure to consult the European Parliament;

(v) the failure of the Commission to take appropriate steps with regard to the Member States of the EEC concerning their participation in the Sixth Agreement;

(vi) the failure of the Community to prevent the abuse of a dominant position allegedly constituted by the activities of the ITC;

(2) declare inadmissible the remaining submissions relied upon by the applicant;

(3) reserve the costs.

Annex

(1) For the cases brought against the ITC, see in particular:

(i) 17 April 1986 *Standard Chartered Bank* v *ITC and Others* (Queen's Bench Division — Bingham, J.) (1986) 3 AllER257, (1987) 1WLR641, *in re ITC*, 22 January 1987 (Chancery Division — Millett, J.) 1Ch419, (1987) 1AllER890 (1987) 2WLR1229 and, on appeal, 27 April 1988 (Court of Appeal — Civil Division), *Financial Times* of 4 May 1988;

(ii) 13 November 1986 *Maclaine Watson* v *ITC* (Queen's Bench Division — Staughton, J.);

(iii) 13 May 1987 *Maclaine Watson* v *ITC* (Chancery Division — Millett, J.) (1987) 2AllER787 and, on appeal, 27 April 1988 (Court of Appeal — Civil Division), *Financial Times* of 3 May 1988;

(iv) 9 July 1987 *Maclaine Watson* v *ITC* (Chancery Division — Millett, J.) (1987) 3AllER886, (1987) 1WLR1711, before the same judge on 18 December 1987 (not published) and, on appeal, 27 April 1988 (Court of Appeal — Civil Division), *The Times* of 5 May 1988;

(v) 9 June and 5 July 1988 *Maclaine Watson* v *ITC* (Chancery Division — Millett, J.; Chancery Division — Peter Gibson, J.), *The Times* of 27 June and 16 July 1988; for cases before the US courts see 25 January 1988 *ITC* v *Amalgamet* 524NYS2d971, Supreme Court, New York County, *American Journal of International Law*, 1988, p. 837.

(2) For cases brought against the members of the ITC, on whether they are bound by the latter's contractual debts:

(i) 24 June 1987 *Rayner (Mincing Lane) and Others* v *Department of Trade and Industry (DTI)* (Queen's Bench Division — Staughton, J.) (1987) BCLC667, and 29 July 1987 *Maclaine Watson* v *DTI* (Chancery Division — Millett, J.) (1987) BCLC707;

(ii) for the appeals against those two decisions see the judgments of 27 April 1988 (Court of Appeal — Civil Division) reported in *The Times* of 28 April 1988 and 30 June 1988. The High Court of Justice refused in part to grant immunity to all the member States of the ITC, defendants in the actions alleging their wrongful conduct brought by various creditors of the ITC.