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RECENT DEVELOPMENTS IN INTERNATIONAL ORGANIZATIONS

CONDUCT UNBECOMING: THE COLLAPSE OF THE INTERNATIONAL TIN AGREEMENT

Ian A. Mallory*

In October 1985 the International Tin Council (I.T.C. or Council), the operating arm of the International Tin Agreement (I.T.A. or Agreement), became insolvent and had to suspend its stabilizing activities in the market. The I.T.C. had incurred liabilities of nine hundred million pounds sterling (\$1.4 billion) to a host of banks and metal brokers. This insolvency precipitated a crisis in the London metal and financial markets of unprecedented proportions. Banks which had extended generous loans to the Council were faced with enormous losses. Metal brokers on the London Metal Exchange (L.M.E. or Exchange) which had processed the Council's trades braced themselves for a chain reaction of bankruptcies that would threaten the Exchange's very existence. Tin producing firms around the world watched with horror the tin price plummet and responded by closing mine after mine, throwing tens of thousands of miners out of work. All parties expressed shock that the I.T.C., widely considered a model international institution and an impeccable credit risk, could get into trouble so quickly and completely. They immediately turned to the Agreement's members for leadership if not for redress.

The twenty-two states which were members of the Agreement, however, conspicuously failed to come to the rescue of the Council. Although they had launched the Council thirty years earlier to administer

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an ambitious international scheme to regulate the world's tin market and had since regularly taken part in its activities, the member states disclaimed any responsibility for the debts of the Council or for the wider effects of its demise. They also refused to implement timely and comprehensive rescue plans to ameliorate the hardship.

Parties to the crisis predicted that the consequences of the governments' conduct would extend well beyond the immediate crisis and would be dire. They alleged that not only were the member states destroying much of the world's tin market and causing mayhem in the City of London, but also were establishing a dangerous precedent for the operations of other international organizations and for sovereign lending. The creditors resorted to direct legal action against the member states, but had little success: the courts upheld the members' claim that they were not liable for the Council's debts.

In June 1989 the I.T.A. formally expired and the member states did not renew it. In December 1989 the legal actions against the states were settled out-of-court for a fraction of the amounts claimed. The demise of the Agreement can now be seen with broader perspective. This article will examine the events leading to the collapse, the causes for it and its effects. It will demonstrate: that the seeds of the Agreement's demise were sown in the late 1960s and sprouted by 1981; that some members had misgivings about the course which the Agreement was following, but shut their eyes to the probable consequences; that the regulators knew of the I.T.C.'s financial problems at least eighteen months before the insolvency, but they took no effective measures to prevent it from happening; that fortuitous changes in exchange rates finally pushed the Council over the brink; and that many creditors of the Council are partially responsible for the damage they suffered as they not only improperly assessed the credit risk of the Council, but also failed to reduce their exposure when officially informed of the risk months before the collapse.

This article will show that the effects of the collapse of the I.T.A. are many, but not necessarily those which had been predicted. The tin market suffered only a temporary, if severe, set-back. The L.M.E. also was badly hit, but has recovered most of its prominence in international tin trading. The tin collapse did not sound the death knell for other commodity agreements, except perhaps for those which were already infirm. The creditor's court actions have established legal precedents with important implications for international law and organization, but few, if any, for sovereign lending.

I. THE TIN MARKET

Tin is a much sought-after member of the family of non-ferrous metals, but is only used in relatively small quantities in alloys. Finished products with tin content currently range from the humble can for the packaging industry to sophisticated electronics.¹ As with any industrial raw material, most tin is consumed in developed countries. Indeed, the European Community (E.C.), the United States, and Japan together account for about two-thirds of the world's annual consumption.²

This geographical concentration of consumption mirrors a concentration in the *loci* of production. Tin is present in abundance in two geographical areas. The main region is in south-eastern Asia, in Thailand, Malaysia, Indonesia, and China. The second main region is in central South America, in Bolivia, and Brazil. Other deposits are found in the Soviet Union, United Kingdom, Australia, Canada, Nigeria, and Zaire.³ Deposits of tin are present in both lode and alluvial formations and are recovered by a variety of techniques.⁴

It is difficult to make general comments about the relative success of tin mining in these countries or by these techniques. The profitability of each individual mine depends on the cost per unit of the ore it produces. The crucial variables determining costs are the quality and accessibility of deposits.⁵ The interplay of these two factors produces a matrix of greatly differing production costs between individual mines. Although most countries have both low and high cost mines, certain important national distinctions exist. The costs of Bolivia's mines are currently almost all high, the United Kingdom's above average, and those in Brazil the lowest in the world.⁶

1. See W.L. BALDWIN, *THE WORLD TIN MARKET: POLITICAL PRICING AND ECONOMIC COMPETITION* (1983), and INTERNATIONAL TIN COUNCIL, *TIN STATISTICS 1976-1987*, at 7 (London 1987) [hereinafter I.T.C. STATISTICS] (describing some of tin's varied applications).

2. I.T.C. STATISTICS, *supra* note 1, at 31; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *INTERNATIONAL TIN STATISTICS, BULLETIN No. 1* (London 1989) [hereinafter TIN STATISTICS].

3. For a discussion of the locations and practices of tin production in the Soviet Union, United Kingdom, Australia, Canada, Nigeria, and Zaire, see W.L. BALDWIN, *supra* note 1, at 22-45; W. FOX, *TIN: THE WORKING OF A COMMODITY AGREEMENT 21-85* (London 1974); and W. ROBERTSON, *TIN: ITS PRODUCTION AND MARKETING 57-70* (London 1982); see also INTERNATIONAL TIN COUNCIL, *TIN PRODUCTION AND INVESTMENT* (1979) [hereinafter TIN PRODUCTION AND INVESTMENT] (describing exploration, prospecting, and production of tin in the Soviet Union, United Kingdom, Australia, Canada, Nigeria, and Zaire).

4. TIN PRODUCTION AND INVESTMENT, *supra* note 3, at 33-67. These techniques include open-cast and shaft mine, floating dredge and gravel pump. *Id.*

5. W. FOX, *supra* note 3, at 2.

6. See TIN PRODUCTION AND INVESTMENT, *supra* note 3, at 127 (discussing the

The prevailing price of tin primarily determines which of the various mines around the world will be operating profitably at any given time. For decades, the world price of tin has been set in two main places, the Malaysian market and the L.M.E.⁷ These two markets traditionally have operated very differently. The Malaysian market (held at Penang until September 1984 and at the Kuala Lumpur Commodity Exchange thereafter) was until 1987 a physical market for locally produced tin with prices set in Malaysian ringgits. Delivery to purchasers was prompt and acceptance of the metal expected; speculation therefore was little evident.⁸

By contrast, L.M.E. is an open futures market which the traders themselves administer. The L.M.E. has had two main functions: first, to provide standards for brands and contracts for a variety of metals; and second, to provide a forum for trading, the "Ring" around which members gather and the rules they follow when there. Prices for tin were (until 1989) quoted in pounds sterling for immediate delivery or at a specified time in the future, usually three months. Traders on the L.M.E. (until 1987) dealt with each other as principals without the Exchange interposing itself between them.⁹ The L.M.E. has attracted the vast majority of the world's paper transactions involving tin, be they for purposes of hedging or speculation.¹⁰

Movements in the tin prices on the Malaysian market and the L.M.E. have usually corresponded, but not identically because traders who operate between the markets must contend with substantial freight and insurance charges as well as currency fluctuations. The latter factor is particularly important because the Malaysian ringgit is linked to the United States dollar.¹¹ Nonetheless, the tin price on both markets fluctuates violently. Compared to that of other metals markets, the volume of trading in tin is low.¹² More importantly, like the prices of all

detailed survey of costs according to country and method of mining); Wagstyl, *Paying the Price of the Market's Collapse*, *Fin. Times*, Mar. 12, 1986, at 16.

7. Memorandum submitted by the 13 Ring Dealing Members of the London Metal Exchange with Forward Sales to the International Tin Council (Feb. 12, 1986) [hereinafter *Memorandum of the Ring Dealers*], reprinted in 2 HOUSE OF COMMONS, TRADE AND INDUSTRY COMMITTEE, THE TIN CRISIS, SECOND REPORT 1985-86, at 78, 84-85 (1986) [hereinafter *SECOND REPORT II*].

8. W.L. BALDWIN, *supra* note 1, at 127; W. ROBERTSON, *supra* note 3, at 128.

9. See R. GIBSON-JARVIE, *THE LONDON METAL EXCHANGE: A COMMODITY MARKET* 33 (Cambridge 1983) (stating that L.M.E. traders traditionally dealt with each other as principals).

10. See W.L. BALDWIN, *supra* note 1, at 142, and W. ROBERTSON, *supra* note 3, at 129 (estimating that physical dealings traditionally have constituted fewer than 15 per cent of transactions in tin contracts on the L.M.E.).

11. W. ROBERTSON, *supra* note 3, at 127.

12. R. GIBSON-JARVIE, *supra* note 9, at 74.

commodities, the price of tin reacts strongly to influences which are both cyclical and long-term.

Temporary variation in consumers' demand is the primary cause of the cyclical movement.¹³ Trend movements involve the interplay of long-term supply and demand and occur more slowly and imperceptibly. Tin supply is dependant primarily on production costs. The effect of cost changes on the market is difficult to predict and can be enormous. For example, over the past ten years Brazil has used its substantial cost advantage as a springboard to leap in front of Malaysia and Indonesia as the world's largest producer.¹⁴ Demand for tin has not increased with overall economic growth because consumers have been using tin more efficiently in their products and switching to competitive substitutes;¹⁵ the volume of tin metal consumed annually has barely risen over the past decade.¹⁶

Beset by chronic medium term cyclical pressures and uncertain trends for supply and demand in the long term, the tin market is inherently erratic. This uncertainty hampers economic planning for nations as well as for individual firms. As a natural response, numerous political efforts have been made to tame the market or insulate certain countries from its effects. The strongest two such political efforts have been the accumulation and adjustment of the United States strategic stockpile and the implementation of the lengthy series of international regulatory agreements which culminated in the Sixth I.T.A. of 1982-89.

The United States strategic stockpile of tin originated on the eve of World War II and expanded enormously during the Korean War. By 1955, the United States General Services Administration (G.S.A.) possessed a stockpile of 350,000 tonnes, equivalent to world consumption for two years, far larger than any rational strategic requirement of the country justified.¹⁷ Since 1962, the G.S.A. has gradually reduced its target level for the tin stockpile and has declared the remainder of its holdings as surplus to be sold. Under pressure from producing countries

13. *Id.* at 72-73; see W.L. BALDWIN, *supra* note 1, at 127; TIN PRODUCTION AND INVESTMENT, *supra* note 3, at 108 (stating that medium and long-term movements of actual prices are influenced by world economic conditions, inflation, exchange rate fluctuations, levels of industrial activity and technological changes, as well as supply features).

14. See I.T.C. STATISTICS, *supra* note 1, at 19 (indicating that Brazil produced 6,645 tonnes of tin-in-concentrates in 1979); TIN STATISTICS, *supra* note 2, at 6 (showing that Brazil produced 44,000 tonnes of tin-in-concentrates in 1988).

15. I.T.C. STATISTICS, *supra* note 1, at 77-102.

16. See *id.* at 30 (stating that world consumption of tin metal was 185,700 tonnes in 1979); TIN STATISTICS, *supra* note 2, at 16 (indicating that world consumption of tin metal increased to 189,000 tonnes in 1988).

17. W. FOX, *supra* note 3, at 226-42.

not to disrupt the market, the United States did not liquidate its stocks but has reduced them gradually, selling tin in small amounts and generally in times of higher prices.¹⁸

II. THE AGREEMENT

International agreements have regulated tin trade for most of the past seventy years. Two separate series of agreements, divided by World War II, have occurred. This study is concerned with the latter series, which comprised six agreements from 1956 to 1989.¹⁹

A. OBJECTS AND STRUCTURE

The war so disrupted the world's tin market that an international tin study group was established to consider international regulation of the market. The group first met in 1947 and took its direction from the concurrently formulated Havana Charter, the constitution of the proposed International Trade Organization. Although the Charter was never implemented, it sanctioned the establishment of international agreements to reduce burdensome surpluses of and fluctuations in price of commodities for the benefit of both producer and consumer.²⁰

The negotiations of the group, convened under the auspices of the United Nations, took years to conclude. The United States partially caused the delay by putting its partisan interests first and declining to be involved in any arrangement which might constrain its freedom to manage its strategic stockpile.²¹ The other group members eventually proceeded without the United States and in 1954 concluded the I.T.A., to be in force from 1956.²²

The fifteen founding members of the I.T.A., six producers and nine consumers,²³ embraced a very wide variety of interests. Producing and

18. W. ROBERTSON, *supra* note 3, at 147.

19. The first international agreement governing tin was the Bandoeng pool, initiated in 1921 as an ad hoc measure to withhold stocks of tin from the South-East Asian market during two years of falling prices. W. FOX, *supra* note 3, at 112-98. A series of four international tin control agreements were in force from 1931 to regulate a producers' cartel. *Id.*

20. *Id.* at 205-07.

21. See McFadden, *The Collapse of Tin: Restructuring a Failed Commodity Agreement*, 80 AM. J. INT'L L. 811, 817 (1986) (stating that a crucial factor in the decision of the United States not to join the First I.T.A. was its unwillingness to accept a constraint on managing its own stockpile).

22. International Tin Agreement, Mar. 1, 1954, 1956 Gr. Brit. T.S. No. 50 (Cmd. 12) [hereinafter First I.T.A.]

23. The producer countries were Belgian Congo, Bolivia, Malaya, Nigeria, Indonesia and Thailand. *Id.* at 75. The consumers were Australia, Belgium, Canada, Denmark, Ecuador, France, India, the Netherlands, Spain, Turkey and the United King-

consuming countries had obvious dissimilar interests, but the interests of the consuming countries were also not congruent. Although all hoped to benefit from greater price stability, many had colonial or commercial ties to producing countries.²⁴ The diverse interests of the member states all found their way into the specific objectives of the I.T.A., the three most important of which were:

(a) to prevent or alleviate widespread unemployment or under-employment and other serious difficulties which are likely to result from maladjustments between the supply of and the demand for tin;

(b) to prevent excessive fluctuations in the price of tin and to achieve a reasonable degree of stability of price on a basis which will secure long-term equilibrium between supply and demand;

(c) to ensure adequate supplies of tin at reasonable prices at all times.²⁵

These objectives were obviously ambitious and difficult to reconcile, but the I.T.A. gave little guidance for their attainment; in particular, it failed to proffer a definition of "reasonable prices." The operating arm of the I.T.A., the I.T.C., was left to attain these objectives on a day-to-day basis.

Under the Agreement, the I.T.C. was to specify, as often as economic circumstances required, a relatively narrow range of prices within which it believed the market for tin would be in relative equilibrium.²⁶ If the market did not maintain its price within this band, the I.T.C. was to intervene and attempt to compel it to do so. The I.T.C. possessed two weapons to compel such compliance, export controls and a buffer stock. The I.T.A. considered export quotas on members to be the more important mechanism. The I.T.C.'s restriction of the exports of its producing members would adjust the tin supply on the international market to the prevailing demand. The buffer stock would assist by rectifying any discrepancies which remained between supply and demand by judicious buying and selling of tin on the open market.²⁷

dom. *Id.*

24. W. Fox, *supra* note 3, at 254-57.

25. First I.T.A., *supra* note 22, art. I, at 2.

26. See *id.* art. VI, at 8 (setting the floor and ceiling prices of tin at £640 and £880 per tonne respectively). The Council was from time to time to consider whether the floor and ceiling prices are appropriate for the attainment of the Agreement objectives. *Id.*

27. *Id.* art. VII. The buffer stock was to purchase tin when the market price was equal to or below the floor price, and to sell tin when it was at or above the ceiling price. *Id.* art. IX. When the price was in the middle third of the band, the buffer stock was to be inactive unless the Council specially authorized otherwise. *Id.* When the price was in the upper or lower thirds, the buffer stock had discretionary powers to sell or buy respectively, if so doing would stabilize the price. *Id.* The producing countries' contributions of both cash and tin to a total equivalent of 25,000 tonnes financed the buffer stock. *Id.* Once these resources were exhausted, the buffer stock was to suspend

Consuming countries endorsed the use of these tools for two reasons. First, export controls were only supposed to be temporary measures. Second, the effect of the buffer stock was to be relatively neutral over time, as gains to producers in times of low prices would offset the gains to consumers in times of high prices.²⁸

The I.T.C. made major decisions through a complex process. In keeping with the Agreement's spirit of equal partnership between producer and consumer, members were classified as either producers or consumers and each bloc had one thousand votes; each country's prominence in the market determined the distribution of votes within each bloc.²⁹ The importance of a decision determined the ratification process required, ranging from a simple majority to a "distributed two-thirds majority" of votes in each bloc.³⁰

The I.T.C. was to have a full-time staff, headed by a senior officer who the members would elect. A separate officer managed the buffer stock.³¹ The I.T.A. established various committees, the most important of which compiled and disseminated detailed statistics on the world's tin industry.³²

The I.T.C. could trade under its own name because the I.T.A. gave the Council "in each participating country, to the extent consistent with its law, such legal capacity as may be necessary for the discharge of its functions."³³ The I.T.C. was granted exemption from taxation on its assets, income, and other property.³⁴ The I.T.A. placed the Council seat in London,³⁵ close to the L.M.E., the most important metal market on which the buffer stock was to trade.³⁶ Because the L.M.E. quoted its tin contract in pounds sterling, the target price band of the I.T.A. also

its operations. *Id.* The buffer stock was expressly empowered to trade on the forward markets, subject to the general restriction of operating only when it had either cash or tin in hand. *Id.*

28. See W.L. BALDWIN, *supra* note 1, at 119-21 (discussing the neutralizing effect of the buffer stock). For excellent analysis of the economics of commodity price stabilization and the buffer stock, see MacBean & Nguyen, *International Commodity Agreements: Shadow and Substance*, 15 *WORLD DEV.* 575, 576 (1987), and D. NEWBERY & J. STIGLITZ, *THE THEORY OF COMMODITY PRICE STABILIZATION: A STUDY IN THE ECONOMICS OF RISK* 16 (Oxford 1981).

29. First I.T.A., *supra* note 22, art. IV, at C.

30. *Id.* arts. II & IV, at C.

31. *Id.* art. IV, at A.

32. W. Fox, *supra* note 3, at 261.

33. First I.T.A., *supra* note 22, art. IV, at E.

34. *Id.*, amended by Amendment to Article IV of the International Tin Agreement, Oct. 18, 1956, 1958 Gr. Brit. T.S. No. 42 (Cmd. 556).

35. First I.T.A., *supra* note 22, art. IV, at A.

36. *Id.* art. IX.

was expressed in sterling.³⁷

The parties entered into a Second Agreement for a further quinquennium from 1961 to 1966 with virtually identical objectives and structure.³⁸ The only significant changes were a reduction in the buffer stock to 20,000 tonnes,³⁹ stipulations that most important decisions required a "distributed two-thirds majority,"⁴⁰ and the accession of new consuming members, including Japan.⁴¹ No other producing countries joined the Second Agreement.

The transition from the Second to the Third Agreement could have been as automatic as that from the First to the Second, but the diplomatic world of 1965 was much different from that of 1960. Developing countries, many of which had just gained independence, suddenly became important actors on the world stage and demanded that international economic arrangements directly serve their needs. The United Nations Conference on Trade and Development (UNCTAD), which had been convened in 1964, recommended that international commodity agreements actively facilitate development; not only were commodity agreements to stabilize prices and production, but were to increase the export earnings of developing producing countries.⁴²

Four other international commodity agreements were then in existence.⁴³ With tin being a classic example of an industrial commodity produced in developing countries and consumed in developed ones, and long the subject of international regulation, the I.T.A. received early attention from UNCTAD. The conference which negotiated the third I.T.A. was convened under the auspices of UNCTAD, and dutifully included its goals in the restated list of the Agreement's objectives. The I.T.A. would now also be dedicated:

(c) To make arrangements which will help maintain and increase the export earnings from tin especially those of the developing producing countries, thereby helping to provide such countries with resources for accelerated economic growth and social development, while at the same time taking into account the interests of consumers in importing countries;

(d) To ensure conditions which will help achieve a dynamic and rising rate of production of tin on the basis of a remunerative return to producers which will

37. *Id.* art. VI.

38. Second International Tin Agreement, Sept. 1, 1960, 1962 Gr. Brit. T.S. No. 45 (Cmd. 1759) [hereinafter Second I.T.A.].

39. *Id.* art. VIII.

40. *Id.* arts. VI & VII.

41. *Id.* at Annex B.

42. W. FOX, *supra* note 3, at 240-47.

43. See F. GORDON-ASHWORTH, INTERNATIONAL COMMODITY CONTROL: A CONTINUING HISTORY AND APPRAISAL 72, 73 (London 1984) (discussing the other commodity agreements for sugar, coffee, wheat, and olive oil).

help secure an adequate supply at prices fair to consumers and which will help provide a long-term equilibrium between production and consumption.⁴⁴

The addition of an express developmental goal to the Agreement greatly exacerbated the latent tension in its objectives. As William Fox put it in the early 1970s, "every question [was] so begged and every viewpoint admirably squared."⁴⁵

Another fateful change to the structure of the I.T.A. was made in 1965: the I.T.C. received the power to borrow for the purposes of the buffer stock upon the security of the tin it held. Interestingly, the third I.T.A. stipulated that no participating country was to incur any obligations for such debts of the Council without that country's consent.⁴⁶ Again, no new producing members acceded to the pact.

The Fourth Agreement, entered into in 1970, made further important changes in the accord's structure. As its membership widened, West Germany joined as a consuming member.⁴⁷ The E.C. also became a signatory.⁴⁸ No new producing countries joined the Agreement, although Australia changed its category from consumer to producer.⁴⁹

The juridical character of the I.T.C. was clarified to emphasize its status as a separate international organization, entitled to the usual diplomatic immunities. The I.T.A. now stipulated that "the Council shall have legal personality. It shall in particular have the capacity to contract, acquire and dispose of movable and immovable property and to institute legal proceedings."⁵⁰ The fourth I.T.A. further stated that the Council would enter into an agreement with the government of the United Kingdom relating to the status, privileges and immunities of the Council and its staff.⁵¹ The parties duly executed a Headquarters Agreement, re-affirming the Council's "legal personality"⁵² and granting the Council immunity from jurisdiction and execution, except in cases when the Council had waived immunity or been subject to an

44. Third International Tin Agreement, June 1-Dec. 31, 1965, 1967 Gr. Brit. T.S. No. 50 (Cmd. 3353), art. I [hereinafter Third I.T.A.].

45. W. Fox, *supra* note 3, at 247.

46. Third I.T.A., *supra* note 44, art. X.

47. Fourth International Tin Agreement, July 1, 1970-Jan. 29, 1971, 1971 Gr. Brit. T.S. No. 91 (Cmd. 4831) [hereinafter Fourth I.T.A.].

48. W. Fox, *supra* note 3, at 251. Although members states of the E.C. had to continue to vote formally on a national basis, they could now do so as a bloc. *Id.*

49. Fourth I.T.A., *supra* note 47, at Annex A.

50. *Id.* art XIV.

51. *Id.* art. V.

52. Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council, Feb. 9, 1972, 1972 Gr. Brit. T.S. No. 38 (Cmd. 4938), art. 3.

arbitration award.⁵³ When the Council entered into a written contract with a person or corporation resident in the United Kingdom, the contract had to allow either party the right to seek private arbitration of any dispute which arose regarding the contract.⁵⁴ The British government concurrently issued an executive order-in-council, granting the I.T.C. "the capacities of a body corporate"⁵⁵ and affirming in the United Kingdom the above limited immunity.⁵⁶ This constituted the extent of British legislation implementing the I.T.A.; Parliament did not formally incorporate the Agreement as a whole into domestic law.

In 1972, changes in the foreign exchange value of the pound sterling, consequent upon its float, induced the Council to set its price band in Malaysian ringgits.⁵⁷ As the Council's financial arrangements were made and tin trading on the L.M.E. was denominated in pounds sterling, this change caused the Council to straddle two currency markets and therefore assume greater foreign exchange risk in its operations.

The Fifth I.T.A., entered into in 1975 for the period 1976 to 1981,⁵⁸ made three important changes. First, a new paragraph in the preamble endorsed the New International Economic Order (N.I.E.O.), the United Nations program to reform the world's economy by redistributing wealth from rich to poor countries.⁵⁹ Second, the countries established a target for "voluntary" contributions to the buffer stock from consumer countries at 20,000 tonnes of tin metal or its equivalent in cash, which effectively would double the size of the buffer stock.⁶⁰ The third, and by far the most important change, however, was the accession of the United States which suppressed its long-standing antipathy to participation.⁶¹

The accession of the United States markedly increased the propor-

53. *Id.* art. 8.

54. *Id.* art. 23.

55. Diplomatic and International Immunities and Privileges, The International Tin Council (Immunities and Privileges) Order, SI 1972 No. 120, § 5 (United Kingdom 1972).

56. *Id.* § 6.

57. Memorandum submitted by the Department of Trade and Industry (Feb. 19, 1986), reprinted in SECOND REPORT II, *supra* note 7, at 146, 154 [hereinafter Memorandum of the D.T.I.].

58. Fifth International Tin Agreement, July 1, 1975-Apr. 30, 1976, 1977 Gr. Brit. T.S. No. 110 (Cmd. 7033) [hereinafter Fifth I.T.A.].

59. *Id.* preamble, para. b.

60. *Id.* art. 22; see Memorandum submitted by the London Metal Exchange (Jan. 29, 1986), reprinted in SECOND REPORT II, *supra* note 7, at 42, 50 [hereinafter Memorandum from the L.M.E.] (stating that eight countries were eventually to make contributions).

61. W.L. BALDWIN, *supra* note 1, at 92-94; UNITED STATES DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 483-84 (1977).

tion of the world's consumption covered by the Agreement, but hastened the escalation of friction between its members over its purpose and conduct. Tension had existed since at least the commencement of the Third Agreement, but had been kept under control as members routinely compromised on crucial issues. Producing countries, especially those with the higher cost mines, such as Bolivia, now wanted the I.T.A. to emphasize its objective to raise their earnings from tin. The price band would be kept high and if export control were necessary, high cost countries would be guaranteed generous quotas.⁶² Whatever their sympathies for the aspirations of many developing countries, many officials in the developed world responded to this focus on raising commodity prices by rejecting the scheme outright as unrealistic and inefficient.⁶³ A struggle ensued over which vision of international economy the I.T.A. would follow: that of the Havana Charter or of UNCTAD/N.I.E.O.⁶⁴

As the Fifth Agreement was ending, acrimony began to taint the deliberations of the Council, virtually paralyzing its operations.⁶⁵ Many of the members abandoned the machinery of the Council and independently intervened in the tin market to forward their own perceived best interests. The United States embarked on large sales from its strategic stockpile.⁶⁶ In response, Malaysia launched a secret crash purchasing program to drive up the price, with some initial success.⁶⁷

This thinly veiled conflict did not augur well for the conclusion of a Sixth Agreement. The negotiations dragged on so long that the parties extended the Fifth Agreement to 1982.⁶⁸ A Sixth Accord was ultimately concluded, but it was as much a testimony to failure as to suc-

62. As one commentator from a developing country blithely put it, developed countries were now to derive little, if any, direct net benefit from the I.T.A.; "[t]he question of who has actually gained from price stabilization [of tin] needs to be looked at carefully if the benefits of price stabilization are not to flow to the rich countries." Desai, *Stabilization of Primary Product Prices: the Lessons of the International Tin Agreement*, in *COMMODITIES FINANCE AND TRADE: ISSUES IN NORTH SOUTH NEGOTIATIONS* 172 (A. Sengupta ed. London 1980).

63. A good expression of the position of many developed countries can be found in Evans, *International Commodity Policy: UNCTAD and NIEO in Search of a Rationale*, 7 *WORLD DEV.* 259 (1979); see also D. NEWBERY & J. STIGLITZ, *supra* note 28, at 439.

64. W.L. BALDWIN, *supra* note 1, at 94-99.

65. *Id.*

66. I.T.C. STATISTICS, *supra* note 1, at 46.

67. See W.L. BALDWIN, *supra* note 1, at 5 (revealing that this episode of the "mystery buyer" caused great disruption and consternation in the market at the time); Sulong, *Malaysian Leader Comes Clean on Tin Buying Operation*, *Fin. Times*, Sept. 19, 1986, at 40 (stating that in 1986 the Malaysian government admitted that it had been responsible and had lost millions of dollars in the process).

68. Memorandum from the L.M.E., *supra* note 60, at 50.

cess. Bolivia and the United States decided that the Agreement did not meet their respective interests, so both decided to pull out of it.⁶⁹

Malaysia was also minded to withdraw from the pact in favor of a producers' cartel but was prevailed upon not to do so.⁷⁰ The United Kingdom also had grave concerns about remaining in an International Tin Agreement which did not bind very important producers such as Bolivia and Brazil, and consumers such as the United States. The United Kingdom chose to remain a member in the hope of maintaining consumer influence over tin producers generally and attaining particular diplomatic advantage with Malaysia.⁷¹

The I.T.A., now handicapped by a serious loss in membership, could only enter into force provisionally. Nonetheless, its twenty-two members⁷² purported to enormously expand the size of the buffer stock to 50,000 tonnes of tin metal; contributions from the government would finance 30,000 tonnes of a "normal stock" and borrowing would finance 20,000 tonnes of "additional stock."⁷³ The producer and consumer countries would underwrite equally the normal stock.⁷⁴ To obtain loans for the additional stock, the Council was to "use as security [tin] stock warrants and, if necessary, government guarantees/government undertakings"⁷⁵ to the I.T.C.. The Council also was empowered to borrow such sums as it deemed necessary for the buffer stock, upon the security of tin warrants held by the buffer stock.⁷⁶

In a fatal defect in drafting, the Sixth Agreement only stipulated how the assets and administrative deficit of the I.T.C. would be apportioned among its members upon the Agreement's termination. Any remaining assets were to be distributed among members in proportion to

69. Wassermann, *UNCTAD: Sixth International Tin Agreement*, J. WORLD TRADE L. 557, 558 (1981).

70. McFadden, *supra* note 21, at 820.

71. Friction had developed between the governments of Malaysia and the United Kingdom over the former's restrictive procurement and investment policies. See Testimony of Mrs. L. Chalker, M.P. and the Rt. Hon. P. Channon, M.P. (Dec. 3, 1986) reprinted in HOUSE OF COMMONS, TRADE AND INDUSTRY COMMITTEE, THE TIN CRISIS: SUPPLEMENTARY REPORT, FIRST REPORT 1986-87, at 3 (1986) [hereinafter FIRST REPORT] (stating that Malaysia had a policy of "buy British last").

72. Memorandum of the D.T.I., *supra* note 57, at 146. The producing members were: Australia, Indonesia, Malaysia, Nigeria, Thailand and Zaire. *Id.* The consuming members were: Belgium/Luxemburg, Canada, Denmark, the E.C., France, Federal Republic of Germany, Greece, India, Ireland, Italy, Japan, Netherlands, Norway, Sweden, Switzerland and the United Kingdom. *Id.*

73. Sixth International Tin Agreement, Apr. 30, 1982, Misc. 13, (Cmd. 8546), art. 21 [hereinafter Sixth I.T.A.].

74. *Id.* art. 22.

75. *Id.* art. 21.

76. *Id.* art. 24.

their contributions, and any Council obligations to the staff were to be met by supplementary contributions from members.⁷⁷ The drafters did not give any apparent consideration to how to deal with any debts to third parties from the operations of the buffer stock. In particular, unlike the previous three Agreements, the fourth included no express language discussing the liability of members for such debts.

Members' contributions were not sufficient to fill the envisaged buffer stock. The defections from membership undermined the drive for contributions; only 20,000 tonnes were raised to the normal stock, for a total initial buffer stock of 40,000.⁷⁸ This shortfall was unfortunate because the condition of the market was worsening. At the end of the Fifth Agreement, the world plunged into its worst recession in fifty years. The world's production of tin metal had slightly exceeded consumption since 1978. In 1981, however, consumption fell to eighty-five per cent of production.⁷⁹ Incredibly, the Council ignored these omens and authorized a further increase in the price band in late 1981. To support the new floor it imposed strict export controls in April, 1982. The Council of the Sixth Agreement resolved to continue the price support program of the Fifth.⁸⁰

The attainment of a Sixth Agreement did not forestall attempts by producing countries to organize themselves into a better defined bloc. Months after the Sixth Agreement entered into force, seven producing countries combined to form the Association of Tin Producing Countries (A.T.P.C.).⁸¹ The main goal of the A.T.P.C. was "to obtain remunerative and equitable returns to tin producers and adequate supplies to consumers at fair and stable prices."⁸² The A.T.P.C. had a wide range of potential powers "to establish the necessary institutional and financial arrangements so as to overcome the problems facing the tin industry."⁸³ Notwithstanding the ambitious tone of the A.T.P.C.'s constitution, the association did not immediately play an active role in the tin market.⁸⁴

77. *Id.* art. 60.

78. Memorandum of the D.T.I., *supra* note 57, at 50.

79. I.T.C. STATISTICS, *supra* note 1, at 16.

80. Memorandum of the L.M.E., *supra* note 60, at 50.

81. Agreement Establishing the Association of Tin Producing Countries, *done at London, Mar. 29, 1983, reprinted in 23 I.L.M. 1009 (1984)*. The seven producing countries which are members of this Association are Bolivia, Malaysia, Indonesia, Nigeria, Thailand, Zaire and Australia. *Id.*

82. *Id.* art. 1, at 1009.

83. *Id.* art. 2.

84. McFadden, *supra* note 21, at 820.

B. EFFECTIVENESS

The I.T.C. was very active between 1956 and 1985. The Council imposed export control for over one-quarter of its life and conducted buffer stock activity for over three-quarters of it.⁸⁵ Its effect on the market, however, has been the subject of considerable debate. Objectively, the record of the I.T.C. has been hardly perfect: in its first twenty-three years it failed to keep the market price within its target band for seventy-nine months, an effectiveness rate of only seventy per cent.⁸⁶ The buffer stock even ran out of money in a vain defense of the floor in 1958.⁸⁷ Unlike its descendant thirty years later, however, the I.T.C. was not thereby insolvent. It had no bank debt, few, if any, trading liabilities, and possessed substantial assets in the form of its tin holdings.

Some commentators have suggested that the I.T.A. was substantially effective in stabilizing the tin market.⁸⁸ Others, led by Smith and Schink, who published a detailed study in 1976, have held that the Council's seventy per cent ratio not only demonstrates the Council's lack of success, but is misleadingly high. Smith and Schink concluded that the buffer stock has been much too small to exert more than a minor influence on the market and that the manner of the Council's application of export controls may have actually destabilized the market; they credit such stability as did exist in the tin market more to the timing of sales of tin from the larger United States strategic stockpile than to the operations of the I.T.C.⁸⁹

III. THE CRISIS

A. THE BUILD-UP

For tin producers, 1985 began with the market in the doldrums. Consumption of tin metal had barely recovered from the trough of

85. Memorandum of the D.T.I., *supra* note 57, at 151-62.

86. *Id.*

87. Memorandum of the L.M.E., *supra* note 60, at 49.

88. See, e.g., W. Fox, *supra* note 3, at 389; *The Role of International Commodity Agreements or Arrangements in Attaining the Objective of the Integrated Programme for Commodities*, UNCTAD (Agenda Item 2) at 17, U.N. Doc. TD/B/C.1/270 (1985) [hereinafter UNCTAD, *Commodity Agreements*] (indicating that tin prices have coincided with I.T.A. predictions in spite of such destabilizing factors as the tin policies of the Soviet Union and the United States); Amlôt, *1985 and All That*, TIN INT'L, June 1988, at 11 (declaring the I.T.C. an example of a successful international commodity agreement during its first twenty years).

89. Smith & Schink, *The International Tin Agreement: A Reassessment*, 86 ECON. J. 715 (1976); see Memorandum of the L.M.E., *supra* note 60, at 50 (discussing the contribution of tin metal to the buffer stock).

1982. To make matters worse, the volume of tin entering the market was reasonably high and expected to increase. The United States was continuing to sell from its strategic stockpile. The export controls suffered by members of the I.T.C. failed to have their desired effect of starving the market of new metal. While the member countries had reduced the volume of their exports by almost forty per cent for three years, non-member countries and smugglers in member countries had drastically augmented their exports in order to appropriate larger shares of the market. Brazil, in particular, had increased its exports by over fifty per cent in 1984 to 14,278 tonnes, an amount equivalent to over ten per cent of the world's total exports for that year. Smugglers in Southeast Asia released a similar volume of tin to the market in 1984. Canada was expected to open its first tin mine later in the year. With these stimuli, the tin price maintained its pressure on the floor of the I.T.C.'s target band.⁹⁰

The price only remained above the floor because the Council had intervened heavily in the market. The buffer stock had been very active since 1981, making enormous purchases of tin: 51,665 tonnes in 1982, 2,415 in 1983 and 6,727 in 1984.⁹¹ In addition, purchases for warehousing was not the Council's only way of supporting the price. The buffer stock also became increasingly active in paper trades, strategically buying and selling tin futures in order to manipulate the market.⁹²

Unfortunately for the Council, protecting the floor price by purchasing vast tonnages of tin on the L.M.E. had not only been exceedingly expensive, but became more so per tonne between 1982 and 1985. When the United States dollar soared against the pound sterling, so did the Malaysian ringgit. The floor price went from an equivalent price of £7,000 per tonne in July 1982 to over £10,000 per tonne in early 1985.⁹³ The Council had made most of its financial arrangements in

90. See Sulong, *Malaysia Accuses Brazil of 'No Positive Response'*, Fin. Times, May 17, 1985, at 36 [hereinafter Sulong, *Malaysia Accuses*] (addressing the factors that were depressing the tin market and causing the collapse of the industry); Sulong, *Tin Market in Doldrums*, Fin. Times, Feb. 13, 1985, at 36 (discussing the effects of the export cartels on the tin industry); I.T.C. STATISTICS, *supra* note 1, at 16-17, 35 (detailing world tin production, consumption, and trade statistics).

91. I.T.C. STATISTICS, *supra* note 1, at 46.

92. Two techniques increasingly used to tie up tin from the market were "special lends" and "special borrows." See Memorandum of the Ring Dealers, *supra* note 7, at 84-85 (defining these practices as agreements between the Council and the brokers to simultaneously sell (or buy) tin on the spot market and buy (or sell) back the same amount forward).

93. See Report by the Buffer Stock Manager (Sept. 20, 1985), reprinted in SECOND REPORT II, *supra* note 7, app., at 239 [hereinafter Buffer Stock Manager] (stat-

pounds sterling and found its resources depleting fast.

It was public knowledge that the Council had been supported by substantial bank loans and was making extensive forward trades; what was not well known was exactly how these items all added up. By the beginning of 1985, the Council's exposure had caused great unease in certain quarters, primarily those with the desire and enhanced access to information to be able to do the arithmetic. One of the first entities afflicted by this inquietude was the Bank of England, which monitors markets in the City of London with a critical eye. In observing the L.M.E., the Bank for months had been concerned about the Council's exposure. The Bank, however, felt it was in a difficult position. Although charged with regulating much of the financial system of the country, the Bank was not responsible for commodity exchanges or the Council. Lacking formal authority to tackle the apparent problem and not wishing to precipitate a crisis in a matter outside of its bailiwick, the Bank contented itself with uttering discreet expressions of concern to the L.M.E., the government, and anyone else who asked for its opinion. Officials of the Bank met with the management of the L.M.E. a number of times to discuss the operations of the Council.⁹⁴ The minutes of one of the first meetings, held in February 1984, illustrates the existence of early concern over the solvency of the Council and the likelihood of the member states covering any financial shortfall:

It was still not known how long [the buffer stock manager] could continue to finance his support operations particularly if there were to be some strengthening of sterling against the dollar. The LME representatives expressed no formal anxiety concerning the Buffer Stock; it was an on-going commercial operation and they would continue to monitor the market. The Chairman [who was an official of the Bank] emphasized that in the event of the BSM's funds becoming exhausted, it should not be assumed that any government would step in to provide additional finance.⁹⁵

The Bank of England also informed the British Department of Trade

ing that the value of currencies demands consideration when addressing provisions for modifying prices in the Sixth International Tin Agreement).

94. Letter from Mr. R. Leigh-Pemberton, Governor of the Bank of England, to the Chairman of the Trade and Industry Committee (July 1, 1986), *reprinted in* FIRST REPORT, *supra* note 71, app. 2, at 47 (advising the committee that a meeting was held between the Bank of England and the L.M.E to discuss buffer stock transactions); Testimony of Mr. C.J. Farrow, Bank of England (Oct. 22, 1986), *reprinted in* FIRST REPORT, *supra* note 71, at 18-32 [hereinafter Farrow Testimony] (testifying that the Bank of England had little power over the L.M.E after the end of exchange control).

95. Extract from the Minutes of the Liaison Meeting between the Bank of England and Representatives of the London Metal Exchange (Feb. 22, 1984), *reprinted in* FIRST REPORT, *supra* note 71, app. 2 Annex, at 47.

and Industry of its opinion at the time.⁹⁶

If the L.M.E. was not distressed in February 1984, it very soon became so after its own assessment of the situation.⁹⁷ The L.M.E., however, found itself in a dilemma similar to that of the Bank of England. The Exchange believed that it could do little about the Council because it only possessed the power to regulate its own members. The Council was not a member of the L.M.E., but a customer of at least thirteen members. The brokers themselves would have to manage the relationship between the Council and the L.M.E..⁹⁸ Certain members of the L.M.E. approached the Bank of England "and asked if there was a subject for concern, and the Bank confirmed that they should have a concern."⁹⁹ A few brokers acted on this concern by declining to accept further trading business of—and hence the credit risk of dealing with—the Council.¹⁰⁰

The fact of, let alone the extent of, official concern over the financial condition of the buffer stock of the Council did not reach the general public's notice in the first half of 1985. Indeed, little word filtered out of, in the language of one official inquisitor in 1986, "the magic circle" of the L.M.E., the Bank of England, and the British Department of Trade and Industry.¹⁰¹ This silence was not only prompted by perceived jurisdictional incapacities, but also by these entities' inability to ascertain the extent of the Council's difficulties. The Council had resisted supplying detailed current information on its buffer stock operations, even to its own members.¹⁰²

96. See Farrow Testimony, *supra* note 94, at 22 (stressing that the Bank of England disclosed to the Department of Trade and Industry the existence of a problem).

97. *Id.*

98. Testimony of J. Lion, Chairman of the L.M.E. (Jan. 29, 1986) [hereinafter Lion Testimony], *reprinted in* SECOND REPORT II, *supra* note 7, at 51-56.

99. Farrow Testimony, *supra* note 94, at 29.

100. Lion Testimony, *supra* note 98, at 53.

101. See Testimony of C.J. Farrow, Bank of England (Oct. 22, 1986), *reprinted in* FIRST REPORT, *supra* note 71, at 18 (referring to the communications between the regulators).

102. Access to information on the operations of the buffer stock was potentially lucrative for an inside trader. The I.T.C. interpreted the I.T.A.'s requirement that such information be confidential as compelling it to retain much of this information from its individual members. Instead, the Buffer Stock Manager submitted edited quarterly reports to the members months in arrears. Some members, including the United Kingdom and the E.C., believed the information they were receiving to be insufficient to assess the Council's activities and in 1983 attempted to reform the information process. The members could not agree on such changes and the initiative foundered. Testimony of M.A.R. Lunn, Assistant Secretary, Department of Trade and Industry (Feb. 19, 1986), *reprinted in* SECOND REPORT II, *supra* note 7, at 171, 173; Note submitted by DTI officials on certain legal aspects of operations of the International Tin Council (Mar. 4, 1986), *reprinted in* SECOND REPORT II, *supra* note 7, app., at 189-92.

The Council itself had good reason for suppressing this information, for it was very aware of its impending difficulties. The officials of the I.T.C. had frequently informed its members that it could not continue indefinitely to defend the floor price without additional resources. In May 1985, the Executive Chairman of the Council warned the members that in the absence of effective controls, a collapse in the market and the resulting insolvency of the Council was distinctly possible.¹⁰³

The alternatives open to the Council in mid-1985 were fourfold: (1) to suspend defence of the floor and watch the market price crash through it; (2) to reduce the floor to a level where it could be defended on a sustainable basis; (3) to receive additional contributions from members to finance its current operations; or (4) to tighten export controls. Certain consuming members, such as Canada, recommended that the I.T.C. lower its price floor.¹⁰⁴ Certain producing members, notably Malaysia, were adamantly opposed to any price reduction.¹⁰⁵ Producing countries were equally reluctant to impose more stringent export controls because, not only would these bring hardship to their industries, but also might prove ineffective if non-members increased their own exports to take up the slack.¹⁰⁶ If export controls were the answer, non-members would have to participate in the scheme.

Entreaties to Brazil by its fellow producers to restrain its exports or even join the Agreement failed.¹⁰⁷ Brazil did not want the dictates of an international body to hobble its young tin industry. The Council,

103. The Executive Chairman wrote:

Given the position on consumption, production capacity and stocks outlined above, no economic provisions would lead to the collapse of the market and the industry. If the market were to collapse, the Council would not have sufficient security in the form of tin warrants to cover its debts to the banks and the banks could be expected to sell the tin they hold as security, thus further depressing prices. Whilst it would not be possible to predict the level to which prices would fall, it is likely that there would not be sufficient tin to cover the debt, leaving a residual amount owing to both the banks and to the market by the Council. In the final analysis, this would have to be met by Members of the Council.

Elements for Consideration in the Negotiations of the Seventh International Tin Agreement (May 10, 1985), *reprinted in* SECOND REPORT II, *supra* note 7, app., at 233, 235.

104. See Testimony of Mr. B. Leeming, former Acting Buffer Stock Manager (Feb. 19, 1986), *reprinted in* SECOND REPORT II, *supra* note 7, at 135, 142 (testifying that the Canadians felt the membership should have examined the situation and reduced the floor to correspond with the market pressure).

105. *Id.*; Edwards, *Tin Buffer Stock May Trade Below Floor Price*, *Fin. Times*, Mar. 29, 1985, at 36 [hereinafter Edwards, *Tin Buffer Stock*].

106. See Sulong, *Tin Market in Doldrums*, *supra* note 90, at 36 (discussing the I.T.C. members' experience with export restrictions).

107. See Sulong, *Malaysia Accuses*, *supra* note 90, at 36 (discussing Malaysia's Minister of Primary Industries warning to Brazil that failure to curb its production and exports might lead to a collapse of the tin market).

needing to do something else, settled for a half-measure. At the end of March 1985, the Council gave the Buffer Stock Manager the authority to operate below the floor, but would not lower it.¹⁰⁸ The allocation of votes and the requirement for a two-thirds distributed majority for significant changes meant that Malaysia alone could block any proposed movement in the floor, however desirable such a change might seem to the other members.

This withdrawal from determined defense of the floor might have stabilized the Council's situation. Unfortunately, the Bank of England's fears about the effects of an appreciation of the pound sterling against the United States dollar were about to come true. In April and May the pound recovered sharply, causing the L.M.E. price of tin to fall. This would have been good news for the Council had it been in a condition to pay cash for tin, but it could no longer do so. The I.T.C. had exhausted its cash some time ago and attempted to control the market by juggling its tin stocks, bank loans, and futures contracts. The diminution in the sterling value of tin meant that the value of the tin held as security by the Council's creditors also fell, making the creditors uneasy. Many banks requested the Council to grant additional tin as security and balked at advancing further sums. Metal traders handling the Council's contracts also called for increased margin payments. The Buffer Stock Manager could not come up with all of the required collateral. Certain traders subsequently were persuaded to accept low margins.¹⁰⁹

The putative regulators, observing the tin market from the sidelines, wrung their hands with increasing frequency but did little else. Fearful of the enormous political repercussions that could follow a collapse of the Council, Department of Trade and Industry officials met with the L.M.E. management in June to inform the Exchange that "no likely hope of a British government guarantee being offered existed against the default of the Buffer Stock Manager." The Department also asked the L.M.E. about the possibility of warning its members about dealing with the Buffer Stock Manager; the Exchange once again took the position that it had no power either to issue such a warning or to enforce

108. Edwards, *Tin Buffer Stock*, *supra* note 105, at 36. The breach of the floor enabled the Buffer Stock Manager to do three things: to break the link between the Malaysian market and the L.M.E. and save itself from expenditures motivated purely by exchange rate fluctuations; to punish speculators against the Council's ability to maintain the floor; and to sell tin at market prices to finance its operations. See Edwards, *Price Tactics Undermine Tin Pact*, *Fin. Times*, May 17, 1985, at 36 (analyzing the impetus behind the breach of the floor).

109. Memorandum of the D.T.I., *supra* note 57, at 147; Memorandum of the Ring Dealers, *supra* note 7, at 85-86.

one. Despite its importance, the Department did not express its message to the banks or the tin mining companies in the United Kingdom.¹¹⁰ The Bank of England likewise did not warn the banks, as it "[did] not set itself up to advise commercial banks about risks. That is for their judgment in their lending."¹¹¹

By late summer, 1985, word of the dire financial straits of the Council leaked out of the "magic circle." Eminent authorities on the tin market, including a senior official of the West German Ministry of Economics and a prominent metal broker, perceived the Council to be on the verge of insolvency and predicted that the Agreement might not be renewed.¹¹²

This wave of concern inspired diplomatic action to resolve the Council's problems. In a report dated September 20, 1985, the Buffer Stock Manager urged the members to keep the Council in business by meeting its costs of financing the stock, awaiting further improvement in the economy, and trying to reach an effective accord with non-member producers. The cost of continued operation, he believed, was less than that which would be incurred by tin industries in the event of a market collapse. He implored the members to stop "gambling on its good fortune" and provide the Council with adequate funds. If not all the members were prepared to share the financing cost, then he hoped that at least those who directly benefitted most from the present price level would.¹¹³ Those who directly benefitted responded to the call. In mid-September, the A.T.P.C. agreed to formulate plans to inject £60 million into the Council.¹¹⁴

B. INSOLVENCY AND RESCUE ATTEMPTS

The deliberations of the Council and the A.T.P.C. over the proposed manner of rescue proceeded slowly. Unfortunately, time was running out fast. In mid-October the buffer stock showed signs of being *in extremis*. One producer country volunteered to resuscitate it with an

110. See Testimony of the Rt. Hon. P. Channon & M.A.R. Lunn (Mar. 19, 1986), reprinted in SECOND REPORT II, *supra* note 7, at 223, 227-99 (stating that the Department of Trade and Industries did not warn the banks and United Kingdom mining companies, but did warn the tin brokers).

111. Farrow Testimony, *supra* note 94, at 29.

112. See Gowers, *Economist Attacks Tin Pact*, *Fin. Times*, Aug. 14, 1985, at 18 (stating that price supports have kept production high); see also *Cut Urged in Tin Support Price*, *Fin. Times*, Sept. 13, 1985, at 40.

113. Buffer Stock Manager, *supra* note 93, at 240.

114. See Stainer, *Producers Move to Shore-up Tin Price*, *The Guardian* (London), Sept. 30, 1985, at 23 (examining the cause of rising production of tin and the I.T.C. efforts).

early installment on its expected contribution,¹¹⁵ but never advanced any money. This delay in payment proved too much for the Council's bankers, who froze the Council's credit lines and demanded immediate resolution of its indebtedness. The Council, now utterly insolvent, could only suspend its operations. On the morning of October 24, 1985, the Buffer Stock Manager telephoned the L.M.E. to tell the exchange that the buffer stock was suspending its operations for lack of funds. Given the situation's gravity, the L.M.E. immediately informed its members and suspended trading in tin.¹¹⁶ The Kuala Lumpur Commodity Exchange followed suit.¹¹⁷

The I.T.C.'s capitulation and the Exchange's suspension of trading sent shock waves throughout the mining and financial worlds. Reactions ranged from incredulity to cynicism. To those not intimately attuned to the situation—practically everyone outside of the “magic circle”, the banks, and the other member governments—the abrupt insolvency of the I.T.C. came as a surprise. They could not believe that an international economic organization backed by most of the world's richest countries might not be immune from that affliction dreaded by all commercial enterprises in the capitalist system: sudden strangulation by unsatisfied creditors. Others saw the termination of the buffer stock's operations as yet another round in the eternal and tiresome wrangle between participants in the tin market; the participants were merely jockeying for position and waiting for high-level meetings to find a solution. The experiences of other international organizations which had previously run out of cash confirmed the latter view: all had happy endings.¹¹⁸ All eyes were now fixed on the Council and its

115. *Tin Council Receives Early Cash Payment*, *Fin. Times*, Oct. 11, 1985, at 40.

116. See Wagstyl, *Tin Market in Crisis as London Trading is Halted*, *Fin. Times*, Oct. 25, 1985, at 1 (explaining the consequences which drove the council to suspend trading in tin); see also Memorandum of the L.M.E., *supra* note 60, at 43 (describing the process by which the Buffer Stock Manager suspended trading on October 25, 1985). See generally Wagstyl, *World Tin Market at the Brink*, *Fin. Times*, Oct. 25, 1985, at 1 (detailing the causes of and repercussions from the trading suspension).

117. See Wagstyl, Sherwell & Sulong, *Tin Trade Suspended Until Council Meets Next Week*, *Fin. Times*, Oct. 26, 1985, at 11 (detailing the repercussions of the halt in trading).

118. Apart from the previous and temporary difficulties of the I.T.A. and other commodity agreements, at least two such precedents of international organizations running out of money exist. In both cases assessment of additional contributions from member states provided the solution. The first was the United Nations Emergency Force (UNEF) in 1961. Some members refused to pay their contributions to UNEF and \$200 million worth of United Nations bonds, half of which the United States purchased, financed the deficit. The second precedent is that of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the 1980s. The United States and the United Kingdom withdrew from it, taking with them thirty per cent of its revenues. UNESCO's allegedly free-spending ways could not be sustained and it

members.¹¹⁹

The bickering that for years had been confined to the board room of the I.T.C. was now played out on the pages of the world's financial press. Many consuming countries, led by West Germany, expressed a preference for a lower tin price rather than a bail-out of the Council. Other consumers wanted to rescue the Council, but could not agree on how to do it. Producing countries were also divided. While Indonesia quickly pledged a contribution, Malaysia was loath to pay for a rescue. True to form, the Council was deadlocked. With apparent contempt for the urgency of the situation, the only decision the Council could make was to adjourn its meetings for two weeks.¹²⁰ The banks, which had precipitated the crisis in the hope of forcing an immediate response from member governments, got their bitter first taste of the international politics of tin.

As the crisis entered its second week without an obvious rescue forthcoming, nervousness began to spread beyond the members of the Council and the creditor banks and brokers. There were three other groups of interested parties in the crisis, of different degrees of proximity to the Council. The first consisted of tin producing firms, who would have to scale down mining operations and lose profits after a price collapse.¹²¹ The second group were entities which dealt with creditors of the Council, which feared a "domino effect" if the creditors were forced to default on their commitments. This group mostly comprised metal brokers on the L.M.E. which either had not dealt with the Council or could absorb any losses from its failure; they feared that the Council's insolvency would precipitate failures of weaker members of the L.M.E. which, given the interlocking web of principals' contracts between members, might set off a chain reaction of unsatisfied commit-

needed restructuring. In these cases, any problems of third party creditors did not come to the fore. Y. BEIGBEDER, *MANAGEMENT PROBLEMS IN UNITED NATIONS ORGANIZATIONS: REFORM OR DECLINE?* 26-35, 147-48 (London 1987).

119. See Stainer, *LME Waits for International Action*, *Guardian* (London), Oct. 26, 1985, at 18 (reviewing the options available to the I.T.C. for restoring the market).

120. See Wagstyl & Bunker, *Tin Trading Remains Suspended as ITC Fails to Solve Crisis*, *Fin. Times*, Oct. 31, 1985, at 1 (discussing the I.T.C.'s inability to decide upon a course of action); Cooke, *Tin Council Must Continue, Say Indonesians*, *Fin. Times*, Nov. 2, 1985, at 2 (explaining that because tin exports account for a large percentage of Indonesia's export revenues, they were willing to pledge \$5 million to the I.T.C.); Davies & Peel, *Bonn Under Fire on Tin Crisis*, *Fin. Times*, Nov. 27, 1985, at 40 (discussing the effect of the tin crisis on the E.C.).

121. The price of the shares of the world's leading private tin producing firm, Paranapanema S.A., fell by half on the So Paulo Stock Exchange within two weeks of the Council's suspension. See Whitley, *Brazil Refuses to Join Tin Pact*, *Fin. Times*, Nov. 8, 1985, at 34 [hereinafter Whitley, *Brazil Refuses*] (describing Brazil's role in the tin industry and in the collapse of the I.T.C.).

ments and pull them all down.¹²²

The third group of persons affected was only slightly more remote: the participants in the other commodity markets, especially those producing and trading other metals. Concerned about the possible economic and financial implications of tin's collapse—the future prices of metals and other commodities governed by international agreement as well as the solvency of individual brokers—purchasers withdrew from the markets. This withdrawal, in turn, had two effects. One, prices of other metals fell, reducing the incomes of mining and metals firms.¹²³ Two, the volume of trading on the L.M.E. diminished by at least half, paring incomes of brokers.¹²⁴ To add to the L.M.E.'s troubles, the Malaysian market soon re-opened and siphoned off much of the remaining tin trading;¹²⁵ the L.M.E. feared that even if it survived the crisis any business lost might never return.¹²⁶ With the banks facing severe loan losses, the very existence of the L.M.E. threatened, and mining firms contemplating lower profits, the I.T.C.'s insolvency indeed caused "mayhem in the City of London."¹²⁷

In the absence of leadership from the Council, the creditors scrambled to shore-up their individual and collective positions. In the first round of what was to become an exceedingly long, complex, and expensive legal contest, a broker creditor of the Council won an injunction from the English High Court restraining the Council from disposing of its assets.¹²⁸ This injunction was later struck down on the grounds that the Council was immune from the Court's jurisdiction by virtue of the I.T.C. (Immunities and Privileges) Order of 1972.¹²⁹ On October 31,

122. See Wagstyl, *The Crisis No One is Ready to Resolve*, Fin. Times, Nov. 1, 1985, at 22 (analyzing the conflicting interests present in the I.T.C. and their inability to resolve the crisis).

123. A leading nickel producer requested the L.M.E. also to suspend trading in that metal because the tin crisis was artificially depressing world nickel prices. *LME Postpones Decision on Tin Trading Restart*, Fin. Times, Nov. 1, 1985, at 1; Another major producer suspended sales of lead and copper because of low L.M.E. prices. Wagstyl, *Tin Council Advances Emergency Meeting After Brittan Appeal*, Fin. Times, Nov. 2, 1985, at 1 [hereinafter Wagstyl, *Tin Council Advances*]. See Stainer, *Tin Crisis Depresses Other Metals*, The Guardian (London), Nov. 25, 1985, at 21 (reporting that trading on the London Metal Exchange decreased of fifty per cent as a result of the tin crisis).

124. Memorandum from the L.M.E., *supra* note 60, at 47.

125. Wagstyl & Sulong, *Tin Council Fails to Resolve Crisis*, Fin. Times, Nov. 7, 1985, at 1; *Malaysia Reopens Tin Mart*, Int'l Herald-Tribune, Feb. 4, 1986, at 9.

126. Lion Testimony, *supra* note 98, at 56.

127. *Id.* at 51.

128. Wagstyl, *Tin Council Advances*, *supra* note 123, at 1.

129. See Wagstyl, *Court Backs Tin Council Immunity*, Fin. Times, Jan. 16, 1986, at 40 [hereinafter Wagstyl, *Court Backs Tin*] (discussing the I.T.C.'s additional victory over Arab Banking Corporation that was attempting to prevent the Council from

1985, the L.M.E. brokers met to discuss the problem; the Bank of England called a meeting of the banks.¹³⁰ The banks formed a committee to explore solutions to the crisis and within days proposed one: they offered the Council one year's grace in loan payments. In return, they asked that the A.C.T.P. countries make the planned cash contributions and the member governments give guarantees of the Council's outstanding indebtedness as well as pledge to keep the Council in funds until its operations could wind up in an orderly fashion.¹³¹

The ball was lobbed firmly back into the Council's court, but once again, the Council did not react like the team it was supposed to be. Few members evinced a desire to play the game with any seriousness. Spurred by its special interests in preserving the health of the L.M.E. and the tin mines in Cornwall, the British government was the first to leap up. The Secretary of the Department of Trade and Industry announced that the United Kingdom would not only honor its share of the Council's debts, but would launch a diplomatic initiative to enlist other governments, especially those of fellow E.C. countries, to make similar commitments.¹³² Many of the E.C. countries found this solution unacceptable, believing that the Council was an independent commercial undertaking and that they were not obliged to save it.¹³³ Malaysia also dragged its feet.¹³⁴ Outside the beleaguered Council, Brazil once again rejected the role of white knight.¹³⁵

The banks sensed their proposal of early November was not going to succeed and at the urging of the Bank of England replaced it with a more comprehensive one.¹³⁶ Led by Standard Chartered Bank, the banks offered the Council not only forbearance but new money. The banks would advance £550 million for three years at market rates to enable the Council to meet its commitments to brokers. In return, the banks wanted something from everyone: guarantees of the Council's indebtedness from its member governments, a deposit of tin from the Council equal to ten per cent of the value of the new loan, and a guar-

transferring assets).

130. R. GIBSON-JARVIE, *supra* note 9, at 16.

131. See Wagstyl, *Banks Set Terms for Helping to Solve Tin Market Crisis*, *Fin. Times*, Nov. 5, 1985, at 1 (setting forth the terms under which a group of sixteen financial institutions were willing to assist in resolving the tin market crisis); Memorandum of Sir Adam Ridley (Jan. 29, 1986), *reprinted in* SECOND REPORT II, *supra* note 7, at 22 [hereinafter Memorandum of Sir Adam Ridley].

132. Wagstyl, *Tin Council Advances*, *supra* note 123, at 1.

133. Memorandum of Sir Adam Ridley, *supra* note 131, at 25-26; Hermann, *UK and Bonn Differ on Tin Wrangle*, *Fin. Times*, Nov. 28, 1985, at 40.

134. *Brinkmanship in Tin Market*, *Fin. Times*, Nov. 14, 1985, at 40.

135. Whitley, *Brazil Refuses*, *supra* note 121, at 34.

136. R. GIBSON-JARVIE, *supra* note 9, at 18.

antee of ten per cent of indebtedness from the L.M.E.¹³⁷

Although the L.M.E. immediately indicated its approval of this scheme, the Council did not. Incredibly, the Council's deliberations on its plight had an air of unreality about them. The memorandum to members from the Executive Chairman reviewing the banks' proposal revealed that the Council's officers believed it still had considerable freedom of action. The memorandum suggested that the Council had three options: to "walk away from the Council's debts;" "state that the Council would meet reasonable residual debts and have an orderly winding up of buffer stock operations;" or "continue buffer stock operations on a limited basis supporting a lower price."¹³⁸ The "Decisions for the Council" were nonchalantly reduced into one sentence: "[w]hether to pay reasonable debts; and if so, how this should be financed."¹³⁹ The Council then did what it did best, postpone the decision until further meetings could be held in a few weeks.¹⁴⁰

By this time, with no resolution in sight, the crisis began to throw up its first casualties. The dreaded chain-reaction of failures of brokers on the L.M.E. appeared about to begin. The Council had not paid MMC Metals Ltd., a subsidiary of the state-owned Malaysia Mining Corporation, for a large sale of tin and MMC was forced to default on £13.9 million of obligations to another broker. MMC was compelled to go into liquidation.¹⁴¹

Producers also began to suffer as the tin price dived by one third, to the equivalent of about £6,000 per tonne on the minor markets, and kept on sliding. This made mine after mine redundant; many closed and more prepared to do so.¹⁴² Frustration at the longevity of the crisis extended across all borders and party lines. In the United Kingdom this frustration found a familiar outlet in demands for an official inquiry.¹⁴³ The House of Commons Select Committee on Trade and Industry was duly charged with the task of determining both the origins of the crisis

137. Wagstyl, *Tin Council Considers Bank's Crisis Plan*, Fin. Times, Nov. 16, 1985, at 20 [hereinafter *Tin Council Considers*]; Memorandum from the L.M.E., *supra* note 60, at 23; Memorandum of the D.T.I., *supra* note 57, at 105-6.

138. Memorandum from the L.M.E., *supra* note 60, at 23.

139. Cessation of Buffer Stock Operations—Options, Statement by Executive Chairman (Nov. 26, 1985), reprinted in SECOND REPORT II, *supra* note 7, at 241-43.

140. Wagstyl & Gowers, *Tin Council to Meet 'Until Decision Reached' on Debt*, Fin. Times, Nov. 21, 1985, at 1.

141. Wagstyl, *Living in the Shadow of an Avalanche*, Fin. Times, Nov. 21, 1985, at 28; Wagstyl, *Tin Council Considers*, *supra* note 137, at 20; Wagstyl, *Malaysian Trader Suspends Dealings on LME*, Fin. Times, Nov. 12, 1985, at 44.

142. *Geevor Warns of Lay-offs*, Fin. Times, Dec. 5, 1985, at 29; *Malaysia Urges LME to Fix Prices on Outstanding Tin Contracts*, Fin. Times, Nov. 14, 1985, at 40.

143. Riddell, *Inquiry Sought Into Tin Crisis*, Fin. Times, Nov. 21, 1985, at 48.

and the appropriate response of the British government. It began summoning persons and documents in earnest, but soon found that the key witness wished to remain mute—the Council refused “to attend to give evidence or to release any information to the Committee,” preferring to cower behind its cloak of immunity in the United Kingdom.¹⁴⁴

Ultimately, the Council’s testimony was not completely necessary because its darkest secret seeped out on its own. In early December the City obtained a copy of the Council’s auditors’ confidential report on the Council’s finances as of October 24, 1985. To governments, bankers, brokers, and miners alike the report on the Buffer Stock Manager’s handiwork proved a terrifying read. The report put the gross amount of the Council’s liabilities at £897 million, significantly higher than had been expected. The Council owed one-third of this sum to sixteen financial institutions and the rest to the brokers. To make matters worse, the volume of its stocks of tin was also high. In addition to the 52,540 tonnes it held in its own name, it controlled 26,845 tonnes held in the name of banks and brokers. The Council’s forward purchases amounted to 63,504 tonnes.¹⁴⁵

Two unhappy conclusions were drawn from this assessment. First, it implied that after making adjustments for those contracts which had been priced, 120,819 tonnes of tin—equal to eight months of world consumption—now had to be valued and likely sold. A difficult task in a confident and liquid market, this was impossible in a skeptical and thin one. This report also appeared to be a numerical indictment of the Buffer Stock Manager’s discharge of his responsibilities: under his direction, the buffer stock controlled a larger volume of tin than the I.T.A. authorized.¹⁴⁶

Dismayed by this revelation, the creditors of the Council primed their writs.¹⁴⁷ Three brokers on the L.M.E. with outstanding trades with the Council commenced the arbitration proceedings to which they were entitled by the Headquarters Agreement.¹⁴⁸ The brokers, however, indicated their willingness to compromise on the Council’s debts.

144. Riddell & Wagstyl, Memorandum submitted by Geevor Tin Mines (Jan. 22, 1986), reprinted in SECOND REPORT II, *supra* note 7, at 1; *Tin Council Shuns Commons Investigation*, Fin. Times, Dec. 5, 1985, at 48.

145. Wagstyl, *Opening a Tin Can of Worms*, Fin. Times, Dec. 4, 1985, at 32; R. GIBSON-JARVIE, *supra* note 9, at 14-15. Its control was pursuant to the terms of “special lends” and “special borrows.” See *supra* note 92.

146. R. GIBSON-JARVIE, *supra* note 9, at 14-15.

147. *Tin Council Creditors Prepare for Court Action*, Fin. Times, Dec. 9, 1985, at 4.

148. Wagstyl, *Brokers in Arbitration Proceedings Against Tin Council*, Fin. Times, Dec. 7, 1985, at 20.

The banks demanded complete recovery, but also tried in earnest to meet with officials of the Council to hammer out a mutually acceptable solution. These officials appeared to be in no hurry to do so.¹⁴⁹

The diplomatic efforts of the British government were supplemented with those of the Commission of the E.C., but only forced two inconclusive informal meetings between the Council and its creditors in early December.¹⁵⁰ Just before Christmas, the Council, or more accurately the blocs within it, managed to make a decision on the rescue proposal which had sat on the table for weeks. They soundly rejected the plan, for two reasons: one, to them it required a virtual admission of the members' liability for the Council's debts; and two, it was too expensive. Most members would only partake in a rescue if it required no admission of liability and if all the creditors shared the burden.¹⁵¹ After these announcements, the Council adjourned its meetings for three weeks.¹⁵²

The banks, never eager to formulate rescue plans for recalcitrant clients, let alone share their burdens, swallowed their outrage at the conduct of the Council and gave it "one more go." Thirteen out of the fourteen banks, plus the brokers, were prepared to implement another, more imaginative proposal. In the belief that the I.T.C. had demonstrated a lamentable incapacity to manage its way out of the crisis, the scheme would establish another entity to take over the Council's assets and liabilities. This new company, "Newco," would wind up the Council's operations in an orderly fashion by releasing its stocks of tin onto the market over a three year period. It would be supported in the interim by an equity infusion of £270 million—£200 million from the governments, £50 million from the L.M.E. brokers and £20 million from the banks—and new loans from Standard Chartered Bank guaranteed in part by the British government. This proposal represented a serious attempt by the creditors to deal with the expressed concerns of the member states; in supporting a separate entity with equity capital, the members would not be directly repaying the Council's debts and could also cap their losses. The members received the Newco proposal before Christmas, with an urgent request for prompt attention.¹⁵³

149. Wagstyl, *Tin Council Adjourns Until Next Wednesday*, Fin. Times, Dec. 13, 1985, at 28; Memorandum of Sir Adam Ridley, *supra* note 131, at 24-26.

150. Memorandum of Sir Adam Ridley, *supra* note 131, at 25-26.

151. Wagstyl, *Tin Move Rejected*, Fin. Times, Dec. 19, 1985, at 36; Peel & Wagstyl, *EEC Ministers Dash Hopes of Tin Crisis Settlement*, Fin. Times, Dec. 18, 1985, at 24; Memorandum of Sir Adam Ridley, *supra* note 131, at 26.

152. Wagstyl, *Tin Council Defers Crisis Talks for Three Weeks*, Fin. Times, Dec. 21, 1985, at 3.

153. *Fresh ITC Rescue Plan Proposed*, Fin. Times, Dec. 24, 1985, at 16; Testi-

Newco struck a responsive chord in many members. For the first time, the Council resolved to formally negotiate with its creditors.¹⁵⁴ Its first offer was £60 million, a sum the creditors thought far too low.¹⁵⁵ It was an encouraging sign, however, and to keep the process going, the British government offered £50 million in cash if the other parties would increase their commitments.¹⁵⁶ In late February 1986, four months after the buffer stock suspended its operations, the parties' working groups agreed on the terms of a provisional plan to put to their respective members.¹⁵⁷ After intense diplomatic pressure, most I.T.C. members finally gave the plan their conditional support. Just when success appeared imminent, however, Indonesia and Thailand vetoed the plan on March 6, 1986. Indonesia stated that its share of the plan's costs—£15 million—was not commensurate with its gains.¹⁵⁸ Ironically, this refusal came despite an attractive last-minute offer to Thailand and Indonesia by Paranapanema, the Brazilian company whose production in 1985 was greater than that of Bolivia, to make a contribution in cash and freeze its production level.¹⁵⁹

C. THE FALL-OUT

With all hope for settlement thus dashed, the market could hold its breath no longer. The banks' united front had frayed during the negotiations,¹⁶⁰ but now fell apart—with Standard Chartered first off the

mony of Mr. P. Graham (Jan. 29, 1986), *reprinted in* SECOND REPORT II, *supra* note 7, at 34-35.

154. Wagstyl, *Tin Council Prepared to Negotiate with Creditors*, *Fin. Times*, Jan. 25, 1986, at 18.

155. Wagstyl, *Tin Council Offers Creditors £60m Towards Rescue*, *Fin. Times*, Feb. 6, 1986, at 36.

156. Gowers, *UK Offers £50m to Rescue Tin Market*, *Fin. Times*, Feb. 7, 1986, at 36.

157. Wagstyl, *Tin Rescue Package Agreed*, *Fin. Times*, Feb. 24, 1986, at 1.

158. Various reasons have been suggested why Indonesia reversed its earlier enthusiasm for a rescue and rejected Newco. Indonesia's export earnings are very dependant on petroleum and fell drastically in 1986, making it more difficult for Indonesia to contribute. Indonesia and Thailand also might have wanted the opportunity to dispose of high-cost producers, mainly Bolivia, once and for all. More likely, however, they did not approve of a rescue which did not continue the Council's buffer stock operations and most directly benefitted creditors. Wagstyl, *Tin Crisis Deadline Extended*, *Fin. Times*, Mar. 6, 1986, at 40; *see Rescue Plan for Tin Market Fails at Last Moment*, *Fin. Times*, Mar. 7, 1986, at 1 (reporting the last moment failure of the rescue plan for the tin market); B.S. CHIMNI, *INTERNATIONAL COMMODITY AGREEMENTS: A LEGAL STUDY* 212 (1987) (discussing the burden this payment would place on Indonesia).

159. *Tin Prices Fall on Failure of ITC Rescue Plan*, *Int'l Herald-Tribune*, Mar. 11, 1986, at 15.

160. One bank had made an unsuccessful application to the Court to stop the Council from transferring its assets to Newco. Wagstyl, *Court Backs Tin*, *supra* note 129, at 40. At least three other banks sold the tin they held as collateral. *Id.*; Wagstyl,

mark, the individual creditors started their own legal actions against the Council.¹⁶¹

For its part, the L.M.E. had postponed the unsavory task of untangling the web of unperformed contracts between its members in the hope that the task would be sweetened with rescue funds. The L.M.E. now decided that the situation was so sensitive that it would maintain the suspension of tin trading and impose a rule of the exchange to settle all outstanding contracts, whether between members, or members and clients, at a fixed price. Hoping to compromise between sellers who wanted the October price maintained and buyers who wanted the lowest current price stipulated, the L.M.E. fixed a price in the middle of the current range of prices on other markets. This "ring-out" was held at £6,250 per tonne at a special session of the Exchange on March 8, 1986. One broker firm which suffered at this "ring-out" decided not only to take on the Council, but the L.M.E. itself. Shearson Lehman launched an action in the English High Court claiming damages from the L.M.E. for its conduct of the "ring-out."¹⁶²

The initial legal problem facing the creditors was that while they had known that the Council was a strange beast, they were not sure how to grab a hold of it once it became unfriendly. The Council had resisted submission to the inquiry of the House of Commons Select Committee and the two asset freezing applications, on the basis that the 1972 Order granted the Council immunity from suit and legal process in the United Kingdom, unless it had waived that immunity.¹⁶³ When served

Another ITC Bank Breaks Ranks, Fin. Times, Mar. 5, 1986, at 36.

161. Wagstyl, *Standard Chartered Begins Legal Action Against Tin Council*, Fin. Times, Mar. 12, 1986, at 1.

162. Wagstyl, *Court Challenge Launched Against LME Tin Ruling*, Fin. Times, Mar. 11, 1986, at 1; Wagstyl, *LME Braced for Lawsuits Over Decision on Tin*, Fin. Times, Mar. 10, 1986, at 1; Wagstyl & Owen, *LME Ends Tin Trading and Sets Settlement Price*, Fin. Times, Mar. 8, 1986, at 1.

163. This immunity from suit did not necessarily extend to countries outside the United Kingdom and certainly not to Malaysia and the United States). See *Malaysian Writ*, Fin. Times, Jan. 15, 1987, at 41. Two Malaysian creditors of the Council sought to enforce their security by court action and the Council pleaded immunity before the High Court of Malaysia. *Id.* The Court held that the Council was not immune from Malaysian process and allowed the writs to be served. *Id.*; *Int'l Tin Council v. Amalgamet Inc.*, 524 N.Y.S.2d 971 (N.Y.S.C. 1988); Ratner, *International Tin Council v Amalgamet Inc.*, 82 AM. J. INT'L L. 837, 837-40 (1988). A United States creditor of the Council commenced arbitration proceedings in New York pursuant to its right under trading contracts. *Id.* The Council applied to the New York Supreme Court for a stay of arbitration proceedings on the grounds that it was immune from suit under United Kingdom law and international comity. *Id.* The Court held that sovereign immunity in United States law is derived solely from two federal statutes, under whose purview the Council did not come *inter alia* because the United States was not a member of the Council. *Id.* The Headquarters Agreement was the source of the Council's

with the writ of Standard Chartered Bank, the Council counter-attacked with the same tactic and applied to have the writ set aside. Mr. Justice Bingham confirmed the Council's general immunity in the United Kingdom under the Order, but denied this plea based on the terms of the loan document, a "facility letter." In the facility letter, the Council had agreed to submit to the English High Court's jurisdiction and in so doing had waived its immunity. Standard Chartered, therefore, could not be stopped from proceeding.¹⁶⁴

With the Council unlikely to have a further defense to Standard Chartered's claim, the action could have proceeded quickly to summary judgment and execution on the Council's unencumbered assets. In scrambling for the Council's free assets, the bank would have had to compete with two brokers: Maclaine Watson and Lazmet. Maclaine Watson had just won an award of £3.25 million pursuant to the arbitration clause in its contract with the Council and was preparing to pounce.¹⁶⁵ Lazmet was in the fortuitous position of having taken delivery of eight hundred tonnes of tin from the Council and having not yet paid for it when the crash occurred; claiming set-off against its own debts due from the Council, Lazmet hung onto the tin as a bargaining counter.¹⁶⁶

Realizing that the chinks in its armor had been found, the Council gave in to these three parties in April and concluded out-of-court settlements with them.¹⁶⁷ The other banks, eyeing with envy the spoils going to the swiftest, attempted to reach similar accommodations. To their disappointment, the Council had no free assets left to offer.¹⁶⁸ The Council only retained its administrative fund; because the Council had reduced its staff, most of that fund was earmarked for legal expenses.¹⁶⁹

In June, 1986 two other brokers won arbitration awards against the

immunity in the United Kingdom and could not have extra-territorial effect in the United States. *Id.* In any case, the Court treated the Council's agreement to arbitration in the contract as constituting a waiver of any sovereign immunity it might have enjoyed. *Id.*

164. Standard Chartered Bank v. Int'l Tin Council, [1986] 3 All E.R. 257 (Q.B.).

165. Wagstyl, *Creditors Closing in on International Tin Council*, Fin. Times, Apr. 3, 1986, at 40.

166. Wagstyl & Hughes, *Tin Broker Settles Out of Court with ITC*, Fin. Times, May 1, 1986, at 40.

167. *See id.* (noting that Standard Chartered received 374 tonnes of metal and £1.2 million). Maclaine Watson accepted 910 tonnes in partial settlement and Lazmet settled for 500 tonnes of the tin it had retained. *Id.*

168. Gowers, *Banks Seek a Final Tin Settlement*, Fin. Times, May 23, 1986, at 40.

169. Stainer, *Fate of "Discredited" Tin Pact is Sealed*, The Guardian (London), June 9, 1986, at 23.

I.T.C.¹⁷⁰ Hungry for satisfaction of these awards, the traders followed their fellow creditors in search of other sources of recovery. Their path led straight to the only store of plenty on the landscape: the member governments' treasuries. The creditors believed that they could politically shame or legally compel the member governments to pay for the remaining debts of the Council. Eleven of the traders formed an entity to co-ordinate their efforts, called "Tinco Realisations," which retained the services of a hardened accountant and two public relations firms.¹⁷¹ In August, Tinco launched an international offensive accusing the member governments of gross irresponsibility and unlawful conduct.¹⁷² The campaign failed as the governments, including that of the United Kingdom, continued to refuse to accept any legal liability for the Council's debts.¹⁷³

The creditors lost little time in taking legal action against the member states. They took many different tracks. The creditors directly sued the governments for the debts, launching three actions in the High Court of England against all the members including the E.C. Another action named only the United Kingdom Department of Trade and Industry.¹⁷⁴ Actions occurred in other countries. Algemene Bank Nederland began preliminary investigative process in the Dutch courts against the Netherlands government.¹⁷⁵ The broker Rudolf Wolff and Co. had a Canadian parent company and commenced an action against the Canadian government in the Supreme Court of Ontario.¹⁷⁶ The creditors also employed the remedies provided by insolvency law. "Tinco" sought to wind up the Council and have the English High Court appoint a liquidator, who would stand in the Council's shoes and claim contributions from the members.¹⁷⁷ Maclaine Watson made ap-

170. J.H. Rayner (Mincing Lane) Ltd. won a settlement for £16.2 million. *Trader Wins Arbitration Award Against ITC*, Fin. Times, June 6, 1986, at 40. Amalgamated Metal Trading also won a settlement for £5.3 million. *Another Trader Wins Claim Against ITC*, Fin. Times, June 13, 1986, at 40.

171. Wagstyl, *Brokers Step Up Pressure for Tin Crisis Settlements*, Fin. Times, July 3, 1986, at 40; Griffiths, *Accountant Heads Tin Traders' Bid to Recover Funds*, Fin. Times, June 16, 1986, at 6.

172. Gowers, *Brokers Say Tin Council Members Acted Unlawfully*, Fin. Times, Aug. 26, 1986, at 8.

173. Simpson & Milner, *Tin Brokers Stake a Million on Chance of Winning £400 Million*, The Guardian (London), Sept. 2, 1986, at 26.

174. Hughes, *Banks Sue Tin Council Members*, Fin. Times, Dec. 30, 1986, at 36; *LME Trader Sues ITC Members*, Fin. Times, July 16, 1986, at 3.

175. Raun, *Dutch Bank Studies Tin Collapse Claim*, Fin. Times, Feb. 20, 1987, at 32.

176. Owen, *Noranda Files Suit Tin Suit Against Canada*, Fin. Times, Oct. 21, 1987, at 38.

177. Gowers, *Metal Brokers Seek to Wind Up World Tin Council*, Fin. Times,

plications to the English High Court to appoint a receiver for the Council for similar reasons¹⁷⁸ and then for an order requiring the Council to disclose all of its assets, including debts owing to the Council from its members.

The winding up case reached the courts, first, in December 1986. The Council moved to strike the petition for winding up on two grounds: on its now familiar defense of immunity from suit; and on the basis that it was a special international entity, not an English company, and therefore not subject to the particular winding up regime of the Companies Act.¹⁷⁹ Mr. Justice Millett agreed with the latter argument and concluded that the High Court had no jurisdiction to wind up the Council.¹⁸⁰

The High Court heard the receivership application next, in April 1987. The creditors' motion asked the Court to appoint a receiver for the Council by way of equitable execution to take over those powers or assets of the Council which enabled it to demand contributions from its members.¹⁸¹ The Council moved to strike out the creditors' motion on various grounds, including its immunity from suit and the existence of non-justiciable issues: the Court would have to decide on the Council's alleged rights by construction of an unincorporated treaty made between sovereign states.¹⁸² The Court held that this was technically an appropriate case for appointment of a receiver by equitable execution but that the Council must demonstrate the right to claim from its members under the I.T.A.. Considering this a non-justiciable matter in English courts, the judge refused to order the appointment of a receiver for the Council.¹⁸³

The examination application, heard in late June 1986, concerned a creditor's right to compel the silent Council to disclose the extent and nature of its assets, especially debts owing to it.¹⁸⁴ Mr. Justice Millett held that the Court had the inherent jurisdiction to order a defendant to provide information on its assets to a judgment creditor if that would prevent the judgment debtor from concealing his assets from lawful ex-

Sept. 1, 1986, at 1.

178. Hughes, *More Suits Against Tin Council Announced*, *Fin. Times*, Dec. 6, 1986, at 5.

179. *Re International Tin Council*, [1987] 1 All E.R. 890 (Ch.D.).

180. *Id.*

181. *Maclaine Watson & Co. v. Int'l Tin Council*, [1987] 3 All E.R. 787, 789 (Ch.D.).

182. *Id.*

183. *Id.* at 787.

184. *Maclaine Watson & Co. v. Int'l Tin Council (No.2)*, [1987] 3 All E.R. 886 (Ch.D.).

ecution.¹⁸⁵ The Court ordered a Council officer to disclose the extent of its assets in the United Kingdom because Maclaine Watson possessed such a valid judgment, its arbitration award.¹⁸⁶

The four direct actions against the member governments came before the Court in May 1987. The governments moved to strike for having no reasonable cause.¹⁸⁷ Mr. Justice Staughton heard the motion for all three actions, but found no basis on which its members could be directly liable for the Council's debts: the Council was a separate legal entity which had contracted on its own behalf.¹⁸⁸ The statements of claim showed no reasonable cause of action so were struck out.¹⁸⁹ Mr. Justice Millett heard the case involving only the Department of Trade and Industry and reached the same conclusion.¹⁹⁰ The action against the Canadian government in the Supreme Court of Ontario, heard a few months later, also was struck out, but for a different reason: it had been commenced in the wrong court.¹⁹¹ Appeals soon were filed in all of the above cases save the Canadian one.¹⁹²

As the smoke cleared temporarily from the legal battlefield, both sides took stock of the growing economic cost of the crisis. After the rejection of Newco and the "ring-out" in March 1986, the price of tin continued to fall, sliding below £4,000 a tonne.¹⁹³ This price was less than the average cost of production for all countries but Brazil, and mines continued to close.¹⁹⁴ In 1986, Malaysia shut thirty per cent of its mines, eliminating five thousand jobs.¹⁹⁵ Its export earnings from tin slumped to forty per cent of those of the previous year and became a prime cause of the diminution in its overall export earnings by seven per cent over the same period.¹⁹⁶ Thailand closed forty per cent of its mines and lost 8,500 jobs; its export earnings from tin were virtually

185. *Id.* at 886-87.

186. *Id.*

187. J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade and Industry, [1987] BCLC 667, 669-70 (Q.B.).

188. *Id.* at 692.

189. *Id.* at 716.

190. Maclaine Watson & Co. v. Dep't of Trade and Industry, [1987] BCLC 707, 713 (Ch.D.).

191. Rudolph Wolff & Co. v. The Queen in Right of Canada, C.O. 23081-87 (unreported decision of Henry J., Supreme Court of Ontario, Dec. 18, 1987).

192. See Maclaine Watson & Co. v. Dep't Trade and Industry, [1988] 3 All E.R. 257 (C.A.) (hearing and deciding the three appeals).

193. Wagstyl, *Tin Price Below £4,000*, Fin. Times, Mar. 19, 1986, at 40.

194. See Wagstyl, *Paying the Price of the Market's Collapse*, Fin. Times, Mar. 12, 1986, at 16 (discussing the implications of the tin market collapse).

195. *Id.* at 16-17.

196. I.T.C. STATISTICS, *supra* note 1, at 26-29; IMF, INTERNATIONAL FINANCIAL STATISTICS (1989) [hereinafter IMF STATISTICS].

halved.¹⁹⁷ Bolivia's production fell by over a third between 1985 and 1986, cutting export revenues from tin by almost half.¹⁹⁸ This reduction had an enormous effect on Bolivia's overall export earnings because shipments of tin have traditionally accounted for one-quarter of them; Bolivia's overall earnings tumbled by ten per cent.¹⁹⁹ In total, world production of tin fell by eight per cent between 1985 and 1986, with only Brazil and Indonesia managing to maintain their levels of output.²⁰⁰ In those mines which remained open, savage cuts were made in costs to ensure their survival.²⁰¹

The severity of the crisis stimulated various official efforts to ameliorate the hardship. These occurred on both national and international planes. The governments of at least three countries offered subsidies or tax concessions to their mines.²⁰² After the Council made its final regulatory act by terminating export controls in late March 1986,²⁰³ international leadership on matters of tin passed to UNCTAD and the A.T.P.C. The A.T.P.C. requested UNCTAD to prepare terms of reference for a new international tin study group which would assume the Council's responsibilities to disseminate information on the world's tin industry.²⁰⁴ With the loss of this and both buffer stock and export control operations, the Agreement now had little reason for existence; nonetheless, the members formally extended the Agreement for two years beyond its original expiration date of June 30, 1987.²⁰⁵

The responsibility for production management fell to the A.T.P.C. itself. The A.T.P.C. began to intervene to help the market recover by removing the enormous "overhang" of tin stocks, whether held by producers themselves or creditors of the Council that had realized their

197. I.T.C. STATISTICS, *supra* note 1, at 26-29; IMF STATISTICS, *supra* note 196.

198. I.T.C. STATISTICS, *supra* note 1, at 26-29; IMF STATISTICS, *supra* note 196.

199. I.T.C. STATISTICS, *supra* note 1, at 26-29; IMF STATISTICS, *supra* note 196.

200. I.T.C. STATISTICS, *supra* note 1, at 26-29; IMF STATISTICS, *supra* note 196.

201. *Rising Tin Means Rising Mine Costs—CRU*, METAL BULL., May 18, 1989, at 11.

202. The British government acted on a strong recommendation by the House of Commons Select Committee and gave the Cornwall mines assistance worth £25 million. 1 HOUSE OF COMMONS, TRADE AND INDUSTRY COMMITTEE, THE TIN CRISIS, SECOND REPORT 1985-86, at xxiii (1986) [hereinafter SECOND REPORT I]; see *A Bad Decision in Cornwall*, Fin. Times, Aug. 11, 1986, at 12. Malaysia also provided a subsidy. Sulong, *Malaysia Announces \$26m Aid Package for Tin Industry*, Fin. Times, July 23, 1986, at 32. Thailand substantially reduced its taxes on tin mining firms. *Thailand Extends Tax Cuts*, TIN INT'L, Aug. 1988, at 6.

203. Wagstyl, *ITC May Scrap Tin Controls Soon*, Fin. Times, Mar. 20, 1986, at 40.

204. *Tin Crisis Bodes Ill for Rubber Pact*, Fin. Times, Nov. 20, 1986, at 40.

205. *LME Lead Stocks to 7-Year Low*, Fin. Times, Apr. 14, 1987, at 38.

security.²⁰⁶ The A.T.P.C. warned the creditors of much lower prices if they precipitously released much of their stocks into the market.²⁰⁷ In March 1987, the members of the A.T.P.C. overcame great internal tension, especially between Indonesia and Thailand, and resurrected the quota system which the Council had operated for over thirty years.²⁰⁸ These export quotas, contemplating an eight per cent reduction in exports, were to remain in place for one year.²⁰⁹ While remaining outside of the cartel—dubbed “Tinpec” by wary consumers—Brazil and China co-operated with it.²¹⁰ The institution of this scheme arrested the decline in the tin price.

The full force of the crisis also hit the L.M.E. after the “ring-out.” The Exchange and its members just managed to contain the damage.²¹¹ MMC Metals Ltd. was the only one of twenty-eight brokers to go bankrupt, but six others were so badly wounded that they had to withdraw from the Ring. Others had to be re-organized or buttressed by parent companies.²¹² All the rest suffered sustainable losses or sorely impaired profits. This spate of near-failures put pressure on the L.M.E. to change from a “clubby” association of brokers trading with one another as principals into a modern exchange with a “clearing-house” system. A “clearing-house” reduces the exposure of each member to the potential default of another by requiring immediate registration of all trades and payment of margins and by offering the Exchange’s guarantee of payment on every contract. In May 1987, the L.M.E. instituted such a system and incorporated itself.²¹³

206. See *ITC's Biggest Creditors Hold on to Tin Stocks*, Fin. Times, Jan. 6, 1987, at 22 [hereinafter *ITC's Biggest*] (detailing the creditors' actions in response to the market collapse); Brown, *Indonesia Urges Tin Producers to Intervene in Markets*, Fin. Times, Oct. 28, 1986, at 35 [hereinafter Brown, *Indonesia Urges*] (noting the concerns of the tin producers over the dive in the market).

207. *ITC's Biggest*, *supra* note 206 at 22; Brown, *Indonesia Urges*, *supra* note 206, at 35.

208. *ITC's Biggest*, *supra* note 206 at 22; Brown, *Indonesia Urges*, *supra* note 206, at 35.

209. See Brown, *Tin Export Curbs Come Into Effect*, Fin. Times, Mar. 3, 1987, at 36 (defining the purpose and extent of export restrictions).

210. *Id.*; Brown, *Indonesia's Change of Heart on "Tinpec,"* Fin. Times, Mar. 4, 1987, at 32.

211. See Wagstyl, *Paying the Price of the Market's Collapse*, Fin. Times, Mar. 12, 1986, at 16 (detailing the implications of the tin market collapse); Wagstyl, *Metal Trader to Withdraw from LME Floor*, Fin. Times, Mar. 14, 1986, at 1 (describing the effects of the collapse on the metal traders); Wagstyl, *Rayner Withdraws from the LME*, Fin. Times, Mar. 21, 1986, at 44; Mooney, *More Pressure for LME Change*, Fin. Times, Mar. 22, 1986, at 6 (listing the L.M.E.'s troubles and the ongoing developments in the market's reconstruction).

212. *Supra* note 211 and accompanying text.

213. Hughes, *Resurgence of the L.M.E.*, EUROMONEY, Feb. 1988, at 33 [hereinaf-

Such a re-organization may have put the L.M.E. on a sounder footing, but this in itself was not going to draw back the business which had fled in October 1985. Other countries considered responding to, if not taking advantage of, the L.M.E.'s embarrassment by launching new tin markets or enhancing existing ones.²¹⁴ Brazil reached an understanding with the A.T.P.C. to find a new exchange for tin, possibly in New York.²¹⁵ Singapore reviewed the possibilities of starting a tin market, prompting a defensive response by Kuala Lumpur, which wanted to remain the leading market in the region.²¹⁶ Kuala Lumpur Market opened itself to traders from Thailand and Indonesia in January 1987 and launched trading in tin futures in October 1987.²¹⁷

The I.T.C. cases came up to the English Court of Appeal in early 1988. The various appeals were all considered together given their common theme, importance, and difficulty. In what was to become one of the largest and most complex hearings in the court's history, a legion of barristers representing the various parties made lengthy submissions before a panel of three judges: Kerr, Nourse, and Gibson LJ.²¹⁸ The case was novel for another reason: mindful of the international importance of the cases to the parties and as precedents, the judges attempted to transcend the familiar confines of English law and decide the matter in a manner consonant with international law. In the introductory words of Lord Justice Kerr:

The legal problems involved in these proceedings are unprecedented, not only in our courts but evidently anywhere. It would be inappropriate to consider them solely by reference to English law in isolation. They concern all international organizations operating in similar circumstances and require analysis on the plane of public international law and of the relationship between international law and domestic law of this country.²¹⁹

A fair legal analysis of the decisions is beyond the scope of this study. The results, however, can be summarized—not without doing them

ter Hughes, *Resurgence*]; R. GIBSON-JARVIE, *supra* note 9, at 22-28; see *L.M.E. Members Support Reform Streamlining*, *Fin. Times*, Nov. 20, 1986, at 40 (noting the support of member firms for a clearing-house system).

214. *Tin Producers to Seek New Trading Exchange*, *Int'l Herald-Tribune*, Sept. 5, 1986, at 13.

215. *Id.*

216. *Kuala Lumpur Tin Market Talks Planned*, *Fin. Times*, May 29, 1986, at 40; see *KLTM Fails to Attract Foreign Sellers*, *Fin. Times*, Jan. 6, 1987, at 27 (listing the possible reasons why the Kuala Lumpur Exchange had difficulty finding foreign sellers).

217. Sulong, *Malaysia Plans Tin Futures Trade*, *Fin. Times*, Oct. 1, 1987, at 38.

218. *Maclaine Watson & Co. v. Dep't of Trade and Industry*, [1988] 3 All E.R. 257 at 269. (C.A.).

219. *Id.*

some violence—as follows.

In the direct actions, the court focused on the Council's juridical nature and its relationship to its members. Three theories of members' liability existed, each asking a different question: (1) does the Council have no legal personality distinct from its members?; (2) if it does have such independent legal personality, are the members concurrently liable for its debts as in a partnership under domestic law?; and (3) if the Council has independent legal personality and its members are not concurrently liable, is the Council an agent for its undisclosed principals, the members?²²⁰ Because the states could not claim sovereign immunity from the jurisdiction of the Court,²²¹ only one of these three questions needed an affirmative answer for the states to be liable.

Lord Justice Kerr determined the first question by stating that while the Council was not a body corporate under English law, it was a "legal entity on the plane of international law."²²² International organizations are creatures of international and not national law; any other conclusion would "domesticate or naturalize international legal entities by subjecting them to the requirements of municipal laws which would be inconsistent with their international character."²²³ The provisions in the I.T.A., the Headquarters Agreement, and the consequential orders under English law giving effect to these treaties established the Council as such an international legal entity distinct from its member states.²²⁴ In particular, the Council's right to contract and capacity to suffer arbitration awards would make no sense unless it was a separate entity; to borrow the apt words uttered by counsel at the appeals, "[d]ebeo, ergo sum."²²⁵

His Lordship found the second question more problematic as entities of mixed liability do exist in many legal systems. Noting the dearth of international law on this point, Lord Justice Kerr construed the I.T.A. as if it were the constitution of a foreign corporation. He could not "find anything in it to support the suggestion that the parties to this

220. *Id.* at 274-75.

221. *Id.* at 313-15, 358. The determination of the issue of sovereign immunity turned on the interpretation of the State Immunity Act 1978 (United Kingdom). *Id.* at 313. This Act denies states immunity from the jurisdiction of United Kingdom courts in those proceedings relating to "a commercial transaction entered into by the State" or "an obligation of the State which by contract (whether a commercial transaction or not) is to be performed wholly or partly in the United Kingdom." *Id.* The Court of Appeal found that if the member states were otherwise liable for the Council's debts, the liability would arise in proceedings relating to one or both of these categories. *Id.*

222. *Id.* at 274.

223. *Id.* at 296.

224. *Id.* at 297-98.

225. *Id.* at 275-98.

treaty intended that they should be liable for the contractual obligations of the I.T.C. if they should remain unperformed. On the contrary, such indications as these point firmly in the opposite direction."²²⁶ The Council members, therefore, are not concurrently liable for its debts.²²⁷

The answer to the third question was only slightly less difficult. Again lacking any precedent in international law on the point, Lord Justice Kerr turned to the I.T.A. and could find nothing to suggest that when contracting under its own name, "the Council was acting as agent for the members as undisclosed principals under the contracts."²²⁸ The relationship between the members and the Council was compared to a "contract of association or membership similar to that which arises on the formation of a company between the shareholders *inter se* and the legal entity which they have created by their contract of association."²²⁹ Having failed to find a basis for the members' liability on these three theories, Lord Justice Kerr dismissed the appeal.²³⁰ Lord Justice Ralph Gibson concurred, with separate but similar reasons, forming a majority of the Court to decide the appeal.²³¹ Lord Justice Nourse, however, did not concur with his two brother judges and wrote a strong dissenting opinion in which he held that the member states should be liable for the Council's debts.²³²

The three judges, having an easier time with the winding up and receivership appeals, dismissed them unanimously by generally endorsing the reasons of Mr. Justice Millett.²³³ The creditors then won two minor victories, one real and one moral. The Court's disclosure of assets ruling was dismissed unanimously.²³⁴ The appeal judges concluded their lengthy judgments by delivering a stinging rebuke of the conduct of the Council, its members and officers:

The way in which the Council has again resisted the present proceedings, designed to assist in the enforcement of a debt to which there is no answer whatever, speaks for itself. In our view this conduct is unbecoming to an international organization, to those who constitute it and to those who are responsible

226. *Id.* at 304.

227. *Id.* at 298-307.

228. *Id.* at 300.

229. *Id.* at 306.

230. *Id.* at 336-59.

231. *Id.*

232. *Id.* at 323-36. Lord Justice Nourse reasoned that while the I.T.A. does not address concurrent liability, one must look to the principles of national and international law for assistance. *Id.* International law, as evidenced by the writings of two jurists, suggests that the attribution of separate legal personality to an international organization does not extinguish the liability of its members. *Id.*

233. *Id.* at 359-76.

234. *Id.* at 376-84.

for its actions. The ITC's present duty is to undo to the greatest possible extent the damage to its creditors by ensuring that its assets are used to pay its debts, without any further prevarication. And its members are, in our view, at least morally obliged to put the ITC in funds to ensure that its creditors are ultimately paid in full.²³⁵

Foiled yet again, the creditors appealed to the House of Lords on the strength of the dissent of Lord Justice Nourse; this appeal ultimately failed.²³⁶ They also changed gears and launched a new action in the High Court of England against the Council members based in tort, and later against the E.C. in the European Court of Justice.²³⁷ In the English tort action, the creditors alleged that the states had fraudulently and negligently misrepresented the Council's situation and had traded fraudulently. Once again, the members tried to prevent the action by moving to strike as disclosing no reasonable cause of action; once again they succeeded.²³⁸ Mr. Justice Evans heard the application in February 1989 and focused on the commercial nature of the Council's undertaking; while this disentitled the members to claim sovereign immunity, it also precluded the creditors from establishing that the members had a duty of care to the creditors, essential in establishing any case of negligence.²³⁹ The members could only be liable if it could be proved that they acted fraudulently. Unfortunately for the creditors, English law requires that an alleged fraudulent representation about the credit worthiness of any person must have been made in writing by the defendant for it to provide the basis for a claim. Because no member made such a representation in writing, the claim failed.²⁴⁰

In their court actions, the creditors only seemed to be winning hearts but not minds. In mid-1988, however, they finally received a little cash and the prospect of more.²⁴¹ The order to disclose assets forced the Council to reveal the details of its finances, which proved to be substantial. The Council admitted that the members, primarily Nigeria and Zaire, owed it £5.7 million.²⁴² It also had over a hundred thousand pounds in its administrative account. The creditors quickly secured

235. *Id.* at 384.

236. The House of Lords dismissed the appeal for reasons virtually identical to those expressed by Lord Justices Kerr and Ralph Gibson. *Tin Council Creditors Suffer Grave Inequalities*, *Fin. Times*, Oct. 31, 1989, at 20.

237. Hughes, *European Court Ruling Sought on ITC*, *Fin. Times*, Feb. 27, 1989, at 34.

238. See Davies, *ITC Creditors Can Sue Member States*, *Fin. Times*, Feb. 28, 1989, at 7.

239. *Id.*

240. *Id.*

241. Hughes, *Members Owe Tin Council £5.7m*, *Fin. Times*, June 14, 1988, at 34.

242. Hughes, *Tin Creditors to Obtain First Cash*, *Fin. Times*, July 9, 1988, at 5.

court orders freezing these assets and then compelling the transfer of the funds in the account to the creditors.²⁴³

This stripping of liquid assets from the Council in July 1988 forced it to terminate its staff and operations.²⁴⁴ The members of the Council responded to this closure in two ways. First, they established a trust fund administered by UNCTAD as an interim arrangement to carry on the important basic statistical work of the Council;²⁴⁵ an international tin study group, supported by thirty-six countries, was being primed to take over this work permanently.²⁴⁶ Second, the members, led by Canada, also tried again to seek a negotiated settlement of the crisis from May 1989.²⁴⁷ The renewed negotiations stalled when the gap between what the states were offering and what the creditors were willing to accept still proved to be enormous.²⁴⁸ The stalemate finally ended in December 1989, when the United Kingdom and Japan offered to close the gap by paying more than their proportionate share of the Council's debts.²⁴⁹ All creditors which had sued the governments accepted this compromise, which would satisfy only about forty per cent of their claims and would not secure any admission of liability from the member states.²⁵⁰

With such excruciating slowness in securing a settlement, the Council could not be rescued before the Sixth I.T.A. expired on June 30, 1989. As the Council had not been the subject of further international resolution, it assumed a phantom-like character; it was extant, but had no responsibilities, funds or employees.²⁵¹ The Council's passage to the

243. *Id.*; Hughes, *Members Owe Tin Council £5.7m*, *Fin. Times*, June 14, 1988, at 34.

244. *Tin Council Forced to Shut Up Shop*, *Fin. Times*, July 7, 1988, at 38.

245. *Tin Council Members Consider Rescue Plan*, *Fin. Times*, July 8, 1988, at 30; TIN STATISTICS, *supra* note 2, at 1.

246. Hughes, *Tin Litigation Enters Final Phase in House of Lords*, *Fin. Times*, June 13, 1989, at 36.

247. Hughes, *Canada Proposes Tin Crisis Meeting*, *Fin. Times*, July 13, 1988, at 34; *Portuguese Mine to Instal \$60 Mil Tin Recovery Plant*, *Fin. Times*, Dec. 13, 1988, at 36.

248. The creditors claimed debts of £513 million, but were reported willing to settle for £225, then £182.5 million, while the members initially offered only £150 million. Prest, *Tin Council to have Talks with Creditors*, *The Independent* (London), May 11, 1989, at 26; Hughes & Gooding, *Time Runs Short for Tin Case Settlement*, *Fin. Times*, May 16, 1989, at 36; Gooding, *Tin Settlement Talks Break Up*, *Fin. Times*, May 17, 1989, at 36; *Tin Pact Expiry "Will Not Affect Settlement"*, *Fin. Times*, May 31, 1989, at 40; *Tin Settlement Doubts*, *MINING J.*, July 28, 1989, at 74.

249. The United Kingdom tendered £30 million and Japan £40 million. *Tin Settlement Doubts*, *supra* note 248, at 74.

250. Gooding, *Tin Creditors' £182.5m Accord*, *Fin. Times*, Dec. 23, 1989, at 22.

251. Save the chairman, who was to be available to chair meetings of the members when required. Prest, *Tin Council Close to Being Wound Up*, *The Independent*

institutional afterlife on July 1, 1989 was little marked, testimony to the fact that after having been adjudged guilty of "conduct unbecoming an international organization," nobody really mourned its passing.

Ironically, the Council's demise occurred as the health of many of its alleged victims recovered. The tin market perked up considerably in 1988 and 1989. Consumption increased steadily from 1985.²⁵² The A.T.P.C. successfully controlled exports and thereby eliminated most of the world's "overhang" of tin stocks by mid-1989.²⁵³ Indeed, the producers managed to overcome their internal tension and extended the export quotas, first until February 1989, and then until December 1990.²⁵⁴ The price of tin rose throughout 1988 and into 1989, so that by April 1989 it had climbed to ninety-three per cent of the prevailing price at the time of the crash.²⁵⁵ Sensitive as ever to price, production of tin rose accordingly. Indeed, the world's production of tin in 1988 was eleven per cent higher than it had been in 1986. The tin producers began to change the focus of their concern fearing that the quick price recovery would encourage substantial additional production, and disrupt the market and the export control scheme.²⁵⁶ This fear was well-founded, as the price of tin slid during the second half of 1989 back to the level prevailing during 1987.²⁵⁷

All major producers expanded their production of tin from the levels of 1986 and 1987, with one significant exception: Bolivia. In 1988 its production was sixty-one per cent and its export earnings from tin forty-one per cent of those of 1985.²⁵⁸ Over twenty thousand miners were laid off, some of whom turned to the only apparent remunerative activity available, the drug trade.²⁵⁹ Many blamed the collapse of the

(London), Sept. 6, 1988, at 22.

252. TIN STATISTICS, *supra* note 2, at 4.

253. *Today's Tin Market—A Statistical Overview*, METAL BULL., June 29, 1989, at 9 [hereinafter *Today's Tin Market*].

254. *Tin Producers Agree to Extend Export Quotas*, Fin. Times, Oct. 27, 1988, at 44; *Sulong, Producers Agree to Continue Quota Scheme*, Fin. Times, Apr. 12, 1989, at 42; *Export Controls Extended by Nine Big Tin Producers*, Fin. Times, Oct. 18, 1989, at 38.

255. Gooding, *Shortage of Stocks May Threaten the Return of Tin*, Fin. Times, June 1, 1989, at 38.

256. *Malaysia Worried at Pace of Tin Price Upsurge*, Fin. Times, Mar. 9, 1989, at 38.

257. *Commodity Price Index*, THE ECONOMIST, Nov. 18, 1989, at 123.

258. TIN STATISTICS, *supra* note 2, at 6; IMF STATISTICS, *supra* note 196, at 131-32.

259. See *World Mining Update*, TIN INT'L, July 1988, at 9 (stating that many tin mines ceased operations); *The Cocaine Economies*, THE ECONOMIST, Oct. 8, 1988, at 38.

I.T.A. directly for Bolivia's plight.²⁶⁰

The L.M.E. also recuperated in 1988 and 1989. The action of Shearson Lehman against the L.M.E. for its conduct of the "ring-out" was decided in March 1989 in favor of the Exchange.²⁶¹ Mr. Justice Webster of the English High Court held that the L.M.E. rule fixing the price of contracts was validly imposed under the constitution of the Exchange.²⁶² Encouraged by this exoneration, as well as the rising price of tin, the L.M.E. decided to try to regain its lost prominence in the tin market and re-launch its tin contract. The contract launched, however, was not exactly the same as the one which had been suspended in 1985. In belated recognition of the international practice to price tin transactions in United States dollars or currencies tied to the dollar, the L.M.E. priced its contract in dollars. The sound of the brokers trading tin in the Ring on June 1, 1989 was the surest signal that, after three and a half difficult years, the tin crisis was finally over.²⁶³

IV. CAUSES OF COLLAPSE

The I.T.A. collapsed for a variety of reasons. Each of these alone would not have caused the demise, but their occurrence in concert proved fatal. These causes are of two types: those which were fundamental to the Agreement and had been apparent for some time, and those which were unexpected precipitants. These causes are listed below in roughly descending order of importance.

A. FUNDAMENTAL CAUSES

1. *Uncertain Objective of the Agreement*

The most important cause of the Agreement's collapse was the tension in its objectives. This tension, latent since 1965, crippled the I.T.A. in the early 1980s. The members of the Agreement could not agree whether, and to what extent, the I.T.A. was a cartel solely to benefit the producers or a stabilizing influence to benefit producer and consumer equally.

The I.T.A. began in 1956 under the banner of the Havana Charter to provide stability in the tin market for the benefit of both producer

260. *The Cocaine Economies*, *supra* note 259, at 38. A former finance minister of the country was quoted as confirming this unhappy shift, that "Bolivia has gone from the economy of tin to the economy of coca." *Id.*

261. Hughes, *LME Defeats Tin Damages Claim*, *Fin. Times*, Mar. 17, 1989, at 38.

262. *Id.*

263. Hughes, *Resurgence*, *supra* note 213, at 33; Gooding, *Brisk Re-start for Tin Trading on LME*, *Fin. Times*, June 2, 1989, at 34.

and consumer. In the late 1970s, with UNCTAD's sponsorship and the campaign for a N.I.E.O., the Agreement's emphasis changed from stability of the tin market to support of the tin price for the benefit of producing countries in the developing world. This shift dissolved the cement which had kept the Agreement together for twenty-five years, the premise of equal partnership between producer and consumer countries for direct mutual benefit. The Agreement then became mostly a one-sided affair that relied substantially on the largess of the consuming countries to keep it running. The target price bands moved up regularly, but never down. Even in 1982, with the bottom falling out of all metals markets during the severest recession in fifty years, the Council demonstrated its producers' bias and raised its target price band. In so doing, the I.T.A. "degenerated into an arrangement for the defense of a non-competitive price floor."²⁶⁴

Developed countries responded to these continual increases in the target band by questioning the appropriateness of the Agreement's use as a vehicle for transferring resources to producing countries. Some developed countries, notably the United States, condemned the drift towards a cartel and retired from the Agreement before it actually became a cartel. Many of those developed countries which remained, such as the United Kingdom, were not really committed, but were afraid of diplomatic repercussions if they withdrew. Their ambivalence caused them to commit two egregious errors: first, to acquiesce in the implementation of the ill-advised policies of the Council between 1982 and 1985; and second, to fail to rescue the Council when these policies rendered it insolvent. The Select Committee on Trade and Industry concluded that "it was wrong to allow doubtful considerations of international relations to outweigh common sense when the decision was taken [for the United Kingdom] to join the Sixth ITA."²⁶⁵ In short, in its sixth incarnation the I.T.A. met the interests of few, if any, states and was disowned when it ran into trouble.

2. *Flawed Operation of Cartel*

Once the Council started to assume the role of administering a cartel in the early 1980s, it failed to take the necessary strategic steps to ensure the cartel's success. Osborne has identified five problems that cartels face, one external and four internal. The external problem, which is the most important to overcome, is "to predict (and if possible, discour-

264. Anderson & Gilbert, *Commodity Agreements and Commodity Markets: Lessons from Tin*, 98 *ECON. J.* 1, 11 (1988).

265. FIRST REPORT, *supra* note 71, at vii.

age) production by non-members."²⁶⁶ The internal problems are: "first, to locate the contract surface; second, to choose a point on that surface (the sharing problem); third, to detect; and fourth, to deter cheating."²⁶⁷ If these problems cannot be overcome, the cartel is doomed to failure.

The Council probably failed on all of these five counts, but certainly on the first and last. It proved incapable of discouraging production by non-members. During the period between 1980 and 1984, the share of the world's production under the Council's control shrunk from seventy-four per cent to fifty-two per cent. In 1984, the Council did not control the world's fourth, fifth, and sixth largest producing countries. The fifth and sixth, China and Brazil, could not be persuaded to join the Agreement; the fourth, Bolivia, had just left it. One of these non-members, Brazil, took advantage of the Council members' restraint and appropriated ever-larger shares of the market. As the Select Committee expressed in its report: "[a]s only about half of the world production of tin ore is under the control of the ITC, and this proportion has diminished considerably since 1980, the attempts by the ITC to match international supply to demand by means of export controls are bound to fail."²⁶⁸

In addition, the Council failed to prevent its members from cheating. The Council was aware that much production of its members, particularly in South-East Asia, was being smuggled out of the countries in defiance of export restrictions. The Council did not suppress this smuggling and lost most of whatever control it still had over the market.

The Council tried to compensate for a failed strategy with more aggressive tactics. The buffer stock, which the I.T.A. established as a supplementary means of stabilizing the market, was given the primary mission of supporting the price on a long-term basis.²⁶⁹ As the Select Committee report concluded: "[i]n these circumstances the Buffer Stock system was bound in the end to require unlimited financial resources."²⁷⁰

3. *Decision-making Structure*

The Council's structure was a fundamental cause of the Agreement's

266. Osborne, *Cartel Problems*, 66 AM. ECON. REV. 835-44 (1976).

267. *Id.*

268. SECOND REPORT I, *supra* note 202, at ix-xi.

269. Gilbert, *International Commodity Agreements: Design and Performance*, 15 WORLD DEV. 591, 611 (1987).

270. SECOND REPORT I, *supra* note 202, at xi.

collapse because it precluded the timely making of difficult decisions. The requirement that most decisions obtain a two-thirds majority of votes in each bloc not only delayed the Council's response to rapidly changing circumstances, but also gave each substantial member a virtual veto on changes. When crisis loomed, near unanimity was impossible to attain, and the Council's suicidal course was locked in. Without any decision of the Council to suspend trading or to lower the floor in the first half of 1985, the Buffer Stock Manager felt obliged to continue his defense of the floor to the very last credit.²⁷¹

This requirement for near-unanimity also paralysed the Council's ability to consider and implement the reasonable rescue plans which were tendered to it.

B. PRECIPITANTS

1. Exchange Rate Fluctuations

An important factor to consider when setting price references for commodity agreements is the possible changes in the value of the currency in which the references are made.²⁷² The members did not adequately appreciate this in the Fifth and Sixth Agreements. They set the Council to operate between two markets with different currencies, the Malaysian ringgit and the pound sterling. When the United States dollar appreciated against the pound sterling between 1981 and 1985, it made the Council's operations on the L.M.E. much more expensive and caused its funds to be depleted quickly. When the dollar subsequently depreciated, it diminished the value of the banks' security, precipitating their intervention. Some have suggested that had the currency fluctuations been different, the Council might have survived.²⁷³ This is indeed possible. The important point, however, is that the Council was made to assume great foreign exchange risk and suffered for it. As Gibson-Jarvie has put it: "[t]o operate the price-restraint or price-support pro-

271. *Id.* at xii. To quote the Select Committee report:

It appears to us that the ITC was totally out of control, and that a council of officials from 22 countries which are not very likely to agree on anything consistently is not a suitable body for what may need to be day-to-day control of a rapidly changing market. There were so many decisions (e.g. on price levels) requiring to be made by the full Council or by the Buffer Finance Committee, which did not meet often enough to have any influence, that the only decision left to the BSM appears to have been how much to gamble in forward dealings before he admitted defeat. The ITC should have stopped him: but it was clearly in the interests of some of the members not to do so.

Id.

272. Gilbert, *supra* note 269, at 599.

273. Anderson & Gilbert, *supra* note 264, at 13.

gramme in two currencies both happily floating seems to be courting unnecessary difficulties.²⁷⁴

2. *Malaysian Secret Purchasing*

The Malaysian government secretly conducted an enormous purchasing program and created an important precipitant of the crisis. By driving up prices during a recession, the program gave two wrong signals: it encouraged producers around the world to continue unsustainable volumes of output and caused the Council to raise its price band to a level which it could not defend.²⁷⁵

3. *Futures Trading*

Some have argued that the Council's futures trading was a primary cause of the crisis.²⁷⁶ This is an overstatement. Futures trading helped precipitate the Council's insolvency by making a bad situation much worse, but did not cause it.

"[F]utures trading . . . enhanced the ITC's ability to defend the stabilization floor."²⁷⁷ The Council could tie up more tin at less cost than purchases for delivery, a technique that could have been beneficial had it been employed prudently. The Council's program of futures trading got out of hand, however, and became very highly leveraged. It thus became a virtual pyramid scheme that, without further resources from member states, was likely to collapse eventually. When the scheme did collapse, it not only presented the Council with additional liabilities, but diminished the value of the Council's assets because:

tin warrants entered as assets in the ITC balance sheet, by raising the tin price futures purchases also improved the appearance of the ITC's financial position permitting additional futures purchases. . . .[W]hen the collapse eventually came, the sixth ITA was transformed from apparent financial health to substantial negative net worth in a very short time.²⁷⁸

As Gilbert has suggested, the Council's problem was not its power to trade futures, but the methods of financing and monitoring this trading.²⁷⁹

274. R. GIBSON-JARVIE, *supra* note 9, at 29.

275. Amlôt, *supra* note 88, at 11; *Today's Tin Market*, *supra* note 253, at 9.

276. See Gilbert, *supra* note 269, at 595.

277. Anderson & Gilbert, *supra* note 264, at 11.

278. *Id.* at 11-12.

279. Gilbert, *supra* note 269, at 595.

4. *Inactivity by Regulators*

The Bank of England, the Department of Trade and Industry of the United Kingdom, and the L.M.E. were aware at least a year before the crash occurred that the Council was in serious trouble. Although one can sympathize with their respective perceived jurisdictional incapacities, given that the Council's headquarters and its chief market were in London and that British creditors and miners were significantly exposed, their inactivity was unfortunate. They were the only institutions in the world positioned to head off a collapse. The Select Committee criticized the conduct of both the Bank and the Department:

The Bank of England should have warned the banks that ITC Member Governments might not provide any finance additional to their original contributions. This would have affected the lending policies of the banks. . . .

The Government should not have been so secretive about its own intentions. Enormous investment, the reputation of a major city institution and of the Bank of England, and the jobs of thousands of Cornish people were at stake.²⁸⁰

Gibson-Jarvie has criticized the L.M.E. in similar terms: "corrective action might have been anticipated from the Exchange authorities. Yet it now seems clear that they too were hypnotised by the status of the ITC in the belief that it could never go seriously wrong."²⁸¹ In fairness, the conduct of the Bank, the Department, and the L.M.E. in trying to find a solution to the crisis after it broke must mitigate whatever criticism they incur.

5. *Sales from United States Strategic Stockpile*

The disruptive sale of tin from the United States strategic stockpile has been cited as an important cause of the collapse.²⁸² This is an exaggeration. The G.S.A. only sold 365 tonnes of tin in 1984 and 375 tonnes in 1985²⁸³ and therefore could not be directly responsible for precipitating the I.T.C.'s financial crisis in 1985. Rather, the United States disposal program, started in 1981, was an indirect cause of the collapse insofar as it contributed to the generally depressed conditions of the tin market in the early 1980s and caused the Council to expend much of its resources at that time. Sales from the G.S.A. between 1981 and 1983 were extensive, totalling thirteen thousand tonnes. These sales coincided with, if they had not partially motivated, large

280. FIRST REPORT, *supra* note 71, at vii.

281. R. GIBSON-JARVIE, *THE TIN CRISIS* 35 (Cambridge 1986).

282. B.S. CHIMNI, *supra* note 158, at 201.

283. I.T.C. STATISTICS, *supra* note 1, at 46.

purchases by the buffer stock.²⁸⁴ The I.T.A. authorized further sales of tin of up to twenty thousand tonnes in October 1984.²⁸⁵ Despite the fact that these sales were not made in 1984 nor 1985, the authorization doubtless had a further dampening effect on the price.

6. *The Creditors' Risk Assessment*

The creditors themselves must bear much of the responsibility for the damage they suffered. The Council was a large player in a volatile market and, therefore, was obviously a significant credit risk. The creditors ignored the growing extent of this risk to retain the Council's lucrative business.

The banks' claim that, in their accounts with I.T.C., they always believed they were dealing only and directly with governments of unquestionable solvency is disingenuous for three reasons. First, international loans to the most credit-worthy sovereign powers are not usually secured by assignment of property, let alone an assignment of property whose value equals one hundred and twenty-five per cent of the outstanding debt.²⁸⁶ The banks' demands that the Council tender huge amounts of tin as security for the loans thus indicates their belief that they were dealing with a separate entity. Second, the banks' first reaction in October 1985, was to demand guarantees of the Council's indebtedness from member governments; had they truly believed that the members were standing squarely behind the Council, this would not have been their first response. Third, another commodity agreement with a similarly wide membership, but which was less successful, had difficulty securing commercial credit.²⁸⁷ In any case, demonstrating poor credit instincts, many of the banks apparently did not conduct a sufficiently thorough investigation of the Council, its constitution, and its affairs before approving their loans. At least five banks did not include an arbitration clause in their loan documents;²⁸⁸ this clause was a potential source of important rights for the banks which the Council would have had to accept by the terms of the Headquarters Agree-

284. Gilbert, *supra* note 269, at 611.

285. TIN STATISTICS, *supra* note 2, at 19.

286. Compare Memorandum of Sir Adam Ridley, *supra* note 131, at 21 (describing the term of the Council's loans) with G.A. PENN, A.M. SHEA, & A. ARORA, THE LAW AND PRACTICE OF INTERNATIONAL BANKING 91-117, 172-95 (London 1987) (setting out the standard terms and remedies in international sovereign loans).

287. This occurred with the Cocoa Agreement. See UNCTAD, *Commodity Agreements*, *supra* note 88, at 35, para. (d) (discussing the Cocoa Agreement).

288. J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade and Industry, [1987] BCLC 667, 674 (Q.B.).

ment. As Mr. Justice Bingham pointed out with regard to Standard Chartered Bank's "facility letter," this omission was probably an oversight.

The brokers were in a similar position. Most of the brokers maintained (temporarily) profitable accounts with the Council with low margins even after the Bank of England warned them of potential problems. Gibson-Jarvie has criticized the activity of the brokers as follows: "the brokers who were co-operating with the [Buffer Stock Manager] in the special deals were playing a highly dangerous game. Experts in the market, they should perhaps have known better."²⁸⁹

7. Structure of the L.M.E.

Some critics have stated that the structure of the L.M.E. both precipitated and exacerbated the crisis because it was a market of principals and not a clearing-house. The market, comprised of principals who did not register their trades with the Exchange, masked the Council's true exposure.²⁹⁰ The principals' market also precluded prudence in setting and uniformity in applying a significant financial constraint on the Council.²⁹¹ Further, once the Council caused one member of the L.M.E. to default, nothing stopped a chain-reaction of defaults except the financial strength of the individual members, some of which had had no contact with the Council.²⁹²

These concerns were valid, but another structure could probably not have averted or substantially softened the crisis. Greater transparency in the Council's trading might have brought matters to a head earlier and reduced the amount of its liabilities. Given the creditors' continuing illusions of the Council's creditworthiness, even after being informed of the growing risks, however, this knowledge might not have encouraged sufficient and timely corrective action. Further, although the structure of the L.M.E. was obviously insufficient to contain the crisis, no evidence exists that a clearing-house would have been much better. "A clearing-house simply spreads the misery amongst its members";²⁹³ thus, a clearing-house only might have helped those few brokers that had no contracts with the Council, but were faced with a knocked-on default of greater amount than their proportional share of

289. R. GIBSON-JARVIE, *supra* note 9, at 9.

290. Anderson and Gilbert, *supra* note 264, at 12.

291. Gilbert, *supra* note 269, at 595.

292. See R. GIBSON-JARVIE, *supra* note 9, at 36 (addressing the effects of default on the clearing-house system).

293. *Id.* at 37.

a default carried by a clearing-house.

V. EFFECTS OF COLLAPSE

The Agreement's collapse, which the Council's insolvency triggered, brought enormous consequences. Some were direct effects felt by the Council's creditors and participants in the tin market. Others were more remote effects in the nature of spill-over to other markets or the establishment of precedent. The effects are listed below in order of descending degree of proximity to the Agreement's collapse.

A. DIRECT EFFECTS

1. *Creditors' Loss*

The most proximate effect of the I.T.A.'s collapse was the enormous loss suffered by the Council's creditors, which they claimed to be almost £300 million after the settlement is taken into account. This loss was unevenly distributed among sixteen banks and thirteen brokers, which themselves are of varying financial strengths. All of the banks are substantial institutions which can absorb the loan losses. The brokers, however, are much smaller.²⁹⁴ One broker could not shoulder the loss and many of the remainder had grave difficulty in so doing.

2. *Business and Structure of the L.M.E.*

The collapse of the Agreement caused non-creditor brokers on the L.M.E. to suffer three knock-on effects of the Council's default. First, creditors of the Council defaulted on contracts to fellow brokers. Second, the lower prices forced by the "ring-out" caused further losses to some (and, it must be noted, gains to others). Third, all brokers suffered from the decline in trading of other metals on the L.M.E. which only fully recovered in 1989.

The L.M.E.'s fear of losing its tin market to other exchanges because of its three and a half year trading suspension has been only partially realized. The first months of renewed tin trading on the L.M.E. have been thin but adequate;²⁹⁵ the L.M.E. will likely retain its position as the most important international tin futures market. Its dominance, however, will not reach pre-1985 levels. The Kuala Lumpur Commod-

294. See Memorandum of the Ring Dealers, *supra* note 7, at 108 (providing a table listing the net worth of the Ring members).

295. See *Tin Attracts Mediocre Interest*, METAL BULL., Aug. 7, 1989, at 10 (explaining the lull in trading business on the L.M.E.).

ity Exchange has since 1987 picked up significant, if thinner, futures business.²⁹⁶ Both exchanges have expressed hope that their markets will be complementary.²⁹⁷ Another may soon join them, as Brazil is considering launching a tin futures contract on the So Paulo Exchange.²⁹⁸

The collapse caused the structure of the L.M.E. to be strengthened. It instituted a "clearing-house" system and incorporated itself. The exchange's victory in the courts over its imposition of the "ring-out" will doubtless strengthen its authority to impose controversial rules on its members.

3. *Depression of the Tin Market*

The extent to which the Agreement's collapse caused the painful depression of the tin market between 1985 and 1988 is the most difficult question to answer. This uncertainty stems from a premise that if the Council had little or moderate effect on the tin market over its thirty-year history, its removal from operation could not be wholly responsible for the state of the tin market thereafter. Indeed, critics cannot blame the Agreement for the impact of trend and cyclical movements which were not only beyond its control, but which ultimately defeated it.

The tin market has been beset by great long-term problems, the most important of which is stagnant consumption. The severity of the 1982 recession precipitated a tremendous cyclical decline in consumption and prices of all metals, and tin is no exception. The tin market would have suffered declining prices and reduced production had the Council not existed or not collapsed (but had no benefit of additional resources). One can even allege that even by absorbing enormous quantities of excess tin from the market between 1982 and 1984, the Council delayed the crash for a few years and paid higher prices to producers than they would have received in an unregulated market. One commentator in early 1985 estimated the sum that the Council caused to be transferred to producers in 1984 to be five hundred million pounds.²⁹⁹

Little doubt exists, however, that the Council's management of the

296. See *Trading—What of the Future?*, TIN INT'L, Jan. 1989, at 9 (covering the prosperity of the Kuala Lumpur Commodity Exchange).

297. See *Trading Operations on the Kuala Lumpur Commodity Exchange*, METAL BULL., July 6, 1989, at 13 (suggesting that the Kuala Lumpur Commodity Exchange and the L.M.E. will complement each other); *LME to Start Tin Trading June 1—Price Tops \$10,000 at Last*, METAL BULL., Apr. 17, 1989, at 9 (assuring that the L.M.E. desires not to compete with the Kuala Lumpur Commodity Exchange).

298. *Brazil Getting into Tin Futures?*, TIN INT'L, Jan. 1989, at 4.

299. Stainer, *Tin Prices Brought Under Control*, The Guardian, Apr. 29, 1985, at 22.

early 1980s worked both ways and greatly exacerbated the punishment which the tin market ultimately received. The great uncertainty that immediately followed the collapse of the Council caused purchases of tin virtually to evaporate. This, in turn, caused the price of the small amounts of tin traded on the secondary markets to plummet; producers had to scale down production accordingly. The price and production were further and more profoundly depressed by the assessment of the likely effect of the disposition of the Council's stocks. Because the tin market is a relatively thin one, the prospect of creditors dumping enormous volumes onto the market was enough to exert a strong influence.

In time, however, the tin market showed its traditional resilience; by 1989 it had largely shrugged off the crisis and was poised for immediate, if uneven, expansion.³⁰⁰ The exception, of course, is Bolivia, whose industry is still depressed. While one can have sympathy for Bolivia's unique plight, Bolivia has little moral or economic right to blame the Agreement's collapse; Bolivia refused to join the Sixth Agreement and thus helped undermine it. More importantly, Bolivia's problems in tin production are domestic and deep-seated: its expensive production costs and mismanagement caused it to lose market share to more competitive countries. Its production has been falling steadily since 1977. One of the worst years of production and general economic decline was 1984, before the insolvency of the Council.³⁰¹ After a painful restructuring of the industry, the Bolivian government finally hoped to improve output from 1989.³⁰²

4. *Rise of Producers' Cartel*

The crisis transformed the A.T.P.C. from a producers' lobby group into an active cartel. In restricting their common output from 1987, the members have demonstrated their cohesion and effectiveness. Whether they can maintain this cohesion under more normal market conditions remains to be seen. Certainly they will face the old problem of securing the continued co-operation of non-members, particularly Brazil.³⁰³

300. The world's tin industry was forced to become "leaner and meaner." *Rising Tin Means Rising Mine Costs*—CRU, METAL BULL., May 18, 1989, at 11. Cost-cutting in mines and improvements in productivity allowed the profitable operation of a great majority of the world's tin mines in operation in 1989. *Id.*

301. See I.T.C. STATISTICS, *supra* note 1, at 19 (presenting a chart of world tin production between 1976-1986).

302. See *Bolivia Debates Tin Mining Costs*, METAL BULL., Mar. 30, 1989, at 11 (stating that a fifty percent rise in Bolivia's tin output is possible); *Bolivia Expects Sharp Rise in Tin Output*, Fin. Times, Mar. 21, 1989, at 36 (discussing the costs involved in restarting one of the world's largest tin mines).

303. Brazil and China have again refused to join the A.T.P.C. In August 1989,

Also, their relationship to the new international tin study group needs definition.

B. INDIRECT EFFECTS

1. *Spill-Over into Other Markets*

The tin market crash in 1985 certainly depressed the prices of other metals on the L.M.E., but had little cumulative effect on the world's metal markets; metal prices fell only marginally and briefly.³⁰⁴ Each metal market ultimately responds to its own specific influences (in addition to general macroeconomic conditions) and the tin market affected other metals only to the degree it injected uncertainty into the L.M.E., one of many metal exchanges in the world.

2. *Other Commodity Agreements*

A frequent prediction during the crisis was that the Tin Agreement's collapse would cause the demise of the buffer stock as a regulatory instrument, and perhaps other international commodity agreements.³⁰⁵ On the surface, the second part of this prophecy appears correct. The Cocoa Agreement ran out of money in 1988, had to suspend its operations, and was not rescued by its members.³⁰⁶ The Coffee Agreement collapsed in July 1989.³⁰⁷

Closer examination, however, proves that no direct linkages between these three events exists. While the three Agreements had similar aims, they had different products, membership, regulatory schemes, and problems.³⁰⁸ The problem of the Cocoa Agreement came to a head in the same month as that of tin, not afterwards.³⁰⁹ The continued

Malaysia accused Brazil and China of substantially overshooting the quotas they had been given. See *Tin Listless as \$ Takes its Toll*, METAL BULL., June 15, 1989, at 7; *Malaysia Backs Continuation of Tin Quotas*, Fin. Times, Aug. 30, 1989, at 28.

304. *Compare Commodity Price Index*, The ECONOMIST, Nov. 26, 1985, at 93, with *Commodity Price Index*, The ECONOMIST, Jan. 4, 1986, at 81 (indicating that the index metal prices as of November 26, 1985 were down only one per cent (in both pounds sterling and SDR terms) from a month earlier).

305. Gilbert, *supra* note 269, at 591; B.S. CHIMNI, *supra* note 158, at 197; Warbrick & Cheyne, *The International Tin Council*, 36 INT'L & COMP. L.Q. 931, 935 (1987).

306. *Commodity Price Index*, The ECONOMIST, Feb. 4, 1989, at 115.

307. Blackwell, *International Coffee Pact Collapses*, Fin. Times, July 4, 1989, at 30.

308. See Gilbert, *supra* note 269, at 591; E. ERNST, INTERNATIONAL COMMODITY AGREEMENTS: THE SYSTEM OF CONTROLLING THE INTERNATIONAL COMMODITY MARKET (The Hague 1982); F. GORDON-ASHWORTH, *supra* note 43, app., at 289.

309. See Wassermann, *Tin and Other Commodities in Crisis*, 20 J. WORLD TRADE L. 232, 233 (1986) (revealing the crisis facing cocoa as a commodity).

charmed existence of the Rubber Agreement³¹⁰ demonstrates that I.T.A.'s demise did not exert any independent destructive effect on the structure of international commodity regulation. Indeed, the implementation in July 1989 of the "Common Fund for Commodities" under the auspices of the United Nations (even if it is more modest than once envisaged) should show conclusively that active regulation of the international commodity markets is not out of fashion.³¹¹ The most that can be said is that the I.T.A.'s failure sapped the desire of some countries both to rescue those other agreements which were in trouble and to support new ones.

The buffer stock was certainly brought into disrepute by the Agreement's collapse. One must, however, distinguish between the potential effectiveness of a buffer stock and its actual management in a given case. Other buffer stocks have operated for years without such spectacular failure. One therefore should not be quick to assume that other mechanisms of regulation are necessarily better. One suggestion, existing for some time, is that a mechanism of "compensatory finance" is more efficient than a buffer stock because it directly reimburses producing countries for cyclical diminution in the value of their export earnings from commodities instead of interfering in the market.³¹² This may prove true, but whether a compensatory scheme for tin might have been more effective in averting a crisis in 1985 is difficult to determine. The problems of maintaining the export earnings of commodity exporters are so massive that even well-funded compensatory finance schemes can be strained. The collapse of the Coffee Agreement and the subsequent decline in price of coffee may cause enormous claims to be made to Stabex, the compensatory finance fund which the European Community administers in favor of developing countries. These claims may be more than the fund can bear.³¹³

The I.T.A.'s collapse should thus properly stand not as an indictment of either the international commodity agreement or the buffer stock, but as a reminder of the enormous power of world commodity markets to sweep away all but the best designed, funded, and managed regulatory schemes. In particular, it has been suggested that any commodity agreement launched or continued in the future must receive greater attention to three things: securing real consensus of members (and the

310. Sulong, *Rubber Agreement Bounces with Health*, *Fin. Times*, Mar. 1, 1989, at 38.

311. *Will They Never Learn?*, *THE ECONOMIST*, July 29, 1989, at 75.

312. D. NEWBERY & J. STIGLITZ, *supra* note 28, at 16.

313. Bloom, *Coffee Price Fall May Bankrupt EC Body*, *Fin. Times*, July 18, 1989, at 16.

industries they represent) over the purpose of the agreement; specifying within the agreement the precise means of attaining these objectives and the financial responsibilities of its members; and insulating the agreement from foreign exchange risk by denominating its affairs in a basket currency such as the Special Drawing Right (SDR).³¹⁴ To these one can add three further considerations. Decision-making in the agreement should be structured so that it will not be paralyzed by the whims of one or two of its members. Any buffer stock (or similar active agency) henceforth established or continued should operate under clearer guidelines and stricter supervision; in particular, if borrowing and futures trading are allowed, responsible parameters are needed. Finally, members should be entitled to full and timely information on its operations.

3. *International Organizations Distinct Entities*

Notwithstanding the final conclusion of an out-of-court settlement, the most important intangible legacy of the Council's collapse is the legal precedent that, absent any government commitments or constitutional language of the organizations to the contrary, international organizations that are set up as separate bodies are ultimately on their own, even to the prejudice of third party creditors. As with domestic limited liability corporations, this is a mixed blessing. This precedent should forward the interests of international order by affirming that international organizations have a distinct and independent legal personality. It should also cause creditors of international organizations to reassess more regularly and prudently their exposure, particularly to those multilateral agencies with substantial economic responsibilities.³¹⁵

Many creditors of the Council claimed during the crisis that absol-

314. See Gilbert, *supra* note 269, at 613-14 (noting flaws to avoid and guidelines to follow for drafting a commodity agreement). At least one commodity agreement has responded to the I.T.C.'s collapse by amending its text: the Rubber Agreement now has a clause limiting its members' liabilities to the organization or to third parties to the extent of their contributions. *Maclaine Watson & Co. v. Dep't of Trade and Industry*, [1988] All E.R. 257, 306.

315. Tinco Realisations attempted to capitalize on this point to force a settlement. In 1988, Tinco warned the public of the alleged dangers of dealing with the Multilateral Investment Guarantee Agency, a new international organization that insures against risks of private investment in the developing world. Tinco claimed that the agency is juridically similar to the I.T.C. and therefore susceptible to abandonment by its members upon insolvency. *An ITC Double*, TIN INT'L, Apr. 1988, at 9. In this context of caveat creditor, however, the obvious cannot be over-emphasized: potential creditors of an international organization should examine carefully both the constitution and the management of the specific organization with which they deal to determine the extent of the credit risk which they will assume. *Id.*

ing the governments from liability would have dire consequences for sovereign lending; if the world's richest countries default on obligations that are supposedly theirs, then the largest debtors among the developing countries would be encouraged to follow suit.³¹⁶ This fear is unfounded, for it ignores the fact that the situation of the I.T.C.'s debts is different in a crucial aspect. The problem addressed in the I.T.C. cases was whether the member states were liable for the Council's debts as if the debts were their own; the Court held that they were not because the Council was a separate entity interposed between the states and the creditors. With sovereign creditors, the debts are clearly incurred in their own names and cannot be denied. The I.T.C. precedent can thus only be relevant to the resolution of loans made to separate state enterprises of these sovereign borrowers without benefit of an express governmental guarantee. As domestic corporate or company law should suffice to shield the governments in most cases, the precedent's implications for sovereign lending are most directly applicable to the situation where pairs or small groups of states by treaty establish an economic entity that is to act within their borders, but is not a creature of their national company law regimes.³¹⁷

4. *International Law in National Courts*

The relationship between international and national law always has been a complex and uneasy one. Although national courts often must resort to international law rules to dispose of the cases before them, they usually have done so when the rules are clear and when those rules are part of the domestic national fabric by either custom or incorporation of a treaty by the national parliament.³¹⁸ In the I.T.C. cases, the English Court of Appeal not only interpreted the terms of a treaty that had not been incorporated into English law, but also attempted to decide the issues according to international law. A prominent national court thus made the rare step of unhesitatingly assuming the role of an

316. Memorandum of Sir Adam Ridley, *supra* note 131, at 31.

317. An example of such an entity is Itaipu, which Brazil and Paraguay established by treaty in 1973 to construct and manage a mammoth hydroelectric project on the Paraná River. Treaty concerning the hydro-electric utilization of the water resources of the Paraná River, Apr. 26, 1973, Brazil-Paraguay, 923 U.N.T.S. 91. The Parties created Itaipu as a "binational entity," with its capital to come from the electricity companies of the two countries. *Id.* The governments gave Itaipu independent juridical and financial capacity to undertake the project, including the power to borrow. *Id.* The stand-alone character of the "binational entity" is emphasized by the treaty provisions which enabled Itaipu to request the two governments to guarantee its indebtedness. *Id.*

318. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 44-53 (3d Oxford 1982).

international tribunal.

CONCLUSION

The insolvency of the I.T.C. was not the largest in history, but will be recorded as one of the most significant. It was the first time that the actions of commercial creditors have terminated the activities of an international organization. It was also the first time an international organization has been so swiftly and utterly abandoned by its members to the great detriment of others. The effects of the collapse were many and of varying strength and longevity. The impact on the creditors and producers has been severe, but (with a few exceptions) will ease over time. The same cannot be said for the diplomatic and legal precedents established by the collapse, which will be much more durable.

As shown herein, defects in the drafting of the Agreement, adverse macroeconomic conditions, and fortuitous movements in exchange rates caused the collapse. Such attribution to impersonal or external phenomena, however, should not mask the *locus* of primary responsibility: the governments of the member states. The governments established the Agreement with ambitious but inconsistent goals. The governments drafted the Agreement's defective text; the structure they created first blinded them to the Council's suicidal course and then rendered them incapable of altering it. The governments—save a noble few such as those of the United Kingdom, Canada, and Japan, as well as the Commission of the E.C.—did little to secure a prompt and reasonable solution to the crisis which they had let happen. Notwithstanding the propriety of the decisions exculpating the states from legal liability, one can only echo the words of the English Court of Appeal that the conduct of the governments was at the very least unbecoming; it caused what must be the sorriest episode in the history of international economic organizations.