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International and Domestic Information Systems on the International Oil Market

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INTRODUCTION

The 1973 world oil crisis, generated largely by the OAPEC oil embargo, raised anew the question of what role the United States government should play in the international oil market. This question has concerned U.S. policymakers ever since the large scale entry of U.S. companies into the international oil market in the late 1920's.¹ Perhaps the most concerted effort to assert a U.S. government presence took place during World War II, when Harold Ickes, then Secretary of the Interior, led unsuccessful efforts to purchase major Arabian oil concessions from U.S. companies for a government "Petroleum Reserve Corporation" and to build a government-owned trans-Arabia pipeline.²

Despite this concern, the U.S. based oil companies have conducted their international dealings in virtually a political vacuum. The government has had little knowledge of, let alone control over, their international negotiations and operations. They have appeared to conduct diplomacy and "foreign policy" almost as independent states, except at certain, often critical times, when they actively sought government support for their international initiatives. Consultation with the government, when it did take place, was often initiated by the companies, very much on their terms, and it seldom allowed the government time to act independently.

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1. *See generally* SAMPSON, THE SEVEN SISTERS, Ch. 4 (1975); BLAIR, THE CONTROL OF OIL, 31 *et. seq.* (1976).

2. SAMPSON, *supra* note 1, at 94-99.

The 1973 crisis revealed that inadequate information would probably have rendered most government initiatives ineffective, even if it had desired or possessed the legal mechanisms to assert its presence or influence more directly into the negotiations between U.S. oil companies and the OPEC producing countries.

The critical need for an adequate, intelligent, governmental decisionmaking information base, irrespective of whether the government should play a greater role in, or seek to regulate, U.S. oil companies' foreign activities, had become obvious on both the domestic and international levels. In November 1974, most major Western industrialized nations (and Japan) concluded, under the auspices of the OECD, the Agreement on the International Energy Program (IEP Agreement)³ in an effort to counter the new assertion of concerted power by OPEC.

THE IEP AGREEMENT INFORMATION SYSTEM

The IEP Agreement called for, *inter alia*, "a more active role in relation to the oil industry by establishing a comprehensive international information system and permanent framework for consultation with oil companies."⁴ The Agreement established a two-part Information System:⁵ a "General Section on the situation in the international oil market and activities of oil companies;" and the "Special Section" which is to ensure efficient operation of the emergency preparedness measures which comprise a substantial portion of the treaty.⁶ Both sections are coordinated through the Secretariat of the International Energy Agency (IEA), the organization created by the OECD in November 1974 to implement the Agreement's provisions. Policy under the Agreement is developed by "standing groups," consisting of representatives of nation signatories in certain functional areas. The Standing Group on the Oil Market (SOM) is the primary functionary for the General Section.

Under the General Section, participating countries are required to report, on a regular basis, "precise data" identified by SOM and approved by the IEA's Management Committee,⁷

3. Agreement on an International Energy Program, done at Paris, November 18, 1974, T.I.A.S. No. 8278, 27 U.S.T. 1685 [hereinafter cited as IEP Agreement].

4. IEP Agreement, Preamble.

5. *Id.* art. 25.

6. An interesting critical analysis of the IEP Agreement, in particular its emergency preparedness provisions, is contained in Willrich and Conant, *The International Energy Agency: An Interpretation and Assessment*, 71 AM. J. INT'L L. 199 (1977).

7. IEP Agreement, art. 29.

on specific subjects relating to oil companies operating within their jurisdiction. These subjects include corporate and financial structure, crude oil production rates, stocks, acquisition costs and prices, allocation of crude oil supplies, terms of access to supplies, and capital investments.⁸ Most of this data is obtained by the governments from their oil companies. The identification of data required is an ongoing SOM function which is still in relatively early development.⁹ In pursuance of this function, SOM is required to consult with companies to make certain that the system is "compatible with industry operations" and to develop standards and procedures to harmonize data reporting and ensure its confidentiality.¹⁰

The data reported is used by both the IEA and participating countries to assist their national energy planning. However, much of the data reported is treated confidentially by the IEA and in a form that will avoid disclosures of "proprietary"¹¹ company information or information that might impair competition within the oil industry.¹² Elaborate procedures have been adopted to avoid disclosure of proprietary company-specific data. Most of the data is transferred to the IEA in aggregate, noncompany-specific form: most of the data received from the IEA by the U.S. government is classified as national security sensitive.¹³ Only certain types of data are obtained through systematic reporting. For other types, such as terms of access to crude supplies, company supply and demand appraisals, industry structure, and exploration prospects, SOM has developed a system of regular, formal consultations with individual oil companies.

Both the General Information System and the emergency

8. *Id.* art. 27. The list is not exhaustive, and it may be expanded by the IEA's Governing Board. *Id.* art. 27(1)(j).

9. *Id.* art. 31.

10. *Id.* art. 30.

11. The term is construed quite narrowly in article 28 as being limited to such matters as patents, trademarks, scientific processes, geological data, individual sales, and tax returns.

12. Article 27(3) requires that participating countries report "on a nonproprietary basis" and in a way that will "not prejudice competition" or undermine its laws protecting competition.

13. To meet current classification standards, the data must be such that its unauthorized disclosure could cause identifiable damage to the national security. Exec. Order No. 12,065, 43 Fed. Reg. 28,957 (1978). Most information received from IEA could be classified as "foreign government information" which, under § 1-303 of Exec. Order No. 12,065, is presumed to cause such identifiable damage.

preparedness activities under the IEP Agreement rely heavily on oil company cooperation for their successful implementation. Although almost as an afterthought in the IEP Agreement, the General Section information system and its mechanisms for consultations with companies may, ironically, prove to be one of the more solid achievements of the Agreement.

The IEA has already developed reporting systems on the prices and acquisition costs of crude oil imports. It also receives data on stocks and production. Generally, reporting as to crude prices and acquisition costs has been confined to OPEC "crude streams," defined by oil gravity and country and usually coincident with supplier countries. Theoretically, however, Article 27 is broad enough to authorize reporting on any crude stream. The role of SOM and other IEA organs in developing these reporting systems could make them important instruments of IEA policy.

U.S. GOVERNMENT REPORTING SYSTEMS

To meet the information shortcomings exposed by the 1973 crisis as well as the more specific requirements of the IEP Information System, DOE and its predecessor FEA, have developed a group of extensive reporting systems by U.S. based oil companies on their international crude oil dealings. When suitably linked, these reports should provide DOE with the ongoing, comprehensive information base necessary for meaningful analysis of the state and direction of the international oil market essential for effective policy formulation. They also will contribute to fulfillment of IEA obligations and certain domestic statutory and regulatory requirements.

Two existing reporting systems, the Foreign Crude Oil Cost Report,¹⁴ and the Transfer Pricing Report,¹⁵ will soon be significantly augmented by a third system, the Foreign Oil Supply Agreement Report (FOSA).

The Foreign Crude Oil Cost Report (EIA-67) contains data on the cost of foreign crude oil acquisitions by U.S. based companies and on the volume of exports from producing countries to the United States. The information on crude oil costs is provided to the IEA under Article 27 of the IEP Agreement. The obligation is imposed upon firms who acquire 100,000 bar-

14. DOE Form EIA-67 (formerly FEA-P-328-Q-O).

15. DOE Form ERA-51 (formerly FEA-F-701-M-O).

rels or more of crude oil per day from countries who are not IEA members. Reporting is geared to the IEA's classification of crude streams. Reports on a contract-by-contract basis can be readily linked with the contract details provided by FOSA reports.

The FOSA Report (form EIA-27) should provide the most significant information about foreign oil operations. Reporting is imposed on any U.S. entity which has a right to lift for export certain volumes¹⁶ of crude oil in foreign countries.¹⁷ These entities are required to report all material terms of their contracts or agreements with foreign producer governments or entities controlled by them, such as national oil companies. Certain specified details are also required: prices, fees for services, other payments to the host government, minimum and maximum lifting rights, and government imposed production limits.¹⁸ Contracts and other related documents must be produced if required by DOE.¹⁹ In addition, companies are required to notify DOE of negotiations with producer governments which might "reasonably lead to the establishment of any supply arrangement" covered in section 215.3.²⁰ DOE can obtain further details through consultation with the reporting company. Hence, some potential for an early warning system on impending negotiations is built into the FOSA regulations.

Many comments on the proposed regulation received from potentially affected oil companies argued against a reporting requirement and urged, instead, a continuation and augmentation of the voluntary consultations that had taken place periodically with the government. DOE concluded that such consultations would not ensure the systematic, current, and ongoing information base necessary for well-informed policy formulation and timely decisions in the international oil supply area. However, DOE is encouraging continuation of the voluntary consultation process to facilitate its understanding of the international oil situation and sharpen the perceptions of both the companies and the government.

16. 150,000 barrels per day average for a year, or a total of 55 million barrels in less than a year, or a total of 150 million barrels over the lifetime of the agreement.

17. Final rulemaking entitled Collection of Foreign Oil Supply Agreement Information, 10 C.F.R. § 215 (1978).

18. 10 C.F.R. § 215.3 (1978).

19. 10 C.F.R. § 215.4 (1978).

20. 10 C.F.R. § 215.6 (1978).

The central concern of most potentially affected (respondent) companies has been the protection of confidential information reported under the FOSA system. A significant portion of the data reported will probably be either "proprietary" or national security sensitive, or both. One approach to ensure confidentiality would be for DOE to classify such data as meets the standards for national security classification under Executive Order 12,065. This order limits access to persons within the government to the classified information who are deemed "trustworthy," *i.e.*, possessing the requisite security clearance, and who can establish that "access is necessary for the performance of official duties."²¹

Access within the government to "proprietary" information, that is, information regarded as confidential for essentially commercial-competitive reasons, could, under current law, be limited to those persons who require such access to fulfill their official duties.

Access may be denied to the public at large under section 552(b)(4) of the Freedom of Information Act, which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from the Act's coverage.²²

To enhance these protections given to FOSA, DOE will impose carefully controlled limitations on access within the government to, and detailed procedures for the handling of, FOSA information classified under Executive Order 12,065, or information which is determined to be "proprietary."²³

The Transfer Pricing Report form (ERA-51) is designed to collect information on transfer prices, those assigned to imported oil between U.S. companies and their foreign trading affiliates, and on crude oil transactions between nonaffiliated entities. This information is required to administer adequately the application to refiners of DOE's Mandatory Petroleum

21. Section 4-101 of Exec. Order No. 12,065, 43 Fed. Reg. 28,957 (1978). Access may be denied to the public at large under § 552(b)(1) of the Freedom of Information Act, which exempts matters properly "kept secret in the interest of national defense or foreign policy" under criteria established by an Executive order. 5 U.S.C. § 552(b)(1) (1976).

22. 5 U.S.C. § 552(b)(4) (1976).

23. An indication of the kinds of procedures that will be adopted with respect to proprietary information under the Freedom of Information Act is included in a recent Notice of Proposed Rulemaking with respect to DOE's proposed FOI regulations. 43 Fed. Reg. 40,530, at 40,536.

Price Regulations. These requirements impose price ceilings on certain petroleum products based on crude oil costs.²⁴ Transfer pricing information also is provided to the IEA under the IEP Agreement.

The obligation to report is imposed on a monthly basis upon refiners importing at least 500,000 barrels of crude, or any crude from a foreign affiliate in that month. Although ERA-51 is limited to refiners, it does provide data similar to that gathered under EIA-67 and the FOSA system but from a somewhat different perspective. This report, therefore, helps DOE monitor certain cost and price movements, both within the United States and internationally, and enhances DOE's analytical capabilities.

Between the essentially interlocking EIA-67 and FOSA systems, and the additional information provided by ERA-51, a substantial data base can be provided. It can be supplemented further, if necessary, by the monthly *Report of Oil Imports into the U.S. and Puerto Rico* designed primarily to facilitate implementation of the Oil Imports Program.²⁵ The obligation to report details, such as volume and port of entry, are imposed on oil companies which import crude oil, residual fuel oil, or finished petroleum products.

The legal authority for imposition of all three major sets of reporting requirements described above lies in section 13(b) of the Federal Energy Administration Act (FEAA), as amended:

All persons owning or operating facilities or business premises who are engaged in any phase of energy supply or major energy consumption shall make available to the Administrator such information and periodic reports, records, documents, and other data, relating to the purposes of this chapter, including full identification of all data and projections as to source, time and methodology of development, as the Administrator may prescribe by regulation or order as necessary or appropriate for the proper exercise of functions under this chapter.²⁶

24. Mandatory Petroleum Price Regulations, 10 C.F.R. § 212 (1978). Section 212.84 prescribes standards for establishing the cost of crude oil imports in transactions between affiliated entities. Basically, an effort is made to emulate the price such entities would charge if they were dealing at arm's-length, § 212.84(c). DOE establishes representative arm's-length prices, compares these with the companies' reported transfer prices, and disallows crude costs attributable to excessive transfer prices.

25. DOE Form ERA-60 (formerly FEA-P113-M-O) [1977] 3 EN. MNGM'T (CCH) ¶ 18,413, which in 1977 consolidated and replaced three earlier reporting forms. See 42 Fed. Reg. 4,889 (1977) for the announcement of the availability of this form.

26. 11 U.S.C. § 772(b) (1976). The data gathering authority is now vested in the

All three reporting systems patently meet the requirements that they relate to the broad purposes of the FEAA and that they are "necessary or appropriate" to the exercise of the Secretary's functions thereunder. For instance, the Secretary's general functions in the execution of his authority under section 5(b) include the collection and analysis of information on energy demand, production, and reserves, the development of a comprehensive energy policy and energy trade policies, integrating domestic and foreign energy supply policies, promoting stability in energy prices, and developing plans and programs for dealing with energy production shortages.²⁷ Furthermore, quite specific authority for much of the information sought lies in section 15 of the FEAA, which imposes on DOE the requirement to report annually in considerable detail on specified energy matters to Congress and the President.²⁸

Detailed information on the financial performance of all U.S. based energy companies will be obtained from the energy company financial report system (FRS) (DOE Form EIA-28), authorized by section 13(b) of the FEAA and specifically mandated by section 205(h) of the Department of Energy Organization Act.²⁹ These provisions require, *inter alia*, that the FRS yield information on energy company operations segregated "by energy source and geographic area."³⁰ Under this mandate, DOE will collect data to compare foreign and domestic financial performance, sources and uses of cash, investments, relative performance, revenue, cost and profit differences, and investment in major foreign regions. Apart from specific international data, the FRS will yield a wide variety of detailed information in areas such as competition and energy supply and development. This information could provide an important complement to the other information systems discussed. Together they should soon provide a relatively comprehensive information base, especially if effectively linked with the IEA system, for informed decisionmaking.

Administrator of the Energy Information Administration of DOE by virtue of section 205(c) of the Department of Energy Organization Act. 42 U.S.C.A. § 7,135(c)(Supp. 1977). The functions of the former Administrator of the FEA are now vested in the Secretary of DOE by virtue of section 301(a) of this act. 42 U.S.C.A. § 7,151(a)(Supp. 1977).

27. 15 U.S.C. § 764(b)(1976).

28. 15 U.S.C. § 774 (1976).

29. 42 U.S.C.A. § 7,135(h)(Supp. 1977).

30. 42 U.S.C.A. § 7,135(h)(2)(C)(Supp. 1977).