

# 1 Purpose, subject and methodology of this study

## Introduction

Studies of international organizations as parties to legal proceedings before national courts have been dealt with in the past mainly using traditional concepts, the two most important of which have focused on the domestic legal personality of international organizations and their immunity from suit. This study is broader in scope. It does not limit itself to issues of immunity or personality and thus does not view the issue from a preconceived legal point of view. Rather, it takes a primarily phenomenological approach: it describes how courts respond to international organizations in proceedings before them.

Although this study focuses on decided cases, it will also analyze scholarly writings and, in particular, the work of the International Law Commission (ILC), the Institut de droit international (IDI), the International Law Association (ILA) and other scholarly bodies entrusted with the codification and development of international law. However, in view of the abundant literature on issues concerning the legal personality of international organizations and their privileges and immunities, theoretical reflections will be kept to a minimum. An effort will be made to address the problems relevant to deciding actual cases. The emphasis is on the way decision-makers handle such problems in the real world of national courts. Therefore, this study will focus on national case law as well as on other legal documents potentially manifesting state practice. This study will not, however, confine itself to analyzing 'how national judges behave' in settling particular types of disputes involving international law. Rather, the comparative analysis will provide a basis for finding 'desired models of [judicial] behavior' for the specific kinds of problems at issue.<sup>1</sup>

<sup>1</sup> Cf. the similar approach taken by the Institut de droit international in 'The Activities of

The purpose of analyzing the relevant case law should not be limited to elaborating whether a consistent practice can be found – which in turn might help to ascertain possible customary rules<sup>2</sup> – or to see whether the international obligations of states have been fulfilled. Rather, this study concentrates on how domestic courts actually deal with such cases and investigates whether certain trends might ultimately lead to new ways of approaching disputes involving international organizations, that is, to a method that is different from the currently predominant party-focused immunity.<sup>3</sup> In this respect, a number of questions are raised: how do domestic courts resolve questions concerning the legal personality of international organizations and their immunity from suit? What are the policy issues underlying immunity claims and are they made explicit by the parties and/or by the courts? What kinds of legal tools are employed to solve such problems? Do courts actively seek to adjudicate disputes involving international organizations or are they rather trying to abstain from them?

This study focuses on the attitudes of and techniques used by national courts when confronted with disputes involving international organizations. Under what circumstances they exercise or refrain from exercising their adjudicatory jurisdiction and their justifications for so doing, are matters which lie at the core of this investigation. Thus, decisions of international courts and tribunals are, in principle, outside the scope of this study. However, such decisions will be analyzed in so far as they contain elements relevant to the question of how national courts should treat international organizations, for example international decisions addressing issues of domestic legal personality or immunities and privileges of international organizations.<sup>4</sup>

National Judges and the International Relations of Their State' (1993 I) 65 *Annuaire de l'Institut de Droit International* 327–448 at 329.

<sup>2</sup> In the course of this investigation national court decisions will be viewed as potential 'sources' of international law, not only in the sense of Article 38(1)(d) of the Statute of the ICJ as a supplementary source and evidence of international law, but rather as relevant state practice for the formation, or – to be proven – the confirmation, of customary law. Cf. Antonio Cassese, 'L'immunité de juridiction civile des organisations internationales dans la jurisprudence italienne' (1984) 30 *Annuaire français de droit international* 556–66 at 566; Sir Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Yearbook of International Law* 65–95 at 67; Karl Zemanek, 'What is "State Practice" and Who Makes It?' in Ulrich Beyerlin, Michael Bothe, Rainer Hofmann and Ernst-Ulrich Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (Berlin, 1995), 289–306 at 294. Cf. also the discussion of potential customary personality and immunity standards at pp. 45ff below.

<sup>3</sup> See, in particular, Parts I and III of this study.

<sup>4</sup> Thus, decisions of international tribunals such as the International Court of Justice, the

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In a broader sense, this analysis of national case law will also contribute to the issue of international law before national tribunals,<sup>5</sup> since issues of the domestic legal personality and judicial immunity of international organizations stand at the intersection between domestic and international law.<sup>6</sup> In fact, most of the legal problems involved concern the interpretation and application of treaty or customary law. Although the majority of cases arise from routine employment or contractual disputes between international organizations and private parties, these cases sometimes have strong political implications.

This book is divided into three major parts. Part I analyzes the attitudes of national courts towards disputes involving international organizations. It describes the various legal approaches taken by courts when confronted with international organizations as parties to legal proceedings. It discusses the applicable legal norms resulting in the adjudication or non-adjudication of such disputes and it focuses on the legal techniques used to avoid such cases or to confront them. Among those legal techniques, jurisdictional immunity is certainly the most prominent but it is by no means the only one: issues concerning the legal personality of international organizations and, in particular, the scope of their personality under domestic law are of particular relevance, as are also the various non-justiciability doctrines.

Part II discusses the policy issues *pro* and *contra* the adjudication of disputes involving international organizations by national courts. It analyzes the rationale for immunizing international organizations from domestic litigation, especially the frequently asserted functional need for immunity. It will also devote substantial space to a discussion of the burden immunity places upon third parties, and the question of how far such a burden can be tolerated.

Part III summarizes the conclusions and seeks to present some suggestions for the future development of this area of the law. It identifies

European Court of Justice or international arbitral bodies, of human rights organs, such as the European Commission of Human Rights and the European Court of Human Rights, as well as of administrative tribunals of international organizations, such as the World Bank Administrative Tribunal, or the OAS and the UN Administrative Tribunals, will be analyzed as far as they prove to be relevant for the main topic.

<sup>5</sup> Cf. recent ILA Committee work. Committee on International Law in Municipal Courts, ILA, *Report of the 66th Conference, Buenos Aires (1994)*, 326ff. See also Thomas M. Franck and Gregory H. Fox (eds.), *International Law Decisions in National Courts* (Irvington-on-Hudson, NY, 1996).

<sup>6</sup> See also Bernhard Schlüter, *Die innerstaatliche Rechtsstellung der internationalen Organisationen unter besonderer Berücksichtigung der Rechtslage in der Bundesrepublik Deutschland* (Cologne, Berlin, Bonn and Munich, 1972), 1, for issues of domestic legal personality.

trends in the case law, and asks whether some of them could substitute for or modify the presently predominant immunity concept with a more flexible principle exempting certain types of dispute from domestic adjudication – a principle that would at the same time guarantee the functioning and independence of international organizations and not unduly impair the access of private parties to a fair dispute settlement procedure.

### **Subject of the study**

The subject of this study is the public international organization before domestic courts. Since national courts sometimes treat other entities, not falling under a strict definition of international organizations, as if they were international organizations, these will also be covered with the necessary caution in mind.<sup>7</sup>

Some clarification is therefore needed of the entities regarded as genuine international organizations as opposed to those other entities also receiving attention in this study. Some terminological explanation of such crucial terms as ‘personality’, ‘immunity’, ‘privilege’ and related notions is also required.

#### *International organizations*

The need to define international organizations arises not only from the scholarly tradition of limiting and clarifying the issues and topics set out for detailed discussion in the course of a learned investigation. For this particular purpose – ascertaining rules concerning the international and domestic legal personality of international organizations that might be relevant for domestic courts in deciding cases involving international organizations – some clarification of the nature of the subject of the investigation might prove valuable for the insights it will give into the factors which may be decisive for the way courts treat international organizations.

This study focuses on what are called ‘intergovernmental organiz-

<sup>7</sup> Such similar treatment might result from an erroneous qualification of certain entities as international organizations, or from a specific legal rule calling for the application of rules relating to international organization to non-international organizations, or from the fact that national courts consider them to be in a similar situation. *Cf.* pp. 11 and 171–2 below.

ations',<sup>8</sup> 'inter-state organizations'<sup>9</sup> or 'public international organizations',<sup>10</sup> which will be referred to hereinafter for convenience simply as 'international organizations'.<sup>11</sup> Although there is no generally accepted definition of international organizations,<sup>12</sup> there seems to be wide consensus on their constitutive elements.<sup>13</sup> International organizations are entities consisting predominantly of states, created by international agreements, having their own organs, and entrusted to fulfil some common (usually public) tasks.<sup>14</sup> Sometimes the possession of a legal personality distinct from its member states is included in definitions of an international organization.<sup>15</sup> However, this distinction appears to be

<sup>8</sup> Cf. the definition of international organizations as 'intergovernmental organizations' in Article 2(1)(i) of the Vienna Convention on the Law of Treaties and in Article 2(1)(i) of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.

<sup>9</sup> Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale' in *La Communauté Internationale. Melanges offerts à Charles Rousseau* (Paris, 1974), 277–300 at 277.

<sup>10</sup> Henry G. Schermers, *International Institutional Law* (Alphen aan den Rijn and Rockville, 2nd edn, 1980), 8; Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, *International Law* (2nd edn, St Paul, MN, 1987), 318. See also the definition of international organization 'as public international organization in which the United States participates pursuant to any treaty' under section 1 of the US IOIA.

<sup>11</sup> It is important to distinguish the notion of international organizations as legal entities from the concept of 'international organization' (usually in the singular) which describes inter-state cooperation or generally refers to the framework and structure of the international society (of states). Georges Abi-Saab (ed.), *The Concept of International Organization* (Paris, 1981), 9. Mario Bettati, *Le droit des organisations internationales* (Paris, 1987), 9. This term is mainly used in Anglo-American international relations theory. The few examples of German usages of this concept (e.g., Hans Wehberg, 'Entwicklungsstufen der internationalen Organisation' (1953–5) 52 *Friedens-Warte* 193–218) have not been widely adopted.

<sup>12</sup> The ILC deliberately omitted a definition of international organizations when it began considering the now-abandoned topic of relations between states and international organizations (second part of the topic) 'in order to avoid starting interminable discussions on theoretical and doctrinal questions, on which there were conflicting opinions in the Commission and the General Assembly, as was only natural'. Díaz-González in *Yearbook of the International Law Commission* (1985), vol. I, 284.

<sup>13</sup> Schermers, *International Institutional Law*, 5.

<sup>14</sup> Rudolf Bindschedler, 'International Organizations, General Aspects' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (2nd edn, 1995), vol. II, 1289–309 at 1289; Enno J. Harders, 'Haftung und Verantwortlichkeit Internationaler Organisationen' in Rüdiger Wolfrum (ed.), *Handbuch Vereinte Nationen* (2nd edn, Munich, 1991), 248–58 at 248; Karl Zemanek, *Das Vertragsrecht der internationalen Organisationen* (Vienna, 1957), 9ff; *Restatement (Third) of the Law, The Foreign Relations Law of the United States* (ed. American Law Institute, St Paul, MN, 1987), § 221.

<sup>15</sup> Cf. Bettati, *Le droit des organisations internationales*, 12. See also the definition of an international organization in the IDI draft resolution on 'The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties', Article 1(a) of the Draft Resolution in (1995 I) 66 *Annuaire de l'Institut de Droit International* 465.

rather a consequence than a constitutive criterion of an international organization.<sup>16</sup> Also, the existence of an independent will of the organization and of permanent organs competent to express that will as a 'basic criterion for distinguishing an international organization from other entities'<sup>17</sup> seems to focus more on the result than on the constitutive elements of an international organization.<sup>18</sup>

International organizations are created by states, and more recently sometimes with the participation of other international organizations.<sup>19</sup> There is some controversy among legal commentators over whether two states by themselves could set up an international organization or whether at least three states are required.<sup>20</sup> In practice, domestic courts do not seem to be aware of this scholarly debate and have been willing to accept without hesitation that, for instance, bilateral commissions or tribunals can be regarded as international organizations.<sup>21</sup>

<sup>16</sup> See pp. 57ff below.

<sup>17</sup> Lacleta Muñoz in *Yearbook of the International Law Commission* (1985), vol. I, 296.

<sup>18</sup> See also the definition of an international organization in the IDI draft resolution on 'The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties' requiring the existence of an organization's 'own will'. Article 2(b) provides: 'The existence of a *volonté distincte*, as well as capacity to enter into contracts, to own property and to sue and be sued, is evidence of international legal personality.' Draft Resolution, (1995 I) 66 *Annuaire de l'Institut de Droit International* 465.

<sup>19</sup> For instance, the EEC became a member of the (Sixth) International Tin Council in 1982; the League of Nations was a founding member of the International Institute for the Unification of Private Law (Unidroit) in 1926. Cf. Henry G. Schermers, 'International Organizations as Members of Other International Organizations' in Bernhardt, Geck, Jaenicke and Steinberger (eds.), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift Mosler* (Berlin, Heidelberg and New York, 1983), 823–37 at 823ff; Ignaz Seidl-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (6th edn, Cologne, Berlin, Bonn and Munich, 1996), 6.

<sup>20</sup> Zemanek, *Das Vertragsrecht der internationalen Organisationen*, 11, argues that it is part of the essential nature of international organizations that they are formed by a multilateral treaty. This view would require at least three participating states in order to form an international organization. Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen*, 5, on the other hand, expressly state that at least two states must participate in an organization. See also Rudolph Bernhardt, 'Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen' (1973) 12 *Berichte der Deutschen Gesellschaft für Völkerrecht* 7–46 at 7; and Sucharitkul in *Yearbook of the International Law Commission* (1985), vol. I, 287.

<sup>21</sup> In *Soucheray et al. v. Corps of Engineers of the United States Army et al.*, US District Court WD Wisconsin, 7 November 1979, a US district court held that the US–Canadian International Joint Commission regulating the water level of the Great Lakes (an 'international agency' in the words of the court) was immune from suit under the IOIA – a finding that presupposes that the Commission is an international organization. Even more explicitly the US Court of Claims held that 'the International Joint Commission is an international organization' enjoying immunity. *Edison Sault Electric Co. v. United States*, US Court of

International organizations are normally set up by international agreement,<sup>22</sup> usually by formal written agreements, i.e. by treaties. The terminology used – whether the constituent treaty is called convention, charter, constitution, statute, etc. – is irrelevant. However, international organizations can also be founded by implicit agreement which might be expressed through identical domestic legislation (e.g., the Nordic Council),<sup>23</sup> or by a resolution adopted during an inter-state conference (e.g., Comecon).<sup>24</sup>

It is further commonly thought that international organizations require a certain institutional minimum, i.e. organs that perform the tasks entrusted to the organization.<sup>25</sup> In practice it is sometimes difficult to distinguish organs of international organizations from mere ‘treaty administering organs’<sup>26</sup> set up by international agreements falling short of true international organization status.<sup>27</sup>

Finally, it has been asserted that only those inter-state entities which meet an ‘official public purpose’ test can qualify as international organizations.<sup>28</sup> It seems, however, that this requirement is no longer generally

Claims, 23 March 1977, reaffirmed in *Erosion Victims of Lake Superior Regulation, etc. v. United States*, US Court of Claims, 25 March 1987. See also the Dutch case of *AS v. Iran–United States Claims Tribunal*, Local Court of The Hague, 8 June 1983; District Court of The Hague, 9 July 1984; Supreme Court, 20 December 1985, involving the bilateral Iran–United States Claims Tribunal which was treated as an international organization as far as immunity was concerned.

<sup>22</sup> Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations. A Functional Necessity Analysis of Their Legal Status and Immunities* (Dordrecht, Boston and London, 1994), 39; Schermers, *International Institutional Law*, 9; and Zemanek, *Das Vertragsrecht der internationalen Organisationen*, 9.

<sup>23</sup> Axel Berg, ‘Nordic Council and Nordic Council of Ministers’ in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (1983), vol. VI, 261–3 at 261.

<sup>24</sup> Schermers, *International Institutional Law*, 9.

<sup>25</sup> Article 1(a) of the Draft Resolution, (1995 I) 66 *Annuaire de l’Institut de Droit International* 465; Zemanek, *Das Vertragsrecht der internationalen Organisationen*, 13.

<sup>26</sup> Waldemar Hummer, ‘Reichweite und Grenzen unmittelbarer Anwendbarkeit der Freihandelsabkommen’ in Hans-Georg Koppensteiner (ed.), *Rechtsfragen der Freihandelsabkommen der Europäischen Wirtschaftsgemeinschaft mit den EFTA-Staaten* (Vienna, 1987), 43–83 at 44.

<sup>27</sup> *Restatement (Third)*, § 221, Comment b. Cf. also the diverging qualification of the nature of the ‘joint committees’ administering the 1972 Free Trade Agreements between EFTA states and the EEC. While Hummer, ‘Reichweite und Grenzen’, 44, calls them ‘treaty administering organs’ (*Vertragsanwendungsorgane*), Theo Ohlinger, ‘Rechtsfragen des Freihandelsabkommens zwischen Österreich und der EWG’ (1974) 34 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 655–88 at 681, note 79, seems to be ready to regard them as organs of an (unnamed) international organization created by the Free Trade Agreements.

<sup>28</sup> Ignaz Seidl-Hohenveldern, ‘The Legal Personality of International and Supranational Organizations’ (1965) 21 *Revue égyptienne de droit international* 35–72 at 37; and Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge, 1987), 72.



accepted.<sup>29</sup> If the public purpose test were upheld, this would have important implications for the present discussion. According to its adherents, inter-state entities which pursue an aim 'which under domestic law the States concerned would fulfil as subjects of private law rather than as subjects of public law' could not be labelled international organizations.<sup>30</sup> The issues of domestic legal personality and immunity from national jurisdiction, however, frequently arise in contexts where international organizations act like 'subjects of private law'. If all those entities that are acting in a private law setting were excluded from the range of international organizations, few issues of interest here would arise in practice. It seems, however, that even the adherents of a 'public purpose requirement' do not always support this result of eliminating inter-state entities acting like private parties from the definition of international organizations. They do not dispute that international organizations might engage in private law affairs in the course of their activities. What they obviously want to exclude from the range of international organizations are entities which fulfil no public purpose at all and are exclusively charged with 'private law tasks'.<sup>31</sup> This restricted view, however, faces two major practical problems. First, from a theoretical point of view, the dichotomy of public/private law activities is difficult to rationalize on an international law level. It is true that international law has to make the distinction in various fields, especially in the sovereign immunity context or for attributing acts to states for the purposes of state responsibility, but it is still far from being a generally accepted distinction. Secondly, with the rise of international organizations entrusted with market regu-

<sup>29</sup> Rosalyn Higgins, 'The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Toward Third Parties - Preliminary Exposé and Draft Questionnaire' (1995 I) 66 *Annuaire de l'Institut de Droit International* 249-89 at 254; and Shihata, 'Réponse' (1995 I) 66 *Annuaire de l'Institut de Droit International* 311. Cf. also the differentiation made by Schermers, *International Institutional Law*, 8ff. between public and private international organizations who - although speaking of public international organizations - states only three requirements (established by international agreement, having organs, established under international law) that have to be fulfilled by an entity in order to qualify as 'public' international organization.

<sup>30</sup> Seidl-Hohenveldern, 'The Legal Personality of International and Supranational Organizations', 37. In his more recent book on international corporations, Seidl-Hohenveldern maintains this distinction and uses an even more pertinent dichotomy when he differentiates between organizations *iure imperii* and organizations *iure gestionis* with the latter being mere intergovernmental enterprises lacking international personality. In the former group he includes those, the acts of which, if done by a single state, would be acts *iure imperii* while the latter comprises entities with a commercial focus which he calls 'common inter-state enterprises'. Seidl-Hohenveldern, *Corporations*, 109ff.

<sup>31</sup> See p. 10 below.



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latory functions to be carried out either by directly dealing on the marketplace (organizations administering commodity agreements)<sup>32</sup> or by regulating its members' market behaviour (certain export-regulating organizations),<sup>33</sup> the issue of whether these organizations should be seen as private or public actors has become increasingly difficult.<sup>34</sup> Moreover, even undisputedly 'public' international organizations undoubtedly perform a number of private law acts.

### *Other international bodies*

Although this study is devoted to international organizations, other 'international' bodies should not be overlooked where decisions dealing with such entities might prove relevant for the subject of this book. The two most important groups of such other international entities are international tribunals and so-called international public corporations. International non-governmental organizations and transnational corporations – although also frequently associated when dealing with international organizations – are of less importance in the present context.

### International tribunals

International tribunals<sup>35</sup> are in many respects comparable to international organizations. As far as the specific topics of personality and immunity are concerned, it is interesting to note that, in fact, many international tribunals have been accorded such status and prerogative either by international agreement or express domestic legislation or even implicitly.<sup>36</sup> Some international courts and tribunals are, of course, part of larger organizations and derive their legal status from them. Nevertheless, there are also frequently specific instruments addressing their privi-

<sup>32</sup> E.g., the International Tin Council. See pp. 118ff below.

<sup>33</sup> E.g., OPEC. See also Henkin, Pugh, Schachter and Smit, *International Law*, 343.

<sup>34</sup> Cf. the difficulty of US courts in characterizing OPEC's activities as *iure imperii* or *iure gestionis* in *International Association of Machinists v. OPEC*, US District Court CD Cal., 18 September 1979, affirmed on other grounds, US Court of Appeals 9th Cir., 6 July–24 August 1981. See p. 91 below.

<sup>35</sup> Cf. Christian Tomuschat, 'International Courts and Tribunals' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (2nd edn, 1995), vol. II, 1108–15 at 1108ff.

<sup>36</sup> For instance, the instrument establishing the Iran-US Claims Tribunal, the Claims Settlement Declaration of Algiers, 19 January 1981, mentions neither the Tribunal's international nor its domestic legal personality. In the view of the Dutch Foreign Ministry, the Tribunal, having been created by an instrument under international law, 'is therefore a joint institution of the two States involved, and has legal personality derived from international law'. Reply to written questions asked in Parliament about the status in the Netherlands of the Iran-US Claims Tribunal in the absence of a treaty between the three countries, Minister for Foreign Affairs, (1984) 15 *Netherlands Yearbook of International Law* 356.

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leges and immunities. Decisions by national courts concerning international tribunals may thus be directly relevant for the analysis of their treatment of international organizations.<sup>37</sup>

### International public corporations

Common inter-state enterprises,<sup>38</sup> joint international state or quasi-state enterprises,<sup>39</sup> international public corporations,<sup>40</sup> or intergovernmental companies and consortia<sup>41</sup> are interesting intermediate entities between international organizations and private corporations operating internationally. Like international organizations, they are created by states or state bodies and possess their own organs. However, the major distinguishing factor lies in the nature of their tasks, which are generally of a commercial, although not necessarily profit-making, character.<sup>42</sup> Such corporate entities are frequently formed on the basis of a treaty and then established in accordance with a national corporate law.<sup>43</sup> They may be relevant for present purposes where their constitutive agreements expressly provide for a legal status similar to that of an international organization and for comparable privileges and immunities.<sup>44</sup>

<sup>37</sup> For instance, the recognition of the domestic personality of the Iran–US Claims Tribunal by Dutch courts in the *AS v. Iran–United States Claims Tribunal* decisions, Local Court of The Hague, 8 June 1983; District Court of The Hague, 9 July 1984. See p. 82 below.

<sup>38</sup> Seidl-Hohenveldern, *Corporations*, 109ff; Ignaz Seidl-Hohenveldern, 'Le droit applicable aux entreprises internationales communes, étatiques ou paraétatiques' (1983 I) 60 *Annuaire de l'Institut de Droit International* 1–37 and 97–102 at 1ff.

<sup>39</sup> IDI Resolution on the law applicable to joint international state or quasi-state enterprises of an economic nature, adopted at its Helsinki Session 1985, (1986 II) 61 *Annuaire de l'Institut de Droit International* 269.

<sup>40</sup> *Restatement (Third)*, § 221, Comment d.

<sup>41</sup> Henkin, Pugh, Schachter and Smit, *International Law*, 341.

<sup>42</sup> Seidl-Hohenveldern stresses their *iure gestionis* character. Seidl-Hohenveldern, *Corporations*, 109. The IDI Resolution on the law applicable to joint international state or quasi-state enterprises of an economic nature characterizes their tasks as 'for purposes of general economic interest principally through private law procedures'. Article 1(b), (1986 II) 61 *Annuaire de l'Institut de Droit International* 271.

<sup>43</sup> For instance, the creation of Eurofima, the European Company for the Financing of Railway Rolling Stock, was provided for in a treaty of 20 October 1955 between a number of European states. It was then established as a company according to Swiss law. Michael Kenny, 'European Company for the Financing of Railway Rolling Stock (EUROFIMA)' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (2nd edn, 1995), vol. II, 178–80 at 178ff; See also Ignaz Seidl-Hohenveldern, 'Gemeinsame zwischenstaatliche Unternehmen' in Friedrich-Wilhelm Baer-Kaupert, Georg Leistner and Herwig Schwaiger (eds.), *Liber Amicorum Bernhard C. H. Aubin* (Kehl am Rhein and Strasbourg, 1979), 193–216 at 193ff, discussing various forms of such entities.

<sup>44</sup> This is the case with Intelsat, the International Telecommunications Satellite Organization, established in 1973 by treaty. See also James Fawcett and Gunnar Schuster, 'Intelsat' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (2nd edn, 1995), vol. II, 1000–4 at 1000ff.