This provision creates difficulties when the type of "company" is unknown in Swiss law as is the case with the common-law trust. Liability, when the conditions for the application of SPIL article 159 are fulfilled, will accord with the general provisions of Swiss law governing contractual or tortious responsibility. As a result, a trustee who, in carrying out a trust function, acts in conformity with the foreign law governing a trust may be liable under Swiss law if the same act constitutes a tort or a breach of contract in Swiss law. Whether SPIL article 159 makes trustees liable to third parties only, such as the creditors of the Trust, or also to beneficiaries, is still a debated question.

IV. Conclusion

As the preceding discussion points out, Swiss law may be applied in some specific circumstances to test the actions of trustees. Since Switzerland has no internal law relating to trusts, however, the provisions of the trust would afford no justification for the trustees' actions, and they would have to account to the plaintiffs under existing provisions of Swiss law. For this reason, if assets are to be held in Switzerland under a foreign-law trust, the trustee or a majority of the trustees should be of a common-law jurisdiction, thus strengthening the substantial connection of the trust with a foreign law recognizing trusts.

United Kingdom*

I. Taxation

The Chancellor of the Exchequer, in his budget speech on March 19, 1991, announced a number of detailed tax changes contained in the Finance Bill. The most significant for anyone who does business in or with the United Kingdom are as follows:

A. Rates of Tax

1. *Corporation Tax*

The rate of corporation tax for the financial year 1990 is reduced from 35 percent to 34 percent and for 1991 to 33 percent. The rate for small companies remains at 25 percent. The lower and upper profit limits for the small companies rate increase from £200,000 and £1,000,000 to £250,000 and £1,250,000 respectively. The rate of ACT (Advance Corporation Tax) remains at one-third.

*Prepared by Clifford Chance, London.

2. *Income Tax*

The rates of income tax for 1991–92 remain unchanged at 25 percent and 40 percent. The threshold at which higher rate tax becomes payable is increased from £20,700 to £23,700.

The personal allowance for those aged under sixty-five and the age-related personal and married couple's allowances are increased in line with the statutory indexation provisions.

3. *Capital Gains Tax*

The annual exempt amount is increased from £5,000 to £5,500 and is available separately to both spouses. For most trustees, the exempt amount is increased to £2,750.

4. *Inheritance Tax*

The inheritance tax rate remains unchanged at 40 percent. The nil-rate band is increased from £128,000 to £140,000.

5. *Value Added Tax (VAT)*

From April 1, 1991, the standard rate of VAT is increased from 15 percent to 17½ percent, principally to fund a major shift in the burden of spending from local authorities to central government.

B. TAXATION OF BUSINESS

1. *Stock Lending*

The restriction that prevented overseas securities held by U.K. collecting agents to be "stock lent" with Inland Revenue approval (thereby avoiding tax charges on the stock loan and subsequent return) was removed early this year. The abolition of the "three-party lending chain" rule will also result in further liberalization of the stock lending rules. In addition, the arrangements for accounting for tax on manufactured dividends paid by the borrower to the lender are to be given firm statutory backing.

2. *Investment Managers*

The rules that exempt U.K. investment managers from tax liability when they are acting on behalf of non-U.K. resident investors are amended to include all transactions in futures and options (not relating to land) and transactions executed by U.K. agents on behalf of offshore funds. An extra-statutory concession is also expected to make it clear that the Inland Revenue will not normally pursue the U.K. tax liability of a nonresident falling within any of the exemptions to these collection rules.

3. *Stamp Duty*

Stamp duty charges on property other than land and buildings are to be abolished.

4. *Carry-Back of Trading Losses*

A company is to be able to carry back a trading loss for three years (instead of only one year) where losses are incurred in accounting periods ending on or after April 1, 1991.

5. *Oil Taxation*

Improvements are made to the tax rules affecting future oil field abandonments by providing a more comprehensive definition of abandonment costs allowable for PRT (Petroleum Revenue Tax) relief.

C. Taxation of Employees

A number of measures are introduced to encourage further employee participation and to tax certain employee benefits. These provisions will be of significance to overseas companies with subsidiaries in the United Kingdom.

D. Taxation of Trusts

A number of changes are made to the taxation of nonresident trusts so as to bring the capital gains tax treatment of them more into line with that of resident trusts. The changes provide a more effective regime for taxing those setting up or benefitting from such trusts.

II. Environmental Protection

Environmental controls in the United Kingdom have been reformed and strengthened by the Environmental Protection Act 1990 (the 1990 Act), which was enacted shortly after the publication of the government White Paper *This Common Inheritance*. The 1990 Act established a common framework to replace the multiplicity of pollution controls that had developed through various pieces of legislation enacted at different times and in varying circumstances. From now on pollution will largely be controlled under two pieces of legislation, namely the Water Act 1989 and the 1990 Act. More importantly, the new legislation reinforces the distinction between the regulatory authorities and the polluter to avoid the situation in the past whereby major polluters, such as water authorities and waste disposal authorities, were also acting as regulators of the industries concerned. The new legislation also enshrines the principle "the polluter pays" together with providing for limited freedom of information about pollution from industries. An obligation has been put on the industrialist to minimize pollution by using the best available techniques not entailing excessive cost (BATNEEC)

or, in some cases, the best practicable means. The legislation also moves towards making the landowner responsible for the costs of cleaning up pollution on its land.

A. Pollution Control

1. *Integrated Pollution Control*

On April 1, 1991, a start was made in introducing the new 1990 Act's framework for pollution control known as *Integrated Pollution Control.* This regime is administered by Her Majesty's Inspectorate of Pollution (HMIP), a regulatory agency formed on April 1, 1987. The purpose of Integrated Pollution Control is to limit pollution from the more serious polluting industries into the three "environmental media" of air, water, and land. Under the 1990 Act, HMIP is responsible for granting authorizations to carry out a "prescribed process" and thereby must seek to limit emissions from substances prescribed for being the most potentially harmful or polluting when released into the environment.

An application for an authorization must be accompanied by the appropriate fee, which is intended to finance the regulatory duties of HMIP and so implement the principle "the polluter pays." As from April 1, 1991, consents from HMIP are required for new processes. For existing processes, a timetable has been introduced for applications to be made for the respective industries. All applications should be in place by January 31, 1996, when Integrated Pollution Control should be fully effective.[1]

An authorization issued by HMIP will be subject to various conditions to which the polluter must adhere. In particular, every authorization implies a general condition that, in carrying on the process, the polluter must use BATNEEC:

(a) for preventing the release of prescribed substances into the environment or, where that is not practicable by such means, for reducing the release of such substances to a minimum and for rendering harmless any such substances that are so released; and

(b) for rendering harmless any other substances that might cause harm if released into the environment.

Substances may be treated differently according to which environmental media of air, water, or land they are released into. Indeed, the idea is that HMIP should choose the "best practicable environmental option" to control the release of such emissions between the various environmental media. When granting authorizations, HMIP must also have regard to the need for the country to comply with any quality standards or quality objectives set by the Secretary of State.

1. The Environmental Protection (Prescribed Processes and Substances) Regulations 1991 (S.I. No 472).

Registers containing particulars of Integrated Pollution Control processes of the particular industries are open to the public. However provisions exist to protect matters of commercial confidentiality from being included in such registers.

2. *Air Pollution Control*

Pollution into the air from the less polluting processes is controlled under Air Pollution Control administered by local authorities also under the 1990 Act. Local authorities are responsible for granting the necessary authorizations and imposing the requisite conditions. A general condition is implied in such an authorization that the person carrying on the process must use BATNEEC:

(a) for preventing or, where this is not practicable, reducing to a minimum and rendering harmless releases into the air of substances prescribed for air; and

(b) for rendering harmless any other substances that might cause harm if released into air.

Air Pollution Control has already been introduced for new processes, but existing processes will be phased in for control under the new regime, with applications needing to be made at various dates between April 1, 1991, and September 30, 1992.

3. *BATNEEC*

The concept of BATNEEC is central to both Integrated Pollution Control and Air Pollution Control. Each authorization is subject to an implied condition that the polluter will use BATNEEC to control emissions. The term BATNEEC (or formulations equivalent in meaning) is gaining increasing currency in international legislation and agreements relating to environmental protection. Departmental guidance has been issued on its meaning.[2] "Best" must be taken to mean most effective in preventing, minimizing, or rendering harmless polluting emissions. "Available" should be taken to mean procurable by the operator of the process in question. "Techniques" embraces both the process and how the process is operated. "Not entailing excessive cost" needs to be taken into two contexts depending on whether it is applied to new processes or existing processes. For new processes, the presumption should be that the best available techniques are used, but that presumption can properly be modified by economic considerations where the costs of applying best available techniques would be excessive in relation to the nature of the industry and the environmental protection to be achieved. In relation to existing processes, timescales will be set whereby the old processes should be upgraded to new standards (or decommissioned).

2. INTEGRATED POLLUTION CONTROL—A PRACTICAL GUIDE ch. 5.

4. *Water Pollution*

The Water Act 1989 established a new framework for the water industry. The main effect was to separate the regulation of water quality and the management of water resources from the operational functions of supplying water for domestic purposes and providing services for the transport, treatment, and disposal of sewage. This separation was achieved by transferring the water supply and sewerage functions of the water authorities to privately owned water and sewerage companies. Responsibility for water resources and pollution control shifted to the National Rivers Authority and responsibility for monitoring and enforcing water quality standards for water supplied for domestic purposes went to the Drinking Water Inspectorate—two new public bodies.

Consents are needed from the National Rivers Authority for the discharge of polluting substances into territorial, coastal, inland, and ground waters. Breach of the legislation has resulted in the National Rivers Authority undertaking prosecutions and the courts imposing heavy financial penalties. With the introduction of Integrated Pollution Control, authorization may instead be required from HMIP for discharges from prescribed processes, but the National Rivers Authority can then direct HMIP what minimum safeguards should be included and, in extreme cases, direct HMIP to refuse to grant such authorization.

B. Waste Disposal

1. *New Framework*

One of the major features of the 1990 Act is that local authorities in England and Wales will no longer be able to act as both regulators and operators of waste disposal. As waste regulation authorities now freed from operational responsibilities, they will have full responsibility for licensing and enforcement, while new arm's length waste disposal companies will compete with the private sector for waste disposal contracts. Councils who are waste disposal authorities will be required to form or participate in forming local authority waste disposal companies and then transfer to them their waste disposal assets, such as landfill sites, transfer stations, or incinerators. Such a company must be at arm's length from its waste disposal authority, which means that various statutory restrictions on financial relations between the two and on the composition of the board must be observed. Alternatively, a waste disposal company could use a private waste disposal contractor by selling its waste disposal assets to, or entering into a joint venture with, the private sector, provided such arrangements are first approved by the Secretary of State.

2. *Waste Management Licenses*

Under the new regime, a waste management license will be necessary for the treatment, keeping, or disposal of any specified description of controlled waste in or on specified land, or the treatment or disposal of any specified description

of controlled waste by means of mobile plant. (Controlled waste generally means household, industrial, and commercial waste.) The waste regulation authority will grant the waste management license to the person who occupies land or who operates the mobile plant at that location. Registers of licenses will contain details of the licenses and other decisions and notices relating to waste. Such registers must be open to inspection by members of the public although there are provisions for protecting commercially confidential information.

3. *Duty of Care*

One feature of the 1990 Act is the placing of a duty of care on any person who imports, produces, carries, keeps, treats, or disposes of controlled waste or who, as a broker, has control of such waste. Such a person is under a duty to take all measures applicable to him in that capacity as are reasonable in all the circumstances to prevent any other person from depositing, treating, or disposing of the waste in an unauthorized way; to prevent the escape of the waste from his own or another person's control; and when the waste is transferred, to secure that the transfer is only to an authorized person or to a person for authorized transport purposes, together with a written description of the waste that will enable other persons to carry out their own responsibilities. This provision must be read together with the Control of Pollution (Amendment) Act 1989, under which carriers of controlled waste need to be registered. The two provisions together should assist the authorities in dealing with unauthorized fly-tipping, whereby waste is transferred to carriers who dump it unlawfully, leaving the municipal authorities to clear it up again.

4. *Clean-Up Provisions*

A move has now been made to place a duty on the landowner to pay the costs of taking remedial measures to counteract the presence of pollution from its site. Each waste regulation authority will be under a duty to inspect its area from time to time, except where a current site license applies. The purpose of this inspection is to detect whether any land is in such a condition that it may cause pollution to the environment or harm to human health due to the presence of noxious gases or liquids caused by deposits of controlled waste in the land. If such an inspection shows that any land is in such a condition, the authority has a duty to carry out whatever works or other measures appear to be reasonable to avoid pollution or harm. The authority is entitled to recover all or part of the cost from the current owner of the land unless a waste management license has been surrendered. The authority must have regard to any hardship that the recovery of the cost may cause to the owner of the land.

The 1990 Act contains powers to remove unlawfully deposited waste and to take other steps to eliminate or reduce the consequences of the deposit. The appropriate authority may recover the necessary costs of removing such waste, taking any other necessary steps, and disposing of the waste either from the

occupier of the land, unless the occupier proves it neither made nor knowingly caused or permitted the deposit of the waste, or from the person who did deposit or knowingly caused or permitted the deposit of the waste.

5. *Registers of Contaminated Land*

Under the new legislation, a local authority will be under a duty to maintain a register of contaminated land. The register will be open to inspection by members of the public, who will be able to obtain copies of the entries. Regulations will specify what uses of the land should be considered contaminated and provide for the form of the registers. This new provision may be a pitfall for purchasers who do not make the necessary enquiries before buying land. It will be possible that after the transaction is completed, the purchaser will find that his land has been placed on such a register, and the value of the land has accordingly been diminished.

C. Genetically Modified Organisms

The new legislation tackles the need to control genetically modified organisms (GMOs). Once introduced, the new legislation will provide that everyone intending to acquire, market, or work with a GMO—whether a university researcher or a large company—will be required to carry out an assessment of the environmental risks and (depending on the circumstances) to notify the Secretary of State or to obtain his consent. A duty will be imposed on all those involved with GMOs to use BATNEEC to prevent environmental damage. The consent of the Secretary of State will be required in circumstances covered by regulations or where he is given a direction regarding the importation, acquisition, release, marketing, or keeping of GMOs. The Secretary of State may also serve a prohibition notice where he has reason to believe that a person is keeping, or proposing to import or acquire, release or market any GMO and he is of the opinion that there is a risk of causing damage to the environment.

D. Statutory Nuisances

The 1990 Act reforms and consolidates the law relating to statutory nuisances, whereby local authorities and individuals are empowered to take action where situations exist that are prejudicial to health or a nuisance. Such situations mainly relate to the state of premises; the emission of smoke, fumes, gases, dust, steam, smell, or other effluvia; the accumulation or deposit of substances; and the emission of noise. The local authority may take action by serving an abatement notice that can be appealed against the Magistrates' Court. A Magistrates' Court can also take action on a complaint made by an individual that he is aggrieved by the existence of a statutory nuisance. In some circumstances, a defense is provided if the best practicable means have been used to prevent or counteract the effects of the nuisance. In this context, "practicable" means reasonably practi-

cable having regard among other things to local conditions and circumstances, to the current state of technical knowledge, and to the financial implications. "Means to be employed" include the design, installation, maintenance, and periods of operation of plant and machinery and the design, construction, and maintenance of buildings and structures. The test is to apply only so far as compatible with any duty imposed by law, safety, and safe working conditions and with the exigencies of any emergency or unforeseen circumstances.

E. Conclusion

The 1990 Act is likely to have far-reaching consequences for those engaged in industry and commerce. The new regulatory authorities are already scrutinizing applications for consents much more closely and are prosecuting offenses with vigor. Industrialists and other producers of waste will now need to consider how to comply with the duty of care in respect of waste. Those buying and selling land will need to have regard to the possible clean-up liabilities introduced by the new legislation. Lenders will need to consider how secure their mortgaged property actually is if there are environmental liabilities on the site as a result of the new controls. The implications of the new legislation need also to be addressed by insurers and the insured alike. Furthermore, the new legislation is unlikely to be the last word on the subject; and further controls can be anticipated as a result of legislation emanating from the European Community.

III. International Treaty Organizations

The House of Lords, by its judgment of February 21, 1991, in *Arab Monetary Fund v. Hashim & Others (No. 3),*[3] has ended much uncertainty over the standing in English law of international treaty organizations.

A. Facts of the Case

The Arab Monetary Fund (AMF) is an international organization based in Abu Dhabi, UAE, pursuant to an agreement made in 1976 between the twenty members of the Arab League. The United Kingdom is not a party to the treaty. Its first director-general was Dr. Hashim, who is alleged to have stolen about U.S. $50 million from the Fund. Having obtained judgment against Dr. Hashim in Abu Dhabi, the AMF sued him in England (and elsewhere), along with members of his family, entities owned or controlled by him, and banks said to have helped him to launder money through numbered accounts. His response, supported by the bank defendants, was to argue that the AMF could not be recognized in English law and thus had no existence as a suitor before an English court.

3. [1991] 2 W.L.R. 729 (H.L. 1991).

This issue came before Mr. Justice Hoffmann in October 1989 and was almost fully argued when the House of Lords gave its judgment in the *Tin Appeals*, a series of appeals arising out of claims by banks and metal traders against the twenty-four members of the International Tin Council (ITC).[4] That case concerned the standing of the ITC, an international organization under an agreement to which the United Kingdom *was* a party. The ITC had its headquarters in London. An Order in Council had been made under the International Organizations Act 1968 expressly conferring on the ITC "the legal capacities of a body corporate." Close reading of the judgment of Lord Oliver in that case gave the clear impression that he believed that the only reason the ITC existed in English law was because of the Order in Council. The defendants in the *AMF* case argued from this that, because no such Order had been made in respect of the AMF, it did not exist in English Law.

Hoffmann J. decided that the AMF existed and could sue in England, not as an international organization, but as an organization that existed in Abu Dhabi, which English law could recognize in the same way as it recognizes bodies incorporated under any foreign legal system. In April 1990 the Court of Appeal (by a majority) rejected this argument, deciding that the effect of the House of Lords decision in the *Tin Appeals* precluded both international recognition and recognition of status in the laws of the AMF's own members.

B. The House of Lords Decision

The House of Lords (with one dissent) overturned the decision of the Court of Appeal and held that the AMF should be recognized as a legal entity with capacity to sue in England.

Lord Templeman gave judgment for the majority of the Law Lords. His reasoning was that English courts would recognize, by comity, corporate bodies created by the laws of a foreign state that was recognized by the Crown, and this principle was left untouched by the *Tin Appeals*. The AMF had been created a corporate body of the UAE, a state recognized by the Crown. The Foreign and Commonwealth Office, as the executive branch responsible for foreign relations, was willing to acknowledge officially the status of an international organization that had acquired legal personality and capacity in one of the member states or in the state where it has its seat or permanent location. Thus the English courts should take the same course, and recognize "the status of an international organization incorporated by at least one foreign state."

Lord Templeman also pointed to there being no uniform practice with regard to recognition of international organizations in the United Kingdom. In some cases, as for the ITC, the organization is given corporate capacity by Order in Council issued under the International Organizations Act 1968. This was not the

4. J. H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus. and others, [1990] 2 A.C. 418.

only method, however. Lord Templeman added that in other cases, treaty provisions agreeing to establishment of the international organization are declared by Parliament to have the force of law. In other cases, most frequently where the United Kingdom is not a party to the treaty, no legislative steps are taken, but the government can still recognize the international organization and the courts too may recognize it by comity provided that a separate legal entity was created, not by the treaty, but by at least one of the member states.[5] Lord Templeman held that the AMF was not created by the AMF agreement (its treaty), but by the registration of the AMF agreement, which created a corporate body in the UAE. He reasoned by analogy with an ordinary U.K. company, which is not "created" by its memorandum and articles of association but by registration under the Companies Acts.

C. Practical Consequences of the Decision

Until 1989, it was generally assumed that treaty organizations to which the United Kingdom was not a member could enter into commitments governed by English law that would be enforced by an English court. The Court of Appeal decision in the *AMF* case destroyed that view: holding that such bodies simply did not exist in English law. The decision of the House of Lords clarifies the situation. This will be helpful in confirming the position of such international organizations in relation to the financial markets in the City of London. It should also be persuasive in a variety of other, particularly common-law-based, jurisdictions around the world. At a practical level, it is now insufficient for such an international organization to point to its constituent treaty as establishing it and defining what it can and cannot do. An international organization must now be able to demonstrate its incorporation under the law of at least one state (a state recognized by the United Kingdom). This will probably be one of its own member states, and in particular its host state. This can best be established by a legal opinion from a lawyer of the organization's host state, acknowledging that the body is incorporated under that state's law.

5. [1991] 2 W.L.R. at 738.