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In accordance with Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community (OJ L 43, 15.2.1983, p. 1), as amended by Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 (OJ L 243, 27.9.2003, p. 1), this file is open to the public. Where necessary, classified documents in this file have been declassified in conformity with Article 5 of the aforementioned regulation.

In Übereinstimmung mit der Verordnung (EWG, Euratom) Nr. 354/83 des Rates vom 1. Februar 1983 über die Freigabe der historischen Archive der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft (ABl. L 43 vom 15.2.1983, S. 1), geändert durch die Verordnung (EG, Euratom) Nr. 1700/2003 vom 22. September 2003 (ABl. L 243 vom 27.9.2003, S. 1), ist diese Datei der Öffentlichkeit zugänglich. Soweit erforderlich, wurden die Verschlusssachen in dieser Datei in Übereinstimmung mit Artikel 5 der genannten Verordnung freigegeben.

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(86) 367 final

Brussels, 24 July 1986

COMMISSION RECOMMENDATION TO THE COUNCIL

Case for the defence of the Community and its Member States with regard to the crisis affecting the International Tin Council

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(submitted by the Commission to the Council)

COM(86) 367 final

COM. 367

Commission Recommendation to the Council

Case for the defence of the Community and its Member States with regard to the crisis affecting the International Tin Council

1. The International Tin Council (ITC), established by the previous International Tin Agreements, had its membership, powers and functions confirmed by the Sixth Agreement. It has legal personality in international law, and on the territory of the host Government - the United Kingdom - has the privileges and immunities governed by a Headquarters Agreement and by the International Tin Council (Immunities and Privileges) Order 1972.

2. The Sixth International Tin Agreement was signed by 22 States (including the ten Member States which constituted the Community at 31 December 1985) and by the European Economic Community.

The Community is a full member of the ITC under Article 56 of the Agreement, which mentions it expressly and gives it the right to vote on all matters falling within its sphere of competence. Decisions on the management of the buffer stock, as an instrument of commercial policy, fall within this sphere of competence, and the Community has regularly exercised its powers in this respect.

3. The members of the ITC are responsible for its financing, and within the Community it was agreed that this responsibility should lie with the Member States only. They have systematically paid to the ITC all the Community's contributions, which - in practice - were demanded of them direct.

This arrangement seems to be contested by the creditors. It should be pointed out in this connection that Annex B of the Agreement - which contains the distribution table - indicates a specific percentage share of the expenditure for the Community, and this share is then broken down among the ten Member States.

4. Since 24 October 1985 the ITC has suspended payments for buffer stock operations, as its available funds are practically exhausted. Its debts to the banks and the London Metal Exchange brokers amount to several million pounds sterling. One creditor (the Standard Chartered Bank) has initiated legal proceedings before the High Court of Justice to have all the ITC's members, including the European Community, charged jointly with the ITC. This creditor was given satisfaction by a settlement through which the ITC placed the remaining quantities of tin available at its disposal. Other creditors have initiated legal and arbitration proceedings against the ITC alone.

Since it is obvious that the ITC will no longer be able to honour any of its debts, the banks on the one hand and the brokers on the other have formed consortia to try and assign financial responsibility for the ITC's debts to the members of the ITC.

5. It is inevitable, given the Community's legal position within the ITC and also the advantage to be gained by the creditors in assigning responsibility to yet another party in a case of such proportions, that if the consortia decide to take the members of the ITC to court in Britain, they will follow the precedent set by the Standard Chartered Bank and take the Member States and the Community to court.

6. Such action would undermine the commercial policy measures taken in the form of the ITC operations on the tin market and on the capital market linked with the financing of the tin market - and these are measures which, according to the creditors, were decided on by all the members responsible for the commercial policy applied by the ITC. As regards

intra-Community relations, the Community should therefore assume its responsibilities in order to cope with the consequences of the commercial policy measures involved. Given the political arrangements governing commodity agreements, this responsibility must be borne by stating in a single voice a common position for the Community and its Member States. The fact that the legal proceedings would implicate at the same level, within the context of a commodity agreement, the Community's finances and also those of its Member States is another argument for adopting this course of action.

7. Apart from this legal and political aspect - which is fundamental as regards intra-Community relations in the sphere of commodity agreements - there is decidedly a distinct advantage to be drawn from organizing joint action against the claims made by ITC's creditors. The creditors are preparing to call into question a number of fundamental principles, which must inevitably be defended on a common basis, as follows:

(i) the sovereign or functional immunity of the States;
(ii) the sovereign or functional immunity of the Community;
(iii) the limited or unlimited financial responsibility of members of international organizations;
(iv) the right of creditors to be subrogated to the international organization in order to claim from its members the resources which it requires in order to pursue its aims.

If just one of the defendants were to be defeated on one of these points this would have detrimental consequences for the Community as a whole and for all its Member States.

For example, if it was decided not to recognize the Community's sovereign immunity, this could ultimately call into question the Community's Budget.

8. In order to express effectively and rapidly the common position of the Community and of its Member States in the relatively short time (15 days for the Community) allowed under the legal procedure, the Commission recommends that the Council decide on the principle of designating a single legal representative (a solicitor together with a barrister) representing the Community and its Member States.

Under the political arrangement governing commodity agreements, the Member States which so wish may of course be represented by a second legal representative whose statements - which will concern any aspects peculiar to the Member State in question - will remain strictly within the framework of the common position and will be intended to back up, and expand on, this position and will be made in agreement with the legal representative of the Community and all its Member States.

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The Commission therefore requests the Council to decide:

(i) that a single solicitor together with a barrister represent and defend the Community and all its Member States, on the basis of a common position, in the court cases which might be brought against them by creditors of the International Tin Council;

(ii) that the Member States which so wish may be assisted and represented, as regards the aspects peculiar to them, by a second legal representative, whose statements shall remain strictly within the framework of the common position, shall be designed to back up, and expand on, that position, and shall be made with the agreement of the legal representative of the Community and all its Member States.