PRIME MINISTER

TIN

Legal Liability

The Solicitor General had advised that the brokers could have a "good" chance of winning a suit against HMG for the entire £500 million owed to them by the ITC. Furthermore, we could not rely on the Courts to secure contributions from other ITC members. Our entire negotiating position rests on this judgement so you should satisfy yourself tomorrow that it is not an excessively cautious one.

An alternative view is that the brokers would have an uphill job in sueing HMG for the ITC's liabilities. They would be entering unknown legal territory. Michael Beloff QC, who has advised the Solicitor General on this, could find no authority which deals specifically with a situation where an international body corporate (the ITC), which is given legal status by a statutory order, defaults.

Opinion attached

HMG's defence would be that the ITC is a statutory body with a legal personality. This status was confirmed by the ITC (Immunities and Privileges) Order 1972 (SI 1972/120). Insofar as the ITC acted within its vires, the liabilities of the ITC members would be restricted to contributions which they have already made. Thus in any law suit, if HMG succeeded in establishing that the ITC is a corporate body, the plaintive would have to show that the ITC's liabilities arose from actions which were ultra vires.

What are the ITC's vires? Michael Beloff regards the International Tin Agreement as the legal basis for the vires but under the ITA, the ITC's powers are very wide. Would it be easy to demonstrate the extent that they were exceeded? The ITC definitely exceeded its powers by accumulating a buffer stock of over 63,000 tonnes, whereas the ITA provides only a stock of 39,660 tonnes. But the ITC's undoing was to borrow against this stock in order to buy forward in the hope that when the time came to complete these transactions, the ITC could unload its stock in the spot market at a price sufficient to cover its purchases. This is a risky strategy but the ITA rules do not expressly exclude it. Article 24, concerned with borrowing, allows the Council to borrow "for purposes of the buffer stock ... Such sums as it deems necessary". The ITA is silent on the question of forward commitments.

The ITA clearly assumed that the ITC would not get into difficulties but there is no built-in guarantee against default. Quite the contrary, the ITA contains the seeds of its own destruction. One of its purposes is to sustain, at some periods, a tin price in excess of a free-market level. The ITC is empowered to borrow against the value of its stock but since this stock is bound, in circumstances where the ITC is supporting the tin price, to be over-valued in relation to a free market price of tin, the ITC was likely to get into difficulties at some point if it used its full borrowing powers.

You should enquire what proportion of the ITC's liabilities could be attributed to operations which were ultra vires. We should question the view that the size of the ITC's liabilities reflects, in a simple way, the degree to which the ITC exceeded its powers under the ITA. The ITA itself may have been fundamentally flawed.

Options

All the interventions offered by Leon Brittan look good compared with the do-nothing option, but the latter is described in the most pessimistic terms - total disaster for us in the Courts and an "uncontrolled collapse" in the tin price to £3,500/tonne. Is this a balanced comparison?

The possibility of a partial recovery of the brokers' debts is discussed above. Should we assume that the price would "collapse" only in the do-nothing option? Are we to believe that the same companies, who are apparently seeing sense in trickling their tin stocks onto the market under a government-organised package, are likely to simply to throw their stock into the market if left to themselves? Conversely, if £3,500 is judged to be a free market price, is it realistic to expect the new company, which will take over the ITC's obligations, to prevent the price from falling below £5,000/tonne? Two banks are unwilling to join the package Leon Brittan proposes; won't they undercut the new company, making it more difficult for it to unload its tin?

Finally, should we, alone among ITC members, guarantee a loan (of £50 million) to the new company? Will acceptance of this element expose us to pressure to bale out the company, if it requires additional funding?

Conclusion

The costs of intervention may be higher than has been presented; the cost of doing nothing may be less.

NICHOLAS OWEN

2 January 1986

Opinion by Michael Beloff QC

RE: THE INTERNATIONAL TIN COUNCIL

ADVICE

1. I am asked to advise Her Majesty's Government ("HMG") as to the potential liability of members of the Sixth International Tin Agreement ("ITA6") in respect of various claims that may be made by bankers and/or brokers in respect of transactions ("the transactions") entered into by the buffer stock manager ("BSM") of the International Tin Council ("ITC") on the basis that the ITC may not be liable in law or alternatively (as appears certainly to be the case) lacks the resources to meet such claims. My advice is confined to the liability that might exist in municipal law as interpreted by the High Court. I am not invited to consider what the position might be in international law. The factual position is not yet clear. It is accepted that the Peat Marwick Report dated 8th November 1985 ("PMR") may not present a full or accurate picture.

2. The transactions have been provisionally identified as follows:

> (1) Transactions the effect of which was to increase at any time the tonnage of buffer stock above 39,666 tonnes.
>
> (2) Transactions involving the use of buffer stock held for the purposes of ITA 5 as security for borrowings under ITA 6 ~~semicolon This would also entail a breach of obligation under ITA 5 to those member countries of ITA 5 who are not also member countries of ITA 6~~.
>
> (3) Transactions known as 'special borrowings', that is the acquisition of tin with finance provided by a broker, interest on the loan being paid to the broker in return for his keeping the tin off the market. The tin warrants

are retained by the broker and sold on by him to recover the capital costs. ~~This is not considered to be borrowing for the purposes of the buffer stock~~.

(4) Any unmatched forward transaction in tin (buying forward at a fixed high price, selling forward at the price ruling on settlement day) such that, on the basis of the price ruling at the date of the contract and taking into account any free resources of the ~~Council~~ ITC, the ~~Council~~ ITC would not on that basis be able to meet all its obligations as they fell due.

(5) Where the price of tin is in the lower sector of the range between floor and ceiling prices, operating on any non-recognised market (that is, any market other than London or Penang).

3. There appear to me to be three possible bases for liability of members in these circumstances.

(i) The transactions were intra vires the ITC, and in the absence of any limitation on their liability, the members are personally liable.

(ii) The transactions were ultra vires the ITC, and on a proper analysis of the facts, the transactions were carried out by the BSM on behalf of the members as distinct from the ITC.

(iii) The transactions were ultra vires the ITC, and, on a proper analysis of the facts, the members warranted to the other parties to the transactions that the ITC had authority to enter into the transactions.

I shall examine each potential head of liability in turn after considering the vires issue, which must necessarily be looked at first.

4. The ITC was given, for the purposes of municipal law "the legal capacities of a body corporate" pursuant to the International Tin Council (Immunities and Privileges) Order 1972 SI 1972 No.129 ("the Order") made under the International Organisations Act 1968 ("the Act") (The Order, para.5). "Corporations may be either statutory or non-statutory, and a fundamental distinction exists between the powers and liabilities of the two classes. Statutory corporations have such rights and can do such acts only as are authorised directly or indirectly by th statutes creating them: non-statutory corporations, speaking generally, can do everything that an ordinary individual can do unless restricted directly or indirectly by statute" (Halsburys Laws, 4th ed. Vol.9 para.1326). In my view, in terms of municipal law, the ITC is a statutory corporation, created from that perspective under statute.

5. What acts then is the ITC "authorised directly or indirectly" to do pursuant to the statutory order? There is no provision in the order or elsewhere which specifically described the nature of such authority. However the ~~Council~~ ITC, endowed as stated, with the legal capacities of a body corporate, is identified in the Order as "The International Tin Council... an organisation of which Her Majesty's Government in the United Kingdom and the governments of foreign sovereign powers are members". (The Order para.4). It appears accordingly to me that it is implicit that the Council is only authorised to act as the ITC. The extent of the powers of

the ITC can, in my view, only be derived from ITA6 which established it. In British Airways v. Laker Airways Lord Diplock said "the interpretation of treaties to which the United Kingdom is a party but have not either expressly or by reference been incorporated in English domestic law is not a matter which falls within the interpretative jurisdiction of an English Court of law" (1985 AC 58 at p.86). It appears to me to be strongly arguable that the treaty has 'by reference' been incorporated in English domestic law for the purposes of determining the ambit of the ITC's powers. Any other conclusion would result in there being no means of ascertaining the powers of the ITC in domestic law. ITA6 would certainly have to be interpreted for the purpose of determining its entitlement to various exemptions eg. from taxes (The Order, para.2,8ff); and, although it could be argued that it can be interpreted for those purposes only, I incline to the view that it can be looked at for the purpose under consideration as well.

6. What then are the limits on the powers of the ITC pursuant to ITA6? If ARticle I of ITA6, setting out its objectives, is to be treated as the objects clause of a limited liability company, then its powers are very wide, and any action taken eg. for the objective of preventing "excessive fluctuations in the price of tin" (Article I(b)), which might characterise the aim of the transactions, would be intra vires the ITC (see eg. Rolled Steel Ltd. v. British Steel Corporation (1985) 2 WLR 908 per Slade LJ 939, 946-7, Browne-Wilkinson LJ 954). However I am persuaded that the

analogy is inappropriate. The ITC is endowed quoad powers "with the... powers provided for in this agreement". ITA6 Article 3.1). If this be so, then a Court would construe the entirety of ITC so as to discern the extent of those powers. ITA6 Article 24 (borrowing for buffer stock) and ITA6 Article 28 (operation of the buffer stock) exemplify the relevant limits on the powers. Upon a reasoned construction of those Articles it appears that the transactions are outwith the powers of the ITC. "Forward transactions" per se are manifestly permitted (see eg. ITA6 Article 29.1). But the particular type of forward transaction which has been identified (see para.2(4) above) is not expressly provided for. To establish buffer stock over and above the prescribed size (see Article 21 and Article 22) would also be ultra vires (see para.2(1) above and PMR passum). Borrowing for the buffer stock in a manner not provided for by Article 24 would similarly be ultra vires (see para.2(3) above) (NB Article 24(2) which was not operated). And there is arguably no express or implied power to do that which is embraced by the other transactions (see para.2(2) and (5)).

7. If the views expressed in paragraph 6 be incorrect (i.e. that on a proper construction of ITA6 some or all of the transactions were within its corporate capacity), members may still not be immune from claims either by ITC itself or by persons who seek to enforce an arbitration award made under Article 23 of the Headquarters Agreement ("HQ Agreement") in respect of which the ITC does not enjoy immunity from suit (The Order para.6(1). Under Article 23 of the HQ Agreement the ITC is required in the case of contracts concluded

with persons resident in the United Kingdom or bodies incorporated having their principal place of business in the United Kingdom to include in the relevant instrument an arbitration clause. This clearly embraces LME contracts into which the ITC have entered) "The nature of a corporation may be shown by contrasting it, as a legal conception, with the individuals or mass of individuals in which it resides. In law the individual corporators, or members of which it is composed are something wholly different from the corporation itself; for a corporation is a legal person just as much as an individual. If a man trusts a corporation, he trusts that legal person, and must look to its assets for payment; he can only call upon individual members to contribute if the Act... creating the corporation has so provided ... After the dissolution of a corporation, the members,m in their natural capacities, can neither recover debts which are due to the late corporation or be charged with debts contracted by it." (Halsbury ibid. para.1209. Re Sheffield and South Yorkshire Permanent Building Society (1889) 22 QBD 470 esp. per Cave H. at p.476. Gower Company Law 4th ed. p.100-101). Again it appears to me that the question is: what has been here provided by ITA6, if it has been incorporated into English domestic law (para.5 above). It is at least arguable that it is to be implied the overall scheme of ITA6 that individual members are liable for the ITCs debts (at any rate up to their unpaid contributions) although it is not anywhere expressly so provided. Equally there is no express limitation in ITA6 on members liability.

8. If the views expressesd in paragraph 6 be correct (i.e. that the transactions are ultra vires the ITC), then it is arguable that in sanctioning the transactions, in so far as they did, the members were authorising the BSM as their agent to enter into the same. Absent any immunity from suit in the domestic courts on account of the commercial nature of the transactions, they would be liable as principals. It would be a question of fact as to which members had so authorised the BSM. If the transactions have all occurred within a period after all members had knowledge of what was being done, then they would on this analysis arguably be fixed with liability as principals. "Where two or more persons give authority to an agent, it is presumed that the authority is to act for their joint account only, unless a contrary intention appears from the nature of the terms of the authority, or from the circumstances of the particular case" (Bowstead Agency, 15th ed. p.50). This analysis of the possible basis of members liability would certainly be well founded if the members involved appreciated that what was being done by the BSM was ultra vires the ITC. If they did not, it might ~~be~~ well be argued that they were not constituting themselves as principals of the BSM vis à vis third parties, but rather warrantors that the ITC, as apparent principal, had capacity to enter into the same (see para.9).

9. "As agents of the company, the directors who induce the other party to enter into a contract which the company is incapable of making, may be liable for breach of warranty of authority" (Gore-Browne on Companies 43rd ed. paras.3-9. Pennington Company Law

4th ed. p.553-4). Where a memorandum imposed a limitation on the company's borrowing powers, and the directors continued to borrow after this limit has been exceeded, or where debenture stock issued after the power to do so was exhausted, claims for breach of warranty of authority have been allowed (Chapleo v. Brunswick Building Society (1881) 6 QBD 696. Firbanks Executors v. Humphreys (1886) 18 QBD 54(CA). Mutatis mutandis, it could be argued that the members by permitting the BSM over a period of time to engage in transactions which, upon this hypothesis, were ultra vires the ITC, the members were warranting to third parties that the ITC via the BSM had capacity to engage in such transactions, which might ~~not~~ be within the usual authority of an employee in the BSM's position. The measure of damages would be the difference between the value of the other party's actual rights against the BTC, and the value which those rights would have had had the BTC been bound by the transaction (Pennington op.cit.554. Bowstead op.cit.466). However if the ITC is insolvent, damages may pro tanto be nugatory.

10. I should add for completeness that if the transactions were ultra vires the ITC, I do not consider that ~~third parties~~ members could (if they wished to do so) avail themselves of the provisions of the Companies Act 1985 s.25 for reasons developed in the letter from the Solicitor-General to the DTC dated 6th November 1985.

11. On any basis upon which members might be liable, I consider that each would by necessary implication have rights of contribution against the others, if in any circumstances any one were the object of a successful suit.

12. I should add in conclusion that one is very much in the realm of terra incognita in connection with this whole matter; not simply because the facts are obscure, but because on the basis of my research I can find no authority which deals specifically with the type of problem here under consideration i.e. the consequences in municipal law of the default of an international body corporate, given legal status in municipal law by an instrument in the nature of the order.

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