

THE DOCTRINE OF IMPLIED POWERS WITH SPECIAL REFERENCE TO THE INTERNATIONAL SEA-BED AUTHORITY*—I

by NISHITANI Hajime

TABLE OF CONTENTS

Introduction

- I The International Sea-Bed Authority
- II The Legal Consequences of the International Legal Personality
 - A. The Formal Approach
 - 1) Delegated Powers Theory
 - 2) Implied Powers Theory
 - B. The Material Approach
 - C. Conclusion
- III Principle of Effectiveness
 - A. Effectiveness
 - B. Cases
 - C. Conclusion
- IV Courts
 - A. The P.C.I.J. and the I.C.J.
 - B. The Court of Justice of the European Communities
 - C. Conclusion
- V Case Law of the P.C.I.J. and the I.C.J.
 - A. Competence of I.L.O. Cases
 - B. Personal Work of Employers Case
 - C. Reparation for Injuries Case

- D. Effect of Awards Case
- E. Certain Expenses Case
- F. Conclusion
 - 1) International Organisations
 - 2) Organs of International Organisations
- VI Case Law of the Court of Justice of the European Communities
 - A. Publication of Lists Cases
 - B. E.R.T.A. Case
 - C. Export Credit Case
 - D. Cornelis Kramer Cases
 - E. Waterway Vessels Fund Case
 - F. Conclusion
- VII General Conclusions
 - A. The International Sea-Bed Authority
 - B. Organs of the International Sea-Bed Authority
 - C. General

* This is the revised version of the present writer's thesis which was completed in part fulfillment of the requirements for the Master of the Jurisprudence from the Law School, University of Auckland at Auckland, New Zealand.

INTRODUCTION

The United Nations Convention on the Law of the Sea 1982 (hereinafter the Convention), ⁽¹⁾ which provides for the International Sea-Bed Authority, stipulates the criteria upon which the Authority shall be deemed to have implied powers, and the grounds for invoking those implied powers. It is the purpose of this thesis to investigate the concepts of the theory of implied powers developed in cases before three Courts: the Permanent Court of International Justice, the International Court of Justice and the Court of Justice of the European Communities. It will then discuss the particular provisions of the Convention in the light of those definitions of the concepts, thereby clarifying the meaning of these provisions.

In Chapter I, the structure of the International Sea-Bed Authority and the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea is discussed. As we are going to see later, it is necessary to discuss the jurisdiction of the organs which apply and interpret the Convention, in order to determine the extent of the implied powers of the organs of the Sea-Bed Authority.

It is also necessary to consider the international legal personality of an international organisation. Depending on the approach which one takes to the concept of international legal personality, differing legal consequences are seen to stem from that concept. Before discussing the implied powers of an international organisation, an approach to this concept must be defined. In Chapter II, this topic is explained.

Although the principle of effectiveness is often suggested as the basis of implied powers, Chapter III seeks to distinguish the effectiveness concept from the concept of implied powers.

Before discussing the concepts of implied powers developed before the three Courts, the conditions for applying these concepts to the Convention must be considered. Chapter IV outlines the different conditions concerning the application of the implied

powers theory. The Permanent Court of International Justice and International Court of Justice lack jurisdiction for authoritative interpretation of the constitutive documents, unlike the Court of Justice of the European Communities and the Sea-Bed Disputes Chamber. Although the Court of Justice of the European Communities, similarly to the Sea-Bed Disputes Chamber, has jurisdiction for authoritative interpretation of the constituent documents, the law applied by the Court is Community Law as distinct from international law. These condition must be noted when the concepts of implied powers defined by the Courts are applied to the Convention.

Chapter V examines advisory opinions rendered by the Permanent Court of International Justice and the International Court of Justice and discusses the concept of implied powers before these Courts.

Chapter VI examines judgements and opinions given by the Court of Justice of the European Communities and discusses the concept of implied powers under Community Law.

Chapter VII, in providing general conclusions, applies the concepts examined in Chapters V and VI, under the considerations set out in Chapter IV of this thesis, to the International Sea-Bed Authority and the Sea-Bed Disputes Chamber, and clarifies the concept of implied powers under the Convention.

(1) U.N. Doc. A/CONF. 62/122 of 7 October 1982 and A/CONF. 62/122/Corr. 1 to 10. On 10 December 1982, the date of the opening for signature, the Convention was signed on behalf of 117 States and two other entities. The Convention will enter into force twelve months after the date of deposit of the sixtieth instrument of ratification or accession, in conformity with Art 308.

I THE INTERNATIONAL SEA-BED AUTHORITY

The International Sea-Bed Authority is an organisation through which States Parties organise and control activities in what is known under the Convention as the "Area", namely the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction,⁽¹⁾ Particularly with a view to administering the resources therein.⁽²⁾ The Authority is endowed with international legal personality. Article 176 of the Convention provides:

The Authority shall have international legal personality and such legal capacity as may be necessary for exercise of its functions and the fulfilment of its purposes.⁽³⁾

The powers and functions of the Authority are stipulated under Article 157, paragraph 2.

The powers and functions of the Authority shall be those expressly conferred upon it by this Convention. The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.⁽⁴⁾

An Assembly, a Council and a Secretariat are established as the principal organs of the Authority.⁽⁵⁾ The Enterprise is established as the organ through which the Authority shall carry out the functions.⁽⁶⁾

The Assembly consists of all the members of the Authority, of which all States Parties of the Convention are members; and, as the sole organ of the Authority consisting of all the members, the Assembly is considered the supreme organ of the Authority, having the power to establish general policies in conformity with the relevant provisions of the Convention on any question or matter within the competence of the Authority.⁽⁷⁾ The Council, on the other hand, is comprised of 36 selected members of the Authority and is the executive organ of the Authority. It has the power to establish in conformity with the

Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.⁽⁸⁾ The Secretariat, which comprises a Secretary-General and such staff as the Authority may require, performs administrative functions.⁽⁹⁾ The Enterprise is the organ of the Authority which carries out activities in the Area directly as well as the transporting, processing and marketing of minerals recovered from the Area.⁽¹⁰⁾

Each principal organ of the Authority and the Enterprise has responsibility for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.⁽¹¹⁾

The Convention has specific provisions with regard to the disputes arising from its interpretation and application. They are dealt with first by the highest administrative body, the Assembly, by means of rules, regulations and procedures, and then by the judicial body, the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea, by means of decisions and advisory opinions.

The Assembly is endowed, under Article 160, paragraph 2, subparagraph (n), with a power to decide which organ of the Authority shall deal with any question and matter not specifically entrusted to a particular organ, consistent with the distribution of powers and functions among the organs of the Authority.⁽¹²⁾

The system of the peaceful settlement of disputes which may arise from the interpretation and application of the Convention, is flexible enough to allow states various modes of peaceful settlement,⁽¹³⁾ ranging from informal non-compulsory procedures to formal compulsory procedures entailing binding decisions. The basic aim is that disputes arising from the Convention should be settled by peaceful means of the parties' own choice including judicial settlement of a compulsory nature, thereby precluding settlement of disputes by the use or threat of force.⁽¹⁴⁾ The aim

is realised in Part XI, Section 5; Part XV; and Annex VI.

The Sea-Bed Disputes Chamber is established as an integrated part of the International Tribunal for the Law of the Sea.⁽¹⁵⁾ It has jurisdiction in disputes concerning the interpretation and application of the Authority's constituent documents.⁽¹⁶⁾ Article 187 of the Convention declares the jurisdiction and access of the Sea-Bed Dispute Chamber to be as follows.⁽¹⁷⁾

The Sea-Bed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories:

- (a) disputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto;
- (b) disputes between a State Party and the Authority concerning:
 - (i) acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or
 - (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power;
- (c) disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or legal persons referred to in article 153, paragraph 2(b), concerning:
 - (i) the interpretation or application of a relevant contract or a plan of work; or
 - (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;
- (d) disputes between the Authority and a prospective contractor who has been sponsored by a State as provided

in article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, article 4, paragraph 6, and article 13, paragraph 2, concerning the refusal of a contract of a legal issue arising in the negotiation of the contract;

- (e) disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, article 22;
- (f) any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.

But its competence is not free from limitation. Article 189 provides:

The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Sea-Bed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures. Its jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention.

According to these Articles, the exercise of the discretionary powers by the Assembly or the Council of the Sea-Bed Authority is not subject to judicial review by the Sea-Bed Disputes Chamber. For example, when such discretion has been exercised in the actual promulgation or adoption of rules, regulations and procedures, the Chamber has no competence to decide whether the rules, regulations and procedures adopted conform to the provisions of the Convention. The competence is limited to a determination in individual cases whether or not a rule, regulation or procedure is being properly applied. The competence of the Chamber with regard to decisions with binding force includes the examination of the application of rules, regulations and procedures in individual cases, but does not include the decision as to their conformity with the provisions of the Convention. On this matter, the Chamber exercises its jurisdiction under Article 191 by means of advisory opinions. This limitation upon the competence of the Chamber with regard to the actions and decisions of the Assembly or the Council is consistent with the view maintained by states seeking to protect the Authority from what they consider to be unacceptable judicial encroachment upon the legislative and discretionary powers of the Authority.

The Chamber also has jurisdiction under Article 191 to deliver advisory opinions on legal questions arising within the scope of the activities of the Assembly and the Council.⁽¹⁸⁾ Article 189, which limits the jurisdiction of the Chamber with regard to decisions of the Authority, does not apply to jurisdiction to deliver advisory opinions. Therefore the Chamber may give an advisory opinion, at the request of the Assembly or the Council, on the exercise by the Authority of its discretionary powers and pronounce on the conformity of the Authority's rules, regulations and procedures with the Convention or on the invalidity of any such rules, regulations and procedures. This pronouncement lacks any binding force.

It is the function of the Chamber to apply the Convention and other rules of international law not incompatible with the

Convention,⁽¹⁹⁾ as well as the rules, regulations and procedures of the Authority adopted in accordance with the Convention, and the terms of contracts concerning activities in the Area in matters relating to those contracts.⁽²⁰⁾ Access in contentious case before the Sea-Bed Disputes Chamber is open to State Parties, the Authority, the Enterprise, state enterprises, and natural or legal persons.⁽²¹⁾ On the other hand access to the Chamber where an advisory opinion is sought is limited to the Assembly and the Council.⁽²²⁾

(1) Art 1, para 1, subpara 1, of the Convention.

(2) Art 157, para 1, of the Convention.

(3) This provision was first proposed as Art 48 of the Informal Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 8/Pt. 1 (1975). The First Committee and its subordinate negotiating groups did not particularly deal with the provision in the context of implied powers. See also Art 52 of the Revised Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 8/Rev. 1 (1976); Art 176 of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10 (1977); Art 176 of the First Revision of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1 (1979); Art 176 of the Second Revision of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Rev. 2 (1980); Art 176 of the Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF. 62/WP. 10/Rev. 3 (1980).

(4) This provision was proposed by the Chairman of the First Committee and the Co-ordinators of the Working Group of 21, whose discussion is not made public, at the Resumed Eighth Session of the United Nations Third Conference on the Law of the Sea, 19 July 1979-24 August 1979, as Art 157, para 1. Suggestions resulting from Consultation Held by the Chairman and Co-ordinators of the Working Group of 21, Document WG 21/2, reprinted as Report on Negotiations Held by the Chairman and Co-ordinators of the Working Group of 21, U.N. Doc. A/CONF. 62/C. 1/L. 26, in *Third United Nations Conference on the Law of the Sea, Official Records*, vol XII, 77. Report on Negotiations Held by the Chairman and Co-ordinators of the Working Group of 21 contained

comments on the proposed articles, but does not mention the proposed Art 157, para 1. The 47th and 48th Meetings of the Resumed Eighth Session were devoted to discussions of the Report on Negotiation Held by the Chairman and Co-ordinators of the Working Group of 21, but the proposed Art 157, para 1, was not discussed almost at all. Cf *Third United Nations Conference on the Law of the Sea, Official Records*, vol XII, 58, para 17. Without being discussed virtually at all, the proposed Art 157, para 1, was adopted as Art 157, para 2, of the Second Revision of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Rev. 2 of 11 April 1980, which wording is practically same as Art 157, para 2, of the Convention on the Law of the Sea 1982. *The United Nations Conference on the Law of the Sea, Official Records*, vol XII, 134. See also Art 21 of the Informal Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 8/Pt. 1 (1975); Art 21 of the Revised Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 8/Rev. 1 (1976); Art 155 of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10 (1977); Art 157 of the First Revision of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1 (1979).

(5) Art 158, para 1, of the Convention.

(6) There is no difference between principal organs and the Enterprise as far as compatibility with the distribution of powers and functions clause, Art 158, para 4. Under Art 24, para 1, of the Informal Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 8/Pt. 1 (1975), the Enterprise and a Tribunal were also the principal organs along with the Assembly, the Council and the Secretariat. Under Art 24, paras 1 and 2, of the Revised Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 8/Rev. 1/Pt. 1 (1976), although the Enterprise was distinguished from subsidiary organs which were stipulated in para 3 of the provision, it was not provided for as one of the principal organs. Even so it was provided for in the Convention itself. Under Art 156, para 1, the Tribunal was not named as a principal organ, because the Tribunal was abolished as an organ of the Authority and combined with the International Tribunal of the Law of the Sea. Under Art 156, para 4, of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10(1977), and Art 158, para 4, of the First Revision of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1 (1979), the Enterprise was not included as one of the organs which shall act in a manner compatible with the distribution of powers and functions as provided in the Convention. Under Art 158, paras 1 and 2, of the Second Revision of the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Rev. 2 (1980), the Enterprise was not stipulated as one of the principal organs, but it was included in the separation of powers and functions clause, Art 158, para 4.

This situation is the same in the present Convention. There is no difference, after the change in the Second Revision of the Informal Composite Negotiating Text, between the principal organs and the Enterprise on this point. Principal organs are accountable to the Assembly as specifically provided for in the Convention under Art 160, para 1. On the other hand the Enterprise is subject to the directives and control of the Council under Art 170, para 2. See also text, Chapter VII, B *infra*.

(7) Arts 159 and 160 of the Convention.

(8) Arts 161 and 162 of the Convention.

(9) Art 166 of the Convention.

(10) Art 170 of the Convention.

(11) Art 158, para 4, of the Convention.

(12) Under Art 26, para 1, of the Revised Single Negotiating Text, U.N. Doc. A/CONF. 62/WP. 8/Rev. 1/Pt. 1 (1976), the power of the Assembly to discuss any question or matter within the scope of that Part of the Convention and make recommendations thereon was separately stipulated from the power to indicate which organ shall be entrusted with such questions and matters not specifically entrusted to a particular organ of the Authority. Since the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10 (1977), Art 158, para 1, two provisions were combined together and since the Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF. 62/WP. 10/Rev. 3 (1980), Art 160, para 2, subpara (n), the provision was stipulated in the paragraph which provided for the individual powers and functions of the Assembly, contrasting with the Revised Single Negotiating Text, Art 26, para 1, and the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1 (1979), Art 160, para 1, in which the provision was stipulated in the clause of the general powers and functions of the Assembly along with the general policies and the supreme organ clause. In the light of the history of the drafting, the Assembly's power to discuss the question or matter within the sphere of the Authority and the power to decide upon the entrusted organ, have been combined under the Informal Composite Negotiating Text, Art 158, which the Convention follows under Art 160, para 2, subpara (n). The Assembly, therefore, seems to have the power to discuss any question or matter within the competence of the Authority. See text accompanying note 16 of Chapter VII *infra*.

(13) Arts 280-284 and 286-287 of the Convention.

(14) Art 279 of the Convention.

(15) Compare Revised Single Negotiating Text, Parts I and IV, with Informal Composite Negotiating Text, Parts XI, Section 6, and XV, which are now Parts XI, Section 5 and XV of the Convention.

(16) Arts 187, 188, 191 and 288, para 3, of the Convention. See also Art 287, paras 1 and 2.

(17) See also Annex IV, Art 37 of the Convention.

(18) Art 1, para 1, subpara (3), of the Convention.

(19) Art 293, para 1, of the Convention.

(20) Annex VI, Art 38 of the Convention.

(21) Annex VI, Art 37 and Art 187 of the Convention.

(22) Art 191 of the Convention.

II THE LEGAL CONSEQUENCES OF INTERNATIONAL LEGAL PERSONALITY

The International Sea-Bed Authority has legal personality under Article 176 of the Convention. There are two main approaches to the legal consequences which stem from the international legal personality of an international organisation. One is the formal approach and the other is the material approach.

A. *The Formal Approach*

The formal approach holds that powers and functions of the organisation are derived from its constituent document, implied or delegated, and not from the fact that it has international legal personality. The theories which fall within this formal

approach would be classified into two groups: the theory of delegated powers, attributed powers, or enumerated powers on the one hand, and the theory of implied powers on the other hand. (1)

1) Delegated Powers Theory

The theory of delegated powers says that an international organisation possesses only those powers and functions which are conferred upon the organisation by its constitution.

Kelsen, discussing the legal status of the United Nations, says:

the United Nations has legally only the power to enter into those international agreements which it is authorised by special provisions of the Charter to include; and these agreements are to be concluded, on behalf of the Organisation through the organs determined by these special provisions. (2)

He defines “juridical personality” as “the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law.” (3) And he says that an international organisation possesses legal personality in the field of international law if the treaty constituting the organisation confers upon its organs the competence to exercise certain functions in relation to the members, and especially the power to enter international agreements establishing the duties, rights and competence of the organisation. Thus the constituent treaty need not expressly confer international legal personality on an international organisation. The latter may or may not be implied in the substantive provisions of the constituent treaty. However, if the constituent treaty does not contain a provision expressly conferring international legal personality upon the organisation, that is to say unrestricted legal capacity under international law, the organisation has only those special capacities which are conferred upon it by particular provisions. (4) In Kelsen’s view, there are two possibilities. Firstly, where there is an express provision conferring upon an organisation international legal per-

sonality, the organisation being an international person enjoys the capacity as defined above. Secondly, where there is not such an express provision, the organisation has "only those special capacities as conferred upon it by particular provisions."⁽⁵⁾ He adheres to the strict delegated theory as far as there is no explicit provision to confer upon the organisation international legal personality.⁽⁶⁾

In the case of *Commission de Communautés Européennes c. Conseil des Communautés Européennes* (*Accord Européen sur les Transports Routiers*), (hereforth referred to as *E.R.T.A. Case*) the Advocate General of the Court of Justice of the European Communities based his argument on the theory of delegated powers.⁽⁷⁾ In his submission to the Court, he said:

that authority of the Community organs must be regarded as being what European law calls "compétence d'attribution" (in German "Enumerationsprinzip")....⁽⁸⁾

He admitted that this "compétence d'attribution" can be interpreted fairly widely and there is a decision of the Court in this context. But he maintained that this approach cannot be applied to the authority of the EEC to conclude agreements with non-members, and necessary powers for concluding agreements with non-members are gained through Article 235.⁽⁹⁾ And he said:

such an extension is legally very difficult on the basis of the law at present in force. The whole scheme of the Treaty of Rome suggests that the authors of the Treaty intended to limit the external authority of the Community strictly to the cases they have expressly provided for.

In this connection it is instructive to compare the European Coal and Steel Community Treaty with the Treaty of Rome. Whereas in the ECSC Treaty the negotiator of 1951 had laid down that (Article 6) "in international relations the Community shall enjoy the legal capacity necessary to perform its functions and to achieve its aims", the negotiators of the Treaty of Rome in 1957 confined themselves to stating that the Community has legal

personality (Article 210), but when dealing with external relations they expressly stipulated in Article 228 that the external authority of the Community could only be exercised “in the cases provided for by the Treaty”.

Surely, to recognise that the Community has “implied powers” in connection with negotiations with non-member countries would be to go much further than was intended by the authors of the Treaty and the States which signed and accepted it? We, at any rate, think so, and this is the main reason why we are proposing in this field a relatively strict interpretation of the Treaty.⁽¹⁰⁾

Regardless of the submission of the Advocate General the Court of Justice of the European Communities in the *E.R.T.A. Case* examined whether there is a Community competence in the external field in the sphere of transport, and laid the basis for rejecting the theory of delegated powers. It held:

In the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy ... one must turn to the general system of Community Law relating to agreements with Non-Member States....

To determine in a particular case the Community's authority to enter into international agreements, one must have regard to the whole scheme of the Treaty no less than to its specific provisions.

Such authority may arise not only from explicit grant by the Treaty ... but may equally flow from other provisions of the Treaty....⁽¹¹⁾

Apart from the express powers conferred upon it by its constituent instruments, it is inevitable that any international organisation will require certain powers which are not expressly conferred on it in order to discharge its functions. To meet changing needs and circumstances on the dynamic international level, the international organisation as a dynamic institution itself, is recognised as having broader powers than delegated

powers. There seems to be little doubt that, in practice, organisations take this view; and instances abound of organisations acting in a manner which is not specifically provided for in their constituent documents.

2) Implied Powers Theory

The theory of implied powers propounds the view that an international organisation also possesses those powers, which although not are conferred upon it by implication from the constituent document as necessary for the performance of its functions. Brownlie writes:

Particular care should be taken to avoid an automatic implication from the very fact of legal personality of particular powers, such as the power to make treaties with third states or the power to delegate powers.⁽¹²⁾

O'Connell says:

It is a mistake to jump to the conclusion that an organisation has personality and then to deduce specific capacities from an *a priori* conception of the concomitants of personality. The correct approach is to equate personality with capacities, and to inquire what capacities are functionally implied in the entity concerned.⁽¹³⁾

Bowett also takes this approach, saying:

the test is a functional one; reference to the functions and powers of the organisation exercised on the international plane, and not to the abstract and variable notion of personality, will alone give guidance on what powers may properly be implied.⁽¹⁴⁾

In the context of the European Communities, the European Parliament, by its resolution declared also that the power derives from the treaty, that is to say, from the explicit provisions read in the context of the treaty as a whole and its specified objectives and from the necessary implications which flow from the provisions of the treaty.⁽¹⁵⁾

B. *The Material Approach*

In contrast to the formal approach, the material approach holds that once international personality has been verified, the international organisation has certain powers and functions on the international level from the very fact of its international personality. The nature and degree of legal consequences stemming from international personality vary for the writers adopting this approach. But the common feature recognised among them is the fact that certain categories of powers and functions are derived from the notion of the international personality, and hence these are to be enjoyed by every organisation entitled to international personality irrespective of the provisions of its constituent treaty.⁽¹⁶⁾

Oppenheim-Lauterpacht states the following:

Not being a State, and neither owning territory nor ruling over citizens, the League did not possess sovereignty in the sense of State sovereignty. However being an International Person *sui generis*, the League was the subject of many rights which, as a rule, can only be exercised by sovereign States.⁽¹⁷⁾

Seyersted, who is perhaps the leading proponent of the material approach,⁽¹⁸⁾ argues that international organisations and States are on an equal footing from the point of view of their legal capacities. In his view the international personality of international organisations is not based on the provisions of the constitution or the intention of its framers but on the objective fact of its existence. This “object personality” is founded in “general and customary international law”⁽¹⁹⁾ as is sufficiently proved by practice.⁽²⁰⁾ According to Seyersted, from the international point of view, the only legal limitation on the inherent powers of an international organisation are: a) the negative provisions of the constitution forbidding the organisation to perform certain acts⁽²¹⁾ ; b) the purposes of the organisation⁽²²⁾ ; c) the fact that no organisation can make decisions binding upon the member states relating to the exercise of jurisdiction over their territory,

nationals, or organs without a special legal basis⁽²³⁾ ; and d) that an act must be decided and/or performed by the organ which is competent under the constitution and in accordance with any procedures therein prescribed.⁽²⁴⁾

Kelsen refers to the Belgian proposal at the San Francisco Conference, which read: "The Parties to the present Charter recognise that the Organisation they are setting up possesses international status, together with the rights involves".⁽²⁵⁾ Kelsen submits that if this had been accepted, the United Nations would have had the power to conclude any treaty whatsoever, especially treaties by which the United Nations accepts functions not conferred upon it by the Charter.⁽²⁶⁾ In his view, in so far as the international organisation is expressly endowed with international legal personality, the organisation has the general power, not capacity, to conclude any treaty because of its international legal personality. Although Seyersted described Kelsen as a leader of the delegated powers theory,⁽²⁷⁾ judging from what he states above, so far as the organisation being expressly endowed with international legal personality, Kelsen seems to have taken the material approach.

Examining the status of the United Nations in the international plane, Weissberg seems to reject the material approach and accept the implied powers theory, saying:

the type of personality which is enjoyed by a non-territorial entity, and the degree of that personality, cannot be conceived on the basis of *a priori* concepts. Instead it must be treated in accordance with the functions which the organization may undertake. Nor are all of these significant for purposes of such a determination, but, rather, only those express powers which *ipso facto* prove - or from which a reasonable inference may be drawn - that the organization has personality are of importance.⁽²⁸⁾

Furthermore he says:

Personality and its scope are derived not only from the purposes of an international entity as expressed directly in its

constitutive document, but also as implied in the instrument and as evolved in actual practice....

The possession of personality, based either on specific provisions or powers from which a reasonable inference may be drawn, or from which this tenet may be extracted, enables the organization to achieve its primary aims. This is because an entity so endowed may, in conjunction with its primary functions, assume additional derivative powers and thus enlarge its capacities. But this is not to say that personality empowers the organization to accomplish tasks for which it was not founded, nor is the principle capable of closing every *lacuna*. On the contrary, it must be employed in association with the substantive powers of the organization.⁽²⁹⁾

He concludes that organisations endowed with international legal personality can undertake two functions.⁽³⁰⁾

- (1) Primary functions: these are powers and functions specifically delegated and enumerated in the constitutive instruments.
- (2) Derivative functions: these are subdivided into two different classes.
 - (a) those which may be implied; and
 - (b) those which are auxiliary in nature.

Moreover the derivative functions are derived not only from the primary functions of the organisation but also from its international legal personality. Finally, although he seems to have accepted the formal approach applying the implied powers theory as examined above, citing the *Case of Reparation for Injuries Suffered in the Service of the United Nations*,⁽³¹⁾ he concludes:

International juridical personality ... increases the powers, rights and competence of the organization and, in this respect, is not only a legal concept, but a supplementary force as well.⁽³²⁾

Consequently Weissberg takes a somewhat indefinite position concerning the legal relation between international legal

personality and powers and functions of an international organisation. This obscure conclusion is partly because of indiscriminate use of the term "international legal personality" by Weissberg. Sometimes it employs the meaning of the complexity of powers and functions and sometimes the legal concept. A careful distinction must be recognised, under the complexity of potential activities of an organisation, between the legal concept and realities.

Rama-Montaldo submits a compromise suggestion, when he writes that the material approach and the theory of implied powers are not contradictory and each has a special field of application. International organisations possess two categories of rights: those which derive directly from their quality as an international person, and those which arise as implied powers from their functional nature. He concludes:

The personality of international organizations derives from certain objective criteria, and it gives rise to certain categories of rights which enable the organization to manifest as a distinct entity on the international plane and enter into relationship with other subjects of international law, even if those rights are not mentioned in the constitution. The concept of implied powers must in turn be applied to the functions of the organization when certain other powers or functions not provided in the constitution are essential or necessary to implement the purposes or functions already established in the constituent document.⁽³³⁾

The material approach seems, in the view of the present writer, open to three main criticisms. In the first place this approach seeks to place, from the examples of practice, international organisations in the same category as states as far as powers and functions are concerned, but does not make any attempt to determine whether all those powers and functions, and the practice of international organisations, are derived from a common element of international personality.⁽³⁴⁾

Secondly, the general assumption is that a state is the subject of the totality of rights and duties because it is an international person and they are inherent in the concept of international personality. Accordingly, if an international organisation enjoys certain powers and functions and they coincide with those of states, the conclusion is that it is an international person in the same manner as a state. And because of the existence of international personality, an organisation also has the totality of rights and duties inherent in the concept of international personality.⁽³⁵⁾ It is cited as an example of the powers which are common between international organisations and states, viz the power to conclude treaties, the power freely to organise its internal functioning, the power to maintain military forces, and the power to operate ships under the flag of the organisation.⁽³⁶⁾ Consequently, even though international personality is itself deduced from the examples of specific powers and functions, the general powers and functions are deduced from the very fact of international personality.

Thirdly, there are three methods of interpreting a treaty, and there is a shade of difference in the extent to which these three methods emphasise the importance of the letter of a treaty. Although there is controversy concerning the extent to which the so-called “liberal” or “extensive” methods are permissible under this provision, Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties 1969 clearly adopted the text as the basis of interpretation.⁽³⁷⁾ These approaches begin their interpretation from the objective fact of the wording of a treaty and determine the powers and functions of an organisation from a treaty text. On the other hand, the material approach begins its interpretation from the notion of international personality whether it is introduced implicitly or explicitly by the treaty. The very existence of the notion confirms its powers and functions. All the powers and functions that a state has are deemed to have been conferred upon an international organisation *a priori*, and according to certain tests,⁽³⁸⁾ the powers and functions of the organisation

would be limited. In so far as the text of a treaty is the primary source for interpreting the powers and functions of an international organisation, there is little scope for the material approach.

C. *Conclusion*

In the Advisory Opinion on *Reparation for Injuries Case*, the International Court of Justice expressly rejected to accept the material approach saying:

This [the concept of international personality] is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of [rights flowing from] obligations incumbent upon its Members.⁽³⁹⁾

It seems to the present writer that the Court saw no legal consequences arising from international personality. The Court accepted that international personality could be possessed by entities other than states, when it held:

Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment ... of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.⁽⁴⁰⁾

The Court again emphasised this point of view, when examining the following: the organs of the United Nations, their tasks and the position of Members in relation to the United Nations and, finally, practice particularly the practice of concluding conventions.⁽⁴¹⁾ It said:

the Organization was intended to exercise and enjoy, and

is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality⁽⁴²⁾

Accordingly, the Court came to the conclusion that the Organisation was an international person. This meant that it was a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing claims of an international nature. After separating the concept of international personality from the international organisation and the rights and duties of the international organisation, the Court decided whether the sum of the international powers of the United Nations comprised the power to bring the kind of international claim described in the request by examining the United Nations' purposes and functions as expressed or implied in its constituent document.⁽⁴³⁾

If the Court had, to some degree, taken the material approach, it would not have been necessary for it to examine the United Nations' purposes and functions. The power of the United Nations to bring the international claim could have been introduced directly from the concept of the international personality conferred upon the United Nations. Instead the Court took pains to define international personality and examined the purposes and functions of the United Nations. The Court in this case clearly seems to have taken the formal approach and adopted the theory of implied powers.⁽⁴⁴⁾

It is suggested by the Court in the *Reparation for Injuries Case* that the correct approach to the legal consequences of international legal personality of an international organisation is to define international personality as the capacity to maintain powers, rights and duties on the international plane and investigate separately what powers, rights and duties are derived from

the constituent document.

Consequently, although Article 176 of the United Nations Convention on the Law of the Sea 1982 stipulates that the International Sea-Bed Authority has international legal personality, the Authority's competence and legal personality must be discussed separately. It seems to be incorrect to derive certain capacities for an international organisation from the notion of international personality itself. Moreover it seems too strict an approach, bearing in mind the dynamic and changing life of the international organisation in the international sphere, to concentrate on the delegated powers in the constituent document only.

(1) For example Seyersted, *United Nations Forces in the Law of Peace and War* (1966) 143; Rama-Montaldo, "International Legal Personality and Implied Powers of International Organizations" (1970) 44 B.Y.I.L. 111 at 112 et seq.

(2) Kelsen, *The Law of the United Nations* (1951) 330.

(3) Ibid, 329.

(4) Ibid, 329-330.

(5) Ibid, 330.

(6) He maintains rather a material point of view where the constituent document expressly confers international legal personality. See text accompanying notes 25-27 of this Chapter *infra*.

(7) *Affaire 22/70*, (1971) XVII *Recueil de la Jurisprudence de la Cour* 203 at 289-290 and 294. (1971) 10 C.M.L.R. 335.

(8) Ibid, 294.

(9) Article 235 of EEC Treaty provides:

If any action by the Community appears necessary to

achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provision.

(10) *E.R.T.A. Case*, *supra* at note 7, at 294.

(11) *Ibid*, 274. And see also *Mannesman AG et autres c. Haute Autorité de la C.E.C.A., Affaires jointes* 4/59 à 13/59, (1960) VI/I *Recueil de la Jurisprudence de la Cour* 241 at 281. *Gouvernement de la République Italienne c. Haute Autorité de la C.E.C.A., Affaire* 20/59, (1960) VI/II *Recueil de la Jurisprudence de la Cour* 663, Valentine, *The Court of Justice of the European Communities* (1965), vol 2, 294 at 301-303; *Gouvernement du Royaume des Pays-Bas c. Haute Autorité de la C.E.C.A., Affaire* 25/59, (1960) VI/II *Recueil de la Jurisprudence de la Cour* 723, Valentine, *op.cit.*, 315; *Cornelis Kramer et autres, Affaires jointes* 3, 4 et 6/76, [1976] *Recueil de la Jurisprudence de la Cour* 1279 at 1300-1309; Opinion 1/76 of the Court of Justice of the European Communities, (1977) 20 *Official Journal of the European Communities*, Information and Notices, No. C107/4 at 12.

(12) Brownlie, *Principles of Public International Law* (3rd ed 1979) 688.

(13) O'Connell, *International Law* (2nd ed 1970), vol 1, 98.

(14) Bowett, *The Law of International Institutions* (4th ed 1982) 337.

(15) Resolution on the Position of the European Communities in Public International Law, (1978) 21 *Official Journal of the European Communities*, Information and Notices, No. C239/16 at 17.

(16) Rama-Montaldo, *supra* at note 1, at 116 et seq.

(17) Oppenheim, *International law* ed H. Lauterpacht (8th ed 1955), vol 1, 384-385.

(18) Rama-Montaldo, *supra* at note 1, at 118-119.

(19) Seyersted, *Objective International Personality of Intergovernmental Organizations* (1963) 100.

(20) Ibid, 21-29.

(21) Seyersted, "United Nations Forces, Some Legal Problems" (1961) 37 B.Y.I.L. 351 at 458.

(22) Ibid, 458.

(23) Ibid, 459-460.

(24) Ibid, 459.

(25) United Nations Conference on International Organisation U.N. Doc. 524, IV/2/26.

(26) Kelsen, *supra* at note 2, at 330.

(27) Seyersted, *supra* at note 21, at 447. See also text accompanying notes 2-5 of this Chapter *supra*.

(28) Weissberg, *The International Status of the United Nations* (1961) 201-202.

(29) Ibid, 203.

(30) Ibid, 203-204.

(31) [Advisory Opinion] [1949] I.C.J. Reports 174. Henceforce referred to as *Reparation for Injuries Case*.

(32) Weissberg, *supra* at note 28, at 204.

(33) Rama-Montaldo, *supra* at note 1, at 124. And see also Rama-Montaldo, *ibid*, 153-155.

(34) See also *ibid*, 119-120.

(35) Seyersted, *supra* at note 21, at 447-459, and *supra* at note 19, at 28-29.

(36) Seyersted, *supra* at note 21, at 448-453.

(37) Art 31, para 2.

(38) See, for example, Seyersted, *supra* at note 21, at 458-460.

(39) Supra at note 31, at 178. On the contrary Seyersted considers that the *Reparation for Injuries Case* endorses the material approach. Supra at note 21, at 454-455. He also cites the Advisory Opinion on *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, [Advisory Opinion] [1954] I.C.J. Reports 47, supra at note 21, at 454-455, and the Advisory Opinion on *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* [Advisory Opinion] [1962] I.C.J. Reports 151, supra at note 19, at 99, as examples of the material approach, although the International Court of Justice did not have recourse to the concept of international legal personality of the organisation as the foundation of the legality of actions taken by the organisation in those two cases. See also Rama-Montaldo, supra at note 1, at 124 et seq; Bowett, *The Law of International Institutions* (4th ed 1982) 338 n 13.

(40) *Reparation for Injuries Case*, supra at note 31, at 178.

(41) Ibid, 178-179.

(42) Ibid, 179.

(43) Ibid, 179-180.

(44) Although see Bowett, supra at note 39, at 336-337; Rama-Montaldo, supra at note 1, at 124 et seq.

III PRINCIPLE OF EFFECTIVENESS

Before discussing the theory of implied powers, an approach of interpretation expressed as the principle of effectiveness seems to need to be clarified. The principle of effectiveness, which is expressed in a Latin maxim, *ut res magis valeat quam pereat*, is sometimes defined as a notion which includes the theory of implied powers. As we are going to discuss in this Chapter, there is a great variety of definition of the principle, depending on the approach of interpretation taken, and there seems to be no general consent in respect of the ground from

which effectiveness is derived and the limit of the principle of effectiveness. The purpose of this Chapter is to discuss various definitions of the principle of effectiveness to exclude the principle from criteria for deciding the extent of powers being implicitly sought from the constituent document of an international organisation.

A. *Effectiveness*

There are, amongst others, three main schools of thought on the subject of interpretation. ⁽¹⁾ They are referred to as the "ordinary meaning of the words" or "textual" method ⁽²⁾; the "intentions of the parties" or "subjective" method ⁽³⁾ and "aims and objects" or "teleological" method. ⁽⁴⁾

There is a principle often referred to as the principle of effectiveness which the courts apply along with the three methods to interpret treaties. This principle is also described in a Latin maxim, *ut res mgis valeat quam pereat*, namely, it is better for a thing to have effect than to be made void. When this principle is applied to the constituent document of an international organisation, the principle maintains that an organisation must have a particular power in order to discharge its powers, purposes and functions effectively. The power derived from the concept of effectiveness is occasionally called implied power. ⁽⁵⁾

The principle is defined widely by some writers and narrowly by others.

In a wide sense, it is defined, not so much as a method of interpretation, but as the purpose to which those methods of interpretation must be applied to produce the result. ⁽⁶⁾ Lauterpacht, using the subjective method, defines the principle of effectiveness widely, when he says that the intention of the parties, express or implied, is the law, and any considerations of effectiveness or otherwise which tend to transform the ascertainable intention of the parties into a factor of secondary importance, are inimical to the true purpose of interpretation. In so far as the rule of effectiveness is identical with the principle of good

faith, it has a full jurisdiction of its own and cannot be regarded as a technical or artificial rule of construction. No principle of effectiveness can properly endeavour to give legal efficacy to clauses or instruments which were not intended to produce such results. Lauterpacht cites the *Reparation for Injuries Case* as an example of a case in which the Court applied the principle of effectiveness.⁽⁷⁾

The principle is also narrowly defined as one of the methods of interpretation. Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties 1969 provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

And the International Law Commission's commentary with regard to the provision reads:

The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in [Article 31, paragraph 1] When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of "effective interpretation".⁽⁸⁾

The Commission clearly employed the textual method applying the maxim and principle of effectiveness as defined by it, in

contrast to the principle of "effective interpretation". The members of the Commission think that the maxim *ut res magis valeat quam pereat* embodied in Article 31, paragraph 1, does not allow an extensive or liberal interpretation. On the contrary the principle of "effective interpretation" is regarded as the approach to interpretation that the maxim intends to avoid.

De Visscher, indirectly defining the principle of effectiveness, resorts to the subjective method, saying:

If in principle a treaty must be interpreted in such a way as will allow it to achieve the aims of the parties to it (the principle of "effectiveness", often expressed in the maxim *ut res magis valeat quam pereat*), the search for this aim must not degenerate into abstract reasoning as to an aim which is supposed to have been that of the Parties, the partial ineffectiveness of the treaty can be explained in fact by the deliberate intention of the Parties not to commit themselves beyond a certain point. ⁽⁹⁾

The principle can also be applied under the teleological method. Schwarzenberger defines the teleological method as follows: such a construction pays little attention to the letter of a treaty, but concentrates on the effective realisation of its objects and purpose or, in other words, its spirit. ⁽¹⁰⁾ And citing the Latin maxim, *ut res magis valeat quam pereat*, he describes the principle "battle-cry of functional treaty interpretation". ⁽¹¹⁾

B. Cases

In *Interpretation of Peace Treaties [Second Phase]*, the International Court of Justice was asked by the General Assembly of the United Nations for an Advisory Opinion as to whether the Secretary-General could appoint the third member of a commission to hear disputes concerning the interpretation or execution of three 1947 Peace Treaties when one party failed to appoint its member and, if so, whether a commission consisting of the third member and the appointee of the other party could hear a dispute. ⁽¹²⁾

The Court rendered the advisory opinion as follows concerning treaty interpretation.

While the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners, it is nevertheless true that according to the natural and ordinary meaning of the terms it was intended that the appointment of both the national Commissioners should precede that of the third member

The Secretary-General's power to appoint a third member is derived solely from the agreement of the parties as expressed in the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists. ⁽¹³⁾

And also:

The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.

The Principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit. ⁽¹⁴⁾

The Court thus in this case refused to apply the principle of effectiveness and instead applied the textual method for the power of the Secretary-General of the United Nations under the Peace Treaties.

The same limitations were recognised by Judge Read in the following passage from his Dissenting Opinion in the same case,

when he said:

In the cases which have been cited above [P.C.I.J., Series B, Nos. 2 and 3, 6, 7, 8 and 9, 13, and Series A., No. 22. [1949] I.C.J. Reports 174. Cited at 233-234.], the Permanent Court went a very long distance by way of interpretation to give effect to the principle of effectiveness The Permanent Court has always recognized that the application of the principle of effectiveness is subject to different considerations. It is, however, necessary to admit that there is no instance in which the Permanent Court intimated that it would apply the principle of effectiveness if application involved doing violence to the terms of the treaty provisions under consideration.⁽¹⁵⁾

Judge Read, however, did not think that interpretation according to the principle of effectiveness would do violence to the terms of the Peace Treaties. Accordingly he stated his position as follows:

The problem of interpretation with which the Court is confronted is a choice between two possible constructions, neither of which does violence to the language of the Treaty and both of which are based upon inferences drawn from the expressions actually used in the text.

In these circumstances, it seems to be clear that the Court is not precluded from adopting either of the foregoing interpretations⁽¹⁶⁾

Under these considerations, Judge Read concluded that, of the two technically possible constructions, the one to be adopted was that which would give the treaty its maximum effect, or at any rate prevent it from being deprived of due effect.⁽¹⁷⁾

Judge Read, again applying the principle of effectiveness, argued in favour of the Court's jurisdiction in *Anglo-Iranian Oil Co. Case* [*Jurisdiction*], a position not shared by the majority. He reasoned as follows:

This Court is directly bound by the provisions of the Charter and it is "the principal organ of the United Nations". It cannot ignore the Preamble of the Charter, and

its statement of Purposes and Principles. It cannot overlook the fact that acceptance of the compulsory jurisdiction of the Court is one of the most effective means whereby Members of the United Nations have sought to give practical effect to the Preamble and to the Purposes and Principles. I should be failing in my duty as a judge, if I applied a rule of interpretation designed to frustrate the efforts of Members to achieve this object.⁽¹⁸⁾

In a leading case, *Fédération Charbonnière de Belgique c. Haute Autorité de la C.E.C.A.*,⁽¹⁹⁾ the Court of Justice of the ECSC applied the principle of effectiveness in the context of the ECSC Treaty. The plaintiffs, an association of all the collieries of Belgium, brought an action challenging the validity of Decision 22/55 and the Letter of 28 May 1955.⁽²⁰⁾ Decision 22/55 had fixed the selling prices for Belgian coal and the plaintiffs challenged the legal competence of the High Authority to fix these prices. By Article 61 of the Treaty,⁽²¹⁾ the High Authority can fix maximum and minimum prices if it finds that such a decision is necessary to attain the objectives defined in Article 3 and particularly in paragraph (c) thereof,⁽²²⁾ but may not fix selling prices in between these two levels. Further, Article 26, paragraph (a), of the Convention containing the Transitional Provisions 1951 declares that prices lists shall not be changed without the High Authority's agreement.⁽²³⁾ Plaintiff alleged the basic assumption of the Treaty was that enterprises were to run their own affairs. It could therefore not be assumed that this had conferred the power on the High Authority to fix prices.⁽²⁴⁾

The question arose, therefore, whether this provision gave the High Authority the power to allow or to prevent coal prices being changed after they had been fixed and, in addition, whether it gave it the power to fix these prices in the first place.

The plaintiffs quite naturally claimed that, before the Treaty came into force, enterprises had been able to fix their own prices, therefore their power to do so must continue after that date unless there was an express provision in the Treaty bringing

that power to an end.

The Court held:

The plaintiffs contended ... that the absence in the Treaty of an express power to fix prices by administrative action prevents the recognition of such power In the opinion of the Court, ... it is permissible, without involving a wide reading, to allow a rule of interpretation that is generally admitted as much in international law as in municipal law, by which the norms established by an international treaty or by a law, imply those norms without which the former would not make sense or would not permit of a reasonable and useful application. ⁽²⁵⁾

Under the system set up to subsidise imported scrap, the High Authority of the ECSC as empowered to impose a levy upon certain consumers of Community produced scrap and with the funds thus raised it paid a subsidy to the consumers of imported scrap. The High Authority, however, without any fault on its own part, paid out a subsidy to a consumer who was not entitled to it. The question thus arose whether, in default of an express provision on this subject, the High Authority could demand back the payment wrongly made. The Court stated:

The subsidy arrangement to which numerous enterprises of the six countries of the Community which are consumers of scrap have been compulsorily subjected will always enable errors to be made in the payment of the amount of the subsidy and it must, therefore, be admitted that the legal basis of an obligation to contribute implies the right to enforce repayment because without this obligation the subsidy system ... could not be operated in a reasonable manner. Thus an express authorisation was not necessary.... ⁽²⁶⁾

C. Conclusion

As we have seen, the definition by writers of the principle of effectiveness varies. The principle is, in the view of

Lauterpacht, superior to other methods of interpretation. It is also, in the views of many other writers, argued as one of the methods. Among the writers who regard the principle of effectiveness as a method of interpretation, there is no agreement about the grounds from which effectiveness is derived and the limit of the principle. In two cases the International Court of Justice admitted the existence of the principle although, Judge Read dissenting, it declined to apply the principle of effectiveness to an organ of an international organisation and an international organisation, arguing that the Court in various cases employed the restrictive interpretation with regard to the jurisdiction on peaceful settlement of disputes.⁽²⁷⁾ Neither writers nor judges seem to agree on which of these three methods of interpretation should be taken to apply the principle of effectiveness. And according to the method taken, the weight of express powers in the treaty is different. Even within the same method, especially in the teleological method, there is a subtle shade of difference in the importance of provisions themselves.

These obscurities in the definition of the principle are partly due to a free use of judicial discretion. In the first instance, whether a court may apply the principle of effectiveness is within the discretion of the court. Secondly, there is no assurance that either one of the two definitions, the wider or narrower one, the court will apply to define effectiveness. Even when the court applies the narrow definition, there is no assurance that which methods, namely the textual, the subjective, or the teleological, the court may use to define the effectiveness. It seems that there is no guarantee that a judge, bent upon achieving a desired result, will not purport to base his decision upon a rule which nominally covers the issue but in fact has little to do with it. Indeed there is no necessity for the judge to use any method of interpretation at all.⁽²⁸⁾ Thirdly, it is not possible to predict how much attention the court will pay to the limit of the principle of effectiveness. Although this is a direct consequence of the grounds from which the principle of effectiveness is derived, there is no agree-

ment in defining the limit from the text. On this point, as so often happens, the difference of view not only relates to the method to be applied but also to the effect of its actual application on the particular case. Another reason is that the Latin maxim, *ut res magis valeat quam pereat*, permits broad interpretation. Although the principle of effectiveness is said to be derived from it, and is cited in most of the writing and cases as the expression of the principle, it merely says that it is better for a thing to have effect than to be made void. It may be defined as a good faith, excluding the principle, as it is defined in the commentary by the International Law Commission.⁽²⁹⁾ On the other hand, among the writers and cases that named the maxim as the expression of the principle of effectiveness, there is great variety in what they derived from the principle.

There is no general consent in respect of the ground from which effectiveness is derived and the limit of the principle of effectiveness. Yet one conclusion seems to follow from the discussion above. The Permanent Court of International Justice and the International Court of Justice, in the cases not dealing with the jurisdiction of peaceful settlement of disputes, seem to apply more rigid and stringent criteria, expressed as theory of implied powers, than the principle of effectiveness. This means that an international organisation also possesses those powers which, although not expressly endowed by its constitution, are conferred upon it by implication from the constituent document for the performance of its functions. This is also true of the Court of Justice of the European Communities in its later cases. One may argue, it is true, that the theory of implied powers and the principle of effectiveness would lead to the same conclusion concerning the powers of an international organisation and its organs. One may also argue that the principle of effectiveness when applied to the powers and functions of an international organisation leads to the theory of implied powers.⁽³⁰⁾ But the points of the arguments in the cases are the criteria to be applied in the constituent document with regard to the implied powers.

Although the principle of effectiveness, however it may be defined, could be always used as an approach of interpretation of any text, the theory of implied powers, which will be discussed later in detail, seems to be applied by the international courts with regard to these points. Development of the criteria applied to evince the powers seems to be evident in Community Law.⁽³¹⁾ Although the theory of implied powers is not free from judicial discretion and approaches to interpretation which cause principle of effectiveness to appear vague, the theory of implied powers seems to impose upon the courts more rigid and stringent criteria for deciding the extent of powers of an international organisation.

(1) Other classification is also possible. See for example Schwarzenberger, *International Law* (3rd ed 1957), vol 1, 498 et seq.

(2) *Polish Postal Service in Danzig*, [Advisory Opinion] [1925] P.C.I.J., Series B, No. 11, 6 at 39; *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, [Advisory Opinion] [1932] P.C.I.J., Series A/B, No. 50, 365 at 373; *Reparation for Injuries Case*, [Advisory Opinion] [1949] I.C.J. Reports 174 at 178-179; *Competence of the General Assembly for the Admission of a State to the United Nations*, [Advisory Opinion] [1950] I.C.J. Reports 4 at 8; *Ambatielos Case* [Jurisdiction], [1952] I.C.J. Reports 28 at 45; *Anglo-Italian Oil Co. Case* [Jurisdiction], [1952] I.C.J. Reports 93 at 104-105 and 110; *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, [Advisory Opinion] [1954] I.C.J. Reports 47 at 51.

(3) *Interpretation of Greco-Turkish Agreement of December 1st, 1926. (Final Protocol, Article VI)*, [Advisory Opinion] [1928] P.C.I.J., Series B, No. 16, 4 at 19; *Access to German Minority Schools in Upper Silesia*, [Advisory Opinion] [1931] P.C.I.J., Series A/B, No. 40, 4 at 16; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, [Advisory Opinion] [1966] I.C.J. Reports 150 at 160 and 162-163; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

notwithstanding Security Council Resolution 276 (1970), [Advisory Opinion] [1971] I.C.J. Reports 16 at 223 (D.O.).

(4) *The Case of the S.S. "Lotus"*, [Judgment] [1927] P.C.I.J., Series A, No. 10, 4 at 17; *Case Concerning Rights of Nationals of the United States of America in Morocco Case*, [Judgment] [1952] I.C.J. Reports 176 at 196; *Admissibility of Hearing of Petitions by the Committee on South West Africa*, [Advisory Opinion] [1956] I.C.J. Reports 23 at 28; *Case of Certain Norwegian Loans*, [Judgment] [1957] I.C.J. Reports 9 at 24; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, [Advisory Opinion] [1962] I.C.J. Reports 151 at 186 (S.O.).

of Effectiveness in the Interpretation of Treaties" (1949) 26 B.Y.I.L. 48 at 172; Schwarzenberger, *supra* at note 1, at 522; McMahon, "The Court of the European Communities Judicial Interpretation and International Organization" (1961) 37 B.Y.I.L. 320 at 340.

(6) Lauterpacht, *ibid*, 48 et seq.

(7) *Ibid*, 72-75.

(8) Reports of the Commission to the General Assembly, U.N. Doc. A/6309/Rev.1. Reprinted at [1966] II Yearbook of the International Law Commission 169 at 219.

(9) De Visscher, *Théories et Réalités en Droit International Public*, (3rd ed 1960), 317-318. (writer's translation) See also O'Connell, *International Law* (2nd ed 1970), vol 1, 253 and 254.

(10) Schwarzenberger, *supra* at note 1, at 517. See also Harris, *Cases and Materials on International Law* (3rd ed 1983) 597.

(11) Schwarzenberger, *ibid*, 520.

(12) [Advisory Opinion] [1950] I.C.J. Reports 221 at 222-225. Resolution 294 (IV) of the General Assembly of the United Nations of 22 October 1949.

(13) *Ibid*, 227.

(14) *Ibid*, 228-229.

(15) *Ibid*, 238.

(16) Ibid, 240.

(17) Ibid, 235 et seq.

(18) [1952] I.C.J. Reports 93 at 143-144 (D.O.).

(19) *Affaire 8/55*, (1955-1956) II *Recueil de la Jurisprudence de la Cour* 199. See also McMahon, *supra* at note 5, at 341 et seq.

(20) For the text of these see *ibid*, 93 and 83 respectively.

(21) Art 61 of ECSC Treaty provides:

the High Authority may fix for one or more products subject to its jurisdiction:

- (a) maximum prices within the common market, if it deems that such a decision is necessary to attain the objectives defined in Article 3 and particularly in paragraph (c) thereof:
- (b) minimum prices within the common market, if it deems that a manifest crisis exists or is imminent and that such a decision is necessary to attain the objectives defined in Article 3;

(22) Art 3(c) of ECSC Treaty provides:

Within the framework of their respective powers and responsibilities and in the common interest, the institutions of the Community shall:

* * *

- (c) seek the establishment of the lowest prices which are possible without requiring any corresponding rise either in the prices charged by the same enterprises in other transactions or in the price-level as a whole in another period, while at the same time permitting necessary amortization and providing normal possibilities of remuneration for capital invested.

(23) Convention containing the Transitional Provisions 1951, Art 26, para (a) provides:

The equalization system is intended from the beginning of the transitional period:

- (a) to make it possible to bring the price of Belgian coal as close as possible to its price in the Common

Market generally, so as to reduce Belgian coal prices to a level near that of the costs of production foreseeable at the end of the transitional period. Price lists fixed in accordance with the principles shall not be changed without the High Authority's agreement.

(24) *Fédération Charbonnière de Belgique c. Haute Autorité de la C.E.C.A.*, supra at note 19, at 208-212.

(25) Ibid, 304-305.

(26) *Mannesmann AG et autres c. Haute Autorité de la C.E.C.A.*, *Affaires jointes* 4/59 à 13/59, (1960) VI/I *Recueil de la Jurisprudence de la Cour* 241 at 281.

(27) *Interpretation of Peace Treaties [Second Phase]*, supra at note 12, at 227. *Anglo-Iranian Oil Co. Case [Jurisdiction]*, supra at note 18, at 103. See text accompanying notes 13-18 of this Chapter supra.

(28) On the question of judicial discretion concerning the application of the method of interpretation, see, for example, *The Corfu Channel Case [Merits]*, [1949] I.C.J. Reports 4 at 24-25.

(29) Reports of the Commission to the General Assembly, U.N. Doc. A/6309/Rev.1. Reprinted at [1966] II Yearbook of the International Law Commission 169 at 219.

(30) The theory of implied powers is occasionally included in the principle of effectiveness and some writers do not differentiate between them. See supra at note 5.

(31) Compare *Fédération Charbonnière de Belgique c. Haute Autorité de la C.E.C.A.*, *Affaire* 8/55, (1955-1956) II *Recueil de la Jurisprudence de la Cour* 199 at 304-305, with the *E.R.T.A. Case, Affaire* 22/70, (1971) XVII *Recueil de la Jurisprudence de la Cour* 263 at 274. But see also Schermers, *International Institutional Law*, (2nd ed 1980) 209.