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COMMENTS

Cartel in a Can: The Financial Collapse of the International Tin Council

I. INTRODUCTION

In 1985, the International Tin Council (the "ITC"), the operative arm of the Sixth International Tin Agreement¹ (the "ITA 6"), collapsed due to debt.² Under the ITA 6 and earlier tin agreements, several sovereign states had joined together to form a tin cartel. This cartel, known as the ITC, incurred this debt over time to fund its efforts to control the supply and market price of tin. On October 24, 1985, however, the ITC announced that it was unable to repay those debts or to fulfill its contractual obligations to purchase tin. When the creditors turned to the member states of the cartel for payment, the member states refused to pay any of the ITC's debts, which are estimated at £ 900,000,000.³ In England,

¹ UNCTAD, Sixth International Tin Agreement, 1981, U.N. Doc. TD/TIN.6/14/Rev.1, U.N. Sales No. E.82.II.D.16 [hereinafter ITA 6]. The ITC's powers to administer the agreement were granted by Article 3(1). The twenty-three member countries of the ITA 6 are: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, the Netherlands, Nigeria, Norway, Sweden, Switzerland, Thailand, the United Kingdom, Zaire, and the European Economic Community. Warbrick & Cheyne, *The International Tin Council*, 36 INT'L COMP. L.Q. 931, n.1 (1987). Of these members, the producing nations are: Australia, Indonesia, Malaysia, Nigeria, Thailand, and Zaire. The consuming nations are: Canada, Japan, India, Belgium, Denmark, Finland, France, Spain, Greece, Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. McFadden, *The Collapse of Tin: Restructuring a Failed Commodity Agreement*, 80 AM. J. INT'L L. 811, 821 (1986) [hereinafter McFadden]. The United States was a member in the ITA 5 but declined to join ITA 6. Wassermann, *UNCTAD: Sixth International Tin Agreement*, 15 J. WORLD TRADE 557, 558 (1981).

² The ITC announced that it could no longer meet its financial obligations on October 24, 1985. Bleiberg, *Tin in a Box: One of the World's Oldest Cartels Has Come to Grief*, BARRON'S, Nov. 18, 1985, at 11 [hereinafter Bleiberg]; Wagstyl, *World Tin Market at the Brink*, Fin. Times, Oct. 25, 1985, at 39, col. 1 [hereinafter Wagstyl].

³ Australia, Indonesia, Malaysia, Nigeria, Thailand, and Zaire had promised to contribute £ 60,000,000 in cash if permitted by their governments, but the money was never paid. Wassermann,

two of the ITC's creditors, Maclaine Watson & Co. and J.H. Rayner, sued the ITC members for payment of the ITC's debts.⁴ These cases were among the many cases emerging from the ITC crisis.⁵ Both were unsuccessful in their first court actions.⁶ Because both cases raised similar issues of sovereign immunity, their direct actions against the ITC members were consolidated in *Maclaine Watson & Co. v. Department of Trade & Industry*⁷ upon appeal to the Court of Appeal. The Court of Appeals, and subsequently the House of Lords, held that the members were not liable on the debt.⁸ These decisions condoned the ITC's behavior despite the fact that an examination of the ITC's actions revealed a history of "gross mismanagement."⁹

Sovereign states that are members of international commodity organizations must bear responsibility for the actions taken by their cartels.

Tin and Other Commodities in Crisis, 20 J. WORLD TRADE 232 (1986) [hereinafter Wassermann]. The creditors of the ITC, anxious to work out a method of payment, made several attempts to involve the member states in a repayment plan.

Plans to refinance the ITC debts through "burden sharing" were numerous but generally unsuccessful. The Graham Kestenbaum plan provided that the bankers, brokers, and ITC members would invest £ 270,000,000 into the equity base of the ITC in order to create a new company, called Newco, to take over the ITC stock and contracts.

Consumer member nations strongly resisted contributing new money to the ITC despite pressure from Britain. Bartholomew, *Slow Trade Planning*, FAR EAST. ECON. REV., Jan. 28, 1986, at 66. Indonesia and Thailand, the second and third largest producers, eventually refused to go along with the final plan. Indonesia claimed that it was not at all responsible and saw no need to contribute. Indonesia felt that the continued production by non members would prevent any long term solution. Bartholomew, *All Chocks Are Away*, FAR EAST. ECON. REV., Mar. 20, 1986, at 154.

Extensive debt settlement negotiations began again in 1989 as the ITC members tried to settle claims pending in court. Gooding, *ITC Members Meet on Debt Settlement*, Fin. Times, Sept. 8, 1989, at 30, col. 1. Although one attempt succeeded, in the end no solution was formulated. Furthermore, no country would contribute to the debts individually because of fears that payments made without a judgment of liability might be construed as an admission of liability. See Prest, *The Collapse of the International Tin Agreement*, 302 THE ROUND TABLE 170 (1987) [hereinafter Prest].

⁴ The ITC owed Maclaine Watson £ 6,000,000 and J.H. Rayner £ 16,000,000.

The English system of civil courts is a three-tiered hierarchy. Cases are first tried in the High court. From there cases go to the Court of Appeal for appellate review before three judges. The parties may petition for a final appellate hearing before the House of Lords, the "supreme tribunal." This is to be distinguished from the Parliamentary House of Lords to which it was originally attached. G. WILLIAMS, *LEARNING THE LAW* 5-9 (1982). Although the creditors were expected to appeal the *Maclaine Watson* ruling to the House of Lords, the creditors and ITC members have recently been involved in settlement negotiations. *ITC Members Meet on Debt Settlement*, Fin. Times, Sept. 8, 1989 at 30, col. 1.

⁵ Thompson, *The ITC Litigation*, 22 J. WORLD TRADE 103, 107-110 (1988).

⁶ J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade & Indus., 1987 B.C.L.C. 667; *Maclaine Watson & Co. v. Department of Trade and Indus.* 1987 B.C.L.C. 707.

⁷ *Maclaine Watson & Co. v. Department of Trade & Indus.*, [1988] 3 All E.R. 257, 268.

⁸ Hughes, *ITC Ruling Dashes Creditors' Hopes*, Fin. Times, Oct. 27, 1989, at 40, col. 1 [hereinafter Hughes]; *Maclaine Watson & Co. v. Department of Trade and Indus.*, [1988] 3 All E.R. at 268; *Maclaine Watson & Co. v. International Tin Council*, [1989] 3 All E.R. 523.

⁹ *Maclaine Watson*, [1988] 3 All E.R. at 268.

Without the threat of legal action and punishment as a deterrent, member states have little incentive to properly administer the international trading organizations to which they belong. This Comment will first review the factual background of the ITC and the court's decision in *Maclaine Watson*. It will then discuss the charges that the ITC administration was mismanaged. Lastly, it will analyze some legal bases that support a decision imposing member state liability.

II. THE TIN CRISIS: A FACTUAL BACKGROUND

A. International Commodity Agreements

An international commodity agreement ("ICA") is a program designed and implemented by sovereign states that have a strong economic interest in a particular commodity. The goal of an ICA is to support the commodity's price in the open market in order to yield profits higher than those available in a competitive market. In order to maintain high prices, the cartel must limit available supply and consumers must reject substitutes of the commodity.¹⁰ In the ITC situation, neither of these requirements was met.

One way to limit supply and raise commodity prices is through the use of a buffer stock. Cartels often build up the buffer stock of a commodity by withholding the commodity from the market when the market price falls below the cartel's lowest acceptable price. By restricting supply, the cartel expects the price to rise. When the commodity's market price exceeds the higher end of the acceptable price range, as predefined by the cartel,¹¹ the cartel will sell off the buffer stock. Other ICAs use buffer stocks to stabilize prices,¹² and the international community has supported the use of buffer stocks by ICAs.¹³

B. The Tin Agreements

The International Tin Agreement was established in 1953 to stabilize the world tin market through artificial devices.¹⁴ Its member nations

¹⁰ R. BORK, *THE ANTITRUST PARADOX* 101 (1978).

¹¹ Gilbert, *International Commodity Agreements: Design and Performance*, 15 *WORLD DEV.* 591, 592-94 (1987) [hereinafter Gilbert].

¹² The International Cocoa Agreement and the International Natural Rubber Agreement both employ buffer stocks. However, a buffer stock is not essential to an ICA. The International Coffee Agreement and the International Sugar Agreement ensure price stability through export quotas on their members. This way the cartel can control output. *Id.* at 591.

¹³ Macbean & Nguyen, *International Commodity Agreements: Shadow and Substance*, 15 *WORLD DEV.* 575 (1987) [hereinafter MacBean].

¹⁴ UNCTAD, *Fifth International Tin Agreement 1975*, U.N. Doc. TD/TIN.5/11 Art. 1; ITA 6, *supra* note 1, Art. 1.

both consumed and produced tin.¹⁵ The ITC was created concurrently as the administrative arm of the International Tin Agreement.¹⁶ Every five years the members redrafted the agreement to accommodate membership and policy changes.¹⁷ Through the joint cooperation of tin consumer nations and tin producer nations, the ITC was able to set a price range that was acceptable to all the members and to support tin prices. The price range was designed to satisfy consumers' demands for tin and producers' desires for higher profits. The ITC used buffer stocks and import quotas to control the world supply of tin.¹⁸ That control allowed the ITC to manipulate tin prices.

The ITA 6 provided for a "normal" buffer stock of 30,000 metric tons of tin metal and an additional buffer stock of 20,000 metric tons, for a total of 50,000 metric tons.¹⁹ The ITC financed the "normal" 30,000 metric tons by requiring members to make financial contributions.²⁰ It financed the remaining 20,000 metric tons of the expanded buffer stock by borrowing money. Lenders accepted actual tin stock as collateral. Individual governments could also voluntarily undertake or guarantee the loans by assuming full responsibility to pay in case the ITC defaulted.²¹

C. The Problem of Supply

Despite its efforts to manage tin prices and supply, the ITC lost control of the world tin supply. The tin supply increased as new tin producers entered the market and rejected membership in the ITA.²² Because these new producers were not subject to the ITC quotas, they were free

¹⁵ ITA 6, *supra* note 1, Art. 5(1).

¹⁶ UNCTAD, International Tin Agreement 1953, U.N. Doc. E/CONF.12/12, U.N. Sales No. 1954.II.D.4 [hereinafter ITA 1].

¹⁷ For example, in 1960 the ITA 1 was modified to institute "more flexible rules" for buffer stock operation. G. SCHIAVONE, INTERNATIONAL ORGANIZATIONS: A DICTIONARY AND DIRECTORY 169 (1983).

The previous International Tin Agreements are: ITA 1 (1956-1961), ITA 2 (1961-1966), ITA 3 (1966-1971), ITA 4 (1971-1976), and ITA 5 (1976-1981). K. KHAN, THE LAW AND ORGANIZATION OF INTERNATIONAL COMMODITY ORGANIZATIONS 189 (1982) [hereinafter KHAN]; *see also* 1 YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1987-88.

¹⁸ ITA 6, *supra* note 1, Arts. 32-39. The buffer stock was probably a more important tool than the export quotas. Gilbert, *supra* note 11, at 598.

¹⁹ ITA 6, *supra* note 1, Art. 21. A metric ton or "tonne" is defined as 1000 kilograms. *Id.* Art. 2.

²⁰ *Id.* Art. 21. The responsibility for payment, shared equally between producing and consuming nations, was met by an initial total member contribution in "the cash equivalent of 10,000 tonnes" and a later payment of 20,000 metric tons of tin metal. *Id.* Art. 22(1) & (2).

²¹ *Id.* Art. 21. No such guarantees supported any ITC loans during this period.

²² McFadden, *supra* note 1, at 824-26.

to mine and to export as much tin as they wished.²³ Thus, the ITC could no longer control the available world supply of tin, and its carefully established price structure weakened.²⁴

Moreover, the ITC faced supply problems on other fronts. ITA members as well as nonmembers ignored the ITC's supply restrictions. Producing members who had agreed to restrict tin output evaded their production quotas by smuggling tin out of their countries. In particular, Indonesian, Malaysian, and Thai mining companies smuggled tin into Singapore.²⁵ Additionally, a Malaysian mining company allegedly independently attempted to manipulate the market to raise prices. As a result of this manipulation, the price of tin increased considerably, despite the fact that demand was low and the supply was "plentiful."²⁶

ITA producers also competed with ITA consumer members. These consumer members were not supposed to be net exporters, so they were not subject to production quotas. Great Britain, for example, despite its consumer status, managed to "cheat" on the tin cartel-by producing and selling tin.²⁷

Thus, although the ITC had originally controlled much of the world's tin production, their market share had weakened considerably by 1985, the year of the collapse. One commentator estimated that the ITA world output fell from 71% in 1981 to 57% by 1985.²⁸ The high prices created by the ITC efforts prompted nonmember tin producers such as Bolivia, Brazil, Canada, China, and Peru to enter the tin market independently. Unfettered by production quotas and price levels, these maverick producers increased the world tin supply and sold tin at lower prices than ITA members could. The ITA "was essentially subsidizing the production of nonmembers."²⁹

The ITA members tried to combat their falling market share by of-

²³ *Caught In a Tin Box*, FAR EAST. ECON. REV., Nov. 7, 1985, at 114 [hereinafter *Caught In a Tin Box*].

²⁴ Another important factor was the 1972 decision by the Council to use the Malaysian dollar as the currency unit for the buffer stock. Because the Malaysian dollar was linked to the U.S. dollar "for all practical purposes," when the U.S. dollar increased in value, the buffer stock manager was able to acquire credit. When the dollar value fell in 1985, however, tin prices fell and the value of the tin collateral fell with it. B. CHIMNI, INTERNATIONAL COMMODITY AGREEMENTS: A LEGAL STUDY 200, 201 (1987) [hereinafter CHIMNI].

²⁵ Chaikin, *Organized Crime and Commodity Agreements*, 3 CO. LAW. 176 (1982); Wagstyl, *The Crisis No One Is Ready to Resolve*, Fin. Times, Nov. 1, 1985, at 22, col. 3.

²⁶ Chaikin, *Evidence of Market Manipulation in Tin Has Emerged*, 3 CO. LAW. 27 (1982). The prices increased from £ 6480 per metric ton to over £ 8000 per metric ton.

²⁷ CHIMNI, *supra* note 24, at 200; *The Tin Cartel is Making a Scrap Heap of the Market*, BUS. WK., Nov. 11, 1985, at 38.

²⁸ McFadden, *supra* note 1, at 825.

²⁹ *Id.*

fering membership to independent producers. For example, at the 1980 ITA drafting conference, a production quota of 1.23%³⁰ was suggested as an allocation for Brazilian tin production. Brazil, however, rejected the offer and remained independent. In the years after the conference, Brazil's production capability expanded rapidly to capture nearly 10% of the market by 1985.³¹ The failure of ITA members to attract new producers³² undermined their command of the world tin market.³³

The problem of supply was exacerbated by the availability of cheap substitutes for tin. Tin consumers believed that the price of tin was too high relative to the price of alternative materials that performed the same functions. Consequently, consumers began to purchase these substitutes. Particularly in food packaging, plastics and aluminum have replaced tin.³⁴ Tin recycling also has increased.³⁵ Tin competes directly with these products, so its price must stay within the same range as the prices of the substitutes. The availability of substitutes at comparable prices means that the demand curve for tin is highly elastic.³⁶ Thus, if the price of tin increases, demand for it falls because consumers have cheaper alternatives.

The presence of an elastic demand curve made price control by an ICA more difficult because consumers would turn to tin substitutes when the price of tin increased by a small degree. Similarly, other ICAs have lost power as product substitutes entered their markets. For example, the International Sugar Agreement suffered from an excess supply of sugar due to overproduction and the increase of sugar substitutes such as corn syrup, saccharin, and aspartame. Additionally, the International Natural Rubber Organization must compete with the falling prices of synthetic rubber.³⁷

Despite its problems of supply, the ITA's original design compensated for some fluctuations in supply through the use of its buffer stock.³⁸ The buffer stock manager purchased the "excess" tin—i.e., the amount

³⁰ ITA 6, *supra* note 1, Annex A.

³¹ Brazil's production levels went from a 1982 figure of 8000 metric tons to 26,000 metric tons in 1985. Gilbert, *supra* note 11, at 612.

³² *The Tin Cartel is Making a Scrap Heap of the Market*, BUS. WK., Nov. 11, 1985, at 38.

³³ A new cartel of tin producers called the Association of Tin Producing Countries formed in 1983. 23 I.L.M. 1009 (1984). This tin cartel succeeded in attracting Brazil to its membership. *Brazil will join tin group*, Fin. Times, Sept. 6, 1989, at 32, col. 7.

³⁴ Bleiberg, *supra* note 2, at 11; Wagstyl, *supra* note 2.

³⁵ McFadden, *supra* note 1, at 824.

³⁶ *Id.* at 816.

³⁷ Wassermann, *supra* note 3, at 234.

³⁸ ITA 6, *supra* note 1, Art. 28(3). The buffer stock managed the ITC tin stockpiles created by the accumulation of members' required tin contributions. *Id.* Art. 22(2).

over the supply desired by the ITC—on the market. The buffer stock manager held the purchased tin on reserve. As a result, buffer stock purchases reduced the supply, thereby causing an increase in tin prices.³⁹ Ordinarily, the buffer stock manager could balance the buffer stock by selling its accumulated tin holdings when the market price exceeded the ITC price ceiling. In the early 1980s, however, nonmember tin production increased the world supply of tin, thereby driving tin prices down.⁴⁰ The buffer stock manager had to purchase more tin stock than originally planned to support tin.⁴¹ The price of tin never increased enough to allow the manager to sell off the buffer stock holdings. Eventually, the cartel had to borrow money to finance the continued buffer stock purchases.⁴² The value of the entire tin agreement hinged upon the strength of the price and supply controls. When the money and the tin stock supply was depleted, the agreement could no longer function.⁴³

D. The Crisis

The ITC collapsed in late 1985 due to its outstanding debt.⁴⁴ ITC creditors, including banks and brokers in tin futures on the London Metal Exchange, have failed to recover the estimated £ 900,000,000⁴⁵ due on loan contracts and tin futures contracts. The ITC itself is bereft of assets.⁴⁶ The ITC members, all but one of whom are sovereign states,⁴⁷ have denied responsibility for the debts.⁴⁸

³⁹ The ITC set floor and ceiling prices in order to meet the ITA 6's goal of a stable tin market. The margin was divided into three equal sized sections. ITA 6, *supra* note 1, Art. 27(1). When the tin prices were at or above the ceiling price or at or below the floor price, the buffer stock manager was required to sell or buy tin to force the price back into the acceptable range. *Id.* Art. 28(3)(a) & (e). If the market price existed within the upper or lower sectors of the acceptable range, the buffer stock manager had discretion to use the buffer stock to adjust prices. *Id.* Art. 28(3)(b) & (d). If the market price was in the middle sector, the manager required authorization from a "two-thirds distributed majority of the Council." *Id.* Art. 28 (3)(c).

⁴⁰ *Caught In a Tin Box*, *supra* note 23, at 114.

⁴¹ The ITC approved buffer stock trading at prices below the established floor. *Tin Buffer Stock May Trade Below Floor Price*, *Fin. Times*, Mar. 29, 1985, at 36, col. 4.

⁴² K. KHAN, *supra* note 17, at 171.

⁴³ E. ATIMOMO, *LAW AND DIPLOMACY IN COMMODITY ECONOMICS* 152 (1982).

⁴⁴ The ITC announced that it could no longer meet its financial obligations on October 24, 1985. Bleiberg, *supra* note 2; Wagstyl, *supra* note 2.

⁴⁵ Estimates of the debt range from £ 600,000,000 to £ 900,000,000. MacGlashan, *The International Tin Council: Should a Trading Organisation Enjoy Immunity?*, 46 *CAMBRIDGE L.J.* 193 (1987); see CHIMNI, *supra* note 24, at 198.

⁴⁶ Breiberg, *supra* note 2, at 11; Wassermann, *supra* note 3, at 232-33.

⁴⁷ The European Economic Community is the only member that is not a sovereign state.

⁴⁸ *The Tin Crisis Is Rattling the Metals Markets*, *BUS. WK.*, Nov. 25, 1985, at 38.

III. MISMANAGEMENT BY THE ITC

There are numerous examples from the early 1980s of mismanagement by the administrators of the ITC. While the court in *Maclaine Watson* recognized this "gross mismanagement," its existence did not affect the court's decision, which indirectly condoned this behavior.⁴⁹ Examples of the mismanagement include unauthorized buffer stock purchases and forward contracts for tin.

A. Buffer Stock—Unauthorized Borrowing

ITC members disavowed liability to third parties for unauthorized borrowing by claiming that they could not be responsible for the *ultra vires* acts of the ITC.⁵⁰ Originally, the buffer stock purchases were limited to 50,000 metric tons. The limit was later modified to include buffer stock holdings from the ITA 5, so that the new ITA 6 total limit was set at 64,183 metric tons.⁵¹ The amount to be financed by borrowing, however, remained limited to 20,000 metric tons.⁵² Figures show that the ITC exceeded its authority by borrowing funds for buffer stock purchases beyond the 20,000 metric ton limit.⁵³ All of the excess tin in the buffer stock was financed by unauthorized borrowing.

Although the governing agreement did not provide for those funds, the members' argument that the borrowing was *ultra vires* is weak because they composed the Council⁵⁴ that approved the borrowing.⁵⁵ The

⁴⁹ After the Court of Appeal's decision in *Maclaine Watson*, several ITC creditors sued the member states on two grounds: negligent misrepresentation and fraudulent trading. *Amalgamated Metal Trading Ltd. v. Department of Trade & Industry*, Fin. Times Law Reports, Feb. 28, 1989. On the negligent misrepresentation charge, the court in *Amalgamated* recognized the commercial nature of the loan and trading contracts between the ITC and its creditors. As a result, it held that the transactions were not protected by the State Immunity Act, and the states were not immune from liability on those transactions. The creditors, however, were still unsuccessful because as the court noted, neither party to a commercial transaction owes a duty of care to the other. Without such a duty, the claim of negligence could not be sustained. The fraudulent misrepresentation claim, based on the allegation that the states had misrepresented their "means or intention to repay the debts," also failed. The member states relied on a defense in the 1828 Statute of Frauds that absolved states from liability unless the "misrepresentation" was written and signed by the maker. The court held that the contracts signed by the ITC could not meet that test. *Hermann, 1677 Statute Protects DTI from Liability for Tin Council Debts*, Fin. Times, Mar. 9, 1989, at 31, col. 5. This decision was upheld by the House of Lords. *Hughes, supra* note 8.

⁵⁰ CHIMNI, *supra* note 24, at 210-11.

⁵¹ *Id.* at 208.

⁵² ITA 6, *supra* note 1, Art. 21.

⁵³ The ITC held over 60,000 metric tons, 10,000 metric tons more than permitted by the agreement. *Wassermann, supra* note 3, at 232. This total included the amount held in forward contracts as the ITA 6 required. CHIMNI, *supra* note 24, at 208.

⁵⁴ "The Council shall be composed of all the members." ITA 6, *supra* note 1, Art. 4(1). Each member appointed a representative, an alternate and advisers to attend the meeting. *Id.* Art. 4(2).

member states had sufficient control over their own representatives to prevent such mismanagement.⁵⁶ The members had extensive knowledge of ITC dealings because the ITC was required to publish quarterly reports detailing the "tonnage of tin metal held in the buffer stock at the end of that quarter,"⁵⁷ yearly audit reports on the buffer stock,⁵⁸ and yearly financial reports on the ITC operations generally.⁵⁹ Armed with these reports, the ITC representatives knew or should have known of the developing problems and informed their governments.

B. Forward Contracts

Much of the ITC's unauthorized borrowing was used to purchase tin futures. The ITC made generous use of tin forward contracts, which were permitted by ITA 6,⁶⁰ in its buffer stock operation.⁶¹ In a forward contract, both the purchasing and selling parties speculate that the market will move either up or down in a way that will benefit them. The ITC purchased futures in tin hoping that the futures would increase in value as the price of tin increased. Instead, the tin prices fell, and the ITC lost money on the deals. Because many of these purchases were financed with borrowed money,⁶² when the ITC defaulted on its loans, it was unable to pay for the unprofitable futures contracts it had already contracted to purchase. The ITC, knowing that the market price of tin was falling, should have known that there was always a possibility that it would lose money on the contracts. Planning to pay for the future contracts with borrowed money proved to be an unwise strategy because the expected profits to fund the loans never materialized.⁶³

IV. LEGAL ARGUMENTS

Aside from the issues of mismanagement, the ITC's creditors could have made strong legal arguments based on members' implied liability

⁵⁵ The ITC had to approve the terms and the conditions of all buffer stock borrowing. *Id.* Art. 24(1).

⁵⁶ CHIMNI, *supra* note 24, at 210-11; *but see* D. POLLARD, LAW AND POLICY OF PRODUCERS' ASSOCIATIONS 284 (1984) [hereinafter POLLARD].

⁵⁷ ITA 6, *supra* note 1, Art. 7(g).

⁵⁸ *Id.* Art. 19(2).

⁵⁹ *Id.* Art. 7(f).

⁶⁰ Futures contracts are purchases made through a broker for tin to be delivered in the future. They were permitted in ITA 6, *supra* note 1, Art. 28(5).

⁶¹ Gilbert, *supra* note 11, at 595.

⁶² Gilbert, *supra* note 11, at 595; Maidenburg, *What the Tin Debacle Means For Futures Markets*, 15 FUTURE 66 (1986) [hereinafter Maidenburg].

⁶³ Although the ITC was overextended, one commentator directs some blame to the way brokers on the London Metal Exchange sold futures contracts. Maidenburg, *supra* note 62, at 68.

for buffer stock borrowing, immunity issues, the alternative liquidation procedures of the administrative account, and the lack of an express statement excluding liability. The *Maclaine Watson* court chose between the application of English law and international law because the litigation involved English contracts made by an international body. The court based its decision on English law because two of the three judges believed that the English court had no authority to interpret an international agreement based on international law.⁶⁴ The court found there was no liability under English law. The third judge, however, found that international law could support ITC member liability.⁶⁵

A. Members' Implied Liability for Buffer Stock Borrowing

All but the first ITA included some provision permitting the ITC to borrow to finance the buffer stock if necessary.⁶⁶ In those previous ITAs, members' liability for buffer stock borrowing was implied. Prior to ITA 6, the ITC needed the unanimous consent of the producers and the approval of a majority of the consumers in order to borrow funds. Furthermore, consumer members were not required to contribute funds to the buffer stock. The wording of the provisions for borrowing in the earlier ITAs suggests that only those members confirming the need to borrow were responsible for the debt. Consumers essentially were exempt. The ITA 2 provision, for example, exempted consuming members from any obligation incurred "in respect of such borrowing" whether or not they approved of borrowing.⁶⁷ This sentence suggests that the exclusion applied only to consumers, leaving producers open for responsibility. According to ITA 3, a country that voted against borrowing funds would not have any obligation respecting that borrowing "without the consent of that country."⁶⁸ Again, this clause suggests that only the withholding member was immune. Similarly, ITA 4 held that no consumer country would have any "obligation for borrowing without consenting."⁶⁹ Although worded differently, each limitation implied that the producer nations who unanimously supported borrowing, and the majority of consumer nations who agreed, would be held responsible for the debt.

⁶⁴ *Maclaine Watson*, [1988] 3 All E.R. at 337.

⁶⁵ *Id.* at 332-34.

⁶⁶ ITA 1, *supra* note 16, made no mention of borrowing.

⁶⁷ UNCTAD, Second International Tin Agreement, 1960, Art. 8 (b)(a), U.N. Doc. E/Conf.32/5, U.N. Sales No. 61.II.D.2.

⁶⁸ UNCTAD, Third International Tin Agreement, 1965, Art. 10(6)(a), U.N. Doc. TD/TIN.3/5, U.N. Sales No. 65.II.D.2.

⁶⁹ UNCTAD, Fourth International Tin Agreement, 1970, Art. 24(c), U.N. Doc. TD/TIN.4/7/Rev.1, U.N. Sales No. E.70.II.D.10.

The situation changed slightly with the ITA 6 because consumer nations acquired voting power and financial duties equal to those of the producers.⁷⁰ Since all the members shared power and responsibility equally, it is possible to infer from previous ITAs that the parties intended to share the burden equally. The new agreement did not mention whether consumers or producers were accountable for buffer stock repayment obligations.

B. Immunity

Immunity from legal process is inextricably tied to any discussion of the liability of ICAs or of their sovereign state members because both ICAs and sovereign states enjoy statutorily granted immunity in England.⁷¹ In the *Maclaine Watson* case, however, legal immunity should not be sufficient to shield either the ITC or the member states from liability. Such a shield would prevent the operation of sufficient deterrents against their misfeasance.

Although the states did not individually or collectively contract with the creditors in their own name as sovereign entities, the issue of state immunity—as opposed to ITC immunity—is still relevant. The theory of concurrent or secondary liability which creditors presented in *Maclaine Watson* suggested that both the ITC and its members would be liable for the ITC's debts. The sovereign immunity issue is also significant to two classes of plaintiffs: those plaintiffs who seek payment of arbitration awards made against the ITC from the member states, and those creditors who, because of omissions in their contracts, have no recourse against the ITC itself.

The ITC and the states do not share identical immunities because two different documents separately determine their immunity status. Therefore, their distinct immunity defenses must be discussed separately.

1. *Immunity of the International Tin Council*

The ITC's status was established in the United Kingdom by the Headquarters Agreement,⁷² an accord between the ITC and the British government. The British Parliament granted⁷³ to the ITC certain immu-

⁷⁰ ITA 6, *supra* note 1, Art. 14(2).

⁷¹ The International Tin Council (Privileges and Immunities) Order, S.I. 1972, No. 120 [hereinafter Order] governs the ITC's immunities, and the State Immunity Act, 1978 ch. 33 [hereinafter State Immunity Act, 1978] governs the sovereign states' immunities.

⁷² Headquarters Agreement, London, Feb. 9, 1972; T.S. No. 38 (1972), Cmnd. 4938 [hereinafter Headquarters Agreement].

⁷³ The ITC enjoyed the same privileges and immunities granted by the British government to several international organizations headquartered in England. English law specifies exactly what

nities in the International Tin Council (Privileges and Immunities) Order 1972⁷⁴ (the "Order"). Although paragraph 6(1) of the Order granted the ITC "immunity from suit and legal process,"⁷⁵ this particular immunity should not protect the ITC from suit because the ITC failed to include arbitration clauses in all of its private contracts, as was required by the British government under the Headquarters Agreement.⁷⁶ Furthermore, Article 24 of the Agreement provided that the ITC agreed to submit to an "international arbitration tribunal" at the request of the British government in order to deal with problems arising from noncontractual obligations or any damages caused by the ITC.⁷⁷ According to the Order, the ITC's immunity was to be suspended for the enforcement of arbitration judgments and awards anticipated to result from the clauses required by Articles 23 and 24.⁷⁸ In fact, eleven creditors had obtained arbitration clauses, completed arbitration proceedings, and won awards—though unpaid—against the ITC.⁷⁹

States generally do not grant immunity from jurisdiction unless they expect external disputes to be handled in another forum.⁸⁰ The provisions in the Headquarters Agreement requiring submission to private ar-

privileges and immunities are to be accorded to an international organization. 18 HALSBURY'S LAWS OF ENGLAND para. 1597 (4th ed. 1977). Thirty-nine international organizations, including the ITC, have the same privileges and immunities. *Id.* paras. 1598-99.

⁷⁴ Order, *supra* note 71.

⁷⁵ The Order also provided for three exceptions to the granted immunity. The ITC was not immune from actions arising due to an express waiver made by the ITC in a particular case, a civil suit resulting from an automobile accident, and the enforcement of an arbitration award "when made under Article 23 or 24 of the Headquarters Agreement." *Id.* para. 6(1)(a), (b), (c). Standard Chartered Bank acquired the last such waiver in their loan agreement with the ITC that said: "[T]his facility letter shall be governed by . . . English law and [the ITC] hereby irrevocably submit[s] to the nonexclusive jurisdiction of the High Court . . . and consent[s] to . . . the issue of any process . . . against [it]." The Court agreed that this was a waiver of immunity consistent with the form set forth in the Order para. 6(1)(a) and agreed that recovery of the loan was permitted despite the ITC's objections. *Standard Chartered Bank v. International Tin Council*, [1987] 1 W.L.R. 641, 642, [1986] 3 All E.R. 257, 258.

⁷⁶ Article 23 of the Headquarters Agreement specifically required that arbitration clauses be included in all contracts the ITC made with residents or corporations of the United Kingdom. Headquarters Agreement, *supra* note 72, Art. 23.

⁷⁷ These did not include disputes about the interpretation of the ITA, so this section is less relevant to this discussion. *Id.* Art. 24.

⁷⁸ Order, *supra* note 71, para. 6(1)(c).

⁷⁹ These creditors were suing the member states for payment because the ITC was unable to pay the awards. The member countries, however, contest that argument. They claim that those creditors who chose to include arbitration clauses in their contracts and won arbitration awards forfeited their opportunity to pursue the member states for the same debts through litigation. Even if the states were forced to pay, it may be impossible to collect. The main assets the countries have in England are their assets in central banks which are immune under the State Immunity Act 1978.

⁸⁰ D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 371 (1982) [hereinafter BOWETT].

bitration indicates that Britain, as the host country,⁸¹ and the ITC members intended to solve disputes with third parties in an established forum. The British government must have intended to restrict the ITC immunity because it included the requirement in the document that governs the status, privileges and immunities of the ITC in England. The grant of immunity hinged upon the satisfaction of this requirement. Alternatively, the ITC's acquiescence to the clause might have operated as an express waiver of immunity because it subjected the ITC to some body that could impose a binding judgment.⁸² It is unlikely that the United Kingdom intended to permit or that the ITC claimed that the ITC could escape responsibility in its private contracts simply by omitting the mandatory arbitration clause.

2. *Immunity of the ITC Members*

In England, the State Immunity Act of 1978 determines what actions taken by sovereign states are immune from legal process. Generally, sovereign actions of a commercial nature are exempt from immunity.⁸³ The State Immunity Act, therefore, is an inadequate shield for the ITA member states because the types of obligations at issue in this case—namely, loans and tin futures purchases—are unprotected by the exemptions in the Act for two reasons.⁸⁴

First, the State Immunity Act's statutory language specifies that states are not immune from any contractual obligations that are to be partially or completely performed in the United Kingdom.⁸⁵ In the *Maclaine Watson* litigation, both types of obligations—the loans and the purchases of tin futures—were contractual. Circumstances suggest that those ITC contracts were at least partially performed in the United Kingdom. The ITC was headquartered in London and transacted most of its business there.⁸⁶ Although not all of the lending banks were Eng-

⁸¹ ITA 6, *supra* note 1, Art. 16(4).

⁸² Order, *supra* note 71, para. 6(1)(a).

⁸³ State Immunity Act, 1978, *supra* note 71, Art. (3)(1)(a).

Historically, the law of England held that sovereign states were always immune from legal proceedings that could stem from any of their acts. For example, in 1919, the English Court of Appeal held that a trading ship owned by a sovereign could not be held for its ordinary commercial trading debts because the sovereign's immunity extended to cover his commercial activities. The *Porto Alexandre*, 1 Lloyd's Rep. 191 (1919). After the passage of the immunity restrictions in the State Immunity Act, such results were impossible.

⁸⁴ The State Immunity Act, 1978, *supra* note 71, permits immunities when the actions of a government, sovereign, or public official acting for the government relate to the "exercise of sovereign authority" or "the circumstances are such that a State . . . would have been so immune." *Id.* Art. 14.

⁸⁵ *Id.* Art. 3(1)(b).

⁸⁶ Headquarters Agreement, *supra* note 72.

lish, the loan transactions did take place in London.⁸⁷ Additionally, the purchases of tin futures were made on the London Metal Exchange.⁸⁸

Second, the Act, like its U.S. counterpart,⁸⁹ restricts states' immunities to those actions that are the purely governmental fulfillment of political duties, or "*actus imperii*."⁹⁰ Any sovereign's commercial act, or "*actus gestionis*," would not be immune from legal proceedings.⁹¹ However, the distinction between *actus imperii* and *actus gestionis* is not easily made. Thus, the question of immunity remains unclear. The facts surrounding the contracts convincingly indicate that the steps taken to operate the buffer stock, such as loans and futures contracts, were in fact commercial.⁹² The lending institutions were all private banks that made business loans to private clients. Trading activity on the London Metal Exchange can be classified as purely commercial since private individuals and institutions do speculate in all of the metals markets. Perhaps the only distinction that can be made is in the size of the transactions. The ITC did borrow and buy in large amounts. The actual nature of the act, however, should not be affected by the size of the transaction.

The courts of England and other countries have held that the motive behind an act does not determine its commercial nature.⁹³ In a recent House of Lords case, a Cuban state enterprise was sued for breach of contract for failure to deliver a cargo of sugar.⁹⁴ The Cuban government had prevented the ships from docking at their Chilean port of delivery because a 1973 coup in Chile had caused an immediate suspension of Cuban-Chilean diplomatic relations. The important question was whether the recall of the ship was a commercial act or an immune political act. The House of Lords, England's highest judicial body, held that

⁸⁷ *Bankers Beware*, FORBES, Apr. 27, 1987, at 63.

⁸⁸ Cooke, *The Tin Crisis is Rattling The Metals Markets*, BUS. WK, Nov. 25, 1985, at 38; Bartholomew, *Slow Track Planning*, FAR EAST. ECON. REV., Jan. 23, 1986, at 67.

⁸⁹ The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 (1989). The Tate Letter, an advisory opinion from a State Department advisor, stated that the United States would make the distinction between *jure gestionis* and *jure imperii*. 26 DEP'T ST. BULL. 984, 985 (1952).

⁹⁰ These acts are described as "*imperii*." State Immunity Act, 1978, *supra* note 71, Art. 3(3)(c).

⁹¹ *Id.* Art. 3(1). See also C. LEWIS, STATE AND DIPLOMATIC IMMUNITY 14 (1985).

⁹² Another commentator has suggested a different method to distinguish a state's commercial acts from its public acts. Badr suggested that any agreement negotiated between a state and a private entity on "equal footing" that is to have effect outside the state's jurisdiction and enforcement power indicates that the agreement is commercial. G. BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 65-70 (1984) [hereinafter BADR].

⁹³ In *The "I Congresso del Partido"*, the English Court of Appeal referred to the decisions of Austrian, Belgian, Greek, and German courts which had come to the same conclusion. The "*I Congresso del Partido*," [C.A.] 1 Lloyd's Rep. 33, 34 (1980).

⁹⁴ The court noted that in Cuba, commercial activities were handled by semi-independent state enterprises, not private companies.

the Cuban government was not immune because the contract was a commercial obligation breached by the Cuban government. The ordered withdrawal of the ships, though perhaps politically inspired, still resulted in a contractual breach. The government did not exercise any of its sovereign powers in preventing the ship from fulfilling its contractual duties. Any private trading company could have recalled its ship and been liable for breach. The court explained that “[i]f immunity were to be granted the moment that any decision taken by the trading state were to be shown to be not commercially, but politically, inspired, the restrictive theory [of immunity] would almost cease to have any content.”⁹⁵ An act that is purely commercial done for purely political reasons is still considered to be a commercial act for purposes of restrictive immunity.⁹⁶ It follows that loans and tin futures obligations that are commercial in nature should not be immune simply because member states claim political motivations.

Although its stated goals were not explicit,⁹⁷ the ITC was motivated by profit. The law does not require proof of a commercial motive, but it is apparent that the ITC had one.⁹⁸ The states, relying on the stated purposes in ITA 6, might argue that they were motivated by political concerns for an adequate world tin supply and the growth of “developing producing countries.”⁹⁹ Individually, however, each tin producing country was motivated by its own increased earnings. The purpose of the cartel was to maintain a high price to satisfy producers.¹⁰⁰ Some analysts

⁹⁵ The “I Congreso del Partido,” [H.L.] 2 Lloyd’s Rep. 367, 376-77 (1981).

⁹⁶ U.S. courts have issued similar rulings. The U.S. Court of Appeals for the Second Circuit held that a ship charter, ordered by a department of the Government of Spain, to transport wheat to Spain is a commercial act. *Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360-61 (2d Cir. 1964).

See also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1975). The assets of five Cuban cigar manufacturers were nationalized by the Cuban government. The government appointed administrators (interventors) who accepted payment from an importer (Dunhill) for goods sent by the original owners. The payments were owed to the previous owners. The interventors refused to return the money to the importers who were still legally bound to pay the previous owners. The U.S. Supreme Court held that the Cuban government was not immune because the debt owed was commercial no matter what the justification for the original expropriation of the manufacturers’ assets.

⁹⁷ However, the purposes do refer to increasing “export earnings” and fostering the growth of the industry. ITA 6, *supra* note 1, Preamble (a) & (d).

⁹⁸ Through the end of each agreement up through ITA 4, a surplus of funds in the buffer stock account was available for distribution to contributing members. KHÁN, *supra* note 17, at 359.

⁹⁹ ITA 6, *supra* note 1, Art. 1(c).

¹⁰⁰ However, the council determines the tin price together. The consumers and the producers share an equal number of votes, so it is unlikely that the consuming nations would support an extremely high price. *But see Caught in a Tin Box*, *supra* note 23, at 115; McFadden, *supra* note 1, at 819 (reports that consumer nations were also critical of the high prices).

believed that the high price was above the "natural" market price.¹⁰¹ For Malaysia, a major tin producer and an ITA 6 member, "tin was one of the pillars" of its economy.¹⁰² Malaysia is heavily dependent upon its tin industry because it creates domestic employment and is a source of foreign exchange.¹⁰³ Without the promise of a profit, member countries such as Malaysia would not have remained cartel members.¹⁰⁴

The passage of the State Immunity Act could have a major impact on the liabilities of member states because of the commercial activities in which they were involved through the ITC. No liability limitation had existed in the earlier agreements, but during that earlier period, immunity was absolute.¹⁰⁵ The ITA 6 was the first tin agreement enacted after the passage of the State Immunity Act.¹⁰⁶ In fact, since the members enacted ITA 6 four years after the statutory restriction on immunity imposed by the State Immunity Act, it is odd that they neglected to address the immunity issue at all. Other changes were made in the document, so the ITC had an opportunity to resolve that issue.¹⁰⁷ The drafters' failure to respond to the change in England's law might be explained by the members' belief that the stated ITA 6 political motives would confer political immunity upon their commercial acts.

C. Liquidation Procedure

The ITC administered two separate financial accounts authorized by the ITA 6. The first, the buffer stock account, dealt with the finances of the buffer stock operation. A second administrative account, which handled the ITC's operating costs, was financed from required member contributions and borrowed money. In the event of dissolution of the ITA 6, the agreement provided for the liquidation of the two financial accounts.¹⁰⁸ The liquidation, however, was structured differently for each account. If a deficit existed in the administrative account, the ITA 6 required members to supply enough funds to satisfy the full amount of debt incurred in that year.¹⁰⁹ On the other hand, members were not obliged to satisfy buffer stock debts. Deficits in that account were to be

¹⁰¹ *The Tin Cartel is Making a Scrap Heap of the Market*, BUS. WK., Nov. 11, 1985 at 38.

¹⁰² Wassermann, *supra* note 3, at 232.

¹⁰³ Bartholomew, *Free Market Revival*, FAR EAST. ECON. REV., Nov. 13, 1986, at 110.

¹⁰⁴ One year after the collapse, Malaysia had closed 275 of its 500 tin mines. *Id.*

¹⁰⁵ See BADR, *supra* note 92.

¹⁰⁶ The ITA 5 lasted until 1982, when the ITA 6 began. McFadden, *supra* note 1, at 819-21.

¹⁰⁷ Other changes made in ITA 6 included a modification in the export control system, equal sharing of financial responsibility between consumers and producers, and alterations in the administration of the buffer stock. Introduction to ITA 6, *supra* note 1, paras. 17, 20, 26.

¹⁰⁸ *Id.* Art. 26.

¹⁰⁹ *Id.* Art. 20(2).

paid from profits of buffer stock sales.¹¹⁰ This plan failed because banks held all of the tin stock as collateral for loans. The ITA 6 did not establish any alternate plan of buffer stock debt financing.

The distinction in liquidation procedure might be explained by the comparatively smaller debt the administrative account could have accumulated.¹¹¹ Furthermore, the ITC specifically had agreed to relinquish immunity in employee matters because the British government wanted to protect people in employment situations from working for an employer immune from suit. For that reason, the State Immunity Act specifies that “[a] State is not immune as respects proceedings relating to a contract of employment between the state and the individual” where the contract is made and to be performed in the United Kingdom.¹¹² Although the ITC was not a “state,” perhaps it was aware of the United Kingdom’s desire to protect individuals in employment situations. Again, the value of these employment contractual obligations was probably smaller than any buffer stock commitments, so the members were probably indifferent to minimal required contributions for unpaid salaries.

D. Lack of Express Statement

The ITA 6 does not contain any express provisions barring or limiting members’ liability to third-party creditors for buffer stock borrowing.¹¹³ This absence is notable because sixteen of the sixty-four international organizations of which England is a member have included some statement in their charter limiting their liability for debt.¹¹⁴ For example, both the Common Fund for Commodities and the International Institute for Cotton repudiated the idea of liability based on membership in the organization.¹¹⁵ Another four organizations, including two commodity organizations, specifically stated that members were not liable for the organization’s borrowing.¹¹⁶ Some organizations also included warnings to “persons dealing with the international organisation” that the

¹¹⁰ *Id.* Art. 26(3).

¹¹¹ The administrative account included office costs and salaries. *Id.* Art. 17(b).

¹¹² State Immunity Act, 1978, *supra* note 71, § 4(1).

¹¹³ The ITAs had never included such express language. *Maclaine Watson*, [1988] 3 All E.R. at 276.

¹¹⁴ *Id.* at 321-22.

¹¹⁵ *Id.* at 354.

¹¹⁶ These four organizations are: the International Sugar Organisation, U.N. Doc. TD/Sugar.10/11/Rev.1, Art.42(2) (1984); the International Cocoa Agreement 1975, U.N. Pub. TD/COCOA.4.10, Art. 37(5); the U.N. Convention of the Law of the Sea, U.N. Doc. A/CONF.62/121, Art. 172(4) (1982); and the Statute of the International Atomic Energy Agency (1956), Art. XIV (g).

members were not liable for debts.¹¹⁷ Such express language can be assessed by any lending institution or creditor as part of its risk analysis and credit check. Without this language, the creditor would have difficulty in assessing the risk involved in a transaction.

The inclusion of such a clause in the agreement of the International Natural Rubber Organisation may be distinguished from the absence of such a clause in the ITA 6 because the International Rubber Organisation inserted that language only after knowledge of the ITC's difficulties became public.¹¹⁸ However, the language in the International Sugar Agreement, the International Cocoa Agreement, the U.N. Convention of the Law of the Sea, and the International Atomic Energy Agency predated the 1985 tin crisis.¹¹⁹ These early amendments make it evident that considerable doubt about members' liability was fueled by the State Immunity Act.

In any loan, there is always a possibility that a borrower will be unable to repay its debt. That risk of default, combined with an increased possibility of liability, suggests that the ITA 6 drafters could have perceived that the immunity issue needed to be addressed.¹²⁰ Although the ITC had ample opportunity to amend the later versions of the ITA,¹²¹ and other international organization had made such changes in their agreements, the court refused to infer that the absence of a statement indicated that the members "tacitly assumed some obligation to deal with [the buffer stock debts] if it should arise."¹²²

E. Choice of Law

No coherent body of law has developed to resolve disputes concerning international organizations. The *Maclaine Watson* court struggled to resolve the question of the ITC's limited liability under both the English legal system and the international legal system. The justices ultimately decided that international law controlled.

¹¹⁷ *Maclaine Watson*, [1988] 3 All E.R. at 276.

¹¹⁸ International Natural Rubber Organization 1987. *Id.* at 306.

¹¹⁹ See *supra* note 116.

¹²⁰ One interpretation is that the members agreed to undertake compliance with the ITC's obligations under ITA 5, Art. 41(6). KHAN, *supra* note 17, at 365. However, that section does not elaborate on the methods the members are to use to undertake those obligations. Khan assumes, conceivably relying on the absence of contrary language, that the amount borrowed is charged to the buffer stock account but is a charge on the members. *Id.* at 171.

¹²¹ The ITAs were revised every five years. *Id.* at 189-94.

¹²² *Maclaine Watson*, [1988] 3 All E.R. at 304.

1. Limited Liability Under English Law

If English law applied,¹²³ the ITC's members could be liable for the ITC's debts. Although Parliament granted the ITC the "legal capacities of a body corporate,"¹²⁴ the ITC was not a corporation, and it did not enjoy the limited liability of a corporation.¹²⁵ Member states had hoped that recognition of the ITC as a true corporation would shield them from liability as "shareholders" of the ITC. English law does provide a method of creating true corporate bodies by an Act of Parliament.¹²⁶ Three other international organizations, all from the European Economic Community, have been incorporated by treaty.¹²⁷ They are English corporations with all of the ordinary powers. Unlike those organizations, however, the ITC was never incorporated.

Corporations are distinct from bodies with corporate status. The English Parliament has granted the status of "body corporate" to a total of forty-three international organizations.¹²⁸ Corporate status means that the organization has the right to hold property, to make contracts, and to institute legal proceedings.¹²⁹ Limited liability is not included. Of those forty-three organizations, thirty-nine—including the ITC—secured certain privileges and immunities distinguishable from those enjoyed by corporations.¹³⁰ While corporations have the power to sue and be sued,¹³¹ the specially granted immunities protect the organizations from legal process. These thirty-nine organizations, unlike corporate bodies, cannot be sued.¹³² Thus, having corporate status is not equivalent to being a corporation.

Evidence from early in the ITC's history suggests that the body considered itself to be subject to English law. The International Tin Agreement's predecessor, the International Tin Committee (1934), obtained several legal opinions to determine what legal status would best satisfy its

¹²³ The *Maclaine Watson* court believed that the ITC could be subjected to the jurisdiction of the English courts. *Id.* at 303.

¹²⁴ The ITC has the capacity to hold property, to make contracts, and to initiate legal proceedings. ITA, *supra* note 1, Art. 16(1).

¹²⁵ English corporate law provides that creditors' rights are "limited to the wealth of that company alone" and do not extend to the assets of shareholders. R. TRICKER, *CORPORATE GOVERNANCE* 151 (1984).

¹²⁶ 9 HALSBURY'S LAWS OF ENGLAND para. 1247 (4th ed. 1974).

¹²⁷ *Id.* para. 1327.

¹²⁸ *Id.* paras. 1598-99.

¹²⁹ ITA 6, *supra* note 1, Art. 16(1).

¹³⁰ 9 HALSBURY'S LAWS OF ENGLAND paras. 1598-99 (4th ed. 1974).

¹³¹ A corporate body can be sued. 9 HALSBURY'S LAWS OF ENGLAND para. 1382 (4th ed. 1974).

¹³² 18 HALSBURY'S LAWS OF ENGLAND paras. 1597-99 (4th ed. 1974).

needs. One opinion letter recommended incorporation because without it:

[T]he members of the [Buffer Stock] Committee would personally have to act as buyers and sellers of tin, which would involve them individually in personal liabilities; and (in the event of any liquidation resulting from liability to creditors) the members of the committee would personally have to be either plaintiffs or defendants as the case may be. We should therefore advise that a private company should be registered . . . and that all transactions in tin should be effected by and in the name of the company, which will be a corporate body capable of suing and being sued.¹³³

The Committee rejected this legal advice, perhaps because it determined that the risk of liability was insignificant. Alternatively, it is possible that the members avoided incorporating under English law for fear that English incorporation would constitute the ITC's submission to English jurisdiction.¹³⁴ If the ITC were subject to English corporate law, the members who administered the agreement might be personally responsible as officers and directors for ITC actions that were beyond the scope of the ITC's powers, such as the unauthorized buffer stock purchases.¹³⁵

At one point, the Court of Appeal's opinion hinted that members of the ITC could be held liable for its debts despite the existence of sovereign states' immunity. That comment implied that the members might be commercial actors and subject to English law. However, such a belief is not reasonable since the ITC has been recognized as an international body with immunities. None of the governing documents states that the ITC is subject to English law. In fact, the grant of special immunities that explicitly protected it from suit and legal process indicates that the ITC was deliberately immunized from English law. English law cannot control.

2. *Limited Liability Under International Law*

The justices agreed that the ITC, as a supra-national organization,¹³⁶ was not subject to the laws of any particular nation.¹³⁷ Instead, the ITC was governed by international law.¹³⁸ However, because international law governing limited liability for international organizations is

¹³³ Letter to the Secretary of the International Tin Committee (July 24, 1934), *reprinted in* KHAN, *supra* note 17, at 164-65.

¹³⁴ *Maclaine Watson*, [1988] 3 All E.R. at 348.

¹³⁵ 9 HALSBURY'S LAWS OF ENGLAND para. 1344 (4th Ed. 1974).

¹³⁶ A supra-national organization is composed of states that are subject to international law. POLLARD, *supra* note 56, at 286-87.

¹³⁷ *Maclaine Watson*, [1988] 3 All E.R. at 229.

¹³⁸ "In the absence of appropriate machinery for the incorporation of bodies in international law,

unclear, the *Maclaine Watson* court struggled to resolve the issue. The fact that the ITC possessed English corporate powers did not alter its international nature.¹³⁹ However, in the absence of an international legislature to formulate laws accepted by all countries, the court found that no consensus on limited liability existed. The law that does exist is geared toward resolving conflicts between sovereign states, not conflicts between international organizations and private parties.¹⁴⁰ Additionally, no international enforcement apparatus is available to ensure that international organizations satisfy dispute settlements.¹⁴¹

The justices on the *Maclaine Watson* court disagreed about the international rule of law with regard to limited liability for international organizations. Two justices held that no international law required that the members of international organizations expressly limit their liability. Without a positive requirement, the justices held that the absence of an express limitation could not be understood as an admission of liability.¹⁴² On the other hand, the dissenting justice believed that when the rule of international law is unclear, the presiding court can study the works of legal scholars, current international treaties and conventions, and local legislation and judicial decisions to determine what the international rule of law would be.¹⁴³ After making the survey, the dissenting justice concluded that members of international organizations are liable for debts of the organizations unless they specifically limit their liability.¹⁴⁴ Because the ITC members did not expressly limit their liability for ITC debts, the justice found that they intended to be liable.¹⁴⁵ Although the majority found no liability, the uncertainty in this area makes contracting with international organizations hazardous for private parties. Because the House of Lords confirmed the Court of Appeal's decision in this case, it appears that a solution could arise only from diplomatic efforts because "an international solution must be found to an international problem."¹⁴⁶

the existence of such a legal personality results from the recognition of them as such by other subjects" POLLARD, *supra* note 56, at 99.

¹³⁹ The "conferment of municipal legal personality on such institutions would not appear to be of vital juridical significance in determining their status in international law." *Id.* at 98.

¹⁴⁰ *Id.* at 286-87.

¹⁴¹ The absence of a legal system is accompanied by the absence of a judicial one. "By and large . . . international organizations have no supreme court capable of adjudicating constitutional disputes." BOWETT, *supra* note 80, at 363.

¹⁴² *Maclaine Watson*, [1988] 3 All E.R. at 306.

¹⁴³ *Id.* at 324.

¹⁴⁴ *Id.* at 330.

¹⁴⁵ *Id.* at 333.

¹⁴⁶ Hughes, *supra* note 8.

V. CONCLUSION

A. ICAs—A Lack of Focus

International commodities organizations face a fundamental dilemma because members are motivated by a "multiplicity of objectives."¹⁴⁷ Economic goals of higher prices, increased consumption, and larger markets must compete with political goals such as increased domestic employment and fair labor standards that promote domestic stability and economic growth in developing countries. If the political goals are desirable, members should reach a consensus on how to achieve them. If economic subsidies are necessary, the states themselves should find a source of funding. Private creditors of ICAs should not find themselves as the unwilling subsidizers of various national programs. In the tin case, the banks and brokers were left with debts totalling nearly £ 900,000,000. That money was borrowed in order to support the economies of the producing countries. Because the courts so far have determined that the countries have no obligation to repay their debt, the creditors are in effect subsidizing the countries. The bankers' unwillingness to risk such a position could create a profound distrust of such supra-national organizations among private creditors.

B. Creditors' Reactions

Bankers accustomed to doing business with supra-national organizations such as the ITC will probably be more wary when choosing their clients and drafting their documents.¹⁴⁸ Any loan request from an international organization or even a government will evoke the memory of the ITC default.¹⁴⁹ It is likely that credit markets for supra-national organizations will shrink. Additionally, even brokers suspect that the tin history may affect future trading on other commodities.¹⁵⁰

¹⁴⁷ MacBean, *supra* note 13, at 583.

¹⁴⁸ Morris, *Bankers Beware*, FORBES, Apr. 27, 1987, at 63 [hereinafter Morris]; Stoakes, *Put Not Your Trust in Princes*, EUROMONEY, May 1986, at 269; [hereinafter Stoakes].

¹⁴⁹ Morris, *supra* note 148, at 63.

¹⁵⁰ *Transatlantic Victims of Tin's Collapse*, FORTUNE, Apr. 14, 1987, at 78; *see also Stockpile of Illwill*, FAR EAST. ECON. REV., Dec. 24, 1987, at 67; Stoakes, *supra* note 148, at 269.

Banks involved in the ITC crisis have accepted a new responsibility. Since actual tin stocks were the collateral for so many of the defaulted loans, many bankers have had to accept the tin stock in lieu of payments. Since they have no metal trading experience, they have had to learn how the metal markets work. *Free Market Revival*, FAR EAST. ECON. REV., Nov. 13, 1986, at 110. This knowledge is crucial because if any bank attempts to liquidate its tin collateral on the market, the price of tin could fall even further, devaluing the remaining stock held by all the banks.

C. Bankers' Responsibility

Although the courts and public opinion seem to support the moral position of the ITC creditors,¹⁵¹ some people question the extent to which the bankers and brokers bargained for the risk of lending to and contracting with the ITC. One commentator, noting that the ITC loans and forward contracts generated large profits, suggested that lenders anxious for the profits were deliberately less critical of the ITC's risk.¹⁵²

The creditors, however, did have opportunities to evaluate the risk of their contracts with the ITC. The Order in Council and the Headquarters Agreement, which stated the ITC's immunities and the arbitration clause requirement, are public documents. Creditors could have examined them and discovered the exact nature of the risk they were assuming.¹⁵³ Furthermore, in none of the contracts between the ITC and the banks or the brokers were the member countries mentioned.¹⁵⁴ Even if the contracting parties had thought that the states were willing to finance the ITC's debts, no such intent was expressed in the contracts or in ITA 6.¹⁵⁵ Finally, the Bank of England unofficially had warned the brokers on the London Metal Exchange that they should not rely on the government members of the ITC to assume its debts.¹⁵⁶ Considering all of these factors, the banks should not have been surprised when the ITC defaulted and the member countries resisted liability.

The result in *Maclaine Watson* does not establish a strong, fair framework for future cases involving international organizations. With the ever-increasing role of state trading organizations in world trade—especially in communist and developing nations—it is essential to have established legal rules. If liability does not deter international organizations, undesirable and irresponsible behavior by the administrators of these agreements may go unchecked. Even the Court of Appeal in

¹⁵¹ *Maclaine Watson*, [1988] 3 All E.R. at 384; Hermann, *ITC—Cutting Through Twists in Search of Principle*, Fin. Times, May 5, 1988, at 18, col. 5.; *Lessons of the ITC Judgment*, Fin. Times, Apr. 28, 1988, at 16, col. 1; *Tin Council Members Have Moral Obligation to Creditors*, Fin. Times, May 4, 1988, at 14, col. 1; Bleiberg, *Irony in Tin: The Cartel is Dead, But Its Spirit Lives*, BARRON'S, Dec. 8, 1986, at 11; *No Honour in Crisis*, FAR EAST. ECON. REV., Dec. 19, 1985, at 116.

¹⁵² Prest, *supra* note 3.

¹⁵³ Chimni argues that their failure was inexcusable. CHIMNI, *supra* note 24, at 206.

¹⁵⁴ *Maclaine Watson*, [1988] 3 All E.R. at 279; *but see* Kleinwort Benson Ltd. v. Malaysia Mining Corp. Bhd., [1989] 1 W.L.R. 379 (where a Malaysian "letter of comfort" assuring the lender that the state tin trading company would be "at all times in a position to meet its liabilities to you" was not an enforceable contractual obligation); *UK Court Allows Tin Case Appeal*, Fin. Times, Feb. 3, 1989, at 30, col. 4.

¹⁵⁵ *Maclaine Watson*, [1988] 3 All E.R. at 279.

¹⁵⁶ *Bank Warned of ITC Collapse Danger*, METAL BULL., June 17, 1986; *see also* CHIMNI, *supra* note 24, at 201.

Maclaine Watson, having found the member states free from liability, acknowledged that an “inference of gross mismanagement” can be made from the facts of the case.¹⁵⁷ The ITC’s representatives, knowing that they faced no individual liability,¹⁵⁸ may not have been risk-averse with the funds they had borrowed. Under the *Maclaine Watson* decision, member states have no incentive to properly administer any ICA to which they belong. If current international law permits the ITC to omit the arbitration clauses without penalty and to escape liability for the mismanagement of the buffer stock, some significant changes must be devised. This Comment has shown that members’ liability was a possible and desirable alternative to the court’s decision.

The Court of Appeal’s decision, which was upheld in the House of Lords,¹⁵⁹ will change the way banks, brokers, and other private parties contract with international organizations. Obtaining state waivers of immunity to establish liability between the original members and institutions will become essential measures to avoid similar crises.

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¹⁵⁷ *Maclaine Watson*, [1988] 3 All E.R. at 268.

¹⁵⁸ “[R]epresentatives of Member countries of the Council . . . shall enjoy: immunity from suit and legal process in respect of the things done or omitted to be done by them in the exercise of their functions.” Order, *supra* note 71, para. 14(1)(a).

¹⁵⁹ Hughes, *supra* note 8.