INTERGOVERNMENTAL COMMODITY REGIMES IN DISREPUTE
LESSONS FROM THE TIN DEBACLE

by

LUDWIG GRAMLICH

Federal Specialized Institution of Higher Learning, Dieburg

I. The End of Commodity Agreements?

1. On 24th October 1985, the Buffer Stock Manager of the International Tin Council (ITC) informed the London Metal Exchange that he no longer had sufficient funds to fulfil the ITC's contractual obligations arising from agreements with the members of the LME. The attempt by the ITC to support the price of the metal had not only exhausted its reserves, it had also forced it to take out loans to the value of around £ 900 m. Sterling.

After the collapse, there were negotiations lasting several months between the ITC member states, with the aim of establishing the right conditions to rescue the International Tin Agreement. However, the efforts proved fruitless.

2. As regards its inadequate operation, the International Tin Agreement is certainly not on its own. OPEC, for instance, has been confronted by problems of this nature for a number of years now, which have forced the Organization to make a variety of modifications to its export and price policies. Other commodity agreements, mainly in the agricultural sector – coffee, cocoa, wheat, sugar – but also the agreement concerning natural rubber – are either ineffective in their operational regulations or, because the contracting parties have recognized this and take account of it, have been "downgraded" to mere information and consultation centres.

3. However, up until very recently, it was precisely the International Tin Agreement(s) which was (were) described as the only agreement(s) between producer and consumer countries that had been really effective and was (were) currently (i.e. in 1980) still in use, though even here some problems had arisen, especially as regards the financing of the buffer stock. What, then, are the reasons for the collapse; and do they typically apply only to this non-agricultural commodity?

---

Author's address: Prof. Dr. Ludwig Gramlich, Fachhochschule des Bundes, Abt. Post- und Fernmeldewesen, Max-Planck-Straße 2, D-6110 Dieburg i. H.
4. Before these questions are dealt with (in section III), it seems necessary to give an outline of the organization and the areas of operation of the various intergovernmental commodity agreements (ICAs) in general, and of the International Tin Agreement in particular (section II). However, precisely in this area of international economic law, two divergent patterns can be distinguished. One of these is based essentially on chapter VI of the Havana Charter\(^8\), whilst the other must be regarded as an integral component of the proposals for a "New World Economic Order", for which reason it has found acceptance in non-global, multilateral agreements concerning North-South relationships, i.e. in the relationships between the EC and the ACP countries\(^9\).

5. However, the events preceding and surrounding UNCTAD VII (1987) do make it seem probable that the "Common Fund" - and thus the mechanism of an "integrated commodity programme"\(^10\) will soon - at last - come into existence\(^11\). Whether, however, the new organization will have more than just a paper existence, pivots upon the operation of the individual commodity agreements which will be included in it. Therefore, the same question applies to the whole as to the parts: What is the use of (and who benefits from) an ICA - which is legally still intact - and what place does it have in today's world economic order? A provisional answer will be attempted at the conclusion of these deliberations (section V).

II. The History and Operation of Intergovernmental Commodity Agreements

1. Whilst the first agreements were made as far back as the second half of the last century, with the aim of putting the sugar-producing countries onto a similar competitive footing, attempts to stabilize the (export) prices of certain commodities by private, and also, increasingly, inter-government agreements date back to the period after 1918\(^12\). The agreements which were made at that time related not least to the tin market, the regulation of which had already been initiated by several agreements between the major producer countries in the early thirties, and the regulation mechanisms contained in these are, to a large degree, similar to those contained in the more recent international treaties concluded after 1945\(^13\).

2. The argument that there is a need for a universal consensus about the fundamental necessity of a commodity policy, and that, in this area, the peculiarities of production and marketing make government intervention not an obstacle to free(r) international trade, but a precondition for it, was not even disputed by the USA in its proposals for the post-war reconstruction of the world economy, as developed on the basis of the Atlantic Charter\(^14\) \(^15\). On the other hand, an analysis of the practical operation of the agreements to date seemed to confirm the conclusion that serious abuses would not be able to be
eliminated, even if overdue structural modifications were made. The concepts which permeated the preliminary discussions for an “International Trade Organization” thus centred around the exceptional and fixed-term nature of any intergovernmental agreements which would be made for the regulation of the trade in commodities. These ideas also predominate in the formulated draft treaty: one central aspect is the fair and equal participation of producer and consumer, exporting and importing countries in every regulatory intervention (Art. 60 [1] [d]. A further one is the differentiation between the “other” raw materials agreements to be agreed with less restrictive conditions, and the restrictive “control” agreements (Art. 61 [1], which were declared to be permissible only under exceptional circumstances (Art. 62 ff.). However, both of these goals were subordinated to the central aim of ensuring a long-term balance between the market forces of supply and demand (Art. 57 [c])

3. The middle way adopted by the terms of the Havana Charter, between the rejection of any market regulation on the one hand, and the support for a multilateral, intergovernmental regulation of the commodity trade on the other, in that they involved neither the prohibition nor the promotion of relevant agreements (cf. Art. 55), but were restricted primarily to measures for the prevention of abuse, was not immediately followed, because the signing of the Final Act of the UN Conference for Trade and Employment on 24. 3. 1948 was not followed by sufficient ITO ratifications. The United States proved to be the central block on this organization coming into being – only GATT avoided the fate of being stillborn. On the other hand, the central concept put forward in the Havana Charter continued for a long time – right into the seventies – to exert a strong influence on the individual ICAs which were negotiated in subsequent years.

4. Considerable shifts in emphasis in all these points did not occur until the UNCTAD started to become involved with the problems of the international commodity markets in 1964. In the General and Specific Principles which were decided at the 1st UNCTAD conference, the aim for (an increase and) stability of prices within the framework of intergovernmental co-operation remained a central principle. However, there were signs of a change in the demands made on the (market-orientated) industrialized countries to take sufficient account of the demands of the developing countries for fair opportunities and prices for their exports and to make efforts to ameliorate any disadvantages arising from substitution (synthetic products). Such demands continued to increase in intensity, with the ultimate aim of enshrining them in agreements which were binding in international law. Since individual agreements for each commodity did not come into being in any great number, or bear any (financial) fruits for the producer countries (in fact, on the contrary, they became less and less effective and gave rise to fundamental doubts – the
Secretary General of UNCTAD, Corea, put forward a multidimensional concept in 1974: the "Integrated Programme for Commodities".

It is hardly coincidental that this proposal was made shortly after the Sixth Extraordinary General Assembly of the UN – with its declaration on the establishment of a "New International Economic Order" and the demands made there, and in the accompanying Action Programme, for commodity policy to be tied into development policy – and shortly before the adoption by the UN General Assembly of the "Charter of Economic Rights and Duties of States". This document, probably the most important in respect of the "New International Economic Order", broke with traditional international (law) practice – despite the view of most Western industrialized countries – at least in two aspects. In the first place, Article 5 (sentence 1) not only recognizes the right of all states to establish commodity producer’s organizations in order to develop their economies, achieve stable financing for this, and contribute to the pursuit of these objectives by promoting steady economic growth – provisions which particularly benefit the developing countries –, but, in sentence 2, lays down a corresponding obligation to refrain from any economic or political measures to curtail this right. In the second place, Art. 28 contains the obligation to co-operate in establishing mechanisms for adjusting the export prices of developing countries to their import prices, in order to work towards fair and just terms of trade for these countries in a way that is profitable for the producers, and fair for the consumers. Article 6 pales by comparison to this, providing for the government obligation to expand international trade mainly by concluding multilateral commodity agreements (sentence 1), though with the provision: "where necessary". Due recognition should be given to the fact that the interests of both the producers and the consumers are referred to here, in view of the particular demands of the developing countries (sentence 2), especially because of the mutual references of all of the Charter provisions in accordance with Art. 33 (2).

5. Even when, at the end of UNCTAD IV, the IPC was voted in (Res. 93 [IV]), its "philosophy" could virtually only gain any acceptance in the establishment of negotiations in areas where there had previously been no ICAs. Organizations which included only producer-countries had already existed previously, but even OPEC still did not manage to gather all producers – at least from the third world countries – into one association. In 1963, the IMF had already provided a facility for the compensatory financing of losses of export profits, and in 1969, further special drawing facilities were added, specifically for commodity buffer stocks. Both the hurdles in the way of taking these drawing facilities, and the amounts available – which were anyway repayable in the short-term, or at the latest in the medium term – disappointed the expectations of the recipients.
The consequences of the approach towards ordered markets matured first of all in the foreign relations of the EC and its member states with the countries of Africa, the Caribbean and the Pacific, with which they had particularly strong links. The very first Lomé Agreement established a “system to guarantee the stabilization of export earnings” – concerning exports of such products from ACP countries to the Community, upon which the economies of these developing countries are “dependent” and are “affected by fluctuations in the price and/or volume” (Art. 16). Certainly, the aid from the Northern partner initially only covered listed agricultural and forestry products, with the exception of iron ore (Art. 17). “Stabex” provisions were also made in the 2nd Lomé Agreement, though the spectrum of commodities included was considerably widened (Art. 25), and consequentially also more funds provided for intervention (cf. Art. 31 with Art. 18–550 m. against 375 m. ECU). However, the second EC/ACP convention also broke new ground, in that Art. 49 created a new system for those signatories from the Southern group who were largely economically dependent on the mining sector, and once again it was mainly to overcome the export (earnings) problem, “in order to counteract the harmful effects on the income of producers, arising from uncontrollable, serious occasional disruptions of the mining industry.” In addition to copper, phosphates, manganese, bauxite and aluminium, and iron ore, “Sysmin” also included tin (Art. 50). Finally, Lomé 3 intensified co-operation in the commodity area, both as regards agricultural products (and sugar) – Art. 147 ff., 175 – and in the particular financing facility for mining products. The statement of objectives at the start of chapter 3 of title II (Art. 176) does, however, show that even within the organizational framework, the rebuilding of a mining industry has now become much more important than the “mere” remedying of disruptions in this sector. Having not even been mentioned in the preceding Agreement text, by 1985 this objective had moved into first place.

6. The Community model, however, was very little in common with the classic ICAs. Whilst there is the same fundamental aim of counteracting instability, the main emphasis is on export earnings, and thus on the one group of the countries involved in the international commodity trade. But this objective fits into a wider development context of financial transfer: “Stabex” and “Sysmin” are intended to help the producer countries benefitting from them to overcome one of the major obstacles in the way of steady, profitable and lasting economic growth, to secure the economic and social advancement of their population. In this, there is some degree of congruence with elements of the IPC, especially with figs. I.1., 2., 3. and III.2.(f.) of Resolution 93 (IV). On the other hand, the other central demand of the IPC for a (market-independent) increase in export earnings (figs. I., before 1. and 2.) has not been
taken up by the Lomé Conventions. As regards functions, it should not be
overlooked that wide-ranging (economic) co-operation is being striven for in
EC-ACP relationships. Co-operation in the commodities field is not, then,
confined to opening up lines of credit, to the current value of 925 m. (Art. 152)
and 415 m. (Art. 178) ECU, but also involves the liberalizing of imports (cf.
Art. 130) so that new markets are opened to the products of developing
countries, thus realizing a concept which is presumably welcomed by all
sides. However, both product-related systems simply latch on to the (negative)
results of previous years, arising from events on the international com-
modity markets which affected the (ACP) producer countries. They have an
indirect intervention effect in the market by allowing the weaker players/
exporters to have a greater scope for participation, and thus avoid a situation
in which the countries concerned (are forced to) resort to direct trade
regulation or restriction measures. To this extent, there is something of a
parallel with the IMF facilities.

With regard to the organization for implementing the objectives of the
agreement, it is sufficient to point out that in the Common Commodity Fund,
as elsewhere, the formal sovereign equality of states has had to cede to the
principle, which is widely used in international financial and economic organi-
zations, of weighted voting in the central organs (Arts. 21, 23). In this point,
the composition of the institutions of the Lomé Convention (cf. simply Art.
22 ff. of the 3rd Agreement), with a 50-50 weighting of each group of
countries, has proved to be an ideal middle way, which has now also found
favour at the global level.

7. The objectives set down in Art. 1 of the first International Tin Agree-
ment, concluded on 9.12.1953, between 6 producer and 14 consumer
countries, had been foreshadowed in the Havana Charter, partly in general
terms, and partly pointing to regulatory agreements: the prevention, or at least
reduction, of unemployment and other serious difficulties which can be
expected when there is a wide gap between supply and demand (letter [a]; see
Art. 57 [a], 62 [b] HCh); the prevention of exaggerated price fluctuations and
the achievement of price stability at a fair level, on a basis which will ensure a
long-term balance between supply and demand ([b]; see Art. 57 [c] HCh);
constant availability of sufficient supplies at acceptable prices ([c]; see Art. 63
[a] HCh); finally a framework for measures to promote more economic
production, but at the same time protecting reserves from over-mining ([d];
see Art. 63 [b] HCh).

Whilst the second agreement followed this fairly closely, the third one,
signed on 14.4.1965, already reflects the ideas and formulations of UNCTAD
I. In particular, Art. I (c) now emphasizes the need to make provisions "which
help to maintain and increase the earnings from the export of tin, especially
those of the tin-producing developing countries, and thus contribute to the provision of these countries with the necessary means to accelerate economic growth and social development, whilst at the same time considering the interests of consumers in the importing countries.\textsuperscript{50} Then, ten years later, there was a note, for the first time, of the rôle "which the International Tin Agreement can play in the creation of a New International Economic Order" (letter [b])\textsuperscript{51}. At the same time, two new objectives were added to the existing ones: "to promote increasing use of tin and increased domestic processing, especially in those tin-producing countries which are in the development stage" (Art. 1 [f]), and "to promote the expansion of the tin market in tin-producing countries which are in the development stage, so that they can have a greater share of the proceeds of tin sales" (letter [k])\textsuperscript{52}. The sixth, and as yet last, International Tin Agreement left it at this.

It is noteworthy that after 1965, even those objectives which were (still) central, were extended considerably. The aim of balance between world production and world consumption, and of minimizing serious problems resulting from an over- or undersupply, has been extended since 1975 to include even the mere expectation of over- or undersupply (Art. I [a]), and from an even earlier stage, since 1970, efforts have been directed not only toward preventing excessive fluctuations of the tin price, but also specifically against fluctuations of the relevant export earnings\textsuperscript{53}.

8. Following the treaties of the thirties*, the parties to the first Agreement saw the necessity for regulatory provisions, in that they recognized (Preamble [a]) "the enormous importance of tin for several countries", because they "depend to a high degree on favourable and fair conditions for the production, consumption and trading of tin". As regards technical implementation, Art. 61 (2) HCh had provided for either the regulation of production, or a control of the volume of imports and exports – with the intention, or (possible) effect, of cutting back (or preventing a rise in) production and trade (letter [a]) – or for the regulation of the price (letter [b]). In the case of tin, a "buffer stock" – initially in the guise of a "price regulation reserve"\textsuperscript{54} – was established as the central mechanism (Art. VIII), with contributions – at least a quarter in cash – coming only from the producer countries. A manager was installed to buy, sell and hold stock (Art. IX). It was his responsibility to undertake the necessary transactions to keep the price of the metal within a range which was initially set by international treaty (Art. VI (2)), and afterwards could be redefined by the International Tin Council (Art. VI (3)). In addition, the International Tin Council, as the central organ of the new international organization (Art. IV), was "from time to time to determine the volumes of tin which could be exported by the producer countries, in accordance with the provisions of this article" (Art. VII (1) 1), bearing in mind the task of "adjusting supply to
demand, and thus holding the tin price between the floor and ceiling price” (ibid., p. 2, appended to Art. I (b)). In addition to these export quotas, and borrowing from their regulatory framework, Art. XII provided for a control of production by restricting permissible stocks in the producer countries to a maximum of a quarter of the export volume of the preceding 12 months. Further (restrictive) provisions were permissible in the case of an (approaching) shortage (Art. XII; see also preamble, letter (e)), and the participating states further declared “that in order to avoid a fall in living standards and the introduction of unfair competitive conditions in international trade, they will strive to guarantee fair working conditions in the tin industry” (Art. XV)\(^55\).

The implementation of the provisions of the agreement and the monitoring of their effective operation was the task of the International Tin Council, with its headquarters in London (Art. IV A (1)). The producer and consumer countries each had 1,000 votes on the Council (ibid., C (12)); each member state had a minimum of five basic votes and these were topped up on the basis of the country’s economic importance with regard to this commodity\(^56\). Decisions were taken by a simple majority, and a high quorum (Art. IV B (10)) ensured that decisions were supported by both sides. The two vice chairmen also had to be elected from the two separate sides (ibid., A (5)); the election of the chairman, however, needed a separate two thirds majority\(^57\) (ibid., A (3) (a)). In accordance with Art. IV A (6), the Council was charged with nominating the manager of the buffer stock. The latter was directly responsible only to the Council Chairman in the execution of his duties laid down in the agreement, and was not allowed “to request or receive” any directive with regard to his management “from any government, person or authority other than the Council, or persons . . . acting on its behalf” (ibis., A (7)). In addition, he was barred from having any financial interest in the tin industry or the trade in tin. Finally, the ITC was granted privileges and immunities (Art. IV E): it was, from the outset, “to be allowed sufficient freedom to operate in every member country, within the scope of the relevant laws, as is necessary to carry out its function as laid down in this Agreement” (ibid., (21))\(^58\). This structure thus also conformed with the Havana model, primarily in Arts. 60 (b), 63 (b) and 64 of the Charter\(^59\).

9. The methods of regulation and the organization of the first Agreement were largely retained. The maximum capacity of the buffer stock was, however, already reduced in the second Agreement by one fifth, to 20,000 t.\(^60\), and the span between the floor and ceiling prices was explicitly divided into three zones (Art. VI (3)), with specific action to be taken by the manager in each zone (Art. IX (2)). In the fourth Agreement, the rules on the operation of the buffer stock (Art. 25) are amended by powers given to the Council Assembly and its (managing)\(^61\) chairman (Art. 27) to restrict, or even suspend, specific, or
even all, operations of the buffer stock. Compulsory contributions are still required only from the producer countries (Art. 21), but the consumer countries, and even outsiders, may make voluntary contributions (Art. 22).

From external appearances, the fifth Agreement (1975) represented a certain break with the past, though from a content point of view, little was changed. However, the ITC was now given powers to take out loans for (amongst other things) the buffer stock account (Art. 7 (d)), though Art. 24 set down strict conditions, in particular the qualified assent of the two groups of member states. All expenses which were exclusively attributable to buffer stock operation, were to be paid by the manager through this account (Art. 6 (a) (iii)). The funds of the buffer stock consisted of the compulsory contributions of the producers (Art. 21), together with any additional contributions by the consumer countries (Art. 22); they could be supplemented by taking out loans on the money markets and by the facilities provided in Art. 24 (Art. 20 (b)). Art. 28 (c) (v) instructed the manager, in the event of the market price for tin (letter (b)) reaching, or falling below, the floor price (see Art. 27), and to the extent that he had no contrary instructions from the Council, and had sufficient funds available, and with the reservation of the possible restriction or suspension of the operation of the buffer stock in accordance with Arts. 28 or 31, to enter the recognized markets (Art. 28 (d)) as a buyer of tin at the floor price, even if this led to the bitter end of illiquidity. The fifth Agreement also clearly stated (Art. 15 (d)) that the legal position and the privileges and immunities of the ITC on the sovereign territory of the United Kingdom continued to be regulated by the Headquarters Agreement of 9. 2. 1972.

The provisions of the sixth International Tin Agreement, of 1982, differ in one essential point. With regard to the borrowing powers of the Council, it now simply stated (Arts. 7 (b), 24) that this was permissible against the provision of tin warrants as securities if the Council deemed this to be necessary: even the content and conditions of borrowing were (now) subject only to approval by the ITC, with a separate simple majority in accordance with Art. 15 (2). The provisions of Art. 28, on the other hand, remained unchanged. Chapter VII, dealing with privileges and immunities, finally, omitted, in its single article, to point to the existing headquarters agreement, and simply stated in general terms the applicability of such an agreement between the host country – no longer necessarily the UK (cf. Art. 2 (2), (3)) – and the International Tin Council (Art. 16 (4)). The previous (fifth) Agreement had already – also in Art. 30 (2) – given the buffer stock manager enabling powers to sell a sufficient quantity of tin at the daily price, on behalf of the Council, if, and as long as, he did not have sufficient funds to cover his operating costs. As the rules relating to such a liquidation of the buffer stock make clear (Arts. 25 and 26), such “other operations” (can) take place in
addition to the regular activities of the manager. In the case of dissolution, particularly where loan repayments must be met, there is a provision empowering the manager to sell sufficient tin to accumulate the necessary additional funds, the Council deciding on the time-scale and the amount.

10. The sixth Agreement provided for a basic “normal” buffer stock of 30,000 t. of tin, financed by the contributions of the government signatories – for the first time, the consumer countries were also required to make contributions (Art. 22 (1)) and a supplementary stock of a further 20,000 t. This was to be financed by borrowing, drawn against tin warrants as security and, where necessary, guarantees (of the member states) (Art. 21, together with Art. 2, 4). However, the actual contributions amounted to only 20,000 t.

The price framework, which remained in three stages, spread over a range of 30% of the floor price (Art. 27 (1)). In accordance with Art. 27 (2) and (4), the floor and ceiling prices were based on those obtaining on the expiry of the fifth Agreement; these were simply continued, pending being newly fixed by the ITC – which never happened. The floor and ceiling prices are given in Malaysian currency – the Ringgit – the external value of which is determined on the basis of a basket of currencies of its major trading partners. The Agreement still failed to determine (cf. Art. 28 (3)) what types of transaction the buffer stock manager was allowed to enter into to stabilize prices; on the contrary, he was to some extent still allowed to play the futures markets (Art. 28 (5)).

In accordance with chapter XIV, export restrictions were in place from the time the Agreement came into force. However, they were not very effective, since neither Bolivia nor the USA were signatories to the sixth Agreement, and other third party producers were also able to achieve considerable rates of increase in production.

There were two factors which were mainly instrumental in the development of the acute crisis in intergovernmental tin regulation: the economic recession in (industrialized) consumer countries, which accelerated the rate of slowdown in demand for commodities, and the steady rate of increase in the production of tin, which was, at the very least, not discouraged by the strength of the US Dollar on the money markets. The increase in value of the world’s number one reserve currency against Sterling, the currency used on the London Metal Exchange, and therefore also by the ITC, led, in view of the close US Dollar/Ringgit relationship, to a constant increase in the tin price in Sterling. At the same time, though, there was no revision of the initial floor price. Whatever the reasons may have been – whether the buffer stock manager did not always use entirely above-board methods of transaction and/or did not co-operate sufficiently with the related organs, the International Tin Council and its Buffer Finance Committee (Art. 9 (c)), so that as a result he did not institute...
counter-measures in accordance with Art. 29 in time — permission not to have to intervene automatically in the market (Art. 28 (3) (e)), even if the tin price dropped below the floor price, was not forthcoming until too late, in the summer of 1985. The end came with a certain amount of inevitability, at a time when the US$ was rapidly losing value, which did not make the oversupply of tin disappear, but merely (!) led to a drastic fall in the price of tin.76

By the end, the buffer stock had risen to over 63,000 t., but was faced by immense debts. Had all of the futures transactions run their course, then this stock would have been increased by several tens of thousand tonnes — and thus reached approximately the level of the stocks of all of the producer countries, or even of the US strategic reserve (120,000 t.)78.

In 1986, the International Tin Council liquidated the buffer stock after some creditors agreed to accept repayment of debts in kind79. This, though, was only the beginning of the legal disputes over who was actually responsible (and to what extent) for the outstanding liabilities of the organization (see below: IV.).

III. The Domestic Basis and Effects of a Commodity Regime – Tin

1. Since tin started to be transported and traded internationally, the international tin markets have always been subject to extreme price fluctuations, the attenuation of which has been the major objective of international co-operation in this sector from the very beginning. The reasons for this need for stabilizing intervention are obvious. On the production side, the number of countries with minable tin reserves was very small and restricted to very few, remote regions, primarily South East Asia and South America; some major producers, such as Indonesia and Malaysia, were granted independence only after 194550. With the exception of the USSR and Australia, and to some extent also the United Kingdom, the producers are developing countries with very different political systems and at different stages of socio-economic development. Recently, China and Brazil, which have not so far been signatories to the International Tin Agreements, have achieved considerable increases in production. Tin is not a major element in the trade balance, or even of the raw materials exports, of all of the producer countries. However, it is the case that the fate of Bolivia is, to a very large extent, dependent on the development of tin export prices51. In Malaysia, too, the world’s largest producer, the prosperity of the population stands and falls not only on export earnings from natural rubber, tropical timber, palm oil and petroleum, but also on earnings from tin.

2. Precisely in the “classic” producer countries of the tropics, the foreign economic aspect is thus (frequently) pushed into the background, behind domestic political and economic considerations. Because of the importance of tin exports for the national economy, the organization of production and not
least the situation of the employees are of immense importance. However, not all producer countries have taken the radical step of taking the mining, processing and/or marketing of the metal into their own hands, i.e. charging nationalized industries with these tasks and banning private sector domestic and foreign competitors from any (parallel) activity, or even nationalizing existing companies. It is true that the regulations governing (mineral) resources everywhere in the world are judged from the historical perspective of mining. At least this applies in the (toned-down) sense that there are special rules governing mines and mining, not least with regard to the appropriation of the minerals produced.

A (mere) licence system within the framework of mostly refined legal regulations, the traditional model for large scale investment - not only in the mining sector - can, however, only be considered in those cases where legal regulations and a functioning state administration make such graduated problem-solving possible. In addition, the operation must be capable of properly utilizing private finance, if not from domestic entrepreneurs/lenders, then from foreign ones. However, if production and/or processing is not (also) to be left to a transnational corporation or a foreign-dominated bank consortium, then precisely the developing countries have hardly any other option than to run the industries through their own nationalized companies, because only the sovereign state itself is capable of raising the necessary finance. It is clear, that in doing this, considerable sums will be raised on foreign and international money markets in the way of foreign direct investment, so that in the last analysis continuing sovereignty over natural resources once again depends (indirectly) on the access to foreign funds of private transnational powers, something that was and is possible only for a very few third world countries. This fact clearly highlights the interdependence of the international economy, something which is also evident in the multi-dimensionality of transnational rules - their relationships in international law are often just as diffuse as their regulatory character. Of course, in project finance, at least in the majority of cases, a project has to be realized, in the long or short term, which is self-regenerating, so that the influx of finance does not constantly increase the foreign debt of the borrowing country, but, on the contrary, can and should contribute to the reduction of this.

3. Whilst deposits of mineral resources can thus have a lasting impact in shaping the (unstable) economic sovereignty especially of developing countries, particularly when no enclave economy of a state within a state has been created, the effect is by no means restricted to the economy. On the income side of the budget, for instance, there is the creation of new revenue: export and licence levies, sums to be paid by state-controlled firms etc., all of which
provides a major part of the pre-requisites for being able to pursue diversified development policies. Infrastructural measures are also possible, to the extent that they have not already been undertaken by the project bearers. Production creates (and maintains) jobs in the area of operations and in supplier companies of every hue, not least in the producer state. The tin workers of Bolivia represent(ed) something of a prominent force in that country, partly because of their stable unionization. The conflict between a few tin barons and the poorly paid mineworkers who worked under shocking conditions came to an explosive head in the revolution of 1952. It led to the nationalization of tin mining and the introduction of universal adult suffrage, and established the rôle of this group of workers in modern Bolivian society. Here too, though, the price collapse in the autumn of 1985 led to more than a noticeable loss of revenue: the lack of competitiveness of the “old” tin production in Bolivia in comparison to newcomers in this sector soon resulted in mass job-losses in the state company COMIBOL, as in the rest of the economy. The new/old President, Paz Estenssoro, is making efforts to regain economic stability by a (partial) re-privatization of state companies and other forms of retreat of the public sector from welfare tasks, in conformity with the conditions of the IMF.

It currently appears as though another metal – silver – will (once again) take over from tin as the primary export product – a poor consolation for the umpteen thousand unemployed in Potosí and other mining towns in Bolivia.

4. The wider range of commodities produced in Malaysia spared it from a similar critical situation. However, the tin-price collapse of 1985 also suddenly put this ASEAN member into a negative growth situation. A quick response of this federal state naturally had to take account of the “New Economic Policy”, which was intended to remove the inequality between the ethnic groups of Malays, Chinese and Indians, and close the gap in the political and economic rôle in the interests of the largest ethnic group, the Malays (“Bumiputra”). This kind of intervention disrupts a favourable investment climate, just as do suspicions of fundamentalist Islamic tendencies coming to the fore. Nevertheless, Malaysia can be seen to be showing concern to improve the legal framework for foreign (direct) investments, especially by allowing foreign majority participation up to 100% (in companies of whose production at least four fifths is determined for export), by extended residence permits for foreign managers and by tax incentives, but also in the form of wages which are still relatively low. In contrast to Bolivia (and many other tin-producing countries), mining is not carried on by state-owned companies, but by private sector companies, which merely require a licence. Thus, the regulatory structure left by the former colonial power has remained fundamentally intact, whilst in the oil sector, by contrast, a “state oil corporation” was set up. Moreover, in the capital, Kuala Lumpur, there is a commodities exchange.
tin market there is (once again) functioning and the exchange has even decided to introduce dealing in tin futures\textsuperscript{104}.

5. The major producer countries were parties to the International Tin Agreements right from the start; it was only in the sixth Agreement that Bolivia ceased to participate\textsuperscript{105}. In addition, seven producer countries have been working together since 1983 in an "Association of Tin-Producing Countries"\textsuperscript{106}. In addition to Malaysia, Bolivia and Thailand, these are Indonesia, Nigeria, Zaire and Australia, which together account for half of world production. In order to reconstruct the market, these seven countries agreed in 1987 to (temporary) export restrictions and, to supplement this, to measures for combatting smuggling. Similar obligations were also accepted by the third party countries, Brazil and China.

6. If all these circumstances and factors are considered, then it is amazing that any intergovernmental regulation of the tin market managed to function at all in a passable manner, bearing in mind that the already divergent interests of producer and consumer countries are partially overlapped by the North/South problems of development co-operation, and besides are to a large degree dependent on domestic economic and technical processes, which allow only a certain level of market operation. However, to the extent that there is still any room for the interaction of supply and demand beyond extra-economic intervention, the regulation mechanism of the International Tin Agreement makes it possible particularly for states to engage in politically motivated buying or selling and tolerable distortions, which cannot be accepted unseen by the other parties\textsuperscript{107}. The organization of the international tin trade is thus shown to be a concept of the lowest common denominator. Of course, the disputes following the price debacle in the autumn of 1985 showed that the underlying thought behind this association might have had something to do with the limitation of liability: when and while ever there is any market regulation within the framework of (multilateral) treaties, and sovereign states are involved in market operations, their behaviour enters something of a legal twilight zone. On the one hand, the states cannot strip themselves of their particular nature even when, on a co-operative level, they conclude treaties with private parties and fulfil these, or in some cases do not, or only poorly\textsuperscript{108}. On the other hand, they make use of the same types of action as natural persons and other private legal entities, often compete with these, and more and more frequently it is unclear – at least at first sight – whether a commercial transaction is taking place with a state (in whatever form of organizational derivation) or not\textsuperscript{109}.

In most Western states, at any rate, cartels and trusts etc. are prohibited\textsuperscript{110}. Restrictions on competition are also being eliminated by external and supranational regulations, especially by EC rules\textsuperscript{111}. However, this rejection is not
only rare in general international law, but – as the Charter 1974 and the practice of “producer-cartels” shows – associations of this kind are limited only by the fundamental principles of the UN Charter: the commodity “weapon” may conflict with the prohibition of intervention, but can scarcely be said to conflict with the prohibition of force.

Did then, accordingly, several concepts – all based on state sovereignty – fuse together in the ITC (and in other commodity agreements) into a kind of armour, behind which, protected from serious damage, forces which were hostile to the market could safely act, with only the danger of losing their stake money – by having to sell off their contributions cheaply – at any price – in the event of liquidation? The damage would then be borne by all the dealers whose activity provides the very point for implementing facilities for price stabilization. For the idea that they would be able to obtain compensation from the state on whose exchange the transaction was carried out is indeed a theoretically charming idea, but the realization of such a claim comes up against virtually insurmountable difficulties.

IV. The Immunity of Intergovernmental (Commodity) Organizations

In court, the events surrounding the tin price débâcle involved several individual strands. On the one hand, exchange dealers were challenging the decision of the Council of the London Metal Exchange to fix a liquidation price of £6,250 for the contracts which were still open on c. 60,000 t. of tin, roughly corresponding to the market price at the time. Secondly, a creditor bank was seeking repayment of a revolving credit of £10 million, which it had originally granted to the ITC in 1982. In this case, the plaintiff was able to point to a stipulation that the contract was subject to English law, and that the defendant irrevocably accepted the non-exclusive jurisdiction of the High Court and also agreed to the initiation of any legal proceedings against it. Then, in early September 1986, a group of 11 LME dealers applied for the compulsory liquidation of the ITC, with the actual intention of bringing actions against the member states of the organization. Some creditor banks then attempted to bypass the ITC and demanded that the treaty signatories themselves (and the EC) should meet the debts of the ITC vis-à-vis the banks. Finally, several brokers got arbitral awards, in accordance with the rules of the LME, and then sought to gain enforcement of these by the Court.

2. This case clearly highlighted the weaknesses of self-regulation which has (had) a long tradition in the stock market and financial sectors in the UK. Sufficient transparency and effective supervision can be established and guaranteed only within a government-sponsored regulatory framework.
3. At the heart of the controversy is the question of the type and extent of the immunity of the International Tin Council from the jurisdiction of a (member) state. Only if it can be shown not to exist (in concrete terms) is there any hope of success resulting from legal action, for this is all interwoven with the problem of piercing the corporate veil\textsuperscript{124}, just as court proceedings against governments also come up against the hurdle of sovereign immunity.

4. Since 1970, the International Tin Agreements – like other commodity agreements\textsuperscript{125} – do not actually delineate the privileges and immunities of the International Tin Council, but (simply) assign legal personality to this central organ (Art. 16 [1] 1). If the existence of the organization-person thus (also) has its basis in international law, its demise can hardly be brought about in the same way as is the case for a legal person in domestic private law\textsuperscript{126}. On the other hand, the extent of its capacity to be a bearer of (international) legal powers and obligations is considerably less than that of sovereign states. It is measured, as formulated in the International Tin Agreement with regard to the rights and functions of the Council (Art. 7 [a]), according to what is necessary for the implementation and operation of the Agreement\textsuperscript{127}. This, of course, is something which the intergovernmental organization will have to establish for itself.

5. In the case of tin, the “Headquarters Agreement” not only states that the ITC possesses legal personality and the ability to enter into contracts, and also that its archives and premises are inviolable\textsuperscript{128}, but also that the Council enjoys immunity from judicial enquiry and enforcement procedures, unless it has expressly waived immunity in a particular case, and even then only to the extent of the waiver declaration\textsuperscript{129}. The wording of the (UK) ITC (Immunities and Privileges) Order 1972\textsuperscript{130}, however, is that immunity extends to “suit and legal process” (Art. 6 [1]), whereas the Agreement referred to “jurisdiction and execution” (Art. 8 [1]). In the international agreement (solely), there was also the provision (Art. 23) that if the International Tin Council entered into formal contracts (other than service contracts) with a person domiciled in the United Kingdom, or an entity based there, or with its headquarters there, then these would (have to) contain an arbitration clause. The implementation of any arbitral award could not be considered to be subject to immunity (in any enquiry procedure) (Art. 8 [1] [c])\textsuperscript{131}.

In view of these normative findings, the English courts must first of all establish whether there is any divergence of content between the international agreement and the domestic implementation of this.

If the ITC is entitled to immunity only to the extent that the host state determines, then, in general terms, this means that actions can be brought against the organization in the other member states and in third party states, provided that there is no objection in international law to the court venue, i.e.
it is not “exorbitant”\textsuperscript{132}. As regards the location of assets or liabilities, however, it is extremely doubtful whether a sufficient relationship to the host state of the headquarters can be affirmed\textsuperscript{133}.

In the United Kingdom, on the other hand, it needs to be established – if no arbitration agreement was made\textsuperscript{134} – whether the ITC really did waive its immunity. Of crucial importance here are the time of the declaration and the form it took. To this extent, too, it depends on the legal framework in the host state.

6. Something which is unclear and extremely difficult, finally, is the problem of material immunity, especially as regards intergovernmental associations. A large section of the literature\textsuperscript{135}, and increasing state practice – which finds not a little of its expression in multilateral agreements\textsuperscript{136} (and drafts\textsuperscript{137}) – distinguishes sovereign from commercial acts – in the restrictive view, only the former are not subject to the jurisdiction of a foreign state\textsuperscript{138} – not (primarily) according to the purpose of the acts, but by their “nature”.

For international organizations, there are no detailed provisions, either in general terms or in individual international law instruments (or in state law provisions). The Whether and the How of immunity are determined much rather according to individual functional parameters. However, it can hardly follow from this that all contracts made between an intergovernmental institution and private persons/entities must fall outside national jurisdiction simply because the action is taken in pursuit of organization objectives. States, too, do not enter into contracts (primarily) with the intention of making profits\textsuperscript{139}. In addition to this, a withdrawal from, or inadequate fulfilment of, a contract, in both situations, may easily be motivated not by economic considerations, but by political ones\textsuperscript{140}. It can hardly be acceptable in such a case to continue to treat the miscreant state “as a private person”, whilst granting an international organization immunity. That there is no differentiation made in the protective provision, so that no limitation is possible, is as unconvincing in this matter as elsewhere\textsuperscript{141}.

7. Now it can scarcely be disputed that the legal relations between the ITC and its member states (including the host state) are governed exclusively by international (treaty) law. Therefore, when the representatives of the individual states meet in the central organ of the organization, the International Tin Council, and make decisions, then this behaviour takes place within the framework and on the level of international law, and is to be regarded – from the perspective of immunity law – as jure imperii. At the same time, the external implementation of contracts entered into with private parties for the regulation of prices\textsuperscript{142} need not necessarily have the character of the internal legal acts of the organization, but, especially if – as is widely held – in the absence of exceptional international law regulations, the law of the host state is
relevant, then this principle may, indeed must, under certain circumstances be ignored in accordance with the host state’s legislation.

The idea of direct action against the ITC members is a totally different matter: they had not made any direct contracts with the dealers and brokers on the LME, and other lenders, i.e. the participating states had not stepped (down) onto the level of co-ordination. Insofar as they were at all active (in the ITC), and this – or even the absence of any activity – resulted in negative financial consequences for the private parties referred to, there is no overriding evidence that this behaviour was not determined by public interests and/or could be classified as being of a “commercial nature” from any other point of view. It is therefore more than understandable that the search for a solution should continue on the diplomatic level.

V. The Common Commodity Fund – Is Failure at Hand?

1. There are many reasons for the collapse of the (sixth) International Tin Agreement. From the point of view of timing, the spectacular collapse in the autumn of 1985 can almost certainly be traced back to the combination of a decline in demand in real terms, with an increase in the tin price because of the strength of the dollar.

Even in such exceptional circumstances, there is no need why intergovernmental commodity market regulation should fail, as long as account is taken of certain requirements. These primarily include:

a) the need for all (major) producer and consumer countries to be parties to any agreement, so that outside agreements by third parties are not possible, or at least will have little effect;

b) a re-organization of the content of agreements so that rapid and flexible reactions to (unforeseeable) market changes are possible. For this to work, unanimity or qualified majority rules in organs with large numbers of (state representative) members are not feasible. On the contrary, provision must be made in the agreement itself for revisions to be made to the floor and ceiling prices under certain conditions. A conceivable possibility here would be an obligation upon the administration of the organization to propose new price levels, and/or temporary authorization of the buffer stock manager to enter more closely defined transactions, even outside of the price range set down in the agreement, which would be binding on the organization. By setting a fixed time limit, the central organ could then be induced to act swiftly itself;

c) clearer rules on liability than have hitherto been provided – not only in the case of commodity organizations.
2. Precisely on this last point, there is no satisfactory solution provided by the “Common Fund”, either. This omission appears somewhat less threatening in that the Fund’s organs are not empowered to intervene in commodity markets (Art. 7 (8)), so that a crisis such as happened in the ITC cannot occur. On the other hand, even this new umbrella organization is empowered to borrow (Arts. 15, 18 D.) to support all its activities (cf. Art. 16 B), i.e. not only to finance commodity stocks. In relation to the lenders, though, the immunity of the Fund is explicitly lifted with regard to the borrowed amounts, even from the point of view of execution (Arts. 42 (1) (a), (3))46. There is no longer any need for a waiver (Art. 49) in the loan agreement, as long as the required domestic (implementation) measures have been carried out (Art. 50)47.

Whether, and in what circumstances, member states are liable for the obligations of the Commodity Fund remains open to question. Art. 17 G. does indeed prescribe in great detail which of the various sums should be used, in which order, for the repayment of loans from the First Account. If the funds available are insufficient, then there will be an increase in the members’ ordinary capital contributions, the modalities of which are to be determined by the supreme organ of the Fund, the Council of Governors (Arts. 20, 21) in an extraordinary session (Art. 17 G. (14))48. However, can the reason for and the extent of an increase in contributions really be separated? Indeed, can a creditor force the Fund to make such a decision with the argument that his/its demand for repayment applies (only) to “the same kind”49 of money?

In the second “window”, the granting of loans and supplements by the Fund is restricted by the total amount available for this purpose, though this amount does include borrowing by the Fund for this purpose (Art. 18 A. (1) (d)), for which a separate account is opened (Art. 18 D. (4) (b)). However, if the amount in the account is not sufficient to make interest and capital repayments, then a very critical situation arises, because the use of other resources of the Common Fund is specifically forbidden (ibid., (c)) and there is no provision for the inflow of additional members’ contributions50. We can wait with bated breath to see who, under such circumstances, will be willing to provide loans.

3. In conclusion, it can be stated that minor legal corrections are not sufficient to solve the problems arising. The “old”, but by no means dead world economic “order” always looked upon commodity control agreements with suspicion. In answer to the demands for the – not a – “new” order, on the other hand, the balance of interests, even in the price-regulating organizations, was not adequate to bring about the required compensation and overcome under-development. Sooner or later, attempts at mediation were doomed to failure. There is little hope that market instabilities could be better evened out at a time when third world states are beginning to make “debt-for-goods”
proposals to their foreign (private) creditors. As long as the subsistence problems of commodity-producing developing countries are not managed by international action, the question remains as to whether the only option open to them is the cartel? Undesirable as this is, the concept is moving – here, as in the debt crisis – into the realms of the possible...\textsuperscript{151}

NOTES


2 Cf. e.g. Mabro (ed.), OPEC and the world oil market: the genesis of the 1986 price crisis (1986); Maull, EurArch 41 (1986) 561 ff.


6 In total there have been six (to date). The first agreement dates from 19.12.1953 (U. N. T. S. 256 (1956) 31), and the sixth from 1.7.1982. The Federal Republic has been a party (on the consumers’ side) since the fourth agreement of 15.5.1970 (BGBl. 1971 II, 1197; 1976 II, 1581, with regard to privileges and immunities). The sixth agreement is valid (only) temporarily (Art. 55 (2)), but does not have a compulsory expiry date (Art. 59); to be extended by 2 years, see NZZ of 1.5.1987, 19.

7 Thus Carreau/Flory/Juillard (fn. 3) 325 f.; in a similar vein: Eisemann, A. F. D. I. 31 (1985) 730 (731); Tomuschat, Commodities, International Regulation of Production and Trade, in EPIL 8 (1985) 94 (99).


10 See below, II. 5


11 The USSR, for instance, has now announced that it will join this organization (EurArch 42 (1987) Z 150). On the formal treaty acceptance of the FRG see BGBl. 1985 II, 714.


14 Doc. in EurArch 1 (1946/47) 343; on this, cf. Erler, Grundprobleme des Internationalen Wirtschaftsrechts (1956) 100 f.

15 Cf. Wilcox (fn. 8) 37, 210; Brown, The United States and the Restoration of World Trade (1950) 47 ff. On similar constructions of stockpiling in the urban economy of the Middle Ages, see Wallerath, DV 20 (1987) 137 (156 f.).

16 Cf. Wilcox (fn. 8) 114 ff.; Brown (fn. 15) 217 ff.; Dormoy (fn. 5) 153 ff.

17 Krappel (fn. 8) 21 ff.

18 Cf. recently Long, RC 182 (1983-IV) 9 (17 f.).


22 Res. 3201 (S-VI) of 1.5.1974, I. L. M. 13 (1974) 715 ff.; see in partic. 4 (j), (m), (t).

23 Res. 3202 (S-VI), same date, I. L. M. 13 (1974) 720 ff.; in partic. I.1 (b) – (g); on this: Schirmer/Meyer-Wöbsé (fn. 13) 128 ff.; Dormoy (fn. 5) 224 ff.


27 Meagher, (op. cit. (fn. 25) 67) rightly underlines the fact that there is a dilatory compromise formula here.


29 Cf. the survey by Tietzel, Aussenwirtschaft 32 (1977) 372 ff. Amongst the new agreements are: rubber (UN Doc. TD/Rubber/15 of 17:10.1979 = Johnston (fn. 21) App. IV.10.01), Jute (articles) 1982 (ibid., App. IV.15.01) and tropical timber (ibid., App. IV.14.01); see also Dormoy (fn. 5) 634 ff., 679 ff.

30 Cf. Johnston (fn. 21) IV., 93 and 121; on the constitution of this organization (at July 1983) ibid., App. IV.11.02.


Cf. e.g. Becker, Die Partnerschaft von Lomé (1979) 56 ff.


37 On EC commodity policy, see e.g. Knall/Wagner, Entwicklungsländer und Weltwirtschaft (1986) 171 ff.

38 Agreement of 8.12.1984, BGBl. 1986 II.19 (= ABl. EG 1986, L 175, 1) valid until 28.2.1990; on this cf. also the special edn. of the "Courier" (no. 89, Jan./Feb. 1985).


40 Dormoy (fn. 5) 593.

41 Becker (fn. 34) 153 ff.

42 Cf. e.g. the Declaration of Ministers on the new (Uruguay) round of GATT (under I.A. (i)), in: GATT Focus no. 41 (Oct. 1986) 1 (2); also Thiel, EurArch 41 (1986) 285 (287 ff.).

43 Cosgrove Twitchett, EurArch 35 (1980) 81 (85 ff.).

44 Cf. above, (at) fn. 31; also Deutsche Bundesbank (fn. 35) 17 ff. and 237; Cuddy, J. W. T. L. 14 (1980) 66 ff.


47 Above, fn. 6; extracts also in: Schirmer/Meyer-Wöbse (fn. 13) 552 ff.

48 On this, cf. Krappel (fn. 8) 96 ff.; Dormoy (fn. 5) 290 ff.; Fox (fn. 13) 222 ff., 243 ff.


51 Fifth Agreement of 21.6.1975, I. L. M. 14 (1975) 1151 ff.; see also Krappel (fn. 8) 100 f.

52 On such “other promotion measures” cf. Dormoy (fn. 5) 664 ff.


54 The terminological change, precisely in the third Agreement of 1965, is not exactly coincidental. The concept of the “buffer stock” had, of course, been used previously (see Wilcox (fn. 8) 116 f.), at least in the English speaking world.


56 Details, with regard to the sixth Agreement, in Johnston (fn. 21) App. I.2.03.

57 As defined in Art. II and 2 of the Agreement: each group is considered separate (see Dormoy (fn. 5) 551 ff.).

In general terms, see also Schirmer/Meyer-Wöbse (fn. 13) 10 ff.; specifically about the ITC, cf. Johnston (fn. 21) III.4.01., 92 ff.

Art. VIII (2); cf. Krappel (fn. 8) 98; Fox (fn. 13) 300 ff.

So designated since the fourth Agreement (Art. 9); see also Dormoy (fn. 5) 533 ff. Text in: U. N. T. S. 824 (1972) 229.

Cf. Fox (fn. 13) 377 ff.

The organization and structure were straightened out; see Wassermann, J. W. T. L. 10 (1976) 95 ff.

Cmnd. 4938; reproduced in Johnston (fn. 21) App. III.3., 21 ff.

For greater details on the structuring of contributions, see Dormoy (fn. 5) 608 ff.; on the control of borrowing, see also Fox (fn. 13) 275 ff.


Eisemann (fn. 7) 733.

Cf. EP-Report (fn. 1) 15; Dormoy (fn. 5) 628; McFadden (fn. 1) 823.


For a critical appraisal of this, cf. McFadden (fn. 1) 822 and 829.

In greater detail: McFadden (fn. 1) 825 ff.; on Brazil, see also FT of 5.8.1987, 28.


See above, fn. 70; also Dormoy (fn. 5) 632; Eisemann (fn. 7) 734.

In greater detail on this kind of committee, cf. Dormoy (fn. 5) 541 ff.; Schirmer/Meyer/Wöbse (fn. 13) 11; see also Seidl-Hohenveldern (fn. 66) 150 ff.

On this, cf. EP-Report (fn. 1) 15, and Eisemann (fn. 7) 734 N.16.

The tin price did, in fact, rise from its trough of £3,300/t. in 1986. At the time the sixth Agreement came into force, the floor price was 29.15 Ringgit/kg, which, at the time, was the equivalent of £7,084/t.

For further details, cf. Fox (fn. 13) 226 ff.

See Eisemann (fn. 7) 740, and NZZ of 25./26.5.1986, 17.

Cf. Fox (fn. 13) 21 ff.

Data on this in EP-Report (fn. 1) 19; see also IMF Survey 16 (1987) 18 (19).

In addition to Fox (fn. 13) 10 f.; see in particular Rogers and Vagts, AJIL 72 (1978) 1 ff., 16 ff.


As was the case from the outset in the discussions on deep-sea mining; on this, cf. Jaenicke, Fs. Mosler (1983) 429 ff., and Orrego Vicuna, A. F. D. I. 24 (1978) 810 ff.


To this extent, older arbitral awards have not lost much of their importance (e.g. Petroleum Development Ltd. v. Sheikh of Abu Dhabi, I. L. R. 18 (1951) 144 (149); Ruler of Qatar v. Int'l Marine Oil Co. Ltd., I. L. R. 20 (1957)
87 On Art. 2 (1) CERDS, cf. e.g. Gramlich (fn. 86) 50 ff., 270 ff.; Dolzer, Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht (1985) 24 ff.
88 Rigaux refers to "pouvoirs privés" (in: Blanc/Rigaux, Droit économique 2 (1979/80) 269 (333 f.)); in similar vein, also Carreau/Flory/Juillard (fn. 3) 43 ff.
89 Cf. Seidl-Hohenveldern, RC 198 (1968-III) 9 (55 ff.).
90 Cf. Gramlich (fn. 86) 367 ff.
92 In general terms, see Fischer, Die internationale Konzession (1974) 266 ff.; Fritzche, Fiskalregime von Bergbauvorhaben (1978); on a specific levy, the "resource rent tax", see also Palmer, IMF Staff Papers 27 (1980) 517 ff.; Flint, Foreign Investment Law in Australia (1985) 414 ff.
94 On the 16th/17th centuries, see Anderson, Die Entstehung des absolutistischen Staates (1979) 88 ff.
96 In general terms on this, cf. Bryan, Colum. J. Transnat’l. L. 17 (1978) 221 ff.; the Malaysian "Investment Incentives Act" 1968/78 and a supplement are reproduced in: Investment Laws of the World V, Mal., 67 ff.; on the most recent liberalization, see FT of 20.7.1987, VII. See also Sornarajah, Mal. L. Rev. 27 (1985) 440 ff.
97 One important factor here, of course, is the restriction of legal trade unions’ activity; cf. the far-reaching restriction possibilities in Art. 10 of the Federal Constitution (in: Blaustein/Flanz (fn. 95)).
98 Fox’s description (op. cit. (fn. 13) 6 ff.) for the most part still holds good.
100 FT of 20.7.1987, IX; of 27.10.1987, 38; of 28.10.1987, 34.
101 As did the important consumer country, the USA; cf. McFadden (fn. 1) 821.


Cf. Fikentscher (fn. 3) 212 ff.


It would often be possible to find out the appropriate state only on the basis that the private institution concerned had been created in accordance with the legal system of the host state. The LME, for instance, is a Limited Co. in accordance with English law.

Even in the Federal Republic, it can be disputed whether any government supervision of the economy is exercised in the interest of the individual participants; cf. BGHZ 58, 96 ff.; 74, 144 ff.; 75, 120 ff.; Starke, WM 1979, 1402 ff.


On the organization of the High Court in detail, cf. de Smith, Constitutional and Administrative Law (6 1971) 357 ff.


On the participation of the EC, in accordance with Art. 56 of the sixth Agreement, and Art. 54 of the fifth, cf. Dormoy (fn. 5) 498 ff.; on the problems in relation to the new members, Spain and Portugal, see HB of 18. 9. and 6. 10. 1986, both 32.

For a general view, see Grossfeld (fn. 109) 148 f.


See e.g. the Report of the (Wilson) “Committee to Review the Functioning of Financial Institutions”, Cmnd. 7937 (1980) 100 ff.

On the control theory underlying this, cf. Grossfeld (fn. 109) 113 ff.


Similar formulae can be found in many other instruments; see Dominicé, RC 187 (1984 IV) 145 (L) 168 ff.
128 Op. cit. (fn. 64) Arts. 3-6 – these are frequently encountered provisions.
129 Art. 8 (1) a); on c), see below (at fn. 131). Subsection b) concerns civil claims arising from traffic accidents; on this, cf. Schaumann, BerGesVR 8 (1968) 1 (120).
131 On this restriction, cf. also Eisemann (fn. 7) 742.
132 Cf. Grossfeld (fn. 109) 134 ff.; BVerfGE 64, 1 (21 ff.); see also Albert, IPRax 1983, 55 ff. and BGH, WM 1987, 1089 ff.
133 Very instructive on this is Tahyar, Colum. L. Rev. 86 (1986) 594 ff.
134 Cf. above (at fn. 131).
135 See Damian (fn. 109) 98 ff.; Schönfeld, NJW 1986, 2980 ff.; for an approach, the end result of which is scarcely different, see Badr, State Immunity (1984); Singer, Harv. Int’l L. J. 26 (1985) 1 ff.; Geiger, NJW 1987, 1124 ff.
138 The issue of the core of sovereign activity is dealt with in an old decision in the USA (Victory Transport Inc. v. Comisaria de Abastecimientos y Transportes, 336 F. 2d 354 (2nd cir. 1964)); on this, cf. Schaumann (fn. 129) 117; Gramlich (fn. 108) 560.
139 However, this is not entirely the case with state “companies” (cf. e.g. in the FRG para. 21 PostVerwG and para 27 no. 4 BundesbankG); on this aspect, see also Gramlich, NJW 1981, 2618 ff. (on OLG Frankfurt/M., ibid. 2650 f.).
140 An example of this is the case of I Congreso del Partido; on the ruling of the House of Lords ((1981) 3 W. L. R. 328) and the lower courts, see Damian (fn. 109) 104 ff.; Fox, Mod. L. Rev. 49 (1982) 94 ff.; also Eisemann (fn. 7) 743.
141 For a different view: Damian (fn. 109) 85 ff.; Dominicé (fn. 127) 215 f.
144 If at all, foreign policy acts are only actionable in administrative courts as public law disputes (see BVerfGE 55, 349 ff.; BVerwGE 62, 11 ff.). Recently, a Canadian Mining Company brought an action in the Supreme Court of Ontario against its own government, arising from Canadian ITC-membership (FT of 21. 10. 1987, 38).
145 The same point is made in the EP-Report (fn. 1) 20.
146 In accordance with the provisions for the ITC (Art. 8 (1) of the Headquarters Agreement, above (at fn. 130, 131). Art. 42 (3) 2 makes it clear
that the object of execution can be restricted only by agreement. In the case of
states, on the other hand, the decision of the debtor is the crucial determining
factor (see Damian (fn. 109) 172 ff.; Synvet, J. D. I. (Clunet) 112 (1985)
865 ff.).

147 However, relevant clauses are at least worthwhile, if only to avoid grey
areas. See also Tomuschat, Commodities, Common Fund, in: EPIL 8 (1985)
91 (94); Adede, RC 180 (1983-II) 9 (65 ff.).

148 Cf. Arts. 9-11 of the Agreement on the Common Fund; in general terms:
Seidl-Hohenfeldern (fn. 66) 273 ff.; Dormoy (fn. 5) 399 ff.

149 See the wording of Art. 42 (1) a). On the accounting unit, see Art. 8 (1),
together with Schedule F; on currencies for borrowing and repayments, cf.
Art. 8 (2) d) and f), which link to Art. XXX f) of the IMF Statutes in the
version of the Second Amendment (on this, cf. Gold, RC 174 (1982-I) 107
(286 f.)).

150 Also sceptical on this: Dormoy (fn. 5) 402 f.

151 Prowse presumes that many states are not yet aware of their (strong)
position – perhaps with exceptions in Latin America – FT of 8./9. 8. 1987,
XII). Cf. also Bond, IMF Staff Papers 34 (1987) 191 (223 f.).