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Briefing Report to the Honorable
Howard M. Metzenbaum, U.S. Senate

February 1988

INTERNATIONAL ENERGY AGENCY

Plan to Provide Legal Defenses to Participating U.S. Oil Companies

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United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-217506

February 8, 1988

The Honorable Howard M. Metzenbaum
United States Senate

Dear Senator Metzenbaum:

The International Energy Agency's (IEA) emergency oil sharing system (ESS) is designed to enable member nations to share oil supplies during an oil supply disruption equal to or exceeding 7 percent or more of members' oil supplies. The voluntary participation of oil companies is considered by the U.S. government and the IEA as vital to the successful operation of the allocation system; however, participation could have anticompetitive consequences and under U.S. antitrust laws could result in suits against U.S. companies.

To ensure the participation of major U.S. oil companies, the Energy Policy and Conservation Act (EPCA) provides a statutory defense against any civil or criminal suit brought under federal or state antitrust laws for actions taken to develop or carry out an approved voluntary agreement(s) and/or plan(s) of action, provided the actions were not taken to injure competition. EPCA also provides a breach of contract defense, provided that the alleged breach was caused predominantly by action taken to carry out a voluntary agreement or plan of action.

Voluntary agreements and plans of action describe the actions that U.S. oil companies can take when assisting the IEA in planning for supply disruptions and when participating in the IEA's information and emergency oil sharing systems. The Department of Justice and the Federal Trade Commission monitor the development and implementation of voluntary agreements and plans of action in order to promote competition and to prevent anticompetitive practices and effects. These documents must be approved by the Attorney General, after consultation with the Federal Trade Commission.

This report responds to your request for a status report on efforts made during the drafting of a second plan of action to expand the antitrust and breach of contract defenses for oil company supply transactions during an oil emergency and to resolve the problem of foreign blockage of information critical to U.S. antitrust review of oil transactions involving foreign affiliates of U.S. companies.

In 1976, the Attorney General approved a combination voluntary agreement and plan of action; however, the types of actions that companies could take were only generally described because the ESS was then in an early stage of development. Since 1979, U.S. government agencies have worked with interested oil companies to devise a second plan of action which would be as specific as possible in describing the substantive actions which would be protected by antitrust and breach of contract defenses.

The most controversial issue in drafting the second plan was whether oil companies should be protected by antitrust and breach of contract defense protections, when the ESS has been activated, for certain type 1 oil supply transactions. As the ESS was designed, these are supposed to be normal commercial transactions by the oil industry, whereby each company voluntarily rearranges its own supply schedule to meet a crisis as it chooses. They would be undertaken independently of the IEA's emergency management organization.

However, the oil industry said that, based on its experience during ESS tests, the IEA might urge companies to undertake type 1 transactions to move oil quickly from countries with obligations to supply oil to countries with rights to receive oil. This was a distinct possibility, because companies could not make "type 2" transactions until well after the middle of each month during ESS operations.

Type 2 transactions occur when companies formally interact with the IEA in Paris, advising the Secretariat that they are prepared to provide or receive specified amounts of oil to help satisfy member country allocation rights and obligations. Antitrust and breach of contract defense protections would apply for type 2 transactions, provided that a company was not seeking to injure competition and provided that it properly implemented certain record making, keeping, and reporting obligations. Companies said that if they made type 1 transactions to facilitate balancing of the ESS, they could be exposed to the same risks which are protected under antitrust and breach of contract defenses for type 2 transactions.

Early drafts of a second plan of action denied defenses for type 1 transactions, but the Departments of Justice and Energy eventually began to consider providing the protections for certain type 1 transactions—if a way could be found to distinguish type 1 transactions undertaken to help balance the ESS from those which companies would have undertaken on their own. Companies would have to make and keep records

and report to federal agencies in a way that would provide reasonable assurance that the agencies could fulfill their antitrust monitoring responsibilities. Problems arose in trying to put these concepts into operation.

The companies and relevant government agencies eventually agreed on an alternative—to support changing the ESS to permit certain type 2 transactions to be made at any time during the month. The IEA Secretariat proposed and the IEA Governing Board approved the proposal as a way to enhance the operational effectiveness of the emergency sharing system and to make it possible to provide U.S. antitrust protection for what otherwise would be characterized as type 1 transactions. Consequently, if the IEA influences what a company intended to be a type 1 transaction, the company can convert it into a type 2 transaction and seek antitrust and, if appropriate, breach of contract defense protections. Under the second plan of action, companies would be protected for type 2, but not for type 1, transactions.

A second major issue in preparing the plan concerned the effect of foreign blocking statutes on the ability of U.S. companies to provide the Justice Department and Federal Trade Commission with required records for their foreign affiliates. EPCA requires that a full and complete record, and where practicable a verbatim transcript, be kept of any meeting held and a full and complete record of any communication (other than in a meeting) made between or among participants or potential participants to carry out a voluntary agreement or plan of action. Such record or transcript is to be deposited with the Secretary of Energy and made available to the Attorney General and the Federal Trade Commission.

A potential problem existed here because many IEA nations have enacted "blocking statutes," which prohibit disclosure, copying, inspection, or removal of documents located in the territory of the enacting nation. All or most blocking statutes appear to carry some form of penal sanction. Conceivably, a blocking statute could be invoked to prevent a foreign affiliate from providing records to U.S. antitrust monitoring agencies. Companies were particularly concerned about what would happen if a blocking statute were invoked as a transaction involving its foreign affiliate was being developed. At one stage during the drafting of a second plan of action, antitrust and breach of contract defense protections would not be available if the affiliate did not comply with the record requirements. Hence, the foreign affiliate and perhaps its parent as well

could be sued. However, if the foreign affiliate provided the information, it would be in violation of the blocking statute and subject to penal sanctions.

A solution eventually was worked out whereby the second plan of action would provide antitrust and breach of contract defense protections for actions taken up to the point where the companies became aware of a foreign blocking statute being invoked to prevent them from providing necessary information. Companies would have to make good faith efforts to try to get the prohibition lifted, and, if lifted, would have to make the required information available.

Language for a second plan of action was essentially finalized at meetings of the IEA's Industry Advisory Board held in April and June 1987. At a meeting held on July 29, 1987, representatives of IEA reporting companies, including most U.S. voluntary agreement participants, favored adopting the draft second plan. Company and Secretariat officials expressed some concerns that the plan was less flexible than might be desired to facilitate oil company implementation, particularly concerning the operational effects of omitting coverage for type 1 transactions. Nonetheless, the IEA Secretariat advised the Department of Energy that, on balance, the companies favored adopting the plan.

On August 21, 1987, the Department of Energy published the draft second plan in the Federal Register, announcing a public hearing and requesting public comments on the document. Only a few comments were received. The Departments of Energy, State, and Justice and the Federal Trade Commission felt that no issues were raised in the comments which would require changing the plan. In mid-October 1987, the Secretary of Energy requested the Attorney General to approve the draft second plan of action and simultaneously sought advice from the Department of State on whether it supported approval of the plan. Subsequently, the Attorney General requested the views of the Federal Trade Commission.

On November 13, 1987, the Secretary of State recommended that the Secretary of Energy and the Attorney General approve the second plan as soon as possible. The Secretary said the plan represents a reasonable balance between the public interest in assuring competition and contract sanctity in the oil industry and the public interest in safeguarding our economic, foreign policy, and national security objectives in the event of a major oil supply disruption.

On December 7, 1987, the Federal Trade Commission informed the Attorney General and the Secretary of Energy that it had no objection to approval of the second plan of action. On December 18, 1987, the Assistant Attorney General for the Antitrust Division advised the Secretary of Energy that the Justice Department approved the second plan. He said that the plan minimizes the risks to competition by restricting the types of data that can be exchanged by participating oil companies and by mandating extensive recordkeeping of communications between them and, as such, contains sufficient safeguards.

In accordance with the Voluntary Agreement, the second plan must also be approved by the Secretary of Energy before it can be carried out. The Secretary of Energy approved the plan on January 26, 1988. The Department of Energy said it intended to submit a copy of the approved plan to the Congress.

The plan cannot go into effect, however, unless the President finds that an "international energy supply emergency" exists. EPCA defines this term as meaning a period when the President determines that IEA oil allocation is required under the provisions of the ESS.

Appendices I through IV provide more detailed information on these matters.

We provided agencies having responsibility for the matters discussed in the report with a draft of the report for their review and comment. The Departments of Energy and Justice suggested several clarifications which we incorporated in the final report. Both the Federal Trade Commission and the Department of State said they had no comments on the report.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this briefing report until 10 days from the date of issue. At that time, we will send copies to the cognizant congressional committees and to other interested parties and will make copies available to others upon request.

If you need further information, please call me on 275-4812.

Sincerely yours,

Allan I. Mendelowitz
Senior Associate Director

Contents

Abbreviations

DOE	Department of Energy
EPCA	Energy Policy and Conservation Act of 1975
ESS	Emergency Sharing System
FTC	Federal Trade Commission
GAO	General Accounting Office
IEA	International Energy Agency
ISAG	Industry Supply Advisory Group
PEG	Petrochemical Energy Group
PMAA	Petroleum Marketers Association of America

Background

Under the International Energy Agency's (IEA) Emergency Sharing System (ESS), member countries agree to establish demand restraint measures for reducing their oil demand by at least 7 to 10 percent during a serious oil supply disruption, maintain emergency oil reserves equal to 90 days of net oil imports, and share oil supplies under an IEA allocation system in a supply disruption equal to or exceeding 7 percent.

Emergency information and data systems, which involve the active participation of oil companies and member countries, permit the Secretariat to estimate total quantities of available oil supplies. Once the ESS is activated, a complex allocation formula is used to determine how much oil each country is entitled to receive or obligated to supply.

The ESS consists of three types of oil distribution, which are designed to be implemented in sequence depending on the need but which can operate simultaneously.

1. Type 1 is essentially a continuation of normal commercial transactions by the oil industry, where each company voluntarily and independently of any IEA requests and approval process rearranges its own supply schedule to meet a crisis as it chooses.

2. Type 2 is the formal involvement of companies interacting with the IEA. Companies advise the IEA Secretariat in Paris that they are prepared to provide or receive a specified amount of oil to help satisfy country allocation rights and obligations.

3. Type 3 requires that the IEA Allocation Coordinator notify member governments with allocation obligations that they must order one or more of their companies to ship oil to countries with allocation rights.

Type 1 and type 2 transactions are voluntary and are expected to handle most reallocation rights and obligations; however, should allocation imbalances remain, mandatory allocation, type 3, may occur.

Type 2 offers can be made in several ways. First, there are "closed-loop" voluntary offers, where a company willing to provide oil has already found a company in need of oil. The voluntary offer specifies both the intended supplier and receiver of the oil. They may be affiliates within the same international oil company or they may be independent companies. Second, there are "open supply" offers, where a company offers to enter into commercial negotiations to provide a specified amount of oil to any potential receiving company. Third, there are "open receive"

offers, where a company in search of oil offers to enter into commercial negotiations with any potential supplying company. The IEA Secretariat, assisted by the Industry Supply Advisory Group (ISAG), reviews all open supply and receive offers and seeks to efficiently match them so as to reduce or eliminate supply imbalances among IEA countries as quickly as possible and with minimal added costs.

All type 2 offers, including closed-loop, are reviewed by the ISAG and Secretariat and are not to be implemented unless and until they have been approved by the IEA Allocation Coordinator, who is the Secretariat's Executive Director.

Antitrust and Breach of Contract Defense Protections

The U.S. government recognized early that the success of the International Energy Program Agreement depended on participation by the major U.S. international oil companies. U.S. oil companies and those of other IEA countries would play a vital role in the implementation of the ESS by providing essential information, advising the IEA on supply and logistical matters, and actually effectuating international oil allocation. Yet, some company actions in assisting IEA allocation could have anticompetitive consequences, exposing them to antitrust and breach of contract risks under U.S. laws.[1] By voluntarily cooperating in assisting the IEA in allocating oil among various nations, and absent statutory authority providing otherwise, companies could be in violation of U.S. antitrust laws. Similarly, if a company were to voluntarily divert a cargo of oil to another IEA country for the primary purpose of facilitating IEA oil allocation, the company might be sued by one of its customers for breach of contract. Absent statutory authority providing otherwise, a court might rule in favor of the customer.

To facilitate the assistance of U.S. oil companies, the Energy Policy and Conservation Act of 1975 (EPCA) authorizes their participation in the development of voluntary agreements and plans of action to implement the allocation and information provisions of the International Energy Program and makes available a limited antitrust and breach of contract defense for actions taken to develop or carry out voluntary agreements and plans of action. It provides companies with a statutory defense against any civil or criminal suit brought under federal or state antitrust laws for actions taken pursuant to an approved voluntary agreement or

[1]The laws, among other things, prohibit price fixing, divisions of the market, and other contracts, combinations, or conspiracies in restraint of trade. The Justice Department and the Federal Trade Commission share responsibility for enforcing antitrust laws.

plan of action to participate in the ESS, provided the actions were not taken to injure competition. EPCA also provides a breach of contract defense, provided that any alleged breach was caused predominantly by action taken during an international energy supply emergency to carry out a voluntary agreement or plan of action.

Voluntary agreements and plans of action describe the types of substantive actions which participating U.S. oil companies can take in implementing the allocation and information provisions of the International Energy Program and for which antitrust and breach of contract defense protections are available. A plan of action is required to be as specific in its description of proposed substantive actions as is reasonable in light of known circumstances.

EPCA authorizes oil companies to participate in developing and implementing voluntary agreements and plans of action, provided that the Justice Department and the Federal Trade Commission (FTC) monitor such development and implementation in order to promote competition and to prevent anticompetitive practices and effects, while achieving substantially the purposes of the act. The Attorney General must approve these documents after consulting with the FTC. The Department of Energy (DOE) administers the agreements and plans with the approval of the Attorney General after each has consulted with the FTC and the State Department.

In 1976, the Attorney General approved a combination Voluntary Agreement and Plan of Action and approved participation in it by specific U.S. oil companies, subject to their written acceptance. Upon approval for participation in the Voluntary Agreement, a company can assert the antitrust defense for actions it takes to carry out an approved voluntary agreement or plan of action if it can demonstrate that the actions were specified in, or within the reasonable contemplation of, these documents. A party that disputes the antitrust defense and brings suit must demonstrate that the actions were taken for the purpose of injuring competition to defeat an otherwise valid antitrust defense.

As of September 1987, the following 17 companies, which are IEA Reporting Companies, participate in the Voluntary Agreement.

- Amerada Hess Corporation,
- Amoco Corporation,
- ARCO,
- Ashland Oil, Inc.,

- Caltex Petroleum Corporation,
- Chevron Corporation,
- CONOCO, Inc.,
- Exxon Corporation,
- Mobil Oil Corporation,
- Occidental Petroleum Corporation,
- Phillips Petroleum Company,
- Shell Oil Company,
- The Standard Oil Company,
- Sun Company, Inc.,
- Texaco Inc.,
- Union Pacific Resources Company, and
- Unocal Corporation.

EPCA and its implementing regulations and the Voluntary Agreement and Plan of Action set forth antitrust safeguards to which companies must adhere. Primarily, companies must give U.S. officials advance notice of IEA industry advisory meetings, and DOE is required to publish the agenda for the meetings in the Federal Register; U.S. government monitors must attend all of these meetings; verbatim transcripts must be maintained of most meetings and complete records of other industry advisory meetings and communications outside of industry advisory meetings; most IEA pre-emergency industry activities are confined to meetings; exchange of confidential or proprietary information is permitted only with advance government approval; and the Justice Department and FTC must make semiannual reports to the Congress and the President on their IEA monitoring.

The 1976 Voluntary Agreement and Plan of Action describes company actions which may be taken when the ESS has been activated. However, the description is very general, since the system was in an early stage of development at that time. The Agreement contemplated that before an international supply emergency occurred, more specific plans of action would be developed, elaborating and applying the allocation principles and measures established by the IEA. Since 1979, concerned government agencies and companies on the IEA's Industry Advisory Board have been preparing a second plan of action which would identify more specifically those activities that would be covered by an antitrust defense. They have been actively assisted by the IEA Secretariat.

Neither the existing Voluntary Agreement and Plan of Action nor the draft second plan of action specifically address the breach of contract defense. Under EPCA, the breach of contract defense is available if a

breach was caused predominantly by action taken to carry out a plan of action. According to the DOE, since the function of a plan of action is to describe actions which participating oil companies would take during an emergency, it would seem that by law and subject to proof of predominant causation cited above, the breach defense by the very nature of the case will apply whenever actions described in and covered by the plan of action are taken.

Objectives, Scope, and Methodology

We reviewed efforts made during the preparation of a second plan of action to expand the antitrust and breach of contract defenses for certain oil company supply transactions during an oil emergency and to resolve a possible problem of foreign blockage of information critical to the U.S. government's antitrust review of oil transactions involving foreign affiliates of the companies.

We built upon our previous work in this area, and especially our June 1985 report on the IEA.[2] We attended meetings of the IEA's Industry Advisory Board and Standing Group on Emergency Questions and a DOE hearing to receive public comments on the most recent draft of the proposed second plan. We interviewed officials of the IEA, the Departments of Energy, Justice, and State and the FTC and analyzed various documents they provided concerning the drafting and preparation of a second plan of action. We also interviewed representatives of U.S. oil companies or their counsels. Our work was performed in accordance with generally accepted government auditing standards between March and November 1987.

[2]Status of U.S. Participation in the International Energy Agency's Emergency Oil Sharing System (GAO/NSIAD-85-99, June 13, 1985).

Protections for Type 1 Transactions

Under draft plans of action published for public comment in 1981 and 1983, companies would have received antitrust defense protections for approved type 2 and for type 3 transactions but not for type 1. Companies also would have received a breach of contract defense protection for any type 2 or 3 transaction if an alleged breach was caused predominantly by action to carry out a voluntary agreement or plan of action during an international energy supply emergency.

In both 1981 and 1983, industry commented that some type 1 transactions should have antitrust defense coverage because the companies would be at risk. In response to the May 1981 draft, industry said that its experience in ESS tests showed that the IEA might urge U.S. oil companies to undertake type 1 transactions to move oil quickly from countries that otherwise would be expected to have allocation obligations to those which would have allocation rights. Should the companies respond, they could be accused of anticompetitive conduct. The anticipated IEA urging was a real possibility because, as the ESS was then designed, companies could not make type 2 voluntary offers until well after the middle of each month during which the ESS was in effect. For example, companies would not submit voluntary offers until the 20th of the month and the process would end on or about the 26th. Companies felt that there would be pressure on them to act earlier in an emergency to alleviate imbalances, quite apart from the type 1 transactions they would undertake for their own commercial reasons.

Companies said that should they make type 1 transactions to help balance the system, the distinction between type 1 and type 2 allocations could break down. IEA-influenced type 1 transactions could expose the U.S. oil companies to the same risks for which they receive an antitrust defense in type 2 and type 3 transactions. Therefore, the companies argued, the antitrust defense should apply to type 1 activities. Many companies also recommended that these type 1 activities not be subject to the full-scale recordmaking, recordkeeping and reporting requirements associated with type 2 activities on the grounds that a far greater number of transactions would be involved and those requirements could impose an unacceptable burden on the companies.

In October 1983, DOE published in the Federal Register a revised draft plan of action, which again excluded type 1 transactions from antitrust defense coverage. DOE observed that coverage for all type 1 transactions would seem out of the question, since they included transactions that industry would have undertaken in any event as normal international business activity. However, selective coverage might be acceptable if a

satisfactory method could be devised for distinguishing among type 1 transactions which should and should not receive coverage. The former came to be referred to as type "1-1/2" transactions.

In response, industry again said there was a need for antitrust defense coverage and suggested that it be provided only if a transaction's specific purpose was to help the ESS.

The IEA Secretariat agreed with industry that coverage was needed for certain type 1 transactions and suggested that the antitrust defense be extended to all type 1 transactions initiated by the companies or the IEA in response to express or implied requests, solicitations, or suggestions of the IEA, including those occurring before the Secretariat's first transmission of allocation rights and obligations to companies. The Secretariat noted that the ESS is predicated on the assumption that a large proportion of supply actions in an emergency will be type 1 transactions, made voluntarily and independently and without advance approval by the IEA. The Secretariat reasoned that without antitrust coverage for those type 1 actions for which antitrust risk might arise, companies might hesitate in making the type 1 transactions or hold them back for use as type 2 voluntary offers in response to specific requests from the IEA. The Secretariat said these would be undesirable developments which would slow adjustment to the supply disruption and substantially increase the efforts required of the IEA.

In 1984, DOE, with the concurrence of the Department of Justice, began to explore with the IEA Secretariat and the U.S. reporting companies whether it was possible to develop some selective form of type 1 coverage; that is, whether a narrowly constructed, carefully monitored type 1 coverage could be developed in the plan of action which would allay the concerns of the companies and facilitate ESS operations without overextending antitrust and breach of contract defenses to normal commercial transactions that might have occurred without regard to the ESS.

Language was drafted for a second plan of action that would give U.S. companies antitrust coverage for certain type 1 transactions. However, during meetings in December 1984 and January 1985, industry and U.S. representatives were unable to agree on the degree of recordmaking, recordkeeping, and reporting requirements for type 1-1/2 transactions. Industry representatives proposed that the requirements be substantially less stringent than those proposed by the government. Government officials, however, felt that additional requirements were

necessary because the government did not have the same ability to monitor development of type 1 or 1-1/2 transactions as it did for type 2 and type 3 transactions and because there was uncertainty about what effect type 1-1/2 transactions would have on the ESS.

In our June 1985 report, we discussed the pros and cons of providing coverage for type 1 transactions, expressed concern about whether type 1s should be accorded antitrust and breach of contract defense protection, and what record requirements should apply.[1] Congress was also apprehensive that overly broad type 1 coverage in the plan of action might ultimately be allowed. In July 1985, while enacting legislation to extend EPCA, the Congress added a new provision, which stated that to be valid, any plan of action which made antitrust and breach of contract defenses available to type 1 activities must be submitted to Congress under a prescribed congressional review procedure. The defenses would not apply to type 1 activities if Congress enacted a joint resolution of disapproval.

Resolution of the Type 1 Issue

Following the amendment of EPCA, discussion of the type 1 issue resumed. In April 1986, the FTC submitted a list of questions to the Industry Advisory Board concerning the need for antitrust and breach of contract defenses for type 1 transactions. The FTC also asked industry to comment on potential alternatives, such as amending the ESS to permit type 2 offers to be made earlier in each monthly oil allocation cycle—this was referred to as the "wider window" approach.

In May 1986, an Industry Advisory Board subcommittee discussed the FTC questions, and during the meeting the wider window concept was discussed at length. Most companies present supported further examination of the wider window approach. Among reasons offered were the following:

- As a result of adverse congressional reaction, type 1-1/2 coverage no longer seemed feasible and the record keeping, making, and reporting requirements which the government was likely to insist on would be too burdensome.

[1]In August 1985, DOE provided the Chairman of the Subcommittee on Environment, Energy and Natural Resources, House Committee on Government Operations, with comments on our report which took exception to our discussion of the type 1 issue. DOE's reservations were based, in part, on additional analyses of the issue that it prepared subsequent to our report. We do not summarize DOE's comments here since a solution was worked out whereby type 1 coverage would not be provided by the plan of action. However, in appendix IV we discuss DOE's points pertaining to the possible breaching of contracts under type 2 voluntary offers.

- The primary motive for making a type 1-1/2 offer would have to be addressed, whereas it would not for a type 2 offer.
- Apart from antitrust concerns, it was necessary to have an efficient, operable ESS. The wider window approach would contribute to that by leveling the workload and preventing companies from saving type 1-1/2 transactions to make them as type 2s.

Officials of the IEA Secretariat indicated they were willing to examine the wider window approach. They thought it might help the allocation system to operate more efficiently, something which the Secretariat had been studying for some time. And, they recognized that the modification might contribute to resolution of the type 1 issue.

In July 1986, the Secretariat prepared a preliminary paper examining the wider window concept and outlining several options for achieving it. Industry's response was that the Secretariat, in conjunction with the U.S. government, should examine the various options and present language for the companies to examine in detail.

In September 1986, the Secretariat provided a written proposal to member countries to amend the procedure for handling voluntary offers to reflect changes which had occurred in the market and to make the procedure more flexible. The Secretariat noted that the current voluntary offer procedure had been established more than 10 years ago, when a few large, integrated oil companies accounted for a greater share of the world oil market and when long-haul crude oils traded via long-term contracts were still the main element in the markets. At that time, it was believed that decisions to eliminate or reduce supply imbalances among IEA member countries by redirecting floating crude oil cargoes could be made without undue haste in view of the long traveling times and the small number of main players. However, the increased importance of short-haul oil cargoes and of spot crude oil and refined product transactions now necessitate faster responses. In addition, technical improvements in the form of computing capabilities permit a more flexible operating approach.

The Secretariat proposed that the voluntary offer or type 2 transaction process be extended over the entire monthly allocation cycle. This would be accomplished in the following way. A company's closed-loop type 2 voluntary offer (i.e., proposed international supply transaction which had already been worked out with a prospective trading partner) could

be submitted to the IEA at any time during the allocation cycle.[2] The Secretariat and the Industry Supply Advisory Group, within 48 hours after receipt of the offer, would process the transaction and notify the company of the IEA's approval, disapproval, or determination that there was insufficient information to act on the offer. "Open-loop" voluntary offers would still only be made during the latter part of each month.

The Secretariat concluded that the proposal would improve the voluntary offer procedure, because it would provide more up-to-date information and permit a faster response for reducing country supply imbalances. It also could have the corollary effect of making it possible to provide U.S. antitrust protection for what would otherwise be characterized as type 1 activities.

In October 1986, the Industry Advisory Board discussed the proposal. DOE indicated that it was pleased with the Secretariat's wider window proposal and that the proposal could provide a basis for finalizing a new plan of action. Companies agreed to generally support the concept as a compromise, in part, for dealing with their antitrust concerns about type 1 transactions. At the same time, they said that the proposal was not a panacea for antitrust concerns. In short, although they supported the proposal, they believed it to be a second-best solution for resolving antitrust type 1 concerns.

Companies recognized that some type 1 transactions which they were willing to make to help balance the IEA system could be submitted as type 2 transactions under the proposed new system, and, if approved, the antitrust defense would be available. At the same time, they expressed concern that other type 1 activities might still be subject to some risk if traders and operational people within the companies were aware of IEA reallocation objectives. Consequently, they said, during an emergency some companies might allow only a small number of people within the company to know IEA reallocation goals and erect a wall around other company traders and operational people. If this were to happen, they said it might inhibit efficient IEA reallocation, but they did not explain how.

In November 1986, the IEA Governing Board provisionally approved the Secretariat's proposal and requested the Secretariat to prepare draft implementing amendments to the IEA Emergency Management Manual

[2]There would be two periods of up to 48 hours each when new offers would not be accepted so that the Secretariat could perform necessary data calculations and analysis.

which codifies Governing Board decisions on ESS operations. In the interim, the Governing Board agreed to apply the Secretariat's proposed modifications on a provisional basis, in order to enable the U.S. government to proceed with a plan of action taking the modifications into account.

Subsequently, DOE revised the draft second plan of action to exclude all type 1 activities from coverage while providing coverage for communications and actions to develop and implement type 2 activities, including closed-loop voluntary offers submitted to the IEA at any time during an allocation cycle.

In commenting on a draft of this report, DOE said that the IEA Secretariat participated in developing and advancing the wider window concept in large part for operational reasons and that operational considerations were the foremost reason the concept was approved within IEA councils.

Language for a second plan of action was essentially finalized at meetings of the Industry Advisory Board held in April and June 1987. At a meeting on July 29, 1987, representatives of IEA reporting companies, including U.S. voluntary agreement participants and the IEA Secretariat, advised DOE they favored proceeding with adoption of the draft second plan. They saw this as preferable to having no plan when a crisis occurred.[3]

During drafting of the plan, companies had expressed concern about being at risk if a company were simply aware of IEA member countries' allocation rights and obligations while making a type 1 transaction and if the transaction were not a response to an IEA Secretariat request to redirect oil. The draft plan of action for which the companies expressed approval at the July 29 meeting does not make the antitrust defense available for such activities. During that meeting a representative of the companies asked the government to comment on whether the companies would be at risk in such a situation.

A Deputy Assistant Director of FTC's Bureau of Competition addressed the issue, noting that there was a sharp difference between a situation where oil companies were responding to "jawboning" or a request of the IEA's emergency management organization and where an oil company

[3]Twelve of the 17 U.S. voluntary agreement companies were represented at the meeting. One company abstained from endorsing the second plan. A representative from Sun Company said that the company had not had enough time to consider the document.

takes independent action not part of any agreement or common plan. Although oil company personnel are likely to know current allocation rights and obligations, independent type 1 actions are unlikely to pose any antitrust risk to a company that does not have monopoly power in any market. The real concern, he said, was the company's antitrust exposure if it responded to the organization's request or jawboning. For the latter situation, the wider window of type 2 is there to provide the companies with coverage and at the same time satisfy the needs of the allocation system. The Director said he was not speaking for the entire government, but he concluded his remarks by saying that he was not aware of any dissenting views or different views within the U.S. government.

From the perspective of promoting competition and preventing and penalizing anticompetitive conduct, we believe the expanded type 2 solution has the following advantages compared with the legal defenses that companies had sought for select type 1 transactions. First, all type 2 transactions, including the expanded closed-loop offers, will be subject to EPCA's full record requirements. This should facilitate the work of the antitrust monitors who have to assess the anticompetitive implications of voluntary offers.

Second, type 1 transactions occur without the advance knowledge or participation of either U.S. government monitors or IEA officials. In contrast, type 2 voluntary offers are received and reviewed by the ISAG in the presence of U.S. government antitrust monitors. In addition, type 2 offers require formal review and approval by the IEA Executive Director. Thus, U.S. antitrust monitors would have an opportunity to review offers for possible anticompetitive effects before the offers are implemented and, if they find reasons to do so, raise questions about a particular offer before the IEA decides whether to approve it.[4]

Third, allowing closed-loop type 2 offers to be made over the entire monthly cycle could even out the antitrust monitors' workload, giving them more time to assess possible anticompetitive aspects. It should also

[4]This would not end the review process. For example, within about 7 to 21 days government antitrust monitoring agencies would receive documents from U.S. reporting companies concerning written communications and any agreements with nonaffiliated companies with respect to any type 2 transactions. These records could be analyzed to assess possible anticompetitive effects of the companies' offers.

give the ISAG and the Secretariat more time to examine voluntary offers.[5] Although each closed-loop offer is to be processed within a 48-hour period or less, presumably fewer offers will have to be considered, on average, during each 48-hour period than would have been the case had all offers been saved for the latter part of each month when open offers are also made.[6]

Fourth, the expanded closed-loop type 2 offers may reduce the total number of company voluntary offers that may be needed to balance allocation rights and obligations and for which the legal defenses could be available. Because the closed-loop offers will be submitted throughout the month and subject to IEA review and approval, the IEA should have more complete and continuous information on the extent to which IEA countries' allocation rights and obligations are fulfilled. If it appears that sufficient offers have been made to a specific country before the latter part of the month when all types of voluntary offers can be made, the IEA Executive Director can decide not to approve additional offers for that country. In contrast, if companies had received antitrust and breach of contract defense protections for select type 1 transactions and if these had not been subject to advance review and approval, it is possible that more transactions would have been made than needed to satisfy some countries' allocation rights.

It has been suggested that the closed-loop type 2 offer in effect allows companies to seek government approval for their type 1 transactions. However, this is an over-simplification for several reasons. First, a closed-loop type 2 transaction must be designed to help balance IEA country rights and obligations. Many type 1 transactions do not fall into this category. For example, if the United States has an allocation obligation during an emergency, a type 1 transaction where a U.S. reporting

[5]As discussed later in this report, the Secretariat is concerned that its workload will increase because companies may submit many of what would have been type 1 transactions as type 2 offers. Since the companies and the government were not able to agree on a method whereby companies could secure legal defenses for select type 1 transactions, there may in fact be an increased number of type 2 offers which the ISAG and the Secretariat will have to process. However, under the wider window approach, the burden of processing type 2s will be spread out over the entire monthly allocation cycle and not just concentrated towards the end of the month.

[6]During a test of ESS in the fall of 1985, the Secretariat and ISAG received, validated, analyzed, matched (where necessary), and approved about 757 voluntary offers during a 6-day period. The total included 410 supply offers and 347 receive offers. U.S. reporting companies accounted for about 200 supply offers.

company moves oil to the United States would normally[7] not help balance allocation rights and obligations nor would oil that a reporting company moved to other IEA countries not having allocation rights. Consequently, companies cannot simply convert all type 1s into type 2s.

Second, as previously discussed, a principal concern of companies was that situations would arise where the IEA would urge U.S. companies to make specific type 1 transactions. These transactions would not be type 1 transactions as defined in the ESS, because they would not be undertaken independently of any request by the IEA.

Third, closed-loop type 2 transactions are not new; what is new is that they can be made at any time during the month. Under the previous system, companies could have delayed making type 1 transactions which they felt were at risk until the latter part of each month, and submitted them to the IEA at that time as closed-loop type 2 offers. Consequently, both antitrust monitors and IEA personnel in Paris would have been additionally burdened, due to the number of offers that would probably have been saved until the short period at the end of each month. Balancing of the oil system would then have been delayed, and this could put added upward pressure on world oil prices, since companies and countries that would benefit from the balancing could, in the interim, seek replacement supplies on spot oil markets. At the same time, some transactions which companies might initially be willing to make to help balance the system might never be made because of the length of time companies might have to wait before they could submit them as type 2 offers. For example, during the first week in a month, a company might have a tanker on the ocean headed for the United States which it could divert to Europe. However, if the company had to wait until the 17th-24th of the month to make the offer and learn whether the IEA would approve, it might not be economical to send the tanker to Europe. By that time, the tanker may have reached the United States.

Although companies favored proceeding with adoption of the draft second plan at the July 29 meeting, they also expressed some concerns that the plan was less flexible than might be desired to facilitate oil company implementation. In particular, questions were raised as to the operational effects of omitting plan of action coverage for type 1 activities and the burden of maintaining the kind of records required for type 2 transactions. The IEA Secretariat raised similar concerns, particularly

[7]An exception would be if the transaction were tied to an exchange with another company that was diverting oil to a country with an allocation right.

that companies not being covered for type 1 activities might submit more type 2 voluntary offers than the ESS could handle administratively after the first month or so. The Secretariat indicated it still preferred a plan whereby U.S. companies could be covered for type 1 transactions. DOE said the government was not convinced that this was a serious risk, but would give consideration to further comments on the issue.

At the July 29 meeting, the Secretariat and several companies also expressed hopes that the U.S. government would continue to explore ways of simplifying the record making, keeping and reporting requirements. Government officials said that they were willing to do so.

The adoption of the wider window approach and the impact it might have on the effective operation of the ESS and on the ability of U.S. antitrust monitors to perform their function will be tested in the fall of 1988, when the IEA conducts its sixth ESS test.

Foreign Blocking Statutes

Many countries have competition laws for regulating economic activity. In earlier times when markets were more likely to be national or local, such laws were applied principally to domestic conduct; primarily since World War II, however, markets increasingly have become international and some countries have applied their competition laws to conduct and transactions that are international in scope, including in rare cases conduct occurring principally or wholly outside national territory. Examples include the United States, the Federal Republic of Germany, the European Economic Community, and other countries.

The reason for applying national competition laws to such conduct is that anticompetitive conduct occurring partly or wholly abroad could have domestic effects as harmful as entirely domestic conduct. This principle is expressed in legal terms as the "effects doctrine," which justifies regulation of foreign conduct because of its effects on the national economy. However, countries disagree about the extent to which the effects doctrine properly justifies application of national laws to foreign conduct with domestic effects, sometimes called "extraterritorial" application.[1]

U.S. antitrust laws have been applied to corporate conduct principally occurring abroad—both in enforcement actions by the government and in treble damage suits by private parties. U.S. government enforcement has precipitated several disputes because of foreign opposition to the extraterritorial application of U.S. laws to foreign firms for conduct that affected U.S. consumers but which took place, in part, outside the United States. In addition, because the United States is unique among nations in the extent to which private party initiated enforcement of its antitrust laws occurs and in permitting treble damages for antitrust violations, some private treble damage actions involving application to foreign firms for foreign conduct of U.S. antitrust laws have been regarded by some countries as unusual and unfair.[2]

Foreign government and corporate concerns have also arisen because U.S. procedural rules may require litigants on both sides and other persons to produce a broad range of information before trial. Virtually all

[1]International Chamber of Commerce, Report of the International Chamber of Commerce Committee on the Extraterritorial Application of National Laws, Apr. 21, 1986, p. 4-13. Also, views expressed by a Department of Justice official to GAO.

[2]Ibid. According to the International Chamber of Commerce report, U.S. antitrust laws have been frequently applied to business conduct principally occurring abroad. However, the Justice Department's Assistant Chief for Transportation, Energy, and Agriculture told us that such instances have been infrequent.

other nations restrict the ability of litigants to obtain relevant evidence in advance of trial; some nations have complained that U.S. procedures permit exorbitant "fishing expeditions" for documents of their companies located in their territories. Many nations have responded to such discovery procedures and to the extraterritorial application of U.S. antitrust law by enacting "blocking statutes," which prohibit companies subject to a country's jurisdiction from complying with other countries' requests for documents and other evidence located in that country.[3] Prohibitions typically include disclosure, copying, inspection, or removal of documents located in the territory of the state. All or most blocking statutes appear to carry some form of penal sanction.

Some blocking statutes cover all documents while others apply only to certain categories of documents (i.e., maritime shipping or uranium production). Some laws always apply; others are activated only when invoked by a government minister or comparable official; and still others generally apply unless a waiver is obtained from a competent official or a local court directs that the documents be produced.

During the drafting of a second plan of action, the possible effect of foreign blocking statutes on the ability of U.S. voluntary agreement companies to provide records of their activities to U.S. government agencies became an issue because some companies have foreign affiliates which they might want to be covered by U.S. antitrust and breach of contract defenses. A need might arise, for example, if one of its foreign affiliates made a type 2 transaction with a third company.

EPCA requires that full and complete records and, where practicable, verbatim transcripts be kept of meetings and full and complete records of any other communication between or among participants or potential participants to develop or carry out a voluntary agreement or plan of action. Such records or transcripts are to be deposited with the Secretary of Energy and be available to the Attorney General and the FTC. EPCA also requires that the Attorney General, in consultation with the FTC and the Secretary of Energy, promulgate rules concerning the maintenance of necessary and appropriate records related to the development and carrying out of voluntary agreements and plans of action.

During the preparation of a second plan, government agencies inserted language into the draft requiring voluntary agreement companies and their designated covered foreign affiliates to make records of unwritten

[3]Ibid.

communications and to deposit copies of these records with the U.S. government. Copies of written communications and documents setting forth any agreement between the U.S. voluntary agreement participant or its designated foreign affiliate and any other nonaffiliated company with respect to any type 2 or 3 transactions are also to be provided to the U.S. government.

U.S. companies raised the issue of what would happen if a foreign government invoked a blocking statute during an emergency to keep them from providing required information to the U.S. government for a supply transaction that a company had been developing.[4] If that were to occur, the antitrust defense would collapse because the firm could not comply with the plan of action's record requirements. Or, if it did comply by providing the information, it would be in violation of the foreign statute and subject to penal sanctions. U.S. companies indicated that this type of retroactive loss of coverage was not tolerable.

Representatives of some U.S. companies involved in drafting the plan indicated that their companies had no or only a few designated foreign affiliates. However, as counsel to some companies indicated, this could change in the future with changes in the market, in which case they might want or need coverage. For some companies, whether coverage was available for their foreign affiliates could be a significant factor in deciding whether to accept a new plan of action.

Whether one or more foreign governments would be likely to invoke blocking statutes to prevent U.S. foreign affiliates from providing the required information is not evident, since a foreign country would presumably benefit from oil it was able to import as a result of a U.S. oil company's voluntary offer. On the other hand, it might invoke a blocking statute as a matter of principle to demonstrate its opposition to the extraterritorial application of U.S. law. The blocking statute issue was raised during the drafting of the second plan because blocking statute problems were occurring more frequently in the international arena, on non-IEA matters, than in the past. The U.S. companies involved in commenting on the drafting of the second plan did not want to leave open the possibility that a blocking statute problem could arise.

As a way out of the dilemma, DOE proposed to other government agencies that if voluntary agreement participants and their covered foreign

[4]IEA countries which have blocking statutes include Australia, Canada, the Netherlands, and the United Kingdom.

affiliates were unable to comply with U.S. requirements because of a foreign blocking statute, they would not be in violation provided that the foreign affiliate (1) made no attempt to invoke the blocking statute and (2) attempted in good faith to secure permission from the foreign government to comply with the requirements. However, the Justice Department, FTC, and State Department were concerned that exempting a foreign affiliate could have an undesirable precedential effect on other antitrust and law enforcement cases in which blocking statutes sometimes frustrate U.S. attempts to secure information from U.S. companies' foreign affiliates. In addition, such an exemption would appear to be inconsistent with EPCA, which requires that a full and complete record be kept.

After considerable discussion, it was decided that companies could receive antitrust and breach of contract defenses for actions taken up to the point where they became aware of a foreign blocking statute being invoked to prevent them from providing required information. Companies would not be denied retroactive coverage, which was of special concern, but would not receive protection after learning of the invocation. The draft plan of action which the companies recommended adopting on July 29, 1987, provides, among other things, as follows:

1. A covered foreign affiliate is not entitled to defenses for any actions taken by it after first learning that its actions are subject to a foreign blocking statute—to the extent the restrictions prevent it from complying with U.S. record requirements.

2. The covered foreign affiliate secures defenses for actions taken before it learned of the operative foreign law prohibition, provided that

- it continues to comply where it can;
- when the prohibition terminates, it promptly complies with all previous requirements not met; and
- it informs the Department of Justice and the FTC of the prohibition within a defined period of time.

3. In addition, within 21 days of the blocking statute being invoked, the parent company of the covered affiliate must provide the Justice Department and the FTC with a report on

- the full particulars on the nature of the prohibition;

- to the extent known, communications between the affiliate and various specified parties, agreements the affiliate entered into with any nonaffiliated or affiliated company, and each action performed to carry out the plan of action; and
- efforts made to obtain any such information not set forth in the report.

4. The foreign affiliate must not have tried to have the foreign law prohibition invoked and must make good faith efforts to obtain a waiver of the prohibition.

5. At least 30 days prior to the suspension of coverage, or contemporaneously with the onset of the international energy supply emergency (whichever is later), the parent must have instructed the affiliate to

- forward a copy of all written communications and written reports of oral communications with other companies;
- keep the parent continuously informed of its unwritten communications with other oil companies; and
- forward to the parent at least every 3 months the copies of other relevant documents held by the affiliate.

Additional Actions Taken in Approving the Second Plan of Action

Under EPCA, before a plan of action can be carried out, it must be approved by the Attorney General, who must first consult with the FTC. The FTC publishes in the Federal Register the views it transmits to the Attorney General about whether the plan should be approved. Under the existing 1976 Voluntary Agreement and Plan of Action, the Secretary of Energy must also approve a plan of action before it can be implemented.[1]

At the meeting of the IEA Reporting Companies on July 29, 1987, an official of the FTC said that Justice and FTC staffs were favorably disposed to the current draft of the second plan of action. He noted that whether their views would be approved by agency heads was, of course, not a foregone conclusion. At the same time, the staffs had no reason to believe that their views would not be acted upon. Oil company representatives at the meeting presumably took the information into account when they favored adoption of the plan.

As written, the second plan of action is an appendix to the existing 1976 Voluntary Agreement and Plan of Action and incorporated by reference into that agreement. It can be activated only if the President determines that an international energy supply emergency exists.

If a company has serious reservations about the second plan, it can withdraw as a voluntary agreement participant or, during a supply disruption, simply refrain from making voluntary transactions to assist IEA allocation. Under the 1976 agreement, any participant may withdraw by giving at least 30 days notice to the Secretary of Energy except that if emergency measures have been implemented, the Secretary may postpone the effective withdrawal date for up to 60 days.

On August 21, 1987, DOE published the draft second plan of action in the Federal Register, announcing a public hearing and requesting written comments on the document by September 21. The public hearing was held on September 22.

Two associations and an oil company commented on the draft second plan. One of these was Sun Company, a U.S. voluntary agreement participant. Sun believed the record making, keeping, and reporting requirements of the plan were excessive and might prove unworkable in a

[1]EPCA also provides that the Attorney General, in consultation with the FTC, Secretary of State, and Secretary of Energy, has the right to amend, modify, disapprove or revoke a plan at any time. He can do this upon his own motion or upon the request of the FTC or any interested person.

worst case scenario. It was particularly concerned about requirements for the disposition and retention of company computer documents and urged the government to relax the requirements in a future test of the ESS. Sun also objected to foreign affiliates being subject to these requirements and suggested dropping requirements which would apply if a foreign country invoked a blocking statute to prevent a foreign affiliate from supplying records. However, Sun did not explain how that could be accomplished if the plan were to meet EPCA's requirements that a full and complete record be kept of any communications between or among participants or potential participants in carrying out a plan of action, and that the record be provided to the Justice Department and the FTC.

Since Sun's comments had been made in writing and had not yet been received, the DOE Assistant General Counsel for International Affairs did not directly address them at the public hearing. However, the record making, keeping, and reporting requirements had been much debated during the drafting of the second plan, and companies on the Industry Advisory Board's Subcommittee C had reluctantly concluded that the language should be included in the plan.

A second party to comment on the draft plan was the Petrochemical Energy Group (PEG), an association of independent companies (not owned or controlled by any of the integrated oil companies), which produce petrochemical intermediate products such as ethylene, propylene, methanol, and ammonia as well as downstream products such as plastics, fibers, synthetic rubber, fertilizers and pharmaceuticals. PEG was concerned that, as currently drafted, the plan failed to provide any participatory or advisory role for the independent petrochemical industry. PEG said it is important that its companies participate in the international allocation of oil because they are direct importers of oil and petrochemical feedstocks and because the oil companies—who are their competitors in petrochemical markets as well as their suppliers—represent the only industry designated to provide advisors under the plan.

During the public hearing, the DOE Assistant General Counsel for International Affairs said there was an apparent misunderstanding as to how the IEA defined an oil company for the purpose of participating directly in the ESS. These companies are called "Reporting Companies." He said it sounded as though some PEG companies play a significant role in the international oil industry and hence would qualify for participation and that any company selected by the IEA could apply for and normally would be accepted as a U.S. voluntary agreement participant. Therefore,

he said, DOE would help interested PEG companies to establish contact with the IEA for the purpose of applying to become reporting companies.

A third party to comment on the draft second plan of action was the Petroleum Marketers Association of America (PMAA). It described itself as a federation of 41 state and regional associations representing 11,000 independent petroleum marketers, collectively accounting for approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in the United States. PMAA said it was pleased with the decision to exclude all type 1 activities from the plan's antitrust protection. In its view, providing antitrust defense coverage to these supply activities, voluntarily undertaken by oil companies to meet the crisis without any IEA monitoring, would severely reduce the U.S. government's ability to prevent and penalize collusive conduct, such as price fixing, divisions of the market, and other contracts, combinations, or conspiracies in the restraint of trade.

PMAA had some concerns with the second plan's granting antitrust protection to closed-loop type 2 activities at any time during an allocation cycle and with approvals granted on an expedited basis. It said that it would support such an extension only if those transactions were closely and effectively scrutinized. It said this was particularly necessary if DOE plans to extend a breach of contract defense to companies with regard to closed-loop offers. Specifically, it stated:

"Obviously, if closed-loop reallocation transactions are not closely reviewed for contract breaches, many companies may choose to breach contracts to obtain the benefits of rising prices. This would result not only in the increase in oil prices, contrary to the IEA's objective, but would result in injury to numerous intermediary suppliers and consumers from the contracts that are breached. If this is the result, DOE will not only have seriously jeopardized the viability of the entire independent segment of the U.S. petroleum industry but will have placed all allocation and price decisions in the event of petroleum supply emergency in the hands of a few international corporations where they do not belong."

PMAA said that providing antitrust protection makes it more difficult for a party injured by IEA allocation transactions to demonstrate that the intent of the companies making the transaction was to injure competition. Therefore, it said, a full and complete record of any communication between or among participants or potential participants (as required by the plan) must be maintained. This should be done even though companies might choose not to participate as actively in the system if the recordkeeping burdens were judged to be too great.

During the public hearing, the DOE Assistant General Counsel for International Affairs, in commenting on PMAA's concerns, said that the U.S. government intended to closely monitor any type 2 transaction, closed-looped or open. In addition, the IEA Secretariat's review of offers should help to assure that abuses do not occur.

The Assistant General Counsel also referred interested parties to an analysis conducted by DOE in 1985.[2] According to it, data on U.S. oil company imports showed that U.S. firms receive very little of their crude oil supplies under long-term contracts with U.S. voluntary agreement participants. Presumably, then, there are few crude supply contracts that U.S. reporting companies could breach. Regarding products, the DOE report cited a RAND analysis which concluded that most product supply contracts specify neither a fixed price nor a fixed quantity. Therefore, the analysis said, rapid adjustment to new market conditions is not prevented by long-term contracts. As suppliers raise prices, this should reduce the quantities demanded by buyers under requirements contracts. In short, companies may be able to escape contractual relationships by raising prices rather than by breaching the contracts.

During the public hearing, the Assistant General Counsel referred to that part of the 1985 DOE report which found there are also significant legal constraints on companies' freedom of action, including where companies reallocate their available oil supplies for the purpose of accommodating IEA oil sharing. The report concluded that:

"it seems clear that U.S. courts only begrudgingly will excuse oil sellers from their contractual commitments, when a supply disruption affects their ability to perform: the excusing provision must clearly cover the supervening event; that event must be beyond the seller's control and be the actual cause of the seller's inability to meet his commitments; and the seller must have acted for a good faith purpose. And even where a valid excuse is recognized, the seller has a legal duty to deal fairly and act in good faith to meet his contractual commitments to the extent practicable; absent an express contractual provision to the contrary, this may be held to entail an obligation to allocate his available supplies equitably among his customers, and between his own needs and those of his customers."

The Assistant General Counsel said that a company supplying refined products may find it even harder to show that a breached contract

[2]Department of Energy Comments on the Discussion of "Type 1" Transactions Contained in the General Accounting Office Report, 'Status of U.S. Participation in the International Energy Agency's Emergency Sharing System,' June 13, 1985. Submitted as an enclosure to an August 5, 1985, letter to the Chairman, Subcommittee on Environment, Energy and Natural Resources, House Committee on Government Operations.

occurred predominantly for the purpose of meeting IEA oil sharing. Because a refiner gets his crude supplies from various sources and because he is likely to have substantial supplies of refined products even after diverting oil for IEA purposes, it would be difficult for the refiner to identify a particular recipient and cut off the supplies of that single recipient. Refiners, he said, are expected to allocate their remaining supplies to their customers in an equitable way.

We spoke with staff of the Departments of Energy, State, and Justice and the FTC concerning the implications, if any, of the comments made on the draft second plan of action published in the Federal Register in September 1987. Their general view was that no issues had been raised at the September 22, 1987, public hearing which would require changing the draft plan.

In mid-October 1987, the Secretary of Energy requested the Attorney General to approve the draft second plan of action and simultaneously sought advice from the Department of State on whether it supported approval of the plan. The Attorney General subsequently requested FTC's views.

On November 13, 1987, the Secretary of State recommended that the Secretary of Energy and the Attorney General approve the second plan as soon as possible. The Secretary said the plan represents a reasonable balance between the public interest in assuring competition and contract sanctity in the oil industry and the public interest in safeguarding our economic, foreign policy, and national security objectives in the event of a major oil supply disruption.

On December 7, 1987, FTC informed the Attorney General and the Secretary of Energy that it had no objection to approval of the second plan of action. On December 18, 1987, the Assistant Attorney General for the Antitrust Division advised the Secretary of Energy that the Justice Department approved the second plan. He said that the plan minimizes the risks to competition by restricting the types of data that can be exchanged by participating oil companies and by mandating extensive recordkeeping of communications between them, and as such, contains within it sufficient safeguards.

The Secretary of Energy approved the plan on January 26, 1988. The plan, however, cannot go into effect unless the President finds that an "international energy supply emergency" exists. EPCA defines this term

as meaning a period when the President determines that IEA oil allocation is required under the provisions of the ESS.

As previously discussed, a 1985 amendment to EPCA requires that any plan of action which makes the antitrust and breach of contract defenses available to type 1 activities has to be submitted to Congress under a prescribed review procedure in order for the type 1 coverage to be effective. Because the second plan excludes coverage for type 1 activities, there is no need to submit the plan for that purpose. However, DOE said that once the plan was approved by the Attorney General, it would transmit a copy to Congress.

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